THE SEXES AND THE LAW

by A. E. Dick Howard

Given the infinity of reasons why men and women may invoke the law, it is intriguing to discover that eight of the opinions handed down by the U.S. Supreme Court during the term ending in 1981 turned directly on issues of gender.

In fiscal year 1981, the Equal Employment Opportunity Commission filed 129 sex discrimination suits and processed 2,303 complaints lodged under the Equal Pay Act. Several hundred "palimony" suits were working their way through the courts. An Oregon man was charged by his wife with rape (but acquitted). All around the country, groups such as the Women's Legal Defense Fund approached legislatures and the bench to combat sex discrimination—on the job, in academe, at the bank—and to press their various views on women's status generally. Small counter-organizations of men began to appear. During the 1970s, in short, gender moved into the courtroom, vying for the place occupied by race the decade before.

Today, it is sometimes hard to see the forest for the trees. Legal relations between the sexes—and the various rights and obligations of men and women *as* men and women—are codified in thousands of federal, state, and local laws, in a maze of bureaucratic regulations, in union contracts and university guidelines. These vary widely. And, owing to pressures from women and men, the rules of the game are always being modified. Thus, while most Americans can hardly be unaware that matters of gender have become courtroom issues, it is difficult to get a clear sense of what *has* happened during the past decade or so and what *has not.* Some perspective is in order.

The legal status of women during the 19th century, in America as elsewhere in the world, was one of considerable inequality. Women could not vote or sit in legislative bodies, and they were absent from bench, bar, and jury. The rights of a married woman (for example, over the property she might have brought to the union) were severely circumscribed. The old Blackstonian precept was invoked—that a woman's "very being . . . is suspended during marriage." In law, husband and wife were one, and the husband was The One.

Such strictures were not whimsical, even if they were misguided. "Nature," wrote physician Alexander Walker in 1839,

"for the preservation of the human species, has conferred on woman a sacred character to which man naturally and irresistably . . . renders a true worship." In the conventional (male *and* female) view of the time, women, however influential or capable in the home, needed to be insulated from certain worldly pressures and duties. Sometimes, they merited special legal protections that men were not granted. In *Muller* v. *Oregon* (1908), the Supreme Court upheld a state law limiting a woman's workday to 10 hours, despite the fact that in 1905 it had struck down a similar law that applied to both men and women. In the event of divorce, women were given preference in child custody, and family support was presumptively the father's obligation.

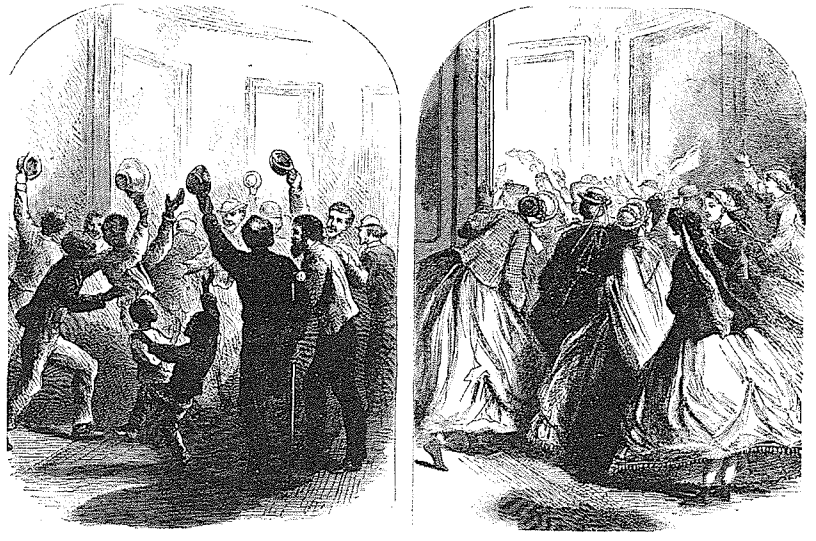
Unrest at Seneca Falls

There was, then, a certain philosophical consistency uniting these restrictive and protective measures: a belief in the uniqueness of each sex, and thus in the special role played by each in society. To shield women, especially mothers, from some of the economic and physical stresses of the 19th-century world was regarded as "enlightened" by the liberals of the day. That women of all ages and experience were also barred from full participation in politics was simply not seen by many members of either sex as a matter of much urgency.

Some women were, of course, restless under such a regime. In 1848, the first women's rights convention in the United States was held at Seneca Falls, New York, and Elizabeth Cady Stanton's litany of complaints focused in particular upon women's unequal legal status. The Seneca Falls delegates met during the same year that abortive socialist uprisings were sweeping Western Europe. Each had about the same immediate impact on the formal social order, which is to say virtually none. In the aftermath of the American Civil War, Congress passed and the states ratified the Fourteenth Amendment (1868), securing the legal rights of the newly freed slaves, but not disturbing the existing

---

A. E. Dick Howard, 47, a former Wilson Center Fellow, is White Burkett Miller professor of law and public affairs at the University of Virginia. Born in Richmond, Va., he is a graduate of the University of Richmond (1954), received his law degree from the University of Virginia (1961), and was a Rhodes Scholar at Oxford. He was law clerk to Supreme Court Justice Hugo L. Black and was chief architect of the new Virginia Constitution, which became effective in 1971. His books include The Road from Runnymede: Magna Carta and Constitutionalism in America *(1968) and* Commentaries on the Constitution of Virginia *(1974).*



From Harper's Weekly, *April 28, 1866.* *Library of Congress.*

The Fourteenth Amendment passed in 1866, guaranteeing blacks' civil rights. Feminists rejoiced. If race was irrelevant, could sex be far behind?

status of women. Indeed, Section 2 spoke specifically of "male citizens," and some women opposed ratification of the amendment hoping to forestall the first appearance of the word "male" in the Constitution.

During the next nine decades, the Supreme Court heard only a few cases involving the rights of women, and its decisions amounted to a string of rebuffs. In *Bradwell* v. *Illinois* (1873), the Court upheld Illinois's power to prohibit women from practicing law. Two years later, the Justices ruled that male-only suffrage did not infringe upon women's rights as citizens. In 1948, in *Goesart* v. *Cleary*, the Court upheld a Michigan law providing that a woman could obtain a bartender's license only if she were the wife or daughter of the male owner of a licensed liquor establishment. And in *Hoyt* v. *Florida*, the Supreme Court readily affirmed the constitutionality of a state law that provided, in substance, that no woman would serve on a jury unless she volunteered for duty. That was in 1961, the first year of John F. Kennedy's New Frontier.

Lest one lose perspective, we should recall that, outside the area of race, the Court was slow to use the Fourteenth Amendment's "equal protection" or "privileges and immunities"

clauses to limit government power in general. Mrs. Bradwell's effort to invoke the privileges and immunities clause failed, but so did virtually every *man* fail who tried to gain redress by invoking the same clause. Still, the Court's decisions on gender distinctions were flavored by assumptions about woman's "separate place." A classic example is Justice Joseph B. Bradley's concurring 1873 opinion in *Bradwell:* "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

Later, during the years of the "activist" Warren Court (1953–69), when the Justices were employing the equal protection clause to achieve sweeping change in legislative reapportionment, civil rights, and criminal justice, distinctions based on gender were allowed to stand.

It was not until the 1970s that the Court began to use the Constitution to redress sex discrimination. By then, Presidents, Congresses, and state legislatures had been dealing with the matter for a decade, setting in place a variety of measures that dramatically altered the legal perquisites of women.

In terms of Washington's formal recognition that sex discrimination was a problem, impetus was provided by President John F. Kennedy's Commission on the Status of Women (1961), chaired by Eleanor Roosevelt. The commission urged women's groups to start challenging discriminatory laws in the courts and to press their claims in Congress. One result was the Equal Pay Act of 1963, which established the principle of "equal pay for equal work." The next year, Title VII of the Civil Rights Act prohibited discrimination on the basis of both race and sex (although the words "and sex" had been added to the bill at the last minute by Southern Congressmen who believed, wrongly as it turned out, that this broadening of the act's coverage would ensure its defeat). In 1967, President Lyndon B. Johnson amended Executive Order 11246 to extend "affirmative action"—a notion first introduced by Kennedy—to women.*

Under President Richard M. Nixon, the Equal Pay Act and the Civil Rights Act were strengthened. In 1972, Congress passed an Equal Rights Amendment, sought by women's groups since 1923, and sent it to the states for ratification.† Meanwhile, anti-

*As originally conceived by JFK, affirmative action meant little more than that business corporations should recruit at black colleges and establish informal ties with minority organizations. The concept has, of course, evolved since then into a controversial, complex compensatory scheme characterized by numerical "goals" and "timetables" set by bureaucrats, legislatures, and courts.

†Section 1 of the amendment states simply that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

discrimination provisions routinely began appearing in such diverse legislation as the Comprehensive Employment and Training Act (1973), the Crime Control Act (1973), and the Disaster Relief Act (1974).

These federal efforts came at a time when new or revived controversies—over contraception, abortion, sexual permissiveness, women's obligations to self and family—were beginning to emerge and as books such as Betty Friedan's *The Feminine Mystique* (1963) and Kate Millett's *Sexual Politics* (1971) were helping to rekindle and fortify a long dormant "women's liberation" movement. The National Organization for Women was founded in 1966, just as a massive new influx of women into the job market was beginning.

Is Sex Like Race?

Not surprisingly, by the early 1970s, challenges to gender distinctions were finding their way to the Supreme Court's calendar in record numbers. The Burger Court's response, at first, was tentative.

In equal protection cases, the Warren Court had evolved a "two-tiered" standard. In all cases involving racial discrimination, the Court closely scrutinized a challenged state action, putting the burden of proof on the state to justify the use of a racial classification by showing some "compelling state interest." Such a standard was virtually impossible for a state to satisfy. In other equal protection cases, however, the Court applied a much more permissive test: Was there a "rational basis" for the classification? This standard was quite easy to satisfy.

In the sex discrimination cases coming before the Burger Court, a key question was whether classifications by sex should be judged by the same "strict scrutiny" standard that applied in race cases.

In 1973 *(Frontiero* v. *Richardson),* four Justices argued for just such a standard. They contended that sex, like race, is an immutable characteristic; that sex frequently bears no relation to ability; and that gender classifications were inherently suspect. While a majority of the Justices in *Frontiero* refused to embrace strict scrutiny, they did strike down the challenged law—a federal statute automatically allowing a serviceman to claim his wife as a dependent, but requiring a service*woman* to prove her husband's actual dependency in order to claim him. Obviously, something was in the wind.

Since 1973, cases involving alleged gender discrimination have crowded the Court's docket. In most of these, the Court has

STATE ERAs: GUIDE TO THE FUTURE?

Proponents of a federal Equal Rights Amendment contend that ERA would give courts "a clear basis for dealing with sex discrimination." They often point to the record of states that have adopted equal rights amendments to their own constitutions. In fact, the impact of state ERAs is not so clear-cut.

All told, 17 states now have constitutional provisions prohibiting gender-based discrimination. Ironically, four of these states have refused to ratify the federal ERA; two of them never ratified the Nineteenth Amendment, which gave women the vote in 1920.

Application of home-grown ERAs differs from state to state; some states without such amendments are more progressive than are some states that have them. Virginia's judges have taken a tolerant view of gender distinctions, despite the clear legislative intention in 1971 that the state's new ERA be strictly interpreted. Yet courts in California, which has no ERA, have methodically struck down sex-based statutes, without any explicit constitutional basis for doing so.

In some states, judges rely on the "rational basis" requirement: To be constitutional, a law with gender-based distinctions need only bear a rational relation to a legitimate state objective. This renders a state ERA virtually irrelevant. Thus, the Louisiana Supreme Court in 1975 *(Louisiana* v. *Barton)* rejected the argument of a husband, charged with "criminal neglect" of his wife, that the relevant statute violated the state's ERA because it applied only to men. "It presently remains a fact of life," the justices concluded, "that . . . the husband is invariably the means of support for the couple."

In other ERA states, judges apply a stiffer "strict scrutiny" test. The Illinois Supreme Court, for example, in 1974 declared unconstitutional the principle of "maternal preference" in child custody awards, even when children of "tender age" are involved *(Marcus* v. *Marcus)*. Courts in Pennsylvania and Washington have struck down laws prohibiting interscholastic athletic competition between boys and girls. (Contact sports were not exempted—as they are in federal anti-discrimination regulations.)

By and large, state courts have reflected the piecemeal approach of the U.S. Supreme Court, judging cases on their merits and applying no rigid principles, regardless of the existence of state ERAs. Absolute "equality" has sometimes yielded to a woman's (or man's) right to privacy. Five ERA states have upheld a sex-based definition of rape, citing women's "unique physical characteristics." The chief impact of state ERAs has been to goad legislatures into rewriting laws. Courts have not been flooded by lawsuits.

When people *have* gone to court, a state ERA has tended to be what the courts made of it. What they made of it was often patterned on principle but stitched with the "facts of life."

upheld the "equal rights" claim. In so doing, the Justices have struck down laws that, for example, required women school teachers to take mandatory pregnancy leaves, virtually excluded women from juries, and assigned different ages of majority to men and women. During the 1978 term, eight Supreme Court cases involved sex discrimination. In six of them, the ruling favored the claim alleging sex discrimination. Some of these cases, interestingly, were brought by men. Thus, in *Orr* v. *Orr*, the Court struck down an Alabama law stipulating that only husbands could pay alimony.

While moving to an "intermediate" level of scrutiny—demanding that gender classifications be justified not simply by pointing to a "rational basis" but by showing that they serve "important governmental objectives"—the Court has stated that distinctions based on sex *may* be valid if they are somehow compensatory. Thus, in 1974, the Court upheld a Florida law granting a $500 property tax exemption to widows but not to widowers; Justice William O. Douglas concluded that the statute was "reasonably designed to [cushion] the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." A year later, in *Schlesinger* v. *Ballard*, the Justices rejected a male naval officer's attack on a military "up-or-out" promotion system giving a female a longer time in grade before being discharged for want of promotion.

In more recent decisions, however, the Court has been somewhat stickier about requiring proof that a scheme of preference really is intended to be compensatory. *Orr* v. *Orr*, the alimony case cited above, is an example. Justice William J. Brennan, Jr. noted in his opinion that such statutes *favoring* women risk "reinforcing stereotypes about the 'proper place' of women and their need for special protection."

The Abortion Cases

Some of the most controversial rebuffs to female litigants have come when the Court has decided that a certain classification is not based on gender at all. In *General Electric* v. *Gilbert* (1976), the Court affirmed the legality of an employee insurance plan that excluded pregnancy-related disabilities. The Justices reasoned that the exclusion divided beneficiaries into two groups based not on *sex* but on *pregnancy*, with the "pool" of nonpregnant persons including both men and women. In 1979, the Court upheld a Massachusetts law giving veterans preference (in hiring by government), contending that the classification was based on military service, not sex; as it happened, only

two percent of veterans in Massachusetts were female.

Allegations of sex discrimination by no means exhaust the gender cases coming before the Supreme Court. The most important single decision by the Burger Court involving the status of women is surely *Roe* v. *Wade* (1973), affirming a woman's constitutional right to have an abortion during the early stages of pregnancy. Predicated on the notion of a woman's right to control her own body, *Roe* has enormous implications as a measure of contemporary thinking about the status of women. This decision was bolstered in *Planned Parenthood of Missouri* v. *Danforth* (1976), when the Justices declared, among other things, that a husband has no right to veto a wife's decision to have or not have an abortion. Should a man be liable for support of a child he did not want and which a woman insisted upon having over his objections? This touchy issue is now cropping up in lower courts.

Three Steps Back

The Supreme Court has also decided a series of "personal autonomy" cases, holding that certain intimate decisions (e.g., the use of contraceptives, even by minors) are protected by the Constitution. Because so many of the autonomy rulings relate to family life and childbearing, they tend to reinforce the change in thinking about women's place in society generally.

All told, the Supreme Court's equal rights and sex discrimination cases point up the sociological interplay between court and country. This is not to say that the Justices follow the election returns; that is a notion that distorts the reality of the judicial process. Yet, while the Court may not veer with the weather of the day, it is affected by the climate of the age. Changes in America's social values will ultimately be acknowledged in Supreme Court decisions.

An obvious question, then, is what effect the recent upsurge in conservative sentiment will have on future court cases. Affirmative action regulations, for example, which continue to stir considerable resentment among businessmen and educators, are part of the red tape the Reagan administration has vowed to trim. The Equal Rights Amendment, which got off to a fast start a decade ago, has now bogged down.

Some of the Supreme Court's most recent decisions seem to indicate a retrenchment of sorts. While standing by their 1973 abortion decision, the Justices ruled in 1977 that neither the states nor Congress is obliged to fund nontherapeutic abortions with public money and that public hospitals could refuse to per-

form such abortions. In 1980, the Court upheld the Hyde Amendment, which cut off federal funding for most abortions.

In the area of sex discrimination specifically, the 1980 Court term yielded several decisions that some see as signaling a new direction. In the most noted case, *Rostker* v. *Goldberg*, the Supreme Court upheld the constitutionality of all-male draft registration. Although Justice William H. Rehnquist invoked "intermediate scrutiny," he upheld the federal law by raising the question of whether, for the purposes of the statute, men and women are "similarly situated." For military purposes, Rehnquist concluded, they are not, because various laws and policies bar women from serving in combat. Earlier in the same term, Rehnquist had written a decision *(Michael M.* v. *Superior Court of Sonoma County)* rejecting a constitutional challenge to a California law punishing men, but not women, for having sex with an under-age partner. There, too, he invoked the "similarly situated" criterion—only women can get pregnant. In a third case *(Russell* v. *Russell)*, the Court held that a military pension, as the "personal entitlement" of the person who earns it, may not become part of the property settlement in a divorce.

While the National Organization for Women has complained that such decisions give a "governmental imprimatur" to sex discrimination, none of these cases necessarily undermines the position staked out by the Court in its previous rulings. In two of the three cases—those involving rape and draft registration—men were the alleged "victims," charging that *their* rights were being violated. The pension case, like the earlier Massachusetts veterans preference case, did not turn on a gender distinction at all, the Justices concluded. Moreover, the draft decision stemmed largely from the Court's historic reluctance to intervene where Congress has made judgments about military preparedness.

Room to Maneuver

The outcome of another sex discrimination case decided by the Court in the same term offers evidence that the Justices are not backing away from a basic commitment to equal rights. In *County of Washington* v. *Gunther* (1981), the Court rejected the argument that in suits alleging job discrimination brought under Title VII of the Civil Rights Act of 1964, a plaintiff must limit his or her claim to seeking "equal pay for equal work"—the standard set by the Equal Pay Act of 1963. Rather, the Court said, litigants are also free to sue for equal pay for "comparable" work. (*County of Washington* was brought by "matrons" in Ore-

Our case for sex discrimination.

Treating men and women equally can be unjust, argues Aetna Life & Casualty in this 1981 advertisement. "Consider the nearly double crack-up rate of male drivers 25 and under versus female drivers 25 and under." With unisex rates, "Sister Sue would pay 40 percent more for auto insurance. Brother Bob could pay 20 percent less. Unfair!"

Aetna Life & Casualty.

gon who guarded female prisoners and were paid $200 less per month than male "deputies" who guarded male prisoners.) The Court's decision here could pave the way for a series of "comparable worth" lawsuits.

In its case-by-case adjudication of sex discrimination issues, the Supreme Court during the 1970s articulated no broad new concept of the Constitution. However, several generalizations emerge from the decisions of the past decade that at least provide some useful guidelines.

First, the Court has greatly curbed legislative power to pass laws embodying gender distinctions where there is no "important government objective." Today, there is no legitimate state objective in keeping women off juries or out of bars, any more than there is in keeping them away from the polls. As a result of the abandonment of old stereotypes, hundreds of suspect state and federal laws have been wiped off the books. This constitutes a minor revolution.

Second, the Court has determined that there may exist a compelling state interest in treating women more favorably than men—to compensate for the effects of past discrimination. However, it has applied this notion fastidiously, leaving ample room for men to challenge laws that, in certain circumstances,

benefit females but not males who are similarly situated.

Third, implicit in much of the above, the Court has affirmed the legislature's right to make *some* distinctions based on gender—when an important governmental objective is at stake. In *Parham* v. *Hughes* (1979), the Justices upheld a Georgia law that only the mother of an illegitimate child could sue for its wrongful death. Observing that paternity but not maternity may be in doubt, they reasoned that Georgia had a legitimate interest in preventing spurious lawsuits. As Justice Lewis F. Powell, Jr. has written, discrimination by sex is not "inherently odious," and the Court recognizes the remaining room for legislative judgment in this area.

So far, the Supreme Court has not reviewed the issue of sex-based differences in insurance rates and pension benefits. In general, women enjoy lower premiums than men on life insurance (because they live longer); women under age 25 pay less for automobile insurance than their male counterparts (because they have about 50 percent fewer accidents). They pay more for disability insurance than do men (because their average claims tend to be higher, until age 60). Because women have a longer life-span, on average, than men, the monthly payments they collect after retirement on an annuity may be less than those of a man who paid the same premiums for the same period of time. All of these differentials are based on "actuarial" tables that are continually revised by insurance companies; state regulatory agencies have by and large upheld them in principle, though often insisting on specific modifications.

The Limits of Competence

If the Supreme Court has enunciated no sweeping "one man, one vote" kind of doctrine in the area of gender, it is because the issues involved are so complicated and the principles are rarely clear-cut. "Important state interest" is not an unequivocal standard, for it can mean different things at different times. Some of the laws that the Court has lately struck down might once have satisfied that standard. When fewer women worked outside the home and those who did could barely earn a living, it was hardly bizarre to burden a husband as a matter of course with the obligation to support his wife in the event of divorce. One day's "enlightenment" is the next day's anachronism. Affirmative action, for example, will be defensible only so long as lawyers for women's groups and racial minorities can convincingly invoke the continued "effects of past discrimination."

Society is not static, and no bill of rights for women (or

men) will settle every issue of gender distinctions forever. A gray area will always exist where what is "right" or "wrong" is a matter of judgment. When, in 1976, the Supreme Court overturned Oklahoma's two-tiered drinking age—a higher one for men than for women—it did so largely because the state was unable to show that men were responsible for significantly more alcohol-related traffic accidents than women (the justification for the law). But what if the male accident rate had, in fact, been shown to be 500 or 1,000 times greater than that of women?

Would the Court, for that matter, have acted differently in *Roe* if the theory of fetal "viability" had been radically altered by routine test-tube conception? Would the Justices have decided what they did in *Parham* if a foolproof medical test for paternity had been available? One need not answer such questions to recognize that changing realities set certain limits on judicial capability to make final determinations. The law can be an effective spur to shifts in human behavior, but changing behavior just as often leads to shifts in law. Moreover, not all of the restrictions or protections that assigned 19th-century women a "special place" were codified in statutes, just as not all, or even most, of women's recent gains in the workplace or in access to graduate schools can be laid at the door of Congress or the Supreme Court.

The Court was never meant to act as a social barometer, but it does not exist in a vacuum. Nor does the law. Eleanor Smeal, president of the National Organization for Women, recently predicted that if the Equal Rights Amendment failed of ratification, and women consequently had to fight sex discrimination on a case-by-case basis, "we'll be working on this until the year 3000." In fact, we'll probably be working on such issues until, and beyond, the year 3000 anyway. The courts will repeatedly have to determine, in real-life cases, where circumstances are as complicated as men and women can make them, what constitutes "equal rights" in practice, what constitutes "abridgment" of those rights, and when such rights may have to be qualified in light of other social interests.

We will not, I believe, ever retrace the major legal steps already taken. But, on occasion, as realities dictate, the law will continue to view men and women differently, no matter how "differently" may be defined as time goes on.