THE SEX DISCOUNT

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This Article interrogates the sexual morality of Equal Protection. Gender equality jurisprudence reveals the unacknowledged influence of a traditional, heteronormative conception of sexual morality—the sexual double standard—that often sets the parameters of gender equality. When the U.S. Supreme Court frames a gendered law as limiting participation in education, the workplace, or civic life, it tends to apply a demanding form of heightened scrutiny that few gendered laws can survive. When, on the other hand, it frames a gendered law as governing the consequences of illicit sex, it tends to apply what I call the sex discount, replacing the rigorous scrutiny mandated by its public equality cases with an unacknowledged, much more deferential form of equal protection review. The Court invokes biological differences between men and women to justify this deference. But the sex discount does not genuinely accommodate gender differences regarding pregnancy, sexuality, or parenthood. Courts tend to reject reproductive justifications for inequality in public life; they tend to assume that biological differences are irrelevant when a heterosexual couple is married; they have applied the sex discount to gendered laws that serve no interest in protecting fetal life; and they apply a sex discount in cases of antigay discrimination that do not involve reproductive or sexual behavior. Rather, the sex discount authorizes governments to use gendered laws to enforce traditional gender norms about the morality of sex: to discourage abortion, to allow antigay discrimination, and to "incentivize" heterosexual marriage.

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INTRODUCTION

In 2003, the U.S. Supreme Court famously recognized the due process liberty right of adults to "decid[e] how to conduct their private lives in matters pertaining to sex."[1] Men and women of all sexual orientations should enjoy equal rights to the sexual liberty the Court announced in *Lawrence v. Texas*.[2] To the extent that government action constrains sexual liberty in gender-specific ways, that action should be subject to the rigorous form of heightened scrutiny that the Court mandates for most other gendered laws. Unless a law's defenders can establish a "substantial" relationship to an "important" governmental objective[3]—a "demanding" burden of justification that "rests entirely on the State"[4]—the gender-based sexual regulation is, or should be, invalid.

Many theorists of sexual and reproductive rights, including me, have advanced this equal sexual liberty argument, which integrates gender equality concerns into the existing jurisprudence of due process sexual and reproductive liberty.[5] While the Supreme Court's scrutiny of abortion restrictions has

1. Lawrence v. Texas, 539 U.S. 558, 572 (2003).

2. *Id.*

3. *See, e.g.*, United States v. Virginia (VMI), 518 U.S. 515, 533 (1996); Craig v. Boren, 429 U.S. 190, 197 (1976).

4. *VMI*, 518 U.S. at 533.

5. *See, e.g.*, Kim Shayo Buchanan, Lawrence v. Geduldig*: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1270–82 (2007); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53–59 (1977); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 154–62 (1988); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 284 (1994); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1298–1324 (1991); Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 117–21 (1989); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1051–53 [hereinafter Siegel, *New Politics*]; Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 351–68 (1992) [hereinafter Siegel, *Reasoning From the Body*]; Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1665 (2004); Nadine Strossen, *Reproducing Women's Rights: All Over*

been severely eroded since *Roe v. Wade*,[6] and the level of scrutiny applied to *Lawrence*'s due process sexual liberty right is contested and unclear, several commentators contend that the intermediate scrutiny required by the Court's gender equality jurisprudence "operate[s] quite strictly 'in fact.'"[7] Thus, advocates of equal sexual liberty seek to deploy the more rigorous equal protection standard to strengthen anemic due process protections of reproductive and sexual rights.[8]

Despite its solid grounding in constitutional theory and doctrine, the equal sexual liberty argument has not been very successful in the courts. In *Lawrence v. Texas*, the Supreme Court majority recognized that equal protection and due process liberty "are linked in important respects, and a decision on the latter point advances both interests,"[9] but it did not say whether the sexual liberty right was fundamental, nor did it identify the applicable standard of review. Many lower federal courts have since interpreted *Lawrence* to protect only a narrow right to be free from criminal prosecution for private, noncommercial "sodomy," "fornication," or adultery,[10] while others have cited the *Lawrence* disclaimers[11] to sanction prosecutions for "soliciting" consensual,

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Again, 31 VT. L. REV. 1, 34–36 (2006); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1173 (1988); Justin Reinheimer, Comment, *What* Lawrence *Should Have Said: Reconstructing an Equality Approach*, 96 CAL. L. REV. 505, 507 (2008).

6. *See* Gonzales v. Carhart, 550 U.S. 124 (2007) (removing the requirement that abortion restrictions contain a health exception and describing "undue burden" in terms that evoke rational basis review); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (lowering the standard of review from strict scrutiny to undue burden); *infra* note 19.

7. Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 75 (1996); *see also* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 488 n.6 (1998).

8. Some scholars and advocates hope that "[b]y grounding their objections in guarantees of equality as well as liberty, . . . constitutional controversy will persist even if *Roe* is reversed." Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 432 (2007). For examples of equality arguments in favor of sexual and reproductive liberty interests, see generally note 5, *supra*.

9. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

10. *See, e.g.*, State v. Whiteley, 616 S.E.2d 576 (N.C. Ct. App. 2005); Berg v. State, 100 P.3d 261, 264 (Utah Ct. App. 2004); Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005). *But see* Witt v. Dep't of Air Force, 527 F.3d 806, 819 (9th Cir. 2008) (interpreting *Lawrence* to mandate heightened due process scrutiny for antigay government action); State v. Limon, 122 P.3d 22 (Kan. 2005) (invalidating the exclusion of same-sex offenders from a "Romeo and Juliet" statutory-rape-mitigation provision for consensual sex involving two teenagers who are close in age).

11. In *Lawrence*, 539 U.S. at 578, Justice Kennedy's majority cautioned:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.

noncommercial same-sex sex,[12] bans on the distribution of sex toys,[13] and restrictions on marriage and adoption by same-sex couples.[14]

The equal sexual liberty argument has also been notably unsuccessful in abortion cases. In *Planned Parenthood v. Casey*, the Court reaffirmed the importance of abortion rights to women's "ability . . . to participate equally in the economic and social life of the Nation"[15] even as it lowered the applicable standard of review.[16] Most recently, in *Gonzales v. Carhart*,[17] the majority ignored the dissenters' powerful equality argument for abortion rights[18] and further diminished constitutional abortion protections by authorizing, for the first time, an abortion restriction that made no exception for procedures that were necessary to protect the woman's health.[19]

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12. *Whiteley*, 616 S.E.2d at 576; Singson v. Commonwealth, 621 S.E.2d 682, 742–43 (Va. Ct. App. 2005). A Republican county commissioner in Mecklenburg, North Carolina recently claimed in an email to a constituent that "we arrest 250 homosexuals a year" for "crimes against nature" and "solicitation" of such "crimes." Matt Comer, *James: Police 'De-infest Areas Where Gays Congregate'*, Q-NOTES, Dec. 18, 2009, http://www.q-notes.com/4632/james-police-de-infest-areas-where-gays-congregate.

13. *See, e.g.*, Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1238, 1250 (11th Cir. 2004).

14. *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004) (upholding Florida's ban on adoption by gay or lesbian individuals or same-sex couples against a due process liberty challenge); *but see In re* Adoption of Doe, No. 06-033881, 2008 WL 5006172, at *27–29 (Fla. Cir. Ct. Nov. 25, 2008) (finding no rational basis for Florida's ban on adoption by gay or lesbian individuals or couples). *See* Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (upholding a different-sex marriage rule in part on the ground that same-sex parents, unlike different-sex parents, cannot procreate by accident and thus do not need marriage to ensure their commitment to their children); *see also* Stanhardt v. Superior Court *ex rel.* Cty. of Maricopa, 77 P.3d 451 (Ariz. 2003); Morrison v. Sadler, 821 N.E.2d 14, 24–25 (Ind. Ct. App. 2005); Conaway v. Deane, 932 A.2d 571 (Md. 2007); Lewis v. Harris, 188 N.J. 415, 458 (2005); Andersen v. King County, 138 P.3d 963, 981 (Wash. 2006). *See generally* Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 35 (2009).

15. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

16. *See* sources cited *supra* note 6. The undue burden standard the Court introduced in *Casey* authorized abortion restrictions such as mandatory waiting periods, antiabortion "counseling" requirements, and mandatory parental notification or consent for young women's abortions, all of which had previously been held unconstitutional under *Roe*. *See Casey*, 505 U.S. at 874. For pre-*Casey* opinions finding such restrictions unconstitutional, see Thornburgh v. Am. Coll. of Obstetrics & Gynecology, 476 U.S. 747, 761–64 (1986) (invalidating a law requiring that abortion providers read statements designed to express the state's disapproval of abortion and to discourage women from going forward with the procedure), *overruled by Casey*, 505 U.S. at 833; City of Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983) (invalidating a mandatory twenty-four-hour waiting period for abortion), *overruled by Casey*, 505 U.S. at 833; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 72–75 (1976) (invalidating a law requiring parental consent to a minor's abortion).

17. 550 U.S. 124 (2007).

18. Justice Ginsburg's dissent, joined by Justices Souter, Stevens, and Breyer, reaffirmed that due process abortion rights "do not . . . vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." *Id.* at 172 (Ginsburg, J., dissenting).

19. *See id.* at 168 (majority opinion); Stenberg v. Carhart, 530 U.S. 914, 938 (2000); *Casey*, 505 U.S. at 846; Roe v. Wade, 410 U.S. 113, 164–65 (1973). Moreover, the language used in this

In this Article, I offer an explanation for the failure of the equal sexual liberty argument to move the courts further. To do so, I interrogate the sexual morality of equal protection. Contemporary equal protection jurisprudence reveals the unacknowledged influence of a traditional, heteronormative vision of sexual morality—the sexual double standard[20]—which often outweighs the courts' commitment to gender equality. In short, when a majority of the Supreme Court frames a gendered law as promoting this traditional form of sexual morality, it tends to diminish the standard of review.

When the Court frames a gender classification as a regulation of illicit (that is, unmarried[21]) sexual behavior that advances traditional sexual morality, the Supreme Court and many federal courts tend to replace the heightened scrutiny mandated by *Craig v. Boren*[22] and *United States v. Virginia* (*VMI*)[23] with an unacknowledged, but much more deferential form of equal protection review that works very much like rational basis. This is the phenomenon I describe as the sex discount.

Traditionally, governments have used gendered laws to enforce the heteronormative sexual double standard, along with a male breadwinner–female homemaker model of family life. Such gendered laws often regulated sexual behavior, as well as public participation. As I explain in Part I, the Court's equal protection jurisprudence historically tended to accommodate such laws by invoking two broad moral concerns it shared with legislatures about married women's participation in public life or work outside the home: It conflicted with women's proper maternal role, and it posed a threat to their chastity.

Since the 1960s, the moral taboo against married mothers' paid work outside the home[24] has largely disappeared from the American cultural

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majority opinion tends to assimilate the undue burden standard into rational basis scrutiny: An abortion restriction is valid where a government "has a rational basis to act, and it does not impose an undue burden." *Gonzales*, 550 U.S. at 124, 158. Governments need not prioritize women's "marginal safety . . . when the regulation is rational and in pursuit of legitimate ends." *See id.* at 166. It was "reasonable" for the U.S. Congress to think that the banned abortion procedure was inconsistent with a physician's proper role. *Id.* at 160. It was not "irrational" to ban only that abortion procedure without banning others. *Id.* The State was not "barred from imposing reasonable regulations." *Id.* at 166.

20. *See infra* notes 153 –169 and accompanying text. *See also generally* Keith Thomas, *The Double Standard*, 20 J. HIST. IDEAS 195 (1959).

21. *See* Ariela Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756 (2006) (noting that marriage sets the boundary between legitimate and illicit sexual behavior).

22. 429 U.S. 190 (1976).

23. 518 U.S. 515 (1996).

24. Since the nineteenth century, many nonwhite and working-class women have worked for pay outside the home, but these women were not usually considered respectable, good mothers. *See, e.g.*, ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 46–47 (2003); ANNA MARIE SMITH, WELFARE REFORM AND SEXUAL REGULATION (2007); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 874–75 (1994).

mainstream. Accordingly, since the early 1970s, the Court has adopted an increasingly skeptical form of gender-based equal protection review that few gendered laws can survive. When the Court acknowledges an equal protection interest, it generally rejects biological rationales for the gender distinction,[25] linking the equality claim to participation in public life.[26] Thus, when the Court frames a gendered law as a restriction on participation in education, the economy, or civic life, it tends to invalidate it even when the government offers a plausible pregnancy-based rationale for treating women differently than men.[27]

By contrast, cultural mores about sexual morality—epitomized by the heteronormative sexual double standard[28]—have been slower to change. As I have observed previously:

> [W]hen judges "demean" a [constitutional] right by constructing it as a right to have sex, they are about to deny the claim. . . . [W]hen a court aims to protect the conduct targeted by a sexual regulation, it construes it in grand and . . . nonsexual terms: it declares that the case is not about sex.[29]

In Part II of this Article, I demonstrate what happens when the Court frames a gendered law as a regulation of illicit sexual behavior. The Court's commitment to gender equality falters: It tends to abandon its usual skepticism of gender-based government action, replacing it with a much more deferential form of review. In these cases, the Court accepts the biological excuses for gender classifications that it rejects in its public equality jurisprudence. It explains its deference by invoking women's capacity for pregnancy, which makes them "differently situated"[30] from men with respect to sexual

25. *See generally* Siegel, *Reasoning From the Body*, *supra* note 5, at 330–31 (demonstrating that biological explanations for gender inequality involve normative cultural assessments of the gender roles appropriate to women).

26. *See, e.g.*, *VMI*, 518 U.S. at 542–46 (rejecting Virginia's assertion that "gender-based developmental differences" could not provide an "exceedingly persuasive justification" for excluding qualified women from the "training and attendant opportunities that VMI uniquely affords" and holding that intermediate scrutiny requires a "hard look" at gender-based "generalizations" that "are likely to . . . perpetuate historical patterns of discrimination"). *See also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) discussed *infra* notes 116 –124 and accompanying text.

27. *See, e.g.*, *Hibbs*, 538 U.S. at 733–34; Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 197–98 (1991); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

28. "[U]nchastity, in the sense of sexual relations before marriage or outside marriage, is for a man, if an offense, . . . a mild and pardonable one, but for a woman a matter of the utmost gravity." Thomas, *supra* note 20, at 195.

29. Buchanan, *supra* note 5, at 1273.

30. The "similarly situated" approach to defining equality—the notion that likes must be treated alike, while laws may treat people differently to the extent that they are differently situated—has been the subject of trenchant academic critique. *See, e.g.*, MacKinnon, *supra* note 5, at 1286–88; Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Wendy W. Williams, *The Equality Crisis:*

regulation—yet it assumes that these "biological" differences disappear, or cease to matter, upon marriage.[31]

The sex discount operates through a convention of constitutional interpretation by which the Court tends to frame gendered laws dichotomously.[32] When the Court upholds a gender classification, it tends to link it to gender differences the Court characterizes as real (and usually biological). By contrast, when the Court invalidates a gender classification, it tends to find gender differences to be unproven, stereotypical, or irrelevant.[33] In this Article, I identify a discursive practice by which the courts tend to characterize gendered government action either as enforcing inequality in public life, or as governing illicit sex. When it frames gendered government action as a restriction on work, education, or civic life, the Court tends to dismiss arguments about gender difference, and to see unconstitutional gender stereotypes instead. In these cases, the Court applies a skeptical form of review which few gendered laws will survive—even, in some cases, when the laws at least arguably address reproductive differences between men and women.[34] When, on the other hand, the Court frames gendered government action as regulating the consequences of illicit sex, it tends to find that the law accommodates relevant, ostensibly biological differences between men and women. In these cases, it applies a deferential form of review that is incommensurable with the standard it declares in public

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Some Reflections on Culture, Courts, and Feminism, 14 WOMEN'S RTS. L. REP. 151, 158 n.50 (1992) (arguing that the similarly situated test, if applied vigorously, "would eliminate the need to apply [heightened scrutiny] to many, perhaps most, sex-based classifications").

31. *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001); Michael M. v. Sonoma County, 450 U.S. 464 (1981); Parham v. Hughes, 441 U.S. 347 (1979).

32. The dichotomy between ostensibly benign biological difference and invidious gender stereotyping has been subjected to incisive feminist critique. *See, e.g.*, Mary Anne Case, *Of Richard Epstein and Other Radical Feminists*, 18 HARV. J.L. & PUB. POL'Y 369, 375–78 (1994). Professor Case notes that "[l]aw is precisely that which fights nature. If something were all that natural, a law would not be needed to bring it about. . . . It has long puzzled and troubled me that it is only with respect to sex and gender that nature is thought to drive law," as opposed to, say, human behavior such as violence or fraud, which may well reflect natural urges, but such urges are not routinely used define what law should require or prevent. *Id.* at 375; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 8–9 (1987) (arguing that gender differences are produced by gender inequality and are then invoked as justifications for continued inequality); Siegel, *Reasoning From the Body*, *supra* note 5, at 353–57 (arguing that abortion laws premised on biological difference or on protection of unborn life rely heavily on unexamined gender role stereotypes).

33. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 200–202 (1976) (finding statistical evidence that men are more likely than women to drink and drive insufficient to justify gender classification); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (1982) (holding that a women-only nursing school perpetuates the stereotype that nursing is women's work, and creates a self-fulfilling prophecy); United States v. Virginia, 518 U.S. 515, 549–550 (1996) (finding that psychological differences between men and women are insufficient to justify exclusion of women who are suited to VMI's adversative pedagogic method).

34. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

equality cases such as *Craig v. Boren* and *VMI*—even when the laws at least arguably perpetuate gender stereotypes.[35]

In practice, the sex discount authorizes governments to use gender classifications to enforce sexual morality: to discourage abortion, to permit antigay discrimination, and to promote marriage. The sex discount does not genuinely accommodate pregnancy, sexuality, or governmental interests in fetal life. Rather, it protects governmental enforcement of traditional gender norms about the morality of sex.

I. GENDER EQUALITY IN PUBLIC LIFE: HEIGHTENED SCRUTINY

The Court's equal protection analysis of gender-based government action has traced changing cultural norms of the gendered morality of sex and public life. During the nineteenth and well into the twentieth century, conventional upper- and middle-class morality required that virtuous women devote their lives to children and family within marriage. While feminists and working women have challenged this norm since at least the mid-nineteenth century,[36] a dominant cultural expectation was that virtuous women "were destined to become 'true women,' the keeper of home, hearth, and the holder of the future for the race."[37] Women's participation in paid work and in public life contravened the predominant "separate spheres" ideology of this era. Accordingly, from the nineteenth century through the 1960s, the Court used minimum rationality to uphold most gendered laws as long as any "basis in reason" could be conceived for the discrimination.[38] The Court affirmed that governments could and should recognize that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."[39]

Thus, even at the height of the *Lochner* era, when the Court was notoriously hostile to laws that secured employment and collective bargaining protections for working men, the Court held that a woman's "physical structure

35. *See, e.g.*, *Nguyen*, 533 U.S. 53.

36. *See, e.g.*, KESSLER-HARRIS, *supra* note 24; THE DECLARATION OF SENTIMENTS, SENECA FALLS CONFERENCE (1848).

37. *See, e.g.*, Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 66; *see also* Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 307 (2002) (noting that white women are stereotyped as "good mothers" and as virtuous and sexually passive). *See, e.g.*, Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (discussed *infra* note 49 and accompanying text).

38. Goesaert v. Cleary, 335 U.S. 464, 467 (1948). *See also* Hoyt v. Florida, 368 U.S. 57, 63 (1961); *VMI*, 518 U.S. at 531. But see Adkins v. Children's Hosp., 261 U.S. 525 (1923).

39. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

and a proper discharge of her maternal functions"[40] justified maximum-hours legislation that the Court likely would have invalidated for men.[41] One exception to this general trend occurred in 1923, when the Court proclaimed in *Adkins v. Children's Hospital*—somewhat prematurely—that "[i]n view of the great—not to say revolutionary—changes which ha[d] taken place . . . in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, . . . the ancient inequality of the sexes [had] . . . now come almost, if not quite, to the vanishing point."[42] In recognition of women workers' newfound equality, the Court invalidated their hard-won minimum wage protections in favor of their "liberty of contract."[43]

More often, though, the nineteenth- through mid-twentieth-century Supreme Court upheld state laws that limited women's participation in various forms of employment and public life, including restrictions on jury service,[44] regulation of women's working hours,[45] and laws that encouraged women's employment as laundresses[46] and restricted their employment as lawyers[47] or bartenders.[48]

The Supreme Court tended to invoke two distinct moral considerations when it addressed the constitutionality of employment protections for working women. The first such concern was that women's participation in public life might be incommensurable with their maternal role. As Justice Bradley declared in his notorious concurrence in *Bradwell v. Illinois*, "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[49] In this era, women's role as mothers made them the proper subject

40. Muller v. Oregon, 208 U.S. 412, 422 (1908).

41. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a state law prohibiting "yellow dog" contracts); Adair v. United States, 208 U.S. 161 (1908) (invalidating a federal law prohibiting "yellow dog" anti-union contracts); Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum-hours legislation for bakers). *But see, e.g.*, Bunting v. Oregon, 243 U.S. 426 (1917) (upholding maximum-hours legislation for male factory workers); Holden v. Hardy, 169 U.S. 366 (1898) (upholding maximum-hours legislation for male miners).

42. *Adkins*, 261 U.S. at 553.

43. *Id.*

44. *See* Hoyt v. Florida, 368 U.S. 57 (1961).

45. *Muller*, 208 U.S. 412, distinguished in *Adkins*, 261 U.S. at 553; Radice v. New York, 264 U.S. 292, 294 (1924).

46. Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912) (noting, with regards to a license fee imposed on male (generally Chinese American) launderers but not on female ones, the Court said, "[i]f Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the 14th Amendment does not interfere by creating a fictitious equality where there is a real difference").

47. Bradwell v. State, 83 U.S. 130, 137–39 (1872).

48. Goesaert v. Cleary, 335 U.S. 464, 465 (1948).

49. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

of gendered employment restrictions: "[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[50] As late as 1961, the Court declared, in *Hoyt v. Florida*,[51] that in light of women's "special responsibilities"[52] as mothers, it was not "irrational" for a state legislature to exempt women from jury service.[53] "[W]oman," the Court declared, "is still regarded as the center of home and family life."[54]

A second moral concern about women's work outside the home involved the risk that participation in public life might pose to their chastity.[55] As Thomas Jefferson observed in 1816, "Were our State a pure democracy . . . there would yet be excluded from their deliberations . . . [w]omen, who, to prevent depravation of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men."[56]

In upholding gendered employment laws, the Court expressed concern that work outside the home might expose women to sexual exploitation, or might tempt them to engage in sexual license that would be more appropriate to men. Thus, in *Muller v. Oregon*, the Court upheld gendered maximum-hours legislation "to protect [women] from the greed as well as the passion of man."[57] In *Adkins*, the Court accepted that gendered legislation was appropriate to protect the "morals" of women workers, but disagreed that minimum wage laws served this purpose.[58] Thus, one year later, the Court unanimously held that a state could properly restrict women's employment on night shifts, not only because night work "threaten[ed] to impair their peculiar and natural functions," but

50. *Muller*, 208 U.S. at 421.
51. 368 U.S. 57, 62 (1961).
52. *Id.* at 62.
53. *Id.* at 63.
54. *Id.* at 62.
55. Alice Kessler-Harris demonstrates that the entry of women into factory and office work raised public concern both that the women might be tempted into (voluntary) sexual license, and that they might be exposed to sexual exploitation. KESSLER-HARRIS, *supra* note 24, at 101–05. Many women were exposed to sexual exploitation in domestic, factory, or office work, while wage work also offered increased opportunities to engage in nonmarital sex and dating relationships. *Id.*
56. United States v. Virginia (VMI), 518 U.S. 515, 531 n.5 (1996) (quoting Letter From Thomas Jefferson to Samuel Kercheval, Sept. 5, 1816).
57. Muller v. Oregon, 208 U.S. 412, 422 (1908). In the absence of laws against sexual harassment and, in most cases, labor unions, work outside the home did in fact expose many black and working-class women to sexual exploitation by employers and others. *See, e.g.*, Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1469–70 (1992); Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 827 (1994).
58. Adkins v. Children's Hosp., 261 U.S. 525, 554–56 (1923); *see also* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394–99 (1937) (overruling *Adkins* and reaffirming states' legitimate interest in "the health of women and their protection from unscrupulous and overreaching employers," whether by regulating their wages or their hours).

also because it "expose[d] them to the dangers and menaces incident to life in large cities."[59] In 1948, the Court again affirmed that concerns about sexual morality warranted gendered employment laws. It noted that because of "vast changes in the social and legal position of women[,] . . . women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced."[60] The Court held that the Michigan legislature had a "basis in reason"[61] to restrict women's employment as bartenders because such employment, without the supervision of a husband or father,[62] might lead to "moral and social problems,"[63] which justified the state in "drawing a sharp line between the sexes."[64] Mid-twentieth-century equal protection jurisprudence generally permitted governments to prescribe the virtues and vices appropriate to women and men by regulating their employment.

Over the past four decades or so, the notion that it is immoral for a married woman to work for pay outside the home has disappeared from the American cultural mainstream. Paid work outside the home is no longer widely understood to expose respectable women to sexual corruption,[65] nor do most people assume that good mothers should never work outside the home.

These cultural changes reflect the profound economic and social changes that, in the 1960s and 1970s, pushed large numbers of married, white, middle-class American women into the work force for the first time since World War II.[66] Since the early 1970s, the Supreme Court has emphatically denounced the

59. Radice v. New York, 264 U.S. 292, 294 (1924).

60. Goesaert v. Cleary, 335 U.S. 464, 465–66 (1948).

61. *Id.* at 467.

62. The state was entitled to assume "that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight." *Id.* at 466.

63. *Id.*

64. *Id.*

65. This change may reflect steps the courts have taken in recent decades to protect women workers against sexual exploitation. Since the mid-1980s, the Court has interpreted Title VII's prohibition of sex discrimination to prohibit sexual harassment in the workplace. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65–67 (1986). Nevertheless, the Court has interpreted this prohibition in ways that are more vigilant about women's chastity than about their workplace equality more generally. As Vicki Schultz has observed, the federal courts' Title VII jurisprudence is relatively tolerant of nonsexualized gender harassment of women in male-dominated workplaces, but the Court is vigilant—she contends too vigilant—about shielding women from harassment that is explicitly sexual: quid pro quo sexual exploitation and unwelcome sexualized talk and touching. *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2136–58 (2003); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1710–55 (1998).

66. Although many such women worked outside the home during World War II, most returned to the home when the war ended and employers replaced them with men. *See* KESSLER-HARRIS, *supra* note 24, at 286–87, 300–03.

separate-spheres ideology that dominated its gender equality jurisprudence until the 1960s. As Wendy Williams observed in 1982:

> [I]n part what the Supreme Court did was simply to recognize that the real world outside the courtroom had already changed. Woman [sic] were in fact no longer chiefly housewife-dependents. The family wage no longer existed; for a vast number of two-parent families, two wage earners were an economic necessity. In addition, many families were headed by a single parent. It behooved the Court to account for this new reality and it did so by recognizing that the breadwinner-homemaker dichotomy was an outmoded stereotype.[67]

Thus, in 1971, the Court adopted a new, more skeptical approach to sex-based government action. Its decision in *Reed v. Reed*[68] marked a "departure from 'traditional' rational-basis analysis with respect to sex-based classifications,"[69] establishing that something more than minimum rationality was required to defend sex-based government action against equal protection challenge.[70] Over the following decade or so, the Court invalidated most state legislation that enforced the separate spheres ideology. It denounced the "old notion" that "generally it is the man's primary responsibility to provide a home and its essentials," and forbade governments to act upon it.[71] The Court declared in 1975: "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[72] Equal protection forbade governments from using sex classifications to "effectively announc[e] the State's preference for an allocation of family responsibilities under which the wife plays a dependent role,"[73] or to "reinforce[ ] . . . that model among the State's citizens."[74]

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67. Williams, *supra* note 30, at 155.

68. 404 U.S. 71, 76 (1971). *Reed* invalidated an Idaho statute that preferred males to equally qualified females as an "illogical" and "arbitrary" means of avoiding intrafamily administrative hearings to determine, as between two relatives, who should administer an estate, despite the state's argument that "men [are] as a rule more conversant with business affairs than [are] women." Brief for Respondent at 12, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133597 [hereinafter *Reed* Brief]. This argument would seem to satisfy minimum rationality. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 683 (1973) (footnote omitted).

69. *Frontiero*, 411 U.S. at 684.

70. *See generally Reed*, 404 U.S. 71; Stanton v. Stanton, 421 U.S. 7, 13–14 (1975) ("*Reed*, we feel, is controlling here," so that minimum rationality, that is, administrative convenience, was "not enough to save the statute."); Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring) ("*Reed* and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present.").

71. *Stanton*, 421 U.S. at 10. *See also* Orr v. Orr, 440 U.S. 268, 279 (1977).

72. *Stanton*, 421 U.S. at 14–15.

73. *Orr*, 440 U.S. at 279.

74. *Id.*

Accordingly, since its 1976 decision in *Craig v. Boren*, the Court has subjected sex-based government action to intermediate or heightened scrutiny, a standard "more difficult to meet than our rational-basis test."[75] Rather than being "rationally related" to a "legitimate" government interest, gender-based government action must bear a "substantial" relationship to an "important" government objective. The Court declares that this "burden of justification is demanding and it rests entirely on the State."[76] Heightened scrutiny of sex-based government action reached its zenith in 1996, when the Court declared in *VMI* that gendered government action requires an "exceedingly persuasive justification,"[77] surviving equal protection scrutiny only if the government can establish a "direct, substantial relationship"[78] between a sex classification and "important governmental objectives."[79] The government's important objective "must be genuine, not hypothesized or invented *post hoc* in response to litigation,"[80] and must not "reflec[t] archaic and stereotypic notions" about gender.[81] A government may not offer, as justification, "the very stereotype the law condemns,"[82] and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,"[83] "[e]ven if a measure of truth can be found in some of the gender stereotypes."[84] The Court purports to carefully scrutinize statutory objectives that are designed to "'protect' members of one gender,"[85] aware that "an attitude of romantic paternalism" may, "in practical effect, put women, not on a pedestal, but in a cage."[86]

With few exceptions,[87] the Court's application of heightened scrutiny has invalidated gender-based restrictions on participation in public life.[88] Since the early 1970s, the Court has been fairly consistent in rejecting gendered rules that

75. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).
76. United States v. Virginia (VMI), 518 U.S. 515, 533 (1996).
77. *Id.* at 531.
78. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).
79. *Hogan*, 458 U.S. at 724; *see* Craig v. Boren, 429 U.S. 190, 197 (1976); *VMI*, 518 U.S. at 533; *Hibbs*, 538 U.S. at 728.
80. *VMI*, 518 U.S. at 533.
81. *Hogan*, 458 U.S. at 725. *See also VMI*, 518 U.S. 515; Orr v. Orr, 440 U.S. 268, 279 (1977); Stanton v. Stanton, 421 U.S. 7, 14–15 (1975).
82. Powers v. Ohio, 499 U.S. 400, 410 (1991).
83. *VMI*, 518 U.S. at 533. *See also* Califano v. Goldfarb, 430 U.S. 199, 223–24 (1977) (Stevens, J., concurring); Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975).
84. J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127, 139 n.11 (1994); *see also Weinberger*, 420 U.S. at 645; *Craig*, 429 U.S. at 201.
85. *Hogan*, 458 U.S. at 725.
86. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).
87. *See, e.g.*, *infra* notes 95 to 110, and accompanying text.
88. *See, e.g.*, *Craig*, 429 U.S. 190; *Goldfarb*, 430 U.S. 199; *Hogan*, 458 U.S. 718; *J.E.B.*, 511 U.S. 127; *VMI*, 518 U.S. 515.

delineated men's and women's work, and the Court and Congress have often condemned employment practices that penalize women workers for becoming mothers.[89] The Court has invalidated a women-only admission requirement to a public college of nursing[90] and a men-only admission requirement to a military college.[91] It has struck down legal practices that enforced men's dominance over women in business matters,[92] assumed women's economic dependency on their husbands,[93] and exempted women from jury service.[94] The Court tends to be skeptical of gender-based government action that circumscribes participation in education, the economy, and civic life.

This is not to say that the Court has struck down every gendered restriction that has come before it. For example, it has accepted compensatory rationales for benefit schemes that afforded more generous entitlements to women than to men.[95] In 1982, in *Feeney v. Personnel Administrator of Massachusetts*,[96] the Court approved a policy of absolute preference for veterans in professional civil service employment that, because 98 percent of veterans were men, resulted in

89. *See, e.g.*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006) (reversing *Geduldig v. Aiello*, 417 U.S. 484 (1974), in the employment context by prohibiting pregnancy discrimination against working women); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (invalidating mandatory imposition of unpaid maternity leave); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (invalidating, as a Title VII violation, an employer rule that removed women's accumulated seniority if they took a maternity leave); Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991) (invalidating, as a Title VII violation, an employer rule excluding women of childbearing age from higher-paid positions involving chemicals that could cause fetal harm); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (condemning gender-differentiated parental leave policies as sex discrimination).

90. *Hogan*, 458 U.S. 718.

91. *VMI*, 518 U.S. 515.

92. In *Reed*, the Court invalidated as irrational an Idaho statute that preferred men over women as estate executors—even though this rule could rationally be defended on the basis that, as state counsel argued, "men were as a rule more conversant with business affairs than were women . . . women still are not engaged in politics, the professions, business or industry to the extent men are." *Reed* Brief, *supra* note 68, at 12–13.

93. *See, e.g.*, *Goldfarb*, 430 U.S. 199; Stanton v. Stanton, 421 U.S. 7 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973). *See also* Kirchberg v. Feenstra, 609 F.2d 727 (5th Cir. 1979) (invalidating a Louisiana law deeming the husband to be the "head of household").

94. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

95. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 317 (1977) (upholding a Social Security rule which afforded more generous retirement benefits to women than to men of similar age and earnings on the basis that its objective was "the permissible one of redressing our society's longstanding disparate treatment of women" (quoting *Goldfarb*, 430 U.S. at 209 n.8)); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding a property tax exemption for widows but not for widowers). *See also VMI*, 518 U.S. at 533–34 (determining that gender classifications "may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promote equal opportunity,' [and] to advance full development of the talent and capacities of our Nation's people") (quoting *Webster*, 430 U.S. at 320, and Cal. Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272, 289 (1987))).

96. 442 U.S. 256 (1979).

a senior civil service that was virtually all male.[97] Because it attributed the rule's disparate gender effect to "the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces, and largely to the simple fact that women have never been subjected to a military draft,"[98] the Court found that the veterans' preference lacked an invidious discriminatory purpose. In the 1970s and early 1980s, the Court tended to treat gendered employment rules based on the women's exclusion from military combat as constitutionally unimpeachable.[99]

Thus, in two early cases, *Schlesinger v. Ballard*[100] and *Rostker v. Goldberg*,[101] the Court upheld gendered rules governing military service: *Schlesinger* upheld the Navy's gendered "up or out" policy, which permitted women a longer tenure than men before mandatory discharge for lack of promotion. *Rostker* upheld male-only draft registration. Each decision relied in part on a "real difference" that, the Court held, left women not similarly situated to men: the statutory exclusion of women from military combat.[102] In each case, the Court elided the applicable equal protection framework,[103] instead emphasizing the deference owed to Congress in military affairs.[104]

The Court's deference in *Schlesinger*, *Rostker*, and *Feeney* seems to reflect tolerance of gender distinctions linked to the combat exemption, rather than to the terms and conditions of military employment more generally: As early as 1973, the Court required that the military provide equal employment *benefits* to women and men as military employees.[105] In any case, these cases show that military service linked to combat has been the last redoubt of the separate spheres ideology in the Court's jurisprudence of gender equality in public life.

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97. The Court upheld the preference on the basis that it lacked a discriminatory purpose. *Id.* at 256, 257–58.

98. *Id.* at 269–70.

99. *But see* Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (invalidating a military service benefits scheme by which wives of servicemen were deemed "dependent" and thus automatically eligible for health and housing benefits, whereas husbands of servicewomen were eligible for such benefits only if they could prove economic dependency upon their wives).

100. 419 U.S. 498, 498, 502 (1975).

101. 453 U.S. 57, 57–58 (1981).

102. The combat exemption was repealed in 1993. Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 97 (2008).

103. In *Schlesinger*, the Court accepted that *Reed v. Reed* established the applicable level of scrutiny, but failed to engage in the *Reed* analysis. *See Schlesinger*, 419 U.S. at 507–08. Likewise, in *Rostker*, the Court acknowledged that *Craig v. Boren* mandated intermediate scrutiny, but did not conduct the intermediate scrutiny analysis. *See Rostker*, 453 U.S. at 72, 74, 87.

104. *Schlesinger*, 419 U.S. at 510; *Rostker*, 453 U.S. at 64–72. "*Rostker* is inconsistent with the rest of the Court's sex discrimination jurisprudence, even if the Court may be reluctant to acknowledge the inconsistency and require sex-neutral rules for military service before legislation and military regulations impose them." Hasday, *supra* note 102, at 152.

105. Frontiero v. Richardson, 411 U.S. 677 (1973).

Our culture has since changed profoundly with respect to women's combat service. In the decades since *Rostker*, the statutory combat exclusion has been repealed,[106] and most restrictions on women's military participation have been lifted by Congress or by military policy.[107] Today, women serve and die alongside men in Iraq and Afghanistan. Women's service in the military is increasingly accepted not only as a personnel necessity for the all-volunteer armed forces, but as a case of ordinary gender equality.[108] Thus, congressional supporters of the 1991 elimination of the statutory combat exclusion framed women's eligibility for combat service as a question of equal opportunity like any other employment matter.[109] The statutory basis for the Court's tolerance of gender discrimination in *Schlesinger* and *Rostker* is gone, and its cultural basis has been substantially eroded.[110]

106. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, §§ 531(a)(1), (b)(1), 105 Stat. 1290, 1365 (1991) (repealing prohibitions on women's assignment to combat aircraft and modifying women's exclusion from combat positions in the Navy and Marines); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 541, 107 Stat. 1547, 1659 (1993) (repealing remaining statutory combat exclusion).

107. *See* Hasday, *supra* note 102, at 133; *see also,* Associated Press, *Women Allowed on Submarines*, N.Y. TIMES, Apr. 30, 2010, at A14 (describing the Navy's changes to a longstanding administrative rule barring women's service on submarines).

108. *See* Hasday, *supra* note 102, at 133–51.

109. Senator Edward Kennedy, one of the bill's authors, described the bill as seeking to "eliminate gender as a classification and commit this Nation to ability as the criterion for classification. . . . Barriers based on sex discrimination are coming down in every part of our society," and "[t]he Armed Forces should be no exception." *Id.* at 137–38 (quoting 137 CONG. REC. 20,729, 20,713 (1991) (statements of Sen. Edward Kennedy)). Senator John Glenn asserted, "[o]pportunity in the United States of America should have no gender," and described the bill as improving "equal opportunity for all women in the military." *Id.* at 138 (quoting 137 CONG. REC. 20,717 (1991) (statement of Sen. John Glenn)). Likewise, Senator Patrick Leahy claimed that "[e]qual opportunity has no gender," a phrase reiterated by the Senate Armed Services Committee. *Id.* at 138 (quoting 137 CONG. REC. 20,729 (1991) (statement of Sen. Patrick Leahy)). In 1992, Representative Les Aspin, who subsequently served as President Clinton's Defense Secretary, asked whether combat exclusions "made women 'second-class citizens.'" *Id.* at 140 (quoting *Gender Discrimination in the Military: Hearings Before the Subcomm. on Military Personnel and Compensation and the Defense Policy Panel of the H. Comm. on Armed Services*, 102d Cong. 77 (1992) (statement of Rep. Les Aspin)).

110. For example, in December 2009, when a general in Iraq threatened to court-martial and imprison women soldiers who became pregnant—and the men who impregnated them, if the men were in the military and could be identified—the policy was met with immediate criticism, not only from feminist advocates and U.S. Senators, but also within the military. General Ray Odierno, the commander of U.S. forces in Iraq, rescinded the policy less than a week after it was announced. *See* Teri Weaver, *U.S. Personnel in Iraq Could Face Court-Martial for Becoming Pregnant*, STARS AND STRIPES, Dec. 19, 2009, http://www.stripes.com/article.asp?section=104&article=66764; *U.S. Military: No Change to Iraq Pregnancy Policy*, REUTERS, Dec. 23, 2009, http://www.reuters.com/article/idUSTRE5BM1BU20091223; Michael Gisick et al., *Senators Lead Calls for Revoking Pregnancy Policy*, STARS AND STRIPES, Dec. 23, 2009, http://www.stripes.com/article.asp?section=104&article=66832; *Military to Scrap Pregnancy Punishment*, REUTERS, Dec. 25, 2009, http://www.reuters.com/article/idUSTRE5BN2D620091224; Jeff Schogol, *Military to Drop Order on Soldiers' Pregnancy in Iraq*, STARS AND STRIPES, Dec. 24, 2009, http://www.stripes.com/article.asp?section=104&article=66867.

On the whole, in most gender equality cases, the Court tends to vigorously protect the equality of men and women in the workplace—even when women's exclusion is premised on the maternal role that had justified the Court's deference to gender classifications in the pre-*Reed* era. Thus, despite its 1974 holding in *Geduldig v. Aiello*[111] that discrimination on the basis of pregnancy was not necessarily sex discrimination for the purpose of equal protection,[112] the Court has interpreted Title VII to prohibit pregnancy-based discrimination by employers who forced workers to take unpaid maternity leave,[113] or who sought to remove women's accumulated seniority when they took it.[114] It also rejected an employer's fetal-protective rationale for excluding women of childbearing age from jobs involving hazardous chemicals.[115]

The Court's embrace of gender equality for working mothers is most striking in *Nevada Department of Human Resources v. Hibbs*.[116] In *Hibbs*, it was open to the Court to frame the Family and Medical Leave Act (FMLA) as an invalid exercise of Congress's Fourteenth Amendment enforcement power by citing *Geduldig* (as Justices Kennedy, Scalia, and Thomas did[117]) as authority that gender discrimination related to pregnancy did not raise equal protection concerns because it was not irrational. Instead, Chief Justice Rehnquist, writing for a five-justice majority,[118] described "the faultline between work and family" as "precisely where sex-based overgeneralization has been and remains strongest."[119] The majority rejected pregnancy-based rationales for workplace discrimination in family and parental leave. Condemning "the formerly state-sanctioned stereotype that only women are responsible for family caregiving," the majority upheld the FMLA as legitimate Fourteenth Amendment enforcement legislation that "reduc[ed] employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."[120]

In upholding the FMLA's mandate of gender-neutral family and parental leave, the Court denounced "the States' record of unconstitutional participation

111. 417 U.S. 484 (1974).
112. *Id.*
113. Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).
114. *Nashville Gas Co.*, 434 U.S. at 136.
115. Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991).
116. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).
117. *Id.* at 751 (Kennedy, J., dissenting). Since counsel for the United States "conced[ed] that *Geduldig* would permit this practice," the majority decision to ignore *Geduldig* leaves its continued validity open to question. *Id.*
118. Justice Stevens would have upheld the legislation on Eleventh Amendment grounds. *Id.* at 740–41 (Stevens, J., concurring).
119. *Id.* at 738.
120. *Id.* at 737.

in, and fostering of, gender-based discrimination in the administration of leave benefits."[121] State employment practices granting maternity or family care leave to women employees but not to men "were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."[122] Moreover, the "mutually reinforcing stereotypes" that women workers have child care responsibilities while male workers lack them "created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver,"[123] leading employers to continue denying family leave to male workers, while questioning "women's commitment to work and their value as employees."[124] These discriminatory practices, the Court held, contributed to "the long and extensive history of sex discrimination" that had been upheld in *Bradwell* and other early gender cases.

In a remarkable transformation from its early gender jurisprudence, the Court now declares a commitment to undiluted gender equality protections for married mothers who work outside the home. The Court's contemporary jurisprudence of workplace gender equality often seems to reflect a philosophy that "pregnancy is central to a woman's family role and that the law should take special account of pregnancy to protect that role for the working wife."[125]

When the Court defines a gender equality claim as one involving participation in public life, then, it tends to reject even plausible claims about reproductive or biological difference, as it did in *Hibbs*. As I have argued previously, when the Court offers constitutional protection to a sexual or reproductive interest, "it declares that the case is not about sex."[126] Rather, it reframes the claim as one of equality in public life. Thus, in invalidating a state ban on same-sex sex, the Court in *Lawrence v. Texas*[127] redirected attention from the "fundamental right to engage in same-sex sodomy," which the Court had dismissed in *Bowers v. Hardwick*,[128] to the right of gay men and lesbians to equality in public life. Bans on same-sex sex, the Court recognized, demean and stigmatize not only gay sex, but gay people, and extend a more

121. *Id.* at 735.
122. *Id.* at 731.
123. *Id.* at 736.
124. *Id.*
125. Williams, *supra* note 30, at 169.
126. Buchanan, *supra* note 5, at 1273.
127. 539 U.S. 558, 575 (2003) (arguing that *Bowers v. Hardwick*, 478 U.S. 186 (1986), constructed the right too narrowly).
128. The *Lawrence* Court observed: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Lawrence*, 539 U.S. at 567.

general "invitation to . . . discrimination both in the public and in the private sphere."[129] Likewise, the *Casey* joint opinion translated the right to decide about abortion into a concern for public equality, linking women's "ability to control their reproductive lives" to "[t]he ability of women to participate equally in the economic and social life of the Nation"[130]: "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[131] The Court's equal protection jurisprudence often rejects biological difference, and recognizes gender stereotyping, when it is offered in support of a law it understands to restrict civic or economic equality.

II. GENDER EQUALITY AND ILLICIT SEX: THE SEX DISCOUNT

Equal protection jurisprudence tends to trace societal changes in gender mores.[132] Thus, as Wendy Williams argued in 1992, the "hard cases" that test the boundaries of equal protection illuminate "the cultural limits of the equality principle."[133] In this Part, I argue that today, the "hard cases" that test the cultural limits of gender equality involve gendered laws that the courts frame as regulations of illicit sex. Entrenched notions of gendered sexual morality—the sexual double standard—set the cultural limits of constitutional equal protection. The Supreme Court and other courts tend to invoke concerns about sexual morality, and find "real" biological differences, as they apply much more deferential gender analyses than *Craig v. Boren*[134] and *VMI*[135] would ordinarily require.

The sexual double standard has been challenged, though not eliminated, in the cultural mainstream. It continues to shape the boundaries of constitutional

129. *Id.* at 575 (O'Connor, J., concurring) (quoting majority opinion).

130. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

131. *Id.* at 852.

132. As Reva Siegel observes, the constitutive rules of equal protection have changed over time, shifting their regulation of gender and racial status in response to evolving and contested norms about gender and racial norms and hierarchies. *See* Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status—Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

133. Williams, *supra* note 30, at 162, 156. Williams contended that the cases in which the U.S. Supreme Court diverges from its usual standard of gender equality reveal the cultural limits of the equality principle. I ask the same question she did, but do not reach the same answer. Williams, writing in 1992, relied only on *Rostker v. Goldberg*, 453 U.S. 57 (1981) and *Michael M. v. Sonoma County*, 450 U.S. 464 (1981), to conclude that equal protection was protecting the role of man (not woman) as "aggressor in war and sex." *Id.* at 155–64. My analysis, which is based on many more cases in the Court's gender equality jurisprudence before and after Williams's article, offers a different theory of the Court's divergence from its usual rigorous standard of gender equality review. I contend that the sex discount allows gender classifications when they serve traditional, heteronormative gender values with respect to sexual activity.

134. 429 U.S. 190 (1976).

135. 518 U.S. 515 (1996).

gender equality. When the Court reads a gendered law as a regulation of illicit sexual behavior, it tends to apply a sex discount, abandoning the demanding level of scrutiny mandated by *Mississippi University for Women v. Hogan*,[136] *J.E.B. v. Alabama ex rel. T.B.*,[137] and *VMI* in favor of a diminished form of equal protection review.[138]

As we have seen in Part I, the Court tends to reject even plausible pregnancy-based rationales when it frames a law as a restriction on public life. In this Part, I demonstrate what happens when the Court frames a gendered law as a regulation of illicit sex or its consequences: It invokes biological differences—however far-fetched[139]—to justify the gendered government action. Although the Court purports to apply intermediate scrutiny, it tends in practice to apply an unacknowledged, much more deferential form of equal protection review.[140] Although the Court attributes such "real" differences to nature, it often assumes that marriage somehow obviates them—a clue as to the cultural concerns that are at work here. In equal protection challenges that involve abortion or antigay discrimination, many state and federal courts apply a deferential level of scrutiny derived from the Supreme Court's due process cases, or they define sex discrimination in ways that exclude equality protections for lesbians, gay men, or other sexual minorities. Taken together, these cases show that the sex discount does not genuinely accommodate biological differences between women and men:[141] It accommodates a cultural tradition of regulating sexual morality in gender-targeted ways.

136. 458 U.S. 718 (1982).

137. 511 U.S. 127 (1994).

138. In earlier work, I observe that, when the Court adjudicates equality cases that concern abortion, it tends to discount the otherwise rigorous level of scrutiny it applies to gendered government action that governs participation in public life. Buchanan, *supra* note 5, at 1287–93. But, as I show in this Article, the discount is not limited to abortion cases. It extends to most cases in which the Court frames a gendered law as a regulation of sexual morality.

139. *See, e.g.*, Michael M. v. Sonoma County, 450 U.S. 464 (1981); Nguyen v. INS, 533 U.S. 53 (2001).

140. *Accord*, *e.g.*, Williams, *supra* note 30, at 157–58 n.50 (arguing that, in *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Michael M.*, 450 U.S. 464, the Court ignored the heightened scrutiny mandated by *Craig v. Boren*, 429 U.S. 190 (1976), and instead used a deferential standard derived from *Parham v. Hughes*, 441 U.S. 347 (1979)).

141. Reva Siegel has observed that while it is no longer acceptable to impose sex-based obligations on women premised on their social role in family life, arguments premised on women's physical role in the reproduction of life supply reasons for imposing regulatory constraints on female citizens. Yet, the possibility that stereotypical conceptions of women's roles might find expression in regulation of women's reproductive conduct is not recognized in law because courts continue to reason about such regulation within physiological paradigms. *See* Siegel, *Reasoning From the Body*, *supra* note 5, at 331.

A. A Word About Tiers of Scrutiny

Because the Constitution of the United States does not enumerate prohibited grounds of discrimination as many twentieth-century constitutions do,[142] U.S. constitutional law uses levels of scrutiny as a measure of the invidiousness of certain grounds of governmental action.[143] While classifications drawn in ordinary economic or commercial legislation are presumed to be constitutional,[144] race-based government action is presumptively unconstitutional.[145] By choosing intermediate scrutiny of gender classifications[146] over the strict scrutiny advocated by Justice Brennan's plurality in *Frontiero v. Richardson*,[147] the Court presumes that, while some gender classifications are invidious, others are likely benign.

In part because the degree of judicial skepticism or deference varies considerably within levels of scrutiny,[148] Justices Marshall and Stevens have long challenged tiered scrutiny as an unprincipled way to decide cases. As Justice Marshall observed, the Supreme Court "has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause."[149] Justice Stevens, similarly, argues that "[t]here is only one Equal Protection Clause."[150] Tiered scrutiny, he contends, "does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard" that questions whether the "justification put forward by the State is sufficient to make an otherwise

142. *See, e.g.*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, ch. 11, § 15(1) (U.K) (Canadian Charter of Rights and Freedoms); INDIA CONST. art. 15; S. AFR. CONST. 1996 § 9(3); *see also* International Covenant on Civil and Political Rights, art. 26, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights, art. 14, Sept. 21, 1970, Europ. T.S. No. 44.

143. *See generally* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

144. *Id.*

145. *See generally* Korematsu v. United States, 323 U.S. 214 (1944); Loving v. Virginia, 338 U.S. 1 (1967).

146. *See generally* United States v. Virginia (VMI), 518 U.S. 515 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).

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

148. *Compare VMI*, 518 U.S. at 515 (describing intermediate scrutiny as requiring an "exceedingly persuasive justification" for gender classifications), *with* Nguyen v. INS, 533 U.S. 53 (2001) (employing a much more deferential approach to intermediate scrutiny). *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding race-conscious government action under strict scrutiny), *with* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701 (2007) (a more typically skeptical application of strict scrutiny). *Compare* Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (applying a typically deferential minimum-rationality review), *with* Romer v. Evans, 517 U.S. 620 (1996) (invalidating an antigay law under a much more skeptical form of what the court called rational basis review).

149. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting).

150. *Craig*, 429 U.S. at 211 (Stevens, J., concurring).

offensive classification acceptable."[151] Justice Marshall long argued that the Court should reject tiered analysis, instead "employing an approach that allows for varying levels of scrutiny depending upon 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'"[152]

While I characterize the diminished level of scrutiny the courts apply in many cases they link to illicit sex as a "discount" from the standard declared in *Craig v. Boren* and *VMI*, it is also plausible to interpret the decisions discussed in this Part as implementing the flexible approach to Equal Protection urged by Justices Marshall and Stevens, without acknowledging it. It appears that, in gender equality cases, the courts apply a flexible level of scrutiny depending on how invidious the classification seems in the circumstances. Either way, gendered notions of traditional sexual morality often seem to inform how invidious the courts will understand a gendered law to be. Such gendered moral intuitions[153] in turn inform the latitude the courts allow to legislatures that use gendered laws to enforce sexual morality. The sex discount, I argue, rests on an unacknowledged assumption that gendered government action is benign when it promotes sexual morality.

B. Illicit Heterosex: The Sex Discount and the Double Standard

1. The Gendered Morality of Heterosex

The sexual double standard has been under sustained cultural challenge since at least the mid-twentieth century. Nonetheless, "the view that unchastity, in the sense of sexual relations before marriage or outside marriage, is for a man, if an offense, none the less a mild and pardonable one, but for a woman a matter of the utmost gravity"[154] remains far more vigorous and mainstream today than the now discredited notion that it is immoral for married mothers to work outside

151. *Id.* at 212–13 (Stevens, J., concurring).

152. Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring) (quoting *San Antonio Indep. Sch. Dist.*, 411 U.S. at 99); *see also* Lyng v. Castillo, 477 U.S. 635, 644 (1986) (Marshall, J., dissenting); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 460 (1985); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 98; Dandridge v. Williams, 397 U.S. 471, 508 (1970).

153. Suzanne Goldberg offers an insightful analysis of the psychological and doctrinal influence of "sticky intuitions" about the morality of LGBT people and of same-sex sex. *See* Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375 (2010).

154. Thomas, *supra* note 20, at 195.

the home. Traditionally, legal rules governing sexual behavior, marriage, and divorce have enforced a heteronormative sexual double standard.[155]

Even though "a large body of middle-class opinion . . . has regarded illicit sexual activity outside marriage as equally unrespectable in men and women alike,"[156] both law and culture have generally focused on "safeguarding the chastity of married women and of the daughters of respectable families."[157]

Under the sexual double standard, "'good' women are presumed to have no interest in sex."[158] In this frame, "[w]omen are delicate, [and] voluntary sexual intercourse may harm them in certain circumstances,"[159] except for "a class of women who are not delicate"—prostitutes, nonwhite women, and others presumed to be unchaste—and are "not worthy of protection."[160]

Meanwhile, the sexual double standard presumes that men are "sexually uncontrollable."[161] As Kristin Luker observes, many conservatives today believe that male sexuality is naturally dangerous and predatory, and can only be restrained by hierarchical heterosexual marriage.[162] Because conservatives and

155. *See, e.g.*, Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 197; Buchanan, *supra* note 5, at 1239–69. *See also, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908); Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

156. Thomas, *supra* note 20, at 205.

157. *Id.* Thus, for example, abstinence-only programs, which promote sexual abstinence until marriage for young men and young women, focus disproportionate and nearly exclusive attention on the importance of virginity in young women, painting young men as predators who will seduce and abandon a young woman who surrenders her body before marriage. *See, e.g.*, MINORITY STAFF SPECIAL INVESTIGATIONS DIV., HOUSE OF REP., 108TH CONG., CONTENT OF FEDERALLY FUNDED ABSTINENCE ONLY EDUCATION PROGRAMS (Comm. Print 2004) [hereinafter WAXMAN REPORT]; JULIE F. KAY & ASHLEY JACKSON, LEGAL MOMENTUM, SEX, LIES & STEREOTYPES: HOW ABSTINENCE-ONLY PROGRAMS HARM WOMEN AND GIRLS (2008); BONNIE SCOT JONES & MICHELLE MOHAVED, AM. CONSTITUTIONAL SOC'Y FOR LAW & POLICY, LESSON ONE: YOUR GENDER IS YOUR DESTINY—THE CONSTITUTIONALITY OF TEACHING SEX STEREOTYPES IN ABSTINENCE-ONLY PROGRAMS (2008).

158. Law, *supra* note 155, at 210.

159. *Id.* at 209 n.109 (quoting KENNETH M. DAVIDSON, RUTH B. GINSBURG & HERMA H. KAY, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 892 (1st ed. 1974)). *See also* Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 386–87 (2006) (arguing that legal and popular framing of statutory rape laws highlight exploitive male sex with underage females, while obscuring exploitive female sex with underage males); Marsha R. Greenfield, *Protecting Lolita: Statutory Rape Laws in Feminist Perspective*, 1 WOMEN'S L.J. 1, 8 (1977) (same).

160. Law, *supra* note 155, at 209 n.109 (quoting KENNETH M. DAVIDSON, RUTH B. GINSBURG & HERMA H. KAY, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 892 (1st ed. 1974)).

161. Law, *supra* note 155, at 210.

162. KRISTIN LUKER, WHEN SEX GOES TO SCHOOL: WARRING VIEWS ON SEX—AND SEX EDUCATION—SINCE THE SIXTIES 9 (2006); *see also* WILLIAM N. ESKRIDGE, JR, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 206 (1996) (making similar arguments for same-sex marriage as a means to control gay men's sexual behavior).

many other Americans—including many judges[163]—consider straight men to be "almost crazed by sex,"[164] they understand patriarchal marriage to be the only way to tame men's sexuality and to get them to take responsibility for their children.[165] As Kerry Abrams and Peter Brooks have noted, many state court decisions frame marriage as an institution that "constrain[s] an unwieldy and dangerous male (hetero)sexuality that would otherwise cause social chaos."[166]

These contested but widespread cultural beliefs often, ironically, lead to an assumption that "female sexual morals should be restricted more than male sexual morals."[167] Since men's desire for heterosexual sex was traditionally assumed to be natural, ungovernable, and morally benign, laws governing prostitution, obscenity, sodomy, adultery, fornication, marriage, parental responsibility, statutory rape, seduction, and alienation of affection effectively protected a right of men to engage in heterosexual, nonprocreative sex for pleasure without

163. *See* Abrams & Brooks, *supra* note 14, at 3–5, 9 (arguing that judges in recent cases rejecting same-sex marriage cases have framed man-woman marriage as a way to constrain "the wildness of male heterosexuality").

164. Law, *supra* note 155, at 209 n.109 (quoting KENNETH M. DAVIDSON, RUTH B. GINSBURG & HERMAN H. KAY, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION 892 (1st ed. 1974)).

165. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting) ("Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.").

See also, e.g., Law, *supra* note 155, at 219–20:

> Some . . . argue from a sociobiological perspective that men are inherently violent and aggressive, while women are sexually passive. Female sexuality domesticates and civilizes men. Men have a natural conscious or unconscious desire to identify and keep their offspring. Male dominance and heterosexuality is essential to familial stability . . . "because of the long evolutionary experience of the race in hunting societies, the provider role accords with the deepest instincts of men. When they are providing for women and protecting them, men feel masculine and sexual; when they cannot perform these roles as in the welfare culture, they often prefer the company of the all-male groups at the bar or on the street." (quoting GEORGE GILDER, WEALTH AND POVERTY 136 (1979)).

See also *Parham v. Hughes*, 441 U.S. 347 (1979), which upheld a Georgia law that permitted a mother, but not a father, to sue for the wrongful death of an "illegitimate" child on the basis that, Georgia argued, "more often than not the father of an illegitimate child who has elected neither to marry the mother nor to legitimate the child pursuant to proper legal proceedings suffers no real loss from the child's wrongful death." *Id.* at 366. *See also* Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating a New York statute that allowed adoption of a child without the consent of the unmarried natural father).

166. Abrams & Brooks, *supra* note 14, at 4.

167. Levine, *supra* note 159, at 364.

punitive consequences.[168] For example, prostitutes were made criminals, while their male customers were not.[169] A woman's adultery was grounds for divorce, while a husband's adultery was not.[170] Our laws have not traditionally punished men for unmarried heterosex.

This sexual double standard supported restrictions on women's participation in public life, such as the limitation on women's work as bartenders upheld in *Goesaert v. Cleary*.[171] Today, despite the Supreme Court's embrace of Justice Stevens's famous dissent in *Bowers v. Hardwick*[172]—"the fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice"[173]—contemporary state and federal legislatures continue to regulate sexual morality, and they often do it in gender-targeted ways. For example, state and federal laws restrict abortion and contraception,[174] promote premarital abstinence,[175] and prevent same-sex marriage.[176] Gender stereotypes are central to arguments in favor of such laws.[177]

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168. *See* Buchanan, *supra* note 5, at 1239–46. At the same time, such laws have banned same-sex intimacy, bound women to procreate within marriage, and burdened women, almost exclusively, with the legal, financial, and social consequences of nonmarital heterosex. *Id.* at 1254–70. *See also* Abrams & Brooks, *supra* note 14, at 9 ("Marriage thus functioned not as a check on the wildness of male heterosexuality but as a way for men to maintain sexual freedom without adverse financial consequences to themselves or their (official) families.").

169. *See, e.g.*, Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 16–20 (1993) (describing state laws that defined prostitution as an offense committed only by women, and gender-targeted law enforcement practices by which female sex workers were arrested, while male customers were let go with a warning, and state court decisions upholding such laws and practices); Thomas, *supra* note 20, at 196–99 (describing prostitution laws in nineteenth century England).

170. Thomas, *supra* note 20, at 199–202.

171. 335 U.S. 464 (1948), discussed *supra* notes 61–65 and accompanying text.

172. 478 U.S. 186 (1986).

173. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting) (internal quotation marks omitted)).

174. For example, the Hyde Amendment of 1976 and laws in thirty-two states restrict public funding for abortion. *See* H.R. 1105: Omnibus Appropriations Act of 2009, Pub. L. No. 111-8 (2009); GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (2010), *available at* http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf. In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Supreme Court upheld a federal ban on partial-birth abortion. Many states restrict access to emergency contraception by restricting Medicaid funding, excluding emergency contraception from contraceptive coverage mandates, or laws authorizing pharmacists to refuse to dispense it. GUTTMACHER INST., STATE POLICIES IN BRIEF: EMERGENCY CONTRACEPTION 1–2 (2010), *available at* http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf. *See generally* Strossen, *supra* note 5, at 7–11.

175. The 2010 healthcare reform legislation restored federal funding of abstinence-only virginity-promotion programs. *See* Rob Stein, *Health Bill Restores $250 Million in Abstinence-Education Funds*, WASH. POST, Mar. 27, 2010, at A02. Twenty-two states require that abstinence be emphasized in sex education; of these, ten do not require that contraception be addressed at all. GUTTMACHER INST., STATE POLICIES IN BRIEF: SEX AND STI/HIV EDUCATION 1–2 (2010), *available at* http://www.guttmacher.org/

The Supreme Court is not immune to these cultural trends. As Susan Estrich points out, "if there is one area of social behavior where sexism is entrenched in law—one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited—it is in the area of sex itself."[178]

Thus gender equality with regard to sexuality may be understood as an existential threat to heterosexuality. Phyllis Schlafly, for example, "mobilized opponents of the Equal Rights Amendment by arguing that it would constitutionalize abortion and homosexuality."[179] The notion that gender equality jeopardizes heterosexuality reflects "the traditional belief and prescription that stable relations require the hierarchy and reciprocity of male/female polarity,"[180] or, at a more basic level, that "[e]rotic attraction . . . depends upon sharp gender differentiation."[181] Many conservatives express concern that constitutional protection of gender equality might mandate what Justice Scalia, dissenting in *J.E.B. v. Alabama*,[182] derided as a "unisex vision of human nature" that insists, wrongly, that "*il n'y a pas de différence entre les hommes et les femmes*."[183]

Likewise, the Court's more liberal justices are careful to reassure the reader that gender equality is not a threat to heterosexuality, and *vive la différence*: "'Inherent differences' between men and women . . . remain cause for celebration," Justice Ginsburg holds in *VMI*, but they may not be used "for

statecenter/spibs/spib_SE.pdf. *See also* Strossen, *supra* note 5, at 9–11 (discussing federal government measures aimed at limiting access to emergency contraception and sex education).

176. *See, e.g.*, Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 710, 110 Stat. 2105 (1996) (federal funding of marriage promotion and abstinence-only education); Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). Approximately twenty-nine states have adopted constitutional amendments banning same-sex marriage. Human Rights Campaign, Statewide Marriage Prohibitions (Jan. 13, 2010), http://www.hrc.org/documents/marriage_prohibitions_2009.pdf; Alliance Defense Fund, Issues by State, http://www.domawatch.org/statissues/index.html (last visited June 1, 2010). *See, e.g.*, HAWAII CONST. amend. II (1998) (repealing the marriage equality holding of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)); ARK. CONST. amend III (prohibiting same-sex marriage, civil unions, and fostering and adoption by same-sex couples); Cal. Proposition 8 (2008) (overruling *In re Marriage Cases*, 183 P.3d 384, 426 (Cal. 2008), and restricting marriage to "one man and one woman").

177. *See, e.g.*, WAXMAN REPORT, *supra* note 157, at 16–18; JONES & MOVAHED, *supra* note 157, at 5–7; KAY & JACKSON, *supra* note 157, at 20–21; Judith A. Reisman, *Sex-on-Demand, Abortion-on-Demand*, *in* BACK TO THE DRAWING BOARD: THE FUTURE OF THE PRO-LIFE MOVEMENT 273, 273–89 (Teresa R. Wagner ed., 2003).

178. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 814–15 (1991).

179. Post & Siegel, *supra* note 8, at 418.

180. Law, *supra* note 155, at 218.

181. *Id.* at 220 (describing ROGER SCHRULTON, SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC 283 (1986)).

182. 511 U.S. 127 (1994).

183. *Id.* at 158 (Scalia, J., dissenting).

denigration of the members of either sex or for artificial constraints on an individual's opportunity. . . . [S]uch classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women."[184] Gender difference remains relevant to matters of sexuality, even though many justices consider it irrelevant to participation in "legal, social and economic" life.

2. The Sex Discount in the Supreme Court

Justice O'Connor has argued that "the stereotype of male irresponsibility"[185] is as constitutionally objectionable as "stereotypes about the 'traditional' behavior patterns of women."[186] Although this principle is not well-established in the Supreme Court's equal protection jurisprudence, the Court's due process cases have repeatedly held that traditional sexual morality is not a plausible or even a legitimate basis for governmental restrictions on sexuality,[187] contraception,[188] or abortion;[189] neither can it justify restrictions on women's employment.[190]

Nonetheless, as I have observed previously, "a plethora of historical and contemporary laws use the threat of pregnancy to coerce compliance with gendered norms that require premarital chastity and marital fidelity for women, but not for men."[191] In this Subpart, I demonstrate that the Supreme Court's

184. United States v. Virginia (VMI), 518 U.S. 515, 533–34 (1996).

185. Nguyen v. INS, 533 U.S. 53, 94 (2001) (O'Connor, J., dissenting with Ginsburg, Souter, and Breyer, JJ.).

186. *Id.*

187. Lawrence v. Texas, 539 U.S. 558, 577 (2003) (endorsing Justice Stevens's dissent in *Bowers v. Hardwick*, 478 U.S. 186, 215 (1986) ("The fact that the governing majority in a State has traditionally viewed a practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.")).

188. "It would be plainly unreasonable to assume that [the State] has prescribed pregnancy and the birth of an unwanted child as punishment for fornication." Eisenstadt v. Baird, 405 U.S. 438, 448 (1972) (invalidating a ban on distribution of contraceptives to unmarried persons); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 695 (1977) (quoting *Eisenstadt*, 405 U.S. at 448, to invalidate a ban on distribution of contraceptives to minors)).

189. Roe v. Wade, 410 U.S. 113, 148 (1973) (noting that "no court or commentator has taken the argument seriously" that "Victorian concern to discourage illicit sexual conduct" might justify an abortion restriction). *But see* Gonzales v. Carhart, 550 U.S. 124, 158 (2007) (suggesting that "ethical and moral concerns" could justify a prohibition on certain abortions).

190. For example, in *Cleveland Board of Education v. LaFleur*, the Supreme Court dismissed the school board's apparent desire to "insulate schoolchildren from the sight of conspicuously pregnant women" as an "outmoded taboo" that could not "serve as a legitimate basis" for a rule excluding pregnant teachers from the workplace after the fourth month of pregnancy. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 641 n.9 (1974).

191. Buchanan, *supra* note 5, at 1254.

contemporary equal protection jurisprudence accommodates this pattern, rather than challenging it.

In practice, illicit sex falls outside the realm of public life to which the Court tends to vigorously apply gender equality rules.[192] Because of "the law's generally myopic view of marriage as the only form of sexual intimacy tied to one's place in the public, constitutional order,"[193] unmarried sex is illicit.[194] When the Court frames a gendered rule as governing the consequences of unmarried sex, it tends not to treat it as a law that affects public participation and thus implicates serious equal protection concerns. In such cases, the Court generally finds that the law accommodates biological differences between women and men, and applies gender-based equal protection in an extraordinarily deferential form.

Thus, in *Michael M. v. Superior Court of Sonoma County*,[195] the Supreme Court unanimously upheld a statutory rape provision that made it a crime for any man to have sexual intercourse with a girl under eighteen years old (other than his wife). Justice Rehnquist's majority applied an unusually deferential form of intermediate scrutiny. The Court upheld the law on the ground that it served a "compelling"[196] interest in preventing "illegitimate" teenage pregnancies. It found that the gender classification "serve[d] to roughly 'equalize' the deterrents on the sexes."[197] While "natural sanctions" deter illegitimate sexual activity by visiting "virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy" on the young woman,[198] criminal punishment was a permissible deterrent for the man, "who, *by nature*, suffers few of the consequences of his conduct."[199]

In contrast to the Court's skepticism about the sufficiency of statistical evidence of gender differences in *Craig v. Boren*,[200] the Court assumed, without any evidence, that the threat of unplanned pregnancy deterred young women from having (hetero)sex, and did not deter men.

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192. "Classic conceptions of politics, economics and family life all assume a sharp division between altruism and competition, home and market, private and public, economy and state, passion and reason, women and men." Law, *supra* note 155, at 209.

193. Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1169 (2006).

194. The law has traditionally treated marriage as the boundary line between licit and illicit sex. *See generally* Dubler, *supra* note 21.

195. 450 U.S. 464, 464 (1981).

196. *Id.* at 471 n.7.

197. *Id.* at 473.

198. *Id.*

199. *Id.* (emphasis added).

200. 429 U.S. 190, 211–12 (1976).

Justice Stevens, in dissent, agreed that a presumption of constitutionality—that is, rational basis scrutiny—"may be appropriate"[201] "if, as in this case, there is an apparent connection between the discrimination and the fact that only women can become pregnant,"[202] although he found it "irrational" to punish the young man for nonmarital sexual behavior without punishing the young woman as well.[203] Thus, the *Michael M.* Court unanimously agreed that a biological difference—young women's capacity for illegitimate pregnancy—constituted a reason to depart from the usual standards of gender equality when it came to unmarried sexual activity.[204]

The pregnancy rationale for the gendered statutory rape law was strained, at best. As Justice Stevens pointed out in dissent, pregnancy was not an element of the crime, and many girls under eighteen are too young to become pregnant. Moreover, the "natur[al]"[205] difference the Court found to justify differential regulation of men and women applied only to nonmarital sex. Neither the legislature nor the Court seemed to find gendered regulation appropriate to govern the natural possibility of *legitimate* pregnancy. The Court's concern about illegitimate pregnancy seems to have blinded it to the harm in leaving boys unprotected against sexual abuse, or to any inequality in allowing young men to have consensual sex with older partners, while criminalizing all nonmarital sex by young women.[206] These elisions suggest that the biological difference invoked by the Court designated a cultural concern about sexual morality.

In equal protection decisions about parental responsibility for nonmarital children, the Court has tended to be frank and unapologetic in its indifference to gender equality.[207] Traditionally, the common law imposed no paternal obligations on men unless they married the mother or voluntarily undertook support obligations by legitimating the child.[208] "For women, biological parenthood was

201. *Michael M.*, 450 U.S. at 498 n.4.

202. *Id.*

203. *Id.* at 500 (Stevens, J., dissenting).

204. Justice Stevens differed from the majority in that he did not believe that the threat of pregnancy served as an effective deterrent to sexual activity by unmarried young women. *See id.* at 498. Moreover, he argued that young women's capacity to become pregnant provided "a reason for applying the prohibition to her—not a reason for granting her a license to use her own judgment on whether or not to assume the risk." *Id.* at 499. The statutory rape law was "irrational," *id.* at 500, because it failed to criminalize the female victim of statutory rape: "[O]nly one, of two equally guilty wrongdoers [was] stigmatized by a criminal conviction." *Id.* at 501.

205. *See supra* notes 198–199 and accompanying text.

206. On the latter point, see Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 417, 418–19 (1984).

207. See, for example, *infra* discussion of *Parham v. Hughes*, 441 U.S. 347 (1978) and *Nguyen v. INS*, 533 U.S. 53 (2000). *But see* Caban v. Mohammed, 441 U.S. 380, 380 (1979) (invalidating a state law requiring the consent of the mother, but not the father, to the adoption of any "illegitimate" child).

208. Law, *supra* note 5, at 960–62; Buchanan, *supra* note 5, at 1241.

in law an 'unshakeable responsibility'; for unmarried fathers, it was merely an opportunity to develop a relationship with his offspring."[209]

This cultural assumption infuses the Court's equal protection jurisprudence on unwed parenthood. The Court repeatedly asserts that biology—not culture or law—dictates that mothers know and care about their children, while unwed fathers are generally "unknown, unavailable, or simply uninterested."[210] On the basis of this "biological" reality, the Court has upheld some remnants of the common law of parental responsibility against gender-based equal protection challenges,[211] authorizing governments to make parenthood automatic for women, but optional—contingent on marriage or legitimation—for men.[212]

In two cases since *Craig*, the Court has invoked nature and sexual morality to interpret constitutional gender equality in ways that authorize governments to impose marriage as a prerequisite for the parental rights of fathers but not mothers. To do this, the Court applies a sex discount, applying an exceptionally deferential form of equal protection review to uphold the gender classifications.

In 1978, in *Parham v. Hughes*,[213] the Court discounted the usual level of scrutiny to uphold a Georgia law that precluded fathers from suing for the death of an illegitimate child, unless they had legitimated the child during his or her lifetime.[214] In upholding the gendered tort scheme, the *Parham*

209. Buchanan, *supra* note 5, at 1241 (quoting *Caban*, 441 U.S. at 408 (Stevens, J., dissenting)).

210. *Caban*, 441 U.S. at 399 (Stewart, J., dissenting); *see also Nguyen*, 533 U.S. at 65 ("Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity."); *Parham*, 441 U.S. at 355; Lalli v. Lalli, 439 U.S. 259, 268–69 (1978) ("Proof of paternity . . . frequently is difficult when the father is not part of a formal family unit. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know who is responsible for her pregnancy.").

211. *But see, e.g.*, *Caban*, 441 U.S. at 380 (invalidating a law allowing the adoption of an illegitimate child without the father's consent, even though the mother's consent was required); Stanley v. Illinois, 405 U.S. 645, 645 (1972) (invalidating a statute that made children of unwed fathers wards of the state upon the mother's death, whereas mothers were deprived of custody only if they were shown to be unfit parents).

212. "The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage . . . ." Lehr v. Robertson, 463 U.S. 248, 263 (1983).

213. 441 U.S. 347.

214. *Id.* The same day, in *Caban v. Mohammed*, 441 U.S. 380 (1979), the majority invalidated a New York statute that required the consent of the mother, but not the father, to the adoption of an illegitimate child. Justice Powell, whose swing vote decided both cases (and who, unlike the *Parham* plurality, applied the standard articulated in *Craig v. Boren*, 429 U.S. 190 (1976), to both cases), explained in *Parham* that the difference was that the Georgia statute, unlike the New York law, offered a "simple, convenient mechanism"—legitimation—by which a father might "eliminate all questions concerning the child's parentage." *Parham*, 441 U.S. at 360.

plurality followed *Reed v. Reed*,[215] but pointedly failed to acknowledge the more exacting intermediate scrutiny the Court had recently mandated in *Craig v. Boren*. Rather, the Court held that only "certain classifications based upon sex are invalid under the Equal Protection Clause."[216] Sex-based legislative classifications were subject to minimum rationality review unless there was "some reason to infer antipathy"[217] that might indicate "invidious discrimination."[218] When "men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations,"[219] the Court held, minimum rationality applies.[220] As it had done four years earlier in *Schlesinger v. Ballard*,[221] the *Parham* Court relied on a facial gender classification in another law to find men and women differently situated with respect to nonmarital children: "[M]others and fathers of illegitimate children are not similarly situated. Under Georgia law, only a father can by voluntary unilateral action make an illegitimate child legitimate."[222]

Justice Powell, whose swing vote decided *Parham*, held that the statute was "substantially related to achievement of the important state objective of avoiding difficult problems in proving paternity" after the child's death. Quoting the Court's earlier decision in *Lalli v. Lalli*,[223] Justice Stewart's plurality declared, "Unlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown."[224] Thus the legitimation provision was "a rational method for the State to deal with the problem of proving paternity."[225] Marriage or legitimation, apparently, would conclusively resolve the question of paternity that, without marriage, was deemed hopelessly uncertain.[226]

In *Parham*'s companion case, *Caban v. Mohammed*,[227] the dissents of Justices Stewart and Stevens linked their holding in *Parham* to biological difference.

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215. 404 U.S. 71 (1971).
216. *Parham*, 441 U.S. at 353.
217. *Id.* at 351 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).
218. *Id.* at 352.
219. *Id.* at 354.
220. *Id.* at 352. *See also* Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting).
221. 419 U.S. 498 (1975).
222. *Parham*, 441 U.S. at 355. GA. CODE ANN. § 74-103 (1978) provided that a father, but not a mother, could apply to have an "illegitimate" child legitimated by court order, thereby entitling the child to inherit from the father as though his parents had been married.
223. 439 U.S. 529 (1978).
224. *Parham*, 441 U.S. at 355.
225. *Id.* at 356 n.9.
226. In *Parham*, paternity was not in dispute. Parham had acknowledged, supported, and visited the child, but had never legitimated the child pursuant to Georgia law. *Id.* at 347, 358.
227. 441 U.S. 380 (1979).

Mothers and fathers were "simply not similarly situated."[228] "Men and women are different,"[229] Justice Stevens argued, especially with regard to "infants or very young children."[230] Justice Stewart likewise observed, "The mother carries and bears the child, and in this sense her parental relationship is clear."[231]

Justice Stevens cited "sociological and anthropological research indicating that by virtue of the symbiotic relationship between mother and child during pregnancy and the initial contact between mother and child directly after birth a physical and psychological bond immediately develops between the two that is not then present between the infant and the father or any other person."[232] The fact of childbirth made it "probable that the mother, and not the father or both parents, will have custody of the newborn infant,"[233] and that "the mother will be the more, and often the only, responsible parent."[234] "[T]he vast majority of unwed fathers," by contrast, "have been unknown, unavailable, or simply uninterested."[235] These "biological" differences justified rational basis review of distinctions between "mothers and fathers of children born out of wedlock."[236] Yet the law required the consent of *married* fathers to the adoption of their children. Marriage, apparently, leveled the biological difference between men and women.

In these decisions and in the laws that were challenged in them, marriage (or its substitute, legitimation) supplied the only touchstone by which a biological father might "identify himself [and] undertake his paternal responsibilities."[237] To the legislature, apparently, biological maternity in itself fulfilled this function. Justice Stevens observed, "I have no way of knowing how often . . . the father 'has established a substantial relationship with the child and [is willing to admit] his paternity,' but has previously been unwilling to take steps to legitimate his relationship" by marrying the mother.[238] He concludes, "I am inclined to believe such cases are relatively rare."[239] According

228. *Caban*, 441 U.S. at 398–99 (Stewart, J., dissenting); *see also id.* at 404 (Stevens, J., dissenting).
229. *Id.* at 404 (Stevens, J., dissenting).
230. *Id.*
231. *Id.* at 397 (Stewart, J., dissenting); *see also id.* at 399.
232. *Id.* at 405 n.10 (Stevens, J., dissenting).
233. *Id.* at 405.
234. *Id.* at 413.
235. *Id.* at 399 (Stewart, J., dissenting).
236. *Id.* at 409 (Stevens, J., dissenting). "[T]he mere fact that the statute draws a 'gender-based distinction' should not, in my opinion, give rise to any presumption that the impartiality principle embodied in the Equal Protection Clause has been violated." *Id.* at 409–10 (Stevens, J., dissenting) (citation omitted). "[W]e should presume that the law is entirely valid." *Id.*
237. *Id.* at 356.
238. *Id.* at 413 (citation omitted).
239. *Id.*

to Justice Stevens, a father who did not marry the mother was "disinterested" and therefore suffered "no adverse impact" from losing his child, because the adoption-consent law "gives the loving father an incentive to marry the mother."[240] Equal protection permitted the use of gender classifications to encourage marriage:[241]

> The appellant, as the natural father, was responsible for conceiving an illegitimate child and had the opportunity to legitimate the child but failed to do so. Legitimation would have removed the stigma of bastardy and allowed the child to inherit from the father in the same manner as if born in wedlock. . . . [T]he appellant here was responsible for fostering an illegitimate child and for failing to change its status. It is thus neither illogical nor unjust for society to express its "condemnation of irresponsible liaisons beyond the bounds of marriage" by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child.[242]

Parham is not a relic of the Court's early gender jurisprudence. In two recent citizenship cases, the Court has used similar reasoning to uphold gendered laws that allocate responsibility for nonmarital children. In 1998 and again in 2003, the Supreme Court addressed the constitutionality of a gendered citizenship statute by which a child born abroad to an unmarried American mother is automatically a U.S. citizen at birth,[243] whereas a child born abroad to an unmarried American father is not a citizen unless the father: (a) proves his blood relationship to the child, (b) "agrees in writing to provide financial support" for the child until the child reaches age eighteen, and (c) either legitimates the child, acknowledges paternity in an affidavit, or is declared by court order to be the father.[244]

The first time the Court considered this issue, in *Miller v. Albright*,[245] a two-justice plurality declined to apply heightened scrutiny to this gendered law. As he had in *Caban*, Justice Stevens held for the plurality that "biological differences between single men and single women"[246] "plainly rebut[ ]" any

240. *Id.* at 407. Justice Stevens did not seem to consider the possibility that the mother of the baby might not want to marry the father or that either parent might be unable to marry because s/he was already married to someone else.

241. Like Justice Stevens in dissent, the justices in the majority do not appear to have considered the possibility that the mother might not have been willing or able to marry the father(s) of her child or children.

242. Parham v. Hughes, 441 U.S. 347, 353 (1978).

243. 8 U.S.C. § 1409(c) (2006).

244. *Id.* § 1409(a).

245. 523 U.S. 420 (1998).

246. *Id.* at 445.

"strong presumption that gender-based legal distinctions are suspect."[247] He did not purport to apply intermediate scrutiny.[248] Unmarried sex—"the joint conduct of a citizen and an alien that results in conception"—was "not sufficient to produce an American citizen."[249] Only "if they agree to marry one another—citizenship will follow."[250] Thus marriage erased, or compensated for, the "biological differences" between single men and single women.[251] In her concurrence, Justice O'Connor pointed out that while the "generalized classifications unsupported by empirical evidence" advanced in Justice Stevens's opinion could satisfy rational-basis review,[252] it was "unlikely . . . that any gender classifications based on stereotypes," like this one, "c[ould] survive heightened scrutiny."[253]

Three years later, in *Nguyen v. INS*,[254] the Court returned to the constitutionality of the gendered citizenship rule. Justice Kennedy, who had joined Justice O'Connor's concurrence in *Miller*, adopted Justice Stevens's reasoning to uphold the classification for a five-justice Court.[255] While the *Nguyen* majority purported to apply heightened scrutiny, it applied an unacknowledged sex discount. As the justices had done in the previous unmarried-parenthood cases, the *Nguyen* majority invoked sexual morality and biological difference to diminish the rigor of the gender equality analysis.

The *Nguyen* majority uncritically accepted the government's improbable contention that the purpose of the century-old[256] gendered citizenship rule was to ensure that citizenship be transmitted only to those children with whom the American parent had had "an opportunity to develop a real, meaningful

247. *Id.*

248. Although Justice O'Connor assumed, perhaps generously, that he did. *Id.* at 452 (O'Connor, J., concurring). Justice Stevens credulously accepted that the objective of the gendered citizenship rule was to ensure paternity and to "encourag[e] the development of a healthy relationship between the citizen parent and the child while the child is a minor." *Id.* at 438. He referred ambiguously to the "legitimacy" and the "importance" of that "strong" governmental interest. *Id.* at 440–41. Because paternity was uncertain and women "typically" have custody of a child after birth, *id.* at 438, he held, "fathers are less likely than mothers to have the *opportunity* to develop relationships." *Id.* at 444. It was not "irrational" for Congress not to rely on genetic testing as proof of paternity. *Id.* at 437. He found a "solid basis," *id.* at 443, for the gender classification, which he described variously as "reasonable," *id.* at 439, "eminently reasonable," *id.* at 441, and "well tailored to serve those interests." *Id.* at 440.

249. *Id.* at 433.

250. *Id.*

251. *Id.* at 445.

252. *Id.* at 451–52.

253. *Id.* at 452 (O'Connor, J., concurring). *See also id.* at 450–54, 460 (Ginsburg, J., dissenting) (documenting lengthy legislative history demonstrating the citizenship rule's descent from the common law of gendered parental responsibility); *id.* at 472 (Breyer, J., dissenting).

254. 533 U.S. 53 (2001).

255. It is possible that Justice Kennedy's real concern was deference to Congress in citizenship matters. Justice Scalia, however, concurred on that basis, *see Miller*, 523 U.S. at 453, and Justice Kennedy did not join his concurrence.

256. Act of May 24, 1934, § 1, Pub. L. No. 73-250, 48 Stat. 797. *See Miller*, 523 U.S. at 468–69.

relationship."[257] In light of a well-documented legislative history showing the citizenship rule's origin in the common law of unmarried paternity,[258] this characterization of legislative purpose was inconsistent with *VMI*'s requirement that the justification for a sex-based classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation."[259]

As Justice Stevens had done in *Miller*, Justice Kennedy found that the gendered citizenship rule accommodated a "biological difference"[260] between men and women.[261] For women, the opportunity to form a relationship with a child "inheres in the very event of birth,"[262] but "does not result as a matter of biological inevitability in the case of an unwed father."[263] Moreover, unmarried paternity was inherently uncertain:

> [I]t is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.[264]

As Justice O'Connor pointed out in her dissent, the Court's reading of the Equal Protection Clause permitted Congress to do what the common law did for centuries: enforce "the stereotypical notion that mothers must care for [nonmarital] children and fathers may ignore them."[265] Moreover, the Court's approach to equal protection analysis looked much more deferential than the heightened scrutiny mandated by the Court in cases such as *Craig v. Boren*, *Hogan*, and *VMI*. In addition to the Court's acceptance of a hypothesized, rather than a genuine objective for the legislation,[266] the *Nguyen* majority deviated

257. *Nguyen*, 533 U.S. at 65.

258. *Id.* at 91–92 (O'Connor, J., dissenting); *see also Miller*, 523 U.S. at 460–70 (Ginsburg, J., dissenting).

259. United States v. Virginia (VMI), 518 U.S. 515, 533 (1996).

260. *Nguyen*, 533 U.S. at 64.

261. "Fathers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63.

262. *Id.* at 65.

263. *Id.*

264. *Id.* In *Miller*, Justice Stevens had put a finer point on this concern: "Congress had legitimate concerns about a class of children born abroad out of wedlock to alien mothers and to American servicemen who would not necessarily know about, or be known by, their children." Miller v. Albright, 523 U.S. 420, 439 (1998).

265. *Nguyen*, 533 U.S. at 92 (O'Connor, J., dissenting); *see also* Buchanan, *supra* note 5, at 1241–46.

266. *See* notes 256–259, *supra*, and accompanying text. As Justice O'Connor pointed out in her dissent in *Nguyen*, the government had asserted that the gendered citizenship law served other

from the rigorous approach to means-ends scrutiny the Court usually deploys in cases involving gender equality in public life. For example, the Court rejected the challengers' argument that Congress should allow DNA testing as an alternative, gender-neutral means to establish parental identity, holding that Congress need not "elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method."[267] As Justice O'Connor pointed out in her dissent, in the Court's prior gender equality cases, "the existence of comparable or superior sex-neutral alternatives has been a powerful reason to reject a sex-based classification."[268] The approach of the majority, by contrast, evokes the most deferential form of rational basis scrutiny.[269]

In the Court's unmarried-parenthood cases, the "biological difference" that justifies deferential equal protection review is not gender, but marriage. The Court presumes:

> Proof of paternity . . . frequently is difficult when the father is not part of a formal family unit. The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy.[270]

This supposedly biological difference justifies the sex discount: "[T]he absence of a legal tie with the mother may . . . appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with his children."[271]

Like the common law of paternity, such rules assume, and to a significant extent ensure, that parental responsibility will be automatic for women, but optional for men.[272] The *Nguyen* majority betrayed the influence of the consensual model of paternal responsibility when it refused to mandate the gender-neutral alternative—DNA testing—because it would permit "[t]he fact

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governmental objectives; the "opportunity to develop a real, meaningful relationship" was hypothesized by the Court. 533 U.S. at 84.

267. *Nguyen*, 533 U.S. at 63.

268. *Id.* at 77–78, 82 (O'Connor, J., dissenting) (citing Orr v. Orr, 440 U.S. 268, 281 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 151 (1980)).

269. *Id.* at 77–78 (O'Connor, J., dissenting) ("The fact that other means are better suited to the achievement of governmental ends therefore is of no moment under rational basis review.").

270. Parham v. Hughes, 441 U.S. 347, 355 n.7 (1979) (quoting Justice Powell in Lalli v. Lalli, 439 U.S. 259, 268–69 (1978), with approval).

271. Caban v. Mohammed, 441 U.S. 380, 397 (1979).

272. *See* Buchanan, *supra* note 5, at 1241–46; *see also Nguyen*, 533 U.S. at 91–92 (O'Connor, J., dissenting).

of paternity [to] be established even without the father's knowledge, not to say his presence."[273]

The sex discount in the Court's equal protection jurisprudence accommodates a cultural assumption that men's biologically-programmed indifference to their children is cured by marriage. The sex discount authorizes legislatures to act on the assumption that nature creates a bond between women and their children that only marriage can create for men.

Alternatively, these decisions may reflect an assumption that the legal obligations imposed by marriage constrain males to take care of children they would otherwise be expected (by "nature") to abandon. But if legal obligations can overcome men's biologically programmed indifference to their children, why not use the law to ensure their connection to nonmarital children as well? Child support laws, of course, do exactly this. As Justice O'Connor pointed out in dissent in *Nguyen*, the gendered citizenship exclusion helps convert the generalized assumption that "'mothers are significantly more likely than fathers . . . to develop caring relationships with their children'" into a "self-fulfilling prophecy."[274]

Parham and *Nguyen* reflect the common law presumption of paternity, by which a child born to a married woman is legally deemed to be the child of her husband.[275] The presumption of marital paternity, like other laws governing illicit sex (such as gender-specific laws governing adultery, illegitimacy, prostitution, and sexual assault[276]), serves several important social purposes: It prevents what eighteenth-century writer Dr. Samuel Johnson described as "confusion of progeny."[277] "[F]emale chastity [was] of the utmost importance because 'upon that all the property in the world depends.'"[278] Moreover, the presumption of

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273. *Nguyen*, 533 U.S. at 67.

274. *Id.* at 89 (O'Connor, J., dissenting) (quoting Miller v. Albright, 523 U.S. 420, 482–83 (Breyer, J., dissenting)).

275. This presumption was rebuttable "only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period" because he had been out of the country. Michael H. v. Gerald D., 491 U.S. 110, 124–25 (1989). To the extent that state laws permitted challenges to the presumption of marital paternity, standing was usually limited to the husband; only three states allowed the wife standing to challenge the presumption. *See id.* at 124–26.

276. Nomi Stolzenberg observes that the presumption of material paternity forms "part and parcel of the same disciplinary apparatus as the bastardy laws and other laws that punish people for deviating from the prescribed norms of sexual behavior." Nomi Stolzenberg, *Anti-Anxiety Law: Winnicott and the Legal Fiction of Paternity*, 64 AM. IMAGO 339, 376 (2007).

277. Thomas, *supra* note 20, at 209 (quoting JAMES BOSWELL, BOSWELL'S LIFE OF JOHNSON 55–56 (G.B. Hill & L.F. Powell eds., 1950) (1791)).

278. *Id. See also Michael H.*, 491 U.S. at 125 ("[The] primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption of paternity appears to be an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state." (citations omitted)).

paternity protects "family integrity and privacy,"[279] or the "peace and tranquility of States and families,"[280] by estopping litigants who would disrupt the "sanctity"[281] of "an otherwise harmonious and apparently exclusive marital relationship"[282] by impugning the paternity of marital children.[283] Furthermore, the presumption of paternity provides "a *useful*, *believable*, *sustainable* fiction"[284] that is socially desirable not only because it is usually true, but also because it is "self-fulfilling."[285] It "teach[es] people to *believe in* procreation and (heterosexual) marriage and the value of containing sex and procreation in marriage in addition to teaching them to *believe that* these norms have been complied with in a particular case."[286]

But the Court's deference to the gendered means legislatures often use to enforce sexual morality contrasts with its condemnation of "self-fulfilling" gender prophecies in laws it frames as regulating public life.[287] The Court acknowledges, for example, that "it may be . . . that most women would not choose [the] adversative method" of instruction used by Virginia's military college;[288] that more women than men seek careers in nursing;[289] and that working mothers continue to bear a heavier share of child-care responsibility than working fathers do.[290] Nonetheless, the Court's gender equality jurisprudence forbids states to regulate men's and women's public participation on the basis of such truths.

The difference between the gendered realities of public life and the gendered norms of illicit sex is that most Americans no longer believe that the gender differences *should* persist in public life—or at least that these are not the kinds of gender differences that governments should promote. The Court, like mainstream American culture, treats marriage as an institution that is sacred both to individuals and to society, and it takes for granted that the gendered regulation of sex is a legitimate way for governments to promote it.[291] But, as I have shown in this Subpart, the sex discount protects gendered laws that

279. *Michael H.*, 491 U.S. at 120.
280. *Id.* at 125 (quoting JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS, § 225, 306–07 (3d ed. 1882)).
281. *Id.* at 123.
282. *Id.* at 120 n.1.
283. *Id.* at 116, 120, 125–26.
284. Stolzenberg, *supra* note 276, at 368.
285. *Id.* at 374.
286. *Id.* at 376.
287. *See, e.g.*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); United States v. Virginia (VMI), 518 U.S. 515, 543 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982).
288. *VMI*, 518 U.S. at 542.
289. *Hogan*, 458 U.S. at 729–30.
290. *Hibbs*, 538 U.S. at 736.
291. For a provocative challenge to this idea, see Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010).

encourage paternal irresponsibility and jeopardize the sexual autonomy of young women, while leaving young men unprotected against sexual exploitation. In the following Subparts, I will also show that the sex discount accommodates gendered laws that obstruct women's access to reproductive healthcare and exclude many lesbians, gay men, and bisexuals from antidiscrimination protections, from military service, and from marriage. Equal protection should not accommodate self-fulfilling gendered prophecies such as these.

C. The Sex Discount in Abortion Cases

Proponents of antiabortion laws and regulations do not typically frame them as regulations of gender roles or of women's sexual conduct.[292] Indeed, the Supreme Court has rejected what it called "Victorian social concern to discourage illicit sexual conduct"[293] as a basis for antiabortion laws, asserting in *Roe v. Wade*[294] that "no court or commentator has taken th[is] argument seriously."[295] More commonly, abortion restrictions are framed as regulations designed to protect the life of the unborn child,[296] an interest the Supreme Court has long recognized as sufficiently weighty to override the woman's liberty interest with respect to abortion.[297] But, as Reva Siegel has observed, abortion laws are "underinclusive with respect to [the] end" of protecting fetal life.[298] For example, most abortion laws allow abortion in case of pregnancy resulting from rape or incest, an exception which betrays "normative judgments about women's sexual conduct:"[299] Termination of fetal life is permissible when the woman did not consent to sex, revealing an unstated assumption that women who consented to sex may be legitimately forced to bear children.[300]

This reasoning is inconsistent with the Supreme Court's early due process jurisprudence of sexual and reproductive liberty, in which the Court found it "plainly unreasonable to assume that [the State] has prescribed pregnancy

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292. Siegel, *Reasoning From the Body*, *supra* note 5, at 330. *But see* Reva Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) [hereinafter Siegel, *The Right's Reasons*] (describing antiabortion arguments focused on women's right and natural desire to be mothers).

293. Roe v. Wade, 410 U.S. 113, 148 (1973).

294. *Id.*

295. *Id.* at 148.

296. Siegel, *Reasoning From the Body*, *supra* note 5, at 330.

297. *See generally Roe*, 410 U.S. at 113; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Gonzales v. Carhart, 550 U.S. 124 (2007).

298. Siegel, *Reasoning From the Body*, *supra* note 5, at 363.

299. *Id.* at 364.

300. *Id.*

and the birth of an unwanted child . . . as punishment for fornication."[301] Moreover, as Siegel points out, this assumption rests on a sexual double standard that is inconsistent with equal protection values:[302] The state imposes no comparable "duties, burdens or sanctions" on the men who have cocreated these pregnancies.[303]

Thus, neither feminists nor conservatives frame abortion exclusively as a question about the moral status of fetal or embryonic life. Both sides of the debate argue about abortion as a fundamental moral question that engages deeply held cultural values about maternity, sexuality, and gender roles.[304] For feminists, abortion is an essential element of women's equality because of its link to sexuality and parenthood.[305] For example, Sylvia Law argued in 1984:

> For most of the twentieth century, the law . . . preserved the dominance of men by creating obstacles to women's ability to control their reproductive capacity. Beginning in the mid-1800's the law restricted access to contraception and abortion. Sex outside of marriage was condemned, by society and the law, much more harshly and consistently for women than for men. If an unmarried woman became pregnant, she needed to persuade a man to marry her. The law did not compel a man to take responsibility for the pregnancy he had helped to cause or the child he had helped to create. The law condemned the child as a bastard and subjected the child to significant legal disabilities. Laws disfavoring the children of an unmarried woman encouraged her sexual purity and made the social and economic status of both the child and mother "ultimately dependent upon the male."[306]

In contrast, as Kristin Luker observed in her in-depth 1984 study of pro-life and pro-choice activists, pro-life activists

> tacitly assume . . . that all married people should be (or should be willing to be) parents. . . . If a man or woman is to be sexually active, they feel, he

301. Eisenstadt v. Baird, 405 U.S. 438, 448 (1972). *See also* Carey v. Population Servs. Int'l, 431 U.S. 678, 695 (1977).

302. Siegel, *Reasoning From the Body*, *supra* note 5, at 364.

303. *Id.* The obligation of child support is not a comparable sanction. As I have observed previously, financial support is a gender-neutral obligation imposed on both mothers and fathers. Buchanan, *supra* note 5, at 1245.

304. *See, e.g.*, KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 158–91 (1984); Reisman, *supra* note 177; Siegel, *The Right's Reasons*, *supra* note 292; Siegel, *Reasoning From the Body*, *supra* note 5. *See also* REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), *available at* http://www.voteyesforlife.com/docs/Task_Force_Report.pdf.

305. *See, e.g.*, Ginsburg, *supra* note 5, at 382–83; Law, *supra* note 4; MacKinnon, *supra* note 5; Siegel, *Reasoning From the Body*, *supra* note 5 .

306. Law, *supra* note 5, at 960–62 (footnotes omitted). *See generally* Buchanan, *supra* note 5; Ginsburg, *supra* note 5; Siegel, *Reasoning From the Body*, *supra* note 5; Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008).

> or she should be married. And if married, one should be prepared to welcome a child whenever it arrives, however inopportune it may seem at the time.[307]

This world view continues to predominate in the contemporary pro-life movement.[308] Women who seek abortions have necessarily transgressed traditional gender norms about sexuality and maternity because, according to the sexual double standard, unmarried women are not supposed to have sex, and married women are supposed to want children.[309]

Although contemporary pro-life activists do not condemn women's work outside the home as their nineteenth- and twentieth-century predecessors did,[310] they "subscribe quite strongly to the traditional belief that women should be wives and mothers *first*."[311] Thus, for example, two contemporary pro-life activists, Mary Hasson and Miki Hill, argue that it is selfish and "materialistic"[312] for couples to "postpone having children until both the husband and wife finished their graduate degrees,"[313] for a wife to "postpone[ ] children for thirteen years so she could travel around the world with her husband and pursue professional

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307. LUKER, *supra* note 304, at 169; *see also* Mary Hasson & Miki Hill, *Crisis of Life? Crisis of Love!*, *in* BACK TO THE DRAWING BOARD: THE FUTURE OF THE PRO-LIFE MOVEMENT, *supra* note 177, at 290; Reisman, *supra* note 177, at 282.

308. *See, e.g.*, Hasson & Hill, *supra* note 307; Barbara R. Nicolosi, *The Problem With Selling Half the Story*, *in* BACK TO THE DRAWING BOARD: THE FUTURE OF THE PRO-LIFE MOVEMENT, *supra* note 177, at 257; Reisman, *supra* note 177.

309. *See generally, e.g.*, Hasson & Hill, *supra* note 307, at 293–95. These authors argue that "real sex" can take place "only in an atmosphere of unconditional, irrevocable love—that is, in a marriage." *Id.* at 296. Unmarried women "experience promiscuous, casual sex as shallow and unfulfilling, and ultimately degrading," *id.*, or at least they should. Hasson & Hill assert that a married woman's "true love is generous, self-giving, and always sacrificial, *and it is central to the pro-life cause*." *Id.* at 294. They go on to argue:

> All the anti-abortion rhetoric in the world does little good if our daily attitude views a child as an interloper, or an unwelcome spoiler in marriage, or an inconvenience. When the next baby must compete with next year's vacation, or a bigger house, the culture of death has taken root.

Id. at 295. *See also* Reisman, *supra* note 177.

310. LUKER, *supra* note 304, at 160–61 (Most contemporary pro-life activists believe that women should get "equal pay for equal work."); Siegel, *Reasoning From the Body*, *supra* note 5 (discussing opposition of nineteenth- and twentieth-century antiabortion activists to women's employment outside the home); Homily of Pope Benedict XVI, Nazareth, May 15, 2009, http://www.vatican.va/holy_father/benedict_xvi/homilies/2009/documents/hf_ben-xvi_hom_20090514_precipizio_en.html (affirming the "God-given dignity and proper role of women," including their role "as mothers in families, as a vital presence in the work force and the institutions of society, or [as nuns]").

311. LUKER, *supra* note 304, at 161. This is also exemplified in Sarah Palin's pro-life rhetoric. "The pro-life movement is pro-women, and it empowers women with the message that we are strong enough and smart enough to be able to pursue education, vocations and avocations while giving life to a child." Steven Ertelt, *Sarah Palin: We Won't Get Over Abortion, Real Women's Advocates Pro-Life*, LIFENEWS.COM, Jan. 21, 2010, http://www.lifenews.com/nat5908.html.

312. Hasson & Hill, *supra* note 307, at 292–95.

313. *Id.* at 292.

success,"[314] or for a new mother to "FedEx her breast milk back home to her infant daughter each day for a week while the mother traveled on business."[315]

Despite abortion's implications for gender equality (both in the public sphere and with regard to sexuality), legal challenges to abortion restrictions since *Roe v. Wade* have tended to rely on arguments other than gender equality.[316] Although abortion rights were a central political priority of feminist activists of the 1970s and 1980s, their legal challenges to abortion restrictions tended to be built on due process arguments, rather than on gender equality.[317] The absence of these arguments from Supreme Court cases may in part have reflected the relative weakness of the Court's standard of review for gender equality in this era[318] compared to the strict scrutiny that *Roe* purported to require for laws restricting abortion. But today, with *VMI*'s robust standard of gender equality looking more promising than the weakened protections offered by contemporary due process abortion jurisprudence,[319] many commentators and advocates call for a return to gender equality arguments for reproductive freedom.[320] But when federal courts adjudicate gender equality claims in abortion cases, they tend to diverge from the heightened scrutiny mandated in the public equality cases, and declare, without explanation, that a more deferential due process standard supplants it.

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314. *Id.* at 294.

315. *Id.* at 292. *See also* LUKER, *supra* note 304, at 159–75; Nicolosi, *supra* note 308, at 271 ("[T]he abortion worldview . . . is one in which sex is pure recreation . . . [and] looks and possessions make life worthwhile.").

316. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 114 (1973) (finding a due process liberty right to decide about abortion); Harris v. McRae, 448 U.S. 297, 297 (1980) (rejecting a challenge to the Hyde Amendment's denial of public funding for medically necessary abortions based on due process liberty and on equal protection (of abortion vs. other medically necessary services)); Maher v. Roe, 432 U.S. 464, 467 (1977) (rejecting Hyde Amendment challenge based on due process liberty and on equal protection (of abortion vs. childbirth)).

317. *See, e.g.*, Ginsburg, *supra* note 5 (arguing that *Roe v. Wade* should have been based on sex equality principles as opposed to broad due process/privacy considerations); Siegel, *Reasoning From the Body*, *supra* note 5, at 272–80.

318. *Reed v. Reed*, 404 U.S. 72, 76 (1971), offered something more rigorous than rational basis scrutiny, while *Craig v. Boren*, 429 U.S. 190 (1976), mandated intermediate scrutiny. *Craig*, 429 U.S. at 218 (Rehnquist, J., dissenting) (describing the majority opinion's standard of statutory review as intermediate-level scrutiny).

319. The "exceedingly persuasive justification" required by the articulation of heightened scrutiny in *United States v. Virginia*, 518 U.S. 515, 515 (1996), is undoubtedly more stringent than the "undue burden" standard articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 837 (1992), especially since *Gonzales v. Carhart*, 550 U.S. 124 (2007), removed the requirement for a health exception and used deferential language in describing the "undue burden" standard. *See supra* notes 8, 16, and 19.

320. *See supra* note 5.

In two recent cases, the Fourth[321] and Ninth[322] Circuit Courts of Appeals adjudicated sex-based equal protection challenges to targeted regulation of abortion providers (TRAP laws) that severely restrict the operation of abortion clinics. TRAP laws burden abortion clinics with onerous architectural specifications and awkward licensing requirements that are not imposed on clinics providing any other outpatient surgical procedure. These laws authorize government inspectors to conduct unannounced, warrantless searches of the facilities and to copy patients' confidential, unredacted medical records.[323] TRAP laws do not regulate the number or kind of abortion procedures that can be performed, and thus serve no interest in protecting fetal or embryonic life. Moreover, state governments do not argue that TRAP laws are designed to prevent abortions by driving abortion clinics out of business because, according to *Casey*, legislation whose "purpose or effect" is to "plac[e] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" constitutes an "undue burden" on women's constitutional right to decide about abortion.[324]

Because such rules are not imposed on clinics providing reproductive care or other healthcare needed by men, challengers to the TRAP laws alleged, *inter alia*, that the legislation created a sex classification that, they argued, should be subjected to heightened scrutiny, or to strict scrutiny as a restriction on a fundamental right.[325] However, both courts of appeals refused to apply strict or heightened scrutiny to the gender equality claims. Each court declared that, if the TRAP laws created a gender classification, it was not subject to heightened scrutiny but to *Casey*'s "undue burden" standard.[326] But undue burden seems inapposite to the TRAP cases, as *Casey* introduced undue burden for the specific purpose of giving greater weight to the "State's interest in potential life"[327] in

321. Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000).

322. Tucson Woman's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004).

323. The legislation challenged in *Tucson Woman's Clinic* and *Greenville Women's Clinic*, like other targeted regulation of abortion providers (TRAP laws), "imposes onerous inspection requirements authorizing warrantless searches and empowering government inspectors to copy confidential medical records, unusual licensing requirements, and specifications for the architectural design of the facility." Buchanan, *supra* note 5, at 1291–92 (footnotes omitted).

324. *Casey*, 505 U.S. at 878.

325. *See* Roe v. Wade, 410 U.S. 113, 170 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); *Greenville Women's Clinic*, 222 F.3d at 172; *Tucson Woman's Clinic*, 379 F.3d at 537, 544.

326. *See Greenville Women's Clinic*, 222 F.3d at 166–67, 170–71; *Tucson Woman's Clinic*, 379 F.3d at 539, 549 (assuming that if "laws singling out abortion" are not gender-neutral, "*Casey* replaces the intermediate scrutiny such a law would normally receive under the equal protection clause with the undue burden standard").

327. *Casey*, 505 U.S. at 872.

the balance against the constitutional liberty of the woman.[328] In the TRAP cases, there was no state interest in fetal life to balance against the woman's constitutional liberty or equality rights. Nonetheless, the appellate courts used this deferential standard in place of the heightened scrutiny that generally applies to gender-based government action—because the subject of the gender classifications was a form of healthcare protected by due process liberty.

In *Bray v. Alexandria Women's Health Clinic*,[329] a majority of the Supreme Court went further, declaring that discriminatory animus toward women was subject to rational basis scrutiny if it involved abortion.[330] Citing *Geduldig v. Aiello*,[331] the Court held that, since "there are common and respectable reasons for opposing abortion,"[332] opposition to abortion could not indicate "hatred of, or condescension toward (or indeed any view at all concerning), women as a class."[333] Justice Scalia's majority held that two abortion-funding cases, *Maher v. Roe* and *Harris v. McRae*—neither of which involved any gender equality claim[334]—established that the constitutional test applicable to abortion cases "is not the heightened-scrutiny standard that our cases demand for sex-based discrimination, but the ordinary rationality standard."[335]

D. The Sex Discount in Sexual Orientation Cases

State and federal courts have also applied a sex discount in sexual orientation cases concerning same-sex marriage and antigay discrimination. In cases involving antigay employment discrimination, the courts have tended to import deferential standards drawn from due process analysis to adjudicate equal protection challenges to antigay workplace discrimination that had nothing to do

328. The *Casey* Court criticized *Roe* for "undervalu[ing] the State's interest in potential life," *id.* at 873, and described its decision to lower the standard from strict scrutiny to undue burden as "a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life." *Id.*

329. 506 U.S. 263 (1992).

330. *Id.* at 272. *Bray* involved a section 1985(3) action brought to enjoin antiabortion protesters from blocking access to abortion clinics. The challengers argued that the abortion protesters were motivated by a "discriminatory animus" toward women. *Id.* at 263, 269.

331. 417 U.S. 484 (1974).

332. *Bray*, 506 U.S. at 263.

333. *Id.* at 270.

334. Both *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), involved equal protection constitutional challenges to the Hyde Amendment, which denied funding for nontherapeutic (*Maher*) and therapeutic (*Harris*) abortions. In *Maher*, the Court applied the rational basis test to uphold the legislative classification by which childbirth was funded and abortion was not. *See Maher*, 432 U.S. at 464, 464–65, 475–77. In *Harris*, the Court applied rational basis review to the legislative classification by which other medically necessary procedures were funded, but medically necessary abortions were not. *See Harris*, 448 U.S. at 299, 312–18. Neither case involved any sex-based challenge.

335. *Bray*, 506 U.S. at 273 (citations omitted).

with sexual behavior. In same-sex marriage cases, the courts have usually construed sex discrimination narrowly, in a way that excludes claims concerning sexual orientation.

In the employment and military discrimination cases, the federal courts have often drawn upon the deferential due process standard from the Supreme Court's infamous decision in *Bowers v. Hardwick*, in which the majority refused to "extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[336] Until *Lawrence* overruled *Bowers* in 2003, federal appellate courts consistently held that *Bowers* mandated rational basis review of equal protection challenges to antigay employment discrimination, even when the discrimination had nothing to do with sexual behavior.[337] As one federal appellate court explained:

> If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.[338]

As the federal courts reached for reasons to link gay or lesbian identity to unproven same-sex misconduct, they often described the plaintiffs as "practicing" lesbians or gay men.[339] When the lesbian or gay plaintiffs did not concede

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336. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

337. *See, e.g.*, Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); *see also* Phillips v. Perry, 106 F.3d 1420, 1425 (9th Cir. 1997) (subjecting "the policy on gays in the military to rational basis review"); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 292–93 (6th Cir. 1997); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (not mentioning *Bowers*, but asserting that rational basis scrutiny applies to the equal protection claim because, *inter alia*, "there is no fundamental constitutional right on the part of a service member to engage in homosexual acts"); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.").

338. *Padula*, 822 F.2d at 103. *See also Ben-Shalom*, 881 F.2d at 464–65; *High Tech Gays*, 895 F.2d at 571 ("[I]f there is no fundamental right to engage in homosexual sodomy under the Due Process Clause of the Fifth Amendment, it would be incongruous to expand the reach of equal protection to find a fundamental right of homosexual conduct under the equal protection component" even though the denial of security clearances involved no claim of a right to sex) (citation omitted); *Woodward*, 871 F.2d at 1075 (finding that *Bowers* was "persuasive, if not dispositive" of the equal protection claim).

339. On the conflation of status and conduct, see, for example, Mary Anne Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 SUP. CT. REV. 75, 87 (noting that the *Lawrence* Court "put the weight of their prose on homosexuals as a group rather than on the conduct in which they engage); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1408–09 (2004) (noting the *Lawrence* Court's focus on "marital-like" same-sex relationships, rather than on "more explicit erotic desires"); Nan D. Hunter, *Living With* Lawrence, 88 MINN. L. REV. 1103, 1124 (2004) (noting that, in *Bowers*, the Court "condemn[ed] certain conduct because gay people engaged in it and condemn[ed] gay people because they engaged in such conduct").

that they were "practicing," many of these courts assumed that their sexual orientation alone was enough to establish that the plaintiff had illicit same-sex sex, or at least wanted to. On this basis, the federal courts applied *Bowers*'s rational-basis scrutiny to reject equal protection challenges to the Department of Defense's policy of refusing to grant "secret" or "top secret" security clearances to gay or lesbian employees,[340] the FBI's refusal to hire a woman as a special agent because she was a lesbian,[341] and the military discharge of gay and lesbian service members on the basis of their sexual orientation, even where no sexual conduct was alleged.[342]

Even after *Lawrence v. Texas*, the Ninth Circuit rejected an equal protection challenge to the military's "Don't Ask, Don't Tell" policy by applying a sex discount that was indirectly based on *Bowers*.[343] In *Witt v. Department of the Air Force*, the Ninth Circuit cited its pre-*Lawrence* jurisprudence—which, in turn, relied on *Bowers*—as authority that equal protection challenges to "Don't Ask, Don't Tell" were subject to rational basis review.[344]

In same-sex marriage cases, state supreme courts have applied a different kind of sex discount. Rather than applying a diminished standard of review, state supreme courts—except for the first such court to recognize the same-sex marriage right[345]—have declined to base the marriage right on the challengers'

340. *High Tech Gays*, 895 F.2d at 565.

341. *Padula*, 822 F.2d at 97, 101.

342. *Ben-Shalom*, 881 F.2d at 463–64; *Thomasson*, 80 F.3d at 921, 929. Shortly after the Supreme Court held, in *Romer v. Evans*, 517 U.S. 620, 632 (1995), that the antigay animus that motivated Colorado's Amendment 2 could not survive rational basis scrutiny, the Sixth Circuit upheld a very similar Cincinnati municipal ordinance prohibiting "preferential treatment" or "special class status" based on "homosexual, lesbian or bisexual orientation, status, conduct, or relationship." *Equal. Found. of Greater Cincinnati, Inc.*, 128 F.3d at 291. This ordinance was mandated by a local ballot initiative that repealed municipal rules, which prohibited antigay discrimination in employment, housing, or public accommodation. *Id.* at 291–92. The Sixth Circuit held that *Bowers*, 478 U.S. 186 (1986), mandated the most deferential form of rational basis scrutiny "because the conduct which defined them as homosexuals was constitutionally proscribable." *Equal. Found. of Greater Cincinnati, Inc.*, 128 F.3d at 292–93.

343. The second post-*Lawrence* appellate decision on "Don't Ask, Don't Tell" (DADT), *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), upheld DADT based on judicial deference to Congress in military affairs. *Id.* at 65.

344. Witt v. Dep't of the Air Force, 527 F.3d 806, 821 (9th Cir. 2008) (citing Philips v. Perry, 106 F.3d 1420, 1424–25 (9th Cir. 1997)). *Philips* in turn cited *High Tech Gays*, 895 F.2d 563 (9th Cir. 1990), and *Bowers v. Hardwick*, 478 U.S. 186 (1986), as authority that sexual orientation merited only rational basis equal protection scrutiny. *Philips*, 106 F.3d at 1426 n.11. Meanwhile, the *Witt* Court held that *Lawrence* mandated heightened scrutiny of the plaintiff's due process challenge. *Id.* at 819.

345. Baehr v. Lewin, 852 P.2d 44, 54 (Haw. 1993) (finding that a different-sex marriage restriction violated a gender equality provision of the state constitution). *Baehr* was reversed in 1998 by state constitutional amendment. *See* HAW. CONST. amend II.

gender equality arguments.[346] Recent state supreme court decisions that recognize a state constitutional right to same-sex marriage have based the right on liberty or equality grounds other than sex.[347] The Supreme Court of California, for example, found that the statute limiting marriage to man-woman couples did not "treat men and women differently," as men and women were equally prohibited to marry a person of the same sex.[348] It concluded:

> [A] statute or policy that treats same-sex couples differently from opposite-sex couples, or that treats individuals who are sexually attracted to persons of the same gender differently from individuals who are sexually attracted to persons of the opposite gender, does not treat an individual man or an individual woman differently *because of* his or her *gender* but rather accords differential treatment *because of* the individual's *sexual orientation*.[349]

The subsequent Iowa and Connecticut same-sex marriage cases declared, without explanation, that their marriage laws were also based on sexual orientation, not sex.[350]

While these courts rightly recognized that antigay discrimination should be treated as constitutionally suspect (or quasi-suspect), their narrow definition of sex discrimination as excluding sexual orientation echoes the narrow definitional limits on gender equality set by the U.S. Supreme Court in *Geduldig v. Aiello*.[351] This, too, may be understood as a kind of sex discount, limiting the parameters of gender equality to accommodate traditional sexual morality.

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346. For examples of the gender equality argument for same-sex marriage, see, for example, *Baehr*, 852 P.2d at 44; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970–74 (Mass. 2003) (Greaney, J., concurring); Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397 (2001); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

347. *See also In re* Marriage Cases, 183 P.3d 384, 436 (Cal. 2008) (finding no gender classification because men and women are equally prohibited to marry a person of the same sex); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 414 n.10 (Conn. 2008) (reviewing the challengers' gender equality argument and declaring, without explanation, "[f]or equal protection purposes, the classification at issue is sexual orientation"); Varnum v. Brien, 763 N.W.2d 862, 884 (Iowa 2009) ("The district court held section 595.2 classifies according to gender. . . . We believe the ban on civil marriages between two people of the same sex classifies on the basis of sexual orientation."); *Goodridge*, 798 N.E.2d at 968 (finding a violation of "basic premises of individual liberty and equality under law," rather than crediting the gender equality argument advanced in Justice Greaney's concurrence).

348. *Marriage Cases*, 183 P.3d at 436. The Court distinguished *Loving v. Virginia*, 388 U.S. 1 (1967), and *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), which invalidated state antimiscegenation laws, on the ground that the statutes did not apply equally across the races: The antimiscegenation laws prohibited only those interracial marriages involving whites. *Id.* at 436–37. The Supreme Court held in *Loving* that "the racial classifications in these statutes [would be] repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 11–12 n.10.

349. *Marriage Cases*, 183 P.3d at 834 (emphasis in original).

350. *See supra* note 347.

351. *See supra* note 111 and accompanying text.

CONCLUSION

The sex discount is not, as the Court claims, primarily designed to accommodate biological differences related to pregnancy, parenthood, or fetal life. Rather, the sex discount accommodates cultural assumptions about the gendered morality of sex. The Court presumes gender classifications to be benign when they are deployed in the service of gendered sexual morality: to discourage abortion, to punish homosexuality, and to incentivize marriage. In this context, it is unsurprising that the Court has thus far resisted the persuasive equality arguments that can be marshaled in favor of sexual liberty, reproductive autonomy, and same-sex marriage.

The Court hesitates to mandate gender equality when that equality might challenge entrenched assumptions about the gendered morality of sex and marriage. Thus, using the sex discount, the Court applies a diminished level of scrutiny in abortion cases, even when the government asserts no interest in protecting fetal life. It applies a diminished level of scrutiny in cases of antigay workplace discrimination, even when the lesbian or gay plaintiffs assert no right to sex. It assumes that gender equality has nothing to say about marriage discrimination. And it accepts far-fetched biological rationales for gendered laws it frames as discouraging unwed pregnancy or promoting heterosexual marriage.

By highlighting cultural barriers to the equal sexual liberty argument, I do not wish to discourage advocates from making it. I think it is right. "[R]obust standards of equal protection should apply to government restrictions on women's sexuality, as well as on their participation in public life."[352] Equal protection and due process together require that people of all genders and sexual orientations should enjoy equal rights to sexual autonomy. Doctrinally, this argument should work. The sex discount illuminates why it usually doesn't.[353]

Equal sexual liberty may not be a winning argument in the current cultural climate, before the current Court, but there is hope. The heteronormative sexual double standard has been subjected to sustained cultural and legal challenge,[354] and it is changing. Even if the equal sexual liberty argument does not

352. Buchanan, *supra* note 5, at 1295.

353. "[W]hen judges 'demean' a due process liberty right by constructing it as a right to have sex, they are about to deny the claim. . . . [W]hen a court aims to protect the conduct targeted by a sexual regulation, it construes it in grand and euphemistic nonsexual terms: it declares that the case is not about sex. The Court and the challengers frame the claim as being about something 'transcendent,' something that can be discussed in polite company." *Id.* at 1273.

354. For challenges to the politics of sexual respectability, see, for example, LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY (2007); Abrams & Brooks, *supra* note 14; Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN'S L.J. 1 (2008); Dubler, *supra* note 21; Katherine Franke, *The Politics of Same-Sex*

win equality cases, its repetition will likely contribute to the cultural change that will be needed to disestablish the heteronormative sexual double standard in American constitutional law.[355]

Marriage Politics, 15 COLUM. J. GENDER & L. 236 (2006); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539 (2006); Melissa Murray, *Equal Rites and Equal Rights*, 96 CAL. L. REV. 1395 (2008); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253 (2009) (regarding the marriage-crime binary); Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529 (2009); Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485 (2009); Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523 (2009); Mariana Valverde, *A New Entity in the History of Sexuality: The Respectable Same-Sex Couple*, 32 FEMINIST STUD. 155 (2006).

355. Repetition of a legal argument can help change the legal climate even when it does not win. See, for example, the NAACP argument in *Brown v. Board of Education*, 347 U.S. 483 (1954), which was preceded by several successful and unsuccessful race-based equal protection challenges the NAACP advanced between the 1920s and the 1940s before finally succeeding in 1954. See also legal arguments for same-sex marriage, which shift the parameters of plausible legal argument even when they lose in court: see, for example, Abrams & Brooks, *supra* note 14 (noting that since *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006), state courts deciding same-sex marriage cases have moved away from questioning the same-sex couple's ability to parent, and instead argue that, unlike straight couples who may accidentally procreate, same-sex couples are "too responsible" to need marriage).

Finally, the opponents of sexual and reproductive liberty have adopted the strategy of trying to change the cultural parameters of plausible legal argument by repeating arguments that have lost previously. *See*, *e.g.*, Amicus Curiae Brief of Right to Life Advocates, Inc. in Support of the Petitioner at 2–3, Gonzales v. Carhart, 550 U.S. 124 (2007) (No. 05-380), 2006 WL 1386209; Brief for the United States as Amicus Curiae Supporting the Respondents at 2, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006421; Brief for the United States as Amicus Curiae Supporting Appellants at 11, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127640 (all arguing that *Roe v. Wade* should be overruled).