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WOMAN'S CONSTITUTION

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The idea of woman is a social construct. Professor Karst begins by considering some of the sources of that construct, and how American law has both reflected and reinforced it. Next, he discusses the role of constitutional law in the modern reconstruction of "woman's place," and examines the limitations of that transformation. Finally, recognizing that women as a group do tend to perceive social relations and approach moral issues in distinctive ways, Professor Karst speculates on the possible consequences of a reconstruction of our constitutional law to include an important measure of that distinctive morality and worldview.

For one who presumes to lecture on woman's nature and its relation to American constitutional law, two comments by Virginia Woolf take on immediate relevance. On the subject of lecturing, Woolf said that it "incites the most debased of human passions — vanity, ostentation, self-assertion, and the desire to convert."[1] As for discussing the nature of woman, Woolf said that it "attracts agreeable essayists, light-fingered novelists, young men who have taken the M.A. degree; men who have taken no degree; men who have no apparent qualification save that they are not women."[2]

I plead guilty to both charges. There is vanity in taking the lectern, and I do desire to convert. Furthermore, I claim no special quali-

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I have imposed on a number of friends and colleagues at UCLA and elsewhere by asking them to comment on a draft of this article, and they have responded with characteristic responsibility and care. I am grateful to William Alford, Alison Anderson, Grace Blumberg, Carole Goldberg-Ambrose, Catherine Hancock, Smiley Karst, William Klein, Sylvia Law, Christine Littleton, Catharine MacKinnon, Kim McLane, Carrie Menkel-Meadow, Mary Newcombe, Patricia Patterson, Gary Schwartz, Steven Shiffrin, Margaret Stevenson, and Jonathan Varat.

1. V. WOOLF, THE DEATH OF THE MOTH 231 (1942).
2. V. WOOLF, A ROOM OF ONE'S OWN 45 (1929).

fication for this task. It is true enough in our society that men and women often live in different worlds,[3] and in any society it is true that no man can know what it is like to be a woman.[4] Fortunately, any man who wants to learn about women's views on these questions today has an advantage over the men who were Virginia Woolf's contemporaries. Beginning in 1949 with the publication in France of Simone de Beauvoir's modern classic, *The Second Sex*, and rapidly accelerating in the past fifteen years, feminist writers of our time have produced a sophisticated and richly diverse literature that offers not only illumination but challenge.

What is the nature of woman? At various times and in various places the answers to that question would differ markedly. Apart from the narrowest sort of biological characteristics, both woman and man are social constructs. I begin by considering some of the sources of our traditional assumptions about the differences between the sexes and how those assumptions have been reflected in our law and reinforced by it. But if law has helped to perpetuate our two-sided cultural construct of woman and man, it can also be the instrument of reconstruction.

My second theme is the role of constitutional law in the modern reconstruction of the social order that defines "woman's place." This reconstruction has succeeded in providing a number of women with access to positions in an ongoing social system—that is, access to social roles designed by men to operate a social system oriented around an essentially male conception of human interaction. Yet, to acknowledge the nature of that advance is also to recognize one reason why the transformation thus far accomplished has been limited: The same male conception of society underlies the very constitutional doctrine that women seek to use in effecting a reconstructed order of male-female relations.

There is an alternative conception. Women themselves—not all women, but women generally, considered as a group[5]—do tend to have a different perception of social relations and a different approach to moral issues. If it is difficult, or unfair, simply to fit women into ex-

3. *See generally* Bernard, *My Four Revolutions: An Autobiographical History of the ASA*, 78 AM. J. SOC. 773, 781-89 (1973).

4. For a sensitive discussion of the topic see MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, in FEMINIST THEORY: A CRITIQUE OF IDEOLOGY 1, 14-29 (1982).

5. Throughout this article, when I speak of the qualities of "women as a group" or "men as a group," the generalization I have in mind is not universal but statistical. I refer not to the traits of any particular woman or man, but to a characteristic more frequently found among one sex than among the other.

isting male-defined roles, one obvious alternative is to modify the system's orientation to take account of women's values. My final theme is thus an exercise in speculation: What might be the consequences if our constitutional law itself were reconstructed to add a healthy measure of the morality and world view characteristic of our society's female half?

I. THE CONSTRUCT OF WOMAN

Hardly anyone will dispute the proposition that there is in our society a set of stereotypical assumptions about the nature of woman and of man. The Supreme Court, for example, regularly remarks on the existence of "archaic and stereotypic notions" about "the roles and abilities of males and females."[6] Any search for the "true" nature of women will be hindered by the imprint of the stereotype of woman on the mind of the person who is searching, whether that person be male or female. The prevailing construct of woman is largely a male product, for it is men who have held the power to define roles and institutions in our society. And the male stereotype of woman is crucially influenced by men's need to define woman in order to define themselves as men. The discussion that follows explores these themes and concludes with some questions about possible ways our social order might be released from the grip of the prevailing construct of woman.

A. *The Durability of Stereotype.*

In 1981, the Supreme Court upheld the constitutionality of an act of Congress authorizing the President to require men—but not women—to register for a possible military draft.[7] Since the mid-1970's, the Court had been insisting on important justification for any governmental discrimination based on sex.[8] In the draft registration case, the Court was far less demanding. The draft, said Justice Rehnquist, was designed to produce combat troops; by law and service regulations, women were excluded from serving in combat. For purposes of the draft, then, men and women were "not similarly situated," and this difference between the sexes was justification enough for requiring only men to register.[9]

One does not have to be a scientist to know that this particular difference between women and men was not biological, but social. The Supreme Court's opinion has been roundly criticized for using one gov-

6. *See, e.g.,* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

7. Rostker v. Goldberg, 453 U.S. 57, 78-79 (1981).

8. The standard for judicial review in these cases was set in Craig v. Boren, 429 U.S. 190, 197 (1976).

9. Rostker v. Goldberg, 453 U.S. 57, 78 (1981).

ernmentally created inequality to justify another,[10] and for exemplifying the influence of sex-role stereotyping on judicial thinking.[11] Both of the criticisms are richly deserved, but the draft registration case also illustrates a more general proposition: It is always possible to find some difference between men and women if one is looking for a way to justify sex discrimination.

When we look back to past generations' assumptions about the differences between men and women, we have no trouble in identifying the stereotype at work. One example of an earlier era's view of women is regularly offered in the modern literature on sex discrimination as the perfect example of archaic and stereotypic thinking about women. A century ago, the Supreme Court rejected Myra Bradwell's claim that Illinois could not constitutionally bar women from the practice of law.[12] Concurring, Justice Joseph Bradley took judicial notice of the fact that men and women were not similarly situated:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .
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> . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[13]

In this passage Bradley is making several interlocking points: Women are delicate, and they are timid; they are necessarily dependent on men, needing men's protection; they fulfill their destiny by serving

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10. *See* Freedman, *The Equal Protection Clause, Title VII, and Differences Between Women and Men: A Critical Analysis of Contemporary Sex Discrimination Jurisprudence*, 92 YALE L.J. 913 (1984); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 182-85 & n.50 (1982); *see also* Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487, 495-97 (1981) (this note was principally authored by Christine Littleton).

11. *See* Freedman, *supra* note 10; Note, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 17, 170-71 (1981).

12. Bradwell v. Illinois, 83 U.S. 130, 139 (1873).

13. *Id.* at 141. This particular law of the Creator was discovered early. In the fourteenth century, Barbara Tuchman tells us, the Menagier of Paris composed a manual of conduct for his fifteen-year-old wife, including the maxim that "it is the command of God that women should be subject to men." B. TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY 213 (1978). For confirmation that reconstruction is going on everywhere, see R. RUETHER, SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY 13 (1983).

others in the domestic sphere, as wives and mothers; and they are unsuited for independent, active lives in public affairs. All these facts are given, in the nature of things, ordained by God's law. Unaware of "the law of the Creator," however, Myra Bradwell had pursued an active and successful career as editor and publisher of a Chicago legal newspaper, taking such emergencies as the Chicago fire in her stride.[14] If God intended women to be delicate, evidently something had gone wrong. Very likely Justice Bradley could not even see the incongruity—and is every male reader sure that had he been alive in 1873, he would have acted differently? To live in a society is to be conditioned by it.

In our own time, the Supreme Court justified the draft registration decision on the basis of judicial deference to the judgment of Congress about military affairs. But Congress's decision to limit draft registration to men was not a military judgment; it was a political decision. Both the President and the Joint Chiefs of Staff had argued in favor of registering women.[15] Congress made no independent evaluation of military necessity; instead, it heard the voice of public opinion.[16] The strength of the public opposition to drafting women is easy to understand; the issue taps our most profound feelings about sex roles.[17] It is easy for us today to heap scorn on Justice Bradley for his assumptions about the nature of women. But, before we begin feeling too superior to him, we ought to ask what it is that prevents our own generation from seeing that a woman like Myra Bradwell would be more fit than most men for today's military service.

B. *The Construction of the Construct.*

The political decision by Congress to exclude women from draft registration may look like a gift to women, but it is part of a larger political order that serves to subordinate women to men's uses. This scheme of things is by no means limited to American society. In all

14. *See Myra Bradwell—Crusader for Reform*, SUP. CT. HIST. SOC'Y Q., Fall 1982, at 4, 4.

15. *See* Rostker v. Goldberg, 453 U.S. 57, 61 (1981) (President); *Rostker*, 453 U.S. at 100 (Marshall, J., dissenting) (service chiefs).

16. Wendy Williams demonstrates this conclusion beyond doubt. Williams, *supra* note 10, at 183-85. *See infra* text accompanying note 93. It is not beyond the range of possibility that the Supreme Court majority heard that same voice. For a discussion of public opinion concerning the drafting of women and the politics of non-ratification of the Equal Rights Amendment, see Rhode, *Equal Rights in Retrospect*, 1 LAW AND INEQUALITY 1, 26-29 & n.106 (1983).

As the dissenters in *Rostker* made clear, the draft was designed to produce noncombat personnel as well as combat troops. *See* Rostker v. Goldberg, 453 U.S. 57, 85 (White, J., dissenting); *Rostker*, 453 U.S. at 97-103 (Marshall, J., dissenting). The dissenters did not take up the issue of the exclusion of women from combat.

17. *See generally* Williams, *supra* note 10.

times and in all cultures that we know about, men's activities have been valued more than women's and men have been more powerful than women.[18] There are people who assume that male dominance is biologically compelled, but a more plausible conclusion is that the biological differences between men and women are one influence among many in the allocation of power in human societies.[19] Surely the fact that women bear and nurse infants, combined with the fact that men, on the average, have greater physical strength, must have disposed the earliest human societies toward a particular division of labor—and thus power—between women and men.[20] In the modern world, even though these biological differences have lost much of their original significance, the structures of male supremacy remain.

Behind the structures, however, lies a more important truth: The social definition of woman has been constructed around the needs of men. I refer not just to men's wanting someone to take responsiblity for the domestic sphere of life, but to men's primary need to overcome deep-seated doubts about their individual worth and even their identities. Not just the stereotype, but women's subordination, too, has important roots in the process by which men identify themselves through the constructs of woman and man.

In our society, as elsewhere, women have had the main responsibility for early child care. Recently, increased attention has been given to the effects of this system on the children's formation of a sense of identity—something that ordinarily takes place in the first few years. Children identify first with their mothers, but very soon they learn that their identities are bound up with gender. For a girl, the formation of her gender identity takes place within the mother-daughter relationship, in which, in Nancy Chodorow's words, "[m]others tend to experience their daughters as more like, and continuous with, themselves,"[21]

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18. *See* Rosaldo and Lamphere, *Introduction*, in WOMEN, CULTURE AND SOCIETY 1, 3 (1974); Rosaldo, *Women, Culture, and Society: A Theoretical Overview*, in *id.* at 17, 19. Legends of matriarchal societies nonetheless persist. *See* Bamberger, *The Myth of Matriarchy: Why Men Rule in Primitive Society*, in *id.* at 263, 264-66.

19. Even Edward Wilson, the "founder" of sociobiology, agrees:

> So at birth the twig is already bent a little bit [toward male dominance]—what are we to make of that? It suggests that the universal existence of sexual division of labor is not entirely an accident of cultural evolution. But it also supports the conventional view that the enormous variation among societies in the degree of that division is due to cultural evolution.

E. WILSON, ON HUMAN NATURE 132 (1978). *See also* P. SANDAY, FEMALE POWER AND MALE DOMINANCE: ON THE ORIGINS OF SOCIAL INEQUALITY (1981) (arguing that male domination is not inherent in human society).

20. *See* Rosaldo, *supra* note 18, at 23.

21. N. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 166 (1978).

and girls see themselves as feminine, like their mothers.[22] Identity formation and attachment are combined in a single process. Mothers see their sons as opposite, and boys, in seeking to be masculine, see that they must separate themselves from their mothers.[23] If masculine identification is initially found in separation, it is reinforced in later childhood years by activities in male peer groups outside the home. Being masculine is something a boy must achieve, through attaining status and power in the individualistic, competitive, and uncompromisingly hierarchical society of other boys. Margaret Mead summed it up: "The little boy learns that he must act like a boy, do things, prove that he is a boy, and prove it over and over again, while the little girl learns that she *is* a girl, and all she has to do is refrain from acting like a boy."[24] It is no wonder that men generally emerge from this process with a sense of separate identity more highly developed than that of women, who typically have a definition of self that is more inclusive. If women as a group have a greater sense of empathy than do men as a group, one reason may be this early process of identity formation.

"Masculinity becomes an issue in a way that femininity does not."[25] A boy becomes a man chiefly by differentiating himself from woman. If a man sees woman as "Other," and as dangerous, needing to be controlled, the reason is that his sense of self is at stake. He defines femininity by way of establishing what he must not be: delicate, timid, domesticated, passive, dependent.[26] Hence man needs woman—

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22. *See id. passim*.

23. *Id.* These themes of identification and separation are the heart of Chodorow's analysis, and reappear throughout her book. See, for example, her discussion contrasting boys' "positional" identification with girls' "affective" identification. *Id.* at 175-76.

Boys also see that to separate from the mother requires strength and the willingness to resist maternal power. *See* E. JANEWAY, MAN'S WORLD, WOMAN'S PLACE 48-57 (1971) (describing the ancient myth of female power); *see also* H. HAYS, THE DANGEROUS SEX: THE MYTH OF FEMININE EVIL *passim* (1964) (detailing the companion myth of feminine evil and trickery). *See generally* D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND THE HUMAN MALAISE (1976); W. LEDERER, THE FEAR OF WOMEN (1968); Horney, *The Dread of Woman*, INT'L J. OF PSYCHO-ANALYSIS 348 (1932).

24. M. MEAD, MALE AND FEMALE 175 (1949), *quoted in* C. TAVRIS & C. OFFIR, THE LONGEST WAR: SEX DIFFERENCES IN PERSPECTIVE 156 (1977) (emphasis in original). Of course girls compete, and experience hierarchy; the point is that girls generally do not need the competition with other girls to establish their femininity. *See* E. MACCOBY & C. JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 247-65 (softbound ed. 1978) (on sex differences in competition and dominance).

25. N. CHODOROW, *supra* note 21, at 181. For a discussion of masculinity as an unattainable ideal, see *id.* at 177.

26. *See id.* at 174, 181-82; D. DINNERSTEIN, *supra* note 23, at 38-75.

The image of woman described in the text is most prevalent among the white middle class. Among blacks, the prevailing stereotype of woman emphasizes self-reliance. By 1977, more than 40% of black households in central cities in the United States were headed by women. *See* Sternlieb & Hughes, *The Changing Demography of the Central City*, SCI. AM., Aug. 1980, at 48, 53. The

not individual women, who differ from each other in the same ways that men do, but this construct of the mind called woman—to define himself. In de Beauvoir's terms, man defines himself as the Subject, and woman as the Other, the object through which he seeks one or another sort of fulfillment.[27] The construct of woman, in other words, leads to the objectification of women.

At the heart of the construct of woman is a traditional definition of femininity. Lists of "masculine" and "feminine" traits have appeared in Western literature for hundreds of years.[28] Most people, of course, have qualities on both lists. Given the luxuriant diversity among individuals both male and female, the traits associated with gender—with masculinity and femininity—are multidimensional; they are not to be found in a bipolar distribution with men at one pole and women at the other.[29] Nevertheless, we largely *experience* the idea of gender as bipolar. We commonly hear the expression "the opposite sex" used in reference to gender, even though the word "opposite" in that context is a

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stereotype of strength is undoubtedly a legacy of slavery. *See generally* E. FRAZIER, THE NEGRO FAMILY IN THE UNITED STATES (rev. ed. 1966). *See also* Simson, *The Afro-American Female: The Historical Context of the Construction of Sexual Identity* in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 229 (1983) (a short review of some 19th century writings of black women). It is perfectly appropriate to speak of a woman who is raising a family on a monthly welfare allowance as "dependent"; the dependence in question, however, is not so much psychological as economic; she is needy.

27. S. DE BEAUVOIR, THE SECOND SEX xvi and *passim* (1971). Compare Chief Justice Taney's racist opinion in Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404-05 (1857), describing black persons at the time of the adoption of the Constitution as a separate "subordinate and inferior class of beings." In more modern language, "we believe that the person with a stigma is not quite human," and we "construct a stigma theory, an ideology to explain his [or her] inferiority and account for the danger that he [or she] represents." E. GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963).

28. In 1792, Mary Wollstonecraft published her *Vindication of the Rights of Woman*, which described the behavior expected of women, including "cunning, softness of temper, *outward* obedience, and a scrupulous attention to a puerile kind of propriety"; she also remarked that it helped to be beautiful. M. WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN 33 (1792), *quoted in* THE FEMINIST PAPERS 40, 44 (A. Rossi ed. 1973). See Vogel, Broverman, Clarkson & Rosenkrantz, *Sex-Role Stereotypes: A Current Appraisal*, 28 J. SOC. ISSUES 59, 63 (No. 2, 1972) for a modern list of feminine and masculine stereotypes. See J. RICHARDS, THE SCEPTICAL FEMINIST: A PHILOSOPHICAL INQUIRY 121-25 (1980) for a discussion of such lists of feminine characteristics.

Generally "sex" is regarded as a biological term (one is male or female), and "gender" as a social one (one is masculine or feminine). *See* Shapiro, *Anthropology and the Study of Gender*, in A FEMINIST PERSPECTIVE IN THE ACADEMY: THE DIFFERENCE IT MAKES 110, 112 (softbound ed. 1983) ("gender is a total social fact that takes on its meaning and function from the wider cultural system of which it is a part").

29. Shapiro, *supra* note 28, at 112; *see also* Tresemer, *Assumptions Made About Gender Roles*, in ANOTHER VOICE: FEMINIST PERSPECTIVES ON SOCIAL LIFE AND SOCIAL SCIENCE 308, 314-15, 317-18 (1975) (criticizing assumptions underlying bipolar scales in use in the social sciences).

glaring exaggeration.[30] In all human societies, sex and gender are categories of supreme importance.[31] What is the first question you ask when you hear that someone has had a baby? In our minds, gender is an either/or classification, and it is a classification that powerfully affects our attitudes toward an individual. The classifications have different imports; the word "woman," unlike "man," is an epithet, and the reason is that the construct of woman is filled with the content of our traditional view of femininity. The result is what Dorothy Dinnerstein aptly calls the "under-personification" of women.[32] Like the black who becomes an "invisible man," with his individuality hidden behind his blackness,[33] a woman's qualities as an individual, a person, are obscured by the abstraction, woman.

If man defines woman in order to achieve masculine identity within a bipolar ideology, then it will not be sufficient to pick out certain traits and categorize particular human beings, who may be biologically either male or female, as feminine. It is anatomy, not gender, that unfailingly accomplishes the separation of man from woman—which is what man has sought. Some men are more timid and shy than others, and some women are stronger and more competitive than others, but the one thing we can count on to differentiate the sexes is the difference in sexual and reproductive function.[34] Thus the objectification of woman by man cannot stop at identifying woman as the Other; it necessarily proceeds into objectification of women's sexuality. There is cruel irony in the fact that a great many women themselves participate in this latter form of objectification, regarding themselves as sexual objects. Catharine MacKinnon seems to be referring to both kinds of objectification when she says that women are "socially defined as women largely in sexual terms."[35]

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30. *See generally* Spence, *Changing Conceptions of Men and Women: A Psychologist's Perspective*, in A FEMINIST PERSPECTIVE IN THE ACADEMY: THE DIFFERENCE IT MAKES, *supra* note 28, at 130.

31. *See* Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 587-91 (1977) (describing the significant implications of gender categorization in American culture).

32. D. DINNERSTEIN, *supra* note 23, at 108.

33. *See* R. ELLISON, INVISIBLE MAN (1952).

34. *See* J. RICHARDS, *supra* note 28, at 128.

35. MacKinnon, *supra* note 4, at 182. On the status of women as observed objects, see *id.* at 23-28 & n.59. MacKinnon cites John Berger's work of art criticism, J. BERGER, WAYS OF SEEING 46-47 (1972). Shirley Ardener's comment about the influence of a dominant mental construct is apt in this context: "to perceive beyond the reflective screens of a dominant structure is a difficult challenge." Ardener, *Introduction*, PERCEIVING WOMEN vii, xxii (S. Ardener ed. 1975).

Women are also socially defined as mothers or potential mothers, as can be seen in Justice Bradley's statement of his ideal of femininity, and in the report of the Senate Armed Services Committee rejecting the idea of drafting women. *See infra* text accompanying note 93.

It may seem that we have strayed from the subject of constitutional law, but we have not. In 1977, the Supreme Court upheld an Alabama state prison regulation that forbade hiring a woman as a guard in a maximum security prison for men, when the position would require close proximity to prisoners.[36] The Court agreed that federal law prohibited the use of sex stereotypes in setting employment standards, but said that the woman appplicant's ability to maintain order in the prison "could be directly reduced by her womanhood."[37] The inmates, deprived of a normal heterosexual environment, might assault a woman guard because she was a woman. Of course, in any prison, there is a legitimate concern for the safety of guards; it may also be true that women guards in a men's prison are at risk in ways that men guards are not. But prison experts testified that women guards could be used safely and effectively in such an environment, and the record also contained evidence of California's success with women guards in men's prisons.[38] That experience, however, was lost on a majority of the Justices, who were unable to see beyond the abstraction, woman. The Court thus reinforced the stereotypic view of women as vulnerable sex objects by using that view as its own justification.[39]

A central feature of the classical definition of femininity unquestionably is the quality of being pleasing to men.[40] But femininity of the traditional kind means more than that; it also means submissiveness, dependence, and domesticity. These features of the construct of woman reinforce a system of control by men over the sexuality and maternity of women.[41] In American society, this control has been achieved

36. Dothard v. Rawlinson, 433 U.S. 321, 336 (1977). The opinion principally addressed the claim that the prison rule violated Title VII of the Civil Rights Act of 1964, *id.* at 328-32, but also disposed of a parallel claim of violation of the equal protection clause. *Id.* at 332-37.

37. *Id.* at 335.

38. *Id.* at 336 n.23 (1977).

39. *See* Note, *supra* note 10, at 493-98, 502-04; *see also* Freedman, *supra* note 10; Powers, *The Shifting Parameters of Affirmative Action: "Pragmatic" Paternalism in Sex-Based Employment Discrimination Cases*, 26 WAYNE L. REV. 1281, 1293-1301 (1980); Williams, *supra* note 10, at 188-89 n.75.

Carrie Menkel-Meadow has remarked that *Dothard* is also premised on a stereotypical view of men's sexuality. Menkel-Meadow, *Women as Law Teachers: Toward the "Feminization" of Legal Education*, in ESSAYS ON THE APPLICATION OF HUMANISTIC EDUCATION IN LAW, 16, 25 & n.20 (1980).

40. *See* J. RICHARDS, *supra* note 28, at 139; MacKinnon, *supra* note 4, at 16-17; E. JANEWAY, *supra* note 23, at 110-15, 196. "The moral of this tale is obvious: the powerful need not please. It is subordinates who must do so . . . . [T]he need to please marks women as subordinates, though often they are petted subordinates." *Id.* at 114.

41. *See* E. JANEWAY, *supra* note 23, at 279-88; J. RICHARDS, *supra* note 28, at 128, 138-43; Ortner, *Is Female to Male as Nature is to Culture?*, in WOMEN, CULTURE AND SOCIETY, *supra* note 18, at 67, 73-76. By sexuality, I mean one's sense of self as a sexual being, and one's expression of that sense, which, for a woman, both necessarily include at least the potential for child-bearing.

through a variety of institutional means, both governmental and private. Prominent among the means historically used to control women's sexuality and maternity has been the law. The range of controls can be called to mind just by reciting a list of legal topics: marriage, marital property, divorce, control over and responsibility for children, illegitimacy, abortion, contraception, prostitution, and rape.[42] Women were also kept home, or submissive, or both, by such private sanctions as: ostracism of "fallen" women,[43] that is, women who were sexually aggressive or who had left male protection; discrimination in employment, including sexual harassment on the job;[44] and virtual exclusion from some professions. Until the early twentieth century, women were excluded from voting, and thus from any direct influence on changing these conditions by legislation. What did men, as a group, want from women, that led them to impose controls that were so severe? An English libertarian feminist, Janet Radcliffe Richards, offers this suggestion:

> The non-bearers of children wanted to control the bearers of children. . . . [They wanted] to define a breeding territory from which other men were excluded, and which would guarantee at once both their having offspring and their being able to identify them as their own. Women can by nature be confident about both these matters; men cannot at all, as long as women are on the loose.[45]

See generally A. RICH, OF WOMAN BORN (1976) (on the relation of patriarchy to male control over maternity); Wallach, *Musings on Motherhood, Marshall, Molecules: A Passage Through the Heart of Maternal Darkness From God's Creation to Man's*, 6 BLACK L.J. 88, 90-107, 140 (1978).

Correspondingly, women have long sought to take control over their own sexuality and maternity as a way of taking control over their lives. Linda Gordon's social history of birth control in the United States concludes with a perceptive analysis of the ways in which the claims of today's feminists in this area of human interaction are a natural outgrowth of claims made more than a century ago. L. GORDON, WOMAN'S BODY, WOMAN'S RIGHT 403-18 (1976).

42. These topics are among those surveyed in Cavanaugh, *"A Little Dearer Than His Horse": Legal Stereotypes and the Feminine Personality*, 6 HARV. C.R.-C.L. L. REV. 260, 260-66 (1971). *See also* MacKinnon, *supra* note 4, *passim*. The law also influences women's control over their own bodies by its treatment of such subjects as battery of women, sterilization, and incest. These same legal coutrols, of course, also shape men's conceptions of themselves.

43. Catherine Hancock has called my attention to this galling remark by the novelist Charles Brockden Brown in 1799: "The gulf that separates men from insects is not wider than that which severs the polluted from the chaste among women." C. BROWN, WEILAND 132 (1962), *quoted in* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 31 (1981). *See* S. EDWARDS, FEMALE SEXUALITY AND THE LAW 52-55 (1981) (on women of sexual experience and working-class women in 19th century thought in Great Britain); *id.* at 55-58 (on mechanisms of control of female "unchastity").

44. *See generally* C. MACKINNON, SEXUAL HARRASSMENT OF WORKING WOMEN (1979).

45. J. RICHARDS, *supra* note 28, at 141. The anthropologist Peter Wilson has a similar view, arguing that male dominance in early human societies resulted, not from male strength, but from the female's power to " 'admit' the male to the pair bond [of parentage]" and "to designate the 'father' of her children, thereby determining the identity of the male." P. WILSON, MAN, THE PROMISING PRIMATE: THE CONDITIONS OF HUMAN EVOLUTION 65 (1983).

Even laws with a protective appearance might serve the ends of male control over female sexuality. Consider, for example, the crime of statutory rape. Modern discussions of the crime treat it as a protection of a girl or young woman against her own immaturity, which might lead her to give an ill-considered "consent."[46] In fact, the crime originated in thirteenth century England in order to conserve a girl's eligibility for marriage, and thus her value to her father as a means to enhance the family's wealth. What was being protected was not the girl's freedom, but precisely her status as an object, her value as a counter in a bargain between one man and another.[47]

The traditional view of femininity thus limited women in both the public and private spheres of life. Women were virtually barred from the public sphere, and at home they were under male tutelage. At least by the beginning of the nineteenth century, the idealized role of woman was firmly fixed at the emotional center of the family. She was, in fact, Justice Bradley's stereotype:[48] dependent and domestic, a creature not of reason but of sentiment and love. Her mission was self-sacrifice; the married woman had no important separate interests, apart from the interests of the family—and those remained entirely under her husband's benevolent power. Her gaze properly focused inward on the family, not outward on the world. She was not fully a citizen; indeed, she was to be excluded from public roles, lest her seductive presence in the public arena distract men from the light of reason that should illuminate that sphere.[49] Such a sexual division of labor not only differen-

46. This was the generally understood purpose of California's statutory rape law, according to Justice Mosk. Michael M. v. Superior Court, 25 Cal. 3d 608, 617, 601 P.2d 572, 578, 159 Cal. Rptr. 340, 346 (1979) (Mosk, J., dissenting), *aff'd,* 450 U.S. 464 (1981). See the discussion of this decision in Williams, *supra* note 10, at 181, 185-88. Catharine MacKinnon has argued that, given the sense of powerlessness of women, any idea of consent in these circumstances is illusory. *See* MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 635, 646-55 (1983).

47. The point appears with chilling clarity in the original legislation itself. *See* 3 Edw. 1 ch. 13, 22 (1275); 13 Edw. 1 ch. 34, 35 (1285). *See also* 20 Hen. 3 ch. 6 (1235). I use the term "girl" advisedly; the cited laws set the age of consent at 12.

48. *See supra* notes 12-15 and accompanying text.

49. *See* Okin, *Women and the Making of the Sentimental Family*, 11 PHIL. AND PUB. AFFAIRS 65, 87 (1982). Women were "denied the freedom of the city, cut off from distributive processes and social goods outside the sphere of kinship and love." M. WALZER, SPHERES OF JUSTICE—A DEFENSE OF PLURALISM AND EQUALITY 240 (1983). Single women, of course, were not only permitted to work, but encouraged to do so at substandard wages. *See generally* A. KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982). Even the admission of large numbers of women into colleges made no significant difference in this pattern; in practical terms, women were segregated in curricula and college life in ways that reinforced the traditional stereotype. *See* Zimmerman, *Daughters of Main Street: Culture and the Female Community at Grinnell, 1884-1917*, in WOMAN'S BEING, WOMAN'S PLACE: FEMALE IDENTITY AND VOCATION IN AMERICAN HISTORY 154, 160 (1979).

tiates women's and men's roles in society; it also creates inequality of social status, wealth, and power.[50]

The facts of male dominance and the stereotype of female dependence combine to produce a social system that reinforces itself in a circular pattern. A vital element of this system is that women themselves are persuaded to cooperate in maintaining it. Most power relationships, most of the time, secure the cooperation of those who are subordinated. The idea of "woman's place" is sold to women as well as men—and often sold to them by other women. At least by the nineteenth century, the selling became overt; women were told, first by doctors and later by child psychiatrists, that their place was in the home.[51] More recently the message has changed. Women need not *stay* home, but when they come home after a day of work they are still expected to fulfill woman's traditional responsibilities: management of the household and service as an emotional anchor for the family. The style of the sales pitch has changed, too; nowadays it is less overt. Consider the messages about woman's role that appear day after day, night after night, on television, both in the programming and in the commercials. The people who decide the message content of television obviously have concluded that the traditional view of male-female relations sells—and sells to both men and women. The heroine may be a doctor or a black-belt expert in karate, but it is a good bet that she will also be femimine in the classical mode. Television reflects our awareness that woman's status is, above all, "the ideational envelope that contains woman's body."[52]

The stereotypes of man and woman are true in one sense. Most people are socialized to try to live up to them, and most of us succeed in some degree. I assume the reader is an academic achiever. Think back to the time when you were in high school. Would you cheerfully have traded some of your academic talents for qualities that more

50. *See* Rosaldo, *supra* note 18, at 17-18, 42; N. CHODOROW, *supra* note 21, at 214; J. RICHARDS, *supra* note 28, at 137 (on the circular reasoning joining definitions of femininity with sex discrimination). *See also* J. MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN 3-12 (1976).

Frances Olsen and Kathryn Powers have perceptively analyzed the role of law in maintaining the sexual division of responsibilities between the public and private spheres, and so maintaining male dominance in both those spheres. *See* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55.

51. *See* B. EHRENREICH & D. ENGLISH, FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN (Anchor paperback ed. 1979); C. TAVRIS & C. OFFIR, *supra* note 24, at 12-14; Smith-Rosenberg, *The Hysterical Woman: Sex Roles and Role Conflict in Nineteenth Century America*, in OUR SELVES/OUR PAST: PSYCHOLOGICAL APPROACHES TO AMERICAN HISTORY 205 (1981).

52. MacKinnon, *supra* note 4, at 15.

closely fit the prevailing stereotypes of masculinity or femininity? If you are male, did you wish you could be an athletic hero? If you are female, did you wish you could be the belle of the ball? If your answer is "No," you are built of sterner stuff than I was. Of course there is truth in the stereotypes when the stereotypes reinforce themselves.

Let me recapitulate, beginning with a small confession. Until not long ago I was puzzled by the feminist slogan, "the personal is political." It seemed to mean one of two things: either that every personal relationship between a woman and a man was primarily a struggle for power—which seemed exaggerated—or that the individual man-woman relationship necessarily influenced politics in the sense of national policy-making—which seemed false. I have come to understand that feminists who say "the personal is political" have other things in mind. One of them is that women's role in society—which is very much an issue of power, and thus of politics—is crucially affected by a definition of woman designed to serve the most intimate needs of men.[53] Men, consciously or not, seeking identity through separation from woman, define the content of the gender categories of masculine and feminine, and use those categories to justify women's dependence. The debate in Congress over registering women for the draft is a vivid illustration of one way in which the personal becomes political.[54]

C. *Two Kinds of Reconstruction.*

The power of the construct of woman to control people's behavior is formidable. Yet two possible kinds of change are suggested by the very mechanisms that have created and maintained the construct. First, if the law of a male-oriented society has contributed to the hold of stereotypical assumptions about women, the same body of law has been made to serve the ends of reform, and offers hope of reforms yet to come. Second, if we can see that the process that forms men has produced a world view tending toward one form of social ordering, then we should also be able to see that the process that forms women produces an alternative world view. Perhaps that perspective offers hope for a reconstruction of a different kind, not merely to open "man's world" to women but to reshape constitutional law for all of us. These

53. See *infra* note 106 and accompanying text for further discussion of the idea that "the personal is political."

54. Thus the Senate Armed Services Committee commented that assigning women to combat might "affect the national resolve at the time of mobilization," and drafting women would "place unprecedented strains on family life." Williams, *supra* note 10, at 183. The senators, all of them male, surely had in mind a definition of femininity when they subscribed to these views—a definition that was not so much reasoned as assumed, on the basis of the senators' experience. *See also* J. MILLER, *supra* note 50, at 3-12 (rationalizations for male dominance).

contrasting themes of reconstruction will occupy the rest of this article, but first they need to be introduced.

We began with the question, "what is the nature of woman?", and immediately recognized that the idea of woman is a construct of mind. The only "nature of woman" is the one that prevails in our world, as the compound product of nature and culture.[55] Indeed, it strains the limits of our ingenuity just to try to imagine what women would be like in a world where the abstraction, woman, was not defined around man's needs.[56] But if men form their sense of "what women are like" in the course of defining their own identities and their views of human interaction, the same process in women tends to produce a different sense of self and a different moral perspective. No lawyer can think about these contrasting moralities without being struck by their relevance to the way we think about law.

In a recent exploration of these differences, Carol Gilligan sounds the same theme of gender identification that we find in the literature that examines the construct of woman.[57] For boys in our culture, as we saw, gender identification means individuation and separation. For girls, it is found in attachment and empathy. Intimacy generally threatens males, but reassures females. Boys play games emphasizing competition under elaborate rules and procedures for resolving disputes; girls play in a more cooperative way, suppressing competition and subordinating the game to their personal relationships. Boys' play leads them toward abstracting human relationships; girls' play fosters empathy for particular people. No wonder that "men's social orientation is positional, while women's is personal."[58]

Gilligan pursues these subjects in the writings of a number of social scientists—most of them men—who have taken the male world view as the norm, and have found women's moral development to be incomplete. Reexamining these writers' data, she finds they support another conclusion: that women and men in our society tend to have distinctive views of interpersonal relationships and of the meaning of

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55. Maccoby and Jacklin, in their summary chapter, take great pains to make clear that even their conclusions about the various forms of sex difference that have been proved and disproved must be taken with qualifications. E. MACCOBY & C. JACKLIN, *supra* note 24, at 349-74. For a brief summary of their conclusions, see *infra* note 128.

56. *See* MacKinnon, *supra* note 4, at 20. On women's self-concept, *see also* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT *passim* (1982); J. MILLER, *supra* note 50, at 17-19, 32-33 (departure from stereotyped gender roles creates anxiety); S. ROWBOTHAM, WOMAN'S CONSCIOUSNESS, MAN'S WORLD *passim* (1973).

57. *See generally* C. GILLIGAN, *supra* note 56.

58. C. GILLIGAN, *supra* note 56, at 16 (summarizing and interpreting the conclusions of Nancy Chodorow). *See generally* N. CHODOROW, *supra* note 21, *passim*; D. DINNERSTEIN, *supra* note 23, *passim*.

morality.[59] She evokes two contrasting images: for men, the ladder of hierarchy; for women, the web of connection.[60] Men tend to see human interactions as the contractual arrangements of individuals seeking positions in a hierarchy. Women, defining the very idea of self as more continuous with their human environments, tend to see the same interactions as part of ongoing, sharing connections in a network of relationships.

The view from the ladder tends to produce a morality of rights, an abstract hierarchy of rules to govern the competition of highly individuated individuals. To see the world from the web, however, is to see individuals in connection with each other, and to see morality as a question of responsibilities to particular people in particular contexts. Just as all of us, men and women alike, embody at least some of each of these moralities,[61] our institutions, including the law, bear the mark of both the ladder and the web. It takes no sophistication, however, to recognize that American law is predominantly a system of the ladder, by the ladder, and for the ladder.

Turning from the construct of woman to what might be called reconstruction, and considering the relationship between the nature of woman and our constitutional law, we can think of the present era as

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59. C. GILLIGAN, *supra* note 56, at 18-23.

60. *Id.* at 62.

61. David Bakan has suggested that all animal life is characterized by a combination of two qualities that he labels "agency" and "communion." *See* D. BAKAN, THE DUALITY OF HUMAN EXISTENCE *passim* (1966). In discussing "sociology as a male science of society," Jessie Bernard refers to Bakan's distinction in characterizing two styles of social science research:

> Agency tends to see variables, communion to see human beings. Agentic research tends to see sex as a variable, communal research to see women as people. Agency has to do with separation, repression, conquest, and contract; communion with fusion, expression, acceptance, noncontractual cooperation. Agency operates by way of mastery and control; communion with naturalistic observation, sensitivity to qualitative patterning, and greater personal participation by the investigator. . . . Nothing in this polarity is fundamentally new. For almost 50 years I have watched one or another version of it in sociology.

Bernard, *supra* note 3, at 784-85. Gilligan's interpretation of women's and men's different tendencies in judging moral issues thus takes its place in an intellectual tradition of long standing. Bernard adds: "[F]or reasons no one has yet formally explicated but which, I believe, most of us intuit, the agentic approach which yields 'hard' data tends to have more prestige than the communal, which yields 'soft' data." Bernard, *supra* note 3, at 785. Bakan's discussion is wide-ranging, touching the fields of biology, psychology, psychiatry, and theology. He finds both agentic and communal features present in all life, including all humans, but he identifies males with agency and females with communion, on the basis of tendencies and emphases within those two groups. Indeed, Bakan's discussion itself seems mightily influenced by the traditional views of masculinity and femininity. *See id.* at 102-53. Bakan does not assert that these differences among groups of humans are biologically compelled. *See id.* at 117. His analysis is helpful in our context because it focuses attention on the duality of agency and communion, and the qualities associated with each. *See also* Carlson, *Understanding Women: Implications for Personality Theory and Research*, J. SOC. ISS., 17, 22-25 (No. 2, 1972).

the first reconstruction. Women in large numbers, often at great personal cost, are defying the stereotype and moving onto a ladder built by and for men. There is much to be said for a constitutional law that permits women to do just that, and the constitutional developments of the past two decades can be seen as the validation of women's claims of access to a world structured by hierarchy.

The limitations of this first reconstruction in redefining "woman's place" are, of course, the limitations of the ladder; they serve to illustrate the need for something more. Gilligan's interpretation suggests the possibility of still another connection between the nature of women and our constitutional law. It is now possible to imagine a second reconstruction, not of the hierarchy but of constitutional law itself, not to abandon the Constitution's historic protection of the ladder but to supplement that goal, recognizing the need to protect the web of connection. After all, there is also much to be said for a constitutional law that takes into account a view of life, self, and morality that is the dominant mode among the female half of the nation's population.

II. CITIZENSHIP AND CHOICE: THE LIMITS OF THE FIRST RECONSTRUCTION

The traditional social construct of woman promotes the dependence of women on men, because femininity in its classical form is fundamentally at odds with a woman's recognition as a complete and independent human being. No wonder that feminists, ever since Mary Wollstonecraft in the eighteenth century, have been calling attention to a conflict between femininity, traditionally defined, and humanity itself.[62] Simone de Beauvoir dramatized the point by identifying the standard definition of femininity with "mutilation."[63] Because she understood the connection between the personal and the political, de Beauvoir saw that any serious concern for releasing women from their dependence must address both the public and private worlds. Women must be recognized as equal citizens, full participants in the public life of the community. They must also gain control over their own sexuality and maternity, the sort of control the abortion rights movement has epitomized in the slogan, "choice."[64]

62. *See* M. WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN (1792).

63. S. DE BEAUVOIR, *supra* note 27, at 682. What de Beauvoir leaves out is that the traditional definition of masculinity also conflicts with humanity, in a different way. When women reclaim the idea of femininity, perhaps both men and women will claim a humanity that has previously been mutilated.

64. *Id.* at 689-724.

In 1949, de Beauvoir's agenda looked like a task for Amazons. Yet a number of today's feminist writers call for changes that are more far-reaching. One writer implies that we may have to abandon completely the notion of the "sentimental family."[65] Others say that women's dependence on men will end only with a thoroughgoing reassignment of responsibility for early child care, so that all children will form their gender identities in formative years spent with both men and women.[66] Still others conclude that women's dependence will be inevitable so long as society gives primacy to heterosexual attraction.[67] From these perspectives de Beauvoir's prescriptions seem mild, indeed.

As these proposals show, we have come a long way since 1949. One measure of the distance is the change in American constitutional doctrine. The process is by no means complete, but on the whole the Supreme Court has accepted de Beauvoir's objectives as the appropriate goals of constitutional law. In the public sphere, the claim of women to equal citizenship now rests on a solid constitutional base.[68] In practical effect, overt discrimination against women imposed by the state is presumptively unconstitutional,[69] and legislation forbidding both governmental and nongovernmental sex discrimination is routinely upheld.[70] In the private sphere, women have found vital constitutional support for their claim to control their own sexuality and maternity.[71] These constitutional developments are recent and famil-

65. Okin, *supra* note 49, at 87-88.

66. N. CHODOROW, *supra* note 21, at 173-90, 211-19; *see generally* D. DINNERSTEIN, *supra* note 23. My own reaction is that these authors are unduly optimistic in their assessment of the likely results of such a change in child-rearing patterns.

67. *See* Wasserstrom, *supra* note 31, at 594; *Interview—MacKinnon on Feminist Theory*, OFF OUR BACKS, May 1983, at 17, 17 & 18. Even if it does not produce such sweeping changes, the women's movement seems destined to touch the lives of all of us: "almost nothing, it turns out, will remain outside its relevance. . . . It is a psychic and social migration, leaving behind a violently altered landscape." Hardwick, *Domestic Manners*, DAEDALUS, Winter 1978, at 1, 11.

68. *See* Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977).

69. *See infra* notes 75-77 and accompanying text. Dothard v. Rawlinson, 433 U.S. 321 (1977), is an unfortunate exception to this line of cases. *See supra* notes 36-39 and accompanying text.

70. See, e.g., the decisions of lower courts upholding the application of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), to state and local government employers. The cases are collected in J. FRIEDMAN & G. STRICKLER, THE LAW OF EMPLOYMENT DISCRIMINATION 531 (1983). On the whole, the Supreme Court has also been inclined to interpret antidiscrimination laws generously, to the end of achieving their purposes. *See, e.g.*, County of Washington v. Gunther, 452 U.S. 161 (1981); Cannon v. University of Chicago, 441 U.S. 677 (1979); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

71. I have discussed these developments in my article, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). For an imaginative proposal for doctrinal integration of these two branches of constitutional law into a single theory of sex-based equality, see Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

iar, and there is no reason to rehearse their details here. Instead, a step back will provide a view of these developments in the aggregate. What has constitutional law contributed to the redefinition of "woman's place," and what are the limits of this endeavor in reconstruction?

For a great many, perhaps most, women in this country, these questions will surely seem remote. Among women who are poor, only a small proportion will be able to claim the benefits of equal citizenship. The "freedom of the city"[72] means little when you are trying to raise a family on a monthly welfare allowance. And for poor women, the slogan "choice" has a hollow ring, even when applied narrowly to the constitutional right to choose to have an abortion. What good is that right if you cannot afford an abortion, and the state stands ready to pay the expenses of childbirth but not of abortion? And what good is the right to practice birth control when motherhood is the only source of identity in sight?[73] Employment discrimination laws do aid working women, but in discussing constitutional law I shall refer mainly to the role of law in a reconstruction among the middle class. It is true that any social change must start somewhere; but it is also true that our constitutional developments to date are only a beginning.

A. *Citizenship: Woman's Nature and Woman's Place.*

The claim to equal citizenship is a claim to be treated by the organized society as a respected and responsible member, a participant, one who counts for something in the society.[74] In other words, the status of citizen is inconsistent with the traditional construct of woman. When femininity, in its classical definition, is embodied in law or otherwise used to limit women's participation in the public life of the community, the principle of equal citizenship is presumptively violated. The Supreme Court has readily accepted the argument that the stereotypical view of femininity does not provide constitutional justification for overt governmental discrimination that denies women access to positions or other forms of power in the public sphere. For example, the Court has recognized that the Constitution gives a woman the same right as a man to serve as administrator of a decedent's estate,[75] to manage community property,[76] or to serve on a jury.[77]

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72. *See supra* note 49.

73. *See* Blake, *Population Policy for Americans: Is the Government Being Misled?*, 2 SCIENCE 522 (1969).

74. *See* Karst, *supra* note 68, at 5-11. *See generally* Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981) (a view of sex equality issues that emphasizes the equal citizenship value of respect).

75. Reed v. Reed, 404 U.S. 71, 76-77 (1971).

76. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

77. Taylor v. Louisiana, 419 U.S. 522, 537 (1975). *Taylor* was not decided on an equal pro-

In two other kinds of cases, however, the Court has stumbled. First is the case in which the governmental discrimination is not overt, but indirect, as when Massachusetts established a preference for veterans in hiring people for the civil service.[78] Because the armed forces had been limiting women's participation to a quota of two per cent of the forces, and had imposed more severe enlistment rules on women than on men, the state hiring preference had the effect of excluding women from the best civil service jobs in the Commonwealth.[79] The Supreme Court refused to recognize this practice as a case of sex discrimination. Because the law also discriminated against men who were nonveterans, it did not seem to the majority to be an intentional discrimination against women. Perhaps the armed services had been guilty of sex discrimination, but the military's conduct was "not on trial in this case."[80] Hence, although the law effectively excluded the plaintiff from the best state jobs, she was suing the wrong party.

Anyone with experience in the field of racial discrimination will find the latter argument depressingly familiar. The school board can't be held responsible for the fact that residential neighborhoods are segregated.[81] The town's zoning laws may exclude would-be minority residents, who can only afford apartments, but that is just an unfortunate result of racial disparities in income[82]—disparities that result largely from differences in employment opportunities. When the minority applicant for a job with the police gets a low score on the employment test, there may be racial differences in educational opportunity, but the police department can't be blamed for that.[83] As this judicial runaround shows, today's version of racism feeds on yesterday's; it may not be anyone's conscious design, but in the aggregate it amounts to a discriminatory system. Given the history of racial discrimination, and the systematic way in which racial subordination feeds on itself, legislation that is racially neutral on its face may reinforce the stigma of

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tection ground, but rather on the basis of the right of a defendant in a criminal case to a trial by a jury drawn from a pool consisting of a fair cross section of the comunity. *See* Williams, *supra* note 10, at 178-79 (recent decisions striking down overt sex discrimination).

78. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

79. Among veterans in Massachusetts, men outnumbered women by a ratio of 58 to 1. *See id.* at 270.

80. *Id.* at 278.

81. As Chief Justice Burger wrote for a unanimous court in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22 (1971): "One vehicle can carry only a limited amount of baggage."

82. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 269-70 (1977).

83. *See* Washington v. Davis, 426 U.S. 229, 245-46 (1976).

caste.[84]

I do not suggest that sex discrimination and racial discrimination are just the same. Instead, I do suggest that the history of subordination of women, coupled with the systematic way in which various forms of conscious and unconscious sex discrimination reinforce each other, should give the Supreme Court pause before it concludes that a law that is certain to exclude women from the best civil service jobs does not amount to sex discrimination.

The Massachusetts case shows how hard it is to prove an intention to discriminate against women. The problem is made especially acute by the Court's statement that discriminatory intent "either is a factor that has influenced the legislative choice or it is not."[85] This view of human motivation would be hopelessly inadequate even if we were talking about the intention of an individual rather than a large body of legislators. The factors that motivate even the simplest action are myriad in number and complex beyond the capacity of a judge or anyone else to untangle. The subject of motivation has puzzled psychologists for a century.[86] Recent studies have focused on the subject of reinforcement, that is, the influences on behavior of the satisfactions or discomforts expected to result from the behavior. Current theory and research have suggested "that motivation and reinforcement may fundamentally be the same thing."[87] Then what makes an individual person behave in a particular way? We might turn the question around and ask, is there anything we can exclude, in a person's entire experience, from the factors that motivated his or her conduct? To extend this sort of inquiry to a group of, say, a hundred members of a state legislature, is to ask a question that comes close to being meaningless. The practical effect is to convert the burden of proof of improper motive into a substantive rule for upholding statutes.

The complications are compounded when the motivation in question is one of discrimination. I have said elsewhere that racial discrimination is apt to operate at the margin of consciousness.[88] The motivations of men concerning the proper role of women are buried

84. *See* Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8-12 (1976); Karst, *supra* note 68, at 48-53.

85. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 277 (1979).

86. *See* Bindra & Stewart, *Introduction*, MOTIVATION 11, 11-12 (D. Bindra and J. Stewart eds. 1971).

87. *Id.* at 9. The essays in this volume confirm the words of the editors, quoted in the text. In particular, see Skinner, *Why is a Reinforcer Reinforcing?*, *id.* at 149; Spence, *Incentive Motivation, id.* at 153; Black *Theories of Reward, id.* at 158; and Bindra, *Drive and Incentive—Motivation, id.* at 171.

88. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978).

even more deeply. When a male-dominated legislature considers an issue that touches the interests of women—abortion, for example—it would be extraordinary if the legislators were to think consciously about the origins of their own personal definitions of woman, and to find the ability to exclude those definitions from the process of legislative decision. The point is not just that men and women live different lives and see the world differently. It is that a group of men, in deciding issues that define women's roles, cannot help being influenced by the traditional construct of woman.[89] In this situation the personal is *literally* political.[90]

The second type of sex discrimination case that has caused difficulty for the Supreme Court is the case of legislation that treats women more favorably than men, in the interest of protecting women or compensating them for their disadvantages.[91] Any sensible view of the draft registration case would place it in this category. Wendy Williams, looking at the legislative history of the exclusion of women from registration, has shown convincingly that a major motivation for Congress's action lay in a particular view of the proper roles of men and women in society: men as the protectors, and women as the center of domestic

89. John Hart Ely, in arguing for a system of judicial review focused on the reinforcement of effective legislative representation, has suggested that judges should be more inclined to strike down a law when it is the product of "we/they" thinking, in which "we" are the legislators and "they" are a group that "we" think deserve separate treatment. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935 n.85 (1973). The idea is that such a law is likely the product of stereotypes held by "we" concerning the distinctions separating "we" from "they." Ely criticizes the abortion decision, Roe v. Wade, 410 U.S. 113 (1973), arguing that the abortion laws there held invalid resulted not from "we/they" thinking (in which "we" are male legislators and "they" are women), but from legislative comparison of the stereotypes of women and of fetuses (a "they/they" comparison). *Id.* at 933 nn.85-86. This criticism ignores the particular way that the personal becomes political in the case of abortion legislation. In such a case the distinction between "we/they" thinking and "they/they" thinking breaks down, because male legislators' thinking about the relative interests of the two "they" groups, women and fetuses, is inextricably bound to the stereotype of woman as child-bearer and child-rearer, a stereotype that grows out of the personal relations between women and men.

90. Law, whether made by judges or legislators, is a projection on a social screen of the lawmakers' privately defined views of reality. We always define reality with some purposes in mind, whether or not we are conscious of those purposes. *See* Simon, *Theories of Decision-Making in Economics and Behavioral Science*, 49 AM. ECON. REV. 253, 272-74 (1959) (the importance of one's sense of social role as a central conditioning feature of one's perception of reality). The male legislator's construct of woman is crucially affected by his own sense of role in a system of male-female relations. This is the point that is missed in calling the abortion law issue a "they/they" choice. *See supra* note 89.

91. Most of these cases have concerned eligibility for various benefit payments. In some of them, there is room for debate whether it is women or men who are disadvantaged by the legislation. *See, e.g.*, Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (death benefits under workers' compensation law); Califano v. Goldfarb, 430 U.S. 199 (1977) (survivors' benefits under the Social Security Act).

life.[92] A Senate committee report posed the hypothetical case of a mother who was drafted, leaving the father to stay home to tend the children; that, said the Senators, would be "unwise and unacceptable to a large majority of our people."[93] Thus do sex stereotypes perpetuate themselves.

Yet in other cases the Justices have been willing to invalidate "protective" legislation whenever they conclude that it merely expresses "a traditional way of thinking about females."[94] In 1948, the Court upheld a law disqualifying a woman from being a bartender unless she was the wife or daughter of a male owner of the bar,[95] but in 1976 the Court expressly "disapproved" of that decision.[96] Later, when the Court struck down legislation authorizing state divorce courts to award alimony to wives but not to husbands, it commmented that such laws "carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection.[97] Yet the Court's record on the subject of protective legislation is mixed;[98] the

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92. Williams, *supra* note 10, at 183-85.

93. S. REP. No. 826, 96th Cong., 2d Sess. 159 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2612, 2647.

94. Rostker v. Goldberg, 453 U.S. 57, 74 (1971) (quoting Califano v. Goldfarb, 430 U.S. 199, 223 (1977)). *See supra* note 7 and accompanying text.

95. Goesaert v. Cleary, 335 U.S. 464, 467 (1948).

96. Craig v. Boren, 429 U.S. 190, 210 n.23 (1976).

97. Orr v. Orr, 440 U.S. 268, 283 (1979). The *Orr* decision provides a cautionary lesson for anyone who is seeking to eliminate demeaning sex stereotypes from the law. The practical result of *Orr*, obviously, is to make alimony for ex-wives no longer the automatic response of a divorce court. There is no way to test the proposition that *Orr* makes it harder for women to be awarded alimony, but that conclusion seems to me a likely one. *See generally* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981).

There is frequently tension between the goal of ridding the law of stereotypical assumptions and the goal of treating women fairly in view of their actual dependence. The problem of sex discrimination is more than a problem of stereotype. If the courts focus only on stereotype, they risk ignoring real harms to real people. Some stereotypes, in other words, grow out of specific harms that deserve remedy. Deborah Rhode partly attributes the failure of the Equal Rights Amendment to a "fundamental ambivalence about the meaning and value of formal equality in a context of social inequality." Rhode, *supra* note 16, at 47.

This dilemma—the hard choice between "equal treatment" and "special treatment"—is sensitively explored by Wendy Williams, *supra* note 10, at 190-200 and *passim*. Williams focuses on Rostker v. Goldberg, 453 U.S. 37 (1981), *see supra* note 7 and accompanying text, and on Justice Rehnquist's plurality opinion in Michael M. v. Superior Court, 450 U.S. 464 (1981), *see supra* note 46. The latter decision upheld California's statutory rape law. Under that law, if two teenagers under 18 engage in sexual intercourse, the young man is guilty of a felony and the young woman is guilty of no crime at all. Williams shows how the case poses difficulties for feminist theory. I agree with her that the case was wrongly decided, and that Justice Rehnquist's opinion rests, finally, upon the very stereotype of woman that he purports to reject.

98. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Michael M. v. Superior Court, 450 U.S. 464 (1981) (decisions upholding "benign" discrimination in favor of women, despite its foundation in the traditional stereotype of woman).

draft registration case is unique only in the dramatic way in which it illustrates the stereotype at work.

Why is it that the Supreme Court is so ready to conclude that overt governmental restrictions on women's access to public positions are based on an outmoded stereotype of woman's role, and thus invalid, and yet has so much trouble when the discrimination is not overt, or when the stereotype is embodied in "protective" legislation? Excluding women from registering for the draft does not keep them from joining the armed forces; the old quotas on women have been modified substantially, and the services now actively recruit women. In other words, the draft decision does not deny women the citizenship value of participation. But the other citizenship values of respect and responsibility *are* at stake in the draft registration case. Men are drafted on the theory that national service is a responsibility of citizenship. Women, or men, who object to military service on grounds of conscience could be given the chance to do alternative service. As for the citizenship value of respect, the exclusion of women from registration is built on the traditional construct of feminine frailty and dependence. In validating the exclusion, the Supreme Court not only accepted the stereotype but strengthened its hold.

If the Court is more ready to validate women's claims to participation in the public sphere than it is to recognize the stereotype at work in other contexts, one reason may be that a citizen's claim to participation fits comfortably into the pattern established by the claims to equality that came to the Court during the recent civil rights era. The women's movement owes much to the civil rights movement, which provided both a political model and, in constitutional terms, a doctrinal model. The civil rights movement aimed mainly at achieving access by racial minorities to institutions that had long been white preserves. The analogous claims of women for access to male preserves in the public life of the community have a familiar look. The claim to the citizenship value of participation is a claim to an opportunity for individualist achievement. That is a right that a male-dominated institution like the Supreme Court can appreciate. The Justices easily recognize the stereotypical construct of woman when it directly hinders access to the ladder.

In contrast, Justices who insist on a showing of intentional discrimination, as in the veterans preference case, or who refuse to see the stereotype of femininity that underlies "protective" laws, as in the draft case, may find it difficult to appreciate the ways in which the traditional construct of woman comes to bear on the issues before them. The chief mechanisms by which the personal becomes political lie in the deepest

recesses of the psyche. Neither little boys nor adult male judges consciously *choose* to define the idea of woman around their own needs for masculine self-identification. Each of us—male or female, policymaker or not—is born into a family and a culture. Some of us may ultimately come to see the nature of woman as a social construct, but all of us learn it first as a fact, much as we learn that a dropped object will fall to the ground.

There is another reason why the Supreme Court has had trouble in recognizing the stereotype at work except in cases of overt discrimination against women. Our legal system, oriented around the morality of the ladder, has a limited view of the reach of constitutional rights and the proper scope of judicial inquiry. To look at the veterans preference case from the ladder is to focus narrowly on the parties before the court and to ignore much of the context of their actions: The military was "not on trial in this case." The same narrow focus may lead a court to ignore the presence of the stereotype in "protective" legislation. No woman would have had standing to challenge the law excluding women from the draft, and the prevailing rhetoric of rights makes it awkward for a man to complain about a stereotypical view of women that seems to cause him no direct harm. Not surprisingly, a Justice steeped in the jurisprudence of rights finds these conceptual limits to be impassable barriers. To transcend these limits, our courts would need to look beyond the idea of rights as personal zones of noninterference to a conception of justice that recognized our interdependence.[99] It would be necessary to widen the inquiry to include the human and institutional contexts that surround the claims immediately before the courts. In short, our judges would need to supplement the jurisprudence and rhetoric of the ladder with a jurisprudence and rhetoric attuned to the morality of the web of connection.

Even so, the rhetoric of rights remains an indispensable element in the reconstruction of the social order defining "woman's place." So long as the courts know only the language of the ladder, it would be foolish not to use that language in framing constitutional claims. Outside the courtroom, too, the language of rights will be useful in bringing all sorts of claims, both personal and political, to the forefront of men's consciousness. "Consciousness raising" is at the heart of feminist strategy. That term usually refers to women's coming to under-

99. There is no necessary connection between male domination and a "rights" mentality. My UCLA colleague William Alford tells me that in China, which continues to be a male-dominated society, there has been no adequate vocabulary, until very recently, to capture the concept of a right. Even now, he says, references to rights are routinely accompanied by references to corresponding duties; for Chinese writers, in Taiwan as well as the mainland, the two ideas are inseparable.

stand their own condition as women. Just as plainly, however, it is important to bring men to new levels of understanding of women's condition as well as their own. Not only must men give up the idea that masculinity implies the domination of women; they must themselves become part of the web of connection, to offer the active care needed if the women close to them are to be free to participate in the public life of the community. To speak to men in terms they understand, it will be necessary to begin by speaking the language of a morality of rights.

B. *The Private Sphere and the Limits of Choice.*

When we turn to the subject of choice—that is, women's control over their sexuality and maternity—we do not really leave the subject of citizenship behind. From the early days of the women's suffrage movement in America, women sought the vote partly as an instrument for taking control over their private lives.[100] Citizenship is a form of power, including the power to influence matters that are personal. The point can be illustrated by a short flight of fancy. Suppose that men—men as we know them, with their present political dominance and with their attitudes toward interpersonal relationships—were, by some miracle, transformed so that they, rather than women, were the ones who became pregnant and bore children. Can anyone doubt that "abortions on demand"[101] would be the governing rule of law?

The nineteenth amendment, constitutionalizing women's right to vote, was adopted in 1920, the same year that Margaret Sanger wrote, "Birth control is woman's problem."[102] Sanger was not being callous; she was merely noting, with her customary realism, that women could not count on men to take any responsibility in the matter. About half a century passed between the nineteenth amendment and the Supreme Court's recognition of a woman's constitutional right to prevent or terminate a pregnancy.[103] What the right to vote had failed to bring about, technology and medical opinion achieved with the aid of an egalitarian wind that had been sweeping over the whole Western world

100. The first convention in America on the subject of women's rights was held at Seneca Falls, New York, in 1848. The convention adopted a "Declaration of Sentiments," patterned in style after the Declaration of Independence. The declaration referred to such legal issues as obedience to one's husband, divorce, and marital property, and also to the double standard of morals. It began with a call for women's suffrage. *See* A. ROSSI, *supra* note 28, at 415-18.

101. This was Chief Justice Burger's phrase, in his opinion in Roe v. Wade, 410 U.S. 113, 209 (1973) (Burger, C.J., concurring).

102. M. SANGER, WOMAN AND THE NEW RACE 100 (1920). The year 1920 is now seen as the end of an earlier era of popular movement for the reform of the double standard of sexual morality. *See* English, *Family, Sexual Morality, and Popular Movements in Turn-of-the-Century America*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY, *supra* note 26, at 117, 117.

103. *See* Roe v. Wade, 410 U.S. 113, 154 (1973).

for a generation.[104]

Earlier I listed a number of legal topics to illustrate how men have used law to control women's sexuality and maternity: marriage, marital property, divorce, control over children, illegitimacy, abortion, contraception, prostitution, and rape. With the exception of prostitution, every one of those subjects has been the focus of at least one major constitutional decision by the Supreme Court since 1965.[105] In the aggregate, these doctrinal developments offer women a degree of control over the private sphere of their lives that would have seemed fanciful just a generation ago.

The control thus gained is vital—and it is not enough. Both these propositions begin in the realities expressed by Catharine MacKinnon, commenting on the expression, "the personal is political":

> It means that women's distinctive experience as women occurs within that sphere that has been socially lived as the personal—private, emotional, interiorized, particular, individuated, intimate . . . . To know the politics of woman's situation is to know women's personal lives.[106]

In other words, the personal is political not only in the sense that the assumptions governing woman's place are grounded in the private ways that men see women, but also in the strict sense that one is identical with the other.

The constitutional claim of choice in the personal, private world is thus even more important to women than the claim to equal citizenship. Male power over women's sexuality and maternity has restricted women to a passive role, permitting them to control conception and childbirth only through a strategy of denial. Such a strategy is capable

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104. The development of the technology of birth control contributed to a climate of opinion conducive to recognition of a woman's right to choose whether to bear or beget a child, and also contributed to the practical difficulty of distinguishing between abortion and some forms of birth control. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 930-32 (1978). It seems clear that the Supreme Court—or at least *Roe's* author, Justice Blackmun—was influenced by medical opinion. *See* Roe v. Wade, 410 U.S. 113, 141-46 (1973); B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 174-75, 177, 183-84, 229-37 (1979). The medical opinion, of course, was supplied chiefly by men. On all these themes—the birth control movement, the Supreme Court's pre-*Roe* treatment of reproductive choice, and the interrelationship of citizenship and choice—see Wallach, *supra* note 41. *See generally* L. GORDON, *supra* note 41.

105. *See* Karst, *supra* note 71, at 667-86. That article, like the judicial opinions it analyzed, was written (and, I now see, conceived) in the language of autonomous choice. Women who want to use constitutional litigation to promote social change almost certainly will have to begin by filtering the values of the web of connection through doctrinal categories designed by men to serve a public world organized around the values of the ladder of achievement. On the role of vocabulary, including constitutional vocabulary, in this process, see *infra* text accompanying notes 217-29. On prostitution, see generally Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979).

106. MacKinnon, *supra* note 4, at 21 (italics in original omitted).

of affecting not only a woman's behavior but her very sense of self. It is not surprising that women who see themselves as receptive rather than active in this central aspect of their lives may display a more general lack of confidence in their own abilities and their own opinions.[107] If consciousness raising is indispensable to the redefinition of woman's place—and it is—then one necessary foundation for that process will be the experience of millions of individual women in taking control over their own personal lives.[108] But, obviously, a woman's control over her personal life is not secured just by assuring her the right to prevent or terminate pregnancy. The choice not to be a mother is itself costly to many a woman's sense of self. One result of the process of gender identification among girls is identification with the role of mother; hence Nancy Chodorow's title, *The Reproduction of Mothering*.[109] Yet to be a mother in our society today is to be expected to make sacrifices of opportunities for participation in the public world. These themes have been explored by a number of social scientists and other writers; in the legal literature, two excellent analyses have been written by Kathryn Powers[110] and Frances Olsen.[111] When a young mother tries to manage a career and at the same time take chief responsibility for child-rearing, she is apt to experience guilt at home and guilt at the office. If she chooses instead to suspend her working life during her children's early years, she is apt to feel left behind by others in her age group who

107. *See* C. GILLIGAN, *supra* note 56, at 68-69. Deference to others' views may also arise out of women's moral concern, their willingness to listen in the interest of learning how others think and feel. *See id.* at 16.

108. Catharine MacKinnon, in speaking of "the politics of woman's situation," *supra* note 4, at 21, includes women's sense of powerlessness to escape the experience of sexual objectification. In this view, women are victimized not only by the behavior that results from the traditional construct of woman, but by their very awareness that the construct is present in the minds of men. *Id.* at 19-27. Here we reach the limits of direct influence of the constitutional value of choice, as enforced by courts. Other constitutional values are more directly implicated in the objectification of women. The freedom of the press is an example; to the extent that it protects portrayals of women as sexual objects, current first amendment doctrine obstructs the modification of the social construct of woman. *See* A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY (L. Lederer ed. 1980).

109. *See supra* note 21.

In an exceptionally valuable new book, Kristin Luker has shown how women activists on both sides of the impassioned national debate over abortion have come to see the issue as a struggle for survival between two fundamentally opposed conceptions of the way in which a woman's worth is validated. K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984). No doubt the intensity of the debate is heightened by the inner conflict experienced by millions of individual women concerning their own roles. But if a woman feels torn between being a mother and taking a place in the public world, that tension itself is a product of the traditional construct of woman. Luker shows how assumptions about women's primary maternal role have promoted restrictive definitions of "women's work" outside the home. *Id.* at 11-15.

110. *See* Powers, *supra* note 50.

111. *See* Olsen, *supra* note 50.

continue to work. By now, no doubt, every reader—at least, every woman reader—will be saying: "It doesn't have to be this way." Fathers can share in the responsibility for children; hours of work can be adjusted; job-sharing plans can be adopted; child-care allowances can be provided for working parents; the list of possible individual and institutional responses goes on and on. What prevents their adoption?

To the extent that the answer lies in our legal system, it seems obvious: on the ladder, there is no concern about such dilemmas. The man makes his choices, and the woman makes hers, and so long as the law itself doesn't interfere, nothing is wrong. According to prevailing wisdom, constitutional law has little to say about these matters, except to make sure that the rest of the legal system respects individuals' zones of noninterference. The law must keep the ladder "open"—which is to say that access to it must be unhindered by the law itself. The jurisprudence and rhetoric of rights, as we presently define rights, is the law of the ladder. The slogan of the ladder, from the Massachusetts civil service to the man who expects his working wife to do all the housework, is: "That's not my department."

If we ask why more individuals have not worked out living arrangements that permit both partners to share in the public and private spheres, the answer is complicated; like many other social truths, it lies partly in myth and partly in reality. The myth is the dual construct of woman and of man. The reality is the difference between the ways in which men and women tend to define themselves and their relations to others. Yet the two seem interrelated in this sense: the abstractions, man and woman, make men reluctant to take time away from the ladder of achievement in order to participate in the web of connection. By the same token, however, to the extent that men do come to appreciate the advantages of a life that includes membership in the network, they seem likely to abandon the stereotypical view of masculinity and femininity. Both in our individual lives and in our institutions, then, the effort to rid ourselves of the dual construct of woman and of man seems linked to the promotion of a view of human interaction as a network characterized by concern, and a view of justice that sees value not merely in autonomy but in interdependence and care about real harms to real people.

C. *The Dilemmas of Autonomy.*

The notion of autonomy presents problems for many women, and as they work out their individual answers to those problems, women provide a living metaphor for society's more general problems with autonomy. The sense of autonomy is an indispensable basis for a wo-

man's redefinition of self. Yet autonomy presents women with serious issues of both theory and practice. One limitation is obvious: Freedom of any kind is no freedom at all for one who is unable to make use of it. A still gloomier view would deny altogether that freedom can have any meaning for a woman in our society, influenced as it is by the traditional construct of woman.[112] As I understand this position, it seems a counsel of despair.[113] If the existence of the construct of woman prevents women from redefining themselves, then the construct of woman is a prison from which there is no escape; neither constitutional law nor anything else in sight offers the faintest ray of encouragement. My argument, of course, is premised on the belief that we can reasonably hope for more.

Even if I am right, however, the idea of women's autonomy presents a problem of theory. The problem is raised by the woman who says she chooses a domestic life of the traditional kind, a life which some of us see as one of dependence. Some may insist that this "hypothetical consent"[114] is no choice at all, but merely a symptom of the damage done to the woman by a system that has conditioned her to trade her humanity for the false rewards of femininity. Others would counter that there is enough freedom if women are introduced to a wide range of information and influences, so that women's conditioning becomes multisided.[115] Whatever your view of autonomy, there is no such thing as a society that does not condition its members' beliefs and attitudes. Consciousness raising itself is conditioning, and if we

112. I take this to be the view of Catharine MacKinnon, *see supra* note 46, at 635-39, who notes the paradox in a reference to "[t]he practice of a politics of all women in the face of its theoretical impossibility," *id.* at 638.

113. MacKinnon herself thinks that far too much is made of labels like "hope" and "despair." She calls for resolution of the paradox of "theoretical impossibility," MacKinnon, *supra* note 46, at 635-45, through a reorientation of theory. Concerning her own writing, she has said in correspondence that she is seeking to confront the condition of powerlessness of women "so that we can *do something* about it together." In an interview she was once asked, "How do you maintain hope for future gains [for women]?" She responded, "I'm more into determination. I am agnostic on the subject of hope." Christie, *Visiting Prof. Discusses Law and Feminism*, HARV. L. REC., Feb. 4, 1983, at 4.

Hope may well be irrelevant to one who does theory, but hope is an indispensable ingredient in any successful large social movement. Furthermore, the power of women in society, unlike the electric power that runs a machine, is not governed by an on/off switch. Not all women are powerless in the same degree; nor is any woman equally powerless in all aspects of her condition. One political purpose of consciousness raising, I assume, is to create the foundation for what Adlai Stevenson used to call a "revolution of rising expectations." Revolutions are never built on total powerlessness; people who would make revolutions dare not let their followers be agnostic as to hope.

114. Susan Moller Okin uses this term to refer to the issue. Okin, *supra* note 49, at 78 n.31. *See generally* Hill, *Servility and Self-Respect*, 5 MONIST 87 (1973).

115. *See* J. RICHARDS, *supra* note 28, at 85-88.

define freedom as freedom from conditioning then freedom is an illusion.[116]

The freedom that matters is the freedom to make serious mistakes;[117] that is why autonomy brings the responsibility of choice. But responsibility is demanding, and usually is no fun at all. One who is dependent, even though she feels unhappy and even guilty about that fact, may feel a kind of relief that someone else is making all the decisions of consequence. But when you have the decision, and the issue is important, the experience can be frightening. Taking responsibility for your own life may be a part of being fully human, but it is no bed of roses. We are all ambivalent about autonomy.

It is particularly difficult when a woman, long accustomed to the demands of the classical definition of femininity, leaves the domestic life and takes a job for which she is paid. The constitutional right of equal citizenship, she will find, is not much help when it comes to such things as wages and promotion opportunities.[118] If other women are also entering the same kind of work, she may find the status of the job declining as it becomes "woman's work"; the job description "secretary" meant something different when nearly all secretaries were men.[119] No-fault divorce eases a woman's exit from a marriage she no

116. No court will be asked to address the problem of autonomy at so sublime a level of abstraction. If a woman with the constitutional freedom, and the resources, to terminate her pregnancy should choose motherhood instead, the fact that her upbringing has conditioned her to believe that motherhood is woman's destiny is no more within the reach of constitutional law than another woman's religious belief that abortion is sin. Of course, if government does the conditioning, other constitutional questions emerge. *See generally* Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980); *see also* M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983).

117. Specifically, sexual freedom can be a trap, and not only in the sense that a woman who abandons the traditional passive role, with its power of denial, may be surrendering one of the few advantages she has in the politics of personal relations. *See* S. EDWARDS, *supra* note 43, at 6-12; Held, *Marx, Sex, and the Transformation of Society*, in WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION 168, 180-81 (1976). *See* J. MILLER, *supra* note 50, at 106-11 (the difficulty of the "liberated" woman's finding an authentic self in exercising her newly-found sexual freedom); *see also* L. GORDON, *supra* note 41, at 410-14; English, *The Fear That Feminism Will Free Men First*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY, *supra* note 26, at 477. The new sexual freedom can be a trap of a more insidious kind, encouraging women to contribute to their own objectification. *See* MacKinnon, *supra* note 4, at 19-20 (quoting and commenting upon Sontag, *The Third World of Women*, 40 PARTISAN REV. 180, 188 (1973)).

Similarly, the ready availability of abortion may in some circumstances take from a woman the one claim she has on the putative father's sense of responsibility to her and to their child-to-be.

118. When the employer is an agency of government, constitutional guarantees of equality provide protection against some forms of sex discrimination, assuming that the courts can be persuaded that sex discrimination exists.

119. As the volume of paper work increased in American businesses in the 19th century, clerical work became separated from the career pattern leading toward administration. It soon became "woman's work." The 1880 census listed only a few women as clerical workers. In 1980, women constituted 89% of the stenographers in the country and 97% of the typists. Scott, *The*

longer wants, but it also brings with it a new attitude toward alimony. The woman may find herself exchanging her house for an apartment, working for inferior wages to support the children (who are living with her), and getting minimal help from their father—or, after a short time, no help at all.[120] How will that woman react when we speak to her of autonomy?

Suppose a woman does enter the public world, and that she achieves the glittering prizes that world offers; isn't that a success story for the values of citizenship and choice? Whatever that woman's choices about motherhood may be, the answer still is, yes and no. For some time, social scientists have been finding that many women show a certain anxiety about competitive achievement.[121] In the perspective of the traditional definition of femininity, one source of this anxiety is easy to understand. A woman socialized to the culture's expectations naturally sees success, in its usual form, as a direct threat to her feminine identity.[122] In particular, she may fear that men will see her success as making her unfeminine, and thus a neuter, or will have trouble in looking behind the abstraction, woman, to see her, the individual, as a valued co-worker—or, worst of all, both.

The psychic problem is not lessened for professional women. I was recently appalled to see a sign in the corridor of the UCLA law school, advertising a showing by a dress shop of clothes suitable for the young woman lawyer. The idea is to avoid looking too feminine, and

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Mechanization of Women's Work, SCI. AM., Sept. 1982, at 167, 172. "[E]ach transformation [of women's work] has extended the notion of a location for women's work separate from that for men's work and the notion that women's work is worth less then men's." *Id.* at 184. The pattern recurs in virtually all work settings. *See* Roby, *Sociology and Women in Working-Class Jobs*, in ANOTHER VOICE: FEMINIST PERSPECTIVES ON SOCIAL LIFE AND SOCIAL SCIENCE, *supra* note 29, at 203-11 (surveying the literature on the status of blue-collar women); *see also* Kanter, *Women and the Structure of Organizations: Explorations in Theory and Behavior*, in *id.* at 34, 35-38 (on management as a male category).

120. *See generally* Weitzman, *supra* note 97.

121. *See* Horner, *Toward an Understanding of Achievement-Related Conflicts in Women*, 28 J. SOC. ISS. 157 (No. 2, 1972). For the view that women's attitudes toward achievement are importantly influenced by their experiences in early childhood, see Hoffman, *Early Childhood Experiences and Women's Achievement Motives*, 28 J. SOC. ISS. 129 (No. 2, 1972).

Cynthia Fuchs Epstein suggests that women entering law schools today are motivated toward the traditional forms of "success" in a degree approximating that of their male classmates. C. EPSTEIN, WOMEN IN LAW 37-45 (1981). My own unscientific observations of UCLA law students lead me to believe that there are significant differences in career motivations between women law students as a group and men law students as a group. *See infra* text at note 230. Carrie Menkel-Meadow has acutely observed how difficult it is to make judgments of this kind. Menkel-Meadow, *Women in Law? A Review of Cynthia Fuchs Epstein's Women in Law*, 1983 AM. B. FOUND. RESEARCH J. 189, 193-95.

122. This theme is central to de Beauvoir's analysis. *See* S. DE BEAUVOIR, *supra* note 27, at 308, 358-60, 428-29, 693-95.

at the same time to avoid looking mannish. One woman graduate of our school, who by all accounts is doing very well in a large and prestigious law firm, was at a firm party, talking with a judge. The firm's managing partner—not some throwback to Justice Bradley's day, but an unusually civilized man—came up and said, "Leave it to Judge X to be with the prettiest girl at the party." The sign in our law school corridor said "Dress for Success."

It is not just the tension between achievement and femininity in its standard definition that produces anxiety in women. It is a more deep-seated distrust of autonomy itself. Many women appear to see individual autonomy as threatening not only their security in the web of relationships, but also their very sense of self. One who sees herself as continuous with the environment, including the human environment, may believe that she will have to give up her affiliations in order to be an autonomous person. Part of the problem is that a woman is apt to see autonomy in conflict with other goals that she values, such as compassion.[123] Most fundamentally of all, she is apt to find the quest for autonomy illusory;[124] what can autonomy mean to a woman who defines herself as part of a relationship? It is no accident that when Gilligan asked four women who were high achievers to describe themselves, not one spoke of her accomplishments. Instead, all four chose to "describe a relationship, depicting their identity *in* the connection of future mother, present wife, adopted child, or past lover."[125]

Half a century ago, Emma Goldman—of all people—looked at the movement for women's emancipation and found it wanting. True emancipation, she said, "will have to do away with the ridiculous notion that to be loved, to be sweetheart and mother, is synonymous with being slave or subordinate."[126] For Goldman, woman was "confronted with the necessity of emancipating herself from emancipation, if she

123. *See* C. GILLIGAN, *supra* note 56 at 48, 71, 97.

124. *See id.* at 48.

125. *Id.* at 158-59 (emphasis in original). An earlier study had focused on a college English class that had twenty-seven members, five of whom were women. Of the five, four agreed to be interviewed again five years after graduation; these are the four women referred to in the text.

To say that many achieving women identify themselves *in* a personal relationship is not to say that they find achievement unrewarding. Cynthia Fuchs Epstein, reporting on women who have performed successfully in law firms, describes them as having gained in self-confidence and self-esteem. C. EPSTEIN, *supra* note 121, at 305-09.

There must surely be moments when independent identity seems important, even to a woman who defines herself in a relationship. On the back cover of a 1962 paperback edition of Mary Beard's *Women as Force in History* appears this description of the author: "Mary R. Beard, wife of Charles Beard, was a noted scholar, sociologist, and historian. A leading feminist, she devoted a lifetime to the pursuit of economic, social, and intellectual recognition of women."

126. Goldman, *The Tragedy of Woman's Emancipation*, in RED EMMA SPEAKS: SELECTED WRITINGS AND SPEECHES BY EMMA GOLDMAN 132, 135 (A. Shulman ed. 1972).

really desires to be free."[127] Some feminists today would call Goldman's assertion a romantic prescription for chaining women to the classical definition of femininity. Making allowance for fifty years' worth of change in awareness and rhetorical style, however, Goldman seems to me to have been touching the edges of a great truth. Women do need to free themselves from the kind of autonomy that not only sets them free but cuts them loose. They do need to find ways of participating in the sphere of public life previously dominated by men, without simply exchanging a place in the web for a step on the ladder. But to say that women need these things is only the half of it; men need them, too. What might our constitutional law look like if it were to pay attention to women's "different voice"?

III. The Constitution in Women's Perspective: The Second Reconstruction

The limitations of a jurisprudence of rights, as we now define rights, are the limitations of a morality centered on noninterference. If our constitutional law can transcend those limits, it can contribute significantly to the completion of the process of redefining "woman's place." Thus women's own perspective on morality, the perspective of the web of connection, can itself aid us in breaking out of the confines of the traditional dual construct of woman and man. But the question to be addressed here is not, merely: What can the Constitution do for women? It is, rather: What can women—not woman as an abstract construct, but real women's distinctive view of human interaction—do for the Constitution and thus for all of us?

The inquiry that follows is not a search for a model constitution for a society organized around the network of connection. A "woman's constitution" in this ideal sense is very much worth designing, but I am convinced that a project on that order is one for a feminist theorist. The possibilities I explore here lie within the range of permissible judicial interpretation of the Constitution as we know it.

A. *Two Views of Justice.*

This final inquiry assumes that there are differences in the ways in which women and men tend to see the world of human interaction and define themselves as part of that world. These differences in the conception of the self are reflected in different emphases in women's and men's approaches to issues of morality and justice. Such conclusions are not susceptible to rigorous scientific proof. Indeed, the best-known

127. *Id.* at 142.

scholarly analysis of studies of the psychology of sex differences, after meticulously reviewing the evidence, concludes that many popular beliefs about the differences between girls and boys are myths and nothing more; a few are demonstrated to be true; and many remain open questions.[128] Even "hard" scientific proof of psychological differences between the sexes can be no more than statements about tendencies among groups of people. Many individuals both male and female will fall outside the general patterns. So, my assumptions about the differences between men's and women's views of morality and justice are based neither on biological necessity nor on proof of the actual behavior of a scientifically selected sample of men and women.

Instead, I shall draw mainly on a body of recent writing that is interpretive. One especially valuable work in this literature is Carol Gilligan's *In a Different Voice*.[129] This is an important book, full of insight about the ways in which men and women tend to see the world and their places in it. For me, the interpretation has the ring of truth. I concede that this reaction is subjective, and I invite the reader to test

128. E. MACCOBY & J. JACKLIN, *supra* note 24, at 349-55. The authors do speak of girls and boys; most studies of this subject deal with school children. One obvious difference between children and adults is that the socialization process has a longer time to work on adults. It would not be surprising to find that sex-role stereotyping was more common among men and women than it is among boys and girls. Thus, women may have lower self-esteem than girls, and may be less oriented toward achievement than are girls. If women of tomorrow's generations do not show these characteristics, presumably a principal reason will have been the consciousness raising that began in our time.

Maccoby and Jacklin conclude that the following beliefs are unfounded: that girls are more "social" than boys; that girls are more susceptible to suggestion than boys; that girls have lower self-esteem than do boys; that girls are better at rote learning and repetitive tasks, while boys are better at higher-level cognitive processing; that boys are more analytical; that girls are more affected by heredity, boys more by environment; that girls lack achievement motivation; that girls are more auditory, boys more visual. *Id.* at 349-51.

The authors conclude that the following sex differences are "fairly well established": that girls have greater verbal ability; that boys have greater visual-spatial ability (a difference that appears in adolescents and adults, not in childhood); that boys have greater mathematical ability; and that "males are more aggressive." *Id.* at 351-52. The latter conclusion is questioned in Tieger, *On the Biological Basis of Sex Differences in Aggression*, 51 CHILD DEVELOPMENT 943 (1980), and defended in Maccoby & Jacklin, *Sex Differences in Aggression: A Rejoinder and a Reprise*, 51 CHILD DEVELOPMENT 964 (1980). No one doubts that males as a group are more aggressive than females; the question is whether this difference is biologically based. Even those who conclude that it is biologically based agree that cultural conditioning plays a powerful role in reinforcing the difference. *See* C. GILLIGAN, *supra* note 56, at 39-46 (the differential incidence of aggression and violence in men's and women's fantasies about intimacy and competitive success); Williams, *supra* note 10, at 185 n.58 (a summary of, and helpful commentary on, the recent literature).

Questions about sex differences in the following areas, say Maccoby and Jacklin, remain open, either because evidence is insufficient or because findings are ambiguous: tactile sensitivity; fear, timidity, anxiety; activity level; competitiveness; dominance; compliance; nurturance and "maternal" behavior. E. MACCOBY & J. JACKLIN, *supra* note 24, at 352-54.

129. *See supra* note 56.

Gilligan's interpretation against his or her own perceptions of men and women—recognizing, as we all must, that our perceptions are conditioned by our culture. Readers who are unpersuaded can still join in the inquiry that follows, treating my references to male and female perspectives as metaphors standing for two contrasting views of morality and justice.

Even the most skeptical will presumably agree with the Supreme Court that, when it comes to viewpoints, "the two sexes are not fungible."[130] The Court made that unremarkable pronouncement in the course of forbidding the systematic exclusion of women from jury panels in federal courts. As a later Supreme Court put it, "women bring to juries their own perspectives and values that influence both jury deliberation and result."[131] Quoting from an earlier opinion discussing the exclusion of a racial group from juries, the Court said:

> the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance . . . .[132]

There is a faint air of mystery in this passage; its application to women suggests that male Justices, like other males, have been conditioned to the idea of woman as the unfathomable Other. Gilligan, addressing herself to the "perspectives and values" that differentiate women's and men's tendencies in judging moral issues, seeks to remove some of the mystery. Reinterpreting the meaning of her own and other scholars' studies, she rejects suggestions that the moral development of women falls short of the level or maturity attained by men.[133] Instead, as we have seen,[134] she views the differences in men's and women's moral judgment as the natural outgrowth of different views of self and human interaction. Her interpretation focuses on the morality of interpersonal relations, but the morality of the network of connection is not limited by the boundaries of personal acquaintance. Indeed, the logic

130. Ballard v. United States, 329 U.S. 187, 193 (1946).

131. Taylor v. Louisiana, 419 U.S. 522, 532 n.12 (1975).

132. *Id.* (quoting Peters v. Kiff, 407 U.S. 493, 503-04 (1972) (Marshall, J., plurality opinion)). Surely an unspoken basis for the *Peters* decision was the Court's concern for the dignity that comes from exercising the responsibilities of citizenship.

133. Gilligan, *supra* note 56, at 5-23. Dorothy Dinnerstein sums up the view that many men have of women's maturity—and that many women have of men's—in a short chapter called "Children! Every One of Them." She places the origin of such thoughts in "a masquerade, in which generation after generation of childishly self-important men on the one hand, and childishly play-acting women on the other, solemnly recreate a child's-eye view of what adult life must be like." D. DINNERSTEIN, *supra* note 23, at 87.

134. *See supra* text accompanying note 57.

of rights and responsibilities in the morality of the web presses beyond these boundaries to embrace not only issues concerning the status of women, but more generally "the social consequences of action."[135] A few aspects of this interpretation are especially suggestive for our constitutional law.

Before summarizing Gilligan's interpretation of the tendencies of men and women in judging moral issues, I want to emphasize that all of us, both women and men, have the capacity to share in both the world views I shall be discussing. If more men display one tendency, and more women another, no doubt the differences are heavily influenced by the way we all learn and maintain our gender identities. What follows is not a description of any individual, male or female, but a caricature designed to highlight the differences in the ways women and men tend to see the world of human interaction and to approach moral issues.[136]

The differences begin in self-definition. Men, finding identity in separation, tend to equate adulthood with autonomy and individual achievement; women, defining themselves as continuous with others, tend to equate maturity with responsibility and care. Men typically see their relationships with others in contractual terms, as derived from arm's length dealings among lonely contenders for places on the ladder of hierarchy. Women typically see the same relationships as primary, as part of their definition of self. Men, abstracting human relationships from their particular contexts, define morality and justice in the vocabulary of rights—specifically, rights to be free from the interference of others. They seek protection against aggression in abstract rules. Women distrust "a morality of rights and noninterference," because of "its potential justification of indifference and unconcern."[137] They define morality and justice in the language of responsibility, seeking solutions for moral problems not in impersonal abstract rules but in "the capacity 'to understand what someone else is experiencing' "[138] and to avoid hurt to particular people in real human situations. Men, presented with moral dilemmas, tend to look for solutions in a hierarchy of rules. Wo-

135. C. GILLIGAN, *supra* note 56, at 167.

136. "The different voice I describe here is characterized not by gender but theme. . . . [T]he contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation . . . ." *Id.* at 2. Despite this disclaimer, Gilligan has been criticized for advancing a theory of "gender dualism." *See* Broughton, *Women's Rationality and Men's Virtues: A Critique of Gender Dualism in Gilligan's Theory of Moral Development*, 50 SOC. RESEARCH 597 (1983).

137. C. GILLIGAN, *supra* note 56, at 22.

138. *Id.* at 57. Here Gilligan is quoting a young woman who participated in a study of college students.

men, faced with similar either/or choices, seek to widen the range of inquiry in the hope of finding solutions that preserve human relationships. If women tend to be deferential to others' judgments,[139] that deference is not just the product of social subordination; it also springs from a healthy moral concern for others, growing out of an inclusive sense of self.

This interpretation of the tendency of women to have a distinctive moral perspective does not imply acceptance of the traditional construct of woman as dependent on man. Nothing in Gilligan's analysis suggests that the morality of the web is merely the product of women's dependent condition.[140] To the contrary, her view of the stages of women's moral development culminates in "the integration of rights and responsibilities"—a moral outlook recognizing the claims of both the actor's own well-being and "the guiding principle of connection."[141]

Nor does this interpretation of women's morality imply the exchange of one stereotype for another as a rule to govern the conduct of public officials. I have argued that the principle of equal citizenship is inconsistent with any effort to justify governmental action limiting women on the basis of the traditional view of femininity.[142] The same conclusion would follow if government were to impose limits on women in the name of Gilligan's generalizations about women's distinctive view of human interaction. Those generalizations are accepted here not as justification for governmental action, not even judicial action, but as a perspective, a way of looking at morality and law. Earlier I asked what constitutional law might contribute to the redefinition of

139. *See supra* note 107.

140. In conversation and correspondence, Catharine MacKinnon has expressed concern that Gilligan's interpretation of women's moral perspective, although it is descriptively accurate, may have the effect of diverting attention from women's condition of powerlessness. If I understand MacKinnon's view correctly, it is that women tend to think of moral issues in terms of networks of relationship *because* they are embedded in a structure of power that has relegated them to the private sphere, where such a perspective is encouraged to develop. "Women's voice," she says, should not fulfill the function of making a virtue of the traditional stereotype of woman.

Gilligan does not enter the "nature/nurture" debate: "No claims are made about the origins of the differences described . . . ." C. GILLIGAN, *supra* note 56, at 2. Even if the social condition of women has been a major contributor to the development of women's distinctive moral perspective, that perspective has much to offer to all of us—not only in redefining "woman's role" but in reshaping our fundamental law.

141. C. GILLIGAN, *supra* note 56, at 57-100. *See infra* text at notes 181-83.

Jessie Bernard devotes much of an article to a discussion of "what women (and sympathetic male colleagues) can do for sociology." *See* Bernard, *supra* note 3, at 776. She assumes, as I do here, that women as a group have distinctive tendencies toward viewing social interactions from a particular point of view. She suggests that women may contribute to sociology by "broadening its perspective, opening up new areas, asking new questions, offering new paradigms." *Id.*

142. *See supra* text accompanying note 74; Karst, *supra* note 68, at 53-59.

the place of women in society. Here I ask what women's moral perspective can contribute to constitutional development.

What does it mean to speak of bringing women's perspective to bear on constitutional law? The constitutional rights of citizenship and choice, so long the object of struggle and so recently won, today offer women access to a number of positions in society formerly reserved to men. But those positions have been previously defined by men to serve the needs of institutions in which women hardly ever participated. Thus, most of the new options are "opportunities for women to act as men do" through "adopting traditional male roles."[143] One way to impress women's viewpoint on constitutional law would be to look beyond the goal of assimilating women to man's world,[144] toward the goal of redefining institutions "to meet women's needs as they see them."[145] In this perspective, women and men are interest groups, and the status of women is a "women's issue" to be addressed through constitutional litigation. I have no doubt of the soundness of this strategy, but it is not the focus of my inquiry here.

The idea that there are such things as "women's issues" has long been an article of faith among politicians, and voting patterns in recent elections strongly suggest that the politicians are correct.[146] But "women's issues" never have been limited to interest group concerns about the status of women.[147] Congresswoman Patricia Schroeder says, "[D]oing something about women's poverty won't make the gender gap disappear. Women will still worry that unless we change the old caveman rules, we will all be blown up."[148] Some feminists may resent

143. *See* Note, *supra* note 10, at 487.

144. Even the failed Equal Rights Amendment, with its emphasis on "rights," might have been interpreted to be thus restricted in its reach.

145. *See* Note, *supra* note 10, at 487. Wendy Williams concludes that any reconstruction of "the law of the public world" to reflect women's needs as well as men's must come from legislatures, not courts. *See* Williams, *supra* note 10, at 175. Henry Hart may be an improbable source for the appropriate response, but his remarks at a 1955 conference seem to me to be as apt in our present context as they were in responding to Judge Learned Hand's famous disclaimer of judicial power to instill the spirit of moderation. *See The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 172, 172, 181 (1952) (speech to Massachusetts Bar). Here are Hart's words, adapted to our context:

> The question—the relevant question—is whether the courts have a significant contribution to make . . . in the direction of [the reconstruction of "woman's place"]—not by themselves; of course they can't save us by themselves; but in combination with other institutions. Once the question is put that way, the answer, it seems to me, has to be yes.

Hart, *Comment*, in GOVERNMENT UNDER LAW 139, 141 (1956).

146. *See* O'Reilly, *Getting a Gender Message*, TIME, July 25, 1983, at 12.

147. In America, feminist movements from the beginning have embraced other major causes, such as temperance and the abolition of slavery. *See* J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 295-309 (1978).

148. Statement by Congresswoman Patricia Schroeder, *quoted in* O'Reilly, *supra* note 146, at 12. Much of Dorothy Dinnerstein's book touches on this theme. She calls on women to "go on

the suggestion that women generally seem more concerned than men about the web of life and the fate of succeeding generations, but such resentment would be misplaced. There is no implication of weakness in recognizing women's attachment to the "guiding principle of connection." Schroeder is right, Gilligan is right, and the Supreme Court is right: women—not all women, but women generally—do tend to see the world differently. To ask about the possible contributions of women's world view to our constitutional law is thus to explore beyond the reshaping of male-defined roles and institutions to accommodate women's needs. It is to imagine the possibility of a more general widening of our constitutional horizons.

B. *Toward Interdependence.*

The men who wrote the Constitution in 1787 designed a framework for governing society as it was perceived by men and run by men. The Framers inherited a body of thought that saw man as an "atom of self-interest,"[149] saw the struggle for power as a zero-sum game in which one person's gain was another's loss,[150] and was suspicious of man's insatiable appetite for power.[151] "Ambition must be made to counteract ambition," wrote James Madison in *The Federalist* No. 51. The powers of government must be dispersed, or tyranny would surely follow. The Bill of Rights, like the original Constitution, defined zones of autonomy, of noninterference. The whole enterprise of constitution-making, from its theoretical underpinnings to its consummation as a political bargain, was relentlessly contractual.[152] In short, from the beginning the Constitution was an institutional reflection of the view from the ladder; safety from aggression was to be found not in connection with others but in rules reinforcing separation and

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cherishing our truant wish that we could stop marching out to meet death halfway." D. DINNERSTEIN, *supra* note 23, at 227. The "death" that she refers to is metaphorical, but it is also literal. *See infra* note 224.

149. R. HOFSTADTER, THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT 3 (1948).

150. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 21, 134-37, 598-99 (Norton paperback ed. 1972).

151. *See* B. BAILYN, THE ORIGINS OF AMERICAN POLITICS (Vintage ed. 1970) (on the English sources of American political culture). One such source lay in the writings of the "London radicals." Of their views, Bailyn says: "if there was one absolute certainty, one unqualified fact, it was that in his deepest nature man was 'restless and selfish.' " *Id.* at 41.

152. *See* W. JORDAN, WHITE OVER BLACK 321-25 (1968) (bargaining at the convention concerning slavery); *see generally* G. WOOD, *supra* note 150, at 471-564 (the Constitutional Convention of 1787 and the ratification debates).

noninterference.[153]

For a century and a half, the Framers' conception dominated thinking about the Constitution. Even today, five decades after the New Deal opened the modern political era, both judges and commentators chiefly speak a constitutional language treating rights as zones of noninterference. It would be naive to expect American courts wholly to renounce their prevailing orientation in favor of one emphasizing mutual care and responsibility within a network of relationship. Yet it does not seem naive to anticipate the possibility that some of our constitutional assumptions may come to be modified, not by dismantling the ladder, but by taking account of the view from the web. Before pursuing the reasons why some optimism on this score may be justified, let us ask what such a modification might imply.

To define oneself as part of a network of relationship is to find security in connection, and to see the source of aggression in separation and the competitive pursuit of individual recognition and power.[154] In the network, the zero-sum-game attitude toward power is moderated; indeed, power itself is seen in a different light. Because women generally find little need to climb the ladder to define themselves, they find little need for subordinates. The idea of power as domination recedes in favor of the idea of power as capacity—notably the capacity to provide care for others in the network of connection.[155] Resistance to domination, of course, implies conflict; consciousness raising and the entry of women into the public sphere surely will continue to bring "new forms of conflict, new calculations of interest, into the kinship system."[156] The perception of human interactions as a network, in other words, does not immunize those interactions from conflict. But the "guiding principle of connection," and the rejection of a view of life in society as a zero-sum game, encourage efforts to resolve conflicts by widening the range of inquiry, seeking ways for the conflicting parties

153. If the Framers gave one single thought to the condition of women, they failed to give that thought utterance. No doubt they assumed that women would find *their* protection in connection—the tutelage of their husbands and fathers.

154. *See* C. GILLIGAN, *supra* note 56, at 43-47.

155. C. GILLIGAN, *supra* note 56, at 167-68; *see* D. MCCLELLAND, POWER: THE INNER EXPERIENCE 85-86 (1975). Maccoby and Jacklin report the results of a cross-cultural study concluding that boys in the seven cultures studied were more interested in "egoistic dominance" and girls were "more likely to attempt to control the behavior of another person in the interests of some social value or in the interests of the other person's welfare." E. MACCOBY & J. JACKLIN, *supra* note 24, at 259. The power that mothers exercise over children may, of course, amount to a harmful kind of domination. On maternal authority, see D. DINNERSTEIN, *supra* note 23, at 163-75.

156. M. WALZER, *supra* note 49, at 241. The release of women from subordination enhances their ability to express their own independent judgment. *See* C. GILLIGAN, *supra* note 56, at 95.

to define new goals that they can share.[157]

It is fair to question whether this process is compatible with the development of constitutional law by judges in the course of deciding cases. The traditional model of a lawsuit is a zero-sum game: if the defendant wins, the plaintiff loses. Even in doctrinal terms, the recognition of a legal right implies that someone has a legal duty. Yet, even so, there are opportunities in constitutional litigation for courts to contribute to a "network"-oriented vision of human relationships in which conflict resolution is not seen as a struggle for domination. The object is to encourage exploration of avenues to cooperation. The courts' means for doing so lie in the realm of substantive constitutional doctrine and in the realm of process.

One doctrinal contribution to the process of cooperative settlement of social conflict would be for the courts to redefine the idea of discrimination, abandoning the requirement of a showing of discriminatory purpose, in favor of a principle recognizing a law's discriminatory impact as a constitutional harm requiring justification by the state. Such a principle would mean, for example, that Massachusetts would have to offer significant justification for the sex discrimination that resulted from its hiring preference for veterans.[158] In the Supreme Court's view of that case, the issue of justification never arose; the Court just didn't see the case as one involving gender discrimination at all. To insist on a showing of illicit purpose in cases of racial discrimination or sex discrimination is to make the parties focus on the goodness or evil in the hearts of public officials. Not only does this issue divert inquiry away from the concrete harms caused to real people by the governmental policy;[159] it also encourages the parties to indulge in name-calling and defensive self-righteousness. When an individual plaintiff sues an individual defendant, and there is no reason to anticipate future dealings with the parties, perhaps we need not be concerned about poisoning their future relations. But when the case involves institutional litigants—say, a city council and a civil rights organization—then it matters very much whether those people are able to talk to each other after

157. *See* L. COSER, THE FUNCTIONS OF SOCIAL CONFLICT 121-28 (Free Press ed. 1964); J. MILLER, *supra* note 50, at 128. Rejecting "the myth of atomism," Elizabeth Wolgast calls for another model of society in which competition is not pre-eminent among the forms of relations among people. She expects this model to develop out of the women's movement. *See* E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN 138-58 (1980).

158. *See supra* notes 78-90 and accompanying text.

159. Alan Freeman has criticized the "perpetrator" perspective on discrimination as contributing to racial inequality. *See* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978). The requirement of a showing of discriminatory purpose is just such a doctrinal diversion.

the lawsuit is over.[160]

The litigation process, too, makes a difference to the prospects of perceiving conflicts and questions of power in the light of a "guiding principle of connection."[161] The recent burgeoning of constitutional litigation involving such institutions as school boards, hospitals and prisons has given courts opportunities for aiding the parties—normally institutional litigants on both sides—to deal with each other in ways that promote cooperative resolution of their conflicts. These lawsuits almost always seek injunctions or other forms of equitable relief that courts will grant only after "balancing the equities" between the contending parties. As Abram Chayes has remarked, this judicial effort "often discloses alternatives to a winner-takes-all decision"—a result not only tolerated by equity but required by it.[162] When a school board submits a desegregation plan, there is opportunity for the parties, including assorted intervening groups, and even amici curiae, to offer their comments.[163] Whether or not the judge takes on a continuing "managerial" role in the prison or the school system, there is room for the judge to bring people together, not only in the interest of settling the immediate dispute, but in the long term interest of preserving the relationship of the parties. That the judge stands ready to decide such cases according to principle, and along the way to enunciate our "public values,"[164] does not minimize the judge's potential role in maintaining the network of relationship.[165]

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160. For a fuller discussion, see generally Karst, *supra* note 88.

It is true that to abandon the requirement of proof of intentional discrimination is to open up the possibility of more lawsuits calling public officials to account for the discriminatory effects of their actions. There can be no doubt that this consideration weighed heavily in the Supreme Court's decision in Washington v. Davis, 426 U.S. 229, 248 (1976), the leading case establishing the requirement of proof of racially discriminatory purpose. But to place this additional obstacle in the way of a lawsuit is not to avoid conflict; the conflict remains, but the victims of discrimination have no hope of judicial redress unless they further poison the air with charges of intentional discrimination.

161. *See supra* note 141.

162. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1293 (1976).

163. *See* Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244 (1977).

164. *See* Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5-17 (1979).

165. The supervisory power of a judge in a child custody case is a familiar example of the judicial role in maintaining continuing relationships; so is the function of a judge in a bankruptcy case, or in supervising trusts and estates. *See generally* Eisenberg and Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Powers, *supra* note 50, at 100-02 (the communitarian potential of institutional litigation).

As this discussion of institutional litigation shows, a legal system wholly devoted to the values of the web of connection very likely would not place an adversary system of justice at the center of

The effort to resolve disputes in a way that preserves the connections among people is a familiar feature of small, closely knit societies. In such a society, one person's dealings with another are apt to touch many aspects of life and to last as long as they both live. In a tribal village, it will almost always be more important to maintain the village community than to do abstract justice in any particular case before the judge.[166] An ethic of care and responsibility obviously is easier to weave into the fabric of justice in such a small-scale world than it is in our own complex world of specialized work, bureaucracy, and fragmented interactions.[167] It is thus arguable that institutional litigation

its mechanisms for formal conflict resolution. In this article, I do not explore such heroic alternatives, but rather the introduction of the morality of the web into an ongoing system.

In the world of no-fault divorce, the judicial handling of issues of child support and child custody has been producing results that are troubling to anyone concerned about sex equality. *See generally* Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982); Sheppard, *Unspoken Premises in Custody Litigation*, 7 WOMEN'S RTS. L. REP. 229 (1982); Weitzman, *supra* note 97.

166. *See* M. GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (1955). A similar emphasis on mediation to preserve ongoing relationships has characterized most dispute resolution in China, not only in the traditional China of agricultural villages but in the modern urban China, which retains some of the immobile character of earlier Chinese society. *See* V. Li, *The Evolution and Development of the Chinese Legal System*, in CHINA: MANAGEMENT OF A REVOLUTIONARY SOCIETY 221, 242-43 (1971).

Such a society may not be all sweetness and light. In China, during the late 19th century, most village disputes were resolved by mediation, either by the village elders or (in the case of intra-clan disputes) by the leaders of the clan. Chinese society has always been male-dominated, and the mediators were always male. When women had disputes about family matters, including questions of property, they often could not make themselves heard by the mediating leaders; even when they were heard, they often gained no satisfaction. Shortly after the beginning of the twentieth century, according to Reginald Johnston, a British consular official in Weihaiwei in North China, women in large numbers resorted to the British colonial courts in cases involving family disputes. R. JOHNSTON, LION AND DRAGON IN NORTHERN CHINA 102-26, 195-216 (1910). This experience suggests that under some social conditions women will prefer adversarial litigation to a "network"-oriented mediation that merely reinforces their subordination. I am indebted to William Alford for this information and this reference.

167. Gilligan's interpretation draws on studies of moral decisions in small groups, particularly decisions concerning intimate relationships. C. GILLIGAN, *supra* note 56. It would be foolish to assume that the morality of the network can be translated directly into a body of constitutional doctrine applicable to nearly a quarter of a billion citizens. Two obstacles stand in the way. First, a serious problem of scale attends any effort to translate individual morality into moral obligations toward large numbers of people, or moral obligations that are widely shared. *See* J. FISHKIN, THE LIMITS OF OBLIGATION (1982). Second, the very idea of constitutional doctrine implies principle—which is to say abstraction—and an irreducible measure of the morality of rights. Gilligan herself recognizes "the tension between responsibilities and rights." C. GILLIGAN, *supra* note 56, at 174. It is not easy to arrive at any theory that can tell us when a generalized, impartial morality of rights should govern decision, and when a more particularized, contextual morality should become controlling. "Each perspective is inadequate without the other, and yet each to some extent excludes the other." Flanagan and Adler, *Impartiality and Particularity*, 50 SOC. RESEARCH 576, 594 (1983).

Each of these problems is the subject of a considerable literature, and I do not propose to enter into the debates summarized by Fishkin and Flanagan and Adler. Granting that there are

should be seen as the exception rather than the rule—that a view of justice emphasizing connection and care may be appropriate for schools and hospitals just because they are communities in which relationships are lasting rather than fleeting, pervasive rather than focused.

Yet, even in the world outside institutional walls, the view from the network can serve important ends of constitutional justice. Looking beyond litigation to more general concerns about the way people deal with each other, we can see that some evils—racial stigma, for example—touch human interactions all across our society. The tendency of women to defer to another's point of view, insofar as it arises out of empathy and moral concern,[168] is a quality much needed in a society of growing racial and ethnic diversity. Our efforts to eradicate the stigma of invidious discrimination will fall short unless we find the willingness and the ability to understand how its victims feel.

In the last three decades, our constitutional jurisprudence has recognized in various ways the inadequacy of a sense of constitutional justice that is limited to the protection of zones of noninterference. In cases of racial discrimination, the barrier of the "state action" doctrine to judicial vindication of equal citizenship was eroded almost to the vanishing point;[169] the doctrine's revival came only after the Supreme Court had confirmed broad power in the Congress to protect against private racial discrimination, and, for good measure, had reinterpreted national civil rights laws to accomplish that protection.[170] The egalitarian activism of the Warren Court consistently served the equal citizen-

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no easy resolutions for these difficulties, nonetheless the morality of the web has clear relevance for our constitutional development. At the immediate doctrinal level, it is possible to identify specific ways in which doctrine can promote a morality of responsibility. More generally, an awareness of the claims of contextual justice can assist judges in their efforts to find creative judicial responses to the problems before them. More generally still, the "network" point of view informs a set of attitudes toward judicial review itself. All these themes are pursued in the text.

Any effort to convert a bureaucracy to a morality centered on active caring will face formidable challenges. *See* V. THOMPSON, WITHOUT SYMPATHY OR ENTHUSIASM: THE PROBLEM OF ADMINISTRATIVE COMPASSION (1975). Bureaucracy requires "a suppression of personal emotion, an adherence to procedures which abstract from personal attachment, inclination, concern for particular others." Nicholson, *Women, Morality, and History,* 50 SOC. RESEARCH 514, 521 (1983) (quoting Lawrence Blum).

168. *See supra* note 107.

169. *See* Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 84-95 (1967); Karst and Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 65-78. That the "state action" doctrine did not quite vanish in the area of racial discrimination was made depressingly clear in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-77 (1972).

170. *See, e.g.,* Runyon v. McCrary, 427 U.S. 160, 168-82 (1976) (42 U.S.C. § 1981 prohibits private nonsectarian schools from discriminating on the basis of race); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 417-43 (1968) (42 U.S.C. § 1982 prohibits racial discrimination in private home sales or leases).

ship values of respect, responsibility, and participation. The rights of citizens thus vindicated are properly called rights to equal opportunity. Although the idea of citizenship that emerges from the Court's opinions in these cases is thus a "citizenship of the ladder," the decisions themselves do lay a foundation for a constitutional recognition of the values and morality of the web of connection. Specifically, those decisions decisively disapprove all manner of public cooperation in the imposition of a stigma of inferiority.

In the Court's opinions, not surprisingly, stigma or stereotype is seen as harmful mainly because it offends an individualistic sense of justice, impeding access to some good such as employment or education. Thus, in a segregated school, the stigma of inferiority is said to be harmful because it interferes with a child's ability to learn.[171] In other contexts, racial and sexual stereotypes are said to prevent government policymakers from seeing a true picture of an individual's qualities, thus distorting decisions about eligibility for employment, dependency benefits, or child support payments.[172] Only rarely does the Court describe stigma as the direct hurt that it is, a severance of its victims from the web of connection. Still, the Court's decisions in these cases, and its occasional references to the psychic harms of stigma, are an important recognition of the constitutional dimensions of a morality of responsibility and care.[173]

Similarly, the Court's opinions accompanying decisions defending the constitutional right to vote emphasize the importance of voting as a means of access to governmental power.[174] Yet the value of the vote to the citizen, even the formerly disenfranchised citizen, surely lies at least

171. Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954).

172. Examples in the sex discrimination area are: Orr v. Orr, 440 U.S. 268, 278-83 (1979) (state law imposing alimony burden on husbands and not wives violates equal protection clause); Stanton v. Stanton, 421 U.S. 7, 13-17 (1975) (state law setting lower age of majority—and thus termination of child support—for women than for men violates equal protection clause); Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (Brennan, J., plurality opinion) (statute presuming that married servicemen have dependent spouses, but not extending the same presumption to married servicewomen violates the equal protection clause).

173. In *Brown* itself, the Court took note of the psychic harm directly caused by racial segregation, but did so only as part of its analysis of segregation's harm to equality of education opportunity. Brown v. Board of Educ., 347 U.S. 483, 494 (1954). A century ago, the Court took note of the direct harm of racial discrimination, referring to the singling out of black people for exclusion from juries as "practically a brand upon them, affixed by the law, an assertion of their inferiority . . . ." Strauder v. West Virginia, 100 U.S. 303, 308 (1880). What the Court has not done, however, is recognize how various types of disadvantage that are not directly imposed by government are mutually reinforcing in a system that results in dependence. *See* Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 834-39 (1983); *see also supra* text accompanying notes 81-84.

174. *See, e.g.,* Reynolds v. Sims, 377 U.S. 533, 562 (1964); *see also* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

as much in the symbolism of citizenship itself. Voting affirms that the citizen is a valued participant in the community.[175] Thus, although the equal citizenship opinions of the Supreme Court generally are written in the language of the ladder, the cases also convey a meaning that is important even though it is unspoken: Citizenship is belonging; citizenship is connection.

If our constitutional justice should more overtly embrace the morality of care and responsibility, we might expect not only the abandonment of the threshold requirement in discrimination cases of proving the discriminatory purpose of government officials, but other doctrinal developments as well. Two examples will suffice. First would be renunciation of the "state action" limitation in cases of discrimination. Anyone who sees the world from the network will have no difficulty understanding the Supreme Court's decisions in *Shelley v. Kraemer*[176] and *Reitman v. Mulkey*,[177] two cases whose opinions have produced consternation among the Court's commentators.[178] Both decisions would rest comfortably on a doctrine recognizing a state's affirmative obligation to protect against private racial discrimination. Second, some forms of poverty are stigmatizing or otherwise serious enough to prevent their victims from participating as members of the community. The idea of a state's affirmative constitutional responsibility to relieve people from such harms is no longer novel;[179] like renunciation of the state action limitation in discrimination cases, it is a predictable conse-

175. *See* Karst, *supra* note 68, at 28-29. The Supreme Court's decisions on constitutional rights to access to the courts can also be seen in this light. *See id.* at 29-31; Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Parts I & II*, 1973 DUKE L.J. 1153, 1173-75, 1974 DUKE L.J. 527, 534-40; Subrin and Dykstra, *Notice and the Right to be Heard: the Significance of Old Friends*, 9 HARV. C.R.-C.L. L. REV. 449, 454-58 (1974).

176. 334 U.S. 1 (1948).

177. 387 U.S. 369 (1967).

178. *See, e.g.*, Black, *supra* note 169; Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Karst and Horowitz, *supra* note 169. As a matter of private morality, these decisions fit easily into the ethics of individualism. The critics were troubled by the failure of the Court to explain how the decisions fit into existing "state action" doctrine.

Abandonment of the "state action" limitation would not imply wholesale judicial intrusion into private groups, families, or small-scale "networks"; competing constitutional values such as the freedom of association would defend against such intrusions. For recognition of this point in a statutory context, see Runyon v. McCrary, 427 U.S. 160, 186-89 (1976) (Powell, J. concurring). The application of these principles of freedom of association to marriages has historically had the primary effect of leaving wives' interests to their husbands' discretionary power. *See* Olsen, *supra* note 50, at 1504-07, 1509-13; Powers, *supra* note 50, at 70-79. In this context, one person's web may be another's tyranny.

179. *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Tribe, *Unraveling* National League of Cities*: The New*

quence of viewing constitutional doctrines from the perspective of the web. From this perspective the organized society's duty to its members is not limited to respecting their zones of noninterference, but extends to the responsibility for preventing or alleviating harms that are dehumanizing.[180]

Raising our constitutional consciousness of a morality of mutual responsibility and care need not supplant the existing structure of constitutional rights, but can supplement it. The morality of the web is incomplete if it wholly subordinates the moral actor to the needs or interests of others. Gilligan traces women's moral development through three stages:[181] first, self-protection; second, self-sacrifice, equating responsibility with care for others; finally, an understanding of "the need of all persons for care"—including the actor herself, who is, after all, a valued member of the network, too.[182] This latter stage of development is aptly called "the integration of rights and responsibilities."[183]

The modification of our prevailing "rights"-dominated constitutional orientation to take greater account of a morality of care would lead us to approach the same problem of integration from the opposite direction, just as an individual man might seek to widen his moral horizons: "For men, recognition through experience of the need for more active responsibility in taking care corrects the potential indifference of a morality of noninterference and turns attention from the logic to the consequences of choice."[184] When these phases of moral development are placed in the context of changes in the relations between the sexes,

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Federalism and Affirmative Rights to Essential Government Services, 90 HARV. L. REV. 1065 (1977); Karst, *supra* note 68, at 59-64.

180. It is possible to see a glimmer of this development in the Supreme Court's decision in Plyler v. Doe, 457 U.S. 202, 230 (1982) (denial of free public education to school-age undocumented aliens violates equal protection clause of fourteenth amendment where state provides free education to children who are citizens or legally admitted aliens).

The field of sex discrimination itself offers opportunities for infusing a measure of the morality of the web into our constitutional law. An illustration is the Supreme Court's obtuse decision in Geduldig v. Aiello, 417 U.S. 484, 497 (1974), holding that California's exclusion of the risk of pregnancy from its disability insurance program for state employees did not constitute sex discrimination. The Court saw the issue as essentially contractual: the state had chosen not to insure all risks, and had set the rates of employee contributions accordingly. As the Court explained in a later decision, the issue involved "nothing more than an insurance package," and there was "no proof that the package [was] in fact worth more to men than to women." General Elec. Co. v. Gilbert, 429 U.S. 125, 138 (1976). From the perspective of the network of connection, the issue of fairness in the case would be seen differently; attention would focus not on the fairness of a bargain, but on the unfairness of exclusion—on "who is left out."

181. C. GILLIGAN, *supra* note 56, at 74.

182. *Id.* at 100, 147-50.

183. *Id.* at 100.

184. *Id.*

we can see that for women it makes no sense to exchange their dependence on men for independence in the sense of isolation. Rather they seek to become equal partners in a network of interdependence. For men, it is true that ending their domination of women is valuable in itself, in the same way that whites register a moral gain when a system of white supremacy is overthrown.[185] But the most important benefits that accrue to men from the termination of women's dependence will be lost if the system of domination is simply exchanged for a life in which everyone is isolated on the ladder. Just as men have the most to gain from their own "active responsibility in taking care,"[186] our constitutional polity—that is, the men and women who compose it—will have the most to gain from a jurisprudence of interdependence.

C. *Rules and Contexts.*

Concern for "the consequences of choice"[187] means careful attention to the context of moral or legal decision. Women tend to distrust the effort to resolve a moral dilemma according to a hierarchy of abstract rules, seeking instead "the reconstruction of the dilemma in its contextual particularity."[188] This preference for a contextual morality, grounded in the needs of real people in the fullness of their real situations, is a direct consequence of the "network" frame of mind. If men want to preserve rules, women want to preserve the web of relationship: "[W]hile Jeffrey thinks about what goes first, Karen focuses on who is left out."[189] This refusal to convert live dilemmas into abstract "math problems with humans"[190] has been seen as a failure of women's moral development, but it is not. It is a different mode of judging, one that "allows the understanding of cause and consequence which engages the compassion and tolerance repeatedly noted to distinguish the moral

185. Indeed, any dominant group gains when it is released from the burdens of domination. *See* R. UNGER, KNOWLEDGE AND POLITICS 157, 243-48 (1975). The contrast I have been discussing, between the orientations of the ladder and the web toward the legal order, is analogous to a host of disputes, old and new, among political philosophers. This article makes no attempt to locate the idea of the morality of the web on that vast canvas. For an ambitious analysis and synthesis of that literature, see generally Sliffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983).

186. *See supra* text accompanying note 184.

187. *See supra* note 184 and accompanying text.

188. C. GILLIGAN, *supra* note 56, at 100.

189. *Id.* at 33. "Who is left out" has its analogues in American constitutional doctrine. *See generally* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (a theory of judicial review centering on the promotion of effective representation in the legislative process).

190. C. GILLIGAN, *supra* note 56 at 28. *Cf.* J. RAWLS, A THEORY OF JUSTICE 121 (1971) ("We should strive for a kind of moral geometry with all the rigor which this name connotes."). In the perspective of the web of connection, moral geometry is a nightmare from which we should hope to awaken.

judgments of women."[191] Far from signaling a failure to develop, this insistence on an effort to do concrete justice to real people shows up the incompleteness of a morality of noninterference. All of us might benefit if we could "come to see the limitations of a conception of justice blinded to the differences in human life."[192]

Can contextual morality be translated into law without violating "the rule of law"? The traditional figure of Justice wears a blindfold, to avoid being influenced by the identity of the parties. Centuries of struggle lie behind the principle that the law should be applied impersonally to everyone. The meaning of the phrase "the law of the land," said Daniel Webster, is "that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."[193] Moreover, the impersonality of the law's application extends to the person of the judge. The judicial robe symbolizes that the judge is there to decide *as a judge*, according to law, not to decide as a man or woman according to his or her personal sense of justice. Wouldn't you be a little uneasy if the legend on the Supreme Court Building were changed to read, "Contextual Justice Under Law"?

There are senses, of course, in which that substitute motto already expresses truth. The life of the law is not reason but judgment; in constitutional law, every effort to take the judgment of human judges out of the process of judging will be doomed to failure. Justice Black, from the beginning[194] to the end[195] of his career, argued that courts had no business doing anything but interpreting the Constitution as it was written. He carried the text around in his pocket, just in case he needed to read you chapter and verse. But, as his famous First Amendment "absolutism" demonstrated,[196] the act of judging inescapably implies choices among competing considerations—or, to use the word Justice Black despised, "balancing" the interests and values at stake in the case at hand. Most of constitutional law is not made up of specific rules, but of general principles. Some of those principles explicitly invite interest-

191. C. GILLIGAN, *supra* note 56, at 100; *see also id.* at 69-70.

192. *Id.* at 100.

193. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819), *quoted in* A. HOWARD, THE ROAD FROM RUNNYMEDE 309 (1968).

194. In Carolene Products Co. v. United States, 304 U.S. 144 (1938), Justice Black refused to join in the portion of the Court's opinion that announced the "rational basis" standard of review. 304 U.S. 144, 155 (1938) (Black, J., concurring). For Black, even that much of a judicial inquiry was excessive.

195. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting).

196. *See generally* Kalven, *Upon Rereading Justice Black on the First Amendment*, 14 UCLA L. REV. 428 (1967).

balancing: Is this an undue burden on commerce? Is this an unreasonable search? But all constitutional doctrines that matter today imply interest-balancing, even when they go in disguise as a system of categories: Is this a bill of attainder? Is this a taking of property? "General propositions do not decide concrete cases," said Justice Holmes in 1905.[197] He might have added that *judges* decide concrete cases, and they perform best when they inquire into the concrete facts that touch the lives of the flesh and blood people who will be affected by their decisions. The dilemma of contextual justice is no dilemma at all; there is no escape from contextual judgment if the judge wants to do a decent job.

Nor is the identity of the parties always irrelevant to the doing of justice, however deeply the Supreme Court may bury the importance of those facts beneath a heap of neutral principles. In a series of cases stretching over a quarter-century, the Court has been faced with hostile actions by various southern state courts and legislatures aimed at the civil rights movement, and the NAACP in particular.[198] In all these cases, the Court has found ways to protect against abuses of governmental power without ever saying that the identity of the parties, in a political context well known to the Justices from their own extrajudicial experience, made a great deal of difference.

The problem of candor about political contexts, so evident in these cases, plagued the Warren Court's egalitarian decisions from the beginning. *Brown v. Board of Education* itself set the pattern; the whole fabric of Jim Crow was the Court's target, but you would never know it to read the opinion in *Brown* or the one-sentence orders announcing the other early decisions striking down state-sponsored racial segregation.[199] The Court never really acknowledged its most important ac-

197. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

198. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 889-96 (1982) (state courts held NAACP liable for economic damages resulting from peaceful political boycott); Dombrowski v. Pfister, 380 U.S. 479, 492-496 (1965) (state harassed NAACP and threatened prosecution under anticommunist statutes); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 540-43 (1963) (state held NAACP official in contempt for declining to disclose NAACP membership lists to anticommunist investigative committee); NAACP v. Button, 371 U.S. 415, 419-26 (1963) (state statute prohibited NAACP lawyers from representing civil rights claims in which the NAACP was not itself a party); Shelton v. Tucker, 364 U.S. 479, 480-84 (1960) (state required its teachers to identify all organizations in which they were members or to which they made regular contributions); Bates v. Little Rock, 361 U.S. 516, 517-23 (1960) (state convicted and fined NAACP officials for refusing to disclose organization membership lists); NAACP v. Alabama, 357 U.S. 449, 451-54 (1958) (state attempted to oust NAACP from its jurisdiction; state court held NAACP in contempt for declining to disclose membership lists).

199. *See, e.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Holmes v. City of Atlanta, 350 U.S. 879 (1955)(golf courses).

complishment, its support for a redefinition of community that would embrace a previously excluded group. The whole judicial contribution to the modern civil rights movement reflects the Court's acute awareness of the context of its decisions, but that awareness never appeared on the surface of the Court's opinions. The *Brown* opinion emphasized the importance of education, and the educational harm of segregation. How did any of that apply to segregation in buses, golf courses, or courtrooms? To understand, you had to know that Jim Crow was a system,[200] something the Court never articulated.

Similarly, when the Court struck down Virginia's use of the poll tax as a condition to voting, it did not rest its decision on the historic use of the poll tax as a means of disenfranchising black people.[201] Yet surely that experience must have had some influence on the decision.[202] Justice Harlan's dissent argued in the language of the ladder: There is little to be said for this law, but it is not for judges to intervene; the remedy lies in the legislature's zone of noninterference.[203] For the majority, Justice Douglas responded in similar ladder-oriented terms, emphasizing the importance of the vote as a means of access to other rights.[204] What the court did not do, and almost never does, was to explain how its decisions fit into a larger social and political context—an explanation that would have pressed the Court to admit that it was repairing a damaged web.

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200. *See* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424-29 (1960). Of course, in *Brown* as elsewhere, the Court focused narrowly on one context to the exclusion of a broader one; "every way of seeing is also a way of not seeing." H. LYND, ON SHAME AND THE SEARCH FOR IDENTITY 16 (1958).

Justice Stewart's opinion in City of Mobile v. Bolden, 446 U.S. 55, 74 (1980) (Stewart J., plurality opinion), blandly ignores the systematic nature of the exclusion of blacks from the public life of the community under Jim Crow: "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." The systematic exclusion can, of course, provide a context in which one feature of a governmental body's present conduct can be seen as part of a larger discriminatory pattern. The Supreme Court got it right two years later in Rogers v. Lodge, 458 U.S. 613, 623-27 (1982) (affirming finding that at-large system conceived and maintained for invidious purposes), with the help of a federal district judge who was not willing to put on blinders. Indeed, on remand from the Supreme Court, the *Mobile* case itself was similarly addressed—with the result that similar findings of deliberate discrimination were made. Bolden v. City of Mobile, 542 F. Supp. 1050, 1054-68, 1073-77 (S.D. Ala. 1982) (finding discriminatory purpose and impact of 1874 election system).

201. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 666 (1966).

202. The Court acknowledged this experience, but did not rest the decision on it. *See id.* at 666 n.3.

Justice Stone's "footnote 4," United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), is an early suggestion that courts should be aware of the possibility that legislation was adopted in this sort of context. The modern doctrine calling for active judicial scrutiny of legislation using "suspect classifications" rests on the same basis. *See* J. ELY *supra* note 189, at 145-70.

203. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 680 (1966).

204. *Id.* at 666-68.

In these senses, contextual justice is already part of our constitutional law. Much of our legal system, however, is designed to limit the influence of contextual considerations on both judicial decisions and legal thinking. Lawyers are trained to analyze and define, to take human interactions apart and categorize the various parts with labels. In court, the lawyer typically seeks to persuade the judge that the case fits into one established category rather than another. This is chiefly a process of exclusion, in which most of the contextual facts about the parties are screened out as irrelevant, and a few facts, those that seem related to the established categories of legal thought, come to be considered controlling. It is a commonplace that legal categories may screen out facts that nonlawyers would regard as crucial to an understanding of what the parties truly deserve in the way of justice.[205] Trial lawyers understand the power of the detail that is legally irrelevant but morally central. In constitutional litigation, as elsewhere, a look at the human context in which legal relations are embedded may alter our sense of justice in a particular case.

Yet there is more for constitutional jurisprudence to learn from women's moral focus on the concrete needs of real people. The concern to understand moral conflict in its particular human context may contribute not only to the quality of justice for particular individuals but also to the development of new legal doctrines—new labels, if you will—that promote justice. Women's insistence on the need to appreciate the whole context in which moral issues arise drives them to widen inquiry, to redefine issues, to expand the range of possible solutions. In law, as in other human dealings, it is often essential to recognize that people are asking the wrong questions: "No answer is what the wrong

205. All analytical reasoning performs this sorting and excluding function. Indeed, the function is performed by the use of words. "Words serve to establish boundaries." Galin, *The Two Modes of Consciousness and the Two Halves of the Brain*, in SYMPOSIUM ON CONSCIOUSNESS 26, 29 (Viking ed. 1976). Because legal rules and principles are abstractions, they inevitably require judges to ignore some features of the human situations confronting them, treating flesh-and-blood people in the abstract, as occupants of roles, and excluding most of their individual qualities. But in this process of exclusion there are important differences of degree between narrowly defined rules and broadly stated principles. The latter invite a wider scope of relevance, a more inclusive definition of the proper context for judgment. Constitutional law, consisting mostly of broadly formulated principles, is at least as receptive to the claims of contextual justice as any other branch of our law. *See generally* J. NOONAN, PERSONS AND MASKS OF THE LAW (1976); Weyrauch, *Law as Mask—Legal Ritual and Relevance*, 66 CALIF. L. REV. 699 (1978). Whatever advantages there may be for the rule of law in ignoring the identity of the parties, there is no advantage at all in forgetting that individuals before the court *are* live people, litigating about real harms, including psychic harms. A lively sense of contextual justice will aid a judge in remembering this obvious but easily forgotten fact. *See* Menkel-Meadow, *supra* note 39, at 18-20.

The concern to do justice to particular individuals in the context of their own particular situations is ultimately a concern for individuality. On the ladder, one finds a lot of talk about individual*ism*, but precious little concern for anyone's individuality.

question begets."[206] The tendency of women to distrust moral syllogisms, to try to resolve moral dilemmas by seeing them in wider perspective, bespeaks not a failure of will, but an intellectual resource worth cultivating. The ability to widen inquiry, to find new approaches, is the essence of all creativity, both legal and nonlegal.[207]

In constitutional law, the creation of new doctrines often begins in a sense of justice that is not analyzed but felt. One such creative development began fifteen years ago in two cases that now stand at the intersection of constitutional law and the status of women. Louisiana had allowed a lawsuit on behalf of a child for damages for the wrongful death of a parent, and a similar action by a parent for the wrongful death of a child. When the child was born outside marriage, however, neither a surviving child nor a surviving parent could bring such an action. The Supreme Court, in opinions written by Justice Douglas, held that this scheme violated the rights of a surviving illegitimate child and a surviving mother under the equal protection clause.[208] A new constitutional category had come into being.

Justice Douglas gave voice to a moral intuition about the injustice of state laws discriminating against illegitimate children or their parents. Yet he offered little further explanation. Eventually the Court did articulate some reasons for heightened judicial scrutiny of such laws, emphasizing the unfairness of disadvantaging a child for a status outside her control and unrelated to her potential contributions to society.[209] What is missing from any of these later opinions is any suggestion that the Justices are in touch with the human contexts—or, for that matter, the institutional contexts—in which the legal status of illegitimacy has its being. One major effect of the modern law of illegitimacy

206. A. BICKEL, THE LEAST DANGEROUS BRANCH 103 (1962). It is always possible, of course, to ask the right question in one's heart, and then explain one's moral or legal judgment according to some abstract principle.

207. *See generally* A. KOESTLER, THE ACT OF CREATION (1964). Some commentators, of course, think that judicial creativity has little or no place in constitutional law. *See infra* text accompanying note 212. For an able defense of the role of insight and intuition in informing moral judgment, specifically including the judgment of public officials, including judges, see Hampshire, *Public and Private Morality*, in PUBLIC AND PRIVATE MORALITY 23, 30-48 (1978). *See* T. NAGEL, MORTAL QUESTIONS 135, 139 (1979) (on intuition as a guide to case-by-case development of principle).

In a situation of conflict such as a lawsuit, to widen the context of inquiry is also to expand opportunities for redefinition of the matters at issue in ways that will permit the parties to find their way to agreement. *See supra* text accompanying notes 160-67. Even the study of law can profit from an effort to understand the live human contexts in which doctrines and principles operate. For a sensitive exploration of this and related issues, see Menkel-Meadow, *supra* note 39.

208. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968).

209. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 505 (1976). The latest decisions in this series are Mills v. Hableutzel, 456 U.S. 91 (1982), and Pickett v. Brown, 103 S. Ct. 2199 (1983).

is that a man's wealth and status will attach to a woman and her children only when he chooses to formalize their union or to formalize his recognition of their children as his.[210] Furthermore, in Louisiana, where this constitutional saga began, the legal disabilities associated with illegitimacy surely were not unrelated to that society's history of race relations.[211] Seen in context, the constitutional problem of illegitimacy is not just a problem of the status of illegitimate children; it is intimately connected with the relations between women and men, and with racial discrimination.

Intuition is another name for a way of understanding that looks at patterns and textures, not analytically but contextually. In the early illegitimacy cases, the Court's intuition was not only creative but right; there is injustice attached to the status of illegitimacy. The effective doctrinal development of a moral intuition, however, depends on asking the right questions. If the Court should ever decide to widen its doctrinal inquiry, seeking more inclusive ways of looking at these issues, the constitutional problem of illegitimacy will be seen clearly as a problem of responsibility and care in the web of connection.

The connection between the preference for contextual justice and judicial creativity in constitutional cases comes into bold relief when we recognize its opposite; the connection between a preference for rules and the belief that judicial creativity has no place in constitutional law. The recent flurry of academic debate about the legitimacy of judicial review reflects not merely opposing views about the role of courts in constitutional cases, but opposing assumptions about the nature of human interactions. Consider two models—hypothetical, of course—of thinking about judicial review.

The morality of the ladder, growing out of a sense of identity based on separation, seeks to define rights—that is, powers of decision—within assigned zones of noninterference. These rights are perceived in the abstract, and bound up with questions of process, of the proper allocation of powers. Because one person's substantive values are as good as another's, value choices should be left to the market, or, if values are to be imposed, the choice to impose them should be made contractually in the legislature's political market. In this model, judicial review is an aberration, finding its only legitimate justification in the original contract, the Constitution as written and intended by the framers. Judicial independence implies separation from policymaking. Almost all substantive choices thus lie in the legislators' zone of nonin-

210. For a discussion of the modern illegitimacy cases, see Karst, *supra* note 71, at 676-82.

211. For a good short history of miscegenation laws, see G. MYRDAL, AN AMERICAN DILEMMA 113-36 (1944).

terference. The task of judges in judicial review entails no personal responsibility to do justice, has nothing to do with the effectuation of substantive values, is unconcerned with the building of a nation, except as those goals were embodied in the specifically defined or clearly understood original intentions of the framers. Judge Learned Hand summed up this philosophy four decades ago in a speech entitled *The Contribution of an Independent Judiciary to Civilization*.[212]

Another view, drawing on the moralities of both the ladder and the web, not only seeks to preserve relationships but also focuses on the real effects of moral choice on real people. These contextual concerns necessarily are substantive, and justice largely means substantive justice. Value choices made by the market or imposed by legislative bargaining are worthy of respect, but if they seriously damage the web of connection, they should not be allowed to stand. Judicial review, far from being an aberration, is what lends legitimacy to the legislature's normal pursuit of self-interest, that is, the interests of those constituents who are able to influence legislators' behavior. In this view, the separation of powers is not a principle commanding wholly independent branches of government but a system of interaction, of checks and balances. Judges are "sentient actors,"[213] with their own responsibilities to real people and with the more general responsibility to contribute to the maintenance of a community; no one should be left out. They properly see themselves not as enforcing a bargain struck in 1787 or 1866 but as helping to make a nation. In short, they are aware of the potential contribution of an *interdependent* judiciary to civilization.

These two models are, of course, overdrawn; I know of no commentator who quite fits either of them. Yet they do suggest that in the context of constitutional issues there is at least a strong possibility that a contractual, ladder-oriented view of human dealings tends toward one position about judicial review, even as a communitarian, web-oriented view of human interaction tends toward another. (There is no inevitability in these linkages. The Supreme Court that struck down social welfare laws in the pre-1937 era had no trouble combining the values of the ladder and active judicial review.) As for judges, it is easy enough to distribute them along a conceptual continuum running be-

212. The speech is reprinted in L. HAND, THE SPIRIT OF LIBERTY 155 (I. Dilliard ed. 1952).

213. Arlie Russell Hochschild uses this term to describe the focus of a particular form of sociological study. Most sociology, she says, has studied people either as "conscious, cognitive actors" or as "unconscious, emotioual actors." She urges a sociology that studies "the *sentient actor* who is both conscious and feeling. Actors must be seen as more than bloodless calculators or blind expressers of uncontrolled emotions." Hochschild, *The Sociology of Feeling and Emotion: Selected Possibilities*, in ANOTHER VOICE: FEMINIST PERSPECTIVES ON SOCIAL LIFE AND SOCIAL SCIENCE, *supra* note 29, at 280, 283.

tween the ladder and the web,[214] but that sorting must be done on the basis of their decisions, not their opinions. Outside the pages of the law reviews,[215] constitutional law thus far knows only the vocabulary of the ladder.[216]

D. *Redefinition and Women's Experience.*

Vocabulary matters. At least for half a century, it has been understood that language shapes the way we analyze the world and even the way we perceive it.[217] Feminist writers have argued for some time that the use of "man" to refer to humans generally, and the routine use of "he" and "his" for a person whose gender is unidentified, reinforce a series of unconscious assumptions about "woman's place."[218] They are right.[219] We need a new vocabulary to escape the traditional dual construct of woman and man. Similarly, what I have called the second reconstruction, the redefinition of our constitutional polity to take account of women's perspectives on life and self and morality, requires a new vocabulary. Here, too, we need to widen our inquiry. The creation of new doctrines, new labels, in constitutional law will depend on a larger social process that only begins in consciousness raising.

Plainly, the language of the ladder is inadequate to express the fundamental values in the network of connection. If women sometimes

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214. On the present Supreme Court, I suppose that Justice Rehnquist comes as close as any of his colleagues to representing the "ladder" orientation to the Constitution and to judicial review in the modern era. No Justice in the Court's history seems to me to approach the "web" end of the continuum of views so closely as Justice Rehnquist approaches the pure "ladder" perspective. Among the current members of the Court, of course, Justices Marshall and Brennan are the most inclined to reflect the orientation of the web.

215. I leave to the reader the parlor game—admittedly one with a limited appeal—of distributing the commentators along this continuum.

216. Some of the embarrassment visible in the opinions of various Justices supporting the constitutionality of affirmative action programs may arise from the perceived need to explain decisions in a particular language. To address each case as a separate adjudication of an individual's claim to access to a position is to adopt the perspective of the ladder. That perspective drastically limits the range of permissible considerations, sending parties and lawyers and judges in search of particularized justifications such as remedying specific past acts of deliberate discrimination by the immediate parties to the lawsuit. The view from the network of connection, with its emphasis on contextual justice and its willingness to expand the inquiry, permits us to see that the main justification for affirmative action is not yesterday's particularized violation of law, but today's social need for integrating the institutions of American life—for expanding the embrace of citizenship, for making sure that no one is excluded. Much of the debate about individual rights and group rights appears grounded in these two distinct perspectives on human interrelationship.

217. *See* E. SAPIR, CULTURE, LANGUAGE, AND PERSONALITY 68-69 (D. Mandelbaum ed. 1949) (written in 1928).

218. *See, e.g.*, R. LAKOFF, LANGUAGE AND WOMAN'S PLACE (1975); C. MILLER & K. SWIFT, WORDS AND WOMEN (Anchor ed. 1977); Bernard, *supra* note 3, at 782-83 & n.32.

219. *See* Karst, *A Discrimination So Trivial: A Note on Law and the Symbolism of Women's Dependence*, 35 OHIO ST. L.J. 546, 549-54 (1974).

find difficulty in speaking in their own voice,[220] part of the reason is that often there are no words to express contextual judgments that "outstrip the capacity for generalization."[221] The difficulty in expression is compounded, however, because our standard moral vocabulary, focused as it is on values such as autonomy and equality, is itself incomplete; we lack words to express the active mutual responsibility and care that are central to the morality of the web.

So it is that Elizabeth Janeway, in discussing relations between the sexes, says that "equality" is "too static," "too small a word, and too confining a description." She prefers "reciprocity"[222]—but that word is itself one of the ladder's favorite terms, with its strong contractual overtones; indeed, reciprocity might be the perfect term to describe the traditional man-woman relationship of public man and private woman. Jean Baker Miller distrusts the term "autonomy," as carrying a threat of having "to pay the price of giving up affiliations in order to become a separate and self-directed individual."[223] She goes on to say, "[w]omen are quite validly seeking something more complete than autonomy as it is defined for men, a fuller not lesser ability to encompass relationships to others, simultaneous with the fullest development of oneself."[224]

True, the language of rights, of liberation, of autonomy, even of equality, seems inadequate to express what women seek for themselves, let alone what they envision as the core values of social life. Sheila

220. *See* C. GILLIGAN, *supra* note 56, at 58-59.

221. *Id.* at 50.

222. E. JANEWAY, *supra* note 23, at 217. Virginia Held speaks of "mutuality," but that word has the same contractual connotations as "reciprocity." *See* Held, *supra* note 117, at 180.

223. J. MILLER, *supra* note 50, at 94.

224. *Id.* at 95. Implicit in this statement is an intuition that women as a group see human interactions in a way that differentiates them from men as a group. Carolyn Merchant, a historian of science, has suggested an analogous distinction concerning women's and men's views of the relations between humanity and the natural world. C. MERCHANT, THE DEATH OF NATURE: WOMEN, ECOLOGY AND THE SCIENTIFIC REVOLUTION (1980). If modern women are inclined to be environmentalists, they are echoing an earlier view linking women to the perception of the world as an organism—a perception that was crushed under the weight of the scientific revolution of the 16th and 17th centuries. That revolution provided new goals and subordinated older ones: humanity's proper relation with nature came to be seen as one of dominion rather than cooperation. Merchant concludes by suggesting that it is time for a reconsideration of the virtues of the older perspective, and she implies that women have a special role to play in leading us to appreciate those virtues.

For a contrasting view, emphasizing women's need for autonomy, achievement, and transcendence, see Carolyn Heilbrun's eloquently argued statement, C. HEILBRUN, REINVENTING WOMANHOOD (1979). Heilbrun recognizes the possibility of a society "in which the ends of the individual and the claims of community might merge" in harmony, but rejects that vision as "too remote a possibility to divert our attention from the here and now in which women must live or lose their lives." *Id.* at 202.

Rowbotham argues that women cannot hope to find their new vocabulary in existing language, "to change it from the inside. We can't just occupy existing words."[225] Jean Bethke Elshtain seeks a feminist analysis of language itself in its relation to a philosophy of mind "that unites mind and body, reason and passion, into a compelling account of human subjectivity and identity."[226] It is hard to imagine a more challenging prescription. What Rowbotham and Elshtain are saying is that the vocabulary of women's perspectives, including their moral perspectives, is going to have to grow out of the experience of women. Thus, consciousness raising is the essential foundation for the second reconstruction as well as the first. Yet, if the values of the network are to be embodied in *any* institutions, they will have to be expressed in language of general application. It is hard enough to think without categories; to govern a society without them is impossible.

Certainly, further infusion of constitutional law with the morality of the web need not await the announcement that women have agreed on a new way to talk about the values of affiliation. Constitutional law has a vocabulary presently in place, and lawyers and judges who seek to promote the "guiding principle of connection" will continue to cast their arguments in the language of equality and freedom. After all, the normal progression of doctrinal development in constitutional law is for changes in substance to "occupy existing words" first, and only later to produce changes in vocabulary.[227]

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225. S. ROWBOTHAM, *supra* note 56, at 33. In a recent study, Carol Gilligan asked a group of adolescent girls, "What does dependence mean to you?" She was surprised to learn that the typical response converted the idea of dependence into interdependence: "My friend and I depend on each other." The implied opposite of dependence, says Gilligan, was not independence but isolation. "Relationships, rather than being construed as an impediment to growth, were being conceived as a protection against isolation." Rich, *Carol Gilligan on Girls and Dependence*, 9 SOJOURNER, Sept. 1983, at 5. Here is an excellent example of the way in which people "occupy existing words," bringing new content with them. It is also an example of the way in which the values of the web of connection, far from representing "passivity, instinct, and helplessness," represent deliberate moral choice; "you *should* be there, you *should* listen, other people *should* listen to you." *Id.*

There is, of course, an opposing view, that any form of dependence of one human on another is destructive. *See* Rapaport, *On the Future of Love: Rousseau and the Radical Feminists*, in WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION, *supra* note 117, at 185, 185 (a critique of this view).

226. Elshtain, *Feminist Discourse and Its Discontents: Language, Power, and Meaning*, in FEMINIST THEORY: A CRITIQUE OF IDEOLOGY, *supra* note 4, at 127, 142. *See also* J. ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT 302-17 (1981).

227. The illegitimacy cases, *see supra* notes 208-11 and accompanying text, exemplify this pattern. A statutory analogy directly on point is the assimilation of sexual harassment into the existing statutory definitions of sex discrimination forbidden by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (Supp. V. 1981). *See also* Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981). Much of the credit for this doctrinal development goes to Catharine MacKin-

I have argued here that although the Supreme Court has expressed the values of equal citizenship in the language of the ladder, its decisions are also capable of bearing meanings that embrace not only independence but interdependence. If, seen from the ladder, citizenship means that no one should be tied down, the view of citizenship from the web is different: no one should be left out. When citizenship is perceived as inclusion in a network of relationship, all three of the core values of equal citizenship take on added meanings. Respect would mean not just tolerance of deviance, not just deference to another's zone of noninterference, but treatment as "one of us," as a member of the community. Participation would mean not just free entry into the struggle for achievement and for power in the sense of domination; it would mean belonging. Citizens would participate in each other's participation, would be concerned for each other's experiences, would seek to speak each other's language; participation would be power in the sense of capacity to fulfill the needs of a self inclusively defined. Responsibility would mean not just the duty to avoid breaking the rules; it would mean care.

Thus, the vocabulary of equal citizenship might serve as an interim language for the infusion of the values of the network into our constitutional law. But the word *interim* deserves emphasis; ultimately the vocabulary of the web must come from those who live there, and until our society changes considerably, that means that the new vocabulary of constitutional law almost certainly will be developed by women out of women's experience. In the meantime, constitutional law itself can help promote the consciousness raising among both women and men on which the new categories of thought must be founded.

By now, some feminists must be getting edgy. Women's suffrage was sold in part on the romantic theory that women would somehow purify politics, a patronizing view that not only proved a silly hope but also reinforced the traditional stereotype of woman. I do not propose a modern analogue to this "sentimentalization" of the suffrage movement.[228] Yet I am persuaded that women as a group tend to define themselves and others as members of networks of relationship, and that this point of view will be progressively infused into our public life as more and more women assume positions with policymaking responsi-

non, whose book, *Sexual Harassment of Working Women*, crystallized the theory into a workable legal doctrine. *See supra* note 44.

228. *See* PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT, *supra* note 226, at 231-39. On sentimentalism and self-evasion as a major symbiosis of social life in 19th-century America, *see* A. DOUGLAS, THE FEMINIZATION OF AMERICAN CULTURE (1977).

bility, including positions in the judiciary.[229]

Constitutional law in particular is a field in which we might expect movement toward the values of the network sooner rather than later. Not only is constitutional law somewhat less bound by precedent than the law in other areas; it is also a field that has engaged the interest, the emotions, and the sense of purpose of large numbers of women who are just now entering the legal profession. One reason why Gilligan's interpretation of women's moral development rings true for me is that it is confirmed by my own experience in the classroom. Women law students generally bring to our discussions the perceptions and values of the web of relationship and a sense of justice focused on care and connection. These women do not seem to think change is impossible, and neither do I.[230]

As if there were not challenge enough in thinking and feeling our way to new conceptions of our public life and new ways of expressing those conceptions, women must at the same time ask themselves whether it is self-defeating to engage in the conflict implicit in bringing those conceptions into institutional reality. Virginia Held puts the question this way: Can the decision "to experiment with love . . . be reconciled with the decision to fight for equal power"?[231] It would take

229. From 1970 to 1980, the proportion of women judges in the United States increased from 6% to 17%. Dullea, *Women as Judges: The Ranks Grow*, N.Y. Times, Apr. 26, 1984, at C1, col. 4.

In these early years of change in the composition of our profession, no doubt the traditional, that is, male criteria for success still influence women toward conformity with previously established expectations for behavior. A woman associate in a law firm will feel pressures to conform to a model of a "successful" lawyer—a model constructed at a time when scarcely any women were in the firm, and when nearly all the lawyers had wives at home who made it possible for them to work the eight-day week. *See* C. EPSTEIN, WOMAN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS 86-150 (1970); C. EPSTEIN, *supra* note 121 *passim*; Sorenson, *A Woman's Unwritten Code for Success*, 69 A.B.A. J. 1414, 1416-18 (1983). My guess, however, is that the traditional model will give way to an acceptance of diversity in career patterns as women become partners in law firms in significant numbers. Carrie Menkel-Meadow, who is skeptical about this prediction, nonetheless has suggested some of the directions this change in model might take. *See* Menkel-Meadow, *supra* note 39, at 31-32; Menkel-Meadow, *supra* note 121, at 196-202. Women now constitute 37% of the students in American law schools, and women lawyers, who constituted 5% of all lawyers in the country a decade ago, now constitute 15% of the profession. Fossum, *A Reflection on Portia*, 69 A.B.A. J. 1389, 1389 (1983).

On the problems inherent in reliance on "aspirational women" to carry forward the process of sexual equality, see Powers, *supra* note 50, at 91-93. On the fact that women are overrepresented in less-prestigious medical specializations, see Lorber, *Women and Medical Sociology: Invisible Professionals and Ubiquitous Patients*, in ANOTHER VOICE: FEMINIST PERSPECTIVES ON SOCIAL LIFE AND SOCIAL SCIENCE, *supra* note 29, at 75, 76 n.1.

230. In the field of sex discrimination itself, we might even expect constitutional law to develop at a rate that outpaces the progress of consciousness raising among women generally. The women who will directly influence the growth of constitutional doctrine will be professionals and policymakers—a relatively small group of women who are the most likely to be conscious of the harms caused by the traditional construct of femininity.

231. Held, *supra* note 117, at 180.

real effrontery for any man to presume to resolve that dilemma. But as individual women seek their various answers to it, one hopeful sign is the increasing recognition that power, in the network, means not domination but the capacity to aid the network itself. One way to exercise that capacity is for individual women to help in raising the consciousness of the men nearest them. That will be no easy task. No man has had a woman's experience, and most men, having found their identities in separation, will begin by fearing the web of connection. Women themselves may fear the consequences of seriously attempting to offer men new perspectives on something so close to the sense of self.

Most fear, however, is fear of the unknown. The recent redefinitions of "woman's place" in our law and our public life, so laboriously attained, now seem natural, even inevitable. The same institutional changes have altered the setting for relations between individual women and men. If women today seem more ready to risk offering guidance, and if men seem more ready to risk taking that guidance seriously, one reason is that we have begun the reconstruction of the social order that defines "woman's place." We have come just far enough to see that this first reconstruction will remain incomplete until we undertake the second one. To dismantle the traditional dual construct of woman and of man will require both the redefinition of individual lives and the redefinition of our constitutional order. In both those processes of redefinition, men can learn much from women's experience and women's perceptions. The first step in conquering fear of the unknown, after all, is to learn about it.