THE QUEST FOR LEGAL EQUALITY:

GENDER AND EQUAL PROTECTION

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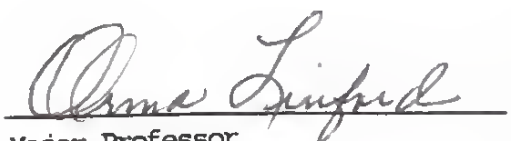

Major Professor

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CHAPTER I

INTRODUCTION

> [T]he principle which regulates the existing social relations between the two sexes — the legal subordination of one sex to the other — is wrong in itself, and now one of the chief hindrances to human improvement; and . . . ought to be replaced by a principle of perfect equality, admitting no power or privilege on one side, nor disability on the other.[1]

When John Stuart Mill wrote those words more than a century ago, he spoke from "the experience of life." Observing the conditions under which women of his day functioned — "the very being or legal existence of the woman [was] suspended during marriage,"[2] women were generally and systematically excluded from educational and professional opportunities — Mill argued for legal equality as an essential first step toward social equality. He saw what few of his contemporaries did, that the slavelike conditions of most women's lives <u>should</u> be changed, and that the appropriate changes could not come about until women were granted full equality under the law: legally barred from any but the most menial employment, women lacked the means to support themselves, were forced into marriage and out of legal existence, a brutal, self-perpetuating cycle.

My purpose here is first to document the recent pursuit by American women of Mill's "principle of perfect equality." I will confine my inquiry to opinions of the United States Supreme Court, to which body we have logically looked for articulation of that principle. I say "logically" because the Court, in recent decades, has shown itself capable -- through novel construction of constitutional text -- of vigorous protection of equal rights for racial minorities.

As the Court has abandoned the presumption of constitutionality of legislative exercises of the broad police power where fundamental individual rights are at issue, so has it infused the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment[3] with power to shield from legislative classifications. In the process of constitutional adjudication, the Court has departed from its traditional "rational relationship" equal protection analysis to require that legislation classifying according to race be essential to attainment of a "compelling public interest." The result of this presumption of invalidity is a nearly absolute prohibition against racial classifications. It was thus not unreasonable to see in the concept of "equal protection" the promise of gender equality.

That the promise of equality of the sexes has not been fulfilled will be fairly readily demonstrated. The more difficult tasks will be to determine <u>where</u> we are, in constitutional terms, in our quest for equality, and <u>why</u>.

Those inquiries require scrupulous analysis of the Court's opinions in cases questioning the constitutionality of gender classifications in a variety of contexts and for a variety of

discernible purposes. Because the body of law is relatively new and is yet "unsettled" on the question of the constitutionality of gender classifications, I will often be no less interested in the rationales offered -- sometimes numerous in a given case, for a given result -- than in the results themselves.

I have chosen, for purposes of illumination, to treat the gender cases in three groups. I will first examine the legacy of legal paternalism as voiced in opinions delivered between 1873 and 1961, for if those cases are no longer good law, neither are they merely a backdrop: the attitudes toward women expressed there inform -- and are at times still embraced by -- individual justices, legislators at state and national levels, and members of the electorate as well.

Next, I will analyze a group of cases decided between 1971, when the Court first invalidated a statutory gender distinction on equal protection grounds, and 1976, when Craig v. Boren[4] announced an intermediate level of equal protection analysis peculiar to gender cases and prevailing today. I have chosen to treat those cases as a discrete body of law for two reasons: First, these are the controversies, arising during a period of feminist activism and coincident with Congress' passage of the Equal Rights Amendment,[5] in which the Court was asked, explicitly and repeatedly, to afford the same constitutional protection from gender classification as had been provided against racial classification.

Second, the years 1971-75 constitute something like "the formative years" in the Court's struggle to decide upon an appropriate constitutional standard in gender cases. Those years and those cases,

then, embody a significant portion of our constitutional history and are thus worthy of special attention.

The third group of cases commences with the Craig decision in 1976, when the struggle with constitutional standards in gender cases may have appeared to have ended. As my analysis of Craig and subsequent cases will illustrate, the Court's confusion did not end there: its consistent (by which I mean only "regular") invocation of the standard established in Craig has not produced a consistent body of law.

Before I turn to examination of the gender cases, however, I must first briefly remind the reader of the Court's fashioning, from the language of the Fifth and the Fourteenth Amendments, a remarkable constitutional protection from discrimination on account of race. Appreciation of the Court's dynamic role in protecting individuals from racial classification is essential to understanding of its treatment of classifications based on sex. Chapters III and IV will describe what the Court has done in cases challenging the constitutionality of gender classifications; Chapter II will suggest what it might have done.

CHAPTER II

EQUAL PROTECTION AND RACE

Early History

Although these United States remained divided in spirit after the Civil War, the system nonetheless continued to work, and vigorously. In the course of a decade following the War, an extraordinary force for national authority manifested itself in the adoption of three constitutional amendments.[6] And although discussion continues on the meaning of particular language and the intentions of particular people, there is no room for debate about the ultimate impact of that period in constitutional terms: there was laid the foundation — some would even say a plan[7] — for federal enforcement of civil rights.

The Court's first construction of the Civil War Amendments came in 1873 with the Slaughterhouse Cases.[8] In the course of deciding there that Louisiana's granting a monopoly to a 17-member corporation did not offend the Fourteenth Amendment, the Court gave meaning to the Equal Protection Clause: "We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class or

an account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other."[9]

Seven years later, the Court invoked the emerging power of the Equal Protection Clause against state statutes excluding Blacks from service on grand or petit juries. Strauder v. West Virginia[10] overturned the murder conviction of a Black man, finding that the Equal Protection Clause implied for Blacks a "right to exemption from unfriendly legislation against them distinctively as colored."

The very promising implication announced by the Strauder court was quickly and severely limited, however, in Plessy v. Ferguson.[11] Upholding there the "separate but equal" doctrine against Thirteenth and Fourteenth Amendment challenges, the Court found no capacity in those amendments to prevent states from assuring the continued "custom" of racial segregation.

The early limits imposed by the Court on the meaning of "equal protection" were paralleled in its review of portions of the first Civil Rights Acts, in cases questioning the authority of the Congress to enforce provisions of the Thirteenth and Fourteenth Amendments. The Civil Rights Cases[12] found no constitutional authority for federal attempts to punish private parties for denying to Blacks equal enjoyment of public accommodations. The Court there construed Sections 1 and 5 of the Fourteenth Amendment as giving Congress the power to prohibit only "State action of a particular character . . . . Individual invasion of individual rights [was] not the subject matter

of the amendment" (emphasis added).[13]

Neither the substance of equal protection nor the federal power to protect Blacks from discrimination posed any real threat to the racist habits and customs of the white majority in the Nineteenth and early Twentieth Centuries. With only a few exceptions, the provisions of federal law designed to enforce the Civil War Amendments did not fare well before the Court, and many were repealed by the Congress.[14]

Plessy's constitutional validation of "separate but equal" gave states a map for continued racist practice: facial neutrality could be assumed to protect state legislation from equal protection challenge. And the Court's finding Congress wanting in constitutional authority to reach any but "[s]tate action of a particular sort" left private individuals free to live and act upon their racist, separatist inclinations.

To avoid constitutional challenge, local governments contrived a myriad of clever devices, in addition to separate facilities, to restrict Blacks in the enjoyment of their fundamental freedoms. Poll taxes, literacy tests, and white primaries, for example, enabled white Americans to defy with impunity the spirit of the Civil War Amendments.

Revolutionary Presumptions: Race and Strict Scrutiny

One might legitimately suppose, reading the historic opinions in Brown v. Topeka Board of Education[15] and Bolling v. Sharpe,[16] that their invalidation of the "separate but equal" doctrine in the field of public education followed a long line of decisions compelling their result. On the contrary, in Brown and Bolling, the Court gave dramatic

and concrete effect to a gradual, profoundly important evolution in equal protection doctrine. The shift brought home in those decisions amounted to nothing less than a shift in the constitutional "balance of power": the traditional deference to the legislatures, with its presumption of the constitutionality of legislative enactments, was gone. In its place was a declaration that all classifications based upon race were constitutionally "suspect" and subject to "strict scrutiny."

To be sure, Brown did not create suspect classifications and strict scrutiny. Korematsu v. U.S.,[17] which in 1944 upheld the exclusion of citizens of Japanese ancestry from certain areas on the West Coast during World War II, had announced that "all legal restrictions which curtail[ed] the civil rights of a single racial group [were] immediately suspect." In 1886, Yick Wo v. Hopkins[18] had overturned a criminal conviction because officials had enforced an ordinance forbidding the operation of laundries in frame buildings only against Chinese laundrymen. But Yick Wo, decided ten years before Plessy, clearly did not rest on the strict judicial scrutiny so unselfconsciously undertaken by the Brown Court.

The judicial and textual power given such enormous, practical effect by Brown and many cases in its wake were drawn less from precedent directly on point than from a kind of sense and momentum of the times. During the two decades preceding, the Court had granted relief to four Blacks who challenged, in effect, the "equal" portion of "separate but equal" in the context of higher education.[19] The reach of the Fifteenth Amendment, protecting citizens' right to vote from

state and federal infringement, had been expanded to prohibit white primaries.[20] Private contracts forbidding the sale of property to Blacks, because they depended on state courts for their enforcement, were found to violate the Equal Protection Clause.[21] And in cases not involving race, the Court had abandoned the presumption of constitutionality of legislation in cases involving restrictions of the exercise of fundamental rights.[22]

In the years after Brown, the Court redefined -- in constitutional litigation — the state action requirement of Section 1 of the Fourteenth Amendment: a coffee shop leasing space in a parking facility built and managed by a state agency was "an integral part of a public building devoted to a public parking service" and could not discriminate on the basis race;[23] the "public character" of a municipal park could thwart the segregationist purposes of a private will;[24] a state constitutional provision authorizing discrimination in the sale or rental of housing "involved the State in racial discriminations" and thus offended the Fourteenth Amendment.[25]

As it was prepared to construe "state action" broadly for Fourteenth Amendment purposes, so was the Court willing to construe broadly Congress' powers in cases involving contemporary versions of the Civil Rights Acts: the Commerce Clause afforded Congress ample authority to prohibit racial discrimination in a barbeque joint in Birmingham,[26] a motel in Atlanta,[27] a second-rate amusement park near Little Rock.[28]

Whatever its sources, then, the meaningful declaration that race was a suspect classification in the context of public education can now

be seen as having had phenomenal -- indeed unique -- effect in this constitutional republic. The interplay of the Court's subsequent opinions construing the Equal Protection Clause and enactments of successive sessions of Congress resulted in something like a federal "search and destroy" mission on the question of discrimination on account of race.

It was well after the Court's opinions on race had inserted the federal district courts and the United States Attorney General into local, day-to-day matters that the Court was asked to rule upon the constitutionality of racial classifications undertaken for a remedial purpose. In 1978, the Court decided Regents of California v. Bakke,[29] a case challenging the affirmative action admissions program of the Medical School of the University of California at Davis. For present purposes it is sufficient to note that a majority of the sharply-divided Court deemed racial classifications "suspect," but explicitly allowed for consideration of race in future admissions policies.

Even in the context of affirmative action, then, racial classifications retained their "inherent suspectness." A 200-year history of brutal and systematic exclusion of Blacks from the mainstream of American life could not spare this racial classification, with its admittedly wholesome intentions, from strict constitutional scrutiny.

No wonder, then, that proponents of full constitutional protection from discrimination on account of sex saw in the Court and the Equal Protection Clause the potential for realization of full equality of

rights. The failure to realize that potential is the substance of the next chapters.

CHAPTER III

GENDER AND EQUAL PROTECTION: THE "SPECIAL" CASE

The Legacy of Legal Paternalism

Within a few years of the publication of Mill's The Subjection of Women, the United States Supreme Court decided Bradwell v. Illinois.[30] One Myra Bradwell, upon being denied a license to practice law by the Supreme Court of Illinois solely because she was female, brought suit challenging that denial as a deprivation of the "privileges and immunities" of citizenship protected from state interference by the Fourteenth Amendment.[31]

More interesting for present purposes than the Court's conclusion that admission to the bar was not a "privilege or immunity" of U.S. citizenship protected from state interference by Section 1 of the Fourteenth Amendment is the attitude toward women betrayed in Mr. Justice Bradley's concurring opinion:

> [T]he civil law, as well as Nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. 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 the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[32]

In 1874 the Court decided yet another case, with more devastating effect to the cause of equality of rights for women.[33] Virginia Minor brought suit claiming that her right to vote was a privilege and immunity of citizenship protected by the Fourteenth Amendment. The Court, however, disagreed, and, as in Bradwell, the tone of the opinion is as interesting as the rule of law: although women were certainly "persons" within the meaning of the Fourteenth Amendment, and although they might be citizens, the Constitution did not guarantee them the right to vote. After all, reasoned the Court, children were persons and citizens and they could not vote!

Whatever "equality" meant during the Nineteenth Century, it did not prevent the systematic exclusion of women from certain employment, and, more importantly, from the polling place. And though women earned the vote in 1920 with the Nineteenth Amendment, the unselfconsciously paternalistic attitude of the Court carried well into the Twentieth Century.

Shortly after the turn of the century, the Court decided Muller v. Oregon,[34] a case challenging the validity of an Oregon statute restricting the hours women could work in laundries to ten per day. The full significance of Muller to women's rights can only be understood when it is viewed against Lochner v. New York,[35] a case decided three years earlier.

At issue in Lochner was a provision of the New York Code restricting the number of hours a baker could work to ten a day and 60 in a week. The Court rejected the State's claim that the statute was a reasonable exercise of its power to legislate for the public health and the health of individual bakers, and found instead that the statute, contrary to the Due Process Clause, was an unconstitutional interference with ". . . the freedom of master and employee to contract with each other in relation to their employment. . . (emphasis added).[36]

Then came Muller, questioning the constitutionality of a provision of the Oregon Code very much like the one struck down in Lochner, except that the statute in Muller spoke only to women's labor. The Court's upholding the Oregon statute, while explicitly affirming its decision in Lochner, required its distinguishing not statutes, but people, male and female, and effectively defining for us "the female condition":

> [W]oman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued . . . . [S]he has been looked upon in the courts as needing especial care . . . . [S]he is not an equal competitor with her brother . . . . [T]here is that in her disposition . . . which will operate against a full assertion of those rights . . . . [S]he is properly placed in a class by herself. . . . [S]he is so constituted that she will rest upon and look to him for protection . . . (emphasis added).[37]

It is not surprising that, in the cases after Muller challenging similar state statutes, there appeared only one female employee

complainant; all other cases were brought by employers charged with violating statutes regulating hours of work for women.[38]

Forty years later, in Goesaert v. Cleary,[39] the Court considered the constitutionality of a Michigan statute forbidding the licensing of female bartenders, except wives or daughters of male tavern owners. It is worth noting here, although the attempt failed, that the Goesaert challenge rested on a claim of denial of the Equal Protection of the Laws guaranteed by the Fourteenth Amendment. Applying the standard rational relationship test, and in an opinion that clearly viewed the claim as trivial, the Court found the statute constitutionally sound.

As late as 1961, the Court gave legal voice to blatantly sexist attitudes in its opinion in Hoyt v. Florida.[40] Arising as it did from the assertion of a defendant's right to a jury trial, the case did not present an uncomplicated gender claim. Gwendolyn Hoyt unsuccessfully challenged there her criminal conviction, claiming a Florida jury statute granting women, as women, an absolute exemption from jury duty, unless they voluntarily registered for jury service, violated her rights as a defendant under the Fourteenth Amendment. The opinion is nonetheless valuable here, for its illumination of the judicial attitude toward women:

> Despite the enlightened emancipation of women from the restrictions 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 home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to

> conclude that a woman should be relieved from the civic duty of jury service . . . .[41]

I will leave for the final chapter discussion of the relevance of that very recent example of presumptions of the "proper" and "preferred" role of women. For the moment I only suggest that the reader consider the similarities between this vision of women and that of the benevolent, paternalistic slaveholder toward Black Americans.

In Search of a Contemporary Standard

It was the prestigious and influential California Supreme Court which first opened the possibility of constitutional protection from gender discrimination similar to that afforded in cases involving race. In 1971 that court considered the constitutionality of a state provision prohibiting women from tending bar unless they or their husbands held the liquor license.

Concluding in Sail'er Inn v. Kirby[42] that a statute involving the fundamental right of lawful occupation and classifying persons on the basis of sex demanded strict scrutiny, that opinion gave eloquent voice to the call for full constitutional protection from gender discrimination: "Sex, like race or lineage, is an immutable trait, a status into which the class members are locked by the accident of birth." And later: "The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."

A detailed look at a United States Supreme Court opinion of the same year, however, reveals the early ambivalence of that body on the question of gender classification. Challenged in Reed v. Reed[43] was an

Idaho statute giving mandatory preference, within given statutorily-defined entitlement classes, to male over female applicants to administer estates. The Court struck down the statute as violative of the Equal Protection Clause, but not, as Sally Reed's attorneys had urged, because sex was, like race, a suspect classification. The Court found instead that the statute had "establish[ed] a classification subject to scrutiny under the Equal Protection Clause" (emphasis added),[44] and, under a rational relationship test, had failed to survive that scrutiny.

The Reed Court found that the first of Idaho's objectives, "merely to accomplish the elimination of hearings on the merits, [was] the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . ." (emphasis added).[45] Noting that a companion statute had the objective of "establish[ing] degrees of entitlement of various classes of persons in accordance with their varying degrees of relationship to the intestate," the Court found "persons within any one of the enumerated classes . . . similarly situated with respect to that objective" (emphasis added).[46]

The unanimous Reed Court had made a subtle but profoundly important shift. All legislation classifies and all judicial review of legislation is, in fact, judicial "scrutiny." But the use of the word "scrutiny" had theretofore been reserved to cases involving suspect classifications or interference with the exercise of fundamental rights, and had triggered application of a "compelling interest" test. In Reed, the Court made the classification itself an issue, but then subjected it to the traditional rational relationship test.

I call attention to this hybrid of constitutional standards, endorsed by all eight of the justices participating, as an example of judicial confusion, or at least a failure of judicial clarity. And as later reliance on Reed will show, that confusion was neither static or innocuous.

Two years later, in Frontiero v. Richardson, four members of the Court followed the lead of the California Supreme Court's Sail'er Inn decision. An opinion written by Mr. Justice Brennan and joined by Justices Douglas, White, and Marshall concluded "that classifications based upon sex, like classifications based upon race, alienage, or national origin [were] inherently suspect, and must therefore be subjected to strict judicial scrutiny."[47]

The questioned federal statute required female -- but not male -- armed forces members seeking increased quarters allowances and spousal benefits to prove that their spouses were dependent on them for one-half of their support. Eight justices joined the Court's judgment that the statute was offensive to the so-called "equal protection prong" of the Fifth Amendment's Due Process Clause, but there were two concurring opinions.

The concurring opinions in Frontiero deserve special attention. They are alike in their reliance on Reed as authority for the result, but different in substance. Mr. Justice Stewart very tersely noted invidious discrimination and cited Reed.[48]

Mr. Justice Powell's opinion, on the other hand, joined by Chief Justice Burger and Justice Blackmun, explicitly rejected the Brennan rationale, finding it "unnecessary for the Court in [that] case to

characterize sex as a suspect classification, with all of the far-reaching implications of such a holding."[49] Asserting further that Reed had not added sex to the list of suspect classifications, Justice Powell argued that the Court should "reserve for the future any expansion of its rationale."[50]

Of particular interest is this language from Justice Powell's opinion:

> There is another, and I find compelling, reason for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted would resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States . . . . [T]his reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes (emphasis added).[51]

Ironically, Justice Brennan's argument for suspect classification also relied on the ERA: ". . . Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal brand of Government is not without significance to the question . . . under consideration."[52]

The lack of a clear majority on the precise ground for the Frontiero ruling posed a question to legal observers and practitioners as to its precedential value; the question would not wait long for an answer. A year later, in Kahn v. Shevin,[53] an opinion by Mr. Justice Douglas representing the views of six members of the Court signaled a clear retreat from Frontiero. Upholding a Florida statute granting an automatic property tax exemption to all widows against an Equal

Protection challenge, the opinion found the statute "reasonably designed to further a state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss [imposed] a disproportionately heavy burden."[54]

Especially disturbing about the Kahn majority opinion are the conspicuous absence of any mention at all of "suspectness" and its compelling interest companion, and the fact that Justice Douglas wrote the opinion. A mere eleven months after his agreement in Frontiero that sex was a suspect classification, he found the simple "reasonableness" of the Kahn statute adequate to sustain the constitutionality of its gender classification.

It is true that the majority opinion in Kahn evidenced particular concern for the remedial intent of the statute, that is, to compensate women as a class for their economic hardships as a class. But as Justice Brennan's dissenting opinion made clear, respect for that remedial intent did not preclude application of strict scrutiny.[55] He in fact argued persuasively that "the need for remedial measures" was compelling, while concluding that the Florida measure, because it benefitted widows who were not in fact needy, lacked the precision necessary to survive that most stringent constitutional test.

The Kahn majority allowed the intent of the measure to do what intent could never do in a race case, govern the choice of constitutional standard. In race cases, the very existence of a classification -- intentions notwithstanding -- compels application of strict scrutiny.

Two other opinions from 1974 offer further evidence of the Court's

refusal to construe the Equal Protection Clause broadly in gender cases. The first considered the constitutionality of the lengthy, mandatory maternity leave policies of school districts in Chesterfield County, Virginia, and Cleveland, Ohio.[56] Federal appellate courts had issued contradictory rulings on the similar policies, on equal protection grounds.

The Supreme Court ignored completely the equal protection claims, finding instead that forcing pregnant teachers to take unpaid leave at four or five months unfairly and unnecessarily interfered with their "freedom of personal choice in matters of marriage and family life." The Court found that the rules created an "irrebuttable presumption" and thus could not survive the more stringent constitutional test triggered by infringement of a basic freedom protected from state interference by the Due Process Clause of the Fourteenth Amendment.[57]

It is worth noting that the Court explicitly approved the Chesterfield County re-employment rules, which provided, in part, that a teacher would be eligible for re-employment upon written notice from her physician of fitness, "and when she [could] give full assurance that care of the child [would] cause minimal interference with job responsibilities."[58]

No member of the Court noticed the presumption implicit in that rule, namely, that babies -- and their "interference potential" -- were the responsibility not of parents, but of mothers.

Pregnancy was again at issue at Geduldig v. Aiello,[59] decided six months after La Fleur. Challenged there was the State of California disability insurance program which excluded coverage for normal

pregnancy. (At its inception, the plan had excluded all pregnancy-related disability, but litigation in the California courts had resulted in a narrowing of the exclusion.)[60]

The Court, in concluding that the plan's exclusion of pregnancy did not establish a gender classification at all, betrayed a dismissive attitude: "The lack of identity between the excluded disability and gender as such becomes clear upon the most cursory analysis. The program divides potential recipients into two groups -- pregnant women and non-pregnant persons."[61]

Although the Geduldig majority failed to take this equal protection challenge seriously, the three dissenting justices did. By limiting disabilities for which women could recover while giving men full compensation for all disabilities, even those affecting only men, California had created a double standard.

Moreover, warned the dissent, "[t]he Court's decision threaten[ed] to return men and women to a time when 'traditional' equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex."[62]

The passionate call by the Geduldig dissenters for a finding of "suspectness" is more than a little curious, however, when viewed against their stances in La Fleur. All had joined that majority opinion (although Mr. Justice Douglas had felt compelled to concur with the result and without comment), and none had noticed its reliance on Due Process -- instead of Equal Protection -- grounds.

If three 1975 opinions failed to establish any firm standards for gender discrimination cases, that very failure served to crystallize

what Kahn and successive cases had suggested, that the Court did not view gender classification in anything like the same light as it viewed racial classification.

Schlesinger v. Ballard[63] upheld as "rational" a federal statute granting longer "up and out" time for female than for male naval line officers. Distinguishing that statute from those at issue in Reed and Frontiero which "were premised on overbroad generalizations," the Court found that the Schlesinger statute rested "instead on the demonstrable fact that male and female line officers in the Navy [were] not similarly situated with respect to opportunities for professional service."[64]

In Schlesinger, once again, the Court allowed asserted intent to define the constitutional standard. The same immediate result might well have obtained under application of strict scrutiny, especially in view of the Court's deference to Congress' constitutional authority over the armed forces.

Whatever hope the Schlesinger dissenters might have offered for a more powerful construction of the Equal Protection Clause vanished with the Stanton v. Stanton[65] opinion in which they all joined. In an opinion delivered only three months after Schlesinger, the Stanton majority, citing Reed, explicitly refused to decide whether a classification based on sex was inherently suspect. The challenged statute, which established different ages of majority for males and females, could not "under any test -- compelling state interest, or rational basis, or something in between . . . in the context of child support . . . survive an equal protection attack."[66]

A month before, in Weinberger v. Weisenfeld,[67] the Court had found a section of the Social Security Act "indistinguishable from that invalidated in Frontiero,"[68] and violative of the Due Process Clause right to equal protection.

Of the eight members participating and agreeing, for one reason or another, that the statute at issue in Weinberger was invalid, only Justice Powell and Chief Justice Burger insisted that the discrimination worked by the statute was against female wage earners. Mr. Justice Rehnquist found the statute simply irrational. The majority opinion found "entirely irrational" the discrimination "among surviving children solely on the basis of the sex of the surviving parent" (emphasis added).[69]

If the first half of the 1970's did not produce constitutional doctrine preventing discrimination on account of sex, there occurred then at least a judicial "change of heart" on the matter of automatically exempting women from jury duty. Taylor v. Louisiana[70] challenged a Louisiana criminal conviction on the ground that the defendant's right to trial by an impartial jury, protected by the Sixth Amendment, had been denied.

Concluding that "[t]he right to a proper jury [could] not be overcome on merely rational grounds,"[71] and finding that the all-male venires at issue were not fairly representative of the local population and therefore could not produce "proper" juries, the Court overturned Taylor's conviction.

Although Taylor clearly does not "fit" with the other cases at hand, it is worthy of mention for its rejection of the argument that

women played a distinctive role in society that justified their exemption,[72] and especially for the example it affords of the Court's willingness to strain the traces of federalism where a fundamental right is at issue.

The table on page 26 gives summary visual effect to the Court's ambivalence during these early years of consideration of the reach of the Equal Protection Clause where gender classifications were at issue. I have excluded La Fleur because the Court ignored the equal protection question raised there, and Taylor, for obvious reasons. I have also deliberately ignored distinctions among majority, concurring, and dissenting positions. For the present purpose of distinguishing equal protection analyses, that data is, I believe, irrelevant.

The Table on page 27 considers the same cases through the lens of federalism, and clearly shows that judicial deference to the principles of federalism cannot explain the Court's actions in these gender cases.

As the tables illustrate, the Court was not prepared either to deem sex a suspect classification subject to strict scrutiny or to view sex in precisely the same light as it had legislative classification subjected to the traditional rational relationship test. There is simply no escaping the fact that by 1975 a noticeably uncomfortable Court wanted a standard for gender cases. Unfortunately, as the next chapter will demonstrate, "simple" articulation of a new standard would not yield a standard capable of simple definition or application.

Table I

Levels of Equal Protection Analysis Applied by Individual Justices in Seven Constitutional Gender Cases, 1971-75

	Brennan	Blackmun	Burger	Douglas	Marshall	Powell	Rehnquist	Stewart	White
1971									
Reed	T+	T+	T+	T+	T+	T+	T+	T+	T+
1973									
Frontiero	S	T+	T+	S	S	T+	N	T+	S
1974									
Kahn	S	T+	T+	T+	S	T+	T+	T+	S
Geduldig	S	T	T	S	S	T	T	T	T
1975									
Schlesinger	S	T+	T+	S	S	T+	T+	T+	S/N
Weinberger	T+	T+	T+	O	T+	T+	T+	T+	T+
Stanton	T+	T+	T+	T+	T+	T+	N	T+	T+

T = Traditional/rational relationship
T+= Traditional/rational relationship + per Reed
S = Strict scrutiny/compelling interest
N = Standard not discernible or case disposed of on other grounds
O = Not participating

TABLE II

A Comparison of the Levels of Equal Protection Analysis Applied by Individual Justices in Cases Challenging the Constitutionality of State and Federal Statutes

	State Statutes									Federal Statutes								
1971																		
Reed	-	T+	T+	T+	T+	T+	T+	T+	T+	T+								
										1973								
										Frontiero	-	T+	T+	T+	T+	S	S	S	S	N
1974																		
Kahn	-	T+	T+	T+	T+	T+	T+	S	S	S								
Geduldig	-	T	T	T	T	T	T	S	S	S								
1975										1975								
Stanton	-	T+	T+	T+	T+	T+	T+	T+	T+	N	Schlesinger	-	T+	T+	T+	T+	T+	S	S	S	S/N
										Weinberger	-	T+	T+	T+	T+	T+	T+	T+	T+	O

T = Traditional/rational relationship
T+ = Traditional/rational relationship + per Reed
S = Strict scrutiny/compelling interest
N = Standard not discernible or case disposed of on other grounds
O = Not participating

CHAPTER IV

GENDER AND EQUAL PROTECTION: THE INTERMEDIATE STANDARD OF REVIEW

INTRODUCTION

The "something in between" to which the Stanton[73] majority alluded (and to which the Court, since Reed, had in fact frequently resorted) was made explicit in 1976. Craig v. Boren[74] found a pair of Oklahoma statutes forbidding the sale of 3.2 beer to females under the age of 18 and to males under the age of 21, offensive to the Equal Protection Clause of the Fourteenth Amendment.

The Craig court announced "that classifications by gender must serve important governmental objectives and must be substantially related to those objectives."[75] Then, applying its variation of simple scrutiny and accepting as "important" Oklahoma's objective -- traffic safety -- the Court found the statutes nonetheless flawed, because the relationship between the classification and the objective was not sufficiently "substantial."

Application of this substantial relationship portion of the test

required the majority's engaging in activity not commonly undertaken by the judiciary, namely, critique of the state's statistical rationale. After asserting that it was "unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique,"[76] the opinion ironically rested on "the obvious methodological problems"[77] of Oklahoma's surveys, and the "unduly tenuous 'fit'"[78] between gender and arrests for driving under the influence.

Although there were only two dissents from Craig, there were six separate opinions,[79] four of which expressed serious reservations about the majority's standard of equal protection analysis.[80] Those reservations notwithstanding, however, the standard articulated in Craig prevails today.

The balance of this chapter will be devoted to examination of the application of Craig's "diaphanous and elastic"[81] standard in subsequent cases. With the exception only of one women's rights case,[82] which presented a right of action question, not an equal protection challenge to legislative classification, I will analyze each opinion in search of some common basis in logic for the Court's various definitions of "substantial" and "important."

I will treat the controversies in five categories. Most cases involve differential treatment of men and women as wage earners and survivors of wage earners. Others challenge different treatment of males and females as parties in marriage and divorce, as parents of illegitimate children, as students in professional school, and as persons and citizens.

Men and Women as Wage Earners and Survivors of Wage Earners

Barely three months after the Craig decision, the Court decided Califano v. Goldfarb.[83] At issue there were provisions of federal social security legislation automatically granting survivor's benefits to widows of covered workers, but requiring widowers to prove that they had depended on their deceased spouses for one-half of their support.

Explicitly invoking the Craig standard,[84] the Court looked carefully at the legislative history of the provision for the requisite important governmental objective. Noting that the act had no compensatory purpose,[85] that it was clearly intended to provide for dependent (as opposed to needy) survivors,[86] and that the presumption of wives' dependency was based on "'archaic and overbroad generalizations,'"[87] the Court invalidated the legislative classification.

Days later, the Court upheld a section of the social security acts that until 1972 had permitted women to exclude, for purposes of average monthly wages and benefit calculation, three more lower earning years than could men of the same age.[88]

In a per curiam opinion the Court found that "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women [had] been recognized as . . . an important governmental objective."[89]

As interesting for present purposes as the result in Webster is the very terse concurring opinion,[90] which, by relying on Mr. Justice Rehnquist's dissent in Goldfarb,[91] evidenced fundamental, lingering questions about an appropriate equal protection standard in gender

cases. That dissent had insisted that, at least in the area of social insurance, simple rationality and administrative convenience were sufficient to sustain gender classifications against equal protection challenge.

It is surprising, then, that in Califano v. Westcott,[92] decided only two years later, there was apparent unanimity on the question of the proper level of equal protection analysis. The separate opinion filed by four justices concurred with the finding of unconstitutionality, dissented only from the remedy ordered, and made no mention whatever of equal protection standards.[93]

Although the Westcott opinion showed agreement on the appropriate equal protection standard, it exemplifies particularly well the complexity and difficulty of that standard in practice. At issue again was a provision of federal social security law, in this instance, assistance to families with children made needy by a father's unemployment.

Readily agreeing that sustenance for children and promotion of family stability were important governmental objectives, the Court went on to describe the legislative burden required to sustain such a classification. The HEW Secretary's assertion of "'solid statistical evidence' that fathers [were] more susceptible to pressure to desert than mothers"[94] was found lacking. The required showing, said the Court, was "that a father [had] less incentive to desert in a family where the mother [was] the breadwinner and [became] unemployed, than in a family where the father [was] the breadwinner and [became] unemployed."[95]

I highlight this opinion and this language because, although it contains no mention of presumptions per se, there is certainly imbedded in it a presumption of unconstitutionality. And, given the challenge of amassing the sort of statistical support the Court deemed necessary for establishment of the "substantial relationship," a presumption not easily overcome.

A year after Wescott, the Court considered gender classification in a state social insurance program. Wengler v. Druggists Mutual Insurance Co.[96] challenged a provision of the Missouri workers' compensation laws requiring of widowers, but not widows, proof of dependency or mental or physical incapacity in order to claim survivors' benefits after work-related spousal death.

Although "[p]roviding for needy spouses [was] surely an important governmental objective,"[97] Missouri failed to show that its discrimination substantially served that end. Once again, a presumption of unconstitutionality was implicit in the opinion. The Court not only spoke directly to "[t]he burden . . . on those defending the discrimination to make out the claimed justification" (emphasis added),[98] its ensuing discussion infused the "substantial relationship" language with great power. The question in Wengler was not really whether the classification was "substantially related" to Missouri's objective, but whether it was, in fact, essential, whether Missouri could accomplish its wholesome purpose without gender classification.

The most recent equal protection challenge to gender classification in the context of social insurance was decided in 1984.

Heckler v. Matthews[99] sustained Congress' temporary revival of a gender classification invalidated seven years earlier by Goldfarb.

The gender classification at issue extended to all widows and wives of disabled or retired workers, for a five-year period, an exception to Congress' pension offset plan, while requiring that husbands and widowers qualify for the exception by proving dependence.

Finding Congress' objective was "to protect reliance on prior law, not to reassert the sexist assumptions rejected in Goldfarb,"[100] the Court had "little trouble concluding that the means employed by the statute [were] 'substantially related to the achievement of [that] objective.'"[101]

The remaining case in this section presented a claim very different from those discussed thus far, and did not arise in the context of social insurance. Personnel Administrator of Massachusetts v. Feeney[102] challenged the state's veteran's preference because it had the effect of freezing women out of the best of Massachusetts' civil service positions.

Acknowledging that "[t]o the extent that the status of veteran [was] one that few women [had] been enabled to achieve, every hiring preference for veterans . . . [was] inherently gender-biased,"[103] the Court nonetheless sustained the statute. Appellee Feeney failed to persuade the majority that a discriminatory purpose could be inferred from Massachusetts' knowledge of its statute's "natural and foreseeable," even "inevitable" consequence, the foreclosing of employment opportunities for women.[104]

Men and Women as Parties in Marriage and Divorce

In a 1979 case, the Court invalidated Alabama statutes providing that men, but not women, could be required to pay alimony.[105] One Mr. Orr had challenged the provision as an unconstitutional denial of equal protection during a contempt proceeding resulting from his failure to make payments to his ex-wife.

The Court determined that Alabama could have two constitutionally permissible objectives: to provide for needy ex-spouses, or to compensate women for discrimination in marriage. The remaining question was, then, whether the state could use sex as a proxy for need. Noting that Alabama already required individualized hearings on divorcing parties' relative financial circumstances, the Court found the statutory distinction "perverse" in its results,[106] and unconstitutional.

By the time the Court decided Kirchberg v. Feenstra,[107] the Louisiana statute challenged there had been repealed, and the state had withdrawn from the litigation. That statute had granted to husbands exclusive authority over community property, an authority Mr. Feenstra had exercised in 1974 when he unilaterally signed over an interest in the couple's jointly-owned home to Kirchberg, an attorney, as security for Kirchberg's representing him in a criminal matter.

Ms. Feenstra's constitutional challenge to the "head and master" statute arose in an action under the federal Truth in Lending Act, an action commenced by Kirchberg subsequent to his foreclosing on the mortgage.

The Kirchberg opinion contributes nothing to an elucidation of

equal protection standards generally, or the Craig standard in particular. I have included it, however, for the examples it affords of the obnoxious "state of state law" and the mindset of some members of the federal bench barely a decade ago. It was 1977 when the District Court summarily dismissed Ms. Feenstra's constitutional claim and described it as an attack on "'the bedrock of Louisiana's community property system . . . .'"[108]

Men and Women as Parents of Illegitimate Children

Two of the three opinions in cases involving differential treatment of men and women as parents of illegitimate children were delivered on the same day and employed, somewhat remarkably, different constitutional tests. At issue in Parham v. Hughes[109] was a Georgia statute which permitted mothers of illegitimate children to sue for the wrongful death of a child, but allowed fathers of illegitimate children to sue only if there was no mother and the father had legitimated the child.

Although the majority cited Craig and many other gender cases, the opinion lacked any mention of the particular language of Craig. It instead began with "[t]he threshold question . . . whether the Georgia statute [was] invidiously discriminatory."[110] Then, finding that "the statutory classification [did] not discriminate against fathers as a class but instead distinguish[ed] between fathers who [had] legitimated their children and those who [had] not,"[111] the Court found the statute rationally related to an acceptable state objective and therefore constitutional.

The Caban v. Mohammed[112] opinion of the same day did apply the Craig test. Caban challenged a New York statute effectively granting to unwed mothers -- but not unwed fathers -- the right to block adoption of their children by withholding consent. Action consistent with that statute had permitted the mother of Caban's children and her husband to adopt the children, although he had "established a substantial relationship with the child[ren] and [had] admitted paternity . . . ."[113]

Although giving great weight to the state's interest in promoting the well-being of illegitimate children and preventing undue delay in adoption, the Court rejected the state's justifications for its gender distinction. That distinction, said the majority, was not "required by any universal difference between maternal and paternal relations at every phase of a child's development,"[114] and thus bore no substantial relationship to the state's asserted interests.

Four years later the Court rejected the equal protection claim of another New York unwed father.[115] The provisions challenged gave to the mother of an illegitimate child the rights to veto an adoption and to prior notice of any adoption proceeding, while affording those rights to only certain fathers.[116] It is apparent that New York had noticed and seized upon the "loophole" suggested by the majority in Caban.[117]

Lehr's 28-month-old daughter had been adopted by the child's mother and her husband, even as he awaited action on his visitation and paternity petition. The majority, obviously heavily influenced by the fact that Lehr had not established a relationship with his child,[118]

had little difficulty finding the requisite substantial relationship between New York's gender distinction and its interest in "prompt and certain adoption procedures."

Men and Women as Students in Professional School

In his sharp dissent from the decision in Mississippi University for Women v. Joe Hogan, Justice Louis Powell accused the Court of "frustrat[ing] the liberating spirit of the Equal Protection Clause."[120] From his point of view, the decision had the effect of depriving women of the choice of sex-segregated nursing education.

The suit had been brought by a practicing male nurse, Joe Hogan, after he was denied admission to the nursing baccalaureate program solely on the basis of his sex. Although Mississippi offered two coeducational nursing programs at other locations, Mr. Hogan wished to pursue a degree in the city where he lived and worked.

The majority opinion, written by Justice Sandra Day O'Connor, appears at first glance to involve a routine application of the Craig standard, in that it begins with examination of the state's objectives and ends with analysis of the relationship between the gender distinction and those objectives. But more careful reading reveals a radical shift in judicial attention from the short- to the long-term causes and implications of the gender classification.

Justice O'Connor's reliance on evidence of the traditional female "ownership" of nursing and the ANA's claim that exclusion of men from nursing depressed nurses' wages[121] demonstrated that hers was not the customary judicial interest in "archaic and overbroad generalizations":

"...MUW's policy of excluding males from admission to the School of Nursing tend[ed] to perpetuate the stereotypical view of nursing as an exclusively woman's job." Moreover, she said, the policy "[lent] credibility to the old view that women, not men, should become nurses, and [made] the assumption that nursing is a field for women a self-fulfilling prophecy" (emphasis added).[122]

The opinion introduced novel considerations to the Court's continuing struggle with gender discrimination. For the first time, a majority acknowledged -- albeit implicitly -- the power of socialization, the devaluation of women's work, and the connection between the two.

To the dissenters' claim of a "frustrated liberating spirit," the majority effectively said: "The 'choice' you cite is not choice at all; it is the product of historic, discriminatory stereotypes, and permitting its continuation would assure perpetuation of those stereotypes."

The Craig analysis, as applied in Mississippi U., had become a decidedly feminist analysis.

Males and Females as Persons and Citizens

With the exception only of Craig, every case in this chapter has dealt with men and women as they were, if you will, caught in the act of playing particular roles. They have found men and women behaving and affected as workers, students, parents, spouses, ex-spouses, and surviving spouses.

The cases in this section, on the other hand, view men and women

in a very different light. And though they involve unrelated statutes and fact situations, they are alike in an essential way: each involves legislation that, at bottom, distinguishes between males and females as beings, as responsible members of society.

Michael M. v. Sonoma County Superior Court[123] upheld a California law that made only men criminally liable for statutory rape. Michael M. was charged under the statute when he was 17 1/2 years old for having had intercourse with a 16 1/2-year-old girl.

Applying the Craig analysis, the majority easily deferred to the legislative judgment that prevention of teen-age pregnancy was an important governmental objective (in spite of evidence offered by the dissent that protection of girls' "virtue" was apparently the state's actual objective).[124] The opinion then permitted the State of California -- operating under a significantly lighter burden than had the State of Missouri in Wengler -- to establish the substantial relationship nexus by the mere assertion that a gender neutral law would be more difficult to enforce.

The result in Michael M. was constitutional approval for the codification of a vision of young women as passive and in need of special protection because they have the capacity to become pregnant. Males, even minor males, can be assigned sole, criminal responsibility because they have the capacity to "cause" pregnancy. All girls, as "potentially-pregnant persons," are found to labor under a special burden imposed by Nature. And the state can constitutionally equalize that biological burden by imposing on males -- but not females -- a criminal burden for participation in the act that causes pregnancy!

Like Michael M., Rostker v. Goldberg[125] considered differential treatment of men and women as responsible individuals. Unlike Michael M., the statutory distinction in Rostker was between adult men and women in relation to their national government. The case sustained federal legislation distinguishing males' and females' obligations to serve their country.

In light of Congress' explicit textual responsibility to provide for the national defense, the Rostker majority's extreme deference to the legislature was entirely predictable. What was not so predictable was the Court's reduction — under a Craig analysis -- of the government's burden in establishing the necessary substantial relationship between discrimination and governmental objective.

Six members of the Court found Congress' exemption of women from registration for the draft constitutionally permissible. To do so required their dismissing the fact that then President Carter had requested the registration of women as well as men, and ignoring Congressional testimony by all four branches of the armed forces that registration of women was consistent with military readiness.

TAKING STOCK

In a discussion of traditional equal protection analysis, Leslie Friedman Goldstein has described the "reasonableness" portion of that analysis as "accordionlike."[126] Her term applies particularly well to the "substantial relationship" prong of the Craig test.

The foregoing discussion has demonstrated that the Court, although now agreeing -- at least superficially -- on the level of scrutiny

applicable in gender cases, interprets the demands of that scrutiny very differently from case to case. At times the government is required to demonstrate that its objective could not be accomplished with gender neutral legislation;[127] at others, the legislative burden virtually disappears, and rationality alone suffices.[128]

Moreover, in spite of the general agreement that the third level of scrutiny is triggered in gender discrimination cases, there is continuing disagreement over what constitutes a gender discrimination case. There persists, in other words, the opinion that not every legislative distinction between the sexes requires special judicial attention at all.[129]

In the final chapter I will examine some political and philosophical reasons for our being in this constitutional never-never land on the question of gender. Just now I refer the reader to the tables on pages 43-45. Table III summarizes the cases in this chapter in terms of their impact. Tables IV & V examine the individual records of the justices in the same cases and reveal definite patterns: William Brennan and Byron White, for instance, voted to invalidate gender classifications in 12 of the 15 cases; Thurgood Marshall would have invalidated 13 of the 15; now-Chief Justice William Rehnquist would have upheld all but two. And all under "the" Craig standard.

This summary of the justices' records is sobering in light of the ages of the three justices most consistently voting against gender discriminations: William Brennan is eighty-two; Byron White is seventy-one; Thurgood Marshall is eighty. There is thus a high probability that one or more of them will leave the Court during George

Bush's presidency. Given the president-elect's philosophy, we cannot expect that his appointees will maintain the strong stance against sex discrimination of these three justices.

Table III

Summary of the Impact of Decisions in Cases Challenging the Constitutionality of Various Gender Classifications, 1976-84

Craig Goldfarb Orr Caban Wengler Mississippi U.	Extended to men benefits, advantages or rights theretofore reserved by statute to women.
Personnel Admin. MA	Continued statutory employment opportunity advantage to a class composed, by virtue of historic discrimination, overwhelmingly of males.
Westcott	Extended to needy children of unemployed, bread-winning mothers benefits equal to those available to needy children of unemployed, bread-winning fathers.
Kirchberg	Relieved women of a statutory disadvantage in state community property law.
Webster	Permitted certain women eligible for retirement in 1975 to retain benefit calculation advantage conferred to them by statute before 1972.
Heckler	Temporarily revived a distinction giving an advantage to certain women in the context of social security.
Parham Lehr	Preserved statutory advantage of some mothers of illegitimate children over some fathers of illegitimate children.
Rostker Michael M.	Preserved statutory distinctions placing certain responsibilities on males and not females.

Table IV

Positions of Individual Justices in Eight Cases Invalidating Gender Classifications

	Brennan	Blackmun	Burger	Marshall	Powell	Rehnquist	Stevens	Stewart	White
Craig	M*	M	D	M	M	D	M	M	M
Goldfarb	M*	D	D	M	M	D	M	D	M
Orr	M*	M	D	M	D	D	M	M	M
Caban	M	M	D	M	M*	D	D	D	M
Westcott	M	M*	M	M	M	M	M	M	M
Wengler	M	M	M	M	M	D	M	M	M*
Kirchberg	M	M	M	M*	M	M	M	M	M

	Brennan	Blackmun	Burger	Marshall	Powell	Rehnquist	Stevens	O'Connor	White
Miss. U.	M	D	D	M	D	D	M	M*	M

M = Justice joined the decision

D = Justice dissented from the decision

* = Justice wrote the majority opinion

Table V

Positions of Individual Justices in Seven Cases Upholding Gender Classifications

	Brennan	Blackmun	Burger	Marshall	Powell	Rehnquist	Stevens	Stewart	White
Webster	M	M	M	M	M	M	M	M	M
Parham	D	D	M	D	M	M	M	M*	D
Personnel Adm. MA	D	M	M	D	M	M	M	M*	M
Michael M.	D	M	M	D	M	M*	D	M	D
Rostker	D	M	M	D	M	M*	M	M	D

	Brennan	Blackmun	Burger	Marshall	Powell	Rehnquist	Stevens	O'Connor	White
Lehr	M	D	M	D	M	M	M*	M	D
Heckler	M*	M	M	M	M	M	M	M	M

M = Justice joined the decision.

D = Justice dissented from the decision.

* = Justice wrote the majority opinion.

CHAPTER V

CONCLUSIONS

It remains now to place the cases since Reed within the broader political context. For while it is true that the Court is, by comparison to its coequal branches, insulated from the political realm, the same Constitution which affords that insulation also prohibits the Court's functioning in a vacuum.

It is not possible to ascertain whether the Court's subjecting the gender classification in Reed to something more stringent than traditional equal protection analysis bore any relation to Congress' simultaneous action to move the proposed Equal Rights Amendment. It is clear, however, that once the Amendment had been passed by the Congress and submitted to the states, the judicial debate over whether strict scrutiny was appropriately applied in gender cases waited for its resolution on the people, or more precisely, on their representatives in the various state legislatures.

Although opponents of the Equal Rights Amendment made a variety of claims about the Amendment's probable impact, it is apparent that members of the Court on both sides of the debate over the proper level

of equal protection analysis in gender cases expected the Amendment to establish a constitutional imperative that gender distinctions receive the same judicial scrutiny as did classifications based upon race or national origin. Thus the Frontiero concurring opinion's appeal to wait on "[t]he Equal Rights Amendment, which if adopted [would] resolve the substance" of the questions.[130] Remember as well Justice Brennan's reminder there that "Congress itself [had] concluded that classifications based upon sex [were] inherently invidious . . . . "[131]

I noted earlier in this study the irony in the resort to the ERA both by justices supporting and by those opposing the designation of sex as a suspect classification. The greater irony is this: had the Amendment not been before the people during this period, it is possible that a majority of the court would have deemed sex a suspect classification, in recognition of something like an "evolving standard of equality." We are after all not without examples of the Court's taking a leadership role in social change by permitting the Constitution to reflect contemporary standards. Racial discrimination is, of course, the paradigm.

But the amendment process was set in motion in 1972, and once it was, the Court's refusal to effect the proposed amendment's intended result by construction of existing text was compelled by the Constitution itself. It is one thing for an activist Court to reflect — even to press — change in the process of constitutional adjudication. It is another thing altogether for the Court, in the context of the constitutionally-determined amendment process, to anticipate the result of that process. The former is a vigorous

exercise of constitutional authority; the latter is an extraconstitutional imposition of judicial will.

It is quite probably the case that the short-lived stance in favor of suspect classifications taken by Justices Brennan, Marshall, White, and Douglas was merely a reflection of their expectation that the ERA would be ratified, and quickly. The Amendment's early progress in the states was, after all impressive,[132] as were the nature and extent of its popular support as evidenced in opinion polls taken throughout the decade.[133]

By the time the Amendment lost momentum in 1975, the Court had settled into a kind of constitutional "holding pattern": unable to make sex a suspect classification and unwilling to relegate it to the position of those classifications commanding only a rational relationship analysis, the Court sought "something in between." Craig's intermediate level of equal protection analysis is the result.

It is cold comfort for ERA proponents but worth nothing nonetheless that the Constitution's design proved itself anew during this period. The Framers clearly and appropriately viewed stability to be of paramount importance, even to the point of permitting -- as was the case with ERA -- a minority to thwart the will of the majority. The tensions so carefully designed into the system functioned perfectly.

In the meantime, a variety of federal statutory provisions have brought about piecemeal progress toward legal equality of the sexes. A summary of the Court's decisions in cases construing those provisions is appended. But the best statute given the most powerful construction

is a very poor substitute for a constitutional guarantee. Legislators are fickle creatures, subject to diverse and constantly changing pressures. They engage necessarily in day-to-day political bartering, a priority here for a priority there, a vote now for a vote later.

A very relevant example of the comparatively haphazard methods of legislative bodies is afforded by Title VII of the Civil Rights Act of 1964: sex was added to the list of protected classes by a conservative southern senator in an attempt to block passage of the measure. Fortunately, the Johnson Administration was determined to see Blacks afforded protection from employment discrimination and threw its considerable weight behind passage.[134] This important federal provision now taken for granted was thus not the product of a plan, but rather the result of a fortuitous political accident. And, like any statutory measure, its future depends on the wishes and the will of future majorities in the Congress.

In a 1977 speech, Congresswoman Margaret Heckler likened the "incomplete solutions" of statutory measures to the beginnings of the age of flight, when human beings devised a series of crude contraptions in order to defy gravity. Only when they added the engine, the power, she observed, were they able to escape from the forces that keep them earthbound:

> The Equal Rights Amendment is the power of constitutional protection that will allow women's equality to become airborne. Without the ERA women's equality will continue to flap its wings, making small leaps forward, struggling against the forces that hold us down. With the ERA, we will have the power, the constitutional foundation to soar above our current limitations, limitations which have bound us to limited choice of opportunity . . . .

> A country that can put men on the moon can put women in the Constitution . . . . [135]

Clearly we have "come a long way" in our quest for legal equality of the sexes. The Equal Protection Clause affords a barrier against the patently sexist codes which abounded only a few years ago. But the effects of that historic discrimination continue: income disparity has been reduced somewhat in recent years, but women's earnings in the year 2000 are projected to be only 74 percent of men's;[136] the trend toward the feminization of poverty continues relentlessly, although most women, regardless of marital and family status, are employed; there is abundant evidence that Justice O'Connor's notion of a "self-fulfilling prophecy" was realistic, that women have so internalized society's sex-based expectations that they do not see choices now legally available to them.[137]

The power of existing constitutional provisions to guarantee equality has been exhausted for the foreseeable future. Only an explicit commitment in the supreme law of the land to a "principle of perfect equality" can break the ties to our discriminatory history.

ENDNOTES

1. John Stuart Mill, The Subjection of Women (Buffalo, N.Y.: Prometheus Books, 1986), p.7.

2. Blackstone's Commentaries, quoted in Sexual Politics, Kate Millett (New York: Ballantine Books, 1969) p. 95.

3. U.S. Constitution, Amendments V and XIV.

4. Craig v. Boren, 429 U.S. 190 (1976).

5. Equal Rights Amendment, Amendment XXVII (proposed).

6. U.S. Constitution, Amendments XIII, XIV, and XV.

7. Robert K. Carr, "Federal Protection of Civil Rights," in Discrimination and Civil Rights, Norman Dorsen (Boston: Little, Brown and Co., 1969) pp. 10-12.

8. Slaughterhouse Cases, 83 U.S. 36 (1873).

9. Id. at 81.

10. Strauder v. West Virginia, 100 U.S. 303 (1880), at 307-308.

11. Plessy v. Ferguson, 163 U.S. 537 (1896).

12. Civil Rights Cases, 109 U.S. 3 (1883).

13. Id. at 11.

14. Dorsen, supra note 7, pp. 9-30.

15. Brown v. Topeka Board of Education, 347 U.S. 483 (1954).

16. Bolling v. Sharpe, 347 U.S. 497 (1954).

17. Korematsu v. U.S., 323 U.S. 214 (1944), at 216.

18. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

19. McLaurin v. Oklahoma State Regents, 399 U.S. 637 (1950); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Oklahoma, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950).

20. Smith v. Allwright, 321 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953).

21. Shelley v. Kraemer, 334 U.S. 1 (1948).

22. For instance, Kovacs v. Cooper, 336 U.S. 77 (1949), Skinner v. Oklahoma, 315 U.S. 535 (1942).

23. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

24. Evans v. Newton, 382 U.S. 296 (1966).

25. Reitman v. Mulkey, 387 U.S. 369 (1967).

26. Katzenbach v. McClung, 379 U.S. 294 (1964).

27. Heart of Atlanta Motel, Mc. v. U.S., 379 U.S. 241 (1964).

28. Daniel v. Paul, 395 U.S. 298 (1969).

29. Regents of California v. Bakke, 438 U.S. 265 (1978).

30. Bradwell v. Illinois, 83 U.S. 130 (1873).

31. In re Lockwood, 154 U.S. 116 (1894) would raise essentially the same issue with the same result.

32. Bradwell, supra note 30, at 141.

33. Minor v. Happersett, 88 U.S. 162 (1875).

34. Muller v. Oregon, 208 U.S. 412 (1908).

35. Lochner v. New York, 198 U.S. 45 (1905).

36. Id. at 64.

37. Muller, supra note 34, at 421-422.

38. Ruth Bader Ginsburg, Constitutional Aspects of Sex-Based Discrimination (St. Paul, Minn.: West Publishing Co., 1974) p. 15, n.2.

39. Goesaert v. Cleary, 335 U.S. 464 (1948).

40. Hoyt v. Florida, 368 U.S. 57 (1961).

41. Id. at 61-62.

42. Sail'er Inn, Inc. v. Kirby, S Cal. 3d 1 (1971).

43. Reed v. Reed, 404 U.S. 71 (1971).

44. Id. at 75.

45. Id. at 76.

46. Id. at 77.

47. Frontiero v. Richardson, 411 U.S. 677 (1973), at 688.

48. Id. at 691.

49. Id. at 691-692.

50. Id. at 692.

51. Id at 692.

52. Id. at 687-688.

53. Kahn v. Shevin, 416 U.S. 351 (1974).

54. Id. at 355.

55. Id. at 357.

56. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

57. Id. at 644.

58. Id. at 651, n. 16.

59. Geduldig v. Aiello, 417 U.S. 484 (1974).

60. Rentzer v. Unemployment Insurance Appeals Board, 32 Cal. App. 3d 604 (1973).

61. Gedulding, supra note 59, at 496, n. 20.

62. Id. at 503.

63. Schlesinger v. Ballard, 419 U.S. 498 (1975).

64. Id. at 508.

65. Stanton v. Stanton, 421 U.S. 7 (1975).

66. Id. at 17.

67. Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

68. Id. at 653.

69. Id. at 651.

70. Taylor v. Louisiana, 419 U.S. 522 (1975).

71. Id. at 534.

72. Id. at 537.

73. Stanton, supra note 65.

74. Craig, supra note 4.

75. Id. at 197.

76. Id. at 204.

77. Id. at 202.

78. Id. at 202.

79. Justices Powell, Stevens, Blackmum and Stewart concurred separately. Chief Justice Burger and Justice Rehnquist dissented separately.

80. See concurring opinions of Justice Stevens, at p. 211; Justice Stewart at p. 214; dissenting opinions of Chief Justice Burger, at p. 215; Justice Rehnquist at p. 217.

81. Id. at 221, Mr. Justice Rehnquist dissenting.

82. Davis v. Passman, 442 U.S. 228 (1979).

83. Califano v. Goldfarb, 430 U.S. 199 (1977).

84. Id. at 210-211.

85. Id. at 216.

86. Id. at 213.

87. Id. at 217.

88. Califano v. Webster, 430 U.S. 313 (1977).

89. Id. at 317.

90. Id. at 321.

91. Goldfarb, supra note 83, at 224-242.

92. Califano v. Westcott, 443 U.S. 76 (1979).

93. Id. at 93-96.

94. Id. at 88.

95. Id. at 88.

96. Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980).

97. Id. at 151.

98. Id. at 151.

99. Heckler v. Matthews, 465 U.S. 728 (1984).

100. Id. at 746.

101. Id. at 748-749.

102. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

103. Id. at 276-277.

104. Id. at 278.

105. Orr v. Orr, 440 U.S. 269 (1979).

106. Id. at 282.

107. Kirchberg v. Feenstra, 450 U.S. 455 (1981).

108. Id. at 458.

109. Parham v. Hughes, 441 U.S. 347 (1979).

110. Id. at 351-352.

111. Id. at 356.

112. Caban v. Mohammed, 441 U.S. 380 (1979).

113. Id. at 393.

114. Id. at 389.

115. Lehr v. Robertson, 463 U.S. 248 (1983).

116. Id. at 250-251, nn. 4 and 5.

117. Caban, supra note 112, at 392.

118. Lehr, supra note 115, at 252.

119. Id. at 263.

120. Mississippi University School for Women v. Hogan, 458 U.S. 718 (1982), at p. 741.

121. Id. at 729-730, nn. 14 and 15.

122. Id. at 730.

123. Michael M. v. Sonomo County Superior Court, 450 U.S. 464 (1981).

124. Id. at 494-496.

125. Rostker v. Goldberg, 453 U.S. 57 (1981).

126. Leslie Friedman Goldstein, The Constitutional Rights of Women (New York: Longman, Inc., 1979), pp. 72-73.

127. Wengler, supra note 96; Westcott, supra note 92.

128. Michael M., supra note 123; Rostker, supra note 125.

129. Mississippi University, supra note 120, Justices Powell and Rehnquist dissenting.

130. Supra note 51.

131. Supra note 52.

132. See Renee Feinberg, The Equal Rights Amendment (New York: Greenwood Press, 1986) p. xi.

133. Mark R. Daniels, Robert Darcy, and Joseph W. Westphal, "The ERA Won -- At Least in the Opinion Polls," PS, xv, No. 4 (1982), 578.

134. Sheila M. Rothman, Woman's Proper Place (New York: Basic Books, Inc., 1978), pp. 232-233.

135. Margaret Heckler, Speech to International Women's Year Conference in 1977, quoted in Sharon Whitney, The Equal Rights Amendment (New York: Franklin Watts, 1984), p. 48.

136. Supra note 132.

137. Supra note 120.

APPENDIX A

Summary of United States Supreme
Court Decisions Construing Federal Statutes
Forbidding Gender Discrimination

Equal Pay Act

Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

Corning Glass continued to violate the Act even after it equalized day (historically all female) and night (historically all male) inspector wage rates in January of 1969. The higher rate preserved for employees hired before January of 1969 served to perpetuate the gender-based wage differential between day and night shifts.

Title VII

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

Title VII prohibits different hiring policies for men who are parents of preschool children and women who are parents of preschool children, but "conflicting family obligations, if demonstrably more relevant to job performance for a woman than a man, could arguably be a basis for distinction . . . ."

General Electric Company v. Gilbert, 429 U.S. 125 (1976).

A private employer's disability program covering all temporary disabilities except pregnancy does not violate Title VII.

United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

Female flight attendant whose forced resignation in 1968 violated Title VII not entitled under Title VII to credit for pre-1968 employment on rehiring in 1972.

Dothard v. Rawlinson, 433 U.S. 321 (1977).

Alabama statute establishing minimum height and weight requirements for state prison guards found to violate Title VII because of its discriminatory impact. Regulation excluding women from contact positions in maximum security male facilities upheld as bfoq.

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).

Employer's policy of denying accumulated seniority to female employees returning from pregnancy leave found to violate Title VII, since seniority accrued during all other disability leaves. Employer's failure to grant sick pay for pregnancy leave is not a violation of Title VII.

Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978).

Department's pension plan requiring women to contribute at a higher rate than men found to violate Title VII. Lower courts erred, however, in ordering Department to pay back amounts overwithheld from female employees.

Board of Trustees v. Sweeney, 439 U.S. 24 (1978).

Court of Appeals placed too heavy a burden on the employer when it required employer "to prove absence of discriminatory motive" to defeat Title VII claims.

County of Washington v. Gunther, 452 U.S. 161 (1981).

The Bennett Amendment to Title VII did not limit Title VII's reach to those claims that could be brought under the Equal Pay Act, but only incorporated the four affirmative defenses of the Equal Pay Act into Title VII for wage discrimination claims.

Newport News Shipbuilding and Dry Dock v. EEOC, 462 U.S. 669 (1983).

Under Title VII as amended in 1978 by the Pregnancy Discrimination Act, discrimination on account of pregnancy is sex discrimination, and an employer's health insurance plan providing greater benefits to pregnant female employees than to pregnant spouses of male employees violates Title VII.

Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983).

A state human rights law is preempted by ERISA only insofar as it prohibits practices that are lawful under Title VII as amended by the PDA. Total preemption would frustrate the goal of joint federal-state enforcement of Title VII's prohibition of discrimination in employment.

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983).

A deferred compensation plan offered to state employees which pays women lower monthly retirement benefits than men who have contributed the same amount violates Title VII.

Hishon v. King and Spalding, 467 U.S. 69 (1984).

A woman lawyer's claim that she was denied partnership in a law firm (in which she was an associate) because of her sex is cognizable under Title VII.

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

Sexual harassment, even when it does not result in "tangible" or "economic" loss to victims, is sex discrimination forbidden by Title VII. Employers are not always liable for sexual harassment by their supervisors. The "voluntariness" of a complainant's compliance with sexual advances is immaterial; courts are rather to determine whether the advances are "unwelcome."

California Federal Savings and Loan Association v. Guerra, 93 L Ed 2d 613 (1987).

A state law requiring employers to grant employees unpaid maternity leave of up to four months does not conflict with the intent of Title VII as amended by the Pregnancy Discrimination Act, does not require action prohibited by Title VII, and is thus not preempted by Title VII.

Johnson v. Transportation Agency, Santa Clara County, 94 L Ed 2d 615 (1987).

An agency, pursuant to its voluntary affirmative action plan, can use sex as one factor to be considered in hiring and promotion to traditionally segregated job categories. The plan's goal of "achieving," as distinct from "maintaining," gender balance is consistent with Title VII.

Title IX

Cannon v. University of Chicago, 441 U.S. 677 (1977).

Woman denied admission to medical school on the basis of her sex has private right of action under Title IX of the Education Amendment of 1972, although private right of action is only "implied" by the statute.

North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

Although Title IX does not explicitly prohibit discrimination in educational employment, HEW regulations bringing employment discrimination within the reach of Title IX are consistent with congressional intent.

Grove City College v. Bell, 465 U.S. 555 (1984).

Receipt by individual students at a private college of Basic Educational Opportunity Grants directly from the Department of Education makes the college a recipient of federal funding for purposes of Title IX. For enforcement purposes, the "program or activity" receiving federal funding is limited to the college's financial aid program.

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THE QUEST FOR LEGAL EQUALITY: GENDER AND EQUAL PRDTECTIDN

by

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AN ABSTRACT OF A REPORT

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In light of the Supreme Court's active and vital role in affording to Black Americans constitutional protection from discrimination on account of their race, scholars and activists alike looked to the Court for realization of Mill's "principle of perfect equality" of the sexes. Because the Court had construed the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment as establishing a nearly absolute barrier against racial classifications, hopes for gender equality were focused on those constitutional provisions, on "equal protection."

This paper documents the development of an intermediate standard of equal protection analysis applicable to gender cases, and examines that standard in application. The Court's decisions in gender cases are considered in three groups: first, the relevant history of legal paternalism, as evidenced in opinions from 1873 to 1961, is described; second, decisions between 1971, when the Court first invalidated a gender classification on equal protection grounds, and 1976, when the third level of equal protection analysis was made explicit, are analyzed; third, the decisions since announcement of the third level of review are analyzed for logic, consistency, and effect.

That "equal protection" does not have the same force when applied to gender as when applied to race is now well-settled. The Court's failure to treat race and gender alike was virtually compelled by the recent failure of the Equal Rights Amendment to gain ratification. The amendment was before -- and rejected by -- the people during the period when the Court was being asked to apply to gender classifications the same "strict scrutiny" that it had brought to classifications based

upon race. Adoption of that standard would -- in light of the failure of the Equal Rights Amendment -- have amounted to judicial usurpation of an essential power committed by the Constitution to the people, the power to amend the Constitution.