CRAIG V. BOREN: SEX DISCRIMINATION, 3.2% BEER, AND THE CLASH BETWEEN OKLAHOMA LAW AND THE EQUAL PROTECTION CLAUSE

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Political events in Oklahoma interact with national trends to produce a Sepreme Court decision establishing equal gender rights for states.

On December 20, 1972, Fred Gilbert, an attorney from Tulsa, Oklahoma, filed suit in the United States District Court for the Western District of Oklahoma seeking declaratory and injunctive relief against the enforcement of two sections of an Oklahoma liquor statute, 37 Okla. Stat., 241, 245 (1971 and Supp. 1975) which prohibited the sale of 3.2% beer to males under the age of 21and females under the age of 18. The suit was filed on behalf of Mark Walker, a twenty year old undergraduate student at Oklahoma State University in Stillwater, Oklahoma, and Carolyn Whitener, co-owner of a local convenience store known as the "Honk-N-Holler." They argued that the law constituted invidious discrimination against males in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The origins of the liquor statute can be found in Oklahoma's response to the national political controversy over the repeal of prohibition. When the Eighteenth Amendment was ratified in 1919, it provided for a uniform national ban on the "manufacture, sale or transportation of intoxicating liquors" within the United States. When Congress proposed the Twenty-First Amendment on February 20, 1933, its objective was to repeal the Eighteenth and allow each state to determine whether, and under what circumstances, the sale and use of intoxicating liquors would be allowed within its borders. Congress also specified that ratification of the Twenty-First Amendment would be by conventions rather than by state legislatures. The Oklahoma legislature failed to issue a convention call and, as a consequence, the state did not participate in the ratification process. Instead, the legislature sent to a vote of the people a statute defining non-intoxicating beverages as those containing 3.2 % alcohol by weight. Under this definition, 3.2% beer could be sold whether national prohibition was ended or not. The statute, which allowed men 21 or older, and women 18 or older, to purchase 3.2% beer, was passed in the special election of July 11, 1933. The required number of states ratified the Twenty-Fifth Amendment shortly thereafter on December 5, 1933. It was not until 1959 that Oklahoma approved the sale of stronger beer and liquor to men and women 21 years of age and older. The age differential for the sale of 3.2% beer, however, remained intact.

Walker was especially frustrated with the practical application of the law. Although the statute forbade the sale of 3.2% beer to males under the age of 21, it did not prohibit them from having or drinking it. Thus, if an underaged male wanted some beer, he could have an 18 year old female make the purchase, a ruse that Walker found both hypocritical and demeaning. It was a sense of frustration that also brought Whitener into the case. After nearly a decade of selling beer to college students, she had come to the conclusion that the law was petty and asinine, and that it presented unreasonable problems for her business. Although initially reluctant to enter the case, she engaged in a number of long conversations with Walker and was finally persuaded by his honesty, commitment and obvious intelligence (Darcy and Sanbrano, 1997).

The setting of different ages of majority for men and women had been a rather common practice among state legislatures. However, the

case was filed during a time of intense political debate over gender equality. With the ratification of the Twenty-Sixth Amendment (1971), which prohibits both the federal and state governments from denying citizens of the United States 18 years of age or older the right to vote on account of age, a national drive to establish the age of majority at 18 for both males and females was gaining momentum. This momentum was furthered by the protest politics of the time, as well as the development of the feminist movement. In response, a number of bills were introduced in the Oklahoma legislature to set 18 as the age of majority for all state purposes, including the sale of 3.2% beer. The latter proposal, which was part of a state house bill, proved to be highly controversial. After considerable legislative maneuvering and acrimonious debate, the bill finally met with defeat in February of 1972. Shortly thereafter, a state senate bill setting at 18 the age of majority for both men and women was passed by both houses and signed into law by the governor. The age differential for the sale of 3.2% beer, however, was retained as an exception (see Darcy and Sanbrano, 1997).

In March of 1972, the state legislature also took up consideration of the newly proposed Equal Rights Amendment. Short and to the point, the proposed ERA was worded as follows: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." Without opposition, the state senate quickly voted to ratify, but the state house ultimately voted against. The negative house vote was the result of a successful lobbying effort by conservative political groups opposed to the ERA. With this action, Oklahoma became the first state to vote against ratification of the amendment, and the lobbying efforts which produced this negative decision subsequently served as a model for similar and successful efforts in other state legislatures (see Darcy and Sanbrano, 1997). Ultimately, the ERA failed ratification in 1982.

Mark Walker was well aware of this swirl of political events, and he often discussed them with his instructors at the university. At that time, I was a graduate teaching assistant for a political science course Walker was taking, and we engaged in a number of lengthy talks. Impressed with his principled opposition to the state's liquor law, I eventually advised Walker that if he really felt that strongly about the issue, he might consider consulting with a lawyer and file a lawsuit. To my surprise, this is precisely what he did. After being turned down by a

local attorney, Walker was referred to Fred Gilbert, who eventually decided to accept the case.

Gilbert proved to be an excellent choice. He was a recent Harvard Law School graduate who already had some experience in litigating gender discrimination issues. Especially noteworthy was the case of *Lamb v. Brown*, 456 F.2d (1972). In 1969, 17 year old Danny Ray Lamb was tried and convicted as an adult for felony burglary of an automobile. The prosecution was allowed under an Oklahoma law in force at that time which provided that males under the age of 16, but females under the age of 18, were to be treated as juveniles. Thus, had Lamb been a female, he would have been subjected to the less rigorous procedures and penalties of the juvenile justice system. On appeal, Gilbert argued that the law was in violation of the equal protection clause of the Fourteenth Amendment. After losing before the Oklahoma Supreme Court, and in federal district court, the United States Tenth Circuit Court of Appeals reversed, holding the Oklahoma law unconstitutional. It was this decision that also provided a powerful incentive for the Oklahoma legislature to shortly thereafter set the age of male and female majority at 18 for most state purposes.

Although Gilbert was elated by his victory before the court of appeals, he was also irritated by the remaining vestiges of gender discrimination in Oklahoma law. It was also at about this time that Walker fortuitously approached Gilbert with his case. The attorney was once again prepared to take up the legal battle for equal rights, although this case would be somewhat different. The centerpiece for the challenge to the state's liquor statute would again be the equal protection clause. However, unlike the *Lamb* case, the Twenty-First Amendment, which grants the states broad regulatory powers over the sale and use of alcohol, would come into play as well. And the two amendments would obviously be in conflict (see Darcy and Sanbrano, 1997). But this was just the beginning. It would be four long years before the case would work its way to the United States Supreme Court.

THE SUPREME COURT AND THE EQUAL PROTECTION CLAUSE

Ratified in 1868, the Fourteenth Amendment commands in part that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court, however, has never interpreted this language to require the evenhanded application of the laws in a narrow and simple manner. Indeed, with such a strict view the states could deny all left-handed people public benefits so long as they vigorously enforced that law. At the same time, the equal protection clause has never been so broadly construed as to forbid all forms of discrimination or inequities before the law. To do so would inevitably produce preposterous results. Infants, for example, are considered persons within the meaning of the Fourteenth Amendment. Yet, no reasonable person would seriously argue that they should have the right to vote, practice law or engage in the full range of legitimate adult activities. Legislative bodies may therefore produce classifications that discriminate to some degree and treat people differently. They may not, however, classify and discriminate invidiously.

The central task for the Supreme Court, then, has always been one of giving content and meaning to the principle of legal equality that falls somewhere between the two extremes noted above. Yet, historians, legal scholars, and Supreme Court Justices have long debated what that content should be. Part of the problem lies with the fact that the intent of the Thirty-Ninth Congress, which drafted and proposed the Fourteenth Amendment, is historically murky. Some argue that the original purpose of the amendment was to give the federal government broad powers to ensure the rights of blacks and to promote the ideal of equality (see Flack, 1908; Wiecek, 1977). Others argue that the amendment was not intended to prohibit racial segregation (see Bickel, 1955; Berger, 1977). Still others conclude that because the historical record is unclear and the amendment is so broad and general that it could be used to support almost anything (see Baer, 1983: 102-103). In addition, many nonracial equal protection claims, such as sex discrimination, that have come before the Court in this century were never contemplated by the framers of the Fourteenth Amendment (see Nelson, 1988). Consequently, contemporary debates over the scope of the equal protection clause

reflect rival interpretations of history, politics, and especially the politics of constitutional interpretation.

Ironically, the equal protection clause was originally employed primarily in the service of anti-regulatory economic claims (see Harris, 1960: 59). But this approach, which emphasized "heightened scrutiny" of governmental regulation of the economy, was abandoned during the mid-1930's as the result of a celebrated political battle between the Supreme Court and the Roosevelt administration. In 1938 Justice Harlan F. Stone provided the rationale for what was to eventually become the basis for the Court's modern equal protection analysis in the case of *United States v. Carolene Products. Co.*, 304 U.S. 144. In this case the Court upheld the power of Congress to prohibit the shipment of certain compounded milk products in interstate commerce. Justice Stone's opinion reaffirmed that heightened scrutiny would no longer be given to legislation regulating economic activities. Instead, the Court would presume "that it rests upon some rational basis within the knowledge and experience of the legislators." But he also added a three-paragraph footnote pointing out that heightened scrutiny might be given to legislation affecting fundamental rights or which involves prejudice against racial and other "discrete and insular minorities." Four years later Justice Douglas made a strong argument for heightened judicial scrutiny of legislation affecting fundamental rights. In *Skinner v. Oklahoma*, 316 U.S. (1942), where the Court struck down a law requiring the forced sterilization of individuals convicted of two or more felonies involving moral turpitude, he observed that "we are dealing here with legislation which involves one of the basic civil rights of man," and that any person proceeded against under this act is "forever deprived of a basic liberty."

With these seeds planted, it fell to the Warren Court (1953-1969) to develop a two-tier approach for equal protection analysis. In the upper tier is the strict scrutiny test, which applies to legislation affecting "suspect classifications" such as race or the exercise of fundamental rights. Such legislation is sustained only if there is a "compelling state interest" in the legislative classification. When the Court applies these standards, legislation is almost invariably declared unconstitutional. Nonsuspect classifications, such as indigency and rights not ranked as fundamental, are relegated to the lower tier. Here the Court employs minimal scrutiny and applies the rationality test, asking simply whether

legislation has a reasonable basis rationally related to a legitimate governmental purpose. When these standards are applied, the constitutionality of legislation is almost invariably upheld. The Warren Court's two-tier analysis of equal protection claims proved to be controversial. The use of strict scrutiny inevitably led to an expansion of rights and classifications in law considered suspect, a development that many conservatives charged as lacking in constitutional justification. The application of suspect classifications was also far from simple. Individuals possess immutable characteristics such as race, sex, alienage, illegitimacy and age because of happenstance, and they are difficult, indeed often impossible, to change. And, in many instances legislative classifications based upon these characteristics can discriminate invidiously. By the end of the Warren era, the major problem facing the Court was one of consistency in determining which classifications were suspect. As we shall see below, the justices were also split over whether gender, like race, was a suspect category.

SEX AS A SUSPECT CLASSIFICATION

The Supreme Court was exceptionally slow in recognizing that sexual discrimination might present a constitutional problem. In 1873, *Bradwell v. State*, 16 Wall. 130 upheld an Illinois statute denying women the right to practice law and two years later the Court ruled that women possessed no constitutional right to vote (*Minor v. Happersett*, 21 Wall.162 1875). Even after the ratification of the women's suffrage amendment in 1920 the Court usually deferred to state legislative judgments. A classic example of this tendency is the case of *Goesaert v. Cleary*, 335 U.S. 464 (1948). In this case the Court upheld a Michigan statute which provided that no female could be licensed as a bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment. The statute was challenged under the equal protection clause because it discriminated between the wives and daughters of owners and the wives and daughters of non-owners. The Court began with the proposition that Michigan could bar all women as a preventive measure against moral and social problems. However, the Court deferred to the legislative belief that for a defined class of women

other factors, such as the presence or supervision of a husband or father, reduced these problems, thus allowing the female relatives of a male owners to be accorded different treatment. As long as the legislative belief in the distinction was not "totally irrational" the classification did not violate the equal protection clause. The Court did not question whether this rationale was supportable in fact.

Of course, the decision in *Goesaert* clearly reflected the minimal standards and high degree of deference to legislative bodies characteristic of the rationality test which the Court subsequently adopted into the lower level of its two-tier analysis. But twenty-three years later an attempt was made to tighten these standards. In *Reed v. Reed* 404 U.S. (1971), the Court declared unconstitutional an Idaho statute which provided that males must be preferred over equally qualified females to administer estates. The Court did not hold sex to be a suspect classification, however. Instead, the Court again applied the rationality test, but it found that the sex criterion was wholly unrelated to the objective of the statute, and that it was an arbitrary legislative choice forbidden by the equal protection clause.

The question as to whether sex was a suspect classification was first explicitly addressed in *Frontiero v. Richardson*, 411 U.S. 677 (1973). This case grew out of a suit filed by Sharon Frontiero, a married Air Force officer, who challenged a federal statute that denied certain benefits and allowances to her husband that were automatically available to the wives of male officers. Justice Brennan wrote the Court's principal opinion, and he argued that with the unanimous opinion in *Reed v. Reed* the Court had now held that "classifications based on sex, like classifications based upon race, alienage, or national origin, are inherently suspect." Although the vote to condemn the statute was 8-1, with only Justice Rehnquist dissenting, five of the justices rejected Brennan's claim that sex was now a suspect classification. Justice Powell's concurring opinion proved to be key. Powell asserted that it would be "premature" for the Court to adopt Brennan's position while the ratification of the Equal Rights Amendment was pending. If adopted, he argued, the ERA would settle the issue definitively. It has also been reported that Justice Stewart attempted to negotiate a compromise with Brennan. Apparently, Stewart was convinced that the ERA would ultimately be ratified, thus making unnecessary the broad constitutional position that Brennan advocated. Stewart would join Brennan's opinion if he would limit it to

simply striking down the statute. In return, if the ERA failed ratification, Stewart would adopt Brennan's position in the next important gender discrimination case. The compromise, however, was rejected, and Stewart wrote a separate concurring opinion (see Woodward and Armstrong, 1979: 255).

Two years later, Brennan again argued unsuccessfully, in *Schlesinger v. Ballard* 419 U.S. 498 (1975), that sex was a suspect classification. Here the Court upheld the Navy practice of mandatory discharge of unpromoted male officers after nine years of active service, and unpromoted female officers after thirteen years. The purported rationale for this differential was that women at that time were barred from combat and most sea duty, and they therefore required more time to demonstrate their fitness and efficiency. At this point, Brennan was one vote short of the Court adopting his standard for the review of gender discrimination claims. But Brennan was a master at building coalitions on the Court and a justice who was not easily deterred. He would soon take up the battle again in *Craig v. Boren*.

THE CASE IN THE LOWER FEDERAL COURTS

The case filed by Fred Gilbert on behalf of Mark Walker and Carolyn Whitener in December of 1972 listed ten respondents. They included both state and local officials ranging from David Hall, the Governor of Oklahoma, right down to the local police chief. The reason for this was that the state legislature enjoyed immunity from lawsuits, but the public officials responsible for enforcing the law did not. Although the cast of characters as well as the name of the case would soon change, *Craig v. Boren* began as *Walker v. Hall* (see Darcy and Sanbrano, 1997).

In preparing his case, Gilbert realized that he faced a number of problems. First, there was the well established authority of the state to regulate the use of alcohol under the Twenty-First Amendment. Section 2 of the amendment specifically states that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." This constitutional power to regulate would not normally be a factor in equal protection cases. Second, Gilbert

realized that the state would present statistics and expert testimony in an attempt to establish that the liqour law regulating the sale of 3.2% beer was reasonable and related to a legitimate state purpose. Finally, there was the potential problem of judicial restraint. The federal district court was obviously familiar with the recent legislative debates over the liquor law, and the court might defer to the judgment of the state legislature by finding some rationale to avoid declaring the law unconstitutional.

At this stage, however, Gilbert's immediate objective was to persuade Judge Stephen S. Chandler, who heard the complaint, that a three-judge district court should be convened. Under federal rules then in force, a three-judge panel was required when the constitutionality of a state statute was challenged and coupled with a request for injunctive relief. The complaint also had to present a "meritorious federal question" and not be frivolous or fictitious. To establish merit, Gilbert argued unconstitutional discrimination in violation of the equal protection clause, cited the Tenth Circuit's decision in *Lamb v. Brown*, and also relied rather heavily on the Supreme Court's decision in *Reed v. Reed*. On February 13, 1973, Judge Chandler dismissed the complaint, citing the state's authority under the Twenty-First Amendment. The following day, Gilbert filed a notice of appeal.

The appeal was heard by a three-judge appellate panel (not to be confused with a three-judge district court panel) which included Tom C. Clark, a former associate justice of the United States Supreme Court. Clark was appointed to the Supreme Court in 1949 by President Truman and retired in 1967. As a retired justice, he retained his title and occasionally sat in lower federal court cases. In his arguments before the appellate panel, Gilbert maintained that Judge Chandler had been in error in dismissing the complaint, attacked the state's statistical evidence, and again pressed his substantive arguments. In response, the state argued that there was no fundamental right to purchase beer under the equal protection clause, and asserted its regulatory powers under the Twenty-First Amendment. The state also cited *Goeseart v. Cleary* to support its position, a case that Gilbert characterized as "ancient." An amused Tom Clark replied that it was not too ancient as he himself was Attorney General of the United States at the time the case was decided (Darcy and Sanbrano, 1997).

In its ruling, the appellate panel vacated Judge Chandler's dismissal and ordered that a three-judge district court be convened. Following

arguments before the district court, a decision upholding the state's liquor law was announced on May 17, 1975. While the court acknowledged that the case was not "free from doubt," it concluded that this was a lower tier case and that the rationality test should be applied. As a result, minimal scrutiny was employed and the court held that the state had met its burden of establishing a rational basis (statistical evidence supporting the male/female age differential) for the achievement of a legitimate governmental purpose (reducing drunk driving). The court also relied on the Twenty-First Amendment to further bolster its opinion (see Darcy and Sanbrano, 1997). Following the decision, the plaintiffs decided to petition the United States Supreme Court .

Prior to the district court decision, a change in plaintiffs was made in the case for technical reasons. Article III, section 2 of the Constitution authorizes the federal courts to decide "cases" and "controversies." This language has been interpreted to mean that a dispute may not be hypothetical, but must real and concrete. If, for example, some event occurs which eliminates a live controversy, the case is rendered moot and subject to dismissal. On November 20, 1972, Mark Walker celebrated his 21st birthday. This meant that he could now legally purchase beer. It also meant that his participation in the case was moot, as he was no longer involved in a true controversy. To rectify this situation, Curtis Craig, one of Walker's fraternity brothers, entered the case. At eighteen years of age, he met the requirements of an adverse relationship. David Boren was sworn in as the Governor of Oklahoma in January of 1975. Thus, the case became *Craig v. Boren* on appeal to the Supreme Court, which accepted the case on January 12, 1976. Although Walker was no longer formally involved in the case, his interest was still high. Tragically, however, he was killed in an automobile accident on March 8, 1976, about seven months before the case was argued before the Supreme Court (see Darcy and Sanbrano, 1997). The young man who had been the motivating force behind the initiation of the case would never know the outcome of the clash of powerful political and legal forces he had set in motion.

THE CASE BEFORE THE SUPREME COURT

During the mid-1970's, the Supreme Court received more than 4,000 petitions for review each year (O'Brien, 1996), but it accepted and produced written opinions for only 140-150 cases per term (Wasby, 1993).

Oral arguments are usually heard during morning and afternoon sessions on Mondays, Tuesdays and Wednesdays. At 10:00 A.M. the justices, dressed in black robes, enter the courtroom of the Supreme Court building from behind a maroon curtain and take their positions at the bench. The chief justice sits in the center and is flanked by the associate justices in order of seniority. While this is taking place, a crier gavels the courtroom to order and chants an introduction.

Arguing before the Supreme Court can be a disconcerting and intimidating experience. The attorneys stand at a lectern facing the justices, and each is normally given thirty minutes to present his argument, although additional time is occasionally allowed in unusually important cases. The justices may appear bored or indifferent if nothing new is presented beyond the written brief earlier submitted to the Court. On the other hand, the justices may ask questions at any time, and they are often penetrating and complex. Thus, the attorney may be forced to deviate from his line of argument and field questions from nine different sources. With the Court's permission, *amicus curiae* (friend of the court) briefs may also be submitted by parties not directly involved in a case, but who still have an interest in its outcome. These briefs are usually submitted on behalf of one side or the other in the case at hand, and they often provide the Court with a broader view of the legal and policymaking implications at stake.

On May 4 Fred Gilbert filed a motion to add another party to the case because Curtis Craig was rapidly approaching the age of 21. The mootness problem was again rearing its ugly head. The motion was denied. From the beginning, Gilbert had worried about using 18-20 year old males to challenge the Oklahoma law because it penalized the seller of beer, not the underage males who bought it. For this reason, Carolyn Whitener was included as a plaintiff in the case. This strategy proved successful. With the denial of the motion to add another party, Whitener was the only person left with standing to proceed. Initially, Whitener

thought the case would last only a few weeks, and never dreamed that it would reach the United States Supreme Court. Although she kept her liquor license current to maintain her participation in the case, by 1975 it was obvious that the business she and her husband owned was failing. The pressure to sell was great, but to do so might jeopardize the case. Newspaper headlines also heaped a certain amount of ridicule on her. Nevertheless, she persisted despite the emotional pressure, and it was her courage and determination that saved the case from mootness dismissal (see Darcy and Sanbrano, 1997).

The case of *Craig, et al. v. Boren, Governor of Oklahoma, et al.* was argued before the Supreme Court on October 5, 1976. Fred Gilbert argued for the appellants, and James H. Gray, Assistant Attorney General of Oklahoma, argued for the appellees. In addition, Ruth Bader Ginsburg and Melvin L. Wulf filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal of the district court decision.

As general counsel to the ACLU, Ginsburg was no stranger to gender discrimination issues. Indeed, she had argued successfully before the Court on behalf of Sharon Frontiero in *Frontiero v. Richardson*. In 1993 she would be appointed by President Clinton to the Supreme Court. Ginsburg and Gilbert had exchanged ideas and discussed legal strategies through a steady correspondence that dated back to *Lamb v. Brown*. This correspondence, which included a number of other lawyers and academics, also played a large role in the preparation of their arguments in *Craig* (see Darcy and Sanbrano, 1997).

In its arguments, the state relied on the strategy that had been successful in the lower federal courts — that minimal scrutiny should be applied, and that the state's statistical evidence established a rational relationship between the 3.2% beer law and a legitimate governmental objective. Gilbert reiterated his equal protection arguments, asserting that the district court decision was contrary to all modern rulings on the subject (Gilbert, 1975:14 – 20). In particular, he cited *Stanton v. Stanton* 421 U.S. 7, a recent decision in which the Supreme Court had struck down a Utah statute which provided that men reach their majority at 21, and women at the age of 18, for the purposes of receiving child support payments. In this case, a badly divided Supreme Court failed to agree on the appropriate standard of review. It ruled, however, that regardless of the standard of review — strict scrutiny, minimal scrutiny, or something in between — the statute was an unconstitutional violation of the equal

protection clause. Gilbert also picked apart the state's statistical evidence, maintaining that it was flawed and misleading (pp. 21-43).

In their amicus brief, Ginsburg and Wulf agreed that the state's statistics were being misused, but they also argued that while the state law, on its face, favored females over males, on a deeper level it reflected a prejudicial attitude toward women as the "second sex," an attitude whose time had passed. Like Gilbert, they argued that *Stanton* was close to the factual situation in *Craig*, and that the Court could therefore rule in favor of the appellants even on the basis of the rationality standard. They also appeared to be suggesting that the time was now ripe for the Court to consider the development of a standard that fell between strict and minimal scrutiny (Epstein and Knight, 1998).

The justices in conference following oral argument discussed the disposition of the case. Chief Justice Burger took the position that the case should be dismissed for lack of standing. Whitener, whom Burger had somewhat derisively characterized as a "mere saloon keeper" during oral argument, was both female and more than 21 years of age. Consequently, she was not involved in a real controversy. If, however, the Court decided to proceed, Burger indicated that he might be willing to decide the case in favor of the appellants, possibly on the basis of the rationality standard. Justices Blackmun, Powell and Rehnquist also favored dismissal, but they disagreed on the other important questions. Powell essentially accepted the somewhat equivocal position taken by the Chief Justice. Blackmun also would lean toward the appellants if the case was decided on its merits, but he was silent as to the appropriate standard of review. Only Rehnquist was of the firm belief that the Oklahoma beer law should be upheld on the basis of the rationality standard (Epstein and Knight, 1998: 4 – 6).

The five remaining justices were in agreement that standing should be granted, and that the Oklahoma beer law should be struck down. But they too indicated differences over the appropriate standard of review. Of course, Justice Brennan was on record as favoring sex as a suspect classification subject to strict scrutiny, but he suggested that he might be willing to accept a slightly less rigorous standard (Schwartz, 1990: 226). Justice White favored strict scrutiny, but indicated he might consider Brennan's suggestion, and Justice Stevens stated a preference for a level of analysis somewhere above the rationality standard. Justice Stewart still favored the rationality standard, and Justice Marshall was

the only one of the nine to advocate an unqualified preference for strict scrutiny (Epstein and Knight, 1998: 5 – 6). As the senior justice in the majority, Brennan assigned the writing of the Court's opinion to himself. At this point, he had a majority to grant standing and strike down the beer law, but he would have to somehow reconcile the diverse viewpoints of his brethren to produce a strong opinion.

Brennan's efforts proved successful. On December 20, 1976, the Supreme Court announced its decision in the case of *Craig v. Boren* 429 U.S. 190. By a 7-2 vote, the Court held the Oklahoma beer law an unconstitutional violation of the equal protection clause. Joining in Brennan's opinion of the Court were Justices White and Marshall. Justices Blackmun, Powell and Stevens wrote concurrences, and Justice Stewart authored a special concurrence. The Chief Justice and Justice Rehnquist dissented.

The Court first addressed the question of standing. Craig's participation in the case was ruled moot because, due to his age, he no longer suffered injury in fact. Whitener, however, was a different matter. The Court noted that in oral argument before the district court the state had "presumed" that she was a proper party to the suit, and had raised no objection to her participation in the case. Given these considerations, a decision by the Court ". . . to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute . . .would be to impermissibly foster repetitive and time-consuming litigation under the guise of caution and prudence" (pp. 193-194). In any event, Whitener had suffered "injury in fact" because

> The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer . . .sanctions and perhaps loss of license.' This Court repeatedly has recognized that such injuries establish the threshold requirements of a 'case or controversy' mandated By Art. III (p. 194).

Finally, the Court noted that in past decisions, it had permitted those in similar situations to resist efforts at restricting their operations by acting as advocates for third parties seeking access to their markets or

services. Consequently, the Court held that Whitener possessed standing to proceed (pp. 195-197).

Once the issue of standing had been disposed of, the Court moved on to the substantive constitutional issues. Justice Brennan started with the premise that to withstand constitutional challenge, prior cases (most notably *Reed v. Reed*) establish that classifications by gender must serve *important governmental objectives* and must be *substantially related* to the achievement of those objectives (p.197). He then turned his attention to the statistical evidence. Noting that the state's drunk driving arrest statistics for 18-20 year olds was tied to the consumption of all forms of alcohol, not just 3.2% beer, he went on to state:

> Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. . . . Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate — driving while under the influence of alcohol — the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it can hardly form the basis for the employment of a gender line as a classifying device. Certainly, if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous fit. (pp. 201-202).

The Court also rejected the state's argument under the Twenty-First Amendment by stating that it

> primarily created an exemption to the normal operation of the Commerce Clause [and that its relevance]. . .to other constitutional provisions is doubtful. Neither the text nor the history of the Twenty-First Amendment suggests it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned. We thus hold that the operation of the Twenty-First Amendment does not alter the application of the equal protection standards that would otherwise govern this case (pp. 206 and 209).

With this opinion, the Court achieved two important objectives and one enormously important objective. For the first time the Court

recognized that persons directly affected by a statute have standing to defend the rights of "third parties" in sex discrimination cases. Additionally, it was held that the Twenty-First Amendment could not be invoked to qualify rights otherwise protected by the equal protection clause. But, by far, the most important development to emerge from this case was the establishment of "middle tier analysis" for sex discrimination claims. No longer would legislative classifications based upon sex be considered presumptively valid and upheld under the standards of rationality and minimal scrutiny. From this point on they would be subjected to a much more heightened, or "intermediate," scrutiny, which would require a substantial relationship to a legitimate governmental interest. This standard was now encased in a Supreme Court precedent, and the state legislatures would have to take heed of that fact.

Some perceptive commentators have also noted that *Craig v. Boren* was the most politically expedient case the Court could have utilized at that time to announce its new equal protection standard. Other cases were available, but some involved huge sums of money while others, such as male/female differentials for jury service, opened up a host of potential problems which could have involved new trials or the release of large numbers of prison inmates. But striking down Oklahoma's beer law " would cost no money and have no identifiable social or political consequences" (Darcy and Sanbrano, 1997: 29). Young men and women would only have to reach the same minimal age before they could legally purchase diluted beer. Consequently, the Court had much more freedom to act than in a case where the stakes would have been much higher.

THE AFTERMATH OF CRAIG V. BOREN

Although the new standard of intermediate scrutiny announced in *Craig* fell below the strict scrutiny reserved for suspect classifications, its application would nevertheless prove highly effective in accomplishing much of what would have been achieved had the Equal Rights Amendment been ratified. Thus, Justice Brennan, while technically failing to have sex declared a suspect classification, for all practical purposes came close to achieving that goal in practice.

In cases following *Craig*, the Supreme Court held that women who take pregnancy leave cannot be denied their seniority in employment upon returning to work (*Nashville Gas Co. v. Satty* 434 U.S. 136, 1977); struck down an ordinance requiring female employees to pay $15 more than male employees into a pension fund (*City of Los Angeles, Department of Water & Power v. Manhart* 435 U.S. 702, 1978); declared unconstitutional a policy denying men admission to the nursing program of a state school (*Mississippi University for Women v. Hogan* 458 U.S. 718, 1982); and upheld a state law requiring employers to provide pregnancy disability leaves (*California Federal Savings & Loan Association v. Guerra* 479 U.S. 272, 1987). Moreover, the potential for applying intermediate scrutiny to legislative classifications other than sex became almost immediately apparent. A good illustration of this point would be illegitimacy. In *Matthews v. Lucas*, 427 U.S. 495 (1976), *Trimble v. Gordon*, 430 U.S. 762 (1977), and *Lali v. Lali*, 439 U.S. 259 (1978), the Court required that classifications based on illegitimacy be "substantially related to a permissible state interest." These cases clearly indicate that illegitimacy is now a quasi-suspect classification subject to intermediate scrutiny. Similar developments can be found in some cases dealing with alienage (see *Plyler v. Doe*, 457 U.S. 202, 1982) and affirmative action (see *Regents of the University of California v. Bakke*, 438 U.S. 265, 1978).

Of course, not all challenged statutes have been invalidated under the test of intermediate scrutiny. In *Lali v. Lali*, a bare majority of the Supreme Court held that two illegitimate children could not share in their deceased father's estate because he had failed during his lifetime to secure a judicial order declaring his paternity. Similar results have occasionally been rendered in gender discrimination cases as well. In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Supreme Court upheld the federal policy limiting the military draft to men only, and in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), the Court upheld a California statute that makes males, but not females, criminally liable for statutory rape. Nevertheless, the overall impact of *Craig* has been impressive. Indeed, a statistical analysis of statutes subjected to intermediate scrutiny since *Craig* indicates that more than 60% of them have been struck down (Ducat, 1996: 1479).

At times, great constitutional cases originate under seemingly unimportant or ordinary circumstances, and this was certainly true of

Craig v. Boren. At issue was a rather silly law, born of politics and compromise, that attempted to regulate the sale of diluted beer which had been legally defined as non-intoxicating. But the underlying issues of gender discrimination were far from unimportant. At the outset, Fred Gilbert had explained to Mark Walker that the case could be filed in either federal or state court, and that procedurally the latter would probably produce a quicker and easier result. Walker, however, was of the firm belief that he had a national constitutional issue, and that the federal courts were the more appropriate forum. Had the case been filed in state court, it might have turned out differently. But Mark Walker insisted on making a federal case out of it, and the ramifications for equal rights under the Constitution have been profound.

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