ARTICLES

EQUALITY, CLASSIFICATIONS, AND IRRELEVANT CHARACTERISTICS

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INTRODUCTION

> *"Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, . . . between black and white . . . [and between heterosexual and gay]."*[1]

Equal protection analysis is hindered by an overemphasis on questions concerning the proper standard of judicial review. These questions consistently focus on the required connection between government classifications and the purpose of governmental action. Although this "latticework of labels"[2] purports to be an analytical process, it cannot explain or predict the results in equal protection cases.[3] Even the most egregious forms of invidious discrimination can be defended as equal because equality is viewed as a formal structure. This formal notion of equality fails because it does not take into account the extent to which factors extrinsic to the notion of equality pervade arguments about equality. Foremost among these extrinsic factors is the idea that when government classifies, certain personal characteristics are not proper subjects

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1. Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting). Justice Stevens did not include the reference to heterosexual and homosexual. However, given his dissenting opinion in Bowers v. Hardwick, 106 S. Ct. 2841, 2856 (1986), he would probably agree with the sentiment. In *Bowers*, Justice Stevens insisted that a policy of selective application of a sodomy statute only against homosexuals "must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group." *Bowers*, 106 S. Ct. at 2859. (Although some commentators use the term "gay" to refer only to *male* homosexuals, this author uses the term gay synonomously with the term homosexual. *See, e.g.*, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 n.4 (1984)).

2. Hoover v. Meiklejohn, 430 F. Supp. 164, 168 (D. Colo. 1977). *See also In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting) ("[T]he code phrase 'suspect classification'. . . simplifies judicial work as do 'per se' rules, but it tends to stop analysis while appearing to suggest an analytical process.").

3. 413 U.S. at 730.

for consideration. There seems to be no way of formalizing the background information that determines which characteristics are properly relevant.

This article examines some of those unarticulated premises. It explores the relevance of race, sex, and sexual preference to governmental decision-making because these characteristic classifications provide the broadest spectrum for analysis.[4] At one extreme is race, today the classic irrelevant characteristic. At the other extreme is sexual preference, still widely considered a significant characteristic in decisions regarding military service, immigration, employment, and child custody. In the middle is classification by sex, a characteristic whose broad relevance has been sharply narrowed in the last fifteen years.

I. Equal Treatment: Who is Similar to Whom?

What does it mean to be treated equally? At the simplest level, to be treated equally is to be treated the same as everyone else. Thus, for example, if each child in a group is given an apple for a snack, then each child has been treated equally. However, this notion of equality as similar treatment becomes unsatisfactory very quickly. Thus, for example, if everyone were charged an annual income tax of $2,000, each person would be treated the same, but the treatment would hardly be equal. The weight of the tax would fall much more heavily on a person with an income of $2,000 than it would on a person whose income was $100,000. It would fall most heavily on one who had no income at all.[5]

It thus becomes clear that to be treated equally sometimes re-

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4. The discussion in this article of the relevance of race, sex, and sexual preference to governmental decisionmaking also has implications for their relevance to decisionmaking by private parties. However, because of the varying coverages of federal and state civil rights statutes, a large quantum of discriminatory activity by private parties is unregulated. *See, e.g.*, Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976) (private club permitted to exclude blacks from membership because of limited reach of 42 U.S.C. § 1981); De Santis v. Pacific Tel. and Tel., 608 F.2d 327, 329-30 (9th Cir. 1979) ("[W]e conclude that Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.") By limiting discussion to governmental activity, this article need not become involved in extensive explanations of the scope of various civil rights statutes and their applicability to private parties. Title VII of the federal Civil Rights Act will be discussed to the extent it applies to governmental employers. *See infra* text accompanying notes 78-101.

5. *See* A. France, Le Lys Rouge (1894), *reprinted in* J. Bartlett, Familiar Quotations 655 (1980) ("The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.").

quires that persons be treated differently. But how does one determine when to treat people similarly, and when to treat them differently, in order to treat them equally? The traditional answer to this question is that similarly situated individuals are to be treated similarly and differently situated individuals are to be treated differently.[6] However, this formal notion of equality begs the question, for it assumes that we know which individuals are similar and which are different. Because all persons share a substantial number of characteristics as members of the human species, they are in that respect all the same, and should thus be treated the same. Yet, each human being, as a unique combination of heredity and environment, is different from anyone else, and should be treated differently. Somewhere between the extremes of universal similar treatment and universal different treatment lies the principle of equal treatment.

In an influential article,[7] Tussman and tenBroek noted the inherent paradox between equality and the idea of classification, because "the very idea of classification is that of inequality."[8] They explained that to define a class is simply to designate a characteristic or trait the possession of which determines inclusion in the class.[9] Every person who possesses the defined characteristic *could* then be viewed as "similarly situated." Would all those, then, who speak Russian be similarly situated? The question cannot be answered in the abstract; it is useful to talk of persons as "similarly situated" only in relation to the purposes for which the classification was made.[10] " 'Similarly situated' cannot mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect."[11] All those who speak Russian might be similarly situated if students were being assigned to language courses, but not necessarily similarly situated if students were being assigned to mathematics courses.

Tussman and tenBroek concluded that a classification was reasonable if it included "all persons who are similarly situated

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6. *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539-40 (1982).

7. Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

8. *Id.* at 344 (citing Atchison, Topeka & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899)).

9. *Id.*

10. *Id.* at 346.

11. *Id.* at 345.

with respect to the purpose of the law."[12] Judicial decisions[13] have not insisted on such a perfect fit ("all persons") between the class of those possessing the trait and the purpose of the law, but they have adopted Tussman and tenBroek's means/ends test.[14] A classification must either be: (1) rationally related to the achievement of a permissible governmental purpose;[15] (2) necessary to achieve a compelling governmental purpose;[16] or (3) something in between.[17]

However, even after the defining characteristic (which determines who is similar to whom) is related to the purpose of the law, the notion of equality is still being viewed in formal terms, and is thus still subject to manipulation. The most invidious forms of discrimination can still be justified as equal treatment. Thus, in 1955, the Supreme Court of Virginia upheld a statute that prohibited interracial marriage, a statute that was part of a larger "[a]ct to preserve racial integrity."[18] After the court found that interracial marriage was harmful to good citizenship, it explained, "[t]he only way by which the statute could be made effective was by classification of the races. If preservation of racial integrity is legal, then racial classification to effect that end is not presumed to be arbitrary."[19] The court found a perfect correlation between the characteristic, race, and the purpose of the statute, preservation of racial integrity. Therefore, no inequality of treatment existed.

The manipulative possibilities of the requirement that classifications bear a certain relation to governmental purpose can like-

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12. *Id.* at 346.

13. *See infra* notes 15-16 and accompanying text.

14. *See infra* note 16 and accompanying text.

15. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the equal protection clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes.").

16. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984), where the Court stated that "[s]uch classifications [by race] are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment of its legitimate purpose.' " *Id.* (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

17. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) ("The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' ") (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)).

18. *See* Naim v. Naim, 197 Va. 80, 81, 87 S.E.2d 749, 750 (1955), *aff'd*, 90 S.E.2d 849 (1956).

19. *Id.* at ___, 87 S.E.2d at 755.

wise be illustrated in the Japanese-American internment cases.[20] The principle of equality is not violated if the government during wartime places all disloyal citizens in internment camps to protect national security and the public safety. All disloyal persons would be similarly situated with respect to a characteristic (loyalty) that is relevant to the protection of national security. The principle of equality is violated, however, if the government places all Japanese-Americans in internment camps to protect the national security. While all Japanese-Americans are similarly situated with respect to the characteristic of national origin, it is difficult to see the relevance of that characteristic to the purpose of protecting the national security.[21]

If the government, like the State of Virginia in the interracial marriage case,[22] asserted that the purpose of the internments was to punish Japanese-Americans because the Japanese had bombed Pearl Harbor, would the principle of equality be violated? One could argue that all those interned are similarly situated with respect to a characteristic (national origin) that is perfectly correlated with the purpose of the classification (to punish those of a particular national origin). Facially, the formal principle of equality is satisfied.

There is clearly something wrong with this reasoning and with that of the Virginia court on interracial marriage, but the error is not made patent by reference to the standard that the classification must be necessary to achieve a compelling governmental purpose.[23] The problem is not in the relationship between the classification and the governmental purpose, but rather with the *nature of the purpose* itself. Neither the preservation of racial integrity nor the desire to punish Japanese-Americans are permissible, much less compelling, governmental purposes.

Some suggest that the principle of equality prohibits the "na-

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20. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

21. *But see Korematsu*, 323 U.S. at 218-19 ("Exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country . . . [I]t was impossible to bring about an immediate segregation of the disloyal from the loyal."); Professor Tribe comments "[T]he decision represents the nefarious impact that war and racism can have on institutional integrity and cultural health." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000 (1978).

22. *Naim*, 197 Va. 80, 87 S.E.2d 749.

23. *See Korematsu*, 323 U.S. 214; *Naim*, 197 Va. 80, 87 S.E.2d 749.

ked preference"[24] of one group over another. By this standard, segregation statutes would constitute a clear-cut preference for whites over blacks and would thus be prohibited. However, the "naked preference" theory is inadequate to explain why courts have approved naked hiring preferences of veterans over nonveterans,[25] city residents over nonresidents,[26] and of heterosexuals over homosexuals.[27]

The case of *Personnel Administrator of Massachusetts v. Feeney*[28] is illustrative. In *Feeney*, the United States Supreme Court upheld a Massachusetts statute that constituted a naked preference for veterans over nonveterans in applications for state employment against a claim that the preference discriminated on the basis of sex.[29] The Court recognized that the law was, by design, not neutral; it intentionally and overtly preferred veterans, without purporting to define a job-related characteristic.[30] The resulting treatment could be described as unequal. One could argue that, in making employment decisions, individuals are similarly situated who have equal amounts of those qualities necessary to do a job properly. By this standard, the Massachusetts statute was unequal because its absolute preference for veterans would result in a more highly qualified nonveteran being rejected in favor of a veteran with lower qualifications. This would further result in a violation of "the widely shared view that merit and merit alone should prevail in the employment policies of government."[31]

The Court chose not to follow this reasoning,[32] and found it permissible for the state to treat all veterans as similarly situated and nonveterans as differently situated, to justify different treatment.[33] However, the Court suggested that if the statute intention-

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24. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 137. ("The class of prohibited justifications consists of what might be termed naked preferences—preferences based on a perception that one person is in some sense 'better' than another, or to be preferred simply because of who he or she is.") *Id.*

25. Personnel Admin'r of Mass. v. Feeney, 442 U.S. 256 (1979).

26. McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976).

27. *E.g.*, Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir.), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984).

28. 442 U.S. 256 (1979).

29. *Id.* at 281.

30. *Id.* at 277.

31. *Id.* at 280.

32. *Id.* at 265.

33. *Id.* Veterans benefits are traditionally "justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian

ally and overtly preferred men over women in hiring decisions, that preference would have been unconstitutional.[34] The Court expressly approved of a naked preference for veterans over nonveterans yet rejected a naked preference for men over women. This outcome can only be explained by reference to a notion underlying and prior to the formal idea of equality, a notion that certain characteristics are not to be considered relevant in the process of classification and thus that actions that classify on the basis of these characteristics are unequal.[35]

The notion that equality requires that certain characteristics be considered irrelevant is made explicit in the federal civil rights statutes, which make it unlawful to discriminate on the basis of race, color, religion, sex, or national origin.[36] The term "discriminate" is normally understood today in a pejorative sense, as meaning "invidious discrimination."[37] But the term has a more basic, neutral sense, meaning "to mark or perceive the distinguishing or peculiar features."[38] Thus it is a compliment to be regarded as a person with "discriminating" taste. While one is generally able to perceive the different skin color of white and black persons, and the different physical characteristics of males and females, the civil rights statutes render the perception of those differences irrelevant to decisions concerning these individuals. In this way, the statutory prohibition of discrimination is the equivalent of the Constitution's equal protection clause mandate of equality; the Civil Rights Act is thus coextensive with the equal protection clause.[39]

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life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations." *Id.*

34. *Id.* at 273. The Court stated that "any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment." *Id.*

35. *See* 442 U.S. 256 (1979). In *Feeney*, the underlying notion was that sex was an irrelevant characteristic.

36. *See* 42 U.S.C. §§ 2000a-2000a-2 (1982) (prohibition of discrimination or segregation in places of public accommodation on the grounds of race, color, religion, or national origin); 42 U.S.C. § 2000d (1982) (prohibition of discrimination in federally funded programs on the grounds of race, color, or national origin); 20 U.S.C. § 1681 (1982) (prohibition of discrimination in federally funded education programs on the basis of sex); 42 U.S.C. § 2000e-2 (1982) (prohibition of employment discrimination on the grounds of race, color, religion, sex, or national origin); 42 U.S.C. §§ 3604-3606 (1982) (prohibition of discrimination in housing on the basis of race, color, religion, sex, or national origin).

37. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 374 (1885); Skinner v. Oklahoma, 316 U.S. 535 (1942).

38. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1981).

39. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 328 (1978) (Brennan,

While the civil rights statutes explicitly provide which characteristics are to be considered irrelevant, the notion of equality is sufficiently broad and vague so that determining the relevance of particular characteristics under the equal protection clause has been left to the Court's interpretation of an evolving consensus of what is fair. Historically, a wide range of characteristics have been considered relevant. At one time, for example, it was a self-evident-truth that God had ordained that the races be separate;[40] it followed from this truth that railroad cars,[41] schools,[42] and swimming pools[43] should be classified by reference to the characteristic of race. Another self-evident truth was that, by the law of the creator, the paramount destiny of womanhood was the noble role of wife and mother;[44] it followed from this truth that the qualifications for admission to the bar should include a classification by reference to sex.[45] This same self-evident-truth reasoning has led to the conclusion that homosexuals are dangerous at close quarters,[46] and it follows therefore that they must be banned from military service.[47]

The problem with self-evident truths about human nature is that, with the passage of time or by exposure to different cultures, they become hardly evident at all.[48] Some turn out to be quite

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White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) ("In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies . . . .").

40. *See* Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting from the Virginia trial judge's opinion):

> Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such [racially mixed] marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id.

41. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

42. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

43. *See* Palmer v. Thompson, 403 U.S. 217 (1971).

44. *See* Bradwell v. Illinois, 83 U.S. (16 Wall) 130, 141 (1892) (Bradley, J., concurring).

45. *Id.*

46. *See* Beller v. Middendorf, 632 F.2d 788, 811 (9th Cir. 1980), *reh'g denied sub nom.* Miller v. Rumsfield, 647 F.2d 80 (9th Cir. 1981), *cert. denied sub nom.* Miller v. Weinberger, 454 U.S. 855 (1981), *reh'g denied*, 454 U.S. 1069 (1981) (citing affidavit from the Assistant Chief of Naval Personnel: "[t]ensions and hostilities would certainly exist between known homosexuals and the great majority of naval personnel who despise/detest homosexuality, *especially in the unique close living conditions aboard ships.*") (emphasis added).

47. *Id.* at 812.

48. *See* P. BERGER, INVITATION TO SOCIOLOGY, A HUMANISTIC PERSPECTIVE 110-18 (1963). Berger demonstrates that "ideas as well as men are socially located." He speaks of the

false. Race is an irrelevant characteristic in relation to travel, schooling, and swimming; sex is an irrelevant characteristic in relation to fitness to practice law; and perhaps a person's sexual preference has no connection with his ability to be a good soldier.

II. Race As A Relevant Characteristic

A. The Historical Relevance of Race

The management of a railroad company might decide to have every railroad car exactly the same. Or they might decide to have a first class car (for those who would pay more) and a second class car (for those who would pay less). They might have a smoking car and a non-smoking car, or a sleeping car and a car with seats only. Classification by reference to the willingness to pay more, the desire to smoke, or the desire to sleep would be relevant to the purposes of running a railroad. If the railroad company decided to have a car for white passengers and a car for black passengers, would race be a characteristic relevant to the running of a railroad?

In 1896, the answer was yes. In *Plessy v. Ferguson*,[49] Plessy, a black man prosecuted for refusing to leave a white coach, challenged a Louisiana law requiring separate railway cars for white and black passengers.[50] The Court stated:

> A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races.[51]

"world-taken-for-granted—the system of apparently self-evident and self-validating assumptions about the world that each society engenders in the course of its history." "[S]ociety supplies our values, our logic and the store of information (or, for that matter, misinformation) that constitutes our 'knowledge.' Very few people, and even they only in regard to fragments of this world view, are in a position to re-evaluate what has thus been imposed on them. They actually feel no need for reappraisal because the world view into which they have been socialized appears self-evident to them. Since it is also so regarded by almost everyone they are likely to deal with in their own society, the world view is self-validating. Its 'proof' lies in the reiterated experience of other men who take it for granted also . . . . Reality is socially constructed."

49. 163 U.S. 537 (1896).

50. *Id.* at 540.

51. *Id.* at 543.

Because "they" look different from "us", the Court reasoned, obviously there is nothing out of the ordinary or unequal for "them" to sit in different railway cars from "us."[52] The Court gave little weight to plaintiff's argument that classifying railway cars by race had as much relevance as classifying by hair color.[53]

A local board of education might choose to have a single-room school house serving the needs of all its students. Where this is impractical, the school board would have to establish several schools. These schools could be classified by age (elementary, intermediate, high school), by neighborhood (so that students could walk to school), by academic ability, or by individual interest (schools emphasizing science or the arts). The school board might also decide to have a white school and a black school. Is race a characteristic relevant to the running of a school system? Again, for years, the answer clearly was yes.[54] In part of this country, separation of the races was a way of life.[55] Just as most people today find it self-evident that public restrooms should be segregated by sex, it was at one time equally obvious that public facilities should be segregated by race.

B. The Current Irrelevance of Race

In *Brown v. Board of Education*,[56] the Supreme Court took a major step toward making race an irrelevant characteristic. The Court found that separate educational facilities were inherently unequal.[57] Consequently, school systems could no longer classify on the basis of race.[58] Although *Brown* by its facts was limited to racially segregated public schools, the idea that race is an irrelevant characteristic was gradually extended to a wide range of deci-

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52. *Id.* at 552. It is difficult to justify the Court's reasoning, which rested purely on differences in skin-color, given the specific facts in *Plessy*. Although the plaintiff in *Plessy* was prosecuted because he was a negro who refused to leave a white coach, he was in fact seven-eighths Caucasion and looked white. The Court ignored this reality and held that the issue of his racial classification was a matter of state law.

53. *Id.* at 549.

54. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (overturning state constitutional or statutory provisions requiring segregated schools).

55. *See* D. BELL, RACE, RACISM, AND AMERICAN LAW 83 (1980) ("Parks, hospitals, prisons, courthouses; all had segregated toilets, drinking fountains, seating arrangements, stairways, waiting rooms, entrances and exits—even telephone booths.").

56. 347 U.S. 483 (1954).

57. *Id.* at 495.

58. *Id.*

sions—who should be served in public accommodations,[59] who should be hired,[60] who should rent an apartment or buy a house,[61] and who should receive benefits under federally funded programs.[62] Race has become the paradigmatic irrelevant characteristic. Race is irrelevant even where a generalization about race is true. Thus, even if it is statistically true that blacks have a shorter life span than whites, a life insurance company cannot consider that information in calculating insurance premiums.[63] And even if the racial characteristics of a neighborhood may sometimes affect the values of homes,[64] real estate appraisers are precluded from considering that information in making appraisals.[65] Justice Harlan's plea in his dissent in *Plessy v. Ferguson*, that the Constitution is colorblind, has again begun to be heard.[66]

C. The Remaining Relevance of Race

However, race could never be an entirely irrelevant characteristic nor could the Constitution be truly colorblind. *Brown v. Board of Education* contained the seeds of race-conscious decisionmaking. Although *Brown II*[67] required public schools to determine

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59. 42 U.S.C. §§ 2000a-2000a-2 (1982).

60. 42 U.S.C. § 2000e-2 (1982).

61. 42 U.S.C. §§ 3604-3606 (1982).

62. 42 U.S.C. § 2000d (1982); 20 U.S.C. § 1681 (1982).

63. *See* City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 709 & n.26 (1978) (dictum).

64. *See* Zuch v. Hussey, 394 F. Supp. 1028, 1032 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977). An expert witness stated:

> The first black family entering an all-white neighborhood tends to pay more for the housing than would be paid by white families purchasing the identical house. Then because of the fears generated, the perception of white residents in the area causes a great many white people to put up a great many houses for sale within a very short period of time. This flooding of the market tends to have a negative effect on the price stabilization of the housing in that area.
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> When the area becomes predominantly black, then you again achieve price stabilization in that area.

394 F. Supp. at 1032.

65. United States v. American Inst. of Real Estate Appraisers, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978) ("The promulgation of standards which cause appraisers . . . to treat race and national origin as a negative factor in determining the value of dwellings . . . may effectively 'make unavailable or deny' a 'dwelling' . . . . When such denial . . . occurs as a result of considerations relating to race or national origin, [section 804 of the Fair Housing Act is] transgressed.") (footnotes omitted).

66. N.Y. Times, Oct. 7, 1985, at A20, col. 3 ("Attorney General Edwin Meese 3d says the Constitution is 'color blind', that 'public policy must be racially neutral,' that 'race-conscious' remedies are illegal and that 'counting by race is a form of racism.' ").

67. 349 U.S. 294 (1955).

admissions on a *non-racial* basis,[68] the question arose whether we could reach the goal of eliminating racial discrimination in the schools without expressly taking into account the racial characteristics of student assignments.

In *Green v. County School Board*,[69] the Court examined the constitutionality of a freedom-of-choice plan that allowed pupils to choose their own public schools. This freedom-of-choice plan made no distinction between white and black students. Yet the Court rejected the plan.[70] Since the school board had been operating a state-compelled dual system, it was "charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[71] To eliminate the effects of past unconstitutional racial discrimination, the Court required the school board to take into account the racial characteristics of student assignments.[72]

The Court later approved, in *Swann v. Charlotte Mecklenberg Board of Education*,[73] the race-conscious altering of attendance zones and the race-conscious transportation of students as within the remedial power of the federal courts to eliminate the effects of past unlawful discrimination.[74] And in a companion case,[75] the Court rejected a state statute designed to freeze the current effects of past discrimination by prohibiting the consideration of race in the assignment of students.[76]

These cases established the principle that race is a relevant characteristic in the remedial context. The Court has also applied this principle in the employment discrimination area to remedy the effects of past discrimination. Ordinarily, courts limit relief in Title VII[77] cases to injunctions against future violations and "make-whole" relief to the individuals victimized by past discriminatory practices.[78] "Make-whole" relief may include backpay and

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68. *Id.* at 300-01 (emphasis added).
69. 391 U.S. 430 (1968).
70. *Id.* at 437.
71. *Id.* at 437-38.
72. *Id.*
73. 402 U.S. 1 (1971).
74. *Id.* at 27-31.
75. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).
76. *Id.* at 45-46.
77. 42 U.S.C. § 2000e-5(g) (1982).
78. *See* Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019, 3036

competitive seniority.[79] This type of relief is not race-conscious because it is limited to identified victims.

Where, however, "an employer or union has engaged in particularly longstanding or egregious discrimination,"[80] make-whole relief limited to identified victims of past discrimination may be singularly ineffective in providing an adequate remedy, because those victims may be hard to find. The Court found that "[i]n such cases, requiring recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force may be the only effective way to ensure the full enjoyment of the rights protected by Title VII."[81] The federal appellate courts have unanimously approved this type of race-conscious remedy as appropriate under Title VII.[82] To eliminate the improper use of racial classifications, the courts must allow racial classification.

However, a majority of the Court questioned this view in *Firefighters Local Union No. 1784 v. Stotts*, quoting an interpretation memorandum on Title VII, to the effect that a court in a Title VII case "was not authorized to give preferential treatment to non-victims."[83] This language was dictum because the Court had already decided the case on two grounds: first, that a district court was not authorized to modify a consent decree against the wishes of one of the parties and contrary to the terms of the decree;[84] and second, that competitive *seniority* could be awarded only to an individual victim of past discrimination.[85] Yet, the Justice Department cited the case for the proposition that all numerical hiring and promotion goals are invalid.[86] In accordance with that view, the Justice Department ordered fifty-one local jurisdictions to modify existing affirmative action plans.[87]

(1986).

79. *See* Abermarle Paper Co. v. Moody, 422 U.S. 405 (1975) (backpay); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (competitive seniority).

80. *Sheet Metal Workers*, 106 S. Ct. at 3036.

81. *Id.*

82. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 612-13 (1984) (Blackmun, J., dissenting) ("In Title VII class-action suits, the Courts of Appeals are unanimously of the view that race-conscious affirmative relief can also be 'appropriate' under § 706(g).") (with citations to cases from all circuits).

83. *Stotts*, 467 U.S. at 581.

84. *Id.* at 574, 583.

85. *Id.* at 579.

86. N.Y. Times, July 3, 1986, at B9, col. 2.

87. *Id.*

The Court rejected the Justice Department's broad reading of *Stotts* in *Local 28 of the Sheet Metal Workers International Association v. EEOC*.[88] In that case, the Court held that a district court may, in appropriate circumstances, order preferential relief benefitting individuals who are not the actual victims of discrimination as a remedy for violations of Title VII.[89] The Court construed two sections of the Civil Rights Act to reach this result. Section 706(g)[90] contains a broad grant of authority to district courts to award whatever equitable relief they deem appropriate. However, section 706(g) provides that courts may *not* require the hiring or admission of a person who was refused employment or admission to a union for any reason other than race.[91] The Court explained that this second part of section 706(g) does not limit relief to actual victims of past discrimination, but rather, in conjunction with section 703(j),[92] was "intended largely to reassure opponents of the bill that it would not require employers or labor unions to use racial quotas or to grant preferential treatment to minorities in order to avoid being charged with unlawful discrimination."[93] Mere racial imbalance does not violate the statute. Thus, a court may not award race-conscious relief merely to maintain racial balance. Where, however, a court has made a finding of unlawful discrimination requiring a remedy, "Congress deliberately gave the . . . [court] broad authority under Title VII to fashion the most complete relief possible to eliminate 'the last vestiges of an unfortunate and ignominious page in this country's history.' "[94]

It is clear that courts are authorized to award race-conscious relief after finding unlawful employment discrimination. The Court has also recently affirmed that race-conscious affirmative action is permissible where a party has voluntarily undertaken to remedy the effects of past discrimination, even without a court finding to that effect, if the party has "convincing evidence that remedial action is warranted."[95] It has been clear for some time that a private employer, who is subject to the strictures of Title

88. 106 S. Ct. 3019 (1986).

89. *Id.*

90. 42 U.S.C. § 2000e-5(g) (1982).

91. *Id.*

92. 42 U.S.C. § 2000e-2(j) (1982). ("Preferential treatment not to be granted on account of existing number or percentage imbalance").

93. *Sheet Metal Workers*, 106 S. Ct. at 3038.

94. *Id.* at 3044 (citing *Albermarle Paper*, 422 U.S. at 418).

95. Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986).

VII but not those of the equal protection clause, may adopt a race-conscious affirmative action program under certain circumstances.[96] The Court adopted this view in *United Steel Workers of America v. Weber*, despite the language of Title VII, which facially prohibits any consideration of race in the hiring process.[97] Because Congress designed the statute to remedy racial discrimination, the Court found it ironic to argue for an interpretation of the language of the statute that would stifle private, voluntary efforts to achieve the same goal.[98] The Court permitted remedial racial preferences where manifest racial imbalances in traditionally segregated job categories exist.[99] The Court imposed no requirement of a prior finding that the employer has violated Title VII.[100] However, to ensure that the interests of white employees would not be unnecessarily trammeled, the Court set limits on race-conscious hiring. Remedial racial preferences should neither require the discharge of white workers nor create an absolute bar to the advancement of white employees; such measures should be temporary, not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.[101]

Governmental employers are subject not only to the limitations of Title VII but to those of the equal protection clause as well. Here it is more difficult to determine the exact boundaries of proper race-conscious decisionmaking. The Supreme Court has stated that "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake" and thus forbidden by the Constitution.[102] On the other hand, eliminating the current effects of past unlawful discrimination is a proper governmental purpose.[103] The difficulty lies in distinguishing between a naked racial preference and a proper race-conscious

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96. United Steel Workers of Am. v. Weber, 443 U.S. 193, 197 (1979).

97. 42 U.S.C. § 2000e-2(a) (1982) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, . . . because of such individual's race . . .").

98. *Weber*, 443 U.S. at 204.

99. *Id.* at 209.

100. *Id.* at 212 (Blackmun, J., concurring) ("The Court, however, declines to consider the narrow 'arguable violation' approach and adheres to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is 'traditionally segregated.' ").

101. *Id.* at 298.

102. Regents of the Univ. of Ca. v. Bakke, 438 U.S. 265, 307 (1978).

103. *See supra* text accompanying notes 67-94.

remedy for past discrimination. A principled distinction is based on the presence or absence of "findings." Just as a court, having "found" unlawful racial discrimination, is authorized to provide race-conscious relief, so non-judicial government bodies, upon "finding" unlawful discrimination, should be able to provide race-conscious relief.

But it does not necessarily follow that legislatures or other governmental bodies should be required to make similar judicial-type findings. In *Fullilove v. Klutznick*,[104] the Court approved a federal set-aside for minority business contractors even though Congress, in the Act, recited no preambulary "findings" on the subject.[105] "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings."[106] Even without judicial-type "findings," the Court was "satisfied that Congress had [an] abundant historical basis from which it could conclude that procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination,"[107] and thus Congress could legislate appropriately. It was not necessary to show that any individual contractors had violated anti-discrimination laws.[108]

The Court has not necessarily extended to state agencies this relatively generous view of congressional authority to redress the effects of racial discrimination. Justice Powell disapproved of an affirmative action program at University of California-Davis Medical School because of the "absence of judicial, legislative, or administrative findings of constitutional or statutory violations."[109] Justice Powell rejected "the remedying of the effects of 'societal discrimination' " as a sufficient justification for the affirmative action program, because that was "an amorphous concept of injury that may be ageless in its reach into the past."[110] On the other hand, Justice Brennan insisted that "[s]tates also may adopt race-conscious programs designed to overcome substantial, chronic minority under-representation where there is reason to believe that the evil addressed is a product of past racial discrimination."[111]

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104. 448 U.S. 448 (1980).
105. *Id.* at 478 (Burger, C.J.).
106. *Id.*
107. *Id.*
108. *Id.* at 475.
109. *Bakke*, 438 U.S. at 307.
110. *Id.*
111. *Id.* at 366.

Justice Powell recently reiterated his view in *Wygant v. Jackson Board of Education*:[112] "[t]his Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[113] Justice Marshall, taking Justice Brennan's view, insisted in *Wygant* that race-conscious decisions need only be supported by a "legitimate factual predicate;"[114] "formal findings of past discrimination are not a necessary predicate to the adoption of affirmative action policies."[115] Justice O'Connor, in a thoughtful separate opinion in *Wygant*, demonstrated that the two conflicting views can be reconciled in a way that supports affirmative action.[116]

According to Justice O'Connor, a nondiscrimination statute is violated not at the time a finding is made but at the time the wrong is committed.[117] Justice O'Connor did not insist on a contemporaneous finding of past discrimination, but on information which gives a public employer a "sufficient basis for concluding that remedial action is necessary."[118] The most obvious information relevant to this determination is "demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool . . . ."[119] Statistical disparity here could be sufficient to support a prima facie Title VII pattern or practice claim[120] and to "lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination."[121]

If a minority job applicant sues a school board, the board would have an opportunity to rebut the plaintiff's prima facie case by demonstrating legitimate business grounds for the disparity.[122]

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112. 106 S. Ct. 1842 (1986).
113. *Wygant*, 106 S. Ct. at 1847.
114. *Id.* at 1858 (Marshall, J., dissenting).
115. *Id.* at 1863.
116. *Id.* at 1852-57 (O'Connor, J., concurring in part and concurring in the judgment).
117. *Id.* at 1855.
118. *Id.* at 1855-56.
119. *Id.* at 1856.
120. *See Albemarle Paper Co.*, 422 U.S. 409.
121. *Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring).
122. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (Title VII forbids the use

However, if the school board is a *defendant* in an action by a white applicant challenging its affirmative action plan, the nonminority plaintiff bears the ultimate burden of proving his case.[123] The nonminority plaintiff could easily prove a prima facie case of a race-based classification. But when the board introduces its statistical proof as evidence of legitimate, remedial purpose, the burden shifts back to the plaintiff to prove that the purported justification was mere pretext.[124] The defending school board need not show an *absence* of job-related, nonracial explanations for the initial disparity.[125] The nonminority plaintiffs then "bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose . . . ."[126] Because the nonminority plaintiffs will rarely be able to meet their heavy burden, it seems that statistical disparity, which was Justice Brennan's predicate for race-conscious remedies, will have the same effect as a statutory violation, which was Justice Powell's standard. The two are no longer in conflict.

A simple example will illustrate the point. If the percentage of black police officers in a city is much lower than the percentage of qualified blacks in the relevant labor pool, is it proper for the police board to adopt a racial preference for hiring black recruits? On its face, statistical disparity without more is evidence at most of societal discrimination, and would not support race-conscious hiring. But the statistical disparity could establish a prima facie violation of Title VII by the city. If, in light of this apparent prior employment discrimination, the city chooses to adopt an affirmative action program, the city need not also show that a prima facie case establishing adverse racial impact and justifying race-conscious hiring was not rebuttable through job-related explanations. That burden is on those who would challenge the program; the burden

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of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.").

123. *Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring).

124. *Id.*

125. *See* Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220, 226 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985) ("[T]he district judge ruled that before taking steps to rectify a perceived violation of Title VII, the State, as an employer, had to meet two burdens—first establish a prima facie case of discrimination and then prove that such prima facie case was not rebuttable through job-related explanations. We hold that, in the context of this case, the imposition of the latter burden on a party seeking to comply voluntarily with Title VII is contrary to the case law and the statute's underlying policy.").

126. *Wygant*, 106 S. Ct. at 1856.

will be difficult to meet. The program should survive challenge.

Race, then, is a relevant characteristic when remedying past racial discrimination. If the consideration of race is forbidden, the remedy will be ineffective. Outside of this remedial context, a person's race should be of no more concern to the government than the color of his hair or his head size. A few state and lower federal court cases[127] have attempted to justify classification by race in other contexts, but these cases are probably wrongly decided. Some courts argue that racial characteristics are properly taken into account to maintain racial integration in housing projects and to avoid ghettoization.[128] This claim is based on the unproven assumption that integration is always beneficial to minorities and forces individual minority group members to make sacrifices to benefit society as a whole.[129] Some courts also argue that race is a relevant characteristic in hiring school teachers in order to provide role models for minority students, but this role model theory has been rejected by the Court because it has no logical stopping point and does not necessarily bear a relationship to the harm caused by prior discrimination.[130] It has been argued that racial classifications, when considered among other factors and on the basis of evidence, are relevant in adoption proceedings.[131] In a recent custody case, however, the Supreme Court has suggested otherwise.[132]

Race, as such, is never properly a consideration of government outside of the remedial context. However, some members of the Supreme Court suggest that race may properly be a factor where it is not singled out but is simply one of a number of characteristics taken into account.[133] Justice Powell, in *Bakke*, approved a race-conscious admissions decisions only if race were one of a number of factors considered to promote diversity in the student body.[134] Consideration of racial characteristics in this sense is similar to government involvement with religion. It would be unconstitu-

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127. *See infra* notes 128, 130-31.

128. *E.g.*, Otero v. New York City Hous. Auth., 484 F.2d 1122, 1136 (2d Cir. 1973).

129. *See* Farrell, *Integrating By Discriminating: Affirmative Action that Disadvantages Minorities*, 62 U. DET. L. REV. 1101 (1985).

130. *Wygant*, 106 S. Ct. at 1842-43.

131. *In re* R.M.G. and E.M.G., 454 A.2d 776, 778 (D.C. 1982).

132. Palmore v. Sidoti, 466 U.S. 429, 434 (1984) ("Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917.").

133. *See Bakke*, 438 U.S. 265.

134. *Id.* at 315-19.

tional for the government to single out religious groups or churches for special treatment, good or ill, but not improper, for example, to grant a property tax exemption to churches as part of a general exemption for nonprofit institutions.[135] A similar argument could be made for the consideration of race. However, racial characteristics have been taken into account for invidious purposes for so long in this country that the prudent course is perhaps to rule out all consideration of race by government, except to remedy past discrimination.

III. Sex as a Relevant Characteristic

No one would deny that men and women are different, but there is substantial disagreement regarding the extent to which such differences are properly subject to consideration by government. A person's sex was long considered quite relevant to many government decisions, but courts have considerably narrowed its relevance in recent years.

A. The Historical Relevance of Sex

A person's fitness to practice law is related to his or her intelligence, training, and moral character. These characteristics are considered quite relevant when a bar examining committee decides who should be admitted to the bar. And what of an applicant's sex? In 1872, Myra Bradwell applied to the Illinois Supreme Court for admission to the bar and she was denied admission because she was a woman.[136] The United States Supreme Court found that this judicial action violated no provision of the Constitution.[137] Justice Bradley, in a concurring opinion, explained that the law "has always recognized a wide difference in the respective spheres and destinies of man and woman."[138] He then catalogued some of those differences: women are timid and delicate, men are protectors of women; women are to be wives and mothers, men are to have careers; married women have no legal existence separate from their husbands, husbands act as the legal head of a family.[139] From this catalogue of differences, it followed that a woman could not be a

135. *See* Walz v. Tax Comm'r, 397 U.S. 664 (1970).
136. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).
137. *Id.*
138. *Id.* at 141.
139. *Id.*

competent attorney.

The related notions that a woman is the center of the home and family life and that a woman is in need of special protection continued to influence judicial decisionmaking into the second half of the twentieth century. At a time when the Court was invalidating state laws that regulated working hours and conditions as a restraint on liberty,[140] it upheld a state law that limited employment by women to ten hours per day.[141] The Court found that a woman's physical structure, and the performance of the maternal function in consequence thereof, justified special legislation restricting the "conditions under which she should be permitted to toil."[142] A woman's sex was relevant to protective legislation since "she is not an equal competitor with her brother," and was therefore "properly placed in a class by herself."[143] As recently as 1961, the Court approved of a system where women were ineligible for jury service unless they registered, while all males were eligible, even though this system resulted in few woman jurors actually serving.[144] The Court found it permissible for the state to conclude that a woman should be free from the civic duty of jury service unless *she* concluded that such service was consistent with her own special responsibilities as the center of home and family life.[145]

B. The Current Irrelevance of Sex

It has become widely recognized that many distinctions that are made between men and women are not based in fact. Beginning in the 1970's, courts have consistently rejected the use of sex as a relevant characteristic in two classes of cases: (1) where the classification is based on stereotypical views as to the proper roles of men and women; and (2) where sex is used as a proxy to represent a more germane characteristic that can be identified only through individualized determinations.

1. Sex Classification Based on Stereotypical Views

The Court rejects gender classifications that are based on one-

140. Lochner v. New York, 198 U.S. 45 (1905).
141. Muller v. Oregon, 208 U.S. 412 (1908).
142. *Id.* at 420.
143. *Id.* at 422.
144. Hoyt v. Florida, 368 U.S. 57 (1961).
145. *Id.* at 62.

dimensional, stereotypical views of women's proper roles. The courts have rejected as stereotypical the views that women, rather than men, should raise children,[146] that women are financially dependent on men but men are not financially dependent on women,[147] and that women are weak and timid.[148] In addition, views that women, but not men, need special state protection from the evils of sex,[149] and that women cannot compete on equal footing with men in a classroom[150] have received judicial criticism.

Many Social Security Act[151] provisions reinforced the view that women rather than men should raise children. For example, under the Act, when a covered male worker died leaving a widow and minor children, the widow and children would both receive benefits; but if a covered female worker died leaving a widower and minor children, the widower would receive no benefits for himself.[152] Congress based this distinction on the presumption that mothers were at home taking care of their children and should be given the option to remain home, while fathers were already out working and would not choose to stay home and take care of their motherless children.[153]

The presumption that women should raise children also underlied an AFDC provision that provided benefits when a father became unemployed but not when a mother became unemployed.[154] Because a mother's employment role, "if any, was secondary,"[155] her lost income did not need to be replaced. A further example of this stereotypical view was New York's domestic relations statute under which a child of unwed parents could not be adopted without the mother's consent, but the father's consent was unnecessary.[156] The legislature based this distinction on the presumption that maternal and paternal roles are invariably different in importance—that " 'a natural mother, absent special circum-

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146. *E.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

147. *E.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977).

148. *E.g.*, Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977).

149. *E.g.*, Michael M. v. Sonoma County Super. Ct., 450 U.S. 464, 494-95 (1981) (Brennan, J., dissenting).

150. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982).

151. 42 U.S.C. § 402(e)-(f) (1982).

152. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 637-38 (1973).

153. *Id.* at 652.

154. Califano v. Wescott, 443 U.S. 76, 78 (1979).

155. *Id.* at 88.

156. *See* Caban v. Mohammed, 441 U.S. 380, 385-86 (1979).

stances, bears a closer relationship with her child . . . than a father does.' "[157]

Legislation that rests upon the presumption that mothers provide better care for children can no longer survive. The Court invalidated all three of the preceding statutes.[158] Even if some empirical support exists for the belief that women are more likely to be at home with children, the Court determined this limited factfinding is insufficient to support a broad sex-based generalization about the proper roles of men and women.[159] The " 'baggage of sexual stereotypes' . . . that presumes the father has the 'primary responsibility to provide a home and its essentials' . . . while the mother is 'the center of home and family life' "[160] is not a proper basis for legislation.

A second stereotypical view that legislation has reinforced is that women are financially dependent upon men, but men are not financially dependent upon women. For example, under the Social Security Act, survivors benefits were paid to all widows of covered male earners, but survivors benefits were payable to a widower *only if* he could prove that he had been receiving at least one-half of his support from his deceased wife.[161] An Alabama statute provided another example of the financial dependence stereotype where husbands, but not wives, could be required to pay alimony upon divorce.[162]

Still another example of disparity in financial treatment involved the age of majority. In Utah, the age of majority was eighteen for women and twenty-one for men.[163] Why the difference? Lawmakers reasoned that because a boy had to prepare himself for a career, it was important that he attend college; therefore, his age of majority was twenty-one so that his parents' support obligation would continue until that time.[164] Girls, on the other hand, did not have to go to college because they were going to be wives and

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157. *Id.* at 388 (argument presented by appellees).

158. Weinberger v. Wiesenfeld, 420 U.S. 636 (1973); *Wescott*, 443 U.S. 76; *Mohammed*, 441 U.S. 380.

159. *Wiesenfeld*, 420 U.S. at 645.

160. *Westcott*, 443 U.S. at 89 (citing Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7, 10 (1975)).

161. *See* Califano v. Goldfarb, 430 U.S. 199, 201 (1977).

162. *See* Orr v. Orr, 440 U.S. 268, 270 (1979).

163. *See* Stanton v. Stanton, 421 U.S. 7 (1975).

164. *Id.* at 10.

mothers. Their age of majority could then be eighteen.[165]

The Court invalidated the three preceding statutes.[166] Notwithstanding the "old notions," the female is no longer "destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."[167] The state is forbidden to reinforce a "preference for an allocation of family responsibilities under which the wife plays a dependent role."[168]

Another stereotypical view that has influenced governmental action is that women are inherently weak and delicate. This view limited female participation in sports activities. While there may be legitimate reasons to segregate men and women in sports activities because of physiological differences,[169] the limitations placed on women in sports have gone far beyond those necessitated by physiological differences. For example, in some states, girls played basketball by a set of rules that kept each player in one half of the court, and therefore required little running.[170] Why did girls not play the full-court game that boys played? An Arkansas district court which overturned the girls' rules explained that "girls did not play the full-court game, because girls and women wore bustles, long trains, and high starched collars. They just couldn't get up and down the court fast enough."[171] However, the court found that "tradition alone, without supporting gender-related substantive reasons, cannot justify placing girls at a disadvantage for no reason other than being girls."[172]

The segregation by sex of sports programs, although usually justified on the grounds of physiological differences, may in fact result from a presumption that girls suffer from "an inherent handicap" or are "innately inferior."[173] This presumption is tested when an individual girl of exceptional athletic ability is denied the opportunity to try out for boys' teams. Where, for example, no girls are allowed to try out for football because of the danger of injury, yet any boy is allowed to try out, regardless of "his size,

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165. *Id.* at 10, 15.

166. *Goldfarb*, 430 U.S. 199; *Orr*, 440 U.S. 268; *Stanton*, 421 U.S. 7.

167. *Stanton*, 421 U.S. at 14-15.

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

169. *See infra* text accompanying notes 249-56.

170. *See* Dodson v. Arkansas Activities Assoc., 468 F. Supp. 394 (E.D. Ark. 1979).

171. *Id.* at 398.

172. *Id.*

173. Force by Force v. Pierce City R-VI School Dist., 570 F. Supp. 1020, 1029 (W.D. Mo. 1983).

speed, body type, lean body mass, fat body mass, or bone structure," the concern for "safety" is a "paternalistic" generalization that women as a class are weak.[174] In this regard, one federal district court noted:

> Any notion that young women are so inherently weak, delicate, or physically inadequate that the state must protect them from the folly of vigorous participation in athletics is a cultural anachronism unrelated to reality. The Constitution does not permit the use of governmental power to control or limit cultural changes or to prescribe masculine and feminine roles.[175]

The view that women are inherently weak, delicate, and physically inadequate is also partly responsible for the exclusion of women from combat roles in the American military. The courts do not seem to take challenges to this exclusion seriously, because "the war power of Congress knows no bounds."[176] However, there is evidence suggesting that the exclusion of women from combat roles has at least as much to do with stereotypical views about the delicacy of women as it does with genuine physical abilities.[177] Women have performed satisfactorily in combat-like roles on city police forces,[178] and in actual combat in other armies.[179] If courts were consistent in their rejection of unfounded stereotypes as the basis for sex classifications, they would look more closely at the court's allowance of physiological differences between men and women to bar women from combat units.[180]

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174. *Id.*

175. Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977).

176. Kovach v. Middendorf, 424 F. Supp. 72, 79 (D. Del. 1976).

177. *See* Kornblum, *Women Warriors in a Men's World: The Combat Exclusion*, 2 LAW AND INEQUALITY 351, 409-17 (1984).

178. *Id.* at 392-93.

179. *Id.* at 394-96.

180. The exclusion of women from combat, in itself difficult to explain, is also used to justify other forms of sex differentiation that are also otherwise unexplainable. Women are not required to register for the draft because "the purpose of registration is to develop a pool of potential combat troops." Rostker v. Goldberg, 453 U.S. 57, 79 (1981). Women in the navy are given a longer period than men before being subjected to a mandatory discharge provision because they are not eligible for combat positions and most sea duty. Schlesinger v. Ballard, 419 U.S. 498 (1975). Women are awarded a disproportionately lower number of Navy NROTC scholarships than men because women cannot be assigned to combat vessels. *Kovach*, 424 F. Supp. at 74. Justice Brennan commented on this phenomenon, "[i]ndeed, I find quite troublesome the notion that a gender-based difference in treatment can be justified by another, broader, gender-based difference in treatment imposed directly and currently by the Navy itself." *Schlesinger*, 419 U.S. at 511 n.1 (Brennan, J., dissenting).

Another stereotypical view that would be insufficient to support a sex-based classification is that women, but not men, need special state protection from the evils of sex. Thus, while a statutory rape law which only males could violate might be justified because of the physiological differences between male and females,[181] it could not be justified as a measure to protect "the virtue of young and unsophisticated girls" from violation.[182] And a gender qualification for "contact positions" in Alabama's penitentiaries could be justified because the position required continual, close physical proximity to male inmates,[183] but could not be justified on the theory that the presence of women guards in the prison invited sexual assaults.[184] Such a rationale would perpetuate "one of the most insidious of the old myths about women — that women willingly or not, are seductive sexual objects."[185]

Segregation by sex in public schools is typically justified by contentions that girls in an all-female school are more likely to speak up in class, to hold more leadership positions,[186] to have a "higher regard for scholastic achievement," and to "devote more time to homework."[187] Underlying this assertion that female students perform better in an all-female environment are the notions that women cannot compete on equal footing with men, and that they are likely to concentrate on frivolous pursuits if men are present.[188] These stereotypical notions are simply insufficient to justify segregation by sex in public schools.[189] Single-sex private schools which purport to serve some special role continue to exist only because they are not required to treat males and females equally.[190] Public schools, on the other hand, do not have that op-

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181. *See* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 471 (1981).

182. *Id.* at 495 n.10 (Brennan, J., dissenting).

183. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977).

184. *Id.* at 345 (Marshall, J., dissenting).

185. *Id.*

186. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 738 (1982) (Powell, J., dissenting, citing report of Carnegie Commission on Higher Education).

187. *See* Vorchheimier v. School Dist., 532 F.2d 880, 882 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977) (testimony of expert witness).

188. *Vorchheimer*, 532 F.2d at 887. The Third Circuit determined that "[e]qual education opportunities should be available to both sexes in any intellectual field. However, the special emotional problems of the adolescent years are matters of human experience and have led some educational experts to opt for one-sex high schools."

189. *See Hogan*, 458 U.S. 718 (state policy of denying males the right to enroll for credit at all-female nursing school violates the equal protection clause).

190. *See* 20 U.S.C. § 1681(a)(1) (1982) (prohibition against sex discrimination in education does not extend to private institutions of undergraduate higher education); *See also*

tion because of the equal protection clause.

Courts reject stereotypical notions about women as sufficient to support classifications based on sex. Although the stereotype may have placed women on a pedestal, "the pedestal . . . has . . . upon closer inspection, been revealed as a cage."[191]

2. *Sex Classifications: Using Sex as a Proxy*

Sex classifications are frequently used when, in fact, sex is not genuinely an issue, but rather represents some other relevant characteristic. This use of sex as a proxy is common where, for example, most women but few men possess the relevant characteristic. Thus, it is argued, it would be administratively inconvenient and wasteful to require individualized determinations concerning the presence of the characteristic because the assumption that women have it and men do not would *generally* be true. This kind of argumentation has not been well received by the courts.

The law has used sex as a proxy when in fact the relevant characteristic was financial dependency.[192] As an empirical matter, it might be true in our society that wives are "frequently dependent on their husbands for support, while husbands are rarely dependent on their wives."[193] Yet, a generalization based on this empirical fact is not sufficient to support a sex-based classification like the one permitting a male member of the armed forces to claim his wife as a dependent, without proving her dependence in fact, but requiring a female member of the armed forces to prove that her husband was dependent on her for more than one half of his support in order to claim him as a dependent.[194] Because financial dependency was the germane characteristic, individual determinations of financial dependency must be made.[195] The administrative convenience of using sex as a proxy for dependency is prohibited. Similarly, a presumption that wives but not husbands are dependent will not support an alimony statute that provides that husbands but not wives will be required to pay alimony upon

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Navahjo v. Alverno College, 487 F. Supp. 635 (E.D. Wis. 1980) (private college was not subject to statute prohibiting sex discrimination).

191. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 20, 95 Cal. Rptr. 329, 341, 485 P.2d 529, 541 (1971).

192. *E.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973).

193. *Id.* at 688-89.

194. *Frontiero*, 411 U.S. 677.

195. Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 151-52 (1980).

divorce.[196] Sex may not be used as a proxy for need, even if most wives but few husbands need alimony. This is especially true in divorce where the state has a specific procedure for individualized hearings to consider the parties relative financial circumstances.[197] There is no reason to use sex as a proxy for need when need itself can be readily ascertained.

Sex also has been used as a proxy in other situations where the relevant characteristics were business experience and safe driving habits. While it might be true that more men than women are able to administer an estate, a statute that prefers men over women when choosing an administrator is not permissible.[198] A probate court must hold a hearing to determine who of the competing applicants is most competent to administer an estate, without regard to sex.[199] Similarly, even if more young men than women drive under the influence of alcohol, the correlation between sex and driving under the influence cannot form the basis for gender as a classifying device.[200]

Insurance companies consider a person's sex to be an important rating factor in setting automobile insurance premiums for young people, because young males have more accidents than young insured females.[201] But what of the young male driver with an unblemished record? Even if most women are safer drivers than most men, an insurance company should evaluate each individual's record, without regard to sex. Recently one court explained that, although sex is given "high marks" by insurance companies as a rating factor, a causal relationship is lacking.[202] The court determined that causality refers "to the actual or implied behavioral relationship between a particular rating factor and loss potential."[203] Total driving mileage provides a good example of a legitimate rating factor because a strong correlation exists between miles driven and loss potential.[204] However, the court noted that "to the extent

196. Orr v. Orr, 440 U.S. 268 (1978).

197. *Id.* at 281.

198. Reed v. Reed, 404 U.S. 71 (1971).

199. *Id.* at 76-77.

200. Craig v. Boren, 429 U.S. 190, 201 (1976).

201. *See* Hartford Accident and Indemnity Co. v. Insurance Comm'r, 505 Pa. 571, ___, 482 A.2d 542, 545 (1984).

202. *Id.* at ___, 482 A.2d at 548 (citing report of National Association of Insurance Commissioners).

203. *Id.*

204. *Id.*

that sex . . . classifications may be defended on causal grounds, the implied behavioral relationships rely largely on questionable stereotype,"[205] and are not permitted.

When sports programs deny girls the chance to participate in sports activities with boys, sex is often used as a proxy for athletic ability and physical strength. Few girls want to play football, and even fewer have the ability to play in the same game with boys, but that empirical data need not produce a rule that prohibits girls from *trying out* for the team. The relevant characteristic is talent, and there is already an established procedure for determining the presence of that characteristic—the tryout. The tryout will determine whether or not the sex-based generalization, that girls cannot play on an equal footing with boys, holds true for all members of the sex.[206] The administrative convenience resulting from excluding all girls will not justify their exclusion.[207] The assertions of concern for the safety of unfit girls are unconvincing given the lack of concern for the safety of unfit boys.[208]

Some girls defy the stereotypes and are able to compete with boys in sports. Karen O'Connor is such a person—an outstanding basketball player who had competed successfully against boys and who wanted to try out for the boys' basketball team.[209] Conceding that, on the whole, boys are substantially better basketball players than girls, Karen insisted that this generalization was "not true of her."[210] She sought an individualized determination of her ability

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205. *Id.*

206. *See, e.g.*, Force by Force v. Pierce City R-VI School Dist., 570 F. Supp. 1020, 1031 (W.D. Mo. 1983). The court stated:

> Nichole Force obviously has no legal entitlement to a starting position on the Pierce City Junior High School eighth grade football team, since the extent to which she plays must be governed solely by her abilities, as judged by those who coach her. But she seeks no such entitlement here.
>
> Instead she seeks simply a chance, like her male counterparts, to display those abilities. She asks, in short, only the right to try. I do not suggest there is any such thing as a constitutional 'right to try.' But the idea that one should be allowed to try—to succeed or fail as one's abilities and fortunes may dictate, but in the process at least to profit by those things which are learned in the trying—is a concept deeply engrained in our way of thinking; and it should indeed require a 'substantial' justification to deny that privilege to someone simply because she is a female rather than a male. I find no such justification here.

Id.

207. *Id.* at 1029-30.

208. *Id.* at 1029.

209. *See* O'Connor v. Board of Educ., 545 F. Supp. 376 (N.D. Ill. 1982).

210. *Id.* at 379.

rather than the use of sex as a proxy for ability. Nevertheless, the court permitted sex to be used as a proxy for the more germane characteristic, athletic ability. The court asserted that because "the classification is reasonable in substantially all its applications, . . . the general rule can [not] be said to be unconstitutional simply because it appears arbitrary in an individual case."[211] This reasoning is difficult to justify, given the ease with which an individual determination of ability could have been made in this case.

Probably the most difficult issue involves the proper use of sex as a proxy for a more germane characteristic when that characteristic cannot be ascertained in individual cases. The principal example of this problem is the use of sex as a proxy for life expectancy. There is simply no way to determine in advance when a particular individual will die.[212] However, women, as a class, live longer than men.[213] Corporations traditionally required female employees to contribute more to pension funds,[214] or to receive smaller payouts upon retirement than male employees.[215] Many individual women, however, do not live as long as the average man; from this perspective, therefore, these women are shortchanged. Rather than using sex as a proxy for life expectancy, an insurance company should "group individuals according to attributes that have a significant correlation with mortality."[216] However, "the administrative cost of such an undertaking would be prohibitive."[217] Instead, insurance companies consider age and sex to be relevant criteria, because these are "relatively identifiable, stable, and easily verifiable."[218]

Despite the actuarial relevance of sex, the Court in a Title VII case refused to allow the use of sex as a proxy for life expectancy because "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[219] In the abstract, this statement is too

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211. *Id.* at 381 (citing O'Connor v. Board of Educ., 449 U.S. at 1301, 1306 (1980) (Stevens, J.) (denying application for a stay)).

212. *See* City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702, 724 (1978) (Blackmun, J., concurring in part and concurring in the judgment).

213. *Id.* at 704.

214. *Id.*

215. *See* Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983).

216. *Id.* at 1103 (Powell, J., dissenting).

217. *Id.*

218. *Id.*

219. City of Los Angeles, Dep't of Water and Power v. Manhart, 435 U.S. 702, 708 (1978).

broad because, for example, there are surely some sixty-year-olds who have a longer remaining life than some thirty-year-olds and yet a life insurance company may generalize about age and set its premiums accordingly. Insurers are in the business of grouping risks by assigning people to classes that correlate with risks.[220] However, in the context of this case, the assertion that even a true generalization cannot be used to exclude an individual to whom it does not apply shows the extent to which the Court insists that *sex* not be used as a proxy. Although classifications and generalizations are usually permissible, generalizations about *sex* must give way to an individualized determination concerning the characteristic that is genuinely at issue.

C. The Remaining Relevance of Sex

Despite the fact that the courts insist that sex be an irrelevant characteristic when the classification is based on stereotypical views or is used only as a proxy, sex, like race, can never be an entirely irrelevant characteristic. Like race, sex is properly taken into account when the purpose is to remedy the effects of past discrimination. And, unlike race, sex is also properly considered as a distinguishing characteristic because of the genuine physiological differences between men and women.

1. Sex Classification to Remedy Past Discrimination

When a court expressly finds that an employer discriminated in hiring on the basis of sex, in violation of a statute, the court may award sex-conscious remedies, such as hiring quotas.[221] Moreover, even without any prior judicial finding of a constitutional or statutory violation, a governmental body has broad discretion to take steps to compensate women for past discrimination.[222] Unlike affirmative action with regard to race, there is no requirement of a

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220. *Norris*, 463 U.S. at 1103-04 (Powell, J., dissenting).

221. *E.g.*, Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982).

222. *See, e.g.*, Johnson v. Transportation Ag., Santa Clara City, Ca., 770 F.2d 752, 758 (9th Cir. 1984), *cert. granted*, 55 U.S.L.W. 4379 (1987). The Supreme Court held that the Transportation Agency appropriately considered a female employee's sex as one factor in determining that she should be promoted and that the agency's affirmative action plan was consistent with Title VII. The Court upheld the lower court's decision that stated "[i]n order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination .... It is sufficient for the employer to show a conspicuous imbalance in its workforce." *Johnson*, 770 F.2d at 758.

specific "finding" of unlawful sex discrimination by the governmental body.[223]

For example, in *Califano v. Webster*,[224] the Court approved a Social Security provision that allowed female wage earners to exclude three more lower earning years than male wage earners, and thus qualify for a higher level of monthly benefits than a similarly situated male.[225] The Court justified different treatment of men and women because the statute operated directly to compensate women for past economic discrimination.[226] Because benefits are based on earnings, and women's earnings have been lower because of employment discrimination, the elimination of some of the low-earning years "works directly to remedy some part of the effect of past discrimination."[227] The Court imposed no express requirement of "findings," relying rather on a congressman's statement that "the theory was that a woman at that age [sixty-two years] was less apt to have employment opportunities than a man."[228]

Without requiring evidence of past discrimination, the use of sex as a characteristic that purports to be remedial is somewhat open-ended. In *Kahn v. Shevin*,[229] the Court approved a $500 property tax exemption that was extended to widows but not widowers.[230] The Court justified the sex distinction because it cushioned "the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[231] The state had made no express findings about economic discrimination against widows. The classification by sex, although it purported to compensate for past discrimination, reeks of stereotypical views of women ("the widow will find herself suddenly forced into a job market with which she is unfamiliar")[232] and uses sex as an inaccurate proxy for need (because not all of the included widows were poor and at the same time some of the excluded widowers were needy).[233]

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223. *Johnson*, 770 F.2d at 758.
224. 430 U.S. 313 (1977).
225. *Id.*
226. *Id.* at 318.
227. *Id.*
228. *Id.* at 319.
229. 416 U.S. 351 (1974).
230. *Id.* at 355.
231. *Id.*
232. *Id.* at 354.
233. *Id.* at 361 (White, J., dissenting).

Something more than a vague claim of a compensatory purpose should be necessary to validate sex differentiations. In the context of race, the Court has insisted on some evidence of prior racial discrimination to support race-conscious remedies.[234] Some similar requirements should be imposed with regard to the remedial use of sex classifications. It would be difficult to justify a property tax exemption for blacks only, based on the economic discrimination they have suffered. A similar exemption for widows only is equally objectionable.

2. *Sex Classifications Because of Physiological Differences*

While differences in skin color will never justify different treatment,[235] physiological differences between men and women can be a proper basis of differentiation. The clearest example of a physiological difference that justifies different treatment is a woman's ability to conceive and bear a child. Because it is an "immutable physiological fact that it is the female exclusively who can become pregnant,"[236] the Court upheld a statutory rape law which only males could violate.[237] The Court also upheld a California law that required employers to grant employees pregnancy leave of up to four months, when a woman is *actually* disabled by the pregnancy, against a challenge that it discriminated against men.[238] In the decision below, the United States Court of Appeals for the Ninth Circuit found that equality was to be "measured in employment opportunity, not necessarily in amounts of money expended—or in amounts of days of disability leave expended. . . . Equality in the disability context compares coverage to actual need, not coverage to hypothetical identical needs."[239] Affirming the Ninth Circuit's decision, the Supreme Court determined that "Congress intended 'to construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they

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234. *See supra* text accompanying notes 67-125.

235. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring) ("[I] cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense.").

236. Michael M. v. Sonoma County Super. Ct., 450 U.S. 464, 467 (1981) (citing *Michael M.*, 25 Cal. 3d 608, 611, 601 P.2d 572, 574, 159 Cal. Rptr. 340, 342).

237. *Id.*

238. California Fed. Savings and Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987).

239. California Fed. Savings and Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 783 (1986), *aff'd*, 107 S. Ct. 683 (1987).

may not rise.' "[240]

The physiological fact that women alone bear children also means that the identity of a child's mother will rarely be in doubt but the identity of a child's father, if the child is illegitimate, will frequently be unknown.[241] Because of this uncertainty about a father's identity, the Court upheld a statute that prevented a father who had not legitimated his child from maintaining a wrongful death action even though the illegitimate child's mother could bring such an action.[242] If this sex classification had been based on the stereotypical view that the mother's role is more important to a child than the father's role, then it should have been invalidated.[243] Moreover, if the classification had been based on the characteristic of parental concern, it would not have been invalidated because an individualized hearing would have determined that the father in that particular case was a caring parent.[244] However, the Court upheld the statute, it seems, because the preference for mothers over fathers was closely connected to the physical reality that only women bear children.[245]

The recognition of physiological differences between the sexes is also legitimate when it involves concerns for personal privacy. Thus, a state correctional facility may establish gender criteria for "contact positions," those requiring continual close proximity to inmates of the institution.[246] In addition, a subsidized housing program may restrict a single parent with a child of the same sex as the parent to a one bedroom apartment, and permit a single parent with a child of the opposite sex to rent a two-bedroom unit.[247] And, opponents of the equal rights amendment notwithstanding, it is permissible to have separate men's and women's bathroom facilities.[248]

The propriety of separate sports programs for males and fe-

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240. *Guerra*, 107 S. Ct. at 689 (quoting *Guerra*, 758 F.2d at 396).

241. *See* Parham v. Hughes, 441 U.S. 347, 355 (1979) (citing Lalli v. Lalli, 439 U.S. 259 (1978)).

242. *Parham*, 441 U.S. 347.

243. *See* Caban v. Mohammed, 441 U.S. 380, 388-89 (1979).

244. *Parham*, 441 U.S. 347, 361 (White, J., dissenting) ("[I]t is conceded that appellant signed his child's birth certificate, continuously contributed to the child's financial support, and maintained daily contact with him . . . .").

245. *Id.* at 355 n.7.

246. Dothard v. Rawlinson, 433 U.S. 321, 336-37 (1977).

247. Braunstein v. Dwelling Managers, Inc., 476 F. Supp. 1323 (S.D.N.Y. 1979).

248. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1076 (1978).

males is perhaps the most difficult of the cases concerning the physiological differences between the sexes. First, there is general agreement that females as a class have a "higher ratio of adipose tissue to lean body weight as compared with the male and females have less bone density than males."[249] "[M]ales, as a class, tend to have an advantage in strength and speed over females. . . ."[250] These are physiological differences. Because of these differences, if males and females played *all* sports together, males would tend to dominate play in some sports and thus diminish opportunities for females to excel or even to participate.[251]

However, unlike a reproductive system, these "physiological differences" are not necessarily true for *individual* females. The range of differences among individuals within the sexes is greater than the average differences between the sexes.[252] Some girls are stronger and faster than the majority of boys. Some girls have a lower fat to lean ratio and more bone density than the majority of boys. Some girls have developed their sports skills so that they can compete successfully against boys their age. The segregation of boys and girls sports team bears a striking resemblance to the use of sex as a proxy for a more relevant characteristic—here, athletic ability. Because sports teams already have an established process for making individualized determinations of ability—the try-out—there is little justification for preventing girls from trying out for boys teams.[253] If, as suggested, few girls will have the strength, speed or ability to compete successfully with boys, then most defections by girls to boys teams will be short-lived, and the situation self-regulating.[254]

On the other hand, even if a few girls are able to compete successfully on boys teams, the majority of girls could not compete on equal footing with boys in those sports that emphasize strength and speed. Boys as a class would tend to dominate many sports if they competed with girls.[255] Is there any justification for prohibit-

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249. Hoover v. Meiklejohn, 430 F. Supp. 164, 166 (D. Colo. 1977).

250. *Id.*

251. O'Connor v. Board of Educ., 545 F. Supp. 376, 379 (N.D. Ill. 1982).

252. *Meiklejohn*, 430 F. Supp. at 169.

253. *Cf.* Orr v. Orr, 440 U.S. 268, 281 (1979) (It is not necessary to use sex as a proxy for need when the state has an already established statutory scheme in which individualized hearings on financial circumstances already occur).

254. Force by Force v. Pierce City R-VI School Dist., 470 F. Supp. 1020, 1026 (W.D. Mo. 1983).

255. *O'Connor*, 545 F. Supp. at 379.

ing a boy from trying out for a girls' volleyball team when it has just been argued that a girl should be allowed to try out for a boys' basketball team? The obvious answer—physiological differences—is inadequate to the extent that individual determinations of speed, strength, and talent can be made at tryouts. At mixed-sex tryouts for a volleyball team, for example, boys would win most of the positions. The justification for keeping boys out of girls' sports must be *compensation*; compensation in part for societal discrimination, but, even moreso, compensation for the lesser speed, strength, bone mass and muscle tissue possessed by the class of females.[256] The exclusion of boys from girls' teams is justified, and sex is a relevant characteristic therein, because the sex distinction is used for a compensatory purpose. The exclusion of girls from tryouts for boys' teams, however, is not justified, because the exclusion serves no compensatory purpose and is not mandated by physiological differences. Rather, it is the result either of stereotypical views about females or the inaccurate use of sex as a proxy.

The physiological fact that women, but not men, bear children renders sex a relevant characteristic to government when it classifies. The physiological differences in anatomy between men and women and the right to privacy also make sex a relevant characteristic in classifying public bathrooms. Beyond that, sex classifications that purport to be based on physiological differences should be examined closely to see if the classification is in fact based on stereotype or uses sex incorrectly as a proxy for a more germane characteristic.

IV. Sexual Preference as a Relevant Characteristic

Is a person's sexual preference ever relevant to the government when it classifies? Many courts seem to think so. While *Plessy v. Ferguson*[257] and *Bradwell v. Illinois*[258] were decided in the nineteenth century, one need not look back to the hoary past to find examples of the same sort of stereotypical, one-dimensional reasoning that makes *Plessy* and *Bradwell* objects of ridicule to-

256. *See* Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) ("[T]he governmental interest claimed is redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes.").

257. 163 U.S. 537 (1896).

258. 83 U.S. (16 Wall) 130 (1872).

day. In *Plessy*, the Court was unable to move beyond its initial perception that certain passengers were black and others white. The Court never asked—so what? In *Bradwell*, the Court was unable to move beyond its initial perception that Bradwell was a woman, and all the lawyers they knew were men. The Court never asked—so what? Today, it is not uncommon for courts to find that a person's sexual preference is relevant to the state when it classifies.[259] Again, the courts are unable to move beyond their initial preoccupation with an individual's private sexual practices and say—so what? Habit, rather than analysis, prevents the question from being asked.[260]

Sexual preference is considered a relevant characteristic in several contexts. Homosexuals are dismissed from their jobs,[261] denied custody of their children,[262] and excluded from the military.[263] They are not allowed to immigrate into this country or become naturalized citizens.[264] The problem with these distinctions is that every traditional justification for the use of sexual preference as a classifying trait is unpersuasive.

The classic justification has been that homosexuals are criminals and thus should be treated differently. A substantial

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259. However, in two states discrimination on the basis of sexual preference is prohibited. *See* WIS. STAT. ANN. §§ 111.32, .321, .322, .36d (West Supp. 1985-86) (employment discrimination because of sex includes discrimination because of an individual's sexual orientation); WIS. STAT. ANN. § 101.22 (West Supp. 1985-86) (prohibition of discrimination on the basis of sexual orientation in housing); Curran v. Mt. Diablo Council of Boy Scouts of Am., 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983), *appeal dismissed*, 104 S. Ct. 3574 (1984) (prohibition against arbitrary discrimination in the Civil Rights Act includes prohibition against discrimination based on sexual preference); in addition to the states of California and Wisconsin, a number of cities have ordinances that prohibit discrimination on the basis of sexual preference. *See Hearings on Civil Rights Act Amendments of 1981: Hearings on H.R. 1454 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong. 2d Sess. 23 (1982) (list of municipalities that prohibit discrimination on the basis of sexual orientation).

260. *Cf.* Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting).

261. Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 559 P.2d 1340 (1977) (public school teacher discharged for "immorality" when it became known he was a homosexual).

262. Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("The father's continuous exposure of the child to his immoral and illicit [homosexual] relationship renders him an unfit and improper custodian as a matter of law.").

263. Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir.), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984) (upholding discharge of Navy officer for homosexual conduct).

264. *In re* Longstaff, 716 F.2d 1439, (5th Cir. 1983) (petitioner ineligible for naturalization because, being excludable on the ground of his homosexuality when he arrived here, he was not lawfully admitted to the United States).

number of states have "sodomy" statutes that prohibit oral and anal sexual relations.[265] The existence of these statutes has been used to justify discrimination against homosexuals in employment,[266] child custody decisions,[267] and immigration decisions,[268] the underlying assumption is that because homosexual behavior is made criminal by statute, an admitted homosexual can be presumed to have violated the law and is thus presumptively unfit. This justification cannot be asserted in the majority of jurisdictions that have repealed sodomy statutes. Even where such statutes still exist, the constitutional right to privacy established by the Court in *Griswold v. Connecticut*,[269] *Stanley v. Georgia*,[270] *Roe v. Wade*,[271] and *Eisenstadt v. Baird*[272] should provide protection from such government interference. A person's consensual, private sexual choices are "quintessentially private and [lie] at the heart of an intimate association beyond the proper reach of state regulation."[273]

However, one must contend with the Court's recent decision in *Bowers v. Hardwick*.[274] Confounding the expectations of scholars,[275] the Court insisted that the constitutional right to privacy

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265. *See* Bowers v. Hardwick, 106 S. Ct. 2841 (1986). Until 1961, all fifty states outlawed homosexual sodomy and twenty-four states and the District of Columbia still do.

266. *Gaylord*, 88 Wash. 2d 286, 559 P.2d 1340 (1977).

267. *Roe*, ___ Va. ___, 324 S.E.2d 691 (Va. 1985).

268. *Longstaff*, 716 F.2d 1439.

269. 381 U.S. 479 (1965) (Connecticut statute prohibiting the use of contraceptive devices constituted an unconstitutional invasion of privacy, at least as applied to married couples).

270. 394 U.S. 557, 568 (1969) ("[T]he states retain broad power to regulate obscenity: that power simply does not extend to mere possession by the individual in the privacy of his own home.").

271. 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

272. 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free of unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

273. Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), *rev'd*, 106 S. Ct. 2841 (1986); *see also* Baker v. Wade, 553 F. Supp. 1121, 1140 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289, *reh'g denied*, 774 F.2d 1285 (5th Cir. 1985) ("Every individual has the right to be free from undue interference by the state in important and intimate personal matters . . . . The right of two individuals to choose what type of sexual conduct they will enjoy in private is just as personal, just as important, just as sensitive—indeed even more so—than the decision by the same couple to engage in sex using a contraceptive to prevent unwanted pregnancy.").

274. 106 S. Ct. 2841 (1986).

275. *E.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1978) ("The argument that consenting homosexuals whose intimacies offend no one who does not seek offense should be protected from governmental intrusion . . . should ultimately prevail in light of the further

extended only to decisions regarding "whether or not to beget or bear a child."[276] "[A]ny claim that these cases nevertheless stand for the proposition that any kind of private consensual conduct between consenting adults is constitutionally insulated from state prescription is unsupportable."[277] The five member majority of the Court was unmoved by the dissenters' view that "[t]he fact that individuals define themselves in a significant way through their intimate sexual relations with others suggests, in a nation as diverse as ours, that there may be many 'right' ways of conducting those relationships."[278]

The majority in *Bowers* is wrong because they give a niggardly and strangely limited reading of the Court's earlier privacy decisions. It is absurd that the right to privacy is so strong that it outweighs the interests of an unborn human fetus[279] yet is not strong enough to outweigh the approbation of those who are offended at the thought of what might be going on in someone else's bedroom.[280] It is absurd that the police cannot enter a citizen's home to search for pornographic materials,[281] but are free to break into that citizens's bedroom to observe the type of sexual acts engaged in. How can the right of privacy encompass "the right of the *individual*, married or single, to be free of unwarranted government intrusion into matters . . . fundamentally affecting a person . . .,"[282] but not extend to sexual intimacy, "a sensitive, key relationship of human existence, . . . constituting in significant fashion, the manner in which individuals define themselves[?]"[283] Finally, the *Bowers* Court passes over, not only the impossibility of enforcing sodomy statutes without an undercover policeman in everyone's bedroom,[284] but also that sodomy cases are seldom prosecuted.[285]

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and crucial fact that the conduct proscribed is central to the personal identities of those singled out by the state's law.") (footnote omitted).

276. *Bowers*, 106 S. Ct. at 2844 (citing Carey v. Population Services Int'l 431 U.S. 678, 688-89 (1977)).

277. *Id.*

278. *Id.* at 2851.

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

280. *See Bowers*, 106 S. Ct. at 2856 (Blackmun, J., dissenting) ("This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their li[ves] differently.").

281. Stanley v. Georgia, 394 U.S. 557 (1969).

282. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in original).

283. *Bowers*, 106 S. Ct. at 2851 (Blackmun, J., dissenting).

284. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) ("Would we allow the

The absence of prosecution indicates that the state is not so much interested in eliminating conduct but rather in establishing a basis for discrimination against homosexuals in other areas. A desire to harm an unpopular group is never a legitimate state interest,[286] and the existence of a sodomy statute should thus never be a justification for making a person's sexual preference a relevant characteristic.

A second justification for the relevance of sexual preference-religious precept—is easily dismissed. Courts have cited the Book of Leviticus[287] and the New Catholic Encyclopedia[288] to prove that homosexuality is immoral and thus a proper subject of state prohibition. This line of argument suggests an attempt to establish religious doctrine and is prohibited by the first amendment.[289] It is as justifiable as would be a statute that required, on religious grounds, that all males be circumcised.

A third justification for the relevance of sexual preference is "morality and decency."[290] "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the due process clause, the courts will be very busy indeed."[291] It is argued that the ultimate justification for most laws rests upon society's morality, and that choices made by the majority, through the electoral process, are "conclusively valid for that very reason."[292] Thus if the morality of

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police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

285. *Bowers*, 106 S. Ct. at 2848 n.2 (Powell, J., concurring) ("It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades . . . . The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct.").

286. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534-35 (1972).

287. Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1202 n.2 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

288. Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, 289, 559 P.2d 1340, 1343 (1977).

289. *See Bowers*, 106 S. Ct. at 2855 (Blackmun, J., dissenting) ("Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that section 16-6-2 represents a legitimate use of secular coercive power. A state can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus.").

290. *Commonwealth's Attorney*, 403 F. Supp. at 1202.

291. *Bowers*, 106 S. Ct. at 2846.

292. Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984).

the majority, as evidenced through the enactment of sodomy statutes, considers certain sexual practices abominable, the courts are to respect that decision.

This argument has two deep flaws. First, it implicitly accepts the view that there is one "morality" in the world that forms the basis for enacting legislation. If the discussion is framed this way, then the challenge to discrimination on the basis of sexual preference is an argument on behalf of immorality. It is very difficult to win an argument on behalf of immorality. But, of course, this statement of the issue prejudges the result. While there may be many people who consider homosexuality to be abhorrent and immoral, there are also many people who consider persecution of homosexuals to be abhorrent and immoral.[293] Which morality is to prevail?

A convenient answer to this question is that the morality of the majority receives conclusive weight,[294] because in a democracy, laws derive their validity from the consent of the governed. But this is precisely the second flaw. Our constitutional system was designed, in part, to protect individuals from the majoritarian political process.[295] In *Roe v. Wade*, the morality of the majority, as evidenced in the legislative process, viewed abortion as immoral and criminal.[296] The challenge to abortion statutes could have been considered an argument for immorality. But the Court considered a competing moral view—that it was immoral for the government to force a woman to bear an unwanted child. The Court refused to give conclusive weight to the moral majority because the statute implicated a most private and personal decision. The lesson to be drawn is that "morality," a vague and variable term, should never be given conclusive weight, and that, as the basis for legislation, should be approached with great skepticism.

A fourth justification for the relevance of sexual preference in court decisions is that homosexuals create hostility. The United

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293. *Cf. Bowers*, 106 S. Ct. at 2856 (Blackmun, J., dissenting) ("[D]epriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our nation's history than tolerance of nonconformity could ever do.").

294. *Dronenburg*, 741 F.2d at 1397.

295. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 128 (1973) ("relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.").

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

States Navy explained its policy of mandatory discharge of homosexuals on the ground that "homosexuality adversely impacts on the effective and efficient performance of the mission of the United States Navy in several particulars."[297] The first "particular" noted is that "the great majority of naval personnel" despise and detest homosexuality and that tensions and hostilities would certainly exist between known homosexuals and the great majority.[298] A public school board justified its firing of a homosexual teacher, not because of the quality of his teaching, but because one student and three teachers found his presence on the staff objectionable, and because the principal believed his presence on the staff would create problems.[299]

In first amendment jurisprudence, the government has never been able to stifle free speech merely because those who hear it find it objectionable and offensive.[300] Likewise, in racial discrimination cases, the fact that a particular remedy will provoke widespread, even violent, opposition has never been a proper ground for ignoring the substantive rights of litigants.[301] In deciding which parent in a racially-mixed household should have custody of a child, "the effects of racial prejudice, however, real, cannot justify a racial classification removing an infant child from the custody of its natural mother."[302] Widespread public distaste toward homosexuality is not, therefore, a legitimate state interest to rationalize a denial of equal protection or to justify a denial of the right of privacy.[303] The mere desire to harm a politically unpopular group is never a legitimate classifying tool.[304]

None of the justifications for the relevance of sexual preference[305] can withstand scrutiny. Quite the contrary, there is no con-

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297. *See* Beller v. Middendorf, 632 F.2d 788, 811 (9th Cir. 1980) (citing Affidavit of Assistant Chief of Naval Personnel).

298. *Id.* at 811 n.22.

299. Gaylord v. Tacoma School Dist. No. 10, 88 Wash. 2d 286, ____, 559 P.2d 1340, 1346-47 (1977).

300. Cohen v. California, 403 U.S. 15 (1971) ("Fuck the Draft.").

301. *E.g.*, Buchanan v. Warley, 245 U.S. 60, 81 (1917).

302. Palmora v. Sidoti, 466 U.S. 429 (1984).

303. *Baker*, 553 F. Supp. at 1145.

304. U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528, 534-35 (1973).

305. This catalogue of purported justification is not exhaustive, but does include the less irrational arguments. Other justifications have been asserted. Sexual preference is relevant, it is said, because gays are child molesters. There is no evidence whatsoever to support this view. *See Baker*, 553 F. Supp. at 1130. Sexual preference is relevant, it is said, because gays are sick. The American Psychiatric Association, the American Medical Association, and

nection between a person's sexual preference on the one hand, and his success as a teacher, parent, soldier, or citizen, on the other hand. The lack of any connection between sexual preference and performance is repeatedly made clear in the reported cases where it is admitted that the individual was an outstanding teacher[306] or soldier,[307] with high evaluations of performance, or an excellent parent,[308] *until* that individual's homosexuality was discovered. Homosexuality per se is viewed in these cases as a disabling restraint, despite the substantial contrary evidence that it is irrelevant to job performance or parenthood. Imagine a school board that tried to fire every teacher who had engaged in a heterosexual act of oral intercourse. The dismissals could be justified because oral intercourse is prohibited in those states with sodomy statutes and is viewed by some as immoral. Yet the public response to such an attempt would certainly be that the sexual practices of teachers is none of the school board's business[309] and that the subject is entirely irrelevant to job performance. Hostility toward homosexuality, and habit, make it appear normal to consider such a sexual preference as relevant.

The assertion that one's sexual preference has no connection with job performance may seem to be a procedural standard, that is, it emphasizes the *connection* between a characteristic and job performance. But the assertion is inevitably a substantive rule—that sexual preference is an irrelevant characteristic. For the person who considers homosexuality abhorrent and immoral, the fact of homosexuality without more makes a person a bad teacher. Where an admitted homosexual is allowed to teach, it is argued, the students' knowledge thereof impairs his efficiency as a teacher, even if, notwithstanding, "he has a flawless record of excellence in

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the American Bar Association, *inter alia*, reject this view. *See id.*

306. *E.g., Gaylord*, 88 Wash. 2d at ___, 559 P.2d at 1346 (plaintiff had been a teacher for over twelve years and had received favorable evaluations of his teaching throughout that time).

307. *E.g., Dronenburg*, 741 F.2d at 1389 (plaintiff had served for nine years in the Navy with an unblemished service record and earned many citations praising his job performance).

308. *E.g.*, Roe v. Roe, ___ Va ___, ___, 324 S.E.2d 691, 692 (Va. 1985) ("Aside from the central issue pervading this case, each parent had been a fit, devoted, and competent custodian.").

309. *Cf. Gaylord*, 88 Wash. 2d at ___, 559 P.2d at 1350 (Dolliver, J., dissenting) ("Historically, the private lives of teachers have been controlled . . . in many ways. There was a time when a teacher could be fired for a marriage, a divorce, or for the use of liquor or tobacco . . . . [T]he practice of firing teachers for these reasons has ceased . . .").

his classroom performance."[310] If the limitation on the consideration of sexual preference were merely procedural, and required a showing of a connection with job performance, some would insist that they had established the required connection.[311] The assertion must then be stated as a substantive rule. Sexual preference is an irrelevant characteristic, because each of the justifications offered to demonstrate its relevance—the criminal law, religious precept, morality and decency, and public hostility—is devoid of merit and unacceptable under our constitutional scheme.

V. Conclusion

Constitutional questions are not settled by a consensus of public opinion, for the written constitution places "in unchanging form limitations upon legislative action."[312] But this assertion is not to be taken literally. The Constitution has changed and with it the substantive protections afforded by notions of equality. It turns out that equality is not so much an unchanging formal principle (likes should be treated alike) but a series of substantive rules about which characteristics are relevant in which situations. These substantive rules are also changing. A person's race, once quite relevant to a host of classifications, is no longer relevant. The relevance of a person's sex, once quite relevant to a host of classifications, has been severely limited. A person's sexual preference is still considered quite relevant in a variety of situations, but that relevance is beginning to be questioned seriously.

Is there an overarching principle that explains when certain characteristics are relevant? Commentators suggest that the government should only take into account characteristics that involve a person's moral status[313] or serve a public value.[314] This article has suggested the problems with the first formulation. Judgments about what characteristics contribute to or detract from a person's moral status invariably differ. We are left with a choice between

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310. *Id.*

311. *Id.* at ____, 559 P.2d at 1346-47. Plaintiff's performance as a teacher was sufficiently impaired by his known homosexuality to be the basis for discharge.

312. Muller v. Oregon, 208 U.S. 412, 420 (1908).

313. *See* Perry, *The Principle of Equal Protection*, 32 Hastings L.J. 1133, 1139, 1141 (1981).

314. *See Public Values*, *supra* note 24, at 134 ("When the government operates to benefit A and hinder B, it may do so only if it is prepared to justify its decision by reference to a public value.").

competing moralities. A similar problem pervades the second formulation. There is a broad range of views regarding what constitutes a public value. The separation of the races and the protection of women from the dangers of the working world were once viewed as public values. Again we would be left with a choice between competing "public values." The search for a central and unifying principle, like that for the Holy Grail, seems destined to be fruitless.

No shorthand formula exists that contains all the information necessary to explain when certain characteristics are relevant. But at least we can require that government justify the reasons for making a particular characteristic relevant; that is, the government should be required to bring to the surface the assumptions underlying a determination of relevance, and see if those assumptions can survive the light of day. Why were public bathrooms racially segregated?—because blacks were inferior and unclean. This underlying assumption, now articulated, cannot survive scrutiny. Why did women but not men receive alimony?—because a woman's proper place was in the home, dependent on her husband. This underlying assumption, once articulated, cannot survive scrutiny. Why are homosexuals fired from their jobs?—because they are immoral and offend people. Once again, the underlying assumption, once articulated, cannot survive scrutiny. The conclusion to be drawn is that characteristics are irrelevant if, in each individual case, an adequate, defensible justification of their underlying assumptions cannot be made.