

## RECONSTRUCTING THE RACE-SEX ANALOGY

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### ABSTRACT

*In the standard account, American sex equality law rests on a partial and imperfect analogy to race, developed in the 1970s by feminists intent on establishing formal equality between men and women, and embraced, albeit selectively and uneasily, by lawmakers and judges. But this account, although containing important elements of truth, obscures the creative ways that advocates turned the tables, arguing that principles developed in sex equality jurisprudence could expand the availability of remedies for racial injustice. This Article explores one example of this phenomenon: efforts, led by Ruth Bader Ginsburg, to use the emerging constitutional distinction between detrimental and beneficial sex classifications as a precedent supporting and justifying the constitutionality of race-based affirmative action. Feminists faced a series of analogical crises in the mid-1970s, including the collision of “benign” sex classifications and race-based affirmative action in the Court, and the Justices’ failure to see pregnancy discrimination as an equal protection violation. In response, feminists reformulated the race-sex*

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*analogy, attentive to differences as well as similarities between race and sex inequality. They also sought to apply their hard won gains in sex equality cases to the race context, arguing that the Court's openness to "genuine affirmative action" for women should extend to racial minorities. The narrow failure of this strategy to win a Court majority had lasting consequences, including a problematic divergence between race and sex equality doctrines and the submergence of gender, work, and family issues in the affirmative action debate. The reconstructed analogy she developed as an advocate, however, remains alive in Justice Ginsburg's jurisprudence, and recovering its history suggests the need for a reassessment of both legal feminist advocacy and constitutional equality law.*

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## INTRODUCTION

In the context of American law, we are accustomed to thinking about race-sex analogies as a mostly one-way street. Indeed, in the postwar United States, it was the African American civil rights movement that laid the groundwork and developed the legal templates for the diverse array of social movements that followed.<sup>1</sup> Beginning in the early 1960s, feminists increasingly began to revive the analogy to race, once a staple of nineteenth century women's rights agitation. By the early 1970s they had achieved considerable success in what once seemed an improbable quest.<sup>2</sup> As the 1970s wore on, legal feminism confronted the analogy's limits—both descriptive and political—which rendered race jurisprudence less useful than it seemed at first.<sup>3</sup> But that narrative of declension, as important as it is, is only part of the story.<sup>4</sup> In response to changing political and legal conditions, feminists and their allies have also used concepts developed in sex equality doctrine as precedents to justify a more expansive race jurisprudence. They laid the groundwork for this reconstructed analogy in the mid-1970s, when the limits of the race-sex analogy as previously articulated became clear.<sup>5</sup> This reciprocity was complex and multifaceted, spanning an array of doctrines and time frames. This Article recovers one strand of that reciprocal relationship, examining how advocates and their judicial allies argued that sex equality jurisprudence could and should be a template for the constitutional treatment of race-based affirmative action.

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1. On this phenomenon generally, see JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* (2002); William N. Eskridge, Jr., *Some Effects of Identity-based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

2. See SERENA MAYERI, *REASONING FROM RACE: LEGAL FEMINISM IN THE CIVIL RIGHTS ERA* (forthcoming) [hereinafter MAYERI, *REASONING FROM RACE*]; Serena Mayeri, Note, "A Common Fate of Discrimination": *Race-Gender Analogies in Legal and Historical Perspective*, 110 YALE L.J. 1045, 1052-60 (2001) [hereinafter Mayeri, *A Common Fate*].

3. See Mayeri, *A Common Fate*, *supra* note 2, at 1072-80; Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 742-46 (2002).

4. Cf. Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 766-67 (2002); Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CAL. L. REV. 819, 820-23 (2002).

5. See Mayeri, *A Common Fate*, *supra* note 2, at 1046.

In the early 1970s, feminist constitutional litigators saw their primary task as convincing the Court that sex-based legal distinctions were, by and large, the product of an outdated and invidious ideology that consigned women to the separate and often inferior sphere of home, family, and lifelong economic dependence. The analogy to race helped feminists persuade judges and other legal decision makers that discrimination based on sex was worthy of similar attention and eradication, and they came within one vote of a Court majority in the 1973 case *Frontiero v. Richardson*.<sup>6</sup> But by the middle of the decade, as Part I of this Article recounts, the race-sex analogy had become a double-edged sword for feminists and their allies. The collision of “benign” sex classifications and race-based affirmative action in the Supreme Court and the Court’s failure to treat pregnancy discrimination as a constitutional violation drove home the analogy’s substantive and strategic limitations.<sup>7</sup>

Feminists did not stand idly by as their race-sex analogy foundered. Instead, as Part II demonstrates, they reformulated the analogy to reflect what they saw as important differences between race and sex inequality and to harness the emerging potential of sex equality jurisprudence to provide a template for addressing the increasingly thorny issue of race-based affirmative action. Their ability to do this depended upon their quiet success in persuading the Court to distinguish between so-called “benign” sex-based classifications that perpetuated women’s dependent and subordinate status and those designed to promote economic opportunity and independence, a synthesis that occurred in the relatively obscure and short per curiam opinion in *Califano v. Webster*.<sup>8</sup> Of course, the distinction between benign and invidious discrimination had deep roots in the advocacy, scholarship, and jurisprudence combating racial segregation and discrimination. But ironically, it was in the context of sex equality jurisprudence, in which feminist lawyers have been accused of taking a rigid formal equality approach, that a principled distinction between invidious classifications and “genuine affirmative action” won the endorsement of a

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6. 411 U.S. 677 (1973).

7. See discussion *infra* Part I.

8. 430 U.S. 313 (1977) (per curiam).

majority of Justices. The development of this distinction frustrated some who doubted judges' ability to reliably separate the wheat from the chaff, but it inspired others, most prominently Ruth Bader Ginsburg, to explore the applicability of sex equality precedents to race jurisprudence.

This reconstructed, or "reverse," analogy had a number of advantages for advocates. Most obviously, it portended a lower level of scrutiny for classifications designed to enhance opportunities for historically disadvantaged groups. But as Ginsburg and others recognized, the reverse analogy's potential extended beyond the mechanical application of a less stringent standard of review. More importantly, the standard articulated in *Webster* invoked a substantive conception of equal protection that recognized societal discrimination as a sufficient justification for affirmative action. Further, it shifted the focus of the inquiry away from harm to third parties, such as men and whites, and toward avoiding the stigmatization of the disadvantaged groups affirmative action was designed to help. The approach the Justices had accepted with little fanfare in *Webster* seemed an ideal template for deciding the highly publicized, bitterly controversial *Bakke* case.<sup>9</sup>

It was not to be. Like the race-sex parallel advanced in *Frontiero*, the reformulated sex-race analogy came within one vote of adoption by the Justices, and once again Justice Powell cast the deciding vote.<sup>10</sup> This time, his opinion would come to be seen as speaking for the Court. The import of the *Bakke* decision, and Powell's opinion in particular, is of course well-known, but its significance for the relationship between sex and race jurisprudence is underappreciated. Powell's opinion in *Bakke* not only remade affirmative action doctrine by elevating diversity as a government interest and subjecting race-based university admissions policies to strict scrutiny, but it also short-circuited attempts to use sex equality doctrine as conceptual and constitutional support for race-based remedial programs. Part II.C details the debate inside the Court over the proper role of sex equality precedents in the evaluation of race-based affirmative action cases. Although a plurality of

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9. See discussion *infra* Part II.B.

10. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 267 (1978).

Justices, led by Justice Brennan, deployed the sex equality precedents to advance principles developed over many years in the race context, Justice Powell's opinion explicitly rejected the sex-race parallel.

Part III explores the post-*Bakke* history of the reconstructed sex-race analogy in affirmative action law and discourse. The disjuncture between the constitutional doctrines of race and sex equality that emerged in the late 1970s endures to this day. Not only did the two doctrines diverge, but the law and discourse of affirmative action neglects or submerges many of the concerns that have motivated sex equality advocacy, including work-family conflict and the accommodation of women's reproductive difference. Even so, the "reverse analogy" championed by legal feminists and affirmative action proponents in the 1970s did not disappear. The final section of Part III traces the theme of doctrinal convergence through Justice Ginsburg's opinions in recent equal protection cases.

Finally, the conclusion proposes that recovering this history may help us rethink the legacy of legal feminism. Legal feminist strategy and judicial decisions in the sex equality area have been subject to penetrating criticism since the 1970s. Without suggesting that they provide a panacea, past or present, this Article suggests how the history of feminist reconstructions of race-sex analogies may support a more optimistic, as well as a more complicated, reading of sex equality advocacy and jurisprudence.

We have grown used to considering sex discrimination, and certainly sex-based affirmative action, as an afterthought rather than an antecedent. Prohibitions on sex discrimination, we are often reminded, appear nowhere in the federal Constitution, and were added to Title VII of the 1964 Civil Rights Act as a cynical segregationist ploy, albeit one successfully exploited by resourceful advocates for women.<sup>11</sup> Indeed, many of sex equality doctrine's shortcomings have, not without justification, been laid at the feet of overzealous adherence to a race analogy.<sup>12</sup> Reconsidering the

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11. On the absence of "women" from the Constitution, see Sullivan, *supra* note 3, at 735-39. On the addition of "sex" to Title VII, see Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 163 (1991); Mayeri, *A Common Fate*, *supra* note 2, at 1063-67.

12. See, e.g., Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 949 (2002) [hereinafter Siegel, *She the*

direction of this arrow through the lens of history can help us to appreciate the historical contingency of our current doctrinal framework, and the complex and often paradoxical nature of the relationship between race and sex equality in law, as well as in life. Moreover, through the eyes of historical actors, we can see constitutional sex equality jurisprudence not merely as a faint echo of race doctrine, or an uneasy compromise between “equality” and “difference,” but as a potentially fruitful source of substantive ideals applicable in other contexts.

In his dissent in *Adarand Constructors, Inc. v. Peña*, the 1995 decision striking down a race-based federal contracting set-aside, Justice John Paul Stevens lamented the “anomalous result” produced by the majority’s application of strict scrutiny to all race-based classifications.<sup>13</sup> Paradoxically, he observed, gender-based affirmative action was now less constitutionally vulnerable than affirmative policies based on race, despite the historical mission of the Equal Protection Clause—to protect formerly enslaved African Americans.<sup>14</sup> As this Article will show, the “anomalous result” itself had a long history, and its ascendancy was far from inevitable.

### I. ANALOGICAL CRISIS<sup>15</sup>

Analogizing sex to race served as an important and often effective strategy for feminist lawyers as they sought to convince judges and other legal decision makers that sex discriminatory laws, long seen as benign or even protective, perpetuated inequality and deserved both moral disapprobation and legal remediation. By the mid-1970s, however, developments within and outside the law made the analogy to race increasingly problematic. An economic downturn fed

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*People*].

13. 515 U.S. 200, 247 (1995) (Stevens, J., dissenting).

14. Stevens remarked:

[T]oday’s lecture about “consistency” will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves.

*Id.*

15. I borrow this term from Sullivan, *supra* note 3, at 742.

skepticism and outright hostility toward affirmative action—particularly race-based policies—and the rise of economic and cultural conservatism provided intellectual and political ammunition to critics. This Part focuses on the doctrinal manifestations of this larger social shift. The first section briefly recapitulates the advantages of analogical reasoning for feminists as they argued early 1970s sex equality cases in court. The second and third sections describe two important doctrinal developments, both occurring in 1974, that reflected the diminishing utility of the race-sex analogy as previously articulated by feminist litigators.

*A. The Appeal of Analogical Reasoning: The Early Sex Equality Cases*

By the early 1970s, feminists had resolved their own internal disputes over whether protective laws were havens safeguarding women from exploitation in an unfair and unequal world or archaic relics of old-fashioned sexist condescension and exclusion. Most who clung to these laws during part or all of the 1960s had come to believe them worth sacrificing at the altar of equality. The result was an unprecedented consensus that women should seek improvement in their legal and constitutional status through multiple avenues—legislation, litigation under the Fourteenth Amendment, and advocacy of an Equal Rights Amendment.<sup>16</sup> Feminists more or less agreed that laws classifying women as weaker beings in need of protection and special consideration were shackles rather than stepping stones; as they were fond of saying, women’s “pedestal,” upon closer inspection, often revealed itself to be a “cage.”<sup>17</sup> As commentators noted then and now, it was this conviction that led legal feminists like Ruth Bader Ginsburg and her colleagues to argue vehemently for the elimination of sex-based classifications from the law—for a version of equality that brooked no distinctions of sex unless a strictly physical and immutable difference was

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16. On the development of this hard-won consensus, see Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004) [hereinafter Mayeri, *Constitutional Choices*].

17. Sullivan, *supra* note 3, at 744 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion)).

involved.<sup>18</sup> Simultaneously, feminists were campaigning for an Equal Rights Amendment (ERA), designed to codify the equality principle in the federal Constitution and obviate the need for reinterpretation of existing constitutional provisions.<sup>19</sup>

With respect to constitutional litigation, legal feminists like Ginsburg were, in the early 1970s, primarily occupied with the task of convincing judges that sex-based classifications were inherently suspect, and should therefore be subject to strict scrutiny. In the *Reed v. Reed* “grandmother brief” and its progeny, they emphasized the parallels between race and sex as categories of differentiation, seeking to demonstrate that in most contexts, to make assumptions about individuals based on such immutable characteristics was a violation of basic principles of equality and fairness.<sup>20</sup> Many saw flaws in the race-sex analogy. Skeptics often contended that laws differentiating between men and women favored the “fairer sex” and were motivated by esteem and protective concern, rather than the hostility, hatred, and attributions of inferiority that impelled racial discrimination.<sup>21</sup> Feminist lawyers spilled much ink in their efforts to show that, in fact, laws that seemingly preferred women effectively perpetuated damaging gender stereotypes and even deprived women of benefits they had earned or could have earned in nontraditional roles as wage earners.<sup>22</sup> Revealing the pedestal’s cagelike attributes was hard work, for the concept of sex discrimination did not come easily to many.

For that reason, feminist lawyers deliberately chose as their first constitutional challenges cases that presented what they perceived

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18. See, e.g., HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 233-54 (1990); Mary Becker, Essay, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 210-11 (1998).

19. See Mayeri, *Constitutional Choices*, *supra* note 16. On the ERA campaign and the amendment’s eventual failure, see generally MARY FRANCES BERRY, *WHY ERA FAILED* (1986); JANE DEHART & DONALD MATHEWS, *SEX, GENDER, AND THE POLITICS OF THE ERA* (1990); JANE MANSBRIDGE, *WHY WE LOST THE ERA* (1986). The most comprehensive account of the ERA’s projected effects at the time of congressional passage in 1971-72 is Barbara Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971), known colloquially as the “Yale ERA article.”

20. See Brief for Petitioner-Appellant at 20, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133596.

21. Mayeri, *A Common Fate*, *supra* note 2, at 1049-51.

22. *Id.* at 1076-79.

to be particularly stark exclusions or disadvantages for women—laws that were difficult to construe as protective or “benign” in their effect on women. In the mid-1960s, Dorothy Kenyon and Pauli Murray made their arguments for equality in jury service to federal judges considering the legitimacy of a civil rights murder acquittal by an all-white, all-male jury in an Alabama county where less than 20 percent of adults were white men.<sup>23</sup> Alabama’s exclusion of women from jury service was total,<sup>24</sup> unlike many states where women could opt into the jury pool voluntarily and were merely “spared” the “burden” of serving. In the late 1960s, Marguerite Rawalt and other National Organization for Women (NOW) lawyers used Title VII to challenge protective laws that operated to exclude women from jobs they wanted, rather than focusing on more controversial minimum wage laws.<sup>25</sup> The first case Ruth Bader Ginsburg argued before the Supreme Court, *Frontiero v. Richardson*, was relatively clear cut in its detrimental effect on service-women whose husbands did not receive the same benefits as the wives of their male counterparts.<sup>26</sup> If judges could see the stark unfairness of invidious discrimination in these instances, then the stage would be set for the closer cases in which sex-differentiating laws superficially appeared to be “benign.” The analogy to race proved useful to legal feminists in the early 1970s because it recast practices once viewed as chivalric concessions to women as discrimination worthy of redress.

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23. See *White v. Crook*, 251 F. Supp. 401, 402, 404 (M.D. Ala. 1966).

24. *Id.* at 408-09. For more, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 131-36 (1998); Mayeri, *Constitutional Choices*, *supra* note 16, at 779-84.

25. See, e.g., *Mengelkoch v. Indus. Welfare Comm’n*, 393 U.S. 83 (1968), *vacated on procedural grounds*, 442 F.2d 1119 (9th Cir. 1971); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

26. 411 U.S. 677, 677 (1973). For more on the Justices’ deliberations in *Frontiero*, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 57 (1998); BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 221-26 (1990); BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE BURGER COURT 65-82 (1988); Mayeri, *A Common Fate*, *supra* note 2, at 1073-76; Fred Strebeigh, *Standard Bearer*, LEGAL AFF., Sept.-Oct. 2003.

*B. "A Disgrace from Every Point of View": The Kahn/DeFunis Conundrum*

As affirmative action became an increasingly controversial political issue in the early 1970s, legal feminists could no longer avoid confronting the complicated "benign" discrimination issue in the litigation arena. To many feminists, opposition to sex-differentiating protective labor legislation on the one hand, and support for affirmative action in employment and education on the other, seemed perfectly compatible.<sup>27</sup> After all, they believed, protective laws were detrimental to women and to the cause of gender equality because even when they did not overtly exclude women from certain positions, such laws operated to perpetuate stereotypes that kept women out of higher-paying, traditionally male jobs. Affirmative action, on the other hand, was a form of differentiation designed to bring women into nontraditional employment, explode outdated notions about their natural proclivities and capacities, and combat the very discriminatory assumptions on which protective laws were based. Undoubtedly, to many it all seemed simple enough.

But as constitutional doctrine evolved, complicated legal and strategic questions arose. If sex-based classifications inherently raised judicial suspicion, and seemingly benign laws were often unmasked as disguised discrimination, then how could judges tell a "true" affirmative action policy from yet another oppressive measure masquerading as a compensatory benefit? How could feminist support for affirmative remediation be kept from under-

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27. For examples of antiprotectionist and proremedial sentiments coexisting peacefully and without comment, see generally Mary Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U. L. REV. 281 (1971); Robert A. Sedler, *The Legal Dimensions of Women's Liberation: An Overview*, 47 IND. L.J. 419 (1972). On feminist efforts to promote the inclusion of women in affirmative action programs, see GRAHAM, *supra* note 18, at 413; NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* 117-54 (2006); SKRENTNY, *supra* note 1, at 94-101.

Affirmative action was not yet a central concern for ERA proponents in the early 1970s, for a variety of reasons. The Yale ERA article addressed the topic only briefly, and affirmative action did not play a prominent role in the congressional debates over the ERA in 1971-72. On the increasing centrality of affirmative action and related issues to the ERA campaign, see Serena Mayeri, *A New ERA or a New Era?: Amendment Advocacy and the Reconstitution of Feminism* (unpublished manuscript, on file with author) [hereinafter Mayeri, *A New ERA*]. On feminist efforts to include women in early affirmative action programs, see GRAHAM, *supra* note 18; SKRENTNY, *supra* note 1.

mining the women's movement's Fourteenth Amendment litigation strategy and Equal Rights Amendment (ERA) advocacy? Conversely, how could the arguments feminists made to defeat laws giving special "benefits" to women fail to discredit the case for affirmative action for women, and even for racial minorities? As if these analytic difficulties were not enough, legal and political developments made them even more salient. Challenges to race-based remedies appeared alongside lawsuits attacking "benign" sex classifications, forcing feminists to articulate not only the differences between programs that ameliorated injustice and those that perpetuated inequality, but also the distinctions between race and sex discrimination as social phenomena.

The latent potential conflict between efforts to expose "benign" differentiation as pernicious discrimination on the one hand, and feminist support for affirmative action on the other, reached a crisis point in the 1973-74 Term, as two pertinent cases reached the Supreme Court for oral argument virtually simultaneously. First in the public consciousness was *DeFunis v. Odegaard*, the challenge by Marco DeFunis, a Sephardic Jewish applicant rejected by the University of Washington Law School, to that institution's affirmative action policy.<sup>28</sup> In the second case, *Kahn v. Shevin*, Mel Kahn, a Florida widower, challenged a state law providing widows with a small property tax exemption.<sup>29</sup> Whereas the *DeFunis* case received extensive media coverage, *Kahn* was little noticed outside the legal community.<sup>30</sup> Indeed, *Kahn's* very progression to the Supreme Court came as an unwelcome surprise to Ginsburg's American Civil Liberties Union (ACLU) Women's Rights Project (WRP); *Kahn* was an inherently undesirable case because it did not involve the kind

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28. 416 U.S. 312 (1974).

29. 416 U.S. 351 (1974). Though often characterized as a \$500 property tax exemption, the \$500 referred to the value of property exempt from the tax. The actual tax savings was approximately \$15. Letter from Ruth Bader Ginsburg to James M. Klein, Harry W. Zanville, and Stephen E. Klein, Civil Law Clinic, Univ. of Toledo Coll. of Law (May 28, 1974) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 1, folder: Califano v. Coffin: Correspondence, 1974).

30. See, e.g., Iver Peterson, *DeFunis Decision May Bring Pressure To End Race as College Admission Criterion*, N.Y. TIMES, Apr. 30, 1974, at 20; Iver Peterson, *Time To Decide If Whites Are Victimized*, N.Y. TIMES, Nov. 25, 1973, at 9; Warren Weaver, *Law School's Plan To Aid Minorities Goes to High Court*, N.Y. TIMES, Feb. 24, 1974, at 1.

of “double-edged discrimination” Ginsburg liked to showcase.<sup>31</sup> Unlike the policy challenged in *Frontiero*, which clearly disadvantaged both women and men, the damage visited upon women by Florida’s statute was considerably more attenuated. Denying benefits to the dependent spouses of servicewomen degraded women’s breadwinning capacity in addition to presupposing a traditional gender role division, while depriving widowers of a property tax exemption did not as directly impinge upon women’s ability to provide for their husbands.

Still, once the case reached the high Court, the WRP could do little but make the best of the situation: after all, a longstanding statute presuming that widows were more likely to be in need of financial assistance than widowers did perpetuate sex stereotypes, and feminists did not believe the miniscule exemption truly was intended to eliminate economic inequality between the sexes. Even so, Ginsburg hoped for a reprieve until the end, declaring to a friend, “I’ll give you a gold medal if you can suggest any route other than equal protection for widower Kahn.”<sup>32</sup> Noting the Court’s apparent inclination toward an intermediate standard of scrutiny for certain equal protection challenges, Ginsburg suggested to her colleagues that *Kahn* was not the case on which to stake the WRP’s fight for strict scrutiny.<sup>33</sup> Indeed, by Ginsburg’s own account, the brief “trie[d] to fudge on the review standard issue.”<sup>34</sup> The fewer precedents set by *Kahn*, the better, she reasoned.

Compounding Ginsburg’s dismay over *Kahn*’s inopportune path to the Supreme Court was its unfortunate juxtaposition with

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31. Memorandum from Ruth Bader Ginsburg to Marc [Fasteau], Brenda [Feigen Fasteau], and Christine [Cassaday Curtis] (Nov. 13, 1973) [hereinafter Ginsburg-Fasteau Memorandum] (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 4, folder: Kahn v. Shevin: Correspondence, 1973-75) (“I don’t think we should do a number on sex as suspect—since we don’t have double-edged discrimination.”).

32. Memorandum from Ruth Bader Ginsburg to Mary McGowan Davis (Jan. 30, 1974) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 4, folder: Kahn v. Shevin: Correspondence, 1973-75) [hereinafter Ginsburg-Davis Memorandum]. Ginsburg had hoped to bring *Wiesenfeld* as the next WRP case after *Frontiero*. Letter from Ruth Bader Ginsburg to John H. Fleming, Robert L. Deitz, and Allan B. Taylor, Harvard Law Review (Dec. 16, 1974) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 4, folder: Kahn v. Shevin: Correspondence, 1973-75).

33. Ginsburg-Fasteau Memorandum, *supra* note 31.

34. Ginsburg-Davis Memorandum, *supra* note 32.

*DeFunis*, argued the same week.<sup>35</sup> *DeFunis*, she feared, would lead the Justices to see Florida's property tax exemption as a permissible remedial measure analogous to affirmative action. The race-sex analogy the WRP lawyers had promoted so assiduously in *Reed* and *Frontiero* now haunted their advocacy in *Kahn*; as Ginsburg later observed, her challenge in *Kahn* was "get[ting] the Court to understand they couldn't lump sex and race together; that there were differences."<sup>36</sup> Conversely, *Kahn* had the potential to undermine arguments for "true" affirmative action; if Mel Kahn's lawyers proved too much, the Court might conclude that all distinctions

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35. The parallels between the two cases were self-evident, at least to Justices Brennan and Blackmun's clerks. See Memorandum from T[homas] M[.] J[orde], law clerk, to Justice William J. Brennan, Re: Kahn v. Shevin [undated] (on file with the Library of Congress in William J. Brennan, Jr. Papers, box I: 325, folder 12) ("There are problems here similar to those raised in the Washington Law School case, e.g., what efforts may a State take to correct past imbalances which were based upon suspect classification distinctions; in the Washington Law School the classification is race; here it is sex."); Bench Memorandum from [Robert I.] Richter, law clerk, to Justice Harry A. Blackmun, Re: No. 73-78, Kahn v. Shevin 2 (Feb. 16, 1974) (on file with the Library of Congress in Harry A. Blackmun Papers, box 185, folder 6) ("The issue is closely tied with the one presented in *Defunis v. Odegaard* which will be argued the following day ....").

Richter wrote:

The first way to distinguish [*Kahn* from cases like *DeFunis*] is that in a case like *Defunis* there is a direct state interest in training black lawyeres [sic]. The widow provision here is aimed at helping needy people, not women and presumably the state's interest would be better served by limiting the exemption to the needy. There is no alternative to the explicit benign racial quota in *Defunis* that will serve the same interest. A second distinction is that racial cases can always be viewed as providing [sic] compensatory-type treatment to cure the pervasive discrimination of the past and that there is always a state interest in training black lawyers to assist in this task. It is difficult to view the provision at issue here as designed to overcome past discrimination although I imagine the argument could be made. Finally, there is the fact that race is suspect and for the moment sex isn't. While this would seem to cut in favor of Mr. Defunis and against Mr. Kahn, this would not necessarily be true if benign classifications were treated differently than invidious ones. (Which is how I think *Defunis* should be resolved). In short, it will be possible to reach any combination or permutation of results in this case and *Defunis* and be able to write consistent opinions or take consistent positions. It will however, have to be a conscious process.

*Id.* at 7-8.

36. Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 COLUM. HUM. RTS. L. REV. 373, 393 (1976) (alteration in original).

based on sex—or race—were impermissible, even if intended to combat proven patterns of discrimination.

The WRP's briefs in *Kahn* attempted to walk this fine line by helping the Justices distinguish between laws targeted to alleviate discrimination and policies based on outdated gender stereotypes. At times, the appellant's opening brief sounded as if no sex-based distinction would escape the discriminatory label: "Both discrimination against, and special benefits for, women stem from stereotypical notions about their proper role in society,"<sup>37</sup> read one sentence. At another point, the brief declared that "lump treatment of men, on the one hand, and women on the other is constitutionally impermissible."<sup>38</sup> In other places, however, the WRP was careful not to close the door on legitimate remedial measures, distinguishing Florida's property tax exemption from a Social Security calculation favoring women that was upheld by the Second Circuit several years earlier in *Gruenwald v. Gardner*.<sup>39</sup> A footnote clarified further:

Generalized provisions based on gender stereotypes of the variety here at issue must be distinguished from affirmative action measures tailored narrowly and specifically to rectify the effects of past discrimination against women in a particular setting. Such measures deal directly with economic and social conditions that underlie and support a subordinate status for women.<sup>40</sup>

Not surprisingly, the State of Florida seized on remedial justifications in defending the tax exemption; the challenged statute was, they implied, tantamount to an affirmative action measure.<sup>41</sup> Ironically, the WRP found itself on the receiving end of a lecture about women's unequal economic status and prospects: "Although

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37. Brief for Appellants at 4, *Kahn v. Shevin*, 416 U.S. 351 (1974) (No. 73-78), 1973 WL 172384.

38. *Id.* at 11.

39. *Id.* at 24 ("[T]he distinction approved in *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir. 1968) had at least a tenuous relationship to discrimination encountered by women in the labor market ... [whereas the Florida tax exemption was] not tied in any way to discrimination encountered by women in economic activity.")

40. *Id.* at 24 n.19.

41. Brief for Appellees at 3, *Kahn*, 416 U.S. 351 (No. 73-78), 1974 WL 185605.

women make up an ever-increasing portion of the work force, they are still far behind in obtaining equality of economic opportunity,”<sup>42</sup> Florida’s lawyers argued, accusing the plaintiff of downplaying women’s economic disadvantages.<sup>43</sup> In their reply brief, Kahn’s lawyers reiterated “the critical distinction between lump treatment of women as the inferior and therefore needier sex, and measures designed to undo the inequalities in economic opportunity women encounter,” including “laws prohibiting gender discrimination in education, employment, financing, housing, and public accommodations.”<sup>44</sup> In the wake of this exchange, Ginsburg was eager to address the *Kahn/DeFunis* distinction in oral argument, and she had a golden opportunity when Justice Harry Blackmun asked her to do just that during her rebuttal: “Since I had carefully prepared an answer to that question, I was delighted with the opportunity to hammer down the distinction,” Ginsburg related to Kahn’s original attorney, Bill Hoppe.<sup>45</sup> She was optimistic about the Court’s likely response to her presentation, remarking magnanimously that she thought the Justices had been “unnecessarily severe” in questioning her opponent.<sup>46</sup>

When the Court issued its decisions in *Kahn* and *DeFunis* on consecutive days in April 1974, however, Ginsburg was sorely disappointed. In what seemed like a startling reversal of his position in *Frontiero*, Justice William O. Douglas wrote for the majority in *Kahn* that the widows’ tax exemption rested upon a desire to compensate women for the economic disadvantages they suffered, particularly after losing a spouse.<sup>47</sup> He distinguished the policy challenged in *Frontiero* as hurting rather than helping women, noting that “[g]ender has never been rejected as an impermissible classification in all instances,” and, perhaps most

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42. *Id.*

43. *Id.* at 9-10 (“Appellant, in arguing that women are not in such an economically inferior position, emphasizes heavily that women have been increasing as a percentage of the work force. He chooses to ignore the fact that this has not benefited women in regard to earning capacity .... The gap, in fact, was greater in 1970 than it was in 1955.” (citation omitted)).

44. Reply Brief for Appellants at 3-4, *Kahn*, 416 U.S. 351 (No. 73-78), 1974 WL 185606.

45. Letter from Ruth Bader Ginsburg to Bill Hoppe, Law Offices of Colson & Hicks (Mar. 8, 1974) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 4, folder: *Kahn v. Shevin*: Correspondence, 1973-75).

46. *Id.*

47. *Kahn*, 416 U.S. at 355.

jarring to feminists, citing the original “Brandeis brief” in *Muller v. Oregon* as “emphasiz[ing] that the special physical structure of women has a bearing on the ‘conditions under which she should be permitted to toil.’”<sup>48</sup> A dissent authored by Justice William J. Brennan, Jr. and joined by Justice Thurgood Marshall agreed that laws designed to ameliorate economic discrimination against women were permissible and necessary, but contended that Florida’s law did not meet the narrow tailoring prong of strict scrutiny—a standard that Justice Douglas apparently abandoned after lending his endorsement in *Frontiero*.<sup>49</sup>

Only Justice Byron White’s opinion satisfied Ginsburg; in a pithy dissent, White criticized the presumption that all widows were more economically disadvantaged than all widowers as resting upon the stereotype that all widows “have been occupied as housewife, mother, and homemaker and are not immediately prepared for employment.”<sup>50</sup> Nor was the remedial justification a “credible explanation,” White reasoned, given the over- and under-inclusiveness of the exemption.<sup>51</sup> To Ginsburg, White was “the only one with complete integrity,” though she had “some sympathy with Brennan and Marshall in their effort to avoid conflict with their probable position in *DeFunis*.”<sup>52</sup> The position of those Justices in *DeFunis* remained no more than probable, as the Court dismissed the case as moot, failing to reach a decision on the merits. Douglas, however, dissented from the finding of mootness, arguing both for the importance of resolving the affirmative action question in general, and against the University of Washington Law School’s affirmative action program in particular.<sup>53</sup> Race, he concluded, was not a permissible criterion for differentiating between applicants for university admission.<sup>54</sup>

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48. *Id.* at 356 n.10 (citation omitted).

49. *Id.* at 359-60 (Brennan, J., dissenting).

50. *Id.* at 361 (White, J., dissenting).

51. *Id.* at 361-62.

52. Letter from Ruth Bader Ginsburg to Sara-Ann Determan, Hogan & Hartson (Apr. 26, 1974) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 4, folder: Kahn v. Shevin: Correspondence, 1973-75) [hereinafter Apr. 26 Ginsburg-Determan Letter].

53. *DeFunis v. Odegaard*, 416 U.S. 312, 320-44 (1974) (Douglas, J., dissenting).

54. *Id.* at 344.

Douglas's opinion in *Kahn*, Ginsburg wrote, was "a disgrace from every point of view."<sup>55</sup> In Ginsburg's view, Douglas had betrayed his vote in *Frontiero* for strict scrutiny by joining the "deplorable" *Kahn* majority position, and had compounded his error by reaching the opposite conclusion in his *DeFunis* dissent.<sup>56</sup> "It is galling," Ginsburg wrote to a fellow lawyer,

that Douglas sees women as appropriate objects of benign dispensation (ranked with the blind and the totally disabled) when he should know that there is no surer way to keep them down than to perpetuate that brand of chivalry. His *DeFunis* dissent indicates he would regard such a "favor" for blacks (where the same earnings gap can be demonstrated) as "invidious."<sup>57</sup>

In the end, Ginsburg's initial assessment seemed correct: *Kahn* was "the wrong case brought to the Court at the wrong time."<sup>58</sup> *DeFunis*, on the other hand, "hit[] a sensitive nerve," as Ginsburg wrote

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55. Apr. 26 Ginsburg-Determan Letter, *supra* note 52.

56. Letter from Ruth Bader Ginsburg to Stephanie W. Kanwit, Reg'l Dir., Fed. Trade Comm'n (Apr. 30, 1974) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 12, folder: Speech File, Apr.-May 1974) [hereinafter Ginsburg-Kanwit Letter]; *see also* Letter from Ruth Bader Ginsburg to Sara-Ann Determan, Hogan & Hartson (Apr. 30, 1974) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 4, folder: Kahn v. Shevin: Correspondence, 1973-75) [hereinafter Apr. 30 Ginsburg-Determan Letter].

57. *Id.* Ginsburg was hardly the Court's only severe critic; in a comprehensive analysis of four Supreme Court Terms, John D. Johnston, Jr., noted that, although "[i]t would have been quite easy ... to reconcile a vote to invalidate the *Kahn* statute with a vote to uphold the admissions policy challenged in *DeFunis*," the Court had blundered in *Kahn* and dodged in *DeFunis*. John D. Johnston, Jr., *Sex Discrimination and the Supreme Court: 1971-1974*, 49 N.Y.U. L. REV. 617, 664 (1974).

Even those who disagreed with Ginsburg and Johnston on the merits of *Kahn* noticed the inconsistency: Justice Powell's clerk, Jack Owens, wrote to Powell on an early draft of Douglas's majority opinion: "Unbelievable. *Join*. Pin him down while you've got the chance." First Draft of Douglas Opinion in *Kahn* (circulated Mar. 12, 1974) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 73-78 Kahn v. Shevin). Justice Blackmun's clerk, Robert I. Richter, noted that Douglas's opinion in *Kahn* was "wholly inconsistent with Justice Douglas' own view that sex is suspect and that reverse discrimination is impermissible (*DeFunis*) but I guess that is his problem." Memorandum from Robert I. Richter, law clerk, to Justice Harry A. Blackmun, Re: No. 73-78 Kahn v. Shevin, Circulation by Justice Douglas (Mar. 12, 1974) (on file with the Library of Congress in Harry A. Blackmun Papers, box 185, folder 6).

58. Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 21.

shortly after the Court's dismissal of the case.<sup>59</sup> "It demonstrates why sex discrimination can't be lumped together with discrimination against historically disadvantaged minority groups."<sup>60</sup>

C. "Exceedingly Difficult To Talk About Equality of Treatment":  
*Pregnancy and the Limitations of Reasoning from Race*

The *Kahn/DeFunis* debacle was followed shortly by the Court's decision in *Geduldig v. Aiello*,<sup>61</sup> a disaster of much greater magnitude for legal feminists. In that case, female plaintiffs, on behalf of themselves and similarly situated women, challenged a California Unemployment Insurance Code provision exempting pregnancy-related work loss from coverage of the state's disability insurance program until twenty-eight days after the pregnancy's end.<sup>62</sup> Carolyn Aiello, a self-supporting hairdresser, had interrupted her employment to receive treatment for an ectopic pregnancy.<sup>63</sup> Augustina Armendariz, the sole financial provider for herself, her husband, and her infant son, suffered a miscarriage and was ordered by her doctors to cease her work as a secretary for several weeks in order to recover.<sup>64</sup> Jacquelyn Jaramillo, who experienced a normal pregnancy and delivery, also supported her family while her husband finished school; she sought benefits for the period in which she was physically incapacitated as a result of childbirth.<sup>65</sup>

In May 1973, a three-judge district court sitting in the Northern District of California ruled, 2-1, that the state's disability benefit scheme violated the Equal Protection Clause.<sup>66</sup> Acknowledging that *Frontiero* had left the appropriate standard of review for sex-based classifications ambiguous, Judge Alfonso J. Zirpoli, a Kennedy

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59. Apr. 30 Ginsburg-Determan Letter, *supra* note 56.

60. *Id.*

61. 417 U.S. 484 (1974).

62. CAL. UNEMP. INS. CODE § 2626 (West 1953) (amended 1979) ("Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.").

63. *Aiello v. Hansen*, 359 F. Supp. 792, 794-95 (N.D. Cal. 1973).

64. *Id.* at 795.

65. *Id.*

66. *Id.* at 801.

appointee, wrote for himself and Ninth Circuit Judge Ben C. Duniway that under the framework established in *Reed*,<sup>67</sup> pregnant women must be treated as individuals, not as a group that would inevitably make large and unwieldy insurance claims.<sup>68</sup> Quoting a recent federal case from Ohio that struck down a mandatory maternity leave provision, Judge Zirpoli wrote: “Sexual stereotypes are no less invidious than racial or religious ones. Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual women involved and is by its very nature arbitrary and discriminatory.”<sup>69</sup> The court opined that “the denial of benefits for pregnancy-related disabilities seems to have its roots in the belief that all pregnant women are incapable of work for long periods of time, and therefore, they will submit large disability claims.”<sup>70</sup> If the state wished to limit the size of insurance claims, Judge Zirpoli maintained, the equal protection guarantee required that it do so directly, rather than using pregnancy as a proxy for large expenditures.<sup>71</sup> Judge Spencer Williams, recently appointed to the bench by President Nixon, dissented, noting that “it is exceedingly difficult to talk about equality of treatment between the sexes when pregnancy is involved.”<sup>72</sup>

A majority of Supreme Court Justices shared this difficulty. In *Geduldig*, Justice Potter Stewart rejected the plaintiffs’ equal protection claim, concluding that, “[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed* and *Frontiero*.”<sup>73</sup> The insurance program, Stewart noted, “divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of

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67. *Reed v. Reed*, 404 U.S. 71 (1971) (striking down an Iowa probate statute as violative of the Equal Protection Clause).

68. *Aiello*, 359 F. Supp. at 798.

69. *Id.* (quoting *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501, 505 (S.D. Ohio 1972)).

70. *Id.* at 799.

71. *Id.*

72. *Id.* at 806 (Williams, J., dissenting) (citation omitted).

73. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

both sexes.”<sup>74</sup> In effect, because men could not give birth, and women did not necessarily become pregnant, discrimination based on pregnancy did not constitute discrimination based on sex. “There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”<sup>75</sup> California’s disability scheme therefore was subject to the least stringent level of review, rational basis analysis, applicable to social welfare provisions generally.

Justice Brennan dissented vehemently from this view, in an opinion joined by Justices Marshall and Douglas. Brennan would have analyzed the disability program under the more stringent standard of review developed in *Reed* and *Frontiero*. He wrote:

In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex .... In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.<sup>76</sup>

Brennan’s objection to the exclusion of pregnancy from California’s disability scheme differed from Zirpoli’s. Whereas Zirpoli defined the primary harm as the violation of a woman’s right to be treated as an individual rather than stereotyped as severely disabled by pregnancy, Brennan emphasized how the law treated women as a group differently from men. Both men, though, accepted feminists’ view that to treat pregnancy as something other than a temporary disability similar to other temporary disabilities was to violate the equal protection guarantee.<sup>77</sup>

To the Court’s majority, in contrast, classifications based on pregnancy seemed logical: pregnancy, after all, did not happen to men, so male and female workers were not similarly situated, a

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74. *Id.*

75. *Id.* at 496-97.

76. *Id.* at 501 (Brennan, J., dissenting).

77. *See id.* at 500-04; *Aiello*, 359 F. Supp. at 797-99.

common prerequisite for equal protection analysis. Significantly, pregnancy discrimination appeared to have no clear racial analogue; rather, it was a product of “real” sex differences with a biological basis that racial distinctions lacked.<sup>78</sup> Further, the class of persons who become pregnant and the category of women were not coterminous; accordingly, the Court was able to distinguish the disadvantages of pregnancy from sex-based inequality.<sup>79</sup> If the *Kahn/DeFunis* dilemma demonstrated the perils of analogy, *Geduldig* was an even more poignant, albeit more subtle, illustration of its limits. When discrimination against women did not resemble the prevailing paradigm of racial injustice, many judges had difficulty recognizing constitutional harm.<sup>80</sup>

## II. REFRAMING THE RACE-SEX ANALOGY

In the wake of the confusion elicited by the juxtaposition of *Kahn* and *DeFunis* and the failure of the civil rights paradigm to capture the harm of pregnancy discrimination, Ruth Bader Ginsburg articulated a theory of the relationship between race, gender, and affirmative action that she would reiterate, elaborate on, and refine in the coming years. Distinctions between race and sex inequality

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78. The parties in *Geduldig* did not make explicit analogical arguments, though at least two amicus briefs pointed out that a policy denying disability benefits to sickle-cell anemia sufferers would clearly constitute invidious racial discrimination. Brief for The Physicians Forum as Amicus Curiae Supporting Respondents at 13, *Geduldig*, 417 U.S. 484 (No. 73-640), 1974 WL 185747; Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae Supporting Respondents at 7-8, *Geduldig*, 417 U.S. 484 (No. 73-640), 1974 WL 185756.

79. The Court reasoned that, “[w]hile it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification .... Normal pregnancy is an objectively identifiable physical condition with unique characteristics.” *Geduldig*, 417 U.S. at 496 n.20. After the Court subsequently found Title VII inapplicable to pregnancy-based discrimination in *General Electric v. Gilbert*, 429 U.S. 125 (1976), Congress responded by enacting the Pregnancy Discrimination Act of 1978. Pub. L. No. 95-555, 192 Stat. 2076 (codified at 42 U.S.C. § 2000e (2000)).

80. At least under the Equal Protection Clause; the Court was more responsive to the constitutional claims of pregnant women when they could be framed as due process violations. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (invalidating public school district’s mandatory maternity leave policy under Due Process Clause). The *LaFleur* case, as well as its companion case *Cohen v. Chesterfield County Board of Education*, had been argued under the Equal Protection Clause as well, but the Court did not take up this analysis. For more on the consequences of this choice, see MAYERI, REASONING FROM RACE, *supra* note 2.

became, for Ginsburg, a context for thinking more broadly about structural changes to the workplace and to the distribution of caretaking and wage-earning responsibilities within the family. Once the Court had firmly established a distinction between detrimental classifications and genuine affirmative action, Ginsburg also hoped to extend the Supreme Court's more expansive view of permissible remedies for sex inequality to increasingly embattled race-based affirmative action programs. For Ginsburg and her allies, the race-sex analogy became, potentially, a flexible tool that permitted dis-analogy to serve as an opportunity for rethinking both race- and sex-based remedies.

A. *"The Home-Work Gap Must Be Confronted": Affirmative Action and Family Roles*

Potentially redeeming the 1974 Supreme Court Term for legal feminists was the WRP's victory in *Weinberger v. Wiesenfeld*, in which Stephen Wiesenfeld successfully challenged a Social Security provision awarding lesser death benefits to widowers than to widows.<sup>81</sup> The plaintiff lost his wife, a schoolteacher who earned substantially more than her husband, in childbirth. After her death, he had trouble finding adequate child care and felt compelled to reduce his own work hours to care for their son, Jason.<sup>82</sup> The *Wiesenfeld* case highlighted not only discrimination against female wage earners, but also against men who served as family caregivers; it was, as Ginsburg later recalled, her ideal case, because the facts allowed the WRP "to cast men in the role of being good parents. The theme was that children will grow up happier and better all around if they have the care of two loving parents, rather than just one."<sup>83</sup>

A majority of the Justices agreed on both counts. Justice Brennan, who had failed to garner majority support for the race-sex analogy in *Frontiero*, persevered in his quest for Court consensus that sex discrimination was an evil comparable to race discrimination and an affront to women's contributions to their families'

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81. 420 U.S. 636 (1975) (plurality opinion).

82. *Id.* at 641 n.7.

83. *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1038 (2004).

financial well-being. Writing for the Court, Justice Brennan acknowledged that “[o]bviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But,” he emphasized, “such a gender-based generalization cannot suffice to justify the denigration ... of women who do work and whose earnings contribute significantly to their families’ support.”<sup>84</sup> Significantly, the opinion also stressed the difficulties that Stephen Wiesenfeld would have faced as a parent caring for his children alone, regardless of whether he had been dependent upon his wife’s income: “It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female,” Brennan wrote, and “to the extent that women who work when they have sole responsibility for children encounter special problems, it would seem that men with sole responsibility for children will encounter the same child-care related problems.”<sup>85</sup>

Justice Lewis Powell’s concurring opinion, joined by Chief Justice Warren Burger, accepted the first premise but did not wholly embrace the second. Powell agreed that the “statutory scheme ... impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical.”<sup>86</sup> Powell “attach[ed] less significance” than the plurality, though, to fathers’ rights to care for their children: “In light of the long experience to the contrary, one may doubt that fathers generally will forgo work and remain at home to care for children to the same extent that mothers may make this choice.”<sup>87</sup> Privately, Powell disapproved of fathers who would order their lives this way. When his law clerk, Julia “Penny” Clark, speculated that the subset of fathers who would choose to remain at home with their children was “a small class, no doubt,” Powell wrote in the margin of her memo, “I would hope so—though the ever-increasing welfare rolls even in prosperous times suggest a high level of indolence.”<sup>88</sup>

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84. *Wiesenfeld*, 420 U.S. at 645 (citation omitted).

85. *Id.* at 652.

86. *Id.* at 654-55 (Powell, J., concurring).

87. *Id.* at 655 n.\*. Justice Rehnquist concurred in the result without reaching the sex discrimination question. *Id.* at 655 (Rehnquist, J., concurring in the result).

88. Memorandum from Julia “Penny” Clark, law clerk, to Justice Lewis F. Powell, Jr. 3 (Jan. 17, 1975) (on file with the Washington and Lee University School of Law in Lewis F.

It is perhaps unsurprising that a man of Justice Powell's background would have been unable to conceive of a responsible father who wished to stay home and care for his child. As Powell biographer John C. Jeffries, Jr. describes, "Powell's family and upbringing had been conventionally male-dominated.... The devotion of women to home and hearth seemed as fixed and right and natural as the seasons."<sup>89</sup> Powell had written to his daughter Jo in 1942, "You should be prepared to do some job in the world, because all women will work more from now on, but your ultimate career, I hope, will be making a home. I am old fashion[ed] enough to believe still that this is woman's highest calling."<sup>90</sup>

By 1975, Powell had hired his first female law clerk—Penny Clark—who recalled later that before choosing her over a similarly qualified male, the Justice consulted the appellate judge for whom Clark had worked to make sure she was not "the kind of girl who's going to break down in tears when the going gets tough."<sup>91</sup> Still, Powell was a gentleman in both manner and deed: to a person, his female law clerks, including the feminist scholars Mary Becker and Christina Brooks Whitman, remember him as unfailingly courteous and respectful of their intellectual abilities.<sup>92</sup> His chivalric gestures bespoke kindness and civility rather than contempt or condescension; as Whitman told Jeffries years later, "He really took me seriously and listened to what I had to say.... Yes, he was paternal, and he had no idea of the things that were going on in my life, but he trusted what I had to say."<sup>93</sup> In *Wiesenfeld*, Powell accepted Penny Clark's recommendation that the challenged statute be invalidated, but stopped short of agreeing with her statement that "unless it is rational for society to insist that men work rather than care for children, there is no rational basis for the gender classification in the existing statutory scheme."<sup>94</sup> Powell's margina-

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Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 73-1892 Weinberger v. Wiesenfeld] [hereinafter Clark-Powell Memorandum].

89. JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* 502 (1994).

90. *Id.* (alteration in original).

91. *Id.* at 503.

92. *Id.*

93. *Id.* at 508.

94. Clark-Powell Memorandum, *supra* note 88.

lia revealed his ambivalence: “This [classification] may have some rationality.”<sup>95</sup>

Despite Powell’s concurring qualification—it was a “close and difficult case for [him]”<sup>96</sup>—*Wiesenfeld* was unquestionably a triumph for legal feminists. Initially, the case had struck some of the Justices and their law clerks as a fairly straightforward application of the *Kahn* principle. The “cert pool memo,” in which a clerk summarizes the case in order to help the Justices decide whether to hear it, recommended summarily reversing the lower court’s invalidation of the distinction in light of *Kahn*.<sup>97</sup> Richard Blumenthal, Justice Blackmun’s clerk assigned to *Wiesenfeld*, acknowledged that the case was “not quite so easy as the cert. pool memo implies,” but still called it “a comparatively easy case” and counseled reversal.<sup>98</sup> “Working women, to be sure, are disadvantaged by the provision,” Blumenthal admitted, “[b]ut if the *Kahn* statistics [on wage-earning disparities] are still valid ... the differential treatment would seem to have a fair and substantial relationship to the object of the legislation,” because “widows with children are far more likely to need such benefits than widowers.”<sup>99</sup> Blackmun’s initial inclination was also to reverse, as were Burger’s and William H. Rehnquist’s.<sup>100</sup> In the end, though, the Court unanimously voted to invalidate the sex-based distinction, perhaps a testament to the persuasive powers of Justice Brennan and attorney Ginsburg.

Notwithstanding the *Wiesenfeld* victory, feminist defeats in *Kahn* and *Geduldig* and the failure of the Court to articulate a consistent

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95. *Id.*

96. Conference Notes of Lewis F. Powell, Jr. (Jan. 22, 1975) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 73-1892 Weinberger v. Wiesenfeld) [hereinafter Powell Conference Notes].

97. O’Neill, Preliminary Memorandum on 73-1892, Weinberger v. Wiesenfeld 3 (July 19, 1979) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 73-1892 Weinberger v. Wiesenfeld) (“Only a very narrow reading of *Kahn*, accepting the petr’s [sic] distinction, and an unnatural focus on the deceased wage earner rather than the actual beneficiary can save the appellee’s case. The case should be reversed in light of *Kahn*, probably summarily.”).

98. Bench Memorandum from Richard Blumenthal, law clerk, to Justice Harry A. Blackmun, Re: Weinberger v. Wiesenfeld, No. 73-1892, at 4 (Dec. 23, 1974) (on file with the Library of Congress in Harry A. Blackmun Papers, box 203, folder 6).

99. *Id.* at 6.

100. See Powell Conference Notes, *supra* note 96.

standard of review for sex-based classifications rendered the future of sex equality law uncertain. These mixed results placed constitutional law at a critical juncture at which, among other things, the relationship between race and sex discrimination's harms and remedies were in question. Ginsburg stepped into the breach, articulating a comprehensive theory of race- and sex-based harm and remediation in her 1975 article, *Gender and the Constitution*.<sup>101</sup> Ginsburg's synthesis of developments in constitutional sex equality law concluded with a section entitled *Realizing the Equality Principle*, in which she laid out her vision of appropriate remediation.<sup>102</sup>

Ginsburg began by noting that “[a]s in the case of discrimination against racial and ethnic minorities, the ultimate goal with respect to sex-based discrimination should be a system of genuine neutrality.”<sup>103</sup> But, she wrote, altering “deeply entrenched discriminatory patterns ... entails recognition that generators of race and sex discrimination are often different. Neither ghettoized minorities nor women are well served by lumping their problems in the economic sector together for all purposes.”<sup>104</sup> For one thing, Ginsburg noted, nonminority women did not suffer the same economic isolation as racial minorities, so that in the realm of education, remedies for sex discrimination might take the form of “altering recruitment patterns and eliminating institutional practices that limit or discourage female participation,” rather than giving special consideration to women in admission to colleges and universities.<sup>105</sup> At the same time, there were important similarities between race and sex discrimination in the context of employment, such that affirmative action in training, hiring, and promotion—including numerical remedies—was appropriate for women as well as people of color.<sup>106</sup>

But the race-sex parallel went only so far, even in the employment context. Ginsburg identified “[c]ustomary responsibility for household management” as “the most stubborn obstacle to equal

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101. Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975).

102. *See id.* at 27-40.

103. *Id.* at 28-29.

104. *Id.* at 29.

105. *Id.* at 30.

106. *Id.* at 32-33.

opportunity for women.”<sup>107</sup> She declared that “above all else, the home-work gap must be confronted.”<sup>108</sup> She wrote:

Care of young children, particularly, poses formidable psychological and logistical barriers for women who pursue and seek advancement in gainful employment. Solutions to the home-work problem are as easily stated as they are hard to realize: man must join woman at the center of family life, and government must step in to assist both of them during the years when they have small children.<sup>109</sup>

To that end, Ginsburg argued that not only must pregnancy discrimination be eradicated—under Title VII and/or the ERA, now that the Equal Protection Clause was unavailable—but that the government and employers should also provide job and income security for childbearing workers and quality child care options for working men and women of all income levels.<sup>110</sup> Only then, Ginsburg insisted, would true equal opportunity for women be realized.

Ginsburg’s calls for universal child care and for job security for pregnant workers were nothing new, of course.<sup>111</sup> But importantly, she articulated such policies as necessary to an effective affirmative action agenda—one that built upon remedies developed in the race context, but recognized the unique dimensions of sex inequality. Race and sex discrimination were not identical, she acknowledged, but their differences should inspire more expansive and creative solutions rather than hampering the recognition and remediation of harm.

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107. *Id.* at 34.

108. *Id.* at 28.

109. *Id.* at 34 (footnote omitted).

110. *Id.* at 38.

111. For more on feminist efforts to obtain universal child care, see Deborah Dinner, *Transforming Family and State: Women’s Vision for Universal Child Care, 1966-1971* (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=582001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=582001).

*B. "I Could Not Have Done Better": The Promise of Reverse Analogy*

So long as the status of "benign" sex discrimination was unsettled, Ginsburg remained wary of the race-sex analogy's impact on both sex and race equality jurisprudence. But the Court's synthesis of its sex equality decisions in the 1977 case *Califano v. Webster*<sup>112</sup> renewed the analogy's appeal by providing a coherent—if somewhat cryptic—articulation of the difference between classifications based on invidious stereotypes and genuine remedial measures. This time, though, the analogy's promise ran in reverse: race-based affirmative action policies, now under fire in an increasingly conservative political climate, stood to reap benefits from a parallel with sex classifications.

Before *Webster* acknowledged a distinction between harmful stereotyping and helpful remediation, Ginsburg was inclined to avoid the question of "benign discrimination," or laws that disadvantaged men, in cases where she sought to overturn sex-based classifications that she believed to be relics of a discriminatory past. In *Craig v. Boren*, an uninspiring case about near-beer that reached the Supreme Court despite the WRP's best-laid plans, the Court established intermediate scrutiny as the standard of review for sex-based classifications.<sup>113</sup> This middle-tier level of review, requiring that sex-based distinctions be "substantially related" to "important governmental objectives,"<sup>114</sup> was a compromise between the remaining Justices from the *Frontiero* plurality—Brennan, Marshall, and White—who favored strict scrutiny, and those

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112. 430 U.S. 313 (1977).

113. 429 U.S. 190, 218 (1976). Powell clerk Christina Brooks Whitman expressed the views of many when she called *Craig* "a silly case on which to make sex discrimination law." Handwritten Notes of Christina Brooks Whitman, law clerk, on Preliminary Memorandum on 75-628 *Craig v. Boren* 1 (Jan. 9, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-628 *Craig v. Boren*); see also "Aid to Memory" Memorandum of Lewis F. Powell, Jr. (July 9, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-628 *Craig v. Boren*) ("This is the silly case from Oklahoma ...."); Bench Memorandum from Tyler Baker, law clerk, to Justice Lewis F. Powell, Jr. 1 (Aug. 16, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-628 *Craig v. Boren*) ("The fate of the nation does not hinge on the resolution of this case.").

114. *Craig*, 429 U.S. at 197.

Justices who remained wary of what they perceived to be a drastic and undemocratic step—Blackmun, Powell, and Potter Stewart.<sup>115</sup> Justice Brennan, perhaps sensing his colleagues' increasing concern that the Court had overstepped its role by applying heightened scrutiny to sex-based classifications, used *Craig* to consolidate what gains he could in a standard that stopped short of making sex a “suspect” classification, while still specifying that a mere rational basis no longer sufficed to justify sex-based legal distinctions.<sup>116</sup>

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115. *See id.* at 191; *see also id.* at 210 n.\* (Powell, J., concurring) (elaborating on the Court's “difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications”).

116. Justice Powell did not approve of such an explicitly articulated new test for sex classifications. Powell wrote a concurrence in *Craig* agreeing that the challenged statute lacked a rational basis but expressing concern about the intermediate scrutiny standard. *Id.* at 210-11 (Powell, J., concurring). Powell's clerk, Tyler Baker, expressed disappointment that “Justice Brennan did not write this opinion as narrowly as it deserved to be written.” Baker “suppose[d] [Brennan] was following the old adage that you make hay while the sun is shining.” Memorandum from Tyler Baker, law clerk, to Justice Lewis F. Powell, Jr. 2 (Nov. 2, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-628 *Craig v. Boren*). Chief Justice Burger was more chagrined, writing to Brennan, “I advised you when I asked you to take over assignment, that I *might* wind up joining you if the opinion was narrowly written. However, you read into *Reed v. Reed* what is not there.... As written, I cannot possibly join.” Letter from Chief Justice Warren E. Burger to Justice William J. Brennan, Jr. (Nov. 15, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-628 *Craig v. Boren*).

Justice Blackmun, on the other hand, had hoped the Court would settle on a “middle tier” level of scrutiny as early as 1974, in *Kahn v. Shevin*. *See* Harry A. Blackmun, No. 73-78—*Kahn v. Shevin* 2 (Feb. 18, 1974) (on file with the Library of Congress in Harry A. Blackmun Papers, box 185, folder 6) (“I am hoping that somewhere out of this session we can come up with a middle tier approach.”). In *Stanton v. Stanton*, 421 U.S. 7 (1975), Blackmun wrote an opinion for the Court striking down a state law requiring parents to support their sons until age twenty-one, but their daughters only until age eighteen, using a rational basis standard. When *Stanton* was under consideration, Blackmun's law clerk, David “Allan” Gates, declared his personal ambivalence about making sex a suspect classification, but nevertheless saw no rational basis for the challenged classification and recommended that it be invalidated. *See* Bench Memorandum from David Allan Gates, law clerk, to Justice Harry A. Blackmun, Re: *Stanton v. Stanton*, No. 73-1461, at 14-16 (Feb. 6, 1975) (on file with the Library of Congress in Harry A. Blackmun Papers, box 201, folder 1); *see also* Harry A. Blackmun, No. 73-1461—*Stanton v. Stanton* 4-5 (Feb. 10, 1975) (on file with the Library of Congress in Harry A. Blackmun Papers, box 201, folder 1) (“Allan properly suggests that the decision should be narrow .... If ... we go on to the merits, then I am inclined to agree that we have some kind of violation of equal protection here. I would not want to do this on a compelling state interest approach or a suspect classification concept but just because there is no rationality whatsoever in the distinction.”).

In the wake of *Craig*, Ginsburg hoped to lead the Justices further away from *Kahn*, and to continue the progress achieved in *Wiesenfeld*. *Califano v. Goldfarb*, a challenge to another Social Security provision that afforded survivors' benefits to all widows regardless of dependency, but only to widowers who had received at least one-half of their financial support from their wives, was next on the WRP's docket.<sup>117</sup> For the Court's crucial center, *Goldfarb* was a very close case: Justice Powell initially thought *Frontiero* and *Wiesenfeld* controlled the outcome, then had second thoughts and requested further analysis from his clerk,<sup>118</sup> who found himself in a "quandary."<sup>119</sup> Stewart, Blackmun, Powell, and Stevens all expressed concern in conference that the Court had "gone too far" in sex discrimination cases, "intrud[ing] on [the] legislative function," but they also recognized the power of these precedents.<sup>120</sup>

Meanwhile, although Ginsburg had been eager to discuss the differences between supposedly "benign" discrimination that actually harmed women and legitimate affirmative action measures when she had argued *Kahn* in the shadow of *DeFunis* three years earlier, by the time she stood before the Supreme Court to argue *Goldfarb* she hoped to dodge the issue altogether. "With preferential program issues in the wings (like the California *Bakke* case) I tried to avoid treading on that territory," Ginsburg explained a few

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117. 430 U.S. 199, 201 (1977).

118. "Aid to Memory" Memorandum of Lewis F. Powell, Jr. 4-5 (Aug. 2, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb) [hereinafter Powell "Aid to Memory" Memorandum] ("At the time we noted this case, I thought it rather clear that this gender-based classification was invalid under *Wiesenfeld* and *Frontiero*. Having now scanned the briefs, and reflected further on the issue, I am no longer confident that my initial view is correct.... I would like for my clerk to present *both* sides of this issue as strongly as possible in light of our prior decisions.").

119. Memorandum from Tyler Baker, law clerk, to Justice Lewis F. Powell, Jr. 14 (Aug. 12, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb) ("I think that this case presents a real quandry [sic].").

120. Conference Notes of Lewis F. Powell, Jr. (Oct. 8, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb); Docket Sheet, No. 75-699—Mathews v. Goldfarb (on file with the Library of Congress in William J. Brennan, Jr. Papers, box I: 401, folder 7); see also Harry A. Blackmun, No. 75-699—Mathews v. Goldfarb (Sept. 27, 1976) (on file with the Library of Congress in Harry A. Blackmun Papers, box 241, folder 5) ("My basic philosophy in this general area is to leave this kind of thing to Congress.").

days after the oral argument.<sup>121</sup> But Justice Stevens had been bound and determined to ask her whether laws discriminating against men without harming women should be judged by the same standard as those that disadvantaged women directly; indeed, he rephrased the question at least twice before Ginsburg replied noncommittally that she would “withhold judgment” on the issue.<sup>122</sup> The *Goldfarb* oral argument further convinced Ginsburg that cases whose harmful consequences to women were ambiguous would only “jeopardiz[e] the forward movement we might generate in sex discrimination cases more clearly entailing an adverse impact on women.”<sup>123</sup> In *Goldfarb*, Brennan could only muster a four-Justice plurality for his opinion striking down the provision as discriminatory, with Stevens providing the fifth vote in a concurring opinion.<sup>124</sup> Though *Goldfarb* was an important victory, especially

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121. Letter from Ruth Bader Ginsburg to E. Richard Larson (Oct. 14, 1976) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 2, folder: Califano v. Goldfarb: Correspondence, 1976).

122. *She's Not Sure About Anti-male Prejudice*, MINNEAPOLIS STAR, Oct. 6, 1976, at 11A. Justice Powell noted that Ginsburg “simply ducked this” question. Oral Argument Notes of Lewis F. Powell, Jr. (Oct. 5, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb).

123. Letter from Ruth Bader Ginsburg to Jane Stevens, Legal Servs. for the Elderly Poor (Oct. 15, 1976) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 2, folder: Califano v. Goldfarb: Correspondence, 1976).

124. *Califano v. Goldfarb*, 430 U.S. 199, 200 (1977). Ginsburg was drawn to Stevens’s approach in his concurring opinion. See Letter from Ruth Bader Ginsburg to John H. Fleming, Sutherland, Asbill & Brennan (Aug. 15, 1977) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 2, folder: Califano v. Goldfarb: Correspondence, 1977-79) (“I liked Stevens’s approach in *Goldfarb*, his assessment of *Kahn*, and his condemnation of laws, whether they discriminate immediately against men or women, reflecting the legislators’ ‘traditional way of thinking about females.’”); see also Carol H. Falk, *Social Security Law on Widower Benefits is Ruled Discriminatory by High Court*, WALL ST. J., Mar. 3, 1977, at 2 (“In a way (Justice) Stevens understands the message I’ve been trying to get across better than anyone,’ Mrs. Ginsburg said.”).

The center Justices wavered during the Court’s deliberations. *Id.* Stevens, for instance, first voted to strike down the provision, then announced his intention to join the dissent, and finally concurred in the Court’s judgment. *Id.*; see Letter from Justice John Paul Stevens to Justice William J. Brennan, Jr. (Oct. 21, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb); Letter from Justice John Paul Stevens to Justice William H. Rehnquist [undated] (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb). Justice Stewart reserved judgment at conference, then indicated his admiration of Brennan’s opinion, then finally joined Rehnquist’s dissent. See Powell

given its significant price tag,<sup>125</sup> the Court had yet to issue a coherent account of how to reliably distinguish between harmful discrimination based on sex and legitimate affirmative action for women.

In *Califano v. Webster*,<sup>126</sup> decided three weeks after *Goldfarb* in March 1977, the Court finally attempted to make sense of what had become a tangled web of constitutional sex equality precedents. An appeal from a federal district court ruling on a pro se plaintiff's petition that was never briefed by the parties, *Webster* seemed an unlikely occasion for an important pronouncement.<sup>127</sup> As Brennan law clerk Jerry Lynch, a former student of Ginsburg's, put it in a letter to his professor two days after the ruling,

Somewhat oddly, the Court has seen fit to synthesize its cases on gender discrimination purportedly "beneficial" to women by

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Conference Notes, *supra* note 96; Letter from Justice Potter Stewart to Justice William J. Brennan, Jr. (Dec. 14, 1976) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb) ("I think your proposed opinion for the Court is a remarkably fine job, and that, given *Weinberger v. Wiesenfeld*, the result it reaches is close to unanswerable."); Letter from Justice Potter Stewart to Justice William H. Rehnquist (Jan. 4, 1977) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb) ("After considerable backing and filling, I have concluded that yours is the preferable conclusion in this case."). Meanwhile, Chief Justice Burger remained incredulous at Justice Powell's joining Brennan's plurality opinion. He wrote to Rehnquist, "I join your dissent. It should convince even the most ardent 'equal protector!'" Letter from Chief Justice Warren E. Burger to Justice William H. Rehnquist (Jan. 4, 1977) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb). At the bottom of this letter, he typed a note to Powell: "Lewis, How *can* you not agree with WHR!?" *Id.* These exchanges inspired Brennan to write a lengthy memo to his colleagues refuting Rehnquist's arguments. See Memorandum to the Conference from Justice William J. Brennan, Jr. (Jan. 6, 1977) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 75-699 Mathews v. Goldfarb).

125. The extension of benefits to widowers cost the government an estimated \$200 million annually. Lesley Oelsner, *Social Security Rules Upset Over Sex Bias*, N.Y. TIMES, Mar. 3, 1977, at 69.

126. 430 U.S. 313 (1977) (per curiam). Chief Justice Burger wrote a concurrence, joined by Justices Stewart, Blackmun, and Rehnquist, in which he expressed puzzlement at the different results in *Goldfarb* and *Webster*. *Id.* at 321 (Burger, C.J., concurring in the judgment); see also *infra* note 142.

127. Pro se plaintiff Will Webster had won a favorable ruling from Judge Thomas C. Platt of the Eastern District of New York, despite unfavorable decisions in similar challenges. *Webster v. Sec'y of Health, Educ. and Welfare*, 413 F. Supp. 127 (E.D.N.Y. 1976).

means of a summary reversal.... [T]he job was done without benefit of briefing, and I suspect that to the extent the Court really believes what the opinion says, it may be of considerable importance.<sup>128</sup>

Lynch himself had drafted the *Webster* per curiam opinion,<sup>129</sup> as well as the Brennan plurality opinion in *Goldfarb*,<sup>130</sup> and he described his delicate balancing act in *Webster* as an “attempt[] to confine legitimate ‘benign’ discrimination pretty narrowly, throwing in a plug for absolute equality ... and yet preserving the possibility that truly compensatory programs can be clearly identified.”<sup>131</sup> The opinion distinguished cases like *Kahn*, *Ballard*, and *Webster*, in which the challenged law served the “permissible” goal of “redressing our society’s longstanding disparate treatment of women,” from instances like *Frontiero*, *Goldfarb*, and *Wiesenfeld*, in which “the classifications in fact penalized women wage earners.”<sup>132</sup> The legislative history of the social security provision challenged in *Webster*, under which a female wage earner could exclude from the computation of her average monthly wage three more lower-earning years than a male wage earner for the purposes of calculating benefits, made “clear that the differing treatment of men and women ... was not ‘the accidental byproduct of a traditional way of thinking about females,’ but rather was deliberately enacted to compensate for the particular economic disabilities suffered by women.”<sup>133</sup> Ginsburg praised her student’s “fine” work.<sup>134</sup> “Had I been assigned the task, I could not have done better,” she

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128. Letter from Jerry Lynch, law clerk to Justice William J. Brennan, Jr., to Ruth Bader Ginsburg (Mar. 23, 1977) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 2, folder: Califano v. Goldfarb: Correspondence, 1977-79) [hereinafter Lynch-Ginsburg Letter].

129. See Jerry Lynch, Draft 4, No. 76-457 Califano v. Webster [undated] (on file with the Library of Congress in William J. Brennan, Jr. Papers, box I:425, folder 6).

130. He wrote to Ginsburg, “Dave Barrett tells me you said you felt like kissing Justice Brennan when you heard about *Goldfarb*. If so, you should save at least a handshake for the draftsman.” Lynch-Ginsburg Letter, *supra* note 128, at 1.

131. *Id.*

132. *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam).

133. *Id.* at 320 (citation omitted).

134. Letter from Ruth Bader Ginsburg to Jerry Lynch, law clerk to Justice William J. Brennan, Jr. (Mar. 28, 1977) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 2, folder: Califano v. Goldfarb: Correspondence, 1977-79).

declared,<sup>135</sup> and indeed, as she later noted, the *Webster* synthesis bore a strong resemblance to the ACLU's presentation in *Goldfarb*.<sup>136</sup>

The *Webster* per curiam emphasized that “[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as ... an important governmental objective.”<sup>137</sup> In cases where the “classifications in fact penalized women wage-earners or when the statutory structure and its legislative history revealed that the classification was not enacted as compensation for past discrimination,” the Court explained, invalidation was appropriate.<sup>138</sup> But the statute challenged in *Webster*, the Court insisted, “operated directly to compensate women for past economic discrimination.”<sup>139</sup> Quoting *Kahn*, the opinion noted that

[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable

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135. *Id.*

136. Ruth Bader Ginsburg, Chapel Hill Address 2 (Sept. 22, 1978) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 14, folder: Speech File, Sept. 22, 1978). Justice Powell called the ACLU's brief in *Goldfarb* “elaborate and sophisticated.” Powell “Aid to Memory” Memorandum, *supra* note 118, at 4.

The four Justices who dissented in *Goldfarb* wrote separately to indicate their belief that the result in *Webster*, with which they agreed, was inconsistent with the result in *Goldfarb*. *Califano v. Goldfarb*, 430 U.S. 199, 224 (1977) (Rehnquist, J., dissenting). Initially, two of these four, Stewart and Blackmun, signed on to Brennan's per curiam opinion in *Webster*. See Letter from Justice Potter Stewart to Justice William J. Brennan, Jr. (Mar. 10, 1977) (on file with the Library of Congress in William J. Brennan, Jr. Papers, box I:425, folder 6); Letter from Justice Harry A. Blackmun to Justice William J. Brennan, Jr., Re: *Califano v. Webster* [hereinafter Blackmun-Brennan I] (Mar. 14, 1977) (on file with the Library of Congress in William J. Brennan, Jr. Papers, box I:425, folder 6). After Chief Justice Burger circulated a concurrence charging that *Webster*, though correct, was inconsistent with *Goldfarb*, both Blackmun and Stewart abandoned the per curiam opinion. See Letter from Justice Harry A. Blackmun to Justice William J. Brennan, Jr., Re: *Califano v. Webster* [hereinafter Blackmun-Brennan II] (Mar. 14, 1977) (on file with the Library of Congress in William J. Brennan, Jr. Papers, box I:425, folder 6) (“The Chief's circulation reached me after I had sent my joinder to you earlier today. Inasmuch as he has written, and inasmuch as I joined Bill Rehnquist in his *Goldfarb* dissent, I shall now join the Chief in the *Webster* case. This means that I am not joining the proposed per curiam.”); Letter from Justice Potter Stewart to Justice William J. Brennan, Jr. (Mar. 16, 1977) (on file with the Library of Congress in William J. Brennan, Jr. Papers, box I:425, folder 6) (withdrawing from per curiam).

137. 430 U.S. at 317.

138. *Id.* (citations omitted).

139. *Id.* at 318.

table to the woman seeking any but the lowest paid jobs. Thus, allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some part of the effect of past discrimination.<sup>140</sup>

Not only did the statute operate in this compensatory fashion, Justice Brennan's per curiam stressed, but Congress had deliberately enacted the differential in order to remedy sex-based wage disparities.<sup>141</sup> That purpose, as well as the rule's unambiguously positive impact on wage-earning women, distinguished the classification from the provision challenged in *Goldfarb*, according to Brennan's reasoning. The *Goldfarb* dissenters, not entirely persuaded by this rationale, nevertheless concurred in the judgment with a brief opinion noting their doubts about the practicability of the *Goldfarb/ Webster* distinction.<sup>142</sup>

Despite its relative obscurity, *Webster* had potentially significant implications that went far beyond Social Security benefit schemes.<sup>143</sup> Ginsburg believed that the Court's reasoning could

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140. *Id.*

141. *Id.* at 319-20. Justice Brennan's emphasis on the intent behind the challenged classification was consistent with his general approach of inquiring into the actual purpose behind challenged legislation. See also *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). For a contemporaneous critique of this approach, see *Supreme Court, 1976 Term*, 91 HARV. L. REV. 177, 181-82 (1977).

142. *Webster*, 430 U.S. at 321 (Burger, C.J., concurring in the judgment) ("While I am happy to concur in the Court's judgment, I find it somewhat difficult to distinguish the Social Security provision upheld here from that struck down so recently in *Califano v. Goldfarb* .... Although the distinction drawn by the Court between this case and *Goldfarb* is not totally lacking in substance, I question whether certainty in the law is promoted by hinging the validity of important statutory schemes on whether five Justices view them to be more akin to the 'offensive' provisions struck down in [*Wiesenfeld* and *Frontiero*], or more like the 'benign' provisions upheld in [*Ballard* and *Kahn*]."). Chief Justice Burger was joined by Justices Stewart, Blackmun, and Rehnquist. See also *supra* notes 126-36 and accompanying text.

143. *Goldfarb* and *Webster* were hardly high-profile cases, but they did receive coverage in the national press. Though their association with the dry topic of Social Security did not make for great copy, the fiscal ramifications of extending benefits to a large new class of recipients were potentially significant. For contemporaneous press coverage of *Webster*, see Philip Hager, *Supreme Court Grants Husbands Equality With Wives on Social Security Benefits*, L.A. TIMES, Mar. 22, 1977, at 5 (covering *Goldfarb* and *Webster*); Lesley Oelsner, *Sex Discrepancy in Old-age Funds Is Unanimously Upheld by Justices*, N.Y. TIMES, Mar. 22, 1977, at 28 (covering *Webster*); *Social Security Ruling Is Voided by High Court*, WALL ST. J.,

provide an excellent model for a case consuming much greater public attention: *Regents of the University of California v. Bakke*.<sup>144</sup> She seized every opportunity in the months following the *Webster* ruling to draw parallels between the two cases and to elaborate on her earlier analysis in *Gender and the Constitution*.<sup>145</sup> *Webster*, Ginsburg repeatedly contended, could “serve as a framework for the Court’s decision of the equal protection challenge by a white male to a state medical school’s special minority admission program. The program assailed in *Bakke* ... surely does not coincide with historic role-typing nourished by race-based animus.”<sup>146</sup> Instead, she argued, the Court’s characterization of the *Webster* statute was equally applicable to the U.C. Davis admissions program: “[T]he only discernible purpose’ of the program [was] to redress ‘society’s longstanding disparate treatment’ of [racial minorities]. And in operation, the special admissions arrangement serves ‘directly to remedy some part of the effect of past discrimination,’” as the Court put it in the gender case.<sup>147</sup> In law review articles, speeches, and letters to the editor, Ginsburg reiterated the suggestion that *Webster* was an excellent theoretical template for *Bakke*, as it “attempt[ed] to preserve and bolster a general rule of equal treatment while leaving a corridor open for genuinely compensatory classifications,” and clarified “[t]he line between impermissible adverse discrimination and permissible rectification.”<sup>148</sup>

The *Webster/Bakke* parallel had other attractions as well. In addition to providing a handy conceptual framework, the *Webster* paradigm shifted the focus of inquiry toward whether the U.C. Davis affirmative action program stigmatized racial minorities, and away from the burden imposed upon white applicants. In the gender cases, the Court showed little concern for the effects of

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Mar. 22, 1977, at 4 (covering *Webster* and noting that the decision saved the federal government \$13 billion).

144. 438 U.S. 265 (1978).

145. See Ginsburg, *supra* note 101.

146. Ruth Bader Ginsburg, *Women, Equality, & the Bakke Case*, C.L. REV., Nov.-Dec. 1977, at 8, 14.

147. *Id.* Almost identical text appeared in Ruth Bader Ginsburg, *Gender and the Supreme Court: The 1976 Term*, in CONSTITUTIONAL GOVERNMENT IN AMERICA (Ronald K.L. Colins ed., 1980); see also Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN’S RTS. L. REP. 143, 146 (1978); Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 824 (1978).

148. Ruth Bader Ginsburg, Letter to the Editor, NEW REPUBLIC, Apr. 30, 1977, at 9.

“benign” discrimination on men; rather, the inquiry focused on whether women were helped or harmed by the preferential treatment, and on whether the challenged laws supported a male breadwinner/female homemaker model that assumed or perpetuated women’s economic dependency and inferiority. Transported to the racial context, the idea that the hazard of affirmative action programs was not so much their impact on the white majority as their effect upon their intended beneficiaries’ opportunities to transcend traditional, oppressive roles made such policies seem more constitutionally palatable. *Webster* also stressed that the impetus for the challenged law should be the result of a deliberate effort to advance the status of women, rather than an “accidental byproduct” of outdated stereotypes. Since race-based affirmative action programs tended to be the result of recent, considered, and well-intentioned efforts at remediation rather than of a reliance on “tradition,” *Webster*’s focus on the process and purpose of enactment seemed to bolster the legitimacy of such policies.

Moreover, the ruling in *Webster* suggested that generalized societal discrimination was an adequate justification for sex-conscious remedies, a proposition that was very controversial in the debate over race-conscious programs. This ability to respond to societal discrimination at the most general level was highly relevant to cases like *Bakke*, where the challenged affirmative action program was justified not by a recent history of overt discrimination or segregation by the University of California itself, but rather by the more diffuse effects of generalized social, educational, and professional disadvantage. Ironically, the Justices seemed willing, in the case of women, to let this background assumption of discrimination and disadvantage go virtually unquestioned. Indeed, in the sex discrimination context, it was the conservative Justices who were more, not less, inclined to acknowledge women’s comparative disadvantage. After years of being told that their complaints about sex discrimination paled in comparison to the grievances of victims of racial oppression, feminists now confronted a constitutional climate friendlier in some sense to the anti-subordination claims of women than to those of racial minorities.

Finally, for feminists, the race-sex analogy continued to hold potential dividends for constitutional sex equality jurisprudence;

reasoning from sex to extend intermediate scrutiny to race-based affirmative action could imply a reciprocal borrowing of strict scrutiny for invidious classifications based on sex as well as race. The potential convergence of race and sex equality doctrine, problematic in the period before *Webster*, now appeared promising to feminists on multiple fronts. Feminists were not alone in seeing the *Webster* ruling as an opportunity. The analytic and strategic advantages of modeling the *Bakke* decision on the Court's opinion in *Webster* were compelling enough that the argument found its way into several of the voluminous briefs filed in the case. Amici, including the federal government, used the gender cases to argue for the applicability of intermediate, rather than strict, scrutiny to race-based affirmative action programs.<sup>149</sup> And one friend of the court presciently identified what Justice Stevens would, almost two decades later, label an "anomalous result": if the Court applied strict scrutiny to race-based affirmative action, it would erect a higher barrier to remedial programs for racial minorities than that which blocked either invidious discrimination against, or compensatory programs for, women.<sup>150</sup>

The United States's submission offered the lengthiest discussion of *Webster* and the other gender cases.<sup>151</sup> The government's brief, the subject of much-publicized dissension within the Carter Administration, took a middle-ground position on the U.C. Davis admissions program that combined opposition to outright quotas with an endorsement of some race consciousness in the consideration of applications.<sup>152</sup> The United States used *Webster* to demon-

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149. See Brief for the Bar Ass'n of San Francisco and the Los Angeles County Bar Ass'n as Amici Curiae Supporting Petitioner at 549-50, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188000; Brief for Petitioner at 77, *Bakke*, 438 U.S. 265 (No. 76-811) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 630, 648 (1975)), 1977 WL 187977; Brief for the State of Washington and the University of Washington as Amicus Curiae at 23, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189504.

150. Brief for the Bar Ass'n of San Francisco, *supra* note 149, at 45-46.

151. For other amicus discussions of the gender cases, see, for example, Brief for the Ass'n of American Law Schools as Amicus Curiae Supporting Petitioner at 64-65, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187968; Brief for Columbia University et al. as Amici Curiae 29, *Bakke*, 438 U.S. 265 (No. 76-811), 1976 WL 181278; Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae at 19, *Bakke*, 438 U.S. 265 (No. 76-811), 1976 WL 178777; Brief for the Society of American Law Teachers as Amicus Curiae at 51 n.17, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189496. The majority of the many briefs submitted to the Supreme Court in the *Bakke* case discussed only race, and did not mention gender.

152. Brief for the United States as Amicus Curiae at 38-40, *Bakke*, 438 U.S. 265 (No. 76-

strate the Court's willingness to accept remedial programs designed to overcome generalized discrimination: "[N]o institution is limited to rectifying only its own discrimination," the brief contended.<sup>153</sup> "If it were, the consequences of discrimination that spilled over from the discriminator to society at large would be irreparable ...."<sup>154</sup> The *Webster* per curiam, the United States's brief noted, established that "compensation from public funds for essentially private discrimination was constitutional. The same principle applies here."<sup>155</sup> In *Webster*, the Court deemed it reasonable to give a benefit to all women on the basis of past group disadvantage, even though some argued that targeting lower-earning individuals or only those individuals who could prove past discrimination was constitutionally preferable.<sup>156</sup> "So it is with minority applicants to professional schools," argued the government.<sup>157</sup> *Webster*, and sex equality doctrine generally, proved useful to an administration seeking middle ground in part because these cases suggested a limiting principle. The constitutional sex discrimination cases demonstrated that it was possible to embrace the possibility of remedial classifications in some circumstances without discounting the potentially harmful consequences of group-based treatment in others. The emerging sex equality doctrine acknowledged and even highlighted the difficulties of line-drawing, but ultimately did not despair of distinguishing between beneficial and detrimental classifications.

The principles advanced in *Webster* were neither new nor unique, of course, but rather were deeply rooted in the advocacy, scholarship, and jurisprudence of anti-racism, as well as in the evolving doctrine of sex equality. Indeed, concerns about stigmatizing or stereotyping beneficiaries of "benign" preferences, and about "purportedly preferential race assignment[s]" that "may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries" inflected Justice Brennan's concurrence in a voting rights case decided three weeks before

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811), 1977 WL 187970.

153. *Id.* at 39.

154. *Id.*

155. *Id.* at 39-40 (citation omitted).

156. *Califano v. Webster*, 430 U.S. 313 (1977); see also Brief for the United States as Amicus Curiae, *supra* note 152, at 64.

157. Brief for the United States as Amicus Curiae, *supra* note 152, at 65.

*Webster, United Jewish Organizations v. Carey*.<sup>158</sup> More generally, in the mid-1970s commentators were developing more sophisticated theories that incorporated anti-subordination and anti-caste principles into equal protection analysis. Perhaps most famously, Yale Law Professor Owen Fiss argued in 1976 that instead of pursuing a formal antidiscrimination principle focused on means-ends rationality and individual harm, courts conducting an equal protection inquiry should ask whether the challenged law or policy inflicted group-disadvantaging status harm.<sup>159</sup>

What was unusual about the *Webster/Bakke* moment was the potential for a convergence of race and sex equality doctrine that acknowledged the reciprocal nature of the relationship between these two often parallel, sometimes divergent, bodies of law. In the past, commentators attempting to justify “preferential treatment” or affirmative action based on race had largely ignored the ongoing debates over the meaning of sex discrimination, at least as a source of potentially fruitful parallels to race.<sup>160</sup> To the extent that they did mention sex or gender, it was usually in passing, as an after-thought, or occasionally as an example of inherently benign discrimination that potentially validated a distinction between invidious and harmless classification.<sup>161</sup> For feminists, moreover,

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158. 430 U.S. 144, 173-74 (1977) (Brennan, J., concurring in part).

159. Owen M. Fiss, *Groups and the Equal Protection Clause*, PHIL. & PUB. AFF., Winter 1976, at 107.

160. Indeed, some of the more influential defenses of “reverse racial discrimination” seemed potentially inapplicable to, or at least weaker in, the context of “reverse sex discrimination,” given women’s numerosity in the population and the difficulty of characterizing women as a “discrete and insular minority.” John Hart Ely’s theory justifying “benign” racial classifications relied upon a process-oriented conception of fairness, suggesting that the imposition of disadvantage on the white majority by the white majority deserved little judicial scrutiny. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

Not all defenses of race-based affirmative action were silent or cryptic on the topic of sex-based policies. One notable exception in the law review literature was law and philosophy professor Richard Wasserstrom’s 1977 article, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581 (1977). But Wasserstrom’s article, like most of the work on this topic in other disciplines, did not discuss constitutional doctrine or case law.

161. In his critical assessment of arguments for and against “preferential treatment” based on race, John Kaplan argued that group treatment might in some cases be justified despite differences between individuals within the group. He drew on the example of “laws requiring shorter hours for women than for men,” which, he suggested, were “not based on the supposition that all women are frailer and less healthy than all men.” John Kaplan,

prior to *Webster*, the reverse parallel was self-defeating. Before the Court had acknowledged that some supposedly “benign” classifications might in fact be constitutionally problematic, women’s rights advocates saw sex equality doctrine as deeply misguided, hardly a promising source of universal equal protection principles.<sup>162</sup> The willingness of the Court, in *Webster*, to acknowledge a distinction between “genuine affirmative action” and laws that disadvantaged women and perpetuated their subordinate status assuaged feminists’ concerns that any talk of constitutionally “benign” discrimination would ultimately redound to women’s detriment.

C. “A Lengthy and Tragic History that Gender-based Classifications Do Not Share”: Reformulation Rejected

Justice Powell’s opinion in *Bakke* explicitly rejected the sex-race parallel advanced by affirmative action proponents and applied strict scrutiny to the U.C. Davis admissions policy. Although his remarks on the relationship between race and sex classifications attracted little attention outside legal feminist circles, they marked a turning point in constitutional equality jurisprudence and in the affirmative action debate more generally. After Powell declined to apply the *Webster* synthesis to race-based affirmative action, the respective jurisprudences of sex and race equality once again set off on divergent, though certainly not independent, paths. The doctrinal analogy between race and sex was alive and well, but mostly functioned to circumscribe the recognition and remediation of inequality. Meanwhile, the issues of gender and work-family conflict that motivated Ginsburg’s mid-1970s reformulation of the race-sex analogy never surfaced in the Supreme Court’s affirmative action jurisprudence.

The *Bakke* case produced more amicus briefs than any Supreme Court case to date.<sup>163</sup> After sifting through the submissions, Bob Comfort, Justice Powell’s clerk, wrote a seventy-page memo to his

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*Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U. L. REV. 363, 365 (1966).

162. See, for example, the discussion of *Kahn* and *DeFunis*, *supra* Part I.B.

163. The secondary literature on the *Bakke* case is similarly enormous. For book-length studies of the case, see generally HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* (2000); BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* (1988).

boss summarizing and analyzing their content. “[T]he main battle of the campaign,” he concluded, was the fight over which standard of scrutiny to apply to U.C. Davis Medical School’s admissions policy.<sup>164</sup> Under strict scrutiny, the case was close; if an intermediate standard of review applied, requiring an “important,” rather than a “compelling,” governmental interest, and a “substantial” relationship rather than a “narrowly tailored” fit between means and ends, then the policy was rather easily justifiable.<sup>165</sup> Comfort’s memo included an assessment of the “sex cases” and their applicability to the *Bakke* controversy.<sup>166</sup> The line of precedents culminating in *Webster* “cut both ways,” Comfort argued: “They do indicate, as Petitioner suggests, that discrimination in favor of disadvantaged groups is not necessarily subject to strict scrutiny. But they also undercut Petitioner’s argument that the only beneficiaries of equal protection analysis ... are minorities” who, by definition, suffer a numerical disadvantage politically.<sup>167</sup> The notion that a majority might suffer disadvantage in the political arena despite its numerosity, Comfort reasoned, “is precisely what Bakke and his allies would argue” in order to establish the possibility for whites to suffer unconstitutional reverse discrimination.<sup>168</sup>

Comfort recognized, however, the need to respond to the argument that “so-called ‘benign’ discrimination need not be strictly scrutinized.”<sup>169</sup> The question then became “whether there are differences between racial classifications and sexual classifications, which would support the application of different levels of scrutiny.”<sup>170</sup> Powell’s clerk identified what he considered to be a crucial distinction: “With respect to sex, there are only two categories to be compared, men and women.... Therefore, the class-wide questions of who has been hurt and who will be burdened are

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164. Bench Memorandum from Bob Comfort, law clerk, to Justice Lewis F. Powell, Jr. 16 (Aug. 29, 1977) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives).

165. *See id.*

166. *Id.* at 35-36.

167. *Id.* at 35.

168. *Id.* at 36. Comfort continued: “And once it is conceded, Petitioner is cast adrift from any neutral principle of majoritarian process and is left to argue about whose ox has been gored how often and for how long.” *Id.*

169. *Id.*

170. *Id.*

simple.”<sup>171</sup> But, “[w]ith respect to race and ethnicity, the opposite is true. The prejudice faced by every distinct racial and ethnic group entering this country makes each a potential candidate for compensatory legislation.”<sup>172</sup> Further, Comfort argued, “[i]n a melting pot country, race and ethnicity have a peculiar capacity to inflame which other distinctions lack.”<sup>173</sup> In the margin of his clerk’s memo, Powell wrote, “Good answer to possible reliance on ‘sex’ classifications not being subjected to strict scrutiny.”<sup>174</sup>

Meanwhile, Justice Brennan’s chambers was busy drafting what Brennan hoped would be the opinion for the Court in *Bakke*. Brennan’s drafts relied heavily on an analogy to the sex discrimination cases to promote the idea that benign distinctions were subject to heightened scrutiny because of their potential to stigmatize women and minorities, and to foster racial division; *Craig*-style intermediate scrutiny would guard against such abuses.<sup>175</sup> In a memorandum to his colleagues, Brennan emphasized that the concern “predominant in our sex discrimination cases,” as well as in *Brown v. Board of Education*, was “stigma, insult, badge of inferiority,” as epitomized in precedents that condemned “‘old notions’ that demean[ed] women by denying them any place in the ‘world of ideas’ and [the Court’s] rejection of ‘traditional ways of thinking’ that assume all members of the female sex to be dependents.”<sup>176</sup> That element of stigma, Brennan argued, was “missing from this case.”<sup>177</sup> Brennan’s conception of “the proper judicial role” in cases like *Bakke* was to “assure ... that the decision maker relying on race intends no insult or slur to whites—that the reliance [on race] is in fact a benign attempt to remedy discrimination in our society.”<sup>178</sup> *Webster*, Brennan concluded, “settled the propriety of this when Congress deliberately legislated an advantage for women

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171. *Id.*

172. *Id.*

173. *Id.* at 37.

174. *Id.* at 36.

175. See William J. Brennan, Jr., First Working Draft of *Bakke* 16-23 (June 9, 1978) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 76-811 *Regents v. Bakke*).

176. Letter from Justice William J. Brennan, Jr. to the Conference 6 (Nov. 23, 1977) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 76-811 *Regents v. Bakke*) (citation omitted).

177. *Id.*

178. *Id.* at 13.

to redress past societal discrimination. I should think the propriety of the approach follows *a fortiori* in the case of reliance on race to address past racial discrimination.”<sup>179</sup>

But Justice Powell had never accepted a full-blown parallel between race and sex, and he was loath to do so now.<sup>180</sup> Apart from his concerns in *Frontiero* about circumventing constitutional amendment processes, Powell had made clear in private communications about that case that he saw “no analogy between the type of ‘discrimination’ which the black race suffered and that now asserted with respect to women. The history, motivation and results—in almost all aspects of the problem—were totally different.”<sup>181</sup> Powell had seen the struggle over racial equality up close in his years on the Richmond, Virginia, school board in the 1950s, where his record was one of determined moderation on the segregation question and steadfast advocacy of higher educational standards.<sup>182</sup> Although he never came to see discrimination against women as fully comparable to that suffered by African Americans, his approach to sex discrimination issues while on the Court might be seen as loosely analogous to his position at the center of the spectrum on racial desegregation, and, for that matter, race-based affirmative action: cautious and deliberate, anxious to avoid bold steps, and solicitous of the middle way.<sup>183</sup>

Just as in *Frontiero*, in which Powell’s concurrence assured the invalidation of the challenged law but prevented feminists from securing majority approval of a constitutional race analogy, Powell’s was again the deciding vote in *Bakke*. Five Justices—

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179. *Id.* at 14.

180. Though he joined Brennan’s opinion, Justice White wrote privately, “I am frank to say that I don’t see much help in the gender classification cases, but if they don’t rub someone else the wrong way, I don’t object.” Letter from Justice Byron R. White to Justice William J. Brennan, Jr., Re: 76-811—Regents of the University of California v. Bakke (June 13, 1978) (on file with the Library of Congress in William J. Brennan, Jr. Papers, box I:442, folder 3). Blackmun, on the other hand, expressed to his colleagues “doubt that the sex classification cases are so easily brushed aside [by Powell] just because they are ‘relatively manageable’ and less complex.” Memorandum from Justice Harry A. Blackmun to the Conference, Re: No. 76-811—Regents of the University of California v. Bakke 10 (May 1, 1978) (on file with the Library of Congress in Harry A. Blackmun Papers, box 260, folder 9).

181. Letter from Justice Lewis F. Powell, Jr. to Justice William J. Brennan, Jr. 2 (Mar. 1, 1973) (on file with the Washington and Lee University School of Law in Lewis F. Powell, Jr. Papers, Supreme Court Case Files, Powell Archives, 71-1694 *Frontiero v. Laird*).

182. See JEFFRIES, *supra* note 89, at 160-68.

183. See *id.* at 169-72.

Powell, Brennan, Marshall, White, and Blackmun—agreed that U.C. Davis could take race into account in making admissions decisions; four Justices—Stevens, Rehnquist, Chief Justice Burger, and Stewart—concluded that the university’s policy violated Title VII of the Civil Rights Act; Justice Powell found the program constitutionally invalid.<sup>184</sup> Because Powell was the only Justice to concur in both elements of the Court’s holding—the constitutionality of taking race into account and the invalidity of U.C. Davis’s particular vehicle for doing so—his was the opinion for the Court.<sup>185</sup>

When the Court decided *Bakke* in this splintered ruling, many heralded the decision as a Solomonic balancing act that preserved affirmative action while invalidating the type of remedy that most troubled its critics—the quota.<sup>186</sup> Whatever observers believed about the gist of the Court’s decision, however, few found Powell’s opinion for the Court particularly enlightening on the subject of gender and state-sponsored affirmative action. In the course of refuting the petitioner’s and amici’s analogies to school segregation, employment discrimination, and sex discrimination cases, Powell offered an oblique assessment of the differences between race and sex discrimination that lit no clear path for those seeking guidance on the status of sex-based affirmative action.<sup>187</sup>

Powell addressed the subject of sex discrimination in the course of rejecting the University’s contention that the intermediate scrutiny standard applicable in gender cases should apply to race-based affirmative action.<sup>188</sup> Gender-based classifications were different from racial categorization in two salient ways, he argued, drawing both on Bob Comfort’s bench memo and on his own long-held views about the relationship between race and sex discrimination. First, sex-based distinctions were “less likely to create the analytical and practical problems present in preferential programs

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

185. *Id.* at 266-68.

186. See, e.g., Anthony Lewis, *A Solomonic Decision*, N.Y. TIMES, June 29, 1978, at A25. For more views, see Edward Fiske, *Educators Welcome Bakke Ruling as Signal To Retain Current Policy*, N.Y. TIMES, June 29, 1978, at A23; Paul Freund, Op-Ed., *Bakke: The Choices that Remain*, N.Y. TIMES, July 9, 1978, at E17; John Herbers, *Minority Leaders, After Review, Regard Bakke Ruling as Setback*, N.Y. TIMES, July 9, 1978, at A14; Tom Wicker, Op-Ed., *Not So Bad? Or Too Bad?*, N.Y. TIMES, July 2, 1978, at E15.

187. *Bakke*, 438 U.S. at 300-03.

188. *Id.* at 302.

premised on racial or ethnic criteria,” because “[w]ith respect to gender there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear.”<sup>189</sup> In contrast to the race context,<sup>190</sup> there were “no rival groups which can claim that they, too, are entitled to preferential treatment.”<sup>191</sup> But “[m]ore importantly,” wrote Powell, “the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum,” he concluded, “the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.”<sup>192</sup>

Like his earlier drafts, Brennan’s opinion on behalf of himself, White, Marshall, and Blackmun accepted many elements of the petitioner’s analogy to the Court’s sex discrimination jurisprudence.<sup>193</sup> The opinion considered the gender cases a useful parallel in evaluating the potential hazards of race-based affirmative action.<sup>194</sup> And, like the petitioners and their amici, Brennan and his colleagues emphasized the dangers that remedial measures posed to beneficiaries, rather than focusing on the burdens imposed on other individuals.<sup>195</sup> Moreover, the Brennan opinion also adopted the argument articulated in *Webster* and *Kahn*, as well as in race cases like *UJO v. Carey*, that remedial programs’ constitutional legitimacy did not depend upon a specific finding that the institution granting the preference was guilty of past illegal discrimination.<sup>196</sup> Justice Marshall’s separate opinion also cited *Webster* as “recogniz[ing] the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.”<sup>197</sup> Because only four Justices endorsed these positions, however, observers were left to puzzle over Powell’s more cryptic sentiments.

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189. *Id.* at 302-03.

190. *Id.* at 303 (“The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications.”).

191. *Id.*

192. *Id.*

193. *Id.* at 324 (Brennan, J., concurring in part).

194. *Id.* at 360.

195. *Id.*

196. *Id.* at 365.

197. *Id.* at 399 (Marshall, J., concurring in part and dissenting in part).

And puzzle they did. Legal feminists challenged both elements of Powell's distinction between race- and sex-based affirmative action programs—his contention that the burdens and benefits of gender-based remedies were easier to discern, and his argument that sex classifications lacked the long and tragic history that might warrant stricter scrutiny. In a 1979 article, Nancy Gertner provided a searing refutation of the Justice's contention that the Court was more competent to evaluate the invidiousness or benignity of gender-based than race-based classifications.<sup>198</sup> In fact, Gertner argued, "courts have experienced difficulties in defining sex discrimination ... which they never experienced in defining race discrimination."<sup>199</sup> In reality, she posited, sex-based classifications posed not only the same "analytic difficulties" as racial distinctions, but also presented an additional set of complications.<sup>200</sup> Like race-based affirmative action programs, compensatory gender classifications could burden other protected groups—minority men, for instance.<sup>201</sup> "Definitional" difficulties were also complex in the sex discrimination context, in which differentiation based on physical distinctions or sex role differences might not be as easily identified as discriminatory.<sup>202</sup> Gertner also pointed to the "conceptual problem of distinguishing paternalistic classifications which stereotype women from 'benign,' affirmative action classifications."<sup>203</sup>

Legal feminists also refuted the contention that gender-based discrimination lacked a "lengthy and tragic history" worthy of redress.<sup>204</sup> Indeed, as Ginsburg emphasized in a panel discussion on *Bakke* at the American Bar Association's annual meeting in the summer of 1978, the Court itself had recognized such a history on several occasions.<sup>205</sup> Although Ginsburg acknowledged that the analogy between racial and gender inequality in the education

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198. Nancy Gertner, *Bakke on Affirmative Action for Women: Pedestal or Cage?*, 14 HARV. C.R.-C.L. L. REV. 173 (1979).

199. *Id.* at 173.

200. *Id.* at 179-80.

201. *Id.* at 180.

202. *Id.* at 179-80.

203. *Id.* at 180.

204. *Id.* at 189 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978)).

205. Ruth Bader Ginsburg, Panel Discussion at the ABA Annual Meeting: Affirmative Action: The Impact of the *Bakke* Decision 6 (Aug. 7, 1978) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 14, folder: Speech File, Aug. 7-30, 1978).

context was imperfect, she wished that Powell had “indicate[d] sharper perception of... [the] similarities, as well as the differences, in our society’s manifestations of race and sex discrimination.”<sup>206</sup> Though the “history of sex discrimination and women’s struggle for equality” was “a long and bitter one,”<sup>207</sup> Gertner contended that the “greatest tragedy of sex discrimination may well be its relative subtlety.”<sup>208</sup> She explained that “even today sex discrimination, and particularly sex stereotypes, are not recognized as discrimination.”<sup>209</sup> Indeed, Gertner argued that this problem of recognition militated in favor of greater, not lesser scrutiny for gender-based affirmative action.<sup>210</sup>

Powell’s treatment of gender in his *Bakke* opinion might be seen in retrospect as an important turning point in constitutional equality jurisprudence and in the affirmative action debate more generally. Though some commentators minimized its importance, stressing that Powell’s opinion only reflected the views of a single Justice,<sup>211</sup> the opinion helped to set the Court on a path toward the “anomalous” differential constitutional treatment of race and sex discrimination that survives to this day. In so doing, *Bakke* perpetuated a pattern of Court decision making that utilized race-sex parallels when feminists wanted to distinguish between race and sex inequality, yet eschewed analogies when they worked to advocates’ advantage.<sup>212</sup> By refusing to apply principles developed in sex equality cases to race-based affirmative action, Powell’s opinion rejected not merely the applicability to race cases of the less stringent standard of review developed in sex equality doctrine, but

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206. *Id.* at 6-7; see also Gertner, *supra* note 198, at 189.

207. Gertner, *supra* note 198, at 191.

208. *Id.* at 194.

209. *Id.* at 191.

210. *Id.* at 195-96 (“The arguments which Justice Powell uses to justify a less exacting standard of review for sex-based classifications seem rather to justify the opposite result.”); see also Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 428 (1997) (arguing that strict scrutiny is best viewed as a device for “smoking out” illegitimate intent).

211. See, e.g., John Hart Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 *HARV. L. REV.* 5, 9 & n.33 (1978) (“Immediate media coverage of *Bakke* gave inordinate attention to Powell’s opinion ....”); Laurence H. Tribe, Comment, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 *HARV. L. REV.* 864, 865 (1979) (“It would be foolhardy to attempt to derive too much meaning from *Bakke*’s message in the area of equal protection ....”).

212. The Court’s decision in *Personnel Administrator v. Feeney* is an example of this trend, which I explore elsewhere. See MAYERI, REASONING FROM RACE, *supra* note 2.

also sidelined a more capacious conceptualization of discrimination's meaning, effects, and remediation. Moreover, it helped set the stage for the doctrinal divergence between constitutional race and sex equality law, and for a disjuncture between an affirmative action debate focused on race-based policies, and issues of work/family balance and gender role reformation that feminists saw as crucial to women's present economic disadvantage and future progress.

### III. THE REVERSE ANALOGY'S AFTERLIFE

This final Part explores a few of the ways in which the complex relationship between the constitutional jurisprudence of sex equality and of race-based affirmative action has developed since the *Bakke* decision. The first section examines the phenomenon of divergence—the “anomalous result” predicted in the 1970s and emergent by the 1990s. The second section then offers some observations about how issues of gender, work, and family—the central concerns of sex equality law—have been submerged in affirmative action doctrine and discourse over the past few decades. Despite these trends, however, Justice Ginsburg's opinions have retained the spirit and substance of her earlier advocacy, including an attempted convergence between race and sex equality doctrines, as the third section demonstrates.

#### A. Divergence: An “Anomalous” Result

Constitutional sex equality jurisprudence and race-based affirmative action doctrine, which had developed along fairly separate trajectories in the 1970s, briefly crossed paths in the 1977-78 Term when the *Webster* synthesis appeared to provide a handy precedent for those who had long attempted to develop a distinction between harmful discrimination and beneficial remediation.<sup>213</sup>

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213. In the brief window between the *Webster* and *Bakke* decisions, citations to *Webster* appeared in lower court opinions upholding race-based affirmative action programs. In *Constructors Ass'n of Western Pennsylvania v. Kreps*, a Third Circuit panel cited *Webster* to support the proposition that race-conscious remedial programs might be an appropriate means of combating discrimination, just as “preferential social security provisions” were “upheld as [a] remedy for general economic discrimination against women.” 573 F.2d 811, 816 & n.15 (3d Cir. 1977). In *Associated General Contractors of America, Inc. v. Kreps*, a Rhode

Subsequent to *Bakke*, however, courts considering the constitutionality of affirmative action plans based on race rarely cited *Webster* or other sex equality cases except to distinguish them.<sup>214</sup> Powell's *Bakke* opinion, initially perceived as an outlier, gradually gained adherents. In *Fullilove v. Klutznick* (1980),<sup>215</sup> the Court upheld a minority business enterprise program, but to the dismay of concurring Justice Powell, did not articulate clearly a standard of review for racial classifications.<sup>216</sup> Justice Powell's position on strict scrutiny gradually triumphed over the following decade, however. Moreover, his rejection of the applicability of *Webster* to race-based affirmative action also gained ground.

In *Mississippi University for Women v. Hogan*, decided in 1982, the Court invalidated MUW's exclusion of men from its nursing program in an opinion by Justice Sandra Day O'Connor.<sup>217</sup> Justice Powell wrote a vehement dissent in *Hogan*, reiterating his view that sex and race discrimination were fundamentally incomparable, at least in the context of educational segregation.<sup>218</sup> But although Powell and O'Connor parted ways in *Hogan*, Powell would find O'Connor a more kindred judicial spirit in her approach

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Island federal district judge declared that there was no "doubt that Congress may, for the common benefit, remedy economic disparity which has resulted from discrimination." 450 F. Supp. 338, 349 (D.R.I. 1978) (citing *Califano v. Webster*, 430 U.S. 313 (1977)). The judge also noted that, as in *Webster*, the challenged "statute's legitimate purpose is not overshadowed by a stigmatizing effect or purpose, or an outmoded stereotype." *Id.* at 352.

214. After *Bakke*, few briefs in race cases cited *Webster*. For exceptions, see Brief for NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae Supporting Respondents, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84-1340), 1985 WL 669746; Brief for the Secretary of Commerce at 57 n.31, *Fullilove v. Kreps*, 444 U.S. 948 (1979) (No. 78-1007), 1979 WL 199310 (citing *Webster* as an analogous instance in which "minority status is ... the only classification that can be used, because the congressional objective ... was the elimination of the effects of past discrimination").

215. 448 U.S. 448 (1980).

216. *See id.* at 495-96 (Powell, J., concurring) ("I would place greater emphasis than the Chief Justice on the need to articulate judicial standards of review in conventional terms ..."). Justice Stevens dissented in *Fullilove*, at one point citing *Goldfarb* to support the proposition that if the challenged classification did not in fact benefit the most disadvantaged members of the group, it should not be upheld as truly remedial. *Id.* at 538 n.9 (Stevens, J., dissenting).

217. 458 U.S. 718 (1982).

218. *Id.* at 742 n.9 (1982) (Powell, J., dissenting) ("Even the Court does not argue that the appropriate standard here is 'strict scrutiny'—a standard that none of our 'sex discrimination' cases ever has adopted. Sexual segregation in education differs from the tradition, typified by the decision in [*Plessy v. Ferguson*], of 'separate but equal' racial segregation.").

to race-based affirmative action.<sup>219</sup> In *Wygant v. Jackson Board of Education* (1986), Justices O'Connor and Rehnquist joined Powell's plurality opinion for the Court, embracing strict scrutiny as the appropriate standard of review for all race-based classifications.<sup>220</sup> Indeed, Powell's plurality opinion in *Wygant* cited *Hogan* for the proposition that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."<sup>221</sup> But although the *Wygant* plurality recognized *Hogan*, a gender case, as a relevant precedent, it ignored *Webster's* lesson that remedying societal discrimination against women was a sufficiently important governmental objective to withstand scrutiny; Powell wrote, "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."<sup>222</sup> Three years later, in *City of Richmond v. J.A. Croson*, Justice O'Connor's opinion for the Court struck down a minority business enterprise set-aside, applying strict scrutiny.<sup>223</sup>

In *Metro Broadcasting v. FCC*, decided the following year, the Court appeared to carve out an exception to the strict scrutiny rule, upholding a congressional enactment designed to increase broadcast diversity.<sup>224</sup> Justice Brennan's plurality opinion, joined by the same three Justices who joined his *Bakke* opinion, applied intermediate scrutiny and cited *Wiesenfeld* and *Hogan* to support the contention that "an examination of the legislative scheme and its history ... will separate benign measures from other racial classifications."<sup>225</sup> Justice O'Connor's dissent, however, called "benign' racial classifications" a "contradiction in terms," and she cited *Wiesenfeld*, *Webster*, and *Goldfarb* as evidence that legislation passed by Congress was not immune from rigorous scrutiny.<sup>226</sup> Five years later, in *Adarand*

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219. Justice O'Connor would later adopt Justice Powell's approach to race-based affirmative action in her pivotal opinion upholding the University of Michigan Law School's policy as narrowly tailored to achieve the compelling governmental interest in educational diversity. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

220. 476 U.S. 267 (1986).

221. *Id.* at 273.

222. *Id.* at 276.

223. 488 U.S. 469 (1989).

224. 497 U.S. 547 (1990).

225. *Id.* at 565 n.12.

226. *Id.* at 605, 609 (O'Connor, J., dissenting).

*Constructors v. Pena*,<sup>227</sup> a majority of the Court vindicated Justice O'Connor's position. Her opinion in *Adarand* eliminated any lingering uncertainty about the standard of review for race-based affirmative action, confirming that strict scrutiny applied regardless of which governmental entity enacted the policy. The Court struck down the challenged policy on the grounds that "consistency" required the application of the same standard of review to allegedly "benign" classifications as to "invidious" distinctions, and that "congruence" dictated the application of that standard to both state and federal actions.<sup>228</sup> It was in *Adarand* that Justice Stevens criticized the "anomalous result" of the doctrines of consistency and congruence, noting its apparent implication that affirmative action for women would be easier to enact than affirmative action for African Americans, for whom the equal protection guarantee originally was intended.<sup>229</sup> After the Court's decisions in *Croson* and *Adarand*, most lower courts have interpreted the requirements of "consistency" and "congruence" to require that gender- and race-based affirmative action—even when coexisting within the same policy or program—be judged by different constitutional standards.<sup>230</sup>

Ginsburg herself identified this "anomalous" result in 1978.<sup>231</sup> "Does [Powell's opinion] mean preferential treatment ordered by a government agency for women is less susceptible to challenge in court than preferential treatment for blacks?" queried Ginsburg in a speech at New York University.<sup>232</sup> "Turning the coin on the other side, does Powell mean courts should continue to tolerate official

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227. 515 U.S. 200 (1995).

228. *Id.* at 225.

229. *Id.* at 247 (Stevens, J., dissenting).

230. See, e.g., *Eng'g Contractors Ass'n v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997) (applying strict scrutiny to racial component of affirmative action plan but intermediate scrutiny to gender-based component). For more on this disjuncture, see Sidney Buchanan, *Affirmative Action: The Many Shades of Justice*, 39 HOUS. L. REV. 149 (2002); Heather Nelson, "Fatal in Fact"? *An Examination of the Viability of Affirmative Action for Women in the Post-Adarand Era*, 21 WOMEN'S RTS. L. REP. 151 (2000).

231. Ruth Bader Ginsburg, Speech at New York University (Aug. 30, 1978) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 35, folder: Speech File, Aug. 1978); see also Ruth Bader Ginsburg, Remarks at Panel Discussion on the *Bakke* Decision, New York Women's Bar Ass'n 35 (Sept. 20, 1978) (on file with the Library of Congress in Ruth Bader Ginsburg Papers, container 14, folder: Speech File, Sept. 20, 1978).

232. Ginsburg, Speech at New York University, *supra* note 231.

discrimination against women to a greater extent than they tolerate such discrimination against racial and ethnic minorities?"<sup>233</sup> To Ginsburg this seemed counterintuitive: under her theory, and Gertner's, sex-based classifications were, if anything, more problematic than race-based distinctions because judges were more likely to mislabel legal favors based on stereotypes as legitimate compensation. Because the true nature of sex-based classifications was more difficult to discern than that of racial distinctions, at a minimum such classifications required the same careful examination.

The divergent treatment of race and sex classifications intensified the legal feminists' dilemma. Women's rights advocates faced the conundrum that arguing for strict scrutiny for sex-based classifications might imperil affirmative action based on sex as well as race, whereas arguing for the constitutionality of sex-conscious affirmative action could further confuse judges who were unable to distinguish such policies from the old protective laws. Once Justice Powell's view that strict scrutiny should apply to all racial classifications regardless of their intent or effect garnered additional votes,<sup>234</sup> the dilemma deepened. Analogizing sex to race was still tempting as an antidote to invidious discrimination against women, but now seemed even more dangerous in the affirmative action arena. And because most of the remaining protectionist sex-based classifications were disappearing from the statute books through judicial and legislative action, preserving and extending the affirmative action remedy began to seem, to some feminists, more pressing than achieving absolute formal equality.<sup>235</sup>

Although Gertner's 1979 critique lamented the allegedly spurious distinctions Powell drew between race and sex discrimination, she also recognized quite clearly how the extension of Powell's *Bakke* reasoning to gender-based classifications "would be costly to those programs that most would agree are genuinely within the category

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233. *Id.* Justice Stevens would, almost two decades later, identify the same "anomaly" in his dissent in the 1995 case *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), which conclusively established strict scrutiny as the appropriate standard for all race-based classifications, including those used in state and federal government contracting programs.

234. *See Adarand*, 515 U.S. 200.

235. By the late 1970s, feminists increasingly confronted questions about the constitutionality of affirmative action under the proposed ERA. *See* MAYERI, REASONING FROM RACE, *supra* note 2.

of affirmative action for women.”<sup>236</sup> Indeed, Gertner feared that the *Bakke* standard “would be far more costly to sex-based than to race-based affirmative action.”<sup>237</sup> *Bakke* suggested that the “[f]indings which will satisfy the Court ... are those that are finely tuned to discrimination of a particular sort: intentional discrimination, perpetrated by identifiable wrongdoers, and directed at identifiable victims.”<sup>238</sup> These elements of intent and specificity, difficult enough to prove in the race context, were even more elusive when it came to sex discrimination, Gertner argued, making the assignment of fault to a particular employer or institutional entity difficult.<sup>239</sup> And given the propensity of equal protection analysis to bleed into Title VII jurisprudence, Gertner worried that voluntary affirmative action for women in employment could be eviscerated by the extension of the *Bakke* standard.<sup>240</sup>

The legal feminist critiques of Powell’s *Bakke* opinion thus brought into stark relief the ways in which developments in the Court’s race discrimination jurisprudence had problematic and often paradoxical effects on the already confused constitutional landscape of sex equality. As the Court leaned toward applying strict scrutiny even to compensatory racial classifications, analogies between race- and sex-based affirmative action grew more dangerous. The Court’s increasing reliance on intent as a primary indicator of redressable discrimination made proving past sex discrimination for the purpose of justifying affirmative action remedies even more difficult. Applying different standards of review to sex- and race-based affirmative action also had potentially problematic consequences for coalitions between feminists and racial justice advocates.<sup>241</sup>

On the other hand, the “anomalous” result did leave the door open for a more expansive conception of permissible sex-based

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236. Gertner, *supra* note 198, at 196.

237. *Id.*

238. *Id.* at 197.

239. *Id.* at 203.

240. *Id.* at 205-08.

241. See Deborah C. Malamud, *Affirmative Action and Ethnic Niches: A Legal Afterword*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA* 313, 315-16 (John David Skrentny ed., 2001) (“If programs jointly proposed and designed to meet the interests of both women and minorities survive legal scrutiny as to women but not as to minorities, the coalition will break apart.”).

affirmative action, and for the development of a flexible jurisprudence that might yet exert influence on decision making in race cases. After all, four Justices embraced Ginsburg's sex-race analogy in *Bakke*,<sup>242</sup> and intermediate scrutiny was still very much alive as a framework for thinking about "benign" classifications. *Webster*'s clear statement that past societal discrimination against women could justify remedial sex-based classifications commanded virtual unanimity on the Court and has never been repudiated.<sup>243</sup> But as Powell's *Bakke* opinion foreshadowed, the potential for sex equality jurisprudence to move race doctrine in a more remedy-friendly direction would not be realized in the near term.<sup>244</sup>

### *B. Submergence: Gender in the Affirmative Action Debate*

Though they had successfully eradicated the constitutional presumption of legitimacy for laws that assumed or ratified the male-breadwinner/female-homemaker model, by the late 1970s, many legal feminists were pessimistic about the prospects for using the existing antidiscrimination framework to address the issues of work-family conflict that plagued feminist efforts to integrate women as equal members of the workforce. In an important 1979 article entitled *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, Mary Joe Frug systematically documented the disadvantages mothers confronted in the workplace, and concluded that existing antidiscrimination laws were mostly inadequate tools for effecting improvement.<sup>245</sup> The constitutional requirement of discriminatory intent and the business necessity defense to Title VII disparate impact claims, as well as the general limitations of litigation as a tool for social change, led Frug to argue that positive steps such as child care support and flex-

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242. See *supra* notes 144-48, 193-97 and accompanying text.

243. Indeed, sometime women's rights skeptic Justice Rehnquist arguably was the most steadfast supporter of this principle. See Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1475 (2002). See generally Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006) (discussing Rehnquist's evolving views on sex equality).

244. Powell himself continued to resist analogies between race and sex discrimination. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 735 (1982) (Powell, J., dissenting).

245. 59 B.U. L. REV. 55, 102 (1979).

time arrangements were necessary to solve working mothers' dilemmas.<sup>246</sup>

Frug saw affirmative action to help women enter nontraditional jobs as important, but she echoed Ginsburg's 1975 assessment that

[a]ffirmative action to end occupational segregation cannot occur in a vacuum .... Because occupational segregation is closely linked to the primary responsibility women feel and bear for child care, changes in occupational choice for women must occur simultaneously with changes in child care support systems and in the way the labor market treats disruptions caused by child care responsibilities.<sup>247</sup>

Frug assumed, though, that such policies would come about through legislative and voluntary efforts, if at all; courts, she believed, were unlikely to find the lack of child care and leave options to be discrimination in need of judicial remedy.<sup>248</sup>

Had the Court taken up the invitation to integrate its sex equality case law with that of race-based affirmative action, such a convergence might have injected some of the concerns animating legal feminists' crusade against sex discrimination into the affirmative action debate. Instead, the majority's failure to apply the reasoning of its sex equality cases to *Bakke's* race-based affirmative action policy arguably reinforced a disjuncture between the debate over affirmative action on the one hand, and discussions of gender and family caregiving on the other. In the following years, affirmative action in the arenas of public debate and Supreme Court jurisprudence continued to be, first and foremost, about

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246. *Id.* at 95-102.

247. *Id.* at 99.

248. For other examples of this view, see, e.g., Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 78 (2003) (describing feminists' traditional pessimism about the possibilities for using litigation to address work-family conflict).

race.<sup>249</sup> To this day, the Supreme Court has not considered an equal protection challenge to a gender-based affirmative action program.

Of course, the submergence of gender in the affirmative action debate does not stem only from the Court's constitutional distinction between race- and sex-based classifications. Indeed, in the Title VII context—in which the race-sex parallel reigns as a matter of official text, if not legislative history—gender and the intrafamily division of labor have not played much more of a role than in the constitutional debate over affirmative action. Though comprehensive analysis is beyond the scope of this Article, a brief look at Title VII jurisprudence, which has diverged from the constitutional law of affirmative action in complicated ways, also reflects the submergence of the particular questions associated with sex-based remedial programs. The leading Title VII voluntary affirmative action case, *United Steelworkers v. Weber*, addressed only the racial element of a job training set-aside that reserved half of its slots for African Americans and 5 percent for women.<sup>250</sup> Legal feminists were

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249. For more on the relative silence about women, especially white women, in affirmative action discourse, see PHILIP F. RUBIO, *A HISTORY OF AFFIRMATIVE ACTION: 1619-2000*, at 180 (2001); Barbara T. Christian, *Camouflaging Race and Gender*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 225, 227 (Robert Post & Michael Rogin eds., 1999); Mari J. Matsuda, *Feminism and Affirmative Action*, in *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 151, 163, 167 (Charles R. Lawrence III & Mari J. Matsuda eds., 1997); Eleanor Holmes Norton, *Affirmative Action in the Workplace*, in *THE AFFIRMATIVE ACTION DEBATE* 39, 47 (George E. Curry ed., 1996); Carol M. Swain et al., *Understanding Racial Polarization on Affirmative Action: The View from Focus Groups*, in *COLOR LINES*, *supra* note 241, at 214, 226; *Comments of Janine Jackson*, 16 *NAT'L BLACK L.J.* 227 (1998-2000); Kimberle Crenshaw, *Playing Race Cards: Constructing a Pro-active Defense of Affirmative Action*, 16 *NAT'L BLACK L.J.* 196 (1998-2000); Darlene C. Goring, *Silent Beneficiaries: Affirmative Action and Gender in Law School Academic Support Programs*, 84 *KY. L.J.* 941 (1995-96); Pamela J. Smith, *Part I—Romantic Paternalism—The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 *J. GENDER, RACE & JUSTICE* 107 (1999); Tim Wise, *Is Sisterhood Conditional?: White Women and the Rollback of Affirmative Action*, *NWSA J.*, Fall 1998, at 1. For an argument that feminists have used the allegedly greater gains of white women from affirmative action as a rhetorical ploy to defend race-based affirmative action, see Sacha E. de Lange, *Toward Gender Equality: Affirmative Action, Comparable Worth, and the Women's Movement*, 31 *N.Y.U. REV. L. & SOC. CHANGE* 315 (2007).

On the greater public support for gender-based affirmative action than for race-based policies, see Dara Z. Strolovitch, *Playing Favorites: Public Attitudes Toward Race- and Gender-targeted Anti-discrimination Policy*, *NWSA J.*, Fall 1998, at 26. For a helpful comparative view, see CAROL LEE BACCHI, *THE POLITICS OF AFFIRMATIVE ACTION: "WOMEN," EQUALITY AND CATEGORY POLITICS* (1996).

250. 443 U.S. 193, 193 (1979).

well aware that the case had important ramifications for the future of sex-based affirmative action: several amici briefs addressed the impact of the Court's forthcoming decision on women,<sup>251</sup> feminist organizations lent their support to affirmative action's defenders,<sup>252</sup> and African American and female workers attempted to intervene in the case to present evidence of past discrimination against them by the defendants.<sup>253</sup> But gender did not figure into either the Court's decision or popular coverage of the case.<sup>254</sup>

Then, when a sex-based affirmative action program did reach the Supreme Court via a Title VII challenge in the 1987 case *Johnson v. Transportation Agency of Santa Clara*,<sup>255</sup> feminists had good reason to argue a straight parallel to race, without further ado or embellishment. An unusually unambiguous victory for civil rights advocates, *Weber* had established the validity of private employer-created voluntary affirmative action programs, and feminists' best hope was that the Court would simply apply *Weber* to the public

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251. Civil rights and feminist organizations issued a joint Statement of Principles, declaring that "[t]his country cannot attain true equality of opportunity without affirmative action." Brief for American G.I. Forum et al. as Amici Curiae at app. A: Statement of Principles, *Weber*, 443 U.S. 193 (Nos. 78-432, -435, -436), 1979 WL 199758. The statement insisted that "Title VII and the anti-discrimination principle must be understood in the context of our nation's history of discrimination *against non-white people and women* and its resulting national patterns of underrepresentation and inequality in the workforce." *Id.* (emphasis added); see also Brief for the Women's Caucus, District 31 of the United Steelworkers of America as Amicus Curiae, *Weber*, 443 U.S. 193 (No. 78-432), 1979 WL 199770; Brief for Women's Equal Rights Legal Defense and Education Fund as Amicus Curiae Supporting Petitioners, *Weber*, 443 U.S. 193 (Nos. 78-432, -435, -436), 1979 WL 199749; Brief for the Honorable Patricia Schroeder et al. as Amici Curiae, *Weber*, 443 U.S. 193 (Nos. 78-432, -435, -436), 1979 WL 199756.

252. See Letter from Frances M. Beal, Kathleen A. Gmeiner, and Gerald C. Horne, to Friends (Mar. 9, 1979) (NOW LDEF Papers, 95-M79, Carton 8, Folder: *Weber v. Kaiser*) ("We are issuing a call for broad unity of labor, civil rights, women's community, religious and other interested organizations in defense of affirmative action and in opposition to the Weber suit."); Letter from Kathe Karlson, Coordinator, N.Y. Affirmative Action Task Force, to Dear Friend [of the National Anti-Weber Mobilization Committee] (June 1979) (NOW LDEF Papers, 95-M79, Carton 8, Folder: *Weber v. Kaiser*); Memorandum from Sue to Phyllis and Stephanie, Re: Report on Affirmative Action Coordinating Center Meeting of Today re: Weber Case (Dec. 27, 1978) (NOW LDEF Papers 95-M79, Carton 8, Folder: *Weber v. Kaiser*).

253. Motion of Rudy Gorden et al., individually and on behalf of Black and Women Workers at Gramercy, for Special Leave to Intervene and for an Order Vacating the Judgment Below and Remanding for a New Trial with Intervenors as Party Defendants and to File a Brief in Support, *Weber*, 443 U.S. 193 (Nos. 78-432, -435, -436), 1979 WL 213604.

254. See, e.g., Steven V. Roberts, *The Bakke Case Moves to the Factory*, N.Y. TIMES MAG., Feb. 25, 1979, at 37.

255. 480 U.S. 616 (1987).

employment policy attacked in *Johnson*<sup>256</sup> and uphold it.<sup>257</sup> Arguably, highlighting differences between race and sex inequality could only jeopardize their cause. In *Johnson*, the Court did apply *Weber* in a fairly straightforward manner, offering no elaboration of the relationship between race- and sex-based affirmative action other than an implicit parallel.<sup>258</sup> Indeed, like feminist advocates, the majority in *Johnson* understandably relied on stare decisis to avoid reopening the thorny controversy about statutory meaning that a too-thorough reexamination of *Weber* would have implicated.<sup>259</sup>

The Court missed an opportunity to integrate its sex and race equality jurisprudence in *Bakke*, in which Powell's assertion of disanalogy discouraged the transfer of concepts from sex to race cases.<sup>260</sup> Almost a decade later, a majority of the Justices assumed some unarticulated congruence between race and sex in *Johnson*, in which the analogy obviated the need for a separate discussion of sex-based affirmative action.<sup>261</sup> Meanwhile, legal developments

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256. Although *Johnson* concerned public employment, the plaintiff's attorney chose not to raise the constitutional issue below. MELVIN I. UROFSKY, AFFIRMATIVE ACTION ON TRIAL: SEX DISCRIMINATION IN *JOHNSON V. SANTA CLARA* 55-56 (1997).

257. The briefs supporting the respondent in *Johnson* urged exactly that. See Brief of Respondent Transportation Agency of Santa Clara, *Johnson*, 480 U.S. 616 (No. 85-1129), 1986 WL 728165; Brief for the State of California et al. as Amici Curiae Supporting Respondents, *Johnson*, 480 U.S. 616 (No. 85-1129), 1986 WL 728161.

258. See *Johnson*, 480 U.S. at 627-40.

259. The *Johnson* dissenters did not hesitate to pinpoint the ways in which the majority glossed over potential distinctions between the affirmative action policies challenged in *Weber* and *Johnson*, respectively. Justice White criticized the majority for failing to reconsider and overrule *Weber*, and charged that the Court's ruling in *Johnson* went even further than *Weber*:

My understanding of *Weber* was, and is, that the employer's plan did not violate Title VII because it was designed to remedy intentional and systematic exclusion of blacks by the employer and the unions from certain job categories.... The Court now interprets ["traditionally segregated job categories"] to mean nothing more than a manifest imbalance between one identifiable group and another in an employer's labor force.

480 U.S. at 657 (White, J., dissenting). Justice Scalia's dissent accused the majority of departing not only from accepted principles of statutory interpretation, but also from *Wygant's* holding that "the objective of remedying societal discrimination cannot prevent remedial affirmative action from violating the Equal Protection Clause." *Id.* at 664 (Scalia, J., dissenting). Scalia also developed further White's distinction between *Weber* and *Johnson*, arguing that the job categories at issue in *Johnson* were not "segregated" as a result of "conscious, exclusionary discrimination," but rather that "because of longstanding social attitudes, it has not been regarded by women themselves as desirable work." *Id.* at 667-68.

260. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 302-03 (1978).

261. *Johnson*, 480 U.S. at 616.

made feminists pessimistic about courts' ability to address work-family conflict. As a result, what Ginsburg, Frug, and other legal feminists saw as a primary cause of women's economic plight and a distinctive attribute of sex inequality—the gendered division of family labor—never surfaced in what we think of as the Supreme Court's affirmative action jurisprudence.

From a political standpoint, this divergence may in fact be a blessing to advocates of progressive work-family policy, who understandably might hesitate to link their universalist goals with a controversial program perceived as benefitting some at the expense of others. In that sense, Justice Powell's emphasis on diversity and its universal benefits<sup>262</sup> does capture one of the virtues of sex equality doctrine: its claim to benefit both the disadvantaged and the comparatively advantaged groups. But the Court's jurisprudence severely limits the role that the amelioration of societal discrimination can play in race-based affirmative action programs. Race doctrine as it has evolved in the years since *Bakke* is a far cry from *Webster*'s matter-of-fact acceptance of societal discrimination as a justification for broad affirmative action policies.

### C. Convergence: Justice Ginsburg's Jurisprudence

Still, the parallel to sex equality doctrine that Ginsburg advanced as an advocate in the 1970s has not disappeared altogether. In fact, her own opinions as a Justice have drawn, sometimes implicitly, upon principles similar to those that animated her earlier advocacy. In *United States v. Virginia*, Ginsburg's opinion for the Court reaffirmed the validity of sex classifications that "compensate women for particular economic disabilities [they have] suffered, [that] promot[e] equal employment opportunity, [and that] advance full development of the talent and capacities of our Nation's people," even as she condemned classifications that "create or perpetuate the legal, social, and economic inferiority of women."<sup>263</sup> Although arguably strengthening the "skeptical scrutiny" accorded to classifications that excluded women or limited their opportunities, Ginsburg was careful not to undermine the *Webster* precedent.

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262. See *Bakke*, 438 U.S. at 311-14.

263. 518 U.S. 515, 533-34 (1996) (citations and internal quotation marks omitted).

Promoting women's advancement and equal participation in the society, the polity, and the economy was, Ginsburg essentially declared, an "exceedingly persuasive justification."<sup>264</sup> As Lawrence Sager has suggested, Ginsburg's analysis in *United States v. Virginia* offered potentially radical implications for race as well as sex equality jurisprudence.<sup>265</sup> By departing from the rigid "tiers-of-scrutiny" approach and drawing a sharp distinction between both exclusion and inclusion subordination and remediation, Ginsburg invited, in Sager's words, "an inversion of the traditional dependency of gender discrimination adjudication on lessons from the analogy of race."<sup>266</sup>

Indeed, Ginsburg's opinions in race-based affirmative action cases bear traces of just such an application. In her dissent in *Adarand*, she stressed "the considerable field of agreement" among the Justices and interpreted the lead opinion to "strongly suggest[] that the strict standard announced is indeed 'fatal' for classifications burdening groups that have suffered discrimination in our society," but in contrast, "[f]or a classification made to hasten the day when 'we are just one race' ... the lead opinion has dispelled the notion that 'strict scrutiny' is 'fatal in fact.'"<sup>267</sup> Ginsburg read *Adarand* to revitalize the distinction between what were once referred to as "invidious" and "benign" classifications, just as her *United States v. Virginia* opinion appeared to vanquish forever classifications that excluded women from opportunities while reaffirming the validity of genuine efforts to promote inclusion and opportunity. Ginsburg's optimistic reading of *Adarand* thus quietly bridged the gap between the sex equality jurisprudence she pioneered as an advocate and a Justice, and the race doctrine she now sought to shape.

Ginsburg injected the values of the *Webster* synthesis into her *Adarand* dissent in two additional ways: first, by emphasizing legislators' prerogative to address the present effects of past societal discrimination, and second, by characterizing the primary purpose

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264. *Id.* at 531-34.

265. Sager, *supra* note 4, at 821-23.

266. *Id.* at 824; see also Shira Galinsky, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in Grutter and Gratz and Beyond*, 7 N.Y. CITY L. REV. 357, 363-66 (2004).

267. *Adarand Constructors v. Peña*, 515 U.S. 200, 271, 275 (1995) (Ginsburg, J., dissenting) (internal citations omitted).

of heightened scrutiny as a device for preventing harm to the policy's intended beneficiaries. She invoked "Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects,"<sup>268</sup> and cited voluminous evidence of continuing societal bias against people of color.<sup>269</sup> In one study she referenced, of testers negotiating retail automobile purchase prices, white women fared significantly worse than white men, but black men, and especially black women, received final price offers two to three times those of white males and one and a half to two times those of white females.<sup>270</sup> Ginsburg did not cite *Webster*, but the implicit message came through: if societal discrimination is a sufficient justification for ameliorating sex inequality, why would race—the cause of even greater disadvantage—be different? Ginsburg did rely explicitly on the sex equality cases later in her opinion to assert that, far from being "fatal in fact," ... review that is searching [is necessary] to ferret out classifications in reality malign, but masquerading as benign. The Court's once lax review of sex-based classifications demonstrates the need for such suspicion.<sup>271</sup> In other words, the primary purpose of heightened scrutiny was not to eradicate classifications for the sake of color- or sex-blindness per se, but rather to ensure that policymakers did not disguise invidious intent in the costume of solicitude as they had once done in cases like *Hoyt v. Florida*<sup>272</sup> and *Goesaert v. Cleary*.<sup>273</sup> Ginsburg summed up: "Today's decision thus usefully reiterates that the purpose of strict scrutiny is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking, to differentiate between permissible and impermissible governmental use of race, to distinguish between a No Trespassing sign and a welcome mat."<sup>274</sup>

Several years later, in her dissent in *Gratz v. Bollinger*, Ginsburg reiterated her belief that the "consistency" invoked in *Adarand* should not be a vehicle for ignoring the principle that "government

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268. *Id.* at 273.

269. *Id.* at 273-76.

270. *Id.* at 274 n.4.

271. *Id.* at 275 (citations omitted).

272. 368 U.S. 57 (1961).

273. 335 U.S. 464 (1948).

274. *Adarand*, 515 U.S. at 275-76 (Ginsburg, J., dissenting) (citations and internal quotation marks omitted).

decisionmakers may properly distinguish between policies of exclusion and inclusion.”<sup>275</sup> Ginsburg acknowledged that “[t]he mere assertion of a laudable governmental purpose ... should not immunize a race-conscious measure from careful judicial inspection.”<sup>276</sup> She echoed, but did not cite, the language of the sex equality doctrine her advocacy helped to produce: “[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”<sup>277</sup> In her concurring opinion in *Grutter v. Bollinger*, Ginsburg was careful to note that the case

[did] not require the Court to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review ... [or] whether interests other than “student body diversity” rank as sufficiently important to justify a race-conscious government program.<sup>278</sup>

The door, Ginsburg seemed to suggest, remained open to a synthetic interpretation of the Court’s equality jurisprudence—one that drew explicitly or implicitly on the conceptual framework she had developed and elaborated as an advocate.

#### CONCLUSION: RETHINKING THE LEGACY OF LEGAL FEMINISM

Recovering the history of the reformulated race-sex analogy both illuminates an underappreciated aspect of legal feminism’s legacy and suggests more expansive possibilities for contemporary equality doctrine. Nineteen-seventies legal feminism has been characterized, and criticized, as overemphasizing formal equality of treatment at the expense of other values.<sup>279</sup> Commentators have questioned advocates’ use of male plaintiffs,<sup>280</sup> lamented the elevation of

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275. 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting).

276. *Id.* at 302.

277. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975), *quoted in* *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977); *id.* at 224 (Stevens, J., concurring in the judgment); *see also* *Califano v. Webster*, 430 U.S. 313, 317 (1977).

278. 539 U.S. 306, 346 n.\* (2003) (Ginsburg, J., concurring) (citations omitted).

279. *See, e.g.*, Morrison Torrey, *Thirty Years*, 22 *WOMEN’S RTS. L. REP.* 147 (2001).

280. *See, e.g.*, Dawn C. Nunziato, *Gender Equality: States as Laboratories*, 80 *VA. L. REV.* 945, 958 (1994).

abstract equality over the valuation of difference,<sup>281</sup> and assailed lawyers for fighting stereotypes rather than subordination.<sup>282</sup> The Court's constitutional jurisprudence has also come in for criticism, and rightfully so, for its failure to conceptualize reproductive rights and pregnancy discrimination as issues pertinent to sex equality,<sup>283</sup> its timidity in questioning the injustices underpinning sex-based distinctions in areas such as military service and sexual assault,<sup>284</sup> and its unwillingness to vigorously attack facially sex-neutral laws that exert a disproportionate impact on women.<sup>285</sup> "Intermediate scrutiny" is derided as irrelevant or infinitely malleable at best, incoherent and insidious at worst.

Although the history recounted here does not undermine the force of these critiques by any means, it does suggest an alternative, and more hopeful, reading of both 1970s legal feminist advocacy and the sex equality jurisprudence that developed, in fits and starts, from that advocacy.<sup>286</sup> Looking purely at the doctrine that emerged, one might say that the very partiality of legal feminists' success in pursuit of "formal equality" had ironic salutary benefits in that it allowed the Court to develop a middle-ground test that left a constitutional door open to "genuine affirmative action" for women, and by extension, for people of color.

The reformulation of the race-sex analogy described in the preceding Parts suggests, though, that by the mid-1970s, this development was less ironic than intentional. The story of *Webster* and its conscription into the cause of race-based affirmative action suggests that legal feminist advocacy, especially after 1974, should

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281. See Becker, *supra* note 18, at 253-59; David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 L. & INEQ. 33 (1984).

282. See, e.g., Catharine A. MacKinnon, Book Review, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759 (1987).

283. See *supra* Part I.C.

284. See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1287-88, 1297-1308 (1991).

285. See, for example, the sources cited in Mayeri, *A New ERA*, *supra* note 27 (discussing feminists' dissatisfaction with the decision in *Personnel Administrator v. Feeney*).

286. This Article, to borrow the words of Mary Anne Case, "do[es] not mean to suggest that modern constitutional sex discrimination law sprang full grown from the head of Ruth Bader Ginsburg like Athena from the head of Zeus." Case, *supra* note 243, at 1450. Indeed, other examples of legal feminist reformulation of the race-sex analogy, which I explore elsewhere, were the product of a wide range of activists and legal decision makers. See MAYERI, REASONING FROM RACE, *supra* note 2.

be interpreted less as an obsession with removing all sex-based distinctions from the law than as an emerging plot to convince the Court to distinguish between legitimate and illegitimate uses of group classifications. That objective was realized in *Webster*, the handiwork of one of Ginsburg's former students, and survived, whereas a similar principle, so assiduously developed by Justice Brennan and other proponents of affirmative action, met with much greater resistance in the context of race.<sup>287</sup>

Further, the preceding history makes clear that the reformulated race-sex analogy was more than just an opportunistic use of a more lenient standard of review in an environment increasingly skeptical of, if not hostile toward, affirmative action. Although in doctrinal terms, intermediate scrutiny provided a handy template for relaxing the requirements for sustaining race-based classifications, the sex-race analogy was not merely about the mechanical application of a means-ends test. The substantive content of sex equality jurisprudence placed emphasis on a different set of concerns than those that troubled foes of "reverse discrimination." On the one hand, the use of male plaintiffs underscored how both sexes were harmed by stereotypes that subordinated women and reinforced their dependency. But the sort of harms men were alleged to have suffered in these cases were not deprivations of their own individual opportunities so much as their inability to benefit from their wives' economic contributions and their concomitant inability to perform nontraditional nurturing roles without legal or financial penalty.<sup>288</sup> At the same time, the point that feminist lawyers consistently drove home in these cases was that women—the truly disadvantaged sex—were stigmatized and devalued by assumptions of dependency and inferiority.<sup>289</sup> This focus on harm to the disadvantaged group, combined with an acknowledgment that the harms of discrimination against that group had a universal component, found its way into the Court's sex equality decisions.

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287. See *supra* notes 124-36 and accompanying text. This may not have been Ginsburg's goal from the outset, and indeed others expressed unequivocal opposition to all "benign" sex classifications. See, e.g., Leo Kanowitz, "Benign" Sex Discrimination: Its Troubles and Their Cure, 31 HASTINGS L.J. 1379 (1980). But Kanowitz's view was the exception rather than the rule.

288. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

289. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); see also *supra* Part II.A (discussing affirmative action and roles in the family).

By the same token, after a confusing and seemingly incoherent series of rulings, the Court—drawing heavily on legal feminists’ analytical tools as well as on theories developed in the race context—synthesized the principle that, if a sex-based classification was truly designed to overcome discrimination and to increase women’s economic opportunities and independence, then differential treatment might be justified.<sup>290</sup> The purpose of heightened scrutiny, on this account, was not to make classification more difficult for its own sake, but rather to distinguish between legitimate and illegitimate classifications on the basis of whether they had the intent and effect of improving the status of the previously disadvantaged group.<sup>291</sup> The sex equality cases also incorporated the assumption, never rigorously examined by the Court,<sup>292</sup> that societal discrimination against women was pervasive and pernicious enough to warrant a legislative response without specific proof of past discrimination or its present effects.<sup>293</sup>

Thus, for all its shortcomings, constitutional sex equality jurisprudence—the product of an ongoing dialogue between advocates and the Justices (and their clerks)—developed what arguably was a more compelling and consistent account of the harm of discrimination and the latitude for its remediation than that which emerged from race cases. Rather than seeing sex equality jurisprudence as a pale shadow of race doctrine, then, this history reveals the potential for mutually beneficial reciprocity between the two bodies of law. On this view, *Bakke* is an important marker not only because Justice Powell’s opinion articulated a new justification for race-based affirmative action in university admissions that a majority of the Court would reaffirm a quarter-century later in *Grutter*.<sup>294</sup> Justice Powell’s role in the rejection of race-sex parallelism is pivotal not only because of his reluctance to embrace strict

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290. See *supra* notes 126-42 and accompanying text.

291. Cf. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004); Fiss, *supra* note 159.

292. Except perhaps by Justice Scalia. See *supra* note 259 (discussing Scalia’s dissent in *Johnson*).

293. Cf. Siegel, *She the People*, *supra* note 12.

294. See John C. Jeffries, Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1, 2 (observing, in light of *Grutter*, that “[d]espite years of strife and litigation, the constitutionality of affirmative action in higher education has now been determined, probably for a generation, along precisely the lines that Powell laid out in 1978”).

scrutiny in *Frontiero*,<sup>295</sup> but also for his rebuff of feminists' reformulated analogy in *Bakke*.<sup>296</sup> Advocate-turned-Justice Ginsburg and her allies are not only pioneers of formal equal treatment for men and women but also aspiring architects of substantive sex and race equality.

This Article is not intended to suggest that this “reverse analogy” was or is a panacea for race doctrine any more than the original race-sex parallel provided a flawless conceptual, political, or legal template for the development of sexual equality law. Indeed, as Ginsburg herself recognized, descriptive and practical differences between race and sex inequality abound. Moreover, the utility of analogical arguments, as I have argued elsewhere, depends not only on their substantive content—including their scope and descriptive accuracy—but also on the political, social, and legal context in which they are invoked.<sup>297</sup> Analogical arguments can—though they need not necessarily—obscure the overlaps, intersections, and tensions between race and sex inequality. When divorced from concrete factual situations and political coalitions, analogies can be doubled-edged if not dangerous. Rather than providing a comprehensive or foolproof solution, my hope is that uncovering alternative histories of the relationship between race and sex equality in advocacy and jurisprudence will help us to understand our constitutional past and better imagine our constitutional future.

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295. See *Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973) (Powell, J., concurring).

296. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 302-03 (1978).

297. See MAYERI, REASONING FROM RACE, *supra* note 2; Mayeri, *A Common Fate*, *supra* note 2; Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 226-30 (2006); see also Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (observing the double-edged nature of analogies); L. Camille Hébert, *Analogizing Race to Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819 (1997) (arguing that sexual harassment doctrine has constrained the remediation of racial harassment); Sager, *supra* note 4.