WOMEN'S RIGHTS AS A CONCERN FOR THE "LIVES LIVED AS CITIZENS UNDER A RIGHTS REGIME"

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ABSTRACT

One of the most opaque and inconsistent areas of constitutional law is the Supreme Court's intermediate scrutiny test as applied to gender discrimination. Sometimes, the Court applies this test in a way that is stricter than strict scrutiny, applying an especially skeptical eye regarding whether the government's stated purpose for the law is genuine. Other times, the Court applies intermediate scrutiny in a far softer manner in which it gullibly accepts the government's stated purpose even it has strong reasons to be skeptical. The Court's standard for how well a gender-discriminatory law must fit its stated purpose also varies significantly from case to case. This essay examines how Ronald Kahn's emphasis on how "lives lived as citizens under a rights regimes" adds clarity and predictability to this seemingly confusing constitutional standard.

KEYWORDS: *constitutional law, equal protection of the law, Fourteenth Amendment, gender equality*

I. INTRODUCTION

Among Ronald Kahn's most significant contributions to constitutional analysis is his rejection of Supreme Court decision-making models that focus entirely

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on either *internal* explanations or *external* explanations. For Kahn, any meaningful understanding of how the Court actually interprets the Constitution has to account for how both types of factors affect judicial decision-making and how those factors interact with one another. He writes:

> I present two primary models through which scholars seek to explain Court decisions. These models differ based on whether or not scholars accept that there is a divide between formalism and realism in explaining Court decisionmaking. That is, the models differ based on whether scholars accept . . . the "formalist-realist divide." Scholars who rely on Model 1 accept this divide, seeking to explain Court decisionmaking in unidirectional terms, either internally—from text or precedent—or externally—that is, directly from the social, economic, and political realities of the world outside, or directly from other factors, such as the attitudes toward public policy of justices before they reach the Court or the Court's response to historical events. (Kahn 2015, 274)

One of the enduring legacies of Kahn's scholarship is to show that neither formalism nor realism can, by themselves, satisfactorily explain the actual decisions of the Supreme Court. For Kahn, internal factors, such precedent, and external factors, such as the justice's political preferences, were parts of a dynamic interaction that cannot be so easily teased apart.

Crucial to this understanding of the Court is an appreciation of how the lives of citizens (and, I would argue, noncitizens) are actually lived in a rights regime: "At the core of Supreme Court decisionmaking is an 'interpretive turn' in which the normative and empirical are mutually constructed, through a consideration of the 'internal' legal and 'external' lives of citizens as lived under a rights regime" (Kahn 2008, 188).

Kahn's great insight, that the Court views issues in light of the actual lived experiences of citizens and also considers internal factors such as doctrine in a constitutional rights–based regime, is especially salient when looking at the Court's confusing and seemingly inconsistent jurisprudence in the area of gender equality and the Fourteenth Amendment. As I will argue, the Court's stated doctrinal test for gender discrimination has led to a seemingly inconsistent mélange of decisions that sometimes uphold and sometimes strike down gender distinctions in the law. These decisions cannot be well understood merely by applying the Court's stated test for gender discrimination. Indeed, the stated test proves to be virtually irrelevant to the Court's analysis in these cases. By analyzing these decisions through Kahn's lens, however, and by examining the lived experiences of the women and men affected by these decisions, we gain greater clarity.

II. INTERMEDIATE SCRUTINY: THE INDETERMINATE NATURE OF THE STATED TEST

Gender discrimination in the context of the Equal Protection Clause has always been a tricky issue for the Supreme Court. Until the 1970s, the Court had only two choices for what level of scrutiny to apply to gender discrimination. One choice was to apply the rational basis test, which provides a very low level of scrutiny. Legislation "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest" (*Cleburne v. Cleburne Living Center* 473 U.S. 432 [1985], 439–40). This "rational basis" test is self-consciously designed to permit legislation that pursues trivial goals or pursues them in a manner that is poorly crafted to achieve them. Recourse against such laws is found in the legislature, not the courts: "The Constitution presumes that even improvident decisions will be rectified by the democratic processes" (*Cleburne v. Cleburne Living Center* 473 U.S. 432 [1985], 439–40).

If the law under review classifies by race, national origin, ethnicity or alienage,[2] then the Court takes a very different approach. Such laws, affecting "suspect classes," are subject to strict scrutiny. They will be sustained only if they are "narrowly tailored to further a compelling government interest" (*Fisher v. Texas*, 133 S. Ct. 2411 [2013], 2417).

Eventually, the Supreme Court found both alternatives unpalatable when it came to gender discrimination. Intermediate scrutiny, from its birth, was a compromise between those justices who wished to apply strict scrutiny to gender discrimination and those who did not.

Historically, the Court provided virtually no protection to women against even the most blatant and debilitating forms of discrimination.[3] Throughout most of U.S. history, little changed in terms of the low level of judicial protection afforded to women against discrimination. As Justice Ruth Bader Ginsberg summarized:

> As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." *Frontiero* v. *Richardson*, 411 U.S. 677, 684, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973). Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional

2. There are, however, many exceptions to the rule that alienage classifications are subject to strict scrutiny; see *Cleburne v. Cleburne Living Center* 473 U.S. 432 (1985), 440.

3. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

> right to the franchise. *Id.*, at 685. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. See, *e.g., Goesaert* v. *Cleary*, 335 U.S. 464, 467, 93 L. Ed. 163, 69 S. Ct. 198 (1948) (rejecting challenge of female tavern owner and her daughter to Michigan law denying bartender licenses to females—except for wives and daughters of male tavern owners; Court would not "give ear" to the contention that "an unchivalrous desire of male bartenders to . . . monopolize the calling" prompted the legislation). (*United States v. Virginia*, 518 U.S. 515 [1996], 531–32)

By the 1970s, judicial attitudes toward women's equality were in the midst of a sea change, which was reflected in the Supreme Court's opinion in the case *Reed v. Reed*, 404 U.S. 71 (1971). In *Reed*, the Court struck down an Idaho law that preferred men over women as probate administrators. While ostensibly applying the Court's lowest form of scrutiny, the rational basis test, the Court obviously applied a toughened version of that test, rejecting the government's stated purpose for the law, which was to increase the likelihood that probate administrators would have some experience in the business world (Cathey 1983). The Supreme Court of Idaho had upheld the statute on that basis:

> The legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women . . . . While this classification may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary. We are concerned only with whether the classification is so irrational and arbitrary that it violates the constitution, and it is our opinion that it is not. (465 P.2d 635, 638 [1970]).

The Idaho Supreme Court's reasoning was certainly in keeping with the tenor of the Court's gender discrimination decisions up to that that time. Women were frequently excluded from business affairs and deprivations of their rights had routinely been justified on slimmer reasoning than the Idaho court relied upon. Yet, the Supreme Court rejected Idaho's argument. Without discussing whether the gender-based rule promoted the likelihood of having estate administrators with business experience, the Court held that the law's distinction was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause" (404 U.S. at 76).

This tougher application of the rational basis test did not go unnoticed. In his famous forward to the 1972 *Harvard Law Review*, Gerald Gunther writes: "At least one pervasive element of the new mood is clear: a majority of the Justices is prepared to acknowledge substantive equal protection claims on minimum rationality claims" (Gunther 1972, 19).

In 1973, Justice William Brennan attempted to more formally recognize the heightened protection for women that emerged in *Reed*. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court struck down a federal law granting male, but not female, soldiers an automatic dependency allowance for their spouses. Brennan, writing for a four-justice plurality, made the case that women had enough in common with racial minorities to warrant protection by strict scrutiny. He acknowledged that *Reed* had applied a higher standard than traditional rational basis review and therefore gave "implicit support" to applying strict scrutiny to gender discrimination.

For all his efforts, Brennan could not muster a fifth vote to apply strict scrutiny to gender discrimination. Thus, three years later in *Craig v. Boren*, 429 U.S. 190 (1976), Brennan compromised (for a more thorough account of the nature and context of Brennan's efforts and eventual compromise, see Gerstmann 1999, 46–56) and created a new intermediate level of scrutiny: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" (*Craig v. Boren*, 429 U.S. 190 [1976], 198).

This test, however, has been an unhelpful guide to how the Court has actually decided equal protection cases about gender discrimination. While the use of the word "important" (more stringent than "legitimate" but more diluted than "compelling") was obviously meant to demonstrate that intermediate scrutiny was indeed intermediate, no Supreme Court decision has ever turned on the issue of whether a government interest rises to the level of "compelling" or is merely "important." *Craig* involved a challenge to an Oklahoma law that allowed eighteen- to twenty-one-year-old females, but not eighteen- to twenty-one-year-old males, to drink 3.2 percent alcohol beer. The state argued that because men were more likely to drink and drive than women, the law promoted highway safety. Because preventing road fatalities is quite obviously a compelling state interest, creating a category of important, but not necessarily compelling, government interests was utterly unnecessary to resolve the case.

More important, the *Craig* Court decided *not* to resolve what is among the most important elements determining how strict the Court's scrutiny really is: whether the government is allowed to offer post hoc justifications for the law or whether it

will be required to offer proof of the actual purpose of the law at the time it was passed. Although Oklahoma argued that it was acting to promote road safety, there was scant legislative record as to the law's original purpose. If the law was actually based on outdated notions of chivalry, which dictated that drunken female drivers should be escorted home and protected from embarrassment, then that would obviously undermine its legitimacy.[4]

Thus, it was an essential question whether this new intermediate scrutiny accepted any government explanation or, instead, independently inquired into the law's original purpose. Because a great many, perhaps nearly all, gender-based laws originally were based on outdated gender stereotypes, the Court's decisions on the constitutionality of these laws are far more likely to turn on this question than on the intermediate scrutiny test as stated by the Court. The Court, however, chose not to address this crucial issue:

> For this appeal we find adequate the appellee's representation of legislative purpose, leaving for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, post hoc rationalization. (*Craig v. Boren*, 429 U.S. 190 (1976), 199, n. 7)

However, "another day" has never come: the Court has *never* answered this crucial question in a consistent fashion. As a result, intermediate scrutiny has vacillated wildly in its level of strictness. Rather than being a middle ground, it has become a constitutional wild card, sometimes as deferential as the traditional rational basis and sometimes applied more strictly than some forms of strict scrutiny. Comparing two important post-*Craig* gender cases demonstrates the malleable nature of intermediate scrutiny.

In *Michael M. v. Superior Court*, 450 U.S. 464 (1981), a young man challenged the constitutionality of a California statute that made it a criminal offense for a male, minor or otherwise, to have sexual intercourse with a minor female while imposing no penalty upon the minor female.[5] Although Michael M. argued that the law's gender discrimination was based on an old-fashioned desire to protect female

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4. "The very social stereotypes that find reflection in age-differential laws are likely substantially to distort the accuracy of these comparative statistics. Hence 'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home" (429 U.S. at 202).

5. See California Penal Code, Section 261.5.

virtue and chastity, California claimed that the goal of the statute was to prevent female minors from getting pregnant.

The Court accepted California's claim even though doing so was an act of spectacular gullibility. The law was originally written in 1850, and in 1895, the California Supreme Court unequivocally stated:

> The obvious purpose of [the statutory rape law] is the protection of society by protecting from violation the virtue of young and unsophisticated girls. . . . It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature. (*Michael M. v. Superior Court*, 450 U.S. 464 [1981], 495, n. 10)[6]

In 1964, the California Supreme Court further held:

> [An under-age female] is presumed too innocent and naive to understand the implications and nature of her act. . . . The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established. Hence the law of statutory rape intervenes in an effort to avoid such a disposition. (*Michael M. v. Superior Court*, 450 U.S. 464 [1981], 495, n. 10)[7]

Although it could not have been clearer that the law was intended to protect feminine virtue and chastity in the name of preserving "social mores," the Court nonetheless accepted the state's more palatable explanation that the purpose of the law was to deter teen pregnancy. However, fourteen years later, in *United States v. Virginia*, 518 U.S. 515 (1996), the Court took a different tack in applying intermediate scrutiny. In that case, the Court ruled unconstitutional the exclusion of women from the Virginia Military Institute (VMI), a public university with the purpose of producing military and civilian leaders. VMI utilized an "adversative" approach to education that the Court described as "[t]ormenting and punishing . . . where surveillance is constant and privacy nonexistent" (522).

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6. Brennan, J. dissenting, quoting *People v. Verdegreen*, 106 Cal. 211, 214–215, 39 P. 607 (1895), 608–609.

7. Quoting *People v. Hernandez*, 61 Cal. 2d, at 531, 393 P. 2d, (1964), 674.

The State of Virginia set forth two purposes for keeping VMI single gendered: offering the option of a single-sex education to promote diversity of educational options for students (the state had recently, under judicial pressure, created a women's only college) and also maintaining the adversative model, which it argued could not be maintained in a dual-gender setting. Both the federal district court and the Fourth Circuit Court of Appeals accepted these reasons as genuine:

> Providing the option of a single-gender college education may be considered a legitimate and important aspect of a public system of higher education, the appeals court observed, that objective, the court added, is "not pernicious." Moreover, the court continued, the adversative method vital to a VMI education "has never been tolerated in a sexually heterogeneous environment." (528)

Nonetheless, the Supreme Court held that these explanations were not the true purposes of the single-gender policy. Completely ignoring *Michael M.*, the *Virginia* Court held: "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation" (533). Accordingly, the Court found Virginia's proffered rationales to be mere "rationalizations" rather than "actual state purposes":

> Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded. See *Wiesenfeld*, 420 U.S. at 648, and n. 16 ("mere recitation of a benign [or] compensatory purpose" does not block "inquiry into the actual purposes" of government-maintained gender-based classifications); *Goldfarb*, 430 U.S. at 212–213 (rejecting government-proffered purposes after "inquiry into the actual purposes") (internal quotation marks omitted). (535–36)

In stark contrast to the Court's extreme gullibility in *Michael M.*, the Court delved all the way back to 1839, the founding year of VMI:

> Neither recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options. In 1839, when the Commonwealth established VMI, a range of educational opportunities for men and women was

> scarcely contemplated. Higher education at the time was considered dangerous for women; reflecting widely held views about women's proper place, the Nation's first universities and colleges—for example, Harvard in Massachusetts, William and Mary in Virginia—admitted only men. See E. Farello, *A History of the Education of Women in the United States* 163 (1970). VMI was not at all novel in this respect: In admitting no women, VMI followed the lead of the Commonwealth's flagship school, the University of Virginia, founded in 1819. (536–37)

This represented truly searching and skeptical scrutiny of Virginia's actual purposes. In fact, in the 1980s, the state had appointed a Mission Study Committee to examine whether to make VMI a coeducational institution. The committee recommended against doing so, concluding that VMI would struggle to recruit a sufficiently large and qualified pool of female applicants. The Court was unimpressed by the report, holding that the Committee did not buttress its report with sufficient evidence, nor was it convincing evidence of the state's true motivations:

> A Mission Study Committee, appointed by the VMI Board of Visitors, studied the problem from October 1983 until May 1986, and in that month counseled against "change of VMI status as a single-sex college." See 766 F. Supp. at 1429 (internal quotation marks omitted). Whatever internal purpose the Mission Study Committee served—and however well meaning the framers of the report—we can hardly extract from that effort any commonwealth policy evenhandedly to advance diverse educational options. As the District Court observed, the Committee's analysis "primarily focused on anticipated difficulties in attracting females to VMI," and the report, overall, supplied "very little indication of how the conclusion was reached." (539)

As a policy matter, it is easy to cheer for the Court's decision to require VMI to admit women. And a strict approach to scrutinizing gender discrimination has much to recommend it. But clearly, although *Michael M.* and the *Virginia* case purportedly apply the same level of scrutiny, they represent vastly different approaches to whether the Court accepts or skeptically investigates the state's proffered state purposes for a law. The level of scrutiny in *Michael M.* is more akin to the deferential version of rational basis historically applied by the courts, whereas the *Virginia* Court applied a searching level of scrutiny that surely would have struck down the gender-based statutory rape law in *Michael M.* Thus, whether a teenager is sent to jail for statutory rape, or whether women are allowed to apply to a prestigious college, turns on which of the oscillating versions of intermediate scrutiny the Court

chooses to apply. Furthermore, the Court offers no explanation whatsoever for which of these very different levels of scrutiny apply to what type of cases.

In fact, many court observers believed that the Supreme Court in the *Virginia* case actually had created a new, higher level of scrutiny for gender discrimination. The Court not only looked skeptically at Virginia's proffered reasons for keeping VMI single sex, but also repeatedly stated that Virginia had not demonstrated an "exceedingly persuasive justification" (518 U.S. at 517, 524, 529–530). This was not the first time that the Court had used that phrase, but as a result of the Court's emphasis on it, "[m]any scholars and some judges . . . interpreted the use of such phrases to mean that gender classifications are now subject to a level of scrutiny more strict than intermediate scrutiny although they disagree about exactly how strict the examination would be" (Bowsher 1998, 307).

The VMI case, however, turned out not to be the last word on intermediate scrutiny or the final stage of an evolution toward a new tougher form of intermediate scrutiny. Five years after the VMI case, in *Nguyen v. INS*, 533 U.S. 53 (2001), the Court returned to the far softer *Michael M.* version of intermediate scrutiny. *Nguyen* upheld a federal law that explicitly applied different standards to mothers and fathers of children born outside the United States. As the Court described the law, it

> governs the acquisition of United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States or its possessions. The statute imposes different requirements for the child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father. (56–57)

In *Nguyen* the pendulum swung again and the Court simply accepted the government's explanation that mothers are more likely to be bonded to children than fathers:

> In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth, an event so often critical to our constitutional and statutory understandings of citizenship. The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship. . . .The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. (65)

As in *Michael M.*, but unlike in the VMI case, the Court accepted the government's proffered explanations without inquiry. But, as Justice Sandra Day O'Connor explained in her four-justice dissent, *there was no evidence that this was one of the actual purposes of the discriminatory statute*:

> The majority does not elaborate on the importance of this interest, which presumably lies in preventing fraudulent conveyances of citizenship. Nor does the majority demonstrate that this is one of the actual purposes of [the law]. Assuming that Congress actually had this purpose in mind in enacting parts of [the law] the INS [Immigration and Naturalization Service] does not appear to rely on this interest in its effort to sustain [the law's] sex-based classification. (79)

What about the *Virginia* Court's use of the phrase "exceedingly persuasive justification" and hopes that the Court was raising the level of scrutiny for gender discrimination? In *Nguyen*, the Court explained that phrase away as being virtually synonymous with the Court's original phrasing of intermediate scrutiny:

> We have explained that an "exceedingly persuasive justification" is established "by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" (533 U.S. at 70.)

Finally, in 2017, the Court switched again to applying intermediate scrutiny more skeptically to question the sincerity of the government's stated purpose for the law. In *Sessions v. Morales-Santana*, 582 U.S. ___ (2017),[8] the Supreme Court struck down a different immigration provision that distinguished between unwed mothers and unwed fathers. The statute in *Morales-Santana* required unwed fathers to have spent more time in the United States than it required of unwed mothers before they could pass their citizenship on to foreign-born children. One of the stated purposes for the discrepancy was to avoid stateless children. The government argued that many states put the child of the mother who is a U.S. citizen at risk of statelessness because they did not provide for the child to acquire the father's citizenship at birth. The Court rejected this argument on the grounds that similar risks can apply to the child of a U.S. citizen father. That is a fair point, but the Court also ruled that "there is little reason to believe that a statelessness concern prompted the

8. Slip op. No. 15-1191 (June 12, 2017).

diverse physical presence requirements."[9] This is a sharp contrast from the Court's approach in *Nguyen*. As noted earlier, in that case, the Court simply accepted the proffered rationale of the government despite the lack of evidence that it was the actual government purpose behind the law and the fact that the INS did not actually rely on that rational in defending the law.

Thus, rather than represent an evolution in intermediate scrutiny, the *Michael M.*, *Virginia*, and *Nguyen* cases demonstrate that intermediate scrutiny is applied in vastly different ways at different times with no judicial explanation or guidance as to which version to apply. Phrases such as "exceedingly persuasive justification" and "important government interest" have little explanatory power.

Furthermore, note that *Craig*, *Michael M.*, and the *Virginia* case all apply very different standards with regard to the level of proof required that the gender distinction sufficiently advances the government interest. In *Craig*, the state pointed to evidence that arrest rates for drunk and impaired driving were approximately *ten to twenty* times greater for young men than for young women.[10] In the VMI case, "The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect 'at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach'" (518 U.S., 540)

In both cases, the Supreme Court found that the nexus between gender and the government purpose was insufficient. In *Craig*, the Court held that the 20:1 and 10:1 ratios did not show a sufficient nexus between gender and dangerous alcohol consumption because most young men have never been arrested for impaired or drunk driving. In the VMI case, the Court found that "[s]ome women, at least, would want to attend [VMI] if they had the opportunity . . . and some women . . . 'are capable of all of the individual activities required of VMI cadets'" (429 U.S., 201–202; 518 U.S., 540–41)

It is certainly true that many responsibly sober young men and many young women could do well at VMI, but it is clear that the *Craig* and *Virginia* Courts were demanding a high standard of proof that the gender distinctions substantially furthered the government purpose. A 20:1 ratio of male-to-female arrests for driving under the influence is a big ratio under any standard and the *Virginia* Court never went beyond the assertion that "some" women would thrive under VMI's

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9. Slip op. at 19.

10. 429 U.S. at 200, n. 8. ("The disparities in 18- [to] 20-year-old male-female arrests were substantial for both categories of offenses: 427 versus 24 for driving under the influence of alcohol, and 966 versus 102 for drunkenness.")

adversative approach and deprivation of privacy. The contrast with the *Michael M.* Court's blithe acceptance of the fit between the state's statutory rape laws and the government's purpose of preventing teen pregnancy is truly remarkable. In that case, the Court accepted the state's assertion that punishing females for statutory rape would create enforcement problems despite the fact *the state failed to offer any evidence whatsoever* for it and despite the fact that, as Justice Brennan pointed out in the dissent, other states had gender-neutral statutes that did not appear to create any enforcement problems.[11]

III. GENDER DISCRIMINATION AND THE LIVED LIVES OF WOMEN

The idea of "lived lives" is at the core of Kahn's understanding of constitutional interpretation.[12] Although legal formulations such as intermediate scrutiny are not meaningless and external factors such as judicial policy preferences and political pressures play a role in judicial outcomes, all of this must be interpreted through the lens of how the rights affect the actual lived lives of members of subordinated groups.

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11. See 450 U.S. at 491–93 (Brennan J. dissenting; citations omitted). "The plurality assumes that a gender-neutral statute would be less effective than § 261.5 in deterring sexual activity because a gender-neutral statute would create significant enforcement problems. The plurality thus accepts the State's assertion that 'a female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution. In an area already fraught with prosecutorial difficulties, we decline to hold that the Equal Protection Clause requires a legislature to enact a statute so broad that it may well be incapable of enforcement.' *Ante*, at 473–474 (footnotes omitted). However, a State's bare assertion that its gender-based statutory classification substantially furthers an important governmental interest is not enough to meet its burden of proof under *Craig* v. *Boren*. Rather, the State must produce evidence that will persuade the court that its assertion is true. See *Craig* v. *Boren*, 429 U.S., at 200–204.The State has not produced such evidence in this case. Moreover, there are at least two serious flaws in the State's assertion that law enforcement problems created by a gender-neutral statutory rape law would make such a statute less effective than a gender-based statute in deterring sexual activity. First, the experience of other jurisdictions, and California itself, belies the plurality's conclusion that a gender-neutral statutory rape law 'may well be incapable of enforcement.' There are now at least 37 States that have enacted gender-neutral statutory rape laws. Although most of these laws protect young persons (of either sex) from the sexual exploitation of older individuals, the laws of Arizona, Florida, and Illinois permit prosecution of both minor females and minor males for engaging in mutual sexual conduct. California has introduced no evidence that those States have been handicapped by the enforcement problems the plurality finds so persuasive. Surely, if those States could provide such evidence, we might expect that California would have introduced it."

12. For example, the phrase "lived lives" is used nineteen different in his most recent article, "The Right to Same-Sex Marriage" (*Cleburne v. Cleburne Living Center* 473 U.S. 432 [1985], 439–40, n. 1).

Through this lens, the Court's far stricter scrutiny in the VMI case is more understandable. VMI is a revered institution in the south: "The VMI, founded in 1839, has an impressive historical background. Its cadets fought in the Civil War, as did several famous alumni, including Stonewall Jackson and George Marshall" (Nimit 2008, 281). To claim that women are inherently, or even usually, incapable of meeting its demanding standards has powerful symbolism.

As Kahn (2008) writes, "Through a *process of analogy*, the Court considers whether a legal concept, such as liberty, should be extended to a group that heretofore had been denied such rights" (179). In terms of exclusion from an important educational institution, the analogy between the gender exclusion at VMI and the racial exclusions that occurred across the south, and, indeed, elsewhere in the United States, seems obvious (e.g., see Amstien 1994, 74; Saferstein 1993, 54).

Applying Kahn's insights, we see that two factors can help explain the very high level of scrutiny in the VMI. First, there is the impact on the lived lives of women, particularly in the American South. Given the importance of the military in that region and prestige of the institution, the impact of the exclusion on gender equality went far beyond the handful of women who wished to apply to the school at that time.[13] By contrast, it would be a great stretch to assume that the INS regulation in *Nguyen* distinguishing between maternal and paternal presumptions of parenthood had that sort of impact on either gender. This is because fathers in that case faced only a "minimal" burden acknowledging paternity in order to pass along their citizenship to their children.[14]

In terms of the analogy of gender and race exclusions from educational institutions, the comparison is especially strong in the case of VMI:

> VMI has a strong Confederate background and retained customs that celebrate the Confederacy. These historical ties can account for the unwillingness of VMI to admit women. For example, the Confederacy fought in the Civil War to retain the right to hold blacks as slaves, and from this belief in slavery, grew the idea of racial segregation. Racial segregation brought to light the struggle for equality, and the recognition of a constitutional premise of equality in education, stemmed from this struggle. Blacks were the first group to successfully challenge equality

13. Since that time, the interest of female applicants in VMI has grown and women now exceed 10 percent of the entering class. C. Craig, "Female Cadets Making Their Mark at VMI" *10 News*, 2015, http://wsls.com/2015/08/24/female-cadets-making-their-mark-at-vmi/.

14. Unlike Nguyen's parental acknowledgment requirement, the requirement of Section 1409(a) age-calibrated physical-presence requirements cannot fairly be described as "minimal" (*Morales-Santana* Slip Op. at 16).

> in state-funded education under the equal protection clause of the Fourteenth Amendment. In 1971, the Supreme Court recognized that women were in a social position 'comparable to that of blacks under the pre-Civil War slave codes,' and therefore, under the Fourteenth Amendment, they were also afforded equal protection rights. The [VMI] Court cited facts indicating similarities between historical discrimination perpetuated against blacks and against women, such as the inability of either group to hold office, to participate in legal proceedings as jurors, to file lawsuits, or to vote. (Nimit 2008, 294–96)

Looking at the statutory rape case, *Michael M.*, and the *Nguyen* case, we see no such analogy to the oppression faced by African Americans, just as we do not see the same sort of impact on the lived lives of any subordinated group. As Kahn avers, internal considerations such as doctrine are present but not definitive. The intermediate scrutiny test provides a beginning point, but the Court applies that test in very different ways depending on the way it analogizes gender discrimination to previous forms of subordination and its impact upon the lived lives of women.

IV. CONCLUSION

Kahn's influence on the study of how the Court decides issues of constitutional law has been truly remarkable. His insights into judicial behavior enable us to better examine a broad range of judicial doctrines. There is no one-size-fits-all approach to the difficult issues of when the government may take gender into account. Kahn shows us, however, that considering the impact of such distinctions on the lived lives of women and analogies of such distinctions to historical forms of subordination lends significantly greater clarity to how the Court has approached this issue.

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