

WOMEN AND LAW: A COMPARATIVE ANALYSIS OF THE UNITED STATES AND INDIAN SUPREME COURTS' EQUALITY JURISPRUDENCE

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I. INTRODUCTION

Gender inequality has a long and pervasive history in both the United States and India. Not surprisingly, the Constitutions of both countries guarantee equality before the law: India's Constitution explicitly mandates equality for women, whereas the U.S. Constitution guarantees equal protection of the law without any explicit designation of the intended beneficiaries. American scholars, and particularly feminists, are increasingly studying India to assess whether and how the world's largest democracy, a democracy grounded in patriarchy, is making good on its promise of equality to women. We have much to learn by looking at India's experience despite the vast cultural differences between the two countries. Most notable is India's commitment to affirmative action and protective discrimination to alleviate centuries of exclusion of women from politics, education, and public employment.

This Article will explore how the respective equality guarantees have been interpreted and applied to issues of gender justice by the Supreme Court of India and by the U.S. Supreme Court. After a brief review of the historic and current gender inequalities in the two countries, Parts II & III of the Article examine the theories of equality reflected in the decisions of the two Courts. The U.S. Supreme Court adheres rigidly to a model of formal equality which requires that all persons similarly situated be treated the same.¹ Thus, to the extent that there are relevant differences between women and men, formal equality does not require equal treatment.² The Supreme Court of India relies on formal equality theory but, because the Constitution of India authorizes "special" provisions for women and other historically disenfranchised groups,³

¹ See, e.g., *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001); see also *infra* notes 26-30 and accompanying text.

² See, for example, *Michael M. v. Super. Ct. of Sonoma County*, 450 U.S. 464, 469 (1981), where the Court stated:

[T]he Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require " 'things which are different in fact . . . to be treated in law as though they were the same.' " . . . [T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances (internal citations omitted).

³ See, for example, Article 15(3) of the Constitution of India, which authorizes the State to make "special provision for women and children"; Article 15(4), which authorizes the State to make "special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes"; Article 16(4), which authorizes provisions "for the reservation of appointments or posts in favour of any backward

the Court frequently has been willing to embrace a model of substantive equality. Substantive equality represents a very different theory of equality—a theory that is less concerned with treating alike the same and more concerned with recognizing differences between men and women and ameliorating the unequal consequences of those differences.⁴

Part IV of the Article contrasts the two Courts' willingness to rely on principles of international law and to engage in judicial activism, particularly with respect to issues of gender violence. Here is where the contrast between the two approaches is the most dramatic. The U.S. Supreme Court has been unwilling to look to the experience of other countries or to rely on principles of international law, most notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁵ when confronted with problems of violence against women.⁶ The Supreme Court of India, relying on international law, has approached the problem of gender violence as an equality issue, finding that freedom from gender violence is a fundamental constitutional right.⁷

Finally, Part V analyzes the extent to which the competing theories of equality reflect and adequately address different cultural conditions within the two countries. In assessing whether either Court has played a meaningful role in advancing the guarantee of equality for its nation's women, the Article concludes that formal equality, standing alone, is insufficient to accomplish meaningful change; that a protectionist approach is a double-edged sword that recognizes and compensates for women's subordinated status, but also promotes and perpetuates that vulnerability; and that substantive equality

class of citizens which, in the opinion of the State, is not adequately represented in the services under the State." INDIA CONST. arts. 15 and 16. For an explanation of the roles that preferences and protective discrimination play in India's constitutional democracy, see T.M.A. Pai Found. v. Karnataka, (2002) 8 S.C.C. 481.

⁴ Substantive equality has been defined as being "directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political, and cultural participation in society." RATNA KAPUR & BRENDA COSSMAN, SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA 176 (1996); see also *infra* notes 129-30 and accompanying text.

⁵ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 108 Stat. 1796, 1249 U.N.T.S. 513 [hereinafter CEDAW].

⁶ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); see also *infra* notes 278-301 and accompanying text.

⁷ See, e.g., *Chairman, Ry. Bd. v. Das*, A.I.R. 2000 S.C. 988; *Apparel Exp. Promotion Council v. Chopra*, A.I.R. 1999 S.C. 625; *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011; see also *infra* notes 302-32 and accompanying text.

offers the best hope for facilitating women's full and equal participation in society.

* * *

India and the United States share a long history of pervasive discrimination against women. In both countries, women were denied the right to vote: in the United States until 1920 when the Nineteenth Amendment was ratified, and in India until 1950 when the Constitution was enacted.⁸ Politically, women remain grossly underrepresented in both countries. Women comprise only 14% of the U.S. Congress⁹ and 22.5% of the state legislatures.¹⁰ In India, women comprise 9% of the Indian Parliament¹¹ and are even more underrepresented in the state legislatures.¹² In the United States, a woman has never served as president or vice president;¹³ in India, Indira Gandhi served as Prime Minister for fifteen years.¹⁴

⁸ U.S. CONST. amend. XIX; INDIA CONST. art. 325.

⁹ U.N. Dev. Programme, *Human Development Report: Deepening Democracy in a Fragmented World* 16 (2002), <http://www.undp.org/reports/global/2002/en/pdf/chapterone.pdf>; see also Adam Clymer, *In 2002, Woman's Place May Be the Statehouse*, N.Y. TIMES, Apr. 15, 2002, at 1.

¹⁰ National Conference of State Legislatures, <http://www.ncsl.org>.

¹¹ U.N. Dev. Programme, *Human Development Report Millennium Development Goals: A Compact among Nations to End Human Poverty* (2003), available at http://www.undp.org/reports/global/2003/pdf/hdr03_complete.pdf; see also Martha C. Nussbaum, *India: Implementing Sex Equality Through Law*, 2 CHI. J. INT'L L. 35, 35 (2001).

¹² WOMEN & POLITICAL EMPOWERMENT 12 (1998) (reprinted data reported by the Centre for the Study of Developing Societies). India's Constitution was amended in 1993 to mandate the reservation of seats for women on panchayats, which are units of local self-governance, and one million women now serve on the panchayats. A constitutional amendment to reserve one-third of all seats in Parliament and the state legislatures for women has been debated since 1996. Louise Harmon & Eileen Kaufman, *Dazzling the World: A Study of India's Constitutional Amendment Mandating Reservations for Women on Rural Panchayats*, 19 BERKELEY WOMEN'S L.J. 32, 54-55 (2004).

¹³ In a poll conducted for the White House Project, 79% of those surveyed said that they were willing to vote for a woman for president. Press Release, The White House Project, New Poll Finds Nearly Eighty Percent of Americans Are Ready for a Woman President, Sept. 12, 2005, <http://www.thewhitehouseproject.org/v2/press/2005/Press%20Releases/roperpoll.html>.

¹⁴ Indira Gandhi served as India's Prime Minister from 1966 to 1977 and from 1980 to 1984 when she was assassinated. Her political power derived from her father, India's first Prime Minister Jawaharlal Nehru, just as Sonia Gandhi's current position of leadership of the Congress Party is linked to her husband, Rajiv Gandhi, who served as Prime Minister from 1984 to 1989. Indira Gandhi, <http://womenshistory.about.com/od/gandhiindira/index.htm> (last visited Mar. 6, 2006).

Women are also markedly underrepresented on the Supreme Courts of both countries. The first female U.S. Supreme Court Justice was not appointed until 1981, joined by a second in 1993.¹⁵ The first woman was appointed to the Supreme Court of India a full forty years after Independence, and typically only one of the twenty-six Justices is female.¹⁶ In the United States, women comprise 22.8% of the federal judiciary¹⁷ and 23.75% of the state appellate judiciary.¹⁸ In India, a shockingly low 2.4% of all judges on the High Courts are women.¹⁹

Economically, the picture in the United States remains bleak. For the year 2002, the estimated earned income of women averaged \$27,338 per year, contrasted with an estimated \$43,797 for men.²⁰ Thus, on average, women are earning 62% of what men earn.²¹ In the same year, 5.2% of the top wage earners in the United States were women, up from a mere 1.2% in 1995. In

¹⁵ Justice Sandra Day O'Connor was appointed in 1981; Justice Ruth Bader Ginsburg was appointed in 1993. Justice O'Connor announced her retirement on July 1, 2005. Supreme Court of the United States, *The Justices of the Supreme Court*, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 9, 2006).

¹⁶ See Nussbaum, *supra* note 11, at 37; see also Indira Jaising, *Gender Justice and the Supreme Court*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA, 291-92 (B.N. Kirpal eds. et al., 2000). Article 124 of the Indian Constitution gives the President the power to make judicial appointments after consultation with judges of the Supreme Court and the High Courts. INDIA CONST. art. 124. Until 1993, the appointment process was controlled by the Executive. As a result of *Supreme Court Advocates-on-Record Ass'n v. Union of India*, (1993) 4 S.C.C. 441, however, the power shifted to the judiciary, and since then it has basically been a system of judges appointing judges, based in large part on seniority. Since women have traditionally been underrepresented in the judiciary, this system serves to insure that women will not be fully represented in the High Courts and in the Supreme Court of India. Jaising, *supra*, at 291.

¹⁷ Alliance for Justice, *Demographic Overview of the Federal Judiciary*, http://www.afj.org/judicial/judicial_selection_resources/selection_databasebyCourtRaceGender.asp (last visited Jan. 17, 2006).

¹⁸ Three hundred and nineteen of the 1343 judges on courts of last resort and intermediate appellate courts are women. See National Center for State Courts, *Women Justices Serving on State Courts of Last Resort and Intermediate Appellate Courts, 2002*, <http://www.ncsonline.org/wc/FAQs/JuoRo/FAQ.htm>; see also Chris W. Bonneau, *The Composition of State Supreme Courts, 2000*, 85 JUDICATURE 26, 28 (2001) (representing that the percentage of women judges on state supreme courts increased from 3.1% in 1980-1981 to 25.8% in 2000).

¹⁹ *CJ for More Women Judges*, TRIBUNE, Dec. 7, 2000, available at <http://www.tribuneindia.com/2000/20001208/nation.htm>.

²⁰ U.N. Dev. Programme, *Human Development Report 2004: Cultural Liberty in Today's Diverse World* 217 (2004), http://hdr.undp.org/reports/global/2004/pdf/hdr04_complete.pdf [hereinafter *HDR: Cultural Liberty*].

²¹ *Id.*

2005, less than 2% of Fortune 500 and Fortune 1000 companies were run by women.²²

As bleak as the economic numbers for American women are, the picture is far worse for Indian women, who earn an average of \$1,442 per year compared to an average \$3,820 for men.²³ This means that Indian women's earnings are only 38% of their male counterparts' earnings.²⁴ On the international gender-related development index, India ranked 127 out of 177 countries.²⁵

These profound gender inequities provide the backdrop for evaluating the role of the courts in interpreting the constitutional guarantee of equality.

II. GENDER DISCRIMINATION CLAIMS IN THE U.S. SUPREME COURT

The U.S. Constitution contains no explicit equality guarantee for women.²⁶ In fact, women are alluded to only once in the document; the Nineteenth Amendment, ratified in 1920, explicitly provides that the right to vote shall not be abridged on the basis of sex.²⁷ The equality guarantee finds expression in the Fourteenth Amendment, which, while not explicitly referring to sex discrimination, prohibits the states from denying to any person the "equal protection of the laws."²⁸

The Supreme Court's approach to claims of gender discrimination is grounded in a theory of formal equality. This approach to equality requires that all persons similarly situated be treated the same. Thus, to the extent that there are relevant differences, formal equality does not require equal treatment. Although the Court never has wavered from its commitment to formal equality,

²² In 2005, there were nine women CEOs in Fortune 500 companies and nineteen in Fortune 1000 companies. *Women CEOs of Fortune 500 Companies*, FORTUNE, Apr. 18, 2005, available at <http://money.cnn.com/magazines/fortune/fortune500/womenceos/>.

²³ HDR: *Cultural Liberty*, *supra* note 20, at 219. For a description of the current realities facing Indian women, see Harmon & Kaufman, *supra* note 12, at 45-57; see also Aradhana Parmar, *Women and the Law*, LAW, POLITICS AND SOCIETY IN INDIA (1990).

²⁴ HDR: *Cultural Liberty*, *supra* note 20, at 219.

²⁵ *Id.* at 219-20.

²⁶ See Martha Craig Daughtrey, *Women and the Constitution: Where We Are at the End of the Century*, 75 N.Y.U. L. REV. 1, 4 (2000).

²⁷ U.S. CONST. amend. XIX provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

²⁸ *Id.* amend. XIV. Although there is no equal protection clause that operates against the federal government, the equal protection guarantee has essentially been read into the Due Process Clause of the Fifth Amendment, which is applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

it has shifted from an approach that was quick to recognize differences between men and women²⁹ to one that deliberately rejects assumptions about differences, even when those assumptions reflect an underlying reality.³⁰

In the first century after the adoption of the Fourteenth Amendment in 1868, the Court assumed the role of benevolent "protector"³¹ of women, upholding gender classifications on the basis of differences between men and women and the need for the law to protect women. In case after case, between 1868 and 1971, the Court upheld gender classifications on the ground that women required special protection given their delicate nature and child-rearing function.³² The theme that emerges from these cases is legally-sanctioned protection of women, expressed as a benign preference for women and a judicial solicitude for the moral and physical well-being of women.

Thus, for example, in *Bradwell v. Illinois*,³³ the Court upheld Illinois' ban on women practicing law, with Justice Bradley declaring, in an oft-quoted concurring opinion, that:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . .

The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.³⁴

²⁹ See *infra* notes 31-48 and accompanying text.

³⁰ See *infra* notes 49-129 and accompanying text.

³¹ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

³² See *Hoyt v. Florida*, 368 U.S. 57 (1961) (supporting exemption for women serving as jurors); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (sanctioning limitation on women serving as bartenders); *Muller v. Oregon*, 208 U.S. 412 (1908) (allowing prohibition on women working more than ten hours per day); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding ban on women practicing law).

³³ *Bradwell*, 83 U.S. at 130.

³⁴ *Id.* at 141 (Bradley, J., concurring). Justice Bradley found that admitting a married woman to practice as a lawyer would be "contrary to the rule of the common law and the usages of Westminster Hall from time immemorial." *Id.* at 140. He further explained that pursuant to the common law:

[A] woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman

Similarly, in *Muller v. Oregon*,³⁵ the Court upheld an Oregon statute that prohibited the employment of women in a factory or laundry for more than ten hours per day.³⁶ Once again, the justification for this gender classification was women's dependent status—her weak physical structure and maternal function:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. . . .

Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained.³⁷

Muller is a particularly significant case because the classification was upheld during the *Lochner* era (from the late nineteenth century until 1937), when the Court was striking down a whole host of labor laws, including minimum wage and maximum hour laws, on the ground that they constituted an interference with liberty of contract.³⁸ Indeed, even when the *Lochner* era ended, states did not extend laws limiting women's working hours to men, which operated to deny women access to a variety of job opportunities.³⁹

Another case in this category of "benign preference" for women is *Goesaert v. Cleary*,⁴⁰ where the Court upheld a Michigan law that prohibited women from working as bartenders unless they were wives or daughters of male tavern owners.⁴¹ The Court had no trouble accepting the proposition that a state can prohibit all women from working in a bar in order to protect their

is incapable, without her husband's consent, of making contracts which shall be binding on her or him.

Id. at 141.

³⁵ *Muller*, 208 U.S. at 412.

³⁶ *Id.* at 423.

³⁷ *Id.* at 421-22.

³⁸ *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* involved a challenge to a New York State statute prohibiting employers from allowing bakery employees to work more than ten hours per day. The Court struck down the statute, finding that it interfered with a constitutional right to contract. *Id.* at 64.

³⁹ HERMA HILL KAY & MARTHA S. WEST, SEX-BASED DISCRIMINATION 17 (5th ed. 2002) (citing JUDITH A. BAER, THE CHAINS OF PROTECTION (1978)).

⁴⁰ 335 U.S. 464 (1948).

⁴¹ *Id.* at 467.

moral and physical well-being.⁴² The limited exception for wives and daughters of bar owners was a rational exception, given the protection that fathers and husbands offered.⁴³

During this era, classifications were evaluated using mere rational basis review, which requires only that the classification bear a rational relationship to a legitimate governmental objective. Thus, in *Goesaert*, the Court stated that equal protection "precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.'"⁴⁴ The Court concluded "[s]ince the line [the legislature has] drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."⁴⁵

As recently as 1961, in *Hoyt v. Florida*,⁴⁶ the Court upheld differential treatment of men and women for jury service, mandating service by men, but permitting service by women.⁴⁷ The Court explained, "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life."⁴⁸

Thus, in the hundred years following the adoption of the Fourteenth Amendment, every gender classification challenged under the Equal Protection Clause was upheld. Laws treating men and women differently were repeatedly validated based on the need to protect women from the harshness of the world, including the dangers of taverns, the harms associated with long working hours, the demands of jury service, and the ugliness of the courtroom. Given inherent, divinely-ordained differences, the two sexes could be treated differently in law, consistent with the equality principle, which only requires that alikes be treated the same. Since women and men are not the same, the equality principle does not require that they be treated the same. Thus, a

⁴² *Id.* at 466.

⁴³ *Id.*

⁴⁴ *Id.* (citing *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

⁴⁵ *Id.* at 467.

⁴⁶ 368 U.S. 57 (1961).

⁴⁷ *Id.* at 69. This decision was effectively overruled by *Taylor v. Louisiana*, 419 U.S. 522 (1975).

⁴⁸ *Hoyt*, 368 U.S. at 61-62.

theory of formal equality, which requires treating equals alike, was used to justify this jurisprudence of difference.

The era of protection ended in 1971 with *Reed v. Reed*,⁴⁹ widely considered to signify the breakdown of the Court's two-tier approach to equal protection. Prior to this time, only two tests were used to analyze equal protection challenges: the rational basis test and the strict scrutiny test. Strict scrutiny was reserved for cases involving a suspect class, such as race or national origin, and cases involving the denial of a fundamental right.⁵⁰ In order to withstand strict scrutiny, the government had to demonstrate that the classification was necessary to achieve a compelling governmental interest.⁵¹ All other cases, including gender classifications, were evaluated pursuant to the rational basis test. Pursuant to this test, legislation is presumed to be valid and will be sustained if the classification is rationally related to a legitimate government interest.⁵² *Reed*, however, raised the possibility that the Court was willing to subject gender classifications to a form of scrutiny less deferential than rational basis review.

Reed involved a challenge to an Idaho statute that compelled an automatic preference to males regarding the administration of estates.⁵³ Whenever competing petitions were filed by a man and woman in the same entitlement class, state law required appointing the male. Richard Reed's parents had separated and Richard's mother had custody. While visiting his father, Richard took one of his father's guns and used it to commit suicide. Both the mother and father petitioned to administer his estate and, based on the statute, the father was chosen.⁵⁴

In a surprising decision, the Court in *Reed* struck down the statute, purporting to apply the rational basis test. Rational basis requires that the classification be reasonably related to a legitimate purpose. The purpose of

⁴⁹ 404 U.S. 71 (1971).

⁵⁰ See, e.g., *Johnson v. California*, 543 U.S. 499 (2005) (finding that strict scrutiny is the proper standard of review for a racial segregation claim); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that racial classifications must survive strict scrutiny).

⁵¹ *Grutter*, 539 U.S. at 333.

⁵² See, e.g., *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) [hereinafter *Beach Commc'ns*], where the Court made clear that social and economic classifications subject to rational basis review "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

⁵³ *Reed*, 404 U.S. at 71.

⁵⁴ *Id.* at 71-72. For a comparable case decided by the Supreme Court of India, see *infra* notes 192-95 and accompanying text (discussing *Hariharan v. Reserve Bank*, A.I.R. 1999 S.C. 1149).

Idaho's automatic preference for males was reducing the workload of the probate courts, certainly a legitimate governmental interest. The Court, however, concluded that the sex classification was arbitrary and not reasonably related to the state objective. Had the statute said "when there are two people in a category who are equally qualified, one will be chosen by random selection," that presumably would have been upheld. The use of gender as a proxy for competence, however, was impermissible.⁵⁵

Although the decision in *Reed* utilized rational basis language, it was a far less deferential version of the test, which more typically operates as an "any conceivable basis" test.⁵⁶ Thus, *Reed* suggested that some form of heightened scrutiny may be accorded claims of sex discrimination.

Two years later, in *Frontiero v. Richardson*,⁵⁷ a plurality of the Court applied strict scrutiny to a sex classification challenged pursuant to the Due Process Clause of the Fifth Amendment.⁵⁸ Federal law provided housing and medical benefits to wives of servicemen but denied such benefits to husbands of servicewomen absent proof of dependency. The plurality in *Frontiero* justified its use of strict scrutiny by concluding that sex, like race, is a suspect classification because women historically have suffered pervasive discrimination, because sex is an immutable characteristic, and because sex⁵⁹

⁵⁵ To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

Reed, 404 U.S. at 76-77.

⁵⁶ See, for example, *Beach Communc'ns*, 508 U.S. at 315, where the Court explained that:

[I]t is entirely irrelevant for constitutional purposes whether a conceived reason for the challenged distinction actually motivated the legislature. . . . In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

(internal citations omitted).

⁵⁷ 411 U.S. 677 (1973).

⁵⁸ The Court has held that the equal protection guarantee applies to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁵⁹ The Court does not generally distinguish between the terms "sex" and "gender," although since *Frontiero* was decided, the Court more often refers to gender discrimination than sex discrimination. See, e.g., *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001); *J.E.B. v. Alabama*,

bears no relationship to fitness. Further, the plurality pointed to Congress' recognition that sex discrimination is inherently invidious, as evidenced by the enactment of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.⁶⁰ While women are not a discrete and insular minority, women are nevertheless underrepresented in politics as if they were a minority.⁶¹

In defense of its policy in *Frontiero*, the government argued administrative convenience, explaining that it was cheaper and easier to conclusively presume

511 U.S. 127 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Michael M. v. Super. Ct. of Sonoma County*, 450 U.S. 464 (1981); *Craig v. Boren*, 429 U.S. 190 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). At times, the Court uses "sex" and "gender" interchangeably within the same decision. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Davis v. Bd. of Educ.*, 526 U.S. 629 (1999); *Miller v. Albright*, 523 U.S. 420 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). According to Mary Anne Case, Justice Ginsburg is responsible for the interchangeable use of "sex" and "gender":

[S]he stopped talking about sex discrimination years ago . . . She explained that a secretary once told her, "I'm typing all these briefs and articles for you and the word sex, sex, sex, is on every page. Don't you know those nine men [on the Supreme Court], they hear that word and their first association is not the way you want them to be thinking? Why don't you use the word 'gender'? It is a grammatical term and it will ward off distracting associations."

Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995) (citing Ernie Freda, *Washington in Brief: Clinton's Old Underwear Full of Tax Holes*, ATLANTA J.-CONST., Dec. 29, 1993, at A8). Justice Scalia, writing in dissent in *J.E.B.*, noted the Court's use of the word gender, stating:

Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word "gender" has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution's peremptories). The case involves, therefore, sex discrimination plain and simple.

J.E.B., 511 U.S. at 157 n.1. In feminist theory, gender has been used to connote, not femininity or masculinity as used by Justice Scalia, but rather the social construct of sex—the myriad ways that the sexes are acculturated as male or female, although in recent years the dualistic approach to sex and gender has itself been called into question. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995) (faulting the dualistic approach to sex and gender and arguing that the law should recognize the primacy of gender-based norms).

⁶⁰ *Frontiero*, 411 U.S. at 687.

⁶¹ *Id.* at 686 n.17; see also *supra* notes 9-19 and accompanying text.

that wives are financially dependent on their husbands because that is frequently the case. Significantly, the Court rejected that rationale, finding that administrative convenience is not a sufficient justification for a sex classification.⁶² Further, the government's explanation did not withstand heightened scrutiny. First, it was not clear that the presumption would save money because many wives might not actually be financially dependent on their husbands.⁶³ Second, individualized determinations of dependency would not be too costly or burdensome because the determination could be made on the basis of affidavits, which was the process used whenever a claim was made on behalf of a husband of a servicewoman.⁶⁴

The Court in *Frontiero* struck down the gender classification, relying on the *Reed* rationale that "any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution].'"⁶⁵ Thus, requiring servicewomen to prove the dependency of their husbands while not imposing a similar requirement on servicemen, solely to achieve administrative convenience, violates the Due Process Clause of the Fifth Amendment.⁶⁶

Without resolving the question of whether sex classifications trigger strict scrutiny, the Court in *Stanton v. Stanton*,⁶⁷ struck down a Utah statute that obligated parents to support their sons until age twenty-one, but their daughters only until age eighteen.⁶⁸ The Court relied on *Reed*, and found the classification irrational and based on "old notions"⁶⁹ of the differences between men and women:

No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity.

⁶² *Frontiero*, 411 U.S. at 690.

⁶³ *Id.* at 689.

⁶⁴ *Id.* at 690.

⁶⁵ *Id.*; see also *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), where the Court struck down a similar gender-based classification contained in the Social Security Act.

⁶⁶ *Frontiero*, 411 U.S. at 690.

⁶⁷ 421 U.S. 7 (1975).

⁶⁸ *Id.* at 14.

⁶⁹ *Id.*

The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.⁷⁰

Ultimately in 1976, in *Craig v. Boren*,⁷¹ a majority of the Court acknowledged a middle, intermediate level of scrutiny as the governing test whenever sex classifications are challenged under the Equal Protection Clause. Classifications by gender must serve important governmental objectives and must be substantially related to achieving those objectives. This landmark ruling was announced, ironically, in a case challenging a classification that disadvantaged men.⁷² The challenged statute in *Craig* prohibited the sale of beer with a 3.2% alcoholic content to males under the age of twenty-one and females under the age of eighteen. The government sought to justify its policy by pointing to traffic safety, certainly an important governmental interest. The issue in *Craig* was thus whether such a gender deferential substantially furthered the government's objective or whether it constituted a denial of equal protection to males between the ages of eighteen and twenty-one.⁷³

The statistical evidence introduced by the government showed that 2.2% of men between the ages of eighteen and twenty-one were arrested for drunk driving as compared to .18% of women in that age category; that more seventeen to twenty-one year old men were killed or injured in traffic accidents than women; and that men were more apt to drink and drive than women.⁷⁴ The Court in *Craig* concluded that the statistical correlation was "unduly

⁷⁰ *Id.* at 14-15 (internal citations omitted).

⁷¹ 429 U.S. 190 (1976).

⁷² See David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33 (1984) ("Male plaintiffs have dominated the short history of sex discrimination law at the Supreme Court.").

⁷³ *Craig*, 429 U.S. at 192.

⁷⁴ *Id.* at 200-01.

tenuous"⁷⁵ and inadequate to prove that "sex represents a legitimate, accurate proxy for the regulation of drinking and driving."⁷⁶

Justice Rehnquist dissented in *Craig*, arguing against applying heightened scrutiny to laws that disadvantage men because men share none of the traditional indicia of a suspect class.⁷⁷ Justice Rehnquist noted, but ultimately rejected, the argument that any sex classification burdens women:

I am not unaware of the argument from time to time advanced, that all discriminations between the sexes ultimately redound to the detriment of females because they tend to reinforce "old notions" restricting the roles and opportunities of women . . . Seeing no assertion that it has special applicability to the situation at hand, I believe it can be dismissed as an insubstantial consideration.⁷⁸

This "insubstantial consideration" is precisely, however, what gender stereotypes do; every stereotype of male machismo is accompanied by a corresponding stereotype of female passivity. The reciprocity of gender stereotypes makes stereotypes about men equally harmful to women. The stereotype that men are more apt to drink and drive carries a corresponding stereotype that women are more apt to be responsible, which is tied to the stereotype of the proverbial "good girl"—a stereotype that has far-reaching consequences for women in the public and private domain.

In the quarter of a century since *Craig*, the Court repeatedly has invalidated gender classifications, using mid-level scrutiny, on the ground that the classification represents archaic stereotypes or overbroad generalizations about men and women. Thus, for example, in *Kirchberg v. Feenstra*,⁷⁹ the Court struck down a state statute that automatically designated the husband as the administrator of jointly owned property; in *Orr v. Orr*,⁸⁰ the Court invalidated a state statute authorizing alimony for women but not for men; and in *Mississippi University for Women v. Hogan*,⁸¹ the Court invalidated a statute that excluded men from enrolling in the state nursing school.

⁷⁵ *Id.* at 202.

⁷⁶ *Id.* at 204.

⁷⁷ *Id.* at 219.

⁷⁸ *Id.* at 220 n.2 (Rehnquist, J., dissenting).

⁷⁹ 450 U.S. 455 (1981).

⁸⁰ 440 U.S. 268 (1979).

⁸¹ 458 U.S. 718 (1982).

Sex classifications have been upheld in only a handful of modern (post-*Craig*) cases, with most addressing claims by fathers of non-marital children that they were being treated less favorably than mothers,⁸² one dealing with the exclusion of women from Selective Service requirements,⁸³ one dealing with a statutory rape law that only punished male offenders,⁸⁴ and another with a provision of the Social Security Act designed to compensate women for the effects of past discrimination.⁸⁵ The last two warrant some discussion.

In *Michael M. v. Superior Court of Sonoma County*,⁸⁶ a divided court upheld California's statutory rape law criminalizing acts of sexual intercourse with a female less than eighteen years of age. Pursuant to the statute, a man who engages in sexual intercourse with an underage woman is subject to criminal prosecution, but a woman who engages in sexual intercourse with an underage man is not.⁸⁷ The Court found that the classification substantially furthered the important objective of preventing unwanted teenage pregnancy.⁸⁸ Justice Rehnquist, writing for the plurality, reasoned that young women did not need to be punished for engaging in sexual relations because the risk of

⁸² See *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001), where a 5-4 majority upheld different requirements for obtaining citizenship depending on whether a child was born to a citizen mother or a citizen father; *Miller v. Albright*, 523 U.S. 420 (1998), where the Court upheld the statutory requirement that non-marital children born to citizen fathers but not citizen mothers must obtain proof of paternity before the child reaches eighteen years of age; *Parham v. Hughes*, 441 U.S. 347 (1979), where the Court upheld a statute preventing a father of a non-marital child whom he has not "legitimized" from instituting a wrongful death suit.

⁸³ In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Court upheld the Military Selective Service Act provision mandating registration of men but not women. Under existing law and policy at the time, women were excluded from combat service. The validity of that combat exclusion was not challenged. The Court had little difficulty in concluding that "[m]en and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft." *Id.* at 78. *Rostker* is arguably *sui generis* because the Court historically accords great deference to the government when reviewing military classifications. "The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Id.* at 64-65. "[J]udicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Id.* at 70.

⁸⁴ *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).

⁸⁵ *Califano v. Webster*, 430 U.S. 313 (1977) (upholding a provision of the Social Security Act authorizing female workers to exclude additional low-earning years from the computation of their average monthly wage).

⁸⁶ *Michael M.*, 450 U.S. at 464.

⁸⁷ *Id.* at 466.

⁸⁸ *Id.* at 473.

pregnancy was itself the deterrent.⁸⁹ Whether or not the legislature was also concerned with protecting the "virtue and chastity of young women" was irrelevant because an illicit motive alone, according to the plurality, does not invalidate an otherwise constitutional classification.⁹⁰

The dissent in *Michael M.* read the legislative history far differently:

[T]he historical development of [the statute] demonstrates that the law was initially enacted on the premise that young women, in contrast to young men, were to be deemed legally incapable of consenting to an act of sexual intercourse. Because their chastity was considered particularly precious, those young women were felt to be uniquely in need of the State's protection. In contrast, young men were assumed to be capable of making such decisions for themselves; the law therefore did not offer them any special protection.⁹¹

The dissent relied on earlier California Supreme Court decisions which leave little doubt that the goal of the classification was to protect young women from sexual activity.⁹²

⁸⁹ *Id.*

⁹⁰ *Id.* at 472 n.7 (citing *United States v. O'Brien*, 391 U.S. 367, 383 (1968)).

⁹¹ *Id.* at 495-96 (Brennan, J., dissenting).

⁹² *Id.* The Court cited *People v. Verdegren*, 106 Cal. 211, 214-15 (1895), where the California Supreme Court stated:

The obvious purpose of [the statutory rape law] is the protection of society by protecting from violation the virtue of young and unsophisticated girls. . . . It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature.

Similarly, in *People v. Hernandez*, 61 Cal. 2d 529, 531 (1964), the California Supreme Court stated:

[The under-age woman] is presumed too innocent and naive to understand the implications and nature of her act. . . . The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition.

Califano v. Webster,⁹³ in contrast, was a case where the governmental objective was not to protect women from sexual activity or unwanted pregnancy, but rather to compensate for past discrimination suffered by women. This case involved a challenge to a provision of the Social Security Act that permitted women to deduct more low income quarters of coverage than men for purposes of calculating the monthly social security benefit.⁹⁴

Califano is one of the few cases where the Court has been confronted with a sex classification defended on the ground that it reduces "the disparity in economic condition between men and women caused by the long history of discrimination against women."⁹⁵ The Court upheld the sex classification, finding that compensation for past discrimination is an important governmental objective sufficient to withstand mid-level scrutiny:

The more favorable treatment of the female wage earner . . . was not a result of "archaic and overbroad generalizations" about women . . . such as casual assumptions that women are "the weaker sex" or are more likely to be child-rearers or dependents. Rather, "the only discernible purpose of [Section 215's more favorable treatment is] the permissible one of redressing our society's longstanding disparate treatment of women."⁹⁶

In reaching this conclusion, the Court indicated that the mere recitation of a benign purpose is not sufficient.⁹⁷ Here, however, the claim of past discrimination suffered by women in the workplace was based on substantiated fact. "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."⁹⁸ Interestingly, even with the more favorable treatment afforded by the Social Security Act, women still received lower retirement benefits on average than men.⁹⁹

⁹³ 430 U.S. 313 (1977).

⁹⁴ *Id.* at 315-16.

⁹⁵ *Id.* at 317.

⁹⁶ *Id.* (internal citations omitted).

⁹⁷ *Id.* (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975), where the Court invalidated a provision of the Social Security Act that denied survivors' benefits to widowers that were granted to widows).

⁹⁸ *Id.* at 318 (citing *Kahn v. Shevin*, 416 U.S. 351, 353 (1974)).

⁹⁹ On average, women's monthly retirement benefit was \$140.50; men's monthly retirement benefit was \$179.60. *Id.* at 318 n.5.

The two most significant cases of the last decade for what they say about gender differences are *J.E.B. v. Alabama*¹⁰⁰ and *United States v. Virginia*.¹⁰¹

In *J.E.B.*,¹⁰² the Court ruled that peremptory challenges¹⁰³ exercised on the basis of gender violate equal protection. The case involved a paternity petition, with the putative father exercising his peremptory challenges to exclude women from the jury, and the state, acting on behalf of the child, exercising its peremptory challenges to exclude men from the jury. Since there were more women than men in the jury pool, the resulting jury was predominantly female and the jury returned a verdict finding that J.E.B. was the father.¹⁰⁴

The issue before the Court in *J.E.B.* was whether a party's use of peremptory challenges in jury selection to exclude one sex substantially furthers the state's objective of affording a fair and impartial trial. What makes the case so interesting is the extent to which it implicates the issue of gender differences. Do men and women perceive issues differently? Are men and women likely to approach issues of paternity, of child support, of rape from different vantage points? If the answer to those questions is yes, does that necessarily mean that peremptories can reflect that underlying reality? The majority of the Court in *J.E.B.* concluded that even if there are gender differences in fact, they may not be recognized in law.

Writing for the majority in *J.E.B.*, Justice Blackmun noted that even if there is some truth to the stereotype, the use of peremptory challenges on the basis of sex is tantamount to using sex as a proxy for bias, which is unlawful under equal protection analysis.¹⁰⁵ Consistent with *Washington v. Davis*,¹⁰⁶ which

¹⁰⁰ 511 U.S. 127 (1994).

¹⁰¹ 518 U.S. 515 (1996).

¹⁰² *J.E.B.*, 511 U.S. at 127.

¹⁰³ A peremptory challenge is "[O]ne of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex." BLACK'S LAW DICTIONARY 245 (8th ed. 2004).

¹⁰⁴ *J.E.B.*, 511 U.S. at 129.

¹⁰⁵ Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.

Id. at 140 n.11.

¹⁰⁶ 426 U.S. 229 (1976); see also *infra* notes 131-33 and accompanying text.

rejected disparate impact theory as a basis for an equal protection violation, Justice Blackmun noted that if peremptories were exercised on the basis of a characteristic disproportionately linked to gender, there would be no equal protection violation.¹⁰⁷ Thus, peremptories exercised against nurses or against veterans would not violate equal protection absent proof of pretext.¹⁰⁸

In a concurring opinion in *J.E.B.*, Justice O'Connor expressed the view that "like race, gender matters."¹⁰⁹ She noted that studies make clear that women are more likely to convict in rape cases than are men, and she intuited that in cases involving sexual harassment, child custody, domestic violence, and child abuse, "a person's gender and resulting life experience will be relevant to his or her view of the case."¹¹⁰ Nevertheless, she agreed with the majority that gender can make no difference as a matter of constitutional law, despite its difference as a matter of actual fact.¹¹¹

Justice Rehnquist, writing in dissent in *J.E.B.*, agreed that there is a difference between men and women but concluded that equal protection is not violated by recognizing that difference: "[t]he two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely 'stereotyping' to say that these differences may produce a difference in outlook which is brought to the jury room."¹¹²

Justice Scalia's dissent in *J.E.B.* was based on his view that there is a difference between a classification based on inferiority and a classification that does not perpetuate disadvantage.¹¹³ He further questioned who has been

¹⁰⁷ "Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext." *J.E.B.*, 511 U.S. at 143.

¹⁰⁸ "For example, challenging all persons who have had military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender or race based." *Id.* at n.16.

¹⁰⁹ *Id.* at 148 (O'Connor, J., concurring).

¹¹⁰ *Id.* at 149.

¹¹¹ "But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact." *Id.*

¹¹² *Id.* at 156 (Rehnquist, J., dissenting).

¹¹³ To say that men were singled out for discriminatory treatment in this process is preposterous. The situation would be different if both sides systematically struck individuals of one group, so that the strikes evinced group-based animus and served as a proxy for segregated venire lists. The pattern here, however, displays not a systemic sex-based animus but each side's desire to get a jury favorably disposed to its case. That is why the Court's characterization of respondent's argument as "reminiscent of the arguments

harmful by the use of peremptories because both sides exercised challenges based on gender.¹¹⁴

Perhaps the most significant analysis of how gender discrimination claims should be analyzed under the Equal Protection Clause is found in *United States v. Virginia*,¹¹⁵ where the Court refused to permit gender differences to justify the exclusion of women from the Virginia Military Institute. With Justice Ginsberg writing for a 7-1 majority,¹¹⁶ the Court concluded that equal protection was violated and that the remedy relied on by Virginia, the creation of Virginia Institute for Leadership at Mary Baldwin College (VWIL), was insufficient to cure the violation.¹¹⁷

The case's significance lies in its exposition of mid-level scrutiny. Intermediate scrutiny is understood as requiring that the classification substantially further an important state interest. Additionally, the justification must be genuine, not hypothesized or invented post hoc, and the burden is on the government to show an exceedingly persuasive justification, which may not be based on overbroad generalizations about the different talents, capacities, or preferences of men and women.¹¹⁸

advanced to justify the total exclusion of women from juries," is patently false. Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case. There is discrimination and dishonor in the former, and not in the latter—which explains the 106-year interlude between our holding that exclusion from juries on the basis of race was unconstitutional, and our holding that peremptory challenges on the basis of race were unconstitutional.

Id. at 160 (Scalia, J., dissenting) (internal citations omitted). In a sense, this is consistent with Cass Sunstein's anti-caste principle. See Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311 (1999). Yet, it is not a view that Justice Scalia adheres to when analyzing affirmative action challenges. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹¹⁴ "This case is a perfect example of how the system as a whole is evenhanded. While the only claim before the Court is petitioner's complaint that the prosecutor struck male jurors, for every man struck by the government petitioner's own lawyer struck a woman." *J.E.B.*, 511 U.S. at 159-60 (Scalia, J., dissenting).

¹¹⁵ 518 U.S. 515 (1996).

¹¹⁶ Justice Clarence Thomas did not participate because his son attended VMI.

¹¹⁷ *Virginia*, 518 U.S. at 533.

¹¹⁸ To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must

Virginia proffered two state objectives: first, that single sex education contributes to diversity in educational opportunities; and second, that the unique "adversative method"¹¹⁹ utilized in VMI would have to be sacrificed if women were admitted. As to the first, the Court simply disbelieved that diversity was the actual reason.¹²⁰ As to the second, the Court rejected the argument that admitting women would destroy VMI's distinctive "adversative method," characterizing it as the classic argument historically used to exclude women from law, medicine, police forces, and military academies.¹²¹

The Court in *Virginia* emphasized that generalizations about women are insufficient to justify gender classifications. While it may be true that few women would be interested in attending VMI, the reality is that most men would not be interested either and "[t]he issue . . . is not whether 'women—or men—should be forced to attend VMI'; rather, [it is] whether the [state] can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."¹²²

The Court in *Virginia* further concluded that the all-women school that Virginia had created was an insufficient remedy for the constitutional violation, given the vast disparities between the two schools in student body, faculty, course offerings, facilities, and prestige.¹²³ Virginia defended the

show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. at 532-33 (internal citations omitted).

¹¹⁹ *Id.* at 520. This method is described as a doubting model of education featuring: "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values." As one Commandant of Cadets described it, the adversative method "dissects the young student," and makes him aware of his "limits and capabilities," so that he knows 'how far he can go with his anger, . . . how much he can take under stress, . . . exactly what he can do when he is physically exhausted.' "

Id. at 522.

¹²⁰ *Id.* at 536-39.

¹²¹ *Id.* at 542-46.

¹²² *Id.* at 542.

¹²³ The two schools offered vastly different programs: VMI's program was designed to produce "citizen soldiers" and offered a military training. *Id.* at 522. VWIL's program, however, was designed to de-emphasize military training and instead offer a "cooperative method" of education designed to foster self-esteem. *Id.* at 549. Beyond the programmatic

programmatic differences on the basis that women and men learn in different ways and that the program at VWIL reflected what was appropriate for most women.¹²⁴ But, that was precisely the problem. The fact that a majority of women might prefer a nurturing, cooperative environment over a strict, militaristic one is insufficient to support the exclusion of women as a matter of constitutional law.¹²⁵

The theory of equality reflected in all of the described U.S. Supreme Court cases is formal equality. Persons similarly situated must be treated the same. In deciding whether men and women are similarly situated, generalizations about women's aptitudes, preferences, interests, or talents will be insufficient even when the generalization reflects reality. That was true in *J.E.B.*—the fact that women may generally favor the petitioner in a paternity suit was insufficient to support the use of peremptories to exclude them.¹²⁶ It was equally true in *Virginia*—the fact that women may generally prefer the program offered at VWIL was insufficient to support the exclusion of women from VMI.¹²⁷

This version of formal equality is one that denies gender differences, in law if not in fact. Justice Ginsburg, an early advocate for gender equality, defended this approach in an essay where she explained that the strategy of minimizing gender differences was necessary because those same differences had been used for over a century to justify a host of discriminatory laws toward women:

Some observers have portrayed the 1970s litigation as assimilationist in outlook, insistent on formal equality, opening doors only to comfortably situated women willing to accept

differences, VWIL was distinctly inferior to VMI in a number of respects: entrants scored 100 points lower on the SAT; faculty possessed fewer degrees and were paid less; fewer degree programs were offered; the endowment was substantially less; the curriculum offered fewer choices; and the alumni association and attendant employment opportunities were less extensive. *Id.* at 551-55.

¹²⁴ Virginia argued that "these methodological differences are 'justified pedagogically,' based on 'important differences between men and women in learning and developmental needs,' 'psychological and sociological differences' Virginia describes as 'real' and 'not stereotypes.'" *Id.* at 549.

¹²⁵ The Court stated that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550.

¹²⁶ *J.E.B.*, 511 U.S. at 127.

¹²⁷ *Virginia*, 518 U.S. at 515.

men's rules and be treated like men, even a misguided effort that harmed more women than it helped.

* * *

Such comment seems to me not fair. The litigation of the 1970s helped unsettle previously accepted conceptions of men's and women's separate spheres, and thereby added impetus to efforts ongoing in the political arena to advance women's opportunities and stature. An appeal to courts at that time could not have been expected to do much more.¹²⁸

Ultimately, Justice Ginsburg pointed to the legislature as the future forum to accomplish a more substantive form of equality. She speculated that if more women were in politics, they would push for a legislative agenda that would reflect women's values, such as a family and medical leave policy that would permit both men and women to take time off from work to care for a relative.¹²⁹

The belief that substantive equality is a matter for the legislature rather than the judiciary is deeply embedded in American equal protection jurisprudence and extends beyond claims of gender inequality. Substantive equality has been defined as "directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society."¹³⁰ The case that firmly established the judiciary's unwillingness to

¹²⁸ Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 17.

¹²⁹ *Id.* at 18. This approach, grounded in separation of powers, stands in sharp contrast to the approach that the Supreme Court of India has taken. As described *infra*, the Supreme Court of India has relied on constitutional provisions to uphold reservations for women and has engaged in a form of judicial activism made necessary by the failures of the political branches. See *infra* notes 147-74, 271-77, 302-32 and accompanying text.

¹³⁰ KAPUR & COSSMAN, *supra* note 4, at 176. Many feminist scholars have argued for a more substantive theory of equality. See, e.g., Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21 (advocating "relational feminism"); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985) (advocating equality of opportunity); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987) (advocating an "acceptance model" whose focus is on eliminating unequal consequences of gender differences); Stephanie Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984) (advocating a "participatory perspective") [hereinafter Wildman, *Legitimation*]; Stephanie M. Wildman, *Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 707, 712-13 (2004) (advocating

adopt substantive equality is *Washington v. Davis*,¹³¹ a race discrimination case. There, applicants for the District of Columbia Metropolitan Police Department challenged the use of a written examination that operated to exclude four times as many black applicants as white. The Court rejected the claim, holding that for equal protection purposes, heightened scrutiny is not triggered absent intentional discrimination.¹³² Thus, the fact that a government policy has a disparate effect on racial minorities does not offend the equality guarantee.¹³³

The same approach has been applied to gender discrimination claims. Perhaps the most graphic example is *Geduldig v. Aiello*.¹³⁴ In that case, the state's disability insurance system excluded pregnancy-related disabilities, but included disabilities affecting only men, such as prostatectomies and circumcision.¹³⁵ The Court rejected a sex discrimination claim, finding that the statute did not create a sex classification, but rather a classification between pregnant women and non-pregnant persons. "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."¹³⁶ Putting aside the obvious fallacy in that proposition given the fact that disabilities affecting only men were covered, the more serious flaw in the Court's thinking is that it reflects a male-normed view of equality. Formal equality is not violated because men and women are treated the same. That is true to the extent that everyone is being denied pregnancy benefits. What the analysis clearly leaves out is the fact that only women can get pregnant and therefore, only women are hurt by the classification. Since formal equality is not concerned with a law's

analysis of "systemic privilege" to clarify the meaning of equal protection laws) [hereinafter Wildman, *Vision and Revision*].

¹³¹ 426 U.S. 229 (1976).

¹³² "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* at 242 (internal citation omitted).

¹³³ "[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Id.*

¹³⁴ 417 U.S. 484 (1974).

¹³⁵ *Id.* at 501 (Brennan, J., dissenting) (making the point that the statute covered disabilities exclusively or disproportionately suffered by men, including prostatectomies, circumcision, hemophilia, and gout).

¹³⁶ *Id.* at 496-97. The decision was effectively overruled when Congress enacted the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2000), which defined sex discrimination to include discrimination based on pregnancy.

consequences, however, the fact that only women were disadvantaged by the classification did not amount to a violation of equal protection “[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex.”¹³⁷ In other words, classifications that disadvantage women do not violate equal protection unless the plaintiff can demonstrate that the legislature acted for the purpose of hurting women.¹³⁸

Justice Brennan, writing in dissent in *Geduldig*, concluded that the exclusion of disabilities related to normal pregnancy constituted invidious sex discrimination:

In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.¹³⁹

¹³⁷ *Geduldig*, 417 U.S. at 497.

¹³⁸ The Court’s seeming disregard for the fact that only women were being denied pregnancy related benefits appears to be inconsistent with the Court’s recognition of biological differences in other contexts. See, e.g., *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001):

To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73.

¹³⁹ *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting).

Another example of the Court's refusal to consider the disparate effects of a classification is *Personnel Administrator of Massachusetts v. Feeney*.¹⁴⁰ There, the Court rejected an equal protection challenge to veterans' preferences in employment, which overwhelmingly operated to exclude women. Citing *Washington v. Davis*, the Court concluded that the equality guarantee was not violated absent proof that the legislature enacted the policy *for the purpose* of excluding women.¹⁴¹ In other words, demonstrating that the legislature enacted the law with knowledge of its consequences does not establish the requisite intent.¹⁴² Thus, the Court in *Feeney* rejected the common sense proposition that an actor is generally thought to intend the foreseeable and natural consequences of his or her actions and reversed the district court which, in a concurring opinion, had held that "the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?"¹⁴³ The Court's answer is yes, representing a definitive repudiation of substantive equality in favor of formal equality: "the settled rule [is] that the Fourteenth Amendment guarantees equal laws, not equal results."¹⁴⁴

The Court's strict adherence to formal equality has been unwavering and linear. The Court has moved from upholding sex classifications because women and men are different, to upholding sex classifications because men

¹⁴⁰ 442 U.S. 256 (1979).

¹⁴¹ "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

Id. at 279 (internal citations omitted).

¹⁴² The same reasoning was applied in *McCleskey v. Kemp*, 481 U.S. 279 (1987), where the Court rejected an equal protection challenge to Georgia's death penalty statute, which had a severe disparate impact on racial minorities. For a discussion of the *Washington v. Davis* line of cases, see Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

¹⁴³ *Feeney*, 442 U.S. at 278 (quoting the concurring opinion in the District Court, 451 F. Supp. 143, 151 (D. Mass. 1978)).

¹⁴⁴ *Id.* at 273.

and women are the same. At both ends of the spectrum, the Court has retained its commitment to treating equals alike.

This rigid adherence to principles of formal equality is not reflected in the jurisprudence of the Indian Supreme Court, which, as the next sections indicate, moves between theories of formal and substantive equality.

III. GENDER DISCRIMINATION CLAIMS IN THE SUPREME COURT OF INDIA

The Indian Supreme Court's interpretation of the various equality guarantees found in the Constitution has been uneven, alternating between formal and substantive equality, with a heavy emphasis on protectionism. Before analyzing the Supreme Court's decisions, it is important to keep in mind the various ways in which India's Constitution authorizes this protectionist approach.

The Constitution of India is radically different from the U.S. Constitution when it comes to addressing societal inequalities. India's Constitution recognizes that formal equality alone is insufficient to ameliorate centuries of inequalities among groups: " 'Equality is one of the magnificent cornerstones of Indian democracy.' We have, however, yet to turn that corner."¹⁴⁵ In recognition of the continuing effects of past discrimination,¹⁴⁶ the Indian

¹⁴⁵ Gov't of Andhra Pradesh v. Vijayakumar, A.I.R. 1995 S.C. 1648.

¹⁴⁶ The process of equalisation and benign discrimination are integral, and not antagonistic, to the principle of equality. In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is sophistry to argue that progressive measures to eliminate group disabilities and promote collective equality are anathema on the score that every individual has entitlement on pure merit of marks. This narrow "unsocial" pedantry subverts the seminal essence of equal opportunity even for those who are humble and handicapped. Meritocracy cannot displace equality when the utterly backward masses labour under group disabilities. So we may weave those special facilities into the web of equality which, in an equitable setting, provide for the weak and promote their levelling up so that, in the long run, the community at large may enjoy a general measure of real equal opportunity. So we hold, even apart from Art. 15(3) and (4), that equality is not negated or neglected where special provisions are geared to the larger goal of the disabled getting over their disablement consistently with the general good and individual merit.

Saran v. Union of India, A.I.R. 1980 S.C. 820.

Constitution embraces an elaborate system of "protective discrimination"¹⁴⁷ authorizing special protection for historically vulnerable groups.¹⁴⁸

This system of protective discrimination is woven throughout the Constitution. The guarantee of equality begins with Article 14, which, like the Equal Protection Clause of the U.S. Constitution, guarantees equal protection of the laws.¹⁴⁹ This is merely the jumping off point for a series of explicit equality guarantees for women contained in the Fundamental Rights section of the Indian Constitution: Article 15(1) prohibits the State from discriminating on the basis of sex;¹⁵⁰ Article 15(2) prohibits discrimination in public accommodations on the basis of sex;¹⁵¹ Article 16(1) guarantees

¹⁴⁷ *Id.*

¹⁴⁸ Article 15(3) of the Constitution of India authorizes the State to make "special provision for women and children." INDIA CONST. art. 15(3); Article 15(4) authorizes the State to make "special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." *Id.* art. 15(4); Article 16(4)(A) authorizes provisions "for [the] reservation . . . of posts [or appointments] . . . in favour of the Scheduled Castes or the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State." *Id.* art. 16(4)(A); Articles 330 and 332 mandate the reservation of seats in the House of the People and in the state legislatures for members of the Scheduled Castes and Scheduled Tribes. *Id.* arts. 330, 332; Article 243D mandates the reservation of seats on panchayats (village councils) for members of the Scheduled Castes, Scheduled Tribes, and women. *Id.* art. 243D.

¹⁴⁹ Article 14 provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." *Id.* art. 14. Classifications challenged pursuant to Article 14 must meet the following standard: "[C]lassification among different groups of persons and differentiation between such classes is permissible provided (1) the classification is founded on intelligible differentia between the groups and (2) such differentia have a rational nexus with the objects sought to be achieved by the statute." *Gov't of Andhra Pradesh v. Vijayakumar*, A.I.R. 1995 S.C. 1648 (upholding affirmative action for women in public employment). The test is one of rationality:

Article 14 of the Constitution ensures equality among equals: its aim is to protect persons similarly placed against discrimination [sic] treatment. It does not however operate against rational classification. A person setting up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice and the different treatment had no reasonable relation to the object sought to be achieved. . . .

Lakshmi v. Punjab Univ., A.I.R. 2003 S.C. 3331. *See also* *Javed v. Haryana*, A.I.R. 2003 S.C. 3057 (upholding the requirement that panchayat members have no more than two children).

¹⁵⁰ Article 15(1) provides: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." INDIA CONST. art. 15.

¹⁵¹ Article 15(2) provides:

No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition

equality of opportunity in government employment and appointment to government office;¹⁵² and Article 16(2) prohibits discrimination on the basis of sex in public employment or appointment to state office.¹⁵³

In addition to the equality provisions contained in the Fundamental Rights, the Constitution of India contains non-justiciable Directive Principles¹⁵⁴ that direct states to work toward the emancipation of women, including equal pay for equal work,¹⁵⁵ just and humane conditions of work, and maternity relief.¹⁵⁶ In the section of the Indian Constitution listing the Fundamental Duties of citizens, the Constitution declares that it is a fundamental duty of every citizen to "renounce practices derogatory to the dignity of women."¹⁵⁷ Further, like the U.S. Constitution, the Constitution of India prohibits discrimination against women with respect to voting.¹⁵⁸

The most significant of all the provisions guaranteeing equality to women is Article 15(3), which authorizes the State to make "special provision for

with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Id.

¹⁵² Article 16(1) provides: "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State." *Id.* art. 16.

¹⁵³ Article 16(2) provides: "No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State." *Id.*

¹⁵⁴ Part IV of the Constitution contains principles for the state and its agencies to follow in formulating policy. The goal of the Directive Principles is to establish a new social order consisting of social, economic, and political justice. See Harmon & Kaufman, *supra* note 12, at 47 n.84. The Indian Supreme Court has held that, unlike Fundamental Rights, Directive Principles are not justiciable, meaning that they are not enforceable by the courts. See *Islamic Acad. of Educ. v. Karnataka*, A.I.R. 2003 S.C. 3724; *Thomas v. Union of India*, A.I.R. 2000 S.C. 1650.

¹⁵⁵ Article 39 provides: "The State shall, in particular, direct its policy towards securing . . . (d) that there is equal pay for equal work for both men and women." INDIA CONST. art. 39.

¹⁵⁶ Article 42 provides: "The State shall make provision for securing just and humane conditions of work and for maternity relief." *Id.* art. 42.

¹⁵⁷ *Id.* art. 51A(e).

¹⁵⁸ Article 325 provides:

There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

Id. art. 325.

women and children.”¹⁵⁹ This provision “was envisaged as a method of protective discrimination,”¹⁶⁰ designed to relieve women from “moribund . . . formal equality.”¹⁶¹ Article 15(3) reflects the constitutional philosophy that true equality cannot be achieved in the absence of affirmative steps to remove the persistent inequality of opportunity between women and men in Indian society.¹⁶² “Article 15(3) treats women as a class, mitigates the rigour of absolute equality enshrined in Article 14 and its species Articles 15(1) and 16(1) and enjoins the State to make any special provision to remedy past injustice and to advance their status, socio-economic and political.”¹⁶³

Article 15(3) thus provides the justification for the protectionist approach evident in a multitude of Indian Supreme Court decisions. These decisions defy easy categorization: some uphold affirmative action programs and reservations for women and embrace a substantive equality model; others interpret ambiguous statutory provisions and personal laws in a manner designed to fulfill the constitutional guarantee of equality; and others rely on formal equality theory to uphold sex classifications based on real or perceived differences between men and women.

A. Decisions Concerning Affirmative Action and Reservations for Women

Drawing on the constitutional authorization of protective discrimination and substantive equality,¹⁶⁴ the Indian Supreme Court has upheld the reservation of seats for women in municipal elections,¹⁶⁵ in managing

¹⁵⁹ Article 15(3) provides: “Nothing in this article . . . shall prevent the State from making any special provision for women and children.” *Id.* art. 15(3).

¹⁶⁰ *Srivastava v. Madhya Pradesh*, A.I.R. 1999 S.C. 2894.

¹⁶¹ *Jain v. Union of India*, A.I.R. 1997 S.C. 3021, *order set aside on other grounds*, *Jain v. Union of India*, 1998 Indlaw S.C. 1669.

¹⁶² *See Singh v. Union of India*, (1978) Indlaw DEL 2.

¹⁶³ *Sesharathamma v. Manikamma*, (1991) 3 S.C.R. 717 (Ramaswamy, J.).

¹⁶⁴ In addition to Article 15(3)’s authorization of special provisions for women, India’s Constitution explicitly authorizes reservations for Scheduled Castes, Scheduled Tribes, and other backward classes. *See* INDIA CONST. arts. 15(4), 16(4), 330, and 332. In 1993, the Constitution was amended to mandate the reservation of seats for women on panchayats, units of local self-governance. For an analysis of this experiment in women’s empowerment, see Harmon & Kaufman, *supra* note 12, at 74-89.

¹⁶⁵ *See, e.g., Agarwal v. Uttar Pradesh*, A.I.R. 1993 S.C. 1440 (holding that the reservation of seats for women on municipal boards is protected by Article 15(3)); *More v. Bombay*, 1953 A.I.R. (Bom.) 311 (upholding provision of the Bombay Municipal Boroughs Act which reserved seats for women in the election).

committees of state cooperative societies,¹⁶⁶ and in employment.¹⁶⁷ Reservations of seats for women in educational institutions have been legislated by the states and repeatedly upheld by the High Courts.¹⁶⁸ These decisions recognize that compensating for discrimination is not an exception to equality but a necessary means of achieving equality.¹⁶⁹

The Indian Supreme Court has held that the power conferred by Article 15(3) is "wide enough to cover the entire range of State activity including employment under the State."¹⁷⁰ Thus, in *Government of Andhra Pradesh v. Vijayakumar*,¹⁷¹ the Court upheld affirmative action and reservation of jobs for women in public employment, noting that "[a]n important limb of this concept of gender equality is creati[ng] job opportunities for women."¹⁷² The decision explains the interplay between Article 15(3) and the Constitution's other equality guarantees:

The insertion of clauses [sic] (3) of Article 15 on relation to women is a recognition of the fact that for centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a matter that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women To say that under Article 15(3), job opportunities

¹⁶⁶ *Reddy v. Andhra Pradesh*, (1993) 4 S.C.C. 439 (upholding reservations for women on the board of cooperative societies under Article 15(3)).

¹⁶⁷ *See, e.g.*, *Gupta v. Uttar Pradesh*, (2005) 5 S.C.C. 172 (holding that reservations of posts for women as teachers is authorized by Article 15(3)); *Lakshmi v. Punjab Univ.*, A.I.R. 2003 S.C. 3331 (upholding preference in favor of appointing a woman principal); *Union of India v. Prabhakaran*, (1997) 11 S.C.C. 638 (upholding reservation of positions as clerks for women); *Gov't of Andhra Pradesh v. Vijayakumar*, A.I.R. 1995 S.C. 1648 (allowing reservation of 30% of seats in government posts for women); *Pansari v. Orissa*, A.I.R. 2000 S.C. 1531 (upholding state policy to broaden women's employment opportunities by providing 30% of medical store licenses to women in order to foster women's self-reliance).

¹⁶⁸ *See, e.g.*, *Chandra v. Bihar*, 1996 A.I.R. 88 (Pat.) (allowing preferences for females in medical school program); *Kavitha v. Tamil Nadu*, 1992 A.I.R. 359 Mad. (allowing allotment of seats for women for cinematography degree program).

¹⁶⁹ *See, e.g.*, *Sawhney v. Union of India*, A.I.R. 1993 S.C. 477.

¹⁷⁰ *Gov't of Andhra Pradesh v. Vijayakumar*, A.I.R. 1995 S.C. 1648.

¹⁷¹ *Id.*

¹⁷² *Id.*

for women cannot be created would be [to] cut at the very root of the underlying inspiration behind this article. Making special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power conferred under Article 15(3), is not whittled down in any manner by Article 16.¹⁷³

The Court in *Vijayakumar*, rejected the argument that affirmative action and reservations are inconsistent with a meritocracy:

[E]fficiency, competence and merit are not synonymous and it is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed upon members of other classes. What is required is an opportunity to prove it. It is precisely a lack of opportunity which has led to social backwardness, not merely amongst what are commonly considered as the backward classes, but also amongst women. Reservation, therefore, is one of the constitutionally recognised methods of overcoming this type of backwardness. Such reservation is permissible under Article 15(3).¹⁷⁴

The Indian Supreme Court's consistency in upholding reservations for women is a strong indication of its willingness to embrace substantive equality. The Court's validation of "protective discrimination" recognizes that equality will not be achieved without redressing the current effects of centuries of discrimination.

B. Decisions Involving Statutory Interpretation and Interpretation of Personal Laws

Article 15(3) has been used by the Supreme Court not only to uphold laws that treat women more favorably than men, but also to interpret ambiguous laws in a manner that protects women.¹⁷⁵ This rule of construction has been

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Ara v. Uttar Pradesh*, A.I.R. 2002 S.C. 3551; *Singh v. Ramendri Smt.*, A.I.R. 2000 S.C. 952; *Satpathy v. Dixit*, A.I.R. 1999 S.C. 3348; *Sesharathamma v. Manikyamma*, (1991) 3 S.C.R. 717; *Kaushal v. Kaushal*, A.I.R. 1978 S.C. 1807.

used repeatedly to interpret Section 125 of the Code of Criminal Procedure, which requires maintenance payments to needy wives:

[Section 125] is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil [sic]. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it [is] to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause – the cause of the derelicts.¹⁷⁶

In *Ara v. Uttar Pradesh*,¹⁷⁷ the Court noted that Article 15(3) “has compelling, compassionate relevance in the context of [Section] 125 and the benefit of [the] doubt, if any, in statutory interpretation belongs to the ill-used wife and the derelict divorcee.”¹⁷⁸ Thus, in *Singh v. Ramendri Smt.*,¹⁷⁹ the Court interpreted the statute to apply to a divorced woman’s right to maintenance, noting that “[a] woman after divorce becomes a destitute.”¹⁸⁰ Although the Court did award maintenance to the woman, it left intact the finding that the wife’s refusal to live with her husband’s abusive parents while he was in the army constituted desertion.¹⁸¹

A dramatic example of the Indian Supreme Court construing a statute in a manner designed to benefit women is *Municipal Corp. of Delhi v. Female Workers*,¹⁸² where the Court held that temporary workers are entitled to

¹⁷⁶ *Singh v. Ramendri Smt.*, A.I.R. 2000 S.C. 952 (quoting *Kaushal v. Kausha*, A.I.R. 1978 S.C. 1807).

¹⁷⁷ A.I.R. 2002 S.C. 3551; see *Satpathy v. Dixit*, A.I.R. 1999 S.C. 3348 (stating that: “The provision under Section 125 is not to be utilised for defeating the rights conferred by the legislature on the destitute women, children or parents who are victims of the social environment”).

¹⁷⁸ *Ara v. Uttar Pradesh*, A.I.R. 2002 S.C. 3551 (quoting *Tahira v. Hussain*, A.I.R. 1979 S.C. 362).

¹⁷⁹ A.I.R. 2000 S.C. 952.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² A.I.R. 2000 S.C. 1274.

maternity benefits.¹⁸³ The Court relied on the Indian Constitution's Preamble, which promises social and economic justice, and interpreted the Maternity Benefit Act as authorizing maternity benefits to women on the "muster roll" who were essentially day laborers.¹⁸⁴

Article 15(3) has also been used to interpret the Hindu Succession Act of 1956 in a way that benefits women by holding that the statute must be construed harmoniously with the constitutional goal of removing gender-based discrimination and effectuating economic empowerment of women.¹⁸⁵ In *Sesharathamma v. Manikyamma*,¹⁸⁶ the Court quoted Sir Henry Maine who stated "the degree in which personal immunity and proprietary capacity of women are recognised in a particular state or community is a test of the degree of the advance of its civilisation."¹⁸⁷ The Court interpreted the Hindu Succession Act to give women the absolute right to property even where a will purported to limit the woman's right to the property.¹⁸⁸ The Court relied on the "constitutional goal to render socio-economic justice, to relieve [the] Hindu female from degradation, disabilities, disadvantages and restrictions under which Hindu females have been languishing over centuries and to integrate them in national and international life."¹⁸⁹

Other cases where the Indian Supreme Court has adopted interpretations of personal law that benefit women include *Kumar v. Bhada*,¹⁹⁰ where the Court rejected a claim of joint ownership of property, finding that under Hindu law, the wife was the absolute owner of "stridhana";¹⁹¹ and *Hariharan v. Reserve*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Mudaliar v. Idol of Sri Swaminathaswami*, A.I.R. 1996 S.C. 1697.

It is true that Section 30 of the Act and the relevant provisions of the Act relating to the execution of the Wills need to be given full effect and the right to disposition of a Hindu male derives full measure thereunder. But the right to equality, removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined in the Constitution and the personal law also needs to be in conformity with the constitutional goal. Harmonious interpretation, therefore, is required to be adopted in giving effect to the relevant provisions consistent with the constitutional animation to remove gender-based discrimination in matters of marriage, succession etc.

¹⁸⁶ (1991) 3 S.C.R. 717.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ (1997) 2 S.C.C. 397.

¹⁹¹ *Id.*

Bank of India,¹⁹² where the Court held that the Hindu Minority and Guardian Act must be interpreted so as not to afford a preference for fathers over mothers as guardians.¹⁹³ The statute at issue in *Hariharan* provided that the natural guardian of a Hindu boy or an unmarried girl is "the father, and after him, the mother."¹⁹⁴ Through a particularly strained reading of the text, the Court concluded that the provision "is capable of such construction as would retain it within the constitutional limits."¹⁹⁵

These cases reflect the Indian Supreme Court's view that "the personal laws conferring inferior status on women [are] anathema to equality" and inconsistent with Article 15(3).¹⁹⁶ These decisions also draw support from international covenants, including the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),¹⁹⁷ on which the Court relies to support its interpretation of personal laws in a way that furthers women's equality.¹⁹⁸

Although the Indian Supreme Court's interpretation of the codification of Hindu law has not been particularly problematic, the same cannot be said with respect to cases that require the Court to resolve the tension between the Constitution's commitment to both women's rights and minority rights.¹⁹⁹ Under British rule, laws were secularized in areas that mattered to the British,

¹⁹² A.I.R. 1999 S.C. 1149. This case is roughly comparable to *Reed v. Reed*, 404 U.S. 71 (1971), where the U.S. Supreme Court struck down an automatic preference for fathers over mothers in administering a child's estate. See also *supra* notes 53-55 and accompanying text.

¹⁹³ *Hariharan v. Reserve Bank of India*, A.I.R. 1999 S.C. 1149.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Mudaliar v. Swaminathaswami*, A.I.R. 1996 S.C. 1697, ¶ 15.

¹⁹⁷ CEDAW, *supra* note 5.

¹⁹⁸ See, e.g., *Hariharan v. Reserve Bank of India*, A.I.R. 1999 S.C. 1149. In *Mudaliar v. Swaminathaswami*, A.I.R. 1996 S.C. 1697, ¶ 19, the Indian Supreme Court relied extensively on the language of CEDAW:

The preamble of CEDAW reiterates that discrimination against women violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of the personality from society and family and makes more difficult for the full development of potentialities of women in the service of their countries and of humanity. Poverty of women is a handicap. Establishment of a new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women etc.

¹⁹⁹ In an effort to accommodate India's extraordinary diversity, the Constitution guarantees minority, religious, cultural, and linguistic rights. See, e.g., INDIA CONST. arts. 15, 25-28 (guaranteeing religious freedoms) and arts. 29-30 (guaranteeing cultural and educational rights).

whereas "private law," law that most affected the lives of women, was not thought to be relevant to colonial interests.²⁰⁰ This public/private dichotomy was continued at Independence, with secular laws covering everything but inheritance, succession, matrimonial and family law matters.²⁰¹ Thus for example, rape has long been treated as a crime but domestic violence remains largely unaddressed, confined to the private non-secular sphere.²⁰² Similarly, where a woman has chosen employment away from her husband, the courts have ordered restitution of conjugal "rights," with constitutional challenges rejected on the ground that the family is beyond the reach of the law.²⁰³ In *Rani v. Kumar*,²⁰⁴ the Indian Supreme Court approved the High Court's view that "the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond."²⁰⁵

Whether or not private law should remain separate from secular law presents a continuing controversy in India.²⁰⁶ The Constitution envisages the adoption of a uniform civil code, which would replace the system of personal law that governs India's different religious groups.²⁰⁷ The enactment of a uniform civil code, however, has proved politically impossible, which has left different religious groups governed by their own personal laws.²⁰⁸ The Court's role in hearing challenges involving Muslim law has attempted to prioritize women's rights over religious claims but, as we shall see, has been largely ineffective.²⁰⁹

The Indian Supreme Court's interpretation of Muslim law has sought to protect women's rights. For example, the Court has construed Muslim law in

²⁰⁰ See Jaising, *supra* note 16, at 298; see also FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 58 (1999).

²⁰¹ See MINISTRY OF EDUC. & SOC. WELFARE, INDIA DEP'T OF SOC. WELFARE, TOWARDS EQUALITY: REPORT OF THE COMMITTEE ON THE STATUS OF WOMEN IN INDIA 140-46 (1974).

²⁰² See, e.g., Jaising, *supra* note 16, at 309 (stating that: "The public/private divide has been used . . . usually to the detriment of women").

²⁰³ *Rani v. Kumar*, (1984) 3 S.C.C. 90 (rejecting a constitutional challenge to restitution of conjugal "rights").

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See AGNES, *supra* note 200, at 94-106; see also BRENDA COSSMAN & RATNA KAPUR, SECULARISM'S LAST SIGH?: HINDUTVA AND THE (MIS)RULE OF LAW (1999); KHUSHWANT SINGH, THE END OF INDIA (2003).

²⁰⁷ Article 44 of the Directive Principles provides: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." INDIA CONST. art. 44.

²⁰⁸ For an insightful analysis of the politicization of secularism, see generally COSSMAN & KAPUR, *supra* note 206.

²⁰⁹ See *infra* notes 210-25 and accompanying text.

a way that treats the impotence of a husband as a ground for divorce, thus entitling a wife to maintenance,²¹⁰ and it has also constricted a Muslim husband's ability to unilaterally divorce his wife.²¹¹

The most famous of the Indian Supreme Court's decisions in the area of personal laws is the Shah Bano case, which has come to symbolize the struggle in India between secularism and minority rights.²¹² In this case, the Court attempted to mediate competing demands between minority rights and women's rights but chose a path that ultimately was undone by the political branches.

Shah Bano had been married for forty-three years, with five children, when her husband divorced her.²¹³ She petitioned for maintenance and was granted 179.20 rupees (approximately \$4.00) a month. The husband, who was an attorney earning 60,000 rupees a year, appealed.²¹⁴ The issue in the case involved the clash between Section 125 of the Code of Criminal Procedure, which requires maintenance of a wife unable to support herself, and Muslim Personal Law, which requires payment of maintenance for only three months.²¹⁵ The Court avoided the conflict between the two laws by interpreting the Qur'an in a way that reconciled the provisions: "For divorced women [m]aintenance (should be provided) [o]n a reasonable ([s]cale). This is the duty of the righteous."²¹⁶

The decision was met with fury from the Muslim community, with massive demonstrations against the Court's usurpation of Muslim authority.²¹⁷ The Congress Party, facing electoral losses, passed the Muslim Women Act of 1986,²¹⁸ which essentially overruled the Shah Bano decision by excluding all Muslim women from coverage under Section 125 of the Code of Criminal

²¹⁰ Janmohamadkhan v. Yasinkhan, A.I.R. 1981 S.C. 1972.

²¹¹ Ara v. Uttar Pradesh, A.I.R. 2002 S.C. 3551.

²¹² Khan v. Shah Bano Begum, A.I.R. 1985 S.C. 945.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* The Court called on the State to move toward adopting a uniform civil code. *Id.* ¶ 32; see Sarla Mudgal v. Union of India, 1995 (3) S.C.C. 635.

²¹⁷ ELISABETH BUMILLER, MAY YOU BE THE MOTHER OF A HUNDRED SONS: A JOURNEY AMONG THE WOMEN OF INDIA 166-67 (1990).

²¹⁸ Muslim Women (Protection of Rights on Divorce) Act, No. 25 of 1986; INDIA CODE (1986).

Procedure.²¹⁹ Shah Bano herself was pressured to withdraw her petition for maintenance.²²⁰

The Indian Supreme Court re-entered the fray in 2001 when the Muslim Women Act of 1986 was challenged as violating the constitutional equality guarantee.²²¹ In *Latifi v. Union of India*, the Court interpreted the Act in a way to avoid the constitutional question, finding that the requirement of maintenance for only three months could be expanded when required to ensure the woman's future well-being.²²² The Court held that an interpretation of the Act that would leave Muslim women in a less advantageous position than Hindu, Buddhist, Jain, Parsi or Christian women would violate the constitutional guarantee of equality.²²³

The Court's efforts to reconcile the competing claims of gender equality and religious autonomy have not been replicated in the political branches. To the contrary, the question has become thoroughly political, with the Hindu right pressing for the secularization of personal laws in the name of women's rights.²²⁴ In the meantime, women's rights remain subordinated to religious claims.²²⁵

²¹⁹ Siobhan Mullally, *Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case*, 24 OXFORD J. LEGAL AFF. 671, 681 (2004). The Muslim Women Act of 1986 was later interpreted by the High Court of Calcutta, in a case dubbed *Shah Bano II*, to require maintenance for a Muslim woman until remarriage. The Court interpreted iddat as the period between divorce and remarriage. *Shades of Shah Bano*, TRIBUNE, June 21, 2000, available at <http://www.tribuneindia.com/2000/20000621/edit.htm#2>.

²²⁰ Mullally, *supra* note 219, at 681; BUMILLER, *supra* note 217, at 165-70.

²²¹ *Latifi v. Union of India*, A.I.R. 2001 S.C. 3958.

²²² *Id.* The Court, however, recently agreed to hear a case challenging the legality of religious courts following an Islamic tribunal's decision ordering a rape victim to move in with her father-in-law who is the accused rapist. *Indian SC to Rule on Legality of Religious Courts*, DAILY TIMES, Aug. 18, 2005, available at http://www.dailytimes.com.pk/default.pk/default.asp?page=story_18-8-2005_pg4_14. See also *World Briefing Asia, India: Supreme Court to Rule on Religious Courts*, N.Y. TIMES, Aug. 18, 2005, at A12.

²²³ *Id.*

²²⁴ The Hindu right campaigned against the 1986 legislation, calling it anti-women. "Those who do not accept ou[r] Constitution and laws, should quit the country and go to Karachi or Lahore." Mullally, *supra* note 219, at 682.

²²⁵ See, e.g., Jaising, *supra* note 16, at 302 (criticizing the Supreme Court's unwillingness to directly address the conflict between minority rights and women's rights: "The truth is that the history of law relating to women is also the history of property law and to disturb the status quo would be to seriously question the existing property ownership patterns in a society based on male lines"); Asian Centre for Human Rights, *Cultural Courts: Where Victims are Held Guilty*, July 6, 2005, <http://www.achrweb.org/Review/2005/80-05.htm> (detailing women's human rights abuses under religious law).

C. Decisions Upholding Sex Classifications Based on Gender Differences

Relying on Article 15(3), the Indian Supreme Court seems to have adopted the same role of benevolent protector that the U.S. Supreme Court played until the 1970s, upholding laws that treat men and women differently on the grounds that they protect women.²²⁶ Whereas the U.S. Supreme Court, beginning in the 1970s, used formal equality theory to prohibit overbroad generalizations about differences between men and women, the Supreme Court of India continues to uphold classifications on the ground that women require protection. The obvious danger of this protectionist approach is that it can be used to perpetuate the very stereotypes that have kept women in a subordinate position.

On the ground that women need protection and that Article 15(3) authorizes such protection, the Indian Supreme Court has upheld a wide variety of laws defended on the ground that the sex classification benefits women. The Court has upheld a provision in a rent control law providing special benefits to women landowners because “[a] widow is undoubtedly a vulnerable person in our society and requires special protection”,²²⁷ an adultery law criminalizing the conduct of the man and not the woman, because women tend to be the victim not the perpetrator,²²⁸ and an employer’s marriage proscription for women, but not men, because Indian women should be deterred from marrying too young.²²⁹ Consistent with this approach, Indian High Courts²³⁰ have upheld laws disabling women from receiving service of process,²³¹ laws entitling women but not men to bail,²³² and laws making it a crime to offend the modesty of a woman but not a man.²³³

²²⁶ See, e.g., *Mahsi v. Union of India*, (1994) 1 S.C.J. 90 (upholding gender based divorce laws based on women’s weaker physique and general vulnerability); *Vishnu v. Union of India*, A.I.R. 1985 S.C. 1618 (upholding law that criminalized adultery by males but not females); *Air India v. Meerza*, A.I.R. 1981 S.C. 1829 (upholding employment policy mandating retirement upon marriage of female employees but not male employees).

²²⁷ *Rahabhar Prods. Private Ltd. v. Tandon*, A.I.R. 1998 S.C. 1639 (citing *EMC Steel Ltd. v. Union of India*, (1991) 1 S.C.R. 381).

²²⁸ *Vishnu v. Union of India*, A.I.R. 1985 S.C. 1618.

²²⁹ *Air India v. Meerza*, A.I.R. 1981 S.C. 1829.

²³⁰ Unlike the United States, India has one unified court system. The Indian Supreme Court is the apex court and each state (or group of states) and territory has a High Court. See INDIA CONST. art. 214.

²³¹ *Shahdad v. Abdullah*, A.I.R. 1967 J. & K. 120.

²³² *Choki v. State*, A.I.R. 1957 Raj. 10.

²³³ *Girdhar v. State*, A.I.R. 1953 M.B. 147.

Many of these decisions reflect stereotypical thinking about women's passivity and need for protection.²³⁴ Thus, in *Vishnu v. Union of India*,²³⁵ the Court rejected a challenge to Section 497 of the Indian Penal Code, which defines the offense of adultery so as to criminalize the behavior of men only. The Court reasoned that "[i]t is commonly accepted that it is the man who is the seducer and not the woman,"²³⁶ and that any woman involved in an "illicit" relationship "is a victim and not the author of the crime."²³⁷ Similarly, in *Mahsi v. Union of India*,²³⁸ in language reminiscent of U.S. Supreme Court Justice Bradley's explanation of why Myra Bradwell was not fit for the practice of law, the Supreme Court of India upheld gender-based divorce laws because of "the muscularly weaker physique of the woman, her general vulnerable physical and social condition and her defensive and non-aggressive nature and role."²³⁹

The most indefensible of the Indian Supreme Court decisions upholding gender classifications is *Air India v. Meerza*,²⁴⁰ where the Court rejected a challenge on behalf of air hostesses employed by Air India to the different retirement rules applied to them and their male counterparts, called pursers. Among the rules challenged was the requirement that air hostesses, but not pursers, had to retire upon marriage.²⁴¹ Utilizing formal equality theory, the Court relied on the fact that the men were paid more, were subject to different promotional rules, and could retain their job upon marriage to support the fact that the pursers and air hostesses were not similarly situated.²⁴² The logic is

²³⁴ See *infra* notes 227-46 and accompanying text.

²³⁵ A.I.R. 1985 S.C. 1618.

²³⁶ *Id.*

²³⁷ *Id.* This decision was reaffirmed in *Revathi v. Union of India*, A.I.R. 1988 S.C. 835.

²³⁸ (1995) 1 S.C.J. 90.

²³⁹ *Id.*; see also *Ahmedabad Women Action Group v. Union of India*, A.I.R. 1997 S.C. 3614; *Rani v. Kumar*, (1984) 3 S.C.C. 90 (rejecting a constitutional challenge to restitution of conjugal "rights" and finding such right to be "inherent in the very institution of marriage itself").

²⁴⁰ A.I.R. 1981 S.C. 1829.

²⁴¹ Regulation 46 provided as follows:

Retiring Age: Subject to the provisions of sub-regulation (ii) hereof, an employee shall retire from the service of the Corporation upon attaining the age of 58 years, except in the following cases when he/she shall retire earlier : . . . (c) An Air Hostess, upon attaining the age of 30 years or on marriage whichever occurs earlier

Id. ¶ 5.

²⁴² *Id.* ¶ 58 ("Having regard, therefore, to the various circumstances, incidents, service conditions, promotional avenues, etc. of the AFPs and AHs the inference is irresistible that AHs though members of the cabin crew are an entirely separate class governed by [a] different set of

completely circular: Article 14's requirement that equals be treated alike is not violated because the preferential treatment afforded males places them in a different category.

The Court in *Air India* also rejected the claim that the different rules violated Article 15 because the different treatment was not on the basis of sex alone. With very little explanation, the Court concluded that the policies were based on sex plus other considerations and, when reviewing such policies, courts need to be practical.²⁴³

The *Air India* decision is filled with the protectionism that marks so many of India's gender cases. One justification for the marriage restriction in *Air India* was that it would insure that women would not marry at too young an age, which could jeopardize their health and interfere with family planning programs.²⁴⁴ Even with respect to the one restriction struck down in *Air India*, the requirement that women retire if they become pregnant, the Court expressed outrage at an employment rule that constitutes "an open insult to Indian womanhood – the most sacrosanct and cherished institution."²⁴⁵ Requiring pregnant women to retire might discourage pregnancy which would "divert the ordinary course of human nature."²⁴⁶ Thus, in a variety of ways, the *Air India* case represents equality theory used to perpetuate sexual stereotypes rather than to ameliorate the gender inequities that result from sexual stereotypes.

The *Air India* controversy was back before the Indian Supreme Court in 2003.²⁴⁷ In the intervening years, the air hostesses, acting through a union representing both male and female employees, had entered into a number of

rules, regulations and conditions of service.").

²⁴³ *Id.* ¶ 66 (citing *Muthamma v. Union of India*, (1979) 4 S.C.C. 260).

²⁴⁴ Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan.

Id. ¶ 77.

²⁴⁵ *Id.* ¶ 80.

²⁴⁶ *Id.*

²⁴⁷ See *Air India Cabin Crew Ass'n v. Merchant*, A.I.R. 2004 S.C. 187.

agreements and settlements regarding seniority, promotion, and retirement age, but distinctions between air hostesses and pursers remained for employees hired before 1997.²⁴⁸ A group of fifty-three air hostesses, dissatisfied with the settlements, formed a competing association consisting only of female employees and brought suit in the Bombay High Court, seeking parity between male and female employees.²⁴⁹ The High Court ordered parity, finding that the lower retirement age for women and the different conditions of service for men and women, including salary and seniority, were discriminatory.²⁵⁰ The Indian Supreme Court reversed, in an opinion harshly critical of the Bombay High Court.²⁵¹

The Court re-affirmed its previous decision, adding that the constitutional prohibition of discrimination based only on sex does not prohibit special treatment of women in employment "on their own demand" or special rules that favor women.²⁵² Since women, acting through their union, had agreed to different rules regarding retirement, there could be no constitutional infirmity.²⁵³ The decision does not reveal the role that women played in the

²⁴⁸ For example, women were required to retire from flight duties at age fifty, whereas men could maintain flight duties until age fifty-eight. *Id.*

²⁴⁹ *Id.* ¶ 33.

²⁵⁰ *Id.* ¶ 35 (citing Writ Petition No. 1163 of 2000).

²⁵¹ It is surprising that the High Court in the impugned judgment completely side-stepped the legal issues firmly settled in the decision of three Judges' Bench of this Court in Nergesh Meerza's case . . . which were binding on it. By impugned judgment, the High Court has indirectly nullified the effect of this Courts [sic] decision in [the] case of Nergesh Meerza . . . and in doing so relied on subsequent event. . . .

We totally disapprove the reasoning and conclusions of the High Court in the impugned judgment that differential treatment which was justified earlier when Nergesh Meerza's case . . . was decided, "has become arbitrary and unreasonable because of the passage of the time and merger of cadres' after 1997. How could the High Court lose sight of the fact that apart from the binding decision of this Court in Nergesh Meerza's case . . ., air hostesses of executive cadre, who were all pre-1997 recruits, were bound, with majority of air hostesses of workmen category, by the agreements and settlements as also awards reached between them and the employer/ Air India.

Id.

²⁵² *Id.* ¶ 41.

²⁵³ The early retirement age of 50 years from flying duties for female members of the crew with an option to them to accept ground duties beyond 50 years up to the age of 58 years being a service condition agreed to and incorporated in a binding agreement or settlement and award reached with the employer, the same cannot be held to be either arbitrary or discriminatory under Articles

collective bargaining process. We are told that 684 of the 1138 air hostesses were members of the union, but we are not told what number of men were members and what influence the women exercised.²⁵⁴ The fact that far more air hostesses were members of the union responsible for negotiating with Air India than were members of the all-female union formed by petitioners to achieve gender parity hardly insures that the agreement promotes women's equality. The Court's deference to the process provides reason to question whose voice and whose experience was heard: "In the course of industrial adjudication through conciliation and negotiation the employer could legitimately acknowledge women's perspective, their life experience and view point. After giving consideration to the same, the employer could agree for terms and conditions which suited the air hostesses."²⁵⁵ Although the Court wrote about respecting a decision by a majority of air hostesses to retire from flight duties earlier than men, it remains unclear who was speaking for the women and whether they truly had a voice at the table.

Whether or not the result represents women's interests is itself controversial. The Court in the second *Air India* case clearly viewed the different ages of retirement to be good for women: "In employment requiring duties on [a]ircraft, gender-neutral provisions of service may not be found necessarily to be beneficial for women. The nature of duties and functions on board of an [aircraft] do deserve some kind of a different and preferential treatment of women [as] compared to men."²⁵⁶ With respect to the earlier retirement age for women, the Court noted that "[t]here is nothing objectionable for air hostesses to wish for a peaceful and tension-free life at home with their families in the middle age and avoid remaining away for long durations on international flights."²⁵⁷

The protectionism exhibited by the Indian Supreme Court has been replicated in a host of High Court decisions. For example, the High Court of Rajasthan in *Choki v. State*²⁵⁸ relied on the "special provision" authorization of Article 15(3) to reject a challenge to a provision of the Criminal Procedure Code that permits bail for women, but not men, in certain serious criminal

15 and 16 of the Constitution. It is not a discrimination against females only on ground of sex.

Id. ¶ 51.

²⁵⁴ *Id.* ¶¶ 33, 35.

²⁵⁵ *Id.* ¶ 41.

²⁵⁶ *Id.* ¶ 43.

²⁵⁷ *Id.* ¶ 59.

²⁵⁸ A.I.R. 1957 Raj. 10.

cases.²⁵⁹ In *Choki*, a mother and father were accused of killing their child, ordinarily a non-bailable offense. Pursuant to Section 497 of the Criminal Procedure Code, however, which authorizes bail for women, individuals under sixteen years of age, and the infirm, the mother was granted bail on the ground that she "is a woman and she has got [another] young son . . . and has nobody to look after him."²⁶⁰ The High Court upheld the challenged statute, reaffirming the State's right to make laws containing special provisions that benefit women.²⁶¹

Similarly, in *Shahdad v. Abdullah*,²⁶² the High Court of Jammu and Kashmir upheld the constitutional validity of a statute disqualifying a woman from accepting service of process. Relying on Article 15(3), the Court explained that this statute "does not give them any disadvantageous position but rather exonerates them from the responsibility of fastening notice of service."²⁶³ This "exoneration" is justified, in part, by the traditional isolation of women from society, as illustrated by the practice of *purdah*.²⁶⁴

Another case that illustrates the protectionist approach is *Girdhar v. State*,²⁶⁵ where the High Court of Madhya Pradesh upheld a law criminalizing assaults which outraged the modesty of a woman, but not a man.²⁶⁶ In addition to upholding the classification as against an Article 14 challenge,²⁶⁷ the Court also upheld the classification as against an Article 15 challenge, explaining

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* (stating that: "The position in the Constitution appears to be that it is open to the State to make laws containing special provisions for women and children, but no discrimination can be made against them on account of their sex . . .").

²⁶² A.I.R. 1967 J. & K. 120.

²⁶³ *Id.* ¶ 33.

²⁶⁴ *Purdah* refers to the custom of women being veiled and otherwise separated from male society and largely confined to the home.

²⁶⁵ A.I.R. 1953 M.B. 147.

²⁶⁶ Section 354 of the Indian Penal Code provides: "Whoever assaults or uses criminal force . . . [on] any woman, intending to outrage her modesty or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both." India Penal Code, No. 45 of 1860; INDIA CODE (1860).

²⁶⁷ Article 14 provides that "[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." INDIA CONST. art. 14. The standard for reviewing Article 14 claims is essentially rational basis review: the classification must have a rational relationship to the object sought to be achieved. See *Girdhar v. State*, A.I.R. 1953 M.B. 147, ¶ 3. The *Girdhar* Court had no trouble concluding that the classification passed this deferential test. *Id.* ¶ 4.

that Article 15 prohibits discrimination on the basis *only* of sex.²⁶⁸ Thus, where the discrimination is based not on sex alone but “also on considerations of propriety, public morals, decency, decorum and rectitude,” the legislation does not offend Article 15.²⁶⁹ Outraging a woman’s modesty is made criminal

not merely because women are women, but because of the factors enumerated above. . . . No civilized country whose action is directed towards securing “the greatest good of the greatest number” can allow assaults or criminal force to women with intent to outrage their modesty to go unpunished and permit the position of women to be injuriously affected by chartered libertines.²⁷⁰

Although the decisions described above reflect a form of protectionism likely to perpetuate gender stereotypes and women’s subordination, protectionism has also been used in the service of overcoming women’s subaltern status. The special status of women in India’s constitutional scheme has been most effectively utilized by the Court in the area of sexual violence, as illustrated in a recent decision entitled *Satyannarayana v. Government of Andhra Pradesh*.²⁷¹ In commemoration of India’s fifty years of independence, the state of Andhra Pradesh issued a governmental order, essentially pardoning prisoners who had been sentenced to life imprisonment and had already served seven years. The order contained a number of exceptions, including one for prisoners convicted of crimes against women. That exception was challenged as violative of the equality principle contained in Article 14.²⁷²

The Indian Supreme Court rejected the challenge as a matter of constitutional law and sound policy. Article 15(3) singles women out for favorable treatment and therefore classifications by sex are explicitly allowed. Moreover, given the seriousness and pervasiveness of gender violence, the exception for crimes against women represents good social policy:

It is no exaggeration to place on record that instances of violence against women and children, particularly females, such as rape,

²⁶⁸ *Girdhar v. State*, A.I.R. 1953 M.B. 147, ¶ 5.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ (2003) 10 S.C.C. 78.

²⁷² *Id.* ¶ 6.

dowry deaths, domestic violence, bride-burning, molestation, brazen ill-treatment of horror, vulgarity and indecency are not only rampant but on phenomenal increase casting a shadow of shame on the society, the culture and governance of this country and it seems that cruelty to women and problems of battered wives have become ironically almost a worldwide phenomenon. Such a situation deserves a special treatment in the hands of the State.²⁷³

The Indian Supreme Court's protectionist attitude, however problematic in other contexts, seems warranted in the area of sexual violence because of the myriad ways in which gender violence operates as the most extreme form of gender inequality and contributes to women's continuing disempowerment. The *Satyamarayana* opinion is consistent with a series of truly stunning decisions, where the Court has stepped into the void created by the political branches, relying on principles of international law to interpret the constitutional right to life and the guarantee of gender equality to include protection from sexual harassment and to guarantee the right to work with dignity.²⁷⁴ Thus, the Indian Supreme Court has issued a detailed sexual harassment code,²⁷⁵ has held that even temporary workers have the right to maternity leave,²⁷⁶ and has decided that rape is a violation of the fundamental right to life which extends to citizens and foreigners alike.²⁷⁷ These decisions stand in sharp contrast to the role played by the U.S. Supreme Court with respect to gender violence. The different approaches of the two courts are explored in the next section.

IV. A COMPARISON OF THE COURTS' ANALYSIS OF CASES INVOLVING GENDER VIOLENCE

The contrast between the response of the Supreme Courts of the United States and India to issues of gender equality is nowhere more stark than in recent cases dealing with gender violence. The two cases that will be discussed in this section that graphically illustrate the two Courts' profound

²⁷³ *Id.* at 83.

²⁷⁴ *See, e.g., Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011 ("Gender equality includes protection from sexual harassment and the right to work with dignity.").

²⁷⁵ *Id.*

²⁷⁶ *Mun. Corp. of Delhi v. Female Workers*, A.I.R. 2000 S.C. 1274, ¶ 38.

²⁷⁷ *Chairman, Ry. Bd. v. Das*, A.I.R. 2000 S.C. 988, ¶¶ 12, 34-37.

differences are *United States v. Morrison*,²⁷⁸ where the U.S. Supreme Court struck down the civil rights remedy in the Violence Against Women Act,²⁷⁹ and *Vishaka v. Rajasthan*, where the Supreme Court of India established freedom from violence to be a fundamental constitutional right.²⁸⁰ The U.S. Supreme Court has, with few exceptions, been loathe to rely on international law in resolving domestic issues.²⁸¹ Thus, it is perhaps not surprising that when confronted with the question of the constitutionality of the Violence Against Women Act, the Court did not look to the experience of other countries or to international covenants in considering the nature of the right to be free from gender motivated violence.²⁸² The Supreme Court of India took a markedly different path, relying on principles of international law to declare a right to be free from sexual harassment and rape.²⁸³

While the different outcomes in the two cases could be explained by the different forms of federalism enshrined in the two countries' constitutions, that explanation only goes so far. To consider *Morrison* as nothing more than a reflection of the dictates of the U.S. Constitution's federalism requirements ignores the gendered aspect of federalism as it is currently conceived by a majority of the Court.²⁸⁴ Judith Resnik convincingly argues that the state/federal dichotomy reflects gendered assumptions about the appropriate

²⁷⁸ 529 U.S. 598 (2000).

²⁷⁹ *Id.* at 627.

²⁸⁰ A.I.R. 1997 S.C. 3011.

²⁸¹ Modern jurists . . . are notably lacking in the diplomatic experience of early Justices such as John Jay and John Marshall, who were familiar with the law of nations and felt comfortable navigating by it. Today's jurists, furthermore, are relatively unfamiliar with interpreting instruments of international law Although the recent decisions of the Supreme Court do not offer much hope for the immediate future, I look forward to the day when the Supreme Court, too, will inform its opinions almost all the time with a decent respect to the opinions of mankind.

Justice Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owning a Decent Respect to the Opinions of Mankind*, Address at the 1994 Annual Meeting of American Society of International Law, AM. SOC'Y INT'L L. NEWSLETTER, Mar. 1, 6-7 (1994). See Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271 (2003); Judith Resnik, *Feminist Justice, At Home and Abroad: Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393 (2002).

²⁸² *Morrison*, 529 U.S. at 598.

²⁸³ *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011.

²⁸⁴ See Resnik, *supra* note 281, at 408; see also Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 420 (2003) (discussing *United States v. Morrison*).

use of governmental power.²⁸⁵ Issues relating to domestic life are traditionally relegated to the state whereas issues of commerce are entrusted to the federal government.²⁸⁶ Professor Resnik explains:

[I]n this federation, the jurisdictional divide between state and federal courts is gender-coded, infused with associations that identify women with families, define women's legal issues as problems of families and violence, and locate disputes about such issues within the jurisdiction of state courts. While some readers may hesitate before sharing the assumption of jurisdiction as gendered, most will be comfortable with a parallel claim: that jurisdictions have hierarchies, and that, in this country, federal jurisdiction is assumed to be a mark of a matter's import. Therefore, to refuse to permit something to become a federal case is to relegate it to a somewhat lesser stature, as about local—as contrasted with national—legal requirements.²⁸⁷

Professor Resnik relies on a fifty-year history of judicial reluctance to establish federal gender bias task forces and to federalize laws involving the non-payment of child support, child custody, and violence against women because gender bias is seen to be a problem only at the state level.²⁸⁸

As is so often the case, how the issue is framed determines how it is to be resolved.²⁸⁹ The issue before the Court in *Morrison* could have been whether violence against women constitutes a denial of the right to equality.²⁹⁰ That was not, however, the way the Court approached the issue. Instead, the

²⁸⁵ Resnik, *supra* note 281, at 408.

²⁸⁶ *Id.*; see also Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1 (2000); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117 (1996).

²⁸⁷ Resnik, *supra* note 281, at 408.

²⁸⁸ *Id.* at 412-15. While state courts reflect gender bias, "we have confidence that the quality of the federal bench and the nature of federal law [will] keep such problems to a minimum." *Id.* at 413 (citing FED. COURTS STUDY COMM. REPORT (Apr. 2, 1990)).

²⁸⁹ For example, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), the majority framed the issue as whether homosexuals have a fundamental constitutional right to engage in sodomy, whereas the dissent viewed the issue as the right to be let alone.

²⁹⁰ See, e.g., Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 251, 262 (2003) (arguing that "violence against women is an expression of gender inequality").

question presented was whether or not Congress exceeded its power in making freedom from gender violence a national civil right.²⁹¹ More specifically, the issue the Court addressed was whether Congress was properly acting within its commerce clause power or its power to enforce the Fourteenth Amendment when it enacted Section 13981(c) of the Violence Against Women Act of 1994, which created a private cause of action in favor of a victim of gender-motivated violence.²⁹²

The Violence Against Women Act (VAWA) was passed in 1994 after four years of hearings where Congress heard testimony from physicians, law professors, rape survivors, victims of domestic abuse, and representatives of law enforcement agencies and private business.²⁹³ The record also included reports on gender bias from twenty-one states plus eight highly detailed reports from Congress and its committees attesting to the magnitude of the problem of gender violence.²⁹⁴ Attorneys General from thirty-eight states supported the legislation.²⁹⁵ Although it was only the private civil remedy that was at issue in *Morrison*, VAWA also provided federal criminal remedies, provisions for funding of local domestic violence programs, and interstate enforcement of orders of protection.²⁹⁶

The statistics regarding gender violence presented to Congress are truly staggering:

Three out of four American women will be victims of violent crimes sometime during their life Violence is the leading cause of injuries to women ages 15-44 As many as 50 percent of homeless women and children are fleeing domestic violence Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others Battering "is the single largest cause of injury to women in the United States" An estimated 4 million American women are battered each year by their husbands or partners Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners Between 2,000 and

²⁹¹ *Morrison*, 529 U.S. at 598.

²⁹² *Id.* at 601.

²⁹³ *Id.* at 629-30 (Souter, J., dissenting).

²⁹⁴ *Id.* at 630-31.

²⁹⁵ *Id.* at 653.

²⁹⁶ Those provisions survive the Court's decision in *Morrison*. *Id.* at 613 n.5.

4,000 women die every year from [domestic] abuse Arrest rates may be as low as 1 for every 100 domestic assaults Partial estimates show that violent crime against women costs this country at least 3 billion—not million, but billion—dollars a year Estimates suggest that we spend \$5 to \$10 billion a year on health care, criminal justice, and other social costs of domestic violence.²⁹⁷

Congress was presented with similarly horrifying findings about the incidence of rape:

[The incidence of] rape rose four times as fast as the total national crime rate over the past 10 years According to one study, close to half a million girls now in high school will be raped before they graduate [One hundred twenty-five thousand] college women can expect to be raped during this—or any—year Three-quarters of women never go to the movies alone after dark because of the fear of rape and nearly 50 percent do not use public transit alone after dark for the same reason [Forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims Less than 1 percent of all [rape] victims have collected damages [A]n individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months Almost 50 percent of rape victims lose their jobs or are forced to quit because of the crime's severity.²⁹⁸

This “mountain of data”²⁹⁹ convinced Congress that gender violence was far more than a collection of individual wrongs and simply a local problem; that it was a widespread “practice of social inequality carried out on an individual level.”³⁰⁰ Yet the Court refused to embrace the paradigm that had

²⁹⁷ *Id.* at 631-32.

²⁹⁸ *Id.* at 633-34.

²⁹⁹ *Id.* at 628.

³⁰⁰ Goldfarb, *supra* note 290, at 254.

been used to combat race discrimination, finding instead that Congress lacked the power to convert a local problem into a federal one.³⁰¹

The Supreme Court of India presents a stark contrast. As noted earlier, the Court has embraced international law to support its finding that women have a constitutional right to be free from sexual harassment and that rape constitutes a violation of the fundamental right to life.³⁰² While the U.S. Supreme Court, under the rubric of a federalism analysis, refused to recognize the link between gender violence and pervasive inequality, the Indian Supreme Court views violence against women in its larger context as an extreme form of gender inequality and as contributing to women's disempowerment.

The Court's activism in this area has been fueled largely by the women's movement, which has played a major role in the Court's jurisprudence and which was galvanized by the Court's failure to do justice in a case involving the rape of a young woman by police officers.³⁰³ The catalyst for change took the form of a case involving the rape of a sixteen-year-old "tribal girl" by two policemen in the police station. The lower court acquitted the officers on the ground that the victim was "habituated to sexual intercourse" having eloped with her boyfriend, and thus could not be raped.³⁰⁴ The High Court reversed, finding that helpless surrender by threats or fear cannot be considered consent.³⁰⁵ In *Tuka Ram v. Maharashtra*,³⁰⁶ known as the *Mathura* case, the

³⁰¹ Relying on *United States v. Lopez*, 514 U.S. 549 (1995), the Court held that Congress had exceeded its power under the commerce clause because gender violence was local, non-economic activity, and because VAWA contained no jurisdictional element. *Morrison*, 529 U.S. at 627. The Court also rejected Section 5 of the Fourteenth Amendment as an alternative source of congressional power, because the Fourteenth Amendment does not reach private conduct and because the legislation lacked congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. *Id.* at 625-26.

³⁰² See, e.g., *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011 ("Gender equality includes protection from sexual harassment and [the] right to work with dignity . . ."); *Apparel Export Promotion Council v. Chopra*, (1999) 1 S.C.C. 759, ¶ 25 (holding that sexual harassment in the workplace results in a violation of the fundamental right to gender equality and the right to life and liberty); *Chairman, Ry. Bd. v. Das*, A.I.R. 2000 S.C. 988 (holding that rape is a violation of the fundamental right to life).

³⁰³ *Tuka Ram v. Maharashtra*, (1979) 1 S.C.R. 810.

³⁰⁴ *Id.* ¶ 3.

³⁰⁵ Mere passive or helpless surrender of the body and its resignation to the other's lust induced by threats or fear cannot be equated with the desire or will, nor can [it] furnish an answer by the mere fact that the sexual act was not in opposition to such desire or volition. . . . On the [sic] other hand, taking advantage of the fact that Mathura was involved in a complaint filed by her brother and that she was alone at the police station at the dead hour of night,

Indian Supreme Court reversed the conviction on the ground that the victim must have been lying since she bore no visible scars.³⁰⁷ The decision served to energize the women's movement, which effectively campaigned for change in the courts' treatment of rape cases.³⁰⁸

The Indian Supreme Court responded. In 1995, the Court held that corroboration cannot be required in a rape case.³⁰⁹ In the same year, in a case involving the rape of four "helpless tribal women" on a train followed by rough and humiliating treatment by the police and further trauma inflicted by the criminal prosecution, the Court directed the National Commission for Women to develop a mechanism for providing rehabilitation and compensation to rape victims "to wipe out the tears of such unfortunate victims."³¹⁰ The Court mandated legal representation for rape victims, anonymity of rape victims, and compensation.³¹¹

One of the most remarkable examples of the Court's activism, and the case that stands in sharp contrast to the U.S. Supreme Court decision in *Morrison* is *Vishaka v. Rajasthan*.³¹² *Vishaka* was a class action brought by social activists and NGOs in response to the gang rape of a social worker in Rajasthan. Since sexual violence is a recurring phenomenon, and since the legislature had not acted, the Court concluded that it must design rules to

it is more probable that the initiative for satisfying the sexual desire must have proceeded from the accused, and that victim Mathura must not have been a willing party to the act of the sexual intercourse.

Id. ¶ 4 (citing the High Court).

³⁰⁶ *Id.*

³⁰⁷ *Id.* ¶ 5.

³⁰⁸ Jaising, *supra* note 16, at 304 (discussing the aftermath of the *Mathura* decision).

³⁰⁹ *Singh v. Madhya Pradesh*, A.I.R. 1995 S.C. 2472.

In *State of Maharashtra v. Chandraprakash Kewalchand Jain* this Court speaking through one of us (Ahmadi, J.) had occasion to point out that a woman who is a victim of sexual assault is not an accomplice to the crime but is a victim of another person's lust and therefore her evidence need not be tested with the same amount of suspicion as that of an accomplice. She is not in the category of a child witness or an accomplice and therefore the rule of prudence that her evidence must be corroborated in material particulars has no application, at the most the court may look for some evidence which lends assurance.

Id. ¶ 7.

³¹⁰ *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 S.C.J. 94, ¶ 18.

³¹¹ *Id.* ¶ 15.

³¹² A.I.R. 1997 S.C. 3011.

combat sexual harassment.³¹³ In interpreting the fundamental rights contained in the Indian Constitution, the Court looked to international law, concluding that “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”³¹⁴ Thus, in India, gender equality should be interpreted according to international conventions and norms in the absence of any domestic law occupying the field.

The Court in *Vishaka* pointed to key provisions of the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW),³¹⁵ and concluded that “[g]ender equality includes protection from sexual harassment and the right to work with dignity.”³¹⁶ Having reached this legal conclusion, the Court proceeded to draft a detailed sexual harassment code and impose a duty on employers, seemingly public and private, to prevent sexual harassment and to provide a grievance procedure for employees.³¹⁷

Another remarkable case dealing with sexual harassment is *Apparel Export Promotion Council v. Chopra*,³¹⁸ involving a complaint of harassment of an employee by a supervisor. The supervisor allegedly tried to sit very close to the employee and touch her and tried to molest her in the elevator, causing her to hit the emergency switch.³¹⁹ The Enquiry Officer removed the supervisor from his position, finding that he “had acted against moral sanctions and that his . . . acts against Miss X did not withstand the test of decency and modesty.”³²⁰ The supervisor successfully challenged his removal in the High Court of Delhi, which concluded that the supervisor merely *attempted* a molestation which did not warrant his removal, although back pay was denied.³²¹ The Division Bench agreed.³²²

³¹³ “In the absence of legislative measures, the need is to find an effective alternative mechanism to fulfil this felt and urgent social need.” *Id.*

³¹⁴ *Id.*

³¹⁵ CEDAW, *supra* note 5. India signed CEDAW on July 30, 1980. U.N. Division for the Advancement of Women, Parties to CEDAW, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Mar. 6, 2006).

³¹⁶ *Vishaka v. Rajasthan*, A.I.R. 1997 S.C. 3011.

³¹⁷ *Id.* In *Medha Kotwal Lele v. U.O.I.*, No. 173-177/1999 (2004), twelve states were fined 10,000 rupees each for non-implementation of the Court’s guidelines in *Vishaka*.

³¹⁸ A.I.R. 1999 S.C. 625.

³¹⁹ *Id.* ¶ 3.

³²⁰ *Id.*

³²¹ In the totality of facts and circumstances, ends of justice would be met if the petitioner is reinstated in service but he would not be entitled to any back

The Indian Supreme Court reversed, restoring the order of removal and finding error in the use of a formalistic approach to the meaning of "molestation."³²³ Citing *Vishaka*, the Court held that sexual harassment encompasses unwelcome sexual advances and verbal or physical conduct with sexual overtones creating a hostile environment.³²⁴ Relying on international instruments, the Court found that sexual harassment in the workplace results in a violation of the fundamental right to gender equality and the right to life and liberty.³²⁵ In other words, sexual harassment is a constitutional wrong.

Another case where the Court treated gender violence as a constitutional wrong is *Chairman, Railway Board v. Das*.³²⁶ This writ was filed in the Calcutta High Court by a public interest lawyer, referred to as a "[priest] in the temple of justice,"³²⁷ on behalf of a Bangladeshi woman who was gang raped by employees of the railroad and then raped again by her rescuer. The High Court ordered the railway to pay 100,000 rupees as compensation.³²⁸ The railway appealed, arguing that the victim was a foreigner and therefore not entitled to constitutional protection, that the incident was only an individual offense, and that the railway should not be vicariously liable.³²⁹

With respect to the claim that the victim was not a citizen, the Court noted that some of the fundamental rights, such as Articles 15, 16 and 19, refer to "citizens," while others, such as Article 14, refer to "persons."³³⁰ Despite this, the Court concluded that "life" as used in Article 21 must be interpreted in a manner consistent with the Universal Declaration of Human Rights, and in a manner consistent with previous interpretations by the Court.³³¹ Thus, the Court held that the protections of Article 21 extend beyond citizens to any

wages. The Council shall consider this period as on duty and would give him consequential promotion to the petitioner. He shall be entitled to all benefits except back wages. The petitioner shall be posted in any other office outside Delhi, at least for a period of two years.

Id. ¶ 13.

³²² The Division Bench "also concluded that since the respondent had not actually molested Miss X and had only tried to assault her and had 'not managed' to make any physical contact with her, a case of his removal from service was not made out." *Id.* ¶ 14.

³²³ *Id.* ¶ 22.

³²⁴ *Id.* ¶ 23.

³²⁵ *Id.* ¶ 25.

³²⁶ A.I.R. 2000 S.C. 988.

³²⁷ *Id.* ¶ 16.

³²⁸ *Id.* ¶ 4.

³²⁹ *Id.* ¶¶ 19, 38.

³³⁰ *Id.* ¶ 28.

³³¹ *Id.* ¶ 32.

persons and the right to life includes the right to live with human dignity. Since rape is a violation of the fundamental right to life under Article 21, the victim is entitled to compensation.³³²

A recent decision by the High Court of Rajasthan, *Suo Moto v. Rajasthan*,³³³ graphically illustrates the efforts of the Indian judiciary to address the failure of the criminal justice system to adequately respond to the increased prevalence of violence against women. A justice of the High Court of Rajasthan read a newspaper article on May 12, 2005 reporting that a German tourist had been raped the previous night by a rickshaw driver and an accomplice.³³⁴ The following day, the judge, acting *suo moto*,³³⁵ invoked the jurisdiction of the High Court over fundamental rights and entered an interim order directing the police to conduct and complete an investigation within three days; the criminal court judge to ensure that, if a charge were filed, the trial would be completed within one month; the superintendent of police to ensure the safety of the victim; and the State of Rajasthan to pay the victim's lodging and boarding expenses for the period necessitated by the investigation and trial.³³⁶

As a result of this order, the investigation was completed and the charge sheet filed against the two alleged perpetrators within thirty-six hours, and the trial was concluded within twenty days, a time frame unprecedented in India.³³⁷ The prosecution called twenty-one witnesses, including the villagers who had responded to the victim's screams for help. The defendants were represented by attorneys who attempted to adjourn the case to obtain information about the victim's character, which was denied based on prohibitions on inquiring about a victim's character.³³⁸ The defendants were found guilty of rape and sentenced to life imprisonment.³³⁹

³³² *Id.* ¶¶ 36-37.

³³³ D.B. Civil Writ Petition No. 2856/2005, June 2005 (decision on file with author) [hereinafter Writ Petition].

³³⁴ *Id.* ¶ 1.

³³⁵ "Suo moto" refers to the power of a judge of the High Court to institute the action on his or her own, without the aggrieved party's involvement. See *Gautam v. Chakraborty*, A.I.R. 1996 S.C. 922.

³³⁶ Writ Petition, *supra* note 333, ¶ 4.

³³⁷ *Id.* ¶ 5.

³³⁸ The Indian Evidence Act was amended in 2003 to provide that "in a prosecution for rape or [an] attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character." Indian Evidence (Amendment) Act, No. 4 of 2003, INDIA CODE (2003).

³³⁹ Writ Petition, *supra* note 333, ¶ 6.

Relying on principles of international law, the High Court used this case as a "catalyst" to reform the criminal courts' treatment of cases involving sexual violence. In addition to ordering the State of Rajasthan to pay 300,000 rupees to the victim,³⁴⁰ the Court ordered the State to set up a special cell to ensure prompt investigation and trial of all charges of sexual violence; to provide financial, medical, psychological and social assistance to all victims; and to organize sensitivity training for judges and police officers.³⁴¹ Although local editorials highlighted the fact that this order was precipitated by an attack on a tourist and motivated by a concern about its effect on the tourism industry, the breadth of the order, if implemented, may reform the response of the criminal justice system to all sexual violence cases.

V. CONCLUSION: EVALUATION OF THE COURTS' APPLICATION OF EQUALITY PRINCIPLES

To what extent do the competing theories of equality reflect and adequately address different cultural conditions within the two countries? Has either Court played a meaningful role in advancing the guarantee of equality for its nation's women?

In the United States, the Court's rigid adherence to formal equality theory has worked to undo the protectionism of the past and the patriarchy underlying that paternalism. Formal equality theory, however, goes only so far, providing equality to women only within a sphere of activity occupied by men. Stephanie Wildman refers to this as the comparison model of equal protection analysis.³⁴² In order for women to state an equal protection claim, there must be a point of comparison; men and women must have been treated differently. By requiring the comparison, the approach fails to address experiences not shared by men, most notably pregnancy and sexual violence.³⁴³ A formal equality model necessarily proceeds from an assumption of a male norm.³⁴⁴

³⁴⁰ Three hundred thousand rupees is approximately \$7,150.

³⁴¹ The order directs that investigations must be completed within one week and trials must be completed within four months. *Id.* ¶ 45.

³⁴² Wildman, *Vision and Revision*, *supra* note 130, at 712-13; *see also* Wildman, *Legitimation*, *supra* note 130.

³⁴³ *See* Kay, *supra* note 130, at 1 (advocating equality of opportunity rather than formal equality).

³⁴⁴ *See* Becker, *supra* note 130, at 36 (noting that formal equality gives women only the right to what men are entitled to "under the rules and requirements worked out by and for men . . .").

Geduldig v. Aiello,³⁴⁵ discussed earlier, illustrates the problem. The U.S. Supreme Court found that California's disability insurance program, which excluded pregnancy-related disabilities, did not violate equal protection because men were not receiving anything that women were not.³⁴⁶ That approach, however, fails to account for the consequences that women may experience in the workplace that are related to pregnancy. In fact, the dissent in *Geduldig* noted that the Equal Employment Opportunity Commission had found that women were experiencing "systematic and pervasive discrimination" in employment opportunities and benefits solely on the basis of their childrearing role.³⁴⁷

Geduldig demonstrates the two deficiencies of the formal equality model as utilized by the U.S. Supreme Court in addressing gender inequities. First, it reflects a male normed view of equality: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."³⁴⁸ Since men cannot become pregnant, women are not being denied anything that men get. Secondly, it completely ignores the radically different effects that seemingly gender-neutral laws can have on men and women, effects that often reflect the responsibilities that women continue to shoulder relating to child care and housework.³⁴⁹

If the goal of equality is full citizenship stature, or, in Justice Ginsburg's words, "[the] equal opportunity to aspire, achieve, participate in and contribute to society based on . . . individual talents and capacities,"³⁵⁰ then surely the rigidity of formal equality must yield to a more substantive model. A model of substantive equality would be less concerned with insuring identical treatment, and more concerned with whether laws or policies serve to perpetuate or reinforce historic patterns of subordination. Under this approach, differences would be recognized and taken into account, not as a form of

³⁴⁵ 417 U.S. 484 (1974).

³⁴⁶ *Id.* at 496-97.

³⁴⁷ *Id.* at 502 (Brennan, J., dissenting).

³⁴⁸ *Id.* at 496-97.

³⁴⁹ See generally SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 134-69 (1989); Suzanne M. Bianchi et al., *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79 SOC. FORCES 191 (2000); Scott Coltrane, *Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work*, 62 J. MARRIAGE & FAM. 1208 (2000).

³⁵⁰ *United States v. Virginia*, 518 U.S. 515, 532 (1996).

protectionism, but with the goal of eliminating the unequal consequences of sex differences, whether biologically or culturally determined.³⁵¹

In India, the Supreme Court's treatment of equality claims is more multi-layered, reflecting the Constitution's commitment to the use of protective discrimination to achieve the goal of equality. Formal equality theory has been employed to uphold classifications based on real or socially constructed differences between men and women. Many of these cases represent simple protectionism, revealing underlying patriarchal norms used to exclude women from the workplace and from civic responsibility. These cases serve to perpetuate the stereotype of women as weak,³⁵² as destined for marriage and motherhood,³⁵³ and as passive with respect to sexual activity.³⁵⁴ Although Article 15(3)'s authorization of laws designed to benefit women holds the promise of a substantive form of equality, it has at times been used to reinforce sexual stereotypes in a way likely to impede women's full participation in society.

The Indian Supreme Court's interpretation of the constitutional proscription of discrimination on the basis of sex *only* has also served to perpetuate sexual stereotypes. As Supreme Court advocate Indira Jaising has noted, this interpretation "has enabled courts to segregate sex from gender and uphold blatantly discriminatory legislation."³⁵⁵ The *Air India* case, discussed earlier, is among the most graphic examples of this myopia.³⁵⁶

However, alongside this series of cases illustrating protectionism in the service of perpetuating subordination, the Court has also utilized protectionism to overcome subordination. The Court has repeatedly and effectively relied on Article 15(3) and on international covenants to address pervasive disadvantages suffered by women, as in the Court's interpretation of personal laws and, most notably, in the Court's jurisprudence regarding violence directed at women.³⁵⁷ While these cases could be viewed as protectionist, they

³⁵¹ For articles advocating different versions of substantive equality theory, see *supra* note 130.

³⁵² See, e.g., *Mahsi v. Union of India*, (1995) 1 S.C.J. 90.

³⁵³ See, e.g., *Air India v. Meerza*, (1982) 1 S.C.R. 438.

³⁵⁴ See, e.g., *Vishnu v. Union of India*, (1985) 1 S.C.R. 741; see also *supra* note 226 and accompanying text; Jaising, *supra* note 16, at 295 (referring to the Indian Supreme Court's reliance on Article 15(3) as justifying the "regulation of female sexuality based on the *weaker sex* approach to gender issues").

³⁵⁵ Jaising, *supra* note 16, at 294.

³⁵⁶ See *supra* notes 240-46 and accompanying text.

³⁵⁷ See *supra* notes 302-41 and accompanying text.

do not serve to perpetuate stereotypes that have historically served to perpetuate power disparities. Rather, these cases reflect the Court's willingness to treat gender violence as a breach of society's commitment to equality. The Indian Supreme Court has recognized what the U.S. Supreme Court failed to acknowledge in *Morrison*, that violence against women operates to prevent women from operating as full and equal participants in society.³⁵⁸

Further, drawing on constitutional provisions that authorize and embody substantive equality theory, the Supreme Court of India has consistently upheld reservations for women in legislative bodies, municipal corporations, and public employment.³⁵⁹ These cases signify the Court's recognition that compensating for discrimination is not an exception to equality but a means of achieving equality.³⁶⁰

Ultimately, the roles of the Supreme Courts of India and the United States reflect the differences between the two constitutional regimes. Although both constitutions make equality a core value and prohibit the State from denying equal protection of the laws, the Indian Constitution also contains a positive grant of power to the government to take steps to eliminate inequality. This mandate is not found in the U.S. Constitution, and the U.S. Supreme Court has not interpreted the equality guarantee to confer any positive rights. Instead, the U.S. Supreme Court has adhered to formal equality theory, initially to rely on women's weak physical structure and maternal function to uphold gender classifications and, more recently, to deny the existence of gender differences to strike down sex classifications.³⁶¹ The Indian Supreme Court has issued a comparable set of formal equality decisions, although it has not meaningfully moved beyond the protectionist stage. However, the Indian Supreme Court, relying on constitutional provisions and international covenants, has been willing to deviate from its adherence to formal equality theory. The Court has recognized that formal equality can stand in the way of true equality and, at least with respect to interpreting personal laws, upholding reservations for women, and seeking to insure women's freedom from sexual violence, has

³⁵⁸ See *supra* note 302.

³⁵⁹ In addition to Article 15(3), which authorizes special provisions for women, and Article 243D which authorizes reservations for women on panchayats, India's Constitution explicitly authorizes reservations for Scheduled Castes, Scheduled Tribes, and other backward classes. See *supra* note 148.

³⁶⁰ See, e.g., *Indra Sawhney v. Union of India*, (1992) 3 S.C.C. 212.

³⁶¹ See *supra* notes 31-144 and accompanying text.

adopted a jurisprudence willing to acknowledge and compensate for disadvantage.³⁶²

So long as society remains riddled with power disparities between men and women, and so long as patriarchy remains deeply embedded in the culture, formal equality theory will fail to achieve gender justice. The goal of an egalitarian society will only be achieved when the courts employ a more result-oriented methodology—a methodology reflected in the Supreme Court of India's recognition that the equality imperative does not merely enjoin discriminatory state conduct but also requires positive protection and corrective action by the state.

³⁶² See *supra* notes 164-223, 271-77, 302-32 and accompanying text.