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Standing; Assertion of Jus Tertii; Sex Discrimination; Equal Protection; Twenty-first Amendment; Craig v. Boren

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CONSTITUTIONAL LAW

Standing • Assertion of Jus Tertii • Sex Discrimination • Equal Protection • Twenty-first Amendment

Craig v. Boren, 97 S.Ct. 451 (1976)

APPELLANTS brought an action in the United States District Court for the Western District of Oklahoma seeking declaratory and injunctive relief.[1] The complaint charged that the operation of two Oklahoma statutes,[2] which prohibited the sale of 3.2% beer to males under the age of 21 while allowing females over the age of 18 to purchase the commodity, violated the fourteenth amendment to the Federal Constitution. The three-judge court held that the gender-based classification did not violate the equal protection clause.[3] In *Craig v. Boren,*[4] on direct appeal, the United States Supreme Court reversed, finding that the gender-based classification could not withstand the requirements of the equal protection clause.[5]

The appellants were Craig, a male then between the ages of 18 and 21, and appellant Whitener, a vendor licensed to sell 3.2% beer. Since Craig reached the age of 21 after the Court noted probable jurisdiction and since only declaratory and injunctive relief were sought, the Court concluded that the controversy had become moot with respect to his claim.[6] Thus, the question whether Whitener had standing to assert the equal protection claims of males 18-20 years of age became a threshold issue. The Court decided this issue in the affirmative, holding that appellant Whitener could assert *jus tertii,* the rights of a third person.[7]

A litigant's ability to assert that the application of a law not only affects himself adversely, but at the same time impinges upon the constitutional rights of third persons is referred to as *jus tertii.* The ability to assert *jus*

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[1] Walker v. Hall, 399 F. Supp. 1304 (W.D. Okla. 1975), *rev'd sub nom.,* Craig v. Boren, 97 S.Ct. 451 (1976).

[2] OKLA. STAT. ANN tit. 37, § 241 (West 1958); OKLA. STAT. ANN. tit. 37 § 245 (West Supp. 1976). The statutes provide in part:

> It shall be unlawful for any person who holds a license to sell and dispense beer . . . to sell, barter or give to any minor any beverage containing more than one-half of one percent of alcohol measured by volume and not more than three and two-tenths (3.2) percent of alcohol measured by weight . . . .
>
> A "minor" for the purposes of Section 241 . . . is defined as a female under the age of eighteen (18) years and a male under the age of twenty-one (21) years.

[3] 399 F. Supp. at 1311.

[4] 97 S.Ct. 451 (1976).

[5] *Id.* at 458.

[6] *Id.* at 454, *citing* Defunis v. Odegaard, 416 U.S. 312 (1972).

[7] *Id.* at 456.

tertii claims thus can be of extreme importance in protecting the rights of out-of-court third parties where it is unlikely that such third parties would be able to effectively assert their own rights.[8] However, it is far from clear when *jus tertii* claims may be asserted.

The doctrine of standing, particularly as it relates to *jus tertii,* is a highly technical area of the law replete with confusion.[9] The Court itself has referred to the doctrine of standing as a "complicated specialty of federal jurisdiction."[10] The Court has also stated that "[s]tanding is an aspect of justiciability and, as such, the problem of standing is surrounded by the same complexities and vagaries that inhere in justiciability. Standing has been called one of 'the most amorphous [concepts] in the entire domain of public law.' "[11] Although "amorphous", the basic requirements for standing in the federal courts have been set down in *Baker v. Carr.*[12] The prerequisites of injury in fact and "concrete adverseness" as set down in that case must be met in order to satisfy the constitutional standing requirements which restrict judicial power to "cases" and "controversies".[13] However, in addition to federal constitutional requirements for standing, the Court also has self-imposed certain prudential limitations on the doctrine of standing.[14]

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[8] *See, e.g.,* Singleton v. Wulff, 96 S.Ct. 2868 (1976). Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953).

[9] *See, e.g.,* Flast v. Cohen, 392 U.S. 83, 95 (1968); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief,* 83 YALE L.J. 425 (1974); Davis, *The Liberalized Law of Standing,* 37 U. CHI L. REV. 450 (1970); Lewis *Constitutional Rights and the Misuse of "Standing,"* 14 STAN. L. REV. 433 (1962); Monaghan, *Constitutional Adjudication: The Who and When,* 82 YALE L.J. 1363 (1973); Scott, *Standing in the Supreme Court - A Functional Analysis,* 86 HARV. L. REV. 645 (1973); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii,* 88 HARV. L. REV. 423 (1975).

[10] United States *ex rel.* Chapman v. FPC, 345 U.S. 153, 156 (1953).

[11] Flast v. Cohen, 392 U.S. 83, 98-99 (1968) *quoting Hearings on S.* 2097 *Before the Subcomm. on Constitutional Rights of the Senate Judiciary Committee,* 89th Cong., 2d Sess. 465, 467-68 (1966) (statement of Paul A. Freund).

[12] 369 U.S. 186, 204 (1962), wherein the Court states:

> A federal court cannot 'pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'... Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.

[13] U.S. CONST. art. 3, § 2. *See* United States v. Richardson, 418 U.S. 166, 180 (1974) (Powell, J., concurring). Justice Powell stated that the requirements set down in *Baker* are "now controlling definitions of the irreducible Art. III case-or-controversy requirements for standing." *Id.* at 181.

[14] *See* Warth v. Seldin, 422 U.S. 490 (1975). The Court stated that

> [w]ithout such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more

Some examples of prudential limitations germane to the topic of standing are found in *United States v. Raines*.[15] In that case the Court said that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional".[16] A closely related rule also set down in that case is that "a litigant may only assert his own constitutional rights or immunities."[17] Since these rules are not constitutionally mandated, but self-imposed by the Court, there have been many exceptions.[18] The Court has allowed exceptions to its prudential limitations and has allowed standing to assert the rights of third parties under the doctrines of *jus tertii*[19] and statutory overbreadth.[20]

Jus tertii is not to be confused with the analogous doctrine of statutory overbreadth. Statutory overbreadth is usually applied in cases involving the first amendment. Under this doctrine the claimant is allowed to assert that the challenged statute might interfere with the rights of some individuals not before the Court even though the petitioner's rights may not be deprived.[21] In asserting *jus tertii,* there can be no hypothetical application of the law to third parties, but rather there must be in fact out-of-court third parties who have related claims which the claimant seeks to assert.

In fashioning its prudential limitations on standing the Court has generally adhered to the policy doctrine that "[o]ne may not claim standing . . . to vindicate the constitutional rights of some third party."[22] From prior decisions two reasons for this general rule emerge. As the Supreme Court stated in *Singleton v. Wulff:*[23]

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competent to address the questions and even though judicial interventions may be unnecessary to protect individual rights. *Id.* at 500.
Accord, Craig v. Boren, 97 S.Ct. 451, 455 (1976).

[15] 362 U.S. 17, 20-25 (1960).

[16] *Id.* at 21.

[17] *Id.* at 22.

[18] *See, e.g.,* Singleton v. Wulff, 96 S.Ct. 2868 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975); Eisenstadt v. Baird, 405 U.S. 438 (1972); Dombrowski v. Pfister, 380 U.S. 479 (1965). Barrows v. Jackson, 346 U.S. 249 (1953).

[19] *See, e.g.,* Warth v. Sedlin, 422 U.S. 490 (1975); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962); Note, *Standing to Assert Constitutional Jus Tertii,* 88 HARV. L. REV. 423 (1975).

[20] *See, e.g.,* Bigelow v. Virginia, 421 U.S. 809 (1975); Grayned v. City of Rockford, 408 U.S. 104 (1972); Goodling v. Wilson, 405 U.S. 518 (1972); Coates v. City of Cincinnati 402 U.S. 611 (1972); Dombrowski v. Pfister, 380 U.S. 479 (1965). *See generally* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970).

[21] *See generally* cases cited note 20 *supra.*

[22] Barrows v. Jackson, 346 U.S. 249, 255 (1953). *Accord,* Eisenstadt v. Baird, 405 U.S. 438, 444 (1972); NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449, 459 (1958).

[23] 96 S.Ct. 2868, 2873-74 (1976). (Two physicians challenged the constitutionality of a Missouri statute which excluded abortions from medicaid benefits).

> First, the courts should not adjudicate such [third party] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. . . Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference to the extent they will be bound by the courts' decisions under the doctrine of *stare decisis.*

Despite the general rule, the Court has allowed the assertion of *jus tertii* under certain conditions. Traditionally the assertion has been allowed when (1) the relationship between the in-court claimant and the third party is of a substantial nature and (2) where the ability of the third party to assert his own rights may be impaired. In *Craig* the Court has apparently neglected to adhere to its traditional approach to determine whether to allow *jus tertii.* The following review of cases, discussed by the Court in *Singleton,*[24] demonstrates the Court's use of this traditional approach.

The relationship between the in-court claimant and the third parties as a factor that the court examines to determine whether it will permit the assertion of *jus tertii* is illustrated by *Griswold v. Connecticut.*[25] In that case, the defendants, a doctor and a director of Planned Parenthood, were convicted of advising married persons as to the use of contraceptives. The defendants were allowed to raise the constitutional rights of the married couples, the Court basing its determination upon the confidential and "professional relationship"[26] that existed between the married couples and the defendants. The Court also pointed out that the rights of the third parties were "likely to be diluted or adversely affected" if not raised by the defendants.[27]

Likewise, in *NAACP v. Alabama ex rel. Patterson,*[28] the Court allowed the NAACP to assert the first and fourteenth amendment rights of its members to remain anonymous when the Association was challenging a contempt order received for not producing membership lists. The Court reasoned that the Association's nexus with its members was sufficient for it to act as

[24] *Id.* at 2874-75. *See also* Note, *Standing to Assert Constitutional Jus Tertii,* 88 HARV. L. REV. 423, 425 (1975).

[25] 381 U.S. 479 (1965).

[26] *Id.* at 481. The Court also stated:

> This law . . . operates directly on an intimate relation of husband and wife and their physician's role in an aspect of that relation. *Id.* at 482.

[27] *Id.* at 481, *citing* Barrows v. Jackson, 346 U.S. 259 (1953); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[28] 357 U.S. 449 (1958).

the members' representative.[29] The Court also said that the Association could assert third party rights "because it and its members are in every practical sense identical".[30] As these cases indicate, the Court has been particularly concerned with the relationship between the *jus tertii* claimant and the out-of-court third parties in determining whether to permit *jus tertii* assertions.

The other concern of the Court in its approach to determine *jus tertii* standing — the ability of the third parties to assert their own constitutional claims — was discussed in *Barrows v. Jackson.*[31] In that case respondent landowner was sued for breaching a racially restrictive covenant. She was allowed to raise the argument that nonwhites would be denied equal protection if the validity of the covenant were sustained. The Court stated that otherwise there would be a

> denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievances before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our denying standing to raise another's rights, which is only a rule of practice, are outweighted by the need to protect the fundamental rights which would be denied. . . .[32]

The Court also stressed that the *jus tertii* claimant was "the only effective adversary."[33]

In analyzing *Craig v. Boren,* in which a vendor of 3.2% beer had standing to assert the equal protection claims of males between 18-20 years of age, the following question arises: Did the Court relax the prudential limitations traditionally applied to questions of *jus tertii?*[34]

In *Craig* both the majority opinion by Justice Brennan and the Chief

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[29] *Id.* at 458-59.

[30] *Id.* at 459, further stating:

> The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies . . ." may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views. *Id.*

[31] 346 U.S. 249 (1953).

[32] *Id.* at 257.

[33] *Id.* at 259. The Court reasoned:

> The law will permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use. The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand. *Id.*

[34] *See* 97 S.Ct. 451, 466 (Burger, C.J., dissenting).

Justice's dissent rely heavily on the authority of *Eisenstadt v. Baird*[35] to justify their respective positions on the granting of the assertion of *jus tertii.* In that case, the appellee, Baird, was convicted for distributing contraceptive articles under a Massachusetts statute which *inter alia* made it illegal for anyone to distribute contraceptives for the purpose of preventing pregnancy. Utilizing the traditional analytical benchmarks to determine whether it would grant the appellee standing to assert the rights of unmarried persons denied access to contraceptives, the Court looked to the relationship between Baird and the third parties, and also to the ability of the third parties to effectively assert their own rights. With respect to the first factor, the Court found that the relationship between the out-of-court third parties and the litigant "whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so".[36] The Court in *Eisenstadt* held that the absence of a doctor-patient or accessory-principal relationship did not automatically dispose of the question of standing in the negative, but that there may be other circumstances in which a litigant may assert the rights of another.[37] However, the Court emphasized that in allowing standing, as was the case in *Barrows v. Jackson,*[38] there was "not simply the fortuitous connection between a vendor and a potential vendee."[39]

Discussing the ability and effectiveness of the third parties to assert their own claims, the Court in *Eisenstadt* stated that this issue was "more important than the nature of the relationship."[40] The Court then pointed out that the enforcement of the statute would "materially impair the ability of single persons to obtain contraceptives."[41] The Court also mentioned, that unlike in *Griswold,* the single persons were "denied a forum in which to assert their own rights" because they were not themselves subject to prosecution, and that this factor made "the case for according standing to assert third party rights" stronger.[42]

In upholding the vendor's assertion of the constitutional rights of the out-of-court 18-20 year old males, the Court in *Craig,* speaking through the opinion of Justice Brennan, considered *Eisenstadt* to be controlling

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[35] 405 U.S. 438 (1972).

[36] *Id.* at 445.

[37] *Id.*

[38] 346 U.S. 259 (1953).

[39] 405 U.S. at 445.

[40] *Id.*

[41] *Id.* at 446, stating that the "very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives", *citing* Griswold v. Connecticut, 381 U.S. 479 (1965).

[42] *Id.* at 446.

precedent.[43] The Court stated that "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function."[44] In analyzing the facts in *Craig,* the Court also discussed the impact this litigation would have on the third parties' interests. The opinion states:

> Just as the defeat of Baird's suit and the "[e]nforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives," . . . so too the failure of Whitener to prevail in this suit and the continued enforcement of §§ 241 and 245 will "materially impair the ability of" the males 18-20 years of age to purchase 3.2% beer. . . .[45]

In his dissenting opinion Chief Justice Burger disagreed with the Court's granting of *jus tertii* standing. He concluded that "permitting a vendor to assert the constitutional rights of vendees whenever those rights are arguably infringed introduces a new concept of constitutional standing to which I cannot subscribe."[46] The Chief Justice was of the opinion that "[i]t borders on the ludicrous to draw a parallel between a vendor of beer and the intimate professional physician-patient relationship [in *Griswold v. Connecticut*] which undergirded relaxation of the standing rules in that case."[47] Chief Justice Burger also believed that there was no barrier stopping the 18-20 old males from asserting their own constitutional rights to purchase the 3.2% beer.[48]

Since the Court relied on *Eisenstadt* in granting the assertion of *jus tertii,* the Chief Justice's statement that *Eisenstadt* limited the assertion of third party rights to relationships which were "not simply the fortuitious connection between a vendor and potential vendees"[49] clearly indicates the Court's relaxation of the prudential limitations traditionally applied to questions of *jus tertii.* Also, Justice Brennan's analogy that the enforcement

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[43] 97 S.Ct. at 456. The Court states:

> Indeed, the *jus tertii* question raised here is answered by our disposition of a like argument in *Eisenstadt v. Baird* . . . .

[44] *Id., citing* Eisenstadt v. Baird, 405 U.S. 438 (1972); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Barrows v. Jackson, 346 U.S. 249 (1953).

[45] 97 S.Ct. at 456, *quoting* Eisenstadt v. Baird, 405 U.S. 438, 446 (1972).

[46] 97 S.Ct. at 467 (Burger, C.J., dissenting).

[47] *Id.* at 466.

[48] *Id.* The Chief Justice indicated that "Craig's successful litigation of this very issue was prevented only by the advent of his 21st birthday. There is thus no danger of interminable dilution of those rights if appellant Whitener is not permitted to litigate them here." *Id. See* Dean v. Crisp, 536 P.2d 961 (Okla. Crim. App. 1975); Bassett v. Bassett, 521 P.2d 434 (Okla. Ct. App. 1974) (Oklahoma courts holding similar gender-based statutes to be unconstitutional).

[49] 97 S.Ct. at 465-67, (Burger, C.J., dissenting), *quoting* 405 U.S. at 445.

of Sections 241 and 245 would "materially impair" the ability of the 18-20 year old males to purchase 3.2% beer as the statute in *Eisenstadt* did "materially impair" the ability of single persons to obtain contraceptives is tenuous because the Oklahoma statute only prohibited a licensed vendor from selling the 3.2% beer to the 18-20 year old males; it did not "materially impair" the ability of the young men to obtain the 3.2% beer. In fact, the Court relied on the fact that the 18-20 year old males were freely obtaining the beer legally from others, usually their female companions, in holding that the Oklahoma statutes invidiously discriminated against the restricted class.[50] *Eisenstadt* involved a much different situation. The Massachusetts statute prohibited anyone from furnishing contraceptives to single persons and a violation could have resulted in a five year maximum sentence.

Although there are not many cases on the subject of the assertion of constitutional *jus tertii,* the cases[51] do indicate that the Court has been "rarely persuaded by the presence of a commercial relationship to permit standing to assert the rights of the other party to the relationship."[52] For example, the Court denied the assertion of *jus tertii* in *McGowan v. Maryland.*[53] That case involved the prosecution of employees of a retail store for violation of Sunday Blue Laws. The Court, after stating the general rule prohibiting the assertion of third party rights, held that the appellants could not raise the first amendment religious freedom rights of the store's customers.[54] *McGowan v. Maryland* presented a simple vendor-vendee relationship as in *Craig v. Boren,* yet the litigant therein was not permitted to assert *jus tertii.* In *Davis & Farnum Mfg. Co. v. City of Los Angeles*[55] the appellant had a contract to erect gas tanks. After executing the contract the city enacted an ordinance prohibiting the tanks. The Court held that the appellant lacked standing to raise the property rights of the other party to the commercial transaction.

Recent cases[56] have confronted the technical requirements of standing in the area of discriminatory zoning. One such case in which the assertion

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[50] 97 S.Ct. at 460.

[51] *E.g.,* McGowan v. Maryland, 366 U.S. 420 (1961); Sprout v. City of South Bend, 277 U.S. 163 (1928); Davis & Farnum Mfg. Co. v. City of Los Angeles, 189 U.S. 207 (1903). *See* Sedler, *Standing to Assert Constitutional Tertii in the Supreme Court,* 71 YALE L.J. 599, 638-40 (1962).

[52] Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599, 639 (1962).

[53] 366 U.S. 420 (1961).

[54] *Id.* at 429.

[55] 189 U.S. 207 (1903).

[56] Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S.Ct. 555 (1977); Warth v. Seldin, 422 U.S. 490 (1975).

of *jus tertii* was denied was *Warth v. Seldin.*[57] Petitioners claimed that Penfield's[58] zoning ordinances excluded persons of low and moderate income from living in that town. One group of the petitioners, taxpayers of the city of Rochester, alleged that Penfield's ordinances increased their tax burdens in Rochester. Assuming arguendo that the Penfield ordinance did cause petitioner to suffer an injury, the Court held that since these petitioners were not subject to Penfield's ordinances, their only possible basis for standing as taxpayers would be to raise the claims of persons of low and moderate income excluded from Penfield.[59] However, the Court rejected the assertion of *jus tertii,* stating that "[n]o relationship, other than an incidental congruity of interest, is alleged to exist between the Rochester taxpayers and persons who have been prevented from living in Penfield. Nor do the taxpayers-petitioners show that their prosecution of the suit is necessary to insure protection of the rights asserted. . . . "[60]

Some petitioners were associations which sought standing on behalf of their members. As previously mentioned, the Court has allowed associations *jus tertii* standing to assert the rights of their members.[61] In denying the assertion of *jus tertii* the *Warth* Court noted that the litigant "can have standing as representative of its members only if it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit."[62] Thus, the Court's language reflects the dual case and controversy requirements of *jus tertii* standing.[63] Not only must the in-court claimant allege facts sufficient to show that the third party would meet the constitutional case and controversy requirements, but he must also demonstrate that he personally meets these requirements. For example, in *Tileston v. Ullman,*[64] the petitioner challenged Connecticut's statute which prohibited the distribution of contraceptives, but failed to allege any personal claims of injury. Since he failed to do so, he could not raise the constitutional rights of others.[65]

As previously mentioned, on the merits the Court in *Craig* found the Oklahoma statutes' gender-based classifications to violate the fourteenth amendment's equal protection clause. There has been considerable dis-

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[57] 422 U.S. 490 (1975).

[58] Penfield is a suburb of Rochester, New York.

[59] 422 U.S. at 509.

[60] *Id.* at 510.

[61] *See* notes 28-30 and accompanying text *supra.*

[62] 422 U.S. at 516.

[63] *Id.* at 498-94. *See* Note, *Standing to Assert Constitutional Jus Tertii,* 88 HARV. L. REV. 423, 428-31 (1974).

[64] 318 U.S. 44 (1943).

[65] *Id.* at 46.

agreement and confusion among the members of the Court and the commentators as to which type of equal protection analysis applies to statutory classifications which distinguish between males and females.[66]

The majority opinion held that the appropriate standard for review was the one set forth in *Reed v. Reed,*[67] wherein the Court invalidated an Idaho statute which gave preference to men over women in the appointment of intestate administrators. The Court in *Reed* stated that to be constitutional a gender based classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[68] It is apparent that the standard applied in *Craig* based on the authority of *Reed* that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives"[69] is of the "middle-tier" or "newer" equal protection formulation.[70]

After *Reed,* the first case in which the Court found a gender-based legislative classification to be unconstitutional, the Court has not consistently adhered to the standard enunciated therein.[71] While in 1971 the Court in *Reed* abandoned the "traditional" rational basis analysis with respect to sex-based classifications, just two years later in *Frontiero v. Richardson,*[72] the Court, while relying upon *Reed,* declared that classifications based upon sex are inherently suspect and must be subjected to close judicial scrutiny. While the Court in *Frontiero* was unanimous in holding the statutory scheme to be discriminatory, only a plurality of four Justices subscribed to the application of strict scrutiny analysis to gender-based statutory classifications.

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[66] *See* Erickson, *Kahn, Ballard, and Wiesenfeld: A New Equal Protection Test in "Reverse" Sex Discrimination Cases?,* 42 BROOKLYN L. REV. 1 (1975); Johnston, *Sex Discrimination and the Supreme Court* - 1975, 23 U.C.L.A. L. REV. 235 (1975); Johnston, *Sex Discrimination and the Supreme Court* - 1971-1974, 49 N.Y.U.L. REV. 614 (1974); Note, *Constitutional Law - Sex Discrimination - Liquor Control Ordinances Treating Men and Women Differently Violate Equal Protection,* 22 WAYNE L. REV. 887 (1976).

[67] 97 S.Ct. at 457, *citing* 404 U.S. 71 (1971).

[68] 404 U.S. at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[69] 97 S.Ct. at 457.

[70] *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

[71] *See, e.g.,* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

[72] 411 U.S. 677, 682 (1973). The case involved the claims of a female member of the armed forces who objected to statutes which allowed servicemen, for the purposes of obtaining increased quarter allowances and medical and dental benefits, to claim their wives as dependents without having to prove that status. A servicewoman, however, had to prove that her husband was in fact dependent upon her for over one-half of his support in order to receive these benefits. *See* Note, 7 AKRON L. REV. 165 (1973).

Decisions subsequent to *Frontiero* only increased the chaos in this area.[73] In 1975, the Court decided *Weinberger v. Wiesenfeld*[74] and *Stanton v. Stanton*.[75] *Weinberger* amply demonstrated "the analytical confusion into which the Court had fallen."[76] The opinion is notable for evading any indication of which equal protection test was applied.[77] Likewise, *Stanton* revealed the Court's difficulty in determining what equal protection analysis to apply. By stating that the statute was unconstitutional under any form of analysis,[78] the Court did nothing to resolve the confusion and uncertainty

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[73] *See* note 66 *supra*. One such case was Kahn v. Shevin, 416 U.S. 351 (1974). That case sustained a Florida statute granting widows, but not widowers, a tax exemption. Justice Douglas retreated from his support of finding gender to be a "suspect" class. The standard used in the equal protection analysis was now back to *Reed's* "fair and substantial relation" test. *See also* Schlesinger v. Ballard, 419 U.S. 498 (1975), wherein the Court sustained the validity of a federal statute under the due process clause of the fifth amendment. That case involved the different treatment accorded to male and female naval officers concerning mandatory discharge for failure to be selected for promotion. A male with more than nine years of active service who failed for a second time to be promoted would be subject to mandatory discharge, whereas a female naval officer could not be so discharged until a thirteen year tenure had elapsed. That the Court applied the deferential standard of mere rationality in this case can be seen from the Court's language: "Congress *may thus quite rationally have believed* that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with 'fair and equitable career advancement programs'." 419 U.S. at 508. (emphasis added). By this language the Court is justifying the classifications "by any state of facts" conceivable. The Court has applied in equal protection cases a deferential standard of review in cases dealing with economic regulation. This "rational basis" test has been defined as one which

> permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26. (1961).

[74] 420 U.S. 636 (1965). *See* Note, 9 AKRON L. REV. 166 (1975). The case involved a challenge to a Social Security provision which allowed widows, but not widowers, to receive benefits when there were minor children in the household. The Court thoroughly discussed *Frontiero* and stated that the classification under the Social Security Act "is indistinguishable from that invalidated in *Frontiero*." 420 U.S. at 642. However, a violation of the Due Process Clause was also found under the authority of *Reed*. *Id.* at 653. While the outcome of *Weinberger* is consistent with *Reed* and *Frontiero*, in terms of equal protection analysis this case added nothing but confusion to the standard to be applied in gender-based discrimination cases. *See also* Ginsburg, *Gender in the Supreme Court: The* 1973 *and* 1974 *terms*, 1975 SUP. CT. REV. 1, 18; Johnston, *Sex Discrimination and the Supreme Court* - 1975. 23 U.C.L.A. L. REV. 235, 257 (1975).

[75] 421 U.S. 7 (1975). This case involved a Utah statute which extended the period of minority to age 21 for males, leaving females to attain majority at age 18. The challenge to the statute was brought because of its effect on child support payments to females. The statute was held to violate the equal protection clause.

[76] Johnston, *Sex Discrimination and the Supreme Court* - 1975, 23 U.C.L.A. L. REV. 235, 249 (1975).

[77] *Id.*

[78] The Court concluded "that under any test-compelling state interest, or rational basis, or something in between — [the statute] does not survive an equal protection attack." 421 U.S. 7, 17 (1975).

that had developed from the previous cases.

In *Craig v. Boren* the Court explicitly recognized that *Reed* would provide the requisite analytical test for determining whether the objective of the Oklahoma statute of enhancing public health and safety was implemented on a constitutionally permissible basis. The Court inquired if "the gender-based distinction closely serves to achieve that objective",[79] and held that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."[80] This case clearly indicates that the less deferential and more critical "middle-tier" approach of equal protection analysis is to be applied.[81] Only the Chief Justice and Justice Rehnquist called for a "rational basis" equal protection analysis to deal with this classification, and while *Frontiero* was cited by the Court, no indication was made as to when, if ever, the strict scrutiny standard of review would be mandated.[83]

To meet appellants' challenge that the statute was unconstitutional, at trial the appellees offered only statistical evidence[84] to prove the need for the gender-based classification. Although there was no certain way to tell what was Oklahoma's objective, the district court concluded that it was the promotion of traffic safety. That court ultimately concluded that the "classification made a fair and substantial relation to the apparent objectives of the legislation."[85]

The statistics established that two per cent of males in the classified age group compared to only .18 per cent of females in the 18-20 age group were arrested for driving under the influence of alcohol. These statistics, which were considered by the Supreme Court to have various shortcomings, proved less convincing when the Court considered that none of them measured the use and dangerousness of 3.2% beer which was considered

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[79] 97 S.Ct. at 458.

[80] *Id.* at 457

[81] *See* note 70 *supra.*

[82] *See* 97 S.Ct. at 466 (Burger, C.J., dissenting); 97 S.Ct. at 467 (Rhenquist, J., dissenting).

[83] 97 S.Ct. at 457-58. *See* 97 S.Ct. at 467. (Rehnquist, J., dissenting). Apparently, the strict scrutiny approach has been discredited, and thus, sex-based classifications are not to be viewed as being inherently suspect.

[84] Appellees produced the following statistical evidence:

> [f]irst, an analysis of arrest statistics for 1973 demonstrated that 18-20 year old male arrests for "driving under the influence" and "drunkenness" substantially exceed female arrests for the same age period. Similarly, youths aged 17-21 were found to be over-represented among those who killed or injured in traffic accidents, with males again numerically exceeding females in this regard. Third, a random roadside survey in Oklahoma City revealed that young males were more inclined to drive and drink beer than were their female counterparts.

97 S.Ct. at 458.

[85] 399 F. Supp. at 1314.

by the state to be non-intoxicating.[86] After reviewing the statistics the Court rightly held that "the relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed's* requirement that gender based differences be substantially related to achievement of the statutory objectives."[87]

Craig v. Boren involved not only gender-based discrimination, but also the power of a state to control alcoholic beverages under the twenty-first amendment.[88] The states have a long history of power to regulate intoxicating beverages. The wording of the amendment clearly shows that its purpose was to create an exception to the Commerce Clause.[89]

In *Goesaert v. Cleary*[90] the Court was faced with a case which involved both gender-based discrimination and alcoholic beverage control. A Michigan statute required that all bartenders be licensed, but no female could obtain a license except if she were the wife or daughter of a male owner. The statute was sustained over the equal protection challenge. The Court stated that "[t]he Fourteenth Amendment did not tear up history by the roots, and the regulation of liquor traffic is one of the oldest and most untrammeled of legislative powers. Michigan could, beyond question, forbid all women from working behind a bar."[91] Although *Craig* did not expressly overrule *Goesaert,* the Court stated that insofar as it is inconsistent with the instant case, it is disapproved.[92]

Although in the past the twenty-first amendment has been used successfully to defeat fourteenth amendment challenges to state power to regulate alcoholic beverages,[93] the Court's holding in *Craig* was that "the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case."[94]

Although *Craig v. Boren* is the first case in which the Supreme Court

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[86] 97 S.Ct. at 459-60. *See* State *ex rel.* Splinger v. Bliss, 199 Okl. 198, 185 P.2d 220 (1947) (3.2% beer held to be non-intoxicating).

[87] 97 S.Ct. at 460.

[88] Section 2 of the twenty-first amendment provides: "[t]he 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."

[89] 97 S.Ct. at 461.

[90] 335 U.S. 464 (1948).

[91] *Id.* at 465.

[92] 97 S.Ct. at 463 n.23.

[93] *See, e.g.,* Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); State Board v. Young's Market Co. 299 U.S. 59 (1936).

[94] 97 S.Ct. at 414. *Cf.* Wisconsin v. Constantineau, 400 U.S. 433 (1971). (The twenty-first amendment did not invade or diminish due process rights). That case held unconstitutional a statute which gave public officials the power to place a notice with the name of an excessive drinker in retail liquor stores without notice or hearing. *But cf.* California v. La Rue 409 U.S. 109. (The Court used the twenty-first amendment to sustain state regulations aimed at prohibiting promiscuous entertainment in liquor licensed establishments.).

has rejected gender-based discrimination based on the regulation of alcoholic beverages, there is much authority from lower federal and state courts that notwithstanding the twenty-first amendment such gender classifications are invalid.[95]

CONCLUSION

In *Craig v. Boren* the Court has addressed important constitutional issues. The Court has reduced its prudential limitation on *jus tertii* by allowing an ordinary vendor to raise the equal protection argument of his vendee not before the Court. This case's clear explanation of the equal protection analysis applied will be useful to lower courts in deciding litigation involving gender-based discrimination. The Court has also clarified its position on the twenty-first amendment vis-a-vis the fourteenth. A state's power to regulate commerce in alcoholic beverages cannot invade equal protection guarantees that "gender-based difference be substantially related to achievement of the statutory objective."[96]

For a possible explanation of the Court's apparent relaxation of the requirements for the assertion of *jus tertii* one must refer to the facts of the case. The most pertinent fact is that appellant Craig became 21 years old before the case reached the Supreme Court. Although Craig's controversy was rendered moot, the Court believed that "a decision by us to forego consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time consuming litigation under the guise and caution of prudence."[97] In *Roe v. Wade*[98] the Court also allowed standing over a mootness issue because the facts were "capable of repetition, yet evading review."[99]

The future will tell whether the Court will permanently relax the requirements for the assertion of *jus tertii*. However, it appears that courts will construe *Craig* narrowly, and will grant the assertion of *jus tertii* either where the traditional prerequisites are clearly shown or, as in *Craig*, where although the traditional prerequisites are not clearly demonstrated, other factors such as the obvious invalidity of the statutory provision or mootness of the third party's claim are also present.

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[95] *See* White v. Flemming, 522 F.2d 730 (7th Cir. 1975); Women's Liberation Union v. Israel, 512 F.2d 106 (1st Cir. 1975); McCrimmon v. Daley, 418 F.2d 366 (7th Cir. 1969); Daugherty v. Daley, 370 F. Supp. 338 (N. D. Ill., 1974); Seldenberg v. McSorley's Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970). Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); Brown v. Foley, 158 Fla. 734, 29 So. 2d 870 (1947); Commonwealth v. Burke, 481 S.W.2d 52 (Ky. 1972); Patterson Tavern & Grill Owner's Ass'n v. Borough of Hawthorne, 47 N.J. 180, 270 A.2d 628. (1970).

[96] 97 S.Ct. at 460. [97] *Id.* at 455.

[98] 410 U.S. 113 (1973). [99] *Id.* at 125.