"The purpose of requiring [intermediate scrutiny] is to assure that the validity of a [gender-based] classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."—Justice O'CONNOR

"I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination. ..."—Justice BLACKMUN

"By applying heightened equal protection analysis to this case, the Court frustrates the liberating spirit of the Equal Protection Clause."—Justice POWELL

Mississippi University for Women v. Hogan

458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982).

In Craig v. Boren, the justices seemed to have reached a compromise—heightened but not strict scrutiny for classifications by sex, in other words, intermediate scrutiny. In 1981, however, two opinions written by Justice Rehnquist raised serious questions about how long that compromise would hold. The first, Michael M. v. Superior Court, found no sexual discrimination in a conviction of a 17<sfr>1/2<efr> year-old male for statutory rape of a 16<sfr>1/2<efr> year-old female. For four of the five justices in the majority, Rehnquist wrote:

> [W]e do not apply so-called "strict scrutiny" to [gender-based] classifications. Our cases have held, however, that the traditional minimal rationality test takes on a somewhat "sharper focus" when gender-based classifications are challenged. See Craig v. Boren (1976) (Powell, J., concurring).

Conceding that the purpose of punishing males for intercourse with females under 18 but not females for intercourse with males under 18 was "somewhat less than clear," Rehnquist accepted the state's argument that it was to prevent pregnancies among teen-agers and that this was a "strong interest."

In the second case, Rostker v. Goldberg, Rehnquist wrote for the Court, upholding 6–3 the Military Selective Service Act, which required only males to register for the draft. The majority found Congress' limitation reasonable. The opinion, redolent with deference toward congressional power to raise armies and wage war, finessed the question of requiring any standard stricter than a rational basis. Some observers, however, discounted the possibility that *Rostker* signalled change because it involved congressional powers that the Court had traditionally been reluctant to question. *Michael M.* was more difficult to discount, though Rehnquist had made a slight bow toward a form of heightened scrutiny.

Mississippi University for Women, a state institution in Columbus, Miss., provided a new test of the compromise's vitality. From its founding, MUW had limited enrollment to women.

Joe Hogan, a male nurse resident in Columbus, applied for admission to MUW's School of Nursing to obtain a bachelor's degree in his field. Solely on the basis of his sex, MUW denied him admission to a degree-granting program, though he was allowed to audit classes. He sued for an injunction in a federal district court, lost, and won on appeal. Mississippi then sought and obtained certiorari.

Justice **O'CONNOR** delivered the opinion of the Court. ...

II

We begin our analysis aided by several firmly-established principles. ... That this statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. See Frontiero v. Richardson (1973) (plurality opinion).

If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women. ...

III

The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. As applied to the School of Nursing, we find the State's argument unpersuasive.

In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. However, we consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wiesenfeld (1975). The same searching analysis must be made, regardless of whether the State's objective is to eliminate family controversy,

Reed, to achieve administrative efficiency, *Frontiero,* or to balance the burdens borne by males and females.

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. ... [But] Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities. In fact, in 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide. ...

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. ... Thus, we conclude that, although the State recited a "benign, compensatory purpose," it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.

The policy is invalid also because it fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men. ...

[*Affirmed.*]

Chief Justice **BURGER,** dissenting. ...

Justice **BLACKMUN,** dissenting. ...

I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to some people by forbidding the State from offering them a choice while not depriving others of an alternate choice. Justice Powell in his separate opinion advances this theme well.

While the Court purports to write narrowly ... there is inevitable spillover from the Court's ruling today. That ruling, it seems to me, places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant. The Court's reasoning does not stop with the School of Nursing of the Mississippi University for Women.

I hope that we do not lose all values that some think are worthwhile (and are not based on differences of race or religion) and relegate ourselves to needless conformity. The ringing words of the Equal Protection Clause of the Fourteenth Amendment—what Justice Powell aptly describes as its "liberating spirit,"—do not demand that price.

Justice **POWELL,** with whom Justice **REHNQUIST** joins, dissenting.

The Court's opinion bows deeply to conformity. Left without honor—indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life. The Court in effect holds today that no State now may provide even a single institution of higher learning open only to women students. It gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 40,000 young women who over the years have evidenced their approval of an all-women's college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State. ...

... In my view, the Court errs seriously by assuming—without argument or discussion—that the equal protection standard generally applicable to sex discrimination is appropriate here. That standard was designed to free women from "archaic and overbroad generalizations. ..." *Schlesinger*. In no previous case have we applied it to invalidate state efforts to *expand* women's choices. Nor are there prior sex discrimination decisions by this Court in which a male plaintiff, as in this case, had the choice of an equal benefit.

By applying heightened equal protection analysis to this case, the Court frustrates the liberating spirit of the Equal Protection Clause. It forbids the States from providing women with an opportunity to choose the type of university they prefer. And yet it is these women whom the Court regards as the *victims* of an illegal, stereotyped perception of the role of women in our society. The Court reasons this way in a case in which no woman has complained, and the only complainant is a man who advances no claims on behalf of anyone else. His claim ... is not that he is being denied a substantive educational opportunity, or even the right to attend an all-male or a coeducational college. It is *only* that the colleges open to him are located at inconvenient distances. ...

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system. At stake in this case as I see it is the preservation of a small aspect of this diversity. But that aspect is by no means insignificant, given our heritage of available choice between single-sex and coeducational institutions of higher learning. ... The Equal Protection Clause was never intended to be applied to this kind of case.

Editors' Notes

(1) **Query:** Again, we see the justices following different *doctrinal approaches* or at least reading the landmarks on those routes differently. Did *doctrinalism* conceal deeper disagreements both about HOW to interpret and WHAT is "the Constitution" to be interpreted?

(2) **Query:** Justice Powell spoke of the "liberating spirit" of the equal protection clause. Where did he find that spirit? What sort of approach would justify such a search?

(3) **Query:** If "separate but equal" is not permissible with respect to sexually segregated

public nursing schools, should it be permissible for any public undergraduate institution?