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"BY REASON OF THEIR SEX": FEMINIST THEORY, POSTMODERNISM, AND JUSTICE

Tracy E. Higgins†

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Nothing can serve as a criticism of a final vocabulary save another such vocabulary; there is no answer to a redescription save a re-redescription.

- Richard Rorty, *Private Irony and Liberal Hope*

Woman must put herself into the text—as into the world and into history—by her own movement.

- Hélène Cixous, *The Laugh of the Medusa*

**INTRODUCTION**

"Woman" is a troublesome term, in feminism and in law. The category is neither consistently nor coherently constituted in linguistic, historical, or legal contexts. Yet the framework through which women have sought (and gained) improvements in their legal, economic, and social status depends upon the ascription of meaning to the term. Each claim under the Equal Protection Clause or civil rights statutes implies an affirmative (though perhaps unstated) "redescription" of the category. Feminist theorists, in turn, offer alternative redescriptions of the term as a critique of categories within both law and feminism. As multiple redescriptions of woman compete for acceptance in law and in feminist legal theory, the question of the authority of the descriptive voice arises. Wherein lies the legitimacy of any particular claim about woman? Is there a transcendent truth, a "metanarrative"* of sexual difference, that is, a narrative that exists outside of contingent, historical notions of gender, against which we may measure the validity of such a claim? If not, upon what basis are we to choose among competing redescriptions?

Both the Supreme Court’s jurisprudence of gender and feminist legal theory have generally assumed that some identifiable and de-

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3 Judith Butler recently made a similar observation, see Judith Butler, *Gender Trouble* vii-ix, 2-3 (1990), but it has been at the core of much feminist theory throughout this century. Virginia Woolf commented on the troubling nature of woman as reflected in the interest men have shown in defining her, making her "the most discussed animal in the universe." Virginia Woolf, *A Room of One’s Own* 39 (1931). Similarly, two decades later, Simone de Beauvoir asked “What is a woman?” and proceeded to explain the trouble created by any particular answer to that question. Simone de Beauvoir, *The Second Sex* xv-xvi (1953). Feminists more recently have suggested that to ask the question “What is a woman?” is itself to invite trouble. See Butler, *supra* at 3; Luce Irigaray, *This Sex Which Is Not One* 78 (Catherine Porter trans., 1985). It is the inevitable asking and answering of this question in law that is the subject of this Article.

4 Lyotard uses the term “metanarrative” or “metadiscourse” to refer to the legitimating explanation of truth claims, for example, the Enlightenment metanarrative “in which the hero of knowledge works toward a good ethico-political end—universal peace.” See Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* xxiii-xxiv (Geoff Bennington & Brian Massumi trans., 1984).
scribable category of woman exists prior to the construction of legal categories. For the Court, this woman—whose characteristics admittedly have changed over time—serves as the standard against which gendered legal classifications are measured. For feminism, her existence has served a different but equally important purpose as the subject for whom political goals are pursued. To the extent that the definitions of the category diverge, the differences among definitions are played out in feminist critiques of the Court’s gender jurisprudence, and, occasionally, in the Court’s response to those critiques.

Despite such differences, both the Supreme Court and its feminist critics have largely treated the analysis of gender categories as a problem of accuracy. For the Court, the validity of gender classifications depends upon their correspondence to a set of gendered norms that the Court accepts as true or real or in some sense independent of legal categories. The response of feminist legal theorists to this analysis has been either to challenge the Court’s conclusions about the accuracy of the correspondence or more recently, to challenge the set of norms against which the gender categories are measured. Neither response displaces the Court’s basic construction of the problem as one of assessing the accuracy of a particular account of gender difference. Indeed, feminist efforts to offer truer or better stories of women’s experience—and to justify those stories through feminist method—assume that there is an underlying truth to be told.

To the extent that these legal accounts of gender, both mainstream and feminist, endeavor to assess the accuracy of gender categories, they represent a mode of argument that tracks foundationalist or objectivist assumptions about knowledge. That is, their authority or persuasiveness rests upon their perceived correspondence to a reality that exists independent of legal discourse. These accounts depend

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6 See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45 (1987) (noting the way in which discrimination doctrine “[c]onceal[s] . . . the substantive way in which man has become the measure of all things”).

7 Foundationalism may be defined simply as the attempt to find some sort of grounding for our ultimate truth claims. The rejection of foundationalism has a long pedigree but has been perhaps most fully elaborated by Richard Rorty in PHILOSOPHY AND THE MIRROR OF NATURE (1979). Rorty explains the quest for foundations as the desire “to get behind reasons to causes, beyond argument to compulsion from the object known, to a situation in which argument would be not just silly but impossible . . . . To reach that point is to reach the foundations of knowledge.” Id. at 159.

8 I do not mean to imply that the legal arguments discussed in this Article necessarily reflect a commitment to a foundationalist theory of knowledge. Indeed, I wish to distinguish my analysis of legal discourse from a broader philosophical critique of epistemology. This Article does not attempt to address the philosophical debate over the nature of reason. Instead, it explores the implications for legal analysis of constructing arguments pre-
therefore upon the identification of secure foundations for (gender) knowledge that are in some sense free of historical, political, or social contingency. Such modernist⁹ or objectivist assumptions have been under attack for decades within the academy.¹⁰ More recently, leftist legal critics have borrowed the insights and tools of antifoundationalist philosophy to call into question law’s claim to rationality and legitimacy.¹¹ Even more recently, some scholars have begun to question whether the postmodern¹² or antifoundationalist view of knowledge as contingent promotes or threatens progressive social movements such as feminism, whatever its usefulness in challenging the validity of existing legal norms.¹³

mised on objectivist assumptions about gender. Cf. Daniel A. Farber, Legal Pragmatism and the Constitution, 72 MINN. L. REV. 1381, 1394 (1988) (suggesting that “[f]oundationalism has been the prevailing style of recent constitutional scholarship”).

⁹ I define “modernism” loosely as a form of thought that seeks to create a general theory about the representation of nature in the mind. The modernist or foundationalist theory of representation provides a cross-cultural and trans-historical account of truth and rationality that in turn serves as a basis for social criticism. See Rorty, supra note 7, at 131-64.

¹⁰ Within continental philosophy, see, e.g., JACQUES DERRIDA, OF GRAMMATOLOGY 6-65 (Gayatri C. Spivak trans., 1976); LYOTARD, supra note 4. Within the Anglo-American tradition, see, e.g., THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); Rorty, supra note 7.


¹² Postmodernism is a disputed term, one not susceptible to simple definition. For the purposes of this Article, I am concerned with the relationship between ideas and social practices and particularly with postmodernism’s denial that ideas exist apart from the practices in which they are embodied. See LYOTARD, supra note 4, at xxiv (defining postmodernism as “incredulity toward metanarratives”). In addressing the utility of antifoundationalism to legal arguments, I discuss both self-described postmodernists, such as Lyotard, and philosophers who reject the term, such as Richard Rorty. See Richard Rorty, Feminism and Pragmatism, in 13 THE TANNER LECTURES ON HUMAN VALUES 1, 13 n.18 (Grethe B. Peterson ed., 1992) (explaining that he is “not fond of the term postmodernism,” but conceding certain similarities between his positions and those of Lyotard).

¹³ Compare John Stick, Can Nihilism Be Pragmatic?, 100 HARV. L. REV. 392, 399 (1986) (arguing that scholars should stop focusing on questions of methodology and, instead, address questions of social change and social justice directly) and Lynn A. Baker, Just Do It?: Pragmatism and Progressive Social Change, 78 VA. L. REV. 697 (1992) (arguing pragmatism is of little use for achieving progressive social change) with Mari J. Matsuda, Pragmatism Modified and the False Consciousness Problem, 69 S. CAL. L. REV. 1768, 1769-64 (1990) (arguing that pragmatism has the potential to empower the least powerful social groups); Martha Minow & Elizabeth V. Spelman, In Context, 63 S. CAL. L. REV. 1597, 1601 (1990) (arguing for “contextual” understanding of the issue and rejecting arguments that such an approach risks powerlessness or political paralysis); Dennis Patterson, Postmodernism/Feminism/Law, 77 CORNELL L. REV. 254 (1992) (arguing that feminist jurisprudence cannot afford to ignore the lessons of postmodernism); Margaret Jane Radin, The Pragmatist and the Feminist, 63 S. CAL. L. REV. 1699, 1699-700 (1990) (suggesting that pragmatism, rather than a general theory, provides the only solution for feminists in a world of nonideal justice); Joseph W. Singer, Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism, 63 S. CAL. L. REV. 1821, 1821-22 (1990) (arguing that for
Rather than addressing the abstract critique of reason that is at
the heart of the postmodernist project, this Article attempts to link
the critique of epistemology implicit in that argument to the more
immediate issue of the utility of the postmodern position to feminist
legal theory. I am less concerned, therefore, with law’s broad claims
of objectivity and rationality than with the ways in which those claims
affect particular legal arguments. Thus, this Article does not address
the possibility of objectivity in a philosophical sense but the conse-
quences for legal theory of adopting objectivist modes of argument.
Whatever the epistemological status of knowledge claims about gen-
der, when those claims are translated into the legal realm, they as-
sume a regulatory function. Thus, while feminist philosophers debate
the status of rationality and objectivity, the critical question for femi-
nist legal theorists is not a metaphysical one but a practical one: when
courts treat gender as pre-existing legal discourse, discoverable
through a neutral process called legal reason, what are the implica-
tions for the regulation and redescription of gender categories?

This Article argues that one implication of the objectivist assump-
tions underlying both legal and feminist accounts of gender is a ten-
dency toward reliance on broad explanatory metanarratives of gender
difference. Such reliance has at least two important consequences:
First, by assuming that there exists a prepolitical answer to questions
of gender, we tend to insulate from scrutiny the standard against
which gender is measured, accepting that standard as natural and
prior to our own participation in its construction. Second, by analyz-
ing gender categories for their correspondence with a standard that is
presumed neutral or objective, we shift responsibility for the creation
and maintenance of gender away from the critic. In short, the resort
to explanatory metanarratives is depoliticizing, casting controversial
normative issues in the guise of objectively answerable questions. This
Article argues that both mainstream legal accounts and feminist ac-
counts of gender exhibit these weaknesses.

Exploring the Supreme Court’s analysis of gender in a range of
cases, Part I argues that the Court’s treatment of gender as a problem
of accurate correspondence stems from an effort to defend the valid-
ity of its own choices about how gender differences matter. This Part
traces the Court’s resort to a series of legitimating narratives or princi-
pies of gender difference and argues that, by relying on narratives of
difference presumed to lie outside the scope of legal discourse, the

oppressed groups, theory matters); Joseph William Singer, Should Lawyers Care About Philos-
14 Compare Martha C. Nussbaum, Skepticism About Practical Reason in Literature and the
Court both avoids responsibility for the political implications of those narratives and reinforces their power. Part I illustrates this analysis by examining in detail the Court’s reasoning in *Bray v. Alexandria Women’s Health Clinic*, in which the Court considered the connection between anti-abortion protesting and anti-woman animus. Part I concludes that the Supreme Court’s reliance on biological differences as a guide to gender shields from the Court’s scrutiny the social meaning attached to such differences.

Part II explores feminist legal theory’s reliance on its own legitimating narratives of woman. It begins by examining various broad theories of gender difference and women’s oppression upon which feminist legal theorists have relied; it then suggests that no theory has offered a stable and coherent basis for feminist advocacy. On the contrary, each has created division and dissent. Part II next discusses feminist legal theory’s tentative move toward antifoundationalist theory as a response to the indeterminacy of the category “woman” but notes that feminists have been hesitant to embrace fully the implications of postmodernism. Exploring this ambivalence through an examination of the conflicting accounts of womanhood and abortion presented in the briefs filed in *Bray*, Part II argues that objectivist assumptions in feminist theory, no less than in mainstream legal theory, serve to obscure the exclusions upon which gender categories are based.

Finally, Part III discusses the implications both for the Supreme Court’s gender jurisprudence and for feminist legal theory of abandoning objectivist accounts of gender in favor of postmodernist assumptions of contingency and social construction. Turning once again to the competing claims of narrative authority in *Bray*, this Part considers whether an antifoundationalist approach to the Court’s gender jurisprudence undermines the power of feminist critique. Part III concludes that both feminists and the Court should acknowledge the normative assumptions that underlie their justificatory claims and take responsibility for the exercise of power those claims entail.

I

**Gendered Legal Categories: Drawing Lines and Recreating Boundaries**

A. Legitimating Difference: The Search for a Metanarrative

As the Supreme Court has attempted to draw and redraw the boundaries of gender categories, particularly in the context of equal protection jurisprudence, it has necessarily confronted the problem of the legitimacy of its own gendered assumptions. The Court’s treatment of gender-based classifications therefore may be understood as a
quest for an acceptable justificatory theory of gender, one rooted safely outside gender politics. Such a quest depends upon the assumption that a verifiable correspondence exists between legislative classifications and an underlying reality of gender difference.

The challenge, as the Court has defined it, is to identify that reality of difference and review gender classifications accordingly. However, the Court's account of gender difference has not remained stable or consistent. It has relied at various times on an ideology of separate spheres, simple social empiricism, and biological sex difference as sources of authority in recreating the categories of women and men. Each source has been challenged, each is unstable, and together they have led the Court to conflicting results.

This section examines the Court's use of these various accounts and argues that, as the Supreme Court has assessed gender categories, it has not merely regulated gender through the limitation and control of the uses of gender in legal discourse. Rather, by defining and redefining the category woman, the Supreme Court has participated in the cultural process of defining womanhood itself, not simply the legal implications that follow from it. Moreover, the Court has done so in a manner that has tended to conceal its own role in the production of gender categories by treating gender (however defined) as prepolitical.

1. Separate Spheres and "the Law of the Creator"

The Court's struggle with the legitimation of gendered legal categories began in the very first case to challenge a sex-based classification under the Fourteenth Amendment. Rejecting Myra Bradwell's challenge to Illinois' denial of her application to the bar—a denial based on her status as a married woman—Justice Bradley in concurrence cited the "law of the Creator" as support for the exclusion of...

16 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873). Although based on the Privileges and Immunities Clause rather than the Equal Protection Clause, Bradwell's lawyer's arguments were premised on the Fourteenth Amendment's guarantee of equality. He argued:

Intelligence, integrity and honor are the only qualifications that can be prescribed as conditions precedent to an entry upon any honorable pursuit or profitable avocation, and all the privileges and immunities which I vindicate to a colored citizen, I vindicate to our mothers, our sisters and our daughters.


In fact Bradwell was one of the first Supreme Court cases to present a Fourteenth Amendment challenge to any legislation. Bradwell was argued several weeks before The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), although the Supreme Court handed down that decision one day before the decision in Bradwell.

17 Bradwell, 83 U.S. (16 Wall.) at 131.
women from the legal profession.\textsuperscript{18} Having dissented from the Court's narrow interpretation of the Privileges and Immunities Clause in the \textit{Slaughter-House Cases} a day before,\textsuperscript{19} Justice Bradley nevertheless concurred in \textit{Bradwell v. Illinois} based on his view that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."\textsuperscript{20} Joined by Justices Field and Swayne, Justice Bradley argued that nature maintained separate "spheres" for men and women. He explained that "the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."\textsuperscript{21} For Justice Bradley, therefore, the Court's demarcation of gender categories merely tracked what he perceived as the natural social order, the logic of which existed independent of the legal order.\textsuperscript{22}

This "separate spheres" ideology pervaded the Court's early cases involving challenges to protective labor legislation. For example, in \textit{Muller v. Oregon}\textsuperscript{23} the Court reviewed an Oregon statute proscribing the employment of women in factories for more than ten hours per day.\textsuperscript{24} In response to the Court's assertion in \textit{Lochner v. New York}\textsuperscript{25} that it was not reasonable to believe that maximum-hours legislation for bakers promoted public health,\textsuperscript{26} Louis Brandeis filed a famous brief in which he devoted over a hundred pages to a discussion of the relationship between hours of labor and the health and morals of women.\textsuperscript{27} Relying on arguments presented in the brief, the Court in \textit{Muller} distinguished its decision in \textit{Lochner} and held that woman's "physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as..."
the passion of man." Almost thirty years later, in *West Coast Hotel Co. v. Parrish*, the Court overruled its decision in *Lochner* but continued to rely on women's special vulnerability as a justification for the gender-based minimum wage standard.

Following the Supreme Court's rejection of economic substantive due process in *West Coast Hotel Co. v. Parrish*, advocates of women's rights turned to the Equal Protection Clause as a constitutional basis for challenging legislation restricting women's employment. Yet, in these decisions too, the strength of separate spheres ideology undermined arguments for legal equality. For example, in *Goesaert v. Cleary* the Court rejected a challenge to a Michigan statute restricting women's employment as bartenders. Justice Frankfurter noted that "bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures." Thus, the strength of the Court's presumption of the inherent differences in men's and women's roles prevented it from piercing the veil of ideological justifications for limitations on women as lawyers, bartenders, or voters.

2. Social Facts and Legal Norms

A century after *Bradwell*, simple reliance on the logic of separate spheres had become increasingly problematic for the Court. Social consensus regarding the natural inevitability of gender categories had broken down, and gender had become a site of political contest. This breakdown of consensus was reflected within the Court itself in the

28 208 U.S. at 422; see also Radice v. New York, 264 U.S. 292, 295 (1924) (upholding restrictions on women's employment and citing *Muller* with approval).
29 300 U.S. 379 (1937).
30 Id. at 391.
31 Id. at 394-95, 400.
32 335 U.S. 464 (1948).
33 Id. at 466. Applying rational basis review, the Court refused to "give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling." Id. at 467.
34 Although social science data were introduced in a number of these cases to support restrictions on women's employment, see, e.g., *Muller v. Oregon*, 208 U.S. 412, 420 n.1 (1908), the Court did not view such data as imposing a responsibility on legislatures to accommodate changing norms. As Justice Frankfurter explained in *Goesaert*, "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." 335 U.S. at 466. In other words, sociological data consistent with legislative categories could justify those categories, but data inconsistent with legislative uses of gender would not necessarily render a statute unconstitutional. By the 1970s, the Court had reversed its approach, using sociological data as a standard against which to measure gender categories. See infra part I.A.2.
35 *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).
36 *See* Goesaert v. Cleary, 335 U.S. 464 (1948).
Justices' differing notions of gender. In an effort to decide cases implicating the increasingly politicized issue of gender difference and, at the same time, to defend its own legitimacy, the Court turned from Justice Bradley's natural law rationale to a more searching use of social empiricism and biological difference—a move foreshadowed by the Brandeis brief in *Muller.* This new empiricism allowed the Court to invoke social or biological reality to ground its gender decisions within the factual context of a particular case.

Under its modern social empiricist approach, the Court's review of gender classifications became an essentially negative process of rooting out false stereotypes by comparing legislative assumptions with empirical facts. Recognizing the risk that legislative distinctions could be based on "gross, stereotyped distinctions between the sexes," the Court examined gender-based categories for evidence of gender stereotyping—the indulgence of false assumptions about the correspondence of biological sex and particular culturally-defined behavior or views. Implicit in this mode of analysis is the modernist notion that, for the purposes of legal analysis, there exists an underlying truth about gender, the distortion of which constitutes sexism. The Court assumed that this truth was reflected, albeit imperfectly, in social practices and thus was discoverable through empirical inquiry.

For example, in *Stanton v. Stanton,* the Court struck down a Utah statute establishing a lower age of majority for females than for males. The Court rejected the state's justification that women mature more quickly, marry earlier, and require less education than men. Justice Blackmun, writing for the majority, found that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." The validity of the statute, the Court indicated, depended upon its correspondence with the reality of men's and women's con-

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40 Of course, the Court's approach to gender categories operates as a limit on the scope of the Equal Protection Clause and may reflect a normative view of the limits of the Constitution in shaping social norms. The point here is that by analyzing gender as though it preexists politics, the Court does not confront the implications of that limitation. Cf. MACKINNON, supra note 6, at 37 (noting that equal protection as a principle of antidiscrimination prevents taking into account structural gender inequality).
41 421 U.S. 7 (1975).
42 Id. at 18.
43 Id. at 14-15.
temporary activities. The Court found the statute invalid because it was inaccurate and outdated.44

Similar reasoning informed the Court's decisions in Reed v. Reed45 and Frontiero v. Richardson.46 In Reed, the Court invalidated an Idaho probate law that established a "mandatory preference" for men over women as administrators of estates, finding the preference simply an "arbitrary legislative choice."47 Frontiero involved the right of a female member of the armed services to claim her husband as a "dependent" for the purpose of certain benefit laws.48 The Court found the different standards for determining "dependency" for women and men unconstitutional.49 In a plurality opinion, Justice Brennan challenged the continued accuracy of the assumption that female spouses were normally dependent, pointing out the increasing involvement of women in the labor force, and invoking employment and income statistics to support his analysis.50

Under this approach, when the Court did find a correspondence between social facts and legislative assumptions, it affirmed gender classifications. For example, in Schlesinger v. Ballard,51 the Court upheld a military-promotion regime that provided a shorter "up or out" period for male members of the armed services than for female members.52 Noting that the military barred women from combat assignments, the Court reasoned that women had fewer opportunities than men had to demonstrate their abilities.53 On this basis, the Court ruled that the longer "up or out" time for women was justified and constitutional.54

44 See id. at 15. The Court explained, "If any weight remains in this day to the claim of earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its unquestioned truth . . . ." Id.
47 Reed, 404 U.S. at 76. In Reed, the Court observed that legislative classification must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." Id. (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
48 Frontiero, 411 U.S. at 678.
49 Id. at 679.
50 Id. at 685-88. The Court's conclusion in Frontiero focused on changing social norms of gender and did not reach gender classifications related to biological difference. Sylvia Law has noted that the brief Ruth Bader Ginsburg of the American Civil Liberties Union filed on behalf of Sharon Frontiero specifically distinguished legislative classifications based on biological difference, implying that such classifications might not raise an equal protection issue. See Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 960 (1984).
52 Id. at 510.
53 Id. at 508.
54 Id. at 510.
The Court's rejection of inaccurate stereotypes in these cases did not require a positive theory of sex or gender; it merely required an eye for false assumptions. Identifying what was false did not necessarily require the Court to make an explicit claim about what was true, even though the mode of analysis posited a knowable truth about gender difference. Consistent with Justice Bradley's suggestion that "the rules of civil society must be adapted to the general constitution of things," the Court based its approach on the assumption that the "general constitution" of gender roles in society reflected true gender difference, or at least a realm of gender difference that existed independent of the law. So long as legal norms accurately reflected these roles, the law was not implicated in the maintenance of gender inequality.

This analysis therefore permitted the Court to avoid articulating an affirmative theory of gender difference apart from the observable differences in the social roles of men and women. According to the logic of its analysis, the Court remained innocent of the politics of gender: it simply reviewed the empirical correspondence between the law and the lives of women and men without making any normative claims regarding the justice of those differences. In order to maintain this innocence, however, the Court had to assume the integrity of the gendered subject independent of legal categories. The lives of men and women, measured empirically, could serve as an objective standard against which to measure the justice of legislative categories only if they were not themselves constituted by those legal categories. Thus, the logic of the Court's standard required the denial of its own participation in defining gender norms.

In Craig v. Boren, the Court questioned the logic of this reliance on social facts as a foundation for gender categories by explicitly acknowledging the relationship between law and the social order of gender. Craig involved an Oklahoma law that established different ages at which teenage girls and boys were permitted to purchase alcohol. The State argued that its legislative distinction was supported by a gender-differentiated risk of drunk driving—evidence responsive to the Court's focus on accuracy in Reed and Stanton. Nevertheless, re-

56 See Jane Flax, The End of Innocence, in FEMINISTS THEORIZING THE POLITICAL 445 (Judith Butler & John W. Scott eds., 1992) (discussing feminists' desire to exercise power innocently); see also infra at 149.
57 429 U.S. 190 (1976).
58 Id. at 191-92.
59 Id. at 200-01.
60 Id. The Court in Stanton cited women's increasing levels of education and participation in public life as evidence that the assumptions upon which the state policy was based were outdated. The Court did note, however, the tendency of the legislative classification to reinforce the factual basis upon which it was premised:
jecting the State’s position, Justice Brennan criticized not only the State’s statistics but the very use of statistics to support gender classifications. He suggested that sociological gender differences observable through statistics may not justify differential treatment because those differences may themselves be the product of—rather than the reason for—differential treatment. As Justice Brennan noted, “The very social stereotypes that find reflection in age-differential laws are likely substantially to distort the accuracy of these comparative statistics.”

In effect, the Court in Craig recognized the role that law plays in constructing and reinforcing gender difference. The statute at issue in Craig contributed to a social climate in which young men who were drinking and driving were arrested, while young women were “chivalrously escorted home.” These attitudes were in turn reflected in the statistics upon which the statute was based.

The Court concluded in Craig that “proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.” Thus, in Craig, the Court largely abandoned the notion that observed social differences between men and women justify gender-based classifications, except perhaps classifications with a compensatory purpose. The Court distinguished Kahn v. Shevin and Schlesinger v. Ballard, in which it had upheld the use of gender-based classifications, citing the legislature’s laudatory objective in those cases of remedying socially and legally created disadvantages based on gender. By distinguishing cases in which legislative categories reinforce statistical disparities (Craig) from those in which legislative categories remedy such disparities (Schlesinger and Shevin), the Court clarified its use of social statistics and rejected the notion that observed gender differences in social roles could justify the legal maintenance of those roles.

To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does and bringing her education to an end earlier coincides with the role-typing society has long imposed.


61 429 U.S. at 201-04. Justice Brennan observed that even if the Court assumed that the statistics were accurate, the correlation between gender and drunk driving was less compelling. He noted, moreover, that the Court had rejected statutes premised on statistical studies with far greater predictive value than those offered by Oklahoma. Id. at 202.


63 Id.

64 Id. at 204.


67 429 U.S. 190, 198 n.6 (1976).
FEMINIST THEORY

J.E.B. v. Alabama ex rel. T.B., the Court's most recent equal protection gender discrimination ruling, confirmed and extended Craig's logic. In J.E.B., a defendant in a paternity action challenged the state's use of peremptory challenges to remove male jurors from the jury pool. The Court held that the use of peremptory challenges based on gender violated the Equal Protection Clause. It reached this conclusion without regard to any empirical evidence of differences between men's and women's behavior as jurors.

In an earlier decision, the Court itself had relied upon the possibility of gender-based empirical differences when it overturned a conviction because women had been intentionally and systematically excluded from the jury:

The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

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69 Id. at 1421-22. Rejecting defendant's equal protection argument, the Alabama trial court empaneled the all-female jury. The jury found petitioner to be the father of the child and ordered him to pay child support. See id. at 1422.
70 Id. at 1430.
72 Ballard v. United States, 329 U.S. 187, 193-94 (1946) (footnotes omitted). Women were completely excluded from jury service until the nineteenth century, and in some states, well into the twentieth century. This prohibition was derived from English common law which, according to Blackstone, rightfully excluded women from juries under "the doctrine of proper defectum sexus, literally, the 'defect of sex.' " United States v. De Gross, 960 F.2d 1433, 1438 (9th Cir. 1992) (quoting 2 William Blackstone, Commentaries 362).

The traditional arguments against the imposition of jury service on women were premised either on a desire to protect women from the atmosphere of the courtroom, see Bailey v. State, 219 S.W.2d 424, 428 (Ark. 1949), or on deference to women's roles within the home and family, see Hoyt v. Florida, 368 U.S. 57, 62 (1961).
The Court in *J.E.B.* rejected not the truth of this finding, but its relevance. The majority concluded that a state actor may not use biological sex as a predictor of behavior based on stereotypical assumptions to eliminate women or men as jurors.\(^7\) As in *Craig*, empirical justification for differential treatment was not enough to justify such treatment. As the Court explained, "Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact . . . cannot support discrimination on the basis of gender in jury selection."\(^7\)\(^4\)

Stated another way, although the logic of *Stanton* rooted out false or inaccurate stereotypes, the logic of *J.E.B.* limited the use of all gender stereotypes, whether or not they could be shown to have an empirical basis. In this sense, *J.E.B.* reinforced the logic of *Craig* empirical correspondence or the accuracy of the assumptions upon which gender categories are based is not alone an adequate justification for differential treatment. Rather, to act upon broadly constructed notions of gender is unconstitutional, whether or not the actions are independently justifiable through reference to the observed behavior of men and women.

3. *Sex, Gender, and Biological Difference*

*Craig* represented a potentially radical alteration in the Court's analysis of gender. The Court's recognition that social facts do not exist independent of the constitutive power of the law and cultural categories, undermined the power of these facts to serve as a prepolitical basis for gender divisions within law. Thus, the abandonment of sociological "facts" as a basis for evaluating legislative distinctions left the Court's jurisprudence unmoored. Having moved beyond the straightforward rejection of "outmoded stereotypes" to question the use of gender classifications that have an empirical basis (that teenage girls are less likely than teenage boys to drink and drive, or that women jurors are more likely to sympathize with a victim of domestic violence), the Court faced the problem of justifying its decisions regarding the relevance of gender in particular contexts.

One possibility would have been for the Court to recognize its own participation in the definition of gender categories and to take responsibility for that participation by articulating a normative vision of gender equality against which legal uses of gender could be measured. For example, it might have explored explicitly the connection

\(^7\) *J.E.B.*, 114 S. Ct. at 1430.

\(^7\)\(^4\) *Id.* at 1427 n.11. The Court continued, "We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *Id.* (citing *Craig* v. *Boren*, 429 U.S. 190, 201 (1976)).
between gender differences and equality, identifying relevant gender differences in the context of their social meaning.

Instead, the Court has continued to treat gender as preexisting the legal categories of man and woman and the issue of sex discrimination as a matter of accurate correspondence. Having rejected sociological fact as the standard against which accuracy may be assessed, the Court has turned increasingly to an alternative explanatory metanarrative of gender difference: biology. An important component of separate spheres ideology and early quasi-empirical defenses of protective labor legislation, biological difference continues to provide the Court with what it views as an incontestable guide to gender difference—immutable biological traits that exist independent of legal and cultural norms. If sociological fact has become a tainted basis for the legal regulation of gender, as the Court suggests in J.E.B., biology remains a potential guide to difference that is universal and consistent over time. By preserving biological difference as a measure of the legitimacy of gender categories, the Court maintains its position as objective critic, assessing gendered actions for their accuracy while remaining innocent of gender politics.

Michael M. v. Superior Court of Sonoma County illustrates this reliance on biological difference. In that case, the Court considered whether California's statutory rape law criminalizing intercourse with teenage girls, but not teenage boys, violated the Equal Protection Clause. Rejecting the challenge, Justice Rehnquist cited young women's vulnerability to pregnancy as a justification for the gender-based distinction and emphasized that "[o]nly women may become pregnant." Different treatment of young men and young women was justified not by any "outmoded stereotypes" about the roles of men and women, nor by any social fact about male and female sexual aggression, but rather by a biological fact: women's unique vulnerability to pregnancy. The Court ruled that this fact, true "by nature," justified the statute's gender-based distinction.

Assessing the Burger Court's approach to gender-based classifications, Sylvia Law has noted that "[t]he Craig standard, condemning explicit sex-based classifications based on inaccurate stereotypical views of men and women, collapses when applied to explicit sex-based classifications that are arguably related to real biological differences." Law, supra note 50, at 988. This limitation was not inevitable, however, given Justice Brennan's focus in Craig on the role of the law in creating and reinforcing gender difference. This analysis could have been extended to biological difference as well.

Id. at 466.
Id. at 470.
Id. at 471.
See id. at 473 (noting that "a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct") (emphasis added).
Yet its talismanic use of biological difference to support the gender-based statutory rape law distracted the Court from a more searching consideration of the role of biology in the case. As Justice Stevens correctly pointed out in dissent, the biological risk of pregnancy did not deter young women from engaging in consensual sex. By treating biology as the critical difference, the Court ignored the gender stereotypes underlying the statute: female chastity and the incapacity of young women to make choices about sexual intercourse. Accepting biological difference as a justification for the statutory distinction, the Court failed to consider the ways in which biology and the law intersect to define and reinforce gendered social norms of teenage sexuality.

That a biological difference in Michael M.—women’s vulnerability to pregnancy—justified gender-based legislation, but differences in drinking and driving patterns in Craig did not, illustrates the Court’s rejection of social empiricism in favor of biological difference. The Court treated the cases differently because it accepted the biological difference of pregnancy as privileged, as logically prior to the social facts and stereotypes rejected in Craig. California could treat men and women differently based on women’s vulnerability to pregnancy because, in so doing, it was regulating a preexisting difference rather than sanctioning an artificial one.

This reasoning informed the Court’s decision in Geduldig v. Aiello as well. In Geduldig, the Court rejected a challenge to California’s exclusion of pregnancy-related medical expenses from its employee’s insurance plan. The Court reasoned that any discrimination in the plan worked against “pregnant persons” rather than against “women,” and concluded that discrimination based on pregnancy was not necessarily discrimination based on gender.

81 Id. at 496-97 (Steven, J., dissenting).
83 See Tracy E. Higgins & Deborah L. Tolman, Law, Cultural Media[stion] and Desire in the Lives of Adolescent Girls, in FEMmISM, LAw, AND THE MEDIA (Martha A. Fineman & Martha McCluskey eds., forthcoming 1996) (discussing the interplay between the law and media accounts of teen sexuality and the consequences of teenage girls’ vulnerability to sexual assault).
84 Other cases in which the Court has accepted a biological difference as a justification for gender-based categories include Parham v. Hughes, 441 U.S. 347 (1979) (upholding a Georgia law that permitted unwed mothers but not unwed fathers to sue for wrongful death of a child) and Lehr v. Robertson, 463 U.S. 248 (1983) (denying a father the right to protest the adoption of the child where the father had not developed a relationship with the child).
86 Id. at 494.
87 Id. at 496 n.20.
The Court’s privileging of biological difference as a justification for differential treatment links *Michael M.* and *Geduldig*. Biology can both legitimate a classification based on gender (as it did in *Michael M.*), and function independently to define a constitutionally legitimate class (as it did in *Geduldig*), because the Court treats biological difference as prior to the cultural construction of the categories of women and men. Women’s vulnerability to pregnancy justified California’s gender-based statutory rape law because the law reflected a natural or real difference that preexists politics. Similarly, the assumption that biology precedes gender justified the Court’s refusal to equate the targeting of biological difference in *Geduldig* with the targeting of women as a group.

Despite the Court’s efforts to anchor gender in biology, a comparison of the Court’s treatment of biological difference in *Michael M.* and *Geduldig* highlights the indeterminacy of biology as a guide to gender difference. In *Michael M.*, women’s vulnerability to pregnancy constituted a legitimate basis for California’s circumscription of teenage girls’ but not teenage boys’ sexual agency because “[o]nly women may become pregnant.” Thus, the Court in *Michael M.* treated the class of women and the class of potentially pregnant persons as coextensive. In contrast, in *Geduldig*, the Supreme Court emphasized the difference between these two classes, insisting that “[t]he lack of identity between [pregnancy] and gender as such . . . becomes clear upon the most cursory analysis.” California’s plan “divide[d] potential recipients into two groups—pregnant women and nonpregnant persons.” That the disadvantaged group contained only women was irrelevant.

This tension between the Court’s position in *Michael M.*, in which it posits a connection between pregnancy and womanhood, and in *Geduldig*, in which it assumes their separation, highlights the significance of the Court’s interpretation of biology in particular contexts. In *Michael M.*, the Court chooses to assign legal significance to the effect women’s vulnerability to pregnancy may have on their sexual choices. In so doing, it affirms California’s role in reinforcing that effect by limiting those choices. In *Geduldig*, the Court chooses not to assign legal significance to the effect women’s vulnerability to pregnancy may have on their employment choices. In so doing, it ignores California’s role as employer in reinforcing that effect. Thus, the

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88 Although the parties and the Court analyzed *Michael M.* as presenting an issue of discrimination against men, feminists have suggested that gender-specific statutory rape laws also discriminate against women by disabling young women from engaging in consensual sex. See Olsen, supra note 82, at 418-21.

89 *Michael M.*, 450 U.S. at 471.

90 *Geduldig*, 417 U.S. at 497 n.20.

91 *Id.*
Court's treatment of pregnancy in these two cases illustrates the degree to which biological facts, like social facts, are constituted by the legal significance assigned to them. Nonetheless, by assuming that biology determines gender difference apart from social, legal, and political frameworks, the Court's analysis effectively obscures its own participation in the creation of gender difference.

B. "By Reason of Their Sex": Defining Equality, Recognizing Misogyny

So long as the Court treats gender as a constitutionally valid basis for differential treatment, at least under some circumstances, it must determine which gender differences are sufficient to justify such treatment. This task precipitates a crisis of legitimacy for the Court: Upon what basis may the Court determine the validity of gender categories? Against what standard may they be measured? What are the implications of adopting a particular standard?

As the preceding section argued, rather than articulating and defending a normative standard of gender equality that takes into account gender difference, the Court has adopted a standard that it assumes is external to its interpretive framework—biological difference. The Court's treatment of biological difference provides a basis for separating true accounts of gender from false ones, thereby allowing the Court to distance itself from gender politics. This objective or foundationist mode of analysis has two important consequences. First, it obscures the degree to which the meaning of biological difference is dependent upon the cultural framework in which it is understood. Second, it gives the Court a stake in defending the neutrality of biological difference. In effect, the Court's analysis produces the gendered subject and then conceals that production, preserving gender difference as a prepolitical standard that masks its own regulatory function.

When the Court cites biological difference as the justification for the legal categories man and woman, as in *Michael M.*, the Court treats those categories as adequately determined by biological sexual difference. In such cases, the Court's assumption that biology has a meaning that is both coherent and prepolitical obscures the degree to which the biological categories themselves are socially constructed.92

92 The claim that sexuality, gender, or any other condition is "socially constructed" has sometimes been misunderstood within the legal academy as meaning that those conditions are somehow not real. See, e.g., Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, 1992 Wis. L. Rev. 131, 131 (noting common disclaimer concerning the limits of radical relativism); Patricia Williams, Remarks at Yale Law School Legal Theory Workshop (May 5, 1994) ("Don't get me wrong, I believe in facts—I don't deconstruct all the way down.") Nevertheless, the claim that a condition is socially constructed does not deny the lived implications of the condition. Rather, it calls attention to the way facts are
The question of whether and how biology preexists law is more immediate when a biological characteristic, rather than an explicitly gender-based category, serves as the marker for differential treatment, as did pregnancy in *Geduldig v. Aiello*. In *Geduldig*, and more recently in *Bray v. Alexandria Women's Health Clinic*, gender is not a proxy for biological difference. Rather, biological difference itself is called into question, and the Court is forced to consider directly its connection to gender.

In *Geduldig* and *Bray*, biology is in the foreground, gender in the background, and the connection between the two is expressly posed. The Supreme Court's analysis in these cases illustrates how privileging biology as a determinant of gender difference conceals the contingency of biological facts themselves. By assuming that biological categories based on sex-specific traits do not necessarily implicate gender, the Court preserves biological difference as a prepolitical measure of gender difference. Yet, in preserving biology as a guide to gender differences, the Court limits the scope of its conception of gender equality. This Section explores the Court's reliance on biological difference in *Bray* and illustrates how that reliance informs not only its evaluation of legislative categories but its perception of discriminatory intent as well.

In *Bray*, the Alexandria Women's Health Clinic sought to enjoin the anti-abortion group Operation Rescue from conducting clinic blockades in the Washington, D.C. metropolitan area. It invoked federal jurisdiction under 42 U.S.C. § 1985(3), commonly known as the Ku Klux Klan Act. This Act provides a federal cause of action produced and the exercise of power in that production. *See Judith Butler, Bodies That Matter* xi (1993). Thus, the claim that biology is socially constructed simply means that it is inevitably shaped by the social and historical context in which it exists.


94 *Id.* at 758. One tactic of anti-abortion activists has been to take direct action against clinics that provide abortion services. Groups such as Operation Rescue blockade doors, harass patients, destroy equipment, and threaten health care workers. *See Felicity Barringer, Abortion Clinics Preparing for More Violence, N.Y. Times, Mar. 12, 1993*, at A1 (describing escalation of violence at abortion clinics and clinics' efforts to safeguard medical personnel). As the violence has escalated, clinics and abortion rights activists have themselves engaged in direct action, escorting patients to and from clinics and staging counter-demonstrations. In addition, they have sought protection from the courts.

Following the Supreme Court's decision in *Bray*, Congress passed the Federal Access to Clinic Entrances Act (FACE) which creates a federal cause of action for women harmed by the blockades and empowers federal courts to grant injunctive relief. 18 U.S.C. § 248 (1994). Significantly, FACE contains no requirement that the action be motivated by discriminatory animus.

95 42 U.S.C. § 1985(3) (1988) provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . the party so injured or deprived may have an
against persons conspiring for the purpose of denying equal protec-
tion of the laws. In earlier cases interpreting the Act, the Supreme
Court had held that in order to prove a private conspiracy in violation
of § 1985(3), a plaintiff must show, among other things, that "some
racial, or perhaps otherwise class-based, invidiously discriminatory ani-
mus [lay] behind the conspirators' action." Assuming arguendo that
"otherwise class-based" includes women, the Court in Bray squarely
faced the question of whether Operation Rescue's clinic blockades
were motivated by discriminatory animus against women. Thus, the
case raised difficult questions concerning the definition of woman for
the purposes of identifying anti-woman animus: Does Operation Res-
cue's anti-abortion protesting necessarily reflect such animus? What is
the significance of the conflicts among women in the particular case
or within the abortion debate more broadly? In short, who gets to
define womanhood? Answering these questions required a theory of
the relationship between abortion and womanhood, between biology
and gender politics.

Writing for the majority, Justice Scalia defined anti-woman ani-
mus as a "purpose that focuses upon women by reason of their sex," whether or not that purpose reflects malicious motive. Thus, whether
Operation Rescue's illegal blockades fell within the scope of § 1985
depended less upon the state of mind of the conspirators than upon
the Court's interpretation of their actions. The Court had to decide
whether targeting pregnant women seeking abortion was activity moti-
vated "by reason of their sex." Given that biological differences in
male and female reproductive capacity serve as the principal and over-
riding cultural marker for gender, targeting persons according to

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96 The district court held that Operation Rescue had violated § 1985(3) by conspiring
to deprive women seeking abortions of their right to interstate travel. The court subse-
quently enjoined petitioners from trespassing on, or obstructing access to, abortion clinics
tion Rescue, 914 F.2d 582 (4th Cir. 1990). The Supreme Court granted certiorari to con-
sider whether § 1985(3) provides a federal cause of action against persons obstructing
access to abortion clinics. Bray v. Alexandria Women's Health Clinic, 498 U.S. 1119
98 113 S. Ct. at 772 (Souter, J., concurring in part and dissenting in part).
99 Id. at 757-58.
100 Id. at 759.
101 Whether or not Operation Rescue's blockades fell within the scope of § 1985(3),
they were illegal under state law.
103 See, e.g., Corbett v. Corbett, 2 W.L.R. 1306, 1323, 1325 (P.D.A. 1970) (describing an
individual's sex as "fixed at birth" and defining a woman as one "naturally capable of per-
forming the essential role of a woman in marriage"). For a discussion of the biological and
their reproductive capacity would seem to imply a sex-based motive. Nevertheless, Justice Scalia dismissed the argument that activity against pregnant persons is activity that targets women by reason of their sex. He invoked Geduldig and its distinction between a class of "potentially pregnant persons" and a class of "women." According to Justice Scalia, to target women based on their reproductive choices is not necessarily to target them based on their womanhood, that is, by reason of their sex. Biology, including reproductive capacity, exists independent of gender categories and is analytically separate from them.

Justice Scalia acknowledged that targeting biology may implicate gender under some circumstances. He suggested that anti-abortion activity can indicate anti-woman animus if "opposition to abortion can reasonably be presumed to reflect a sex-based intent." In other words, opposition to abortion does not necessarily constitute anti-woman animus but may reflect separate underlying misogynous motives: Operation Rescue may target abortion because of rather than in spite of its impact on women. Moreover, "[s]ome activities," Justice Scalia explained, "may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." For example, "[a] tax on wearing yarmulkes is a tax on Jews." Justice Scalia suggested that such an inference cannot be drawn about the motives of those who would impose a tax on pregnancy (as in Geduldig) or blockade abortion clinics.

Justice Scalia's conclusion that a tax on yarmulkes is discriminatory and that abortion protests are not is not self-evident. The examples cannot be distinguished either by the specificity of the target or the severity of the resulting harm. Certainly, yarmulkes are no more closely identified with Jews than pregnancy is with women—not all Jews wear yarmulkes and non-Jews may wear them, while most women become pregnant and no men ever do. Moreover, a tax on yarmulkes is no more intrusive (arguably much less intrusive) than the denial of abortion services.


104 See 113 S. Ct. at 801 (O'Connor J., dissenting) (arguing that the statute must reach conspiracies whose motivation is directly related to characteristics unique to that group).

105 Id. at 759.

106 Id. at 760 (despite the legislative override of Geduldig).

107 Id. at 760.

108 Id.

109 Id.

110 Id.
Justice Scalia's reasoning necessarily hinged on his treatment of biological sexual difference as prior to and separate from gender. That Justice Scalia found taxing yarmulkes and blockading clinics so evidently different simply reflects his assumption that pregnancy can be dissociated from womanhood while yarmulke-wearing cannot be dissociated from Jewishness. He assumes as much because he believes that pregnancy is separable from gender, that biology is independent of culture and of law. In Bray, as in Geduldig, the Court treated the content and meaning of biological sexual difference as preexisting law, as an independent variable in the legal equation. For the Court, it is a marker of sexual difference that does not necessarily have gendered implications.

Justice Scalia's unstated reliance on the privileged position of biology allows him to sidestep the central, and admittedly difficult, question the case posed: when do actions that target a characteristic that defines a group implicate the identity of that group? This question cannot be answered fully without a theory connecting group characteristics to the social context in which that group is defined—in this case, an understanding of the meaning of pregnancy and its connection to women. Justice Scalia offered no such theory. He provided only an implicit analysis of two signs of difference, yarmulkes and pregnancy, and asked only whether pregnancy, like yarmulke wearing, is "such an irrational object of disfavor that... an intent to disfavor [women] can readily be presumed." This analysis is flawed in two related ways. First, the effort to identify a presumption based on the object of disfavor misapprehends that class-based animus is unavoidably a contextual phenomenon. Whether the targeting of an action toward a particular class signals class-based animus depends on the social meaning of the action and its target: because the wearing of a yarmulke has a certain social meaning, the targeting of that headwear sends a corresponding message. This is not an inevitable, ahistoric truth, but rather an

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111 Cf. J.E.B., 114 S. Ct. at 1436 n.1 (Scalia, J., dissenting). In his dissent in J.E.B., Scalia distinguishes between sex and gender discrimination, noting that "[t]he word 'gender' has acquired a new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes." Id. Although he clearly believes that biological sexual difference and gender difference are distinct, his view of the connection between the two is less clear in light of his analysis in J.E.B. Given that the case focused on the use of cultural assumptions about the sexes and their behavior as jurors, it clearly implicated the construction of sexual difference—or more succinctly, gender.


113 Cf. Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that air force prohibition of nonregulation headwear did not violate the First Amendment free exercise rights of Jewish servicemembers). In Goldman, the Court rejected the free exercise challenge in light of the military's "evenhanded" treatment of religious apparel coupled with the Court's deferential review of military regulations. Id. at 509-10.
interpretation of social relations—relations that must be analyzed in context, and not through abstract presumptions.

Second, and more fundamentally, whether the targeting of abortion is “irrational” simply misses the point. Justice Scalia stated in *Bray*:

[O]pposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class—as is evident from the fact that men and women are on both sides of the issue...\(^\text{114}\)

Yet not even the staunchest defenders of abortion rights would characterize opposition to abortion as necessarily irrational. Misogyny need not be the only rational explanation for an action in order for the Court to conclude that the action has discriminatory meaning and implications. Nevertheless, framing the question in this way reinforces the disconnection between the biological marker of pregnancy and the politics of gender. In so doing, the Court preserves biology as a foundation for gender difference that is logically prior to and separate from the sphere of gender politics.

As *Bray* illustrates, the Court’s treatment of biological difference as prepolitical prevents it from considering the complexity of the social meaning assigned to biological difference. Relying on unstated and unexamined assumptions of difference, the majority in *Bray* offers no account of the relationship between womanhood and abortion. Moreover, the Court offers no explanation for the premise that challenging the pregnancy-related choices of women is less problematic than challenging their career-related choices. Under the Court’s framework, biological differences may justify discrimination in two ways: They rebut the presumption of gender bias by offering a true foundation for gender-based classifications (as in *Michael M.*);\(^\text{115}\) or, they render gender bias invisible by eliminating the need for explicitly gender-based classifications (as in *Bray* and *Geduldig*).\(^\text{116}\) In each situation, the Court creates an opposition between biology as objective and gender as subjective, maintaining biology as an uncorrupted measure of difference.

Over the last century, the Court’s assumptions about gender have shifted from an ideology of separate spheres to a much narrower but equally problematic ideology of biological difference. What has re-

\(^{114}\) 113 S. Ct. at 760.


mained consistent, however, is the Court's assumption that gender categories preexist law. This assumption permits the Court’s own ideology of gender difference to remain unstated. Yet, despite the Court’s efforts to separate biology and gender, the degree to which a sex-specific action reflects anti-woman animus—whether it is “objectively invidious”—cannot be determined without a substantive vision of women’s equality.\textsuperscript{117} Such a vision, in turn, cannot be articulated without relinquishing the attempt to ground gender difference outside culture, law, and politics. Women do not preexist legal and cultural descriptions of womanhood. Instead, the exercise of interpretation, a process in which the Court is an important participant, recreates the concept of womanhood.

II

Feminist Theory and the Challenge of Postmodernism

A. Identity Politics and Internal Conflict

Just as the Supreme Court has shifted its ideology of gender difference over time, feminist legal theorists have defined their subject woman in various ways, both tracking and determining the nature of legal claims raised on her behalf. The earliest claims for “simple equality”—equal treatment, equal pay, equal opportunity—depended only on defining woman as like man but excluded.\textsuperscript{118} Such a definition simultaneously avoided the complexities of gender difference and rhetorically eliminated any justification for different treatment. This claim of simple equality was consistent with the Supreme Court’s early approach to gender classifications—the identification and elimination of false stereotypes.\textsuperscript{119} As the limitations of this approach were exposed, the definition of woman and explanations of the nature of her inequality or oppression became more complicated. Indeed, the Court’s decisions in \textit{Geduldig} and \textit{Michael M.} highlighted the complexity of the equality puzzle.\textsuperscript{120} Efforts to translate needs surrounding pregnancy, reproductive freedom, and the threat of sexual violence

\textsuperscript{117} Justice Scalia’s attempt to flee substance for nature or biology in the context of \textit{Bray} is consistent with his attempt, evident in his jurisprudence more broadly, to flee substance for originalism and for the idea of tradition understood as historical fact. See James E. Fleming, \textit{Constructing the Substantive Constitution}, 72 Tex. L. Rev. 211, 271-72 (1993).

\textsuperscript{118} See, e.g., Williams, supra note 5 (offering rationale for the equal treatment approach to pregnancy); Wendy W. Williams, \textit{Notes from a First Generation}, 1989 U. Chi. Legal F. 99 (acknowledging difficulty in accounting for difference but arguing strategically for simple equality).

\textsuperscript{119} See supra part I.A.2.

into claims of right have required more complicated theories of difference.\textsuperscript{121}

Even as particular feminist theories of gender difference have evolved, feminist legal theorists have generally assumed that there exists some identity, described by the category of woman, that serves as the source of feminist goals within law and politics and as the subject of theory.\textsuperscript{122} Indeed, the structure of identity politics seemingly necessitates such an assumption, underlying as it does feminism's claim to speak as and for the group women.\textsuperscript{123} In the legal realm, the group-based nature of civil rights claims has required increasingly complex theories of what it might mean to discriminate "by reason of her sex."\textsuperscript{124} Feminist legal theorists therefore have been compelled to develop a notion of womanhood that can simultaneously describe the collective experiences of women and translate that description into legal claims. Such general accounts or "metanarratives"\textsuperscript{125} of gender have lent political coherence to feminism and have served as a basis for expanding the substantive scope of equality claims for women.\textsuperscript{126}

\textsuperscript{121} See, e.g., Mary E. Becker, \textit{Prince Charming: Abstract Equality}, 1987 Sup. Ct. Rev. 201 (pregnancy and difference); Finley, supra note 120 (pregnancy and maternity leave policy); Littleton, supra note 120 (pregnancy and difference); Reva Siegel, \textit{Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection}, 44 STAN. L. REV. 261 (1992) (abortion); MACKINNON, supra note 5 (sexual harassment, pornography, and sexual violence).

\textsuperscript{122} Elizabeth Spelman explains this tendency in the following way:

[A]s feminists, our motivation for thinking, talking, and writing about any particular woman is that she is a \textit{woman}; at the same time, the point is not to talk only about \textit{one} woman, but about \textit{women}—any and all women. So the logic of our inquiry and concern seems to lead us to focus on the "woman-ness" or womanhood of any or all women, just as the Platonist's interest directs his explorations.

\textit{ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT} 3 (1988).

\textsuperscript{123} As Judith Butler explains:

[T]he juridical formation of language and politics that represents women as "the subject" of feminism is itself a discursive formation and effect of a given version of representational politics. And the feminist subject turns out to be discursively constituted by the very political system that is supposed to facilitate its emancipation.


\textsuperscript{124} The Violence Against Women Act illustrates this tendency by including two separate standards for proving group-based harm. To establish a claim for damages suffered as a result of gender-motivated violence, a plaintiff must show that she was targeted on the basis of her sex \textit{and} that the act was motivated, at least in part, by anti-woman animus. See 42 U.S.C.A. § 13981 (1995). As the legislative history makes clear, in the case of rape, the woman may be chosen as a victim because of her sex, but the act might not reflect anti-woman animus. \textbf{See} The Violence Against Women Act, S. Rep. No. 138, 103d Cong., 2d Sess. (1993).

\textsuperscript{125} See \textit{supra} note 4 for an explanation of metanarrative; \textit{see also} Fraser & Nicholson, \textit{supra} note 14, at 27 (comparing feminist with postmodern uses of the concept of metanarratives).

\textsuperscript{126} This analytical move, identifying as common or collective those experiences that have been assumed personal and private, is the goal of feminist consciousness-raising ef-
Despite the temptation, and arguably the necessity, of articulating generalizable claims about women, feminist legal theorists have divided over the content of such claims and have struggled to locate an account of gender that is credible. Just as the Supreme Court has attempted to ground its gender analysis outside the contestable realm of law and culture, feminist theorists have sought some coherent and convincing basis for offering better accounts of women's lives. Like the Court, some feminists, including feminist legal theorists, seem to be motivated in this endeavor by a desire to root gender outside of politics, to describe a connection among women that precedes feminism.

Although feminist legal theorists have effectively criticized the Court's approach to gender by exposing the partiality of its assumptions, they have frequently done so by offering a fuller theory of gender difference, an alternative "metanarrative" that does not rely on a problematic privileging of biology. In so doing feminists have faced their own crisis of authority, one that stems from the problem of accounting for differences among women rather than differences between men and women. Among women, indeed among feminists, who

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127 See, e.g., Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281 (1991) (describing women's inequality largely in terms of sexual vulnerability); Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1 (1988) (positing an existential gender difference based on women's experience of connection); Becker, supra note 121 (discussing the problems with a single meta-theory and advocating a contextual and strategic approach); Herma Hill Kay, Equality and Difference: The Case of Pregnancy, 1 Berkeley Women's L. J. 1 (1985) (positing sameness between men and women qualified by biologically-driven "episodic" differences); Law, supra note 50 (analyzing generally the problems gender categories present in constitutional interpretation).

128 Ellen Rooney has described this tendency as motivated by a "desire that what unites us (as feminists) pre-exist our desire to be joined; something that stands outside our own alliances may authorize them and empower us to speak not just a feminists but as women." Ellen Rooney, In a Word. Interview, in The Essential Difference 152 (Naomi Schor & Elizabeth Weed eds., 1994).

129 See, e.g., Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity (Gisela Bock & Susan James eds., 1992); MacKinnon, supra note 6, at 32; Theoretical Perspectives on Sexual Difference (Deborah L. Rhode ed., 1990); Littleton, supra note 120.

130 See, e.g., Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 Berkeley Women's L.J. 199 (1989) (arguing that feminists must locate their theory in women's experience in order fully to account for differences); Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139 (analyzing how black women's experience is eclipsed by focusing either on race or gender as distinct categories); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990) (arguing
has authority to speak on woman's behalf? This section explores this question as it is raised in feminist theory generally and in Bray specifically.

1. *Telling Woman's Story*

The invocation of the category woman necessarily implies a claim about the descriptive content of the term, a claim that generates debate and division among feminists. Thus, just as the Supreme Court confronts the dilemma of simultaneously rejecting and recreating gendered categories, so must feminism confront the instability of the very category it purports to represent. Feminists must consider whether it is possible to shape the linguistic representation of woman in a way that meaningfully serves the goals of expanding women's political representation while avoiding the re-creation of traditional categories or new divisions. Feminists have sought a broad and generalizable account of gender difference to provide theoretical coherence and a basis for particularized political and legal claims. Yet the recent history of feminist theory indicates that, with each general theory of gender, criticism emerges to undermine the validity of the claims that both underlie and flow from the account. Consequently, the development of feminist legal theory has been characterized by

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131 As Judith Butler has explained:

[T]he presumed universality and unity of the subject of feminism is effectively undermined by the constraints of the representational discourse in which it functions. Indeed, the premature insistence on a stable subject of feminism, understood as a seamless category of women, inevitably generates multiple refusals to accept the category . . . . [T]he fragmentation within feminism and the paradoxical opposition to feminism from "women" whom feminism claims to represent suggest the necessary limits of identity politics.

*Butler, supra* note 123, at 4.

132 Drucilla Cornell has explained the dilemma as follows:

If there is to be feminism at all, as a movement unique to women, we must rely on a feminine voice and a feminine "reality" that can be identified as such and correlated with the lives of actual women. Yet all accounts of the Feminine seem to reset the trap of rigid gender identities, deny the real differences among women (white women have certainly been reminded of this danger by women of color), and reflect the history of oppression and discrimination rather than an ideal to which we ought to aspire.

*Drucilla Cornell, The Doubly-Prized World: Myth, Allegory and the Feminine, 75 CORNELL L. REV. 644, 644-45 (1990).*
pressures both in favor of and against a general or cross-cultural account of women’s inequality or oppression.\textsuperscript{133}

For example, some feminists have argued that there is a cross-cultural commonality to women’s lives based on their capacity to become pregnant and bear children.\textsuperscript{134} Perhaps the most significant and widely cited example of such a theory is Nancy Chodorow’s psychoanalytic account of mothering.\textsuperscript{135} In an effort to explain the perpetuation of sexual oppression, Chodorow focuses on the practice of mothering and the way that the practice reproduces itself—that is, the mechanism by which women as mothers produce gendered daughters and sons.\textsuperscript{136} Setting forth a psychoanalytic theory of gender identity, Chodorow argues that gender-stratified parenting practices (female mothering) create women whose identity is primarily relational and men whose identity is primarily autonomous.\textsuperscript{137}

The work of Nancy Chodorow, Carol Gilligan,\textsuperscript{138} and others is not premised on biological imperatives nor does it claim (expressly) to explain gender differences cross-culturally.\textsuperscript{139} Nevertheless, as femi-
nist legal theorists have imported this work into the legal realm, they have frequently (and perhaps necessarily) simplified the theories of difference and generalized the claims in order to posit legal theories of group-based harm. For example, Robin West has focused on women's "essential connection" to others through intercourse, reproduction, and parenting to posit a jurisprudential theory based on women's sense of "existential 'connection' to other human life." West criticizes what she characterizes as male jurisprudence, both traditional and radical, for privileging a male subjectivity as human subjectivity. She does not argue against the notion of an abstract, generalizable subject per se. Rather, she suggests that the subject that both mainstream and critical jurisprudence posit is gendered and does not reflect the (abstract, generalizable) subject that is woman.

This feminine subject is characterized by a "state of connection," leading her to "value love and intimacy because they express the unity of self and nature within [her] own sel[f]." A consequence of this male-defined jurisprudence is that the law misconceives and, as a result, undervalues the harms women suffer.

This metanarrative, what might be called the mothering story, is attractive to feminists for several reasons. It translates what has been treated as biological imperative into a sociological and psychoanalytic account of gender difference, thereby challenging its inevitability without undermining its explanatory power. In addition, this account of women, particularly Carol Gilligan's work, simultaneously revalues women's experience and provides a basis for concrete political claims, including abortion and maternity rights.

Notwithstanding its usefulness and appeal, this effort to describe a common feminine experience that derives from women's role as mothers has inevitably produced factionalization and rebellion.

GILLIGAN, supra note 134, at 2.


See West, supra note 127, at 5.

Id. at 64-70. See Patterson, supra note 10, at 285 (criticizing West for her modernist assumption that woman "exists prior to being taken up and constituted by legal discourse").

West, supra note 127, at 2 (arguing that the claim that "what separates us is epistemologically and morally prior to what connects us—while 'trivially true' of men, [is] patent[ly] untrue of women").

Id. at 40.

Id. at 58-72.


See, e.g., MACKINNON, supra note 6, at 39 (criticizing relational feminism and suggesting that "the damage of sexism is real, and reifying that into differences is an insult to our possibilities"); Pamela S. Karlan & Daniel R. Ortiz, In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda, 87 NW. U. L. REV. 858 (1993) (question-
First, not all women can or wish to be mothers and therefore some resist a definition of woman as mother as not reflecting their experience.\textsuperscript{148} Second, not all women experience motherhood in the same way. Mothering is not consistent cross-culturally or indeed within any single culture.\textsuperscript{149} Mothering has different social meanings depending upon one’s race, class, marital status, or sexual orientation.\textsuperscript{150} Moreover, some feminists have argued that to describe the specificity of the category woman as derivative of her role as mother is to reinforce traditional notions about women’s role that have undermined women’s representation in the political sphere.\textsuperscript{151}

Mothering is not the only cross-cultural feminine experience that has been offered as a basis for a feminist metanarrative of gender difference. Indeed, in feminist legal theory a more important metanarrative has been Catharine MacKinnon’s theory linking gender inequality and sexual violence. MacKinnon has premised her theory of sexual oppression and state power on the constructive force of male sexuality.\textsuperscript{152} She argues that “[t]he substantive principle governing the authentic politics of women’s personal lives is pervasive powerlessness to men, expressed daily . . . as sexuality.”\textsuperscript{153} Focusing on sexual violence, she articulates a theory of sexual oppression that describes women’s sexuality through their experience of pornography, rape,
and sexual harassment.¹⁵⁴ Powerfully documenting and theorizing the impact of sexual violence upon women, MacKinnon implies that women are completely overdetermined by the conditions of their oppression and therefore cannot affirmatively experience their own sexuality within patriarchy.¹⁵⁵ Thus, she finds it pointless (and even antifeminist) to theorize about women’s sexuality apart from positing it as a construct of male dominance.¹⁵⁶ Her analysis assumes the impossibility of female sexual autonomy: women are victims of male power, male definitions, and male sexuality, with no hope of creating any sexual agency for themselves in this context.¹⁵⁷

This effort to articulate a general account of women’s oppression as rooted in women’s sexuality has also led to controversy and division within feminism. In response to MacKinnon, other feminists have rejected the notion that women’s sexuality is either unknowable or simply a product of male dominance.¹⁵⁸ Instead, they have argued the necessity of developing an understanding of women’s sexuality by obtaining more information about its range, quality, and complexity—about the often contradictory nature of women’s experiences of sexu-

¹⁵⁴ See id. at 127-54. MacKinnon explains:
Taken together and taken seriously, feminist inquiries into the realities of rape, battery, sexual harassment, incest, child sexual abuse, prostitution, and pornography answer these questions by suggesting a theory of the sexual mechanism. . . . Force is sex, not just sexualized; force is the desire dynamic, not just a response to the desire object when desire’s expression is frustrated.

¹⁵⁵ See id. at 138 (explaining that “[w]omen also embrace the standards of women’s place in this regime as ‘our own’ to varying degrees and in varying voices—as affirmation of identity and right to pleasure, in order to be loved and approved and paid, in order just to make it through another day”).

¹⁵⁶ Id. at 135-37. Criticizing the editors of the Diary of the Barnard Conference for suggesting that women “negotiate sexual pleasure,” MacKinnon remarks, “As if ‘negotiation’ is a form of freedom. As if pleasure and how to get it, rather than dominance and how to end it, is the ‘overall’ issue sexuality presents feminism.” Id. at 135.

¹⁵⁷ Despite her reluctance to consider women’s sexuality other than as a product of their oppression, MacKinnon’s espousal of feminist method leads her to the conclusion that women can know and criticize their condition in a local way. She has explained that “[g]iven the pervasiveness of inequality, imagination is the faculty required to think in sex equality terms.” MacKinnon, supra note 127, at 1327. See discussion infra part III.A. But, she notes, “we cannot know what women not unequal as women would want, how sexuality would be constructed, how law would relate to society, what form the state would take, or even if there would be one.” Id. at 1328.

¹⁵⁸ See, e.g., Carole S. Vance & Ann Barr Snitow, Toward a Conversation About Sex in Feminism: A Modest Proposal, 10 Signs 126, 127 (1984) (noting the emergence of a pro-sex anti-sex divide and linking it to “deeply different views about women’s sexual agency, the theory of social construction, the connections between sex and gender, and the nature of representation”); Mariana Valverde, Beyond Gender Dangers and Private Pleasures: Theory and Ethics in the Sex Debates, 15 Feminist Stud. 237, 241 (1989) (criticizing MacKinnon for “denying women any position, however precarious, from which to reclaim or invent nonpatriarchal sexual desires”).
ality. They differ in their prescription for legal reform as well, arguing against the regulation of pornography and the criminalization of prostitution.

In addition to fostering the very divisiveness they are intended to quell, both the mothering story and the dominance story operate to naturalize a particular type of women's experience. For example, the mothering story explains gender difference by privileging a traditional Western, heterosexual experience of motherhood within the nuclear family. Similarly, the dominance story privileges women's accounts of sexual violence while discounting accounts of sexual pleasure as problematic, compromised, or even products of false consciousness. To the extent that one account or the other becomes the "official" feminist story of gender difference, it constitutes the category woman in a particular way, accepting some experiences as definitive while excluding others. When feminists aspire to account for women's oppression through claims of cross-cultural commonality, they construct the feminist subject through exclusions and, as Judith Butler has observed, "those excluded domains return to haunt the integrity and unity of the feminist 'we'."

159 Jana Sawicki, Identity Politics and Sexual Freedom: Foucault and Feminism, in Feminism and Foucault 177, 187 (Irene Diamond & Lee Quinby eds., 1988) (urging a "politics of difference" and arguing that "[d]ialogue between women with different sexual preferences can be opened, not with the aim of eliminating these differences, but rather learning from them and discovering the basis for coalition building"); Valverde, supra note 158, at 243 (arguing that "[a]ny theory of sexuality must take into account that even as we suffer patriarchal oppression, we continue to have genuine active desires, and these include, among others, some women's desires to have intercourse").


162 See Chodorow, Mothering, supra note 135, at 98 (specifying a "core gender identity" that "stand[s] for the mother's particular psychic structure and relational sense"). But see Spelman, supra note 122, at 80-113 (criticizing Chodorow's theory for inadequately accounting for racial, class, and cultural differences among women).

163 See Mackinnon, supra note 152, at 135-37 (criticizing the notion that feminists can or should concern themselves with women's sexual pleasure or desire under the conditions of patriarchy). But see Ruth Colker, Feminism, Sexuality, and Authenticity, in At the Boundaries of the Law: Feminism and Legal Theory, supra note 150, at 142 (suggesting that "[i]f women can overcome patriarchy sufficiently to see their subordination then women should be able to overcome patriarchy sufficiently to see their freedom").

2. Questioning the Storyteller

The divisions within feminism surrounding various metanarratives of women's oppression suggest that any effort to give specific content to the category woman will inevitably generate disagreement among women. This realization forces reconsideration not only of the way gender categories are constituted but also of the way in which we think about the constitution of such categories. Questioning the idea of woman's identity as such, some feminists have begun to reexamine the quest for a general account of oppression. Although many feminist legal theorists have remained concerned with the imperatives of identity politics, feminist philosophers and political theorists have been more willing to challenge the coherence of the category. In so doing, they have turned increasingly to the antifoundationalist stance of postmodernism as a basis for social criticism.\textsuperscript{165}

Postmodernism, broadly defined, rejects the role of philosophy as a foundation for social criticism. For example, Jean-Francois Lyotard defines the postmodern condition as one in which the "grand narratives" of legitimation, including narratives of historical progress, scientific rationality, reason, and justice, are no longer credible.\textsuperscript{166} These modern or Enlightenment accounts yield to a new "postmodern" view in which social criticism, including moral judgment, exists independent of any universalist theoretical ground. As Nancy Fraser and Linda Nicholson explain, "No longer anchored philosophically, the very shape or character of social criticism changes; it becomes more pragmatic, ad hoc, contextual, and local."\textsuperscript{167} This wide-ranging attack on metaphysics has led to skepticism of any overarching theory of justice and a call for what Lyotard describes as a "justice of multiplicities."\textsuperscript{168}

The postmodern skepticism of grand theory resonates with feminist legal theory's increasing distrust of universal claims about women.


\textsuperscript{166} LYOTARD, supra note 4, at 27-41.

\textsuperscript{167} Fraser & Nicholson, supra note 14, at 26. Fraser and Nicholson are careful to point out the very different commitments that led postmodernists and feminists to embrace antifoundationalist premises. Postmodernists have responded to a crisis in the condition of philosophy. Feminists have responded to the demands of political practice. Nevertheless, they argue, the two bodies of theory inform and complement each other.

\textsuperscript{168} LYOTARD, supra note 4, at 12; see also Jean-Francois Lyotard, The Differend, The Referent, and The Proper Name, in Diacritics 4 (Georges Van Den Abbeele trans., Fall 1984).
Postmodernism suggests that the problem lies not in ensuring that the representation of women's experience is accurate, but rather in the concept of representation itself. Sexual difference, however it may be measured, is irretrievably bound up with gender. In short, gender itself is a product of power and language and social institutions, including law, not a reality that preexists those structures. Thus, for postmodern feminist theorists, the problem of accounting for a range of feminist views and experiences is less an ontological than an epistemological difficulty.\(^{169}\)

At the same time, postmodernism apparently undermines the central goal of feminism and other forms of social criticism: the identification and critique of inequality and injustice that transcend cultural, political, and geographic boundaries. As Fraser and Nicholson have argued, Lyotard's justice of multiplicities not only calls into question universalist notions of justice but also renders problematic feminist critique of legal institutions and legal reform outside of narrow, localized experience.\(^{170}\) To the extent that postmodernism questions the use of cross-cultural categories, it threatens to undermine the identification of broad structures of inequality premised on gender.\(^{171}\)

Thus, postmodernism is at once promising and threatening for feminism. Divisions within feminism over descriptions of women's experience, coupled with the risk of reinforcing traditional gender roles, have continued to draw feminists away from broad theories of gender difference and towards a recognition of the contingency and partiality of any particular account of gender. By questioning the possibility of true accounts and emphasizing the constitutive role of language, postmodernism resonates with feminist critiques of legal accounts of womanhood.

\(^{169}\) As Drucilla Cornell has explained:

[T]he condition in which the suffering of all women can be "seen" and "heard," in all of our difference, is that in which the tyranny of established reality is disrupted and the possibility of further feminine resistance and the writing of a different version of the story of sexual difference is continually affirmed.\(^{170}\) It is precisely this disabling of broad social criticism that has led some feminists to question the usefulness of postmodern theory for feminism. See, e.g., Kathryn Pyne Addelson, Knower/Doers and Their Moral Problems, in FEMINIST EPICMIOLOGIES, supra note 165, at 265; Sandra Harding, Feminism, Science, and the Anti-Enlightenment Critiques, in FEMINISM/POSTMODERNISM, supra note 14, at 83 (arguing against complete relinquishment of modernist notions of epistemology as justificatory strategy); Sandra Harding, Rethinking Standpoint Epistemology: What is "Strong Objectivity"?, in FEMINIST EPICMIOLOGIES, supra note 165, at 49 (1993); Sabina Lovibond, Feminism and Postmodernism, in NEW LEFT REVIEW 5 (Nov./Dec. 1989).

At the same time, if postmodernism disables truth claims feminists themselves cannot claim to tell true stories of women’s experience. It is for this reason that some feminists have been ambivalent about embracing fully the implications of antifoundationalism. Feminists, along with other groups on the margin of power, are reluctant to relinquish the hope that resort to some standard independent of politics and culture will strengthen their claims. Those who have been excluded from power continue to rely upon the possibility that those empowered who purport to respect that standard will respond to arguments for their inclusion. Although women have been largely excluded from the development of Western notions of justice (and indeed at times assumed incapable of reason), resort to claims of justice and equality has led to identifiable legal gains for women. Feminists therefore may fear that without an objectively defensible basis for distinguishing between truth and falsehood, women are left only with power to dictate the outcome of competing claims of truth. That prospect most frightens those who are oppressed. As Sabina Lovibond has asked, “How can any one ask me to say goodbye to ‘emancipatory metanarratives’ when my own emancipation is still such a patchy, hit-or-miss affair?”

Feminists may also be reluctant to embrace postmodernism because, despite the difficulty of giving content to the category “woman,” that category seems necessary to feminist political advocacy. In
other words, the lingering essentialism and tendency toward universalizing theoretical claims in feminist legal theory result, at least in part, from the political utility of making specific claims about women as a group. The perceived strategic cost of surrendering the claim to narrative authority is a product not only of the political structure but of the legal structure as well: the protection of civil rights laws is premised on the allegation of a group-based harm, thereby requiring an argument structured in terms of the characteristics, needs, and vulnerabilities of that group. These laws require feminist advocates not only to structure claims based on an allegation of harm to a particular woman but also to link that harm to the condition of women as a group.

Confronted with both the need to offer an authoritative account of women's experience and the consequences of exclusion implicit in offering such an account, feminist legal theorists have hoped for a middle path between postmodernism and foundationalism. They have revealed and criticized the partiality of law's description of womanhood while maintaining the possibility of a truer description, one freer from distortion and exclusion. In this sense, feminists' movement between critique and reaffirmation of gender categories parallels the Court's continuing quest for a principled basis for reviewing gender classifications. In sorting true from false accounts, however, feminists and the Court face a crisis of authority: Whose descriptions are valid? From what standpoint can mainstream accounts be criticized as incomplete?

In confronting this crisis of authority, some feminist legal theorists have relied upon the claim that women qua women enjoy a (presumably shared) form of understanding that is different from that of men. Drawing upon the work of Chodorow and Gilligan, these feminists maintain that, having been excluded from mainstream legal theory, women's perspective must be recovered as a measure of women's experience. Thus, when transported into the realm of legal theory, Chodorow's and Gilligan's claims of different voice have tended to become claims of authority. Just as biology functions to free the Court from political determinations of gender difference, the assumption that women as individuals have privileged access to knowl-

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178 See supra part II.A.1.
edge about women's position as a group preserves the innocence of the feminist critic. She can both criticize the accepted account as partial and offer her own account as authoritative. She need not attend to the regulatory consequences of her own partial perspective.

For example, Robin West has suggested that women "are more nurturant, caring, loving and responsible to others than are men." West's argument for attending to women's perspective is not merely one of process—that women have been left out of the conversation and should be included—but that women may have a privileged relationship to certain aspects of lived experience. For West, there is something that is "women's experience" that exists apart from legal discourse and against which the adequacy of legal categories may be measured. Women have access to that experience, and their accounts, or "true stories" of women's lives, stand in contrast to the false or distorted picture that has characterized mainstream legal theory. Thus, West preserves both feminists' critical position with respect to mainstream accounts and her own privileged position with respect to knowledge of women's condition. She does not pause to consider the partiality of her own description or its regulatory implications.

Similarly, Ruth Colker emphasizes the need for women to "struggle against limiting forces in our lives to move toward authenticity." She suggests that "[w]ithout a sense of our authentic selves, we would have no basis for selecting priorities in our feminist struggles." Like the Court's effort to eradicate stereotypes by measuring legal categories against observed gender differences, for Colker, feminists' task is to work through the distortion of patriarchal notions of woman to reach her authentic self. If that authentic self guides feminist commitments, the exercise of power by feminists will be innocent, tracking and reflecting women's true selves, free from coercion.

B. Pregnancy, Abortion, and the Crisis of Authority

The position of the feminist advocates in Bray illustrates the dilemma feminists face in choosing between relinquishing a claim to narrative authority and offering credible accounts of women's experience. Because the Supreme Court has been largely unwilling to acknowledge that cultural and political forces necessarily constitute the social meaning of biological difference, the Court's inquiry in Bray focused on whether abortion is related to womanhood rather than the

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179 West, supra note 127, at 17-18 (citing GILLIGAN, supra note 134, at 159-60).
180 West, supra note 127, at 64; see also West, Phenomenological Critique, supra note 140, at 144 (urging women to "start speaking the truth about the quality of our internal lives").
182 Id.
more complicated question of how it is related. By invoking biology as a putatively objective measure of gender difference, the Court invited the resolution of the dispute over the connection between abortion and the category woman through claims of descriptive authority.184 The parties and amici were put in the position of offering competing accounts of the meaning and impact of anti-abortion protests.

Not surprisingly, the authority to speak on behalf of women and to make claims about the relationship between abortion and women's equality emerged as a critical source of controversy in the briefs. Given the requirement of a class-based invidiously discriminatory animus under § 1985(3),185 the application of the statute to Operation Rescue’s activities seemed inescapably to depend upon plaintiff’s ability to make persuasive claims about the connection between womanhood and abortion. Faced with conflicting accounts, NOW and the Clinic were obliged to offer an interpretation of the meaning of the blockades independent of the protesters’ explanation of their motives. They therefore attempted to root that interpretation in a source outside of politics, anchoring it in an ontological truth about the world and the role of gender.186 Invoking aspects of the mothering story, NOW and the Clinic argued in their brief that “the capacity to bear children and the ability to undergo abortion, and the capacity to make decisions in respect thereto, link all the women who are the objects of the conspiracy and are a defining characteristic of being a woman.”187 Thus, despite Operation Rescue’s insistence that its target is abortion and not women, this distinction, the respondents argued, is impossible to draw. Targeting women on the basis of a characteristic that defines them as women, here vulnerability to unwanted pregnancy, was sex discrimination under the statute.

184 Id. at 760. Justice Scalia explained:
Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class—as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations.

Id. He thus raises the issue of who may speak for women—those who represent NOW on behalf of the clinic or those who participate in Operation Rescue's illegal blockades.

185 See supra note 97 and accompanying text.


187 Id. at 25 (emphasis added). Respondents argue that “[o]nly [women] suffer the potentially serious health consequences of a delayed or prevented abortion. Where women suffer a substantial burden that men need not suffer, as they do here, the challenged conduct is gender-based.” Id. at 29 (citation omitted). Yet, in order to move from the fact that women are disproportionately affected by the blockades to the conclusion that Operation Rescue intended that effect, respondents must assume a particular connection between abortion and gender other than the biological fact that pregnancy occurs in women’s bodies.
The Clinic and NOW did not argue that opposition to abortion is sex discrimination per se.\(^{188}\) They allowed for the possibility that some forms of anti-abortion activism (perhaps effected through political channels or by encouraging adoption as an alternative) might not be motivated by anti-woman animus, even though that activism would be directed, by definition, toward women. The critical factor therefore seemed to be the forcible blockading and intimidation of women—coercion rather than persuasion.\(^{189}\) Nevertheless, they argued that targeting women to prevent or discourage them from exercising a right that all women enjoy is a conspiracy to deprive all women of equal protection and thus a violation of § 1985(3). By focusing on means rather than motive, the respondents attempted to sidestep the problem of interpreting anti-abortion efforts in light of gender politics. In so doing, they sought to avoid the substantive debate over the meaning of abortion. Instead, they searched, as the Court has done, for an objective basis against which to assess the legitimacy of Operation Rescue’s actions.

Despite the focus on blockading, NOW and the Clinic could not have meant literally that every action preventing women from exercising their right to abortion necessarily reflects anti-woman animus. For example, feminists would not likely interpret a protest by pro-choice groups outside a clinic that is known to perform unsafe abortions as “anti-woman” since the purpose of such a protest would be to protect women from the threat of harm. Similarly, a labor picket challenging the payment of lower wages to women clinic workers could not simply be deemed discrimination even if it had the effect of denying abortion services to women seeking them. Presumably NOW would object not to all blockading of clinics regardless of the motive, but rather only to blockades motivated by the view that even abortions performed safely are harmful to women (and society generally) and therefore should be stopped. Such a view is premised on a political belief about the connection between pregnancy and women’s equality, not on an ob-

\(^{188}\) See id. at 24 n.41 (arguing that “petitioners’ long argument that opposition to abortion is not the per se equivalent of discrimination against women is off the point [since there is no claim that it is]).

\(^{189}\) See id. at 32 (pointing out that Operation Rescue “choose[s] to blockade clinics as a mob and intimidate the women patients rather than debating women about their choices and trying to persuade women to their view”). Both Justices O’Connor and Stevens rely on this point in their dissenting opinions. See Bray, 113 S. Ct. at 802 (O’Connor, J., dissenting) (arguing that “in assessing the motivation behind petitioners’ actions, the sincerity of their opposition cannot surmount the manner in which they have chosen to express it”); 113 S. Ct. at 790 (Stevens, J., dissenting) (noting that “[p]etitioners in this case form a mob that seeks to impose a burden on women by forcibly preventing the exercise of a right that only women possess”).
jectively discernable truth about women's lives—that women alone are vulnerable to unwanted pregnancy.\textsuperscript{190}

Similarly, consider feminists who espouse an anti-pornography position. If, in order to discourage what they perceived as exploitation of women, feminists blockaded an area frequented by women sex workers who produced pornographic films, could their actions come within the scope of § 1985(3) as a conspiracy to deprive the women of equal protection? Assuming that women alone are targeted, is this a conspiracy that is motivated by anti-woman animus? The answer depends upon the connection between the production of pornography and the oppression of women, one of the most difficult and controversial issues within feminist theory and politics.\textsuperscript{191} Whether such an action reflects anti-woman animus cannot be determined simply by the fact that women alone are the targets of the conspiracy.

In contrast to NOW and the Clinic, Operation Rescue emphasized the difficulty of positing an objective relationship between womanhood and abortion. Rejecting the contention that efforts to prevent abortion necessarily reflect anti-woman animus, Operation Rescue argued that the fact that only women can bear children and therefore only women can undergo abortion is irrelevant.\textsuperscript{192} Although abortion protesting may have a disparate impact on women as a class it does not necessarily reflect anti-woman animus. Focusing on the subjective intent of the participants in the blockade, petitioners insisted that "[t]here is absolutely no reason to believe that [the protesters] consider abortion essential to female equality, or [that they] wish to forestall that equality. There is likewise no reason to believe that considerations of this sort underlay [their] opposition to abortion."\textsuperscript{193} Whether denial of reproductive services contributes to

\textsuperscript{190} NOW would likely acknowledge that the relationship between abortion and women's equality reflects a particular normative vision about the prerequisites for women's equal citizenship. Nevertheless, NOW distanced itself from this claim in its brief in order to respond to Operation Rescue's assertion that the relationship between gender and abortion is indeterminate. NOW therefore posits, at least rhetorically, a realm of gender that is prepolitical.

\textsuperscript{191} The debate over the regulation of pornography has generated an enormous volume of feminist scholarship since the mid-1970s and remains one of the most controversial policy debates within feminism. Compare Catharine A. MacKinnon, \textit{Not a Moral Issue}, 2 YALE L. & POL'Y REV. 321 (1984) with Carol Smart, \textit{Unquestionably a Moral Issue: Rhetorical Devices and Regulatory Imperatives}, in \textit{Sex Exposed}, supra note 160.

\textsuperscript{192} Reply Brief for Petitioners at 7, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (No. 90-985) (arguing that a claimant "must show discriminatory \textit{animus}, not \textit{impact}").

\textsuperscript{193} Id. at 9 (criticizing Respondents for "indulg[ing] in unfounded suspicions regarding hypothetical secret motives for petitioners' anti-abortion stance"). Thus, Operation Rescue attempts to focus the debate on the connection between abortion and women's equality. Whether abortion protesting reflects anti-woman animus depends upon one's belief about the centrality of abortion to women's position as a group, an issue that Operation Rescue believes the Court ought not decide. See \textit{id}. 
women's inequality is, after all, open to debate. To conclude otherwise, petitioners insisted, would mean embracing NOW's views as a matter of law and labeling the entire anti-abortion movement as sexist. "Respondents may honestly believe that any threat to the practice of human abortion is a threat to female equality. But by no means does Section 1985(3) incorporate respondents' tendentious and controversial point of view into federal law." Thus, Operation Rescue's notion of anti-woman animus is a wholly subjective one, premised on proof of the particular state of mind of the actor and the actor's notion of the connection between woman and abortion.

Several amicus briefs supporting Operation Rescue also contested the definition of anti-woman animus, highlighting in different ways the significance of sexual differences and the divisions among women regarding such differences. For example, the Southern Center for Law & Ethics suggested that it is NOW's position, not Operation Rescue's, that is misogynist. The Center argued that "[t]he view that women need to become relatively more male-like in their sexuality, through legal access to abortion, inherently implies that women are by nature inferior." The contrast between NOW's position and the Center's argument illustrates the way in which seemingly fixed biological factors may be interpreted as having radically different implications for gender equality. Similarly, Feminists for Life of America (FFLA) cited nineteenth century feminists' opposition to

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This Court has never suggested that it is the business of a federal court to embrace, as a matter of law, the political stance and rhetoric of an advocacy group like respondent National Organization for Women. This Court should decline respondents' invitation to label the entire pro-life movement, as a matter of law as "sexist."

Id. Thus, Operation Rescue posits a realm of legitimate, rational, and objective legal reasoning apart from the political position of advocacy groups such as NOW (and presumably itself as well).


196 Brief for the Southern Center for Law & Ethics as Amicus Curiae in Support of Petitioners at 15-16, Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (No. 90-985). The Center suggests that the mere fact of biological difference does not suggest a hierarchy of values:

While it is true that a man will never experience the burdens of being pregnant and giving birth, it is equally true that a man will never experience the benefits of getting pregnant and giving birth. Men will never experience the joy, satisfaction, and bonding that carrying and birthing a child can produce. The fact of difference does not in itself produce a conclusion regarding equality: the judgment of equality is rather a value determination.

Id. Like Operation Rescue, the Center posits a realm of nature that exists independent of the political construction that groups like NOW choose to place on it. It is this construction, the Center argues, that distorts the order and that may be discriminatory.

197 Id. at 16.
abortion and quoted selectively from modern feminist writing to suggest that division exists within the feminist community regarding the link between opposition to abortion and sex discrimination.\footnote{198} FFLA insisted that the Court not use § 1985(3) to “resolve the political and cultural dispute over whether opposition to abortion constitutes discrimination against women.”\footnote{199} FFLA’s position highlighted the continuing controversy over the social meaning of pregnancy and its relation to women’s equality. Both amicus briefs attempted to challenge NOW’s authority to define for all women the meaning of pregnancy and the significance of abortion.

Operation Rescue and its supporters thus acknowledged that the interpretation of its actions as anti-woman (or not) reflects a political position concerning the connection between womanhood and pregnancy. By challenging the authority of a particular group of feminists to define what constitutes woman or anti-woman, indeed, by suggesting that such a definition may not be possible at all, the petitioners’ argument illustrates the danger to feminists of relinquishing descriptive authority. A definition of discriminatory animus that is limited to hostility or hatred of women would not include within its scope a subjectively benign belief that women are suited primarily for child-rearing and ought not work outside the home.\footnote{200} Under the petitioners’ definition, the creation and perpetuation of a social structure in which women are separate and unequal would not reflect discriminatory animus so long as the men supporting the system loved women or they found women allies such as Jayne Bray. The implications of such a definition for the scope of civil rights statutes are clear. NOW cannot concede that the connection between womanhood and abortion is contingent and political if such a concession would inevitably undermine the authority of its claims. And such a concession will

\footnote{198} Brief of Feminists for Life of America as Amicus Curiae in Support of Petitioners at 10-30, Bray v. Alexandria Women’s Health Clinic, 113 S. Ct. 753 (1993) (No. 90-985). FFLA insists that “[t]he nineteenth century founding mothers of the women’s movement did not view legalized abortion as a solution to, but rather, as an abhorrent consequence of, the oppression and disenfranchisement of women.” Id. at 11. Moreover, it insists that modern feminists as well are divided on the connection between abortion and gender discrimination. Id. at 29. For a discussion of the position of “pro-life” feminists, see Linda C. McClain, Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism, in FEMINIST NIGHTMARES: WOMEN AT ODDS (Susan Ostrov Weisser & Jennifer Fleischner eds., 1994).

\footnote{199} FFLA Brief, supra note 198, at 28.

\footnote{200} Petitioners argue that Randall Terry, the leader of Operation Rescue, “has a loving relationship with his wife and daughters.” Brief for Petitioners at 29, Bray v. Alexandria Women’s Health Clinic, 113 S. Ct. 753 (1993) (No. 90-985). However, Terry may love his wife but still insist that she accept full responsibility for raising the children. In fact, in a speech before representatives of Human Life International, one of the world’s largest anti-abortion organizations, Terry called for making “dads [the] Godly leaders” of the family with “the woman in submission, raising kids for the glory of God.” 1 FRONT LINES RESEARCH 1 (1994) (a publication of Planned Parenthood of America).
always undermine NOW's claim so long as courts premise legal analysis of gender on the assumption that the meaning of gender is discernable outside the political or linguistic context.

As the debate in *Bray* illustrates, feminist legal theorists have struggled, as has the Court, with the question of narrative authority. Just as the Court has sought a foundation for distinguishing legitimate from illegitimate gender-based distinctions, so too have feminist theorists attempted to articulate a credible account of gender difference and inequality. Challenges to such accounts, especially with regard to differences among women, have led feminists to reconsider the utility of cross-cultural theories and to posit gender as socially and politically contingent. Nevertheless, in the face of challenges such as Operation Rescue's in *Bray*, feminists have been reluctant to cede their claim to authority and have tended to return to essentialist premises. The failure of NOW's objectivist account of gender difference in *Bray* suggests that the way out of the dilemma may be to question the possibility of objectivity with regard to gender categories rather than to insist upon feminists' narrative authority.

### III

**Gender Contested: Postmodernism as Solution or Dissolution?**

The Supreme Court concluded that a legislative classification that favors men over women in the selection of administrators of estates was unconstitutional by comparing the assumptions underlying the classification with a particular account of women's lives. In modernist terms, the assumptions were "false," inaccurate, or outmoded when compared to "reality," as determined by the truth-defining rules of legal discourse. Similarly, when feminists in any discipline challenge accepted androcentric accounts of gender difference by offering different data on women's experience, they engage in a modernist critique of those accounts as false or incomplete. Under this prevailing methodology, truth claims appear to be true because they conform to the truth-defining rules of the dominant discourse—what Nancy Fraser has called "the socio-cultural means of interpretation and communication."

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201 *See* Reed v. Reed, 404 U.S. 71 (1971); *supra* notes 45-47 and accompanying text.

202 For example, in the natural sciences, feminist empiricists have argued that feminism within the scientific community makes *better* science possible by revealing biases that obscure knowledge and distort observation. *See*, e.g., Marcia Millman & Rosabeth Moss Kanter, *Introduction to Another Voice: Feminist Perspectives on Social Life and Social Science* vii (Marcia Millman & Rosabeth Moss Kanter eds., 1975).

203 Nancy Fraser, *Toward A Discourse Ethic of Solidarity*, 5 PRAXIS INT'L 425 (1986). Fraser offers the following description of these cultural vocabularies:
This mode of analysis, used both by the Court and by feminists, has served as a basis for significant gains for women. Nevertheless, as I have argued in Parts I and II, modernist critiques create problems for feminist analysis in several ways. First, they omit (or ignore) the degree to which the alternative account is itself partial and constituted through exclusionary choices. Second, they obscure the degree to which feminist critics, in offering such accounts, participate in the reproduction of the category woman as the subject of law and feminist theory. Finally, modernist critiques are bound by their own rules of truth-telling.\textsuperscript{204} To the extent that the feminist subject is constituted by the political or legal system upon which she relies for her emancipation, the efforts of the feminist critic on her behalf will be limited by the norms of that system.\textsuperscript{205} This Part explores alternative postmodern or antifoundationalist modes of argument which emphasize questions of contingency and authority. More importantly, it asks what feminists might gain and lose from redefining the subject through such a departure from the rules.

A. Embracing the Postmodern: The End of Innocence

Substituting antifoundationalist assumptions of contingency and social construction for objectivist accounts of gender requires the abandonment of, or at least the qualification of, the language of truth-telling.\textsuperscript{206} It entails the acknowledgment that all accounts of woman

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\textsuperscript{204} Jean-François Lyotard explores these limits in the following explanation of legitimation and language:

It is useful to make the following three observations about language-games. The first is that their rules do not carry within themselves their own legitimation, but are the object of a contract, explicit or not, between players (which is not to say that the players invent the rules). The second is that if there are no rules, there is no game, that a "move" or utterance that does not satisfy the rules does not belong to the game they define. The third remark is suggested by what has just been said: every utterance should be thought of as a "move" in the game.

\textit{Lyotard, supra} note 4, at 10 (citation omitted). Of course, this does not suggest that freedom from the rules of discourse is possible—as Lyotard suggests, without rules, there can be no game. Nevertheless, postmodernism insists upon recognition of the constraints the rules impose and upon freeing the imagination to compose alternative rules.

\textsuperscript{205} Or, as Audre Lorde has explained, "[T]he master's tools will never dismantle the master's house." \textit{Lorde, supra} note 150, at 112 (comments at "The Personal and the Political Panel," Second Sex Conference, New York, Sept. 29, 1979).

\textsuperscript{206} In explaining the usefulness of pragmatism to the feminist project, Richard Rorty recommends that feminists eschew the language of truth-telling:
are partial and contingent. More importantly, however, it entails a recognition that to choose among such partial accounts is an exercise of power.\textsuperscript{207} Such a recognition does not imply that principled choices cannot be made but rather that they cannot be made innocently.\textsuperscript{208} Both the judge and the critic must investigate, acknowledge, and accept responsibility for the exclusionary implications of their choices rather than treating their assumptions as preexisting and fixed.

Consider, for example, Justice Scalia's explanation in Bray of what it might mean to target women "by reason of their sex."\textsuperscript{209} Making clear that anti-woman animus does not require a hostile motive, he suggested that "the purpose of 'saving' women because they are women from a combative, aggressive profession such as the practice of law"\textsuperscript{210} would be "objectively invidious."\textsuperscript{211} Justice Scalia may have viewed this position as obvious in 1993. However, in 1873, another Associate Justice interpreting the Fourteenth Amendment (which like § 1985(3) was a creation of the Reconstruction Congress) reached the opposite conclusion.\textsuperscript{212} As Justice Bradley explained in Bradwell,\textsuperscript{213} "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."\textsuperscript{214} Thus, what the Court deems "objectively invidious" discrimination depends necessarily upon its assumptions about the relevance of gender in a

\begin{itemize}
\item \[D\]o not charge a current social practice or a currently spoken language with being unfaithful to reality, with getting things wrong. Do not criticize it as a result of ideology or prejudice, where these are tacitly contrasted with your own employment of a truth-tracking faculty called "reason" or a neutral method called "disinterested observation." Do not even criticize it as "unjust" if "unjust" is supposed to mean more than "sometimes incoherent even on its own terms."
\end{itemize}

\textsuperscript{207} Rorty, \textit{supra} note 12, at 242.

\textsuperscript{208} Jane Flax urges recognition of this exercise of power when she warns that "[s]peaking in knowledge's voice or on its behalf, we can avoid taking responsibility for locating our contingent selves as the producers of knowledge and truth claims." Jane Flax, \textit{The End of Innocence}, in \textit{FEMINIST THEORIZE THE POLITICAL, supra} note 164, at 445, 458.

\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).
\textsuperscript{213} Id.
\textsuperscript{214} Id.
particular context, assumptions that have regulatory implications, whether or not those implications are acknowledged.\textsuperscript{215}

Shifting from an assumption of objectivity to a recognition of contingency would require the Court to articulate its assumptions about gendered categories and grapple with its own responsibility for assigning (or reassigning) meaning to particular markers of difference. Its analysis of gender would no longer take the form of measuring possibly "false" or "inaccurate" assumptions against an underlying reality of gender difference. Positing a prepolitical measure of gender difference, whether rooted in biology, social norms, or natural law, would be suspect. Instead, the Court would have to acknowledge that biological differences do not preexist the interpretive frame of legal discourse. Recognizing the contingency of its own assumptions would leave the Court with no prior rule or logic of gender. Its task would then be to choose explicitly among competing constructions of gender based on a theory about each construction’s relationship to substantive commitments to justice and equality.

Antifoundationalist premises do not make such choices impossible or arbitrary, nor do they, by denying the existence of objective standards, insulate those choices from critique. Rather, the recognition of contingency simply compels the Court and other participants in the juridical system to recognize the degree to which they produce the subjects that they evaluate and adjudicate.\textsuperscript{216} In cases like Bray, in which the political meaning of a gendered trait is directly contested, the Court would have to acknowledge its own participation in the recreation of meaning. The Court could not avoid this responsibility by refusing to choose among competing accounts of the relationship between pregnancy and gender or simply invoking the standard of biological fact. The majority's position, that abortion has nothing necessarily to do with the politics of gender, would not appear neutral in any sense. Rather, the Court would have to concede that by sepa-

\textsuperscript{215} Although it seems clear that the Court would decide Bradwell differently today, it is unlikely that the Court would view exclusion of women from military combat in the same light as their exclusion from legal practice. See Rostker v. Goldberg, 453 U.S. 57, 76 (1981) (upholding male-only draft registration because "[w]omen as a group . . . unlike men as a group, are not eligible for combat"). The motivation behind excluding women from combat may be benign, based on a desire to save women "from a combative, aggressive profession." Bray, 113 S. Ct. at 759. Whether the Court would find such an exclusion "objectively invidious" would depend upon the Court's understanding of the relevance of gender in the two situations. The distinction between courtroom battles and military battles turns simply on the Court's view of women as lawyers and as soldiers.

\textsuperscript{216} See Michel Foucault, The History of Sexuality, An Introduction, Volume I 135-59 (Robert Hurley trans., 1980) (discussing the relationship between juridical and productive law). Highlighting his point of the regulatory force of institutions including law, Foucault asks, "Is 'sex' really the anchorage point that supports the manifestations of sexuality, or is it not rather a complex idea that was formed inside the deployment of sexuality?" Id. at 152.
rating abortion from gender politics, it changes the rules within legal discourse concerning truth claims about gender, and in so doing, alters the power relations that are constituted within that discourse.

Significantly, it is in the context of abortion that the Supreme Court has come closest to acknowledging its own exercise of power in the regulation of gender. In the joint opinion of Justices Kennedy, O'Connor, and Souter in Planned Parenthood v. Casey, the Court declined to overrule what it termed the "essence of Roe's original decision." In so doing, it acknowledged that its decision in Roe had, in a very important sense, altered the opportunities for women to define their lives. The joint opinion noted that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." At the same time, it acknowledged the political nature of its resolution of the abortion controversy—indeed it cites the politicization of Roe as partial justification of its decision in Casey. In a remarkable passage, the three justices wrote:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in Roe... its decision has a dimension that the resolution of the normal case does not carry. ... A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.


In his dissent in Casey, Justice Scalia harshly criticized the joint opinion its reliance on the controversy surrounding the abortion issue as a justification for upholding the central core of Roe. See id. at 2884 (Scalia, J., dissenting). Nevertheless, in Webster v. Reproductive Health Services, 492 U.S. 409 (1989), Justice Scalia himself...
Thus, the Court acknowledged the connections among gender politics, the dispute over abortion, and its own role in regulating gender in the resolution of that dispute. It confronted the politics of its decision in *Roe* and affirmed (implicitly at least) a theory of gender that connects women’s equality and reproductive freedom.\footnote{Of course, *Roe* and *Casey* were not unique in implicating the Court in the regulation of gender. Rather, at the time of *Casey*, the circumstances of national politics and the changing composition of the Court simply made adherence to its assumption of objectivity impossible. At that historical and political moment,\footnote{223} the Court could no longer pretend to resolve the abortion controversy by resort to neutral or prepolitical principles of constitutional theory.\footnote{224} This crisis of legitimacy triggered a burst of candor about the Court’s own role. At the same time, the joint opinion made clear that it viewed *Casey* as extraordinary: “The Court is not asked to [resolve a national controversy] often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*.”\footnote{225} Nevertheless, whenever the Court reviews gender categories against a particular set of assumptions about gender difference, it participates in the regulation of gender. It does so whether it resolves strongly contested issues such as the constitutional status of abortion or reaffirms more widely accepted ideas about gender such as the risk of unintended pregnancy among teenage girls. Relinquishing its objectivist mode of analysis would simply require the Court to acknowledge that participation.}

cited the political controversy surrounding the issue as a reason to overturn *Roe*. See id. at 585 (“We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will.”). In *Casey*, he clarified his point by suggesting that “[t]he Court would profit . . . from giving less attention to the fact of this distressing phenomenon, and more attention to the cause of it.” *Casey*, 112 S. Ct. at 2884 (Scalia, J., dissenting).

\footnote{222} Justices Blackmun and Stevens were more explicit in their reliance on equality. See *Casey*, 112 S. Ct. at 2846-47 (Blackmun, J., concurring in part and dissenting in part); 112 S. Ct. at 2842 (Stevens, J., concurring in part and dissenting in part). Similarly, Justice Ginsburg would likely rely on an equality justification for the protection of abortion rights. See Ginsburg, supra note 220.

\footnote{223} The Court handed down its decision in *Casey* in June of 1992, during a presidential campaign in which the composition of the Supreme Court had become a significant issue, especially as it bore on the continued protection of the right to abortion. The issue of Supreme Court nominations had been further politicized in the wake of the highly publicized confirmation hearings of Justice Clarence Thomas a few months earlier.

\footnote{224} But see *Casey*, 112 S. Ct. at 2874 (Scalia, J., dissenting) (seeking refuge from value judgments by recourse to historical fact); see also Fleming, supra note 117, at 265-67 (criticizing Scalia’s flight from substance).

\footnote{225} *Casey*, 112 S. Ct. at 2815.
The implications of postmodernism for both the Court’s approach to gender and feminist legal theory go beyond the mere recognition of the inevitable incompleteness of any specific account of gender difference. In addition to exposing the partiality of such accounts and the political implications of choosing among them, postmodernism emphasizes the regulatory role of language and the interpretive process itself. Beyond the direct regulatory implications of its decisions in particular cases, the Court’s construction of the legal discourse surrounding gender affects the structure of arguments raised on women’s behalf, the kinds of harms that may be translated into legal claims, and even the degree to which those harms are experienced or acknowledged as violations by the individual. Similarly, feminist legal theorists’ critique of and engagement with this legal discourse regulates the scope of feminist reinterpretations of women’s experience. Thus, for the Court and its feminist critics, to choose among competing accounts of womanhood is not merely to reinforce exclusions but to alter the way women experience and express their lives.

This regulatory effect is a function of language and, more specifically, the interpretive process itself. If, as postmodernists contend, language at least partially constitutes the real by describing and naming it, then interpretation contributes to how the real is known. Understood in this way, the process of interpretation undermines the opposition of subject and object, of empirical and normative, by simultaneously constructing and reflecting meaning. It limits what we see and how we think by privileging a particular set of viewpoints.

226 See, e.g., General Electric Co. v. Gilbert, 429 U.S. 125, 139 (1976) (constructing pregnancy as an “additional risk, unique to women”). The Court’s analysis of the problem of pregnancy in terms of gender difference led to the long debate among feminists about special treatment versus equal treatment. In the end, the debate was over whether it was better for women to choose equality (meaning sameness) and sacrifice their needs or insist that their needs be met fully and sacrifice the strength of their equality claim. The Court’s original structuring of the debate in terms of sameness and difference meant that neither strategy was satisfactory.

227 A good example is the Court’s shift in approach to sexual harassment from viewing it as a personal problem that may intrude into the workplace to a form of sex discrimination. See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); MacKinnon, supra note 127.

228 Ruth Hubbard has explained the role of language in defining experience as follows: “[F]or humans, language plays a major role in generating reality. Without words to objectify and categorize our sensations and place them in relation to one another, we cannot evolve a tradition of what is real in the world.” Ruth Hubbard, Have Only Men Evolved?, in Women Look at Biology Looking At Women 7 (Ruth Hubbard et al. eds., 1979). In defining the terms of legal discourse, the Court helps to regulate the expression of experience. In his opinion in Casey, Justice Scalia seemed to acknowledge this effect in his statement that the Court’s decision in Roe “created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act.” Casey, 112 S. Ct. at 2882 (Scalia, J., dissenting).

229 As Michel Foucault notes, language defines “the limits and the forms of expressibility: What is it possible to speak of? What has been constituted as the field of dis-
Thus, when the Court and its critics act upon their (inevitably) contingent knowledge of gender, they both regulate experience and alter it. If language works in this way, the process of naming and interpretation has power implications for which the interpreter, whether the Court or its feminist critics, must assume responsibility.

The abortion debate again serves as an illustration of the role of both feminists and the Court in constructing the parameters of women’s experience. When courts and feminists define the relationship between gender and abortion in a particular way, they act as creators of knowledge, not simply interpreters of fact. Within abortion discourse, this creation of knowledge has tended to reflect a particular political rhetoric, namely that of individual rights and personal liberty. Feminists, philosophers, and ethicists on both sides of the debate have posed the question as a conflict between the rights of the mother and the rights of the fetus. Hence, they have consciously structured the question to respond to the norms of debate within their particular spheres of discourse. Yet, in its implementation, the conflict of rights approach has particular gender, class, and race implications that the construction of terms has obscured. Feminists have recognized these implications, reexamined the framing of the moral issues surrounding abortion, and recast the analysis to account more fully for a broader range of women’s experience.

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230 See, e.g., MacKinnon, supra note 152, at 215-34 (discussing the problems of the feminist claim to equal rights and formal equality within the existing system of gender hierarchy); Tracy Higgins, Note, Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy, 103 Harv. L. Rev. 1325, 1336 (1990) (arguing that “the model of conflicting rights has undermined the development of effective policy by focusing on the competing rather than the common needs of the mother and the fetus”). But see Martha Minow, Interpreting Rights: An Essay for Robert Cover, 96 Yale L.J. 1869, 1874 (1987) (defending rights-based claims and suggesting that “[b]y invoking rights, an individual or group claims the attention of the larger community and its authorities”); Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women’s Movement, 61 N.Y.U. L. Rev. 589 (1986) (discussing the political and expressive value of rights discourse).


232 See, e.g., MacKinnon, supra note 152, at 193 (suggesting that “[i]t is probably no coincidence that the very things feminism regards as central to the subjection of women—the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate—form the core of privacy doctrine’s coverage”). But see Linda C. McClain, The Poverty of Privacy?, 3 Colum. J. Gender & L. 119 (1992) (defending the right of privacy in arguments for women’s reproductive freedom against charges that privacy is an impoverished concept).
This interplay of the Court's abortion analysis and feminist critique illustrates the regulatory consequences of structuring the debate around a conflict of rights. Apart from the outcome in any particular case, the debate itself limits the types of harm that can be expressed within the legal discourse and constructs the experience of pregnancy and abortion in a particular way. Acknowledging the postmodernist assumption of the role of language in the construction of experience would force both feminists and the Court to assume more fully the responsibility for those consequences.

B. Feminist Epistemology: Telling Better Stories

For the Supreme Court, adopting antifoundationalist assumptions would mean abandoning its quest for prepolitical categories of gender difference and acknowledging the power implications of its role in adjudicating gender difference. For feminists, it would mean qualifying the claim to tell true stories about women as a means of either challenging or supporting those categories. A commitment to antifoundationalist assumptions would lead feminists to continue to expose as contingent and provisional that which has been assumed to be necessary and permanent. Yet, feminist theorists could not purport to replace existing partial accounts with more complete or authoritative feminist accounts. Feminists would be no more entitled than the Supreme Court to claim an ideal vantage point from which to define woman. Instead, feminists would have to acknowledge that their own accounts of gender are necessarily partial and, like the Court's, entail choices that operate to exclude certain experiences.

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283 In exhorting feminists to abandon a commitment to truth claims, I do not mean to suggest that feminists should not challenge existing accounts of gender. Moreover, I recognize that such challenges may take the form of allegations of falsehoods.

Even Julia Kristeva, who denies the possibility of the representation of women in language acknowledges that "we must use 'we are women' as an advertisement or slogan for our demands." Julia Kristeva, Woman Can Never Be Defined, in New French Feminisms 137 (Elaine Marks & Isabelle de Courtivron eds., 1981). She warns, however, that "a woman cannot 'be'; it is something which does not even belong in the order of being. It follows that a feminist practice can only be negative, at odds with what already exists so that we may say 'that's not it' and 'that's still not it.'" Id. Richard Rorty makes a similar point when he quotes Catharine MacKinnon's claim that "woman is not yet the name of a way of being human." Rorty, supra note 12, at 7. He concedes, however, that "practical politics will doubtless often require feminists to speak with universalist vulgar." Id. at 13.

284 But see West, supra note 127, at 64 (arguing that the only way to demonstrate the consequences of women's exclusion from law is "to tell true stories of women's lives").

285 Judith Butler has explained:

In response to the radical exclusion of the category of women from hegemonic cultural formations on the one hand and the internal critique of the exclusionary effects of the category form within feminist discourse on the other, feminist theorists are now confronted with the problem of either redefining and expanding the category of women itself to become more inclusive (which requires also the political matter of settling who gets to
As Part II argues, feminists have been reluctant to acknowledge the contingency of their own perspective, fearing that without an objective standpoint from which to assess the representation of women in law, feminism loses its critical power. Yet as the preceding discussion of Bray illustrates, operating within the Supreme Court's modernist paradigm, which posits correspondence between law's story and a true story of woman's condition, has not necessarily enhanced feminist critique. Feminist claims that a particular account is false or inaccurate are persuasive only to the degree that the alternative account is convincing within a particular discourse. The claim that the alternative account is "true" or representative of women's experience generally is superfluous. Indeed, such a claim creates another site of contest: controversy emerges over the authority of a particular feminist voice to represent women.

Yet if we surrender the modernist conception of truth, how are we to choose among multiple and conflicting accounts? More precisely, if postmodernism requires feminists to relinquish the claim to tell truer stories of women's lives, can feminists nevertheless claim to tell better stories?

Feminists have reacted to this challenge of postmodernism in at least two ways. While conceding the contingency of any particular account of women's experience, some have attempted to preserve feminist narrative authority by privileging feminist method, particularly standpoint epistemology. Their effort rests on the assumption that women's stories that are a product of feminist methodology reflect make the designation and in the name of whom) or to challenge the place of the category as a part of a feminist normative discourse.

Butler, *Gender Trouble*, supra note 176, at 425. Jane Flax argues that "[t]o take responsibility is to firmly situate ourselves within contingent and imperfect contexts, to acknowledge differential privileges of race, gender, geographic location, and sexual identities, and to resist the delusory and dangerous recurrent hope of redemption to a world not of our own making." Flax, *supra* note 207, at 460.

Indeed, Lovibond suggests that feminism would lose its purpose altogether. She argues that "[i]t would be arbitrary to work for sexual equality unless one believed that human society was disfigured by inequality as such." Lovibond, *supra* note 170, at 28.


Defending feminist epistemologies, Sandra Harding explains, "[T]he development of feminist justificatory strategies [addresses] not only the problem of justifying one's claims to others, but also the problem of justifying them to oneself and to those who might prove sympathetic to feminist goals." Harding, *Anti-Enlightenment Critiques*, supra note 170, at 89.

But see Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 867-88 (199). Bartlett discusses and rejects standpoint epistemology and postmodernism and proposes instead a concept of "positional knowing." She argues that "[p]ositionality recon-
women’s experience more completely, in a form undistorted (or less distorted) by patriarchy. For example, Catharine MacKinnon, although suggesting that sexuality is a product of social construction, posits an identity of woman that has been distorted or silenced under patriarchy and that may be discoverable (albeit imperfectly) through feminist method. These accounts of women’s experience are better, she suggests, not because they are truer to some ideal woman but simply because they are less constrained by the false consciousness produced by women’s oppression.

MacKinnon’s reliance on the concept of social construction distinguishes her standpoint epistemology from more essentialist (and less postmodern) versions. She suggests that feminists should use consciousness-raising to expose the role of patriarchy in constructing women’s experience and to begin to articulate a transformative vision of gender. She does not directly posit the existence of an authentic self that may be revealed through process. Nevertheless, her reliance on consciousness-raising does imply a belief in women’s access to truth or at least to knowledge that may legitimately be privileged.

Other feminists have relied less on claims about women’s relationship to truth than on the value of fuller process. Conceding that feminists cannot claim to know what is true, they suggest simply that more inclusive accounts or theories are better than less inclusive ones. Thus, they emphasize the inclusion of women’s voices in the process, whether it be scientific or legal. For example, feminists in the natural sciences have argued that the inclusion of women as researchers and as research subjects has improved the development of scientific theory by making it more complete than it once was. In the legal realm,

ciles the existence of reliable, experience-based grounds for assertions of truth upon which politics should be based, with the need to question and improve these grounds.” Id. at 884.

See MACKN ON, supra note 152, at 128-29.

See id. at 96 (describing consciousness-raising as “unraveling and reordering what every woman ‘knows’ because she has lived it”). Although MacKinnon does not explicitly claim that through consciousness-raising women uncover the reality of their oppression, she does imply as much by rejecting, for example, affirmative accounts of women’s sexuality and experience of nonsubordination as products of false consciousness. See id. at 135. See Colker, supra note 163, at 195-47 (criticizing MacKinnon for crediting women’s account of oppression while discounting their accounts of pleasure); see also Tracy Higgins, Book Review: Toward A Feminist Theory of the State, 13 HARV. WOMEN’S L.J. 325 (1990) (noting essentialism implicit in MacKinnon’s theory of sexuality and subordination).

Compare MACKN ON, supra note 152, at 135 (rejecting women’s accounts of sexual pleasure as products of sexual oppression) and MACKN ON, supra note 6, at 39 (criticizing analysis of sexual difference as “reaffirming what we have been”) with MACKN ON, supra note 152, at 115 (explaining that “[t]reating some women’s views as merely wrong, because they are unconscious conditioned reflections of oppression and thus complicitous in it, posits objective ground”).

See supra notes 179-82 and accompanying text (discussing West and Colker).

See Haraway, supra note 172; Harding, Anti-Enlightenment Critiques, supra note 170; Longino, supra note 172.
Mari Matsuda has argued that a concept of justice that takes into account the perspective of the subordinated can be accepted as better or more complete, even within a framework of contingent truth.\(^{245}\) Similarly, Margaret Jane Radin has argued that the deliberate inclusion of marginalized groups serves as an antidote to what she terms the "bad coherence" problem that renders pragmatism (arguably) indifferent to social injustice.\(^{246}\)

None of these efforts resolves the fundamental challenge posed by postmodernism: How do we argue effectively if we can no longer claim access to truth? Instead, these efforts attempt to replace a substantive vision of truth (a "true" definition of woman) with a non-substantive value scheme. In other words, rather than evaluate an account of gender against a particular conception of woman, these approaches encourage us to focus on whether the account is the product of a particular methodology or a sufficiently inclusive process. Of course, the privileging of such accounts simply reflects a normative decision—if not a decision about what is true, then a decision that certain methods or processes are preferred. Thus, we can accept an account of women's experience that emerges as a product of consciousness-raising as better (or truer) only to the extent that we accept the value of the methodology. A principle defined through the participation of marginalized groups is better (or truer) only to the extent that we accept broader participation as a component of what defines truth or justice or legitimacy. Feminist's reliance on method cannot, therefore, offer an exogenous basis for proving or supporting our substantive commitments any more than the Supreme Court's reliance on social science or biology. Rather, the privileging of women's voices implicit in feminist method simply reflects those commitments.\(^{247}\)

Moving away from truth claims to process claims only shifts the arena of debate. It is not surprising, then, that these approaches cannot definitively resolve conflicts among women's own accounts of their experiences.\(^{248}\) Indeed, focusing on such conflicts reveals the degree to


\(^{246}\) See Radin, supra note 13, at 1705-11.

\(^{247}\) This is not to say that feminist method is not a legitimate tool for feminists to explore and evaluate women's accounts of their experience. Rather, feminists must simply recognize the substantive (and exclusionary) implications of their commitment to method.

\(^{248}\) Despite her own tendency to privilege certain women's accounts over others, Catharine MacKinnon gives perhaps the best statement of the dilemma of feminist methodology:

Consider the accounts of their own experience given by right-wing women and lesbian sadomasochists. How can male supremacy be diminishing to women when women embrace and defend their place in it? How can dominance and submission violate women when women eroticize it? Now what
which debates over both authority and method turn ultimately on substantive claims. In *Bray*, both petitioners and respondents conformed to the truth-defining rules of feminist standpoint epistemology in a limited sense: they attributed particular authority to the voice of women and regarded, albeit selectively, the biological sex of the actors in the blockade confrontations as significant to the question of anti-woman animus.

Paradoxically, both sides contended that gender was at once determinative of and irrelevant to the identification of anti-woman animus. Operation Rescue insisted that the participation of women in the blockades insulated it from the charge of discrimination, suggesting that a position cannot be misogynist so long as it is held by at least one woman. On the other hand, it regarded the gender of the clinic patients as irrelevant. Operation Rescue's target was abortion, not women. That women alone were seeking the services of the clinic or that the reduced availability of abortion services generally harmed women was incidental to the purpose of the blockade.

Respondents, in contrast, argued that Operation Rescue's conspiracy was designed to deprive women as a group of their constitutionally protected right to make and carry out decisions respecting childbirth. Petitioners rejected the contention that Operation Rescue's blockades targeted abortion rather than women, arguing that a conspiracy against a class of women of childbearing age, pregnant and seeking help, was a conspiracy against women. “[T]he capacity to bear children and the ability to undergo abortion, and the capacity to make decisions in respect thereto, link all women who are the objects of the conspiracy and are a defining characteristic of being a

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*is women's point of view? Most responses simply regard some women's views as "false consciousness" or embrace any version of women's experience which a biological female claims. Neither an objectivist dismissal not a subjectivist retreat addresses the issue. Treating some women's views as merely wrong, because they are unconscious conditioned reflections of oppression and thus complicitous in it, posits objective ground. . . . Both feminism and antifeminism respond to the condition of women, so feminism is not exempt from devalidation on the same account.

MACKINNON, *supra* note 152, at 115.

249 Brief for Petitioners at 20, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993) (No. 90-985) (pointing out that "Jayne Bray is a woman"). Scalia picks up on this distinction in *Bray*, pointing out that "men and women are on both sides of the issue [of abortion] just as men and women are on both sides of petitioners' unlawful demonstrations." *Bray*, 113 S. Ct. at 760.


251 See *id.* at 17-18 (explaining that the class "does share a common feature—the members are each 'seeking abortion'"—but this feature represents an activity and not the sort of characteristic (immutable or otherwise) necessary to define a proper class").

Thus, respondents rejected the argument that the gender of the patients was irrelevant. It is impossible, they argued, to target abortion services without targeting women. At the same time, they denied the significance of women’s participation in the anti-abortion movement, insisting that “[Jayne Bray’s] participation does not turn a gender-based conspiracy into a gender neutral one.”

By selectively emphasizing or disregarding the sex of the subjects and objects of the protests, both NOW and Operation Rescue invoked the authority of women’s accounts to validate particular claims about women and abortion. When women’s interpretations of their experience conflicted, feminist method supplied no principled basis upon which to choose among competing accounts. Standpoint epistemology, which privileges women’s accounts of their own experience, does not yield a basis for accepting NOW’s claims and rejecting Jayne Bray’s. Moreover, dismissing Jayne Bray’s position as co-opted, distorted, or produced by false consciousness implies that an alternative feminist position is available free from contingency, a claim that cannot be verified or effectively defended. Similarly, a process that demands the inclusion of the perspectives of marginalized groups does not lead to a clear outcome in Bray. Neither methodological principle offers a basis for choosing among these conflicting accounts.

But recognizing the indeterminacy of feminist method does not leave feminists substantially less equipped to defend one view over another. Feminists are not left merely with relativism because, properly understood, antifoundationalism undercuts both objectivism and relativism. Indeed, it is a commitment to foundationalism that leads to the trap between objectivism on the one hand and relativism on the other. Objectivism and relativism are two sides of the same argument. They both link the legitimacy of knowledge claims to the existence of neutral principles. Objectivism assumes those principles are available as a basis for evaluating moral claims. Relativism assumes that, without such neutral principles, evaluation is problematic if not impossible. Thus, beginning from the premise that objectivity is


255 For an explanation of the link between relativism, mutualism, and objectivism, see Richard Bernstein, Beyond Objectivism and Relativism (1983); Frank Michelman, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986).

256 Professor Martha Nussbaum has made this point as follows:

[T]he collapse into extreme relativism or subjectivism seems to me to betray a deep attachment to metaphysical realism itself. For it is only to one who has pinned everything to that hope that its collapse will seem to entail the collapse of all evaluation—just as it is only to a deeply believing religious person, as Nietzsche saw, that the news of the death of God brings the threat of nihilism.
possible leaves feminism in the middle. The Supreme Court's objectivist approach to gender discounts feminist knowledge claims as political because the biological difference (or sameness) cannot fully account for them. Operation Rescue's relativist approach to defining discriminatory animus discounts NOW's description of abortion as simply one among many possible interpretations. Even the most persuasive feminist accounts fail to meet the criteria of objective truth on the one hand or complete consensus on the other. Feminist legal theorists must be prepared to challenge the relevance of both criteria by focusing attention on the necessary partiality of knowledge claims and the political implications of that partiality.

Thus, rather than leading to the notion that all truths are equal, feminist antifoundationalism merely emphasizes the role of power in defining truth or in setting truth-defining rules. For example, although most feminists (though not all) would agree that reproductive control is essential to women's equality, the centrality of abortion rights is not "true" in the sense of deriving from some post-patriarchal reality. One may deem an equality-based theory of abortion that accounts for differences among women to be better than competing accounts premised on privacy or even anti-choice accounts only to the extent that it more successfully (meaning more persuasively) translates the complicated experience of abortion into the terms of legal discourse.

More generally, relinquishing a representational account of knowledge transforms feminist arguments from claims of authority to claims of advocacy. Feminism thus avoids the virtually unanswerable critique regarding the accuracy of a particular representation of women's experience. Instead, the validity of a position depends upon whether it offers a persuasive account of the connection between women's experience and substantive commitments to equality and justice. Feminism need not claim to do more than offer such an account.

In this form, feminist criticism of the Supreme Court's analysis of gender difference is not an appeal from false appearance to an underlying reality. The claim is no longer that the Court's analysis is premised on an incomplete or inaccurate understanding of woman's condition. Rather, postmodern feminism insists that by positing and describing woman, the Court acts to recreate that category, partially constituting truth rather than innocently identifying it. Its criticism of the Court's approach is based on an alternative vision, not necessarily a truer one.

Both the Supreme Court and feminist legal theorists have generally assumed that woman, however she is defined, preexists legal categories and have sought to discern her characteristics to guide legal regulation of gender. This Article has argued that such efforts tend to obscure the unavoidable role of the critic in the creation and reinforcement of gender categories. Both the Court and feminist legal theorists should abandon arguments that rely on prepolitical conceptions of gender difference and should instead attend to the regulatory consequences of particular, partial conceptions. In so doing, feminist legal theorists would acknowledge the exercise of power that is implicit in their own efforts to represent women politically and linguistically. At the same time, conceding the partiality of any particular account of gender would mitigate the paralyzing critique of incomplete representation. By abrogating the search for fixed foundations, postmodern feminism eliminates both the possibility that an authentic story can be told and the debate over who has the authority to tell that story.