

MADISON LECTURE

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In 1981, Sandra Day O'Connor became the first woman appointed to the United States Supreme Court. Through her wide-ranging career, Justice O'Connor personally witnessed the evolution of the legal world from a time when a top Stanford Law School graduate could gain employment only as a legal secretary, to one in which the law has recognized a heightened consciousness of women's rights. She also has witnessed the development of a "new feminism," which posits that women and men have particular ways of looking at the world. In this lecture, Justice O'Connor outlines the Supreme Court's jurisprudence in the area of women's rights and takes on the new feminism, calling it a throwback to the "myths we have struggled to put behind us."

I am very happy to be celebrating with you the One Hundredth Anniversary of Women Graduates from New York University School of Law. New York University showed great foresight by admitting women law students before the turn of the century. It was one of the first major law schools to do so. Columbia Law School did not admit women until 1927; Harvard Law School did not admit women until 1950. In fact, New York University flouted the wishes of Columbia Law School committee member George Templeton Strong, who had written in his diary: "Application from three infatuated Young Women to the [Columbia] Law School. No woman shall degrade herself by practicing law in New York especially if I can save her."¹

New York women wouldn't be saved, however. The first woman to sit on the federal bench was a New Yorker,² as was the first woman admitted to practice before the Supreme Court.³ A New York woman wrote the state's first workmen's compensation law,⁴ and a New York woman wrote the "Little Wagner" act that permitted New York City employees to bargain collectively without violating antitrust laws.⁵ And,

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¹ K. Morello, *The Invisible Bar* 76 (1986) (quoting 4 *The Diary of George Templeton Strong* 256 (A. Nevins & M. Thomas eds. 1952)).

² Florence Ellinwood Allen was appointed to the United States Court of Appeals for the Sixth Circuit in 1934 by President Roosevelt. *Id.* at 234.

³ See text accompanying notes 18-22 *infra* (discussing Belva A. Lockwood).

⁴ See K. Morello, *supra* note 1, at 131 (discussing Crystal Eastman).

⁵ Morello, *Bar Admission was Rough for 19th Century Women*, *N.Y.L.J.*, May 13, 1983, at 19.

a New York woman worked on every major civil rights case that came before the United States Supreme Court in the 1950s and 1960s. You all can be very proud of this tradition. But being an early woman lawyer was not an easy accomplishment, even for New Yorkers.

Most of the women legal pioneers faced a profession and a society that espoused what has been called "The Cult of Domesticity,"⁶ a view that women were by nature different from men. Women were said to be fitted for motherhood and homelife, compassionate, selfless, gentle, moral, and pure. Their minds were attuned to art and religion, not logic. Men, on the other hand, were fitted by nature for competition and intellectual discovery in the world, battle-hardened, shrewd, authoritative, and tough-minded.

Women were thought to be ill-qualified for adversarial litigation because it required sharp logic and shrewd negotiation, as well as exposure to the unjust and immoral. In 1875, the Wisconsin Supreme Court told Lavinia Goodell that she could not be admitted to the state bar.⁷ The Chief Justice declared that the practice of law was unfit for the female character.⁸ To expose women to the brutal, repulsive, and obscene events of courtroom life, he said, would shock man's reverence for womanhood and relax the public's sense of decency.⁹

In a similar case, Myra Bradwell of Chicago, who had studied law under her husband, applied to the Illinois Bar in 1869 and was refused admission¹⁰ because as a married woman her contracts were not binding, and contracts were the essence of an attorney-client relationship.¹¹ The Court also proclaimed that "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws."¹²

The United States Supreme Court, I blush to admit, agreed with the Illinois court.¹³ Justice Bradley, concurring in the Court's opinion, cited the natural differences between men and women as the reason Myra Bradwell could not be admitted. He wrote, "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of

⁶ See, e.g., Bloch, *American Feminine Ideals in Transition, the Rise of the Moral Mothers, 1785-1815*, *Feminist Studies*, June 1978, at 101; Welter, *The Cult of True Womanhood: 1820-1860*, 18 *Am. Q.* 151 (1966).

⁷ *In re Goodell*, 39 *Wis.* 232, 244 (1875).

⁸ *Id.* at 245 ("The peculiar qualities of womanhood . . . its purity, its delicacy, its emotional impulses . . . are surely not qualifications for forensic strife.").

⁹ *Id.* at 245-46.

¹⁰ *In re Bradwell*, 55 *Ill.* 535, 535 (1869).

¹¹ See *id.* at 535-36.

¹² *Id.* at 539.

¹³ See *Bradwell v. Illinois*, 83 *U.S.* (16 *Wall.*) 130, 139 (1872).

the occupations of civil life.”¹⁴

Even Clarence Darrow, one of the most famous champions of unpopular causes, had this to say to a group of women lawyers: “You can’t be shining lights at the bar because you are too kind. You can never be corporation lawyers because you are not cold-blooded. You have not a high grade of intellect. I doubt you can ever make a living.”¹⁵ Another male attorney of the period commented, “[A] woman can’t keep a secret, and for that reason if no other, I doubt if anybody will ever consult a woman lawyer.”¹⁶

Luckily for us women lawyers today, our female predecessors had far more spunk, spirit, and wit than they were given credit for. Clara Shortridge Foltz, the first woman lawyer in California and the first woman deputy district attorney in America, displayed the characteristic mettle of these early women lawyers. When an opposing attorney once suggested in open court that she had better be at home raising children, Foltz retorted: “A woman had better be in almost any business than raising such men as you.”¹⁷

A New York woman lawyer pioneer, Belva Lockwood, was in 1879 the first woman admitted to practice before the United States Supreme Court.¹⁸ To receive that honor, however, she had to try three times to get a special bill passed in the Senate to change the admission requirements.¹⁹ Inexhaustible, she rode her three-wheeler all over Washington, lobbying senators and explaining to the press that she was going to “get up a fight all along the line.”²⁰ In 1884, the redoubtable Mrs. Lockwood even ran for President, reasoning that even though women could not vote, there was nothing to stop them from running for office.²¹ Even without women voters, she garnered 4149 votes in that election.²²

In my own time and in my own life, I have witnessed the revolution in the legal profession that has resulted in women representing nearly thirty percent of attorneys in this country and forty percent of law school graduates.²³ Projections based on data from the Census Bureau and Department of Labor indicate that forty years hence half the country’s at-

¹⁴ *Id.* at 141 (Bradley, J., concurring).

¹⁵ K. Morello, *supra* note 1, at x.

¹⁶ Elwood-Akers, Clara Shortridge Foltz, California’s First Woman Lawyer, 28 *The Pac. Historian* 23, 25 (1984).

¹⁷ Polos, San Diego’s “Portia of the Pacific”: California’s First Woman Lawyer, 26 *J. San Diego Hist.* 185, 188-89 (1980).

¹⁸ Davis, Belva Ann Lockwood: Remover of Mountains, 65 *A.B.A.J.* 924, 927 (1979).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See id.*

²² *See id.* at 928.

²³ *See Feminist Majority, The Feminization of Power: Women in the Law* 1, 7 (1990) [hereinafter *Feminization of Power*].

torneys will be women.²⁴ I myself, after graduating near the top of my class at Stanford Law School, was unable to obtain a position at any national law firm, except as a legal secretary. Yet I have since had the privilege of serving as a state senator, a state judge, and a Supreme Court Justice.

Women today are not only well-represented in law firms, but are gradually attaining other positions of legal power, representing 7.4% of federal judges,²⁵ 25% of United States Attorneys,²⁶ 14% of state attorneys,²⁷ 18% of state legislators,²⁸ 17% of state and local executives,²⁹ 9% of county governing boards,³⁰ 14% of mayors and city council members,³¹ 6% of United States congresspersons,³² and of course, just over 11% of United States Supreme Court Justices.³³ Until the percentages come closer to fifty percent, however, we cannot say we have succeeded. Still, the progress in my own time has been astounding.

That progress is due in large part to the explosion of the myth of the "True Woman" through the efforts of real women and the insights of real men. Released from these prejudices, women have proved they can do a "man's" job.

This change in perspective has been reflected, as most social change eventually is, in the Supreme Court's jurisprudence. I would like to sketch briefly how the Justices' comments about gender differences have changed in direct response to the change in the position of women in our society.

The ratification of the Bill of Rights in 1791 had little immediate effect on the legal status or rights of women. Its strictures were limited initially to the federal government; the states were free to continue as before in fashioning the political and legal rights of their citizens. State legislation affecting women was drawn primarily from the British common law, which gave women few property or contractual rights. Only in the case of unmarried women were the laws in this country somewhat more generous than in England, at least insofar as property ownership and management were concerned.

As you know, it was not until after the Civil War and the resultant

²⁴ See *id.* at 1 (the Feminist Majority projects that by the year 2000 one-third of the country's attorneys will be women).

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ *Id.* at 10.

²⁸ Carroll, *Taking the Lead*, 64 *J. State Gov't* 43, 43 (1991).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Annals Am. Acad. Pol. & Soc. Sci.*, May 1991, at 67.

³² Carroll, *supra* note 28, at 43.

³³ *Feminization of Power*, *supra* note 23, at 3.

adoption of the thirteenth, fourteenth, and fifteenth amendments to our Constitution that there were national guaranties for certain individual liberties which the states could not abridge. But even these additions to our Constitution did not easily translate into concepts that benefitted women as a group until the last half of the twentieth century. Until that time, despite the efforts of women such as Elizabeth Cady Stanton, Susan B. Anthony, and Sojourner Truth, society as a whole, including the Court, generally accepted the separate and unequal status of women.

The fourteenth amendment prohibits states from "denying to any person . . . the equal protection of the laws."³⁴ There is little evidence to suggest that at the time of its adoption in 1868 this amendment was seen as a vehicle of women's equality under law. In fact, the fourteenth amendment for the first time introduced sex-specific language into the Constitution. Section 2 of the amendment, which deals with legislative representation and voting, says that if the right to vote is "denied to any of the male inhabitants" of a state aged twenty-one or over then the proportional representation in that state shall be reduced accordingly.³⁵ Moreover, the Supreme Court determined in 1873 in the *Slaughter-House Cases*³⁶ that the equal protection clause should be narrowly interpreted to apply only to state laws that discriminated against blacks.³⁷

The same Court on the very next day handed down the *Bradwell* decision, mentioned earlier,³⁸ denying Myra Bradwell's claim that the state of Illinois had denied her the privileges and immunities of United States citizenship when it refused, because of her sex, to give her a license to practice law.³⁹

For the first half of the twentieth century the Court continued to defer to legislative judgments regarding the differences between the sexes. In 1948, Valentine Goesaert and three other women challenged the constitutionality of a Michigan statute forbidding a woman from being a bartender unless she was "the wife or daughter of the male owner" of the bar.⁴⁰ The Court, in an opinion by Justice Frankfurter, rejected the claim that the statute violated the equal protection clause, saying that "despite the vast changes in the social and legal position of women," the state unquestionably could forbid all women from working as bartenders.⁴¹

³⁴ U.S. Const. amend. XIV, § 1.

³⁵ *Id.* § 2.

³⁶ 83 U.S. (16 Wall.) 36 (1873).

³⁷ See *id.* at 81.

³⁸ See text accompanying notes 10-12 *supra*.

³⁹ See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 138-39 (1872).

⁴⁰ See *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948).

⁴¹ See *id.* at 465-66.

Even as late as 1961, the Court reaffirmed Florida's practice of restricting jury service to men, unless women registered separately.⁴² The Court said, "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of the home and family life."⁴³

The Supreme Court began to look more closely at legislation providing dissimilar treatment for similarly situated women and men in the early 1970s. The first case in which the Court found a state law discriminating against women to be unconstitutional was *Reed v. Reed*.⁴⁴ In *Reed*, the Court struck down an Idaho law giving men an automatic preference in appointments as administrators of estates.⁴⁵ *Reed* signaled a dramatic change in the Court's approach to the myth of the "True Woman."

In subsequent cases, the Court made clear that it would no longer swallow unquestioningly the story that women are different from men. In 1972, striking down a federal statute which made it easier for men to claim their wives as dependents than it was for women to claim their husbands as dependents, Justice Brennan wrote: "There can be no doubt that our nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."⁴⁶

Two years later, the Court struck down a Utah statute providing that child support was required for girls only until their legal majority at eighteen, while child support for boys was required until they reached the age of twenty-one.⁴⁷ The state had justified the difference by arguing that women matured faster, married earlier, and tended not to require continuing support through higher education, while men usually did require this additional support.⁴⁸ The Court took a hard look at these justifications, concluding:

A child, male or female, is still a child. No 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 . . . Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the profes-

⁴² See *Hoyt v. Florida*, 368 U.S. 57, 69 (1961). *Hoyt* was overturned on sixth amendment grounds in *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975).

⁴³ *Hoyt*, 368 U.S. at 61-62.

⁴⁴ 404 U.S. 71 (1971).

⁴⁵ See *id.* at 77.

⁴⁶ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).

⁴⁷ See *Stanton v. Stanton*, 421 U.S. 7, 13-17 (1975).

⁴⁸ See *id.* at 10.

sions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice.⁴⁹

In 1976, the Court made its more careful standard of review explicit, ruling that sex-based classifications would be upheld only if they served important governmental objectives and were substantially related to the achievement of those objectives.⁵⁰

Through the next two decades, the Court invalidated, on equal protection grounds, a broad range of statutes that discriminated against women. The laws struck down included a Social Security Act provision allowing widows but not widowers to collect survivors benefits;⁵¹ a state law permitting the sale of beer to women at age eighteen but not to men until age twenty-one;⁵² a state law requiring men but not women to pay alimony after divorce;⁵³ a Social Security Act provision allowing benefits for families with dependent children only when the father was unemployed, not when the mother was unemployed;⁵⁴ and a state statute granting only husbands the right to manage and dispose of jointly owned property without spousal consent.⁵⁵

The volume of cases in the Supreme Court dealing with sex discrimination declined somewhat in the 1980s. Several of the more recent cases brought before the Court have involved interpretations of statutes such as Title VII rather than of the equal protection clause. In *Hishon v. King & Spalding*,⁵⁶ for example, the Court held that once a law firm makes partnership consideration a privilege of employment, the firm may not discriminate on the basis of sex in its selection of partners.⁵⁷

In all of these cases, the Court has looked with a somewhat jaundiced eye at the loose-fitting generalizations, myths, and archaic stereotypes that previously kept women at home. Instead, the Court has often asked employers to look to whether the particular person involved, male or female, is capable of doing the job, not whether women in general are more or less capable than men.⁵⁸

Just when the Court and Congress have adopted a less sanguine view of gender-based classifications, however, the new presence of

⁴⁹ Id. at 14-15.

⁵⁰ See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁵¹ See *Califano v. Goldfarb*, 430 U.S. 199, 212-17 (1977).

⁵² See *Craig*, 429 U.S. at 199-204.

⁵³ See *Orr v. Orr*, 440 U.S. 268, 278-83 (1979).

⁵⁴ See *Califano v. Westcott*, 443 U.S. 76, 83-89 (1979).

⁵⁵ See *Kirchberg v. Feenstra*, 450 U.S. 455, 459-61 (1981).

⁵⁶ 467 U.S. 69 (1984).

⁵⁷ See id. at 73-76.

⁵⁸ See, e.g., *Califano*, 443 U.S. at 89 (disallowing withholding of Social Security benefits when mother, not father was unemployed).

women in the law has prompted many feminist commentators to ask whether women have made a difference to the profession, whether women have different styles, aptitudes, or abilities.⁵⁹ Ironically, the move to ask again the question whether women are different merely by virtue of being women recalls the old myths we have struggled to put behind us. Undaunted by the historical resonances, however, more and more writers have suggested that women practice law differently than men. One author has even concluded that my opinions differ in a peculiarly feminine way from those of my colleagues.⁶⁰

The gender differences currently cited are surprisingly similar to stereotypes from years past. Women attorneys are more likely to seek to mediate disputes than litigate them. Women attorneys are more likely to focus on resolving a client's problem than on vindicating a position. Women attorneys are more likely to sacrifice career advancement for family obligations. Women attorneys are more concerned with public service or fostering community than with individual achievement. Women judges are more likely to emphasize context and deemphasize general principles. Women judges are more compassionate. And so forth.

This "New Feminism" is interesting, but troubling, precisely because it so nearly echoes the Victorian myth of the "True Woman" that kept women out of law for so long. It is a little chilling to compare these suggestions to Clarence Darrow's assertion that women are too kind and warm-hearted to be shining lights at the bar.⁶¹

One difference between men and women lawyers certainly remains, however. Women professionals still have primary responsibility for children and housekeeping, spending roughly twice as much time on these cares as do their professional husbands.⁶² As a result, women lawyers have special difficulties managing both a household and a career.

These concerns of how to blend law and family we share with women lawyers of over one hundred years ago, who, like us, debated whether a woman could have both a family and a profession. The prevailing view then, as Mrs. Marion Todd put it in an 1888 letter to the Women Lawyers' Equity Club, was that a husband was simply "too great a responsibility."⁶³

⁵⁹ See, e.g., Sherry, *Civil Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543, 580-84 (1986).

⁶⁰ See *id.* at 613.

⁶¹ See text accompanying note 15 *supra*.

⁶² Barnett & Baruch, *Determinants of Fathers' Participation in Family Work*, 49 J. Marriage & Family 29, 33 (1987) (husbands of working women performed average of 30% of child care tasks, and 19% of household chores).

⁶³ Drachman, "My 'Partner' in Law and Life": *Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America*, 14 Law & Soc. Inquiry 221, 231 (1989).

Today, while many women juggle both profession and home admirably, it is nonetheless true that time spent at home is time that cannot be billed to clients or used to make contacts at social or professional organizations. As a result, women still may face what has been called a "mommy track" or a "glass ceiling" in the legal profession—a delayed or blocked ascent to partnership or management status due to family responsibilities.⁶⁴ Women who do not wish to be left behind sometimes are faced with a hard choice. Some give up family life in order to attain their career aspirations. Many talented young women lawyers decide that the demands of a career require delaying family responsibilities at the very time in their lives when bearing children is physically easiest. I myself chose to try to have and enjoy my family and to resume my career path somewhat later.

The choices that women must make in this respect are different from the choices that men must make. Men need not take time off from work to have a family—not even the bare minimum amount of time needed to deliver a child. It is in recognizing and responding to this fundamental difference that the Court has had its most difficult challenges. The dilemma is this: if society does not recognize the fact that only women can bear children, then "equal treatment" ends up being unequal. On the other hand, if society recognizes pregnancy as requiring special solicitude, it is a slippery slope back to the "protectionist" legislation that historically barred women from the workplace.

Again, the Court's decisions in the area of pregnancy discrimination reflect the social trends and illustrate the remaining ambivalences. In 1908, the Court in *Muller v. Oregon*⁶⁵ upheld regulations prescribing maximum working hours for women, but not men, because "maternal functions," "the burdens of motherhood," and society's concern for "vigorous offspring" justified treating women differently.⁶⁶

After the Court began to look at gender classification more carefully in the 1970s, it struggled with the question of when it was appropriate to treat pregnancy differently. The Court ruled in *Cleveland Board of Education v. LaFleur*⁶⁷ that the school board violated due process when it placed school teachers on forced leave at an arbitrarily fixed stage in pregnancy well in advance of the expected delivery date.⁶⁸ The case was

⁶⁴ See, e.g., Kaye, *Women Lawyers in Big Firms: A Study of Progress Toward Gender Equality*, 57 *Fordham L. Rev.* 111 (1988); LaMothe, *Endangered Species*, *Stanford Law.*, Spring/Summer 1989, at 14; Kingson, *Women in Law Say Path is Limited by "Mommy Track,"* *N.Y. Times*, Aug. 8, 1988, at A1.

⁶⁵ 208 U.S. 412 (1908).

⁶⁶ See *id.* at 421.

⁶⁷ 414 U.S. 632 (1974).

⁶⁸ See *id.* at 651.

decided on due process grounds, not equal protection grounds. It nonetheless took the view that ability to work had to be evaluated individually, not stereotypically.⁶⁹

At the same time, however, the Court held that excluding "pregnancy" from a disability policy did not amount to an equal protection violation.⁷⁰ Pregnancy, the Court said, was a disabling condition like any other; it was not a gender-based classification subject to more careful scrutiny.⁷¹ A state disability insurance program was free to include or exclude pregnancy on any rational basis, as it could any other physical condition.⁷²

In a similar case two years later, the Court reaffirmed its position on pregnancy by rejecting a similar challenge under Title VII,⁷³ a federal statute prohibiting employment discrimination based on race, color, religion, sex, or national origin. The Court held that an exclusion from disability benefits for pregnancy was "not a gender-based discrimination at all."⁷⁴

These two cases took the view that equality required treating women and men precisely the same. Pregnancy had to be "degendered" in order to be treated fairly. Consequently, pregnancy was characterized as a disability that happened to occur in women, not men. As such, it was no different from a disability that occurred only in men. Hence, the Court reasoned, it should be treated the same as any other disability and could reasonably be excluded from disability insurance policies for reasons of cost.

Congress, however, disagreed with the Court's interpretation of Title VII and passed the Pregnancy Discrimination Act, which prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions, requiring pregnant women to be treated the same as other persons similar in their ability or inability to work.⁷⁵ In so doing, Congress declared that discrimination on the basis of pregnancy *was* discrimination against women,⁷⁶ instead of disavowing the connection between pregnancy and women as the Court had done. Senator Williams, a sponsor of the Act, made this change of heart explicit: "The entire thrust . . . behind this legislation is to guarantee women the basic right to partici-

⁶⁹ See *id.* at 644, 647-48.

⁷⁰ See *Geduldig v. Aiello*, 417 U.S. 484, 492-97 (1974).

⁷¹ See *id.* at 496 n.20.

⁷² See *id.* at 497 n.20.

⁷³ See *General Elec. v. Gilbert*, 429 U.S. 125, 133-36 (1976).

⁷⁴ *Id.* at 136.

⁷⁵ See 42 U.S.C. § 2000e(k) (1989).

⁷⁶ H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, reprinted in 1978 U.S.C.C.A.N. 4749, 4752 ("Pregnancy-based distinctions will be subject to the same scrutiny on the same terms as other acts of sex discrimination proscribed in the existing statute.").

pate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”⁷⁷

In 1987, the Court heard a reverse discrimination suit under the Pregnancy Discrimination Act.⁷⁸ An employer claimed that a state law requiring employers to provide four months of unpaid pregnancy leave improperly favored pregnant women over temporarily disabled men, in violation of the Pregnancy Discrimination Act’s mandate that pregnant women be treated the same as other workers equally able to work.⁷⁹ The Court upheld the state statute, reasoning that Congress had established a floor for providing pregnancy benefits, not a ceiling.⁸⁰ Tellingly, the Court recognized that true equality between women and men was best achieved by taking pregnancy into account, so that “women, as well as men, [could] have families without losing their jobs.”⁸¹

Nonetheless, the Court was concerned that the legislation not be overtly protectionist and suggested that the pendulum would not be allowed to swing too far toward treating women differently. It emphasized that “unlike the protective labor legislation prevalent earlier in this century, [the California statute] does not reflect archaic or stereotypical notions about pregnancy and the abilities of pregnant workers. A statute based on such stereotypical assumptions would, of course, be inconsistent with Title VII’s goal of equal employment opportunity.”⁸² Obviously, *Muller v. Oregon*’s patronizing concerns about the “burdens of motherhood”⁸³ continued to ring warning bells in the Justices’ minds.

This last Term, the Court, again interpreting the Pregnancy Discrimination Act, held that fertile women could not be excluded from work at a battery plant on the ground that they were capable of becoming pregnant and would risk birth defects from lead exposure if they chose to bear children.⁸⁴ As in *Muller*, the employer had contended that society’s concern for “vigorous offspring” was the benign reason for the employer’s exclusion of fertile women.⁸⁵ The Court disagreed, holding instead that the employer could only justify excluding women from these jobs if they could not do the work safely and efficiently.⁸⁶ The Court held that the categorical exclusion of fertile women was not justified because “fertile women . . . participate in the manufacture of batteries as

⁷⁷ 123 Cong. Rec. 29,658 (1977).

⁷⁸ See *Califano Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987).

⁷⁹ *Id.* at 278-79.

⁸⁰ See *id.* at 285.

⁸¹ *Id.* at 289.

⁸² *Id.* at 290.

⁸³ See text accompanying note 66 *supra*.

⁸⁴ See *International Union v. Johnson Controls*, 111 S. Ct. 1196, 1207-08 (1991).

⁸⁵ *Id.* at 1209-10.

⁸⁶ See *id.* at 1207.

efficiently as anyone else.”⁸⁷ The Court reaffirmed its rejection of traditional categories, stating that “women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.”⁸⁸

The question of when equality requires accommodating differences is one with which the Court will continue to struggle. I think in recent cases the Court has acknowledged, along with the “New Feminism,” that sometimes to treat men and women exactly the same is to treat them differently, at least with respect to pregnancy. Women do have the gift of bearing children, a gift that needs to be accommodated in the working world. However, in allowing for this difference, we must always remember that we risk a return to the myth of the “True Woman” that blocked the career paths of many generations of women.

I would hope that your generation of attorneys will find new ways to balance family and professional responsibilities between men and women, recognizing gender differences in a way that promotes equality and frees both women and men from traditional role limitations. You must reopen the velvet curtain between work and home that was drawn closed in the Victorian era. Not only women, but men too, have missed out through the division of work and home. As more women enjoy the challenges of a legal career, more men have blessings to garner from taking extra time to nurture and teach their children.

If we are to continue to find ways to repair the existing difference between professional women and men with regard to family responsibilities, however, we must not allow the “New Feminism” complete sway. For example, asking whether women attorneys speak with a “different voice”⁸⁹ than men do is a question that is both dangerous and unanswerable. It again sets up the polarity between the feminine virtues of homemaking and the masculine virtues of breadwinning. It threatens, indeed, to establish new categories of “women’s work” to which women are confined and from which men are excluded.

Instead, my sense is that as women continue to take on a full role in the professions, learning from those professional experiences, as from their experiences as homemakers, the virtues derived from both kinds of learning will meld. The “different voices” will teach each other. I myself have been thankful for the opportunity to experience a rich and fulfilling career as well as a close and supportive family life. I know the lessons I have learned in each have aided me in the other. As a result, I can revel both in the growth of my granddaughter and in the legal subtleties of the

⁸⁷ *Id.*

⁸⁸ See *id.* at 1206.

⁸⁹ See text accompanying notes 59-61 *supra*.

free exercise clause.

Do women judges decide cases differently by virtue of being women? I would echo the answer of my colleague, Justice Jeanne Coyne of the Supreme Court of Oklahoma, who responded that “a wise old man and a wise old woman reach the same conclusion.”⁹⁰ This should be our aspiration: that, whatever our gender or background, we all may become wise—wise through our different struggles and different victories, wise through work *and* play, profession *and* family.

⁹⁰ Margolick, *Women’s Milestone: Majority on Minnesota Court*, N.Y. Times, Feb. 22, 1991, at B16.