

TOWARDS A NEW EQUAL PROTECTION: TWO KINDS OF EQUALITY

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Μηδεὶς ἀγεωμέτρητος εἰσὶτω μου τὴν στέγην·
... ἄδικος μηδεὶς παρεισερχέσθω τῇδε·
ἰσότης γὰρ καὶ δίκαιόν ἐστι γεωμετρία.¹

Let no one who is ignorant of geometry enter this place
Let no one who is unjust enter
For equality and justice are geometry

Introduction

The nomination and subsequent Senate confirmation hearings of the newest Supreme Court Justice, Justice Ruth Bader Ginsburg, recently focused attention once again on the Supreme Court's decisions dealing with challenges to gender-based classifications under the Fourteenth Amendment's Equal Protection Clause.² Justice Ginsburg's pivotal role in these cases,³ which have defined how gen-

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1. Inscription over the door of Plato's Academy, recorded by Tzetzes, the 12th century A.D. grammarian. *Hist.var.chileades* 8, 972-75 quoted in F.D. Harvey, *Two Kinds of Equality*, 26 *CLASSICA ET MEDIAEVALIA* 101, 126 (1965).

2. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

3. Decisions for which Justice Ginsburg submitted briefs (for Appellants, Appellee, Petitioners) include *Reed v. Reed*, 404 U.S. 71 (1971), *Struck v. Secretary of Defense, cert. granted*, 409 U.S. 947, *judgement vacated*, 409 U.S. 1071 (1972); *Frontiero v. Richardson* 411 U.S. 677 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Edwards v. Healy*, 421 U.S. 772 (1975); *Turner v. Department of Employment Security*, 423 U.S. 44 (1975); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Duren v. Missouri*, 439 U.S. 357 (1979). Justice Ginsburg submitted *amicus* briefs in the following cases: *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Liberty Mutual Insurance Co. v. Wet-*

der-based classifications are now treated, is not the only reason for renewed interest. Rather, as Justice Ginsburg herself remarked, the question of whether gender is a suspect classification remains because the Court has not yet answered it definitively, or negatively.⁴

This article will first review the Court's *ad hoc*, and hence variable, analysis as applied to equal protection challenges to gender-based discrimination to illustrate that the Court has failed to articulate a coherent and satisfactory approach to this important area of constitutional law. The arguments for recognition of gender as a suspect class, raised in Justice Ginsburg's briefs and writings, and elsewhere, will then be considered.⁵ More than simply reviewing the inadequacies of past decisions, this article will demonstrate that equal protection analysis must be undertaken *de novo*⁶ because of its importance as the means by which the Court considers challenges to classifications which impede full and equal opportunity to participate in organized society.⁷

The need for a new approach to equal protection analysis arises, in part, because of the inherent conflict between those now considered citizens of the United States and the very limited class

zel, *judgment vacated*, 424 U.S. 737 (1976); General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Craig v. Boren, 429 U.S. 190 (1976); Coker v. Georgia, 433 U.S. 584 (1977); Dothard v. Rawlinson, 433 U.S. 321 (1977); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); University of California Regents v. Bakke, 438 U.S. 265 (1978); Los Angeles, Dep't. of Water and Power v. Manhart, 435 U.S. 702 (1978); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Westcott, 443 U.S. 76 (1979); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980); Vorchheimer v. School District of Philadelphia, 430 U.S. 703 (1977).

4. *Hearing of the Senate Judiciary Committee*, FEDERATED NEWS SERVICE, July 20, 1993, available in LEXIS, News Library, where Justice Ginsburg cited Mississippi University for Women v. Hogan, 458 U.S. 718 (1981).

5. In *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993) (Ginsburg, J., concurring), Justice Ginsburg again noted that it remains an open question whether gender classifications are inherently suspect. Similarly, the question of whether, or why, gender should be treated differently than race or ethnic status has been left unanswered. She also stated that the appropriate standard for judging whether a hostile work environment so altered working conditions as to "make it more difficult to do the job" was the same for race-based as gender-based discrimination. *Id.* at 372-73.

6. While a superficial reading of the cases to be outlined in detail below might suggest that the Court has actually formulated a clear and consistent approach to Equal Protection cases, a closer examination of the material will reveal internal inconsistencies of such magnitude as to preclude their reconciliation. Moreover, the end result reached (gender not suspect, occasional "remedial" measures upheld; race suspect, no affirmative action permitted) is an unsatisfactory answer to the problems of a diverse society, struggling to allow participation of a greater number of citizens while laboring under the long and unfortunate history of discrimination against both women and racial minorities.

7. Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

to whom the term "citizenship" originally⁸ could be properly applied.⁹ If there is to be any substance to the promise offered in the U.S. Constitution,¹⁰ more complete participation must be allowed to those previously excluded. As Justice Ginsburg noted,¹¹ "[w]e still have, cherish, and live under our eighteenth century Constitution because, through a combination of three factors or forces — change in society's practices, constitutional amendment, and judicial intervention — a broadened system of participatory democracy has evolved, one in which we take just pride."¹²

An expansive reading of the Constitution, however, alone will not suffice.¹³ Rather it is time to re-examine the very idea of what equality is promised in the Fourteenth Amendment and the American Constitution. It is important to remember that the basic idea of democracy, which took hold in colonial America, was synonymous with the idea of equal opportunity.¹⁴ Moreover, Thomas Jefferson's election in 1800 was due, in no small part, to the appeal of Jeffersonian democracy, characterized by its faith in entrusting government to the people and by expressions of equal rights.¹⁵

8. "As framed in 1787, the Constitution was a document of governance for and by white, propertied adult males . . ." Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 LAW & INEQ. J. 17 (1988) [hereinafter Ginsburg, *Remarks*]. Clearly women were not included. It is worth remembering here the often quoted reply by John Adams to Abigail Adams' plea "to remember the ladies" in the course of founding the United States: "We know better than to repeal our Masculine systems." 1 ADAMS FAMILY CORRESPONDENCE 370, 382 (L. Butterfield ed., 1963) (original manuscript dated 1776) quoted in Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, in WOMEN & THE LAW 15-A-2 (Carol H. Lefcourt ed., 1993). See MacKinnon, *supra*, for more examples of women's "no special interest" to 18th and 19th century writers.

9. This is equally true for the time of the Constitution's, and the Fourteenth Amendment's, adoption.

10. I will argue below, chiefly based on Karst, *supra* note 7, that the Fourteenth Amendment contains a substantive promise of equal protection of the laws which should be understood to mean equal opportunity for participation by all citizens as respected and valued members of society. See *infra* notes 184-88 and accompanying text.

11. Ginsburg, *Remarks*, *supra* note 8, at 17.

12. Similarly, at her confirmation hearings Judge Ginsburg remarked: "I think rank discrimination against anyone is against the tradition of the United States and is to be deplored. Rank discrimination is not part of our culture. Tolerance is. And a generous respect for difference based on . . . diversity." *Excerpts from Senate Hearings on Ginsburg Supreme Court Nomination*, N.Y. TIMES, July 23, 1993, at A16.

13. An "expansive" reading of the Constitution is inadequate not only because it depends too heavily on the whims of individual jurists and their own philosophy but also because it suggests that the Constitution itself does not provide the basis for such interpretation. Rather it suggests that the expansive reading is imported into the document by the jurist, clearly a less credible basis for any decision.

14. ALLAN NEVINS & HENRY STEELE COMMAGER, A POCKET HISTORY OF THE UNITED STATES 48 (1970).

15. In Jefferson's words (from his inaugural address) the "sacred principle that though the will of the majority is in all cases to prevail, that will, to be rightful, must

To arrive at a clearer understanding of what is meant by "equality," it will be useful to examine the various kinds of equality first recognized and articulated by the Greek Philosophers, Archytas, Plato and Aristotle.¹⁶ Because the very words and ideas involved in democracy, politics, ethics and philosophy were first discussed and matured by the Greeks, "[t]here is nothing in Greek civilization that does not illuminate our own."¹⁷

This article will show that there is more than one kind of equality. The Greek philosophers recognized that in addition to simple arithmetic equality ("that which is the same and equal in number or dimension"),¹⁸ there is also geometric equality (when the first stands in the same relation to the second as the second to the third).¹⁹ Arithmetic equality is at work when equal rights are ac-

be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression." Noble E. Cunningham, Jr., *Jeffersonian Democracy*, in *THE READERS COMPANION TO AMERICAN HISTORY* 593, 594 (Eric Foner & John A. Garraty eds., 1991). That Thomas Jefferson was elected by a small group of white, and frequently slave-owning, males in no way diminishes the force of his comments. Nor does there seem to be any logical justification to allow women and blacks now to enjoy some, but not all, of the rights previously enjoyed by the limited group of 'original' citizens. If we now apply the term 'citizen' to a wider group of people, this enlargement does not argue for a diminution in the rights and privileges associated with the term citizenship; nor does it argue for a restriction of those rights only to those originally labelled 'citizen.'

16. ARCHYTAS, DK 47 B 2; PLATO, *LAWS* 756c-758a; ARISTOTLE, *POLITICS* 1301b29-1302a8. (All classical references cited in this article are cited numerically according to *Chicago Manual of Style*. The CHICAGO MANUAL OF STYLE §§ 15.298-15.304 (14th ed. 1993). The typeface for each of these references, however will remain consistent with the *Bluebook*. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION § 2.2 (15th ed. 1991)). Justification can be found for such an inquiry by the fact that these are the philosophers whose political philosophy has formed the basis of subsequent modern political philosophy and whose culture has provided the ethos of our society. The Framers of the Constitution were also familiar with these philosophers and their political thought. NEVINS & COMMAGER, *supra* note 14, at 107. Similarly, Jefferson's political thought had its roots in the Enlightenment. Cunningham, *supra* note 15, at 593.

17. WILL DURANT, *THE LIFE OF GREECE* vii (1966). "Excepting machinery, there is hardly anything secular in our culture that does not come from Greece. Schools, gymnasiums, arithmetic, geometry, history, rhetoric, physics, biology, anatomy, hygiene, therapy, cosmetics, poetry, music, tragedy, comedy, philosophy, theology, agnosticism, skepticism, stoicism, epicureanism, ethics, politics, idealism, philanthropy, cynicism, tyranny, plutocracy, democracy: these are all Greek words for cultural forms . . . matured for good or evil by the abounding energy of the Greeks." *Id.*

18. Arithmetic equality appears at first glance to be perfect equality, for each number in a sequence (12,10,8,6,4,2) stands at equal distance from each other. Thus in a democracy, each person will have equal rights, e.g. one person, one vote. See *infra* notes 200-230 and accompanying text.

19. Geometric equality appears at first to have done away with equality. The numbers no longer stand at equal distance (64,32,16,8,4,2) with the result that each person might appear not to have equal rights. A closer examination, however, shows that the ratio between the numbers remains constant (so 4 is twice 2; 8 twice 4; 16 twice 8). Thus there is perfect equality. See *id.*

corded to everyone; geometric equality is employed to treat different groups differently to remedy past injustices, or to account for their differing positions. More importantly, it will be demonstrated that just as the Greeks recognized that both were necessary in any political system, so too it must be understood that both are necessary for a proper understanding and application of the Equal Protection Clause.

I will argue that application of only one type of equality - either arithmetic or geometric - is, in fact, not satisfactory and likely to result in an unstable political system. According to Aristotle, "for the constitution to be framed absolutely and entirely according to either kind of equality is bad. And this is proved by experience, for not one of the constitutions formed on such lines is permanent."²⁰ Arithmetic equality is really a superficial equality; geometric equality is a more perfect and satisfactory equality.²¹ Rather, it is necessary sometimes to employ arithmetic equality and sometimes geometric equality.²²

The notion of two kinds of equality is not foreign to American jurisprudence, although it has not been explicitly discussed in those terms. Indeed it will be argued that the Court's equal protection analysis does, in fact, employ both kinds of equality. When gender classifications bearing no substantial relationship to the benefits at hand are struck down and all people are accorded equal benefits, arithmetic equality is at work. When benign or remedial measures are allowed to compensate those burdened by the effects of past discrimination, geometric equality is at work. Rather than simply tolerating these benign measures (or arbitrarily applying identical treatment where it yields unequal results) by virtue of some undefined (or ill-defined) analysis, a recognition of the two types of equality will yield a more consistent, and intellectually satisfactory, approach to equal protection decisions — and a more satisfactory result for those seeking full and fair opportunity to participate in our democratic society.

20. τὸ δὲ ἀπλῶς πάντα καθ' ἑκατέραν τετάχθαι τὴν ἰσότητα φαῦλον. φανερόν δ' ἐκ τοῦ συμβαίνοντος· οὐδεμία γὰρ μόνιμος ἐκ τῶν τοιούτων πολιτειῶν. ARISTOTLE, *POLITICS* 1302a3-5 (H. Rackham trans., 1967). The reason for this lack of permanence is, of course, political strife (στάσις) which results from inequality — more precisely, from those seeking equality (ὁλῶς γὰρ τὸ ἴσον ζητούντες στασιάζουσιν). *Id.* at 1301b29-30.

21. διὸ δεῖ τὰ μὲν ἀριθμητικῇ ἰσότητι χρῆσθαι, τὰ δὲ τῇ κατ' ἄξίαν. *Id.* at 1302a8-9.

22. As the 4th century B.C. orator Isocrates observed, what contributed most to the good government of the Athenian state was the recognition of the two kinds of equality - "that which makes the same award to all alike and that which gives to each man his due." AREOPAGITUS 21-22 (G. Norlin trans., 1980).

*Gender-Based Classifications, The Supreme Court's
Response to The Early Challenges*

A. Pre-Twentieth Century Challenges

There was little concern for women in the minds of the original framers of the Constitution. They were certainly not understood to be included in the phrase "[A]ll men are created equal."²³ Nor did the framers of the Fourteenth Amendment see that amendment as a bar to classification by sex, age, economic or social status.²⁴ Thus it is hardly surprising that the few gender-based equality claims which were brought following the adoption of the Fourteenth Amendment were unsuccessful.²⁵ In fact, the Supreme

23. Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978) [hereinafter Ginsburg, *Sex Equality*]. Ginsburg quoted Thomas Jefferson: "Were our state a pure democracy, there would still be excluded from our deliberations . . . women, who, to prevent depravation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men." (quoting M. Gruberg, *WOMEN IN AMERICAN POLITICS* 4 (1968)). It should be noted, however, that the English language (like French and Latin) lacks a generic term (such as *άνθρωπος*). As a result, the term for the male of the species has done service for both men and women. See *supra* note 8 and *infra* note 24.

24. Ginsburg, *Sex Equality*, *supra* note 23, at 452. That racially based discrimination was what prompted the Fourteenth Amendment is a commonplace that need not be repeated. That the terms of the amendment are more sweeping, and universal, and hence not limited by its own language to racial discrimination, must also be remembered. See *infra* notes 181-82 and accompanying text. Nonetheless, those who hoped to gain women's suffrage by virtue of the Fourteenth Amendment (specifically section 2 which prohibits the denial or abridgment of the right to vote to "male inhabitants") were sorely disappointed. MacKinnon, *supra* note 8, at 15A-4-5 n.12, has noted that "Congressional repudiations" of any guarantee of women's suffrage centered on section 2 and little considered whether section 1 granted equal protection to women in areas other than the vote, with the interesting, and paradoxical, result that there is little direct repudiation of the idea that equal protection might apply to women.

Beyond being denied the vote, at the time of the Civil War amendments women also lacked the ability to enter into contracts, to maintain control of their own earnings, to litigate or to hold property. The Fourteenth Amendment had no effect on those disabilities. Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 162 [hereinafter, Ginsburg, *Sexual Equality*].

25. The unerring belief in the natural inferiority of women, so pervasive in 19th century thought, is best summarized by the 1852 New York *Herald* editorial. "How did woman first become subject to man as she now is all over the world? By her nature, her sex, just as the negro is and always will be, to the end of time, inferior to the white race, and, therefore, doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature. The women themselves would not have this law reversed." in AILEEN KRADITOR, *UP FROM THE PEDESTAL SELECTED WRITINGS IN THE HISTORY OF AMERICAN FEMINISM* I 190 (1968).

While economic considerations (especially concern for jobs, fear of competition) have been more prominent in 20th century discussions, the importance of this underlying belief in women's inferiority should not be underestimated.

Of course, both the divine ordination of woman's status and economic concerns have been explained as "benign preference." As Blackstone stated: "[T]he disabili-

Court refused to sustain *any* challenge to gender-based classification under the Equal Protection Clause²⁶ prior to *Reed v. Reed*²⁷ in 1971.

In the late 1800s, one woman's denial of admission to the Illinois bar solely because of her gender was not deemed an infringement of the Fourteenth Amendment's privileges and immunities clause in *Bradwell v. Illinois*.²⁸ Nor was denial of the right to vote a denial of a woman's privileges and immunities, despite the recognition that women qualified as persons and citizens for the purposes of the Fourteenth Amendment.²⁹

While neither the denial of admission to the bar nor the right to vote is currently a barrier to women, the judicial viewpoint made clear in Justice Bradley's concurrence in *Bradwell* is instructive:

The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things and cannot be based upon exceptional cases.³⁰

Exactly how the law of the Creator was revealed to Justice Bradley, and those who have followed him, was never made explicit, as Justice Ginsburg has noted.³¹ Unfortunately, such categorical assumptions about women are not simply a remnant of an age gone by.³²

ties which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England." 1 W. BLACKSTONE, COMMENTARIES 445 (3d. ed. 1768).

26. Ginsburg, *Sex Equality*, *supra* note 23, at 451. For a more complete discussion of these earlier decisions, see *id.* at 451-58.

27. 404 U.S. 71 (1971). The importance of *Reed* for the subsequent course of gender-based challenges will become clear from the following review. See *infra* notes 51-55 and accompanying text. The pivotal role of then advocate Ginsburg in arguing the cases which resulted in gender being recognized as "quasi-suspect" should not be underestimated. A review of the cases will support this assertion. See *supra* note 3.

28. 83 U.S. (16 Wall.) 130 (1872).

29. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

30. *Bradwell*, 83 U.S. (16 Wall.) at 141.

31. Ruth Bader Ginsburg, *Gender and the Constitution*, 44 CINC. L. REV. 1, 4 (1975) [hereinafter, Ginsburg, *Gender*]. See *id.* at n.18 for citations of modern judicial expressions of the same sentiment, including *Turner v. Dept. of Employment Security*, 43 U.S.L.W. 2356 (Utah, Feb. 4, 1970). In *State v. Bearcub*, 465 P.2d 252, 253 (Or. Ct. App. 1970), the Oregon Court of Appeals stated that "[t]he Creator took care of classifying men and women differently, and if the legislature accepts these differences . . . we are not prepared to say that the classifications thus made were without good reason."

32. For judicial expression of such ideas see *infra* notes 161-70 and accompanying text, including a discussion of Justice Powell's comments (in the *Bakke* case) regarding gender discrimination.

B. 20th Century Challenges

Twentieth century decisions to gender-based challenges, prior to 1971,³³ justified gender-classifications as "rational social legislation" because of the "need" to protect women as the weaker sex. In *Muller v. Oregon*,³⁴ the Court upheld the constitutionality of an Oregon statute limiting the number of hours (to ten per day) that a woman could be employed in a laundry, factory, or manufacturing plant.³⁵ *Muller*³⁶ thus signaled "benign preference" as a theme justifying gender-based legislation, which appeared in thematic counterpoint to divine ordination as justification for differential treatment of women. Responsible for bearing the next generation, but as the "weaker sex," women were viewed as needing the law's protection. The willing acceptance of such "protective" legislation for women stood in stark contrast to the denial of any parallel protection for men in *Lochner*,³⁷ where the Court viewed such protective legislation as an unacceptable infringement of the individual's freedom to contract.

Gender-based, protective, economic legislation persisted even after *Lochner* was repudiated.³⁸ Why did gender-neutral, protective legislation not follow? Because "hours and other limitations applicable to 'women only' operated to deny women access to better-paying positions and promotions, thus protecting men's jobs from

33. In 1971, the United States Supreme Court, in *Reed v. Reed*, 404 U.S. 71 (1971), declared arbitrary legislative distinctions based on gender forbidden under the Fourteenth Amendment. See *infra* notes 51-55 and accompanying text for discussion.

34. 208 U.S. 412 (1908).

35. *Id.* at 422-23.

36. *Muller* is remarkable because of the latitude allowed to the state for legislation in the economic and social sphere, remarkable, of course, because of the Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905) to strike down similar legislation limiting the hours (also to ten per day) for men and women in bakery employment.

37. *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* stands for the Court's willingness to strike down any state social and economic legislation which it believed to encroach on economic freedom. Finding no legitimate purpose for regulating labor conditions in the absence of an actual health or safety concern, the *Lochner* Court was above all concerned with protecting the *laissez-faire* approach to American free enterprise.

38. The use of substantive due process in *Lochner* to invalidate state laws in this area came to an end with *Nebbia v. New York*, 291 U.S. 502 (1934), where the Court upheld the state's right to adopt whatever economic policy it deemed to promote the public welfare. *Id.* at 537. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.3, 363-64 (4th ed. 1991).

women's competition."³⁹ Indeed, *Muller* has been cited as a "road-block to the full equality of women."⁴⁰

Thus the actual motivation and effect of legislation would be ignored so long as a "benign" purpose could be offered as "protective wrapping"⁴¹ for the law. *Gosaert v. Cleary*⁴² clearly followed this reasoning: the Court upheld a Michigan statute barring women from the job of bartender unless they were the wives or daughters of male bar owners. The "unchivalrous desire of male bartenders to try to monopolize the calling" would be ignored so long as the benign justification of "protecting" women was advanced.⁴³

Similarly, the Warren Court, in *Hoyt v. Florida*,⁴⁴ upheld a Florida statute limiting jury duty solely to women who registered voluntarily with the court. Women were treated advantageously, in the Court's view, by such legislation in recognition of their place at "the center of home and family life."⁴⁵ No thought was given to the rights of Hoyt, who, when denied access to a representative jury, was convicted by an all-male jury of second-degree murder for killing her husband.⁴⁶ Nor was there any recognition of the fact that the majority of adult women were not engaged in full-time family care.⁴⁷

39. Ginsburg, *Gender*, *supra* note 31, at 6. See *id.* at n.31 where Justice Ginsburg cited contemporary literature critical of the result reached in *Muller*.

40. Ginsburg, *Gender*, *supra* note 31, at 5 (citing Murray, *The Rights of Women*, in *THE RIGHTS OF AMERICANS* 521, 525 (N. Dorsen ed., 1971)).

41. As Justice Ginsburg termed it. Ginsburg, *Gender*, *supra* note 31, at 7.

42. 335 U.S. 464 (1948). Michigan could validly legislate to exclude women from the occupation of bartending because of the "grave social problems" female bartenders might create or, conversely, from which they might need to be protected. What problems could arise for a female bartender that did not already exist for female waitresses in the same establishment (e.g. drunken men) are not immediately obvious. The chief difference between the two, once the protective wrapping was off, is the obviously higher pay scale available to bartenders.

43. *Id.* at 467. Cf. *Schlesinger v. Ballard*, 419 U.S. 498 (1975) which allowed a greater number of years to females than males in the military before requiring retirement (by the "up or out rule") because of women's decreased opportunity for promotion due to the lack of possibility of combat. Realistically, this conferred no benefit to women. With no possibility for severance pay, the additional years in the military simply put women at a disadvantage once in the outside job market.

44. 368 U.S. 57 (1961).

45. *Id.* at 62.

46. Ginsburg, *Sex Equality*, *supra* note 23, at 456. A jury comprised of at least some women might have better appreciated the state of mind of a woman suffering from long term abuse.

47. By the mid-twentieth century, according to the U.S. Department of Commerce's Current Population Reports ser. P-50, no. 54, *Work Experience of the Population in 1953*, 2 (Aug. 4, 1954), the majority of adult women had either not entered or had passed the years when full-time child care was required (cited by Ginsburg, *Sex Equality*, *supra* note 23, at 456 n.25).

Almost as prominent as "benign" or "protective" justifications for gender-based classifications was a second explanation for the different treatment women received: the Constitution was an empty cupboard for sex-equality claims.⁴⁸ Despite the fact that women had been recognized as persons and citizens for Fourteenth Amendment purposes as early as 1874,⁴⁹ and despite the Nineteenth Amendment enfranchising women in 1920, no refuge against gender discrimination would be afforded to women by the Constitution because of their initial exclusion by the Constitutional Framers.⁵⁰

Is Gender A Suspect Classification: Reed and its Progeny

The break from the uniformly deferential treatment of all gender-based classifications came not from the liberal Warren Court, but, surprisingly, from the more conservative Burger Court, in an opinion written by Chief Justice Warren Burger in *Reed v. Reed* (1971).⁵¹

At issue were Idaho's intestate succession laws which mandated a preference to males over females within each established statutory classification used in the selection of estate administrators. Chief Justice Burger delivered the unanimous opinion holding that where legislation "provides that different treatment be accorded on the basis of their sex . . . it thus establishes a classification subject to scrutiny under the Equal Protection Clause."⁵² Clearly, this is a different equal protection analysis than the Court had hitherto employed.⁵³

The Fourteenth Amendment does not deny States the power to treat different classes of people differently. The Court declared, however, that the Equal Protection Clause does deny "the power to

48. Ginsburg, *Sex Equality*, *supra* note 23, at 456-57.

49. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874). See *supra* note 29 and accompanying text.

50. "The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of franchise by the nineteenth amendment." *Fay v. New York*, 332 U.S. 261, 290 (1947) *quoted in* Ginsburg, *Sex Equality*, *supra* note 23, at 456-57).

51. 404 U.S. 71 (1971).

52. *Id.* at 75.

53. The Court, without elaboration, appeared to be saying that any legislative classification based on gender was subject to scrutiny. Is this a tautology for the statement that any legislation which is violative of the equal protection of the laws is subject to scrutiny under the Fourteenth Amendment's Equal Protection Clause? Or, is the Court, in fact, saying *implicitly* that gender is a suspect classification so that normal Equal Protection analysis must be conducted with greater judicial scrutiny than would otherwise be the case? See *infra* notes 58-65 and accompanying text.

legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”⁵⁴ Mandatory preference for either sex “merely” to reduce administrative hearings “is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment”⁵⁵

Although it seemed to pose the question of whether gender was a suspect classification, and thus subject to a strict standard of judicial scrutiny, the *Reed* decision did not answer it. That question was answered affirmatively, but by only four members of the Court, in the following year. In *Frontiero v. Richardson*,⁵⁶ the Court invalidated a requirement that female members of the armed forces prove the dependency of their spouses in order to obtain the same quarters and benefits automatically granted to married males without any proof of their spouses’ dependency. The *Frontiero* appellants urged the Court to find gender-based classifications - like classifications based on race, alienage and national origin - to be inherently suspect and thus subject to “close judicial scrutiny.” The Court found “at least implicit support”⁵⁷ in *Reed* and noted that the *Reed* Court’s approach⁵⁸ departed from “traditional” Equal Protection Clause analysis,⁵⁹ a departure justified by the Nation’s “long and unfortunate history of sex discrimination.”⁶⁰

54. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). The opinion then stated that the classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” *Id.* (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

55. *Reed*, 404 U.S. at 76.

56. 411 U.S. 677 (1973). Four justices concurred only in the judgment, one justice dissented, while four justices joined in the opinion which declared gender a suspect classification. Three of the concurring justices found it unnecessary, for the purpose of the case, to characterize sex as a suspect classification “with all of the far-reaching implications of such a holding.” *Id.* at 692.

57. *Id.* at 682. The *Frontiero* Court noted that the *Reed* decision was unanimous. *Id.*

58. “[D]ifferent treatment . . . on the basis of their sex . . . thus establishes a classification subject to scrutiny under the Equal Protection Clause.” *Reed*, 404 U.S. at 75 (1971).

59. Under traditional Equal Protection analysis, a legislative classification must be sustained unless it is “patently arbitrary” and bears no rational relationship to a legitimate governmental interest. *Frontiero*, 411 U.S. at 683. Clearly by “traditional” rational basis Equal Protection analysis, the *Reed* Court should have upheld the law, a reasonable measure to reduce workload, in the view of its proponents. It was reasonable, moreover, to assume that “as a rule” men are more familiar with business than are women. Instead, the *Reed* Court rejected the “apparently rational explanation” and invalidated the law because it provided dissimilar treatment for similarly situated men and women, making “arbitrary legislation” forbidden by the Constitution. *Frontiero*, 411 U.S. at 683-84 (1973) (citing *Reed*, 404 U.S. at 76).

60. *Frontiero*, 411 U.S. at 683.

Working with an attitude of "romantic paternalism," the Nation's legislatures had, from the beginning, enacted statutes "laden with gross, stereotyped distinctions between the sexes"⁶¹ which imposed special disabilities upon women simply because of an "immutable characteristic determined solely by an accident of birth."⁶² The *Frontiero* Court found such disabilities not in accord with "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."⁶³ Moreover, such statutes and disabilities relegate an entire class to inferior legal status without any regard to individual capability.⁶⁴ Gender should thus be considered a suspect⁶⁵ classification because, like other suspect criteria, gender "frequently bears no relation to ability [to] perform or to contribute to society."⁶⁶ No majority appeared in *Frontiero*, however, to support a declaration of gender as a suspect class.⁶⁷

Without majority support for gender as a suspect class, the Court in *Kahn v. Shevin*⁶⁸ was free, the following term, to uphold a Florida property tax exemption provided to widows, but not to widowers. Unlike *Frontiero* (where females were denied benefits "solely for administrative convenience"),⁶⁹ the Court found the Florida law "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."⁷⁰

61. *Id.* at 684-85.

62. *Id.* at 686.

63. *Id.* (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

64. *Frontiero*, 411 U.S. at 686-87. The Court also found support for gender as a suspect classification in Congress's recognition that such classifications are "inherently invidious," evidenced by its passage of legislation: Title VII of the Civil Rights Act of 1964; the Equal Pay Act of 1963; and, the Equal Rights Amendment in 1972. *Id.* at 687. The Court concluded that "this conclusion of a coequal branch of [g]overnment is not without significance . . ." *Id.* at 687-88.

65. Classifications based on gender are inherently suspect and, therefore, subject to strict judicial scrutiny. Where there is strict scrutiny, mere "administrative convenience" will not sustain the statute's constitutionality. *Id.* at 686-88.

66. *Id.* at 686.

67. Justice Powell's concurrence, joined by Chief Justice Burger and Justice Blackmun, found it unnecessary to decide the issue "with all of the far-reaching implications of such a holding." *Id.* at 691-92. Additional motivation, if any was needed, to avoid reaching that question was supplied by the possible passage of the Equal Rights Amendment and a desire to avoid assuming a legislative function. Justice Stewart's concurrence was based on the fact that the statute worked an "invidious discrimination." *Id.* at 691.

68. 416 U.S. 351 (1974).

69. *Id.* at 355 (citing *Frontiero*, 411 U.S. at 690 (1973)).

70. *Kahn*, 416 U.S. at 355 (1974). "If the discrimination is founded upon a reasonable distinction or difference in state policy" then a discrimination in favor of a certain class will not be judged arbitrary and will be upheld. *Id.* (quoting *Allied Stores v. Bowers*, 358 U.S. 522, 528 (1958)). Once again, "benign preference" serves as a justification for gender-based discrimination in legislation.

Justice White, however, in his dissent found the proffered "benign preference" an inadequate justification for the statute.⁷¹ By allowing a property tax exemption to all widows (who are thus *all* presumptively needy), the State gave a benefit to even those rich widows least in need of State largess, while denying it to needy widowers.⁷²

Justices Brennan and Marshall's dissent reiterated the opinion, expressed in *Frontiero*, that "gender-based status . . . , like classifications based upon race, alienage, and national origin, must be subjected to close judicial scrutiny, because it focuses upon generally immutable characteristics over which individuals have little or no control."⁷³ Further, legislation favoring widows did not serve an overriding or compelling interest that could not be achieved by more narrowly tailored legislation and must, therefore, be invalidated.⁷⁴

While the Court in *Kahn v. Shevin* found ample justification, by "benign preference," to uphold a small tax advantage for widows, it found no need to extend equal disability coverage to pregnant women, the same women, responsible for "bearing future generations," who were seen to need "preferential" legislation in *Muller*.⁷⁵ Apparently legislation could be upheld by reason of "benign preference," but there was no corresponding obligation to examine all legislation affecting women to see if it accorded with the doctrine of "benign preference."

Indeed, the Court in *Geduldig v. Aiello*⁷⁶ found the exclusion of women disabled by normal pregnancy from disability coverage under California's disability insurance program to be "rationally supportable," and so refused to invalidate the law under the Equal Protection Clause.⁷⁷ The Court found California's interest in mini-

71. *Kahn*, 416 U.S. 351, 360-62.

72. Justice White found administrative convenience (already found inadequate in *Frontiero*) inadequate justification here since gender-based classifications were "suspect." Greater justification than the presumption offered by the State (all widows are needy, all widowers are not) is thus necessary. Further, if the State proposed to compensate *females* for the effects of past discrimination, then it should not have limited the exemption solely to *widows*. *Id.* at 361. Similarly, if past discrimination is the touchstone, then widowers who, as members of racial or ethnic groups had similarly suffered, should also be compensated.

73. *Id.* at 357 [footnotes omitted]. The dissent also noted that gender-based classifications have often been used "to stereotype and stigmatize politically powerless segments of society." *Id.*

74. *Id.* at 359-60.

75. See *supra* notes 34-40 and accompanying text.

76. 417 U.S. 484 (1974).

77. *Id.* at 495 (citing *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) to support the view that the State need not attack all aspects of a problem — or even the problem itself — at one time).

mizing the cost to participating employees and in keeping the program self-supporting to be legitimate state interests.⁷⁸ Further, the Court found that the exclusion worked discrimination against "[no] definable group or class⁷⁹ in terms of the aggregate risk protection derived by that group or class from the program."⁸⁰

The dissent found quite the opposite, that the statute singled out women for less favorable treatment in a "gender-linked disability peculiar to women" while men received full compensation for all disabilities suffered.⁸¹ The dissent⁸² argued that such dissimilar treatment of men and women based on physical characteristics must necessarily constitute sex discrimination.⁸³ Such differential treatment⁸⁴ would necessarily be invalidated under stricter judicial scrutiny.

Despite the promise offered by *Reed* and *Frontiero*, no decision definitively labelled gender-based classifications inherently sus-

Interestingly, by means of the same "rational basis" test which the Court used, the District Court had invalidated the exclusion under the Equal Protection Clause because "the exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose."

78. *Geduldig*, 417 U.S. at 495. It is not clear that the State demonstrated that these goals were impossible, or even difficult, to meet if pregnancy related disabilities were included. The State merely alleged greater cost. See the dissent's argument on this point, where the District Court's assessment of the impact is quoted. *Id.* at 503-05. Despite admitting that inclusion of normal pregnancy-related disabilities would be "substantial," the District Court found that these increased costs would not destroy California's disability program. The costs could be accommodated by "reasonable" changes in contribution rates, etc. *Id.* at 493-94.

79. The Court ignored the fact that the Fourteenth Amendment offers equal protection to the individual. Thus "aggregate" rights analysis is a disingenuous way to justify such a plan. Cf. *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1111 (1969) (describing the rights conferred by the Fourteenth Amendment as individual rights, not group rights).

80. *Geduldig*, 417 U.S. at 496. Only by defining the two classes as pregnant and nonpregnant people could the Court arrive at such a conclusion. Justice Stewart concluded that "while it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." See *id.* at 496 n.20. The Court then went on to say that "there is no risk from which men are protected and women are not." *Id.* at 496-97. Since men can never be at risk of pregnancy, this does not seem to follow. The suitability of "aggregate risk protection" to analysis made under the Equal Protection clause is doubtful. See *supra* note 79.

81. *Id.* at 501. Thus men were covered for prostatectomies, circumcision, gout and hemophilia - disabilities primarily, or exclusively, suffered by men.

82. *Id.* at 498 (Brennan, J. dissenting). Justices Brennan, Douglas and Marshall argued that, beginning with *Reed* and *Frontiero*, the precedents established required a stricter level of scrutiny.

83. *Id.* at 501.

84. Such diffiered treatment was justified solely because inclusion of pregnancy-related disabilities would be "too costly." *Id.* at 504. The dissent cited *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1971), to assert that the State "must do more than show that denying [benefits to the excluded class] . . . saves money" when legislation is subject to strict scrutiny.

pect. This allowed the Court to uphold both a law benefitting Florida widows as "benign" and a law denying benefits to working women disabled by pregnancy⁸⁵ as "rational." The most lenient rational basis analysis allowed both results. In neither of these cases did the Court follow *Reed* or *Frontiero* in its analysis to ask if the legislative distinctions were necessary. No prediction could be made, on the basis of the four preceding cases, regarding the likely outcome (or even what level of scrutiny the Court would employ) for any equal protection challenge to a gender-based classification. Hence, the decisions following 1974 are not consistent in their analyses or results.

In *Weinberger v. Wiesenfeld*,⁸⁶ the Court invalidated a provision of the Social Security Act⁸⁷ granting survivors benefits to widows with minor children,⁸⁸ but denying benefits⁸⁹ to surviving widowers. Justice Brennan drew on *Frontiero* to assert that "archaic and overbroad generalizations" negating the importance of the female wage-earner's importance to the family were inconsistent with the Constitution.⁹⁰ The Court in *Wiesenfeld* found the gender distinction irrational⁹¹ and in no way justified by some generalized benign compensation for the economic difficulties experienced by women.⁹² Applying, instead, a "functional approach,"⁹³ the Court reasoned that the sex of the surviving parent was unrelated to the purpose of allowing the surviving parent to care for the child,⁹⁴ and thus the gender-based distinction was merely "gratui-

85. Thus, women disabled by pregnancy were denied disability benefits for which they would have been eligible if disabled by any other disability.

86. 420 U.S. 636 (1975).

87. 42 U.S.C. § 402(g).

88. Based on the earnings of the deceased husband/father. *Wiesenfeld*, 420 U.S. at 643.

89. Based on the earnings of the deceased wife/mother. *Id.*

90. *Wiesenfeld*, 420 U.S. at 643. Indeed the Social Security provision was found more pernicious than that in question in *Frontiero* because *Wiesenfeld* was not even allowed the opportunity to demonstrate that he qualified based on dependency. *Id.* at 645.

91. *Id.* at 651. The Court looked to the purpose of the Social Security provision — to enable the surviving parent to care for the child at home — to find gender-based differential treatment irrational.

92. *Id.* at 648. In contrast to *Kahn v. Shevin*, the *Wiesenfeld* Court rejected "the mere recitation of a benign, compensatory purpose . . . [as] an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.* at 648. See *supra* notes 68-72 and accompanying text.

93. The functional approach appears to look to the purpose of the legislation while applying a heightened rational basis test. This heightened rational basis standard seems to be motivated by the presence of a gender-based classification and concern regarding "archaic and overbroad generalizations." *Id.* at 652.

94. *Id.* Since the benefits were need based, a surviving father who worked instead of caring for his children would not receive any benefits. Cf. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), where the Court struck down, under the Due Process

tous."⁹⁵ Unfortunately, the "functional" approach did not provide any stronger basis for future decisions.

Although the *Wiesenfeld* Court was unanimous, the Court sharply divided when faced with an almost identical problem only two years later. In *Califano v. Goldfarb*,⁹⁶ the Court, by a narrow margin (5-4), affirmed a District Court's ruling to strike down an identical Social Security provision providing benefits to surviving widows regardless of need, but only to surviving widowers upon proof of dependency.⁹⁷ The majority found that a two-fold discrimination existed in the provision: not only did widows and widowers receive different benefits but so too did female and male wage-earners.⁹⁸ The Court declined to uphold differential treatment solely on the basis of gender,⁹⁹ despite the noncontractual¹⁰⁰ nature of the Social Security provisions involved in both *Wiesenfeld* and *Goldfarb*. Moreover, the Court reasoned that because there was an absence of deliberate Congressional intent to provide a "benign preference" to widows, where the presumption that all widows are dependent is based on archaic stereotypes,¹⁰¹ and because the de-

Clause, the State's assumption that a father had presumptively no rights to the care and custody of his children, with whom he had been living and whom he had supported, after the death of his common law wife.

95. *Wiesenfeld*, 420 U.S. at 653. *Wiesenfeld* provided the sole opportunity for Justice Rehnquist to concur in an opinion striking down legislation under an equal protection challenge. He did not reach the issue of gender-based discrimination but simply concluded that the distinction did "not rationally serve any valid legislative purpose" because it was irrational to distinguish between surviving mothers and fathers who provided care for their children as the sole surviving parent. *Id.* at 655.

96. 430 U.S. 199 (1976).

97. *Id.* at 204. Widowers were defined as dependent if they had received at least one half of their support from their deceased wives. *Id.* at 201. In other words, the female wage earner must provide three-quarters of the family's income (all of her own and half of her husband's). Cf. the *Frontiero* requirements discussed *supra* notes 56-60. Justice Brennan regarded this gender-based distinction as "indistinguishable" from that decided in *Wiesenfeld*. *Id.* at 204.

98. *Id.* at 209. Despite paying in at the same rates as her male colleagues, Mrs. Goldfarb received fewer benefits since her widowed husband received no benefits following her death. Thus the Court emphasized that the Social Security provision worked to the disadvantage of widowers and female wage earners. *Id.*

99. *Goldfarb*, 430 U.S. at 211-12.

100. A "non-contractual" (i.e., no specific contract exists regarding return between the Social Security payor/recipient and the Government) interest in future benefits (such as Social Security) does not preclude an Equal Protection claim.

Rather, *Wiesenfeld* held that the fact that the interest is 'noncontractual' does not mean that 'a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment,' nor does it 'sanction differential protection for covered employees which is solely gender based.'

Goldfarb, 430 U.S. at 211-12 (citation omitted). Thus differentiation solely on the basis of sex must not be made without sufficient justification.

101. Focusing on the discrimination against male widowers as the relevant issue, Justice Stevens concluded that this discrimination was "merely the accidental by-

sire for administrative convenience had already been rejected in *Frontiero* and *Reed*, there was no basis to support gender-based discrimination in employment related benefits.¹⁰²

The dissent¹⁰³ argued against what it saw as the majority's application of heightened scrutiny, to the field of social insurance legislation.¹⁰⁴ The dissent further justified as "benign preference" legislation conferring a benefit on widows within the Social Security system:¹⁰⁵ a classification benefitting "aged widows . . . is scarcely an invidious discrimination."¹⁰⁶

"Benign preference" is, once again, advanced as a justification for legislation "favoring" women. More noteworthy is the dissent's focus on the inapplicability of heightened scrutiny to the social insurance setting.¹⁰⁷ Why? Because the cost of extending benefits to female members of the military in *Frontiero* was a mere pittance in comparison to the estimated 500 million dollars annual cost of ex-

product of a traditional way of thinking about females." *Id.* at 223. He also rejected "benign preference" as justification because while not "wholly irrational" the legislative history showed that "habit, rather than analysis or actual reflection" was responsible for equating the term widow with dependent. *Id.* at 219-22. He concluded that "something more than accident is necessary to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses." *Id.* at 223.

In trying to reconcile the apparent inconsistency between *Kahn* and *Wiesenfeld*, Stevens preferred to follow the unanimous decision in *Wiesenfeld*. *Id.* at 224. See also his discussion of *Kahn* and some 19th century presumptions about women's inferiority. *Id.*

102. *Id.* at 216-17 (stating that administrative convenience included not only the time, but also money, saved by using presumptions instead of individual hearings).

103. Justice Rehnquist joined by Chief Justice Burger and Justices Stewart and Blackmun.

104. *Goldfarb*, 430 U.S. at 225 (Rehnquist, J., dissenting). The dissent distinguished *Wiesenfeld* by the terms of the Social Security provision flatly denying any benefits to surviving widowers/parents regardless of any showing of need. In the instant case, only a showing of dependency was required. The dissent further argued that recent cases, which had declined to extend constitutional provisions into social security legislation, were controlling (citing *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Lucas*, 427 U.S. 495 (1976)). Noteworthy in *Goldfarb* is the dissent's seeming acceptance of a heightened standard of scrutiny implicit in *Reed* and explicit in *Frontiero*, while merely restricting the applicability of such a standard in the social security setting.

105. *Goldfarb*, 430 U.S. at 226 (1976). The dissent compared the Social Security provision to the property tax exemption for widows only upheld in *Kahn v. Shevin*, 416 U.S. 351 (1974).

106. *Goldfarb*, 430 U.S. at 242. The dissent further argued that because a showing of dependency is only required for widowers, not widows, the legislation was overinclusive and, hence, not offensive to the Equal Protection Clause in social welfare cases. *Id.* at 236.

107. Yet it should be noted that while in this case Justice Rehnquist seemed now to accept the heightened scrutiny applied in *Frontiero*, he dissented there on the basis of the deferential rational basis standard (referring to the District Court Judge's opinion in *Frontiero v. Richardson*, 341 F. Supp. 201 (1972)). *Frontiero v. Richardson*, 411 U.S. 677, 691 (1973) (Rehnquist, J. dissenting).

tending social security benefits to widowers in *Goldfarb*.¹⁰⁸ More striking is that the dissenters' seemed to accept, inferentially, that heightened scrutiny was applicable in other settings.

What, one might ask, is the basis for the *Goldfarb* dissenters' tacit recognition of the applicability of a heightened standard of scrutiny to gender-based classifications in other areas? In 1976 the Court, in *Craig v. Boren*,¹⁰⁹ enunciated a standard of heightened judicial scrutiny, now known as the intermediate level of scrutiny. The weighty issue before the Court which finally crystallized this standard of review was nothing more nor less than an Oklahoma provision which prohibited the sale of 3.2% beer to males under the age of 21 years but permitted its sale to females over the age of 18.

In *Craig v. Boren*, the Court again began from *Reed* to affirm that legislative distinctions between males and females are "subject to scrutiny under the Equal Protection Clause."¹¹⁰ The Court then announced that "[t]o withstand constitutional challenge, *previous cases establish* that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."¹¹¹ How did the Court reach this new standard? A review of the cases previously decided provided the framework: mere administrative ease and convenience is no longer found to be a "sufficiently important objective to justify gender-based classifications."¹¹² Similarly, "archaic and overbroad" generalizations regarding women no longer justify gender discrimination where gender is an "inaccurate proxy for other, more germane bases of classification."¹¹³ Where there is a weak congruence between gender and the trait which gender represents, either the

108. Ruth Bader Ginsburg, *Some Thoughts on Benign Classifications in the Context of Sex*, 10 CONN. L. REV. 813, 821 (1978) [hereinafter Ginsburg, *Some Thoughts*].

109. 429 U.S. 190 (1976). *Craig* was decided prior to *Goldfarb* in the 1976 Term.

110. *Id.* at 197 (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)).

111. *Id.* [emphasis added].

112. *Id.* at 198 (citing *Reed*, 404 U.S. 76-77 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); and *Stanton v. Stanton*, 421 U.S. 7 (1975)).

113. "Outdated misconceptions" about women's place in the home similarly cannot support legislation based on their doubtful accuracy. *Craig*, 429 U.S. at 198-99.

Cf. Stanton v. Stanton, 421 U.S. 7 (1975) where Utah's statutorily mandated differential support of males and females (males to the age of 21 and females only to the age of 18) was found to be "self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed." *Id.* at 15.

Stanton seemed to recognize the possible existence of an intermediate standard: the Utah legislation was struck down as failing all standards — compelling state interest, rational basis or in-between. The *Stanton* Court did not articulate what the "in-between" standard would be; that was left for *Craig v. Boren*.

legislation must be reformed along gender-neutral lines or actually comport with reality, i.e., there must be significant empirical evidence supporting differential treatment of men and women.¹¹⁴ Although accepting highway safety as an important objective, the Court concluded that the discrimination against 18 to 21 year-old males was not substantially related to the legislative objective.¹¹⁵

If the *Craig* opinion appeared to set forth a definite and well-established basis for applying a heightened level of scrutiny to gender-based classifications, a perusal of the three major concurring opinions in *Craig* (Powell, Stevens, Stewart and Blackmun) and the

114. *Craig v. Boren*, 429 U.S. at 199 (citing *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 650 (1974)). In *LaFleur*, the Court invalidated the mandatory and overly restrictive maternity leave provisions (requiring unpaid leave for pregnant school teachers after the fifth month). *LaFleur*, 414 U.S. at 644. Although challenged under the Equal Protection Clause, the regulations were overturned by the due process clause as creating an irrebuttable presumption of physical incapacity in no way related to the individual's condition. *Id.* Cf. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Vlandis v. Kline*, 412 U.S. 441 (1973).

Justice Powell would have invalidated the regulation under the Equal Protection Clause, under which it was challenged, because the regulations were irrational. *LaFleur*, 414 U.S. at 653. See also *id.* at n.2 where again Justice Powell did not reach the question of gender as a suspect classification. However, he stated that the classifications, whether gender or disability, "must at least rationally serve some legitimate articulated or obvious state interest." *Id.* Here the regulations did not serve the state's interest. This rational basis standard seems to fall somewhere between the *Royce Guano* and *McGowan* standards. See *supra* note 54 and accompanying text and *infra* notes 130 and 143.

In *LaFleur*, Justice Rehnquist argued that "literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are," *LaFleur*, 414 U.S. at 658 (quoting Chief Justice Burger's dissent in *Vlandis v. Kline*, 412 U.S. 441). Justice Rehnquist criticized the majority's preference for individualized determinations as a step backward from "a relatively uniform body of rules enacted by a body exercising legislative authority" to an *ad hoc* determination made by the "King's representative," where the legislative body alone, represented "a significant step forward in the achievement of a civilized political society."

Justice Rehnquist proceeded from the unsupported, and insupportable, assumption that all *ad hoc* determinations are arbitrary and all legislative pronouncements are not. Clearly this is the wrong distinction. The issue is not the size of the decision-making body (one or many), but whether the rule maker (one or many) is responsive to those being burdened by the legislation. This is the true distinction between oligarchy and democracy, which are not simply definable by the number involved in the process of governance. Working from this mistaken assumption, Rehnquist viewed any challenge to legislative line-drawing as "an attack upon the very action of lawmaking itself." *Id.* But see Justice Jackson's concurrence in *Railway Express*, *infra* note 194-195 and accompanying text.

115. *Craig v. Boren*, 429 U.S. at 204-09. The slight statistical difference between males and females was a 2.0 to 1.8 % arrest rate differential respectively for the age group in question (18-21 year-olds) and so could hardly justify the use of gender as a means of classification. *Id.* at 201. In sum, the principles embedded in the Equal Protection Clause are not to be rendered inapplicable by statistically measured loose-fitting generalities concerning the drinking tendencies of aggregate groups. *Id.* at 208-09. But see *supra* note 79 and accompanying text.

two separate dissents (Burger and Rehnquist) casts doubt on any such assumption. Justice Powell acknowledged that "the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications."¹¹⁶ He suggested that the Court's approach to gender-based classifications was to apply a more critical examination than is normally applied when "fundamental' constitutional rights and 'suspect classes' are not present."¹¹⁷ Powell concluded that Iowa's gender-based classification failed, however, because it did not bear a "fair and substantial relation" to the legislative objective, i.e., it failed a rational basis test.¹¹⁸

Justice Stevens found Oklahoma's legislation denying 18 to 20 year-old males the right to purchase beer objectionable¹¹⁹ because it classified on the basis of an accident of birth.¹²⁰ Although not

116. *Id.* at 210. See *id.* at n.24 for Powell's discussion. Despite dissatisfaction with the Court's acknowledged two-tiered approach, (i.e. deferential rational basis and strict scrutiny) he found support for it in precedent. Unhappy with the view of the standard enunciated in *Craig* as a "middle-tier" approach, Powell stated "I would not endorse that characterization and would not welcome further subdividing of equal protection analysis." *Id.* Powell admitted that "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." *Id.* What standard does this yield? This vague standard is not a definitive "intermediate-level of scrutiny," at least not in the eyes of some members of the Court. At most one can hope for is a rational basis analysis with a "sharper focus."

117. *Id.* at 210. Justice Powell's concurrence is illuminating to the observer trying to ascertain just what standard of review the Court has been employing in gender-based cases. Justice Powell too considered *Reed* the relevant precedent, but read that case less broadly. Does this suggest that a broad reading of *Reed* leads to gender as a suspect classification? Or, if *Reed* should be read less broadly, does this imply that traditional deferential equal protection analysis, or something in between, is the appropriate standard?

118. *Id.* at 211 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) from which the standard of a "fair and substantial relation" is taken). Thus while explicitly acknowledging a heightened level of scrutiny - more than that ordinarily employed in nonsuspect classifications - Justice Powell would have the Court decide the case on a pure rational basis standard.

119. "[N]ot as obnoxious as some the Court has condemned, nor as inoffensive as some the Court has accepted." *Id.* at 212 (footnote omitted). Stevens admitted, that "[m]en as a general class have not been the victims of the kind of historic, pervasive discrimination that has disadvantaged other groups," although he seemed to feel that an exception might be made from that generalization for 18-20 year-old males. *Id.* at 212 n.1.

120. This suggests that gender classifications in general should be treated as inherently suspect. Justice Stevens noted:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'

Id. at n.2 (quoting from *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), in turn quoting from *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)).

totally irrational,¹²¹ "the unfairness of treating all 18-20 year-old males as inferior to their female counterparts" did not justify the law. Justice Stevens concluded that "there is only one Equal Protection Clause" which requires the State to govern impartially,¹²² and that the Court had not applied different standards of review in different cases.¹²³ Yet, as the gender cases just reviewed indicate, the Court has not applied the same standard in different cases, nor have all of the Justices applied the same standard even within the same case.

Justice Stewart saw the disparity in *Craig* as "total irrationality,"¹²⁴ recognizing that disparate treatment on the basis of gender required some "colorably valid justification" to avoid invalidation.¹²⁵

The dissents, separately expressed by Chief Justice Burger and Justice Rehnquist, complete the gamut of possible views on what standard the Court had, and should have, used for gender-based classifications. Burger dissented from making gender classifications not only suspect, but also "disfavored," arguing for a level of constitutional classification that would not examine any claim of gender discrimination.¹²⁶ Under a rational basis standard, the law should be upheld.¹²⁷ Like Burger, Rehnquist simply applied "rational basis" equal protection analysis,¹²⁸ as defined by the standard set forth in *McGowan v. Maryland*: "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."¹²⁹ By the application of the *McGowan* standard, Justice Rehnquist effectively eviscerated the Equal Protection Clause as a potential safeguard against arbitrary and discriminatory legislation: some state

121. By traditional Equal Protection analysis this conclusion should result in the law being upheld. Any hope that a single standard could clarify what reasoning the Court has followed in these cases was effectively dissipated by Stevens' examination of the issue.

122. *Craig v. Boren*, 429 U.S. at 211.

123. *Id.* at 211-12. The enunciation of a single standard for all Equal Protection analysis would seem highly desirable - at least for the sake of consistency. However, Justice Stevens viewed the two-tiered analysis not as a "completely logical method of deciding cases," but rather as a way to explain past "decisions that actually apply a single standard in a reasonably consistent fashion." *Id.* at 212. Indeed, this concurrence seems remarkably oracular in terms of its clarity.

124. *Id.* at 215.

125. *Id.* Whether this means a higher standard of scrutiny or simply not the most deferential rational basis standard is not clear.

126. *Id.* at 217 (Burger, J., dissenting).

127. Burger noted that eight members of the Court had found the law "not irrational," hence there was no basis for invalidating it. *Id.*

128. *Id.* at 221-22 (Rehnquist, J., dissenting).

129. *Id.* (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)).

of facts can always be conjured up to justify arbitrary and unnecessary legislation.¹³⁰

Craig v. Boren, the opinion, the concurrences and the dissents, highlights the equal protection problem: not only is there no agreement on whether gender classifications are inherently suspect, but those professing to make use of the rational basis test are, in fact, using two different standards: the standard of extreme deference enunciated in *McGowan*¹³¹ and the more exacting standard set forth in *Reed*¹³² which requires a "fair and substantial relation" between legislation and its objective.

A review of the equal protection cases shows that the Court has failed to developed a well-accepted and consistent approach to gender-based classifications. *Mississippi University for Women v. Hogan*,¹³³ a challenge to a women-only nursing school, confirms this. While the intermediate level of scrutiny is likely to be used, its acceptance is anything but universal.

In *Hogan*, Justice O'Connor, writing for the Court, stated that *Reed* firmly established gender-discriminatory classifications as subject to scrutiny under the Equal Protection Clause.¹³⁴ Further, the Court placed the burden on those seeking to uphold legislation which discriminates on the basis of gender¹³⁵ and established that the governing standard for such legislation was that set forth in *Craig v. Boren*.¹³⁶ The need to determine whether there is a "requisite direct, substantial relationship between objective and means,"¹³⁷ requires "reasoned analysis," not "the mechanical application of traditional, often inaccurate, assumptions about the proper role of men and women."¹³⁸ Justice O'Connor's commitment to the intermediate standard was clear:

130. The *McGowan* standard not only requires complete irrelevance before allowing the law to be overturned, but further presumes that the legislature has acted constitutionally despite any resultant inequality. Where any state of facts reasonably may be conceived to justify legislation, it survives Equal Protection scrutiny. Thus the likelihood of any challenged statute being invalidated is slim. *Maryland v. McGowan*, 366 U.S. 420 (1961).

131. See *supra* note 130 and *infra* note 143 and accompanying text for discussion of the deferential rational basis standard. See *infra* note 178 for a discussion of the most deferential rational basis standard.

132. The *Reed* standard is taken from *Royster Guano*. See *supra* note 54. See *supra* note 114 for the *Royster Guano* standard in *LaFleur* and *supra* note 118 and accompanying text for the standard in *Craig*.

133. 458 U.S. 718 (1981).

134. *Id.* at 723.

135. *Id.* at 724.

136. *Id.*

137. *Id.* at 725.

138. *Id.* at 726.

[W]hen a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.¹³⁹

Justice O'Connor's opinion is undercut by four dissenters, an indication of just how sharply divided the Court remains on the issue of the appropriate standard for gender-based classifications. Justice Blackmun's dissent displayed a lack of commitment to the intermediate level of scrutiny: "it is easy to go too far with rigid rules in this area of *claimed sex discrimination*, and to lose - indeed destroy - values that mean much to some people"¹⁴⁰ Justice Powell,¹⁴¹ another dissenter, viewed this case as presenting no "serious equal protection claim of sex discrimination."¹⁴²

Clearly these opinions do not comprise a coherent whole. Depending on the appeal of the facts of the case, support is sometimes marshalled to follow *Reed*, *Frontiero*, and *Craig* and thereby subject gender classifications to heightened scrutiny;¹⁴³ at other times,

139. *Id.* at 724 n.9. Were Justice O'Connor's sentiments those of the entire Court, not simply a majority for this one case, then those seeking to challenge legislation under the Equal Protection Clause could take heart. Given, however, the variability of the response of the other members of the Court, and the very *ad hoc* nature of the Court's decisions, as this article has shown, there is ample room for concern.

140. *Id.* at 734 [emphasis added].

141. *Id.* at 735 (Powell, J., dissenting).

142. *Id.* at 742. According to Justice Powell, the anomaly resulting in this case revealed "legal error - that of applying a heightened equal protection standard, developed in cases of genuine sexual stereotyping, to a narrowly utilized state classification that provides an *additional* choice for women. Moreover, . . . [this] system should be upheld in this case even if this inappropriate method of analysis is applied." *Id.* at 736. Again, "benign preference" obscures the fact that by restricting male access to nursing programs what results is a profession chiefly restricted to women, a "pink-collar ghetto," i.e., underpaid and under-respected precisely because it is dominated by women.

143. In *Stanton v. Stanton*, 421 U.S. 7 (1974), although finding it unnecessary to decide whether gender classifications are inherently suspect, the Court found *Reed* to establish a presumption of scrutiny under the Equal Protection Clause and then used the *Royster Guano* equal protection standard to strike down a statutory distinction where male child support is granted up to the age of 21 but female child support is permitted only until the age of 18. *Id.* at 13-14 (citing 253 U.S. 412, 415 (1920)). Such a distinction, which the Court found "self-serving" and coincident with role-typing imposed by society failed all tests - "compelling state interest, rational basis, or [anything] in between." *Id.* at 15, 17.

The Court reformed the Social Security Act governing AFDC payments to unemployed fathers so that payments would be made whether the father or mother was unemployed in *Califano v. Westcott*, 443 U.S. 76 (1978). The Court ruled that while Congress may deal with any problem incrementally, it may not do so along gender lines where the result is the exclusion of families headed by unemployed mothers and a denial of their subsistence benefits. *Id.* at 89.

wholly deferential rational basis analysis is used to uphold the legislation.¹⁴⁴ More disturbing is the frequent theme¹⁴⁵ running

Working from the standard set forth in *Craig* ("classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives"), the Court in *Califano v. Webster*, 430 U.S. 313 (1977), upheld Social Security provisions designed to benefit women by allowing them to eliminate a greater number of low-earning years than men for the calculation of the benefits to be received. The Court found the discernible purpose of redressing "society's longstanding disparate treatment of women" adequate justification. *Id.* at 317.

Citing *Webster*, the Court in *Orr v. Orr*, 440 U.S. 268 (1978), applied the intermediate level of scrutiny to invalidate an Alabama statutory system requiring only husbands, but not wives, to pay alimony. Arguing that even if gender were a reliable proxy for need and even if marriage as an institution discriminated against women (so that the statute would be serving a remedial need), there was no need to use gender as a proxy for need because individualized hearings were already being held. *Id.* at 281. "Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex." *Id.* at 283. While ameliorative legislation in the computation of Social Security benefits is upheld in *Webster*, a gender-neutral need-based analysis is preferred in *Orr* in the context of individualized divorce hearings.

In *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1979), following *Craig v. Boren*, 429 U.S. 190 (1976), *Califano v. Webster*, 430 U.S. 313 (1977), *Orr v. Orr*, 440 U.S. 268 (1979), and *Califano v. Westcott*, 443 U.S. 76 (1979), the Court applied an intermediate standard of scrutiny to invalidate the denial of workers compensation benefits to the surviving widower of a deceased female wage earner. The Court relied heavily on both *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Califano v. Goldfarb*, 430 U.S. 199 (1977), but did so in conjunction with the intermediate level of scrutiny, not simply by applying precedent. In addition to using the intermediate test, the Court further shifted the burden of proof to those who would uphold discriminatory legislation: a justification more persuasive than which the 1925 legislature used, namely, widows are more needy than men, was necessary. *Wengler*, 446 U.S. at 151. The Court then invalidated the law because there was no justification for disparate treatment of similarly situated spouses, not because it worked as invidious discrimination by discounting the importance of a female wage earner's benefits to her surviving family. *Id.* at 148-49.

144. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court upheld the exclusion of women from coverage for disability due to pregnancy in a disability plan, citing *Geduldig v. Aiello* for support. (The opinion borrowed heavily from *Geduldig* to find no discrimination by virtue of aggregate risk protection.) Citing GE's longstanding practice of downgrading the role of women in the labor force, the dissent objected to the total loss of income suffered by women disabled due to pregnancy. *Id.* at 147-50. GE's past employment practices, recognized as a motivating factor by the District Court, were cited as further evidence by the dissent. Thus the dissent described the Court's opinion as "simplistic and misleading." *Id.* at 152. Justice Stevens criticized the characterization (pregnant vs. nonpregnant persons) used by the Court to arrive at its conclusion that the exclusion did not constitute gender-based discrimination. Rather, he argued, the distinction should be between those who face the risk of pregnancy and those who do not: because only women have the capacity to become pregnant, exclusion of pregnancy related disability is discrimination on account of sex. *Id.* at 155, 161-62.

Justice Ginsburg has suggested that the able pregnant woman seeking only to do a day's work is a more sympathetic figure to the Court, viz. *LaFleur*. *Sex Equality*, *supra* note 23, at 462. See also *supra* note 114. The woman disabled by preg-

throughout the successful challenges that the significant discrimination requiring invalidation is against men, not women.¹⁴⁶

Given that the issue of whether gender is an inherently suspect classification remains unanswered,¹⁴⁷ and given the very *ad hoc* nature of the precedent with quite variable results due to the appeal of the facts,¹⁴⁸ there is ample reason to reconsider again the arguments for gender as a suspect classification.

Gender Based Classifications: The Problem

What justification is there for revisiting the question of suspect status for gender classifications, beyond the desire for a coherent body of doctrinal precedent for equal protection challenges? One goal which could be accomplished by such a reexamination would be better guidance for the lower courts in place of the Court's current *ad hoc* and inconsistent approach to gender classifications. Another would be to restore a sense of legitimacy to the Court's decision-making process. Both are arguments for a definitive — and affirmative — declaration that gender is a suspect classification.

nancy is considered suspect (i.e. is she malingering so she can stay at home "where she belongs"?). Justice Ginsburg also suggested that the reason for Aiello's (and Gilbert's) lack of success is the tacit assumption by the Supreme Court that childbirth marks the commencement by the woman of her primary role as mother-wife. In this role she should be supported by her husband, not her employer or the state. That Aiello worked by necessity was irrelevant to the Court. Ginsburg, *Gender*, *supra* note 31, at 42.

145. See, e.g., *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 154-55 (1979) (Stevens, J., concurring).

146. See, e.g., *Wiesenfeld, Goldfarb, Craig, and Orr* where men are granted benefits formerly reserved for women. It would seem that the Court is most comfortable striking down legislation that is, in fact, less favorable to men than legislation discriminating against women. Less able to comprehend the discriminatory nature of legislation impinging only on women, i.e. disability due to pregnancy (e.g. *Geduldig, GE v. Gilbert*) or the difficulties of pregnancy and the lack of access to, or funding for, abortion (e.g., *Beal v. Doe*, 432 U.S. 438 (1977), *Maher v. Roe*, 432 U.S. 464 (1977), *Poelker v. Doe*, 432 U.S. 519 (1977)) (a discussion of the abortion funding cases is outside the scope of this article), the Court has upheld legislation severely restricting the autonomy of adult women while regarding it as not in the least problematic.

147. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1981).

148. What is most distressing is not the fact-specific nature of the decision making but rather the fact that equal treatment for 18-21 year-old beer drinking males and benefits for widowers is likely to receive a much warmer reception than 1) women employees seeking disability benefits to support themselves when disabled by pregnancy; or, 2) equal access to government funding for medical procedures like abortion, both of which have a qualitatively and quantitatively greater impact on the economic and social well-being of women than beer-drinking does for young males. Moreover, the substantive basis of the Fourteenth Amendment, and its role as a very important safeguard protecting equal opportunity for full participation as citizens, is somehow demeaned by the narrow, and often unimportant, issues to which alone the Court seems comfortable applying it.

Without a clear standard, consistent and coherent decisions having any sense of legitimacy are impossible.

*Vorchheimer v. School District of Philadelphia*¹⁴⁹ is a case in point. Had gender been ranked as a suspect class, as Justice Ginsburg noted, *Vorchheimer* would have overturned a ruling allowing for 'separate but equal' schools for scholastically superior boys and girls.¹⁵⁰ Instead, the Supreme Court affirmed. As the trial judge in *Vorchheimer* described it, the lower courts are left with "an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea."¹⁵¹ Given the "uneven, insecure, and . . . sharply divided opinions,"¹⁵² the question of how any given case will be decided remains open.

Justice Stevens recognized the result of this uneven treatment. To the question of when does disadvantageous treatment of pregnant or formerly pregnant women constitute unlawful sex discrimination (after *LaFleur*, *Aiello*, *Gilbert* and *Nashville Gas*¹⁵³), he replied that while the answer should be "always," it appeared in 1976 to be "never" and is now [1977] clearly "sometimes."¹⁵⁴

Absent a declaration of suspect status, the Court is free to apply standards ranging from the most deferential rational basis to an intermediate level of scrutiny. The results are obvious: under a

149. 400 F. Supp. 326 (E.D.Pa.1975), *rev'd*, 532 F.2d 880 (3rd Cir.1976) *aff'd by an equally divided Court*, 430 U.S. 703 (1977). The Court, in a non-decision (4-4 split), affirmed the lower court's judgment for the School district which had argued that the "separate but equal" doctrine in effect in Philadelphia (where the oldest school for scholastically superior children was reserved for boys) was nonstigmatic. Contrary to this view is that of Christopher Jencks and David Reisman, who see the reservation of *any* institution for males only as an "unwitting device for preserving tacit assumptions of male superiority." CHRISTOPHER JENCKS & DAVID REISMAN, *THE ACADEMIC REVOLUTION*, 297-98 (1968)(quoted by Ginsburg, *Sex Equality*, *supra* note 23, at 473-74).

150. Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1976 Term*, 217, 221 in *CONSTITUTIONAL GOVERNMENT IN AMERICA* (Ronald K.L. Collins, ed., 1980) [hereinafter, Ginsburg, *1976 Term*]. For those who think this type of segregation no longer exists, Chief Justice Rehnquist's recent decision to grant a stay to the Citadel, a male-only state supported military college, preventing the registration of Shannon Faulkner (originally granted admission which was then denied upon discovery of her gender) serves as one more reminder of just how far we have yet to go before reaching gender equity. *Woman Registers at Citadel, Then is Barred*, N.Y. TIMES, January 13, 1994, at A8.

151. *Vorchheimer*, 400 F. Supp. at 341-42.

152. Ginsburg, *Sexual Equality*, *supra* note 24, at 171.

153. 434 U.S. 136 (1977). *Nashville Gas's* practice of eliminating a woman's accumulated job seniority once she was forced to take a leave of absence due to pregnancy related disability was invalidated by Title VII. *Id.* Interesting here was the Court's decision that the exclusion of pregnancy from disability coverage was valid, while the loss of her seniority, which effectively precluded a return to work in many cases, was not.

154. Ruth Bader Ginsburg, *From No Rights, to Half Rights, to Confusing Rights*, 7 HUM. R. 12, 14 (1978)(quoting *Nashville Gas*, 98 S.Ct. at 357).

deferential rational basis test almost any interest addressed by the legislature is legitimate.¹⁵⁵ But the question must be raised whether the validation of any piece of legislation, solely because of some conceivable set of facts, is appropriate when considering legislation burdening those not adequately represented by the decision-making body. Indeed, Justice Ginsburg has argued that an important result of labelling gender as suspect and subjecting gender-based classifications to strict scrutiny is to reverse the presumption of constitutional validity.

"Absent this starting point [of suspect classification], the legislative product would come to the court shored up by 'one of the first principles of constitutional adjudication' - the basic presumption of the constitutional validity of a duly enacted state or federal law."¹⁵⁶ Heightened judicial review, resulting from a reversal of the presumption of legislative validity, is the necessary first step to allow equal constitutional protection to those groups which are outside the very narrow group actually represented in the legislative process.

Is the Court's failure to apply a heightened, and single (strict), standard prompted by jurisprudential restraint?¹⁵⁷ Or is the Fourteenth Amendment simply an inappropriate basis from which to argue for the legal equality of both men *and* women, due to its origins in the years following the Civil War which should be viewed largely, or exclusively, as an effort to remedy the plight of African-Americans?¹⁵⁸ Or, does the Court's variable approach to gender issues result from a judiciary comprised chiefly, almost exclusively, of men¹⁵⁹ who do not grasp the implications of gender-based discrimi-

155. Ruth Bader Ginsburg, *Gender-Based Discrimination and the Equal Rights Amendment*, 74 F.R.D. 298, 327 (Panel Presentation at the 1976 Second Circuit Judicial Conference).

156. Ginsburg, *Gender*, *supra* note 31, at 17.

157. As Justice Ginsburg remarked, "the majority of the justices have avoided articulating any standard of review for gender-based line drawing from the rationality measure. Rather, the tendency has been to deal with each case in its narrow frame, to write an opinion for that case and that day alone." *Women as Full Members of the Club: An Evolving American Ideal*, 6 HUM. R. 1, 5 (1977) [hereinafter, Ginsburg, *Full Members*]. In this view, the Court's decisions are comprehensible as an effort not to transgress into the legislative arena; to rule only within the narrow confines of the facts presented. A close reading of the opinions, concurrences and dissents precludes accepting such an explanation, as my review has shown.

158. *Id.* at 2. See *supra* note 24 and *infra* note 182 for a discussion of the suffragists' reaction to the Fourteenth Amendment.

159. Currently, women hold only 13.4 percent (or only 199) of the nearly 1500 federal judgeships. Harvey Berkman, *High Court Trails Circuit in Appointing Women to Bench*, CHI. LAW., May, 1993, at 3. Specifically, that means that only 15 percent (or 24) of the Circuit judges, 11.5 percent (or 65) of the District judges, 13.7 percent (or 40) of the Bankruptcy judges, 18.2 percent (or 63) of the full-time Magistrates and only 5.8 percent (or 7) of the part-time Magistrates are women. [These

nation as an impediment to women's opportunity to participate fully in the political, social and economic life of the American community?¹⁶⁰ Further evidence for this last explanation can be found by an examination of *University of California Regents v. Bakke*.¹⁶¹

Bakke best illustrates the Court's confusion on the actual impact of gender-based classifications and the comparability of race and gender classifications. Those supporting a remedial race-based quota system for admission to University of California, Davis Medical School urged that such a program be subjected to the less exacting scrutiny applicable to gender-based classifications. Judging the comparison between race and gender as inapposite Justice Powell stated that:

Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classifications as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.¹⁶²

Did Justice Powell mean that because gender classifications are inherently less odious than racial or ethnic classifications, compensatory legislation for women is less problematic? Justice Gins-

statistics were obtained from the Administrative Office of the Courts.] This is an increase from the 1-2 percent rate characteristic of the 1960s, or 4 percent in the 1970s. Beverly Blair Cook, *Women Judges: The End of Tokenism*, in *WOMEN IN THE COURTS* 84, (Winifred L. Hepperle & Laura Crites eds. (1978)). But it hardly reflects the increased number of women (40%) in law schools. See also *The Role and Status of Women Jurists: Country-by-Country Summary*, GUILD PRAC. 35 (Winter, 1980).

160. Contrast the change resulting from women now holding approximately 20 percent of state legislative seats. Women bring a "consistently more liberal and feminist perspective," according to a recent report issued by the Center for the American Woman and Politics at Rutgers University. Women's legislative agenda is more human-oriented and demonstrates a willingness to undertake the difficult problems of health care, aging, families and education. *Women in Politics: A Different Public Policy Perspective*, STAR TRIB. (MINNEAPOLIS) Jan. 14, 1994, at A16.

161. 438 U.S. 265 (1977).

162. *Id.* at 302-03 (citations omitted).

burg suggested¹⁶³ two possibilities for these remarks, both of which yield anomalous results, and are "less than crystal clear."¹⁶⁴ Does this statement suggest that preferential treatment for women is less susceptible to challenge than preferential treatment for blacks?¹⁶⁵ Or, does this mean that official discrimination against women is tolerated to a greater extent than similar discrimination against traditional suspect classes such as racial and ethnic groups?¹⁶⁶ Or, worse, both?

"Preferential" laws denying women equal opportunities have never been regarded as on a par with "back of the bus" treatment accorded African-Americans.¹⁶⁷ Indeed, discriminatory legislation was thought to favor the "fairer and weaker sex," to place women on a pedestal. But as the Supreme Court of California noted in *Sail'er Inn*:¹⁶⁸

Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.¹⁶⁹

With no "suspect" label and tied to no particular standard, the Court, when presented with a gender-based classification, will sometimes uphold "benign" legislation; it will sometimes strike down discriminatory legislation, if the price tag is not too high; it will sometimes uphold legislation with strongly adverse consequences for women. In contrast, by reason of suspect status, discriminatory racial and ethnic classifications have been struck down. By the same token, laws based on racial or ethnic classifications

163. Ruth Bader Ginsburg, *Bakke Decision*, 65 WOMEN'S LAW. J. 11, 14 (1979) [hereinafter, Ginsburg, *Bakke*]; see also Ginsburg, *Sexual Equality*, *supra* note 24, at 170.

164. Ginsburg, *Bakke*, *supra* note 163, at 14; Ginsburg, *Sexual Equality*, *supra* note 24, at 170.

165. Comparing the result in *Bakke* with *Kahn v. Shevin*, *Schlesinger v. Ballard*, *Califano v. Webster*, one could answer this question affirmatively.

166. Given the whole range of pregnancy-related cases, this too could be answered affirmatively. See *supra* notes 77-84 and accompanying text.

167. But this comparison is not helpful, for it obscures the consequences of the laws' treatment of women. Discriminatory legislation which is capable of being labeled as 'benign' is surely no easier - indeed, it is often harder - to eradicate than blatant and offensive discrimination, by virtue of that inaccurate label. See *infra* note 173.

168. 485 P.2d 529, 541 (1971).

169. *Id.* The *Sail'er* Court concluded that gender classifications are thus properly treated as suspect. The language quoted is taken almost verbatim by the U.S. Supreme Court in *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

which might remedy the long record of discriminatory treatment suffered by these groups have also been struck down.

We are thus left with the question, then, if there are *any* advantages to gender being labelled a suspect class. Conversely, one might also ask whether the remedial legislation upheld in the area of gender, presumably because it lacks the label 'suspect' might have anything to offer racial or ethnic minorities seeking to overcome the effects of a long history of discrimination.¹⁷⁰ Clearly the paradigm¹⁷¹ developed by the Court is unsatisfactory for any number of reasons, not the least of which is the lack of opportunity for full participation afforded to women and minorities.

Gender as a Suspect Class

Justice Ginsburg has argued for gender as suspect because "it is *presumptively impermissible* to distinguish on the basis of congenital and unalterable traits of birth over which the individual has no control and for which he or she should not be penalized."¹⁷² Both sex and race provide an "unalterable identifying trait which the dominant culture views as a badge of inferiority justifying dis-

170. Justice Brennan's dissent in *Bakke v. Regents of Univ. of Cal.*, 438 U.S. 265, 358-59 (1977), suggested just that. Brennan argued that, in fact, considerations developed in gender classifications might be applied to certain racial classifications. *Id.* Where remedial goals are furthered by racial classifications, such classifications should be allowed if they serve "important governmental objectives" and are "substantially related to the achievement of those objectives" (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977), which in turn quotes *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

So too Justice Ginsburg interpreted *Webster* to stand for a "rule of equal treatment" which allowed genuinely compensatory measures, to be achieved by gender classification where there is a genuine remedial purpose "tailored in scope and time to match the remedial end." Ginsburg, *Sexual Equality*, *supra* note 24, at 169-70.

171. The chiastic paradigm developed is as follows:

GENDER	RACE
Not suspect	Suspect
Intermediate (?) standard	Uniform standard/Strict scrutiny
Remedial measures	No remedial measures linked to race.

The real anomaly resulting from this arrangement is that race, a suspect classification by virtue of the invidious discrimination suffered, automatically leads to the highest standard of judicial review (strict scrutiny) which in turn eliminates any possibility for racially based remedial measures, necessary because of the past invidious discrimination. Gender, on the other hand, which is *not* recognized as suspect, because of the continued (*mistaken*) belief that such gender discrimination is really "benign preference," can merit remedial treatment. Clearly something is wrong here.

172. Briefs for Appellant, *Reed*, 15 and *Frontiero*, 27.

advantaged treatment in social, legal, economic and political contexts."¹⁷³

The justification for treating both race *and* gender as inherently suspect classifications is best summarized by the following passage:

The similarities between race and sex discrimination are indeed striking. Both classifications create large, natural classes, membership in which is beyond the individual's control; both are highly visible characteristics on which legislators have found it easy to draw gross, stereotypical distinctions. Historically, the legal position of black slaves was justified by analogy to the legal status of women. Both slaves and wives were once subject to the all encompassing paternalistic power of the male head of the house. Arguments justifying different treatment for the sexes on the grounds of female inferiority, need for male protection, and happiness in their assigned roles bear a striking resemblance to the half-truths surrounding the myth of the "happy slave." The historical patterns of race and sex discrimination have, in many instances, produced similar present day results.¹⁷⁴

Why is suspect classification important? Because without that recognition, the pervasive social, cultural and legal roots which have helped to maintain gender discrimination will remain firmly anchored; because women (and other groups accorded suspect status) continue to be under-represented in policy-making bodies and thereby lack the political power necessary to have a meaningful voice in the legislative process (which is really the process of allocating benefits and burdens). The presumed rationality of legislation, which may be appropriate where legislation concerns only those whose interests are truly represented in the process, should be viewed with greater suspicion where it affects those under-

173. Brief for Appellant, *Reed* 24-25. Yet the *Bakke* opinion discounts any similarity between race and gender, perhaps because of an inability to recognize that so-called preferential treatment accorded to women is, in fact, really similar to back-of-the-bus treatment accorded to minorities; perhaps because women comprising a majority do not represent a "discrete and insular" minority, as the other suspect classes. Yet this is to ignore the almost "total political silence" imposed on females well into the 20th century, as Justice Ginsburg has noted. By virtue of not being an insular minority, women have lacked the opportunity to develop that type of political power and identity which their status and numbers might suggest. Ginsburg, *Full Members*, *supra* note 157, at 4. This is not to suggest, however, that all discrete minorities have developed into groups of political power, only that by virtue of being "discrete" they have the potential to do so which women, spread out over wide geographic area and socio-economic strata, have not.

174. *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?* 84 HARV. L. REV. 1499, 1507-08 (1971)(footnotes omitted)(quoted by Ruth Bader Ginsburg in *Reed*, Brief for Appellant, 15-16).

represented in the process.¹⁷⁵ Above all, by recognizing gender as a suspect classification the Court would be giving support to the idea that women are full persons within the meaning of the Constitution.¹⁷⁶

What argument can be offered to those who assert that the Fourteenth Amendment provides no basis for gender equality? As Justice Ginsburg has argued, is not "equality of rights under the law for all persons, male or female, . . . so basic to democracy, and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land"?¹⁷⁷

The Fourteenth Amendment, What Does it Guarantee?

A. The Scope of the Amendment

Does the Fourteenth Amendment offer any constitutional guarantees? A product of the years following the Civil War, was it intended solely to help newly freed slaves achieve the rights of citizenship still denied them?¹⁷⁸ Or, is there a substantive basis for

175. "[W]omen are sparsely represented in legislative and policy-making chambers and lack political power to remedy the discriminatory treatment they are accorded." *Reed*, Brief for Appellant, 6. If there is any doubt about the lack of adequate representation of issues of concern to, or relating to, women, some recent comments made can serve as stark reminders. When breast cancer first achieved sufficient political recognition in 1988 to merit Congressional concern, a female lobbyist sought a Congressional sponsor to introduce language in a larger health care bill to allow Medicare coverage for mammograms. Typical of Congressional attitudes, the Congressman initially approached to act as sponsor responded "I did the women's thing last year . . . The guys will think I'm soft on women." The lobbyist's reply: "Fear not. Just tell them you're a breast man." Susan Ferraro, *The Anguished Politics of Breast Cancer*, N.Y. TIMES, Aug. 15, 1993 (Magazine) at 61. If we are now seeing some increased legislative concern for issues such as breast cancer, it is perhaps due to the personal experiences of some members of Congress whose family members have been affected. Clearly full legislative representation is a distant goal for these groups whose views are not adequately represented or considered, especially given the broad range of issues of concern to women and minorities. Equal representation, surely, should not depend solely on heightened awareness among legislators who have more rarely experienced misfortunes all too common for women and minorities.

176. *Reed*, Brief for Appellant at 41, where it is argued that past Supreme Court decisions have lent credence to the view that women are "less than full persons within the meaning of the Constitution."

177. *Frontiero*, Brief for Appellant 19-20 quoting *President's Commissions on the Status of Women*, AMERICAN WOMEN 44-45 (1963).

178. For an exposition of this view, see Justice Rehnquist's dissent in *Trimble v. Gordon*, 430 U.S. 762, 777 (1976). Rehnquist also offered there the most deferential definition of the rational basis test: so long as a law is not "patently irrational" and "mindless" it should be upheld. *Id.* at 786. Despite his insistence that the only area of law to which the Equal Protection Clause can apply, classifications based on race, Rehnquist admitted that there would be less cause for complaint if the Court had developed a consistent body of doctrine. "If . . . recognizing that those who drafted and adopted this language had rather imprecise notions about what it meant, the

the rights guaranteed to all persons and citizens by the very terms of the Amendment that gives it great applicability?

Despite its anti-slavery origins, it can be argued that the Equal Protection Clause, the most sweeping of the provisions contained in the Fourteenth Amendment, was intended to impose upon the states "a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights - especially life, liberty, and property - and to do so equally."¹⁷⁹ In addition to requiring administrative fairness, in fact, the Fourteenth Amendment also included a requirement for equal laws: "The equal protection of the laws is a pledge of the protection of equal laws."¹⁸⁰ The Amendment was written not with language specific to racial discrimination (as was the Fifteenth Amendment¹⁸¹), which suggests a level of breadth designed to accommodate constitutional growth.¹⁸²

Court had evolved a body of doctrine which both was consistent and served some arguably useful purpose, there would likewise be little cause for great dissatisfaction with the existing state of the law." *Id.* at 777. A consistent and useful approach to the Equal Protection Clause is exactly what I am arguing is both possible and necessary.

179. Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). The authors noted that the equal protection provision was found in virtually all forms of the proposed amendment, and was, of all the provisions of the Amendment, the "common meeting ground" of those who supported the amendment. *Id.* at 341-42.

180. *Id.* at 342 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). The importance of this recognition of the broad ambit of the Fourteenth Amendment so soon after its adoption can not be overstated. Both the quality of the legislation as well as the quality of its administration are thus brought within the scope of the Equal Protection Clause.

181. Compare the language of the Fifteenth Amendment ("The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude") with that of the Fourteenth Amendment ("All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws") U.S. CONST., amends. XIV, XV.

182. See Karst, *supra* note 7, at 17, where he argued that the framers of the Amendment declined to use the language of specific rights and groups precisely to allow for the potential for growth.

That women were not able to marshal support for inclusion of language guaranteeing women's suffrage in the Fourteenth Amendment does not limit the importance of the breadth of the language. As Flexner noted: "[s]lavery and the condition of the Negro had been a boiling national issue for thirty-five years [prior to the adoption of the Fourteenth Amendment]; a war had been fought over it. No such intensity of feeling existed yet regarding the status of women Opinion in Congress and throughout the North was concerned with assuring the vote for the Negro; it was relatively uninterested in how such a controversial measure would affect women." ELEANOR FLEXNER, *CENTURY OF STRUGGLE* 148 (1975). For a discussion of the wo-

The dynamic quality of the Equal Protection Clause has been acknowledged by the Court.

Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.

Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.¹⁸³

B. The Substantive Core

Critically important in our constitutional framework for those most likely to be outside of the decision-making process is the "substantive core" of the Fourteenth Amendment and especially the Equal Protection Clause. That is, the "principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."¹⁸⁴ While equality may be value neutral, this Amendment is not.¹⁸⁵

The critical question to be asked is clear: have the individuals burdened by any given legislation had any significant part in the legislative process — hence the importance of the "suspect" classification. Groups or individuals with access to the decision-making process are likely to be treated fairly; those outside of that process, i.e. historically women and minorities, are not. The legislative decisions regarding poorly represented groups are more likely to be

men's suffrage movement and the passage of the Civil War Amendments, *see id.* at 145-58.

That the Fourteenth Amendment was prompted by concern for the rights of African-Americans is not to be denied. That the plain meaning of the language is not so limited must also not be denied.

183. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966)(citations omitted). Were the Equal Protection Clause not dynamic, the result in *Harper v. Va. Bd. of Elections* would have been to uphold a state poll tax (clearly discriminatory against the poor and minorities) because it was founded on "some rational and otherwise constitutionally permissible state policy," which is what Justice Black's dissent proposed. *Id.* at 673-74. The majority cited, as support for its belief in the potential for change inherent in the Fourteenth Amendment, the change from *Plessy* (separate but equal is constitutionally permissible) to *Brown* (repudiating separate but equal). There would be few proponents today, even among adherents of the most deferential rational basis test, of upholding an infringement of such a fundamental right as the right to vote by a poll tax.

184. Karst, *supra* note 7, at 4.

185. The failure to recognize this substantive principle, indeed the belief that the Amendment lacks any substantive basis, Karst explained, is responsible for the "substantive void" which has characterized the Court's decisions in this area. In his words, "[s]urely we are near the point of maximum incoherence of equal protection doctrine." Karst, *supra* note 7, at 3.

based on inaccurate stereotypes. In addition, the full impact of that legislation is unlikely to be appreciated by the legislators making it because they will never be subject to its burdens.¹⁸⁶

In addition to requiring that organized society treat each individual as someone worthy of respect, someone who belongs to the community, the Equal Protection Clause requires that legislation which burdens members of society and prevents their full participation be invalidated. For such legislation inexorably leads to legislation by stereotype, and stereotyping stigmatizes.¹⁸⁷

Where society operates free of such stigma, citizens have a strengthened sense of their own self worth, both as individuals and as members of the community. This leads to the realization that there is no inherent dichotomy between the rights of the individual and the rights of the political and social community: participation in the community is fully necessary for the development of the individual; and the development of the individual is fully necessary for the community.¹⁸⁸

In essence, then, we are left with only one point of conflict: should the Equal Protection Clause, and hence the opportunity for full and meaningful participation in the community, be restricted only to those for whom the Constitution was originally written?¹⁸⁹

186. As Karst stated: "When the burden of the legislation falls most heavily on a group that is likely to be the subject of the legislatures' systematic neglect, it is natural for the judicial scrutiny to be heightened." Karst, *supra* note 7, at 24-25 (citing *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

Cf. ARISTOTLE, *POLITICS* 1281b38-1282a1-23. Aristotle theorized that, contrary to first impression, it is preferable to have the one using, rather than the maker, judge the product. For the one who uses the house is a better judge than the maker; the diner a better judge of the meal than the cook. So too those affected by legislation are better judges of its burdens and benefits than those who legislate but are unaffected by the legislation.

187. "The essence of any stigma lies in the fact that the affected individual is regarded as unequal . . ." Karst, *supra* note 7, at 6.

188. *Id.* at 9. This idea goes back to the Greeks, for whom political community was essential to the very identity of the individual. "[I]t is clear that the city-state is a natural growth, and that man [sic] is by nature a political animal . . ." (ἐκ τούτων οὖν φανερόν ὅτι τῶν φύσει ἡ πόλις ἐστὶ, καὶ ὅτι ὁ ἄνθρωπος φύσει πολιτικὸν ζῷον.) ARISTOTLE, *POLITICS* 1253a2-4. (H. Rackham trans., 1967). Because humans are political creatures, they "consequently fulfill their natural potential and are happy only by belonging to a political community. By participating in politics, they share in the ongoing political debate over interest and justice, and make use of their distinctive capacity for reason and speech. Moreover, Aristotle does define citizenship as political participation." MARY P. NICHOLS, *CITIZENS AND STATESMEN, A STUDY OF ARISTOTLE'S POLITICS*, 3 (1991) (citing ARISTOTLE, *POLITICS* 1253a1-18, 1274b31-75b21). See also Wolfgang Kullmann, *Man as a Political Animal in Aristotle*, in *A COMPANION TO ARISTOTLE'S POLITICS* 94-117 (David Keyt & Fred Miller Jr. eds. (1991)) [hereinafter, *COMPANION*].

189. For such is the result when a deferential rational basis standard is used by a judiciary chiefly composed of propertied white males to review legislation crafted by those for whom the Framers wrote the Constitution: propertied white males.

Or, should it not also provide full constitutional protection of the substantive guarantee of the Fourteenth Amendment — equal citizenship¹⁹⁰ — to everyone who is now a person and citizen (including women)?

A reading of the Equal Protection Clause in this manner would not require the judiciary to perform a function in conflict with the legislative branch.¹⁹¹ Attribution of purpose to legislation is, in fact, part of the ordinary judicial process of statutory construction and interpretation in which the Court daily engages.¹⁹² To require clear articulation of the reasons for legislation, in fact, safeguards the legislative process and does not require the judiciary to infringe on a coequal branch.¹⁹³ Indeed, one could argue that judicial refusal to examine legislation by presuming its validity and imputing rational basis where there might be none favors legislative arbitrariness. As Justice Jackson stated in *Railway Express Agency Inc. v. New York*:¹⁹⁴

Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states, and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not mere abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation . . .¹⁹⁵

To give the Equal Protection Clause full force, it is not sufficient that laws are gender neutral and allow no distinctions (although this is the necessary starting point). Once the substantive basis of the Equal Protection Clause is recognized, then it becomes clear that the simple application of "equal" laws, i.e.

190. Thus the impact of legislation on the full participation in society for those not previously included in "We The People" would have to be considered.

191. What Justice Rehnquist called "an endless tinkering with legislative judgment, a series of conclusions unsupported by any central guiding principle"? *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). See *supra* note 178.

192. *Developments in the Law of Equal Protection*, 82 HARV. L. REV. 1065, 1116 (1969).

193. Gerald Gunther, *In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 43-45 (1972).

194. 336 U.S. 106, 112-13 (1949).

195. *Id.*

arithmetic equality, can not achieve the desired result.¹⁹⁶ Where such diverse groups as those for whom the Constitution was originally written and those groups excluded from initial representation are involved, "equal" rights achieves quite disparate results. But equality is not only arithmetic, it is also geometric.¹⁹⁷ The very notion of "equality" has long been recognized as being broad enough to accommodate different, and competing, interests within the political community.¹⁹⁸

Developed within the contexts of mathematics and music theory, the notions of arithmetic and geometric equality were then applied by the Greeks (chiefly Archytas, Plato and Aristotle) to the political sphere.¹⁹⁹ It is my contention that recognition and use of the two kinds of equality are not only useful, but necessary for a coherent and consistent understanding and application of the Equal Protection Clause. The remainder of this article will be devoted to a consideration of the two kinds of equality and their applicability to the Equal Protection Clause.

Two Kinds of Equality

A critical and fundamental shift in thinking occurred in the late 6th and 5th century B.C. in Athens which signalled the rise of participatory democracy²⁰⁰ and *isonomia*, equality of political

196. By "equal" arithmetic equality is usually meant, where each individual receives the same; where each number stands at an equal distance from its neighbors. See *supra* note 18 and *infra* notes 199-229 and accompanying text for a full discussion.

197. Geometric equality appears unequal at first because the numbers no longer stand at the same distance to each other, and hence each does not have "equal" rights. But because the ratio between the numbers is equal, the result is actually perfect equality. See *supra* note 18 and *infra* notes 199-229 and accompanying text.

198. See *infra* notes 199-229 and accompanying text.

199. Given the Greeks preoccupation with the importance of the political community to the individual's development, it is understandable that anything of use to political theory would be applied there.

200. In c.510 B.C. Cleisthenes, by making the people his political partners, created a "balanced form of government by giving all citizens equally the right to participate in the political life of the state and by eliminating the political monopoly which birth and wealth had enjoyed so far." MARTIN OSTWALD, *NOMOS AND THE BEGINNINGS OF ATHENIAN DEMOCRACY* 154 (1969). Most striking was the slogan Cleisthenes used to win support for his reforms: *isonomia*, equality of political rights. See OSTWALD (*supra*) for a complete discussion of *nomos*, *thesmos* and the development of Athenian democracy.

The importance of this original shift, which essentially resulted in the application of arithmetic equality — equal shares, equal rights — to Athenian government, can not be overstated. By breaking away from the traditions which tied political power to birth and wealth, participation by *all* citizens in the governance of their city-state became possible. As the discussion which follows will demonstrate, however, this first, essential critical shift was not sufficient. In Athens, because the principle of equal shares, equal rights was carried out to its logical conclusion by means

rights.²⁰¹ *Isonomia* thus comes to stand for democracy, rule by the people (*demos*).²⁰²

Archytas of Tarentum²⁰³ was the first to set forth the three proportions, the three kinds of equality, in a work on music,²⁰⁴ of which the first two were applied to politics.²⁰⁵

of election by lot to magistracies, membership in the Boule (Council), etc., the problem was to find a philosophical justification for allowing greater participation by virtue of qualification, hence geometric equality. In the United States, where there still exists an extreme imbalance, directly related to wealth and birth, in the level of participation possible (both in government and society as a whole), the problem is reversed: finding a philosophical justification for a greater share for those lacking the essentials (education, housing, jobs) necessary for greater participation in society and the body politic. For an examination of the differences between Greek and American citizenship, see Martin Ostwald, *Shares and Rights: "Citizenship" Greek Style and American Style*, (forthcoming, in papers delivered at the 'DEMOCRACY 2500' COLLOQUIUM in Washington, April 1993, to be published by the American School of Classical Studies at Athens, summer 1994).

201. H.G. LIDDELL ET AL., GREEK-ENGLISH LEXICON (1969) (citing HERODOTUS 3.80). Significant, too, in the adoption of *isonomia* is the fundamental shift in thinking which it signals about laws, lawmaking and government.

Prior to Cleisthenes the usual word for law was *thesmos* (θεσμός): "imposed upon a people by a lawgiver legislating for it." OSTWALD, *supra* note 199, at 55. With Cleisthenes, *nomos* (νόμος) is now adopted for "law." *Nomos* "looks upon a statute as the expression of what the people as a whole regard as a valid and binding norm." *Id.*

202. "The rule of the many, on the other hand, has, in the first place, the fairest of names, equality before the law, and further it is free from all those outrages which a king is wont to commit. There places are given by lot, the magistrate is answerable for what he does, and measures rest with the community." HERODOTUS 3.80.6. (G. Rawlinson, trans., 1942). The thrust of *isonomia* is that the same rules apply to both upper and lower classes: equality of the law. Martin Ostwald would now define it as "equality of legislative and judicial rights." Letter from Martin Ostwald, Professor Emeritus of Classics, Swarthmore College and University of Pennsylvania, (Feb. 11, 1994)(on file with author).

Equality of political rights in Athens meant far more than 1 person, 1 vote. It meant that all citizens had equal opportunity to hold office (most offices were assigned by lot, although those requiring special qualifications were filled by election); to participate in the Assembly, the decision-making body, to pass judgment on the officials who were required to account for their magistracies before leaving office. See also David Keyt, *Aristotle's Theory of Distributive Justice*, in COMPANION, *supra* note 188, at 238, (summarizing political egalitarianism, where political authority or that which is to be distributed is described as "the primary expression of democratic justice.").

Yet even a democracy committed to the ideal of equal political rights and each citizen having the same value as another recognized the need for both geometric and arithmetic equality. Cf. THUCYDIDES 2.37.

203. Archytas lived in the early 4th century B.C., was of the Pythagorean school of philosophy, and was highly regarded in antiquity, especially for his work in mathematics.

204. Diels-Krantz, *Die Fragmente der Vorsokratiker* 47 B 2 (=DK 47 B 2) (Berlin, 1951).

205. F.D. Harvey, *supra* note 1, at 101 (1965). I rely heavily on Harvey for his treatment of the two equalities in Archytas, Plato and Aristotle, and make use of Harvey's translations of Archytas's fragments. It is Harvey's premise that Archytas was the first to set forth these concepts. His thesis finds support from Plato's *Gor-*

There are three proportions in music: (i) the arithmetical, (ii) the geometric, (iii) the subcontrary which they call the harmonic. The *arithmetical* is when there are three terms which stand in the following relation to one another in proportion: the first exceeds the second by the same amount as the second exceeds the third (e.g. 6, 4, and 2, where $6-4 = 4-2$) The *geometric* is when the first stands in the same relation to the second as the second to the third (e.g. 8, 4 and 2, where $8:4 :: 4:2$). And of these the greater are in the same ratio as the smaller (i.e. 8 is twice 4; and 4 is twice 2).²⁰⁶

When applied to politics, the equality of arithmetical proportion is really only superficial equality. While the numbers stand at equal distance from each other, there is no account of the smaller ratio between the numbers (4 is twice 2; 6 is $1\frac{1}{2}$ times 4; 8 is $1\frac{1}{3}$ times 6) as one progresses up the scale. Geometric proportion, however, yields a true and satisfying equality, for the proportion between the numbers is constant throughout (4 is twice 2; 8 is twice 4; 16 is twice 8).²⁰⁷

According to Archytas,²⁰⁸ the result of applying geometric proportion (*logismos*) is to stop discord and dissent (*stasis*) and increase harmony (*homonoia*). With geometric proportion there is equality (*isotes*):²⁰⁹ "By this, then, the poor take from the powerful, and the rich give to the needy, both sides trusting that through this they will get τὸ ἴσον [equal share, equality]."²¹⁰

gias, where Plato introduces the idea of geometric equality "without a word of explanation, as if it were already familiar." PLATO, GORGIAS 508a6 (E.R. Dodds ed., Oxford, 1959). I am indebted to Professor Martin Ostwald for referring me to these works.

206. Harvey, *supra* note 1, at 103-04.

207. Harvey, *supra* note 1, at 104-05.

208. DK 47 B 3, *supra* note 1, at 105.

209. "Logismos when discovered stops stasis and increases homonoia; when it occurs, there is no pleonexia, but there is isotes; for by this we settle our disputes." (στάσιν μὲν ἔπαυσεν, ὁμόνοιαν δὲ αὐξησεν λογισμὸς εὐρεθείς· πλεονεξία τε γὰρ οὐκ ἔστι τούτου γενομένου καὶ ἰσότητας ἔστιν· τούτῳ γὰρ περὶ τῶν συναλλαγμάτων διαλασσόμεθα.) Harvey, *supra* note 1, at 105.

210. τὸ ἴσον also includes the notion of "fairness." Archytas noted further: "[i]t is a rule and it prevents men from doing wrong: it stops those who know how to calculate before they do wrong, persuading them that they will not be able to escape notice, when they come to it; and it prevents those who do not know from doing wrong, showing by that fact (i.e. that they do not know how to calculate) that they are doing wrong." Harvey, *supra* note 1, at 105.

For a description of the application of these ideas to Tarentum's constitution, see ARISTOTLE'S POLITICS 1320b9. In Tarentum, commercial property existed for the use of the needy. Both lot, sortition, i.e. the lottery, (the ultimate expression of arithmetic equality) and election (geometric equality) were used for selecting officials. This allowed full participation in most offices while reserving those with specialized functions for people with the appropriate qualifications. *Id.*

Plato²¹¹ understood that "to unequals[,] equals become unequal if they are not harmonized by measure For there are two equalities (i.e. arithmetical and geometric proportion), which are called by the same name, but are in reality in many ways almost the opposite of one another."²¹² Plato described arithmetical equality as equality "of measure, weight, and number,"²¹³ i.e. the lot.²¹⁴ Arithmetic equality, because it does not differentiate between citizens, can be applied by *any* state or legislator. Geometric equality, however, "the truest and best form of equality, is not an easy thing for every one to discern."²¹⁵ Geometric equality gives in proportion to the nature of each,²¹⁶ resulting in the greatest good to both individuals and states:²¹⁷ "Indeed, it is precisely this which constitutes for us 'political justice,' which is the object we must strive for."²¹⁸ Requiring greater statesmanship to be properly applied, geometric proportion should not be applied exclusively. Without the anchoring principle of arithmetic equality, one could argue alternatively from geometric equality that only those most qualified should have any share in government, in essence a reversion to a pre-democratic government where political power was linked solely to birth and wealth. Thus it is only through the conjunction of the belief in the need for equality of citizens *and* the recognition that equal things given to unequals yields inequality that constitutional government, true polity, is possible. Thus the application of both arithmetic and geometric equality is necessary for any true constitution.²¹⁹

211. PLATO LAWS 756e-757e. (B. Jowett trans., 1953) (quoted in Harvey, *supra* note 1, at 108).

212. τοῖς γὰρ ἀνίσοις τὰ ἴσα ἄνισα γίγναι ἂν, εἰ μὴ τυγχάνοι τοῦ μέτρου *Id.* at 757a. δυοῖν γὰρ ἰσοτήτοιον οὔσαιν, ὁμωνύμοι μὲν, ἔργῳ δὲ εἰς πολλὰ σχεδὸν ἐναντίαιν. *Id.* at 757b.

213. τὴν μέτρῳ ἴσιν καὶ σταθμῷ καὶ ἀριθμῷ. *Id.* at 757b.

214. The closest modern parallel is jury selection. In simplified form, election to office by lot assumes that all citizens are equal in their ability and willingness to fulfill basic civic functions. They are selected by a lottery, without regard to particular qualifications.

215. τὴν δὲ ἀληθεστάτην καὶ ἀρίστην ἰσότητα οὐκέτι ῥάδιον παντὶ ἰδεῖν. *Id.* at 757b.

216. μέτρια διδοῦσα πρὸς τὴν αὐτῶν φύσιν ἑκατέρῳ. *Id.* at 757c.

217. πᾶν δὲ ὅσον ἂν ἐπαρκέσῃ πόλεσιν ἢ καὶ ἰδιώταις, πάντ' ἀγαθὰ ἀπεργάζεται. *Id.* at 757c.

218. PLATO, LAWS 757c (R.G. Bury trans., 1926). ἔστι γὰρ δὴ που καὶ τὸ πολιτικὸν ἡμῖν αἰεὶ τοῦτ' αὐτὸ τὸ δίκαιον· οὐ καὶ νῦν ἡμᾶς ὀρεγομένους δεῖ καὶ πρὸς ταύτην τὴν ἰσότητα. PLATO, LAWS 757c.

219. For practical application, see PLATO LAWS 744b-c where geometric proportion is used to allow those with greater property qualifications greater participation. It should be noted that in Athens where everyone had equal opportunity to participate by virtue of the lot, geometric proportion was necessary to counteract the presumption that all were inherently equal for all purposes of governing. In the United States this presumption is reversed: those who coincide with the original Framers of the Constitution have had, and continue to have, control of the legislative bodies

Aristotle, who discussed the two kinds of equality at the greatest length, also understood the need for both arithmetic and geometric equality.

All men grasp justice to some extent; but they only go part of the way, and they do not state the whole of the absolutely just. For example, justice is thought to be equality; and so it is, but for equals, not for everybody. Inequality is also thought to be just; and so it is, but for unequals, not for everybody. They omit the "for whom" and judge badly. That is because they are judging themselves. Most men are bad judges in their own cause.²²⁰

Thus the issue of the two equalities is not simply a matter of distribution of benefits and burdens in a political system, it is also a theory about justice: everyone should be treated equally, unless there are good grounds to justify a difference in treatment.²²¹ Rather than implying an inequality between people, the two notions of equality assume equality.²²² The question then becomes one of discovering what differences justify different treatment.

Justice is relative to persons and requires the same ratio for the persons as for the things, . . . Men admit the equality of the things but dispute that of the person. This is mainly because, as just mentioned, they judge badly in their own affairs, but also because each side is really saying something true about justice and hence thinks it is saying the whole truth.²²³

Aristotle then discussed the most important issue: the purpose for which the political community was formed. If it was formed solely

where the burdens and benefits of citizenship are allocated. Those previously excluded from participation remain outside of the majoritarian political process. Geometric proportion is thus essential to ensure anything approaching equal opportunity to participate because those excluded are laboring under the disability of centuries of political silence and powerlessness.

220. ARISTOTLE, *POLITICS*, 1280a9-17 (R. Robinson, trans., 1962). πάντες γὰρ ἄπτονται δικαίου τινός, ἀλλὰ μέχρι τινός προέρχονται, καὶ λέγουσιν οὐ πᾶν τὸ κυρίως δίκαιον. οἷον δοκεῖ ἴσον τὸ δίκαιον εἶναι, καὶ ἔστιν, ἀλλ' οὐ πᾶσιν ἀλλὰ τοῖς ἴσοις· καὶ τὸ ἄνισον δοκεῖ δίκαιον εἶναι, καὶ γὰρ ἔστιν, ἀλλ' οὐ πᾶσιν ἀλλὰ τοῖς ἄνισοις· οἱ δὲ τοῦτ' ἀφαιροῦσι, τὸ οἷς, καὶ κρίνουσι κακῶς. τὸ δ' αἶτιον ὅτι περὶ αὐτῶν ἡ κρίσις, σχεδὸν δ' οἱ πλείστοι φαῦλοι κριταὶ περὶ τῶν οἰκείων. ARISTOTLE, *POLITICS*, 1280a9-17.

221. Harvey, *supra* note 1, at 114.

222. "Equality (or inequality) of the persons' is distressingly off the point: for this suggests that the whole question is an empirical matter, whereas it is a decision about procedure which rests on a moral belief about human rights." *Id.* Cf. K.R. Popper: "I hold, with Kant, that it must be the principle of all morality that no man should consider himself more valuable than any other person. And I assert that this principle is the only one acceptable, considering the notorious impossibility of judging oneself impartially." (quoted by Harvey, *id.* at 128).

223. ARISTOTLE, *POLITICS*, 1280a17-25. ὥστ' ἐπεὶ τὸ δίκαιον πᾶσιν, καὶ διήρηται τὸν αὐτὸν τρόπον ἐπὶ τε τῶν πραγμάτων καὶ οἷς, καθάπερ εἴρηται πρότερον ἐν τοῖς ἠθικοῖς, τὴν μὲν τοῦ πράγματος ἰσότητα ὁμολογοῦσι, τὴν δὲ οἷς ἀμφισβητοῦσι, μάλιστα μὲν διὰ τὸ λεχθὲν ἄρτι, διότι κρίνουσι τὰ περὶ αὐτοὺς κακῶς, ἔπειτα δὲ καὶ διὰ τὸ λέγειν μέχρι τινός ἑκατέρους δίκαιόν τι νομίζουσι δίκαιον λέγειν ἁπλῶς. *Id.*

for wealth or commercial purposes, then perhaps those with the greatest property might have a claim to a greater stake. But because humans are political animals, they are driven to live together even where they have no need of mutual assistance. Common interest — the desire to share in the good life — brings them together. The good life — the opportunity for full participation as a respected member of the community²²⁴ — is precisely what the Fourteenth Amendment's Equal Protection Clause promises, where the state is governed with a view to common advantage for all.²²⁵

The converse of full participation is not simply lack of the good life, but strife or revolution: "For party strife is everywhere due to inequality, where classes that are unequal do not receive a share of power in proportion . . . for generally the motive for factious strife is the desire for equality."²²⁶ It is here that Aristotle describes in detail the two kinds of equality,²²⁷ arithmetic and geometric, the means by which strife is avoided:

For the constitution to be framed absolutely and entirely according to either kind of equality is bad. And this is proved by experience, for not one of the constitutions formed on such lines is permanent . . . Hence the proper course is to employ arith-

224. The good life then is the chief aim of society, both collectively for all members and individually. "[W]hen the multitude governs the state with a view to the common advantage, it is called by the name common to all the forms of constitution, 'constitutional government' [polity]." *Id.* at 1279a37-39. When government is formed for this purpose, when it is deemed a "polity," it is considered by Aristotle to be the best form of government. See NICHOLS, *supra* note 188 and accompanying text.

225. 1278b23-25. μάλιστα μὲν οὖν τοῦτ' ἐστὶ τέλος, καὶ κοινὴ πᾶσι καὶ χωρὶς συνέρχονται δὲ καὶ τοῦ ζῆν ἕνεκεν αὐτοῦ καὶ συνέχουσι τὴν πολιτικὴν κοινωνίαν. *Id.*

The opportunity for full participation allows for the complete development of the individual. Similarly, the political community achieves its full realization through the development of its members. "It is precisely because the members of the multitude have *different* contributions to make that they have a just claim to rule. Aristotle teaches democrats the value of heterogeneity to a defense of their claim to political participation." NICHOLS, *supra* note 188, at 66.

226. ARISTOTLE POLITICS, 1301b27-29. πανταχοῦ γὰρ διὰ τὸ ἄνισον ἡ στάσις, οὐ μὴ τοῖς ἀνίστοις ὑπάρχει ἀνάλογον . . . ὅλως γὰρ τὸ ἴσον ζητοῦντες στασιάζουσιν. *Id.*

227. "But equality is of two kinds, numerical [arithmetic] equality and equality according to worth [geometric equality] - by numerically equal I mean that which is the same and equal in number or dimension, by equal according to worth [geometric equality] that which is equal by proportion; for instance numerically 3 exceeds 2 and 2 exceeds 1 by an equal amount, but by proportion 4 exceeds 2 and 2 exceeds 1 equally, since 2 and 1 are equal parts of 4 and 2, both being halves." ARISTOTLE, POLITICS at 1301b29-36. (H. Rackham, trans., 1967) ἔστι δὲ διττὸν τὸ ἴσον, τὸ μὲν γὰρ ἀριθμῷ τὸ δὲ κατ' ἀξίαν ἐστὶν - λέγω δὲ ἀριθμῷ μὲν τὸ πλῆθει ἢ μεγέθει ταῦτ' αἰσθάνεσθαι καὶ ἴσον, κατ' ἀξίαν δὲ τὸ τῷ λόγῳ οἷον ὑπερέχει κατ' ἀριθμὸν μὲν ἴσῳ τὰ τρία τοῖν δυοῖν καὶ ταῦτα τοῦ ενός, λόγῳ δὲ τέτταρα τοῖν δυοῖν καὶ ταῦτα τοῦ ενός, ἴσον γὰρ μέρος τὰ δύο τῶν τεττάρων καὶ τὸ ἐν τῶν δυοῖν, ἁμῶς γὰρ ἡμίση.

metrical equality in some things and geometric equality in others.²²⁸

To summarize, Aristotle saw political participation as natural for humans who are, biologically, political animals. From the perspective of having surveyed approximately 150 developed constitutions, Aristotle concluded that geometric equality combined with arithmetic equality is best. Because the most stable political systems are those allowing the greatest number to participate, both arithmetic and geometric equality are necessary.²²⁹ Above all, for the purpose of distributing the benefits and burdens within the political constitution as well as for political justice, both arithmetic and geometric equality must be employed together.²³⁰

From Archytas to Plato and subsequently to Aristotle, the first two types of equality (arithmetic and geometric) were applied to politics. In a political climate which gave rise to the first participatory democracy, the importance of equality of citizenship (arithmetic equality) cannot be overemphasized. But, as Archytas, Plato and Aristotle all recognized, difficulties followed when only one of the forms of equality characterized any form of constitution.

228. ARISTOTLE POLITICS at 1302a3-9. I have substituted "arithmetic" for Rackham's "numerical" in a desire for consistency and because Aristotle uses *arithmetike*. Similarly, geometric is substituted for "according to worth." τὸ δὲ ἀπλῶς πάντα καθ' ἑκατέραν τετάχθαι τὴν ἰσότητα φαῦλον. φανερόν δ' ἐκ τοῦ συμβαινόντος. οὐδεμία γὰρ μόνιμος ἐκ τῶν τοιούτων πολιτειῶν . . . διὸ δεῖ τὰ μὲν ἀριθμητικῇ ἰσότητι χρῆσθαι, τὰ δὲ τῇ κατ' ἀξίαν. *Id.*

229. The critical shift in Athenian, and Greek, political thought and government was the recognition, from the time of Cleisthenes forward, that *all* citizens have an equal stake and an equal right to participate in their governance: hence, the birth of democracy with its basic premise that all citizens are equal (arithmetic equality). Even as democracy was being practiced in a form truly demonstrative of the belief in equality of citizenship, there was the recognition that differing needs and differing abilities to contribute required something beyond pure arithmetic equality; hence, geometric equality. With arithmetic and geometric equality both applied, government could achieve the goal of equal citizenship while acknowledging reality.

It should be remembered that the recognition of the two kinds of equality was not merely idle theoretical or philosophical musings for Archytas, Plato or Aristotle. Rather it was an essential part of the discussion of how to implement the best political system in an era when political participation was the ultimate good; where individuals were defined in terms of their connection with the city-state. It should be remembered that Socrates' death is an extreme example of the latter. When faced with a choice of exile or death, Socrates chose death. He could not imagine life separate and distinct from Athens, his city-state. See PLATO'S APOLOGY.

230. The need for both kinds of equality allows for assimilation of a variety of competing groups and people within the political community, something which is only possible with the help of a statesman. "The activity of statesmanship reveals a world that is not an ordered whole but rather is composed of dissimilar elements that can come together - break apart in friendship and hostility . . . From Aristotle's standpoint, however, the absence of an ordered whole is not simply a defect in nature or the cosmos. It is nature's gift to humanity of the opportunity for statesmanship and all that it entails." NICHOLS, *supra* note 188, at 11.

Arithmetic equality is the hallmark of democracy: each citizen gets equal shares. In geometric equality, each no longer stands in the same position; rather each citizen receives his or her due. Thus what at first appears to be true equality, namely arithmetic equality, although the essential beginning point for true democracy, results in inequality; when coupled with geometric equality, which produces perfect equality, however, there can be true constitutional government (polity).

Two Types of Equality and the Fourteenth Amendment

With a full exposition of the two kinds of equality, arithmetic and geometric, and their importance to a stable and just political system (in the views of Archytas, Plato and Aristotle) before us, it is now time to turn to a consideration of whether and how these two kinds of equality can properly be applied to the Fourteenth Amendment.

For a constitutional provision whose substantive goal is equal treatment under the laws for all citizens, both arithmetic and geometric equality are necessary in turn. Where equal measures are appropriate (for instance, one person, one vote) then simple arithmetic equality will suffice — indeed, it is essential. In other words, if gender, or other, classifications serve no useful purpose, or hinder the full participation of that class burdened by differential treatment, then neutral provisions are the most equal approach. Gender neutrality is thus called for in the equal distribution of benefits (*e.g.*, *Reed*, *Frontiero*, *Wiesenfeld*, *Goldfarb*). Arithmetic equality — equal measure, equal rights — is properly applied in the cases where there is no valid reason for distinction.

Where opportunity for full and equal citizenship — “the right to be treated by the organized society as a respected, responsible, and participating member” — is involved, but citizens stand in differing positions, then geometric equality is necessary to ensure full access, especially for those groups historically excluded from Constitutional protection. So geometric equality was properly applied in upholding a Social Security provision allowing women to compensate for their economic disadvantage in the workforce by eliminating a greater number of low earning years.²³¹ Similarly, a property tax exemption for widows only could be seen as an example of geometric equality. It seems more accurate, however, to argue that here such

231. *E.g.*, *Califano v. Webster*, 430 U.S. 313 (1973), where a Social Security provision allowing women to eliminate a greater number of lower earning years was upheld as a means to redress society's longstanding disparate treatment of women in employment. See *supra* note 143 for discussion.

differential treatment is misused, and arithmetic equality is to be preferred.²³²

A misapplication of arithmetic equality occurred in *Bakke*, where the Court refused to recognize the need for an affirmative action program to increase minority enrollment in medical schools because "equal" treatment in fact yielded unequal results due to the differing relative positions of those involved. However repugnant the idea of "quota" is to those who have *not* been historically disadvantaged, the achievement of true equal opportunity requires meaningful remedial measures in recognition of the actual position of historically disadvantaged groups. By explicitly recognizing the necessity for remedial measures, and tailoring them in a circumscribed way,²³³ such measures are likely to be much more effective than generalized, unfocused and half-hearted attempts to make up for past discrimination. While "color-blind" selection may be the Court's goal, it can be argued from the preceding discussion of the Greek philosophers (especially Aristotle with his comprehensive review of Greek constitutions) that such a goal is both unattainable and undesirable. The proper employment of both arithmetic and geometric equality should be seen as the ultimate goal, and the ultimate expression, of constitutional government.

The denial of disability coverage for a disability unique to women - pregnancy - resulted in neither arithmetic nor geometric equality being properly applied.²³⁴ Both arithmetic and geometric equality would have achieved a more equitable result. Arithmetic equality is called for where differential treatment for women (e.g., denial of disability benefits for pregnancy) results in preventing their full participation in society. Geometric equality is necessary where not to recognize women's reproductive capacity would similarly limit women's participation (e.g., family leave). Penalizing women for their reproductive capacity by providing no benefits automatically denies women equal opportunity for participation in the economic, political and legal community.²³⁵

232. *E.g.*, Kahn v. Shevin, 416 U.S. 351 (1973). See *supra* notes 68-75 and accompanying text. Need based determination of benefits would not only achieve better results, it would also avoid stigmatizing all widows (and women) as presumptively needy. Further, those men in need would properly be accorded benefits.

233. See *supra* note 170 for Justice Ginsburg's comments on *Webster*.

234. *Geduldig v. Aiello*, 417 U.S. 484 (1973); *GE v. Gilbert*, 429 U.S. 125 (1976). See *supra* notes 76-84, 144 and accompanying text.

235. See also Justice Marshall's opinion in *California Federal Savings & Loan v. Guerra*, 479 U.S. 272 (1987). For a discussion of the importance of recognizing women's biological differences, and the impact of the abortion-funding cases, see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984). "A political struggle that embraces recognition that men and women are both limited by

Rather than a constitutional claim of last resort without substantive content, the terms of the Equal Protection Clause of the Fourteenth Amendment recognize the fundamental truths about the need for participation in the body politic and the importance of such participation for political stability. Moreover, recognition of the two types of equality is inherent in the tradition of political philosophy with which the Framers of the Constitution were familiar, namely the Greek political philosophers.

Recognition of the two types of equality is essential for an understanding and implementation of the substantive basis of the Equal Protection Clause. Moreover, such recognition would give greater coherence to the heretofore inconsistent, erratic and *ad hoc* body of judicial decisions which have so far comprised equal protection doctrine. Employment of both kinds of equality, essential for a stable and just political system, would provide the very guiding principle for equal protection analysis which those opposed to the use of the Fourteenth Amendment and Equal Protection Clause to challenge arbitrary legislation have complained is lacking. Indeed, one could argue that the very incoherence and inconsistency which has characterized equal protection analysis to date is attributable to the Court's failure to recognize that there are two kinds of equality. Use of both types of equality and an acceptance of their legitimacy, for which the Greek philosophers provide considerable support, would provide an intellectually and philosophically satisfying basis from which future decisions could be made.

Conclusion

This article examined the major equal protection challenges to gender-based legislation. The judiciary has developed no clear, coherent body of precedent. Instead, the cases show an *ad hoc* and variable method of analysis which is highly dependent on the emotional appeal of the facts particular to the case. Challenges to restriction of complete benefits for men appears eminently more comprehensible to the Court than challenges to significant impediments to women. Indeed, those cases challenging impediments to women's full participation in the social and political community have been met with an unbelievably naive assumption that such differential treatment is "benign preference."

At best, the Court has shown equivocal commitment to the intermediate standard of scrutiny to gender-based classifications. It is time now to reconsider the question of gender as a suspect class.

biology and able to transcend it may be stronger than one that ignores the core reality of sex differences in relation to reproductive biology." *Id.* at 1039.

Justice Ginsburg has been an eloquent advocate for such classification. The argument, that an immutable characteristic stemming from an accident at birth is in no way an appropriate basis for legislative classification, is still a valid basis from which to argue for gender as a suspect class.

The reversal of the presumption of validity, which otherwise attaches to legislation, is the important achievement that would be realized by labelling gender a suspect classification. No presumption of legislative validity is appropriate where legislation adversely affects women and minorities, too long underrepresented in decision-making bodies. Critical judicial examination of the impact of legislation affecting the full and equal participation of the community would serve as an effective guarantee against arbitrary government.

A definitive declaration that gender is a suspect class is necessary, but it is not sufficient. Rigid application of strict scrutiny to racial classifications, necessary to eliminate discriminatory distinctions, has allowed the judiciary to eliminate any possibility for meaningful affirmative action, preserving the status quo as effectively as the original discriminatory measures struck down. Clearly, something beyond suspect classification is needed.

What has been lacking so far in equal protection analysis is an understanding that there are two kinds of equality, arithmetic and geometric. When equality is given to unequal things, the result will be unequal, as Plato noted, unless due measure is applied.²³⁶ For a proper understanding and application of the Equal Protection Clause, both kinds of equality are essential. As the Greek Philosophers Archytas, Plato and Aristotle pointed out, both types of equality are essential not only in distributing the benefits and burdens of the political system, but also as the basis for true political justice. Those political systems which failed to make use of both kinds of equality are not only impermanent, but suffer discord.

The purpose of the political and social community is to offer the possibility of the good life, as Aristotle explained, with governance directed to the mutual advantage of all. The application of two kinds of equality to the Equal Protection Clause will allow fulfillment of its promise — full and equal opportunity for participation in the community. Those previously excluded will achieve greater participation and personal development. But that is not the only gain. By allowing greater participation and development for all, individuals and, collectively, the community as a whole will achieve a greater level of development. Finally, by applying both types of

236. PLATO, LAWS 757a. See *supra* notes 199-229 and accompanying text.

equality in equal protection analysis, the good for which we should strive, true justice, will be possible.