THE IDEOLOGICAL DISTINCTIONS BETWEEN SEX AND RACE DISCRIMINATION AS FOUND IN SELECTED SUPREME COURT CASES AND BRIEFS OF COUNSEL

by

Mary Hill Rojas

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APPROVED:

M. David Alexander
Co-Chairperson

Sheila Slaughter
Co-Chairperson

David J. Parks

Larry R. Morrison

Margaret A. Eisenhart

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Blacksburg, Virginia

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This dissertation is dedicated to my children,

and , who began to believe "writing a dissertation" was a way of life. Also, it is dedicated to my parents, who never once wavered in their support, and to my sisters and friends, who served as buoys throughout the stormy writing process. Finally, I give my thanks to my doctoral committee, especially my two major advisors, Dr. David Alexander and Dr. Sheila Slaughter, for their constant encouragement, critiques, and suggestions.

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CHAPTER I

The Crucial Variables of Race and Sex

> The misery of the black people oppressed in American society cannot be compared with that of any of the unfortunate classes among other peoples. Everywhere there exists hostility between the rich and the proletariat; however, the two classes are not separated by any insurmountable barrier: the poor become rich, the rich, poor; that is enough to temper the oppression of the one by the other. But when the American crushes the black population with such contempt, he knows that he need never fear to experience the fate reserved for the Negro.
>
> Alexis de Tocqueville, 1835

> In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes, and to make them keep pace one with the other but in two pathways which are always different.
>
> Alexis de Tocqueville, 1835

Historically, women and blacks in the United States have been subject to discrimination in various forms.* Both have been denied the right to vote and to serve on juries. Both have been denied entrance to certain public institutions of higher education and denied access to certain areas of employment. Both race and sex, as immutable characteristics, have been used at various times to relegate blacks and women to an inferior position in society without regard to individual differences and capabilities.

This legal and social discrimination of blacks and women has taken its toll as attested to by a long line of dismal statistics. Fifty percent of all women 16 and over are in the labor force and 52% of all wives work outside the home. Yet the median income of full-time year round workers in 1979 was $9,476 for black women, $10,244 for white women, $12,738 for black men, and $17,427 for white men. Women earn less than men even if they have more education. A woman with 4 years of college has a median income which is less than a man with only an 8th grade education (NOW, ERA Countdown Campaign, 1981, p. 1). Of the families living below the poverty line 49% are headed by women (Women's

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*It is recognized that "women and blacks" are not mutually exclusive. However, the double jeopardy suffered by black women will not be treated here. See Gerda Lerner's Black Women in White America (1973) for a good introduction to issues involving the black woman.

Bureau, 1979, p. 2). In education, girls start out ahead of boys in virtually every field, yet by 12th grade girls show a steady decline in not only achievement scores but IQ scores as well (Sadker, 1979).

For blacks the situation is similar to that of women. Nearly one-third of all blacks have income below the poverty level. Fourteen percent of all blacks are unemployed. Only one-fourth of all blacks have an income of over $15,000 a year. In education, blacks have completed an average of 9 years of school compared to an average of 12 for whites (Lawyers Committee, 1978, pp. 13-16).

The civil rights movement of the 1960's, while focusing on the plight of the black in the United States, also drew attention to the role of women in society. As a consequence, an enormous literature has resulted dealing with both race and sex discrimination and its results. However, for the most part, these two areas have been treated separately. Nevertheless, often there has been the assumption that both forms of discrimination were grounded in the same dynamics. There is a need to examine more closely the assumption of a relationship between racism and sexism.

The Problem and the Need

Historically the justification for race and sex discrimination in the United States often has been viewed within a similar context. As an 1852 editorial in the New

York Herald stated, "How did women first become subject to man as she now is all over the world? By nature, her sex, just as the negro, is and always will be, to the end of time, inferior to the white race, and, therefore doomed to subjection" (Davidson, Ginsburg, & Kay, 1974, p. 2). When a legal status had to be found for blacks in the 17th century, "the nearest and most natural analogy was the status of women and children" (Myrdahl, 1944, p. 1073). Therefore, it is no surprise that the abolitionist movement in the United States was closely coordinated with a fight for women's emancipation. As Lucy Stone, feminist and abolitionist, wrote in 1847, "I expect to plead not for the slave only, but for suffering humanity everywhere. Especially do I mean to labor for the elevation of my sex" (Flexner, 1959, p. 69). Elizabeth Cady Stanton, a contemporary of Lucy Stone, saw clearly the linkages of race and sex discrimination when she claimed:

> Prejudice against color, of which we hear so much, is no stronger than that against sex. It is produced by the same cause, and manifested very much in the same way. The Negro's skin and the woman's sex are both prima facie evidence that they were intended to be in subjection to the white Saxon man. (Chafe, 1977, p. 44)

Not only historically has the position of blacks and women been viewed as analogous. Gunnar Myrdahl, the Swedish sociologist, in his book An American Dilemma, saw "the important similarities between the Negro problem and the

women's problem" in the United States (Myrdahl, 1977, p. 1073). The sociologist, Helen Mayer Hacker, also wrote of the similarities in her 1951 article, "Women as a Minority Group," in which she compared characteristics of blacks to those of women. Certainly the current women's movement has developed political strategies on the assumption that there is a relationship between racism and sexism as have legislators when enacting anti-discrimination legislation. Title VII of the Civil Rights Act of 1964, for instance, which prohibits discrimination in employment, includes both race and sex as legislatively suspect classifications. Similarly, Title IX of the Education Amendments of 1972, which prohibits discrimination in education based on sex, was written as being analogous to Title VI of the Civil Rights Act of 1964 which prohibits discrimination in education based on race.

Although a case can be made for the analogy between racism and sexism, in recent years, anti-discriminatory law, when used in sex discrimination cases, has been interpreted and implemented quite differently from cases involving race discrimination. As Holly Knox, director of the Project on Equal Educational Rights, has said in speaking of Title IX in comparison to Title VI, "Califano is trying to set up a double standard, condoning rules that discriminate on the basis of sex while he bans rules that discriminate on the basis of race and national origin. There is no

justification for this in the law or the legislative history" (NOW Times, August, 1979, p. 7). This statement was comparable to the findings in 1972 of two New York University professors, John D. Johnston and Charles L. Knapp, when they wrote,

> Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist"—at least their opinions in that area exhibit a conscious attempt to free themselves from habits of stereotypical thought with regard to discrimination based on color. With respect to sex discrimination, however, the story is different. "Sexism" . . . is as easily discernible in contemporary judicial opinions as racism ever was. (Johnston & Knapp, 1971, p. 676)

The greater concern within society for racism than for sexism also has its roots in history. After the Civil War in the United States, the leading male abolitionists did not want the "Woman's Question" to complicate their work of putting the country back together. As a consequence, although feminists had fought to have women included in the Fourteenth Amendment, which guaranteed the equal protection of the laws to blacks after the Civil War, only men were included. By way of emphasis the word "male" was mentioned three times in the Amendment. The feminists of the 1860's had failed in their attempts to make "the privileges and immunities" of the Fourteenth Amendment apply to women (Sachs & Wilson, 1978, pp. 82-85). A similar fight by feminists 100 years later in the 1960's to include sex as well as race in Title VI of the Civil Rights Act of 1964

also was unsuccessful. Title VII of that same Act, however, does include the word "sex," but only because of a political miscalculation on the part of sourthern Congressmen. The Congressmen thought that by including "sex," the bill, assuring race equity in employment, would be viewed as ludicrous and defeated.

The early academicians viewing women as a minority group, such as Myrdahl and Hacker, while emphasizing the similarities of the position of women and blacks, also recognized the dissimilarities. Myrdahl noted, for example, that in the years before the Civil War the woman in the American South was "elevated as an ornament and looked upon with pride, while the Negro slave became increasingly a chattle and a ward" (Myrdahl, 1944, p. 1073). Some writers in the 1970's, such as Catherine Stimpson, found feminists "seeking to exploit the passion and energy of the civil rights movement without coming to grips . . . with the differences between women and blacks" (Chafe, 1977, p. 58). William Chafe, writing in 1976, stated, "If powerful similarities exist for the condition of women and that of blacks, however, there are even stronger arguments against the analogy" (Chafe, 1977, p. 51).

Nevertheless, although these writers recognized the substantive differences between women and blacks, there was general agreement that the comparative study of racism and

sexism had value. William Chafe admitted that "it may be self defeating to become embroiled in a quarrel over which is more unequal or the victim of greater opperssion" (Chafe, 1977, p. 78). He felt, rather, that

> The more salient question is how a condition of inequality for both is maintained and perpetuated—through what modes is it reinforced? By that criterion, continued exploration of the analogy of sex and race promises to bring added insight to the study of how American society operates. (Chafe, 1977, p. 78)

Richard A. Wasserstrom, Professor of Law and Philosophy at the University of California, wrote:

> In our own culture the first thing to observe is that race and sex are socially important categories. They are so by virtue of the fact that we live in a culture which has, throughout its existence, made race and sex extremely important characteristics of and for all the people living in the culture. (Wasserstrom, 1977, p. 584)

Therefore, he suggested that to be able to "think clearly" about racism and sexism, it was important to look at "the ways they are and are not analytically interchangeable phenomena" (Wasserstrom, 1977, p. 584).

In further support of the value of the examination of racism in comparison to sexism, Ronald T. Takaki of Stanford University, wrote as late as 1979,

> While studies by historians like Eugene Genovese and Eleanor Flexner have advanced our understanding of the subordination of blacks and women respectively, they have tended to analyze the two groups separately. Such a fragmented approach has precluded a comparative analysis of the stereotypes applied to blacks and women and fails to recognize how the oppression of different

> groups served common needs of white men. (Takaki, 1979, p. 136)

The comparison of racism and sexism in the United States, then, is seen as being valuable in the study, as William Chafe notes, of "the forms" by which the dominant group has kept women and blacks in "their place," outside of the United States' social, economic, and political mainstreams (Chafe, 1977, p. 59). One way of exploring these "forms" is by looking at society's institutions and their supporting ideologies.

Ideology integrates beliefs into a more or less coherent picture of the operations of the political, economic, and social order, delineating who exercises power and on what grounds. In order to keep women and blacks in "their place," an ideology of beliefs and attitudes had to be developed over time to support the system where power and advantage were concentrated in the hands of white males. Ideology also "outlines criteria for the moral evaluation . . . on the fairness of who gets what, when, where, and how" (Silva & Slaughter, 1980, p. 51). The "fairness" of women being excluded from the vote or of blacks being considered property was justified by an ideology of beliefs and attitudes about both of these groups' place in society. Richard Wasserstrom wrote, then, that the fundamental question is, "What are [society's] institutions, attitudes, and ideologies in respect to matters of race and sex?" (Wasserstrom,

1977, p. 583). It is this question that this study hopes to illuminate by focusing on the ideological distinctions between race and sex discrimination as found in the law over time. Specifically, by looking at one of society's most powerful institutions, the legal order, this study will explore: (1) how one of society's major institutions, the Supreme Court, has justified or condemned, over time, a condition of inequality with respect to blacks and women, (2) how this justification or condemnation has changed over time, and (3) how the justification or condemnation of the legal separation of the sexes has differed from that for the separation of the races.

Methodology

Data Selection

The source of data for this study consists of selected United States Supreme Court cases, including both the Court opinions and briefs of counsel, dealing with race and sex discrimination from the Civil War to the present day. The Supreme Court, since its inception, has heard more than 400 cases involving questions of race and sex discrimination. If the Court's opinions and the briefs of counsel were to be studied in depth, it was apparent this number had to be limited. Also, for the purposes of this study, the selected cases needed to be historically representative in order to

explore any shift in ideology over time. Therefore, a selection procedure was paramount.

The first step in selection was to set up historical categories reflective of the public ideology concerning race and sex discrimination at various stages in United States history. The notion was that these categories for both race and sex would be similar, given that women's issues often followed the fight for civil rights for blacks. Therefore, a review of the literature dealing with chronologies of the black American's changing legal status with respect to the Supreme Court was first conducted (see Appendix A-1). There was a general consensus in the literature of historical periods:

1. Before freedom from slavery until after the Civil War.
2. From 1865, the end of the Civil War, until 1883 when the Supreme Court ruled in the Civil Rights Cases that Congress had no constitutional authority to prevent color lines from being drawn.
3. From 1883 through the turn of the century, a period when rampant racism captured the public mind.
4. From World War I to the beginning of the United States' involvement in World War II, a time when blacks under the leadership of such persons as W. E. B. Dubois, Mary Church Terrell, Marcus

Garvey, and Mary McLeod Bethune began to reject the accommodationist views of black leaders like Booker T. Washington.

5. From the emergence of the United States as a world leader and "defender of democracy" after World War II to the landmark Supreme Court case, Brown v. Board of Education of Topeka in 1954.
6. From 1954 to 1970, an era marked by black militance and the raising of the consciousness of millions of white Americans to the plight of the blacks.
7. From 1971, beginning with the Supreme Court case, Swann v. Charlotte-Mecklenburg, to the present, a time of regrouping and remedies, affirmative action and "reverse" discrimination.

Based on these historical periods, the following dates were set as limits for the categories:

1865-1883: The Civil War to the Civil Rights Cases

1884-1920: The Civil Rights Cases to World War I

1915-1941: World War I to World War II

1942-1954: World War II to Brown

1955-1971: Brown to Swann

1972-1979: After Swann to present

The category "before freedom from slavery" was eliminated, as the only major Supreme Court case dealing with race discrimination during that historical period was the Dred Scott

decision, a case to be dealt with separately in this dissertation.

Once these historical categories were constructed from the literature, it was necessary to see if, in fact, they would correspond to those for sex discrimination. Although there were no comparable chronologies of the woman's changing legal status as there were for blacks, nevertheless, after a reading of the available histories of the American woman and of the literature on sexism and the law, it was possible to establish logical historical categories, emphasizing women's changing legal status (Appendix A-1):

1. From the early 1800's to the feminist convention at Seneca Falls, New York, in 1848, a period when women, realizing their right to speak out against slavery was curtailed by their sex, began to demand equality for women as well as blacks.
2. From the Seneca Falls Convention of 1848 up to the turn of the century, an era when a small group of "radical" feminists demanding reform of society to accommodate what they saw as the inalienable rights of women gave way to a younger generation seeking broader acceptance in society as a whole.
3. From the turn of the century to the passage of the Nineteenth Amendment in 1920 granting women the right to vote, a time of shifting feminist

ideology as the fight for the ballot overshadowed feminist arguments for reform in all realms of society.

4. From 1920 to World War II, an era of declining power for women, culminating in the Depression when many argued that women should devote themselves to motherhood and the home and leave the jobs available to men.
5. From World War II to Reed v. Reed (1971), the first case in which the Supreme Court held unconstitutional a law imposing sex discrimination, years in which women entered the workforce in unprecedented numbers during World War II, the Black Revolution sensitized women to the bonds of their own "sphere," and politicians, after decades of ignoring women's demands, began to listen once more.
6. From Reed to the present, a period where a sense of fair play for women predominated, but fundamental social changes in the woman's role and status, as symbolized by the Equal Rights Amendment, created a backlash within parts of society.

Again, based on these historical periods, the following dates were set as limits:

1848-1895: Seneca Falls to the suffrage convention's virtual disavowal of Elizabeth Cady Stanton's leadership

1896-1920: Suffrage convention to Suffrage Amendment

1921-1941: Suffrage Amendment to World War II

1942-1971: World War II to Reed

1972-1979: After Reed to present

As there were no Supreme Court cases dealing with sex discrimination in the early years of the 1800's, that category was eliminated.

The historical categories for sex and race were similar enough to justify their use. Therefore, the next step in the selection process was to draw up a list of Supreme Court cases dealing with issues concerning women and blacks, corresponding to the historical categories. This list was then submitted to a panel of experts who were leaders in the fields of racism and the law and sexism and the law (see Appendix A-2). The experts were asked to select four cases from each historical category that they felt were of greatest significance to the development of the ideology surrounding the status and role of blacks and women in United States' history (Appendix A-3 and A-4). Those cases selected by three or more of the experts were used as the data base for the study. The final cases selected, including both the briefs of counsel and the opinions of the

court, are shown in Figure 1. The Lawyer's Edition of the United States Supreme Court Reports was used in analyzing the opinions of the cases.

The Method of Inquiry

Using legal cases as a source of data satisfies a prime methodological concern, that of validity and reliability of the data base. Courts records, as primary historical sources, are high in credibility as it is to be assumed that no intentional deceit or error has been written into the record. Such records, therefore, can be of great value, if viewed historically, in establishing long-term cultural trends and values and in studying institutional change.

Another methodological concern is submitting the data to a systematic procedure of inquiry. The ideology supporting the institutional exclusion of one group or another, as in race and sex discrimination, is often subtle, certainly qualitative, and always subjective. The methodology used in its study, logically, therefore, must be qualitative yet rigorous enough to meet scientific demands. Such problems as how the ideology surrounding race and sex discrimination developed and changed over time and what the variables of the ideologies are and how they differ can only be explored by subjecting the data to a systematic, yet naturalistic, methodological procedure.

Race Discrimination

1865-1884

U.S. v. Cruikshank, 92 U.S. 542, 23 L. Ed. 588 (1876)
Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879)
Civil Rights Cases, 109 U.S. 3, 27 L. Ed. 835 (1883)
Ex Parte Yarbrough, 110 U.S. 651, 28 L. Ed. 274 (1884)

1885-1920

Plessy v. Ferguson, 163 U.S. 537, 41 L. Ed. 256 (1896)
Bailey v. Alabama, 219 U.S. 191, 55 L. Ed. 191 (1911)
Truax v. Raich, 239 U.S. 33, 60 L. Ed. 131, (1915)
Buchanan v. Warley, 245 U.S. 60, 62 L. Ed. 149 (1917)

1921-1941

Nixon v. Herndon, 273 U.S. 536, 71 L. Ed. 795 (1927)
Powell v. Alabama, 287 U.S. 45, 77 L. Ed. 158 (1932)
Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 83 L. Ed. 208 (1938)
Smith v. Texas, 311 U.S. 128, 85 L. Ed. 84 (1940)

1942-1954

Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161 (1948)
Sweatt v. Painter, 339 U.S. 629, 94 L. Ed. 1114 (1949)
Terry v. Adams, 345 U.S. 461, 97 L. Ed. 1152 (1952)
Brown v. Board of Education I, 347 U.S. 483, 98 L. Ed. 873 (1954)

1955-1972

Brown v. Board of Education II, 349 U.S. 294, 99 L. Ed. 110 (1955)
Gomillion v. Lightfoot, 364 U.S. 339, 5 L. Ed. 2d 110 (1960)
Heart of Atlanta Motel v. U. S., 379 U.S. 241, 13 L. Ed. 2d 258 (1964)
Swann v. Charlotte-Mecklenburg, 402 U. S. 1, 28 L. Ed. 2d 554 (1971)

1973-1979

Keyes v. School District #1, 413 U.S. 189, 37 L. Ed. 2d 548 (1973)
Washington v. Davis, 426 U.S. 229, 48 L. Ed. 2d 597 (1976)
Virginia Private School Cases, 427 U.S. 160, 49 L. Ed. 2d 415 (1976)
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 50 L. Ed. 2d 450 (1977)

Sex Discrimination

1848-1895

Bradwell v. Illinois, 82 U.S. 130, 21 L. Ed. 442 (1873)
Minor v. Happersett, 88 U.S. 162, 22 L. Ed. 627 (1875)
Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1879)
In Re Lockwood, 154 U.S. 116, 38 L. Ed. 929 (1894)

1896-1920

Lochner v. New York, 198 U.S. 45, 49 L. Ed. 937 (1905)
Muller v. Oregon, 208 U.S. 412, 52 L. Ed. 551 (1908)
Quong Wing v. Kirkendall, 223 U.S. 62, 56 L. Ed. 350 (1912)
Bunting v. Oregon, 243 U.S. 426, 61 L. Ed. 830 (1917)

1921-1941

Adkins v. Children's Hospital, 261 U.S. 525, 67 L. Ed. 785 (1923)
Buck v. Bell, 274 U.S. 200, 71 L. Ed. 1000 (1927)
West Coast Hotel v. Parrish, 300 U.S. 379, 81 L. Ed. 703 (1937)
Breedlove v. Suttles, 302 U.S. 277, 82 L. Ed. 252 (1937)

1942-1971

Goesaert v. Cleary, 335 U.S. 464, 93 L. Ed. 163 (1948)
Hoyt v. Florida, 368 U.S. 57, 7 L. Ed. 2d 118 (1961)
Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510 (1965)
Reed v. Reed, 404 U.S. 71, 30 L. Ed. 2d 225 (1971)

1971-1979

Frontiero v. Richardson, 411 U.S. 677, 36 L. Ed. 2d 583 (1973)
Craig v. Boren, 429 U.S. 190, 51 L. Ed. 2d 547 (1976)
Maher v. Roe, 432 U.S. 464, 53 L. Ed. 2d 484 (1977)
Orr v. Orr, 436 U.S. 924, 59 L. Ed. 2d 306 (1979)

Figure 1. The Supreme Court cases selected for analysis including the opinions and briefs of counsel.

Such naturalistic inquiry is primarily concerned with discovery rather than verification of pre-existing theory or hypotheses. As Egon Guba writes, "The naturalistic inquirer . . . has as his purpose the discovery of phenomena whose empirical elaboration and testing would be worthwhile" (Guba, 1978, p. 13). He goes on to say that the paradigm for such inquiry is most basically

> concerned with description and understanding; thus, he begins as an anthropologist might begin learning about a strange culture, by immersing himself in the investigation with as open a mind as possible, and permitting impressions to emerge. (Guba, 1978, p. 13)

B. G. Glaser and A. L. Strauss use a strategy for qualitative research, grounded theory, which is closely wed to naturalistic inquiry, as it is also theory-generating as opposed to theory-testing (Glaser & Strauss, 1967). As educator Sharon Merriam says, grounded theory "emphasizes inductively generating theory which is 'grounded' in the data, rather than testing theory or merely describing empirical phenomena" (Merriam, 1980, p. 13). Merriam further writes, "categories, properties and hypotheses emerge simultaneously throughout the process of data collection, coding and analysis" (Merriam, 1980, p. 15). Unlike traditional content analysis, then, categories are generated by the researcher from the data rather than the researcher developing categories based upon hypotheses before the

analysis is carried out. Constant comparative techniques further provide a rigorous, codified procedure.

Although John Williamson, David Karp, and John Dalphin, authors of The Research Craft, warn against "delineating a constant, rationalized set of procedures for conducting historical research," recommending instead a "kind of methodological eclecticism," (Williamson et al., 1977, p. 279), nevertheless, working with a specific, bounded data base as in this study, many of the techniques of grounded theory were useful. Therefore, each of the Supreme Court opinions and the briefs of counsel used as data in this study were subjected to the following process suggested by Glaser and Strauss' grounded theory methodology:

1. A first reading of all the cases.
2. A detailed reading of each case, underlining sections relating to the ideological rationale for excluding or including blacks and women in the wider society.
3. Notations of core quotes for each case.
4. The writing of a "theoretical memo" upon completion of the second reading, noting the generalities, ideas and themes emerging on the ideology surrounding sex and race discrimination.
5. The development of categories as the cases were read, compared, and contrasted.

6. The continual analysis of the categories "with an eye to refining them so that they reflect the data as precisely as possible." (Merriam, 1980, p. 26)

Although this approach to the data provides a systematic framework, nevertheless, a constant sensitivity on the part of the researcher was needed to remain open to what the data source might possibly generate.

As a result of this process, over 1,000 notecards, each containing a core quote, were written and categorized. These categories formed the basis for Chapters III and IV. Also, however, an attempt was made to quantify these data by determining the percentage of the total notecards for each category. In this way an approximate weight could be given to the relative importance of each section (see Appendix B, Table 2, and Appendix C, Table 4).

Delimitations

The general purpose of this study was to generate insights into the relationship between racism and sexism. Such a broad mandate demanded delimitations to make it empirically feasible. Initially, therefore, fundamental decisions were made to limit the subject to the ideology surrounding race and sex discrimination as reflected in the law. "The law" was delimited further to mean only cases heard at the Supreme Court level. Therefore, legislation dealing with race and sex discrimination, such as Title IX

of the Education Amendments of 1972 and Titles VI and VII of the Civil Rights Act of 1964, were not used. However, it was decided, to the extent possible, to include the briefs of counsel as a part of the data base in order to explore the alternative ideologies of beliefs and attitudes presented to the Court on race and sex. The briefs provide the Court with a forum of conflicting ideologies to which the Justices listen, accepting some of the arguments, rejecting others, and ultimately resolving the conflict in the final opinion. The use of the briefs, therefore, allows for a view of the various rationales presented to the Court for its consideration. Those the Court chooses, and those it rejects, provide valuable insight into the beliefs and attitudes about women and blacks promulgated by the larger society. At the same time, such data as may be found in the Amicus Curiae briefs, the arguments presented by the friends of the Court not parties to the case, were not used because of the enormous quantity of such briefs.

The number of cases was limited to four for each historical period. This meant 24 race discrimination cases, plus the Dred Scott case handled separately, for a total of 25. As there was one less period for sex, 20 cases were used for sex discrimination. As far as possible the list of Supreme Court cases involving race and sex discrimination included only those cases directly dealing with blacks and

women. Therefore, such cases as the Slaughter House Cases of 1873, although having a direct impact on women and blacks because of the Court's narrow construction of the Fourteenth Amendment, were not included because the cases themselves did not directly involve issues concerning women or blacks. The decision was also made to exclude the "reverse discrimination" cases of the 1970's.

A vital aspect of the study was the limitation of viewing the data not as a lawyer might but as a social scientist. For example, the briefs of counsel from a lawyer's perspective are of little legal interest; it is only the Court opinion that develops the law and sets precedent. As historical documents, however, the briefs to a social scientist provide a rich source of data on the conflict of ideologies within the wider society. The briefs and the dissenting opinions indicate the nature of the struggle. Thus, these data presenting the opposition are necessary in understanding the final decision. The briefs also provide additional evidence of the social reality and of the substance of the debate surrounding race and sex equity. Therefore, the legal reasoning, of interest to the lawyer, is not the focus of this study. Rather, the study looks at the underlying rationale and justification for that reasoning. In the Dred Scott decision, for example, the legal reasoning turned on concepts involving property, whereas the ideology

underlying this legal concept turned on the "degradation" of the black. At times, as in Dred Scott, this ideology is quite blatant, with other cases more subtle.

Definition of Terms

Discrimination—

> Actions or practices carried out by members of dominant groups, or their representatives, which have a differential and negative impact on members of subordinate groups. (Feagin & Feagin, 1978, p. 20)

Ideology—

> A fairly coherent set of ideas explaining the issues of the day and offering solutions to them. As such, idologies help organize their adherents' beliefs and hopes about their world's present and future, giving structure to their perceptions in several ways. First ideology outlines the operations of the political economy, clearly delineating who exercises power and on what grounds. . . . Further, ideology outlines criteria for the moral evaluation of the ongoing political economy—on the fairness of who gets what, when, where, and how. Finally, these descriptive and evaluative elements combine to supply an imperative for collective action, mandating defense of, or attack upon, the political economy. Ideologies thus either inhibit or inspire social movements. (Silva & Slaughter, 1980, p. 51)

Minority Group—

> A minority group is not a proportion but a condition; it is composed of people who are considered inferior because of their membership in a social category, so that they are denied rights and obligations accorded to others; their nonparticipation in the life of the larger society, or certain aspects thereof, perpetuates their status and marks them as a minority. (Glazer, 1977, p. 104)

Racism—

> The making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals, and social roles solely on the basis of race differences. (Johnston, 1971, p. 676).

Sexism—

> The making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals, and social roles solely on the basis of sex differences. (Johnston, 1971, p. 676).

An Overview of the Study

1. Chapter I: Statement of the problem, need and purpose, methodology, delimitations, definitions, and dissertation overview.
2. Chapter II: Conceptual approach based on a review of the literature on law and its relation to the social context and a review of the literature of the analogies of racism and sexism.
3. Chapter III: An in-depth, historical analysis of the ideology surrounding sex discrimination as found in selected Supreme Court opinions and the briefs of counsel.
4. Chapter IV: An in-depth, historical analysis of the ideology surrounding race discrimination as found in selected Supreme Court opinions and the briefs of counsel.

5. Chapter V: A comparison and contrast of the ideologies surrounding race and sex discrimination as found in the law, summary, conclusions, discussions, and implications of the dissertation.

CHAPTER II

The Interdependence of Law, Society, Race and Sex

> I have very serious objections, dear Rebecca, to being called Henry. There is a great deal in a name. It often signifies much, and may involve a great principle. Ask our colored brethren if there is nothing in a name. Why are the slaves nameless unless they take that of their master? Simply because they have no independent existence. . . The custom of calling women Mrs. John This and Mrs. Tom That, and colored men Sambo and Zip Coon, is founded on the principle that white men are lords of all. I cannot acknowledge this principle that white men are lords of all. I cannot acknowledge this principle as just; therefore, I cannot bear the name of another.
>
> A letter from Elizabeth Cady Stanton, 1847

This dissertation is an exploration of the ideologies relating to race and sex discrimination as reflected in selected Supreme Court opinions and briefs of counsel. As such, it rests on two assumptions: first, that law is reflective of society and, therefore, is an expression of both social ideals and social realities and, second, that there is validity in comparing the respective positions in society of blacks and women. To substantiate these assumptions it is necessary to review the literature in both areas.

The Interdependence of Law and Society

The legal order, specifically the Supreme Court, was chosen as a vehicle for this study because of its role in institutionalizing the norms of society. The law reflects not only cultural ideals but also the realities of any historical period, the way people think, feel, and react to social situations. Both race relations and relations between the sexes have been dealt with in the law. Therefore, the law, given that there is an interdependence of law and society, has the potential of providing insights not only as to how race and sex have been made central to divisions of responsibilities and power, but also as to how a condition of inequality has been maintained over time with respect to blacks and women, both major emphases of this dissertation.

Law and Society: The Background

The recognition of the general interdependence of law and society dates back at least to Plato who insisted law had two parts: (1) the preamble, which was the moral justification for (2) the substance of law itself (Stumpf, 1966, p. 9). But perhaps the first authoritative treatise on the relationship of law to its social context was that of Montesquieu (1689-1755) who saw law and justice as a result of numerous social factors such as local manners, customs, environment, and religion. It was he who challenged the idea that ideal rules of law were deduced "a priori" and, therefore, were constant from age to age and people to people (Stone, 1972, p. 5). Others, such as Friedrich Savigny (1779-1861), and Henry Maine (1822-1888), both jurists, also moved from simply the study of the law to show the law's intimate relation to the social context. They not only challenged the "a priori" speculations as to justice, but also challenged the adequacy of pure logical analysis with respect to the law (Stone, 1972, pp 9, 35). Jeremy Bentham (1784-1832), the English legal reformer, leveled a severe blow "at those who would argue that there are antecedent moral principles and natural rights to which law must conform" (Stumpf, 1966, p. 18). Rather, he, too, saw in part that "a law is whatever the community decides to punish as an offense" (Stumpf, 1966, p. 101). The

European sociologist, Emile Durkheim (1858-1917), agreed with Bentham, suggesting, for instance, that law depended on a "social solidarity which comes from a certain number of states of conscience which are common to all members of the same society" (Aubert, 1969, p. 159).

In the United States, the notion that there was more to the law than legal logic, technical reasoning and a God-given judicial code dates back to Oliver Wendell Holmes, Jr. (1841-1935) who rejected the view that "law is an abstract entity pre-existing and waiting to be found by a judge" and asserting, on the contrary, "that it is, in great measure, made by the judge" (Stone, 1972, p. 10). It was Roscoe Pound (1870-1964) at the turn of the century, however, who brought the sociological aspects of jurisprudence to the attention of the United States. Pound reiterated the hypothesis of earlier writers in Europe that the center of legal development did not lie in legal reasoning and decision but in society itself. He saw law:

> predominantly as an instrument of social engineering in which conflicting pulls of political philosophy, economic interests, ethical values, constantly struggle for recognition against a background of history, tradition, and legal technique. (Friedman, 1964, p. 36)

The theme of all these early writers, both in Europe and in the United States, was to "explain law as one element of the social complex," not as an autonomous entity based on logic and pure abstraction (Stone, 1972, p. 9).

Although in the United States there was some work between the two world wars looking at the law through the eyes of the social scientist, it was not until the 1950's and 1960's with the advent of the civil rights movement that interest in law and its relation to society and social change once again burgeoned. A "Law and Society" journal was begun. Titles such as "Justice, Legal Systems and Social Structures," "Morality and the Law," "The Social Organization of Law," became commonplace (Hartzler, 1976; Stumpf, 1966; Black & Mileski, 1973). Chapters on law were added to introductory sociology texts using Phillip Selznick and Leonard Broom's rationale that

> law in society is best understood as an activity or enterprise—a living institution performing social tasks. The legal order is more than a system of norms or rules. It is also a set of agencies responding to social needs, pressures and aspirations. (Broom & Selznick, 1977, p. 408)

The argument, then, from Montesquieu to Selznick and Broom has been that law is a reflection of the social context in which it arises. As a consequence, by looking at the law it can be better understood how society is structured. This is the fundamental assumption that justifies the use of Supreme Court cases and briefs of counsel as the data base for this dissertation in order to explore the ideology defining the place of blacks and women in United States society.

Law and the Maintenance of Inequality

One of the primary concerns of this dissertation is how the legal order has maintained a condition of inequality over time with respect to blacks and women and how that inequity has been legitimized. The literature on society and the law helps to conceptualize these concerns.

Roberto Unger, a recent author in the field of society and the law, has written of the law in modern society. His formulations, unwittingly, illuminate the legal anomalies surrounding blacks and women. Unger focuses on the legal order of a modern, liberal state such as the United States. He compares this legal order with other "concepts" of law. The first "concept" he writes of is customary or interactional law.

Customary law, Unger writes, is characterized by "factual regularity in behavior [and]. . . the tendency to identify established forms of conduct with the idea of a right order in society and the world at large" (Unger, 1976, p. 49). With customary law, there is a closely held communion of reciprocal expectations backed by group consensus. Customary law is nonpublic and nonpositive. "Its nonpublic quality means that it is common to the entire society rather than associated with a centralized government that stands apart from other social groups" (Unger, 1976, p. 50). Custom is nonpositive because it is made up

of implicit standards rather than of formulated rules, although these standards, though tacit, may be highly precise guidelines for behavior. Customary law is legitimized by tradition and a shared set of beliefs and view of the world. Although customary law predominates in simple societies, Unger notes that it may be found in all forms of social life (1976, p. 50). From Unger's description, it is quite clear that much of the law that has surrounded blacks and women, for example, has been customary law legitimated by formal law.

When there is a disintegration of community and a division of labor within society, Unger maintains the state emerges and along with it a centralized government. The state imposes bureaucratic or regulatory law, Unger's second "concept" (Unger, 1976, pp. 61-63). With the onset of regulatory law, there is a division between private and public law. Regulatory law suffers from internal conflict according to Unger. On the one hand it is usually legitimized by being tied to a body of religious precepts such as the "Divine Rights of Kings," which, because of the sacred connotations, should not be disturbed or changed. On the other hand, regulatory law is "subordinated to the sovereign's view of his own convenience or the welfare of his subjects, without higher support or constraint" (Unger, 1976, p. 65). Regulatory law, therefore, has the potential

of being, at once, both arbitary and inflexible. A legal separation of the races as was found in the United States, is a good example of regulatory law. The idea of the separation of the races has religious overtones of a God-given order based on Biblical prescriptions such as the curse of Ham. On the other hand, the separation is administered arbitrarily, at the convenience of the whites in command, with only a pretense of adhering to the ideals of equality and individuality of the society at large.

With the development of a modern liberal state like the United States, Unger maintains a third "concept" of law emerges, the ideal of the legal order. The hallmark of the liberal society is the growth of group pluralism which in turn produces a sense of the "unjustifiability of the rank order" and "the corruption of moral agreements" (Unger, 1976, p. 176). Thus, there is no social hierarchy, theology, or shared set of beliefs that wins the spontaneous allegiance of society's members. In the United States, the unjustifiability of the rank order embedded in the "separate but equal doctrine" surrounding blacks has been accepted. However, with woman there appears to be, still, a morally agreed upon "rank" for her in the private, domestic sphere, and there is a shared set of beliefs that this order is right.

Unger also maintains that the rule of law tries to deal with the demise of moral agreement in a liberal society by ensuring the impersonality of power, by adhering to a legal order that is committed to the ideal of autonomy and generality (Unger, 1976, p. 178). By autonomy, Unger means that there are special institutions and experts apart from the state's administration whose main task is adjudication. Generality, he writes, implies the notion of equity, the application of the law without regard to personal or class favoritism (Unger, 1976, pp. 52-54). The creation of a legal order that espouses generality and autonomy that lay claim to everyone's allegiance, therefore, is a necessary concomitant "of the effort to order society and to distribute power in a way that can be justified or at least widely tolerated" (Unger, 1976, p. 68).

The generality and autonomy which gives legitimacy to the legal order is grounded, Unger suggests, in its relationship to the abstract dictates of a "higher law," "a normative order that transcends society altogether" (Unger, 1976, p. 79). This higher or natural law originally had its roots in transcendent religion in which "all individuals have an equality of essential worth derived from the universal fatherhood of God" (Unger, 1976, p. 80) and in which there is a God-given order of nature and social life. These natural rights, in modern liberal society, came to be conceived of

"as powers of the individual to act within a sphere of absolute discretion," thereby acknowledging social pluralism while at the same time setting down the "existence of universal entitlements and rules superior to state power" such as the equal worth of each individual (Unger, 1976, p. 85). As Unger notes,

> An abstract generality satisfies the ideal of equal worth. The fewer the distinctions the law makes among categories of persons or acts, the greater the respect shown for the ideal of equal worth. Men with similar duties and entitlements under the same rules have been recognized as equals even though their actual social experience and their degrees of access to power and wealth may differ sharply. (Unger, 1976, p. 81)

However, women and blacks, traditionally, often have not had "similar duties and entitlements" as the white male, nor, often, have they lived under the same rules, nor have they been recognized as equals.

It is clear then that a legal order based on autonomy and generality does not guarantee the entitlements of individuality and equality. David Trubek, a contemporary scholar of law and society, suggests in fact, that a perennial problem that sociologists of the law must confront is the gap between "the law on the books and the law in action" (Trubek, 1977, p. 539) by which he means the gap between society's ideals and reality. Throughout the history of the study of the relationship of society to the law, this gap is a major, recurrent theme. Karl Marx, for instance,

viewed legal ideals as but a mask blurring the power relationships and struggling interests of labor and owner (Aubert, 1969, p. 33ff). To many Marxists, then, law is but "an instrument that maintains and confirms basic cleavages in society" (Aubert, 1969, p. 11). To Marxists, legal ideals are pure sham and the gap between the ideal and real is to be expected. The legal order is illusory, creating false hopes of community, protecting inequalities, and masking a system wherein custom and bureaucratic law reign supreme. The legal treatment of blacks and women in the United States, in part, appears to bear this out.

Max Weber, writing in a similar vein as Marx, saw capitalism's need for a "depersonalized" bureaucracy to ensure maximum efficiency of production. This bureaucracy, in turn, fostered a conceptually systematized, rational body of law. Weber, wrote, however, that even though bureaucracy and its legal order are "abstractly impersonal," there are present, nevertheless, ". . . the sure instincts of the bureaucracy for what is necessary to maintain their power in their own state, and, therewith also as against other states" (Aubert, 1969, p. 159). It is within this context that Weber spoke of the gap in adjudication between bureaucracy's acclaimed objectivity, that "peculiar virtue, the exclusion of love, hatred and every purely personal . . .

feeling" and the law as actually translated by the power interests (Aubert, 1969, p. 155).

William Graham Sumner called the gap "the strain for consistency in the mores" and maintained this strain produced social change (Kanowitz, 1973, p. 36). His notion was, for example, that if, as in the United States, "equality" is one of the dominant mores and women, by law, cannot vote, the resulting dissonance, over time, will create change. David Trubek shared Sumner's views when he wrote that the legal order and its promise of generality and autonomy was liberal society's "solution to the perceived discrepancy between the ideal of equality and the reality of hierarchy and domination" (Trubek, 1977, p. 548). He saw law, then "as an imperfect effort to mediate between deeply held ideals and pervasive and powerful aspects of social structure" (Trubek, 1977, p. 543).

For much of United States history both blacks and women have suffered from the gap reflected in the law between the ideal of equality and the reality of hierarchy and domination. In a real sense, both groups, historically, have been excluded from the legal order as described by such authors as Roberto Unger and David Trubek. For example, neither blacks nor women, traditionally, have been viewed as "equal in the sight of the law" with similar duties and entitlements as those of white males. Rather, the

law often has treated them as groups with certain immutable characteristics rather than as individuals, and, as a consequence, has set them apart from the legal order as special cases and, therefore, unequal. Similarly, as Trubek notes, within a legal order based on generality and autonomy, the law ideally promotes self-realization by "erecting obstacles to those who would retard it" (Trubek, 1977, p. 549). Yet for both blacks and women the law has often acted instead as a deterrent to self-realization. The history of the relationship of the law to blacks and women has often been a history of erecting obstacles to individual achievement, whether it be by denying them acces to certain schools or certain jobs.

One explanation for such contradictions is that blacks and women, traditionally, have been dealt with by the legal order under the auspices of customary law. This is suggested by Unger who writes, "Customary law persists in the patterns of interactional expectations and usages on which legal order relies and which it influences" (Unger, 1976, p. 54). Community consensus and tradition have played strong roles in legitimizing the separate law pertaining to blacks and women, as this dissertation will show. Also, the notion that treating blacks and women under the same law as white men would disrupt community cohesion has served to legitimate a separate law. The law, as applied especially

to women, often has reflected the lawmaker's ideal of this group's proper social place in an "a priori," natural order, rather than reflecting the objectivity and equity associated with a formal legal system. Therefore, the reliance on the customary notion of a natural order where blacks and women have their place has not been uncommon with judges. It would seem, then, that Trubek's "powerful aspects of social structure" in the case of blacks and more particularly, women, has often taken precedence over the ideals of equality and individuality.

Over time, with blacks, there has been a breakdown of the use of customary law to legitimize their legal separation in society. With women this has not been so clear. Unger provides a clue as to why this may be true. He writes that customary law holds sway "in social contexts in which the settlement of disputes by the legal system tends to be avoided" (Unger, 1976, p. 55). These social contexts are "those in which the organization of power and the nature of consciousness . . . would be undermined by the use of legal rules and by the attempt to view relations among persons as relationships of entitlement and duty" (Unger, 1976, p. 55). He then mentions the family as such a context, which traditionally has been the bulwark of the woman. It may be speculated, therefore, that as long as a woman's place is perceived as in the home, the legal order will sidestep

issues relating to women for fear of disturbing the social order.

Nevertheless, David Trubek is optimistic about the contradictions of the legal order as he believes that

> The idea of law reflects the consciousness of a society whose ideals and social structure are in conflict. . . As members of a liberal society we embrace ideals and yet we are aware of their negation. The idea of law offers the possibility of escape from this contradiction. (Trubek, 1977, p. 541)

He suggests that a program of critical social thought about the law is necessary to bring a new realism to the study of law in society. Among the concerns of such a program would be "ascertaining the extent to which the legal system . . . can in fact operate independently of the systems that allocate wealth, status and power" (Trubek, 1977, p. 548). By looking at two powerless groups, blacks and women, and their ideological treatment by the law, this dissertation will contribute to Trubek's call for a new realism in the study of law in society.

The Analogy of Racism and Sexism

The analogy of racism and sexism was used early in the history of the United States. The Grimke sisters, for instance, wrote that both women and blacks were "accused of mental inferiority" (Chafe, 1977, p. 45). At a women's rights convention in 1859, Wendell Phillips harangued, "Woman's Rights and Negro Rights! What rights have either

women or negroes that we have any reason to respect? The world says, 'None!'" (Stanton, Anthony, & Gage, 1889, p. 275). In her Civil War diary, Mary Boykin Chestnut used the term "African" to "distinguish that form [of slavery] from the inevitable slavery of the world. All married women, all children, and girls who live in their father's house are slaves!" (Chestnut, 1905, p. 486).

However, the academic studies using the analogy did not come until well into the 20th century. Some of these early studies drawing a parallel between racism and sexism revolved around viewing women as a minority group. Louis Wirth, in his pioneering work on "The Problem of Minority Groups," wrote that "minorities are not to be judged in terms of numbers. The people whom we regard as a minority may actually, from a numerical standpoint, be a majority" (Linton, 1945, p. 349). Although he was speaking to ethnic and racial minorities, the applicability of his definition to women can be seen clearly. He defined minorities by several criteria:

A. identified by physical or cultural characteristics

B. singled out by the society in which they live for differential and unequal treatment by a dominant group enjoying a higher social status and greater privileges

C. excluded from certain opportunities—economic, social and political

D. held in lower esteem and may be objects of contempt, hatred, ridicule and violence

E. denied access to equal education opportunities

F. restricted in their scope of occupational and professional advancement

G. not as free as other members of society to join voluntary associations

H. subject to more than the ordinary amount of social and economic insecurity

I. singled out by public policy for special treatment

J. restricted in their property rights

K. denied the equal protection of the laws

L. deprived the right of suffrage

M. excluded from public office

N. treated as a member of a category, irrespective of their individual merits (Linton, 1945, p. 347ff)

Wirth further noted that as a result of the differential treatment, "the minority comes to suffer from a sense of its own inferiority or develops a feeling that it is unjustly treated" (Linton, 1945, p. 348). At this point, "they clamor for emancipation and equality [and] become a political force to be reckoned with" (Linton, 1945, p. 349). He emphasized, however, that

> While minorities more often than not stand in a relationship of conflict with the dominant group, it is their nonparticipation in the life of the larger society, or in certain aspects thereof,

> that more particularly marks them as a minority people and perpetuates their status as such. (Linton, 1945, p. 350)

In The American Dilemma, Gunnar Myrdahl was one of the first to equate theoretically the position of blacks and women in society. He noted many similarities between the position of a traditional minority, blacks, and women. He wrote, for instance, that originally both blacks and women were under the power of the paterfamilias. He noted the justification for this hierarchy came from Biblical commands including "the ninth commandment linking together women, servants, mules, and other property" (Myrdahl, 1944, p. 1073). He discovered that depriving blacks of their freedom under slavery and denying women legal rights were argued, historically, in the same way. He found that the study of the personality and intelligence of the woman had broadly paralleled that of the black. Both women and blacks had come to believe in "their inferiority of endowment" and, as the black had been "awarded his place," so there is a "woman's place" (Myrdahl, 1944, p. 1077). He also mentioned the political disenfranchisement of women and blacks and the similarity in providing only education to both groups that was deemed appropriate.

Myrdahl found employment practices similar for both blacks and women. As with blacks there were certain "women's jobs," normally in the low salary brackets,

offering little career opportunities. He maintained that women's competition, as with blacks, had been dreaded by white males because of the low wages for which blacks and women had been prepared to work. White males had found it "unnatural" to work under women or blacks; women, themselves, had found working under other women uncomfortable as blacks had often felt about working under another black (Myrdahl, 1944, p. 1077). In personal relations, Myrdahl noted, white men preferred "a less professional and more human relation, actually a more paternalistic and protective position" with their black and women employees (Myrdahl, 1944, p. 1078).

In 1951 Helen Mayer Hacker, a sociologist from Columbia University, built upon the concepts laid down by Myrdahl. Hacker, like Myrdahl, maintained women had many of the same psychological characteristics of minority groups such as self-denigration, feelings of inferiority and the acceptance, in general, of the prevailing attitudes towards them. Women, she suggested, like racial and ethnic minorities, tended to develop a separate subculture, a "woman's world" (Unger & Denmark, 1975, p. 90). Again, as did Myrdahl, Hacker noted the similarities of the status of minorities and women in the economic and political spheres.

Hacker also suggested that the "race relations cycle," as defined by Robert Park, which described "the social

processes of reeducation in the relations between two or more groups who are living in a common territory under a single political or economic system" applied equally well to women (Unger, 1975, p. 98). Hacker maintained, for instance, that Park's sequence of competition, conflict, accommodation, and assimilation could be seen in the "sex relations cycle" in the wake of the Industrial Revolution when women sought employment in competition with men.

> Men were quick to perceive them [women] as a rival group and made use of economic, legal, and ideological weapons to eliminate or reduce their competition. They excluded women from the trade unions, made contracts with employers to prevent their hiring women, passed laws restricting the employment of married women, caricatured the working woman, and carried on ceaseless propaganda to return women to the home or keep them there. (Unger, 1975, p. 99)

Accommodation resulted.

> Like other minority groups, women have sought a protected position, a niche in the economy which they could occupy, and, like other minority groups, they have found these positions in new occupations in which dominant group members had not yet established themselves and in old occupations which they no longer wanted. (Unger, 1975, p. 99)

Assimilation, Hacker wrote, had yet to come as, "If men and women were truly assimlated, we would find no cleavages of interest along sex lines. The special provinces of men and women would be abolished" (Unger, 1975, p. 100).

Women, like blacks, have also been viewed as a special caste within the larger society. The notion of woman as

caste dates back to the abolitionists and the early feminists. At a 19th century women's rights convention, one speaker noted, "she [the married woman] is oppressed with such limitation and degradation of labor and avocation, as clearly and cruelly mark the condition of a disabled caste" (Gornick & Moran, 1971, p. 456). In contemporary times, Helen Mayer Hacker was one of the first to introduce the concept of caste in male-female relationships and to relate the caste-like status of women to that of blacks (Unger, 1975). Others after Hacker, such as Jo Freeman, a feminist theorist, wrote that male-female relationships constituted a sexual caste system in the United States just as black-white relations did. Freeman saw both blacks and women as a part of a caste system where "society is composed of birth-ascribed hierarchically ordered. . .groups. . .entailing differential evaluation, differential rewards and differential association" (Freeman, 1971, p. 204). She emphasized that within a caste system there are, historically, separate bodies of law that apply to the different castes. She then claimed that in the United States there had been a de jure basis for not only a racial caste system but for a sexual caste system as well. This was true, she noted, as in domestic law, labor legislation and constitutional issues, the law for women and men had been distinct and had served

"as a mechanism of social control to maintain each sex in its ascribed place" (Freeman, 1971, p. 207).

A classic statement by contemporary feminists of the analogy of race and sex using caste as a central premise was found in Casey Hayden and Mary King's article, "Sex and Caste: A Kind of Memo." Meant to be a memo for private circulation, Hayden and King, both workers in the black civil rights movement, commented,

> There seem to be many parallels that can be drawn between treatment of Negroes and treatment of women in our society as a whole. But in particular, women we've talked to who work in the movement seem to be caught up in a common-law caste system that operates, sometimes subtly, forcing them to work around or outside hierarchical structures of power which may exclude them. (Hayden & King, 1966, p. 35)

They went on to write:

> Many people who are very hip to the implications of the racial caste system, even people in the movement, do not seem to be able to see the sexual caste system and if the question is raised they respond with: "That's the way it's supposed to be. There are biological differences." Or with other statements which recall a white segregationist confronted with integration. (Hayden, 1966, p. 35)

The notion of caste, however, for the most part seems to have been abandoned as applied to women because of difficulties with the term. For example, a caste system, by definition, precludes one caste living intimately in marriage with one from another caste. However, thinking of women as either a minority group or as a caste is

emotionally powerful and, initially, served as an effective, although vulnerable, consciousness-raising tool.

Law professors, John D. Johnston and Charles Knapp, although not using the concept of caste, did use the sex-race analogy to compare the treatment of blacks and women in the law. Describing themselves as "middle-aged, white males, . . . fairly typical WASPs of the sub-species law professor," Knapp and Johnston reached the conclusion that:

> Analytically, state-enforced sex discrimination is virtually identical to racial discrimination in at least three significant ways: 1) each reflects a group stereotype based on imputed characteristics which, if not purely imaginary, are nonetheless inapplicable to many individual members of the group; 2) each provides governmental endorsement for the opinion privately held by members of a dominant group that, due to the supposed existence of these characteristics, each member of the subordinate group is inherently inferior; and 3) proceeding from the assumption that the stereotypes are accurate, each attempts to confirm and perpetuate the existence of the supposed characteristics by requiring every citizen to conform to a variety of rules, all of which reflect the belief that one group is in fact inferior to another. (Johnston, 1971, p. 676)

Johnston and Knapp were not the first to see the similarities of race and sex discrimination in the law. Litigative effort on behalf of women, against sex discrimination, had been patterned on the black civil rights litigation of the 1960's due to the apparent analogy of sexism and racism. Many feminists hoped that if sexism was found analogous to racism the chances were that classification

based on sex, like classification based on race, would be seen as a "suspect classification" by the Supreme Court, subject to "strict scrutiny" (Babcock, Freedman, Norton, & Ross, 1975, p. 89).* Thus, in the first half of the 1970's, the strategy for dealing with constitutional issues involving sex was to "establish that sex was analogous to race for purposes of the equal protection clause of the Constitution" (Berger, 1980, p. 16). It was hoped then that sex-based litigation would have the same success as race litigation in attacking both federal laws that had surface neutrality but disparate impact, and those that represented prima facie discrimination (Berger, 1980, p. 16). The assumption was, based on the sex-race analogy, that if this strategy had been successful for blacks it would be successful for women. However, it was quite clear that for the most part the Supreme Court rejected the analogy. "The Burger Court was not going to do for women what the Warren Court had done for blacks, and the feminist movement was not going to be able to piggyback on the civil rights movement to any great extent" (Berger, 1980, p. 17).

But it was not only in the Supreme Court that the sex-race analogy was to be questioned. The debate began with those very writers who had advocated women as a minority

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*See Chapter III for an in-depth discussion of "suspect classification."

group. Myrdahl wrote that the woman's problem, unlike that of the black, was basically "the center of the whole complex of problems of how to reorganize the institution of the family to fit the new economic and ideological basis." Women were "still hindered in their competition by the function of procreation." The black, on the other hand, labored "under the yoke of the doctrine of unassimilability" (Myrdahl, 1944, p. 1078). Helen Mayer Hacker also observed that "account must . . . be taken of differences which impose qualifications on the comparison of the two groups" (Unger, 1975, p. 97). She listed among these differences the influence of marriage as a social elevator for women but not necessarily for blacks. She also noted the greater importance of women to the dominant group and the probability of a more marked ambivalence in the attitudes of white males toward women than toward blacks. Finally, she commented, "women's privileges exceed those of Negroes. Protective attitudes toward Negroes have faded into abeyance, even in the South, but most boys are still taught to take care of girls, and many evidences of male chivalry still remain" (Unger, 1975, p. 97).

Many blacks involved with the civil rights movement of the 1960's saw the race-sex analogy as an insult. Viewing "women's liberation" as primarily a white, middle class movement, they asked how a comparison could be made of the

historical situation of the manacled, lynched black and a housewife. Linda La Rue, a black author, for instance, wrote in 1970,

> Blacks are oppressed and that means unreasonably burdened, unjustly, severely, rigorously, cruelly and harshly fettered by white authority. White women, on the other hand, are only suppressed, and that means checked, restrained, excluded from conscious and overt activity. (La Rue, 1970, p. 38)

She also maintained that the common oppression of blacks and women is an

> abstraction designed purposely or inadvertently to draw validity and seriousness to the women's movement. . . . Any attempt to analogize black oppression with the plight of the American white woman has the validity of comparing the neck of a hanging man with the hands of an amateur mountain climber with rope burns. (La Rue, 1970, p. 36)

The primacy of racism over sexism, and with it the implicit disparagement of the sex-race analogy, was not unique to the 1960's. The civil rights movement after the Civil War confronted the same issues. For example, although Frederick Douglass, abolitionist and feminist, believed that "The right of woman to vote is as sacred in my judgement as that of man," he, nevertheless, gave the black male priority (Gornick, 1971, p. 564). "When women, because they are women, are hunted down through the cities of New York and New Orleans; when they are dragged from their houses and hung upon lamp posts . . . then they will have an urgency to obtain the ballot equal to our own" (Gornick,

1971, p. 565). Nearly all the white male abolitionists after the Civil War also "saw black male suffrage as the fitting triumph of their decades of antislavery toil" (Gornick, 1971, p. 563).

Nevertheless, there were some that saw the race-sex issue as inseparable, especially women who were also black. In the 1800's Sojourner Truth, herself black, wrote:

> There is a great stir about colored men getting their rights, but not a word about the colored women; and if colored men get their rights, and not colored women theirs, you see the colored men will be masters over the women and it will be just as bad as it was before. (Gornick, 1971, p. 562)

In the civil rights movement of the 1960's, Shirley Chisholm, black legislator, felt strongly that feminists had much to learn from the black civil rights movement (Chisholm, 1970, p. 42). Pauli Murray, another recent black civil rights leader, also insisted:

> The Negro woman can no longer postpone or subordinate the fight against discrimination because of sex to the civil rights struggle, but must carry on both fights simultaneously. She must insist upon a partnership role in the integration movement. (Lerner, 1973, p. 599)

In the mid-1970's a noticeable shift took place in the use of the sex-race analogy, away from a description and comparison of the victims, the black and the woman, to a focus on the victimizer, the white male. The basic theme of these recent writers was that even though the substantive condition of blacks and women may be different, the

oppression of both groups had served the needs of the white male by maintaining the status quo of white male domination.

Two recent historians, Lawrence Friedman and Ronald Takaki, both wrote of the importance of race and sex to the acquisition of power. They both wrote that, although taking different forms, the oppression of the black and the woman was interdependent in serving the white man's needs. Friedman's thesis was that in order for the United States initially to create a nation-state "the image of the virtuous and patriotic republican had to be cultivated," the archetype being George Washington, a white male (Friedman, 1975, p. xiv). The "True American Woman," a term heralded in prose and poetry in the first half of the 19th century, was to be the symbol of the male patriot's roots, bound to support her man in his quest for the Promised Land by keeping the home fires burning. It was soon understood that "the gender of the New Nation was male" (Friedman, 1975, p. 180). "The notion of a 'True American woman' who sustained her man's efforts was, then, an affirmation of the male gender of the Promised Land" (Friedman, 1975, p. 180).

Not only was the woman's role as wife and mother essential to the concept of Nation but also, Friedman wrote, "Only a white America could be a flawless America where citizens felt a sense of place and belonging" (Friedman, 1975, p. 180). Early historians characterized the American

Republic as the exclusive achievement of the white male. The likes of Benjamin Franklin wrote that white must become the "Complexion of my Country" (Friedman, 1975, p. 181). American colonization societies flourished as a means of purifying America of blacks by resettling them in Liberia. Friedman maintained, then, that "The Rising Glory of America" depended not only on a sexual ideology idolizing the woman who made "her husband's happiness her own" and "yielded her will to his in all things" but also depended on a racial ideology that, by identifying blacks as "pernicious" and "noxious," could serve as a scapegoat for the nation's ills (Friedman, 1975, p. 167). With both ideologies the white male was served.

Similarly, Takaki used the Harvard Medical School's reaction to the admission in 1850 of three black males and one white female as an example of the white male's attempts to relegate people unlike themselves to specifically defined places (Takaki, 1979, p. 136ff). The reaction by both faculty and students to the admissions was one of anger, outrage and fear. Both blacks and women were held to have lesser intelligence and the students protested that their admission would degrade the school. The blacks' presence "was a disturbing contradiction to the belief in white intellectual superiority" (Takaki, 1979, p. 138). According to the faculty, the blacks were a "source of irritation and

distraction" and interfered with "the success of their teaching" (Takaki, 1979, p. 137). The woman, on the other hand, was seen as "unsexing" herself, as repudiating the image of women as "modest" and "delicate" beings (Takaki, 1979, p. 139).

Takaki's thesis was that by bifurcating society along the lines of race and sex, the white male was reaffirming his claim to "membership in a race of superior intelligence" (1979, p. 138). "Racial and sexual imagery enabled them to delineate their own white male identity" (Takaki, 1979, p. 142). This imagery for woman elevated her to a position of virtue and "true womanhood" while the imagery surrounding the blacks degraded them to the "child/savage." The end result was the same, however; both were shut out of the institutions of knowledge and power. As Takaki noted, "the subordination of blacks" and "the confinement of women" were interdependent (1979, p. 136). Both Friedman and Takaki, then, in using the sex-race analogy, rather than focusing on the victim, focused on the victimizers' means of maintaining their dominance.

William Chafe's essay "Sex and Race: Analogy of Social Control" (1977) is an appropriate finale for a review of the literature on the interrelationships of racism and sexism. The essay gave an overview of the development of the arguments for and against a comparison of the condition

of blacks and women and then, like Takaki and Friedman, moved on to the major thesis that, although they had taken different forms, both racism and sexism had reinforced the power of the dominant class, the white male. Thus, Chafe saw as the real value of the race-sex analogy a means by which to examine "the process and forms of social control in America" (Chafe, 1977, p. 46).

Using Richard Wright's Black Boy by way of example, Chafe delineated the means by which white society had controlled the black. He wrote of four basic "circles of control," the first being physical intimidation, the result of which was "pervasive fear, anchored in the knowledge that whites could unleash vicious and irrational attacks without warning" (Chafe, 1977, p. 60). The second circle was the economic power of whites over blacks as "only a limited number of economic roles were open to blacks, and if they were not played according to the rules, the job would be lost" (Chafe, 1977, p. 61). The psychological power of whites "to define and limit the reach of black aspirations" was the third circle of control (Chafe, 1977, p. 61). Chafe used the example of Wright telling a white woman he wanted to be a writer. Her reply was, "You'll never be a writer . . . who on earth put such ideas into your nigger head" (Chafe, 1977, p. 62). Chafe's fourth circle was the

> most devastating control of all . . . that exercised by the black community itself out of self-defense. In the face of a world managed at every level by white power, it became an urgent necessity that black people train each other to adapt in order to survive. (Chafe, 1977, p. 62)

Chafe then found that the means of social control, if not the substance of the control, was very much the same for women as it was for blacks. The physical strength and alleged dominance of the male over the female had been an important means of controlling women's freedom. The traditional image had been the male "protecting" the female, who, it had been assumed, was unable to fend for herself (Chafe, 1977, p. 66). The woman traditionally had been economically dependent on the man, a state which Charlotte Perkins Gilman argued was the root of women's subjugation and humiliation (Chafe, 1977, p. 66). Women's aspirations had been curtailed by psychological control just as had blacks. Not unlike Richard Wright sharing his desire to be a writer, Chafe used the example of Carol Kennicott in Sinclair Lewis' Main Street saying to her boy friend, "I want to do something with my life." He responded, "What's better than making a comfy home and bringing up some cute kids?" (Chafe, 1977, p. 68). As Chafe noted, "The aspirations, horizons and self-images of blacks and women have been defined by others in a limiting and constrictive way" (Chafe, 1977, p. 20). Also, women, like blacks, had been kept in line by their peers. Again, Chafe showed Carol

Kennicott receiving hostile glances "when she violated her place by talking politics with the men," and being applauded when she became pregnant (Chafe, 1977, p. 71). Thus, Chafe wrote,

> Women and blacks have kept each other in line not only as a means of group self-defense . . . but also as a means of maintaining self-respect by defending the course they themselves have chosen. (Chafe, 1977, p. 71)

Chafe's conclusion was that:

> Despite profound substantive differences between women and blacks, and white women and black women, all have been victims of a process, the end product of which has been to take away the power to define one's own aspirations, destiny, and sense of self. (Chafe, 1977, p. 76)

For this reason he found the analogy of race and sex "has the potential of developing insights into the larger processes by which the status quo is perpetuated from generation to generation" (Chafe, 1977, p. 59).

It can be seen that the use of the race-sex analogy has developed and changed over time. For example, at one time women were seen as a caste as were blacks. At another time the idea of women as caste was disparaged because of the often great experential differences of blacks and women. Writers have focused most recently, not on a comparison of the substantive conditions of the two groups, but on the procedures and results of the white male's oppression, which often effectively have shut out both blacks and women from the power structure. By focusing on the Supreme Court, an

overwhelmingly white male institution, this dissertation builds on the latter approach to the sex-race analogy. A comparison of the ideology of the Court in dealing with issues of race and sex should illuminate the process by which the powerless are kept powerless or allowed power by the dominant group. At the same time, such a comparison should provide appropriate strategies for change based on the differentiation between racism and sexism.

CHAPTER III

Women and the Law

That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomic truth. It may have been a radical error, and we are by no means certain it was not, but that this was the universal belief certainly admits of no denial.

Bradwell v. Illinois, Opinion of the Lower Court, 1870

I say the "young men and boys" rather than the "young people" because the problems I want to discuss in this book belong primarily, in our society, to the boys: how to be useful and make something of oneself. A girl does not have to, she is not expected to, "make something" of herself.

Growing Up Absurd, Paul Goodman, 1963

The purpose of this chapter is to describe the major categories justifying sex discrimination that were generated by a content analysis of the selected Supreme Court cases and briefs of counsel used for this dissertation.* The categories, in turn, when compared with those that emerged from the race discrimination cases, described in Chapter IV, will help answer the questions of this study posed at the outset: How has one of society's major institutions, the Supreme Court, justified or condemned over time a condition of inequality with respect to blacks and women? How has this justification or condemnation changed over time? How has the justification for the legal separation of the sexes differed from that for the separation of the races?

This chapter begins with a brief historical description of the foundations of gender-based classification in the law. There is then a review of the differential application of legal standards to men and to women. The categories follow this review, providing the legal system's rationale for the seemingly arbitrary application of the law to women as well as the rationale supporting equity. Finally, the chapter concludes with an analysis of the data in terms of the questions asked in the dissertation. It should be emphasized that for the most part the only data systematically

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*See Chapter I, p. 10, for a full discussion of the methodology.

used in this chapter are the opinions and briefs of counsel of the Supreme Court cases on women's issues selected for this study.

A Background: Common Law and Common Language

The Common Law

The legal system in the United States often has treated men and women as two separate classes, with separate and distinct laws for each group. The rationale for this legal differentiation between the sexes had its roots in English common law. The 18th century English jurist, Sir William Blackstone, whose name is virtually synonymous with the law, wrote in his Commentaries on the Law of England of this legal difference between men and women:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law . . . a femme-covert. . . under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. (Reed, Brief of Appellant, 1971, p. 28).

Coverture, therefore, was a legal and social veil for the great majority of those women who were married. It has been argued, however, that, at its best, common law rules were meant to establish "mutual duties of wife and husband to support each other, and that there resulted a neutral inter-dependence between husband and wife" (Frontiero,

Brief of Appellant, 1973, p. 59). In reality, however, the wife's status was subservient to that of her husband. The opinion of the Alabama Supreme Court in 1893 spoke to the legal subservience of the woman:

> The authorities are uniform that the husband is the head of the family, so long as the marital relation is maintained. He determines where the home shall be, is entitled to the wife's labor and services, has the right to have her society, controls the home and the household, and, with limited exceptions, she must obey his commands. In domestic management she is not presumed to have an independent will of her own . . . The husband has, in consequence of his marriage, a right to the custody of his wife, and whoever detains her from him violates that right, and he has a right to seize her wherever he finds her. (Orr, Brief of Appellee, 1979, p. 12)

The single woman or "femme sole," although retaining rights unavailable to married women, was viewed both socially and legally as an anomaly and, as a consequence, dismissed as an aberration. As Supreme Court Justice Joseph Bradley wrote in 1873, "It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule" (Bradwell, Concurring Opinion, 1873, p. 446). As a consequence, the courts historically have tended to perceive of all women as wives and mothers rather than as individuals.

The effects of common law notions about the relation of men and women are still being felt. It was only in July, 1981, for example, that the United States Supreme Court

invalidated as unconstitutional Louisiana's "head and master" laws that allowed husbands exclusive control over jointly owned property (Kirchberg v. Feenstra, 1981).

The Common Language

In the common law the woman's domain was to be the private one of the home ruled by the law of the husband or father. The man's domain was public and ruled by the written law of the United States Constitution and the legislatures. The language pertaining to gender in the written law, including the Constitution, used both gender-neutral words such as "person," individual," "citizen," as well as the masculine pronouns "he," "him," and "his," an English construction grammatically intended to refer to both sexes. On occasion, however, laws were specifically limited to "males," although the Constitution avoided this construction except in the third section of the Fourteenth Amendment. The question, then, was inevitably raised as to whether or not the seemingly gender-neutral language of the written law meant that women and men were to be treated equally, especially in the Constitution.

The first case dealing in part with the language of gender to reach the Supreme Court was brought in 1873 by Myra Bradwell, an attorney who was refused a license to practice law in Illinois because she was a woman. In her petition to the lower court, she addressed the problem of

language in the Illinois law regulating admission of lawyers to the bar. The law, in outlining the qualifications of an attorney, used the pronoun "he." Bradwell argued that the law, nevertheless, included women. "Your petitioner claims that the pronoun he . . . is used indefinitely for any person, and may refer to either a man or a woman" (Bradwell, Lower Court Petition, 1873, p. 3). She supported her contention with another section of the Illinois State Code which explicitly read, "When any party or person is described or referred to by words importing the masculine gender, females as well as males shall be deemed to be included" (Bradwell, Lower Court Petition, 1873, p. 31). She also referred to a case whereby the code of Iowa, which allowed only "white males" to the bar, had been legally interpreted to include females (Bradwell, Lower Court Petition, 1873, p. 6). Finally, she argued that the word "men" was a generic term used for both sexes and by way of example wrote,

> Section 3 of our Declaration of Rights says "that all men have a natural and indefensible right to worship Almighty God," etc. It will not be contended that women are not included within this provision. (Bradwell, Lower Court Petition, 1873, p. 3)

Bradwell's lawyer addressed the language problem before the Supreme Court: "The 14th Amendment says 'all persons.'" Of course, women, as well as men, are included in this

vision and recognized as citizens" (Bradwell, Brief of Plaintiff, 1873, p. 3). The Supreme Court, however, totally avoided the debate and dismissed Bradwell's plea by maintaining that the Fourteenth Amendment of the United States Constitution did not cover the right to practice law.

Whether or not the language of the Constitution included women again was debated, in part, two years later in the Supreme Court case Virginia Minor v. Happersett (1875). It is in this case that the Court concluded that women, in fact, were "citizens" and "persons" as used in the Constitution. Virginia Minor maintained that, as a citizen, the Fourteenth Amendment of the Constitution granted women as well as men the right to vote. First, however, the Court had to establish that women were in fact "citizens" and "persons" in the Constitutional sense and, therefore, included in the Constitution. Close to half of the Court's opinion is spent doing so. However, although the Court agreed that Virginia Minor was a "person" within the meaning of the Constitution, she was not allowed to vote as the Court decided that voting was not a right guaranteed by the Constitution except by special amendment (Minor, Opinion of the Court, 1875, p. 630).

Although the Supreme Court in Minor had seemed to agree that constitutional language should be regarded as gender-neutral, in In Re Lockwood (1894), 19 years after Minor, the

Supreme Court equivocated. The state of Virginia had refused to allow Belva Lockwood to be a lawyer because she was a woman. The Virginia law said that any "person" who was a member of the bar in Washington D.C. was automatically a member of the bar in Virginia. Belva Lockwood was a member of the bar in Washington D.C. The Supreme Court dismissed the language issue this time by briefly ruling that, "It was for the supreme court of appeals to construe the statute of Virginia in question and to determine whether the word 'person' as therein used is confined to males, and whether women are admitted to practice law in that commonwealth" (Lockwood, Opinion of the Court, 1894, p. 930).

The ambivalence surrounding the inclusion of women in the constitutional word "persons" was commented upon as late as 1971 in the Supreme Court case, Reed v. Reed, a case challenging a law giving preference to men over women as estate administrators. The counsel for the appellant felt compelled to note that finally the law had "begun to recognize the claim of women to full membership in the class 'persons'" (Reed, Brief of Appellant, 1971, p. 10). The tradition of the common law had made women's legal status so ambivalent that the courts historically have had to ponder the very inclusion of women in the language of the written law. These beginnings have affected women and the law until today.

Legal Reasoning and Sex Discrimination

Although serious consideration of the constitutionality of sex discrimination per se by the Supreme Court did not begin until 1971 in Reed v. Reed, the Supreme Court as early as 1873 in Myra Bradwell v. Illinois was called upon to address the place of women in the legal structure. Bradwell and a series of other Supreme Court decisions between 1873 and 1971 consistently reinforced the idea that legal classification by gender was both natural and not worthy of great consideration. The attitude of Justice Felix Frankfurter, who wrote the opinion in Goesaert v. Cleary, a 1948 case challenging a Michigan law preventing women from working as bartenders, was fairly typical of the law's response to women's issues. He stated succinctly, "Beguiling as the subject is, it need not detain us long" (Goesaert, Opinion of the Court, 1948, p. 165).

Although gender based classification for the most part was accepted as natural by the Court, it nevertheless had to be constitutionally acceptable as well. Often, however, the constitutional standards used to guard the rights of men were different from those used for women. A basic premise of the legal system is that law creates a body of standards and precedents by which to judge new situations in a consistent, unarbitrary manner. This premise justifies the use of the law as a system of control. In the case of women, however,

the standards often have not been applied in the same way as they have for men. It is important, then, first, to review in this section those differences in application of the legal standards and then seek the sociological rationale which the Court has used to justify the use of these standards in separate ways for men and women. The legal standards most frequently relied upon in the cases dealt with in this chapter have been the Fourteenth Amendment, the Nineteenth Amendment, and the legal notions of police powers, fundamental rights, benefits and burdens, and congressional intent.

The Fourteenth Amendment

The Fourteenth Amendment of the United States Constitution was written originally to prevent racial discrimination against blacks in the aftermath of the Civil War. As a consequence, the Fourteenth Amendment, until recently, was not to afford much protection for women, and as late as 1973 in Frontiero v. Richardson, the counsel for the appellee questioned the use of the Amendment for sex discrimination cases ". . . in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate . . . racial discrimination emanating from official sources in the States" (Frontiero, Brief of Appellee, 1973, p. 16).

Nevertheless, the Fourteenth Amendment has been more and more broadly interpreted by the Supreme Court over the years until today, more than any other legal tool, it

protects the basic rights of all individuals from state tyranny. Its three basic clauses have provided the crux for most of the important constitutional litigation of this century:

1. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States;

2. nor shall any state deprive any person of life, liberty, or property without due process of law;

3. nor deny to any person within its jurisdiction the equal protection of the laws.

The first clause, the Privileges and Immunities Clause, provides one of the first examples of differential application of law to women and men. The case was Bradwell v. Illinois (1873). In Bradwell, Justice Bradley wrote that the claim which:

> Assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation or employment in civil life [is faulty because] the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. (Bradwell, Concurring Opinion, 1873, p. 446)

This ruling came just 24 hours after the Slaughterhouse Cases where local butchers were complaining about a private corporation's monopoly of slaughtering. Supporting the butchers' right to their occupation, Justice Bradley, seemingly contradicting his words in Bradwell, wrote:

> If my views are correct with regard to what are the privileges and immunities of citizens, it

> follows conclusively that any law . . . depriving a large class of citizens of the privilege of pursuing a lawful employment does abridge the privileges of those citizens. (The Slaughterhouse Cases, Opinion of the Court, 1873, p. 420)

The differentiation between the sexes and their relation to the Fourteenth Amendment had begun.

The second clause of the Fourteenth Amendment, the Due Process Clause, also has been applied differently to men than it has been to women. In Lochner v. New York (1905) a law regulating the number of hours male bakers could work was held in violation of the Due Process Clause because it interfered with a man's right to contract freely and, therefore, arbitrarily deprived him of his "property." The Court noted, "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual" (Lochner; Opinion of the Court, 1905, p. 943). Nevertheless, three years later in Muller v. Oregon (1908), a case similar to Lochner, again brought under the Due Process Clause, again challenging a law regulating the number of hours employees could work, the Court upheld the law and seemingly reversed Lochner. However, Lochner was distinguished from Muller as the employees were women. The Court wrote,

> Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designated for her protection may

> be sustained, even when like legislation is not necessary for men, and could not be sustained. (Muller, Opinion of the Court, 1908, p. 556)*

The other two United States Supreme Court cases in this dissertation that relied on due process and involved the issue of women in the work force were Adkins v. Children's Hospital (1923) and West Coast v. Parrish (1937). The first, Adkins, dealt with the constitutionality of the minimum wage for women.** In this case, the Supreme Court insisted that a constitutional standard applied to women should be the same as that applied to men: "We cannot accept the doctrine that women of mature age, sui juris, require or may be subjected to restrictions upon their liberty or contract which could not lawfully be imposed in the case of men under similar circumstances" (Adkins; Opinion of the Court, 1923, p. 796)

Nevertheless, in a rare, open reversal, Adkins was overturned by the Supreme Court in 1937 by West Coast Hotel

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*The final chapter of the struggle for state regulated work hours was Bunting v. Oregon (1917) where Lochner was overturned sub silentio as labor laws for both men and women were held constitutional under the Fourteenth Amendment (Bunting, Opinion of the Court, 1917, p. 834)..

**Because the case came from the District of Columbia, the Court used the Due Process Clause of the Fifth Amendment, which applies to federal laws, instead of the Fourteenth Amendment, which applies to the state. However, both Due Process Clauses have been interpreted in the same way, and it is possible to speak of them together.

Company v. Ernest Parrish and Elsie Parrish His Wife. The Court in West Coast ruled that a minimum wage law for women and not men did not violate the Due Process Clause of the Fourteenth Amendment. The dissenting opinion of Justice George Sutherland in West Coast, however, pointed out that applying the Due Process Clause in one way to men and another to women was arbitrary and unconstitutional.

> If, in light of the facts, the state legislation, without reason or for reasons of mere expediency, excluded men from the provisions of the legislation, the power was exercised arbitrarily. On the other hand, if such legislation in respect of men was properly omitted on the ground that it would be unconstitutional, the same conclusion of unconstitutionality is inescapable in respect of similar legislative restraint in the case of women. (West Coast, Dissenting Opinion, 1937, p. 720)

From Lochner, Muller, and West Coast, it was clear that the Due Process Clause could be interpreted differently for the two sexes.

More so than the first two clauses of the Fourteenth Amendment, the Equal Protection Clause has been the constitutional focus in the movement to gain equal rights for women, but this was not always so.

Historically, the Equal Protection Clause, as with the Fourteenth Amendment as a whole, focused on racial classifications. Laws applying only to women, on the other hand, were not only considered reasonable because of the nature of

women but were not seen as coming under the purview of the Equal Protection Clause.

Quong Wing v. Kirkendall (1912) illustrated the use of the Equal protection Clause as a tool for race equity but not for sex equity. The case involved women engaged in the laundry business who were exempt from a state license tax that men were obliged to pay. The man bringing the suit was Chinese. The Court upheld the law based on the Equal Protection Clause, carefully underscoring the argument of the defense that the law only involved sex discrimination and that there was no intent to discriminate on the basis of race which would have been unconstitutional under the Equal Protection Clause.

> Neither can it be successfully maintained that the purpose of this law is to discriminate against the subjects of the Emperor of China, for no such motive is apparent on the face of this law, nor is there anything in its practical application that would lead to such a conclusion. The law by its terms operates equally upon all male persons, and by its exemptions operates equally upon all female persons. (Quong Wing, Opinion of the Court, 1912, p. 351)

The Equal Protection Clause gradually was expanded, however, and became used as a way to assure that state laws were applied even-handedly to various groups of people who were similarly situated and to assure that state legal classifications were reasonable and not arbitrary (see, for example, Oyama v. California (1948), Graham v. Richardson (1971). However, for women's rights it has remained

relatively weak. Until as late as the 1960's, any law based on gender classification easily could pass muster under the Equal Protection Clause if it were in any way rationally related to a legitimate governmental objective. Therefore, in Goesaert v. Cleary (1948) the Court upheld a Michigan law that prevented women, who were not the daughters or wives of male bar owners, from being bartenders. The Court felt it a "reasonable" law fulfilling the state's objective of avoiding "moral and social problems" (Goesaert, Opinion of the Court, 1948, p. 166).

Unlike gender classification, the Supreme Court has viewed race classification in a law as "highly suspect" and has demanded not just a "rational" governmental objective but a "compelling" one subject to "strict scrutiny" by the courts to withstand a challenge under the Equal Protection Clause (Bolling v. Sharpe, 1954; Korematsu v. U.S., 1944). Women's rights advocates of the 1960's saw the advantage of convincing the Supreme Court to place gender-based classification in the same "suspect" category as race as a means of strengthening the Equal Protection Clause in cases of sex discrimination.

Therefore, in a 1972 Supreme Court case, Reed v. Reed, classification by sex was argued by counsel to be "suspect," and, thus, subject to "strict scrutiny." The case involved a male preference law for estate administrators which was

claimed by the state of Idaho to be "rationally" related to the governmental objective of "administrative convenience" and, therefore, valid under the Equal Protection Clause. Although the Supreme Court disagreed that gender classification should be "suspect," the Court did concede, for the first time, that such classification could be in violation of the Equal Protection Clause (Reed, Opinion of the Court, 1972, p. 230). Therefore, although the Supreme Court had not declared classification by sex "suspect," it had in Reed moved toward a more stringent review.

More recently, in Craig v. Boren (1976), a middle-tier standard of review for laws based on gender classification was developed by the Court. The challenged law in this case required men to be 21 years old to buy beer, while women had only to be 18. The Court implied that any law classifying by gender had to withstand a more rigorous test than "rational relationship" but not as rigorous a scrutiny as demanded by a "suspect" class (Craig, Opinion of the Court, 1976, p. 407).

Although under the Equal Protection Clause gender-based classification has never been declared suspect, a plurality of the Supreme Court did declare such legislation "suspect" and in violation of due process in 1973 in Frontiero v. Richardson. Brought under the Fifth Amendment because it involved the military, the challenged law allowed benefits

to male military personnel but not to female personnel unless they could prove the economic dependency of their husbands. The Court used the following rationale for declaring the sex-based statute "suspect":

> And what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions . . . between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. (Frontiero, Opinion of the Court, 1973, p. 592)

However, a plurality is not a majority, and a majority of the United States Supreme Court has never held sex to be a "suspect" classification.

There is no doubt that the Fourteenth Amendment has evolved from its initial purpose to eliminate racial discrimination into a tool of some strength for women's rights. However, it is also true that the Court is reluctant to use this Amendment to eradicate sex discrimination with the same force that it has used to remove race discrimination.

The Nineteenth Amendment

The Nineteenth Amendment granting women the right to vote came after years of struggle. When the Amendment was first passed, there were some fleeting attempts to interpret it broadly as an Equal Rights Amendment, subjecting all gender-based laws to close scrutiny. A counsel in a case in

Alabama, for instance, insisted that "the final ratification of the Nineteenth Amendment . . . had the effect of making our organic as well as statutory laws applicable to men and women alike" (U.S. Supreme Court Reports, 82 L. Ed. 261 1937).

Although interpreting the Nineteenth Amendment as an Equal Rights Amendment failed, nevertheless, the Amendment did have an impact beyond simply the right to vote. In Adkins v. Children's Hospital (1922), the Court, calling a minimum wage law for only women invalid, spoke to the force of the Nineteenth Amendment:

> The ancient inequality of the sexes, otherwise than physical, as suggested in the Muller Case . . . has continued "with diminishing intensity." In view of the great—not to say revolutionary—changes which have taken place since that utterance, in the contractual, political, and civil status of women, culminating in the 19th Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. (Adkins, Opinion of the Court, 1922, p. 794)

The implication was that, given the Nineteenth Amendment, it could now be assumed women were legally on the same footing as men. However, in a dissenting opinion in this same case, Justice Oliver Wendell Holmes wrote, "It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women or that legislatures can not take these differences into account" (Adkins, Dissenting Opinion, 1922, p. 801).

Following Holmes' lead, in Breedlove v. Suttles (1937), a case debating a law that required a poll tax for men but not for women, the counsel for Suttles, a tax collector for the state of Georgia, emphasized that the Nineteenth Amendment only granted the right to vote, nothing more. He quoted a Massachusetts case: "The change in the legal status of women wrought by the Nineteenth Amendment was radical, drastic and unprecedented. While it is to be given full effect in its field, it is not to be extended by implication" (Breedlove, Brief of Appellee, 1937, p. 64). The United States Supreme Court agreed, and the gender-based law was upheld.

Although the constitutional protection of the Nineteenth Amendment has been very narrowly interpreted, for many years it was seen as virtually the only constitutional safeguard of women's rights. This is seen in Hoyt v. Florida (1961), a case challenging the legality of different jury obligations for men and women:

> Appellant's contention essentially is that women should be freely admitted on juries and is one which cannot be said to be based on the Constitution, but, rather, one which is based on a changing view of the relative rights and responsibilities of women in our public and social life. While it may be true that this has actually progressed in virtually all phases of life as we know it today, including jury duty, it certainly has not achieved the stature of a constitutional compulsion on the states, excepting only as reflected in the grant of women's enfranchisement by the 19th Amendment to the United States Constitution. (Hoyt, Brief of Appellee, 1961, p. 118)

Aside from the Fourteenth and Nineteenth Amendments, other legal standards have been used in cases dealing with women which have been applied differently in similar cases dealing with men. One of these standards is the notion of police powers.

Police Powers

In addition to the specific powers of state constitutions, states have more general powers to promote and protect the public welfare. Most commonly stated, it is seen as in the public interest to protect the "safety, health and morals" of the people of the state by means of specific police powers. Compulsory education and compulsory vaccination are but two examples of such powers.

Although police powers protect all citizens, women as a group have been viewed as requiring even greater protection than men even if it meant excluding the women from the rights enjoyed by men and the responsibilities expected of men. A major reason for this was explained in the Court's opinion in West Coast v. Parrish (1937).

> The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.
>
> It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. . . . We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and

> that her physical well-being becomes an object of public interest and care in order to preserve the strength and vigor of the race. (West Coast, Opinion of the Court, 1937, p. 710)

In Goesaert v. Cleary (1948) it was affirmed that the public interest in protecting the "safety, health and morals" of women justified a law excluding women from bartending but not from serving drinks. However, the counsel for the appellant questioned this differential use of police powers for men and women:

> Can it be contended that it promotes public safety to permit only women to act as bartenders who happen to be the wife or daughter of the male owner of the business while neither the woman who owns her own license nor her daughter can so act?
>
> Can it be contended that a woman bartender would promote the morals of an establishment if her husband or her father were the licensee more than if she or her mother held the license?
>
> And is it claimed that the male owner is more solicitous of sanitation or public health than the female? (Goesaert, Brief of Appellant, 1948, p. 28)

Although protecting women as a special class under the auspices of the states' police power has fallen out of favor, as late as 1971 in Reed v. Reed the counsel for the appellant felt compelled to quote a lower court case refuting Goesaert: "In light of current customs and mores, the municipal restrictions against females bartending may no longer be viewed as a necessary and reasonable exercise of the police power" (Reed, Brief of Appellant, 1971, p. 49).

Fundamental Rights

Certain fundamental rights are explicitly guaranteed by the United States Constitution in the Bill of Rights and in the Fifth and Fourteenth Amendments' Due Process Clauses which protect life, liberty, and property. The Supreme Court also has found other rights to be implicitly guaranteed such as the right to vote and to travel.

The quest for fundamental rights has been a major part of the litigation surrounding women beginning with the right to pursue an occupation (Bradwell v. Illinois, 1873), and the right to vote (Virginia Minor v. Hapersett, 1875). Although the right to choose an occupation and the right to vote have subsequently been found fundamental rights under constitutional protection, when they were first brought up in Bradwell and Minor in relation to women, they were declared rights not covered by the Constitution.

Most recently, the notion of fundamental rights has been used with two issues that particularly affect women—legal access to contraceptives and to abortions (Griswold v. Connecticut, 1965; Roe v. Wade, 1973). In both, the fundamental constitutional right to privacy was extended by the Court to cover individual control over the reproductive process. However, with abortion, full control was limited to the first trimester of pregnancy and further limited in Maher v. Roe (1977) when the Court found constitutional a law

withholding Medicaid funds to indigent women wanting non-medically necessary abortions.

Benefits and Burdens

Orr v. Orr (1979) challenged an Alabama law that awarded alimony only to women. The Supreme Court indicated this law put an undue burden on the male. In this case, although disagreeing on other grounds with the opinion, Justice Rehnquist described the theory of benefits and burdens:

> Statutes alleged to create an impermissible gender-based classification are generally attacked on one of two theories. First, the challenged classification may confer on members of one sex a benefit not conferred on similarly situated members of the other sex. . . .
>
> Second, the challenged statute may saddle members of one sex with a burden not borne by similarly situated members of the other sex. Standing to attack such a statute lies in those who labor under its burden. (Orr, Dissenting Opinion, 1979, p. 327)

The definition of a benefit and a burden tends to be in the eye of the beholder. For many years, women were to be protected, and this protection often was viewed as a benefit. However, protective labor laws for women often excluded them from fair competition with men (Muller v. Oregon, 1907; West Coast v. Parrish, 1937). Eliminating the poll tax for women until they registered to vote, whereas men had to pay the tax whether they voted or not, was seen as a benefit as it was discrimination in favor of women. Yet it is to be supposed that this law effectively kept women

from voting so as to avoid the tax payment (Breedlove v. Suttles, 1937). Allowing women to choose to register for jury duty when this choice was not open to men was seen as favorable to women although it resulted in virtually all-male juries (Hoyt v. Florida, 1961).

Recently, certain classes legally can be "benefitted" through affirmative action programs, because they have been previously "burdened" due to discrimination. It has been aruged that women have suffered past discrimination, and based on this argument "female preference" laws have been upheld within the last decade. Commenting on these laws, the counsel for the appellant in Orr v. Orr (1979) noted that in order

> to ease a woman's entrance into a male dominanted society . . . [and] compensate a woman for the discrimination which she suffered as a participant in that society . . . sometimes distinctions must be drawn between the sexes to provide each man and woman an equal opportunity to rise or fall. (Orr, Brief of Appellant, 1971, p. 24)

As Justice Lewis Powell wrote in Bakke, however, "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth" (Orr, Brief of Appellant, quoting Regents of University of California v. Bakke, 1971, p. 27). Once again what may be seen as a benefit for women may in fact be a burden.

Congressional Intent

The Supreme Court, in its decisions, can write broad new rules often dramatically affecting society as it did in Brown v. Board of Education (1954) on desegregation and Roe v. Wade (1973) on abortion. On the other hand, the Court can choose to play a nonactivist role by deferring to the intent of law-making bodies.

In two early cases, the Court chose to defer to congressional intent. In Bradwell v. Illinois (1873), the Supreme Court determined that the Illinois Supreme Court was correct in excluding Mrs. Bradwell from the legal profession as that had been "the intent of the legislature" (Bradwell, Concurring Opinion, 1873, p. 446). Also, in Virginia Minor v. Hapersett (1875), the Court deferred to the legislature with the matter of women's right to vote: "If the law is wrong, it ought to be changed; but the power for that is not with us" (Minor, Opinion of the Court, 1875, p. 631). More recently, in two cases decided by the Supreme Court in 1981, the Court excluded women from the military draft (Rostker v. Goldberg, 1980) and from a share in their husband's military retirement pay upon divorce (McCarty v. McCarty, 1981) by deferring to congressional intent.

On the other hand, at times the counsels have appealed to legislative intent but the Court has chosen to ignore it. In Craig v. Boren (1976) and Frontiero v. Richardson (1973),

for instance, the counsels for the states argued that only upon a clear showing that the legislation in question was arbitrary should the Court substitute its judgment for that of the legislative body concerned. Nevertheless, the Supreme Court took an activist role in both cases and declared the gender-based laws involved unconstitutional.

From this review of the constitutional standards and legal concepts frequently used in cases of women's rights, it is clear that often the application of the law not only differed for men and women but served as a means for excluding women from full participation in society. What has been the rationale supporting this legal differentiation of the sexes? In the examination of the cases involving sex discrimination selected for this dissertation, there emerged recurring reasons given to justify gender classification in the law. These reasons in the composite illustrate the dominant ideology used by the Supreme Court to separate the sexes legally into two classes. It is this ideology that is now examined.

Women and Men as Separate Legal Classifications

There are four major themes that emerged from a comparative analysis of the opinions and briefs of counsel of the 20 Supreme Court cases on women's issues selected for this dissertation. These themes or categories help explain the dominant ideology promulgated by the Supreme Court to justify

the legal separation of the sexes into two distinct classifications and the consequent differential application of the law to men and women. The purpose of this section, then, is to present the categories with supporting data from the cases. It is apparent that not all the data can be included; however, Table 2 in Appendix B gives an idea of the frequency with which the arguments constituting each category were used. Also, Table 1 in Appendix B gives a summary of the issues involved in each of the cases analyzed.

1. The first category, Natural Order, embodies the argument that a division of the sexes is a "given," natural and ordained by God, and a change in this order would result in chaos.
2. The second category is The Woman's Place Is in the Home. In this category, the Court justifies men and women as separate legal classifications because men and women function in different domains. The woman's domain is seen as the home, away from the public realm of the man; her only real role is that of wife and mother.
3. The third category covers the general theme of Women in Need of Protection. The reasons for this special protection formed subcategories:

A. Woman as the weaker sex—women are perceived as possessing certain emotional and physical traits that make them more vulnerable than men.

B. Women and children—women are perceived as being one with children and both are perceived as requiring special care.

C. Propagation of the race—women are seen as needing special protection as they alone bear children.

D. To protect women's morals—women are perceived as being both morally corrupt and morally vulnerable; they are both the temptress and the virgin. Special laws are necessary to protect them from themselves and others.

4. The fourth category is Dependency as an Economic Issue. Economic benefits have accrued for men by having women at home and by controlling women laborers through special work laws.

It will become clear that none of these categories are mutually exclusive. Nevertheless, they do establish a paradigm that, when compared with those categories emerging from race discrimination cases in the next chapter, will provide insight into those questions this dissertation addresses.

In reporting each category, examples have been drawn from both the Supreme Court's opinions and briefs of counsel, creating a description of the arguments most consistently

used by the lawyers and the Supreme Court over time to justify a separation of the sexes. As can be seen by the data presented, at one time or another the Supreme Court wrote into its opinions the rationale embodied in each of the categories.

Introduction

The counsels and the Court, itself, often claimed throughout the cases analyzed that a woman was denied a right solely because of her sex. In Virginia Minor v. Happersett, the counsel for Mrs. Minor argued, "The defendant refused to register the plaintiff solely for the reason that she is FEMALE . . . " (Minor, Brief of Plaintiff, 1875, p. 218). Again, in Re Lockwood the Court commented, although it refused to rule on the issue, that "the only reason for the rejection of her application [for an attorney's license] was that she is a woman" (Lockwood, Opinion of the Court, 1894, p. 929). In more recent times, neither the language nor the argument has changed significantly. For example, in Reed v. Reed the counsels for the appellant wrote that their client was being discriminated against "solely on the ground that she is a female" (Reed, Brief of Appellant, 1971, p. 7). Again, in Frontiero v. Richardson the Court established that, "The sole basis of the class established in the challenged statutes is the sex of the individual involved" (Frontiero, Opinion of the Court, 1973, p. 592).

The notion of "sole reason" is misleading, however, because womanhood has carried with it for years, in the words of Supreme Court Justice William Brennan in Orr v. Orr, not just one reason but a whole "baggage of sexual stereotypes" (Orr, Opinion of the Court, 1979, p. 321). During the feminist movement of the 1960's and 1970's, therefore, it was incumbent upon the legal counsels advocating women's rights to break down the stereotypical assumptions about the roles of women and men. The argument used by the counsel for the appellant in Orr v. Orr was typical when he noted, "The thrust of every gender discrimination decision rendered by this Court is to the effect that neither a state nor national government can rely on 'archaic and overbroad generalizations,' . . . about the sexes" (Orr, Brief of Appellant, 1979, p. 17). What were the "archaic and overbroad generalizations" relied upon historically by the Supreme Court to uphold the idea that, legally, men and women are two classes?

Category I: A Natural Order

As Supreme Court Justice Bradley noted in Bradwell v. Illinois, "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman" (Bradwell, Concurring Opinion, 1873, p. 446). The argument for a natural, God-given order as a rationale to keep the sexes legally

separate was found in all five historical periods examined in this dissertation.

Louis Brandeis, in his brief for the state of Oregon in Muller v. Oregon, supported his argument for protective labor laws for only women by quoting a work on "Constitutional Limitations" which supported the natural order:

> But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class while leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulation recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection. (Muller, Brief for the State of Oregon, 1908, p. 13)

In Breedlove v. Suttles, a case requiring a poll tax of all men but only of those women who actually registered to vote, the counsel for the state found this classification reasonable given the "natural limitations imposed by sex" (Breedlove, Brief of Appellee, 1937, p. 9). The counsel further argued that the very "laws of nature" made women less able to earn money and, therefore, women should be freed of the poll tax (Breedlove, Brief of Appellee, 1937, p. 49). Finally, in summing up, the counsel maintained that classification by sex "has . . . always been made and enforced from time immemorial, and, unless prohibited in express terms of the Constitution, it is a natural and proper one to make" (Breedlove, Brief of Appellee, 1937, p. 66). The Breedlove Court agreed saying women were "naturally

entitled" to the special exemption, and upheld the law as based on a rational classification (Breedlove, Opinion of the Court, 1937, p. 255).

As late as 1971, nature was called upon to justify gender-based classification. Reed v. Reed challenged the Idaho Supreme Court's decision that a law giving legal preference to male estate administrators over females was constitutional. The Idaho court had argued that such gender classification was natural: "Philosophically it can be argued with some degree of logic that the provisions of I.C. 15-3.4 do discriminate against women on the basis of sex. However, nature itself has established the distinction" (Reed, Brief of Appellant, 1972, p. 54).

The belief in a natural order was accompanied by the belief that a change in this order would doom the family and cause chaos in society as a whole. The counsel for Mrs. Myra Bradwell in Bradwell v. Illinois commented on the fears of those opposing equality for women:

> It seems to be feared that doing justice to women's rights in any particular would probably be followed by the establishment of the right of female suffrage, which, it is assumed, would overthrow Christianity, defeat the ends of modern civilization, and upturn the world. (Bradwell, Brief of Plaintiff, 1873, p. 2)

"The Head and Master" laws that assured the man as head of of household were seen as essential to the integrity of the family and a way to maintain "social order" (Buck, Brief of

Defendant, 1926, p. 559; Breedlove, Brief of Appellee, 1936, p. 57). As change in the role and status of women did occur the Court tried to ignore it.

> Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards. (Goesaert, Opinion of the Court, 1948, p. 165)

In Hoyt v. Florida the counsel for the appellee characterized any change in the traditional roles as leading to sure disaster. "The only bulwark between chaos and an organized and well-run family unit is our woman of the day" (Hoyt, Brief of Appellee, 1961, p. 12). In reply, the Court again leaned toward the traditional norms even in the face of recognized change:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of the home and family life. (Hoyt, Opinion of the Court, 1961, p. 122)

A decade later, however, in a major shift, the Supreme Court ruled in Reed v. Reed that a law which stated that males must be preferred to females was unconstitutional. The Court said, "whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of

sex" (Reed, Opinion of the Court, 1970, p. 230). Interestingly enough, neither of the counsels had used the argument of "avoiding intrafamily conflict" as a reason for retaining the law. The Court, however, felt the need to comment on the old fear that equality of man and woman would create familial havoc. In this instance the Court chose equality over the avoidance of family conflict as the higher value.

The unshakeable belief in a "natural order" which helped justify for so long a division of the sexes for the most part has become unacceptable in the 1970's as an overt argument for gender classification in the law. In attempting to lay to rest the argument for a "natural order" the counsel for the appellant in Orr v. Orr wrote, "Habit rather than analysis made it seem acceptable and natural to distinguish between male and female" (Orr v. Orr, Brief of Appellant, 1979, p. 22). Nevertheless, the Court still does distinguish between male and female as will be seen in the following categories.

Category II: The Woman's Place Is in the Home

Justice Bradley, in Bradwell v. Illinois, clearly spoke to the woman's expected role in the private domain:

> The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should

> belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. (Bradwell, Concurring Opinion, 1873, p. 446)

In the early cases, this role for the woman was seen as a duty and obligation, and this duty, in turn, necessitated separate laws for men and women. In Muller v. Oregon for instance, the state counsel, Louis Brandeis, spoke of "the duty" the female worker "owes to the home and family" (Muller, Brief for the State of Oregon, 1908, p. 19).

The woman's entrance into the work force, therefore, meant a "double day," fulfilling her home duties as well as those of the marketplace. Although no one suggested that the man assume additional duties at home, the woman's double day was recognized both implictly and explictly. The Brandeis brief in Muller v. Oregon, for example, included the statement, "For women over twenty, ten and one-half hours is a reasonable time so long as they remain unmarried" (Muller, Brief for the State of Oregon, 1908, p. 158). In a more explicit reference to the double day, the same brief reads:

> The wife's life is darkened even more by the long-hour day, especially if she also be a working woman. Even if the day be one of only ten hours, she must arise as early as five o'clock to prepare breakfast for her husband and herself, so that they may be at their work places at seven. Beginning at that early hour her day will be a very long one. (Muller, Brief for the State of Oregon, 1908, p. 5)

The perception of the importance of the role of housewife, however, was surrounded by ambivalence. There was the

nobility of the role as expressed in Bradwell v. Illinois, "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother" (Bradwell, Concurring Opinion, 1873, p. 446). There was condecension by the counsel for the plaintiff towards the role in Lochner v. New York, a case involving a law limiting the hours of male bakers.

> Then there is the American housewife. Here is the real artist in biscuits, cake and bread, not to mention the American pie. The housewife cannot bound her daily and weekly hours of labor. She must toil on, sometimes far into the night, to satisfy the wants of her growing family.
>
> It seems never to have occurred to these ungallant legislators to include within the purview of the statute these most important of all artists in the most indispensable of trades. (Lochner, Brief of Plaintiff, 1905, p. 9)

In Hoyt v. Florida, a case involving differential jury selection for men and women, the role of housewife was looked upon with sentimentality in the eyes of the counsel for the appellee:

> The only bulwark between chaos and an organized and well-run family unit is our woman of the day. She and she alone ministers to our wants and needs as the partner in marriage, the mother in travail and the healer and comforter during illness and sadness. (Hoyt, Brief of Appellee, 1961, p. 12)

The same counsel, however, also subtly belittled the role:

> The home, though it no longer be the log cabin in the wilderness, must nevertheless be maintained. The advent of "T.V." dinners does not remove the burden of providing palatable food for the members of the family, the husband is still, in the

> main, the breadwinner, child's hurts are almost without exception, bound and treated by the mother. (Hoyt, Brief of Appellee, 1961, p. 11)

Finally, the courts have looked at the role with disparagement as reported by the counsel for the appellant in Reed v. Reed:

> Less chivalrous than this Court, but more accurately reflecting the impact of the stereotype, the judge stated that plaintiff's "lament" should be addressed to her sisters who prefer "cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping to becoming embroiled in plaintiff's problems. . . ". (Reed, Brief of Appellant, 1972, p. 53)

An inseparable part of the woman's private world of the home has been the care of children. To be a mother was "the law of the creator" (Bradwell, Concurring Opinion, 1873, p. 446). The daily care, rearing and education of the children was seen by the Court as the woman's role (Muller, Opinion of the Court, 1970, p. 556; West Coast, Opinion of the Court, 1937, p. 710). Nevertheless, the ultimate responsibility for the children lay with the father as head of household. As the counsel for the appellee pointed out in Breedlove v. Suttles:

> In Georgia the husband is designated by law as the head of the family, and it is the obligation of the father to provide for the maintenance, protection and education of his children. (Breedlove, Brief of Appellee, 1937, p. 57)

However, even with the social changes in the 1960's the maternal role of women was seen as eternal.

> Ever since the dawn of time conception has been the same. Though many eons may have passed, the gestation period in the human female has likewise remained unchanged. Save and except for a number of beneficial precautions presently available, parturation is as it well may have been in the Garden of Eden. The rearing of children, even if it be conceded that the socio-psychologists have made inroads thereon, nevertheless remains a prime responsibility of the matriarch. (Hoyt, Brief of Appellee, 1961, p. 11)

"The prime responsibility of the matriarch" for the rearing of the children was never seriously challenged in the cases analyzed. However, at one point in Reed v. Reed the counsel for the appellant did suggest that laws providing for exemption from jury duty because of child care be gender-neutral (Reed, Brief of Appellant, 1972, p. 53).

There has been however, a challenge in the 1970's to the vision that the primary function of woman is to be a child nurturer. In Reed v. Reed the counsel for the appellant argued that women's lives were no longer shaped primarily by child care.

> Today, of course, scientific developments have placed the choice and timing of parenthood within the realm of individual decision. Even for those who suspend or curtail economic activity to care for offspring, the period devoted to childrearing is limited. In these days of longevity, most women, for the larger part of their lives, are not preoccupied with child care functions. (Reed, Brief of Appellant, 1971, p. 51)

These changes in the role of the woman were summed up in the brief of the appellee in Orr v. Orr:

> This Court recognized in Stanton v. Stanton that the trend is toward an expansion of women's roles: "No longer is the female destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas. Women's activities and responsibilities are increasing and expanding. (Orr, Brief of Appellee, 1973, p. 9)

Nevertheless, there is little doubt that the prime responsibility for childbearing and rearing over time has fallen to the woman. In the three cases covered dealing specifically with reproduction (Buck v. Bell, 1927; Griswold v. Connecticut, 1965; Maher v. Roe, 1977) the defendants were all women. Although Buck dealt with sterilization of both men and women, the case centered on "defective" women who were kept institutionalized solely to prevent them from producing defective children "in order to prevent our being swamped by incompetence" (Buck, Opinion of the Court, 1927, p. 1002). The Court agreed their sterilization was constitutional. In Griswold the Supreme Court decided that a law prohibiting contraceptives invaded the privacy and "sanctity of a man's home" (Griswold, Opinion of the Court, 1965, p. 515). Although the Court referred to the "man's home," nevertheless, the case was brought by three women who had requested birth control information from Planned Parenthood in defiance of the law. Finally, in Maher v. Roe, an abortion case, the five appellees were all women, and it was clear that the total responsibility for the abortions, as well as for the care of the children, if an abortion were

not performed, would fall to the women. In none of these cases was the role of the man in the birth and care of the child considered.

The Supreme Court has accepted over time the argument that women need special dispensations because of their roles of wife and mother, "especially when the burdens of motherhood are upon her" (Muller, Opinion of the Court, 1908, p. 256; see also West Coast, Opinion of the Court, 1937, p. 710). The Court's position on this issue was made very clear in Hoyt v. Florida:

> It is true, of course, that Florida could have limited the exemption as some other States have done, only to women who have family responsibilities. But we cannot regard it as irrational for a state legislature to consider preferable a broad exemption, whether born of the State's historic public policy or of a determination that it would not be administratively feasible to decide in each individual instance whether the family responsibilities of a prospective female juror were serious enough to warrant an exemption. (Hoyt, Opinion of the Court, 1961, p. 122)

Even cases within the last decade, such as Maher v. Roe, see the woman as responsible for the bearing and caring of the children with all that implies for her role and status in both the public and private world of society.

Category III: Women in Need of Protection

Women as the weaker sex. Historically, women have been seen to possess certain characteristics which have made them

seem generally more vulnerable than men. This is clearly seen in the words used to describe women in comparison to men in the Supreme Court cases selected.

In Bradwell v. Illinois (1873), women were seen as "orderly" and "decent;" men were "violent" and "rowdy." Women possessed "sympathy and a "silver voice;" men "severity" and "sternness" (Bradwell, Opinion of the Court, 1873, p. 446). The Court in Muller v. Oregon (1908) noted, "There is that in her disposition . . . which will operate against a full assertion of [her] rights," whereas men were seen by the same court as "greedy," and "passionate" (Muller, Opinion of the Court, 1908, p. 556). Because of these characteristics, it has been seen as more appropriate that women have "a lighter burden" than men (Quong Wing, Opinion of the Court, 1912, p. 352) and enjoy "special considerations" (Breedlove, Opinion of the Court, 1937, p. 245).

Besides these general characteristics assigned to the "gentle" sex, women traditionally have been seen as physically weaker and, therefore, in need of special protection. The arguments in Muller v. Oregon used by Louis Brandeis in advocating protective labor laws for only women, for example, were used in the courts for years afterwards as a rationale for gender-based classification in the law. One of Brandeis' major arguments was that because women were physically weaker they needed special protection.

> Long hours of labor are dangerous for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences, physicians are agreed that women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application. Overwork, therefore, which strains endurance to the utmost, is more disastrous to the health of women than of men, and entails upon them more lasting injury. (Muller, Brief for the State of Oregon, 1908, p. 83)

The Court agreed and justified special legislation for women because of their "physical structure" (Muller, Opinion of the Court, 1908, p. 555).

In Adkins v. Children's Hospital, the counsel for the appellees, although arguing that a minimum wage for only women was unconstitutional, nevertheless agreed that other forms of protection for women were necessary, "because of her physical nature woman cannot stand the strain of long hours that the man can stand with due regard to health" (Adkins, Brief of Appellees, 1922, p. 39). Although the Court in Adkins decided a minimum wage was unconstitutional and doubly so because it would affect only women, the dissenting opinion insisted that women's physical weakness set them apart legally from men.

> The 19th Amendment did not change the physical strength or limitations of women upon which the decision in Muller v. Oregon rests. The Amendment did give women political power, and makes more certain that legislative provisions for their protection will be in accord with their interests

> as they see them. But I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the Amendment. (Adkins, Dissenting Opinion, 1923, p. 800)

In Breedlove v. Suttles the "physical differences" between the sexes also was used as one reason why it was natural that "women be exempt from the performance of some duties which are imposed on men" (Breedlove, Brief of Appellee, 1937, p. 48).

By the 1970's, for the most part, the argument of the physical weakness of women gave way to simply the physical differences between men and women. These differences are now argued as "an accident of birth" and, therefore, legal classifications based on them are seen as "objectionable" (Craig, Opinion of the Court, 1976, p. 416). In a total rejection of the physical weakness argument, the Supreme Court in Frontiero v. Richardson maintained that biological differences between the sexes bear "no relation to ability, to performance or contributions to society" (Frontiero, Opinion of the Court, 1973, p. 592).

This is not to say, however, that the physical weakness argument is totally missing; rather, it is more subtle and used particularly in such areas as the concern for military might. The counsel for the appellants in Frontiero argued that the additional benefits for men in the military reflected the military's need for a man's greater strength.

> The defendants claimed below that the "provision of additional benefits to male members of the Air Force [is justified] in view of the structure of our Armed Forces to rely heavily on men, a structure necessitated by physical differences between men and women." (Frontiero, Brief of Appellants, 1973, p. 38)

In areas other than the military if the physical weakness argument is used, it often is couched in qualifying, tenuous language such as used in the Brief of Appellants in Craig v. Boren:

> . . . The only caveats expressed were that males, being more muscular, could for that reason be viewed in a general sense as more "active" than females. . . . that females, being somewhat smaller and having somewhat lesser body fluid than males, could for that reason be viewed in a general sense as possibly more affectable by equivalent amounts of alcohol than males; . . . that young men might possibly have a greater socially-induced but not innate, "interest" and "curiosity" in alcohol (as well as a number of other things) than young women. (Craig, Brief of Appellants, 1976, pp. 20-21)

Women and children. The Supreme Court often classified women with children and disadvantaged members of society, thus in need of protection. In Virginia Minor v. Happersett the Court, in considering the issue of whether women were "citizens," presented the following argument. The Court first reasoned that women, as well as men, were included in the term "children" and as "all children born in a country of parents who were its citizens" became citizens, women must be citizens (Minor, Opinion of the Court, 1875, p. 628). The Court had established that women were citizens because

they had been children. Subsequent courts found them still children even as adults.

In Lochner v. New York the Court said that men are "in no sense wards of the state."

> There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interferring with their independence of judgment and of actions. They are in no sense wards of the state. (Lochner, Opinion of the Court, 1905, p. 941)

In stark contrast, in Muller v. Oregon the counsel for the plaintiff quoted a Nebraska case which stated, "Women and children have always, to a certain extent, been wards of the state" (Muller, Brief of Plaintiff, 1908, p. 21). The Supreme Court accepted this argument by upholding the challenged protective labor laws for women and children and in so doing emphasized the comparison of women to children: "As minors, though not to the same extent, she has been looked upon in the courts as needing special care that her rights may be preserved" (Muller, Opinion of the Court, 1980, p. 556).

The labor protection laws, challenged in Adkins v. Children's Hospital, provided a minimum wage for "women and children." The Act of Congress allowing a minimum wage was to "protect the women and minors of the District from conditions detrimental to their health and morals" (Adkins, Brief

of Appellant, 1923, p. xvii). This Act of Congress established a Minimum Wage Board which in turn developed the Act's specific regulations. In these regulations the phrase "women and minors" was changed to "woman or minor girl," thus apparently excluding minor boys (Adkins, Brief of Appellant, 1923, p. iii; West Coast, Opinion of the Court, 1937, p. 706).

In Breedlove v. Suttles women were not considered with children but rather with other disadvantaged groups. Those exempted by law initially from paying a poll tax were the indigent, people over 60, the blind, crippled and disabled soldiers, and women. Finally, in 1935, however, only two classifications were legally exempt, the blind and women (Breedlove, Brief of Appellee, 1937, p. 9ff). The Supreme Court upheld this classification.

In the last decade the notion that women as children are in need of protection is no longer found in the cases as an argument used to support legal separation of the sexes. It will be seen in much of what follows, however, that women and children have been and are still perceived by the Court as inextricably bound.

Propagation of the race. The major public duty that the courts acknowledged women provide for the nation was to "propagate the race." Again and again the Court and the counsels argued that it was necessary to protect the woman

so she could fulfill this duty. The man's role in "race propagation" was never mentioned.

In pleading for protective labor laws for women, the counsel for the state, Louis Brandeis, in Muller v. Oregon, commented, "The overwork of future mothers . . . directly attacks the welfare of the nation" (Muller, Brief for State of Oregon, 1908, p. 47). The Muller Court agreed with Brandeis and used his argument in its final opinion. The Court viewed the health of women as in the public interest because of her womb:

> as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race. . . . having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. (Muller, Opinion of the Court, 1908, p. 556).

By way of contrast, the same Court in Lochner found the protection of the health of men, by limiting work hours, as totally outside the public interest. "We think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act" (Lochner, Opinion of the Court, 1905, p. 941).

In Adkins v. Children's Hospital, the counsel for the appellant maintained that legislation providing for a minimum wage only for women was just as the protection of women was paramount to the very life of the nation.

> In a word, the ends towards which this legislation was directed were, within the area of Congressional power, the ends of the very life of the Nation, namely the health and civilized maintenance of this generation and a healthy and civilized continuance of generations to follow. (Adkins, Brief of Appellant, 1923, p. xxx)

The Court, in a decision later reversed, ruled that such a law interferred with a woman's right to contract. Justice Holmes, in a dissenting opinion, however, agreed a minimum wage should be upheld for women to prevent the "deterioration of the race" (Adkins, Opinion of the Court, 1923, p. 800).

In Buck v. Bell, the Supreme Court sanctioned the sterilization of Carrie Buck, a "feeble-minded woman" because, in the words of the counsel for the appellant, the sterilization statute was "to promote the welfare of society by mitigating race degeneracy. . . " and to limit "the propagation of the unfit" (Buck, Brief of Defendant, 1927, pp. 17-18). Carrie Buck's individual claim to bear children "must give way to the larger right of society to protect her, her offspring and society itself humanely against such afflictions and burdens" (Buck, Brief of Defendant, 1927, p. 37). The Supreme Court agreed, and in a classic statement on involuntary sterilization of women wrote, "The principle

that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes" (Buck, Opinion of the Court, 1927, p. 1002).

The Supreme Court in West Coast v. Parrish in upholding a minimum wage for only women quoted the earlier case, Muller v. Oregon. The woman's physical well-being, the Court said, "becomes an object of public interest and care in order to preserve the strength and vigor of the race" (West Coast, Opinion of the Court, 1937, p. 710). Again, the Supreme Court in Breedlove v. Suttles used the "preservation of race" doctrine in a seemingly non sequitur: "In view of burdens necessarily borne by [women] for the preservation of the race, the state reasonably may exempt them from the poll tax" (Breedlove, Opinion of the Court, 1937, p. 255).

The acceptance of the argument that preserving the race for the good of the nation justified treating men and women differently under the law began to erode in Griswold v. Connecticut (1965) when the Supreme Court struck down a law forbidding the sale of contraceptives to married couples. Although the case was prima facie gender-neutral, the plaintiffs, nevertheless, were all women. The overall result of this case was that childbearing was seen as an individual choice not a public duty and that men and women had a

"right to control childbearing without the interference of the state.

The "right" of the woman to control her childbearing was clearly present in the advocacy of legalized abortion in the early 1970's when the Supreme Court declared abortion in the first tri-mester a part of the fundamental, constitutional right of privacy: "The right of a pregnant woman to determine whether to terminate her pregnancy, is grounded in the right to privacy and to personal liberty" (Maher, Brief of Appellees, 1976, p. 13). The Supreme Court even struck down state laws that required a woman to have spousal or parental consent for an abortion. It fundamentally was the woman's right to choose. "Spousal and parental consent requirements were struck down because they allowed a person other than the woman or her physician to veto the abortion" (Maher, Brief of Appellees, quoting Bellotti v. Baird, 1976, p. 20).

The Court had gone a long way from the notion that propagating the race was, in essence, a public duty. This is not to say that childbearing was totally free of state regulation. In Roe v. Wade (1973), the initial case legalizing abortion, the Supreme Court made it clear that only during the first trimester of pregnancy was the choice of abortion fully that of the woman. In the second and third trimester, the health of the mother and the fetus made

regulation of abortion in the public interest possible under the states' police powers.

In a subsequent decision, however, the Court indirectly allowed for state regulation during the first trimester. A Connecticut policy allowed the state Medicaid plan to cover pregnancies brought to term but not abortions unless approved by a doctor. In Maher v. Roe, the law was challenged as an infringement upon a woman's fundamental right to privacy by qualifying her ability to choose freely to have an abortion. In deciding that the policy did not infringe upon a woman's right to privacy, the Court resurrected a contemporary version of the timeworn doctrine of "propagation of the race" by stating, "The State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth' . . . an interest honored over the centuries" (Maher, Opinion of the Court, 1977, p. 497). The Court developed the theme in a footnote, tying the future of the state to the soundness of the Connecticut policy.

> 11. In addition to the direct interest in protecting the fetus, a State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth. (Maher, Opinion of the Court, 1976, p. 497)

The use of this propagation of the race argument in the majority opinion was disparaged by the dissenting Justices:

> The Court also suggests . . . that a "State may have legitimate demographic concerns about its rate of population growth" which might justify a choice to favor live births over abortions. While it is conceivable that under some circumstances this might be an appropriate factor to be considered as part of a State's "compelling" interest, no one contends that this is the case here, or indeed that Connecticut has any demographic concerns at all about the rate of its population growth. (Maher, Dissenting Opinion, 1976, p. 504)

The preservation of the race doctrine, therefore, is not totally dead. However, its use in justifying classification by sex in laws unrelated to pregnancy seems to have died with the unsuccessful argument of counsel for the appellee in Reed v. Reed. The counsel tried to convince the Court that men should be given preference as estate administrators because women needed to attend to propagating the race:

> We find in all species that nature protects the female and the offspring to propagate the species and not because the female is inferior. The pill and the conception of children in a laboratory and incubation in a test tube, if this occurs, and their rearing in nurseries and children's homes cannot get away from this prime necessity if the race is to be continued, and there will still remain a difference and the necessity for a different treatment. (Reed, Brief of Respondent, 1970, p. 13)

To protect women's morals. Many of the early cases selected pleaded that women needed special protection "to protect their morals" (Muller, Opinion of the Court, 1908, p. 533; Adkins, Opinion of the Court, p. 1923; West Coast, Opinion of the Court, 1937, p. 708). A minimum wage, for

instance, was required for women "to maintain them in good health and to protect their morals" (Adkins, Opinion of the Court, 1923, p. 789). In this case, however, the Court found the correlation between morals and wages was absurd.

> The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages. (Adkins, Opinion of the Court, 1923, p. 795)

However, the dissenting opinion of Justice Holmes found the law quite logical. "The end—to remove conditions leading to . . . immorality . . . no one would deny to be within the scope of constitutional legislation" (Adkins, Dissenting Opinion, 1923, p. 800).

It seems protecting the woman's morals was in the best interest of society for two major reasons. The first was that such protection contributed in an often vague way to the conservation of the well-being of society as a whole. This notion is seen in the brief of the counsel for the plaintiff in Muller v. Oregon:

> It is held to be competent to limit the hours of service in dangerous employments, or upon public works, and to forbid absolutely the employment of children, and to forbid employment of women in certain callings, upon the ground of public morals. . . . The employment of females in vocations that may be said to be immoral or that might have relation to the public morals, or possibly employments that might be considered peculiarly dangerous or hazardous, and known to be such, and service therein may be forbidden on the ground of conservation of the public health or public morals. (Muller, Brief of Plaintiff, 1908, p. 12)

The second reason was more explicit and tied directly into the theory of the preservation of the race. This is clearly seen in the counsel for the appellant in Adkins v. Children's Hospital as he reiterated the plaintiff's reasons for advocating a minimum wage:

> Plaintiff's theory, which prevailed upon the "rehearing," is something like this:
>
> > For the sake of conserving the health and morals of women workers, and thereby the next generation, Congress wishes them to have more money. (Adkins, Brief of Appellants, 1922, p. xl)

It is never quite clear whether the woman was the immoral influence or whether the male world was so rough and tumble that the woman, weak and delicate, would naturally fall upon entering the male domain. There was no doubt, however, that under certain circumstances when the female entered the male's work world immorality would follow. Immorality, therefore, could be avoided by keeping women out of the workforce. In Goesaert v. Cleary, the Supreme Court agreed with a lower court's judgment that women were to be excluded from bartending unless the bar was owned by a father or husband. The Court justified this decision in the name of avoiding immorality:

> Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and

> social problems otherwise calling for prohibition. (Goesaert, Opinion of the Court, 1948, p. 166)

In this case it was quite clear that the Court believed a woman alone as bartender would create "grave social problems" whereas a man would maintain "decorum" (Goesaert, Brief of Appellant, 1948, p. 33).

Although the Supreme Court, in cases such as Goesaert, has upheld the morality argument, more recently the morality argument has been attacked. The counsel for the appellant in Craig v. Boren, in trying to prove the absurdity of a law allowing women to buy beer at 18 while men had to wait until age 21, implicitly reviewed the morality issue in the heavily gender-based criminal law:

> However, to back up several years in age, the young boy of 16 or 17, as a "criminal" adult and hence fully "accountable" for his misconduct "like a man," . . . could easily get ten years in the Penitentiary for sharing his marijuana cigarettes with his like-aged (but criminally "immature") girlfriend. . . ten years for getting caught in a penny-ante poker game with her, . . . five years for making "orthodox" love to her, . . . ten years for "unorthodox" love with her, . . . another ten for asking her in writing about it, . . . and so on— yet the like-aged female, though doing the identical (or even worse) acts, nevertheless enjoyed a relative immunity under a presumption she was still "incapable of knowing right from wrong" (Craig, Brief for Appellants, 1976, p. 8)

This law percieved of women as morally innocent. On the other hand, the same counsel showed "women-as-temptress" in the law as he argued that the law requiring men to be 21 before buying beer originated in the perceived need to protect

young men from the evils of "women, wine, and song" (Craig, Brief of Appellants, 1976, p. 11).

In a reaction to the use of moral arguments in the law, the Supreme Court in the last decade has tried to strip its judgment of any moral precepts especially when it "is rooted in a centuries old perception of the proper social and moral place for men and women" (Orr, Brief of the Appellant, 1979, p. 616). It is a difficult task to strip the law of all moral precepts, however, as can be seen in Maher v. Roe, a case dealing with abortion, certainly an issue caught in the moral maelstrom. In Maher, a Connecticut law limiting Medicaid funds for abortion was challenged. The law apparently had been enacted because of moral objections to abortion. The lower court in an attempt to keep the law free of any subjective, "moral" judgments had ruled the law unconstitutional:

> The court found implicit in Roe v. Wade, . . . and Doe v. Bolton, . . . the view that abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy . . . And any moral objection to abortion was deemed constitutionally irrelevant: The state may not justify its refusal to pay for one type of expense arising from pregnancy on the basis that it morally opposes such an expenditure of money. (Maher, Opinion of the Court, 1977, p. 491)

The Supreme Court implicitly disagreed with the lower court by not ruling on the moral issue but deferring to Congress to settle the problem: "when an issue involves policy

choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature" (Maher, Opinion of the Court, p. 498).

The moral issues concerning the woman's proper place, her place in the work world, and her implied sexuality, no longer predominate in the courtroom. Moral judgments of even some 15 years ago as found in Griswold v. Connecticut now seem misplaced in a court of law:

> To say that the statutes are void on their face is a shocking claim. For then they could be used by the single and the married. That contraceptives could be used by the married in relations with the spouses is a decision for legislative determination. But that single people should be allowed to use a contraceptive device is so contrary to American experience, thought, and family law that it does not merit further discussion. (Griswold, Brief of the Appellees, 1965, p. 176)

Protecting the morals of women or preventing the moral downfall of men by keeping men from women has gone underground as a legal argument, but such arguments as the possibility of "sex in the foxhole," used to keep women legally from the draft, indicate the argument is not totally dead.

Category IV: Dependency as an Economic Issue

Women dependent and women in need of protection have been the norm long before Justice Bradley wrote, "Man is, or should be, woman's protector and defender (Bradwell, 1873,

p. 446). Historically, this dependency was paternalistic, providing emotional support as well as economic. The Muller Court made that clear:

> It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection. (Muller, Opinion of the Court, 1908, p. 556)

In Muller, and 40 years later in Goesaert v. Cleary, the notion of dependency gave way to control. In Muller the Court commented on the man's control over woman:

> Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. (Muller, Opinion of the Court, 1908, p. 556)

Man's control over woman was also agreed upon by the Court in Goesaert:

> The District Court has sufficiently indicated the reasons that may have influenced the legislature in allowing women to be waitresses in a liquor establishment over which a man's ownership provides control. (Goesaert, Opinion of the Court, 1948, p. 166)

Woman's dependency and man's control, however, were not just social issues but quite clearly economic issues as well. This was seen in Muller v. Oregon when the Court commented that because of her natural dependency woman could never be

an "equal competitor" with man (Muller, Opinion of the Court, 1908, p. 556). The counsel for the plaintiff in Muller, however, saw the protection of women as a means for economically controlling them:

> Women, in increasing numbers, are compelled to earn their living. They enter the various lines of employment hampered and handicapped by centuries of tutelage and the limitation and restriction of freedom of contract. Social customs narrow the field of her endeavor. Shall her hands be further tied by statute ostensibly framed in her interests, but intended perhaps to limit and restrict her employment and whether intended so or not, enlarging the field and opportunity of her competitor among men? (Muller, Brief of Plaintiff, 1908, p. 31-32)

In the same case the counsel for the appellant, Louis Brandeis, argued with supporting documents that "The establishment of a legal limit to the hours of woman's labor does not result in contracting the sphere or her work" (Muller, Brief for the State of Oregon, 1908, p. 82).

Muller raised the issue that protective labor laws acted to restrict women's competitive participation in the labor market. However, it was in Adkins v. Children's Hospital that the issue was recognized by the Court as valid. One of the appellees in Adkins was a woman who had lost her job because of the new law requiring a minimum wage for women. The court decided, therefore, that such a law for only women interferred with a woman's right to contract and kept them from jobs otherwise open to men: "It is simply and exclusively a price-fixing law, confined to adult women

. . . who are legally as capable of contracting for themselves as men" (Adkins, Opinion of the Court, 1922, p. 795).

The Court reversed Adkins in West Coast v. Parrish, but the dissenting opinion in West Coast kept alive the argument that protective labor laws curtailed women's ability to compete with men in the labor market. The dissenting Justices wrote that a minimum wage for women alone "would unreasonably restrain them in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work" (West Coast, Dissenting Opinion, 1937, p. 720).

The Supreme Court had accepted fully woman's natural dependency on men in Goesaert v. Cleary (1948) when it insisted a woman could not serve as a bartender unless a man was the owner and in control. As in the earlier cases, however, the Goesaert Court dismissed the argument that this dependency was really an economic issue: "We cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling" (Goesaert, Opinion of the Court, 1948, p. 166). This cavalier dismissal came even after the counsel for the appellants, through a long series of affidavits, had shown that the women who worked as bartenders would suffer "irreparable injury" if the Michigan law prohibiting women to work as bartenders was enforced (Goeseart, Brief of Appellant, 1948, p. 9).

> Some of the plaintiffs are licensed bar owners. Admittedly they have large sums of money invested in their businesses. Admittedly they will either have to close their places of business or hire male bartenders. In either event, they will lose their investments of years of work and savings. Some of the plaintiffs are barmaids. Admittedly they will lose their jobs and be deprived of their means of livelihood. (Goesaert, Brief of Appellants, 1948, p. 37)

Two later cases, Frontiero v. Richardson and Orr v. Orr, once again pointed out the economic issue implicit in sex equity. In Frontiero a law was challenged awarding benefits automatically to men in the military while requiring female members of the military to prove their husbands dependent upon them before receiving benefits. The counsel for the Armed Forces argued that the law was economical: "the classification chosen by Congress to achieve administrative economies is based upon reasonable presumptions of dependency, which are in accord with the realities of American life" (Frontiero, Brief of Appellees, 1973, p. 10). The counsel for the appellant countered that the presumption of dependency by the military was illogical:

> They argue that this presumption, made admittedly only to lighten the administrative workload of bearing both men and women, is justified because women earn less than men. The defendants treated as self-evident the proposition that difference in income levels somehow determines which family member is dependent. (Frontiero, Brief of Appellants, 1973, p. 47)

The Supreme Court agreed with the appellant's counsel that there was no rational basis for the law's classification by

sex. The Court did make it clear, however, that the government had not shown that the gender-based law was in fact cheaper and easier to administer. This lack of economic evidence contributed to the Court's decision in favor of equity (Frontiero, Opinion of the Court, 1973, pp. 593-594).

In Orr the issue at stake was Alabama's law awarding alimony to women only. The Court ruled that the total exclusion of men as possible recipients of alimony was in violation of the equal protection of the laws. As in Frontiero, however, the Court did note that such equity would not mean added expense to the State of Alabama in administrative costs:

> There is no reason, therefore, to use sex as a proxy for need. Needy males could be helped along with needy females with little if any additional burden on the State. In such circumstances, not even an administrative convenience rationale exists to justify operating by generalization or proxy. (Orr, Opinion of the Court, 1977, p. 320)

In both Frontiero and Orr it appeared that inequity could be condemned as long as equity did not cost too much.

Women and Men as One Legal Classification

Introduction

Although it has been and still is legally acceptable to classify by sex because of society's perceptions of the differing roles, status, and characteristics of men and women, it is also true that from the earliest cases dealing with gender there were those arguing that such classification

was in conflict with the basic ideology of the Constitution espousing equity. These plaintiffs and defendants, counsels and justices, argued that men and women should be legally one class, that classification by sex had little, if any, place in United States law. The history of the Equal Rights Amendment, first introduced in Congress in 1923, serves as the prototype of this argument.

In order to convince the Supreme Court that gender-based laws were really an inaccurate proxy for other, more germane bases of classification, the counsels relied on the three basic arguments which emerged from the data used for this dissertation.

1. The first category is Women as Individuals. Women should be treated as individuals. Society's stereotyped preconceptions about their place, role, and nature had no place in a court of law.
2. The Equality of Men and Women as a Fundamental Ideal, the second category, is grounded in the basic philosophy of equity in the United States. "All men are created equal" includes women as well.
3. In the third category, Sex Discrimination as Analogous to Race Discrimination, the position of women in society is equated to that of blacks in an attempt to prove an inferior status for women and the

> consequent need to eradicate gender-based classification in order to achieve equity.

As will be seen by the data presented, it was only in the last decade, except for the anomalous Adkins case, that the Court accepted as valid the arguments embodied in these three categories.

Category One: Women as Individuals

The Supreme Court, until the last decade, has based most of its decisions concerning gender-based laws on its often stereotyped perception of the woman's place, role, and nature. Until the present day those who have advocated men and women should be one legal classification have had to fight this stereotypical vision, arguing rather that women be seen as individuals.

As early as 1873, in Bradwell v. Illinois, the counsel for Mrs. Bradwell argued that men and women be judged on their individual merits:

> Of a bar composed of men and women of equal integrity and learning, women might be more or less frequently retained, as the taste of judgment of clients might dictate. But the broad shield of the Constitution is over them all, and protects each in that measure of success which his or her individual merits may secure. (Bradwell, Brief of Plaintiff, 1873, p. 13)

One of the earliest pronouncements against "discrimination, based on sex," came in Quong Wing v. Kirkendall as the dissenting judge decried the use of biological characteristics as the basis for legal classifications.

> Among these small operators there is a further discrimination, based on sex. . . . A discrimination founded on the personal attributes of those engaged in the same occupation, and not on the value or the amount of the business, is arbitrary. (Quong Wing, Dissenting Opinion, 1912, p. 352)

In Adkins v. Children's Hospital, a case decided soon after the passage of the Nineteenth Amendment, the Supreme Court, in affirming that a minimum wage for women only was invalid, atypically emphasized women as individuals not a composite.

> As a means of safeguarding the morals the attempted classification, in our opinion, is without reasonable basis. No distinction can be made between women who work for others and those who do not; nor is there ground for distinction between women and men; for, certainly, if women require a minimum wage to preserve their morals, men require it to preserve their honesty. For these reasons, and others which might be stated, the inquiry in respect of the necessary cost of living and of the income necessary to preserve health and morals presents an individual, and not a composite, question, and must be answered for each individual, considered by herself, and not by a general formula prescribed by a statutory bureau. (Adkins, Opinion of the Court, 1922, p. 726)

Although Adkins was later overturned in West Coast v. Parrish, the Adkins mandate of looking at women as individuals rather than a composite was not totally lost. A dissenting judge in West Coast quoted at length from Adkins, emphasizing that it was an individual question whether or not a minimum wage would enhance morality, one not dependent on gender alone (West Coast, Dissenting Opinion, 1937, p. 717).

Those advocating equity in the last two decades have relied on statistics of women's participation in the labor force and public life to erode another stereotype, women in the home. Statistics were used by the counsels for the appellants in Hoyt v. Florida (1961) in a futile attempt to convince the Supreme Court that Florida's jury laws, virtually excluding women from jury service because of their duties in the home, were outdated and unconstitutional. Ironically, in Hoyt, although the counsel argued that one law should apply to both men and women, at the same time, she had to argue that men and women were different enough so that an all-male jury was biased. This irony did not go unnoticed by the counsel for the State of Florida, who ended his brief with a bit of irony of his own:

> Throughout the course of appellant's brief the single thread which forms the knot is as follows:
>
> Because she was a woman and had committed an act, the circumstances of which could best be understood by women, she was deprived of due process because she had no real chance of securing a woman on her jury. This position is one which she cannot support by any law or rationale with which appellee is acquainted. . . .
>
> Might it not be further argued logically that since women have been shown, by appellant's own statistics, to be the equal of men in every sense of the word, that she was in fact tried by the ultimate of juries—male equivalence appearing to be the goal of the statitistical position advanced to the appellant. (Hoyt, Brief of Appellee, 1961, p. 16)

It was not until 1972, however, in Reed v. Reed that

the first full scale assault on the stereotypes surrounding women was successfully mounted by the counsels for the appellant. The counsels began by saying that Idaho's male preference law perpetuated stereotypes by not treating women as individuals:

> The judgement that "in general men are better qualified to act as an administrator than are women" rests on totally unfounded assumptions of differences in mental capacity or experience relevant to the office of administrator. To eliminate a woman who shares an eligibility category with a man when there is no basis in fact to assume that women are less competent to administer than are men, is patently unreasonable and constitutionally impermissible. (Reed, Brief of Appellant, 1971, p. 7)

The brief then documented in some 67 pages the stereotypes about women, showing them as a deterrent to women's full participation in society, refuting them by outlining the realities of women's lives, and finally making a plea that the law treat women "as full human personalities" (Reed, Brief of Appellant, 1971, p. 7). The Supreme Court agreed and for the first time a male preference law was judged to violate the Equal Protection Clause of the Fourteenth Amendment.

In three of the four cases used in this dissertation following Reed (Craig v. Boren, 1976; Frontiero v. Richardson, 1973; Orr v. Orr, 1979), the Supreme Court argued that women must be seen as individuals before the law, not as stereotypical composites. In Frontiero, the Court noted, ". . . our statute books gradually became laden with gross,

stereotyped distinctions between the sexes. . . " (Frontiero, Opinion of the Court, 1973, p. 591). These distinctions, the Court continued, often relegated "the entire class of females to inferior legal status without regard to the actual capabilities of its individual members" (Frontiero, Opinion of the Court, 1973, p. 592). In Craig v. Boren, Justice John Stevens, speculating as to the origins of the different ages for buying beer for males and females in Oklahoma, decided it was due to the perpetuation of a stereotyped attitude about the relative maturity of the members of the two sexes (Craig, Concurring Opinion of the Court, 1976, p. 417). The Court, also in Craig, stated: "Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving" (Craig, Opinion of the Court, 1976, p. 411). Again, the Supreme Court said in Orr, "There is no reason, therefore, to use sex as a proxy for need" (Orr, Opinion of the Court, 1979, p. 320). Finally, in Orr v. Orr the Court, invalidating an Alabama law awarding alimony to women, spoke to gender classification as carrying "the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection" (Orr, Opinion of the Court, 1971, p. 320).

Those who have adovcated that women and men be one legal classification over the years not only have argued that separate classes are based on often unfounded stereotypes; they also have argued that gender-based classification is contrary to the United States' fundamental belief in equality.

Category Two: The Equality of Men and Women as a Fundamental Ideal

The attorney representing Myra Bradwell in Bradwell v. Illinois argued that Bradwell had the right to be a lawyer even if she were a woman. He based his argument on the "inalienable rights" of a citizen outlined in an earlier Supreme Court case, Cummings v. Missouri:

> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. (Bradwell, Brief of Plaintiff, 1873, p. 8)

Based on such declarations by the Court, the same counsel insisted that Bradwell's petition to become an attorney, ". . . is not a question of taste, propriety or politeness, but of civil right" (Bradwell, Brief of Plaintiff, 1873, p. 2). He emphasized the fundamental inadmissibility of the total exclusion of a class from their chosen occupation:

> While the legislature may prescribe qualifications for entering upon this pursuit, they cannot, under

> the guise of fixing qualifications, exclude a class of citizens from admission to the bar. The legislature may say at what age candidates shall be admitted; may elevate or depress the standard of learning required. But a qualification, to which a whole class of citizens never can attain is not a regulation of admission to the bar, but is, as to such citizens, a prohibition. (Bradwell, Brief of the Plaintiff, 1873, p. 9)

Because of these fundamental premises embodied in the political philosophy of the United States, the counsel argued that the Illinois' law prohibiting women, but not men, from practicing law was a travesty of justice. The Court, as has been seen, did not agree.

In another early case, Virginia Minor v. Happersett, the counsel for Mrs. Minor argued that the woman's inability to vote was a breach of the fundamental ideals of the United States:

> We ask the Court to consider what it is to be disenfranchised; not this plaintiff only, but an entire class of people, utterly deprived of all voice in the government under which they live! We say it is to her, and to them, a Despotism, and not a Republic. . . . Either we must give up the principles announced in the Declaration of Independence, that governments derive their just powers from the consent of the governed; and are formed by the people to protect their rights, not to withhold them; or we must acknowledge the truth contended for by the plaintiff, that citizenship carries with it every incident to every citizen alike. It cannot be disputed, that upon this principle of absolute political equality, our government is founded. (Minor, Brief of Plaintiff, 1873, p. 32)

The counsel's brief for Minor stands still as a classic statement on women's rights. The argument of the counsel, also Mrs. Minor's husband, was grounded in the rights of

the "citizen" as one class, not on "men" and "women" as two classes of citizens.

> There can be no division of citizenship, either of its rights or its duties. There can be no half-way citizenship. Woman, as a citizen of the United States, is entitled to all the benefits of that position, and liable to all its obligations, or to none. (Minor, Brief of Plaintiff, 1875, p. 13)

The Court did agree women were citizens but they did not agree a right of citizenship was to vote.

In Muller v. Oregon the counsel for the plaintiff argued that men and women enjoyed the same sacred and inviolate rights, as one class.

> For reasons of chivalry, we may regret that all women may not be sheltered in happy homes, free from the exacting demands upon them in pursuit of a living, but their right to pursue any honorable vocation, any business not forbidden as immoral, or contrary to public policy, is just as sacred and just as inviolate as the same right enjoyed by men. (Muller, Brief of Plaintiff, 1908, p. 24)

The counsel for the plaintiffs in Muller continued to refute gender-based classification relying further on the argument of fundamental ideals: "Women, equally with men, are endowed with the fundamental and inalienable rights of liberty and property, and these rights cannot be impaired or destroyed by legislative action under the pretense of exercising the police power of the state" (Muller, Brief of Plaintiff, 1908, p. 8). In Adkins v. Children's Hospital again the fundamental rights argument was used to plead one class:

> In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.
>
> This emphatic statement of the fundamental rights secured by the Constitution was surely not intended to be limited to men and to exclude women. (Adkins, Brief of Appellees, 1922, p. 48)

The fundamental ideals argument did not meet with much success for the first 70 years of the 20th century. The differences between men and women seemed so obvious, natural, and accepted that philosophic equity seemed inapplicable. As the counsel for the Appellant noted in Adkins v. Children's Hospital, "Men and women remain men and women eternally" (Adkins, Brief of Appellant, 1922, p. lxiii). Therefore, it seemed apparent that "the 14th Amendment does not interfere by creating a fictitious equality [between the sexes] where there is a real difference" (Quong Wing, Opinion of the Court, 1912, p. 332).

By the 1970's those advocating one class continued to appeal to fundamental ideals in their pure form but only peripherally. In Reed v. Reed, for example, the counsels for the appellant called on John Stuart Mill's idea of perfect equality to support their argument for sex equity:

> That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side,

> nor disability on the other. (Reed, Brief of Appellant, 1971, p. 40)

Again the same counsel briefly referred to fundamental ideals by using the example of the West German Constitutional Court which "focused on the superior norm of equal protection in gender-based cases and in so doing rejected laws classifying by sex" (Reed, Brief of Appellant, 1971, p. 55). Too, in Frontiero v. Richardson the Justices in the opinion of the Court recognized the place of fundamental ideals over administrative convenience in deciding the constitutionality of gender-based laws:

> In any case, our prior decisions make clear that, although efficacious administration of governmental program is not without some importance, "the Constitution recognizes higher values than speed and efficiency." (Frontiero, Opinion of the Court, 1973, p. 594)

The Court in Frontiero also called upon a "basic concept of our system" in judging that awarding benefits automatically to men in the military but not women was sex discrimination.

For the most part, however, in the 1970's the counsels and the Court did not call upon "fundamental ideals" as a major argument for sex equity except as they related to the dominant argument of the day, attempting to show sex discrimination as analogous to race discrimination.

Category Three: Sex Discrimination as Analogous to Race Discrimination

Those advocating that men and women should be treated as one legal class argued that sex-based laws were as invidiously discriminatory as race-based laws. To strengthen this argument, they equated the experience of blacks and women. In order to equate the position in society of blacks and women in the United States, it was necessary first to "prove" an inferior status for women. The problem was that although the historical status of blacks was unequivocally accepted as inferior to whites, the status of women was often sentimentalized as being at times even superior to that of men. The counsel for the appellant in Reed v. Reed quoted a legislator in the 19th century, an era when women had very few civil rights, which showed this sentimentality:

> And a legislator commented during an 1866 debate in Congress: "It seems to me as if the God of our race has stamped upon [the women of America] a milder, gentler nature, which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life. They have a higher and holier mission. (Reed, Brief of Appellant, 1971, p. 27)

It was very seldom in the cases selected, until those of the 1970's, that women's status was said to be "inferior" to that of men. However, on occasion, the counsels advocating change for women did argue an inferior status as did the counsel for Virginia Minor when he said, "Her disenfranchised condition is a badge of servitude. A citizen

disenfranchised is a citizen attainted" (Minor, Brief of Plaintiff, 1875, pp. 32, 40). Minor's counsel also spoke of "elevating" the woman's position (Minor, Brief of Plaintiff, 1875, p. 39). At times, as in the Brandeis brief of Muller v. Oregon, the woman's "physical inferiority" was referred to explicitly (Muller, Brief for the State of Oregon, 1908, p. 21).

However, for the most part, the law did not overtly justify the separation of men and women because of a perceived inferiority in the nature or status of women. An "inferiority," of course, was implied in such as women's need for protection, their association with children, and their submission to their husbands, but it was not until the 1970's that the counsels against gender-based classification argued the unequal status of women by trying to prove their inferior status:

> Prior decisions of this Court have contributed to the separate and unequal status of women in the United States. But the national conscience has been awakened to the sometimes subtle assignment of inferior status to women by the dominant male culture. (Reed, Brief of Appellant, 1971, p. 6)

The same counsel emphasized the domination of male society over women writing, "the dominant male society exercising its political power, has secured women's place as the second sex" (Reed, Brief of Appellant, 1971, p. 59). At the same time, the California Supreme Court, as quoted in Reed v. Reed stated that women's special legal status was not a

pedestal but a cage:

> Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. (Reed, Brief of Appellant, 1971, p. 21)

The United States Supreme Court adopted the metaphor as its own in Frontiero v. Richardson:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. (Frontiero, Opinion of the Court, 1973, p. 590)

Women as inferior and caged became a vital corollary in support of the race-sex analogy.

By comparing the inequities suffered by women to those of blacks, those advocating sex equity hoped that the Supreme Court would apply the Equal Protection Clause of the Fourteenth Amendment with as much force to classification by sex as it had done in cases dealing with classification by race. This was not a new idea. The counsel for Myra Bradwell in Bradwell v. Illinois unsuccessfully tried to convince the Court that the privileges and immunities of the Fourteenth Amendment vindicated not only the "colored" but "mothers," "sisters," and "daughters" as well (Bradwell, Brief of Plaintiff, 1872, p. 10). The counsel for Virginia Minor in

Minor v. Hapersett argued that the position of women and blacks in society was the same, commenting that at times, "woman's condition is even more helpless than his [the black's]" (Minor, Brief of Plaintiff, 1875, p. 29). The counsel also quoted from the Dred Scott Case and then asked the Court to substitute the word "women" in the case for "persons of the African race" in order to underscore the plight of the woman in American society (Minor, Brief of Plaintiff, 1875, p. 18). As in Bradwell, the Minor Court did not agree with counsel. The results of these two cases seem to have convinced counsels that comparing sex discrimination to race discrimination was not a productive means to achieve sex equity. This was clearly seen in Quong Wing v. Kirkendall (1912) when the Court condemned race discrimination as unconstitutional while at the same time considering sex discrimination acceptable (Quong Wing, Opinion of the Court, 1912, p. 352). After Quong Wing the race-sex analogy seemed to disappear until returning full blown with the onset of the black revolution and the feminist movement of the 1960's.

The renewed interest in the analogy came in Hoyt v. Florida where the counsel for the appellant attempted to prove jury laws based on gender unconstitutional, using as precedent jury cases involving race discrimination (Hoyt, Brief of Appellant, 1961, p. 10ff). The Court reacted to

the analogy by dismissing it:

> This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service. . . . There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in those cases, nor the long course of discriminatory administrative practice which the statistical showing in each of them evinced. (Hoyt, Opinion of the Court, 1961, p. 126)

However, by 1972, in Reed v. Reed the counsels for the appellants insisted that gender-based classification was as invidious a discrimination as classification by race and devoted some 11 pages of their brief to comparisons between race and sex discrimination. Their general thesis is embodied in the following quote:

> Race and sex are comparable classes, defined by physiological characteristics, through which status is fixed from birth. Legal and social proscriptions based upon race and sex have often been identical, and have generally implied the inherent inferiority of the proscribed class to a dominant group. Both classes have been defined by, and subordinated to, the same power group—white males. (Reed, Brief of Appellant, 1971, p. 18)

The debate raged as the counsel for the respondent refuted the claim of similarities between race and sex discrimination:

> Appellant likens women to slaves and claims they have been discriminated against as though they were an alien race, neither of which arguments are valid. Women are not slaves and they are in a different situation than those of a disadvantaged race in that there is not and has not been the prejudice between men and women of the same

> race as there has been and very often now is prejudice between the races. Furthermore women in the United States have the same right as men to vote and enact laws, and control their status. (Reed, Brief of Respondent, 1971, p. 7)

While deciding that the Idaho male-preference law in Reed was, in fact, discriminatory, the Court, in its opinion, made no comment on the sex-race debate.

In a subsequent case, Frontiero v. Richardson, however, the Court jumped full force into the fray. Although the counsel for the appellants made no referral to race-sex comparisons, probably taking a cue from the Reed Court's avoidance of the issue, the counsel for the appellees argued against the analogy:

> Nor is legislation affecting women, like that affecting racial or ethnic minorities, commonly perceived as implying a stigma of inferiority or a badge of opprobrium which suggests that the affected class lacks equal dignity. . . .
>
> Classifications based on sex, however, do not express an implied legislative judgment of female inferiority. Sex classifications are commonly founded upon physiological and sociological differences, and not on social contempt for women. (Frontiero, Brief of Appellees, 1973, p. 17)

Unlike Reed, the Frontiero Court chose to address the issue by stating that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes" (Frontiero, Opinion of the Court, 1973, p. 591). The Court then expanded the analogy with specific examples of past discrimination against blacks and women, among them

their inability to hold office, serve on juries, bring suit in their own names, and hold or convey property. Therefore, a plurality of the Court, but not a majority, concluded that classifications based on sex, like those based on race, should be subject to "strict judicial scrutiny" (Frontiero, Opinion of the Court, 1973, p. 592).

In two of the three subsequent cases used in this dissertation following Frontiero, the Court used the race-sex analogy to bolster its rejection of gender-based classification. However, the emphasis on the analogy was never as strong as in Frontiero, In Craig v. Boren the Court suggested that if beer were sold at an earlier age to those ethinic groups shown to have lower drinking rates, the law would be held unconstitutional. The same, therefore, should be done with similar gender-based laws (Craig, Opinion of the Court, 1976, p. 415). In Orr v. Orr the Court again used the analogy:

> There is no question but that Mr. Orr bears a burden he would not bear were he female. The issue is highlighted, although not altered, by transposing it to the sphere of race. There is no doubt that a state law imposing alimony obligations on blacks but not whites could be challenged by a black who was required to pay. (Orr, Opinion of the Court, 1979, p. 315)

An economic argument, directly related to the race-sex analogy, is that women need special compensation because of "past discrimination." The need for "affirmative action" for women has been around at least since Muller v. Oregon when the Supreme Court called for special legislation to

guarantee equity for women, "She will still be where some legislation to protect her seems necessary to secure a real equality of right" (Muller, Opinion of the Court, 1908, p. 556).

In arguing for a minimum wage for women in Adkins v. Children's Hospital, the counsel for the District of Columbia maintained that special legislation for women was necessary "because of the actual handicaps of women in industry" (Adkins, Brief of Appellants, 1922, p. xxxvii). The counsel, for example, pointed out the pay gap between men and women that contemporary feminists still point to with dismay:

> There is a notion, quite general, that women in the trades are underpaid, that they are not paid so well as men are paid for the same service, and that in fact in many cases the pay they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissions have resulted in findings to the above effect. (Adkins, Brief of Appellants, 1922, p. xxxvii)

The result is, the counsel argued, that women needed the "weight of legislation" to raise them to a parity with men (Adkins, Brief of Appellants, 1922, p. xxxix).

Again, the Supreme Court in West Coast v. Parrish noted that, given the great discrepancy in pay and bargaining power between male and female laborers, the legislature had a right to provide special legislation to remedy the gap:

> The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining powers is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. (West Coast, Opinion of the Court, 1936, p. 712)

Of course, it is this "special legislation" in the form of protective labor laws that has been condemned in more contemporary times as restricting women in the labor market. This early "affirmative action" grew out of a judicial paternalism that assumed certain characteristics of all women. However, based on the model for blacks, the "affirmative action" of the 1970's has acted instead to open up the labor market to women who have been traditionally shut out. Nevertheless, it is a fine line between the old notion of giving special treatment to women for their protection and enacting laws to assist their full participation in society.

Conclusion

This chapter has aimed to provide the data that will help give answers to the questions posed in this dissertation as to (1) how one of society's major institutions, the Supreme Court, has justified or condemned over time a condition of inequality with respect to blacks and women and (2) how this justification or condemnation has changed over time. The findings of this chapter will be used in this concluding section to formulate answers to these two questions as they relate to women. The third question posed as

to how the justification differs for race and sex, will be discussed in the concluding chapter.

Although the data in this chapter have not been organized on a case by case basis or according to the issues argued in the cases, it is important to note that the great majority of the cases debate the degree and role of women's participation in the public domain. This can be seen in Table 1, Appendix B. Of the 20 cases, 11 dealt with employment and five deal with civic responsibility. A third issue, reproduction, was dealt with in three cases. Of the remaining two, both "reverse discrimination" cases, one dealt with marriage and one with social custom. It is clear, then, that the great legal struggle of the woman, as reflected in these cases, has been to move from the private domain where she is seen in terms of her function as a homemaker, childbearer, and child raiser, to the public domain where she attempts to participate as a full human personality. Historically, the man has been able to move between the two domains with relative ease. The woman, on the other hand, has been locked into the private domain, and her ability to function fully in the public domain is the issue at stake in the cases examined for this study.

Until the late 1960's the woman's attempts to move into the public domain were thwarted by the Court in various ways. Again, Table 1, Appendix B, gives an indication of

the Court's legalistic avoidance of the constitutional issues involved in gender-based classification. In three of the cases, the Court decided there was no constitutional issue involved in excluding women (Bradwell, Minor, Breedlove). In one case (Lockwood), the Court deferred back to the state legislature for its judgment. In four cases, the Court allowed that a constitutional standard could be applied differently to men and women (Muller, West Coast, Goesaert, Hoyt). In two cases, it was decided that the constitutional standard did not apply to women (Strauder, Quong Wing). In six cases, five of which were decided after 1964, the constitutional standard debated was applied the same to men as it was to women (Adkins-overturned, Griswold, Reed, Frontiero, Craig, Orr). The Court decided in two of the three reproduction cases (Buck and Maher) that regulations dealing with childbearing were in the public interest and, therefore, constitutional. The third case, Griswold, found that the regulation of childbearing through the prohibition of contraceptives was an invasion of privacy and, therefore, unconstitutional. The ambivalence surrounding this issue is clear and continues today through the abortion cases and the fight by feminists to "control their own bodies."

A percentage distribution of the measured thematic content as shown in Table 2, Appendix B, suggests the rationale

used by the legal system to support the legal decisions that limited women's participation in the public domain. As was seen from the data presented, in one case or another the Supreme Court wrote into its final opinion all of the rationales justifying gender classification that were represented by each of the categories. Two of the strongest categories, for instance, were that a woman's duty is in the home and that a woman, for various reasons, needs to be sheltered and protected when she is outside the home. Obviously, both arguments served to restrict women in the public domain. The Court accepted both arguments and, thereby, gave their approval of them to serve as precedent.

The economic issues surrounding sex discrimination were made explicit in the economic category, "Dependency as an Economic Issue," and also played a role in other categories including "Sex Discrimination as Analogous to Race Discrimination." In this last category affirmative action, to a great extent an economic issue, accounted for 10% of the category's thematic content. Affirmative action can be costly; yet, as various times in later cases, such as Orr v. Orr and Frontiero v. Richardson, it seemed as if sex equity was dependent on its economic cost. The Court gave assurances that changes in the law to achieve equity would not mean great expense. Certainly embedded in all the "protection" categories there were the implicit economic issues

that surfaced in the category, "Denendency as an Economic Issue." If women are kept protected and controlled, their economic status can also be restricted. The economic reality for women today substantiates this premise—on the average for each one dollar a man earns in the United States, a woman earns $.59 (ERA Countdown Campaign, 1981, p. 1). At any rate, because of the diversity of issues surrounding the economics of equity, it was a difficult area to categorize much less analyze. It is suggested, therefore, that this may be a fruitful area for future research.

From Tables 1 and 2 (Appendix B) and the narrative material presented in the chapter, it is apparent that until the last decade the woman was seen by the Court as being at home and the Constitution and the laws of the land were not meant to apply in this domestic arena. Therefore, when the woman left her assigned sphere for the public one, she was viewed as an alien where special constructions of the law to fit her special case were seen as "reasonable." Whereas men were seen for the most part as individuals interacting with the external environment, women were judged by the legal system as a group in terms of an internal nature and function perceived to belong to all women (see Okin, 1979). in the realm of employment, for example, protective labor laws were deemed constitutional for some men, depending on the nature of their job not because of the nature of the men. The

hours of underground miners and smelters, for example, were regulated because of the "peculiar conditions and effects" of the job (Lochner, Opinion of the Court, 1905, p. 940). But in Muller v. Oregon the counsel for the state argued that protective labor laws were constitutional for all women not because of the nature of their jobs but because of the nature of women. The counsel commented on a lower court decision, "adult females . . . [are] separated by natural conditions from all other laborers" (Muller, Brief of Plaintiff, 1908, p. 20). In the area of civic responsibility, men were exempt from jury duty only because of individual factors such as "age, bodily infirmity or because they are engaged in certain occupations" (Hoyt, Opinion of the Court, 1961, p. 122). However, all women were exempt because of what were perceived as their "special responsibilities" (Hoyt, Opinion of the Court, 1961, p. 122). Their "special responsibilities" were in the home.

Because the woman was an alien in the public world, the Court consistently defined her status there by her status in her private world. This can easily be seen by the arguments used to keep her apart: she was a wife, a mother, not a factory worker or lawyer. This perhaps helps explain why the appeals to fundamental ideals were either ignored by the Court or bypassed. The ideals applied to the public world, and the standards for full membership in the public world

were those characteristics perceived to be held by those who belonged in that world, men. This is vividly clear in this quote by the Supreme Court in Muller. The woman's private world and function takes precedence over the Constitution:

> The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long-continued belief concerning it is worthy of consideration. (Muller, Opinion of the Court, 1908, p. 555)

Women, therefore, were kept out because, as a group, they were viewed as possessing those characteristics unfit for full citizenship. As the data show, women were weak, men strong; women produced children, men did not; women tended children, men did not; women were gentle, retiring, men were not. It is no wonder, therefore, that the most frequently used argument by feminists in the 1960's and 1970's to achieve legal equity for women was to insist that

women be viewed as individuals—not in terms of their function but in terms of their humanity.

For the most part women were perceived by the Court as being totally different from men, an irony as their lives are so intimately intertwined. But this also helps explain the almost total lack in the data of the comparison by those advocating sex equity of men and women. Women are compared to blacks, but it was seldom that it was argued that if men had certain responsibilities or privileges then in all fairness women should as well. Women were "persons" and "citizens" as were men, but aside from that there were no common denominators and so the constitutional and legal standards created to apply to men could not apply in the same way to women.

There was always the oppositional ideology that women should be treated by the law as men were, but the only early case in which this ideology became the opinion of the Court was Adkins v. Children's Hospital (1923). This case came just after the passage of the Nineteenth Amendment in 1920 when feelings for women's rights ran high. In Adkins the fundamental rights of women were seen as the same as those of men. Adkins, however, is one of the very few Supreme Court cases to be overturned in an open reversal. In sum, the dominant ideology of the Court up until the last decade

was to view men in terms of their fundamental rights and women in terms of their fundamental function in the home.

The second question posed in this dissertation is how the legal rationale for the separation of the sexes has changed over time. There is no doubt that reform surrounding women's rights in the wider society had been taking place during all the years covered by this dissertation. Women were entering new occupations, universities were opening up to women and the civic responsibilities of women were expanding. However, in the legal arena, at the Supreme Court level, it can be said that until the mid-sixties with the impetus of the civil rights movement there was no change either in the results of the cases involving women or in the language of the Court. To reiterate, five of the six cases applying legal standards equally to both men and women were decided after 1965. The sixth, Adkins, decided in 1923, was subsequently overturned.

The rationale used to uphold gender-based classification was consistent as well up until the mid-sixties. The argument in Bradwell v. Illinois (1873) insisting that women be excluded from the lawyer's profession because of her duties as a wife and mother was really no different from that in Hoyt v. Florida (1961) insisting women not have to sit for jury duty because of their home responsibilities. Therefore, the historical categories, as initially used to

divide the cases, had little meaning in terms of change. In essence, there proved to be only two historical periods, 1873 to 1965 and 1965 to 1979; the first period when sex-based classification was accepted as natural and the latter period when such classification was no longer automatically assumed legal.

The greatest change in the last decade in the rationale for sex equity, aside from the plea to view women as individuals, was the argument that because of gender-based classification women had been relegated to an inferior status, comparable to that of black Americans. The Court in at least two cases, Reed (1971) and Frontiero (1973), accepted this argument and in so doing totally reversed the dominant ideology of the Court for the past 90 years that saw the woman's place protected and coddled. Since Reed and Frontiero, the Court has vacillated in its stand on sex-based classification. Such vacillation is to be expected as true sex equity would involve fundamental and far reaching changes.

Perhaps, however, the most obvious change between pre-1965 and post-1965 is the degree to which the Court was willing to make extra-legal comments about women. Woven throughout the pre-1965 cases, as can be seen clearly by the data presented in the chapter, were comments about women that were intuitive and subjective. In the post-1965 cases,

virtually all such comments have disappeared. Whether this indicates the Court has truly changed its perception of the role and status of women or whether such perceptions have simply been hidden from view emerging in more subtle ways is unclear.

CHAPTER IV

Blacks and the Law

> But to bring men hither, or to rob and sell them against their will, we stand against. In Europe, there are many oppressed for conscience sake; and here there are those oppressed who are of black color. . . . Ah! consider well this thing, you who do it, if you would be done to in this manner—
>
> Germantown Mennonites, William Penn's Colony, 1688

"Well, Mr. Chief Justice," the chauffeur began, "I just couldn't find a place—couldn't find a place to . . . "

Warren was stricken by his own thoughtlessness in bringing an employee of his to a town where lodgings were not available to the man solely because of his color. "I was embarrassed, I was ashamed," Warren recalled. "We turned back immediately."

Richard Kluger, Simple Justice

The purpose of this chapter is to describe the major categories justifying and condemining race discrimination that were generated by a content analysis of selected Supreme Court opinions and briefs of counsel. The categories, in turn, when compared with those that emerged for sex discrimination in Chapter III, will help answer the questions of this study posed at the outset: How has one of soceity's major institutions, the Supreme Court, justified or condemned over time a condition of inequality with respect to blacks and women? How has this justification or condemnation changed over time? How has the justification for the legal separation of the sexes differed from that for the separation of the races?

This chapter begins with a review of the Dred Scott case (1857). The legal reasoning used in this Supreme Court case was overruled by the adoption of the post-Civil War Amendments to the Constitution. However, the sociological rationale used by Justice Taney in the case for separating the races serves as a baseline for the cases analyzed in this chapter after the Civil War. Therefore, a review of the case is important. Following the review of the Dred Scott case is an overview of the legal reasoning relied on by the Supreme Court in the cases selected for this dissertation. The categories follow this overview, providing the legal system's rationale for both supporting and

condemning the separation of the races in the United States. Finally, the chapter concludes with an analysis of the data in terms of the questions asked in the dissertation. It should be emphasized that for the most part, the only data systematically used in this chapter are the Supreme Court opinions and briefs of counsel from the cases on race selected for this study.

An Introduction:
The Dred Scott Case, 1857

The English common law, as explained by Sir William Blackstone in his Commentaries on the Law of England, was very influential in the formation of American jurisprudence. As Blackstone wrote of the separate spheres of the sexes in relation to the common law, so he also wrote of the black slave and liberty.

> . . . the law of England abhors and will not endure the existence of slavery within this nation; . . . And now it is laid down that a slave or Negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person and his property. (Blaustein & Zangrando, 1968, p. 34)

However, Blackstone also wrote that England's colonies were not subject to the law of England and, therefore, slavery could be legally maintained in America.

The Negro slave as property was upheld by the United States Supreme Court in the case that helped set the stage for the Civil War, Dred Scott v. Alex. Sandford, Saml.

Russell, and Irene Emerson (1857). Not only did the Court conclude that a black freeman was not a "citizen" within the meaning of the Constitution, but Chief Justice Roger Taney also added that the Negro ". . . had no rights which the white man was bound to respect" (Scott, 1857, p. 701). The opinion of Taney deserves close attention: first, it pointed to the prevailing justifications used to separate the races before the Civil War; second, it illuminated the legal situation that the Civil War Amendments to the Constitution remedied and third, it served, in part, as a prototype of the ideology justifying judicial separation of the races even after the Civil War. Therefore, the case stands as a base point by which to analyze the cases on race selected for for this dissertation.

The Court's opinion written by Justice Taney referred to the abject degradation and inferiority of the black "race" some 18 times in half as many pages. Blacks, in Taney's words, were "subordinate and inferior, . . . altogether unfit to associate with the white race" (Scott, Opinion of the Court, 1857, p. 702). Again and again Taney spoke to the "marks of inferiority and degradation. . . fastened upon the African race" (Scott, 1857, p. 705).

The argument of inferiority was necessary to justify legally the "line of distinction between the citizen and the subject" (Scott, 1857, p. 706). Blacks formed "a class

of persons . . . separated and rejected" (Scott, 1857, p. 706) and, therefore, were not citizens and were, as a consequence, outside the purview of the Constitution. Taney gave one final convoluted proof of their noncitizenship by arguing that the privileges and immunities guaranteed to citizens by the Constitution would have no meaning if blacks were meant to be citizens as it was obvious blacks and whites did not enjoy the same privileges; therefore, blacks must not be citizens (Scott, 1857, p. 708).

Taney also suggested reasons other than inferiority for the legal separation of the races. There was, for instance, a natural order, he claimed, that demanded such separation: ". . . a perpetual and impassable barrier was intended to be erected between the white race and the one . . . reduced to slavery" (Scott, 1857, p. 707). Again, the purchase of blacks as an "ordinary article of merchandise," Taney wrote, "was regarded as an axiom in morals as well as in politics, which no one thought of disputing or supposed to be one to dispute" (Scott, 1857, p. 702). Ironically, at the same time, Taney also called upon the basic ideals of the United States to prove the inequality of blacks:

> . . . for if the language, as understood in that day, would embrace them [blacks], the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind . . . they would have deserved and received universal rebuke and reprobation. (Scott, 1857, p. 703)

Taney further justified the legal separation of the races as benefiting blacks. Because they were of an inferior order, he maintained, "the negro might justly and lawfully be reduced to slavery for his benefit" (Scott, 1857, p. 701). Arguing much like future Justices in sex discrimination cases, Taney insisted that the special laws for blacks protected them. He wrote that if blacks were citizens "and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety" (Scott, 1857 p. 705). At the same time, Taney implied potential violence inherent in blacks assuming citizenship. Citizens' rights for both freeman and slave would inevitably produce, he wrote, "discontent and insubordination among them, . . . endangering the peace and safety of the State" (Scott, 1857, p. 705).

Taney's opinion turned on the legalities of citizenship and slaves as property. It also dealt with the legal reasons for invalidating the Missouri Compromise. It was the legal situation embodied in this opinion that the post Civil War Amendments attempted to remedy. Beyond the pure legalities, however, the opinion also suggested an underlying ideology that foreshadowed the rationale used by the Supreme Court in cases selected for this dissertation to

justify the separation of the races. Taney spoke of the fear of violence, the social distinctions between the races, and, finally, the fear of black power and the consequent need to keep the black oppressed. As will be seen, all of these and others were used as reasons to keep blacks and whites apart in the years following the Civil War. The only major argument used by Taney which was not used after the Civil War was the explicit referral to the perceived inferiority of blacks.

The Legal Reasoning of Race Discrimination

Introduction

The Civil War saw the end of slavery and the adoption of three Amendments to the United States Constitution which secured "to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoys" (Strauder, Opinion of the Court, 1879, p. 665). These were the Thirteenth, Fourteenth, and Fifteenth Amendments. In addition to the Amendments, Congress attempted to make its will known through a series of civil rights acts that reiterated equity for blacks.

Surrounding the post Civil War Amendments and Congressional legislation was a sense of the gravity of racial discrimination that infused all the Supreme Court cases analyzed. Emphasizing this gravity, Justice John Harlan,

in his dissenting opinion in the Civil Rights Cases (1883), called the Fourteenth Amendment, for example, the "supreme act of the Nation" (Civil Rights Cases, Dissenting Opinion, 1883, p. 851). The counsel for the defendant in Buchanan v. Warley (1917) maintained that dealing with race relations in the South after the Civil War was "the most tremendous problem that ever confronted our Anglo-Saxon civilization" (Buchanan, Brief of Defendant, 1917, p. 19). The attorneys for the petitioner in Gaines v. Canada (1938) also noted "the struggle of the Negro to attain an education and improve the standard of his citizenship in the midst of an indifferent or hostile environment is one of the epics of America" (Gaines, 1938, p. 23). This same theme was reiterated by Supreme Court Justice William O. Douglas when he referred to segregation as a "bitter chapter in American history" (Atlanta Motel, Concurring Opinion, 1964, p. 282). Not only were legal standards of equity in place through the Constitutional Amendments and congressional legislation for use in judging race discrimination, but such discrimination was viewed as a serious concern to the nation.

With the legal standards in place, classification by race could only stand if the law was circumvented or interpreted to allow it. In the cases analyzed, circumvention was often an issue brought to the Supreme Court but rarely a ploy used by the Court to maintain segregation. In Smith

v. Texas (1940), for example, the Court decided that blacks were systematically excluded from grand juries in Texas even though they were included on lists of potential jurors. The attorneys for the petitioner described the circumvention of the law:

> It is more than a mere gesture at compliance when never at any time has more than one negro been even placed on the grand jury panel and even then, almost invariably, he is placed with deadly accuracy as number sixteen, considering that the judge himself testified that it was his understanding of the law that the grand jury should be composed of the first twelve? (Smith, Brief of Petitioner, 1940, p. 19)

The Court found such circumvention unconstitutional as it also did in Gomillion v. Lightfoot (1960), a gerrymandering case redrawing municipal borders from a square to an irregular 28 sided figure in order to exclude black voters. The Court noted, "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens . . . of their theretofore enjoyed voting rights" (Gomillion, Opinion of the Court, 1960, p. 117).

Rather than circumvention, however, interpretation by the Supreme Court of the Civil War Amendments played the greatest role in both upholding legal classification by race and in condemning it. Shifts, over time, for instance, in the intrepretation of the Fourteenth Amendment have been critical to the Court's ability to rule on civil rights and civil liberties. It is important, therefore, to review

these Amendments, their interpretation and use in the cases selected for this dissertation.

The Thirteenth Amendment

The Thirteenth Amendment to the United States Constitution assured that "neither slavery nor involuntary servitude, except as a punishment for crime. . . shall exist within the United States. . . " In even stronger language, Justice Harlan in the Civil Rights Cases (1883) maintained that "the 13th Amendment alone obliterated the race line" (Civil Rights Cases, Dissenting Opinion, 1883, p. 849). Although the Court never interpreted this Amendment that broadly, it did agree that the Amendment gave Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States" (Civil Rights Cases, Opinion of the Court, 1883, p. 842). The question then debated, however, was whether segregation of the races in public places was a "badge of slavery." The answer of the Court in the Civil Rights Cases (1883) and reiterated in Plessy v. Ferguson (1896) was that "it would be running the slavery argument into the ground, to make it apply to every act of discrimination a person may see fit to make" (Civil Rights Cases, Opinion of the Court, 1883, p. 844). Plessy ended any thoughts of extending the Thirteenth Amendment beyond a very narrow construction:

> 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, or reestablish a state of involuntary servitude. Indeed, we do not understand that the 13th Amendment is strenuously relied upon by the plaintiff in error in this connection. (Plessy, Opinion of the Court, 1896, p. 258)

Nevertheless, in Bailey v. Alabama (1911), the Court did agree that "While the immediate concern was with African slavery the Amendment was not limited to that. It was a charter of universal freedom . . . " (Bailey, Opinion of the Court, 1911, p. 201). In this instance the Court called unconstitutional labor contracts that virtually assured peonage status of black farmworkers in Alabama. But Justice Oliver Wendell Holmes dissented saying, "The 13th Amendment does not outlaw contracts for labor" (Bailey, Dissenting Opinion, 1911, p. 203).

With narrow interpretation of the Thirteenth Amendment, the bulk of the work assuring racial equity fell to the workhorse of civil rights, the Fourteenth Amendment.

The Fourteenth Amendment

The Fourteenth Amendment guaranteed that no state could "abridge the privileges and immunities" of United States citizens, "deprive any person of life, liberty or property, without due process of law," or deny to anyone "the equal protection of the laws."

In early cases the Fourteenth Amendment was considerably narrowed by the Court's interpretation that it be applied only to direct state action. In United States v. Cruikshank (1876) the Court made it clear that it was the duty of the states to assure equality of rights. "The only obligation resting upon the United States is to see that the states do not deny the right" (Cruikshank, Opinion of the Court, 1876, p. 592). Therefore, state action had to be involved in racial discrimination before the Fourteenth Amendment could be effective. Only slowly over the years was the Amendment interpreted by the Court to protect a greater range of rights against discrimination. For instance, in Buchanan v. Warley (1917), the issue at bar was a municipal law requiring a separation of the races in residental areas. Because it was a public ordinance, the Court maintained that the due process clause of the Fourteenth Amendment, assuring protection of property, had been violated. Restrictive covenants under private contracts, however, were not considered unconstitutional until 1947 in Shelley v. Kraemer. In Shelly the Court broadened the Amendment's interpretation by holding that the judical action needed to enforce private agreements was state action and, therefore, private restrictive covenants fell under the purview of the Fourteenth Amendment and were unconstitutional.

Another early case to set a precedent narrowly constructing the Fourteenth Amendment was the Civil Rights Cases of 1883 calling constitutional the separation of the races in public places, specifically inns, theaters, and trains. This case relied on the Cruikshank doctrine that "it is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment" (Civil Rights Cases, Opinion of the Court, 1883, p. 839). It was Plessy v. Ferguson (1896), however, that pronounced "reasonable," under the Fourteenth Amendment, a state statute providing separate but equal railroad cars for blacks and whites. In interpreting the Fourteenth Amendment, the Court stated:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. (Plessy, Opinion of the Court, 1896, p. 258)

In a dissenting opinion, Justice Harlan said of the decision, "the thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone or atone for the wrong this day done" (Plessy, Dissenting Opinion, 1896, p. 264). Justice Harlan's dissent was prophetic, and through a slow erosion of the "separate but equal" doctrine and a shift in the interpretation of the Fourteenth

Amendment, the Court, finally, in 1954 in Brown v. Board of Education, declared segregation in public schools "inherently unequal." Segregation, therefore, was in violation of the equal protection clause of the Fourteenth Amendment (Brown, Opinion of the Court, 1954, p. 881).

Another aspect of the Fourteenth Amendment involved the intent to discriminate. If a state action had a disproportionate negative impact on minorities but was neutral on its face, the proof of a racially discriminatory purpose was required before there was an equal protection violation. The question of intent was settled by the Court in Village of Arlington Heights v. Metropolitan Housing Development Corporation (1977), a case involving a town council denying rezoning for low income housing, a ruling that impacted negatively on minorities. Based on a Fifth Amendment case, Washington v. Davis (1976), the Court ruled such a denial by the town council did not constitute a violation of the Fourteenth Amendment. Intent to discriminate had to be proven. To prove a purpose to discriminate, however, is often difficult. As the counsel for the defendant said as early as 1876 in United States v. Cruikshank, "the act usually indicates the intent; but who can know the secret intent" (Cruikshank, Brief of Defendants, 1876, p. 25).

The Fifteenth Amendment

The third of the Civil War Amendments, the Fifteenth, was to assure that the right of citizens to vote "could not be abridged because of race, color, or previous condition of servitude." The first case analyzed in this dissertation to rely on the Fifteenth Amendment was Ex Parte Yarbrough (1884) involving a black forcibly kept from voting in a federal election. The Court stated: "The 15th Amendment of the Constitution, . . . clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the states" (Yarbrough, Opinion of the Court, 1884, p. 278). The Court also made it plain that the Fifteenth Amendment meant black men, not black women (Yarbrough, Opinion of the Court, 1884, p. 278). After Yarbrough the right to vote for blacks under the Fifteenth Amendment has been consistently upheld even in potentially ambiguous situations. For example, in Terry v. Adams (1952) a private political organization, which excluded blacks, yet served as the Democratic Party primary for a Texas county, was called unconstitutional under the Fifteenth Amendment. Only one Justice dissented on the grounds that a private organization did not involve state action. The others argued on various grounds the organization's relationship to the state. A more recent case, Gomillion v.

Lightfoot (1960), brought under the Fifteenth Amendment, prohibited gerrymandering as a means to exclude blacks from voting. The Fifteenth Amendment, in general, has been a powerful tool for assuring blacks the right to vote.

The Legal Standard of White Status

There were other legal standards besides the Civil War Amendments used in the cases selected for this dissertation. A portion of the United States Code, for instance, was used in the Virginia Private School Cases (1976) which invalidated racial discrimination in private schools if those schools solicited students through advertising to the public at large. The Commerce Clause was used to force the integration of a motel in the 1964 case Heart of Atlanta Motel v. United States. The Due Process Clause of the Fifth Amendment was called upon in Washington v. Davis (1976), a case involving a standardized test for police recruits in the District of Columbia which impacted more negatively on blacks than whites. Undergirding all the legal reasoning, however, was the fundamental notion that achieving white status for blacks was the ultimate goal of the law.

The Civil War Amendments, as well as the civil rights acts enacted both after the Civil War and during the 1960's, all embodied the idea of raising blacks to the status of whites. This concept was an integral part of the law both by interpretation and construction. In Strauder v. West

Virginia (1879), a case confirming the right of black men to sit on juries, the Court in its opinion wrote, "It [14th Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons" (Strauder, Opinion of the Court, 1879, p. 665). Again in the Civil Rights Cases (1883), Justice Harlan emphasized that the Court had settled the fact that the Fourteenth Amendment was "To secure to the colored race . . . the enjoyment of all the Civil rights that, under the law, are enjoyed by white persons" (Civil Rights Cases, Dissenting Opinion, 1883, p. 852). The Court, in Buchanan v. Warley (1917), recognized two post Civil War laws enacted by Congress that built in the white standard as the black goal:

> In giving legislative aid to these constitutional provisions Congress enacted in 1866 that: All citizens of the United States shall have the same right. . . as is enjoyed by white citizens . . . to convey real and personal property. (Buchanan, Opinion of the Court, 1917, p. 162)

As late as 1976 in the Virginia Private School Cases, the Supreme Court decided a case prohibiting racial discrimination in private schools based on an 1866 law guaranteeing "the same right . . . to make and enforce contracts. . . as is enjoyed by white citizens" (Private School Case, Opinion of the Court, 1976, p. 424).

But raising blacks up to the same status as whites was not necessarily to mean being perceived as white. This was

made clear in Plessy v. Ferguson (1896) when the Court in its opinion said, ". . . he [the black] is not lawfully entitled to the reputation of being a white man" (Plessy, Opinion of the Court, 1896, p. 260). The Court, by way of explantaiton, continued, "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences" (Plessy, Opinion of the Court, 1896, p. 261). Given these differences, to separate the races was approved as long as the blacks enjoyed the same privileges and status as the whites. This was the basic premise of "separate but equal." Given the separate but equal doctrine, the argument was that a statute separating the races nevertheless could apply "to the two races with perfect . . . equality" (Plessy, Brief of Defendant, 1896, p. 50). Consistently throughout the cases, the counsels argued that with segregation "we have endeavored to do exact justice to the negro as well as to the white . . . for the good of both races" (Buchanan, Brief of Defendant, 1917, p. 118). In Brown v. Board of Education of Topeka (1954), however, the doctrine that the races, although separated, could still be equal changed to the philosophy that to fulfill truly the law of the land, to raise the black to the whites' standard, the black had to be integrated into white society.

What were the differences perceived in blacks and whites that demanded separation of the races? What was the

rationale used by the legal system to substantiate the "separate but equal" doctrine? What was the rationale used to erode and finally topple this doctrine? In analyzing the briefs and opinions of the Supreme Court cases selected for this dissertation, there consistently emerged four major categories used to justify the maintenance of segregation and six categories used to argue its demise. In the following section the categories used to justify legal classification by race are described using examples from the data by way of explanation. It is apparent, however, that not all the data can be included; Table 4 in Appendix C provides an idea of the frequency with which the arguments constituting each category were used.

Blacks and Whites as Two Legal Classifications

The rationale that emerged from the data to support a separation of the races fell into four main categories:

1. Custom and Sentiment, the first category, embodies the concepts of tradition and natural order. It is perceived that a separation of the races has always been and always will be part of the universal scheme of life. This category lays the groundwork for Category II.
2. The second category, Racism as a Social Issue, formed three subcategories:

a. Race in the community not the courts—Separation of the races, as a social issue, is perceived as outside the purview of the legal system. It is, rather, an issue that must be dealt with in each individual community.

b. Social incompatibility—It is a "given" that the races are socially incompatible and are, therefore, more comfortable being apart.

c. The sexual issue—The fear of miscegenation calls for a separation of the races.

3. The third category is Fear of Violence. In this category the separation of the races is seen as necessary to promote peace and prevent conflict and ill-feeling.

4. The last category, Maintenance of of Power, emerges most forcefully from those advocating that classification by race is invalid. The concept embodied in this category is that the fundamental reason for segregation is to assure the social and political dominance of the white race.

Unlike the Supreme Court cases dealing with sex discrimination, it was very seldom that the Court in the cases analyzed accepted the arguments supporting classification by race. Nevertheless, those arguments as they appeared in the briefs of counsel, whether they were accepted or rejected by

Supreme Court, describe an ideology that kept segregation a reality in the wider society for many years and also shed light on racism in the United States even today.

It will become clear that none of these categories are mutually exclusive. Nevertheless, they do establish a paradigm that, when compared with those categories that have emerged from the sex discrimination cases in the previous chapter, will provide insight into those questions this dissertation addresses.

Category I: Custom and Sentiment

The foundation for the rationale supporting the separation of the races has rested on the argument that segregation is an integral part of the customs and sentiment of the people. This is clearly seen in the Opinion of the Supreme Court in Plessy.

> In determining the question of reasonableness it [the Court] is at liberty to act with reference to the established usages, customs, and traditions of the people. . . . Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the races in public convenances is unreasonable. . . (Plessy, Opinion of the Court, 1896, p. 260)

The Court in so saying had accepted the argument of the counsel for the defense that "from time immemorial" laws had "upheld the exercise of police power on the basis of color and race" (Plessy, Brief of Defendant, 1896, p. 13). The counsel for the defense in Buchanan v. Warley put it even more succinctly: "The separation of the white and

black races upon the surface of the globe is a fact. . . . Why this is so, it's not necessary to speculate" (Buchanan, Brief of the Defendant, 1917, p. 37).

Although the Plessy Court accepted tradition and custom as part of law, the Court in Terry v. Adams did not. The Court disparaged the power of custom in Terry, a case involving the voting rights of blacks in "private" primaries, by commenting, "long accepted customs and the habits of a people may generate 'law' as surely as a formal legislative declaration, and indeed, sometimes even in the face of it" (Terry, Opinion of the Court, 1952, p. 1163). The Court found in this case that such customs were but "an old pattern in a new guise" (Terry, Opinion of the Court, 1952, p. 1166) and ruled that the voting rights of blacks had been violated. The counsel for the plaintiff in Brown II, the case following Brown I that decided the appropriate relief for blacks suffering under segregation, also spoke out strongly against consideration of local custom as a rationale for continuing legal segregation:

> . . . the Fourteenth Amendment, on its face and as a matter of history, was designed for the very purpose of affording protection against local mores and customs, and Congress has implemented that design by providing redress against aggression under color of state laws, customs and usages. (Brown II, Brief of Appellants, 1955, p. 14)

Aside from custom and tradition, more specifically, the

feelings, deisres, and sentiment of "the people,"* were also called upon by the counsels and Court to justify segregation. In Plessy the counsel for the plaintiff commented on the intensity of the feelings surrounding integration of the races:

> Six-seventhsof the population are white. Nineteen-twentieths of the property of the country is owned by white people. Ninety-nine hundredths of the business opportunities are in the control of white people. These propositions are rendered even more startling by the intensity of feeling which excludes the colored man from the friendship and companionship of the white man. Probably most white persons, if given a choice, would prefer death to life in the United States as colored persons. (Plessy, Brief of James Walker for Plaintiff, 1896, p. 9)

The Plessy Court, upholding a legal division of the races, quoted a New York case which stated that nothing could be accomplished by laws which "conflict with the general sentiment of the community" (Plessy, Opinion of the Court, 1896, p. 261).

In both Gaines v. Canada and Shelley v. Kraemer the counsels for the defense relied on the beliefs and desires of the populace to argue in favor of segregation. "The policy of the state respecting separation of the races for purposes of education is believed by the people of the state to be a wise policy." In support of this "belief" the

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*"The people" consistently meant whites, i.e., "among the best friends of the negro are the people in the Southern states" (Buchanan, Brief of Defendant, 1917, p. 18).

counsel went on to say, "Experience has shown it to be a wise policy" (Gaines, Brief of Respondent, 1938, p. 71). In Shelley the counsel insisted that separation of the races in residential areas was not segregation but the desire of the people. "And respondents earnestly submit this is not segregation nor discrimination. It is separation which is the will and desire and determination of the people" (Shelley, Brief of Respondent, 1947, p. 17).

In Virginia, after Brown I had decided segregation in the schools to be unconstitutional, the desires of the populace took precedence over the law. The governor named a 32-man, all-white commission to ascertain "the wishes of the people of Virginia" as to desegregation (Brown II, Brief for Appellants of Harold Boulware et al., 1955, p. 9). Also, the continuation of segregation, after Brown I and Brown II had prohibited it, was justified in the name of public sentiment by the counsel for the petitioners in Keyes v. School District No. 1 (1971):

> The board has employed a variety of devices which have enabled parents to choose schools so as to achieve racial separation. Optional zones located in the border areas of mixed racial population between white and black schools functioned as an effective device to accommodate segregationist sentiment among the public. (Keyes, Brief of Petitioners, 1971, p. 31)

In order to imbue the tradition of segregation with authority, some counsels, especially in earlier cases, called upon God and a natural order. The defense in Plessy

quoted the Pennsylvania Supreme Court:

> To assert separateness is not to declare inferiority in either. It is simply to say that, following the order of divine providence, human authority ought not to compel these widely separated races to intermix. (Plessy, Brief of Alexander Morse for Defendant, 1896, p. 48)

The counsel for the defense in Buchanan v. Warley (1917) called upon both God and nature, "this law only seeks to regulate that natural and normal segregation which has always existed and to prevent a few of each race from overstepping the racial barriers which Providence and not human law has erected" (Buchanan, Brief of Defendant, 1917, p. 10). The same counsel later emphasized this point:

> Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, . . . yet God has made them dissimilar, with those natural instincts and feeling which He always imparts to his creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. (Buchanan, Brief of Defendant, 1917, p. 37)

Although the reliance on Divine Writ died after Buchanan as a legal argument, the counsel for the plaintiff in Brown II, quoted a South Carolina Superintendent objecting to the fact that "'Our churches seem to be letting their zeal run away in leading the way,' He denounced the desegretation as contrary to the Scriptures and to good sense" (Brown II, Brief of Appellants, 1955, p. 8).

In general the Supreme Court did not use custom or sentiment as a rationale to either uphold or condemn a legal separation of the races. Custom, tradition and sentiment, however, did lay the groundwork for viewing racism as a social issue, not as a legal issue, in the wider society. Custom, tradition and sentiment also served as the underpinnings for the idea that the races must be kept apart because of natural incompatibility and a fear of miscegenation. Category II, Racism as a Social Issue, embodies these concerns as they emerged as legal arguments.

Category II: Racism as a Social Issue

Race in the community not the courts. In the Civil Rights Cases the Court upheld the exclusion of blacks from public places by stating: "Congress did not assume, under the authority given by the 13th Amendment, to adjust what may be called the social rights of men and races in the community" (Civil Rights Cases, Opinion of the Court, 1883, p. 843). In response, Justice Harland said in a dissenting opinion:

> I agree that government has nothing to do with social, as distinguished from technically legal, rights of individuals: No government ever has brought or ever can bring its people into social intercourse against their wishes. (Civil Rights Cases, Dissenting Opinion, 1883, p. 855)

But, he continued, the rights at issue for a black in this case were "no more a social right than his right, under the law, to use the public streets . . . or a turnpike road, or

a public market or a postoffice" (Civil Rights Cases, Dissenting Opinion, 1883, p. 856). The debate as to when the separation of the races was a social issue and when a legal issue had begun and would continue up to the present day.

The Court in Plessy v. Ferguson made the social issue its major rationale for upholding the separate but equal doctrine:

> The argument. . . assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced conmingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals . . . if the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane. (Plessy, Opinion of the Court, 1896, p. 261)

If in Plessy separation of the races in railroad cars had been called a social issue, not a legal one, it was logical the counsel for the defense in Buchanan v. Warley would argue that separation by race in residential areas was also a social issue. "The war amendments . . . do not go to the romantic extent of attempting to secure or guarantee to the negro social equality with the whites" (Buchanan, Brief of Defendant, 1917, p. 50). The Buchanan Court, however, disagreed, distinguishing this case from Plessy because of the constitutional guarantee of right to property.

"These enactments did not deal with social rights of men, but with those fundamental rights in property" (Buchanan, Opinion of the Court, 1917, p. 162).

Missouri Ex Rel. Gaines v. S. W. Canada involved the admission of a black to the Missouri law school when separate facilities were not available for blacks. The state, while not providing a law school for blacks, nevertheless had a policy of arranging for blacks to attend law schools in any one of four adjacent states. Relying on Plessy, the the defendant for the state argued that the case involved a social question, not a legal one.

> . . . his [Gaines'] real purpose is to lend his name as litigant to those interested in furthering a movement to bring about social equality between the white and negro races. As we have pointed out this is not a question which can be settled by laws or judicial decisions. (Gaines, Brief of Respondent, 1938, p. 71)

The Court, however, ruled that Gaines must be admitted to the school given the lack of separate but equal facilities.

The social issue came to turn on the rights of an individual personally to discriminate based on race. In Shelley v. Kraemer the Court said that private, residential "restrictive covenants" were unconstitutional because of the state judicial system needed to enforce them. The counsel for the defense had tried to argue, however, with no success, that the Court had no right to force one person to deal with another:

> If a man would merely refuse to sell his property or to lease or rent it to a Negro purely and simply because he was a Negro, would that man violate any law or be subject to any judicial penalty? Clearly he would not. No man may be forced to deal with any other man, black or white, unless he chooses to do so. (Shelley, Brief of Respondent, 1974, p. 68)

With Brown v. the Board of Education of Topeka and the Civil Rights Act of 1964, the legal prohibitions of race discrimination became more stringent until the counsel for the plaintiff in Atlanta Motel v. United States questioned again the Court's right to intefere in personal social decisions.

> But if the Civil Rights Act of 1964 can tell a proprietor that he must do business with members of the Negro race, one might properly ask how long will a man's home or a man's yard or even his fields be held inviolate. (Atlanta Motel, Brief for the Plaintiff, 1964, p. 22)

Finally, in the Virginia Private School Cases the counsels for the petitioner argued that private schools could exclude blacks. "Civil Rights," they insisted, "did not include 'social rights'" (Private School Cases. Brief of Andrew Lipscomb for Petitioner, 1976, p. 12). It was a futile argument. The Court held that a private school open to the general public, without a "plan or purpose of exclusiveness," could not prohibit the enrollment of blacks. In Plessy the Court had permitted the individual to discriminate on social grounds outside the purview of the legal system, but by the 1970's these issues were seen as very much within the scope of the law.

Social incompatibility. Underlying the premise that the separation of the races was a social issue was the notion that blacks and whites were incompatible. Therefore, in the words of the counsel for the defense in Plessy v. Ferguson, "It is very certain that such unreasonable insistence upon thrusting the company of one race upon the other . . . is calculated . . . to foster and intensify repulsion between them rather than to extinguish it" (Plessy, Brief of M. J. Cunningham for Defendant, 1896, p. 50). The counsel for the defense in Buchanan spoke of the "antipathy" of the races that "exists between them from living together in the ultimate social association of neighbors on the same block" (Buchanan, Brief of Defendant, 1917, p. 7). He continued by insisting that all laws separating the races "are founded upon the proposition that . . . certain evils result from the too constant and promiscuous commingling of their members" (Buchanan, Brief of Defendant, 1917, p. 77).

The incompatibility of the races again was implied in Gaines by the counsel for the defense when he quoted an Ohio case excluding a black home economics student from a "home management house": "It has never been the policy of the Ohio State University to require students of different races or nationalities to reside together as part of a single family" (Gaines, Brief of Respondent, 1938, p. 45). In a later case, the antipathy between the races was

reiterated by the counsel for the respondent quoting a Missouri case as precedence: "On the other hand, if it was distasteful to plaintiff to have a colored man as his adjoining neighbor, he had the legal right to refuse to sell him or his agents the property in controversy" (Shelley, Brief of Respondent, 1948, p. 18).

After Brown (1954) the incompatibility of the races as an argument to prevent integration lost its effectiveness although remnants of the argument remained. For instance, bussing as a means for integrating schools was branded by the counsel for the respondents in Swann v. Charlotte-Mecklenberg (1971) as a means sought by the petitioner for "total social mixing" (Swann, Brief of Respondents, 1971, p. 66). Stressing this social mixing in a section of his brief entitled "Racial Balance—The Harbinger of Massive Court Involvement in Social Theories," the defense continued:

> The Supreme Court is now being asked by petitioners to direct this School Board to engage in another experiment in efforts to seek some educational or social goal which has eluded them and will continue to do so for years to come. It is well known that social balance, social equivalence, education equivalence and related concepts will not be accomplished by the blacks over night. All the sociologists and educators agree on this point. (Swann, Brief of Respondents, 1971, p. 63)

Finally, in Arlington Heights v. Metropolitan Housing the issue involved a village council refusing to rezone to

allow low income, racially integrated housing. The charge was that this refusal was racially discriminatory. In the words of the counsel for the petitioners, "it was charged that the ordinance bars people who were uncongenial to the present residents and that it expressed the social preferences of the residents for more congenial groups" (Arlington Heights, Brief of Petitioners, 1977, p. 29). The Arlington Court did recognize the case involved what they called the "social issue" defining it as "the desirability or undesirability of introducing at this location in Arlington Heights low and moderate income housing that would probably be racially integrated" (Arlington, Opinion of the Court, 1977, p. 46). The Court dismissed the issue, however, relying rather on arguments against rezoning that had nothing to do with the incompatibility of blacks and whites living as neighbors.

The sexual issue. On occasion, in the cases analyzed, the social issue became a sexual issue. In the Civil Rights Cases one of the three cases involved a black woman, Mrs. Robinson, charged with riding in a railroad car reserved for whites. She was riding with her nephew whom the railroad conductor thought was white. Therefore, the conductor assumed Mrs. Robinson was a prostitute and asked her to leave. If he had asked her to leave because she was black, he would have violated the Civil Rights Act of 1875. Mrs.

Robinson's attorney argued that "so long as a woman behaves with propriety, I deny that the conductor has anything to do with her moral or social status" (Civil Rights Cases, Brief of Plaintiffs, 1883, p. 22). The Supreme Court, however, ruled the Civil Rights Act of 1875 void, discrimination by race in public places permissible, and Mrs. Robinson's morals, therefore, a moot question.

Miscegenation was seen, for the most part, as abhorrent. For instance, intermarriage of blacks and whites was considered by both the counsels for the plaintiff and the defense in Plessy as impermissible under the law. Intermarriage to both meant the destruction of the races and was, therefore, subject to laws of the state. The counsel for the plaintiff affirmed this by noting,

> Whether therefore two races shall intermarry, and thus destroy both is a question of police. . . . In the meanwhile it cannot be thought that any race is interested on behalf of its own destruction. (Plessy, Brief of S. F. Phillips for Plaintiff, 1896, p. 10)

However, he argued that such a separation of the races with regard to marriage did not mean that a separation of the races in railroad cars was lawful. The court disagreed, using the prohibition of intermarriage as precedent to bolster its argument of the constitutionality of separate but equal accommodations for blacks and whites (Plessy, Opinion of the Court, 1896, p. 259).

The notion of the destruction of the races through intermarriage was again used in Buchanan v. Warley when the defense argued that blacks and whites should not live as neighbors in order to assure the preservation of "the purity of the race."

> If there is danger of conflict, and of peril to the preservation of the purity of the race, where there is merely the brief and temporary and almost casual association in the schools and in the vehicles of public travel, how much greater must be this same danger where the relation is the fixed and permanent and uninterrupted one of immediate neighbors on the same block; the negro with his family living side by side with the white man's family, day after day and year after year? (Buchanan, Brief of Defendant, 1917, p. 47)

The Court, however, carefully refuted this argument, making a distinction between "amalgamation of the races" and the right to property:

> It is the purpose of such enactments, and it is frankly avowed it will be their ultimate effect, to require by law, at least in residential districts, the compulsory separation of the races on account of color. Such action is said to be essential to the maintenance of the purity of the races, although it is to be noted in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited.
>
> The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person. (Buchanan, Opinion of the Court, 1917, p. 163)

The sexual issue surfaced full blown in Powell v. Alabama, a case involving young black men charged with the rape of young white women. The Court recognized the horror of the crime:

> The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried . . . (Powell, Opinion of the Court, 1932, p. 165)

The fact that the young women may have been prostitutes was secondary to the sexual issue involving black men and white women. The counsel for the plaintiff quoted an Alabama Supreme Court case as precedent:

> The infamy involved in a white woman's immorality with negroes is so great that no matter how clearly the general fact of prostitution be established, it will not be deduced that she might have been guilty of immoral conduct with negroes . . . (Powell, Brief of Petitioners, 1932, p. 16)

However, on the contrary, the Court concluded that because of the hostility surrounding the case the trial court had to be particularly careful that justice be done and ruled that time had not been given to the accused to secure counsel which the Court ruled a violation of due process (Powell, Opinion of the Court, 1932, see particularly p. 171).

Category III: Fear of Violence

The argument that the separation of the races was necessary in order to maintain pulic order and prevent conflict was consistently used by the counsels throughout the cases analyzed. Just as consistently, however, with few exceptions, the Supreme Court refused to allow the fear of violence to override constitutional rights.

Plessy was a major exception. In Plessy the Court accepted the idea that segregation was necessary to avoid violence. This acceptance coupled with the tradition of a state's powers to preserve peace made public order a common argument for the counsels to use in attempting to uphold a separation of the races. The counsel for the defendant in Plessy had written:

> The statute here in question is an exercise of the police power, and expresses the conviction of the legislative department of the State of Louisiana that the separation of the races in public conveyances with proper sanctions, enforcing the substantial equality of the accommodations applied to each, is in the interest of public order, peace, and comfort. (Plessy, Brief of Alexander Morse for Defendant, 1896, p. 8)

The Court accepted this argument "with a view to the . . . preservation of the public peace and good order" (Plessy, Opinion of the Court, 1896, p. 260). In Justice Harlan's dissent he maintained, to the contrary, that separation of the races ". . . can have no other result than to render permanent peace impossible and to keep alive a conflict of

races, the continuance of which must do harm to all concerned" (Plessy, Dissenting Opinion, 1896, p. 264).

The defense in Buchanan v. Warley also insisted that the order of society was paramount.

> To live in social intimacy with the members of another race as distinct as the negro and the white, which to the average mind is repugnant, and which is certainly not a natural right, ceases to be a constitutional right the moment it threatens the peace and good order of society. (Buchanan, Brief of Defendant, 1917, p. 11)

Unlike in Plessy, the Buchanan court disagreed, "the police power, as broad as it is, however, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution" (Buchanan, Opinion of the Court, 1917, p. 160). The Court unequivocally continued:

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be prompted by depriving citizens of their constitutional rights and privileges. (Buchanan, Opinion of the Court, 1917, p. 163)

The history of most of the cases analyzed was, in fact, violent. In United States v. Cruikshank a band of persons conspired "to injure, oppress, threaten and intimidate Levi Nelson and Alexander Tillman, citizens of the United States of African descent and persons of color" (Cruikshank, Opinion of the Court, 1875, p. 590). In Ex Parte Yarbrough "E. H. Greed did . . . willfully beat, bruise, wound and maltreat the said Berry Saunders" (Yarbrough, Opinion of the

Court, 1883, p. 275). In arguing against blacks and whites living as neighbors, the counsel for the defense in Buchanan v. Warley intimated violence:

> Is this a constitutional privilege of the negro, even though it may involve the most bitter and violent racial antagonism on the part of the whites whose homes are thus in a peculiar sense invaded and destroyed? (Buchanan, Brief of Defendant, 1917, p. 13)

In Powell v. Alabama the Court commented at length on the "atmosphere of tense, hostile and excited public sentiment" surrounding the case (Powell, Opinion of the Court, 1932, p. 162).

In later cases, especially after Brown I, desegregation was viewed as surrounded by "dark and uncertain prophecies" (Brown II, Brief of Appellants, 1955, p. 14). In speaking of a black trying to find overnight lodging in segregated Georgia, the counsel for the appellees in Heart of Atlanta Motel v. United States quoted Senator Hubert Humphrey describing the problems Negroes planning interstate travel faced: "They must draw up travel plans much as a general advancing across hostile territory would establish his logistical support" (Atlanta Motel, Brief of Appellee, 1964, p. 42). In a separate opinion in Keyes v. School District No. 1, Justice Lewis Powell wrote of the friction caused by busing as a means for desegregation. "This has risked distracting and diverting attention from basic educational ends, dividing and embittering communities, and exacerbating,

rather than ameliorating, interracial friction and misunderstanding" (Keyes, Opinion of the Court, 1973, p. 589). Finally even as late as Village of Arlington Heights v. Metropolitan Housing Development Corp., the brief for the respondents included a description of the hostility at a meeting proposing rezoning of a suburban area to include low-income housing: "The public hearings were characterized by emotional, often racial, reactions on the part of the overflow crowds" (Arlington, Brief of Respondents, 1977, p. 17).

It is virtually a truism that black-white relations have meant violence; it is equally true, however, that in the cases analyzed, the Court, with few exceptions, did not accept the possibility of violence as a rationale for the continued separation of the races.

Category IV: Maintenance of Power

It can be argued that the fundamental reason for segregation is to keep the subordinate group socially and politically powerless. Certainly the issues involved in the cases analyzed made this clear—voting, jury duty, peonage, education-overall, a methodical exclusion of blacks from the sources of power. Nevertheless, those advocating racial separation did not use the "maintenance of power" as a rationale for retaining segregation. Rather, this category emerged from those attempting to dissemble the apartheid

system. It was apparent that power was a rationale for maintaining segregation; yet, to argue in a democracy that the races should be separated to maintain white power apparently seemed inappropriate to those counsels advocating segregation. The closest the proponents of segregation came to using power as a rationale for maintaining the separation of the races was through such arguments as that of the counsel for the defendant in Plessy v. Ferguson who commented segregation was "justified on grounds of public policy and expediency" and that "the weight of authority seems to support the doctrine" (Plessy, Brief of Alexander Morse for Defendant, 1896, p. 13). Aside from this, power as a justification for segregation only surfaced in the hands of its opponents.

In Strauder v. West Virginia the Court first cautioned against discriminations "which are steps towards reducing them [blacks] to the condition of a subject race" (Strauder, Opinion of the Court, 1879, p. 665). But the Court veered from its own advice in both the Civil Rights Cases and Plessy v. Ferguson by allowing segregation in public places. It was Justice Harlan in a dissenting opinion who spoke out against the unequal distribution of power inherent in the separation of the races: "there cannot be in this Republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former

just such privileges as they may choose to grant" (Civil Rights Cases, Dissenting Opinion, 1883, p. 856). Again, in Plessy Harlan stressed, "it seems that we have yet . . . a dominant race, a superior class of citizens, which assumes to regulate the enjoyment of civil rights" (Plessy, Dissenting Opinion, 1896, p. 264). Harlan had understood the counsel for the plaintiff's argument that Plessy involved:

> a discrimination intended to humiliate . . . one race in order to promote the price of ascendancy in another . . . Instead of being intended to promote the general comfort and moral well-being, this act is plainly and evidently intended to promote the happiness of one class by asserting its supremacy and the inferiority of another class. Justice is pictured blind and her daughter, the Law, ought at least to be color-blind. (Plessy, Brief of James Walker for Plaintiff, 1896, p. 19)

A sample of the cases analyzed showed clearly that power was a central issue in not only the early cases but in the later cases as well. For instance, in Buchanan v. Warley, concerning residential segregation, the counsel for the plaintiff reiterated Justice Harlan's warnings about "establishing a permanent superiority for the white race" (Buchanan, Brief of Moorfield Storey for Plaintiff, 1917, p. 33). In both Nixon v. Herndon and Terry v. Adams, two similar cases, the Court recognized controls over primaries as a means "to strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens" (Nixon,

Opinion of the Court, 1952, p. 1160). In Sweatt v. Painter the Court implicitly recognized that the exclusion of blacks from the all-white University of Texas law school also excluded them from contact with the powerful of the state:

> The [black] law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. (Sweatt, Opinion of the Court, 1949, p. 1119)

The Sweatt Court also recognized that "those qualities which are incapable of objective measurement. . . kept the separate facilities for blacks and whites unequal." Among these intangibles the Court named the access to power of the white school in the form of "the position and influence of the alumni" (Sweatt, Opinion of the Court, 1949, p. 1119). Even after Brown v. Board of Education of Topeka the Court confronted cases of localities attempting to keep blacks powerless. An example was Gomillion v. Lightfoot where the counsel for the appellee accused the State of Alabama of "depriving Tuskegee Negroes of political influence through gerrymandering municipal boundaries" (Gomillion, Brief of Petitioners, 1960, p. 6).

The proponents of segregation, however, denied a power struggle. In Buchanan v. Warley the counsel for the defendant denied the plaintiff's "extraordinary statement that this law [residential segregation] was passed for the vicious

motive of oppressing the negro . . . that it will at some future time have the effect of degrading instead of helping the members of the race" (Buchanan, Brief of Defendant, 1917, p. 26). Another denial of the power struggle was embodied in Terry v. Adams (1952) in the testimony of a Judge and member of the exclusionary Jaybird Democratic Association: "The Association was not formed, was not directed against the negro, it was directed against the bad white men who were leading astray the darkies" (Terry, Brief of Respondents, 1952, p. 3).

Implicit in the denial of a power struggle was the patronizing attitude of the powerful towards the powerless. There is no doubt that under slavery and as early freemen, the larger society viewed blacks as degraded and powerless. Justice Strong recognized this in his opinion in Strauder v. West Virginia. "The colored race, as a race, was abject and ignorant" and, the Court continued, because of this, upon emancipation, "state laws might be enacted or enforced to perpetuate the distinctions that had before existed." Justice Strong suggested, therefore, that blacks "needed the protection which a wise government extends to those who are unable to protect themselves" (Strauder, Opinion of the Court, 1879, p. 665).

However, the notion of protection very early gave way to the idea that the blacks must be able to fend for

themselves:

> When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights, as a citizen or a man, are to be protected in the ordinary modes by which other men's rights are protected. (Civil Rights Cases, Opinion of the Court, 1879, p. 665)

The implicit argument, then, was that blacks were just ordinary citizens under the law; therefore, if they felt themselves powerless, they had no one to blame but themselves. This is clearly seen in Plessy v. Ferguson when the Court upheld racial separation:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. (Plessy, Opinion of the Court, 1896, p. 261)

Patronizing of the powerless by the powerful involved blaming the victim. Blaming the victim raised its head in full form in the brief for the defendant in Buchanan v. Warley. In opposition to the argument that segregation created black ghettoes the counsel stated:

> And it is equally absurd to attempt to make the morals of the negro another matter dependent upon geographical location. We all know that the shiftless, the improvident, the ignorant and the criminal carry their moral and economic condition with them wherever they go. If in fact the negro sections are the least desirable sections of the city, and they are not so by any means, the negroes have made them what they are themselves; and this irrespective of the law, for we are speaking of conditions as they existed before this law went into effect. If the negroes carry with them a blight wherever they go. . . on what theory do they assert the privilege of spreading that blight to white sections of the city? (Buchanan, Brief of Defendant, 1917, p. 12)

The inevitable conclusion of such an argument was:

> If, after fifty years from slavery, the negro is still unable to stand alone, he at least cannot complain that the law during all that time has not afforded him equal rights and opportunities with the white man. (Buchanan, Brief of Defendant, 1917, p. 56)

The Buchanan Court did not mention the "blaming the victim" argument and its blatant use, it seems, died with the Buchanan case. A more familiar argument of the patronization of the powerful was found in Nixon v. Herndon, a case involving the exclusion of blacks from Democratic primary elections. Admitting the Democratic Party was dominant in Texas and that the Party was a "white man'a party," the counsel for the state of Texas nevertheless argued:

> The plaintiff in error has a right under the law of Texas to organize a party of his own and, if he can, get others to join with him to nominate candidates for office. This right is given to all and constitutes equality before the law. (Nixon, Brief of the State of Texas, 1926, p. 14)

Ultimately, the power argument became a question of whether or not the state had the power to classify by race. The argument culminated in Brown I within the sparring camps of counsels. The counsels for the appellants argued that their clients were calling into question "the state's power to enforce racial classification" (Brown I, Brief of Appellants, 1954, p. 12). On the other hand, the counsels for the appellees, relying on the precedent of Plessy and the Kansas Supreme Court, insisted, "It is significant that in each of the cases cited above, the court expressly recognized . . . the legislature has power to classify students in the public schools on the basis of color" (Brown I, Brief of Appellees, 1954, p. 17).

With Brown the Court decided that the state, except in unusual circumstances, did not have the power to classify by race. With this shift in the power of the state, in Heart of Atlanta Motel v. United States (1964), the counsel for the plaintiff asked the question which would be the focus of the central power issue of the 1970's—reverse discrimination and the reach of federal control. Speaking to the interpretation of the Commerce Clause in the Constitution and the Civil Rights Act of 1964, he stated:

> If the wants and desires of the Negro race, currently referred to as civil rights, can be forced upon other people, whose wants and desires are subject to the regulations of Congress because all people are part of interstate commerce, then there is no logical or forseeable end to the

> extension of the power of Congress under the commerce clause. . . . There can be no question but that the Civil Rights Act of 1964, if upheld, will be the straw that broke the camel's back. If such Act is upheld, the flood gates of federal power will be wide open and no one will ever again legally and peaceably be able to resist the onslaught of federal control by congressional legislation. (Atlanta Motel, Brief of Appellants, 1964, p. 41)

The maintenance of power, a retention of the status quo, and the dominance of whites permeated the whole of segregation. The autocratic use of power often was seen as a direct contradiction to democracy by those opposing segregation and, as will be seen in the following section, the categories that emerged supporting integration focused on dismantling the system of arbitrary power underlying legal classification based on race.

Blacks and Whites as One Legal Classification

The rationale that emerged from the data to support legal classification by race as unconstitutional fell into four main categories:

1. The first category is Race as a Sole Reason. The separation of the races solely based upon the color black is seen as a direct contradiction of the fundamental ideals of the United States.
2. Segregation as Denial and Deprivation—Classification by race is seen as the antithesis of equality because it inevitably acts to deny and deprive

blacks of the privileges, responsibilities and immunities open to whites.

3. The third category, Negative Results of Segregation, formed three subcategories.
   A. Segregation creates a caste through isolation—In this subcategory, segregation is seen as isolating blacks from the mainstream of society and creating a caste of the oppressed.
   B. Segregation creates a sense of inferiority—Separation of the races is seen as negative because it warps the individuality of blacks by instilling in them a feeling they are inferior to whites.
   C. Segregation creates socioeconomic ills—In the third subcategory segregation is seen to result in impoverishment for blacks both socially and economically, resulting in ghettoes, low educational achievement and unequal employment opportunities.
4. Heterogeneity is Good—This is the only category that assumes there is good for both races in integration and, based on the pluralistic society of the United States, integration is seen as a necessity if the country's democratic system is to survive.

Introduction

Those advocating blacks and whites as one legal classification used powerfully negative words to describe segregation. The word "evil," for example, in the cases and briefs analyzed was not uncommon. "The evils of discrimination because of color exist and doubts as to whether or not federal power now exists to remedy it can only adversely affect our national morale" (Shelley, Brief of Petitioners, 1947, p. 50). The Court itself used the word "evil" to refer to facets of segregation. In Terry v. Adams the Court referred to the "evil" of the state's collusion in preventing blacks from participating in primary elections (Terry, Opinion of the Court, 1952, p. 1164). Again in Heart of Atlanta Motel v. United States the Court branded racial discrimination by motels as "that evil" (Atlanta Motel, Opinion of the Court, 1964, p. 269).

Other words with strong, negative connotations were used throughout the cases to describe the system of separation of the races. Justice Harlan in his dissenting opinion spoke of hostility and humiliation,

> I cannot see but that, according to the principles this day announces, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race, would be held to be consistent with the Constitution. (Plessy, Dissenting Opinion, 1896, p. 265)

The counsel for the plaintiff in Buchanan v. Warley wrote in conclusion to his brief,

> For the sake of the good that is in him he should be made to feel the possibility of final fellowship, not thrown contemptuously back upon himself, segregated as a contamination, obliged to slink and creep, his legitimate longing to "acquit himself in all men's sight as a man" forever annihilated. (Buchanan, Brief of Clayton Blakey for Plaintiff, 1917, p. 44)

Similar language was used by the counsel for the plaintiff in Nixon v. Herndon when he wrote that political discrimination was "a brazen attempt to banish him from a party of his choice and brand him with a mark of inferiority, as an outcast" (Nixon, Brief of Plaintiff, 1926, p. 31). Justice Goldberg's concurring opinion in Heart of Atlanta Motel v. United States described discrimination as "not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color" (Atlanta Motel, Concurring Opinion, 1964, p. 288).

Into the 1970's as well, the words used to describe racial discrimination were negative and emotional. The counsel for the respondent in Swann v. Charlotte-Mecklenberg asked, "When can a school system born under the ill-fated star of Plessy v. Ferguson purge itself of the . . . stigma . . . ?" (Swann, Brief of Respondents, 1971, p. 45).

It was a rare case and a rare brief of counsel in those analyzed that did not have a sense of urgency and emotion attached to it. It was within this atmosphere that the following categories emerged.

Category I: Race as a Sole Reason

The most frequently used rationale for doing away with legal separation by race was that color was the sole reason for the classification and such a reason flew in the face of the fundamental ideals of equality in the United States. Nevertheless, race had been established early on as a means of classification. Therefore, if the sole reason for a legal classification was to be race, there had to be a means of identifying the race. In the case of blacks, the badge of identitification was color. The question then became when is black black? This issue was taken up at length in Plessy v. Ferguson by the counsel for the plaintiff. His argument was two-fold. First, he maintained it was impossible to define the limits of race. Second, he maintained it totally unjust that a conductor of a railway car, as in Plessy, was to judge those limits.

> How can the court itself say to what race belong quadroons, and octoroons and those persons who are of mixed Caucasian and African descent in the proportion of fifteen-sixteenths Caucasian and one-sixteenth part African blood? . . . There must be a time when color runs out entirely. When is this? . . . Who, what law has fixed these degrees? Who will say from mere inspection whether the relator in this cause is one of pure Caucasian blood or otherwise? The conductor of a railroad

> train is expected to do all this, without the aid of the legislature or of the court to guide him. (Plessy, Brief of James Walker for Plaintiff, 1896, p. 50)

However, the Court dismissed this argument by saying:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states, some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others that it depends upon the preponderance of blood and still others that the predominance of white blood must only be in the proportion of three-fourths. But these are questions to be determined under the laws of each state and are not properly put in issue in this case. Under the allegation of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race. (Plessy, Opinion of the Court, 1896, p. 261)

The issue, in the cases analyzed, was never raised again. There seemed to have been an acceptance of the argument made by the counsel for the defendant in Plessy, "as a rule, there is no question as to which race a man belongs, it requires no exercise of judicial powers to determine that question" (Plessy, Brief of J. J. Cunningham for Defendant, 1896, p. 40).

Once the question of who was black was answered to the satisfaction of the Court, it was then argued that the use of race as the sole criteria for legal classification was unconstitutional. Justice Harlan in his dissenting opinion in the Civil Rights Cases unequivocally wrote:

> Exemption from race discrimination in respect of the civil rights which are fundamental in citizenship in a republican government, is, as we have seen, a new right, created by the nation. . . (Civil Rights Cases, Dissenting Opinion, 1883, p. 854)

The Court, however, disagreed, relying on the past to justify separation of the races, "Mere discriminations on account or race or color were not regarded as badges of slavery" (Civil Rights Cases, Opinion of the Court, 1883, p. 844).

Yet in Truax v. Raich, an alien labor case, the Court said that race could not be the sole reason for denying a person the right to work:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. (Truax, Opinion of the Court, 1915, p. 135)

Certainly the Court was adamant in Buchanan v. Warley that discrimination based on color alone had no merit with questions of property. The Court first asked the question,

> May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? (Buchanan, Opinion of the Court, 1917, p. 161)

Then the Court answered the question:

> The 14th Amendment and these statutes enacted in furtherance of its purpose operate to qualify

> and entitle a colored man to acquire property without state legislation discriminating against him solely because of color. (Buchanan, Opinion of the Court, 1917, p. 162)

In Nixon v. Herndon the Court was once again adamant that color alone could not be the basis for discrimination in cases dealing with elections:

> States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case. (Nixon, Opinion of the Court, 1926, p. 761)

In Gaines v. Canada a black applied by written correspondence for entry to the University of Missouri law school, and it was only after his filing of transcripts from a black college that the registrar realized he was a negro and advised him he could not attend the University of Missouri. Missouri had no law schools for blacks. The Court wrote that Missouri denied to blacks, solely because of race, the equal protection of the laws:

> The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. (Gaines, Opinion of the Court, 1938, p. 213)

Again in Smith v. Texas the Court ruled it unconstitutional that blacks were "intentionally and systematically excluded from grand jury service solely on account of their race and color" (Smith, Opinion of the Court, 1940, p. 86).

The Court continued, "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand" (Smith, Opinion of the Court, 1940, p. 87).

The opposition to discrimination based solely on color was reiterated time and again by the Supreme Court (Shelley v. Kraemer, Opinion, p. 1184; Sweatt v. Painter, p. 1118; Terry v. Adams, p. 1165; Heart of Atlanta Motel v. United States, p. 275). Finally, the Court bluntly wrote in Swann v. Charlotte-Mecklenberg that it was not concerned with "the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious or ethnic grounds" (Swann, Opinion of the Court, 1971, p. 570). Rather, the only objective was to assure that "school authorities exclude no pupil of a racial minority from any school directly or indirectly, on account of race" (Swann, Opinion of the Court, 1971, p. 570).

In order to emphasize the absurdity of the separation of the races based solely on color, many counsels used analogies with other groups not so excluded. The Court perhaps began this trend in Strauder v. West Virginia. ". . . if a law should be passed, excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment?" (Strauder, Opinion of the Court, 1879, p. 666). Justice Harlan picked up the theme in his dissenting opinion in Plessy v. Ferguson:

> There is a race so different from our own that we do not permit those belonging to it to become citizens . . . I allude to the Chinese race. But by the statute in question a Chinaman can ride in the same passenger coach with white citizens while citizens of the black race . . . are yet declared to be criminals . . . if they ride in a public coach occupied by citizens of the white race. (Plessy, Dissenting Opinion, 1896, p. 264)

The counsel for the plaintiff in Plessy argued if the state may require blacks and whites to be separated "Why may it not require all redheaded people to ride in a separate car?" (Plessy, Brief of Plaintiff, 1896, p. 29). The counsel for the plaintiff in Nixon v. Herndon wrote,

> Whites, Browns, Reds, and Yellows, together with mongrels of varying intermediate tints, walk in and demand and receive the ticket they prefer to vote; while the voter who happens to be black can only ask for the Republican ticket. (Nixon, Brief of Plaintiff, 1926, p. 30)

The proponents of segregation only infrequently tried to argue that color carried with it other characteristics. The counsel for the defense in Gaines v. Canada, for example, argued:

> But it will be said the classification now in question is one based on color, and so it is; but the color carries with it natural race peculiarities which furnish the reason for the classification. There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well-organized governments. (Gaines, Brief of Respondents, 1938, p. 29)

The only time the "natural race peculiarities" were ever described in the cases analyzed was by the counsel for the plaintiff in Buchanan v. Warley in an attempt to disparage the stereotypes surrounding blacks.

> No one outside of a court room would imagine for an instant that the predominant purpose of this ordinance was not to prevent the negro citizens of Louisville, however industrious, thrifty, and well-educated they might be, from approaching that condition vaguely described as "social equality." This is not a restriction laid upon a specified class of citizens because they are dirty, shiftless, or otherwise objectionable in their habits. It puts in one class every colored man, no matter how free he may be from all these objectional qualities, simply because he is colored, and it puts in the other class every white man, even though he may be in every way an "undesirable citizen," simply because he is white. (Buchanan, Brief of Plaintiff, 1917, p. 32)

Otherwise, in the cases analyzed, the debate surrounding racism focused on the sole reason of color not on stereotypical characteristics assigned to the black race.

Those arguing against legal classification by race, therefore argued the law must be, in Justice Harlan's words, "color-blind" (Plessy, Dissenting Opinion, 1896, p. 263). Ironically, with the civil rights movement in the 1960's the attempts to make the law "color-blind" were disbanded in favor of "color-conscious' law. Keyes v. School District No. 1, illustrated this change. The school district was accused of "de facto" segregation, yet the counsel for the district maintained the district historically had had a policy of racial neutrality; the changing times, however,

had changed this policy from "color-blind" to "color-conscious."

> The full facts in this case show that Denver has never practiced discrimination toward any racial or ethnic group and that, until 1964 when Denver adopted an affirmative policy of seeking racial and ethnic heterogeneity to the extent feasible within the neighborhood school policy, the Denver schools had followed a completely color-blind policy as far as pupil assignment was concerned. (Keyes, Brief of Respondent, 1971, p. 59)

The Keyes' Court emphasized that racial neutrality was not enough:

> In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions. (Keyes, Opinion of the Court, 1971, p. 546)

The problems inherent in color-blind versus color-conscious did not go unnoticed even in the earliest cases. The counsel for the defendant in Plessy v. Ferguson noted the difficulties:

> They insist that every man must know the difference between a negro and a white man, that the exercise of judgment is not necessary to determine that question, and that men must be put on juries because they are negroes. Here, it seems that the rule is reversed, that there is no difference between a white man and a negro, that no difference in color must be observed by a railroad conductor, and if he notes any such distinction he is undertaking to judicially consign complainant to the inferior race. (Plessy, Brief of M. J. Cunningham for Defendant, 1896, p. 40)

Color as the sole reason for segregation was a common argument used to disparage the separation of the races. There were other arguments used with almost as great frequency, however. One of these is embodied in the second category, segregation as denial and deprivation.

Cagegory II: Segregation
as Denial and Deprivation

The Plessy doctrine of separate but equal was called inherently unequal by the Brown Court. But this recognition of the Plessy doctrine as false was argued long before the Brown Court validated it. Contrary to the Plessy doctrine, those arguing against classification by race maintained segregation inevitably acted to deny and deprive blacks of the privileges, responsibilities, and immunites open to whites.

A fundamental premise of the legal system is to allow for a recourse of perceived injustices. In race discrimination cases those petitioning the Court for a redress of grievances historically have been blacks. It was not until the mid-1970's that whites came to the courts claiming the "reverse discrimination" they felt inherent in affirmative action. However, historically it has been blacks who have claimed that they have been denied, deprive, excluded, and restricted by laws separating the races. For the most part, the Supreme Court has agreed with the blacks, at least in those cases analyzed.

Because of Plessy subsequent Courts had to distinguish the separate but equal doctrine from the issue at hand when ruling against segregation. In Buchanan v. Warley the Court emphasized that the difference between Buchanan and Plessy was that nothing was denied the black in Plessy as it was in Buchanan.

> The defendant in error insists that Plessy v. Ferguson is controlling in principle in favor of the judgment of the court below. . . . It is to be observed that in that case there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the express requirements were for equal though separate accommodations for the white and colored races. (Buchanan, Opinion of the Court, 1917, p. 162)

The Court maintained in Buchanan, however, that the plaintiff, unlike in Plessy, had been "denied the right to use, control, or dispose of his property" (Buchanan, Opinion of the Court, 1917, p. 163).

In Gaines v. Canada the Court praised the treatment Missouri had afforded the blacks of that state but concluded, nevertheless, that blacks had been unconstitutionally excluded from law school:

> It is said that Missouri is a pioneer in that field and is the only State in the Union which has established a separate university for negroes on the same basis as the state university for white students. But, commendable as is that action, the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it had

> established at the University of Missouri. (Gaines, Opinion of the Court, 1938, p. 211)

The Court in Shelley v. Kraemer ruled that restrictive covenants, as their name implied, "denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color" (Shelley, Opinion of the Court, 1947, p. 1184). Again in Terry v. Adams, the Court emphasized the deprivation suffered by blacks through exclusion:

> It is significant that precisely the same qualifications as those prescribed by Texas entitling electors to vote at county-operated primaries are adopted as the sole qualifications entitling electors to vote at the county-wide Jaybird primaries with a single proviso—Negros are excluded. . . . The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. (Terry, Opinion of the Court, 1952, p. 1160)

By the 1970's the Court recognized the denial and deprivation suffered by blacks touched not only the tangible but the intangible as well. For example, the Court in Heart of Atlanta Motel v. United States found the refusal of a motel owner to rent rooms to blacks a deprivation, and, further, it quoted Congress as saying that such denial was also a "deprivation of personal dignity" (Atlanta Motel, Opinion of the Court, 1964, p. 264).

In only two cases of the ones analyzed which dealt with exclusion, denial, and restriction did the Supreme Court

disagree that the refusal to include blacks was a deprivation that demanded appropriate relief. These cases were the Civil Rights Cases and Plessy v. Ferguson where the Court allowed segregation in public places.

In some of the cases in the 1970's the Court was called upon to determine if in fact exclusion had taken place, and if so, if it had been on the basis of race. In both Village of Arlington Heights and Washington v. Davis the basic arguments before the Court were that a zoning law and a personnel test both excluded a disporportionately high number of blacks from public housing and the police force. The Court ruled, however, that such exclusion was not unconstitutional because the laws themselves could not be shown to have been written with a racially discriminatory intent (Davis, Opinion of the Court, 1976, p. 597; Village of Arlington Heights, Opinion of the Court, 1977, p. 450).

In general, then, the Supreme Court viewed a legal separation of the races as depriving blacks of their civil rights. This deprivation the Court saw as the antithesis of the equality promised by democracy. This is clearly seen in Smith v. Texas, a case where blacks had been included in lists for potential grand jurors but in fact excluded from ever serving. The Court wrote:

> For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the

> laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised. (Smith, Opinion of the Court, 1940, p. 86)

Category III: Negative Results

The third rationale used consistently over time by the proponents of integration was that a separation of the races had negative results that were harmful to blacks, both individually and as a group, and to society as a whole. Three subcategories emerged under this general category.

Segregation creates a caste through isolation. In the cases analyzed, the counsel for the plaintiff in Plessy was the first to suggest that the separation of the races formed a black caste:

> a law assorting the citizens of a state in the enjoyment of a public franchise on the basis of race, is obnoxious to the spirit of republican institutions, because it is the legalization of caste. (Plessy, Brief of James Walker for Plaintiff, 1896, p. 14).

In historically two disparate cases, Buchanan v. Warley and Brown v. Board of Education of Topeka, the counsels advocating segregation both used an 1849 case, that recognized racial casted, but denied the court's ability to relieve it:

> It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This

> prejudice, if it exists, is not created by law, and probably cannot be changed by law. (Buchanan, Brief of Defendant, 1917, p. 33; Brown I, Brief of Appellees, 1954, p. 19)

In Heart of Atlanta Motel v. United States the plaintiff's counsel tried to refute black caste by arguing caste was a product of socioeconomics not race:

> The second concurring opinion held that "the denial of the constitutional right of Negroes to access to places of public accommodations perpetuates a cast [sic] system in the United States." We suggest that there will always be economic stratification in our society and that social stratification will continue to be largely determined by economic. . . . The Constitution of the United States does not guarantee against the classification system of people by economic status (cast [sic] system, if you must). Atlanta Motel, Brief of Plaintiffs, p. 26, 1964)

In both Gomillion v. Lightfoot and Heart of Atlanta Motel v. the United States the counsels attempting to desegregate argued against the black caste set up by segregation:

> While admittedly the Constitution does not secure the right of Negroes or of any other group or class to exercise political influence in a community, it does bar the nullification of that influence by the erection of color or caste distinctions. (Gomillion, Brief of Petitioners, 1960, p. 9)

> The promise of the anti-slavery amendments was not merely the abolition of human bondage. The framers were equally determined to remove the widespread disabilities, associated with slavery, that branded the Negro a member of an inferior caste. (Atlanta Motel, Brief of Appellees, 1964, p. 62)

The Court itself avoided the emotion-laden term "caste" but did agree that the purpose of separating the races was

to isolate blacks, with consequent negative results. The Court in Keyes v. School District No. 1 accepted the lower court's ruling that the Denver schools showed "'an undeviating purpose to isolate Negro students' in segregated schools 'while preserving the Anglo character of [other] schools'" (Keyes, Opinion of the Court, 1971, p. 558). In three education cases (Brown, 1954; Swann, 1971; Keyes, 1971) the counsels arguing against separating the races maintained that the isolation, the segregation itself, was the cause of the low achievement of black schools:

> unconstitutional inequality inheres in the retardation of intellectual development and distortion of personality which Negro children suffer as a result of enforced isolation in school from the general public school population. (Brown I, Brief of Appellants, 1954, p. 5)
>
> . . . Judge McMillan was persuaded by the expert testimony and by the facts of the case that segregation itself is the greatest barrier to quality education. (Swann, Brief of Petitioners, 1971, p. 45)
>
> The trial court found, as a matter of fact, that the segregated schools were offering unequal and inferior educational opportunities to minority children. The trial court went on to find, as a matter of fact, that a cause of the inequality was the segregated condition of the school. (Keyes, Brief of Petitioners, 1973, p. 53)

The Court agreed with these arguments enough so that it ordered the abolition of segregated schools in Brown, validated the transportation of students as a means to desegregation in Swann, and recognized "de facto" segregation in Keyes.

The issue of isolation or segregation as the cause of inequalities was complicated by the argument that "de facto" isolation of blacks in schools was not a result of state action but a result of housing patterns. In quoting a lower court, the counsel for the respondents in Keyes wrote: "The impact of the housing patterns and neighborhood population movement stand out as the actual culprits" (Keyes, Brief of Respondents, 1971, p. 74). Again, this argument implied that the isolation of blacks was outside of the Court's ability for the remedy.

But isolation and caste were not the only causes of inequality. Those advocating integration argued, also, that a separation of the races caused a sense of inferiority in blacks which, in turn, had negative results.

Segregation creates a sense of inferiority. The first case analyzed that disparaged the legal differentiation of the races because such a policy created a sense of inferiority in blacks was Strauder v. West Virginia, a case involving the right of black men to serve as jurors. The Court said:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure

> to all others. (Strauder, Opinion of the Court, 1879, p. 666)

Other early cases picked up this theme. Justice Harlan in his dissenting opinion in the Civil Rights Cases noted that slavery "rested wholly upon the inferiority, as a race, of those held in bondage" (Civil Rights Cases, Dissenting Opinion, 1883, p. 848). Therefore, he continued, if blacks as a class could still be discriminated against as freemen, they were "branded as one inferior and infected" (Civil Rights Cases, Dissenting Opinion, 1883, p. 849). The debate was developed and exploded in Plessy v. Ferguson. The counsel for the plaintiff charged that the law maintaining separate railroad coaches for blacks had as its object "to debase and distinguish against the inferior race" (Plessy, Brief of James C. Walker for Plaintiff, 1896, p. 26). The counsel for the defense, quoting another court's opinion, wrote that "separateness is not to declare inferiority . . . but simply to say that . . . human authority ought not to compell these widely separated races to intermix" (Plessy, Brief of M. J. Cunningham for the Defendant, 1896, p. 48). The Plessy Court settled the argument by commenting without explanation that laws separating the races "do not necessarily imply the inferiority of either race to the other" (Plessy, Opinion of the Court, 1896, p. 258).

The counsel for the plaintiff in Buchanan v. Warley (1917) attempted to revive the inferiority argument by

saying that a law separating the races tended to "reduce negro citizens to a position of inferiority" (Buchanan, Brief of Moorfield Storey for Plaintiff, 1917, p. 31). Nevertheless, the inferiority argument after Plessy v. Ferguson did not reappear full blown until Brown v. Board of Education of Topeka. In that case the counsel for the appellant argued that segregation in the schools instilled in the black child

> . . . a feeling of inferiority resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society. . . . Moreover, it was demonstrated that racial segregation is supported by the myth of the Negro's inferiority, . . . and where, as here, the state enforces segregation, the community at large is supported in or converted to the belief that this myth has substance in fact. (Brown I, Brief of Appellants, 1954, p. 9)

The Court fully agreed:

> To separate them [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. (Brown I, Opinion of the Court, 1954, p. 880)

The inferiority argument became convoluted when the Court tried to determine that a school was inferior when there were high concentrations of blacks as in the case of Keyes v. School District No. 1. The counsel for the respondents suggested that the cause of the inferiority of the schools was a high concentration of blacks:

> The district court found that certain court-designated schools showing low test scores were inferior schools compared with others, that concentrations of Negro and Spanish surnamed pupils were the cause of the inferiority, but that the racial and ethnic concentrations were not caused by actions of the school district. (Keyes, Brief of Respondents, 1971, p. 62)

Equating high concentrations of blacks with inferior schools, however, suggested the blacks were inferior. The Keyes Court tried to settle the confusion by saying that blacks as a group suffered from cultural and economic deprivation and discrimination; however, no inferiority of blacks per se was inferred (Keyes, Opinion of the Court, 1971, p. 557). Therefore, the argument that a separation of the races instilled in blacks a sense of inferiority, combined with the debate that all-black schools were inferior, led to the argument that both de jure and de facto segregation created socio-economic ills impacting most heavily on blacks.

Segregation creates socioeconomic ills. Although the socio-economic rationale for ending segregation was not predominant until after Brown, the counsels advocating desegregation in earlier cases, especially those dealing with segregated residential areas, did introduce the issue. The counsel for the plaintiff in Buchanan v. Warley, for instance, decried a new residential segregation law:

> A negro who was fortunate enough to own a home in a good neighborhood may use his utmost endeavor to instill into his children right principles and shield them from contaminating influences, but before their maturity he dies and the law drives

> his widow and children back to the red light district, where every vestige of early training is wiped out through the degrading influences there predominating. (Buchanan, Brief of Clayton Blakey for the Plaintiff, 1917, p. 24)

The counsel for the defense, however, shifted the argument from the degrading influence of the environment to the degrading influence of the black.

> This record shows that where even a single negro moves into a white block the destruction wrought to property values therein is as immediate and as great as if an incendiary had gone from house to house with a torch in his hand and set them all on fire. (Buchanan, Brief of Defendant, 1917, p. 91)

In Shelley v. Kraemer the counsel for the petitioners said the Supreme Court of Missouri erred in ruling that the alleviation of black ghettos was beyond the authority of the courts (Shelley, Brief of Petitioners, 1947, p. 55). The counsel stressed the "crowded, congested conditions contributing to crime, juvenile delinquency and disease" (Shelley, Brief of Petitioners, 1947, p. 54). He cited these socio-economic ills as a direct result of the restrictive covenants in housing which segregated blacks from whites. The Court did not respond to this argument. The counsel for the appellant in Keyes v. School District No. 1, once again attempted to argue that educational difficulties resulting from socio-economic conditions were not within the power of the state to resolve (Keyes, Brief of Respondents, 1971, p. 122). To support this argument, the counsel relied

on the Coleman Report to convince the Court that the issue at hand was not racial but socio-economic and, therefore, outside of the purview of the Court.

> [T]he apparent beneficial effect of a student body with a high proportion of white students comes not from racial composition per se, but from the better educational background and higher educational aspirations that are, on the average found among white students. (Keyes, Brief of Respondents, 1971, p. 127)

This time, the Supreme Court in Keyes recognized the socio-economic issue but at the same time insisted on the affirmative duty of school boards to ameliorate segregated conditions:

> Indeed, as indicated earlier, there can be little doubt that principal causes of the pervasive school segregation found in the major urban areas of this country, whether in the North, West, or South, are the socio-economic influences which have concentrated our minority citizens in the inner cities while the more mobile white majority disperse to the suburbs. But it is also true that public school boards have continuing, detailed responsibility for the public school system within their district and, as Judge John Minor Wisdom has noted, "[w]hen the figures [showing segregation in the schools] speak so eloquently, a prima facie case of discrimination is established." Moreover, as foreshadowed in Swann and as implicitly held today, school boards have a duty to minimize and ameliorate segregated conditions by pursuing an affirmative policy of desegregation. (Keyes, Opinion of the Court, 1971, p. 579)

The strictly economic issues surrounding segregation were not used to any great extent by those hoping for integration, though there is no doubt that it was costly to

maintain separate facilities for the two races. Nevertheless, cost was seldom an issue. On the contrary, In Gaines, for instance, the counsel for the University of Missouri saw the expenditure of "millions of dollars" to uphold separate education for the races as praiseworthy (Gaines, Brief of Respondents, 1938, p. 71). The cost of segregation seemed secondary to the possibility of racial mixing. This is apparent in Shelley v. Kraemer when the counsel for the defense tells of a woman, "an aged and ailing Mrs. Mathilda Sohlma, [who] . . . had chances to sell [her house] to colored" but refused (Shelley, Brief of Respondent, 1947, p. 73).

Nevertheless, in two early cases, economics did play a role. The first, Bailey v. Alabama, involved involuntary servitude as punishment for the breach of labor contracts. Although the decision of the Court turned on the illegalities of peonage, not race, the population affected was black, and the counsel for the plaintiff maintained that the object of the labor contract laws was "to compel the negroes to the performance of their contracts" (Bailey, Brief of Plaintiff, 1911, p. 22). He also refuted the economic justification for the law:

> To the commercial argument so often offered in favor of this class of statutes that they are necessary to enable the planter to make his crop, which is vital to the welfare of the South, Mr. Justice Jones of the South Carolina Supreme

> Court gives a complete answer in the few words, "liberty is better than prosperity." (Bailey, Brief of Fred Ball for Plaintiff, 1911, p. 45)

The Court agreed by deciding the law created illegal peonage, "compulsory service in payment of a debt" (Bailey, Opinion of the Court, 1911, p. 201). The counsel for the defendant in Buchanan v. Warley (1917) also referred to the need for labor in defense of his contention that there was no economic prejudice against blacks in the South:

> But no one has ever accused the South of a desire to expatriate the negro. On the contrary, we need and want him here and he needs the South. As Booker Washington has said, "It is in the South that the negro is given a man's chance in the commercial world," where, he said, "there is no industrial prejudice against the negro, such as is found in most Northern communities." One Southern State at least (North Carolina) has even passed a law penalizing any one who should induce negro farm laborers to leave that State. (Buchanan, Brief of Defendant, 1917, p. 50)

The one recent case which relied predominantly on economics to help destroy segregation was Heart of Atlanta Motel v. United States. A motel owner refused to serve blacks and was accused, therefore, of disrupting interstate commerce in violation of the Commerce Clause of the Constitution. The debate between the counsels outlined the basic thrust of the case. On the one hand the counsel for the appellees presented his argument by quoting Congress' attempts to curtail discrimination in commercial enterprises:

> First, racial disputes, like labor disputes, discourage patronage and interfere with business; they thereby interfere with and reduce purchases-

> for-resale from other States. Second, the refusal of such retail establishments to serve Negro consumers, like a group boycott forbidden by the Sherman Act, imposes a wholly arbitrary limitation on the market by eliminating an important source of potential demand for goods from other States. (Atlanta Motel, Brief of Appellees, 1964, p. 10)

On the other hand, the counsel for the defendant maintained serving blacks would ruin his client's business:

> The long established policy and practice of Heart of Atlanta Motel has been to refuse to rent accommodations to any Negroes. As alleged in plaintiff's complaint, this policy was adopted and pursued as in the best interest of plaintiff's business and as necessary to protect plaintiff's property, trade, profits and reputation. In other words, plaintiff chose, and now chooses not to serve Negroes. (Atlanta Motel, Brief of Appellants, 1964, p. 54)

The Court decided, however, that the Commerce Clause gave Congress the right to prohibit racial discrimination in businesses serving the public.

Category IV: Heterogeneity is a Good to be Pursued

The focus for both major sections of this chapter, "Blacks and Whites as Two Legal Calassifications" and "Blacks and Whites as One Legal Classification," has been on the black's position in the larger society. The "separate but equal" doctrine purported to focus on both whites and blacks. However, its result was to exclude blacks. As Justice Harlan wrote in his Plessy dissenting opinion:

> Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by

> blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . No one would be so wanting in candor as to assert the contrary. (Plessy, Dissenting Opinion, 1896, p. 263)

Those advocating one classification for black and whites spoke to the evils of excluding blacks. Few, if any, spoke to the hearts and minds of whites living under segregation and the impact on whites of a system in which they played the role of oppressor, consciously or unconsciously. At only one point in the data analyzed did anyone even briefly raise the issue of the possibility of segregation being detrimental to whites: "We. . . refrain from speculating as to whether the court would also have found that segregation was detrimental to white children and impaired their educational and mental development" (Brown I, Brief of Appellees, 1954, p. 40). In the cases analyzed some did speak, however, to the importance of heterogeneity to the United States as a nation.

The first to initiate this theme was Justice Harlan, again in his dissenting opinion in Plessy:

> The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of the law. (Plessy, Dissenting Opinion, 1896, p. 264)

It was not until the later cases, however, that the issue of heterogeneity as a positive national good was addressed. The counsel for the petitioners in Swann v.

Charlotte-Mecklenberg used a report from the Center for Urban Education which read, "Good education as well as the moral imperatives of a pluralistic society, demands desegregation of the schools" (Swann, Brief of Petitioners, 1971, p. 214). The counsel for the respondents in Swann quoted a circuit judge from a lower court in a gerrymandering case which touched on the notion of heterogeneity. The judge, in essence, asked if integration was necessary because racial mixing was a good in itself or if racial mixing was a necessity because there had been an unconstitutional prevention of integration. "The question is not whether zones can be gerrymandered for the assumed good purpose of racial mixing, but whether gerrymandering occured for the unconstitutional purpose of preventing the mixing of races" (Swann, Brief of Respondents, 1971, p. 8). In the same brief the counsel attempted to answer the question by insisting that "The Constitution does not guarantee to a child the right to attend a school having any particular racial complexion" (Swann, Brief of Respondents, 1971, p. 28).

Integration or heterogeneity, after Brown I, had become the ideal but usually in the name of justice for blacks. Nevertheless, in Village of Arlington Heights the counsel for the respondents quoted a case that envisioned a better world that replaced ghettos with "truly integrated and balanced living patterns" (Village of Arlington Heights,

Brief of Respondents, 1977, p. 23). The implication was that both blacks and whites would benefit by such heterogeneity.

By the time of Keyes v. School District No. 1 (1971) heterogeneity was built into the law as enforced integration. Again, this integration was to alleviate the social injustices heaped upon blacks. Nevertheless, heterogeneity was seen, if not as an explicit good, at least as a neutral policy to be achieved. The counsel for the respondent in Keyes, for example, spoke of Denver's "Significant steps . . . as a matter of educational policy, to promote racial and ethnic heterogeneity in the schools" (Keyes, Brief of Respondents, 1971, p. 82). Justice Powell, responding in his concurring opinion in the same case, however, did emphasize the good in heterogeneity: "In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors" (Keyes, Concurring Opinion, 1971, p. 582).

Nevertheless, the vision of the good society being one where all peoples of all races live together in cooperation was consistently secondary as a rationale for integration to the notion of the injury done to blacks through the classification by race.

Conclusion

This chapter has aimed to provide data that will help give answers to the questions posed in this dissertation as to (1) how one of society's major institutions, the Supreme Court, has justified or condemned over time a condition of inequality with respect to blacks and women and (2) how this justification or condemnation has changed over time. The findings of this chapter will be used in this concluding section to formulate answers to these two questions as they relate to blacks. The third question posed as to how the justification or condemnation differs for race and sex, will be discussed in the concluding chapter.

Although the data in this chapter have not been organized on a case by case basis or according to the issues argued in the cases, it is important to note that the issues debated concerned the status of blacks in four of the five major institutions of society: economics, politics, education, marriage and the family (see Figure 2). Only the status of blacks in the institution of religion was not debated in the cases analyzed. In addition, cutting across the great majority of the cases was the concern of social proximity as exemplified by the rape in Powell and public seating in The Civil Rights Cases and Plessy. It is clear from the cases, then, that the concern over the rightful place of the black permeated almost every aspect of society.

	Issues			
	Economics	Education	Politics	Marriage-Family
Cases	Bailey	Gaines	Cruikshank	Buchanan
	Truax	Sweatt	Strauder	Shelley
	Davis	Brown I	Yarbrough	Arlington Heights
		Brown II	Nixon	
		Swann	Smith	
		Runyon	Terry	
			Gomillion	
TOTALS	3	6	7	3

Figure 2. Primary issues in the Supreme Court cases analyzed concerning racial discrimination.

In answer to the first question posed in this dissertation, except for the three early cases (Cruikshank, The Civil Rights Cases, and Plessy) the Court consistently condemned a legal separation of the races in the cases examined. Even in the two cases involving "private" discrimination, the Court established linkages with the public domain and, therefore, was able to condemn the exclusion of blacks in private restrictive covenants (Shelley) and in private schools (Virginia Private School Cases). Nevertheless, legal segregation existed in the United States until 1954 for, although on the one hand, the Court had clear legal standards embedded in the Constitution condemning a separation of the races; on the other hand, the Court had The Civil Rights Cases and Plessy, both of which justified segregation, serving as legal precedent for an apartheid system.

As can be seen in Table 2, Appendix C, the most frequent argument used by both the counsels and the Court to maintain segregation was that the antipathy between the races was a social issue, not a legal one. This idea was fundamental in two of the four categories that emerged as rationales upholding segregation, Race as a Social Issue and Custom and Sentiment. In both The Civil Rights Cases and Plessy the Court accepted the idea that legally blacks could be equal while, at the same time, being legally

separated. The former satified legal equity while the latter resolved the perceived social antipathy of the races.

The other two categories, Fear of Violence and Maintenance of Power, reflected arguments used by the counsels consistently over time to justify segregation. Just as consistently, however, these arguments were ignored or condemned by the Court. The Court, for example, never considered potential violence a strong enough argument for denying constitutional rights. Nevertheless, the counsels continued to use potential violence as an argument against integration because of its power and perhaps as a deterrent to prevent the Court from moving too rapidly towards integration. Certainly, the data show the Court saw the fourth category, The Maintenance of Power, as an argument that directly conflicted with democratic ideals.

The most powerful argument against segregation, accepted time and again by the Court, emerged in the category, Race as a Sole Reason. The argument was simple and direct: skin color should have nothing to do with a person's ability to function fully in society. Skin color should have nothing to do with a person's value as an individual. The logic of this argument was highlighted by the counsels when they used analogies with other groups such as red-heads or the Irish to point out the absurdity of singling out blacks for segregation. The negative stereotypes associated with blacks

in the wider society were seldom used by the Court or counsels as a rationale to keep blacks separate, nor was there ever an attempt to disparage these stereotypes in order to promote integration. The color black was seldom seen as a proxy for other characteristics. As a consequence, the absurdity of using color as the sole reason for discrimination was a strong argument used by those justices and counsels advocating blacks and whites as one legal classification.

Surrounding the race discrimination cases was an aura of hostility, evil, ill-will, and distaste. Although, at times, the counsels would argue that segregation was "good" for blacks, this was an infrequent argument (see Buchanan, Brief of Defendant, 1917, p. 15). No one argued that segregation was "good" for whites, although this was implied in such categories as Maintenance of Power. Instead, the advocates of segregation were forced to argue on negative grounds. Rather than being a "good," the counsels argued that segregation prevented often nebulous "evils" such as the possibility of intermarriage or black power. The arguments for the demise of segregation also emphasized the negative: the deprivation, isolation, inferiority, and socio-economic ills that a separation of the races created. Again, except for the three early cases (Cruikshank, The Civil Rights Cases, and Plessy), the Court consistently

recognized the deprivations suffered by blacks because of segregation and provided relief (see Table 1, Appendix C).

The "good" of integration was found for the most part, then, in providing relief for the "evils" done to blacks through segregation. There were, however, some that saw integration, itself, as a "good" and not simply as a correction of an "evil." Heterogeneity or cultural pluralism, historically, has been considered as a strength of the United States, but blacks had been set apart from this strength through segregation. Although the category Heterogeneity is Good was fairly weak (see Table 2, Appendix C), nevertheless, it does reflect the current argument that affirmatively including blacks not only helps blacks but strengthens institutions, whether they be universities or political parties or business corporations.

The second question posed in this dissertation is how the legal rationale for the separation of the races has changed over time. In the legal arena of the Supreme Court, the arena examined in this dissertation, the historical categories initially constructed proved of little use. In essence, there were only four historical periods. The first was from 1865, the end of the Civil War, until 1896 when the Supreme Court ruled in Plessy that "separate but equal" was a constitutional means of dealing with the race question. During this time the Court was struggling with

the definition of federal and states' rights as they applied to the power of the Fourteenth Amendment to protect blacks from discrimination. The Court not only concluded that the Amendment only addressed state action against blacks and not individual discrimination (Cruikshank), but it also agreed that the Court had no right to interfere in the separation of the races as long as such segregation produced no legal inequities (Plessy). The second historical period was from 1897, after Plessy, until Brown I in 1954 when the Court found segregation inherently unequal. This period of 58 years saw the Court slowly eroding the Plessy decision through reinterpretation of the Fourteenth Amendment. Each of the cases analyzed during this time was a decision by the Court against a legal separation of the races. Even during times of rampant racism and concern with racial purity, as in 1917 when Buchanan v. Warley was tried, the Court rejected the counsel's plea that blacks and whites should be separated. The Court consistently relied on the constitutional standards assuring equity. Finally, in Sweatt, the Court made it clear that the equity assured by the Fourteenth Amendment could not be achieved unless segregated facilities were equal, not only in tangible goods but in intangible qualities as well. The Sweatt mandate made segregation of educational institutions a virtual impossibility. However, it was only in Brown I that the Court

specifically pronounced segregation in violation of the Constitution. The third period ran from post-Brown I, 1954, through the Virginia Private School Cases in 1976. The Court, during this time, spared nothing in dissembling segregation, even declaring private schools excluding blacks, which advertised publicly, as in violation of the Constitution. The final period only briefly touched upon in this dissertation began with Washington v. Davis in 1976 when the Court decided that intent to discriminate against blacks had to be proven before a constitutional violation could be found. This case signaled the beginning of a reexamination of the Court's all-out attack on racial discrimination.

Overall, the law and the Supreme Court have emphasized raising the black from the degradation of slavery to an equal status with whites. The Post-Civil War Amendments were written for blacks with this view in mind. The Court never saw blacks legally as anything but equal in status to the whites, not even in Plessy. The black was seen as an individual with the same legal rights as the white. The races could be socially separated but the legal status of whites and blacks under the Constitution had to be the same. The ultimate question surrounding racial separation, then, became "Can blacks achieve the same status as whites under segregation?". The Court in Brown answered negatively.

The concept of status also has explanatory power. Status, for instance, helps explain why so few employment cases were brought by blacks to the Court, especially as employment had been a primary legal concern for women as seen in Chapter III. Blacks, however, have always been accorded employment rights (Truax and Bailey), as have whites, as male labor has always been perceived of as a social necessity. Rather, it has been the status of such labor which has been, and still is, at issue for blacks. Blacks have sought to move up in occupational status and have seen education as a means to do this. This is one explanation as to why so many key cases for blacks focus on education and not work. Therefore, the role and function of the black was never a part of the decisions of whether to segregate or integrate the races. The crux of the decisions was the question of equality in status. Black men and white men are the same; therefore, they must be treated the same under the law.

CHAPTER V

Summary and Discussion, Implications and Recommendations for Future Research

> In the final analysis, law in any enlightened society must reflect truth. But in this imperfect world of ours, truth can never hope to be anything better than what is perceived as truth, and in a democracy, the judiciary itself will ultimately reflect society's perception of truth. Therefore, as society's perceptions of truth evolve, so do the judiciary's, and the law pronounced thereby.
>
> Frederick P. Gilbert, Counsel for the Appellant, Craig v. Boren

Summary and Discussion

The original idea for this dissertation stemmed from the investigator's curiosity at the reluctance in the United States to guarantee legal equality between the sexes. This reluctance was symbolized by the apparent failure to ratify the Equal Rights Amendment. At the same time the massive movement to assure equality for blacks was supported by the full weight of authority from all three branches of government, the judicial, legislative and executive. It seemed a contradiction that equity for blacks was a national priority, while equity for women was allowed to languish. It is obvious from the review of the literature that those advocating equity for women also were sensitive to this contradiction and, in order to sensitize others, tried to equate the position of women to that of blacks. The equation was not totally convincing. Why? What were the differences between "sexism" and "racism"? Was it productive for women to argue the inequities they suffered by comparing them to those of blacks? Did society perceive of the inequities of these two groups as being, in fact, the same?

The investigator decided that in order to study such questions a methodical comparison was needed of decisions made on the behalf of blacks by those in power with those being made on behalf of women. The legal arena of the Supreme Court was chosen as a logical source of data for such

a comparison. First, the Supreme Court is a major decision-making institution in the United States and also serves a primary role in institutionalizing the norms of society. Second, both blacks and women have brought their grievances, through their legal counsels, to the Court for final arbitration. Third, the Court opinions and briefs of counsel recording the grievances, the arbitration, and the decisions of the cases constitute a discrete and accessible body of data which satisfy the methodological concerns of validity and reliability.

It was decided that the briefs of counsel would be used as data as well as the Court opinions. Although the final Court decisions and the relief granted were of interest to the investigator, of equal interest was the debate of the counsels for the plaintiffs and defendants. Were there similarities in the substance of the debate in the arguments surrounding equity for blacks and for women? If so, what were they? If not, did this then not call into question the efficiacy of the comparison of blacks and women when making policy decisions about the two groups?

Ultimately, three research questions were delineated which served as a framework for the study: (1) How has one of society's major institutions, the Supreme Court, justified or condemned, over time, a condition of inequality with respect to blacks and women? (2) How has this justification

or condemnation changed over time? (3) How has the justification or condemnation of the legal separation of the sexes differed from that of the separation of the races? The methodology employed in the investigation to help answer these research questions involved basically four stages:

1. Historical periods were developed from the literature reflecting the changing legal status of blacks and women over time. There resulted six periods for blacks and five periods for women.
2. A chronological list of Supreme Court cases dealing with issues concerning blacks was developed. These cases were categorized according to the historical periods. A similar list was made of cases involving women's issues.
3. The two lists of cases were sent to experts in the areas of sex discrimination and the law and race discrimination and the law. The experts were asked to select four cases in each historical category that they felt were the most important. The result was a selection of 24 Supreme Court cases dealing with issues of concern to blacks and 20 cases dealing with issues of concern to women. The Court opinions and the briefs of counsel from these 44 cases served as the data base for the study.

4. The data were then subjected to a systematic content analysis using primarily the methodology suggested by Glaser and Strauss in their work on grounded theory (Glaser, 1967). From this analysis, categories emerged representing the rationale justifying men and women as separate legal classifications and the legal separation of blacks and whites. Also, categories emerged from the data representing the rationale condemning legal classification by gender or race.

The resulting categories served to help answer the study's first research question as to how a condition of inequality for blacks and women is justified or condemned in the legal arena. As discussed in depth in Chapter III, the counsels and the Supreme Court justified a condition of inequality with respect to women primarily because of the woman's function in propagating the race and her role in the domestic domain as wife and mother. In further justification for the special treatment of women, the counsels and Court spoke to womanly characteristics that required women be protected; protection men were not perceived as needing. In sum, women, as distinct from men, were judged as a group rather than as individuals, on the basis of their function, role, and emotional and physical traits.

The oppositional ideology, unsuccessful in the Court until the last decade except for the anomalous Adkins case in 1922, insisted that women be viewed as individuals, as were men, under the fundamental democratic premise of equality. In the past decade, those advocating sex equity also attempted to argue that the status of women was comparable to that of blacks. The Court in the early 1970's did accept the counsels' argument that women, like blacks, had suffered past discrimination and inequities that demanded appropriate relief.

As with the categories emerging from the sex discrimination cases, the categories formed from the cases dealing with race also, in the composite, resulted in a profile of the justification used to argue a legal separation of blacks and whites. As discussed in depth in Chapter IV, those counsels and Justices advocating segregation appealed to a tradition and custom which seemed to warn not only of a natural antipathy between blacks and whites but also of potential violence between the races were integration to occur. In general, the advocates of segregation argued that the relations between the races were a social issue and, except to assure equality under the law, the Court should have little, if anything, to do with the integration of the races.

Because of the Civil War Amendments, however, the Court did have the obligation to see equity achieved between whites and blacks. This meant raising the black to the white's status. Therefore, those advocating blacks and whites as one legal classification argued that segregation prohibited equity by creating conditions that served as obstacles to the black's ability to achieve equal status. Time and again, as the data showed, the advocates of integration pointed to the negative results of segregation and to the deprivations suffered by blacks. With the guidance of constitutional law, the Court consistently accepted the arguments that equity must be served. Blacks were viewed by the Court as having the same legal rights and responsibilities as those of whites. The law was to be color blind. However, it must be emphasized that these arguments obviously were grounded on the assumption that the counsels and the Court were addressing black men and white men. For example, in Buchanan (1917), an era when women had few civil rights and responsibilities, the Court insisted that the Fourteenth Amendment assured "the colored race" full civil rights under the law. The Court meant, of course, black men.

The second question posed at the outset of this dissertation concerned the change over time of the ideology justifying or condemning legal classification by sex and by race. Again, as with question one, this question was

discussed in depth in Chapters III and IV. It was found that with the cases dealing with gender the historical periods initially constructed were of little use. In the final analysis, there were only two periods: (1) From Bradwell v. Illinois in 1873 up until the mid-1960's, during which time the Court consistently upheld special laws for women, justifying them because of the woman's roles of mother and wife and her perceived inherent characteristics; and (2) from 1972 with Reed v. Reed to the present, during which time the Court began to recognize that laws classified by sex were often arbitrary and grounded in age-old stereotypes and, therefore, required closer scrutiny than had before been given them.

The historical categories initially constructed for the cases on race discrimination also required modification. The data indicated four rather than six periods: (1) From the end of the Civil War through Plessy (1896), during which time the Constitution was amended to assure blacks equal rights. However, the Court interpreted the amendments to allow for the "separate but equal" doctrine; (2) from Plessy (1896) to Brown (1954) during which time the Court slowly eroded the doctrine of "separate but equal" by consistently ruling in favor of the legal rights of blacks; (3) from Brown (1954) to Davis (1976) during which time the Court spared nothing in dissembling segregation; and (4) Davis

(1976) to the present, a period only hinted at in this study, when the Court began to reexamine racial discrimination by ruling that an intent to discriminate must be proven before a constitutional violation can be found.

The third question posed in this dissertation has not previously been discussed. It asks how the justification or condemnation of the legal separation of the sexes differs from that of the separation of the races. This third question constitutes the primary focus of the study, namely to examine the differences and similarities between racism and sexism. Therefore, it is discussed here in depth.

It is apparent from the data presented in Chapter III and Chapter IV that the ideological debate surrounding the legal treatment of blacks and women in the United States is, for the most part, not the same for the two groups. The categories emerging from the data differed considerably for the two groups as can be seen in Figure 3.

Not only the categories, but the issues brought to the Court for arbitration were different for blacks and women. For instance, a majority of the cases concerning women dealt with access to employment (see Appendix B, Table 1). It was clear that a primary focus of women's struggles for equal rights concerned their ability to enter the public domain. Employment was the key to the woman's move from her traditional, private world of the home to the public world. In

Figure 3. A comparison of the categories from the Supreme Court cases analyzed on race and sex discrimination.

Sex	Race
<u>As Two Legal Classifications</u>	
1. Natural order	1. Race as a social issue a. Race in the community, not courts b. Social incompatibility c. The sexual issue
2. The woman's place is in the home	2. Custom and sentiment
3. Women in need of protection a. Women as weaker sex b. Race propagation c. To protect her morals	3. Fear of violence
4. Dependency as an economic issue	4. Maintenance of power
<u>As One Legal Classification</u>	
1. Women as individuals	1. Race as a sole reason
2. Equality of men and women as a Fundamental ideal	2. Segregation as denial and deprivation
3. Sex discrimination as analogous to race discrimination	3. Negative results of segregation a. Caste through isolation b. Sense of inferiority c. Socio-economic ills
	4. Heterogeneity is good

contrast, blacks were already employed in the public domain. The issues they brought to the Court dealt, therefore, not with access to employment as much as access to full participation in the political and educational institutions of society (See Appendix C, Table 1).

There were other general differences. First, there was a sense of gravity and importance attached to the cases dealing with race discrimination. This ambience of gravity was missing from the cases on sex discrimination. Second, the members of the Court in the cases dealing with race discrimination were guided by constitutional law specifically created to achieve race equity. No such standards were available for cases dealing with women. The Court, therefore, could boldly strive for equity between the races even though lower courts were insisting on segregation. This is clearly seen by the fact that the Supreme Court from Plessy (1896) through Brown (1954) reversed the decisions of the lower courts ten times in the twelve cases analyzed. The reversals all ruled in favor of the rights of blacks. Also, all relied on the Fourteenth Amendment except for Terry v. Adams which used the Fifteenth Amendment (see Table 3, Appendix C). The two cases that the Court affirmed included Plessy, which supported segregation, and Truax v. Raich, which guaranteed the right to choose an occupation irrespective of race or nationality.

To the contrary, during a similar time span, 1908 in Muller v. Oregon through 1961 in Hoyt v. Florida, the Court affirmed the decisions of the lower courts in the cases dealing with sex discrimination nine times in the nine cases analyzed. Eight of those times the Court upheld gender based laws. The one case it did not was the Adkins case, subsequently overturned. As can be seen in Table 1, Appendix B, the Fourteenth Amendment, constructed in the name of equity for blacks, provided little help with sex equity. These facts seem to indicate the importance of constitutional standards when a decision is made on an issue deeply embedded in tradition and custom. With the race cases the Court ruled according to the Constitution, even in the face of custom and public sentiment. In the sex cases, customary law and tradition won out as specific constitutional guidelines were missing.

Aside from the general differences, further consideration of the data resulted in three more fundamental contrasts between racism and sexism, which are represented by the statements, "Separate but Equal versus Separate and Unequal," "Status versus Role," and "Public versus Private." It is to be emphasized that these differences represent the perceptions of blacks and women held by the overwhelmingly white, male Supreme Court and counsels.

Separate but Equal versus
Separate and Unequal

Blacks in the data analyzed, historically, were seen as separated from whites yet, in theory, as symbolized by the Fourteenth Amendment, were equal to whites. Women, on the other hand, were seen as different from men, separate but unequal. For example, as shown by the data, a major reason used to treat women differently from men was that women, because of inherent characteristics, needed protection; they were weak, they propagated the race, they were childlike. However, unlike women, protection for blacks, when mentioned at all in the data, focused on the "unfriendly action" of the States against blacks after emancipation (Strauder, Opinion of the Court, p. 665) or on the need "to protect the blacks from discrimination" (Nixon, Opinion of the Court, 1926, p. 761; see also Civil Rights Cases, Dissenting Opinion, 1883, p. 848 and Brown, Brief of Appellant, 1954, p. 8). Only once did the Court in any way relate the black's need of protection with weakness and, even then, the weakness was not inherent but due to a lack of "training": "Their training had left them mere children and as such they needed the protection which a wise government extends to those who are unable to protect themselves." Only once did a counsel argue that "the Constitution was to protect the negro. . . This nation has toward him a great responsibility,

comparable to the responsibility of the parent toward the child" (Buchanan, Brief of Clayton Blakey for Plaintiff, 1917, p. 43).

Unlike with women and men, it simply was not argued that blacks had inherent characteristics that set them apart from whites, thereby requiring special legal treatment for them.* The counsels advocating integration used analogies comparing blacks to other groups to show the absurdity of separating out only blacks for special treatment. Their argument was clear: blacks are like everyone else except for the color of their skin; therefore, why exclude them and not red-heads or brunettes? No one suggested, however, that women were the same as men. On the contrary, as one counsel noted, "Men and women remain men and women eternally" (Adkins, Brief of Appellant, 1922, p. lxiii). Therefore, until the 1970's it was the rare occasion that judges or counsels suggested that women be viewed as analogous to men.

It is to be noted that in the wider society, however, blacks have been surrounded by stereotypes that attributed to them inherent characteristics which were often very similar to those of women. Often they were thought of, for ex-

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*This discussion is continually complicated by the fact that the Court was directing its attention to black men—it is to be supposed black women would be in need of protection because of their "femaleness," not their "blackness".

example, as childlike, intellectually inferior and ruled by passion (Lyons, 1980). Nevertheless, except for the Dred Scott case, in the data analyzed such stereotypes describing blacks were not found. This can only be attributed to the Civil War Amendments which claimed the equality of blacks and whites. Therefore, no matter the stereotypes, beliefs, or attitudes in the wider society, under the law blacks and whites were equal. Given this premise, then, it was futile to argue inequality between the races as a reason for legal classification by race. The counsels justified segregation by arguing antipathy between the races and a fear of violence if the races were integrated; they argued that custom and tradition made segregation rational but they did not argue that blacks and whites were inherently different and, therefore, must be separated. There has been no similar law for women, however, and no constitutional standard proclaiming equaltiy between the sexes. Therefore, the most powerful argument used by the counsels and Justices until the last decade was that men and women were inherently different and should be treated so. "Proof" of these differences was found time and again in the data, both in the briefs of counsels and in the Court opinions. From the data it was very clear that blacks and whites were viewed as separate but equal; women and men were separate and different or unequal.

Status versus Role

Another primary difference between blacks and women in their relationship with the law, apparent from the data, was the difference between status and role. Aside from the strictly biological differences, one of the major contrasts between the sexes recognized by the counsels and Justices was that of role. For women, role or function was central to the legal decisions examined in this dissertation. To the contrary, the function or role of blacks was never a consideration in the cases dealing with race discrimination. Rather, the fundamental concern in the data examined regarding blacks and the law, from the Civil War to the present day, was status. The Civil War Amendments and early civil rights legislation had been written in an attempt to raise the black to the same status as the white by assuring the removal of the barriers that prevented equal opportunities for blacks for upward mobility in the public domain. More recent civil rights legislation and affirmative action continue this theme in contemporary times. Whether it was access to the University of Texas Law School, as in Sweatt v. Painter, or access to primary elections, as in Nixon v. Herndon, blacks have demanded through the law opportunities to achieve equality with whites.

For women, role not status was the issue. As clearly seen from the data, the woman's place was in the home where

she was expected to fulfill her role as wife, mother, and homemaker. This role took precedence over woman as lawyer or woman as jurist (Bradwell, 1873; Hoyt, 1965). Laws regulating the woman's work day took into consideration the fact of their "double day," working both outside and inside the home (Muller, 1908). The tenaciousness of the woman's domestic role and the subsequent "double day" for women holding jobs outside the house is a major issue even today.

Although role was never a consideration in the data analyzed concerning legal classification by race, status did become an issue for women in the last decade. First, in cases such as Frontiero there was an attempt by the Court and the counsels to equate the position of women to that of blacks, and second, in such cases as Reed v. Reed, statistics and other empirical data were used by the counsels to show a low status for women in the public sector. The oppression of the work world for women had been recognized in 1908 in Muller. But the argument of the counsels and the Court then was not one of status as it became in the 1970's. Rather, they had argued that women, in the name of their role and function, needed special protection outside the home. Recognition by the Court within the last 10 years that sex discrimination is not just a question of role, but a question of status as well, has been a major step forward in helping to remove obstacles which have prevented women

from attaining the same status as men in the public domain outside the home.

In sum, for women, the greatest difficulty in their legal struggle has been to convince the Court to consider their position, not according to their traditional roles and function in the home but according to their status in the world of work. On the other hand, for blacks the greatest difficulties in achieving equity have involved overcoming the obstacles that have prevented equal status with whites in all the major institutions of society.

Public versus Private

A third major difference shown by the data between race discrimination and sex discrimination concerns "place." Gunnar Myrdahl saw parallels between women and blacks in that each had their proper place in society. Books such as Race and Place (Weinberg, 1967) and Woman's Proper Place (Rothman, 1978) have been written to define this "place." Yet few have compared the two "places" of blacks and women and, from the data analyzed in this study, there is considerable difference.

From the data on sex discrimination emerged the discrete category, "The Woman's Place is in the Home." The argument embodied in this category to justify legal classification by sex was that women belong in the home, the private, domestic domain; therefore, they may participate in

the public domain of the broader society but only under special rules. For blacks there was also a "place", a place which was defined by social proximity to whites in the public sector. The blacks' "place", then, has been historically that which was separated from the white. The legal debate dealing with race, therefore, was whether equity could be served, as demanded by the law, while at the same time maintaining for blacks a separate place in the public domain. This obviously was not the issue with women.

There is another concept dealing with the public versus private differences of blacks and women. The fight against race discrimination has been played out in public. Its evil has been recognized in federal policy and law since the end of the Civil War. Justice Harlan in the Civil Rights Cases (1883) maintained that a "badge of servitude," as condemned by the Thirteenth Amendment, was "any discrimination in the exercise of a public function" (Dissenting Opinion, p. 850). Also, when the Court in Plessy chose to defend segregation, they did so by justifying it as a "public good" (Plessy, Opinion of the Court, 1896, p. 260). The civil rights movements, by the very word "civil", emphasized the public rights of blacks.

On the other hand, women, perceived as in the domestic domain, seldom have been taken seriously in public. Civil

rights for blacks were distinguished from women's rights possibly because "civil", meaning public, did not entirely explain the private world of the woman. Finally, laws of equity for women have consistently been viewed as an intrusion into the privacy of the family, so closely bound in the public mind is woman to the private, domestic domain. The Equal Rights Amendment, for instance, if using the Civil War Amendments as a model, should have been viewed as assuring women in the broader society equal opportunities to attain the same status as males. Rather, opponents of the Amendment have confused the status issue of women in the public domain outside the home with the role issue of women in the home and see the Amendment as a threat to the family.

Aside from the preceding findings, the results of this study also help clarify the debate surrounding the efficacy and validity of comparing minorities and women as summarized in the review of literature in Chapter II. As seen in that review, there were three basic arguments. The first found valid the comparison of women and blacks. Advocates of this view were authors such as Gunnar Myrdahl and Helen Mayer Hacker. Certainly, the similarities of the two groups are apparent as is seen by the ease in applying Louis Wirth's criteria for a minority group to women (see p. 41 of this dissertation). Nevertheless, as seen from the data analyzed for this study, those making decisions on behalf of women

and blacks for the most part have not perceived of the two groups as being similar. To the contrary, the two groups have been perceived as fundamentally different.

Second, in the literature it was argued, by authors such as William Chafe, that if the experience of women could not be substantively compared to that of blacks, nevertheless, a comparison of the two groups would shed light on the form and process of excluding certain groups from power. This study did illuminate these processes within one institution, the Supreme Court. Of the two groups, blacks and women, women were excluded in a manner that depended on the irrational. Women were judged based on the beliefs and attitudes of the Justices, rather than on the systematic logic of the law. The Court, in the cases dealing with race discrimination, depended on the rational standards of the law to guide them and, for the most part, saw that equity for blacks was served. However, as much as this may be true as seen in the data, it is to be emphasized that, although the Court consistently disparaged race discrimination in each individual case, the Court, nevertheless, allowed legal segregation to stand for more than 50 years.

The third argument found in the review of literature was that both racism and sexism served the white male by reinforcing his power. The data here analyzed suggest this to be true but in different ways for blacks and women. By

keeping women dependent and by perceiving them as aliens in the world of work, the white male's economic power was assured. (See, for example, Muller, West Coast, Goesaert.) However, the issue that emerged most strongly with blacks was not economic power but political power, the domination of whites. Whites were served by segregation. By keeping blacks in a separate enclave, in all areas of civic life, away from any access to power, whites were assured political power. (See, for example, Smith, Nixon, Gomillion.) Women, in the data, never were viewed as a political threat. Blacks, in the data, seldom were viewed as an economic threat.

Why are there such differences between blacks and women, given the obvious similarities pointed out by authors such as Helen Hacker and Gunnar Myrdahl? Why are there such differences between blacks and women, given that both groups have been oppressed by the white male and kept politically and economically impotent? A possible explanation is the difference in the two groups' respective positions in the class structure. Blacks, historically, have continually been at the bottom of the socio-economic ladder. At the same time, they have always worked in the public marketplace; indeed, their labor, often cheap, unskilled, and servile, is needed to maintain the economic system. Therefore, their concern has been with climbing the socioeconomic

ladder through opportunities provided by education and political power. The issues they chose to bring to the Supreme Court substantiate this notion.

Women, however, are distributed throughout the class structure and, some, usually through marriage or inheritance, have had access to status and, indirectly, power. This diverse distribution makes unity for political action more complex for women than for blacks. At the same time that women are distributed throughout the class structure, they are also outside of the political milieu because of their identification with the home. Indeed, women are almost totally politically powerless. Nevertheless, women's work in the domestic sector, as consumer and caretaker of daily chores, is necessary to the continuation of the political-economic system as it is now constructed. However, domestic work goes unrecognized and is not valued. Therefore, women struggle to leave the private sphere and enter the public sphere where they can be regarded as adult citizens in a society that awards not only status, but identity itself, through public work and political participation.

In summary, true equity of blacks and whites, women and men demands that people be defined not only by their color or gender. The black man becomes the man who is black, his personhood is primary. Legally, blacks and whites are, in fact, viewed in this way. Women, legally, have been

seen, however, as different from men, separate and unequal. Society has yet to think of the person who is a woman, personhood as primary over womanhood. Also, unlike with blacks whose battle has been for status in the public domain, women continue to fight on two fronts: first, to shed the perception that they and their traditional roles in the private, domestic domain are inseparable and, second, to be viewed as full personalities in the public domain of the wider society.

The differences between race and sex discrimination have been discussed at length because in the data they are so apparent and immediate. However, it would be wrong to finish this section without a comment on some of the similarities found between the two groups. Both groups have brought cases to the Supreme Court in which they demanded a fuller participation in civic life, whether it be in employment, education, or government. Both groups have argued that they had been kept out of the mainstream of public life because of tradition, public sentiment, and custom. Ultimately, then, a basic struggle of both groups has been to break loose of their assigned and powerless places and fully enter the wider society. For the most part, as seen from the data, the Supreme Court has assisted blacks in doing this. For the most part, as seen from the data, the Supreme Court has not similarly assisted women.

Summary of Conclusions

General Conclusions

The gravity and importance attached to race discrimination by the Court was apparent by the numbers of cases dealing with race and the language of the counsels and justices in dealing with the issues. In general, this ambience of gravity was missing from the cases on sex discrimination.

The constitutional law from the earliest cases condemned race discrimination and, therefore, served as a standard by which to guide the Court in its decisions. No such standards were available for cases dealing with women.

Specific Conclusions

Sex discrimination and the law. The primary rationale used by the Court and the counsels to justify legal classification by gender encompassed the ideas that woman's place was in the home where she acted as wife, homemaker, and mother. This role plus perceived inherent characteristics that were thought to make her more vulnerable than men were seen as resulting in her inability to fully function outside the home. Special treatment by the law, therefore, was seen as justified.

The oppositional ideology, successful in the Court only within the last decade, argued that women should be treated as individuals by the law, not as a stereotypical composite

of womanhood. It was also argued that women should enjoy the equality promised by the fundamental ideals of the United States. Finally, women, like blacks, it was said should be seen as oppressed persons, suffering from past discrimination that demanded appropriate legal relief.

The rationale used by the Court upholding gender classification in the law remained fundamentally the same from the first case analyzed in 1883 to the mid-1960's. In the last decade in many cases dealing with gender, the Court accepted the oppositional ideology supporting careful scrutiny of sex-based laws.

Race discrimination and the law. The primary rationale used by the counsels and the Court to justify a separation of the races was embodied in the notion that segregation in public places was a social issue, not a legal issue, grounded in tradition and custom. The Court's interference in this social order was potentially explosive as it would aggravate the natural antipathy between the races and disrupt the power structure.

The rationale used in opposition to a legal classification by race was that segregation resulted in deprivation for the black sommunity and fostered negative conditions for individual blacks as well as for society as a whole. In general, segregation was seen by those advocating integration as a means for maintinaing white power based on the

sole criteria of color and, consequently, in direct conflict with the democratic principle of equality. Also, integration was seen not only as a means of correcting the evils of segregation but as a means of promoting heterogeneity, a strength of democracy and a good for humanity.

Except for the early cases (Cruikshank, The Civil Rights Cases, and Plessy), the Court in the cases analyzed accepted the ideology of those disparaging segregation and between Plessy in 1896 and Brown in 1954 slowly but consistently eroded the constitutionality of segregation. With Brown, segregation was declared "inherently unequal" and, therefore, unconstitutional. The Court then turned the force of law towards integration in order to provide appropriate relief for the grievances of blacks.

Race discrimination and sex discrimination compared. The differences—Blacks historically were seen by the Court and the counsels as separate from whites, yet, in theory, as symbolized by the Fourteenth Amendment, equal to whites. Blacks and whites were "separate but equal." Women were seen as separate and different from men, "separate but unequal." Status was the basic issue surrounding the blacks' attempts to gain equal rights through the law. The blacks' role or function in society was never considered in the data analyzed. However, for women, often legal decisions turned on their role in the home as wife, mother and

homemaker. Their status only became an issue in the past decade when there was an attempt to prove a status for women comparable to that of blacks in the world of work.

The blacks' struggle for civil rights took place in the public domain where national policy and constitutional law prohibited race discrimination. The issue of the black's "place" as separate from the white also was a public concern. In sum, legal classification of race was a public issue. To the contrary, the woman's "place" was not within the public domain; her's was the private world of the home. The perception by the Courts of women in the home hampered women's ability to gain equal legal status in the public domain of the wider society. Her different rights and responsibilities were perceived of as being of private, not public, concern.

The similarities—Both groups have brought cases to the Supreme Court in which they demanded a fuller participation in civic life, whether it be in employment, education, or government. Both groups have argued that they have been kept out of the mainstream of public life because of tradition, public sentiment, and custom. Both groups have struggled to break loose of their traditional place in society.

Implications of the Study

In looking at the essential importance of the Civil War Amendments for the blacks' struggle for equity, it is obvious the grave importance of constitutional standards specifically guaranteeing equal rights for women.

Affirmative action policies are grounded in the concern for providing equal opportunities for status attainment to the oppressed. For blacks and women working in the public domain, outside the home, this philosophy of affirmative action is certainly applicable. Women, however, also must cope with role and function differentiation in the domestic domain. Affirmative action programs, therefore, need not only to deal with status remedies, the primary concern of blacks, but need also to deal with role and function remedies as well, if women are to be able to fully participate in the wider society. Therefore, issues such as childcare, maternity and paternity leave, and flexible work schedules become essential in achieving sex equity.

Finally, the perception by the counsels and the Supreme Court of the position of blacks as reflected in the data analyzed is so different from that of women that policy decisions based on an assumption of similarities may neglect areas of importance to women. Given the data in this study, the comparison is inaccurate as the primary issue of blacks

as perceived within the legal arena concerns status and the primary issue of women concerns function and role. Yet, in using the comparison of women to blacks in affirmative action programs, for the most part, only issues of status have been broached.

Recommendations for Further Research

It is clear that the Supreme Court in the last decade has changed its perception of women's relation to the law. For the most part, the Court has accepted women on equal legal grounds with men when the law in question gives arbitrary preference to either sex. However, often cases dealing with women impinge upon their role in the domestic domain. Further analysis of recent cases is needed to determine the Court's perception of these situations. For example, in McCarty v. McCarty (1981) the Court ruled that a divorced wife had no right to a part of her former husband's military pension. In essence, a fundamental issue before the Court was the economic value of the woman's role in the domestic domain.

To corroborate and extend its findings, a replication of this study needs to be conducted using only cases from the last decade dealing with race and sex discrimination.

For comparative purposes with the ideology of the law surrounding gender and race, a replication of this study needs to be conducted using the same historical time span

but analyzing Supreme Court cases dealing with nationality and alienage, both suspect classifications.

To be able to more clearly understand the woman's legal position in society, research is needed on the relationship of the law to the domestic domain.

Research is needed on the use of language within the legal arena as it includes or excludes blacks and women. Historically, the language of the Court spoke of "the people" but meant white males. Protecting "negroes" under the Civil War Amendments meant black males. A clearer understanding of language, as a reflection of those in power, can only serve to help break down the perceptions in society that serve as obstacles to women and blacks.

Research is needed on the black woman. Not only must she contend with the female issues of role and status, but she also must contend with the second status issue of color. How do counsels and Courts perceive of a person who is both black and female? One small hint was found in the Civil Rights Cases when a counsel for a black woman, Mrs. Robinson, said: "Leave Mrs. Robinson's color out of the case . . . Mrs. Robinson was entitled to stand on her own character and conduct as a lady" (Civil Rights Cases, Brief of Plaintiffs, 1883, p. 21).

In sum, the Court in Washington v. Davis (1976) slowed the dramatic thrust of the race discrimination cases of the

preceding 20 years by insisting there must be proof of intent to discriminate. With sex discrimination cases there continues an ambivalence by the Court which stems from a lack of clear constitutional standards regarding sex equity. There is a need to implement new strategies, then, and to develop new policies which assure that neither blacks nor women lose any of the ground gained in guaranteeing both groups the civil rights that often have been denied them.

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Yarbrough, Ex Parte Yarbrough, 110 U.S. 651, 28 L. Ed. 274 (1884). Brief for Petitioners, Counsel, Henry B. Tompkins; Brief in Contra, Counsel, S. F. Phillips.

APPENDIX A

CASE SELECTION

A-1: THE HISTORICAL CATEGORIES

A-2: PANEL OF EXPERTS

A-3: COVER LETTER AND LIST OF CASES DEALING WITH RACE DISCRIMINATION

A-1: THE HISTORICAL CATEGORIES

The following publications were used by the author in the survey of the literature to develop the historical categories for the selection of the cases:

Race Discrimination

Bardolph, R. The civil rights record: Black Americans and the law, 1849-1970. New York: Thomas Y. Crowell Co., 1970.

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Kluger, R. Simple justice. New York: Alfred A. Knopf, 1976.

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Sex Discrimination

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Kurland, P. B., & Casper, G. (Eds.). Landmark Briefs and arguments of the Supreme Court of the United States: Constitutional law. Arlington, Va.: University Publications of America, 1981.

Williams, W. Babcock, Freedman, Norton, Ross' sex discrimination and the law. Boston: Little, Brown and Company, 1978 supplement.

A-2: PANEL OF EXPERTS

Race Discrimination*

Lawyers Committee for Civil Rights Under the Law, Washington, D.C.
- Mr. Norman Chachkin, Director
- Ms. Lezlie Baskerville, lawyer, staff
- Ms. Rosalind Gray, lawyer, staff
- Mr. William Robinson, lawyer, staff

National Association for the Advancement of Colored People
- Ms. Althea Simmons, Director, Washington D.C.
- Mr. Steven Ralston, New York, staff

Tuskegee Institute, Tuskegee, Alabama
- Dr. Josetta M. Jackson, Department Head Political Science

Sex Discrimination*

Dr. Beverly Blair Cook, Professor of Political Science, University of Wisconsin, Publications on the judicial process and women's rights.

Dr. Leslie Friedman Goldstein, Professor of Political Science, University of Delaware, author of The Constitutional rights of women: Cases in law and social change.

Dr. Ruth Bader Ginsburg, United States Circuit Judge, District of Columbia Circuit, author of Sex-based discrimination: Text, cases and materials.

Dr. Barbara Allen Babcock, Assistant Attorney General of the United States, author of Sex discrimination and the law.

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*An ex-officio expert source for both race and sex discrimination was Kurland, P.B., & Kasper, G. (Eds.). Landmark Briefs and arguments of the Supreme Court of the United States: Constitutional Law. Arlington, Va.: University publications of America, 1981. In case of a tie among the cases selected by the panels of experts, the cases chosen as landmark in these volumes were used as a final source.

A-3: COVER LETTER AND LIST OF CASES DEALING WITH RACE DISCRIMINATION

April 23, 1981

Dear _____:

I am a doctoral student in Educational Administration at Virginia Polytechnic Institute and State University. In my dissertation I am exploring the ideologies underlying selected Supreme Court decisions in cases dealing with issues of race as compared with those used in cases of gender. In order to select the cases I will use, I need expert help. As you are a leader in the field of race discrimination, I am hoping you will agree to serve as one of my experts in the selection of the cases dealing with race.

My request, I hope, will take little of your time. I have included a list of Supreme Court cases concerning issues related to race, divided into five historical categories. I am requesting that you make a "forced" choice of the four cases you view as most important within each historical category.

I realize that the cases deal with different issues, have had different impacts and that some of them are "ancient history." To simplify your task, therefore, I am asking that you speculate as to which cases you would include in a volume written on an historical overview of landmark decisions concerned with race discrimination, where space would permit the inclusion of only four cases per category. I ask that you choose only four cases even though you feel that none of the cases in a category are landmark decisions or even though you feel that more than four cases in a category are of vital importance.

I appreciate your consideration of this request and, if you are interested, I will send you a summary of the results of the dissertation when it is available. I am enclosing a self-addressed envelope for your use. I hope to begin work on the cases at the beginning of May, so if you could return your selections as soon as is convenient, I would be grateful. Thank you very much for your time and for any help you may be willing to give.

Sincerely,

Mary Hill Rojas

INSTRUCTIONS: Please choose four and only four cases in each historical category. It should be noted that there have been some limitations put on the selection of cases for this list. For example, the major "reverse discrimination" cases are not included. If, however, there is a case you feel very strongly about that is not on the list, please feel free to note it in the appropriate category along with the four you "force" choose. Simply circle the number of your choices.

1865-1884	1. U.S. v. Cruikshank, 92 U.S. 542 (1876) 2. Hall v. DeCuir, 95 U.S. 485 (1878) 3. Strauder v. West Virginia, 100 U.S. 303 (1880) 4. Ex Parte Virginia 100 U.S. 339 (1880) 5. Virginia v. Rives, 100 U.S. 545 (1880) 6. Civil Rights Cases, 109 U.S. 3 (1883) 7. Ex Parte Yarbrough, 110 U.S. 651 (1884)
1885-1920	8. Plessy v. Ferguson, 163 U.S. 537 (1896) 9. Williams v. Mississippi, 170 U.S. 213 (1897) 10. Cumming v. County Bd. of Education, 175 U.S. 528 (1899) 11. Clyatt v. U.S., 197 U.S. 207 (1905) 12. Bailey v. Alabama, 219 U.S. 191 (1911) 13. Hodges v. U.S., 203 U.S. 1 (1906) 14. Berea College v. Kentucky, 211 U.S. 26 (1908) 15. U.S. v. Powell, 212 U.S. 546 (1909) 16. Truax v. Raich, 239 U.S. 33 (1915) 17. Guinn v. U.S., 238 U.S. 347 (1915) 18. Buchanan v. Warley, 245 U.S. 60 (1917)
1921-1941	19. Moore v. Dempsey, 261 U.S. 86 (1923) 20. Corrigan v. Buckley, 271 U.S. 323 (1926) 21. Harmon v. Tyler, 273 U.S. 668 (1927) 22. Nixon v. Herndon, 273 U.S. 536 (1927) 23. Richmond v. Deans, 281 U.S. 704 (1930) 24. Aldridge v. U.S., 283 U.S. 308 (1931) 25. Nixon v. Condon, 286 U.S. 73 (1932) 26. Powell v. Alabama (Scottsboro Case), 287 U.S. 45 (1932) 27. Grovey v. Townsend, 295 U.S. 45 (1935) 28. Hill v. Oklahoma, 295 U.S. 394 (1935) 29. Brown v. Mississippi, 297 U.S. 278 (1936) 30. Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) 31. Lane v. Wilson, 307 U.S. 266 (1939) 32. Smith v. Texas, 311 U.S. 128 (1940) 33. Chambers v. Florida, 309 U.S. 227 (1940) 34. Mitchell v. U.S., 313 U.S. 80 (1941)

1942-1954

35. Smith v. Allwright, 321 U.S. 649 (1944)
36. Screws v. U.S., 325 U.S. 91 (1945)
37. Moregan v. Virginia, 328 U.S. 373 (1945)
38. Shelley v. Kraemer, 334 U.S. 1 (1948)
39. Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631 (1948)
40. Henderson v. U.S. Interstate Commerce Comm., 339 U.S. 816 (1950)
41. McLaurin v. Oklahoma State Regents, 339 U.S. 737 (1950)
42. Sweatt v. Painter, 339 U.S. 629 (1949)
43. Williams v. U.S., 352 U.S. 91 (1951)
44. Barrows v. Jackson, 346 U.S. 249 (1953)
45. Dist. of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953)
46. Terry v. Adams, 345 U.S. 461 (1953)
47. Avery v. Georgia, 345 U.S. 559 (1953)
48. Bolling v. Sharpe, 347 U.S. 497 (1954)
49. Brown v. Board of Education I, 347 U.S. 483 (1954)

1955-1972

50. Brown v. Board of Ed. II, 349 U.S. 294 (1955)
51. Cooper v. Aaron, 338 U.S. 1 (1958)
52. NAACP v. Alabama, 357 U.S. 449 (1958)
53. U.S. v. Raines, 362 U.S. 17 (1960)
54. Gomillion v. Lightfoot, 364 U.S. 339 (1960)
55. Burton v. Wilmington Parking Authority, 356 U.S. 715 (1961)
56. Bailey v. Patterson, 369 U.S. 31 (1962)
57. Goss v. Bd. of Education, 373 U.S. 683 (1963)
58. Peterson v. Greenville, 373 U.S. 244 (1963)
59. Edwards v. South Carolina, 372 U.S. 229 (1963)
60. Watson v. City of Memphis, 373 U.S. 526 (1963)
61. NAACP v. Button, 371 U.S. 415 (1963)
62. Lombard v. Louisiana, 373 U.S. 267 (1963)
63. NAACP v. Alabama, 377 U.S. 288 (1964)
64. McLaughlin v. Florida, 379 U.S. 184 (1964)
65. Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964)
66. Griffin v. Schl. Bd. of Prince Edward Co., 377 U.S. 218 (1964)
67. Bell v. Maryland, 378 U.S. 266 (1964)
68. Cox v. La., 379 U.S. 536 (1965)
69. Rogers v. Paul, 382 U.S. 198 (1965)
70. Bradley v. School Board, 382 U.S. 103 (1965)
71. South Carolina v. Katzenbach, 383 U.S. 301 (1966)
72. Evans v. Newton, 382 U.S. 296 (1966)
73. Adderley v. Florida, 385 U.S. 39 (1966)
74. Reitman v. Mulkey, 387 U.S. 369 (1967)
75. Loving v. Virginia, 388 U.S. 1 (1967)
76. Whitus v. Georgia, 385 U.S. 545 (1967)
77. Jones v. Mayer, 392 U.S. 409 (1968)
78. Green v. New Kent Co. Schl. Bd., 391 U.S. 430 (1968)
79. Gaston County v. U.S., 395 U.S. 285 (1969)
80. U.S. v. Montgomery Co. Schl. Bd., 395 U.S. 225 (1969)

1955-1972 (Cont'd.)

81. Singleton v. Jackson Municipal Separate Schl. Dist., 396 U.S. 290 (1970)
82. Alexander v. Holmes County Bd. of Ed., 396 U.S. 1218 (1970)
83. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 41 (1971)
84. Griggs v. Duke Power Co., 401 U.S. 424 (1971)
85. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)
86. Peters v. Kiff, 407 U.S. 493 (1972)
87. Wright v. Council of the City of Emporia, 407 U.S. 484 (1972)
88. U.S. v. Scotland Neck City Bd., 407 U.S. 484 (1972)

1973-1979

89. Keyes v. Schl. Dist., 413 U.S. 189 (1973)
90. Norwood v. Harrison, 413 U.S. 455 (1973)
91. Milliken v. Bradley (Milliken I), 418 U.S. 717 (1974)
92. Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 (1976)
93. Virginia Private Schl. Cases, 427 U.S. 160 (1976)
94. Hills v. Gantreaux, 425 U.S. 284 (1976)
95. Washington v. Davis, 426 U.S. 229 (1976)
96. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977)
97. Franks v. Bowman, 424 U.S. 747 (1976)
98. Bd. of Schl. Commissioners v. Buckley, 429 U.S. 1068 (1977)
99. Delaware State Bd. of Ed. v. Evans, 434 U.S. 880, 994 (1977)
100. International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977)
101. Austin Ind. Schl. Dist. v. U.S., 429 U.S. 990 (1977)
102. School District of Omaha v. U.S. 433 U.S. 667 (1977)
103. Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977)
104. Dayton Bd. of Ed. v. Brinkman, 97 S. Ct. 2766 (1977)
105. Brennan v. Armstrong, 97 S. Ct. 2907 (1977)
106. Columbus Bd. of Ed. v. Penick, 99 S. Ct. 2941 (1979)

A-4: COVER LETTER AND LIST OF CASES DEALING WITH SEX DISCRIMINATION

January 21, 1981

Dear _____.

I am a doctoral student in Educational Administration at Virginia Polytechnic Institute and State University. In my dissertation I am exploring the ideologies underlying selected Supreme Court Decisions in cases dealing with issues of race as compared with those used in cases of gender. In order to select the cases I will use, I need expert help. As you are a leader in the field of women and the law, I am hoping you will agree to serve as one of my experts in the selection of the sex discrimination cases.

My request, I hope, will take little of your time. I have included a list of Supreme Court cases concerning issues related to women, divided into five historical categories. I am requesting that you make a "forced" choice of the four cases you view as most important within each historical category.

I realize that the cases deal with different issues, have had different impacts and that some of them are "ancient history." To simplify your task, therefore, I am asking that you speculate as to which cases you would include in a volume written on an historical overview of landmark decisions concerned with sex discrimination, where space would permit the inclusion of only four cases per category. I ask that you choose only four cases even though you feel that none of the cases in a category are landmark decisions or even though you feel that more than four cases in a cateogry are of vital importance.

I appreciate your consideration of this request and, if you are interested, I will send you a summary of the results of the dissertation when it is available. I enclose a self-addressed envelope for your use. I hope to begin work on the cases in mid-March, so if you could return your selections as soon as is convenient I would be grateful. If you should have any questions, please call me at . Thank you very much for any help you may be willing to give.

Sincerely,

Mary Hill Rojas

INSTRUCTIONS: Please choose four and only four cases in each historical category. It should be noted that there have been some limitations put on the selection of cases for the list. For example, The Slaughterhouse Cases are not included, although very important for women's issues. If, however, there is a case you feel very strongly about that is not on the list, please feel free to note it in the appropriate category along with the four you "force" choose. Simply circle the number of your choices.

1848-1895	1.	Bradwell v. Illinois, 82 U.S. 130 (1873)
	2.	Virginia Minor v. Happersett, 88 U.S. 162 (1875)
	3.	Strauder v. W. Va., 100 U.S. 303 (1880)
	4.	Maynard v. Hill, 125 U.S. 190 (1888)
	5.	In Re Lockwood, 154 U.S. 116 (1894)
1896-1920	6.	Cronin v. Adams, 192 U.S. 108 (1904)
	7.	Lochner v. New York, 198 U.S. 45 (1905)
	8.	Muller v. Oregon, 208 U.S. 412 (1908)
	9.	Quong Wing v. Kirkendall, 223 U.S. 62 (1912)
	10.	Hawley v. Walker, 232 U.S. 718 (1914)
	11.	Riley v. Massachusetts, 232 U.S. 671 (1914)
	12.	Bosley v. McLaughlin, 236 U.S. 385 (1915)
	13.	Miller v. Wilson, 236 U.S. 373 (1915)
	14.	Bunting v. Oregon, 243 U.S. 426 (1917)
	15.	Simpson v. O'Hara, 243 U.S. 629 (1917)
1921-1941	16.	Leser v. Garnett, 258 U.S. 130 (1922)
	17.	Adkins v. Children's Hospital, 261 U.S. 525 (1923)
	18.	Radice v. New York, 264 U.S. 292 (1924)
	19.	U.S. v. Robbins, 269 U.S. 315 (1926)
	20.	Buck v. Bell, 274 U.S. 200 (1927)
	21.	United States v. Schwimmer, 279 U.S. 644 (1929)
	22.	Poe v. Seaborn, 282 U.S. 101 (1930)
	23.	Morehead v. New York, 298 U.S. 587 (1936)
	24.	West Coast Hotel v. Parrish, 300 U.S. 379 (1937)
	25.	Breedlove v. Suttles, 302 U.S. 277 (1937)
1942-1971	26.	Glasser v. U.S., 315 U.S. 60 (1942)
	27.	Skinner v. Oklahoma, 316 U.S. 535 (1942)
	28.	Ballard v. United States, 329 U.S. 187 (1946)
	29.	Fay v. New York, 332 U.S. 261 (1947)
	30.	Goesaert v. Cleary, 335 U.S. 464 (1948)
	31.	Hetaffer v. Argonne lo., 340 U.S. 852 (1950)
	32.	Hawkins v. U.S., 358 U.S. 74 (1958)
	33.	Heaton v. Bristol, 359 U.S. 230 (1959)
	34.	Wyatt v. U.S., 362 U.S. 525 (1960)
	35.	United States v. Dege, 364 U.S. 51 (1960)
	36.	Hoyt v. Florida, 368 U.S. 57 (1961)
	37.	Gray v. Sanders, 372 U.S. 368 (1963)

1942-1971 (Cont'd.)

38. Griswold v. Connecticut, 381 U.S. 479 (1965)
39. State v. Hall, 385 U.S. 98 (1966)
40. United States v. Yazell, 382 U.S. 341 (1966)
41. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966)
42. Dandridge v. Williams, 397 U.S. 471 (1970)
43. Goldberg v. Kelly, 397 U.S. 254 (1970)
44. Williams v. McNair, 401 U.S. 951 (1971)
45. U.S. v. Vuitch, 402 U.S. 62 (1971)
46. Wyman v. Jems, 400 U.S. 309 (1971)
47. Reed v. Reed, 404 U.S. 71 (1971)
48. Phillips v. Martin-Marietta, 400 U.S. 542 (1971)
49. Perez v. Campbell, 402 U.S. 637 (1971)
50. United States v. Mitchell, 403 U.S. 190 (1971)

1971-1979

51. Forbush v. Wallace, 402 U.S. 910 (1972)
52. Eisenstadt v. Baird, 405 U.S. 438 (1972)
53. Alexander v. Louisiana, 405 U.S. 625 (1972)
54. Stanley v. Illinois, 405 U.S. 645 (1972)
55. Roe v. Wade, 410 U.S. 113 (1973)
56. Doe v. Bolton, 410 U.S. 179 (1973)
57. Frontiero v. Richardson, 411 U.S. 677 (1973)
58. Pittsburgh Press v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973)
59. Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974)
60. Kahn v. Shevin, 416 U.S. 351 (1974)
61. Corning Blass v. Brennan, 417 U.S. 188 (1974)
62. Geduldig v. Aiello, 417 U.S. 484 (1974)
63. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)
64. Connecticut v. Menillo, 423 U.S. 9 (1975)
65. Schlesinger v. Ballard, 419 U.S. 498 (1975)
66. Taylor v. Louisiana, 419 U.S. 552 (1975)
67. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)
68. Burns v. Alcala, 420 U.S. 575 (1975)
69. Edwards v. Healy, 415 U.S. 911 (1975)
70. Bigelow v. Va., 421 U.S. 809 (1975)
71. Stanton v. Stanton, 421 U.S. 7 (1975)
72. Turner v. Dept. of Employment Security, 423 U.S. 44 (1975)
73. Bellotti v. Baird, 428 U.S. 132 (1976)
74. Singleton v. Wulff, 428 U.S. 106 (1976)
75. Chandler v. Roudebush, 425 U.S. 840 (1976)
76. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)
77. Planned Parenthood v. Danforth, 428 U.S. 52 (1976)
78. General Eelctric v. Gilbert, 429 U.S. 125 (1976)
79. Graig v. Boren, 429 U.S. 190 (1976)
80. United Air Lines, v. Evans, 431 U.S. 553 (1977)
81. Califano v. Webster, 430 U.S. 313 (1977)
82. Califano v. Goldfarb, 430 U.S. 199 (1977)
83. Coker v. Georgia, 433 U.S. 584 (1977)
84. Vorcheimer v. Schl. Bd. of Phila., 429 U.S. 893 (1977)

1971-1979 (Cont'd.)

85. Dothard v. Fawlinson, 433 U.S. 321 (1977)
86. Nashville Gas v. Satty, 434 U.S. 136 (1977)
87. Beal v. Doe, 432 U.S. 438 (1977)
88. Maher v. Roe, 432 U.S. 464 (1977)
89. Poelker v. Doe, 432 U.S. 519 (1977)
90. Carey v. Population Services, 431 U.S. 678 (1977)
91. Fiallo v. Bell, 430 U.S. 787 (1977)
92. Quilloin v. Walcott, 434 U.S. 246 (1978)
93. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978)
94. Duren v. Missouri, 435 U.S. 1006 (1979)
95. Orr v. Orr, 436 U.S. 924 (1979)

APPENDIX B

TABLE 1: SUMMARY OF SELECTED SUPREME COURT CASES ON SEX DISCRIMINATION

TABLE 2: DISTRIBUTION OF CATEGORY CONTENT FROM SELECTED SUPREME COURT CASES ON SEX DISCRIMINATION

Table 1

Summary of Selected Supreme Court Cases on Sex Discrimination

Case	Date	Issue	Primary Constitutional Decision	Result	Authors of Supreme Court Opinions	
			First Historical Period			
Bradwell v. Illinois	1873	Employment (right to practice law)	14th Amendment does not apply to issue—Decision belongs to state	The states could prohibit women from practicing a career	Opinion: Concurring: Dissenting:	Samuel Miller Joseph Bradley Salmon Chase
Minor v. Happersett	1875	Civic responsibility (voting)	14th Amendment does not apply to issue—Decision belongs to state	The states could prevent women from voting	Opinion:	Morrison Waite
In Re Lockwood	1894	Employment (right to be a "person" and a lawyer)	Deferred to state legislature	The states could prevent women from practicing a career	Opinion:	Melville Fuller
Strauder v. West Va.	1879	Civic responsibility (jury duty for blacks)	14th Amendment constructed to protect blacks, not women	Women could be excluded from jury duty; blacks could not be excluded	Opinion: Dissenting:	William Strong Nathan Clifford Stephen Field
			Second Historical Period			
Lochner v. New York	1905	Employment (working hours)	Freedom to contract guaranteed by 14th Amendment infringed when work hours regulated for men	The state may not regulate work hours of male workers except in certain high risk jobs	Opinion: Dissenting:	Rufus Peckham John Harlan, Edward White, William Day
Muller v. Oregon	1908	Employment (working hours)	14th Amendment rights not infringed when work hours regulated for women	A state may regulate work hours of female workers	Opinion:	David Brewer
Quong Wing v. Kirkendall	1912	Employment (license tax for men only)	14th Amendment constructed to protect against race discrimination, not sex discrimination	A state may impose a license tax on laundry men while exempting laundry women from the same tax	Opinion: Concurring: Dissenting:	Oliver Holmes Charles Hughes Lucius Lamar
Bunting v. Oregon	1917	Employment (working hours)	Due process of law allows for regulation of working hours	Work hours can be regulated for both men and women	Opinion: Dissenting: Abstained:	Joseph McKenna Willis VanDevanter James McReynolds Louis Brandeis

Table 1

Summary of Selected Supreme Court Cases on Sex Discrimination (Cont'd.)

Case	Date	Issue	Primary Constitutional Decision	Result	Authors of Supreme Court Opinions	
			Third Historical Period			
Adkins v. Children's Hospital	1928	Employment (minimum wage for women only)	Due process of law must apply equally to men and women	Requiring a minimum wage only for women is prohibited	Opinion: Dissenting: Abstained:	George Sutherland William Taft Oliver Holmes Louis Brandeis
Buck v. Bell	1927	Reproduction (sterilization of defectives)	Regulation of child bearing in public interest valid under due process of law	Institutionalized feeble-minded daughters of feeble-minded mothers may be sterilized without their consent	Opinion: Dissenting:	Oliver Holmes Pierce Butler
West Coast v. Parrish	1937	Employment (minimum wage for women only)	Due process of law can apply differently to women than it does to men	A state may fix a minimum wage for women and minors while not requiring one for men	Opinion: Dissenting:	Charles Hughes George Sutherland Willis VanDevanter Pierce Butler James McReynolds
Breedlove v. Suttles	1937	Civic responsibility (Poll tax to vote)	14th Amendment does not apply to issue—Decision belongs to state	A state may demand a poll tax of a man and not of a woman	Opinion:	Pierce Butler
			Fourth Historical Period			
Goesaert v. Cleary	1948	Employment (Right to be a bartender)	Prohibiting women from certain jobs does not violate 14th Amendment	A state may forbid all women from serving as bartenders	Opinion: Dissenting:	Felix Frankfurter Wiley Rutledge William Douglas Frank Murphy
Hoyt v. Florida	1961	Civic responsibility (obligatory jury duty)	Obligatory jury duty for men and volunteer jury duty for women does not violate 14th Amendment	A state may require men to serve on juries while women need only volunteer to serve	Opinion: Concurring:	John Harlan Earl Warren Hugo Black William Douglas
Griswold v. Connecticut	1965	Reproduction (sale of contraceptives)	Use of contraceptives part of fundamental constitutional right to privacy implictly guaranteed by the Bill of Rights	Information, instruction and advice on contraceptives may be given to married persons	Opinion: Concurring: Dissenting:	William Douglas Arthur Goldberg Earl Warren William Brennan Hugo Black Potter Stewart
Reed v. Reed	1971	Civic responsibility (male-first estate administrators)	Arbitrary sex-based laws in violation of 14th Amendment	Male preference laws developed because of administrative convenience are prohibited	Opinion:	Warren Burger

Table 1

Summary of Selected Supreme Court Cases on Sex Discrimination (Cont'd.)

Case	Date	Issue	Primary Constitutional Decision	Result	Authors of Supreme Court Opinons	
			Fifth Historical Period			
Frontiero v. Richardson	1973	Employment (automatic benefits to men only)	Automatic employment benefits for men but not women in violation of due process of law	Employment benefits for military servicemen and serivcewomen must be the same	Opinion: Concurring: Dissenting:	William Brennan Lewis Powell Warren Burger Harry Blackmun William Rehnquist
Craig v. Boren	1976	Social custom (legal age to buy beer)	Under the 14th Amendment gender-based laws must serve important governmental objective	A state may not require men to be 21 to buy beer while allowing women at 18 to buy beer	Opinion: Concurring: Dissenting:	William Brennan Lewis Powell John Stevens Harry Blackmun Porter Stewart Warren Burger William Rehnquist
Maher v. Roe	1977	Reproduction (state payment of abortion)	14th Amendment and the right to privacy do not preclude a state's right to regulate funding for abortions	A state may refuse to fund non-therapeutic abortions under Medicaid	Opinion: Concurring: Dissenting:	Lewis Powell Warren Burger William Brennan Thurgood Marshall Harry Blackmun
Orr v. Orr	1979	Social custom (alimony paid by men only)	14th Amendment prohibits gender-based laws which serve no important governmental objective	Husbands cannot be required to pay alimony if similarly situated wives also cannot be required to pay	Opinion: Concurring Dissenting:	William Brennan Harry Blackmun John Stevens Lewis Powell William Rehnquist

Table 2

Distribution of Category Content from Selected Supreme Court Cases on Sex Discrimination

Category	Percentage Distribution of Thematic Content		Total No. Cases in Which Category is Found (Includes Briefs and Opinions)	
	Major Categories	Sub-Categories	Major Categories	Sub-Categories
Women and Men as Two Legal Classifications				
Natural Order	14		13	
Woman's Place Is in the Home	13		11	
Protection	57		15	
Woman as Weaker Sex		(24)		(12)
Woman as Child		(6)		(6)
Race Propagation		(17)		(8)
To Protect Her Morals		(10)		(7)
Dependency as an Economic Issue	16		8	
Women and Men as One Legal Classification				
Women as Individuals	30		13	
Equality of Men and Women as a Fundamental Ideal	18		9	
Sex Discrimination as Analogous to Race Discrimination	52		13	

APPENDIX C

TABLE 3: SUMMARY OF SELECTED SUPREME COURT CASES ON RACE DISCRIMINATION

TABLE 4: DISTRIBUTION OF CATEGORY CONTENT FROM SELECTED SUPREME COURT CASES ON RACE DISCRIMINATION

Table 3

Summary of Selected Supreme Court Cases on Race Discrimination

Case	Date	Issue	Primary Constitutional Decision	Result	Authors of Supreme Court Opinions	
			First Historical Period			
United States v. Cruikshank	1876	Civic Responsibility (state elections)	14th Amendment does not apply to issue nor does 1st Amendment—Decision belongs to the state	The state has the responsibility to prevent mob violence against blacks in state election proceedings	Opinion: Concurring:	Morrison Waite Nathan Clifford
Strauder v. West Virginia	1879	Civic Responsibility (jury duty)	14th Amendment demands blacks not be excluded by the state from juries	State statutes that exclude blacks from juries are prohibited	Opinion: Dissenting:	William Strong Nathan Clifford Stephen Field
The Civil Rights Cases	1883	Public accommodations (segregation in public places, inns, theaters)	The Civil Rights Act of 1875, not authorized by the 13th or 14th Amendment is unconstitutional	Separate accommodations for the races in commercial enterprises cannot be prohibited by Congress	Opinion: Dissenting:	Joseph Bradley John Harlan
Ex Parte Yarbrough	1884	Civic Responsibility (federal elections)	15th Amendment guarantees the right of blacks to vote in federal elections	The federal government has the power to guarantee the safety of blacks voting in federal elections	Opinion:	Samuel Miller
			Second Historical Period			
Plessy v. Ferguson	1896	Public accommodations (segregation in railroad cars)	State statutes providing separate but equal accommodations for the races is not prohibited by the 14th Amendment	Interstate railroad lines could have separate but equal cars for blacks and whites	Opinion: Abstention: Dissenting:	Henry Borwn David Brewer John Harlan
Bailey v. Alabama	1911	Employment (involuntary servitude)	13th Amendment forbids peonage and the 14th Amendment guarantees due process	Employees may not be held as criminals for indebtedness, especially without the right to testify or their own behalf	Opinion: Dissenting:	Charles Hughes Oliver Holmes
Truax v. Raich	1915	Employment (aliens)	14th Amendment protects aliens against discrimination in employment	No one because of race or nationality can be denied the right to work for a living	Opinion: Dissenting:	William Day James McReynolds
Buchanan v. Warley	1917	Housing (statutory restrictive covenants)	14th Amendment guarantees the right to acquire property free from racial discrimination	Public ordinances upholding restrictive covenants in housing are prohibited	Opinion:	William Day

Table 3

Summary of Selected Supreme Court Cases on Race Discrimination

Case	Date	Issue	Primary Constitutional Decision	Result	Authors of Supreme Court Opinions	
			First Historical Period			
United States v. Cruikshank	1876	Civic Responsibility (state elections)	14th Amendment does not apply to issue nor does 1st Amendment—Decision belongs to the state	The state has the responsibility to prevent mob violence against blacks in state election proceedings	Opinion: Concurring:	Morrison Waite Nathan Clifford
Strauder v. West Virginia	1879	Civic Responsibility (jury duty)	14th Amendment demands blacks not be excluded by the state from juries	State statutes that exclude blacks from juries are prohibited	Opinion: Dissenting:	William Strong Nathan Clifford Stephen Field
The Civil Rights Cases	1883	Public accommodations (segregation in public places, inns, theaters)	The Civil Rights Act of 1875, not authorized by the 13th or 14th Amendment is unconstitutional	Separate accommodations for the races in commercial enterprises cannot be prohibited by Congress	Opinion: Dissenting:	Joseph Bradley John Harlan
Ex Parte Yarbrough	1884	Civic Responsibility (federal elections)	15th Amendment guarantees the right of blacks to vote in federal elections	The federal government has the power to guarantee the safety of blacks voting in federal elections	Opinion:	Samuel Miller
			Second Historical Period			
Plessy v. Ferguson	1896	Public accommodations (segregation in railroad cars)	State statutes providing separate but equal accommodations for the races is not prohibited by the 14th Amendment	Interstate railroad lines could leave separate but equal cars for blacks and whites	Opinion: Abstention: Dissenting:	Henry Borwn David Brewer John Harlan
Bailey v. Alabama	1911	Employment (involuntary servitude)	13th Amendment forbids peonage and the 14th Amendment guarantees due process	Employees may not be held as criminals for indebtedness, especially without the right to testify or their own behalf	Opinion: Dissenting:	Charles Hughes Oliver Holmes
Truax v. Raich	1915	Employment (aliens)	14th Amendment protects aliens against discrimination in employment	No one because of race or nationality can be denied the right to work for a living	Opinion: Dissenting:	William Day James McReynolds
Buchanan v. Warley	1917	Housing (statutory restrictive covenants)	14th Amendment guarantees the right to acquire property free from racial discrimination	Public ordinances upholding restrictive covenants in housing are prohibited	Opinion:	William Day

Table 3

Summary of Selected Supreme Court Cases on Race Discrimination (Cont'd.)

Case	Date	Issue	Primary Constitutional Decision	Result	Authors of Supreme Court Opinions	
			Third Historical Period			
Nixon v. Herndon	1926	Civic Responsibility (primary elections)	14th Amendment prohibits a state statute making blacks ineligible to vote in primary elections	State statutes forbidding blacks from voting in the primary election of a political party are unconstitutional	Opinion:	Oliver Holmes
Powell v. Alabama	1932	Crime (fair trial)	14th Amendment guarantees as a part of due process the right to secure counsel	Great care must be taken in serious crimes surrounded by public hostility to secure counsel and assure a fair trial	Opinion: Dissenting:	George Sutherland Pierce Butler
Missouri v. Canada	1938	Education (higher education)	14th Amendment demands that a state provide equal education within the state for blacks and whites	A state with a law school for whites but not for blacks must allow blacks to enter the school even if the state provides for an equal education for blacks in a neighboring state	Opinion: Dissenting:	Charles Hughes James McReynolds
Smith v. Texas	1940	Civic Responsibility (grand juries)	14th Amendment guarantees blacks the right to serve on grand juries	Although a state statute does not exclude blacks, sufficient evidence of defacto exclusion is enough to establish discrimination	Opinion:	Hugo Black
			Fourth Historical Period			
Shelley v. Kraemer	1948	Housing (private restrictive covenants)	14th Amendment may invalidate private agreements if state courts are necessary to uphold them	Restrictive housing covenants based on private agreements are prohibited	Opinion: Abstentions:	Fred Vinson Wiley Rutledge Stanley Reed Robert Jackson
Sweatt v. Painter	1949	Education (higher education)	14th Amendment guarantees an equal education which means equality not only of objective facilities but of subjective qualities as well	Although a state provides two law schools for whites and blacks, with "equal" faciliites, blacks are allowed entrance to the white school if subjective qualities, such as prestige, are unequal	Opinion:	Fred Vinson
Terry v. Adams	1953	Civic Responsibility (private primary elections)	15th Amendment covers all elections where public issues are decided and public officials elected	Private political organizations excluding blacks from voting in primaries are prohibited	Opinion: Concurring: Dissenting:	Hugo Black Felix Frankfurter Sherman Minton
Brown I v. Bd. of Ed. of Topeka	1954	Education (public schools)	Segregation is inherently unequal and, therefore, offensive to the 14th Amendment	The "separate but equal" doctrine has no place in public education—public schools must be integrated	Opinion:	Earl Warren

Table 3

Summary of Selected Supreme Court Cases on Race Discrimination (Cont'd.)

Case	Date	Issue	Primary Constitutional Decision	Result	Authors of Supreme Court Opinions	
			Fifth Historical Period			
Brown II v. Bd. of Ed. of Topeka	1955	Education (public schools)	Appropriate relief for segregation, unconstitutional under Brown I, is required	All segregated schools had to make a prompt and reasonable start to desegregate	Opinion:	Earl Warren
Gomillion v. Lightfoot	1960	Civic Responsibility (gerrymandering)	Gerrymandering violates the 15th Amendment if it deprives citizens the vote because of race	The City of Tuskegee, or any other city, could not redraw its boundaries to prohibit blacks from voting	Opinion: Concurring:	Felix Frankfurter Charles Whittaker
Heart of Atlanta Motel v. United States	1967	Public accommodations (segregation in motels)	The Civil Rights Act of 1964 prohibiting segregation in public enterprises is constitutional based on the Commerce Clause	Motels open to the public may not refuse to serve blacks	Opinion: Concurring:	Tom Clark Hugo Black William Douglas Arthur Goldberg
Swann v. Charlotte-Mecklenberg	1971	Education (desegregation plans)	As segregation is unconstitutional, authorities must to whatever necessary to integrate public schools	Various means including bussing, pairing, altering school zones are valid to achieve integration in public schools	Opinion:	Warren Burger
			Sixth Historical Period			
Keyes v. School Dist. No. 1	1973	Education (de facto segregation)	A dual public school system, even if nonstatutory, must integrate as segregation is unconstitutional	Although Denver had no "de jure" segregation, its schools were "de facto" segregated—this is unconstitutional	Opinion: Concurring: Dissenting: Abstention:	William Brennan William Douglas Lewis Powell William Rehnquist Byron White
Virginia Private School Cases	1976	Education (segregation in private schools)	An 1866 law assuring blacks and whites equal rights to make contracts does not violate the 1st or 5th Amendments	A private school which advertises publicly cannot exclude blacks from admission	Opinion: Concurring: Dissenting:	Potter Stewart Lewis Powell Byron White
Washington v. Davis	1976	Employment (personnel tests)	A test excluding a disproportionately high number of blacks does not violate due process of 5th Amendment as intent to discriminate must be shown	A personnel test is not discriminatory simply because more blacks than whites fail it	Opinion: Concurring: Dissenting:	Byron White John Stevens William Brennan
Arlington Heights v. Metropolitan	1977	Housing (rezoning)	Denial to rezone for low income housing is not in violation of the 14th Amendment as there was no intent to discriminate	Disporportionate impact on blacks is not enough to prove discrimination	Opinion : Concurring: Dissenting:	Lewis Powell Thurgood Marshall Byron White

Table 4

Distribution of Category Content from Selected Supreme Court Cases on Race Discrimination

Category	Percentage Distribution of Thematic Content		Total No. Cases in Which Category is Found (Includes Briefs and Opinions)	
	Major Categories	Sub-Categories	Major Categories	Sub-Categories
Blacks and Whites as Two Legal Classifications				
Race as a Social Issue	38		12	
Race in the Community not the Courts		(12)		9
Social In-compatibility		(13)		7
The Sexual Issue		(12)		4
Custom and Sentiment	24		13	
Fear of Violence	24		13	
Maintenance of Power	14		13	
Blacks and Whites as One Legal Classification				
Race as a Sole Reason	39		19	
Segregation as Denial and Deprivation	15		14	
Negative Results	39		11	
Caste through Isolation		(13)		9
Sense of Inferiority		(9)		6
Socioeconomic Ills		(17)		5
Heterogeneity is is Good	7		7	

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THE IDEOLOGICAL DISTINCTIONS BETWEEN SEX AND RACE DISCRIMINATION AS FOUND IN SELECTED SUPREME COURT CASES AND BRIEFS OF COUNSEL

by

Mary Hill Rojas

(ABSTRACT)

The purpose of this study was to compare the underlying rationales found in selected Supreme Court cases and briefs of counsel justifying or condemning legal classification by sex and legal classification by race. Political strategies have been developed based on the assumption that racism and sexism are analogous. Yet, in recent years, anti-discrimination law, when used in sex discrimination cases, often has been interpreted and implemented quite differently from cases involving race discrimination. This study, using a content analysis based on "grounded theory," compared perceptions of racism and sexism as found in the opinions and briefs of counsel of the United States Supreme Court.

The data showed that until the 1970's women were seen as wives and mothers whose place was in the home. Women were perceived as having certain inherent characteristics which made them more vulnerable than men. Special laws for women, therefore, were perceived as justified. On the other hand, there were those who argued equity for women based on

fundamental ideals and the notion that women should be seen as individuals, not as a stereotypical composite of womanhood. The efficacy of segregation was argued on the grounds of a perceived belief in a natural antipathy of the races and a fear of violence if there were to be integration. Those advocating integration argued the deprivations caused by segregation. There was a gravity surrounding the race cases that was missing from the sex cases. The race decisions, also, were firmly grounded in the Constitution, which was not true for the sex cases.

Fundamentally, blacks and whites were seen as having the same rights even during segregation when they were "separate but equal." Women were never perceived as being the equal of men. They were different and they functioned under a different law. Also, the role of women in the home was primary, not her status in the world outside the home. For blacks, role was never an issue. Rather, for blacks status was the central concern. Finally, the blacks' struggle was perceived as a fight to secure their place in the wider society. The women's place was perceived as in the domestic domain, outside the purview of public concerns.