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White v. Fleming: In Search of a Standard of Review for Classification Based on Sex

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White v. Fleming: In Search of a Standard of Review for Classifications Based on Sex—"Ever since Eve, mankind has realized that one thing may lead to another . . . ." *City of Milwaukee v. Piscuine.*[1] Changing societal views concerning women have done much to condemn legislation which has cast upon women the role of moral menaces. Occasioned by this change in attitude, not only has new legislation[2] been enacted, but challenges to sex-based classifications have become increasingly frequent and successful. Unfortunately, in attempting to effectively set apart sex classifications due solely to prejudicial attitudes from those having a legitimate basis, the courts have employed widely varying rationales for their decisions. The resulting confusion as to which rationale is correct has virtually left the courts free to roam within the ambit of the equal protection clause, choosing or creating guidelines they deem appropriate. Looking for a trend in the case law in this area, the Seventh Circuit, in *White v. Fleming*,[3] elicited minimal guidelines for a test to be temporarily employed[4] in evaluating classifications based upon sex. Drawing upon language from *Eisenstadt v. Baird*,[5] the court stated that it will "not accept a classification based solely on sex without further inquiry as to whether the differences between men and women rationally justify the classification."[6] The court took note that there are anatomical and physiological differences between men and women that may justify classifications for certain purposes.[7] It determined, however, that these differences do not include a greater or lesser propensity for promiscuous sexual activity thought to follow from contacts in taverns.[8]

Dorothy White, an entertainer, was arrested and charged with unlawfully sitting with a male patron at the tavern in which she worked in violation of section 90-25 of the Milwaukee

1. 18 Wis. 2d 599, 612, 119 N.W.2d 442, 449 (1963).

2. *See, e.g.*, Equal Pay Act, 29 U.S.C. § 206(d) (1963); Title VII of the Civil Rights Act, 42 U.S.C. § 2000a, et seq. (1964); Equal Rights Amendment, H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).

3. 522 F.2d 730 (7th Cir. 1975).

4. Until it reexamines this area "[t]he precise terms of the test ultimately to be evolved by the Supreme Court for judging the validity of a classification based on sex cannot now be determined." *Id.* at 736.

5. 405 U.S. 438 (1972).

6. 522 F.2d 730, 736 (7th Cir. 1975).

7. *Id.* at 737.

8. *Id.*

Code of Ordinances.[9] Essentially, the ordinance prohibits, with certain exceptions, female tavern employees from sitting with male patrons or from being at or behind a bar, except to receive food or drink orders for delivery to patrons who are not at the bar.

The Milwaukee Common Council, upon enacting this ordinance, included it within part V of the Milwaukee Code of Ordinances—business and trade regulations.[10] This would seem to indicate that section 90-25 was designed to operate as a regulation of the liquor industry. The state legislature allows each individual city, town and village to issue or deny licenses for the sale of intoxicating beverages.[11] Such power necessarily includes the authority to regulate the use of the liquor license when granted. Recognizing the need for such authority, a further grant was expressly given to these governing bodies to adopt any additional regulations on the sale of such intoxicants as local conditions in each community might warrant.[12] Under this grant of power, the City of Milwaukee may adopt reasonable regulations to control the conduct of the employees on premises licensed for on-site consumption of intoxicating liquors. The Milwaukee Common Council adopted section 90-25 to regulate the contact between female employees and the public in taverns. The ordinance was not intended to place any restraints on the legitimate activities of female entertainers, waitresses or employees, but only to prohibit conduct other than that which would be required in such occupations—

9. MILWAUKEE, WIS., CODE OF ORDINANCES § 90-25 (1974):

Any female entertainer, waitress, or female employe of any Class "B" fermented malt beverage or Class "C" intoxicating liquor licensed premises who shall at any time stand or sit at or behind the bar, except for the specific purpose of receiving food or drink orders for delivery to patrons who are not at the bar, or any female entertainer, waitress, or female employe who shall sit at any table or in any booth or elsewhere on the premises with any male patron, shall be punished by a fine not to exceed twenty-five dollars ($25) or in default of payment thereof be committed to the county jail or house of correction of Milwaukee county for not to exceed 60 days or until such fine and costs shall be paid. . . . The provisions of this section shall not apply to licensed female bartenders, or to female employes who are members of the immediate family and household of the licensee, or to female entertainers while actually performing in an area behind the bar which area is ordinarily used for back-bar entertainment. (Am. Ord. 469, F.66-3715-b, passed Mar. 19, 1971).

10. Note also the existence, within Milwaukee's Code of Ordinances, of part VIII—public safety, morals and welfare.

11. WIS. STAT.§ 66.054 (1973).

12. WIS. STAT. §§ 66.054(12) -(13) (1973).

conduct thought by the common council to lead to evils not enumerated within its provisions which would adversely affect the morals of the community. An examination of section 90-24 of the Milwaukee Code of Ordinances[13] further explains the rationale behind the enactment of section 90-25.

> A reading of the companion ordinance (Section 90-24) at once discloses the practical difficulties of its enforcement. It prohibits any person of the opposite sex "to him or her unacquainted" to issue an invitation for a drink.
>
> If the person charged had been in the tavern before or only casually talked to the entertainer, waitress, or female employe, the patron no longer was a person "theretofore to him or her unacquainted." Further, under that ordinance it would be necessary to establish the conversation between the female employe and the patron to prove solicitation. It is thus apparent that many subterfuges are readily available to circumvent the ordinance. Section 90-25 prevents fraternization or mingling with patrons so as to prevent the evil at its inception.[14]

Miss White challenged the constitutionality of this ordinance, alleging that it deprived her of equal protection under the law. The District Court for the Eastern District of Wisconsin[15] pointed out that "[w]hat is at issue here is not per se a regulation of the liquor industry but an ordinance which circumscribes the conduct of an individual in a tavern: conduct which would be legal in any other context but is herein made illegal solely because of the sex of the individual."[16] Indicating the existence of a classification based on sex, the court applied the standard of rationality[17] and found that Milwaukee's bargirl ordinance was "so irrational and invidious that it is pat-

13. MILWAUKEE, WIS., CODE OF ORDINANCES § 90-24 (1974):

> Any person of either sex who shall solicit, appeal to, ask or invite another person of the opposite sex theretofore to him or her unacquainted to purchase for, procure for, or give to such person a drink of intoxicating liquor, malt beverage, nonintoxicating liquor or soft drink in any Class "B" malt beverage or Class "B" intoxicating liquor licensed premises, shall be punished by a fine not to exceed twenty-five dollars ($25), or in default of payment thereof be committed to the county jail or house of correction of Milwaukee county not to exceed 60 days or until such fine and costs shall be paid. . . .

14. Brief for Plaintiff-Respondent at 12-13, City of Milwaukee v. Piscuine, 18 Wis. 2d 599, 119 N.W.2d 442 (1963).

15. White v. Fleming, 374 F. Supp. 267 (E.D. Wis. 1974).

16. *Id.* at 270.

17. *Id.* at 271.

ently unconstitutional under the equal protection clause of the United States Constitution."[18] The Court of Appeals for the Seventh Circuit affirmed the judgment.[19]

Until recent years the different treatment accorded women was virtually immune from attack under the equal protection clause.[20] Applying the traditional rational basis test,[21] sex-based classifications were invariably deemed valid. These courts began their inquiry by assuming that vast differences between men and women existed, which eased the way to the finding of a rational connection between the classification and the legitimate interest advanced.[22]

A leading case reflecting this approach was *Goesaert v. Cleary*.[23] This decision involved a challenge to a Michigan statute which forbade females generally from becoming barmaids, but made an exception in favor of the wives and daughters of the owners of the liquor establishments. The Court sustained this sex classification, remarking, "[B]artending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures . . . ."[24] Cases subsequent to *Goesaert* have tended to rely heavily upon its rationale in justifying similar legislation based upon sex against constitutional challenges.[25] Following the *Goesaert* analysis, these courts have yielded to legisla-

18. *Id.* at 273.

19. 522 F.2d 730 (7th Cir. 1975).

20. *Id.* at 731.

21. Traditionally, this process involves the existence of a legitimate governmental objective and a determination that the legislative classification bears a rational relationship to that legitimate objective. Since the Supreme Court never declared sex to be "suspect," sex-based classifications were not subjected to strict scrutiny. Under this latter approach the Court inquires whether the challenged statute impinges upon a fundamental interest or delineates a suspect classification. If so, such classification will be upheld only if it serves a "compelling" state interest. This test will also strike down a statute which, by examining the relationship between the classification and legislative objective, can reasonably be less restrictive and still achieve its purpose. *See generally* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974).

22. Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L. J. 163, 167 (1975).

23. 335 U.S. 464 (1948).

24. *Id.* at 466.

25. *E.g.*, Hargens v. Alcoholic Beverage Control App. Bd., 263 Cal. App. 2d 601, 69 Cal. Rptr. 868 (Ct. App. 1968); State v. Burke, 79 Idaho 205, 312 P.2d 806 (1957); Henson v. City of Chicago, 415 Ill. 564, 114 N.E.2d 778 (1953); City of Milwaukee v. Piscuine, 18 Wis. 2d 599, 119 N.W.2d 442 (1963) (Upholding the ordinance challenged in *White*).

tive judgments concerning different treatment of the sexes. A problem, however, has developed in employing the *Goesaert* rationale. Given this general insensitivity of the courts toward sex discrimination and the predominantly male membership of legislative bodies, these cases "graphically illustrate the ineffectiveness of the permissive [traditional] rational basis test in distinguishing classifications which might possibly have a legitimate basis from those which are due solely to the prejudiced attitudes of the legislators."[26]

In recent years, there has been a noticeable change in societal attitudes towards women.[27] Prompted by legislative activity in the area of sex discrimination,[28] the more recent court decisions[29], which surely would have been controlled by *Gorsaert* not so many years ago, have apparently abandoned *Goesaert* and its approach. There exists, however, uncertainty and inconsistency on the current standard of review. It is apparent that though *Goesaert* has not been overruled, the courts today seem to be less willing to defer to legislative regulations based on sex classifications. Rather, the courts are subjecting these classifications to a greater intensity of review. Two decisions noted by the *White* court, *Daugherty v. Daley*[30] and *Women's Liberation Union of Rhode Island v. Israel*,[31] have invalidated legislative regulations of the conduct of women in liquor establishments. Under the guise of limiting *Goesaert* to its facts, the Seventh Circuit intimated that were it not for the recent developments in societal attitudes toward women and in equal protection law, these cases assuredly would have been controlled by *Goesaert*.[32] Suggesting that *Goesaert* was distinguishable from the instant case, the court, pointing to *Daugherty* and *Women's Liberation Union*, did not feel bound to extend its

26. Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L. J. 163, 170 (1975).

27. 522 F.2d 730, 732 (7th Cir. 1975).

28. *See, e.g.*, Equal Pay Act, 29 U.S.C. § 206(d) (1963); Title VII of the Civil Rights Act, 42 U.S.C. § 2000a, et. seq. (1964); Equal Rights Amendment, H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).

29. Women's Liberation Union of R.I. v. Israel, 512 F.2d 106 (1st Cir. 1975); Daugherty v. Daley, 370 F. Supp. 338 (N.D. Ill. 1974) (three-judge court); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971); Commonwealth of Ky., Alcoholic Beverage Control Bd. v. Burke, 481 S.W.2d 52 (Ky. Ct. App. 1972).

30. 370 F. Supp. 338 (N.D. Ill. 1974) (three-judge court).

31. 512 F.2d 106 (1st Cir. 1975).

32. 522 F.2d 730, 733 (7th Cir. 1975).

holding. But in *City of Milwaukee v. Piscuine*,[33] the Wisconsin Supreme Court distinguished the statute challenged in *Goesaert* as one which goes much farther than section 90-25 of the Milwaukee Code of Ordinances.

> Although it is true that in . . . *Goesaert* . . . the legislation prohibited female employment as bartenders in taverns the Milwaukee ordinance has nothing to do with prohibiting employment but regulates the conduct of female employees in taverns. . . . [*Goesaert* held] that legislation prohibiting such female employment is not contrary to the constitutional guarantee of equal protection. It follows that mere regulation of the conduct of female employees as in the Milwaukee ordinance does not violate that guarantee.[34]

Piscuine states that though *Goesaert* is distinguishable from the instant case, both cases should be treated similarly. *Goesaert* would not have to be extended to apply to the challenged Milwaukee ordinance. Hence, since *Goesaert* is still law today, the Seventh Circuit is not merely refusing to extend its rationale to the instant case, it is refusing to follow its rationale altogether.

The court did concede the applicability of another constitutional provision that *Goesaert* was grounded upon. As with the statute in *Goesaert*, the ordinance involved in the instant case is related to conduct within the confines of liquor establishments. As such, the municipality places great emphasis upon the plenary power of the state under the twenty-first amendment[35] to proscribe certain conduct in its taverns. This power was recognized in *Goesaert* and recently reaffirmed in *California v. LaRue*.[36] The applicability of this amendment, however, is not determinative of the challenge. Undoubtedly the twenty-first amendment strengthens the case for the city, but does not render inapplicable other constitutional provisions. "It is still necessary to consider and apply the appropriate equal protection test."[37] From this starting point the Sev-

33. 18 Wis. 2d 599, 119 N.W.2d 442 (1963).

34. Id. at 607, 119 N.W.2d at 447.

35. U.S. CONST. amend. XXI, § 2.

> 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.

36. 409 U.S. 109 (1972).

37. 522 F.2d 730, 733 (7th Cir. 1975).

enth Circuit began its search for the current standard of review for sex-based legislation.

Briefly examining the Supreme Court's pronouncements concerning sex classifications in *Reed v. Reed*[38] and *Frontiero v. Richardson*,[39] the Seventh Circuit felt it inappropriate at this time to subject the challenged ordinance to the strict scrutiny standard.[40] The cases since *Frontiero* which have addressed the issue of the appropriate treatment under the equal protection clause of legislation which disadvantages women, have still refused to declare whether sex-based classifications are inherently suspect.[41]

Refusing to apply the highest standard of review, the courts then turned to an examination of the minimal standard required for the validity of legislative classifications—the rational basis test. Under this analysis the courts have required legislative classifications not deemed to be either suspect or fundamental to bear some rational relationship to a legitimate legislative purpose.[42] Traditionally, the classification will be valid "if any state of facts reasonably may be conceived to justify it."[43] In recent years this approach, which of necessity

38. 404 U.S. 71 (1971). A unanimous Court held invalid an Idaho statute which gave preference to men as administrators of decedents' estates under the equal protection clause.

39. 411 U.S. 677 (1973). In a plurality decision by the Court, sex-based classifications of members of the uniformed services for purposes of dependents' benefits were held to be unjustifiably discriminatory. Four of the justices believed sex to be inherently suspect, and therefore subject to close judicial scrutiny. The other justices, however, remained uncommitted.

40. 522 F.2d 730, 733-34 (7th Cir. 1975). Mr. Justice Powell, in his concurrence in Frontiero which was joined by the Chief Justice and Mr. Justice Blackmun, deferred from categorizing sex as a suspect classification in light of the pendency before the state legislatures of the proposed Equal Rights Amendment, "which if adopted will resolve the substance of this precise question." 411 U.S. 677, 692 (1973). Other courts, however, have found that sexual classifications are to be properly treated as suspect, requiring the strictest test of judicial scrutiny. *See* United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971).

41. *See* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975).

42. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

43. McGowan v. Maryland, 366 U.S. 420, 426 (1961). This interpretaion of the rational basis test involves the least amount of scrutiny ever employed by the Court. A decade later, the Burger Court interpreted the rational basis test as requiring that "a fair and substantial relation" exist between the legislative goal and the classifica-

requires a considerable amount of judicial restraint, has seemed to be losing momentum. The Court has been "less willing than it formerly had been to ascribe legitimate purposes to the legislative body."[44] The Court's devotion to judicial restraint waned as it seemed to subject certain classifications to a greater intensity of review.[45] Included within these classifications are those based upon sex. The recent decision in *Weinberger v. Salfi*[46] has called a halt to this trend. In that case the Supreme Court reaffirmed the traditional rational basis standard in disposing of constitutional challenges to social welfare legislation.[47] In failing to extend a greater intensity of review to the classification before it, the Court made no mention as to its applicability to *Reed* and *Frontiero* and sex classifications.

The real confusion, however, arises from numerous lower court decisions[48] which have interpreted *Reed* as recognizing the existence of a third standard, somewhere between the rational basis and strict scrutinty tests, for use in sex classification cases. The "intermediate" standard has been attributed to the language in *Reed* which calls for a "fair and substantial" relation to exist between the basis of the classification and the object intended to be achieved.[49] More recently the existence

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tion. Reed v. Reed, 404 U.S. 71, 76 (1971). This is where the confusion arises. Is the "fair and substantial" requirement of *Reed* to be interpreted as the standard of the rational basis test, or of an intermediate test? The "fair and substantial" criteria seemingly requires a greater degree of scrutiny than the *McGowan* standard. Since, however, these words have come from F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), it could be argued that this standard is really nothing but an application of the rational basis test. A reading of *Reed* alone will not solve the problem.

44. 522 F.2d 730, 734 (7th Cir. 1975).

45. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). *See also* Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33-37 (1972).

46. 422 U.S. 749 (1975).

47. *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

48. *E.g.*, Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1269 (9th Cir. 1974); Eslinger v. Thomas, 476 F.2d 225, 230-31 (4th Cir. 1973); Wark v. Robbins, 458 F.2d 1295, 1297 n.4 (1st Cir. 1972).

49. *Citing* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), *Reed* required that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .'" 404 U.S. 71, 76 (1971). *See generally* Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

of an intermediate test was thrown into doubt by the Supreme Court's application of a rational basis test in *Village of Belle Terre v. Boraas*,[50] reversing the Second Circuit's decision which had applied a less deferential test. Hence, it appears "unclear whether the Court now accepts an intermediate form of equal protection analysis."[51] And yet, though the Seventh Circuit could not evince a clear test from the Supreme Court to apply in judging the validity of sex-based classifications, it seemed to find that the sum total of the case law in this area requires that a special significance be imputed to sex classifications. It chose to review the legislation with a greater degree of scrutiny by refusing to accept "a classification based solely on sex without a further inquiry as to whether the difference between men and women rationally justify the classification."[52]

What is interesting about the Seventh Circuit's opinion is the manner in which the court implemented this test in declaring the provisions of the Milwaukee ordinance to be in violation of the equal protection clause. Referring to the proffered municipal interest of reducing the planning of promiscuous sexual activity[53] by means of restricting the conduct of female tavern employees, the court conspicuously avoided comment on the legitimacy of the interest sought to be achieved and the futherance of the ordinance's objective by the classification. It cannot be denied that protecting the moral well-being of the community is a legitimate concern of the municipal government, nor can it be said that this concern is not furthered by the ordinance.[54] The conclusion seems inescapable that the legisla-

50. 416 U.S. 1 (1974). Significantly, this case did not involve a sex classification; rather, the subject concerned the constitutionality of a village zoning ordinance limiting the occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons. The ordinance was upheld. *See also* Stanton v. Stanton, 421 U.S. 7 (1975). In this case the Court, finding no "rational relationship" to exist, declared that a Utah statute specifying a greater age of majority for males than for females, in the context of child support, denies equal protection.

51. Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1068 n.5 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). Again, no mention was made concerning the applicability of a less deferential test to sex-based classifications.

52. 522 F.2d 730, 736 (7th Cir. 1975).

53. The Milwaukee Common Council intended the ordinance as an instrument of morality which would make more difficult any designs for a later immoral encounter between a male patron and the female employee. The interest of prohibiting the solicitation of drinks by female employees for the protection of male patrons is the subject of another Milwaukee ordinance, according to City of Milwaukee v. Piscuine, 18 Wis. 2d 599, 612, 119 N.W.2d 442, 449 (1963).

54. There should be no question as to the chemistry of man's attraction to his

tive interest is legitimate, and also that there is indeed a rational relationship between the classification and that legitimate objective. It would seem, therefore, that the court could have reached its decision only by shielding those disadvantaged by a classification based on sex with some special protection.

The effect of rendering special significance, at least implicitly, to sex classifications indicates the application of a standard higher than the rational basis test. Indeed, because the classification was based solely on sex, the court deemed it necessary to make a further inquiry as to whether the difference between a man and a woman rationally justifies different treatment. The court felt it necessary, in the area of sex classifications, to review the underlying legislative assumptions in light of this nation's long history of sex discrimination to see that no "stereotyped assumptions concerning propensities thought to exist in some members of a given sex" become the basis for legislation.[55] Application of the Seventh Circuit's test, however, does not eliminate the major concern inherently marked upon sex classification legislation—the problem of distinguishing classifications which might possibly have a legitimate basis from those which are due solely to the prejudicial attitudes of the legislators.[56] Is it that the men on the bench feel that they are better qualified than the men in the legislature to spot which sex classifications are based on stereotyped assumptions, and therefore impermissible, and which are not, and therefore permissible? This arrogant attitude has caused the court to overlook a fundamental fact. "Without . . . 'sex-unique' differences, men would be indistinguishable from women, and the issue of sex discrimination would never have arisen in the first place."[57] The solution is not in trying to zero

female counterpart. It did not end with the current legislative and judicial concern over the changing role of women in society. Contact between men and women in liquor establishments may indeed lead to promiscuous sexual activity.

55. 522 F.2d 730, 737 (7th Cir. 1975).

56. Not discussed or treated in this opinion is the problem of ameliorative sex-based classifications, those which attempt to alleviate the effects of past discrimination toward women. Whether the Seventh Circuit's analysis can be, or was intended to be, applied to ameliorative classifications is open to question. For a discussion of how these classifications have been analyzed under the equal protection clause, *see* Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L. J. 163 (1975); Comment, *Constitutional Law: Ameliorative Sex Classification and the Equal Protection Clause*, 14 WASHBURN L.J. 127 (1975).

57. Comment, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of*

in on the stereotyped assumptions thought to exist in one sex over another; rather, the key is in recognizing that the "sex-unique" differences lie at the heart of sex classifications.

Appearing to offer workable guidelines to be employed in dealing with sex-based classifications, the court has actually offered little to help solve the problem of the nature of the standard of review to be applied in this area. While the court's language seems to dispel any reliance on the *Goesaert* rationale, just where its analysis of sex-based classifications fits in relation to the "minimal-intermediate-strict scrutiny" trilogy is open to question. Although not invalidating all classifications based on sex, when the court finds that the classification is purportedly related to the accomplishment of a legitimate legislative objective, and that objective could be accomplished by the challenged classification, the failure of the court to find a rational basis for the different treatment of men and women within the ordinance would render the classification arbitrary and violative of the equal protection clause. The practical effect of this analysis is to say that sex is inherently suspect under the traditional two-tier equal protection analysis.[58] If it is granted, however, that no "compelling state interest" is necessary because sex is not a suspect classification, the court's analysis requires the application of an intermediate equal protection test. Requiring that a further inquiry be made as to whether the differences between men and women rationally justify the classification, the court compels a "more than rational" connection exist between the legitimate legislative goal and the classification. Both interpretations are plausible, but which is proper and correct? The court gives no answer. As numerous other courts, the Seventh Circuit is wavering indecisively between classifying sex as suspect and recognizing the existence of an intermediate equal protection test for sex-based legislation.

The present status of sex-based classifications under the

Sex Discrimination, 75 COLUM. L. REV. 441, 461 (1975).

58. Under this analysis an initial inquiry is made as to whether a fundamental right-suspect classification is involved. If so, a "compelling state interest" is required to uphold the statute's classification. If neither a fundamental right nor a suspect classification is found, the Court requires the petitioner to prove that the statute has no rational basis.

equal protection clause remains uncertain. While the *Goesaert* rationale appears no longer applicable, a clear standard has not emerged to take its place. Indeed, there is a wide divergence in the standard that the courts have applied.[59] Until the Supreme Court articulates why some classifications of persons are or are not entitled to any form of protection beyond that required by the most minimal standard, the members of such classes may well feel that the courts' review is as arbitrary as the challenged legislation.

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59. Note, *The Emerging Bifurcated Standard for Classifications Based on Sex*, 1975 DUKE L.J. 163, 177 (1975).