SUPREME COURT NARRATIVES ON EQUALITY AND GENDER DISCRIMINATION IN EMPLOYMENT: 1971-2002

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INTRODUCTION

In 1971 the Supreme Court held for the first time that the Constitution forbid discrimination against women.[1] Reversing course from the earlier part of the century when it upheld protective legislation limiting women's ability to work, the Court thus entered the national conversation on women's roles sparked by the modern feminist movement. One of its contributions to the debate was to articulate a new set of legal rules to govern expanding notions of equality and gender discrimination in the private sphere of the family and the public sphere of work.

While formulating the legal standard by which to judge gender discrimination, the Court engaged in a parallel discourse about feminism and equality and the proper role of women that shaped its decisions. It defined the terms discrimination and equal protection not just by applying legal precedents and constitutional and other jurisprudential doctrines, but also by drawing on the cultural beliefs, values and ideologies swirling around it and within its justices.[2] As Amsterdam and Bruner describe in their book *Minding the Law*, judicial decision making requires more than "do[ing] law";[3]

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[1] *See* Reed v. Reed, 404 U.S. 71 (1971) (invalidating a state law under the Equal Protection Clause that gave men preferential treatment as administrators to an estate when several people, both male and female, were entitled to become administrators).

[2] One of the primary studies supporting the impact of extralegal factors on decision making is Segal and Spaeth's analysis of Supreme Court decisions since 1953, which demonstrates that whether a judge is liberal or conservative will be a more accurate predictor of case outcomes than any specific facts or legal principles. *See* JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). For an earlier work on ideology and the Supreme Court, see GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963 (1965). For a classic work on the view of the Court as a political, and not just legal institution, see Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policymaker*, 6 J. PUB. L. 279, 293 (1957) (arguing that the Court is inevitably a part of the dominant alliance); *see also* GERALD ROSENBERG, THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that the Court followed, not led on such contentious social issues as abortion rights and civil rights).

[3] ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 287 (2000) (exploring how the Court's decisions about race, family law and the death penalty are shaped by cultural

it also involves justices "convincing themselves and others both how things are and how they really are."[4]

Even a cursory look at historical legal decisions reveals this process. The Court's view in *Bradwell v. Illinois* that "the natural and proper timidity and delicacy [that] belongs to the female sex evidentially makes her unfit for the occupation of civil life"[5] provides a glimpse into the social constructions of gender during the latter part of the nineteenth century. Modern Supreme Court decisions still draw from such social constructs. A full understanding of these decisions is thus lacking without examining these cultural narratives.[6] Often those narratives are so woven into our consciousness that we fail to see them, just as the justices in *Bradwell* most assuredly contended that they were merely "doing law" when they barred women from the practice of it. To unearth this often-invisible social process, I use the social science research methodology of content analysis to examine and uncover systematically the different narratives woven by the Court on equality and gender from 1971 through the present, focusing on the public sphere of employment.

Through these thirty odd years, as more women entered the work place and male dominated professions, the Court issued forty-one decisions that expanded and contracted women's opportunities and status in the workplace. Using as its source the Constitution and various civil rights laws, including the Equal Pay Act[7] and Title VII of the Civil Rights Act,[8] the Court not only defined equality in the legal sense, but in the cultural, political and social sense as well. As it devised the constitutional test for gender discrimination and interpreted these laws, the Court drew on various non-legal formulations of equality to decide such issues as the equalization of benefits and pay scales, sexual harassment in the workplace and how to treat differences between the sexes.

To uncover the dominant themes about equality employed by the Court, I apply a constructionist approach to content analysis in which I identify "interpretive packages" or "frames" from the text.[9] To establish

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norms, drawing from multiple disciplines, including literary theory, linguistics, psychology and historiography).

[4] *Id.* at 286.

[5] 83 U.S. 130, 141 (1872).

[6] *See, e.g.*, Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Case*, 99 COLUM. L. REV. 739, 765-66 (1999) (discussing how Justice White's preconceived understanding of lesbian and gay relationships in *Bowers v. Hardwick* led him to view such relationships as so different than heterosexual activities that they were undeserving of the privacy protections afforded heterosexuals in cases such as *Griswold v. Connecticut*).

[7] Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2003) ("No employer . . . shall discriminate . . . between employees on the basis of sex. . . .").

[8] Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) *et seq.*

[9] William Gamson & Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power,*

these themes, various notions of equality, drawing from multiple sources, including feminist, legal and political philosophy, are identified. Through an analysis of the Court's narratives on gender discrimination, I then look to see which of these definitions of equality the Court utilized in the forty-one cases it decided on gender discrimination in employment since 1971.

Part I places the Court's narrative on gender and equality in its historical, cultural and social context by describing the growth of the feminist movement beginning with its origins in the nineteenth century and continuing to the present, focusing primarily on women's struggle for equality in the workplace. Part II describes the methodology used to conduct the content analysis, including the various formulations of equality. The methodology is applied and the Court's narrative discussed in Part III. The goal of this section is to apply the same level of scrutiny to the Court's social and cultural narratives as is routinely applied to its legal narratives, thus providing a clearer understanding of judicial decision-making on gender and equality.

I. HISTORICAL AND PRESENT CONTEXT

The first wave of feminism in the nineteenth century fought for women to be recognized as individuals distinct from their husbands.[10] The idea that individuals were naturally equal and entitled to govern themselves, first recognized during the seventeenth-century Enlightenment, was not always applied to women.[11] Men commanded the economic and public sphere, while women were relegated to second class status and a supporting role in the home, as the law prevented women upon marriage from suing or being sued, inheriting, entering into contracts, making wills or keeping their own earnings.[12] Since property ownership was at the root of citizenship,[13] nineteenth-century feminists believed that women could achieve economic security by permitting women to keep their own property.[14] The workplace was considered a secondary and less preferred arena for women, suitable only for poor women, African American women and white women who

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95 AM. J. SOC. 1 (1989).

[10] *See* ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY 26, 43 (2001) [hereinafter KESSLER-HARRIS].

[11] *See id.* at 22.

[12] These common law disabilities had their genesis in the English law courts. A comprehensive commentary can be found in, BLACKSTONE'S COMMENTARIES (St. George Tucker ed. 1803). *See also* RICHARD MORRIS, STUDIES IN THE HISTORY OF AMERICAN LAW 173 (1964 2d ed.) (1959).

[13] Initially, only property owners could vote in the new American republic. While this requirement was eliminated by the nineteenth century, the link between economic self-sufficiency and political participation persisted throughout the century. *See* KESSLER-HARRIS, *supra* note 10, at 7.

[14] *See id.* at 10.

lacked male support.[15] Thus, the early struggles for women's rights focused not on equality in the workplace, but on securing for the propertied class a more equal status for women.[16]

When attention turned to women's status in the workplace, it was to protect them. Throughout the end of the nineteenth century and into the twentieth, state legislatures at the urging of women reformers and organized labor, passed restrictive labor laws limiting women's work hours, prohibiting night work, mandating rest times and limiting the weight a women could lift at work.[17] Unlike the earlier feminist property reforms, these restrictions were directed at the mostly poor women who populated the workforce. Some viewed these laws as necessary to protect women from the worst kinds of exploitation in the workplace as capitalism ran rampant posing a risk to workers' health and safety. But they had another effect as well: preventing work from sapping women of the energy and time needed for their maternal roles. Men, who also labored under exhausting and exploitative conditions, were not protected because of their status as breadwinners.

This double standard where men could compete unfettered in the workplace and women could not, was upheld by the Supreme Court in 1908 in *Muller v. Oregon*.[18] The Court found that, while the Fourteenth Amendment protected men's freedom to contract without limitation, the same freedom was not applicable to women. In upholding legislation limiting women's workdays to ten hours in certain occupations, the Court explained that "her physical structure and the proper discharge of her maternal functions-having in view not merely her own health, but the well being of the race-justify legislation to protect her from the greed as well as the passion of man."[19]

The decision and the campaign for protective legislation for women, highlighted tensions within the early feminist movement that would repeatedly resurface throughout women's struggle for equal rights. The dividing line for feminists then (and now) was whether equality meant attending to differences or ignoring them. The many female reformers who had advocated for protective legislation saw *Muller* as a victory for women.[20]

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[15] *See* Mimi Abramovitz, *Learning From the History of Poor and Working Class Women's Activism*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 118 (2001) (discussing women wage earners in the early nineteenth century).

[16] Most of these impediments were removed by mid-century with New York's 1848 law considered a model for other states that soon followed suit. New York's law permitted married women to own property and inherit. Laws permitting women to retain their wages and in general engage in contracts followed a few decades later. *See* Kessler-Harris, *supra* note 10, at 26.

[17] *See* KESSLER-HARRIS, *supra* note 10, at 30-33.

[18] 208 U.S. 412 (1908). *Muller* was a challenge to Oregon's labor law that limited women to ten hours of work per day in laundries, factories or other places with mechanical equipment.

[19] *Id.* at 422.

[20] The maternalists, as they were called, were primarily middle class women aligned with various labor organizations. They were responsible for a wide variety of reforms during this time

To them "equality required different treatment"[21] because of the need to accommodate women's family obligations. Legislation regulating work hours and conditions was also considered "a kind of social democracy for poor mothers," the first step in demonstrating the need for state regulation of capitalism's worst excesses.[22] Other feminists viewed these laws as reinforcing women's second-class status by putting family obligations and women's maternal roles first.[23]

In 1935 men and women's differing attachment to the workplace was enshrined in the Social Security Act when the federal government, in response to the Depression, created an array of programs to address the economic hardship sweeping the nation.[24] Those with an attachment to the workplace, primarily men,[25] were entitled to more generous and less stigmatizing benefits including, pensions, unemployment insurance and work programs. Poor women and their children received assistance through the Aid to Dependent Children program, a means-tested program that provided only bare sustenance. Unlike in other industrialized countries, benefits were tied to work, not citizenship, leaving women in a double bind. Protective legislation and cultural norms discouraged women from working, but it was only work that could create economic security, including retirement pensions and other benefits.

While women, especially poor and African-American women, worked, many had only a transient connection to the workforce. These women's work patterns were spotty as they worked only a few years before they were married or to provide "pin money." Work patterns were highly segregated with women primarily concentrated in female occupations such as the service industry and as secretaries.[26] This changed during World War II when

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period, including minimum wage laws for women, mother's pensions, maternal health clinics and the creation of a permanent Women's Bureau within the Department of Labor. *See* KESSLER-HARRIS, *supra* note 10, at 33-35; *see also* ROBYN MUNCY, CREATING A FEMALE DOMINION IN AMERICAN REFORM, 1890-1935 (1991); Landon R.Y. Storers, *Gender and the Development of the Regulatory State: The Controversy over Restricting Women's Night Work in the Depression Era South*, 10 J. POL'Y HIST. 183 (1998).

[21] Jo Freeman, *From Protection to Equal Opportunity: The Revolution in Women's Legal Status, in* WOMEN, POLITICS AND CHANGE 457, 459 (Louise A. Tilly & Patricia Gurin eds., 1990).

[22] Sybil Lipshultz, *Hours and Wages: The Gendering of Labor Standards in America*, 8 J. WOMEN'S HIST. 114 (1996). She also argues that the maternalists were in fact social feminists who had a rights-based view of democracy that encouraged workers to agitate for reform of the capitalist system. Women were chosen as "the legal door opener" to argue this approach in the courts. *Id.* at 115.

[23] The National Woman's Party who first introduced the ERA into Congress in 1923 represented this group. *See* KESSLER-HARRIS, *supra* note 10, at 190.

[24] For a comprehensive discussion of the origins of the Social Security Act, see THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES (1995); MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (1997); MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN (1996).

[25] Male breadwinners headed eighty-five percent of all families at the time. *See* KESSLER-HARRIS, *supra* note 10, at 4.

[26] For a comprehensive discussion of gender discrimination in employment both

women filled the jobs left vacant by men sent to the battlefield.[27] Although the vast majority of women wanted to continue working after the war, ingrained cultural and social beliefs about the primacy of men in the workplace, coupled with deference to returning veterans, led women to return quietly to the domestic sphere.[28]

Expectations of a more comfortable living standard and increased educational opportunities encouraged women, especially of the middle class, to work in the 1950s. Unfortunately, these women found a job market and workplace inhospitable to their needs. Dismissing women because of pregnancy was considered reasonable. Disability insurance for pregnancy was at best considered unnecessary because husbands would provide and at worst conducive to fraud because it was believed that women would work just to receive those benefits.[29] Women were also disadvantaged by seniority rules as well as promotion and training policies that favored men. As a 1957 Presidential Commission found, "both men and women generally take it for granted that the male is the family bread winner and that he has a superior claim to available work, particularly over the woman who does not have to support herself."[30]

As workplace inequities became more apparent, change occurred slowly. In 1963 Congress passed the Equal Pay Act,[31] requiring equal pay for equal work. However, the Act, the first major piece of federal legislation that directly addressed sexual discrimination in the workplace,[32] had serious deficiencies. Since women did few jobs that men did, the equal pay for equal work formula was often not applicable. Earlier versions had proposed equal pay for *comparable* work, a distinction that would have permitted comparisons between women's gender segregated jobs and men's more lucrative jobs. The word "equal" was substituted for "comparable" as a compromise to obtain passage of the Act since its purpose was also to protect men, even sometimes at women's expense. Requiring employers to pay men and women the same for equal work discouraged employers from hiring women because they could pay them less, a practice begun during World War II.[33]

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historically and presently, see BARBARA RESKIN & IRENE PADAVIC, WOMEN AND MEN AT WORK (2d ed. 2002).

[27] For an account of women's experiences in the labor force during World War II, see NANCY BAKER & CHRISTY WISE, A MOUTHFUL OF RIVETS: WOMEN AT WORK IN WWII (1994).

[28] *See* KESSLER-HARRIS, *supra* note 10, at 207-08.

[29] *See id.* at 211.

[30] *See id.* (citing NATIONAL MANPOWER COUNCIL, WOMANPOWER: A STATEMENT BY THE NATIONAL MANPOWER COUNCIL WITH CHAPTERS BY THE COUNCIL STAFF (1957)).

[31] 29 U.S.C. § 206.

[32] The Fair Labor Standards Act, passed in 1938, did provide some protection for certain groups of women against differential wages but was not directed at women per se.

[33] *See* Jo Freeman, *Women and Public Policy: An Overview, in* WOMEN, POWER AND POLICY 47-67 (Ellen Boneparth ed., 1982).

A year later Congress passed Title VII of the Civil Rights Act, prohibiting discrimination in employment on the basis of race, sex and national origin.[34] The inclusion of sex in this landmark Act can best be described as a fluke. Race discrimination was the primary focus of the law. The proposal to add gender discrimination was a tactical decision designed to derail the Act. It was met with derision, was little debated, and to the surprise of many, passed.[35]

The Equal Opportunity Employment Commission (EEOC) replicated the marginalization of sex discrimination that characterized the passage of the Civil Rights Act in its first few years of operation. Despite the growing number of complaints it received,[36] the EEOC thought its resources were better spent on race discrimination complaints. As Kessler-Harris describes, several members were openly hostile to the sex provision believing that it would interfere with traditional family patterns.[37] As the *New York Times* sarcastically observed in a 1965 editorial, "it would have been better if Congress had abolished sex itself."[38]

This view began to change as the complaints received by the EEOC painted a convincing picture of the systemic nature of gender discrimination. About one third of the complaints, composing the largest overall category of complaints, alleged discrimination in the distribution of benefits, with men receiving better life insurance, health and pension benefits. One-quarter of the complaints addressed work opportunities with women complaining that they were shut out of jobs because of seniority rules or because men were preferred over women after layoffs.[39] Women also complained about losing their jobs when they married or had children.[40] The EEOC slowly began to redefine such practices as discrimination, instead of viewing them as the inevitable consequences of women's role in society.

As Kessler-Harris describes, the EEOC first muddled through because it was hesitant to upend longstanding practices.[41] Thus, for example, the Commission left employers with some discretion in determining when to terminate pregnant women[42] and inquired about the background and

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34 *See* 42 U.S.C.§2000(e) *et seq.*

35 Racism also tinged the debate over the inclusion of sex. Both Congressmen and certain women's organizations, including the National Woman's Party, argued that if sex were excluded from the Act, African American women would have more rights than white Christian women since race already received protected status. *See* KESSLER-HARRIS, *supra* note 10, at 242.

36 Over one-third of the complaints received the first year alleged sex discrimination. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N FIRST ANNUAL REPORT, H.R. DOC. NO. 86, at 58-59 (1966) [hereinafter EEOC 1st Report].

37 *See* KESSLER-HARRIS, *supra* note 10, at 241.

38 *De-Sexing the Job Market.* N.Y. TIMES, Aug. 21, 1965, at 20.

39 *See* EEOC 1st Report, *supra* note 36, at 39-45, 64.

40 *See id.*

41 *See* KESSLER-HARRIS, *supra* note 10, at 246-56.

42 *See id.* at 254.

ambitions of young women who were denied employment.[43] During its first five years the Commission also resisted comparisons with race discrimination, permitting certain practices that would be considered discrimination if committed against people of color.[44] The breaking point for feminist advocates came when the EEOC decided to let newspapers continue publishing sex segregated help wanted ads. This EEOC decision galvanized women to form the National Organization for Women (NOW) in 1966, whose initial and primary purpose was to pressure the EEOC to take gender discrimination more seriously.[45]

The EEOC was also faced with the question that had divided earlier feminists: was protective legislation a form of inequality or a necessary corollary to equality? After initially wavering, it declared such protective legislation a form of discrimination in 1969[46] and adopted a version of equality that emphasized the capacities of individual women rather than group stereotypes. The same year, the EEOC publicly affirmed the equivalency of race and sex discrimination.[47] Thus by the end of the decade, the EEOC, under pressure from women's advocacy groups such as NOW, no longer treated sex discrimination as a nuisance but as a widespread and pernicious problem. Its rulings redefined cultural norms by labeling workplace behavior previously viewed as natural and appropriate as the discriminatory violation of individual rights.

By the 1970s, the women's movement was emerging as a potent force for change. While the 1960s signified the movement's birth, the 1970s was its heyday. Women's rights were a part of the national political landscape, with laws, a federal agency and women's organizations, such as NOW, a presence in Washington. Both Democrats and Republicans professed support for women's rights.[48] Public opinion had also begun to shift. By the early 1970s,

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[43] *See id.* at 252.

[44] Kessler-Harris gives as an example the refusal to grant compensatory seniority to a woman who had been refused promotion because she was married, when blacks were routinely granted such a remedy. *See id.*

[45] *See id.* at 257-59.

[46] *See id.* at 265-67.

[47] *See* KESSLER-HARRIS, *supra* note 10, at 259.

[48] All three Presidents of this decade, Nixon, Ford, and Carter, found it politically advantageous to appoint various task forces and advisory committees on women. Nixon's 1969 report entitled, *Presidential Task Force on Women's Rights and Responsibilities: A Matter of Simple Justice,* recommended an office of women's rights and responsibilities, proposed amendments to strengthen various laws, and urged the President to encourage Congress to pass the Equal Rights Amendment. *See* WINIFRED WANDERSEE, ON THE MOVE: AMERICAN WOMEN IN THE 1970S (1988) [hereinafter WANDERSEE]. President Ford appointed a National Commission to study and report on the status of women. The Commission's final report, *To Form a More Perfect Union: Justice for American Women,* documented gender discrimination. *See* MYRAK MARX FERREE & BETH HESS, CONTROVERSY AND COALITION: THE NEW FEMINIST MOVEMENT ACROSS FOUR DECADES OF CHANGE 142 (2000) [hereinafter FERREE & HESS]. President Carter appointed a National Advisory Committee on Women although its head, Bella Abzug was subsequently fired when she criticized the size of the defense budget, ruining relationships between Carter and feminist

"women's liberation had become a household word"[49] and nearly 40% of women were in favor of "most efforts to strengthen and change women's status in society."[50]

In sharp contrast to the Civil Rights Act, where gender was an afterthought, the 1970s brought a rash of legislation aimed at helping women achieve equality in such diverse areas as sports, science, employment and financial services, to name a few. Examples include Title IX of the Civil Rights Act that prohibited sex discrimination in any educational program that received federal funds,[51] 1972 amendments to the Equal Pay Act that extended coverage to more occupations,[52] the Equal Credit Opportunity Act, which prohibited discrimination in credit transactions,[53] and the Women's Education Equity Act of 1974 that provided grants and programs to eliminate stereotypes and achieve educational equity.[54] In 1972 Congress also passed the Equal Rights Amendment, the centerpiece of the women's rights movement during this decade.[55]

The workplace was also transformed during the 1970s. The number of working women increased from 43.3% in 1970 to 51.2% in 1980; thus for the first time "there were more women in the labor force than out of it."[56] Most women worked in gender segregated occupations such as teaching, nursing and clerical work,[57] but were excluded from such male dominated professions such as law, medicine and blue-collar work, including the construction trade, fire departments and prison systems.[58] Women viewed employment in these occupations as providing a living wage, in contrast to the low wages found in the "pink ghetto." Also, unlike clerical work, which served the needs of a typically male employer, and hence replicated women's roles at home, these jobs offered autonomy and self-sufficiency. With unions sometimes hesitant to support women,[59] informal and independent work

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groups. *See* FERREE & HESS at 143.

49 *Id.* at 86.

50 *Id.* at 88.

51 *See* 20 U.S.C. § 1681 (2003).

52 *See* 29 U.S.C. § 206(d) (2003).

53 *See* 15 U.S.C. § 1691 (2003).

54 *See* 20 U.S.C. § 3041 (2003).

55 The Equal Rights Amendment was first proposed in 1923 by the National Women's Party and introduced into every subsequent Congress. Until the 1960s, it was a point of dissension among feminists with many women's groups opposing it out of fear that it would invalidate existing protective legislation they viewed as essential. This split within the feminist movement was finally resolved in the 1960s when protective legislation became viewed as an outdated and oppressive mechanism for obtaining equality for women. NOW activated the issue in the 1970s by demanding Congressional hearings. *See* FERREE & HESS, *supra* note 48, at 137-41.

56 WANDERSEE, *supra* note 48, at 127.

57 *See id.* at 128-29. For example, in 1976, 98.5% of secretaries and typists were women. *See* Nancy Maclean, *The Hidden History of Affirmative Action: Working Women's Struggles in the 1970s and the Gender of Class*, 25 FEMINIST STUD. 43, 55 (1999).

58 *See* Maclean, *supra* note 57, at 49.

59 While some progressive unions did advocate for reform, many did not, choosing, for

caucuses emerged to challenge gender-segregated occupations[60] and leading to the formation of more organized advocacy groups such as 9-5.[61] During this decade, affirmative action was also viewed as the primary and most effective mechanism for redrawing and integrating the workplace.[62] According to feminist historian Nancy MacLean, "occupational segregation . . . declined more in the decade from 1970 to 1980, the peak years of affirmative action enforcement, than in any other comparable period in U.S. history."[63]

Feminist gains quickly generated conservative opposition. The success of the ERA in Congress sparked an antifeminist movement, with Phyllis Schafly organizing the National Committee to Stop ERA in 1972.[64] By the mid-1970s, partisan splits appeared with the emergence of the new right in the Republican Party, the increasing visibility of such conservative groups as Jerry Falwell's Moral Majority and an anti-abortion movement galvanized by the Supreme Court's 1973 decision in *Roe v. Wade*.[65]

Thus, a decade begun in optimism ended in retrenchment and defensiveness as organized opposition to the feminist movement grew. Passage of the Equal Rights Amendment looked increasingly out of grasp (and was ultimately defeated) while the Republican party turned decisively to the right to appeal to white conservative voters.[66] Despite the gains women made in equalizing the workforce, poverty among women grew. The term "feminization of poverty" was coined as the number of poor households headed by women increased to the highest levels ever.[67] The response was to scapegoat women, and especially black women, by enforcing stricter rules in the Aid to Families and Dependent Children (AFDC) program and limiting

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example, to preserve seniority systems that favored male workers. *See id.* at 58.

60 As MacLean describes, "women were organizing in steel plants and auto factories, in banks and large corporations, in federal and university employment, in trade unions and professional associations, and in newspaper offices and television networks." *Id.* at 52. This aspect of the women's movement often crossed class, racial and ethnic lines as professional and pink-collar workers, white women and black women changed the notion of what constituted "women's work." *See id.*

61 *See id.* at 55.

62 *See id.* at 54. The Department of Labor originally refused to include sex in Order 4, the original affirmative action order, although the EEOC did include women in its affirmative action orders. In 1967, President Johnson included women in Executive Order 11, 375. *See* KESSLER-HARRIS, *supra* note 10, at 276 (citing Exec. Order. No. 11,375, 32 C.F.R. 14303 (1967)).

63 Maclean, *supra* note 57, at 66.

64 *See* WANDERSEE, *supra* note 48, at 128-29.

65 410 U.S. 959 (1973) (holding that women had a constitutional right to terminate pregnancies in their first trimester).

66 The ERA failed to meet the seven-year deadline for ratification in 1979, as well as an extended deadline in 1982. *See* FERREE & HESS, *supra* note 48, at 137-41.

67 *See* WANDERSEE, *supra* note 48, at 133; FERREE & HESS, *supra* note 48, at 176; *see also* Diane Pearce, *The Feminization of Poverty: Women, Work and Welfare*, *in* WORKING WOMEN AND FAMILIES 103-24 (K.F. Feinstein ed., 1979).

the growth of benefits.[68] In short, the successes of the 1970s spawned a backlash that intensified throughout the next decade.

The 1980s began with the election of a Republican president, Ronald Reagan, who unlike past presidents was hostile to women's rights, choosing to cater to his party's increasingly conservative faction. Feminist historians Ferree and Hess describe "the major challenges of the 1980s [as] includ[ing] maintaining public approval for positions that a popular president and the federal government no longer supported."[69] This included a Justice Department that pulled back on the enforcement of equal opportunity statutes[70] and Supreme Court decisions that made discrimination harder to prove.[71] Affirmative action also came under attack with Presidents Reagan and Bush actively campaigning against it.[72]

Economically, women, particularly poor women and African American women, did not fare well during this decade. Inequality grew as wages remained depressed and tax cuts to the wealthy failed to "trickle down" to the bottom of the economic ladder where nearly half of the female labor force was concentrated.[73] With poor women getting poorer and welfare programs getting stingier,[74] the feminization of poverty continued to increase. Squeezed by a labor market that exploited low wageworkers and

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68 For a gender and race based analysis of the AFDC program, see ABRAMOVITZ, *supra* note 24. This backlash response to women's rights also highlighted the sometimes-differing objectives of poor, African American and middle class white women. African American women did not always benefit from the elimination of workplace barriers because they were pushed into a workplace without the supports and resources available to middle class white women. Elevating the social value of work over motherhood, and neglecting the crucial supports that allow the balancing of work and family left poor and African American women left to fend for themselves. As work became the acceptable, and even the preferred choice for middle class women, a lack of employment, especially for those women on welfare, was attributed to individual irresponsibility rather than a commitment to mothering. African American women were in a particularly precarious position as they were blamed for the worsening position of black men. As Daniel Moynihan and others opined at the time, a matriarchal black culture was destroying the ability of black men to lead, and care for, their families. *See* KESSLER-HARRIS, *supra* note 10, at 268-75.

69 FERREE & HESS, *supra* note 48, at 159.

70 *See id.* at 174.

71 *See, e.g.*, Richmond v. Crosson, 88 U.S. 469 (1989) (holding that state and local government affirmative action policies were subject to strict scrutiny); Wards Cove v. Antonia, 490 U.S. 642 (1989) (holding that employees bear the burden in claims of discrimination); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (concluding that the Civil Right Act of 1981 did not apply to race based denials of promotion); Martin v. Wilks, 490 U.S. 755 (1989) (permitting white firefighters to challenge affirmative action decrees).

72 *See* FERREE & HESS, *supra* note 48, at 174.

73 *See id.* at 173.

74 It was during the 1980s that conservative rhetoric about welfare escalated, with social scientists, such as Charles Murray in his influential book, *Losing Ground: American Social Policy 1950-1980*, advocating for the abolition of welfare. *See* CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980 (1984). Poor women were increasingly viewed as unwilling to work, resulting in the passage of the Family Support Act of 1988, 42 U.S.C. § 1305 (2003), which forced recipients into work by imposing punitive sanctions – the loss of welfare benefits – if they did not.

cutbacks in social services programs women found it increasingly difficult to earn a living wage or care for their families.

Women at the higher end of the economic ladder also faced obstacles. Their advancement in male-dominated occupations was stymied. A new phrase entered the lexicon "the glass ceiling" to denote the invisible barrier women confronted when climbing the corporate ladder.[75] As surveys during the decade demonstrated, men still overwhelmingly (95%-97%) comprised senior management and executive positions in the nation's largest corporations[76] and although the disparity between women's and men's wages decreased during the decade, by its end women were still earning only seventy-four cents to a man's dollar.[77]

New approaches to increasing women's wages were implemented during the 1980s. Whereas in the 1970s women entered previously male occupations as a way to eliminate the wage gender gap, in the 1980s women used the principle of pay equity to increase the pay and status of traditionally female occupations.[78] The concept of pay equity or comparable worth meant that jobs involving similar skill levels, effort, working conditions, and level of responsibility would be compensated at the same rate of pay.[79] This highlighted the inequity of paying teachers, nurses and secretaries less than, for example, the typical male jobs of tree trimmers or sign painters.[80] While the idea did not take hold across the labor force, by the end of the decade many state governments, and some local ones, had adopted comparable worth policies.[81]

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[75] *See* GLASS CEILING COMMISSION, *Executive Summary as Authorized by the Civil Rights Act of 1991*, Pub. L. No. 102-166, 105 Stat. 1071 (1991) [hereinafter GLASS CEILING COMMISSION] and Section 9 of the Federal Advisory Committee Act, Pub. L. No. 92-462, 5 U.S.C. App. II (1992).

[76] *See id.* at 12.

[77] Some economists attribute this to a decline in men's wages, not an increase in women's wages or salaries. *See* Annette Bernhard et al., *Women's Gains or Men's Losses? A Closer Look at the Shrinking Gender Gap in Earnings*, 302 AM. J. SOC. (1995) (finding that half of the increase in women's earnings relative to men result from men's declining wages). For studies on the role of sex and race in income distribution, see J.N. Baron & E.E. Newman, *For What it's Worth: Organizations, Occupations, and the Value of Work Done by Women and Nonwhites*, 55 AMER. SOC. REV. 55 (1990) (studying the role of sex and race in income distribution); P. ENGLAND, COMPARABLE WORTH: THEORIES AND EVIDENCE (1992) (same).

[78] For example, in 1981, women still made up over 98% of secretaries, a percentage that had not budged ten years later. Clerical workers such as bank tellers and cashiers showed some increase in gender integration during the decade. Female bank tellers went from 97.3% in 1981 to 90.3% in 1991, and women cashiers went from 86.45% to 80.9%. Some of the biggest gains for women were in the professional sector. The percentage of women in the legal field (as lawyers and judges) increased from 14% in 1981 to 18.9% in 1991. The percentage of women accountants increased from 38.5% in 1981 to 51.5% in 1991. *See* FERREE & HESS, *supra* note 48, at 201-03. As these examples demonstrate, an integrated workforce occurs when women enter previously male dominated occupations and not vice versa.

[79] *See* FERREE & HESS, *supra* note 48, at 175.

[80] *See* Deborah Rhode, *Gender Equality and Employment, in* AMERICAN WOMEN IN THE NINETIES 253, 253-273 (Sherri Matteo ed., 1993).

[81] *See* FERREE & HESS, *supra* note 48, at 175.

During the 1980s a new form of discrimination, sexual harassment, was recognized in the workplace. First identified by feminist legal scholar Catharine A. Mackinnon, sexual harassment "refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[82] Initially sexual harassment was viewed as a personal problem not relevant to the workplace. The first sexual harassment lawsuits brought in the mid 1970s were unsuccessful,[83] although within a few years these cases were reversed and sexual harassment was defined as a form of sexual discrimination under Title VII.[84] Surveys conducted in the beginning of the 1980s confirmed that sexual harassment was a common occurrence in many workplaces. The first federal survey, conducted in 1980 by the U.S. Merit Systems Protection Board, found that 40% of female federal employees surveyed had been victims of sexual harassment.[85] Throughout the decade such diverse groups as university faculty and staff, blue-collar workers, attorneys and the airline industry identified sexual harassment as a problem.[86] Sexual harassment was broadened to include, in addition to requesting sexual favors in exchange for jobs, promotions, and other job related benefits, the creation of a hostile work environment, which made it difficult for women to perform their jobs. Despite the legal and social recognition of sexual harassment, many businesses were hesitant to

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[82] CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979) [hereinafter MACKINNON, WORKING WOMEN].

[83] *See id.* at 59. The cases include Corne v. Bausch & Lomb, 390 F. Supp. 161 (D. Ariz. 1975), where the court dismissed the complaint because it was a personal matter unrelated to the workplace. In *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), the court determined that a male supervisor's inappropriate comment that a female employee be sexually cooperative to receive a promotion was not representative of the *employer's* policy, and in any event, was not an issue with which the courts should involve themselves. As the court stated, "[t]he attraction of males to females and females to males is a natural sex phenomenon and . . . this attraction plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the Courts to refrain from delving into these matters." *Miller*, 418 F. Supp. at 236.

[84] The first successful case was, Williams v. Saxby, 413 F. Supp. 654 (D.D.C. 1976), involving a black woman who alleged that after she spurned the sexual advances of her immediate supervisor, she was treated poorly at work. There, the court found that sexual harassment was treatment based on sex under Title VII. Subsequently several appeals courts agreed. *See* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Garber v. Saxon Bus. Prods. Inc., 552 F.2d 1032 (4th Cir. 1977). In 1980, the EEOC issued guidelines defining sexual harassment as sex discrimination. *See* 29 C.F.R. § 1604.11(a) (2003).

[85] U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1991).

[86] *See, e.g.*, Edward LaFontaine & Leslie Tredeau, *The Frequency, Sources and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 SEX ROLES 433 (1986); Donald E. Maypole & Rosemarie Skaine, *Sexual Harassment of Blue-Collar Workers*, 9 J. SOC. & SOC. WELFARE 682 (1982); Nina Burleigh & Stephanie B. Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms*, 75 A.B.A. J. 46 (1989); Susan Littler-Bisop et al., *Sexual Harassment in the Workplace as a Function of Initiator's Status: The Case of Airline Personnel*, 38 J. SOC. ISSUES 137 (1982); Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152 (1988).

implement sexual harassment policies or grievance procedures.[87] Nonetheless, behavior that had in an earlier decade been either ignored or accepted as an inevitable product of a gender-integrated workplace was now considered unlawful.[88]

The 1980s also saw the increase of women in participation in electoral politics especially on the state and local level. While on the federal level the percentage of women that were members of Congress only rose from 3% to 5% between 1979 and 1989, in state legislatures it increased from 10% to 17%.[89] Beginning with the election of Ronald Reagan in 1980, a gender gap in voting also appeared with women 6-9% less likely to vote for Reagan than men.[90] The 1980 presidential election also marked the first time that as many women voted as men.

Another significant trend during the 1980s was women's willingness to identify with feminist ideology, despite what feminist historian Mary Fainsold Katzenstein described as "ten interrupted years of antifeminist, antiliberal, self identified conservative presidential administrations."[91] By 1986, according to a Gallup Poll, half of all white women and two-thirds of minority women labeled themselves as feminists.[92] Even those unwilling to call themselves feminists gave credit to the movement for improving their lives.

Feminism also took on different forms, with the more organized movement of the 1970s supplemented or replaced by what Katzenstein labels unobtrusive mobilization within institutions, as women within large male dominated institutions reshaped those institutions without identifying themselves as feminists even while advocating for women's rights.[93] Thus, by

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[87] Edmund Wall, *The Definition of Sexual Harassment, in* SEXUAL HARASSMENT: CONFRONTATIONS AND DECISIONS 79 (Edmund Wall ed., 2000).

[88] The recognition of the phenomenon of sexual harassment was emblematic of a new direction in feminism. In the previous decade mainstream feminists had emphasized the similarities between men and women as the basis for equal treatment. Sexual harassment highlighted the differences and in particular, the way women may experience phenomena men would have a hard time identifying. Other feminist scholars including Carol Gilligan, Jean Bethke Elshtain, and Betty Friedan, also emphasized women's differences and differential experiences in moral thought (Gilligan) and the sphere of family life (Elshtain, Friedan). *See* CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); JEAN BETHKE ELSHTAIN, THE FAMILY IN POLITICAL THOUGHT (1982); BETTY FRIEDAN, THE SECOND STAGE (1981).

[89] Ruth B. Mandel, *The Political Women, in* AMERICAN WOMEN IN THE NINETIES 34, 39 (Sherry Matteo ed., 1993).

[90] FERREE & HESS, *supra* note 48, at 189.

[91] Mary Fainsod Katzenstein, *Feminism within American Institutions: Unobtrusive Mobilization in the 1980s*, 16 J. WOMEN IN CULTURE & SOC'Y 27, 30 (1990) [hereinafter Katzenstein, *Feminism*].

[92] *See* Barbara Kantrowitz, *How Women View Work, Motherhood, and Feminism*, NEWSWEEK, Mar. 31, 1986, at 51.

[93] *See* Katzenstein, *Feminism*, *supra* note 91, at 37-53 (offering as two examples the military and the Catholic Church. She describes how parishioners and religious orders of nuns challenged the Church's refusal to ordain women, their lack of attention to social justice issues and specific sexist rules and customs. In the military, women challenged the cap on the number of women soldiers, their exclusion from military academies and certain types of jobs and also

the end of the decade and despite a backlash against it, feminist ideology became woven into the political, social and legal landscape taken for granted much like traditional roles were in the past.

The issues identified in the 1980s continued to dominate in the 1990s. Sexual harassment remained a visible rallying point for feminists. The nomination of Clarence Thomas for Supreme Court justice and the accompanying charges of sexual harassment by his former assistant, Anita Hill, in 1991 placed the issue center stage, as did charges of harassment by service women against U.S Navy Flyers at the Tailhook Association Convention that same year. In response to several Supreme Court decisions,[94] businesses also began adopting sexual harassment policies in greater numbers.[95]

The glass ceiling still dominated discussions about women's employment opportunities as evidenced by the passage of the Glass Ceiling Act (part of the Civil Rights Act of 1991), mandating the establishment of a Glass Ceiling Commission to examine barriers to women and minority advancement in corporate America and formulate a strategic plan to overcome it.[96] The Commission found a litany of barriers demonstrating that, despite women's gains over the past decades, a thick residue of discrimination and bias remained. They included corporate climates that alienated and isolated women, the failure to recruit, mentor or train women for higher positions, biased rating, performance and testing systems and harassment by colleagues. The Commission also noted the "lack of vigorous, consistent monitoring and law enforcement."[97]

At the decade's end, there was considerable evidence that the glass ceiling had still not been shattered; the proportion of women corporate officers in the 500 largest corporations was only 12% in 1999.[98] And while inroads have been made in professions such as medicine and law,[99] women still remain, for the most part segregated by occupation and concentrated in the service industries.[100] The majority of minimum wage workers are

called attention to sexual harassment within the military.).

94 *See, e.g.*, Burlinton Industries v. Ellworth, 524 U.S. 742 (1998); Clark v. Breeden, 532 U.S. 268 (2001); Pollard v. DuPont, 532 U.S. 843.

95 According to some estimates, nine out of every ten companies now have sexual harassment policies. *See CNN Morning News* (CNN television broadcast, June 26, 1998).

96 *See generally* Civil Rights Act of 1991, Pub. L. No. 102-166 (1991).

97 GLASS CEILING COMMISSION, *supra* note 75, at 8.

98 *See* UNITED NATIONS STATISTICAL DIVISION, *The World's Women 2000: Trends and Statistics*, *available at* http://unstats.un.org/unsd/demographic/ww2000/table6a.htm (last visited Jan. 22, 2004) [hereinafter UN STATISTICAL DIVISION].

99 *Compare* THOMAS PASKO, PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE U.S. 2004 (Am. Med. Ass'n 2003) (stating that nearly one-quarter of physicians are women), *with* ABA COMMISSION ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION (2001) (stating that only one-third of all attorneys are women).

100 For example, in 1998 women made up 93.2% of all childcare workers and 91.8% of all home health care workers. *See* BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR,

women.[101]

The status of poor women also declined in the 1990s. In 1996, the Aid to Families with Dependent Children program was replaced with the Temporary Assistance to Needy Families (TANF), a time-limited and work-focused program that requires women to work up to thirty-five hours per week.[102] This finalized the new norm of motherhood, introduced in the late 1960s, where women were wageworkers rather than stay at home mothers.[103] For poor women, as in the past, this meant low wage work, and a lack of adequate resources such as day care.[104]

The 1990s also marked the first legislation directly addressing the competing demands of work and parenting. Unlike other industrialized countries, women's struggle for equality in the United States did not encompass the notion that it was society's collective responsibility to help families balance work and home. The Family and Medical Leave Act, passed in 1993,[105] was the first law to address this idea by permitting up to twelve weeks unpaid leave of absence for both women and men for family needs. Although much less generous than benefits granted in other countries,[106] feminists viewed the law as a major victory.

The 1990s were also notable for gains in the political arena. Women increased their representation in state legislatures from 17% in 1989 to 22.6% in 2002. The biggest gains were at the federal level, with the number of women in the Senate increasing from 2 in 1999 to 13 in 2002, and in the House from 23 to 73.[107] In 1992, women surpassed men in electoral

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EMPLOYMENT, HOURS, AND EARNINGS (1998).

[101] Sixty percent of minimum wage workers are women. *See* Jared Bernstein & Chauna Brocht, *The Next Step: The New Minimum Wage Proposal and the Old Opposition*, Economic Policy Institute Issue Brief 130B (Mar. 8, 2000).

[102] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601 (2003).

[103] While full time labor force participation has steadily increased over the decades (from 27% in 1978 to 42% in 1997) it is interesting to note that at least one study found that 65% of married mothers of pre-schoolers do not work full time or year round. *See* Phillip N. Cohen & Suzanne M. Bianchi, *Marriage, Children, and Women's Employment: What do we Know?*, MONTHLY LAB. REV. 22, 26 (Dec. 1999). In contrast, poor women, even those with children under 6 are required to work 35 hours per week to remain eligible for public assistance benefits. This double standard for poor women highlights how changing social norms expecting women to work can rebound against poor women on welfare with young children, who now are required to work a full week, in contrast to more affluent women who can, and do, choose not to.

[104] For a review of the various obstacles facing welfare recipients since the passage of TANF, see Vicki Lens, *TANF: What Went Wrong and What to do Next*, 47 SOC. WORK 279 (2002).

[105] The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2003).

[106] The United States, Greece, Ireland and Portugal are the only four countries in Europe and North America that do not have paid maternity leave. *See* Sheldon Rahn & Hobart Burch, *Paid Maternal and Parental Leave Legislation and Primary Prevention*, 3 SOC. POL. J. 75 (2002). For a comparison of child related leave policies in the United States and ten peer countries, see Jane Waldfogel, *International Policies Toward Parental Leave and Child Care*, 11 FUTURE OF CHILD. 99 (2001).

[107] *See* Center for American Women in Politics, Eagleton Institute of Politics, Rutgers the State University of New Jersey, *Women in Elected Office 2002 Fact Sheet Summaries, available at*

participation making up 54% percent of all voters.[108]

After four decades of struggle, the legal, social, political and cultural landscape for women was transformed. Women are now expected to work for at least some portion of their adult life and at more and varied types of jobs. They are also engaged in political life in greater numbers. In many respects feminist ideology has become mainstream as the separate spheres ideology becomes more marginalized. Despite these gains, the basic conundrums that confronted feminists in the early part of the century remain unresolved. The "difference" debate continues: should biological, cultural or socially based differences be leveled, celebrated or ignored? Poverty remains skewed by gender, women still face barriers to full equality, and women of all classes struggle with integrating work and home.

II. METHODOLOGY

Throughout the history of the modern feminist movement much of what Kessler-Harris describes as the "gendered imagination"[109] was constructed in courtrooms particularly so in the Supreme Court. To study this process systematically the social science research methodology of "qualitative content analysis" is used.[110] Content analysis is a research

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www.cawp.rutgers.edu/facts/cawpfs.html (last visited Mar. 27, 2003). Despite these considerable gains, women still hold only 13% of federal elected offices and 22% of statewide offices. The United States still fares poorly compared to other nations that have larger proportions of women in national legislative bodies. While 14% of U.S. Congressional members were women in 2002, in Sweden the rate was 45%, Spain 28%, and the United Kingdom 18%. *See* UN STATISTICAL DIVISION, *supra note* 98, at tbl.6A.

108 FERREE & HESS, *supra* note 48, at 190.

109 KESSLER-HARRIS, *supra* note 10, at 5-6.

110 The use by legal academics of empirical based methods to study law has become more common over the past twenty years. *See, e.g.*, Lee Epstein & Gary King, *Exchange: Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002) (providing a comprehensive critique of empirical research appearing in law reviews and suggesting ways it could be improved). Both quantitative and qualitative methods have been used, with the former seeking to explain phenomena through statistics and the latter producing more descriptive and primarily non-numerical data. For some recent examples of quantitative empirical legal research, see Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545 (2002) (examining health care antitrust enforcement through a content analysis of judicial opinions, consent decrees and formal administrative actions); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000) (examining errors in capital sentencing in state and federal appellate court decisions); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415 (1999) (examining how creditor's fare in bankruptcy proceedings). A related form of legal scholarship used by critical race theorists and feminist legal scholars examines court narratives as a form of storytelling and attempts to infuse into legal scholarship the stories of oppressed groups that have been routinely left out of these narratives. *See, e.g.*, Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Case*, 99 COLUM. L. REV. 739 (1999); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Larry Cata Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996); Marc. A. Fajer, *Can Two Real Men Eat Quiche Together: Storytelling, Gender Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Charles J. Butler,

method designed for studying texts. It allows the researcher to examine "ideological mind sets, themes, topics, symbols, and similar phenomenon"[111] embedded in language by following a set of procedures whereby the text is systematically analyzed.[112] In this study William Gamson and Andre Modigliani's constructionist approach[113] for analyzing the public discourse is used by assigning frames to a text that describes the "central organizing idea or story line." This method is used to examine the forty-one cases decided by the Supreme Court between 1971 and 2002 that addressed the issue of equality and gender in the workplace.[114]

Note, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same Sex Marriage*, 73 N.Y.U. L. REV. 841 (1998); William N. Eskridge, Jr., *Gay Legal Narratives*, 46 STAN. L. REV. 607 (1994). The study herein also focuses on court narratives, but using the social science research methodology of content analysis to examine them.

[111] BRUCE LAWRENCEBERG, QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES 176 (1995).

[112] The unit of analysis can range from single words, to whole paragraphs, to the entire text of a book or article. Each unit is assigned a code that is a tag or label representing the meaning of the words. In this study the majority opinion is considered the unit of analysis. See *infra* note 117 discussing procedure for the coding of majority, concurring and dissenting opinions.

[113] Constructionism is a theoretical approach that recognizes the subjective nature of social problems while noting that they are social constructs based on people's perception of a problem. It focuses on the processes and activities surrounding problem definition in the public arena rather than the substance of the problem. The first theorists to develop this theoretical approach were Malcolm Spector and John I. Kitsuse, who, in their classic book, *Constructing Social Problems*, laid out a process for dissecting social problems by exploring "the activities of individuals or groups making assertions of grievances and claims with respect to some putative condition." MALCOLM SPECTOR & JOHN I. KITSUSE, CONSTRUCTING SOCIAL PROBLEMS 75 (1977). The activities of various groups and individuals, including advocates, politicians, government officials, etc., are examined to discover how a social condition is transformed into a social problem. Later theorists focused on the rhetorical activities of claims making by examining all of the tools of the trades, such as symbols, metaphors, and narratives that paint a portrait of the problem. *See, e.g.*, PETER EDELMAN, CONSTRUCTING THE POLITICAL SPECTACLE (1988) (describing how claims are often constructed so as to advance a certain ideology); Deborah Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281 (1989) (describing how causal stories are created about social problems that identify who is responsible and what should be done about it); IMAGES OF ISSUE (Joel Best ed., 1995) (describing how social problems are often reduced to simplified typifications or stereotypes); DONILEEN LOSEKE, THINKING ABOUT SOCIAL PROBLEMS (1999) (emphasizing the centrality of values in the process of social problem definition). Empirical studies based on constructionism often rely on content analysis to dissect the public discourse about a social problem. *See, e.g.*, Donileen Loseke, *Writing Rights: The Homeless Mentally Ill and Involuntary Hospitalization*, *in* IMAGES OF ISSUE 261 (Joel Best ed., 1995) (analyzing *New York Times* articles for construction of the image of the mentally ill homeless); William Gamson & Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power*, 95 AM. J. SOC. 1 (1989) (analyzing the public discourse on nuclear power).

[114] This included all Supreme Court opinions published between 1971 and 2002 that explicitly address any issue relating to women and the workplace, such as terms and conditions of employment and the amount and availability of benefits, including employer-sponsored benefits or government benefits related to work, (e.g., Social Security benefits). Included are opinions involving either a private employer or a governmental unit as an employer or provider of work-related benefits or that involve an educational opportunity directly relevant to employment. Also included are so-called reverse discrimination cases in which men challenged employers or government for not providing them or their families with the equivalent benefits provided to women. These cases are included because they also address gender roles and expectations in the workplace and because discrimination against men is linked to discrimination against women.

In these forty-one cases, the Court's explicit task was to decide, often in cases of first impression, what constitutional standard under should apply to women and to interpret federal laws such as the Equal Pay Act and Title VII of the Civil Rights Act. The legal doctrines contained in these cases have been thoroughly examined elsewhere and are not the focus on this study.[115] Instead, this study tells the other half of the story: the explanations, cultural observations, and other social constructions that the Court employed to support its legal holding and notions of equality. The primary unit studied is the majority opinion because it represents the institutional consensus of the Court.[116]

Content analysis can proceed two ways: by applying predetermined codes to the text or by letting codes emerge from the text inductively.[117] The former approach was used because the conceptual framework for gender equality has been fully developed. The feminist and legal scholarly literature has been reviewed to indicate the dominant frames or categories in equality discourse. This literature indicated five dominant frames in the area of equality and gender discrimination including: separate spheres, formal equality, substantive equality, difference theory and non-subordination theory.[118] Each case was coded according to these categories based on a textual analysis of the Court's decision.

A. *Separate Spheres Frame*

Any discussion of equality must begin with its opposite—inequality—and specifically the separate spheres frame, which dominated social, legal

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115 *See, e.g.*, LAURA OTTEN, WOMEN'S RIGHTS AND THE LAW (1993); LESLIE FRIEDMAN GOLDSTEIN, THE CONSTITUTIONAL RIGHTS OF WOMEN (1988).

116 Unless otherwise indicated, if both the majority and concurring opinion in a particular case utilize the same frame, no distinction is made and both are referred to as "the Court." When they differ in their approach, the difference is so noted. The generic phrase "the Court" is used, rather than individual justices' names because this study focuses on the institutional consensus of the Court and is not an analysis of individual justices' opinions. The patterns of individual justices voting is included in Table 1. Dissenting opinions are included in some instances as an illustrative counterpoint to the majority opinion, but the focus, as stated above, is on the institutional consensus as represented by the majority opinions.

117 *See* MATTHEW MILES & MICHAEL HUBERMAN, QUALITATIVE DATA (1994) for a discussion of the first approach. For a discussion of the inductive approach, called grounded theory, see JULIET STRAUS & ABSELM CORBIN, BASIS OF QUALITATIVE RESEARCH (1990).

118 Feminist jurisprudence contains multiple and disputed approaches to equality. The purpose of this study, however, is not to enter this debate but to analyze which formulations of equality the Court has used. To construct a workable framework for coding the decisions the formulations have been streamlined and sometimes consolidated. I use the labels that are most closely associated to the formulations described in the literature, but which are not necessarily identical to those used throughout feminist jurisprudence. *See, e.g.*, CATHERINE A. MACKINNON, WORKING WOMEN, *supra* note 82 (using the term "difference doctrine" to describe what other feminists sometimes call formal equality). I follow most closely Katherine T. Bartlett's description of the various frames, as described in her essay, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1 (1994).

and cultural thought until the mid twentieth century.[119] This frame encompasses the idea that men and women are different and hence, should be treated differently. Each occupies a different sphere of life. Men's sphere was the "impersonal, public and competitive," while women's "the personal, private and charitable."[120] Women were physically and mentally inferior to men. Unable to hold office or own property or even to serve as legal guardians for their own children, they were not permitted to compete equally in the world. The separate spheres frame was reflected in such early Supreme Court decisions as *Bradwell v. Illinois*,[121] which barred women from the practice of law because "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother," and *Muller v. Oregon*, which upheld restrictions on the number of hours a woman could work because "her physical structure" and the performance of "maternal functions" placed her at a disadvantage in the struggle for subsistence.[122]

B. *Formal Equality*

The first form of gender equality was modeled after racial equality, which placed blacks and whites on equal footing. Just like blacks are not naturally different from whites, neither are women different from men. This sameness requires equal treatment. This notion of equality, referred to as "formal equality," is part of the liberal tradition as formulated by John Stuart Mill.[123] Its core beliefs include the freedom of individual choice and the right of every individual to be treated equal to all others. Overbroad generalizations or stereotypes about women used to justify differential treatment violate a woman's right to equality because it impinges upon individual autonomy. Equal treatment applies to groups as well, and similarly situated groups must be treated alike. This conception of equality emphasizes men and women's sameness and is wary of any gender related special accommodations because such distinctions have been used against women in the past.[124]

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119 *See supra* Part I (discussing the early history of the feminist movement).

120 JULIE A. MATTHAEI, AN ECONOMIC HISTORY OF WOMEN 117 (1982); *see also* Nancy F. Cott, *The Bonds of Womanhood: "Woman's Sphere" in* NEW ENGLAND, 1780-1835, 197-200 (1977); ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES 306 (1975).

121 83 U.S. (1 Wall.) 130, 141 (1873).

122 208 U.S. 412, 422-23 (1908).

123 JOHN STUART MILL, ON LIBERTY (1869). For the application of the principles to women, see JOHN STUART MILL, THE SUBJECTION OF WOMEN (1869). For contemporary writers on the liberal tradition, see MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE (1999); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); JOHN RAWLES, A THEORY OF JUSTICE (1971).

124 For examples of feminist works that have argued this frame, see Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985); Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1985); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982); Ruth Bader Ginsberg, *Sexual Equality*

C. *Substantive Equality*

Substantive Equity goes a step further than formal equality and recognizes that equal treatment can lead to unequal outcomes since not all groups start at the same place. Equality's promise is an empty one "unless individuals have a right to demand from their governments . . . material prerequisites, and that these prerequisites may vary depending on one's position in society."[125] Thus, under substantive equality remedies that rectify past discrimination, such as affirmative action, or compensate for present disadvantages, such as pregnancy, are not only acceptable, but also necessary.[126] Thus substantive equality recognizes differences, but with the goal of eliminating or leveling them to encourage more equal outcomes.

D. *Difference Theory*

Feminists have criticized the liberal framework of equality because it does not sufficiently recognize the extent to which social and biological differences disadvantage women.[127] This theory also uses the male as the standard, too often requiring women to fit into the norms of the male world. For example, comparable worth formulations that measure the value of woman's work based on similar work done by men still rely on what is valued in a man's world, not a women's. Or, as Littleton describes it, equalization

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Under the Fourteenth and Equal Rights Amendments, 179 WASH. U. L.Q. 161 (1979); Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. L. 347 (1971). *See also* WENDY KAMINER, A FEARFUL FREEDOM, WOMEN'S FLIGHT FROM EQUALITY (1990); CYNTHIA EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER (1988).

[125] NUSSBAUM, *supra* note 123, at 68; *see also* JOHN RAWLES, JUSTICE AS FAIRNESS 43 (2001) [hereinafter RAWLES, JUSTICE] (explaining his idea of "difference principle" as requiring that the "greatest benefits [should go] to the least advantaged members of society"). Rawles also placed women in that disadvantaged group, arguing that "if a basic, if not the main cause of women's inequality is their greater share in the bearing, nurturing, and caring for children . . . steps need to be taken to equalize their share or to compensate them for it." RAWLES, JUSTICE at 167.

[126] For a discussion of affirmative action and comparable worth schemes, see Sylvia Law, *"Girls Can't Be Plumbers" – Affirmative Action for Women in Construction: Beyond Goals and Quotas*, 24 HARV. C.R.-C.L. L. REV. 45 (1989); Mary Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear*, 53 U. CHI. L. REV. 934 (1986); Deborah Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207 (1988).

[127] For a feminist critique of liberalism and specifically for its emphasis on male values of rights, responsibilities and the individual rather than more feminine values of caring, connection and community, see Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); SUSAN MOLLER OKIN, REASON AND FEELING IN THINKING ABOUT JUSTICE & ETHICS 229 (1989); Marie J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986); Herma Hill Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39 (1985); DEBORAH L. RHODE, JUSTICE AND GENDER (1989); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter, MACKINNON, FEMINIST THEORY]. The main work cited for the view that women experience and see the world differently is Carol Gilligan's, *In a Different Voice*. For a defense of the view that liberalism is not unconnected to community and is useful for advancing women's position in society, see Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992). *See also* NUSSBAUM, *supra* note 123.

would merely require that a step stool be available to permit women to be seen from a podium, rather than designing podiums that adjust to both men and women's heights.[128] Compensation, then, is not enough; women's contributions and skills must be equally as valued and accommodated as men's.

Feminist scholars formulated difference theory as an alternative to the equality formulations.[129] Its goal is to fit women's and not only men's needs.[130] It recognizes biological and cultural differences, but differently than the separate spheres frame. Women should not to be either punished or protected based on these differences, but neither should they be treated the same as men. Rather, women should be compensated when cultural or biological differences have unequal and negative consequences. They should get specific rights based on their specific needs or accommodations that eliminate any advantage men may have.

While difference theory is similar to substantive equality, it cuts deeper by suggesting that provisional remedies, such as affirmative action or comparable worth schemes, are ultimately insufficient in addressing root social and biological inequalities. Difference theory conflicts most though, with formal equality. Under difference theory a remedy may be necessary not because men and women are similarly situated, a requisite of equality theory, but because they are different. Where a formal equality feminist would argue that pregnancy is like any other disability and hence should be covered under disability plans, a difference feminist would argue that it should be covered because pregnancy unequally and uniquely burdens women. Coverage is required because pregnancy is a biological difference with negative consequences for women and not because it can be likened to other disabilities that affect all people.

Thus, unlike equality theory, difference theory does not require reference to a similarly situated group of men. For example, women would

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128 *See* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1325 (1987).

129 I use "difference theory" as the label for several different strands of feminist theory that have in common a critique of the formal equality approach. I label it difference theory because the notion of difference is central to these formulations or what Martha Minow describes as the "dilemma of difference." *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND THE AMERICAN LAW 20 (1990). For discussions of these various strands of feminist "difference" theory, see Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1294-1301(1987); Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, DUKE L.J. 324 (1991); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990); Linda Krieger & Patricia Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513 (1983); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Mary E. Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 REV. L. & WOMEN'S STUD. 133 (1992); Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201 (1987).

130 For a full discussion of this formulation, called acceptance theory, see Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1325 (1987).

be entitled to higher pay in sex segregated jobs such as nursing because culturally based differences make these jobs less valued than men's. Proof that male nurses receive higher pay or even that there are male nurses would not be necessary. Similarly, no showing would be needed that men do comparable jobs of equivalent value but are paid more. In short, all that is necessary is a showing that women are socially or biologically disadvantaged.

E. *Non-Subordination Theory*

An offshoot of difference theory is non-subordination theory, which emphasizes the power imbalance between men and women. The consequences of male power are more significant and relevant than men and women's similarities or differences. As stated by its major proponent, Catharine A. Mackinnon:

> [A] rule or practice is discriminatory... if it participates in the systemic social deprivation of one sex because of sex. The only question for litigation is whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status.[131]

Sexual harassment in the work place is the paradigmatic example. By treating women as sexual objects at work, men reinforce their power, undercut women's autonomy and self-sufficiency and render women inferior.

III. DISCUSSION AND FINDINGS

Between 1971 and 2002 the Supreme Court decided forty-one cases involving forty-four issues relating to gender discrimination in employment. The cases fall into the following four categories: (1) challenges to benefit programs and pay scales that treated men and women differently; (2) barriers to employment, including seniority systems that favored men and gender-related exclusions from employment opportunities, promotions and professional schools; (3) pregnancy and maternity related issues that disadvantaged women in the workplace; and (4) work environment issues such as sexual harassment.

The cases reflected the various stages of the modern feminist movement, but with the Court often lagging behind due to the slow pace of litigation in the lower courts or within administrative agencies. The 1970s and 1980s saw the most activity, with nineteen discriminatory practices challenged in the 1970s and eighteen in the 1980s. In contrast, the Court

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[131] MACKINNON, WORKING WOMEN, *supra* note 82, at 117; *see also* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987) (extending the analysis of gender status and social deprivation); MACKINNON, FEMINIST THEORY, *supra* note 127 (same).

decided only eight cases between 1990 and 2002.

The Court's involvement beginning in the 1970s, was primarily focused on the equalization of benefits and pregnancy related issues.[132] As the Court deliberated, the women's movement was in its heyday and Congress passed several equal opportunity laws.[133] The typical benefits cases involved blatant forms of discrimination in government programs and other benefit plans with different rules for men and women that reflected the dominant separate spheres ideology.[134] The Court also spent much of the 1970s resolving the knotty issues posed by pregnancy and child bearing. Overall feminists won over two-thirds of the cases they brought succeeding on thirteen of nineteen issues, a success rate of 68%.[135]

The women's movement's next frontier, after equalizing benefit programs, was equalizing job opportunities by challenging discriminatory seniority rules and women's exclusion from male dominated occupations. These issues increasingly dominated the Court's docket in the 1980s. [136] Between 1981 and 1989 the Court decided eight cases in this category (in contrast to four the decades before),[137] encompassing such diverse issues as women's exclusion from the draft, the impact of sexism in previously male-dominated professions such as accounting, the effect of seniority systems on women's' opportunities and the legitimacy of affirmative action programs.[138] While comparable worth and pay equity themes dominated this decade, the Court addressed them only indirectly in 1981. The Court also grappled with pregnancy-related issues and tied up some loose ends from the benefits cases, particularly in the area of pensions. Despite the backlash against feminism that begun in the 1970s and intensified in the 1980s especially on the federal level,[139] feminists fared about as well as in the previous decade, winning eleven out of eighteen cases, or 61% (compared to 68% in the

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132 *See supra* Part I (discussing nature of complaints to the EEOC during this time period).

133 *See id.* (discussing the various laws passed during this time period).

134 *See* Parts I,III (discussing protective legislation and unequal status of women in the nineteenth and early twentieth century).

135 *See infra* tbl.3b. A vote was considered pro-feminist if the outcome could be characterized under the equality, difference and non-subordination frame as those terms are defined in the scholarly literature (e.g., the result required men and women in similar situations to be treated the same, permitted a remedy for past discrimination against women, or compensated women for the unequal consequences that result from biological or cultural differences or the power imbalance between men and women).

136 *See supra* Part I (discussing the transformation of the workplace during the 1970s).

137 *See generally* Part III. One of these eight cases, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), involved men's exclusion from an all-female nursing school.

138 Although the peak years of affirmative action occurred in the 1970s, it was not until 1987 that the Court considered its first case directly involving affirmative action for women. *See generally* Part III.

139 *See supra* Part I (describing the feminist backlash that began in the 1970s and which gained force in the 1980s).

1970s).[140]

The 1990s saw a substantial drop off of cases concerning employment discrimination with the Court deciding only eight such cases between 1990 and 2002. This may well have reflected a tactical shift as women, now inside many institutions, mobilized change from within rather than relying on organized women's organizations and lawsuits.[141] The exception was sexual harassment, which dominated the public debate into the 1990s, touching the Supreme Court itself during the nomination of Clarence Thomas. All but two of the eight cases decided during this decade-concerned sexual harassment.[142] Of the eight cases heard, seven were feminist victories,[143] although as explained below the victories were not always clear-cut. Particularly in the sexual harassment cases, the Court occasionally tempered non-subordination theory with a dose of separate spheres ideology.

Although this study focuses on the institutional consensus reached by the Court as demonstrated by the majority (and sometimes concurring opinions), the voting patterns of each individual justice were analyzed.[144] This analysis revealed distinct patterns. Some justices routinely voted for outcomes that advanced the cause of women's rights, while others did not. The greatest disparity was between Justices Marshall and Brennan, who cast pro-feminist votes 92% and 91% of the time respectively and Justices Rehnquist and Scalia, whose pro-feminist percentage of votes was 37% and 38%. The two female justices on the Court, Sandra Day O'Connor and Ruth Bader Ginsberg, voted the pro-feminist position 71% and 85% of the time.

A. *Equalizing Benefits And Pay Scales*

Between 1973 and 1988 the Court decided twelve cases involving differing benefit plans and pay scales for women and men.[145] The first type of gender discrimination prohibited by the Court was in government benefit programs that distinguished between men and women, more often to men's disadvantage. Social Security widows' benefits, Workman's Compensation widows' benefits and military medical and housing benefits were only given to men who could demonstrate that they were supported by their spouse, while women were automatically entitled to them. Social Security mother's benefits were available to mothers with young children whose father had

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[140] *See infra* tbl.3c.

[141] *See* Katzenstein, *Feminism, supra* note 91. A court perceived as increasingly conservative by feminists may also have contributed to its less prominent role.

[142] These two cases included a challenge to a policy that excluded women between certain ages from working around lead in a battery making factory and a challenge to a policy that excluded women from an all male military college.

[143] *See infra* tbl.3d.

[144] *See infra* tbl.1.

[145] *See infra* tbl.3a.

died, but not to men with a deceased spouse. Men were entitled to benefits under the Aid to Dependent Children-Unemployment Fathers (ADC-UF) program while women were not. The assumption was that women were less likely to be the breadwinner and hence more likely to need benefits when their husbands died, served in the military or were unemployed.

The Court struck down all of these laws using the formal equality frame, accompanied by a narrative that emphasized the similarities between men and women and dispelled separate spheres ideology. While all but one of the invalidated programs disadvantaged men ,[146] the decisions focused on eradicating female stereotypes and elevating women's status. The Court set the stage in its first benefits case, *Frontiero v. Richardson*,[147] invalidating military regulations requiring the spouses of female soldiers but not male soldiers, to demonstrate need in order to become eligible for medical, dental and increased housing allotments. In an opinion written by Justice Brennan, the Court forcibly and in great detail criticized women's past unequal treatment:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism', which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly entrenched in our national consciousness that, 100 years ago, a distinguished Member of this Court was also able to proclaim '[m]an 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 . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the nineteenth century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right.[148]

The Court then went on to criticize the present status of women in equally as forthright language:

> It is true, of course that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be

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[146] The exception was the Aid to Dependent Children-Unemployment Fathers (ADC-UF) program where only unemployed men, and not unemployed women were entitled to benefits. In all of the other programs challenged, including Social Security mother's benefits and widow's benefits, workman's compensation, and military benefits for spouses, it was the men who faced stricter eligibility requirements than women.

[147] 411 U.S. 677 (1973).

[148] *Id.* at 684.

> doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena[149]... in part because of past discrimination, women are vastly under-represented in this Nation's decision-making councils. There has never been a female President, or a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives.[150]

Sprinkled consistently throughout the Court's decisions on benefit programs that treated men and women differently was a continuing narrative that defined women as self-sufficient. Thus in *Weinberger v. Wiesenfeld*,[151] a case challenging the denial of "mothers benefits" to men when their wives died, Justice Brennan noted that the "the presumption of complete dependency of wives upon husbands has little relationship to present reality."[152] The Court replaced the stereotypical image of the homemaker with that of the working woman by emphasizing the unfairness of a tax scheme where unlike a man's taxes, those taxes taken out of a women's paycheck did not go to mother's benefits when she died.[153]

The Court followed the same narrative line did in *Califano v. Goldfarb*[154] and *Wengler v. Druggists Mutual Insurance Co.*[155] where widows were automatically entitled to Social Security benefits and workman's compensation benefits upon the death of their spouses, but men had to demonstrate that their wives had supported them. In both cases, the Court challenged the assumption that men were always the primary breadwinners. In *Goldfarb*, Justice Brennan noted that Congress "proceeded casually on the generally accepted stereotype"[156] that wives were dependent on husbands and needed the assistance, while men did not, and that such "old notions

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149 *Id.* at 686.

150 *Id.* at 686 n.17.

151 420 U.S. 636 (1975).

152 *Id.* at 643. Notwithstanding this language, and the Court's referencing of a statistic that showed forty-one percent of married women worked, *id.* at 643 n.11, the Court acknowledged that there was empirical support that men were the primary breadwinners. *See id.* at 645. The willingness to ignore this evidence is indicative of the extent to which the Court was engaged in the redrawing of stereotypical roles and challenging the separate spheres ideology.

153 *See id.* at 645. Interestingly, the defendant in *Wiesenfeld* relied, in part, on substantive equality (and even difference theory) by arguing that the statute was designed to compensate women as a group for past economic discrimination by providing help for women left to fend for their families in a still discriminatory labor market. *See id.* at 646. The Court countered this argument by noting that Congress's purpose was not to economically compensate women or it would have also granted benefits to widows without minor children who had similarly been disadvantaged in the workplace after spending many years at home rearing children. *See Wiesenfeld*, 420 U.S. at 648-51.

154 430 U.S. 199 (1977).

155 446 U.S. 142 (1980).

156 *Goldfarb*, 430 U.S. at 217 n.18.

and archaic and overbroad generalizations"[157] could no longer be a law's underpinning. Likewise in *Wengler*, in an opinion by Justice White, the Court found that the denial of worker's compensation benefits to a widower constituted "discrimination against working women"[158] and denigrated the importance of women's earnings to their families.[159] The decision labeled as an "offensive assumption" that "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their support."[160] In *Califano v. Wescott*,[161] a case challenging the denial of AFDC-UF benefits to families with unemployed mothers, the Court, in an opinion by Justice Blackmun rejected the "baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials while the mother is the 'center of home and family life.'"[162]

In constructing men and women as equal, the Court also occasionally redrew men's roles to make them more like women. The most notable example was in *Wiesenfeld*, the mother's benefits case, where the Court stressed that fathers, no less than mothers, have the constitutionally guaranteed right to the "companionship, care, custody and, management of their children,"[163] and may, like mothers, wish to stay home and care for their children after the death of a spouse.[164]

The Court also used the formal equality frame to portray women as equal to men when it came to pay scales, thus negating cultural norms that men were entitled to higher pay because of their role as breadwinners. In *Corning Glass Works v. Brennan*,[165] mostly male night shift inspectors were paid more than female day shift inspectors, although both did the same work.[166] The practice had its origins in the 1920s when automation permitted night inspections yet women were prohibited from working at night.[167] To attract men to the inspector's job, which was originally perceived as women's work,

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157 *Id.* at 211 (internal citation omitted).

158 *Wengler*, 446 U.S. at 147.

159 Not all of the justices saw the denial as discrimination against workingwomen. While agreeing that the distinction was invalid, one concurring justice made the point that it was not discrimination against women that was at stake, but discrimination against men. *Id.* at 155 (Stevens, J., concurring).

160 *Id.* at 148.

161 443 U.S. 76 (1979).

162 *Id.* at 89 (internal citation omitted).

163 *Wiesenfeld*, 420 U.S. at 652.

164 *See id.* at 652. Not all of the Justices shared this view; one concurring Justice agreed the distinction was invalid but then expressed his view that "in light of the long experience to the contrary, one may doubt that fathers generally will forgo work and remain at home to care for children to the same extent that mothers may make this choice." *Id.* at 655 (Powell, J., concurring).

165 417 U.S. 188 (1974).

166 *See id.* at 192.

167 *See id.* at 191.

the employer offered higher pay.[168] The disparity was later embedded in subsequent labor agreements that were challenged in 1974 under the Equal Pay Act.[169] The Court invalidated the pay scale using formal equality language that equalized men and women's status. Justice Marshall, citing from a Senate report that rejected the, "ancient and outmoded belief that a man because of his role in society should be paid more."[170]

The Court relied on formal equality even where there was an empirical basis for distinguishing between men and women. *City of Los Angeles v. Manhart*[171] involved a state pension plan requiring women to contribute more from their paychecks than men because they lived longer and as a group received more benefits.[172] The result was that women's take home pay was less than men's for the same work.[173] The Court, in an opinion by Justice Stevens, invalidated this standard actuarial practice of relying on group generalizations to set rates. Justice Stevens began by differentiating between real differences and stereotypical ones:

> There are real and fictional differences between women and men. It is true that the average man is taller than the average woman; it is not true that the average woman driver is more accident prone than the average man . . . It is now well recognized that employment decisions cannot be predicated on mere stereotyped impressions about the characteristics of males and females.[174]

Stevens then explained that even real differences could not be a basis for discrimination because it violated the core essence of formal equality, the right to individual autonomy: "even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[175] Fairness to the individual superceded fairness to the class.[176] The Court also used racial discrimination as a point of comparison, emphasizing that actuarial differences based on the different longevity between blacks and whites would not be acceptable,[177] thus neither should differences between men and women.

The Court reinforced this concept of formal equality in a later case, *Arizona v. Norris*,[178] when it prohibited discrimination in the payout of a state retirement plan offering retirement benefits from private third parties that

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168 *See id.*
169 *See id.* at 195.
170 *See id.*
171 435 U.S. 702 (1978).
172 *See id.* at 704.
173 *See id.* at 705.
174 *Id.* at 707.
175 *Id.* at 708.
176 *See id.* at 709.
177 *See Manhart*, 435 U.S. at 709.
178 463 U.S. 1073 (1983).

used sex to predict longevity thus resulting in less benefits for women. In a per curium opinion they stated that the law required employers to treat their employees as individuals and not "as simply components of a racial, religious, sexual or national class."[179]

In *Califano v. Webster*,[180] the Court turned to substantive equality when formal equality proved insufficient to redress discrimination. Under the Social Security Act, women, until 1972, were permitted to exclude three more lower earnings years than a similarly situated male from the computation of their average monthly wages resulting in higher benefits for women.[181] Men who were disadvantaged by the Act challenged it. A formal equality approach would have required men and women to be treated the same and the disparity eliminated. However, the Court eschewed this approach, relying on substantive equality, which meant compensating women for their disadvantage. The Court, in a per curium opinion, found it significant that the rule was "not the accidental byproduct of a traditional way of thinking about females."[182] Rather, it was a way of "redressing our society's long standing disparate treatment of women . . . operating directly to compensate women for past economic discrimination."[183] As the Court explained, "[w]hether from overt discrimination or from the socialization process of a male dominated culture, the job market is inhospitable to women seeking any but the lowest paying jobs."[184] The use of the word "compensation," coupled with recognition of past discrimination, was a clear formulation by the Court of the principles of substantive equality, which permits differential treatment to compensate for disadvantages.

The Court's language in *Webster* regarding "the socialization process of a male dominated culture"[185] contained an echo of difference theory, although the Court did not directly apply this principle in that case. It did however, venture into difference theory in the later case of, *Washington v. Gunther*.[186] The plaintiffs in *Gunther* were female prison guards who were paid less than male guards.[187] Under the Equal Pay Act, women were to

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[179] *Id.* at 1083. In contrast, the dissenting Justices in both *Manhart* and *Norris* insisted that it was longevity and not gender that was being used in the calculation of pension benefits. *See Manhart*, 435 U.S. at 727 (Burger, J., dissenting); *Norris*, 463 U.S. at 1104 (Powell, J., dissenting). The dissenters also stressed the need for insurance companies to rely on actuarial group based statistics, whether it be based on gender or some other factor, in predicting future payments that could not by their very nature be based on individual determinations not yet known. *See id.* In other words, equality was not at stake here because gender had nothing to do with it, even though the group affected was only and all female.

[180] 430 U.S. 313 (1977).

[181] *See id.* at 315-16.

[182] *Id.* at 320.

[183] *Id.* at 317-18.

[184] *Id.*

[185] *Id.*

[186] 452 U.S. 161 (1981).

[187] *See id.* at 163-64.

receive equal pay for equal work.[188] However, the male and female guards did not perform equivalent work because the men guarded more prisoners than the women who spent most of their time doing clerical work.[189]

The Court upheld an expansive interpretation of Title VII that recognized, consistent with difference theory, that the male standard was not the appropriate one. To compensate women for the negative consequences of culturally and socially created differences, the Court allowed women to bring discrimination claims even when performing jobs that were not equivalent to men's. As Justice Brennan, writing for the majority in *Gunther,* noted, the equal pay for equal work formula was of no help to women in sex segregated occupations where there were few if any men performing the same work:

> Under petitioners reading . . . , only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress . . . Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove the system is a pretext for discrimination . . ., [A] female auditor thus might have a cause of action while a female secretary might not.[190]

Gunther and *Webster* represented the most expansive interpretation of equality in the area of benefits and pay scales. On the opposite end of the spectrum was a series of cases that addressed fair compensation after a finding of discrimination. After declaring certain pension programs invalid because they discriminated against women in the computation of benefits, the Court was asked in three separate cases—*Manhart,*[191] *Norris*[192] and *Florida v. Long* —[193] whether reimbursement or retroactive benefits should be granted to women who had contributed at higher rates before the practice was declared illegal.

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188 *See* 29 U.S.C. § 206 (d)(1); *see also Gunther,* 452 U.S. at 167.

189 *See Gunther,* 452 U.S. at 165.

190 *Id.* at 178-79.

191 *Manhart,* 435 U.S. at 702.

192 *Norris,* 463 U.S. at 1073.

193 487 U.S. 223 (1988).

In all three cases the Court switched from a narrative of equality to emphasizing the burden equality could create. The Court portrayed the issue as one of fiscal responsibility rather than equality. In *Norris*, (after using the formal equality frame to invalidate a discriminatory retirement plan) the Court, after noting equalization would cost the state between $817 million to $1,260 million annually for fifteen to thirty years, found "no justification for the Court . . . to impose this magnitude of burden retroactively on the public."[194] Similarly, in *Long* the Court noted that retroactive liability, estimated at forty-three million dollars, would threaten the security of the funds and its beneficiaries.[195] Additionally, in *Manhart* the Court stated that it could not "ignore the potential impact which changes in rules affecting insurance and pension plans may have on the economy. Fifty million Americans participate in retirement plans . . . administrators must be given time to adjust gradually to Title VII's demands."[196]

According to the Court's narrative, employers and benefits administrations were no longer the perpetrators of discrimination as in past narratives, but unwitting victims. Thus the Court in *Manhart* emphasized that it "must recognize that conscientious and intelligent administrators of pension funds . . . may well have assumed that a program like [respondents] was entirely lawful . . . pension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden."[197] At the expense of women who had been discriminated against, beneficiaries, including the women whose pension funds were unfairly calculated were to be protected and their pension funds undisturbed. While the dissenting Justices in *Long*[198] argued that the failure to provide retroactive relief would perpetuate past discrimination the majority declined to impose the remedy that arguably flowed from its initial finding of discrimination and the principles of equality.

A similar clash between the principles of equality and pragmatism confronted the Court in *Heckler v. Mathews*,[199] a challenge to a law passed after *Goldfarb*, which invalidated the dependency test for widowers applying for Social Security benefits. Congress, fearing a drain on social security funds because of the large number of state and federal employees now eligible for widow's benefits, passed a provision requiring any widows benefits to be offset by federal or state pension payments.[200] To protect

194 *Norris*, 463 U.S. at 1106-07 (Powell, J., dissenting) (awarding no retroactive relief).

195 *See Long*, 487 U.S. at 235-37.

196 *Manhart*, 435 U.S. at 721-22.

197 *Id.* at 720.

198 *Long*, 487 U.S. at 248 (Stevens, J., dissenting).

199 465 U.S. 728 (1984).

200 *See Heckler*, 465 U.S. at 732; *see also* 1977 Amendments, § 334(a)(2)-(b)(2); 42 U. S. C.

those couples that had relied on the old rules in planning for their retirement, men who were eligible for widow's benefits under the dependency rule were exempted from the offset provision if they retired between 1977 (the year *Goldfarb* was decided) and 1982.[201] Congress thus in effect permitted a five-year extension of an invalid gender based classification. Those men who were not granted the exemption (i.e. men who were not eligible under the dependency rule) challenged the new rule, claiming that it treated two similarly situated groups differently: non-dependent men who received a pension offset and non-dependent women who received their widow's benefits without an offset.[202]

The Court, in an opinion by Justice Brennan, acknowledged that Congress was reviving a gender distinction, but upheld it because it wasn't based on the mechanical application of "traditional, often inaccurate, assumptions about the proper roles of men and women"[203] but on retirement planning expectations. Brennan found a close fit between Congress' goal of protecting the interests of retiring couples and the form and duration of the exemption.[204] Thus, while professing its commitment to the underlying principles of formal equality the Court declined to apply the standard in order to escape what it perceived as an inequitable outcome. Like its retroactive pension decisions, the Court displayed elasticity when applying the principles of formal equality calibrating where the burden should fall as benefits and pension plans were equalized.

B. *Barriers to Employment and Work Opportunities*

From 1971, when height and weight restrictions for corrections officers were challenged, until 1996, when women contested their exclusion from a public military college, the Court decided twelve cases concerning gender-related barriers in the workplace.[205] Similar to the benefits and pay scale cases, the Court followed a shifting narrative of opening up opportunities but drawing a line when it perceived that men's interests could be harmed or when deeply entrenched views about women's proper roles were at stake.

The narrative sometimes shifted within the same case, as in *Dothard v. Rawlinson*,[206] when the Court decided whether women could be employed as prison guards. At issue was a state statute specifying minimum height and weight requirements that excluded many women.[207] Also challenged was a

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§ 402(b)(4)(A), (c)(2)(A) (1976 ed., Supp. V).

201 *See Heckler*, 465 U.S. at 733.

202 *Id.* at 735.

203 *Id.* at 750.

204 *Id.*

205 *See infra* tbl.3b.

206 433 U.S. 321 (1977).

207 Prison guards were required to be at least 5'2" and one hundred twenty pounds, which

state law prohibiting women from being hired in all male maximum-security prisons. As in *Manhart* where actuarial tables provided an empirical basis for distinguishing between men and women, true physical differences were at issue. But the Court, in an opinion by Justice Stewart, avoided addressing these differences, instead invalidating the height and weight requirements because there was "no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance."[208] The Court, as in *Manhart,* focused on the individual, suggesting that a test for applicants that measured strength directly would be valid "because it would be one that measure[s] the person for the job and not the person in the abstract."[209]

But the Court abruptly shifted course when it barred women, in the same case, from serving as guards in certain all-male prisons. In the Court's most overt statement of the separate spheres ideology , the justices in *Dothard* invoked the traditional image of women as seductive sexual objectives. After portraying Alabama's penitentiaries as "peculiarly inhospitable . . . for human beings of whatever sex,"[210] and after rejecting the idea that it was "romantic paternalism"[211] to deny women the choice of where to work, it cast women in the role of seductress:

> A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women because they were women . . .The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility. [212]

Justice Marshall, in his dissent, called the majority to task for using womanhood as the disqualifying factor. After noting that much of the job relied on psychological and moral authority, which men and women equally possessed, he stated:

> In short the fundamental justification for this decision is that women guards will generate sexual assaults. With all respect, this rationale

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the court found would exclude 41.13% of the female population, but less than 1% of the male population. *See id.* at 329.

208 *Id.* at 331.

209 *Id.* at 332 (citing Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971)).

210 *Id.* at 334.

211 *Id.* at 335.

212 *Dothard,* 433 U.S. at 335-36.

> regrettably perpetuates one of the most insidious of the old myths about women- that women, wittingly or not, are seductive sexual objects .... It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, the pedestal upon which women have been placed has ... upon closer inspection, been revealed to be a cage.[213]

Three years later in 1980, the Court again relied on the separate spheres theme when it upheld women's exclusion from the draft. The case *of Rostker v. Golberg*[214] was originally brought by men protesting the Vietnam War. One of their arguments was that the draft was discriminatory because it excluded women.[215] The case went into legal limbo until registration for the draft was revived during the Soviet invasion of Afghanistan.[216] Congress resisted the President's call for compulsory registration of men and women and voted to authorize a male-only registration.[217] The issue before the Court was whether the male only registration law discriminated against women. The Court, in an opinion by Justice Rehnquist, rejected any suggestion that the exemption was the "accidental by-product of a traditional way of thinking about females," noting that the Congress had deliberated long and hard on the issue.[218] Because the purpose of registration was to ready troops for combat and since women were excluded from combat, excluding women from registering for the draft was appropriate.[219] Since women and men were not similarly situated, there was no constitutional violation.[220]

The Court's narrative cast the issue as a clash between military preparedness and women's equality with the former the clear winner. The Court noted that the President's motivation for asking women to register for the draft was "based on equity" not military preparedness.[221] The Court described how a misplaced focus on equity would harm the military. Citing from various Senate reports, Rehnquist described the problems that would result in drafting even a small number of women for non-combat roles, including "administrative problems such as housing and different treatment with regard to dependency, hardship and physical standards."[222] Military flexibility would be impeded by having two groups —those who could engage

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213 *Id.* at 345 (Marshall, J., dissenting).
214 453 U.S. 57 (1981).
215 *See id.* at 62.
216 *See id.* at 60.
217 *See id.* at 61.
218 *Id.* at 74.
219 *See id.* at 77.
220 *See Rotsker*, 453 U.S. at 79.
221 *See id.*
222 *Id.* at 81.

in combat (men) and those who couldn't (women).[223] The Court portrayed the exclusion of women from combat (and hence registration) as a well-settled and virtually unchallengeable position. It cited with approval a Senate report stating that "the principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people."[224] It further noted that "no major country [had] women in combat jobs in their standing army."[225] In short, the Court constructed a separate spheres narrative that portrayed women as a problem in the military, and drew a distinction between the "important" issues of military preparedness and, as Justice Rehnquist put it, "gestures of superficial equality."[226]

While the military and all male prisons were off limits to women, the Court was willing during the early 1980s to open so-called "female professions" to men. Using the difference frame in *Mississippi v. Hogan*,[227] the Court invalidated a state nursing program that excluded men. The state framed the decision to exclude men as an issue of substantive equality for women contending that the school's "single-sex admission policy . . . [was] to compensate for discrimination against women and therefore, constituted educational affirmative action."[228] The Court, in an opinion by Justice O'Connor, rejected that argument, employing a narrative that was more consistent with difference theory than the formal equality approach used to invalidate benefit rules that excluded men. Thus, the Court did not argue that men and women must be treated alike because they are alike. Instead, the Court found that "the exclusion of men from nursing schools "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job . . . [and] lends credibility to the old view that women not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."[229] Citing the American Nurses Association position that "excluding men from the field has depressed nurse's wages,"[230] the Court recognized that social and cultural norms resulted in certain professions being less valued because they constituted "woman's work." While the remedy—allowing men greater access to a female profession—seemed oddly

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223 *See id.* at 82.

224 *Id.* at 77.

225 *Id.* at 77 n.12.

226 *Rotsker*, 453 U.S. at 79. Justice Marshall in dissent protested that the Court was wrongly excluding "women from a fundamental civic obligation." *Id.* at 86. As to the majority's argument that equity should not be a concern when it came to the military, Marshall noted how well female soldiers performed in the military, thus constructing a narrative to counter the majority's portrayal of woman as a hindrance. *See id.*

227 458 U.S. 718 (1982).

228 *Id.* at 727.

229 *Id.* at 729-30.

230 *Id.* at 730 n.15.

tailored because it relied on men to elevate women's professional status, the reasoning was nonetheless consistent with difference theory.[231]

The entry of women into the male dominated professions of law and accounting during the 1980s and the glass ceiling they encountered,[232] provided the Court with several opportunities to address women's opportunities in the workplace. *Hishon v. King*,[233] decided in 1983, involved a female law associate who claimed she had been denied partnership because she was a woman. The Court determined that partnership decisions in professional law firms came under the ambit of Title VII, thus providing women with an important tool for challenging the glass ceiling. *Hishon* was one of the few cases regarding employment discrimination with no accompanying narrative. The Court laid out a straight statutory construction argument that being considered for partnership qualifies as a "privilege" of employment protected from discrimination under Title VII.[234] The argument was devoid of any references to the discrimination woman faced, the need for an expansive interpretation of the Act, or any of the narratives that the Court commonly employed in its employment discrimination cases.

Five years later, however, in the case of *Price Waterhouse v. Hopkins*,[235] the Court plunged headfirst into the complex personal, social and psychological dynamics affecting women's advancement in the workplace. The plaintiff, an accountant at Price Waterhouse, was the only woman proposed for partnership that year in a firm in which only seven of the six-hundred-and-sixty-two partners were women.[236] She claimed that sex stereotyping had played a role in the decision because she had been turned down for partnership for behavior that would have been acceptable in a man. She had been variously described as being "macho," as "overcompensat[ing] for being a woman"[237] and as acting "unladylike."[238] One partner advised her that in order to improve her partnership chances she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled and wear jewelry."[239] She claimed that her aggressiveness and outspokenness, traits valued in men, elicited a negative reaction because she

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231 The state also argued that same-sex education was better for women, but the Court rejected the notion that men would affect the performance of female students, thus, at least in this respect, putting it at odds with some difference theory feminists who contend that women learn better in all-female atmospheres where their different talents and interests can emerge without being forced into a male mold. *See id.* at 731.

232 *See supra* Part I (discussing the obstacles women faced in male dominated occupations and the glass ceiling they encountered).

233 467 U.S. 69 (1983).

234 *Id.*

235 490 U.S. 228 (1989).

236 *See id.* at 233.

237 *Id.* at 235 (alteration in original).

238 *Id.*

239 *Id.*

was a woman.

To decide the legal issue, the Court first had to address the role of sex stereotyping in discrimination cases. In a plurality decision written by Justice Brennan, the Court labeled sexual stereotyping as a form of sex discrimination. It relied on the principles of formal equality, which prohibit the use of any group generalizations or stereotypes as a violation of the right of each individual to be treated the same as other similarly situated individuals. Women were not to be required to act a certain way and "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[240] As the Court further stated, "[w]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[241]

In its narrative, the Court refused to view sex stereotyping as innocuous or harmless. It showed little patience when the defense denigrated the plaintiff's expert witness on sex role stereotyping, a social psychologist, for relying too much on "intuitive hunches."[242] The Court portrayed sexual stereotyping as so obvious a harm that no expert witness was needed:

> It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.' Nor does it require expertise. . .to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.[243]

The Court emphasized the seriousness of the harm caused by sex stereotyping: "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not."[244] The Court thus constructed a narrative that went beyond prohibiting overt acts of discrimination to attacking the more subtle dynamics that supported it. Ending discrimination wasn't simply a matter of letting women do "men's work"; it also meant letting go of stereotypical notions about how women should behave when they were doing it.

In *United States v. Virginia*,[245] decided nearly 25 years after the Court refused to allow women to work as corrections officers in all male prisons, the Court relied on the theme of formal equality to require an all male

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240 *Id.* at 250.

241 *Price Waterhouse*, 490 U.S. at 251.

242 *Id.* at 255.

243 *Id.* at 259.

244 *Id.* at 251.

245 518 U.S. 515 (1996).

military college to open its doors to women. Responding to Virginia Military Institute's (VMI) argument that most women were not tough enough to sustain the adversative method used by the school and that their admittance would dilute this method,[246] the Court, in an opinion by Justice O'Connor, rejected the use of overbroad generalizations about women noting that there were also many men who would not choose to learn under such conditions.[247] Consistent with the formal equality frame, the Court switched the focus to the individual arguing that women with the capacity and desire to undergo such training, no matter how few, should not be excluded merely because of their sex.[248]

To counter the defendants' narrative that soldiering was not for women, the Court engaged in a lengthy and colorful narrative that ridiculed discrimination from days past. It reached back into the historical record quoting from a 1925 Columbia Law School report warning that "if women were admitted to the Columbia Law School, . . . then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!"[249] It described past resistance to female doctors, using a doctor's letter from 1869 stating that, "God forbid that I should ever see men and women aiding each other to display with the scalpel the secrets of the reproductive system."[250] The Court tied this historical narrative to the present by observing similar reservations to admitting women to the military and then extolling women's accomplishments,[251] noting for example that "women cadets have graduated at the top of their class at every federal military academy."[252] The cumulative effect of this narrative, framed by quotes from the past that sounded quaintly silly to the modern ear, rendered the defendant's objections to admitting women as similarly old-fashioned and nonsensical; a proposition just waiting to be proved wrong. The Court's construction of a narrative where women were capable of performing even the most male of jobs in the military also marked how far it had come from 1977 when it prevented women from working in all male prisons and 1981 when it excluded women from draft registration.

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246 *See id.* at 535.

247 *See id.* at 542.

248 *See id.* The Court also rejected Virginia's attempt to create a separate military academy for women. It found the academy unequal in terms of method, resources and training. *See id.* at 557. It portrayed as a smokescreen Virginia's argument that "single sex education provides important education benefits" and contributes to "diversity in educational approaches." *Id.* at 535. The Court turned this argument around, reciting the state's lengthy history of resistance to providing women with the same educational opportunities. *See Virginia*, 518 U.S. at 537.

249 *Id.* at 543 (quoting THE NATION, Feb. 18, 1925, at 173).

250 *Id.* at 544 (quoting E. Clark, *Medical Education of Women*, 4 BOSTON MED. & SURG. J. 345, 346 (1869)).

251 *See id.* at 544 n.13 -14.

252 *Id.* at 544 n.13.

Making room for women in previously all-male domains caused disruptions in the workforce; thus, like in the benefits cases, several cases required the Court to balance the interests of women against other groups. Veterans preference programs, seniority rules and affirmative action programs raised one of equality's most vexing questions—who should "win" when an opportunity granted to one means an opportunity denied to another? The formal equality approach, in its preference for equal treatment without distinctions, often resolves this dilemma by refusing to acknowledge it. Outlawing affirmative action programs because they advantage one group over another would be an example of a rigid application of the formal equality frame using a "sex-blind" approach.[253] In contrast, substantive equality is designed to grapple with these dilemmas, and equalize disadvantaging differences resulting from past discrimination. The difference frame goes even further, looking beyond temporary remedies for past discrimination to ingrained biological and cultural disadvantages.[254]

In several cases the Court relied on the substantive equality frame to resolve these dilemmas. In the 1975 case of *Schlesinger v. Ballard*,[255] the Court allowed women more time than men to obtain a promotion in the military before being forcibly discharged.[256] As the Court stated, "the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service . . . Fair and equitable" career advancement programs thus required differential treatment of men and women.[257]

Twelve years later, in *Johnson v. Transportation*,[258] the Court resolved a conflict where men and women's interests were directly at odds. *Johnson* involved an affirmative action plan that integrated women at a county highway department who held primarily clerical jobs, into the higher skilled job of road dispatcher.[259] The Court, in an opinion by Justice Brennan, used

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253 The Supreme Court has increasingly moved closer to this approach. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding that affirmative action programs are subject to strict scrutiny because only a narrowly tailored and compelling reason would justify treating one group differently than another under the under the equal protection clause).

254 In contrast to affirmative action that seeks to redress past discrimination, the diversity approach to affirmative action focuses on creating a diverse work force or educational setting because of the advantages that accrue from heterogeneous grouping. The first form of affirmative action is more consistent with the substantive equality frame. The diversity approach is more consistent with the difference frame because it recognizes biological, cultural and social distinctions among people.

255 419 U.S. 498 (1975).

256 *See id.* at 500.

257 *Id.* at 508 (emphasis in original).

258 480 U.S. 616 (1987).

259 *See id.* at 620-21.

a sweeping historical narrative about justice, quoting from its decision in *Steelworkers v. Weber*,[260] a landmark case on affirmative action that held that Title VII permitted a color conscious approach to helping minorities:

> It would be ironic indeed if a law triggered by a Nations' concern over the centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long constituted the first legislative prohibition of all voluntary, private, race conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[261]

The Court upheld the affirmative action plan in *Johnson* using substantive equality, where the goal was equalization to remedy past discrimination. They emphasized that the plan was a remedial measure to "eliminate Agency work force imbalances in traditionally segregated job categories."[262] It noted that of the 238 workers in the job classification relevant to the case, not one was a woman.[263] The decision to require only a showing of a statistical imbalance and not direct evidence of the employer's past discrimination was, according to the Court, "grounded in the recognition that voluntary employer action can plays a crucial role . . . in eliminating the effects of discrimination in the workplace."[264] The Court's narrative emphasized the collective responsibility of all employers, not just those guilty of past discrimination, to implement the dictates of substantive equality.

But the Court also emphasized the temporary nature of that task. An important rationale for upholding the plan in *Johnson* was that it was designed to "attain a balanced work force, not to maintain one."[265] This distinction between "attaining" and "maintaining" was crucial to the Court's narrative of substantive equality. It reiterated it several times,[266] thus making it clear that affirmative action was intended as a temporary measure to compensate for past exclusions and not to assure diversity for diversity's sake.[267] Thus, the Court rejected a difference theory approach that would

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260 443 U.S. 193 (1979).

261 *Johnson*, 480 U.S. at 629.

262 *Id.* at 637.

263 *See id.* at 621.

264 *Id.* at 630.

265 *Id.* at 639.

266 *See id.* at 640. "[T]here is ample assurance that the agency does not seek to use its Plan to maintain a permanent racial and sexual balance." *Johnson*, 480 U.S. at 641. In addition, the Court stated that "the agency has no intention of establishing workforce whose permanent composition is dictated by rigid numerical standards." *Id.* at 637.

267 For an example of the diversity approach, see Justice Powell's decision in, University of California v. Bakke, 438 U.S. 265 (1978), which declared racial quota's invalid but recognized that attainment of a diverse student body was constitutionally permissible. Justice Powell stated that:

legitimize diversity as an end in itself.[268]

The Court's narrative also contained repeated references to protecting the interests of other employees, specifically men. An important consideration was "whether the Agency plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement[,]"[269] noting that 95% of the jobs had been filled by men.[270] It stressed that the petitioner (a man) "had no absolute entitlement to the road dispatcher position . . . [and that] denial of the promotion unsettled no legitimate, firmly rooted expectation"[271] and even noted that he was eventually promoted.[272]

Harm to men proved to be the Court's breaking point, causing it to depart from the substantive equality frame in several cases where men and women's interests conflicted. The first example was *Personnel Adm'r v. Feeney*,[273] decided in 1979. *Feeney* involved a veterans' preference program in state government that resulted in women's exclusion from most professional slots.[274] Women who scored among the top on civil service tests were routinely and repeatedly passed over in favor of veterans. Only the lower level traditionally female positions were exempt from the veterans' preference.[275] This resulted in a two-tiered work force with men occupying the higher status jobs such as attorney and accountant and women in the lower status and traditional female jobs like clerk and secretary.[276]

The Court, in an opinion by Justice Stewart, upheld the law without overtly relying on a separate spheres frame; in fact, he argued that the

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> An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Id. at 314.

268 The Court also chose a substantive equality approach over difference theory when deciding the relevant comparison for determining whether a work force was unbalanced: the percentage of minorities or women in the area labor market or the percentage who possess the relevant qualifications. *See Johnson*, 480 U.S at 633 n.10. The Court noted that using a specialized labor force as a point of comparison "would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities." *Id.* The Court thus viewed the absence of minorities and women in certain occupations as caused by discrimination, while difference theory would have recognized not only discrimination, but also that deeply ingrained cultural and social patterns may steer minorities or women away from certain jobs. *See id.*

269 *Id.* at 637-38.

270 *See id.* at 638 n.15.

271 *Id.* at 635.

272 *See Johnson*, 480 U.S. at 636 n.15.

273 442 U.S. 256 (1979).

274 *See id.* at 283.

275 *See id.* at 284-285.

276 *See id.* at 270.

preferences had nothing to do with women. According to the Court, the distinction was "between veterans and non-veterans, not between men and women."[277] After all, the Court noted, "significant numbers of non-veterans are men."[278] The preferences were thus "not a law that [could] plausibly be explained only as a gender based classification[,]" [279] and "[t]he State intended nothing more than to prefer 'veterans.'"[280]

The separate spheres theme appeared when the Court acknowledged that "[t]he enlistment policies of the Armed Services may well have discriminated on the basis of sex,"[281] but insisted that "the history of discrimination against women in the military is not on trial in this case."[282] In short, the Court rendered women invisible. It refused to acknowledge a gender related link with a disproportionate and harmful impact on women, insisting it was not at issue.

In pursuit of a policy that overwhelmingly benefited men, it chose to ignore the impact on women, relegating them to second-class status in the public sphere of work. What the majority in *Feeney* rendered invisible, the dissent characterized as blatantly evident in a counter narrative that put women's interests on a more equal footing. According to Justice Marshall, the preference program's purposeful discrimination reflected and perpetuated "archaic assumptions about women's roles" and "rendered desirable state civil service employment an almost exclusively male prerogative."[283] The results were entirely foreseeable given the "long history of policies severely limiting women's participation in the military."[284]

A few years later, in 1982, the Court again opted to protect men's rights over women's. In *Ford v. EEOC*,[285] after several complaints were filed against Ford Motor Company for sex discrimination, Ford offered the claimants jobs without retroactive seniority.[286] The question before the Court was whether the offer of a job without seniority tolled Ford's back pay liability after it was subsequently found to have discriminated against the claimants. Since seniority was key to a whole host of benefits, including wage levels, promotions, transfers, and protection from layoffs, this put women at a distinct disadvantage and made Ford's job offer less attractive, especially if

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277 *Id.* at 275.

278 *Id.*

279 *Feeny*, 442 U.S. at 275.

280 *Id.* at 277.

281 *Id.* at 278.

282 *Id.*

283 *Id.* at 283 (Marshall, J., dissenting).

284 *Id.*

285 458 U.S. 219 (1982).

286 The jobs involved positions in a warehouse, where women had never worked before. *See id.* at 221. Ford was subsequently found to have discriminated against the plaintiff.

they had employment elsewhere.[287] This was why the claimants refused Ford's offer; they would have forfeited their seniority at their present jobs with no compensating offer of seniority at Ford, leaving them more vulnerable to layoffs.[288]

The Court could have equalized the women's status by granting retroactive seniority thus putting them on par (the formal equality frame) or bringing them up to speed (the substantive equality frame) with the men who were hired when they were illegally refused jobs. The Court, in an opinion by Justice O'Connor, instead upheld the failure to offer retroactive seniority. It argued that the denial of seniority helped women because it provided an incentive for employers to voluntarily comply with Title VII, which was more effective than lengthy lawsuits. Requiring employers to offer retroactive seniority was a disincentive because it made hiring more costly.[289] As the Court stated, "victims of job discrimination want jobs, not lawsuits."[290] The Court reinforced this narrative by quoting from a claimant's testimony: "I was just wanting that job so bad because you can't, a woman, when you've got three children, I needed the money and I was wanting the job so bad."[291] In the guise of protecting women, the Court overrode their claim for seniority.

The women in *Ford* were also portrayed as asking for too much. They had already been made whole because they had other employment.[292] As the Court explained, requiring Ford "to provide what amounts to a form of unemployment insurance to claimants, after they have found identical jobs and refused the defendant's unconditional job offer, would be, absent special circumstances, to grant them something more than compensation for their injuries."[293]

Set against a backdrop of unduly complaining women, who were ostensibly more concerned with jobs than seniority, the Court added another narrative line: its concern for Ford's other employees, who were primarily men because few women had been hired in the past. As the Court explained, giving seniority to a new hire would require Ford "to cope with the deterioration in morale, labor unrest, and reduced productivity that may be engendered by inserting the claimant into the seniority ladder over the heads of incumbents, who have earned their places through their work on

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287 *See id.* at 251.

288 *See id.* at 247.

289 *Id.* at 229.

290 *Id.* at 230.

291 *Ford*, 458 U.S. at 230 n.12.

292 *See id.* at 234. Two of the claimants had found jobs at General Motors, where they were working when Ford offered them a job.

293 *Id.* at 235.

the job."[294] Granting seniority would thus "threaten the interests of other, innocent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant has unfairly been granted seniority."[295] And although the claimants subsequently proved Ford had discriminated, the Court warned that we "should be wary of any rule that encourages job offers that compels innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proved, unlawful discrimination."[296]

The Court's narrative in *Ford*, pitted men, portrayed as innocent hardworking victims, against women whose claim of discrimination was suspect [297] and who were asking for more than they deserved. Unlike past narratives where the workplace created obstacles for women, here women become the obstacle. In short, faced with the choice of making the women whole or protecting the male employee's rights, the Court constructed a separate spheres narrative that subordinated women's concerns to men's.

The Court reaffirmed this theme in 1983 and 1989. In *Grace v. International Union*[298] the employer followed layoff procedures in a Title VII conciliation agreement rather than a collective bargaining agreement that protected mostly white men's seniority rights. Several laid off men filed grievances.[299] The employer sued in federal court to enjoin the arbitration of the grievances based on the conciliation agreement. While the district court held that the conciliation agreement should prevail, the court of appeals reversed and required the employer to arbitrate. When the arbitrator held for one of the men the employer brought an action to overturn the award. The question before the Court was whether the award should be enforced. The Court addressed the effect of the district court's order upholding the conciliation agreement and the conciliation agreement itself. In an opinion by Justice Blackmun, the Court chastised the company for choosing to abide by the conciliation agreement over the collective bargaining agreement "by entering into the conflicting conciliation agreement, and by subsequently acting on its mistaken interpretation of its contractual obligations, the Company attempted to shift the loss shift to its male employees, who shared no responsibility for the sex discrimination."[300]

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294 *Id.* at 229.

295 *Id.* at 241.

296 *Id.* at 240.

297 The Court was referring to the fact that the claimants had spurned Ford's offer before their claim had been adjudicated, but after the complaint was filed. *See Ford*, 458 U.S. at 240.

298 W.R. Grace & Co. v. Local 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757 (1983).

299 *See id.* at 760.

300 *Id.* at 770.

emphasized that altering the collective bargaining agreement through a conciliation agreement would undermine federal labor policy and harm unions, "[a]lthough the ability to abrogate unilaterally the provisions of a collective bargaining agreement might encourage an employer to conciliate with the Commission, the employer's added incentive to conciliate would be paid for with the union's contractual rights."[302] The Court noted that the union had not been a party to the conciliation agreement[303] ignoring the fact that the union had declined the EEOC's request to participate. Thus, in a case that pitted the interests of unions (who, through collective bargaining often preserved the rights of their mostly male members) against female victims of gender discrimination, the Court chose the former, constructing a narrative that depicted male employees as peripheral to the dynamics of gender discrimination in spite of having been its main beneficiary for years.

The same theme appeared in *Lorance v. AT & T*, [304] where the Court upheld a seniority system that was changed after women began filling more highly skilled jobs. Instead of plant wide longevity, seniority was keyed to the length of time served in specific positions.[305] Women who had recently been promoted to the more skilled and previously male dominated position of testers lost their seniority upon promotion and were among the first laid off several years later when an economic downturn hit the company.[306] The women alleged that the change in seniority rules was intentionally designed to discourage them from entering the more highly skilled position because it required them to give up their seniority.[307]

The majority, in an opinion by Justice Scalia, framed the issue as a statute of limitations question holding that the women were required to challenge the new seniority rules within 300 days of its effective date, even though its effects did not become known until years later.[308] The Court stated that:

> This 'special treatment' strikes a balance between the interests of those protected against discrimination by Title VII and those who work — perhaps for many years — in reliance upon the validity of a facially lawful seniority system . . . In the context of the present case, a female tester could defeat the settled (and worked for) expectations of her co-workers whenever she is demoted or not promoted under

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302 *See id.*

303 The EEOC asked the union to participate but it declined. *See id.* at 759.

304 490 U.S. 900 (1989).

305 *See id.* at 902.

306 *See id.*

307 *See id.* at 903.

308 *See id.* at 912. The dissent, in an opinion by Justice Marshall, challenged this legal analysis, arguing that Title VII did "confer absolute immunity on discriminatory adopted seniority systems that survive their first 300 days" and that it could be challenged based on a continuing violation theory. *Id.* at 914 (Marshall, J., dissenting).

the new system, be that in 1983, 1993, 2003, or beyond.[309]

The Court thus adopted a narrative where women played the role of virtually endless nuisances, disrupting the interests of long-time employees who, because of discrimination, were mostly men. In short, men's interests mattered most, underscoring their primacy in the "separate sphere" of work.

In sum, throughout the 1970's and 80's separate spheres ideology sometimes prevailed in the Court's narratives albeit stated in a less overtly sexist way. When specific men stood to be harmed, including those utilizing veterans' preference programs and seniority systems, the Court retreated from an equality framework thus insuring men's advantage over women in the workplace. Similar to the pension benefit cases, where the Court stopped short of equalizing benefits because of the high cost, the Court hesitated to fully embrace equality. On the other hand, the Court adopted the principles of formal equality and even substantive equality, when it upheld affirmative action programs, struck down height and weight requirements and ultimately acknowledged women's roles as citizen soldiers.

C. *Pregnancy and Mothering*

From 1971 through 1991 the court decided ten cases that directly bore on pregnancy or maternity issues. Reproductive capability, the most defining difference between men and women, highlighted the tension between the various frames of equality. Should it be treated like any other disability and hence compensated in the same way (the formal quality frame)? Should it be ignored because it does not affect men and hence no provision made for it (the separate spheres frame)? Or should special provisions be made because it is a biological and socially constructed difference that disadvantages women (the difference frame)?

The Court's inconsistency and uneasiness was apparent, sometimes within the same case. The Court's first Title VII case, *Phillips v. Martin Marietta*,[310] is an example. At issue was an employer's refusal to hire mothers with pre-school children. Using the formal equality frame, the Court held that it was a violation of Title VII to have "one hiring policy for women and another for men—each having pre-school age children."[311] However, it reverted to the separate spheres frame when it remanded the case because "[t]he existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a [bona fide occupational qualification]."[312]

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309 *Lorance*, 490 U.S. at 912.

310 400 U.S. 542 (1971).

311 *Id.* at 615.

312 *Id.* at 615-16.

The Court's next case, *Cleveland v. LaFleur*,[313] was a challenge to a school policy that required teachers to take maternity leave in their fourth month of pregnancy regardless of their physical condition. The school board argued in part, that the rule maintained continuity of instruction.[314] The Court, in an opinion by Justice Stewart, easily disposed of the school board's argument by demonstrating that the four-month rule interfered with continuity more than teachers setting their own leave dates in advance.[315] The Court exposed the real reason behind the rule—"outmoded taboos" about pregnant women working.[316] It suggested that the rules were "inspired by other, less weighty, considerations," that included "sav[ing] pregnant teachers from embarrassment at the hands of giggling school children."[317] It quoted a school board member who said, "it was 'not good for the school system' for students to view pregnant teachers, 'because some of the kids say, my teacher swallowed a watermelon.'"[318] The Court's rejoinder was that "[w]hatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word," thus implicitly characterizing such views as hopelessly outdated.[319]

The Court invalidated the mandatory leave policy using the individuality framework of the formal equality frame. Relying on medical testimony, it emphasized the unique way women experienced their own pregnancies with "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter."[320] The Court concluded that it was inappropriate to apply a general and rigid standard to all.[321]

In the same case, the Court rejected a rule that required a teacher to wait until her child was three-months-old before returning to work. As with the mandatory leave requirement, the Court emphasized that there was no "universally true" point when women could return to work.[322] The Court highlighted the real reason behind the rule – that "new mothers are too busy with their children within the first three months to allow a return to work,"[323] and then stated that this "can hardly be said to be universally valid."[324]

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313 414 U.S. 632 (1974).

314 *See id.* at 641-42.

315 *See id.* at 642-43.

316 *Id.* at 641 n.9.

317 *Id.*

318 *Id.*

319 *Lafleur*, 414 U.S. at 641 n.9 (citing Green v. Waterford Bd. of Educ., 473 F.2d 629, 635 (2d Cir. 1973)).

320 *Id.* at 645.

321 The Court did suggest that a "firm date during the last few weeks of pregnancy" would be appropriate, thus demonstrating that individuality had its limits. *Id.* at 647 n.13.

322 *Id.* at 650 n.15.

323 *Id.*

324 *Id.*

The Court's narrative in *LaFleur* proceeded on two levels. It responded to the stated official objections to women working, and then dug deeper to uncover and criticize cultural mores that required women to hide their pregnancy at work. It normalized pregnancy in the workplace dismissing the official rules as "unduly penaliz[ing] a female teacher for deciding to bear a child,"[325] and characterizing the "real" reasons behind the rules as outdated and no longer relevant.

The Court's normalization of pregnancy had its limits. Whether pregnant women should receive various monetary benefits, such as unemployment or disability benefits, proved a more difficult question for the Court to answer. It said yes to unemployment benefits but no to disability benefits. In *Turner v. Utah*,[326] a challenge to the denial of unemployment benefits to pregnant women, the Court, in a per curium decision, echoed *LaFleur*'s formal equality language by pointing out that not all pregnant women were unable to work when pregnant thus making the blanket denial of unemployment benefits based on class based generalizations and not individual capabilities, wrong.[327]

However, in *Geduldig v. Aiello*[328] and then in *General Electric v. Gilbert*[329] the Court held that state and private employers, respectively, could deny disability benefits for pregnancy. The Court's central reason for rejecting coverage was cost. In *Geduldig* it noted how expensive pregnancy disability coverage was and that the state had "a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of disability insurance."[330] As in the seniority cases, the Court framed the issue as an "us versus them," the "us" being all employees and the "them" being pregnant women.

The Court's narrative broke the link between pregnancy and gender. As they stated that:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex based classification . . . . The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes

325 *Lafleur*, 414 U.S. at 648.
326 423 U.S. 44 (1975).
327 *See id.* at 46.
328 417 U.S. 484 (1974).
329 429 U.S. 125 (1976).
330 *Geduldig*, 417 U.S. at 496.

members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[331]

The Court further explained that the state was merely being underinclusive,[332] by taking one step at a time. Pregnancy was excluded not because of gender discrimination, but because it was not reasonable or fiscally sound to cover every conceivable disability. After all, it didn't cover short-term disabilities either.[333]

In *Gilbert*, the Court followed its narrative in *Geduldig*. It first focused on fiscal concerns, indicating that the employer's cost for disability benefits was higher per female employee than for male employees, even with pregnancy excluded.[334] The point was that women were already getting more than their fair share.

The Court, as it did in *Gilbert*, marginalized pregnancy in the workplace claiming its exclusion from disability coverage was not an instance of unequal treatment. As the Court explained, "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."[335] The Court characterized pregnancy as something beyond normal experience, "an additional risk unique to woman,"[336] noting that the private insurance market would consider pregnancy disability insurance an "extra."[337] The Court also portrayed pregnancy as a private individual act with no public consequences. It was a "voluntarily undertaken and desired condition"[338] and it would be wrong to assume that "greater economic benefits must be required to be paid to one sex or to the other because of their differing roles in the scheme of human existence."[339]

The Court's narrative placed pregnancy squarely in a separate spheres framework by making men the workplace standard. Since pregnancy is an "extra," a unique condition not experienced by men, its impact on women can be ignored. Only when women are like men will they be treated the same. When pregnancy makes them different, economic penalties inure to the pregnant women (no disability coverage) that does not apply to disabled male workers (even those suffering from sex-related disabilities). In sum, while pregnant women cannot be forced to leave their job (as noted in

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331 *Id.* at 497 n.20.

332 *Id.* at 494.

333 *Id.* at 495.

334 *Gilbert*, 429 U.S. at 130 n.9.

335 *Id.* at 135. This was an inaccurate characterization. As the dissent pointed out, men were covered for prostatectomies, vasectomies and circumcisions. *See id.* at 152 (Brennan, J., dissenting).

336 *Id.* at 140 n.17.

337 *Id.*

338 *Id.* at 136.

339 *Gilbert*, 429 U.S. at 140 n.17.

LaFleur),the workplace need not otherwise accommodate them.[340]

In *Nashville v. Satty*,[341] the Court treated sick leave during pregnancy in the same way as pregnancy disability benefits, upholding the denial of sick pay to pregnant employees while providing it to other disabled employees. The Court's rationale was that the policy did "not deprive any individual of employment or otherwise adversely affect his status as an employee."[342] As in *Geduldig* and *Gilbert*, the Court treated pregnancy as a non-issue in the workplace.

However, in *Satty*, the Court prevented employers from denying women their accumulated job seniority while on maternity leave. The Court's narrative was directly at odds with *Geduldig* and *Gilbert* and its sick leave decision. Instead of marginalizing pregnancy, *Satty* placed it center stage. The Court's remedy, restoring seniority, fit squarely into the framework of difference theory since it recognized a biological difference of unequal and negative consequences for women.

The Court emphasized the consequences of lost seniority for present and future job opportunities. It consigned women to temporary jobs, if available, when they returned to work arguing that "the effects of a lower seniority level, with its attendant relegation to less desirable and lower paying jobs, [would result] for the remainder of [their] career[s]."[343] Unlike the pregnancy disability benefits cases, where the Court refused to view unpaid pregnancy leave as hindering women in the workplace, the Court directly linked the consequences of pregnancy and women's workplace prospects. It effectively switched its narrative from benefit to burden. Women were not asking for something "extra" because they were pregnant—a "benefit"—but for a "burden" to be alleviated that was uniquely imposed on them:

> Petitioner has not merely refused to extend to women a benefit that men cannot and did not receive, but has imposed on women a substantial burden that men need not suffer. . . . We held that [title VII] does not require that greater economic benefits be paid to one sex or the other because of their differing roles in the scheme of human existence. . . . But that holding does not allow us to read [the law] to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their

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340 The Court eventually adopted the same narrative in pregnancy disability cases, but only after Congress overturned its decisions in *Geduldig* and *Gilbert* and passed the Pregnancy Discrimination Act in 1978 [hereinafter PDA]. *See* 42 U.S.C. § 2000e. Using classic equality language, the law mandated that women "affected by childbirth and related conditions . . . be treated the same as other persons not so affected but similar in their ability or inability to work." *Id.*

341 434 U.S. 136 (1977).

342 *Id.* at 144-45.

343 *Id.* at 141.

different role.[344]

Moreover, unlike *Gilbert* and *Geduldig*, where the Court viewed pregnancy as different in fact and consequences from other disabilities, the Court compared pregnant employees to other employees who took medical leave. They described an employee who was "absent from work for ten months due to a heart attack and *yet* returned to her previous job at the end of this period with full seniority back to her date of hire,"[345] in contrast to the respondent, who returned to work after seven weeks from maternity leave to a temporary job and then was passed over for a permanent job by an employee hired during her maternity leave.[346] The employer was also harmed by the practice, as the Court explained:

> [P]etitioner's policy of denying accumulated seniority to employees returning from pregnancy leave might easily conflict with its own economic and efficiency interests. In particular, as a result of petitioner's policy, inexperienced employees are favored over experienced employees; employees who have spent lengthy periods with petitioner and might be expected to be more loyal to the company are displaced by relatively new employees. Female employees may also be less motivated to perform efficiently in their jobs because of the greater difficulty of advancing through the firm.[347]

Later narratives on pregnancy were more similar to *Satty* than *Gilbert* and *Geduldig* with one important exception discussed below. After passage of the PDA in 1978,[348] the Court reconsidered its treatment of pregnancy disability benefits. In *Newport News Shipbuilding v. EEOC*,[349] the Court held that the PDA prevented employers from capping the pregnancy related hospital coverage of its male employees' spouses, while providing full coverage to its female employees.[350] *Newport News* was similar to the early benefits cases that excluded men from coverage and, as in these cases, the Court adopted a formal equality frame. The Court, in an opinion by Justice Stevens, compared pregnancy to other disabilities finding that "a plan that provided complete hospitalization coverage for the spouses of female

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344 *Id.* at 142.

345 *Id.* at 140 n.3 (emphasis added).

346 *See id.* at 139.

347 *Satty*, 434 U.S. at 143 n.5. This narrative is also consistent with those employed in the seniority cases, including *Ford* where the Court protected the interests of long-standing employees against new hires. The Court also did not express concerns, as in *Ford*, that male employees would resent the seniority granted to female workers. The distinction may have been that in *Satty* the women had lost actual seniority accrued while working, while in *Ford* the seniority would have been granted to them without ever working a day at Ford, albeit because of discrimination.

348 *See supra* note 340 and accompanying text (discussing the PDA).

349 462 U.S. 669 (1983).

350 *Id.* at 693.

employees but did not cover spouses of male employees when they had broken bones would violate Title VII by discriminating against male employees."[351] In other words, the medical costs of giving birth were like any other medical costs and should be equally covered. The Court, again using a formal equality narrative, also rejected the employer's argument that the PDA was designed to "focus on the needs of female members of the workforce rather than spouses of male employees."[352] It responded by stating that the PDA:

> [H]as now made it clear that . . . discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.[353]

The Court's acknowledgement that gender discrimination and pregnancy were linked had its limits, as demonstrated in *Wimberly v. Missouri*.[354] In *Wimberley* the plaintiff took a leave of absence for pregnancy but was not rehired because no position was available. She then applied for unemployment compensation but was denied since she had voluntarily left her employment.[355] Although most states considered pregnancy a voluntary termination for good cause[356] thus entitling women to unemployment compensation, Missouri did not. The Federal Unemployment Tax Act,[357] similarly to the PDA, provided that unemployment compensation should not be denied under state law solely on the basis of pregnancy. The Court held that Missouri didn't discriminate against pregnant woman but had adopted "a neutral rule that incidentally disqualifies pregnant or formerly pregnant claimants as part of a larger group"[358] of persons who, having voluntarily left their employment for whatever reason, were not eligible for unemployment insurance.

Echoing its earlier decisions in *Gilbert* and *Geduldig*, the Court separated pregnancy from gender claiming that the employee was not denied unemployment because of her pregnancy but because she voluntarily left work. Using a separate spheres framework, the Court ignored the causal chain created by the employee's pregnancy, and held that but for the

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351 *Newport News*, 462 U.S at 683.

352 *Id.* at 680.

353 *Id.* at 684.

354 479 U.S. 511 (1987).

355 *Id.* at 512-13.

356 *Id.* at 515.

357 I.R.C. § 3304(a)(12) (2003) ("[N]o person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy.").

358 *Wimberly*, 479 U.S. at 517.

pregnancy the employee would not have become unemployed. As the Court said, it was not "even necessary to know that petitioner left work because of her pregnancy" despite the central role her pregnancy played in her need for unemployment insurance.[359] Pregnancy was not women's unequal burden as described in *Satty*. Moreover, requests to accommodate it were a plea for special treatment in the workplace. As the Court stated several times, they interpreted the Federal Unemployment Tax Act, a law prohibiting discrimination against pregnant women, as not requiring "preferential treatment for women on account of pregnancy."[360]

Three years later the Court reversed course, using the difference frame in *California v. Guerra*,[361] a case challenging a state statute that required employers to provide maternity leave and reinstatement to pregnant employees. In *Guerra*, the employer argued, consistent with *Wimberly* that the benefit was reverse discrimination because it gave preferential treatment to women since disabled males did not have the right to leave and reinstatement.[362] The employer also argued that the plain wording of the PDA prohibited such special treatment because it forbade employers from treating pregnant employees any differently than other employees.[363]

The Court rejected the employer's argument and, in contrast to *Wimberley*, framed the benefit not as special treatment, but as an important mechanism for allowing "women as well as men, to have families without losing their jobs"[364] while at the same time to "guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[365] Thus, while in *Wimberley* the Court insisted that pregnant women who voluntarily left their employment must be treated the same as men, in *Guerra* it did just the opposite: it permitted women who left work because of pregnancy to be treated differently than men who left work because of a disability (who were not entitled to reinstatement). The Court also suggested that the differential treatment should be remedied by "giv[ing] comparable benefits to other disabled employees,"[366] and not by taking benefits away from pregnant employees. Thus, women, in particular pregnant women, set the standard for workplace accommodations. By recognizing the biological and social disadvantages resulting from pregnancy and motherhood and upholding the right of the state to treat women differently because of it, the Court thus

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359 *Id.*

360 *Id.* at 521.

361 479 U.S. 272 (1987).

362 *See id.* at 284.

363 *See id.*

364 *Id.* at 289.

365 *Id.* at (citing 123 CONG. REC. 29,658 (1977) (statement of Sen. Williams)).

366 *Id.* at 291 (alteration in original).

relied on difference theory. The Court also carefully distinguished between the present benefit and women's special treatment in the past under the separate spheres frame, noting that, "unlike the protective labor legislation prevalent earlier in this century . . . [the law] does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers."[367]

The last case decided by the Court concerning women's reproductive capacity was *UAW v. Johnson Controls*,[368] decided in 1991. In *Johnson Controls*, a battery manufacturer prohibited all women (except those whose infertility was medically documented) from jobs involving actual or potential exposure to lead because of the possible damage to a fetus.[369] Using the formal equality frame, the Court, in an opinion by Blackmun, noted that men and women equally situated were treated differently. As stated by the Court, "[d]espite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees."[370] It invalidated the policy, noting that "fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job."[371]

Johnson Controls was also notable for its outright rejection of the separate spheres approach, making it the modern day counterpoint to *Bradwell v. Illinois*, the nineteenth century case that found women too delicate to practice law.[372] The employer in *Johnson Controls* made a contemporary separate spheres argument for its fetal protection policy by invoking the safety exception to Title VII's bona fide occupational requirement (BFOQ).[373] The Court explicitly rejected the notion that a woman's reproductive function was a legitimate workplace concern. It also rejected the argument that the policy was related to the essence of the business (necessary to qualify as a BFOQ): "the unconceived fetuses of Johnson Controls' female employees, however, are neither customers or third parties whose safety is essential to the business of battery manufacturing."[374] The Court constructed a narrative where a woman's

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367 *Wimberly*, 479 U.S. at 290.

368 499 U.S. 187 (1991).

369 The employer had initially required women to sign a statement that she was aware of the risks to the health of an unborn child. After eight pregnant employees tested with high lead levels in their blood, the employer, fearing liability for birth defects, changed to the challenged policy. *See id.* at 191.

370 *Id.* at 198.

371 *Id.* at 197. One of the three plaintiffs was a man who was denied a leave of absence for the purpose of lowering his lead level because he wanted to become a father. The Court also noted that lead may harm the male reproductive system. *See id.* at 198.

372 83 U.S. 130 (1873).

373 *Johnson Controls*, 499 U.S. at 202.

374 *Id.* at 203. The *Johnson Controls* Court distinguished *Dothard*, the prison case, where there

employment choices were her own: "women who are either pregnant or potentially pregnant must be treated like others similar in their ability to work"[375] and "women as capable of doing their job as their male counterparts may not be forced to choose between having a child or having a job."[376] The Court also stressed women's individual autonomy when it stated that "[i]t is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."[377]

In sum, over the twenty years the Court deliberated on pregnancy and maternity issues it zigzagged inconsistently through various equality frames. It began by insisting that fathers and mothers of small children were alike, while claiming in the same case that they weren't. This confusing and contradictory picture persisted. Forced maternity leave and the loss of seniority were "wrong," denying pregnant women disability benefits (prior to the PDA) and pregnancy related sick leave were "right": women could not be denied unemployment benefits because they were pregnant, but could be denied those same benefits if they left their employment due to pregnancy. Pregnancy "imposed on women a substantial burden that men need not suffer,"[378] but it was also not "a sex-based classification."[379] As it oscillated between different equality frames the Court could not decide whether a woman's maternal role was a problem without a solution in the workplace or a fact of life that required accommodation and acceptance.

D. *Sexual Harassment*

Between 1986 and 2001 the Court decided seven cases on sexual harassment in the workplace.[380] The theory used by the Court was based on the work of Catharine A. Mackinnon.[381] According to Mackinnon, sexual harassment is a form of sex discrimination because it reinforces inequality between men and women, an inequality that stems from the social meaning of female sexuality that constructs women as subordinate to men (referred

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was a work related purpose to women's exclusion from employment in an all-male prison because the "the employment of a female guard would create real risks of safety to others if violence broke out because the guard was a woman." *Id.* at 202 (discussing Dothard v. Rawlinson, 433 U.S. 321 (1977)).

375 *Id.* at 204.

376 *Id.*

377 *Id.* at 211. However, it should be noted that three Justices, White, Rehnquist and Kennedy, in a concurrence thought that the BFOQ exception could support a sex-specific fetal protection policy, but not in the instant case. *See Johnson Controls,* 499 U.S. at 212.

378 *Satty,* 434 U.S. at 141.

379 *Gilbert,* 429 U.S. at 134.

380 *See infra* tbl.3d.

381 *See* MACKINNON, WORKING WOMEN, *supra* note 82.

to as "non-subordination theory").[382] Requiring sex in exchange for employment or creating a sexually hostile work environment are forms of sexual discrimination because they insure men's domination and power over women in the economic sphere of work.[383]

The Court's first sexual harassment case was *Meritor v. Vinson*,[384] decided in 1986. *Meritor* involved a bank teller who was sexually harassed by her supervisor, with whom she was sexually involved with due to a fear of losing her job. [385] The employer's conduct included public fondling and forced rape on several occasions.[386] Instead of claiming quid pro quo harassment (a job in exchange for sex), the plaintiff claimed that her boss' sexual misconduct created a hostile work environment that was in itself a form of sex discrimination.[387] She did not allege economic harm but emotional or psychological harm.[388] The Court, in an opinion by Justice Rehnquist, found that Title VII was "not limited to economic or tangible discrimination,"[389] thus recognizing that an employee's work environment was as relevant as their pay or benefits. The Court also framed sexual harassment as a work, rather than personal matter. It did this, in part, by comparing it to racial harassment, thus dispelling the idea that it was not the social byproduct of men and women working together but an issue of discrimination. Quoting directly from the lower court opinion the Court stated:

> Sexual harassment [that] creates a hostile or offensive work environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demanding and disconcerting as the harshest of racial epithets.[390]

The voluntary nature of the sexual relationship did not prevent the Court from finding harassment. According to the Court, the "correct inquiry [was] whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual

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382 *See id.* at 6.

383 *See id.* at 7.

384 477 U.S. 57 (1986).

385 *See id.* at 60.

386 *See id.*

387 *See id.* at 64.

388 Indeed, plaintiff received a promotion while at work. *Id.* at 59 ("She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone.").

389 *Id.* at 64.

390 *Meritor*, 477 U.S. at 67.

intercourse was voluntary."[391]

Thus, the Court recognized the essential principles of the non-subordination frame: that introducing sex into work, whether in the form of quid pro quo or a hostile work environment, unfairly disadvantaged and burdened women and was not a personal or social matter but a serious workplace issue. By distinguishing between a voluntary act and an unwelcome act, the Court also recognized that the power dynamics underlying sexual harassment meant a woman could agree to do something she didn't want to.[392] The Court, however, did not entirely abandon the separate sphere lens. It also found that the plaintiff's "sexually provocative speech or dress" was relevant to the question of whether the advances were welcome.[393] The notion that a woman's manner of dress and verbally expressed fantasies indicates her actual sexual desires is a peculiarly male constructed notion.

In 1993, in *Harris v. Forklift*,[394] the Court refined its definition of sexual harassment. In *Forklift* a supervisor harassed his female employees at an equipment rental company with verbal insults and gestures.[395] He made sexual innuendos and once asked several female employees to fish coins out of his front pants pocket.[396] The employees suffered neither economic nor psychological harm. The issue before the Court was "whether conduct, to be actionable as abusive work environment harassment . . .must seriously affect . . . psychological well-being or lead the plaintiff to serious injury."[397] The Court's narrative, as in *Meritor*, linked sexual harassment with workplace efficacy rather than isolating it as a personal or social issue. As the Court stated, it "can and often will detract from employees job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[398]

The Court's narrative framed sexual harassment, as exemplified by the supervisor's conduct, not as innocent albeit vulgar banter but as words capable of inflicting serious harm. As the Court put it, it created, "environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group

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391 *Id.* at 68.

392 The Court addressed the liability of the employer for the acts of the supervisor, indicating agency principles should be used, but did not hold on this matter because of the lack of a complete record. *See id.* at 72.

393 *Id.* at 73.

394 510 U.S. 17 (1993).

395 His comments included: "You're a woman. What do you know?" or "We need a man as the rental manager." *Id.* at 19.

396 *See id.*

397 *Id.* at 20 (emphasis in original).

398 *Id.* at 22.

workers."[399] While it recognized the damage it caused, the Court did not require the damage to occur before relief could be sought. As the Court said, "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[400] Therefore, psychological harm was not a requirement. By shifting the focus from the damage done to the victim to the perpetrator's conduct, the Court acknowledged the social reality within which harassment occurs. This reasoning is consistent with non-subordination theory, which stresses social context. The harassment did not have to actually harm the victim (although it did have to interfere with her work), the conduct per se was discriminatory because it reinforced men and women's social inequality.

The *Forklift* Court, however, fell short of letting women define what constituted harassment. Instead, it used the reasonable person standard, without indicating whether it should be a "reasonable" man or a woman.[401] The distinction is crucial under non-subordination theory[402] since a man's status and inherent power negates his ability to make this judgment. It would make the male standard normative.

The Court's next case, *Oncale v. Sundowner*,[403] addressed same-sex harassment by men. The plaintiff was a member of an all-male crew on an oil rig where he was sexually assaulted, battered, touched and threatened with homosexual rape by two of his supervisors.[404] In an opinion by Justice Scalia, the Court held that same-sex harassment constituted sex discrimination, using both the formal equality frame and the non-subordination frame. The equality frame was reflected in the Court's statement that "Title VII's prohibition of discrimination 'because of sex' protects men as well as women."[405] As the Court explained, the relevant issue was not the sex of the victim but that the victim was chosen based on his sex. What is important is whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[406] Thus, sexual harassment was an "equal opportunity" act with either men or women chosen because of their sex and

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399 *Forklift*, 510 U.S. at 22.

400 *Id.*

401 *Id.*

402 *See, e.g.*, Holland M. Tahvonen, Note, *Disability-Based Harassment: Standing and Standards for a "New" Cause of Action*, 44 WM. & MARY L. REV. 1489, 1494 (2003) (discussing the importance of delineating whether the perspective of the reasonable person is male or female); Mary Beth Heinzelmann, *The "Reasonable Lesbian" Standard: A Potential Deterrent Against Bias in Hostile Work Environment Cases*, 12 LAW & SEXUALITY 337, 341-44 (2003) (discussing the evolution and certain courts' usage of the "reasonable woman" standard).

403 523 U.S. 75 (1998).

404 *Id.* at 77.

405 *Id.* at 78.

406 *Id.* at 80.

hence equally protected under the law.[407]

The Court's recognition that power and not sexual desire is at the root of sexual harassment also reflected non-subordination theory. The Court noted that "harassing conduct need not be motivated by sexual desire"[408] or sexual orientation, and gave as an example a female employer "motivated by a general hostility to the presence of women in the workplace."[409] Similarly, and as the Court found, a man could exert power over another man through sexual harassment, with or without being a homosexual. In sum, sexual harassment was about power and using one's power to inject sex into the workplace whether the perpetrator was a woman harassing other women or the other way around.[410]

The next two cases decided by the Court, *Burlington Industries v. Ellerth*[411] and *Faragher v. Boca Raton*,[412] required the Court to dissect the power relationships underlying sexual harassment. The question in both cases was whether an employer could be held liable for a supervisor's harassment when the employer was unaware that the harassment was happening. In both cases it was lower level supervisors who committed the harassment. In *Burlington*, the plaintiff had been harassed by an offsite supervisor but did not inform the company or her immediate supervisor.[413] In *Faragher*, several female lifeguards were harassed by their male supervisor at a remote and isolated public pool. No complaints were ever made to the city managers of the pool.[414] Both cases are discussed interchangeably below.

The Court settled somewhere between the separate spheres frame which would view harassment as the inevitable byproduct of men and women working together and hence not the responsibility of the supervisor, and the non-subordination frame which views harassment as part of the underlying power dynamics in the workplace. It began by analyzing liability based on agency principles, examining whether harassment was a "personal act" that

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407 Under this reasoning, the formal equality argument would likely fail if an employer harassed both men and women because of the difficulty in proving it was because of sex when both sexes were being harassed.

408 *Oncale*, 523 U.S. at 80.

409 *Id.* at 81.

410 The Court also took pains in *Oncale* to deflect any criticism that it was transforming Title VII "into a general civility code for the American workplace." *Id.* at 80. It was thus not "reach[ing] genuine and innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." *Id.* at 81. The requirement that conduct "be severe or pervasive enough to create an objectively offensive or abusive work environment . . . [is] sufficient to insure that courts and juries do not mistake ordinary socializing in the workplace such as male on male horseplay or intersexual flirtation for discriminatory conditions of employment." *Id.* at 81.

411 524 U.S. 742 (1998).

412 524 U.S. 775 (1998). The Court handed down both this case and *Burlington* on the same day.

413 *Burlington*, 524 U.S. at 748-49.

414 *Faragher*, 524 U.S. at 782-83.

does not serve the purposes of the employer ("frolic and detour") or whether it furthered the master's business, and hence fell within the scope of employment.[415] On the one hand, the Court noted that "the supervisor is clearly charged with maintaining a productive, safe work environment since .... It is by now well recognized that hostile environment sexual harassment by supervisors (and for that matter co employees) is a persistent problem in the workplace."[416] On the other hand, the Court stated that not all harassment was work related. For example, a supervisor "who expresses his sexual interests in ways having no apparent object whatever of serving an interest of the employer[,]" [417] is different than one who "might reprimand male employees for workplace failings with banter, but respond to women's shortcomings in harsh or vulgar terms."[418]

In the end the Court combined the two views. While it described sexual harassment by supervisors as in general, a personal act,[419] it noted that harassers were aided by the authority of their position and thus recognizing the power component of the non-subordination theory. Employees were a "captive pool of potential victims"[420] and the "supervisor's power and authority invest[ed] his or her harassing conduct with a particular threatening character."[421] It noted that "the victim may well be reluctant to accept the risks of blowing the whistle on a superior."[422] But, hesitant to make employers liable for all acts of sexual harassment committed by supervisors, the Court settled on a standard that made employers liable whenever a supervisor took tangible employment action such as firing, demotion, reassignment, etc.[423] but not when the employee suffered no tangible harm. In Burlington, an affirmative defense could be raised that the employer exercised reasonable care to prevent and promptly correct any sexual harassing behavior.[424] The burden was also placed on women to not remain silent. In fact, an employer could escape liability if a victim unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.[425]

Thus, the Court declined to view sexual harassment as so pervasive and easily foreseeable that employers bore the burden and responsibility for insuring it did not occur, even among supervisors who clearly had control

415 *Id.* at 798.
416 *Id.*
417 *Id.* at 799.
418 *Id.* at 798-99.
419 *Burlington*, 524 U.S. at 757.
420 *Id.* at 760.
421 *Id.* at 763.
422 *Faragher*, 524 U.S. at 803.
423 *Burlington*, at 762-63 (finding that such actions were work related, not personal).
424 *Id.* at 765.
425 *Id.*

over which persons were more likely to exploit their power. Instead, a separate grievance process, written policies and training would substitute for such supervision. Additionally, the Court required victims to assume responsibility for their plight by requiring them to use such procedures, unless it would be unreasonable to do so. This approach normalized the view that it is reasonable for women to respond to sexual harassment by filing a complaint, a view that is inconsistent with women's lack of power in harassing situations.[426] On the other hand, the Court did acknowledge that employers had at least some responsibility for harassment by supervisors, thus removing harassment from the personal realm.

In *Clark v. Breeden*,[427] the Court addressed the issue of retaliation for filing a complaint. In *Breeden*, the plaintiff was meeting with her male supervisor and a male subordinate to review job applications. After noting that a psychological report indicated that the applicant had once said to a coworker, "I hear making love to you is like making love to the Grand Canyon," the supervisor stated, "I don't know what that means," to which the subordinate responded, "[w]ell, I'll tell you later," while both men chuckled.[428] Breeden filed a complaint and then alleged retaliation when she was subsequently transferred. However, because the Court, in a per curium opinion, found "no reasonable person could have believed"[429] that their behavior constituted harassment, she was not protected from retaliation. Nevertheless, the plaintiff did just what the *Faragher* Court told women to do— file a complaint when confronted with sexual harassment. And while the complaint may have appeared trivial, unless it was in bad faith, the Court could have viewed the plaintiff not as unreasonable, but especially vigilant in preventing a hostile work environment from developing. The Court's portrayal of the complaint as unreasonable is more typical of the separate spheres frame, which views sexual harassment complaints as a nuisance to be ignored, not a problem to be remedied.[430]

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426 Empirical research has established that women are hesitant to use formal grievance procedures against their harassers. *See, e.g.*, Louise F. Fitzgerald, Suzanne Swan, & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117 (1995) (finding that filing a formal complaint is the least likely response to sexual harassment); Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment*, SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 152 (William O. Donohue ed., 1997) (showing a complaint rate of only 5%); James E. Gruber & Lars Bjorn, *Blue Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 WORK & OCCUPATIONS 271 (1982) (showing that 10% of female victims will deny sexual harassment has occurred as a means of coping with it); Vita C. Rabinowitz, *Coping With Sexual Harassment*, *in* IVORY POWER: SEXUAL HARASSMENT ON CAMPUS 103, 106-07 (Michele A. Paludi ed., 1991) (showing victims will blame themselves, look for extenuating circumstances or minimize the harassing behavior); Inger W. Jensen & Barbara A. Guteck, *Attributions and Assignment of Responsibility in Sexual Harassment*, 38 J. SOC. ISSUES 121 (1982) (finding that one-quarter of victims blame themselves at least in part).

427 532 U.S. 268 (2001).

428 *Id.* at 269.

429 *Id.* at 271.

430 The Court also found the plaintiff had not established a causal link between her firing

In the second case filed in 2001, *Pollard v. DuPont*,[431] the Court grappled with remedies for harassment, specifically with whether front pay—money awarded in lieu of reinstatement—is an element of compensatory damages. If it was, then it would be subject to the statutory compensatory damages cap of $300,000 added as an additional remedy to Title VII claims by Congress in 1991. The Court, in an opinion by Justice Thomas, held that the 1991 Act remedies were an addition to past remedies, and hence did not limit or lessen past remedies such as front pay.[432] The Court also determined that front pay did not fall within the definition of compensatory damages provided for under the 1991 Amendment, which was defined as compensation for future pecuniary losses and emotional pain and suffering. The Court's narrative emphasized the implication of putting a cap on front pay when it was used in lieu of reinstatement. The Court stated that:

> [It]would lead to the strange result that employees could receive front pay when reinstatement eventually is available, but not when reinstatement is not an option —whether because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries that the discrimination has caused the plaintiff. Thus the most egregious offenders could be subject to the least sanctions.[433]

The Court recognized, consistent with non-subordination theory, the extent and implications of sexual harassment and the need to deter the worst offenders and compensate women who could not return to their workplace.

In sum, while the Court initially accepted the non-subordination frame it tempered it by often and inconsistently blending it with the separate spheres frame. The result was an uneven approach to sexual harassment that gave legal and social recognition to a phenomenon ignored for years, but which did not fully protect women from sexual harassment.

CONCLUSION

For the last thirty odd years, the Court, along with the rest of us, has puzzled over the connection between equality and gender. At a critical juncture in the feminist movement, this inquiry has interjected itself into many of the most contentious public disputes of the ay. Should pregnancy be ignored or accommodated in the workplace? What doors should be

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and the complaint. The Ninth Circuit Court of Appeals, which found retaliation, looked at the time between the filing of the right to sue letter and the plaintiff's transfer to another position three months later. The Court went back to the initial filing of the EEOC complaint, which was twenty months before the decision to transfer and determined based on the length of time that had passed that there was no retaliation. *See id.* at 272-73.

431 532 U.S. 843 (2001).

432 *Id.* at 854.

433 *Id.* at 853.

opened for women, and which should remain shut? How should the economic pie be divided among men and women? Who should bear the burden of the costs of equality?

The answers the Court gave were filtered through the lens of "legal talk," with phrases such as "intermediate scrutiny" and "discrimination" parsed in legal terms, and thoroughly dissected and analyzed by legal scholars. But embedded within this legal discourse, and no less essential to it, was a continuing cultural, social and political discussion about gender discrimination and equality. Content analysis gives us the tools to better understand this discourse. As Amsterdam and Bruner state, "[p]erhaps the most powerful trick of the human sciences is to decontextualize the obvious and then recontextualize it in a new way."[434]

What were some of the conclusions and observations drawn from this discourse to provide insight into the Court's workings? Most noticeable is the Court's fluidity in choosing from the various formulations of equality and separate spheres ideology through the years and sometimes even within the same case. While the Court oscillated among different versions of equality, using substantive equality to give a little more (military promotions, affirmative action, and social security benefits) and formal equality to level sex-based distinctions in public programs (widows and mothers Social Security benefits, Worker's Compensation, and Unemployment Insurance), it also, with some regularity, abandoned the equality framework. This was most apparent in the early years, the 1970s, during a period of rapid change and reorientation of sex roles. The Court's ambivalence and confusion toward these changes was evident when it prevented employers from refusing to hire women with school-age children, but then stated it might be appropriate if family obligations were shown to interfere. Similarly, the pregnancy cases had the Court tied up in knots, as it bounced from denying pregnancy was related to gender, to calling it a burden unique to women.
The Court also occasionally advanced the more radical strands of feminist theory when it used difference theory language to require that men be admitted to an all female nursing school and when leveling men and women's pay scales.

At other times the Court hesitated pushing the cultural lines too far forward, abandoning its equality framework and reverting to a separate spheres frame when women asked to enter the roughest domains of men – all male prisons and the military. While this trend diminished in later decades, as exemplified by the opening of all male military college to women, the sexual harassment cases that preoccupied the Court throughout the last decade-and-a-half showed a Court caught between the frames of non-

434 AMSTERDAM & BRUNER, *supra* note 3, at 4.

subordination and separate spheres. Yes, sexual harassment was a work, not personal issue and an abusive use of male power, but the Court still required women to file a complaint against that very power structure in order to be compensated for it.

The Court was also most likely to abandon an equality framework when the interests of an identified group of men were at risk. Beginning with veterans preference programs, it rendered women invisible in the workplace by refusing to recognize the connection between discrimination in the military, veteran's preference programs and women's second class status in state government. Later on, collective bargaining agreements trumped EEOC conciliation agreements and seniority rights could be denied to victims of discrimination when it worked against men's interests and job status. The one major exception was in the area of affirmative action, although the Court took pains to argue that no man was specifically harmed.

The Court also hesitated in imposing certain remedies after it found a violation of equality, calibrating how far it thought society should go monetarily in compensating for discrimination. This was most notable in the pension cases when, while recognizing the harm, the Court explicitly citing the high cost of doing so, declined to order full redress. Cost also played a substantial role in the pregnancy disability cases, with the Court using it as a reason for not including pregnancy in disability plans.

As the Court applied the various frames of equality or separate spheres ideology, its narratives shifted. When arguing for formal, substantive equality or difference theory, the Court used often impassioned language admonishing against stereotyping, encouraging women to be treated as individuals and bemoaning and even ridiculing past social mores about women. Throughout the 1970's and into the 1980's it redefined the workplace to include working women as a norm entitled to be treated as equal to men and to be compensated for past discrimination.
Then, beginning in the mid-1980's, the Court delved into reshaping workplace behavioral norms by labeling sexual harassment as a work issue and criticizing the double standard that required women to act like "ladies" as they traversed the corporate ladder.

When relying on the separate spheres frame the Court dampened its tone. However, even the separate spheres cases are notable for the absence of the more overt gender stereotyping that characterized such decisions in the past. Indeed, the Court went out of its way in the pregnancy disability and veteran's preference cases to state that it was not treating women differently than men; this defensive posture revealed the Court's absorption and refection of cultural mores that made such distinctions unacceptable. Rather, the Court reverted to a more subtle story line, quietly rendering women invisible by refusing to acknowledge certain gender related links in

the workplace or casting men more readily as the victims and women as grasping for too much.

In sum, no less than in the days of *Bradwell*, the Court defined the cultural and social terrain of equality and gender, managing "the laws own special dialectic between continuity and change."[435] Its notions about equality and gender infused its legal analysis, providing a backdrop and reasoning for its choices as it reshaped the landscape of work for women. As such, it is as important to unravel the social and cultural values embedded in the Court's decisions, as it is to understand its legal pronouncements. This inquiry and analysis can help reveal the unresolved ideological tensions and inconsistencies hiding beneath our public debates while also helping us understand why the Court decides the way that it does.

[435] AMSTERDAM & BRUNER, *supra* note 3, at 285.

TABLE 1A: SUPREME COURT CASES ON GENDER DISCRIMINATION IN EMPLOYMENT 1971-1986: JUSTICE'S VOTES*

Justice**	DG	PW	BR	WT	MR	BG	RN	BM	ST SW	SV	OR	Vote
Phillips	+		+	+	+	+		+	+			9-0
Frontiero	+	+	+	+	+	+	-	+	+			8-1
LaFleur	+	+	+	+	+	-	-	+	+			7-2
Brennan	+	+	+	+	+	-	-	-	0			5-3
Geduldig	+	-	+	-	+	-	-	-	-			6-3
Ballard	-	+	-	-	-	+	+	+	+			5-4
Wiesenfeld	0	+	+	+	+	+	+	+	+			8-0
Turner	+	+	+	+	+	0	-	0	+			6-3
Gilbert		-	+	-	+	-	-	-	-	+		6-3
Goldfarb		+	+	+	+	-	-	-	-	+		5-4
Webster		+	+	+	+	+	+	+	+	+		9-0
Satty (1)		+	+	+	+	+	+	+	+	+		9-0
Satty (2)		+	+	-	+	-	-	-	-	-		6-3
Dothard (1)		+	+	-	+	+	+	+	+	+		8-1
Dothard (2)		-	+	-	+	-	-	-	-	-		6-3
Manhart		+	0	+	+	-	-	+	+	+		6-2
Feeney		-	+	-	+	-	-	-	-	-		7-2
Wescott		+	+	+	+	+	+	+	+	+		9-0
Wengler		+	+	+	+	+	-	+	+	+		8-1
Gunther		-	+	+	+	-	-	+	-	+		5-4
Rostker		-	+	+	+	-	-	-	-	-		6-3
Ford		-	+	-	+	-	-	+		-	-	6-3
Hogan		-	+	+	+	-	-	-		+	+	5-4
W.R. Grace		-	-	-	-	-	-	-		-	-	9-0
Newport News		-	+	+	+	+	-	+		+	+	7-2
Norris (1)		-	+	+	+	-	-	-		+	+	5-4
Norris (2) Retro		-	+	+	+	-	-	-		+	-	5-4
Mathews		+	+	+	+	+	+	+		+	+	9-0
Hishon		+	+	+	+	+	+	+		+	+	9-0
Wimberly		-	-	-	-	-	-	0		-	-	8-0
Meritor		+	+	+	+	+	+	+		+	+	9-0

* + = pro-feminist; - = anti-feminist; 0 = no participation in vote

TABLE 1B: SUPREME COURT CASES ON GENDER DISCRIMINATION IN EMPLOYMENT 1987-2002: JUSTICE'S VOTES*

Justice**	PW	BR	WT	MR	RN	BM	SV	OR	SC	KN	SR	GN	TH	BY	Vote
Guerra	-	+	-	+	-	+	+	+	+						6-3
Johnson	+	+	-	+	-	+	+	+	-						6-3
Long		+	-	+	-	+	+	-	-	-					5-4
Price Waterhouse		+	+	+	-	+	+	+	-	-					6-3
Lorance		+	-	+	-	+	-	0	-	-					5-3
Johnson Controls			+	+	+	+	+	+	+	+	+				9-0
Forklift				+	+	+	+	+	+	+	+	+			9-0
VMI					+		+	+	-	+	+	+	0	+	7-1
Oncale					+		+	+	+	+	+	+	+	+	9-0
Burlington					+		+	+	-	+	+	+	-	+	7-2
Faragher					+		+	+	-	+	+	+	-	+	7-2
Pollard					+		+	0	+	+	+	+	+	+	8-0
Breeden					-		-	-	-	-	-	-	-	-	9-0

* + = pro-feminist; - = anti-feminist; 0 = No participation in vote

**DG, William Douglas; PW, Lewis Powell; BR, William Brennan; WT, Byron White; MR, Thurgood Marshall; BG, Warren Burger; RN, William Rehnquist; BM, Harry Blackmun; SW, Potter Stewart; SV, John Paul Stevens; OR, Sandra Day O'Connor; SC, Antonin Scalia; KN, Anthony M. Kennedy; SR, David H. Souter; GN, Ruth Bader Ginsberg; TH, Clarence Thomas; BY, Stephen G. Breyer

Table 1c: Percentage Pro-feminist Vote by Justice

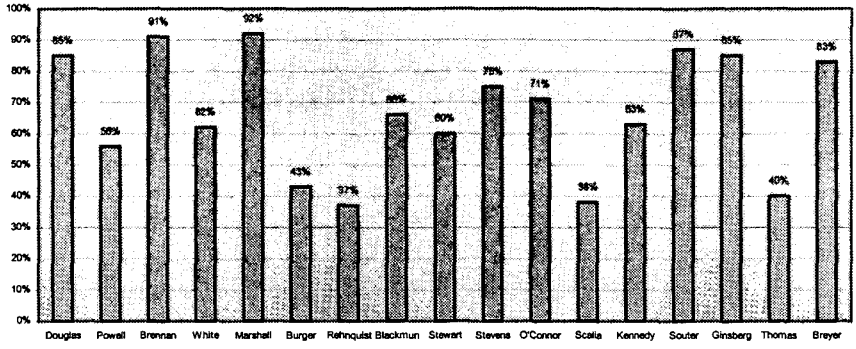

TABLE 2A: SUPREME COURT CASES ON GENDER DISCRIMINATION IN EMPLOYMENT: 1971-1979

Cases	Issue	Date	Vote*
Phillips	Denial of employment to mothers of pre-school children held invalid	1971	+
Frontiero	Requirement that spouses of female, but not male soldiers must show need for benefits held invalid	1973	+
LaFleur	Forced maternity leave in school system held invalid	1974	+
Brennan	Pay scale differential evening/day shift that advantaged men held invalid	1974	+
Geduldig	Exclusion of pregnancy from coverage in state disability benefits program upheld	1974	–
Ballard	Military promotions for women that were less stringent than for men upheld	1975	+
Wiesenfeld	Social Security mother's benefits extended to men	1975	+
Turner	Denial of unemployment benefits for pregnant women held invalid	1975	+
Gilbert	Denial of pregnancy disability benefits in private sector upheld	1976	–
Goldfarb	Requirement that widowers, not widows, must show need for Social Security widow benefits held invalid	1977	+
Webster	Social Security earnings calculations more advantageous for women upheld	1977	+
Satty (1)	Loss of seniority upon return from maternity leave held invalid	1977	+
Satty (2)	Denial of sick leave use for maternity leave upheld	1977	–
Dothard (1)	Height/weight requirements for corrections officers eliminated	1977	+
Dothard (2)	Contact positions in all male prisons denied to women	1977	-
Manhart (1)	Higher pension contributions for women held invalid	1978	+
Manhart (2)	Retroactivity of pension contributions denied	1978	–
Feeney	Veteran's preference programs that excluded women from government jobs upheld	1979	–
Wescott	ADC-U program expanded to include women	1979	+
% pro-feminist			**68%**

* + = pro-feminist; – = anti-feminist

TABLE 2B: SUPREME COURT CASES ON GENDER DISCRIMINATION IN EMPLOYMENT: 1980-1989

Cases	Issue	Date	Vote*
Wengler	Requirement that widowers, not widows, must show need for workman's compensation benefits held invalid	1980	+
Gunther	Pay scale for guards in prison system lower for women held invalid	1981	+
Rostker	Registration of women for the draft upheld	1981	-
Ford	Retroactive seniority denied to successful Title VII claimants	1982	-
Hogan	State nursing school restricted to women required to admit men	1982	+
Norris (1)	Lower retirement benefits for woman held invalid	1983	+
Norris (2)	Retroactivity for gender based retirement benefits denied	1983	-
Grace	Collective bargaining seniority rule enforced over EEOC agreement	1983	-
Newport News	Pregnancy benefits for spouses of male employees less than female employee's invalid	1983	+
Mathews	Gender based Social Security spousal benefits extended for five years	1984	+
Hishon	Coverage of law partnerships under Title VII	1984	+
Meritor	Hostile environment sexual harassment claim held as form of sex discrimination	1986	+
Johnson	Affirmative action plan for women in nontraditional jobs upheld	1987	+
Guerra	Leave and reinstatement rights for pregnant employees granted	1987	+
Wimberly	Denial of eligibility of pregnant women for unemployment benefits upheld	1987	-
Long	Norris decision on retirement benefits held not retroactive	1988	-
Price Waterhouse	Law firm denial of partnership to woman held to be discriminatory	1989	+
Lorance	Seniority system that disadvantages women upheld	1989	-
% Pro-fem			**61%**

* + = pro-feminist; - = anti-feminist

TABLE 2C: SUPREME COURT CASE ON GENDER DISCRIMINATION IN EMPLOYMENT: 1990-2003

Cases	Issue	Date	Vote *
Johnson Controls	Fetal protection policy for women employees	1991	+
Forklift	Sexual harassment and psychological harm	1993	+
VMI	Exclusion of women from all-male military college	1996	+
Burlington	Liability of employers for sexual harassment committed by supervisors	1998	+
Faragher	Liability of employers for sexual harassment committed by supervisors	1998	+
Oncale	Same-sex sexual harassment	1998	+
Breeden	Retaliation for filing of sexual harassment complaint	2001	-
Pollard	Damage calculations for sexual harassment violations	2001	+
% Pro-fem.			**87%**

* + = pro-feminist; - = anti-feminist

TABLE 3A: SUPREME COURT CASES ON GENDER DISCRIMINATION IN EMPLOYMENT: BENEFITS AND PAY SCALES FRAMES

Cases	Issue	Date	Frame*
Frontiero	Spouses of female, but not male soldiers must show need for benefits,	1973	FE
Brennan	Pay scale differential evening/day shift benefited men	1974	FE
Wiesenfeld	Social Security mother's benefits denied to men	1975	FE
Goldfarb	Widowers, not widows, must show need for Social Security widow benefits	1977	FE
Webster	Social Security earnings calculations more advantageous for women	1977	SE
Manhart (1)	Pension contributions higher for women	1978	FE
Manhart (2)	Pension contributions/retroactivity	1978	SS
Wescott	ADC-U program restricted to men	1979	FE
Wengler	Widowers, not widows, must show need for workman's compensation benefits	1980	FE
Gunther	Pay scale for guards in prison system lower for women	1981	D
Norris (1)	Lower retirement benefits for women	1983	FE
Norris (2)	Retirement benefits /retroactivity	1983	SE
Mathews	Gender based Social Security spousal benefits extended for five years	1984	FE
Long	Pension contributions for women/ retroactivity	1988	SS

* = FE (Formal Equality); SE (Substantive Equality); D (Difference Theory); SS (Separate Spheres)

TABLE 3B: SUPREME COURT CASES ON GENDER DISCRIMINATION IN EMPLOYMENT: BARRIERS TO EMPLOYMENT AND WORK OPPORTUNITIES FRAMES

Cases	Issue	Date	Frame*
Ballard	Military promotions for women that were less stringent than for men upheld	1975	SE
Dothard (1)	Height/weight requirements for corrections officers eliminated	1977	FE
Dothard (2)	Contact positions in all male prisons denied to women	1977	SS
Feeney	Veteran's preference programs that excluded women from government jobs upheld	1979	SS
Rostker	Registration of women for the draft upheld	1981	SS
Ford	Retroactive seniority denied to successful Title VII claimants	1982	SS
Hogan	State nursing school restricted to women required to admit men	1982	D
Grace	Collective bargaining seniority rule enforced over EEOC agreement	1983	SS
Hishon	Coverage of law partnerships under Title VII	1984	FE
Johnson	Affirmative action plan for women in nontraditional jobs upheld	1987	SE
Price Waterhouse	Law firm denial of partnership to woman held to be discriminatory	1989	FE
Lorance	Seniority system that disadvantages women upheld	1989	SS
VMI	Exclusion of women from all-male military college	1996	FE

* = FE (Formal Equality); SE (Substantive Equality); D (Difference Theory); SS (Separate Spheres)

TABLE 3C: SUPREME COURT CASES ON GENDER DISCRIMINATION IN EMPLOYMENT: PREGNANCY AND MATERNITY ISSUES FRAMES

Cases	Issue	Date	Frame*
Phillips	Denied of employment to mothers of pre-school children held invalid	1971	FE/SS
LaFleur	Forced maternity leave in school system held invalid	1974	FE
Geduldig	Exclusion of pregnancy from coverage in state disability benefits program upheld	1974	SS
Turner	Denial of unemployment benefits for pregnant women held invalid	1975	FE
Gilbert	Denial of pregnancy disability benefits in private sector upheld	1976	SS
Satty (1)	Loss of seniority upon return from maternity leave held invalid	1977	D
Satty (2)	Denial of sick leave use for maternity leave upheld	1977	SS
Newport News	Pregnancy benefits for spouses of male employees less than female employee's invalid	1983	FE
Guerra	Leave and reinstatement rights for pregnant employees granted	1987	D
Wimberly	Denial of eligibility of pregnant women for unemployment benefits upheld	1987	SS
Johnson Controls	Fetal protection policy for women employees	1991	FE

* = FE (Formal Equality); SE (Substantive Equality); D (Difference Theory); SS (Separate Spheres)

TABLE 3D: SUPREME COURT CASE ON GENDER DISCRIMINATION IN EMPLOYMENT: SEXUAL HARASSMENT FRAMES

Cases	Issue	Date	Frame*
Meritor	Hostile environment sexual harassment claim held as form of sex discrimination	1986	NS
Forklift	Sexual harassment and psychological harm	1993	NS
Burlington	Liability of employers for sexual harassment committed by supervisors	1998	NS/SS
Faragher	Liability of employers for sexual harassment committed by supervisors	1998	NS/SS
Oncale	Same-sex sexual harassment	1998	FE/NS
Breeden	Retaliation for filing of sexual harassment complaint	2001	SS
Pollard	Damage calculations for sexual harassment violations	2001	NS

* = FE (Formal Equality); SE (Substantive Equality); D (Difference Theory); SS (Separate Spheres); NS (Non-subordination)