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In *An Interpretive History of Modern Equal Protection,*[1] Michael Klarman poses a powerful challenge to the conventional wisdom regarding the structure of Burger Court jurisprudence. Most commentators have concluded that during the Burger era the Court lacked a coherent vision of constitutional law, and was given to a "rootless" activism[2] or a "pragmatic" approach to constitutional analysis.[3] Klarman argues that, at least in the area of equal protection analysis, the Burger Court's approach did reflect a unifying theme, which he describes as a focus on "legislative inputs."[4] According to Klarman, this approach "directs judicial review towards purging legislative decisionmaking of certain considerations rather than guarding against particular substantive outcomes."[5]

Klarman is correct that the analysis of legislative inputs was an important element of Burger Court jurisprudence. In proffering this theory as a complete or near-complete explanation of that Court's equal protection analysis, however, he vastly oversimplifies the decisionmaking dynamic of the Burger era. This point emerges clearly upon a close examination of the Court's gender discrimination cases — an area where Klarman contends that "a legislative inputs focus converts the morass [of decisions] . . . into an orderly pattern evidencing the Justices' gradual sophistication in process theory."[6]

Klarman's analysis of the gender discrimination cases relies pri-

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1. Michael Klarman, *An Interpretive History of Modern Equal Protection,* 90 MICH. L. REV. 213 (1991).

2. Vincent Blasi, *The Rootless Activism of the Burger Court, in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 204-05 (Vincent Blasi ed., 1983).

3. BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION (1990).

4. Klarman, *supra* note 1, at 284.

5. *Id.*

6. *Id.* at 304.

marily on *Weinberger v. Wiesenfeld,*[7] *Califano v. Goldfarb,*[8] and *Califano v. Webster*[9] — three cases dealing with gender-based discrimination in the Social Security system. Taken alone, these cases might plausibly be viewed as supporting Klarman's position. By contrast, the results in other significant gender discrimination cases decided during the Burger era are inconsistent with a focus on legislative inputs. Klarman himself concedes that some of the Court's pre-*Wiesenfeld* cases reflect the influence of different factors.[10] He contends, however, that by 1977 the Court had made a clear institutional commitment to the analysis of legislative inputs that was reflected in its subsequent gender discrimination jurisprudence.[11]

This analysis fails to take into account decisions such as *Michael M. v. Superior Court of Sonoma County,*[12] a case decided four years after *Webster* and *Goldfarb. Michael M.* was an equal protection challenge to a California statutory rape law that punished a male for having even consensual sexual intercourse with a female under the age of eighteen, but did not provide analogous punishment for a female having sexual intercourse with an underage male. Four Justices argued that this gender-based discrimination was unconstitutional, making arguments consistent with legislative input analysis.[13] However, a majority of the Court rejected the equal protection claim.

No single opinion in *Michael M.* commanded majority support. Justice Blackmun wrote a short, cryptic opinion that was devoted largely to an attack on the Court's decisions upholding restrictions on abortion funding and the access of minors to abortions.[14] The remaining four members of the majority, however, joined an opinion by Justice Rehnquist that was flatly inconsistent with the premises of legislative input analysis.

Rehnquist argued that the statute was justified as a device to prevent teenage pregnancy,[15] and that the state was allowed to conclude that a gender-neutral statute would be less effective than one that pun-

7. 420 U.S. 636 (1975).

8. 430 U.S. 199 (1977).

9. 430 U.S. 313 (1977) (per curiam).

10. Klarman, *supra* note 1, at 306-07.

11. *Id.* at 307.

12. 450 U.S. 464 (1981).

13. *See* 450 U.S. at 496-502 (Stevens, J., dissenting); 450 U.S. at 488-96 (Brennan, J., dissenting).

14. 450 U.S. at 481-87 (Blackmun, J., concurring in the judgment). Blackmun also noted that the female in *Michael M.* may not have in fact consented to sexual intercourse. 450 U.S. at 483-85.

15. 450 U.S. at 470-71 (opinion of Rehnquist, J.).

ished only males.[16] Those challenging the statute had argued that its true purpose was to protect the virtue and chastity of young women, and, as such, the statute was unconstitutional because it was based on an archaic stereotype. Rehnquist conceded that some legislators may have supported the statute for this reason. He also contended, however, that

> [t]he question for us . . . is whether the legislation violates the Equal Protection Clause of the Fourteenth Amendment, not whether its supporters may have endorsed it for reasons no longer generally accepted. Even if the preservation of female chastity were one of the motives of the statute, and even if that motive be impermissible, petitioner's argument must fail because "[i]t is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[17]

In other words, Rehnquist rejected the relevance of actual legislative inputs to the constitutionality of the *Michael M.* statute.

Michael M. paints the picture of a Court deeply divided over the proper methodology to be employed in gender discrimination cases — a picture confirmed by other cases as well.[18] Admittedly, despite differing over verbal formulations, the Burger Court was united in the view that discrimination against women should be subjected to stringent judicial scrutiny. In the post-*Reed* era, only Justice Rehnquist was willing to countenance such discrimination.[19] By contrast, with respect to discrimination against men, the differences among the Justices were deep and profound. The Justices' voting patterns reflected the persistence of these differences. Of the fourteen cases dealing with such issues,[20] six were decided by votes of five to four[21] and five by a

16. 450 U.S. at 473-74.

17. 450 U.S. at 472 n.7 (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)).

18. *See, e.g.,* Parham v. Hughes, 441 U.S. 347 (1979) (no majority opinion); Craig v. Boren, 429 U.S. 190 (1976) (seven separate opinions).

19. *See* Taylor v. Louisiana, 419 U.S. 522, 538-43 (1975) (Rehnquist, J., dissenting) (juries); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting) (benefits for servicewomen).

20. Lehr v. Robertson, 463 U.S. 248 (1983) (parental rights of unwed father); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (single-sex nursing school); Rostker v. Goldberg, 453 U.S. 57 (1981) (draft registration); Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464 (1981) (statutory rape); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (workers' compensation); Caban v. Mohammed, 441 U.S. 380 (1979) (parental rights of unwed father); Parham v. Hughes, 441 U.S. 347 (1979) (right of unwed father to file wrongful death action); Orr v. Orr, 440 U.S. 268 (1979) (alimony); Fiallo v. Bell, 430 U.S. 787 (1977) (immigration of illegitimate children); Califano v. Webster, 430 U.S. 313 (1977) (social security benefits); Califano v. Goldfarb, 430 U.S. 199 (1977) (social security benefits); Craig v. Boren, 429 U.S. 190 (1976) (access to 3.2% beer); Schlesinger v. Ballard, 419 U.S. 498 (1975) (military discharge based on promotion); Kahn v. Shevin, 416 U.S. 351 (1974) (property tax exemption).

21. *Mississippi Univ. for Women,* 458 U.S. at 718; *Michael M.,* 450 U.S. at 464; *Caban,* 441 U.S. at 380; *Parham,* 441 U.S. at 347; *Goldfarb,* 430 U.S. at 199; *Schlesinger,* 419 U.S. at 499.

six-to-three margin.[22]

An analysis of these decisions reveals that the Burger Court Justices fell roughly into three groups. One bloc, consisting of Justices Brennan, White, and Marshall, viewed discrimination against men with great suspicion. With the exception of *Califano v. Webster,*[23] and a single, unexplained vote by Justice Brennan in *Lehr v. Robertson,*[24] during the Burger era these Justices invariably voted to strike down gender-based classifications. Typically, Chief Justice Burger and Justices Stewart and Rehnquist opposed the Brennan/White/Marshall bloc. Justice (now Chief Justice) Rehnquist has never voted to strike down a statute that discriminated against men; with one ambiguous exception, Chief Justice Burger took the same view.[25] Justice Stewart joined these Justices except in rare cases where he found men and women to be "similarly situated" with respect to the relevant issue.[26]

The balance of power on gender discrimination issues during most of the Burger era was held by three swing Justices — Blackmun, Powell, and Stevens.[27] A variety of considerations influenced the votes of this group. Stevens' analysis resembles Klarman's legislative input theory.[28] Conversely, Powell seemed most strongly influenced by the the extent to which males could escape the burden imposed upon them by the discrimination.[29] Finally, Blackmun's votes and opinions show

22. *Lehr,* 463 U.S. at 248; *Rostker,* 453 U.S. at 57; *Orr,* 440 U.S. at 268; *Fiallo,* 430 U.S. at 787; *Kahn,* 416 U.S. at 351.

23. 430 U.S. at 313.

24. 463 U.S. at 268.

25. The one exception is Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980), in which Burger joined a majority opinion striking down a statute providing that a widow would automatically qualify for survivors' benefits under a state workers' compensation scheme, but that a widower would qualify only if he could show actual dependence or mental or physical incapacitation on the decedent. The opinion for the Court concluded that the statute discriminated both against males (the widowers themselves) and females (the deceased workers). 446 U.S. at 147. The doctrine of stare decisis also played an unusually strong role in *Wengler. See* 446 U.S. at 147-52.

Burger's vote in *Wengler* is discussed in greater detail in Earl M. Maltz, *The Concept of the Doctrine of the Court in Constitutional Law,* 16 GA. L. REV. 357, 379-80 (1982).

26. Besides Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980), discussed *supra* note 25, Stewart also voted to strike down discrimination against men in Orr v. Orr, 440 U.S. 268 (1979) (alimony), and Craig v. Boren, 429 U.S. 190, 214-15 (1976) (Stewart, J., concurring in the result) (access to 3.2% beer).

27. Justice O'Connor replaced Justice Stewart for the last two gender discrimination cases of the Burger era. She also proved to be a swing vote, voting to require the state to admit men to a previously all female nursing school in Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), but to allow states to treat unwed fathers less favorably than unwed mothers with respect to parental rights in Lehr v. Robertson, 463 U.S. 248 (1983).

28. Stevens' approach is outlined in Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting), and Califano v. Goldfarb, 430 U.S. 199, 222-23 (1977) (Stevens, J., concurring in the judgment). His position is discussed in greater detail in Maltz, *supra* note 25, at 387-90.

29. *Compare, e.g.,* Caban v. Mohammed, 441 U.S. 380, 386-87, 392, 394 (1979) (opinion of

no clear pattern.[30]

Given this dynamic, it is not surprising that neither Klarman's legislative inputs analysis nor any other easily described theory adequately explains the Burger Court's gender discrimination jurisprudence.[31] The pattern of decisions is comprehensible only when one recognizes that the Burger Court was not a monolithic institution, but rather a collection of nine individuals who had widely divergent political and judicial agendas. It was almost inevitable, then, that the Court would produce a set of decisions that was not rootless but multirooted, reflecting the influence of a variety of different factors. As a result, close attention to the approaches of the Justices as individuals better elucidates these cases than an attempt to uncover some artificial structure that explains the work of the Court as a unified whole.

Powell, J.) (striking down discrimination against unwed father) *with* Parham v. Hughes, 441 U.S. 347, 360 (1979) (Powell, J., concurring in the judgment) (upholding denial of wrongful death action to unwed father who had not legitimated child). Powell's approach is discussed in greater detail in Maltz, *supra* note 25, at 390-93.

30. For more on Blackmun's approach, see Maltz, *supra* note 25, at 393-95.

31. For a somewhat different view of the factors dividing the Justices, see Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 924 (1983) (arguing that the Court has "oscillated between two different approaches to legislative sex classifications, reflecting opposing views about the nature and significance of sex differences").