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# Constitutional Law-Gender Classifications and the Equal Protection Clause-The New Standard

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why the one body who can prevent governmental exclusions of relatively unpopular expression should unflinchingly demand proof of some serious evil directly caused by the expression. Any test which affords protection only to expression whose content the Court paternally perceives as important to society is far too limited and destructive to serve the first amendment's function of free expression.

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# CONSTITUTIONAL LAW—GENDER CLASSIFICATIONS AND THE EQUAL PROTECTION CLAUSE—THE NEW STANDARD

*Craig v. Boren*[1]

Oklahoma statutes prohibited the sale of 3.2% beer to females under 18 and males under 21.[2] The appellants, a male between 18 and 20 when suit was filed[3] and a licensed vendor of 3.2% beer,[4] brought suit for declaratory and injunctive relief. The appellants contended that, by invidiously discriminating against all males between 18 and 20, the statute was unconstitutional as a violation of the Equal Protection Clause of the fourteenth amendment.[5] A three-judge federal district court[6] found a

1. 97 S. Ct. 451 (1976).

2. The statutes provide:

> It shall be unlawful for any person who holds a license to sell and dispense beer . . . to sell, barter or give to any minor any beverage containing more than one-half of one percent of alcohol measured by volume and not more than three and two tenths (3.2) percent of alcohol measured by weight.

37 OKLA. STAT. § 241 (1953).

> A "minor" for the purposes of Sections 241 . . . is defined as a female under the age of eighteen (18) years, and a male under the age of twenty-one (21) years.

37 OKLA. STAT. § 245 (Supp. 1976).

3. Appellant Craig attained the age of 21 before the case was decided. In light of the fact that the suit was brought for declaratory and injunctive relief, the Court dismissed the case as to him for mootness. 97 S. Ct. at 454. *See also* Defunis V. Odegaard, 416 U.S. 312 (1972).

4. The Court found that this appellant had "established independently her claim to assert *jus tertii* standing." 97 S. Ct. at 455. *Cf.* Chief Justice Berger's dissent, *Id.* at 466. This note does not encompass a discussion of the "standing" issue.

5. Section 1 of the fourteenth amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due

rational basis for the gender-based classification (*i.e.*, males between 18 and 20) and upheld the statute.[7] The United States Supreme Court reversed and held the Oklahoma statute unconstitutional.[8]

The fourteenth amendment does not require that absolute equality of the laws be provided.[9] In deciding whether constitutional guarantees of equal protection have been violated in a given situation, the Supreme Court has developed "tests" to be applied. Where the statute or governmental action discriminates against a category drawn by race,[10] national origin,[11] or alienage,[12] it will be subject to *strict judicial scrutiny*.[13] These suspect classifications are presumptively invalid. The burden is on the state to show that the classification is necessary for the accomplishment of a compelling state interest. Justice Stewart has gone so far as to state that he could not conceive of a valid criminal statute that discriminated on the basis of race.[14]

Closely related to cases involving a suspect classification are classifications that affect a "fundamental" right, such as the right to travel,[15] the right to vote,[16] the right of procreation,[17] and the right to privacy.[18] Gener-

process of law; *nor deny any person within its jurisdiction the equal protection of the laws*. (emphasis added)

6. A federal statute provides that no injunction against the enforcement of a state statute shall be issued by a district court unless the application is heard by a court of three judges. 28 U.S.C. § 2281 (1965).

7. Walker v. Hall, 399 F. Supp. 1304 (W.D. Okla. 1975).

8. Only 37 OKLA. STAT. § 245 (Supp. 1976) was held unconstitutional, leaving the Oklahoma legislature to redefine the word "minor" in this context.

9. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 75-76 (1971).

10. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954); Shelley v. Kraemer, 334 U.S. 1 (1948).

11. *See, e.g.*, Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 100.

12. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Truax v. Raich, 239 U.S. 33 (1915). *Cf.* Hampton v. Mow Sung Wong, 426 U.S. 88 (1976).

13. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 688 (1973), with dicta saying, "[c]lassifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."

14. McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring). The heavy presumption of invalidity is also demonstrated by the fact that only twice has the Supreme Court upheld discrimination based on race or national origin. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). Both of these instances occurred when the United States was engaged in a war, and the national origin or race involved was that of the enemy.

15. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

16. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). .

17. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

18. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Griffon v. Illinois, 351 U.S. 12 (1956).

ally, classifications that affect these rights are subject to strict judicial scrutiny. The Court has severely restricted the number of "fundamental" rights by holding that they include only those rights that are "explicitly or implicitly guaranteed by the Constitution,"[19] *i.e.*, they include only constitutional rights.

At the other extreme, if the statute sets out a classification drawn by economic or social welfare it is presumptively valid. The burden is on the one challenging the statute to show that the legislature could have had no *rational basis* for the classification set out in the statute.[20] Where the statute draws a classification in the area of economics or social welfare, the Court will go to great lengths to find a rational basis for the classification and hence uphold the statute.[21] These two extremes define the boundaries of what is often referred to as the Court's two-tier approach to equal protection analysis.

There are many discriminatory classifications that have not fit squarely into either the "compelling state interest" test or the "rational basis" test. Possibly the best example of classifications that fall between the enunciated tests are gender-based classifications. The suspect classifications have three elements in common, *i.e.*, they are immutable characteristics over which the individual has no control,[22] they are politically impotent minorities, and they typically bear no relation to the individual's ability to perform or contribute to society. Classifications drawn as to sex do not segregate a politically impotent minority but they do exhibit the other two characteristics of suspect classifications.[23] For this reason the Court has been faced with a difficult task in deciding equal protection cases involving gender-

19. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (the Court refused to extend the strict scrutiny analysis to a statute affecting the right to education).

20. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (administration of a public welfare program discriminated against large families by setting a ceiling on the funds that could be received by any one family); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday Blue Laws discriminated in favor of certain types of businesses); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (the challenged statute discriminated against certain businesses selling corrective eyeglasses without the services of licensed ophthalmologists or optometrists).

21. *See, e.g.*, Railway Express Agency, Inc., v. New York, 336 U.S. 106 (1949), in which the Court found a rational basis for a statute which prohibited advertising on the side of other people's vehicles but did not prohibit advertising on one's own vehicle.

22. Alienage is generally an immutable characteristic only for the first five years of residency in the United States. 8 U.S.C. § 1427 (1970). Consequently, giving strict judicial scrutiny to classifications based on alienage has less support than does giving such heavy review to classifications based on race or national origin.

23. There are situations for which a gender based classification conceivably bears a substantial relation to the characteristic intended to be represented by the classification. For example, the life expectancy of females used to compute life insurance premiums may justify lower rates for females.

based discrimination.[24] In recent years the Court has been unsettled as to where gender-based classifications fit into the two-tier approach to equal protection.

From 1971 through *Craig* the Supreme Court decided only five cases in which they squarely faced the issue of what test to apply to gender-based classifications. *Reed v. Reed*[25] decided the constitutionality of an Idaho statute that gave a preference to males over females for appointment as administrators of estates.[26] The Court, in deciding unanimously that the statute was invalid, said "[t]he question presented by this case, then, is whether . . . [the classification] bears a rational relationship to a state objective. . . ."[27] This language led some justices to rely on *Reed* as precedent for applying the traditional rational basis test. However, the *Reed* opinion went on to say,

> A 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, so that all persons similarly circumstanced shall be treated alike."[28]

This often quoted language led other justices to interpret the opinion as being precedent for the application of a stricter judicial review than mere rational basis.[29]

In *Frontiero v. Richardson*[30] the Court was faced with the same issue in the context of military fringe benefits. Federal statutes[31] provided that a serviceman could claim his wife as a dependent and receive an extra housing allowance as a matter of course. A servicewoman could get a similar allowance only upon a showing of an actually dependent husband. The Court, in a plurality opinion applying strict judicial scrutiny and

24. A more subtle reason why the task of deciding gender-based classification cases is difficult is the pending Equal Rights Amendment. Placing these cases into the suspect category tends to effectively "pass" the ERA and rob the legislative branch of its function. Applying the rational basis analysis tends to endorse rejection of the amendment. *See* Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring).

25. 404 U.S. 71 (1971).

26. "Of several persons claiming and equally entitled to administer, males must be preferred to females. . . ." 3 IDAHO CODE § 15-314 (1948) (repealed 1971).

27. 404 U.S. at 76.

28. 404 U.S. at 76, *quoting*, Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Adding to the confusion of the already ambiguous opinion is the fact that *Royster* was an economic classification case that applied rational basis analysis. This language from *Royster* has been used as precedent for applying strict judicial scrutiny analysis to gender-based classification cases. *See* text accompanying note 33 *infra*.

29. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351, 358 (1974) (Brennan, J., dissenting, joined by Marshall, J.); *Id*, at 361 (White, J., dissenting).

30. 411 U.S. 677 (1973).

31. 37 U.S.C. §§ 401, 403 (1964) (amended 1973); 10 U.S.C. §§ 1072, 1076 (1970).

explicitly stating that gender was a suspect class,[32] held the statute invalid. Interestingly, both the plurality, applying strict judicial scrutiny, and Justice Powell, applying the rational basis test, found precedent in *Reed*.[33]

*Kahn v. Shevin*[34] dealt with the validity of a Florida statute that exempted widows, but not widowers, from state property taxes. In a 6-3 decision the Court applied the rational basis test and held the statute valid. One year later, in *Schlesinger v. Ballard*,[35] the Court ruled on the validity of mandatory military retirement. A male officer, who had been passed over twice for promotion, was subject to mandatory discharge while a female officer was entitled to 13 years service, regardless of her promotion record.[36] The Court applied a rational basis test and held, in a 5-4 decision,[37] that the statute was valid.

In several cases decided between *Reed* and *Craig v. Boren*,[38] the Court avoided the issue of what test properly applies to gender-based classifications. In *Weinberger v. Wiesenfeld*[39] and *Stanton v. Stanton*,[40] the Court found the statutory discrimination against females invalid. In both cases the Court concluded that the activity was invalid under *any* test, hence, it did not have to decide whether gender was a suspect classification. In *Geduldig v. Aiello*[41] the Court found that denying work loss benefits to women who experienced *normal* pregnancies but not to those who experienced abnormal pregnancies was not discriminatory against all women. The Court recognized that the classification was unique to women but held

32. 411 U.S. at 688.

33. The majority opinion stated that the appellant is contending that gender-based classifications are suspect classifications and then said: "[W]e agree and, indeed, find at least implicit support for such an approach in our unanimous decision only last Term in *Reed v. Reed*. . . ." 411 U.S. at 682. In his concurring opinion, Powell, J., said: "*Reed v. Reed* . . . did not add sex to the narrowly limited group of classifications which are inherently suspect." 411 U.S. at 692. Chief Justice Burger, who wrote the *Reed* opinion, joined in Powell's opinion.

34. 416 U.S. 351 (1974).

35. 419 U.S. 498 (1975).

36. 10 U.S.C. § 6401 (1952).

37. Mr. Justice Douglas waivered between applying strict judicial scrutiny or rational basis analysis in *Frontiero, Kahn* and *Ballard* depending upon whether the discrimination was against females or males. The different split of the Court in *Kahn* and *Ballard* is attributable to Douglas's switching.

38. 97 S. Ct. 451 (1976).

39. 420 U.S. 636 (1975) (An action was brought challenging § 402(g) of the Social Security Act, 42 U.S.C. § 402(g) (1970), which provided that the widow of a deceased husband would be provided survivor's benefits, but that the husband of a deceased wife would not be granted survivor's benefits. The Court held that this was invidious discrimination against women employees and was invalid under *any* equal protection test.).

40. 421 U.S. 7 (1975) (The Court held that a state statute specifying a greater age of majority for males than it specified for females, denied, in the context of a parent's obligation for support payments for his children, equal protection of the laws under *any* test.).

41. 417 U.S. 484 (1974).

that there was no definable group or class being discriminated against by the practice. In *Stanley v. Illinois*,[42] two years later in *Cleveland Board of Education v. LaFleur*,[43] and again in *Turner v. Department of Employment Security*,[44] the Court found that the challenged statutes created irrebuttable presumptions and therefore were constitutionally invalid.[45]

The cases set out immediately above demonstrate the Court's reluctance to face the question of where gender-based classifications fit into the two-tier approach to equal protection analysis. The *Reed, Frontiero, Kahn,* and *Ballard* opinions demonstrate the difficulty the Court has had in settling on a "test" when it has faced the question. The answer to the resulting confusion, is that the Court has been applying neither the traditional rational basis test nor strict judicial scrutiny, but rather some middle tier.[46] Justice Powell has candidly stated that the Court has not applied the traditional rational basis test, declaring "[t]he relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender based classification."[47]

*Craig v. Boren*[48] recognizes a middle tier of equal protection analysis and states the "test" as follows: "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives."[49] A thorough examination of this two-

42. 405 U.S. 645 (1972) (A state statute which provided that the children of an unwed father automatically became wards of the state upon the death of their mother, but where divorced, married or unmarried parents never lost their children without a hearing, was invalid as a violation of the fifth and fourteenth amendments.).

43. 414 U.S. 632 (1974). The Court held that a requirement of mandatory leave from teaching duties for a school teacher who was pregnant was invalid.

44. 423 U.S. 44 (1975). A state statute disallowing the payment of state unemployment compensation to pregnant women for a period starting 12 weeks before birth and ending 6 weeks after birth was constitutionally invalid. The Court here relied on the irrebuttable presumption doctrine even though earlier in the same Term they had rejected that doctrine. *See* Weinberger v. Salfi, 422 U.S. 749 (1975).

45. In Taylor v. Louisiana, 419 U.S. 522 (1975), noted in Krause, *Jury Selection—Sixth Amendment Right to Air Cross Section of the Community—A Change in Emphasis*, 41 MO. L. REV. 446 (1976), the Court found that a state statute which provided that women would not be put on the jury selection rolls, unless they specifically requested such consideration, was unconstitutional. The decision was based on the sixth amendment right to a jury of a fair cross-section of the community as applied to the state through the fourteenth amendment. Here, equal protection analysis of a gender-based classification was not in issue.

46. *See, e.g.*, Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Comment, *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 129-39 (1974); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

47. 97 S. Ct. at 464, *quoted from* the footnote to Justice Powell's concurring opinion.

48. 97 S. Ct. 451 (1976).

49. 97 S. Ct. at 457. Justices Brennan, White, Marshall and Blackmun all

part test is in order. The Court in *Craig* accepted with little discussion "the enhancement of traffic safety" as meeting the requisite important governmental objective.[50] In prior cases the Court has recognized that a goal of offsetting past discrimination is also a valid state objective.[51] As a practical matter this justification for the discrimination arises only where there is a preference for females (*i.e.*, discrimination against males). In the *Craig* opinion the Court rejected classifications drawn because of old notions of the proper role of females in the home and not in the business world or the "world of ideas," as *not* being valid state objectives.[52]

The other state objective which the *Craig* opinion rejects is administrative ease and convenience.[53] Virtually every classification based on gender is a substitute for another trait or characteristic that, but for administrative ease, could be more accurately isolated with individual determinations. The Court could reject the state's proferred objective and declare virtually any gender-based classification invalid as having an objective of administrative convenience. Indeed, there has been some indication that the Court may do just that.[54] This sort of reasoning by the Court is potentially equivalent to the long defunct substantive due process methodology or the irrebuttable presumption doctrine so clearly criticized in *Weinberger v. Salfi*.[55]

In the second half of the *Craig* test, the consideration is whether the classification is substantially related to the valid state objective. The Court in *Craig* considered various statistical evidence of the relation between male and female drinking and traffic safety. They concluded that no substantial relation was shown, and for this reason declared the statute

endorsed the "new test" set out. Justices Rehnquist, Stewart, Powell and Chief Justice Burger applied the rational basis test, although Powell stated that it takes on a "sharper focus" when applied to gender-based discrimination cases. Justice Stevens stated that there is really one equal protection standard. The Stevens standard can be paraphrased as follows: Is the statute objectionable, and if it is, is the proffered justification for the otherwise offensive classification acceptable?

50. In accepting this as the objective of the statute the Court recognized that this may not have been the real objective of the statute. 97 S. Ct. at 458 n.7.

51. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498, 519-20 (1975) (Brennan, J., dissenting); Kahn v. Shevin, 416 U.S. 351, 353-54 (1974).

52. *See, e.g.*, Craig v. Boren, 97 S. Ct. 451, 457 (1976); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Taylor v. Louisiana, 419 U.S. 522, 535 (1975); Reed v. Reed, 404 U.S. 71 (1971).

53. *See, e.g.*, Craig v. Borne, 97 S. Ct. 451, 457 (1976); Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971). *Cf.* Weinberger v. Salfi, 422 U.S. 749 (1975). "The administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining to rely on rules which sweep more broadly than the evils with which they seek to deal." *Id.* at 784.

54. Kahn v. Shevin, 416 U.S. 351, 361-62 (1974) (White, J., dissenting); Stanley v. Illinois, 405 U.S. 645, 653, 657 (1972); Reed v. Reed, 404 U.S. 71, 77-78 (1971).

55. 422 U.S. 749 (1975).

unconstitutional.[56]

The importance to equal protection analysis of this part of the opinion is two-fold. First is the fact that the Court considered statistical evidence at all. When attempting to place just where the new test falls in relation to the previous two parameters of equal protection analysis, this fact tends to put the test closer to strict scrutiny than rational basis. It is a characteristic of the strict judicial scrutiny test that the burden of proof of justifying the classification is on the government. Second, the Court based its decision partially on the fact that there was an "unduly tenuous fit" between the classification drawn and the trait sought to be singled out (*i.e.*, drunken driving). In *Craig*, this arose out of the over-inclusiveness of the classification.[57] Under the traditional "rational basis" analysis the Court has upheld over-inclusive classifications as well as under-inclusive classifications. The Court has rejected over-inclusiveness challenges saying that it is a first amendment doctrine only,[58] and under-inclusiveness challenges because the statute was valid one-step-at-a-time reform.[59] Hence, again the new "test" is dissimilar to the traditional "rational basis" analysis.

Although the Supreme Court opinions have been couched in terms of classifications based on "gender" or "sex", indicating that discrimination against males will be treated the same as discrimination against females, that has not been evidenced by the results. Viewing the Supreme Court cases from *Reed* through *Craig* on a "result-reached" basis reveals the different treatment. In that period nine Supreme Court cases dealing with gender-based discrimination have been decided. Six of these dealt with discrimination against females, and in all six the discriminatory action was found invalid. [60] In both of the cases, excluding *Craig*, dealing with dis-

56. A significant part of the *Craig* opinion was devoted to the effect of the twenty-first amendment on the normal operation of the fourteenth amendment. The state argued that the twenty-first amendment "strengthened" its power to regulate alcohol. Therefore even if the classification was invalid under normal equal protection analysis, it was valid in this instance. The Supreme Court, in essence, said that the twenty-first amendment does mitigate the limitation imposed by the Commerce Clause on the states' ability to regulate commerce, but that it does not qualify the individual rights protected by the Bill of Rights or the fourteenth amendment. 97 S. Ct. at 460-63. Interestingly, the state failed to argue the twenty-first amendment within the context of the equal protection analysis. The argument, here, would be that the "important governmental objective" is the regulation of alcoholic beverages. The statute is, *a fortiori*, "substantially related to the achievement of that objective." Hence, if the Court accepts this objective, the classification would be valid under the new "test" laid out by *Craig*.

57. 97 S. Ct. at 459. "The legislation imposes a restraint on one hundred percent of the males in the class allegedly because about 2% of them have proabably violated one or more laws relating to the consumption of alcoholic beverages." *Id.* at 465.

58. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

59. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

60. In the following cases there was discriminatory state action against females, which the Court ultimately found invalid: Turner v. Dept. of Employment Security, 423 U.S. 44 (1975); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v.

crimination against men, the Court found the discrimination valid.[61]

Because the new test enunciated in *Craig*, developed from prior case law as opposed to being completely contrary to it, that case law is still viable. It is clear that gender-based classifications drawn to further administrative convenience or based on old notions of females' limited role in society will not be valid. It can be concluded that classifications discriminating against females will be more likely held invalid than those discriminating against males. Similarly it can be concluded that the Court has left an avenue of escape from the strict application of the test, *i.e.*, declaring the classifiation's objective to be administrative convenience and therefore invalid. Finally, it should be noted that, although the decision was a convincing 7-2 for invalidation, only four Justices accepted the new test.[62] Hence the question of what equal protection test is applicable to gender-based discrimination cases cannot be deemed entirely settled.[63]

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Wiesenfeld, 420 U.S. 636 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). *Cf.* Geduldig v. Aiello, 417 U.S. 484 (1974). This is a case in which conduct discriminatory on its face against women was held valid. However, the Court did not reach that conclusion by applying equal protection analysis for gender-based classifications. Rather, the Court found that, in this particular case, there was no definable group being discriminated against; hence, there was no violation of equal protection. *See also*, Gilbert v. General Electric Co., 97 S. Ct. 401 (1976) (case brought under TITLE VII of the Civil Rights Act of 1964).

61. Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

62. *See* note 49 *supra*. Califano v. Goldfarb, 97 S. Ct. 1021 (1977), decided as this note was being prepared, bears out the conclusion that the Court is still unsettled as to where gender-based classifications fit into the two-tier approach to equal protection. The case held, in a 5-4 decision with four Justices endorsing the *Craig* test that § 402(f) of the Social Security Act discriminated against covered female employees and was invalid. *See* notes 60 and 61 and accompanying text, *supra*, which were written without reference to *Goldfarb*. *Goldfarb* was factually very similar to Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). *See* note 39 *supra*.

63. Interestingly, despite all the confusion over what "test" to apply, the Court has, in all of the gender-based classification cases since *Reed*, except *Ballard* and *Goldfarb*, been clearly divided as to whom should ultimately win the case.