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Deborah A. Vaughan

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THE RECIPROCITY OF LEGAL RIGHTS AND RESPONSIBILITIES: REFOCUSING THE CRAIG TEST IN EVALUATING GENDER-BASED DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE

I. INTRODUCTION

It may be impossible to ever know how the Equal Rights Amendment would have or could have changed the American legal landscape. Currently, the landscape is littered with inconsistent bodies of statutory and case law governing legal treatment based on gender. Some ERA opponents have argued that additional language in the Constitution is unnecessary to secure equal rights between women and men. The Constitution, it is argued, currently has sufficient language to achieve the goals that the ERA was to have attained. Acknowledging that the job of revising outmoded sex-biased laws can be done without an ERA, one leading commentator nevertheless observes that there is a pressing need for an “authoritative formulation of the basic norm” of equality between the sexes in order for the courts to clean up the landscape.

The alternative to curing gender discrimination with an ERA is the equal protection clause of the fourteenth amend-

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1. The proposed Equal Rights Amendment to the United States Constitution read:

   Section 1. Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.
   Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
   Section 3. This amendment shall take effect two years after the date of ratification.


2. Corker, Bradwell v. State: Some Reflections Prompted by Myra Bradwell’s Hard Case that Made “Bad Law,” 53 Wash. L. Rev. 215, 247 (1978). Professor Corker claims that the ERA’s chief value was symbolic and would have set a dangerous precedent in constitutional law.

The fifth amendment due process clause has also been interpreted to contain an equal protection guarantee which is binding on the federal government. During the 1970's, the United States Supreme Court handed down a number of cases interpreting the equal protection clause with respect to gender discrimination. What emerged from this line of cases is the development of a new legal standard of judicial review, the "middle tier" or substantial relationship test, as enunciated

4. U.S. Const. amend. XIV, § 1. The amendment reads in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

5. Bolling v. Sharp, 347 U.S. 497 (1954). The Court in Bolling held that the fifth amendment's due process clause is applicable against the federal government as an equivalent guarantee of equality with the fourteenth amendment equal protection clause. Of course, neither the ERA nor the equal protection clause could have remedied private action unaccompanied by official participation.


7. For an insightful analysis of the middle tier model, see L. Tribe, American Constitutional Law 886-1105 (1978). See also Fox, Equal Protection Analysis: Laurence Tribe, the Middle Tier and the Role of the Court, 14 U.S.F.L. Rev. 525 (1980).

The "traditional" doctrine of equal protection analysis developed throughout the 1960's. The two-tiered model applied a relatively weak standard of review to most legislative classifications: the classification would survive if it was rationally related to a legitimate governmental objective. See, e.g., Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 417 (1970); Fleming v. Nestor, 363 U.S. 603 (1960); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). One commentator assesses the rule of rationality as a shorthand articulation of the rule of clear mistake, and that because of the great amount of deference given to the legislature, the rule actually becomes one of no mistake. Fox, Equal Protection Analysis, 14 U.S.F.L. Rev. at 526 n.3.

When the classification or legislation involves a "suspect" class (e.g., race) or a "fundamental" right (voting, for example) then the statute is presumed invalid unless the state can prove that the legislative objective was based on a compelling state interest and that the classification was necessary to achieve it. This strict scrutiny standard is nearly impossible for lawmaking bodies to meet. Id. at n.4. See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Robel, 389 U.S. 258 (1967). See generally Tussman & TenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 339 (1949), which heralded the great developing period of the equal protection doctrine.

Middle tier equal protection analysis rests on the same premise as the rational relationship and strict scrutiny tests: that similarly situated persons should be treated equally unless the state can justify its unequal treatment by demonstrating an overriding state interest. The middle tier presumably applies a standard of scrutiny which falls somewhere between rational and compelling. According to Craig v. Boren the state must demonstrate an important governmental objective which is substantially related to the achievement of such objectives in order to justify a gender-based classification. 429 U.S. 190, 197.
in Craig v. Boren and propounded in several commentaries.\(^8\)

The thesis of this comment is that the Supreme Court's interpretation of the Craig test is inadequate for the purpose of evaluating gender-based classifications under the equal protection clause, because it yields inconsistent results. The test should further the general rationale of the equal protection clause: the right of each individual to equal concern and respect as a person under the law.\(^8\)

The Court's application in gender discrimination cases of the underlying premise of traditional equal protection analysis, that similarly situated persons ought to be treated equally, seems to have caused a fundamental problem with the post-Craig case law. Theoretically, if the Court were to determine that the challenged classes are not similarly situated, the state will not have to justify its classification. Moreover, classifications based on factors other than gender will be evaluated according to a lenient rational relationship standard.

It appears, however, that the Court has difficulty deciding when women and men are to be considered similarly situated. It has sometimes held that physiological differences between the genders meant that they were not similarly situated, particularly where sexual or military matters were at issue.\(^{10}\) At other times, the Court has determined that classifications are not explicitly predicated on gender but on some other factor, such as finding that the statute discriminates between pregnant women and non-pregnant persons rather than between women and men.\(^{11}\) Because of this unfocused approach, the character of the Court's treatment of gender-based classifications has ranged from pure legal egalitarianism\(^{12}\) to old-fashioned prejudice.\(^{13}\) This comment will suggest that there exists

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8. See, e.g., Cassen, Equal Protection-Equal Status: A Summary of Sex Discrimination Cases Since Frontiero, 11 Lincoln L. Rev. 167 (1980); Roberts, Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal for Deferential Middle-Tier Review, 27 Wayne L. Rev. 35-93 (1980); Note, However the Discrimination is Described, if Gender-Based, the Substantial Relation Test Applies, 1981 Utah L. Rev. 431-45.


10. See infra notes 77-88 and accompanying text.

11. See infra notes 77-80 and accompanying text.


a standard of judicial review which flows from the existing body of case law, particularly the cases handling the distribution of social responsibility, that would produce more consistent results than the standard which the Court has been using in its application of the Craig test. By adopting it, the courts will come closer to completing the work that the ERA was to have accomplished.

Justice Stevens, concurring in Craig, recognized the possibility that something less than justice could result from overly particularized standards of review:

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms.14

A more effective way to evaluate gender-based discrimination is to extend the single standard to which Justice Stevens refers toward a standard which evenhandedly allocates rights and responsibilities among individuals of both sexes. If the equal protection clause, as Craig and its progeny have interpreted it, is to embody the norm of equality between women and men, the single standard suggested by Justice Stevens should be applied.

II. DEVELOPMENT OF THE CRAIG TEST

The Reconstruction Amendments15 were enacted soon after the Civil War as expressions of legislative hostility to slavery and as a proclamation of the supremacy of the federal

14. 429 U.S. 190 at 212 (Stevens, J., concurring).
15. The Reconstruction Amendments were the thirteenth, fourteenth, and fifteenth amendments to the Constitution. The thirteenth amendment reads in pertinent part: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1. See pertinent part of fourteenth amendment, supra note 4. The fifteenth amendment, reads in pertinent part: "The right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.
government over the states.\textsuperscript{16} Out of these three amendments grew the "antidiscrimination principle" which disfavors legislative classifications that depend on race or ethnic origin.\textsuperscript{17} The most significant application of the antidiscrimination principle was made during the 1950's and 1960's by the Warren Court through its decisions invalidating racially discriminatory governmental decisions and conduct.\textsuperscript{18} The principle was later expanded to encompass classifications based on alienage,\textsuperscript{19} legitimacy,\textsuperscript{20} and sex.\textsuperscript{21}

Doctrines dealing with gender discrimination were developed by the Burger Court during the 1970's, but the Court had actually dealt with the gender issue earlier. All gender-based classifications reviewed by the Court under the fourteenth amendment before 1971 were upheld.\textsuperscript{22} The following discussion illustrates how the Court extracted the current test from traditional equal protection doctrine.

In \textit{Reed v. Reed},\textsuperscript{23} when confronted with a state statute which expressed a preference for men over women to be ap-

\begin{footnotesize}
\begin{enumerate}
\item L. Tribe, \textit{supra} note 6, at 416.
\item See In re Griffiths, 413 U.S. 717 (1973); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 633 (1948).
\item Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).
\item See Hoyt v. Florida, 368 U.S. 57 (1961) (upholding state law excluding women from service on grand or petit juries unless they volunteer); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding statute forbidding women to tend bar unless the wife or daughter of the male owner); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage law for women); Muller v. Oregon, 208 U.S. 412 (1908) (due process permits state imposed limits on working hours of women); Bradwell v. Illinois, 83 U.S. 130 (1873) (state not compelled to admit an otherwise qualified woman to the bar).
\item It is beyond the scope of this comment to consider doctrines concerning classifications based on legitimacy other than to say that the level of scrutiny used to evaluate such classifications approximates the one employed to evaluate gender discrimination. See Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976).
\item 404 U.S. 71 (1971).
\end{enumerate}
\end{footnotesize}
pointed administrator of decedent's estate, the Court broke new ground by invalidating the classification. Relying on a 1920 tax discrimination case, \textit{Royster Guano v. Virginia}, the Court held that legislative classifications 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."

The Court in \textit{Reed} had moved into an unexplored area of judicial scrutiny. At the time, only race and alienage were considered suspect classifications, triggering strict scrutiny. Yet the standard borrowed from \textit{Royster} seemed to be stronger than the alternative rational relationship test. If the Court had used a rationality test, the state justification of administrative convenience would most likely have been accepted.

The Court divided sharply two years later in \textit{Frontiero v. Richardson} over the question of whether sex-based classifications were inherently suspect. A federal statute provided that housing and medical benefits were available to wives of military officers without question, but husbands of military officers were required to prove actual dependency. Invalidating the statute, the plurality observed that the discrimination contained both a procedural and a substantive dimension. Only female officers bore the procedural burden of proving their spouses' dependency. Female officers who provided less than half their spouses' support were denied the substantive benefits available to similarly situated male officers.

The legislative scheme in \textit{Frontiero} was invalidated because it was based on outdated sexual stereotypes about "breadwinners" and "dependents." The plurality opinion compared the classification in \textit{Frontiero} with those based on race and alienage, calling them "inherently suspect" and sug-

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24. \textit{Id.} at 76-77.
26. 404 U.S. at 76. For a similar treatment involving a state child support statute granting mandatory support to males until the age of twenty-one and to females until the age of eighteen see \textit{Stanton v. Stanton}, 421 U.S. 7 (1975).
27. \textit{See supra note} 7.
gesting that all three kinds be subject to strict scrutiny.29 Although the Frontiero decision was based on Reed, the plurality recognized that by departing from "traditional rational basis analysis" it was using a stronger version of scrutiny than the Court actually employed in Reed.30

The plurality of four Justices argued that gender was an immutable characteristic which made it a suspect classification. Noting that subtle gender discrimination pervades our educational institutions, job market, and political arenas, the plurality opinion also mentioned the passage of the ERA by Congress, concluding that classifications based on sex are "inherently invidious."31

Following Frontiero, the Court struggled with developing an appropriate standard of review for gender-based discrimination. It upheld as many classifications as it invalidated. For example, in Kahn v. Shevin32 the Court upheld a property tax exemption available to widows but not to widowers because the state's purpose was to reduce economic disparities between men and women.33 The Court reasoned that such compensatory discrimination, analogous to affirmative action employment practices, outweighed the seriousness of a classification based on sex.

Another gender-based classification was upheld in Geduldig v. Aiello,34 which involved a state disability insurance plan that excluded disabilities attributable to pregnancy. By recharacterizing the nature of the discrimination, the Court accepted the state's argument that the scheme merely discriminated between non-pregnant persons and pregnant

29. Id. at 688.
30. Id. at 684. The Court cited eighteenth century historical analyst Alexis de Tocqueville, who observed that the history of sex discrimination is as old as the nation. The French commentator once wrote: "The Americans have applied to the sexes the great principle of political economy which governs the manufacturers of our age, by carefully dividing the duties of man from those of woman in order that the great work of society may be the better carried on." 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 222-23 (1954).
33. 416 U.S. at 353, 355 ("We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden.").
women. A major factor influencing the Court was the financial viability of public welfare programs: "Particularly with respect to social welfare programs, so long as the line drawn by the state is rationally supportable, the courts will not impose their judgment as to the appropriate stopping point." This was a major deviation from the direction set in Frontiero because the Court retreated to the weak, rational relationship test without even finding a compensatory basis for the classification.

In Schlesinger v. Ballard the Court upheld a statute prescribing a longer period of time for female officers to qualify for promotion than for male officers. The Court did not even question the government's justification that the program served to compensate female officers for prior discriminatory military employment practices. The Court was reluctant to intrude upon the business of the military. "[I]t is for Congress and not the courts to decide when the policy goals sought to be served by the [promotion scheme] are no longer necessary. . . ."

Without having committed itself to a well-defined standard of review, the Court in Weinberger v. Wiesenfeld, invalidated a denial of "[m]other's insurance benefits" under the Social Security Act to a widower father, even though the distinction was similar to the tax exemption in Kahn. The Court reasoned that the statute was based on "archaic and overbroad generalizations" about the role of male and female parents. It further remarked that "[t]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects any inquiry into the actual purposes underlying a statutory scheme." In addition to looking beyond the asserted purposes of any scheme it reviewed under the equal

35. Id. at 496-97 n.20.
36. Id. at 496.
38. The scheme essentially provided that if a naval officer did not qualify for promotion within a certain period of time, he would be discharged. Female officers, however, were granted a longer period of time within which to qualify. See 10 U.S.C. §§ 6382, 6401 (1976).
39. Id. at 510 n.13.
41. Id. at 643.
42. Id. at 648 (emphasis added).
protection clause, the Court indicated that it was looking for a very close fit between the purposes of the scheme and a gender-based distinction.

Finally, in Craig v. Boren the Court clarified its standard of review when it invalidated an Oklahoma prohibition on the sale of liquor to males eighteen to twenty-one years old. Citing the Reed decision, the Court stated: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Pointing out the illogic of upholding the statute on the basis of any sort of compensatory motive, the Court accepted the state's goal of enhanced traffic safety as its motive, but it rejected the statistical argument that young men are more prone to auto accidents than women as too weak a relationship to justify the state's goal.

With Craig, the Supreme Court had made it plain that once a classification was found to discriminate on the basis of gender, it would be upheld only upon the showing of an important state interest. Administrative convenience, outdated stereotypes regarding sex roles, and traditional assumptions about dependency would not be enough to sustain a sex-based classification. But the pre-Craig cases revealed that the Court would uphold statutes where the state could show a genuine compensatory motive, or where the issue was related to the Court's perception of a female physical role.

III. DEVELOPMENTS SINCE CRAIG V. BOREN

Armed with a new articulable test to be applied to claims of gender discrimination under the equal protection clause, the Court decided a variety of issues which fell into three general categories: (1) Social responsibility, (2) economic access

43. Id. at 648 n.16.
44. Id. at 653.
45. 429 U.S. 190 (1976).
46. Id. at 197.
47. Id. at 199.
53. See Kirchberg v. Feenstra, 450 U.S. 455 (1981); Personnel Adm'r v. Feeney,
and equality, and (3) physiological differences. The holdings within each category were consistent with one another, but the law among them was not. It is this lack of consistency among the three types of cases which underscores the weakness of the Court's application of the Craig test.

It is clear from an examination of the later gender discrimination cases that the Court has not developed a third discrete test forming the middle tier of equal protection analysis. Instead, it has created a sliding scale upon which the underlying policies range. Classifications involving social responsibilities (such as estate administration or alimony) were invariably invalidated. When the classification turned on the physiological differences between the genders, the Court upheld the scheme. The Court decided least consistently in the area of access to economic equality, although it has set reasonably firm groundwork toward invalidating most discriminatory classifications.

A. Social Responsibilities

Reed, Stanton, and Craig are archetypical examples of the social responsibility value; each dealt with the unfavorably impacted class' right to be treated as equals. The discrimination invalidated in those cases was arbitrary, irrational, and unjust. The distinction, solely based on gender, would have operated to deprive the affected individual of a right generally thought to be available to each person: to be an estate administrator, to receive child support, to enjoy the privilege of buying liquor.

After Craig, several cases were decided on social responsibility grounds. In Orr v. Orr, an Alabama statute which provided that males but not females could be required to pay alimony to the divorced spouse was invalidated. Similar to


Craig, the alimony statute was held underinclusive because it deprived (needy) males of an opportunity that the state was willing to extend to (needy) females. Consistent with the line of social responsibility cases, Orr stands for the proposition that there can be no justification for less than even-handed allocation of responsibility, particularly if the allocation is based upon outmoded stereotypes.60

In Caban v. Mohammed,61 the Court invalidated another traditional notion that "a natural mother . . . bears a closer relationship with her child . . . than a father does."62 This notion was the basis for the state adoption statute. The Court believed that the statute, which granted only an unwed mother the authority to consent to her child's adoption, resulted in an arbitrary denial of the father's right to share responsibility for the illegitimate child.63

Like Reed and Orr, the unanimous decision of the Court in Kirchberg v. Feenstra,64 invalidating a Louisiana "head and master" statute, indicated that it is unlikely that any justification could uphold an arbitrary denial of equal responsibility for the normal affairs of life. This feature is what makes the social responsibility cases paradigm examples of the Court's proper application of the Craig standard.

The only inconsistency in this area arises when the military is involved. For example, in Personnel Administrator v. Feeney,65 the Court upheld a state absolute lifetime hiring preference for veterans in public positions even though the policy overwhelmingly favored males. The Court excused this inequity by recharacterizing the distinction as one between veterans and non-veterans. It noted that the low number of female veterans was "attributable . . . to the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces, and largely to the simple fact that women have never been subject to a military draft."66

62. Id. at 388.
63. Id. at 394.
64. 450 U.S. 455 (1981).
66. Id. at 269-70.
The majority added a novel element\(^7\) to the Craig analysis by relying on a race discrimination case which held that a neutral statute is not violative of the equal protection clause solely because it results in a disproportionate impact.\(^8\) Instead, the equal protection clause is violated only when the disproportionate impact can be traced to a purpose to discriminate on the basis of race.\(^9\) The Court stated that: "Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not."\(^{70}\) Hedging, the Court went on to recognize that the enlistment policies of the armed services might be discriminatory, "but the history of discrimination against women in the military is not on trial in this case."\(^{71}\)

B. Economic Access and Equality

A second major category of policies turns on access to full economic participation in society, particularly through the public sector. The original access cases, Frontiero v. Richardson\(^{72}\) and Weinberger v. Wiesenfeld,\(^{73}\) involved proof of dependency provisions which operated to prevent spouses from enjoying equal access to public economic benefits. Presumptions based on archaic and overbroad generalizations about women's role as dependents and men's role as breadwinners were rejected. The Supreme Court repeatedly commented on the increased need and opportunity for women to enter the workplace.

After Craig, the Court invalidated similar provisions which deprived widowers and children of needed public economic assistance. In these cases,\(^{74}\) the Court found that the

\(^{67}\) Id. at 273.

\(^{68}\) Id. at 273-74.

\(^{69}\) The Court relied on Washington v. Davis, 426 U.S. 229 (1976), for authority that the equal protection clause requires a showing of a discriminatory intent. Id. at 238-44.

\(^{70}\) 442 U.S. at 277.

\(^{71}\) Id. at 278. When one considers that the Massachusetts veterans hiring preferences was predicated of the federal congressional power to recruit and draft predominately male military, then the decision in Feeney becomes clearer. See infra notes 85-86 and accompanying text for a discussion of Rostker v. Goldberg.

\(^{72}\) 411 U.S. 677 (1973).

\(^{73}\) 420 U.S. 636 (1975).

classifications violated both the substantive and procedural aspects of equal protection. Substantively, one class would have received greater benefits than the other. Procedurally, the disfavored class bore burdens of proof from which the favored class was exempt.

The Court has remarked that it will grant wide latitude to classifications made under social welfare legislation, but it will not grant immunity from constitutional scrutiny. The state interest in saving costs is frequently an overriding factor in the defense of legislative classifications. The Court, however, has frequently focused on the goal of reducing the historic disparity in economic conditions between men and women caused by discrimination against women. This policy arises whenever the Court upholds a classification as compensatory. Significantly, though, both in Kahn and Webster the respective governments would have incurred additional expenses if similarly situated males had been afforded the same benefits that the statutes granted women.

C. Physiological Differences

The third major category of cases turns on the physiological differences between men and women. These classifications have been uniformly upheld, although the split among the Justices in the decisions reveals that this area is far from settled. In the pre-Craig case of Geduldig v. Aiello, the Court characterized a pregnancy exclusion from state disability plan as a distinction between pregnant women and non-pregnant persons. The Court apparently found it incidental that only one sex was ever incapacitated by pregnancy. The only way to explain this unusual reasoning is that the Court must have been reacting to the spectre of increasing compensation costs for subsidizing reproduction.

More recently, in *Parham v. Hughes* the Court upheld a statute which placed different burdens on males and females by recharacterizing the classification. In *Parham*, a statute which prevented unwed fathers but not unwed mothers of illegitimates from filing a wrongful death action for the death of the child was determined to be a distinction between fathers who legitimate their children and fathers who do not. The Court in *Parham* was influenced by the traditional image of a casual, wandering, possibly unknown male making spurious claims on the death of an illegitimate child.

The traditional stereotype of the male who is less deserving of full legislative respect also figured into the Court’s decision in *Michael M. v. Superior Court* which upheld a statutory rape law that prosecutes males only. The plurality in this case found that males and females affected by the statute were not similarly situated. The plurality found that the law was central to the state’s objective of preventing teenage pregnancy. To decide thus, the Court must have found, unlike in *Geduldig*, that the fact that only females could become pregnant was not incidental to the classification. Even if pregnancy prevention was the state’s true goal, it does not follow that because only teenage females become pregnant, only males are responsible for the pregnancy. This legal distinction based upon a physical characteristic is patently unfair, especially when liability is imposed in such a heavy-handed manner. If pregnancy is truly the problem, perhaps in at least the statutory sense, a more logical choice would be to impose liability on both partners. The “natural deterrence” of preg-

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80. *Id.* at 355. There existed a statutory procedure whereby an unwed father could legitimate his child. Mothers were not included in this statute. The wrongful death remedy was available to unwed fathers who performed the additional step of legitimating their offspring, even though mothers could sue without legitimating their offspring. 441 U.S. 347, 355 (1979).


82. 450 U.S. at 468-69. Justice Rehnquist analyzed the *Craig* test as if it were a slightly more stringent version of the traditional rational relationship test. He observed that pregnancy would be a natural deterrent to teenage females which would equalize the sanctions befalling the two sexes. He relied on language in *Parham* which reflected that “underlying [the Court’s previous] decisions is the principle that a legislature may not make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.” *Id.* (citing Parham v. Hughes, 441 U.S. 347, 354 (1979)) (emphasis added).

83. *See supra* notes 77-78 and accompanying text.
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nancy for a teenage female, as suggested by Justice Rehnquist,\(^4\) does not seem related in any way to the criminal penalty imposed solely on the male.

The Court again found that men and women are not similarly situated in *Rostker v. Goldberg.*\(^5\) *Rostker* involved a challenge to the constitutionality of the male only Military Selective Service registration system. The Court upheld the classification on the basis of another statute which forbade women to participate in combat or to be drafted, concluding that for the purposes of the registration system, women and men are not similarly situated. As it did in *Personnel Administrator v. Feeney,* the Court avoided confronting a clear case of gender discrimination by resting its holding of validity on a second underlying statute which is also discriminatory.\(^6\) Furthermore, as in *Schlesinger v. Ballard,*\(^7\) the Court showed extreme deference to Congress' authority to regulate military affairs.

The rationale underlying all of the physiological difference decisions, however, is the perception that the physical differences between men and women somehow create a legal distinction between otherwise similarly situated individuals. In all of these cases, women and men have been categorically excluded from performing fundamental social obligations. Contrary to the decision in *Craig,* in which the Court held the test to be whether the classification itself was substantially related to the achievement of important government objectives, the Court simply abdicated its responsibility by diverting its focus to non-issues such as whether men and women are similarly situated to serve in combat.

Recharacterization of gender discrimination begs the question. It masks prejudicial preferences in a particularly cavalier way. The dissent in *Geduldig,* for example, noted that the effects of pregnancy excluded from a disability plan were “functionally indistinguishable” from the effects caused by

\(^4\) 450 U.S. at 473.
\(^5\) 453 U.S. 57, 67 (1981) (citing Schlesinger v. Ballard, 419 U.S. 495, 506-07 (1975)). See also 453 U.S. at 79 where the majority relies on Michael M. v. Superior Court for the proposition that the sexes are not similarly situated in this case.
\(^6\) See supra note 65-71 and accompanying notes.
\(^7\) See supra notes 37-39 and accompanying text. Even assuming the legitimacy of a policy excluding women from combat, a statute substantially related to such an interest would not have to also exclude women from selective service registration because women could be drafted into non-combat positions.
another disability.\textsuperscript{88}

This conflict highlights the anomalous nature of the Court's treatment of physiological differences. The difference between female and male has been incorporated into the Court's rationale behind essentially economic or political distinctions. Yet, the earlier \textit{Craig} analysis had always asked whether the unfavorable effects of a gender-neutral statute would be outweighed by the effects of a discriminatory scheme. In \textit{Parham}, the unwed mother was not permitted to legitimate her illegitimate child. If she and the father had had the same option at law, the wrongful death action provision would have had a more logical, even-handed basis. Alternatively, if all unwed parents had been required to show proof of parentage in a wrongful death action, there would have been no violation of the equal protection clause. Instead, the Court tortured the classic equal protection analysis to avoid applying the true \textit{Craig} test by perceiving a non-gender discrimination.

To summarize, the current doctrine that the Court applies when faced with a challenged statute under the equal protection clause is to initiate the following inquiry. First, it must find that there is an actual discrimination between women and men. The Court is more likely to find such discrimination when the underlying issue involves social responsibilities. If the issue can be recharacterized as between classes not based on gender, the \textit{Craig} test will be inapplicable, although a weaker form of scrutiny may still apply. If the issue involves reproduction or the capacity to procreate, the Court will probably find that women and men are not similarly situated.

After finding a gender-based distinction, the Court will examine the articulated governmental objectives for creating the classification. The Court will not attempt to discover what the objectives are. The party defending the classification bears the entire burden of explaining the governmental purposes. If they involve military recruitment or promotion policy, the inquiry will most likely end there. If the defending party advances a clearly compensatory objective, and not a mere reci-

\textsuperscript{88} 417 U.S. at 500-01. The dissent also noted that other sex-linked disabilities such as prostate surgery and circumcision were covered under the same plan. \textit{Id}. (Brennan, J., dissenting).
tation of benign purpose, the Court will validate the classification. The classification will be upheld, however, only if it favors females by redressing the class for historic inequities. Simple administrative convenience, judicial economy, or cost savings alone will never be accepted as legitimate ends.

Finally, the fit between the state's important objective and the classification must be substantial. The gender-based-scheme must be substantially necessary to carry out the state policies behind the statute. If the Court reaches the issue, this requirement of substantial relationship will ordinarily carry a presumption of statutory invalidity.

The Craig analysis as it now stands produces inconsistent results. There is no distinct line between those cases where the gender-based classification was upheld and those where it was not. Yet with some certainty, it can be said that challenges involving social responsibilities will stand the strongest chance of success.

IV. JUSTICE STEVENS' APPROACH

The antidiscrimination principle has always stood for the even-handed regard for each individual. Justice Stevens' notion of a standard based on responsibility closely approximates this ideal. Although not as accurate as it should be, Justice Stevens' standard provides valuable insights into the process by which treating people as equals can be achieved:

[A] traditional classification is more likely to be used without pausing to consider its justification than a newly created classification. Habit, rather than analysis, makes it more acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was some inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination to the stated purpose for which the classification is being made.

Justice Stevens appears to be the only member of the...
Burger Court willing to find and condemn unjustified gender discrimination against either sex without forcing the distinction to fit the pattern of invidious discrimination. It is enough that similarly situated individuals have been treated disparately at the hands of the law without a countervailing state goal. He has not found it necessary to find discrimination which implied that one sex is inferior to another, or to discover a distinction which adds to the burdens of an already disadvantaged class of people.

Justice Stevens' remarks in these cases suggest that he bases all equal protection analysis on a general comparison of the amount of harm done to the disadvantaged class with the purposes that the classification is likely to achieve.\(^9\) A disproportionate level of harm is violative of the equal protection clause. Justice Stevens' determination of a disproportionate amount of harm is related to his notion of personal responsibility.

The following discussion will illustrate Justice Stevens' view of equality through responsibilities and will show how he incorporates this principle into the physiological difference cases. His conclusions about all three categories of cases are logically consistent by reflecting his primary concern with governmental even-handedness.\(^2\)

In *Craig v. Boren*, where young males were forbidden from buying liquor because the Oklahoma legislature was concerned about traffic safety, Justice Stevens found the classification objectionable because it was based on gender.\(^3\) The statute condemned the entire class of males between eighteen

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91. *See* Michael M. v. Superior Court, 450 U.S. at 495.
92. *Compare* Justice Stevens' views with Watson, *Self-Consciousness and the Rights of Nonhuman Animals and Nature*, 1979 ENVTL. ETHICS 99. Professor Watson presents a reciprocity framework as an analysis of morality and as an explanation and justification of the attribution of moral rights and responsibilities. His view seems to be a highly moralistic one, resting on the Golden Rule:

> Consider the admonition to do unto others as you would have them do unto you. Even if it is only a hope, this implies that if you assume a right of behavior toward others, then they have the same right of behavior toward you, and that they should accept as a duty to behave toward you as you behave toward them. Similarly, the admonition to act only in ways, the general description of which can be proposed as universal moral principles, is to imply that, by assuming rights, you accede that all others have the same rights and that it is the duty of all to abide by the embodied universal principles.

*Id.* at 100.
93. 429 U.S. at 212.
and twenty-one on the basis of an unrepresentative few. His concept of individual responsibility requires that all individuals be held accountable for traffic safety. The imposition of the state legislative classification, however, operated to deny the affected class of males the opportunity to behave responsibly. Denial of the opportunity to participate in social responsibilities on an equal basis with the opposite sex was a harm disproportionately greater than the consequences of the offsetting state policy of reducing accidents and therefore violated equal protection.

Justice Stevens' view of equality through responsibilities can have harsh implications. In *Caban v. Mohammed*, the majority, relying on the authority of *Craig*, invalidated a statutory classification which would have resulted in an unwed mother having the sole authority to consent to the illegitimate child's adoption. Justice Stevens dissented on the ground that even though unwed parents shared the responsibility for conception, only the mother had a constitutional right to determine independently whether or not to bear the child. By accepting the responsibility of bringing new life into the world, the mother acquired superior rights to determine the child's future with respect to adoption.

This view is partly based on pragmatic acknowledgement of the fact that frequently the mother is the only one who knows the identity of the child's father and that she could just as well marry someone else. Although it could be argued that this view is rooted in the theme of physiological differences, it seems that Justice Stevens actually focused on the practical alternatives available to the unwed mother. Since she bore the largest portion of the responsibility for the child, she should have the ultimate right to consent to its adoption.

Justice Stevens does not appear to subscribe to the view that physiological differences *per se* create legal distinctions between the sexes. Dissenting in *Michael M.*, he expressly rejected the connection that the plurality drew between the prosecution of males for statutory rape and the fact that only females become pregnant. In light of the state goal of reducing teenage pregnancy, he found the justification wholly inad-

94. 441 U.S. 380.
95. Id. at 403.
96. 450 U.S. at 496.
97. Id. at 497.
equate because it took both partners to produce a pregnancy. Since the natural differences between the sexes were irrelevant to him vis-à-vis the state purpose, only a statute which subjected both males and females to criminal liability would have satisfied the equal protection clause.

Although Justice Stevens' view of equality may be stringent in demanding equal personal responsibility, it is tempered with a deep sense of fairness. "[E]ven if my logic is faulty and there actually is some speculative basis for treating equally guilty males and females differently, I still believe that any such speculative justification would be outweighed by the paramount interest in even-handed enforcement of the law." 98

Justice Stevens' emphasis on fairness is also revealed in the dependency cases. In Califano v. Goldfarb, 99 he concurred in the invalidation of a Social Security Act provision which required widowers, but not widows, to prove actual dependency on the deceased spouse in order to collect survivor's benefits. Though the majority found that the classification imposed a procedural burden on males and a substantive burden on female wage earners, the relevant issue in Justice Stevens' view was the male plaintiff's claim for benefits. The key inquiry for him was whether similarly situated persons were treated differently solely because they were not of the same sex. His concurrence was based on the Court's holding in Wiesenfeld, 100 indicating that he thought the challenged classification was directly linked to outmoded sexual stereotypes about dependency. Justice Stevens reiterated his disagreement with the majority of the Court in Wengler v. Druggists Mutual 101 stating that he did not share the view of simultaneous disfavor of males and females.

V. A Solution to the Craig Test Confusion

The Supreme Court has demonstrated that the Craig test is unwieldy and too difficult to use, particularly when the basis of a classification is rooted in military matters, child rearing, or reproductive capacity. The Court has also demon-

98. Id. at 502 (emphasis added).
100. Id. at 220.
101. 446 U.S. 142 (1980).
strated some confusion when considering whether a compensatory motive will save a gender-based classification from invalidation. The result has been an inconsistent body of case law in which the challenged gender-based distinctions have not been faced squarely.

The major cases, however, particularly those decided during the interval from Reed to Craig, suggest that certain underlying values have consistently played a part in the Court's decision making. From these values flow a general principle to which Justice Stevens has alluded. Justice Stevens' theme of responsibility with fairness should be extended to form the following standard: Does the challenged classification serve to further the equal distribution of legal rights and responsibilities between the affected individuals? If the classification does nothing to further the equal distribution of legal rights and responsibilities, then the Craig standard should be applied to determine whether the state has an important interest which would outweigh the detriment to the affected class.

The link between legal responsibilities and rights would serve to further the antidiscrimination principle by clarifying the notion of similarly situated. Classes would be similarly situated when they shared the same social responsibilities. To the extent that different classes are charged with the same social responsibilities and obligations they should be entitled to share the same rights equally. The basic norm of equality, as Professor Ginsberg suggests, would be clearly articulated within the test, a feature which the middle tier equal protection analysis has always lacked.

For example, in Michael M. the underaged female bore equal responsibility for consensual intercourse as did the underaged male. The two individuals should have been treated equally. The articulated state interest of discouraging teenage pregnancy was relevant only to the issue of whether the state should punish such activity. Assuming no other important state interest, the statute would have failed under the new test.

In Rostker v. Goldberg, a challenge to the male-only draft registration system, the Court should have focused on

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102. See Ginsberg, supra note 3.
103. See supra notes 81-84 and accompanying text.
104. See supra notes 85-87 and accompanying text.
the general obligation to contribute to the national defense as a responsibility of all citizens. It can be argued that if all citizens have the right to national defense, then women should be subject to the draft to the same extent as men in order to serve the national interest.

The test could also help to eliminate the problem of recharacterizing the classes by refocusing the Court's notion of equality. If the Court were satisfied that men and women should be treated equally in a particular instance, the Court might not be tempted to stretch the logic in search of ways to recharacterize the classification.

In *Parham v. Hughes* the Court upheld a statute which denied illegitimate fathers a right to sue for the wrongful death of their illegitimate offspring by recharacterizing the discrimination as between fathers who legitimate and fathers who do not. Under this new test the case might be resolved the same way, because the Court should continue to find a non-gender basis for the distinction. The focus on the new test, however, would shift the inquiry from asking whether the claimant had complied with a procedural requirement toward a more relevant inquiry concerning the extent of the unwed father's participation in parenting. Because there are many situations where an unwed father will assume responsibilities toward his child, his rights should be evaluated under a statute which does not discriminate between genders on the basis of archaic prejudice about the roles unmarried parents play.

The Court has encountered other problems in which the classification has been defended as compensatory, such as *Kahn v. Shevin*. A truly compensatory scheme would redistribute legal rights and responsibilities in an equal fashion. Sometimes, it would be necessary to redress an earlier imbalance in legal rights and responsibilities by invoking an imbalance in the opposite direction. Such a compensatory scheme would be subjected to strong scrutiny before it could be said to comply with the equal protection clause. As under *Craig*, a mere recitation of a benign purpose would obviously fail as an important state interest.

Moreover, a judicially approved compensatory scheme would be conceptually tied to the goal of redistributing legal

105. *See supra* notes 79-80 and accompanying text.
responsibilities fairly. When the scheme failed or ceased to produce an equitable distribution of legal rights and duties, lower courts could consider the classification. When the compensatory scheme had completed its purpose and the chain of historic discrimination against a class had been broken, a court would have adequate grounds for nullifying it.

The proposed test would be equally applicable in other instances because it does not confine itself to gender. Although the Craig test was developed in the context of gender discrimination, the Court has developed a parallel middle-tier scheme for evaluating classifications based on legitimacy. There are a number of other grounds for classification which have never been held to the strict scrutiny standard: wealth, age, mental and physical health. It seems that the test comparing the distribution of legal rights and responsibilities among members of any class created on these grounds would provide a sound reason for invoking the middle standard of scrutiny.

The Supreme Court diluted the possible effectiveness of the Craig test when it refused to confront the issue of gender discrimination in Geduldig, Feeney, Parham, Michael M., and Rostker. Those who chose to recharacterize the discrimination probably knew that under a strict application of the Craig test the classifications would have failed. The Court itself failed the legal system by reaching out for illogical and vague reasons to uphold the classifications. Not only did the Court leave the original questions about constitutionality unanswered, but it added a layer of confusion to the Craig test by creating new outlandish classifications (non-pregnant persons, for example), and by injecting elements into equal protection analysis which have little or no foundation in case law (e.g., discriminatory intent as required by Feeney). Asking if the challenged classification serves to further the equal distribution of legal rights and responsibilities between the classes would prevent those confusing problems. The Court

107. See supra note 22.
could have used this test as a way to simplify the case law and make less judicial "noise."

VI. CONCLUSION

The political climate of the United States has vastly changed since the activist era of the 1970's. Access to public entitlements, educational opportunities, equal employment opportunity, and reproductive control are no longer considered settled issues either by the federal or state legislatures. In light of the existing and proposed changes by the Reagan administration, there may well be reason to question how well the equal protection guarantee will fare. It appears that profound changes in our interrelated economic and political systems could spark an equal protection crisis. Even now there is federal legislation that creates gender-based classifications. If the equal protection clause is to be the vanguard against gender discrimination that the ERA was intended to have been, it is important to develop a consistent body of case law.

Under Craig, the Court attempted to establish a more stringent standard of review for gender based classifications than the rationality test. Subsequent sex discrimination cases, however, demonstrate that the Court often circumvents the Craig test in a way which leads to unfair and inconsistent treatment of the genders.

Alternatively to using the Craig test, the Court should add to its Craig analysis a concept of correlative legal rights and responsibilities which flows directly from the gender-based equal protection cases of the 1970's. The Court ought to adjust its view of the legal landscape accordingly. Until it does, we can expect the confusion caused by the uncertainties of the Craig test to continue interfering with the fulfillment of  

114. E.g., 42 U.S.C. § 633 (1976). The federal work incentives and job training program creates a priority for opportunities starting with unemployed fathers, then mothers, pregnant women and dependents last. In another example, the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901, 902 (1976), establishes federal benefits for miners who have become disabled as a result of working in United States coal mines. Section 902(a)(2) defines the miner’s dependent as a wife and section 902(e) defines widow as the miner’s wife at the time of his death.
the antidiscrimination principle embodied within the equal protection clause.

Deborah A. Vaughan