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THE WOMEN'S CONVENTION AND THE EQUAL PROTECTION CLAUSE

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I. INTRODUCTION

The subject of international human rights has been the focus of widespread study for several decades. Beginning in 1948 with the adoption of the Universal Declaration of Human Rights,[1] the existence, if not the scope, of a body of international civil and political entitlements has been almost universally accepted. Since then, human rights have become an increasingly popular subject for debate and study. More recently, since the inception of the women's movement, the subject of women's rights in the United States has also been a popular issue for academic consideration. Debate on gender issues is no longer limited to a handful of pioneer feminist writers, but has become one of the most popular topics for a new generation of constitutional scholars. However, in contrast to the prevalence of discourse regarding international human rights and women's rights independently, the subject of women's international human rights has received relatively little attention.

This Article addresses whether the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention)[2] violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Women's Convention purports to protect and promote women's rights. However, the Convention is silent regarding the promotion or protection of similar rights for men. Furthermore, the Convention identifies and protects many rights already addressed by gender-neutral international human rights instruments. Thus, it creates an explicit gender-based classification. Because international treaties such as the Women's Convention carry the same weight and are subject to the same treatment as U.S. federal law, the constitutionality of the Convention is dictated by U.S. jurisprudence.

Part II of this Article outlines and discusses the origin and content of the Women's Convention. Part III contains a historical review of gender jurisprudence in the United States, with particular emphasis on recent United States Supreme Court decisions. Part

1. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

2. Convention on the Elimination of All Forms of Discrimination Against Women, Jan. 22, 1980, U.N. Doc. A/Res. 34/180, 19 I.L.M. 33 (1980) [hereinafter Women's Convention].

IV describes the procedure for obtaining ratification of an international human rights instrument and analyzes whether, in light of gender case law, the Women's Convention violates the United States Constitution's Equal Protection Clause. The Article concludes with an analysis of the current status and constitutionality of the Women's Convention and suggestions for gaining U.S. ratification.

II. THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

On December 18, 1979, the United Nations General Assembly adopted the Women's Convention.[3] The Convention represents an affirmative effort to address women's rights in a comprehensive manner. Opened for signature on March 1, 1980, 135 countries have subsequently ratified the Convention.[4] The United States, however, has yet to do so.

The United States originally demonstrated great enthusiasm for the Women's Convention by participating in the drafting of the Convention and its early signature on July 17, 1980.[5] The Carter Administration submitted the Convention to the United States Senate on November 12, 1980.[6] Since then, however, the Convention has remained in the Senate with very little effort toward ratification. The Committee on Foreign Relations held hearings on the Convention in 1988, 1990, and 1994.[7] The main explanation offered for the Committee's inaction was a lack of support for ratification by the Reagan and Bush Administrations.[8] The Clinton Administration currently supports ratification of the Convention subject to certain reservations, understandings, and declarations.[9] During 1994, the Senate Committee on Foreign Relations recom-

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3. Women's Convention, *supra* note 2, pmbl., 19 I.L.M. at 33.

4. *See* SENATE COMM. ON FOREIGN RELATIONS, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, S. Rep. No. 103–38, 103d Cong., 2d Sess. 2 (1994) (on file with author) [hereinafter SENATE REPORT] (recommending that Senate give advice and consent to ratification of Women's Convention).

5. SENATE REPORT, *supra* note 4, at 2–3; *see also* 126 CONG. REC. S29,358 (daily ed. Nov. 12, 1980) (transmittal letter of President Carter).

6. 126 CONG. REC. S29,358 (daily ed. Nov. 12, 1980) (transmittal letter of President Carter).

7. SENATE REPORT, *supra* note 4, at 2–3.

8. SENATE REPORT, *supra* note 4, at 8–9.

9. SENATE REPORT, *supra* note 4, at 10–11.

mended ratification by the Senate.[10] Part (IV)(B) of this Article discusses the current status of the Convention.

The Women's Convention is composed of six parts preceded by a preamble. The preamble outlines the goals and objectives of the Convention, thus serving as a statement of "governmental interests" behind its creation. Stated objectives of the Women's Convention include:

(1) the removal of obstacles to the full development of women's potential in political, social, and cultural arenas;

(2) ensuring women's access to food, health, education, training, and opportunities for employment;

(3) providing for the maximum participation of women on equal terms with men in all fields;

(4) eliminating women's role in procreation as a basis for discrimination; and

(5) changing traditional gender roles in both society and the family to achieve full equality between men and women.[11]

Following the preamble, the Women's Convention specifically identifies a series of women's rights. Each of the Convention's six parts addresses a distinct class of rights. Part I contains general provisions, including a definition of the term "discrimination" as it is used throughout the Convention.[12] Article 1 defines the phrase "discrimination against women" to mean

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[13]

Article 2 includes a list of actions and responsibilities that ratifying state parties agree to undertake.[14] For example, state parties agree to "repeal all national penal provisions which constitute discrimination against women."[15]

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10. SENATE REPORT, *supra* note 4, at 3–4.
11. Women's Convention, *supra* note 2, pmbl., 19 I.L.M. at 33–35.
12. Women's Convention, *supra* note 2, art. 1, 19 I.L.M. at 36.
13. Women's Convention, *supra* note 2, art. 1, 19 I.L.M. at 36.
14. Women's Convention, *supra* note 2, art. 2. 19 I.L.M. at 36.
15. Women's Convention, *supra* note 2, art. 2(g), 19 I.L.M. at 36.

Parts II, III, and IV of the Women's Convention each address specific classes of rights.[16] Part II enumerates a series of political rights. These include the rights to vote, to be eligible for public office, to participate in the lawmaking process, to participate in the political process, to participate in international political affairs, and to enjoy independent rights of nationality.[17] Part III identifies social and economic rights that should be afforded women in areas such as education, employment, and health care.[18] Part IV provides women with rights of equality before the law, including legal capacity, standing before courts, and the right to contract.[19] Also addressed in Part IV are rights surrounding the family such as marital rights, children's rights, and property rights.[20]

Part V calls for the establishment of a Committee on the Elimination of Discrimination Against Women,[21] which is designed to monitor states' actions regarding the provisions of the Convention. The Committee is also charged with reviewing reports regarding the status of women's rights filed by each state party.[22] This self-monitoring process represents the extent of the enforcement mechanism available in the Women's Convention.[23] The Convention does not authorize state parties to submit reports regarding other state parties, nor may individuals submit reports regarding any state party. Furthermore, in practice, the Committee has no power to undertake action against self-reported violators of the Convention. Instead, the Committee's sole remedy is to provide an annual report for the General Assembly of the United Nations based on the reports received from the state parties.[24]

III. GENDER JURISPRUDENCE IN THE UNITED STATES

The United States Supreme Court's treatment of gender-based classifications has evolved considerably over the last century.

16. Women's Convention, *supra* note 2, arts. 7–16, 19 I.L.M. at 37–42.
17. Women's Convention, *supra* note 2, arts. 7–9, 19 I.L.M. at 37–38.
18. Women's Convention, *supra* note 2, arts. 10–14, 19 I.L.M. at 38–41.
19. Women's Convention, *supra* note 2, arts. 15–16, 19 I.L.M. at 41–42.
20. Women's Convention, *supra* note 2, art. 16, 19 I.L.M. at 41–42.
21. Women's Convention, *supra* note 2, art. 17, 19 I.L.M. at 42–43.
22. Women's Convention, *supra* note 2, art. 18, 19 I.L.M. at 43.
23. *See* Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 495–96 (1990) (explaining that Women's Convention outlines lucid human rights agenda for women, but has limited implementation powers).
24. Women's Convention, *supra* note 2, art. 21, 19 I.L.M. at 43–44.

Under early U.S. federal and state laws, men and women were not treated as equals. In fact, the first case to question gender-based distinctions did not come before the Court until the late nineteenth century.[25]

The Court flatly rejected early challenges brought under the Privileges and Immunities Clause of the Fourteenth Amendment, on the grounds that state rights were not subject to federal protection.[26] Similarly, the Court did not favorably receive early challenges to gender-based classifications brought under the Equal Protection Clause.[27]

Later, the Court became more willing to consider equal protection challenges to gender-based classifications. However, until 1971, the Court continued to extend great deference to legislative pronouncements in gender-related cases.[28] In 1971, the Court undertook to define a new standard of review for gender-based classifications even though the Court maintained its view that gender was not a suspect class.[29] During the ensuing five years, the Court grappled with the new standard and refined what is known as intermediate scrutiny. This new intermediate level of scrutiny, also called the substantial relationship test, is the standard by which the Court continues to measure gender-based classifications.[30]

Intermediate scrutiny, however, does not offer a "bright line" test for review. Instead, it offers an amorphous test, defined by terms such as "substantial relationship" and "important interests," that has resulted in somewhat fact-specific applications.[31] The lack

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25. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 133 (1873) (challenging Illinois decision denying female's application for law license).

26. *Id.* at 139.

27. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874) (explaining why constitutional amendments did not change status of women).

28. *See* Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (acknowledging states' prerogative to treat sexes differently), *overruled by* Craig v. Boren, 429 U.S. 190, 210 (1976).

29. *See* Reed v. Reed, 404 U.S. 71, 76 (1971) (setting standard to review statutes under Equal Protection Clause).

30. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725, 730 (1982) (invalidating university's policy of denying admission to males because university failed to show substantial relationship to educational goals).

31. *See* Rostker v. Goldberg, 453 U.S. 57, 78–79 (1980) (upholding requirement that only men register for military service); Parham v. Hughes, 441 U.S. 347, 354 (1980) (validating Georgia statute requiring father in suit involving wrongful death of child to have previously legitimatized child); Califano v. Webster, 430 U.S. 313, 316–17 (1977) (substantiating Social Security Act's prior treatment favoring women); Schlesinger v. Ballard, 419

of definiteness in the intermediate scrutiny standard has led to division on the Court in most cases in which it has been applied.[32] Several important cases leading to and demonstrating the application of the intermediate scrutiny standard are discussed below. These cases are useful for understanding the context in which current gender-related classifications are measured.

A. *Early Challenges to Gender-Based Classifications*

1. *Bradwell v. Illinois*

The first case involving a challenge to a gender-based distinction was *Bradwell v. Illinois*[33] in 1873. In *Bradwell*, the Illinois Supreme Court refused to issue a female applicant a license to practice law on the ground that females were not eligible to practice under the laws of the state.[34] The plaintiff had complied with every requirement for admission to the bar, including submitting a petition for admission, obtaining a certificate from a lower court in support of her good character, and successfully completing the required examination.[35] The Illinois Supreme Court, however, denied her application on the ground that, as a married woman, she would not be bound by the express or implied contracts that arise between an attorney and a client.[36]

The plaintiff in *Bradwell* argued that, under the Privileges and Immunities Clause of the Fourteenth Amendment, women as well as men should be entitled to the enjoyments of life, which include admission to the legal profession.[37] The Court avoided the gender classification issue by citing an earlier decision stating that the Fourteenth Amendment protects only those privileges and immunities that result from U.S. citizenship. The Court reasoned that, because "the rights to control and regulate the granting of licenses to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal Government,"

U.S. 498, 510 (1975) (upholding statute giving women longer time period to achieve military promotion).

32. *See, e.g.*, *Hogan*, 458 U.S. at 719 (5–4 decision); *Rostker*, 453 U.S. at 58 (6–3 decision); Michael M. v. Sonoma County, 450 U.S. 464, 465 (1981) (5–4 decision).

33. 83 U.S. (16 Wall.) 130 (1873).

34. *Bradwell*, 83 U.S. at 137–39.

35. *Id.* at 130.

36. *Id.* at 131.

37. *Id.* at 137.

the rights that emanate from U.S. citizenship cannot govern or control those state rights.[38] Although the Court has subsequently rejected the rationale in *Bradwell* that admission to the bar is not a privilege arising from U.S. citizenship,[39] *Bradwell* set the tone for later Court opinions endorsing gender-based classifications.

In the years following *Bradwell*, the Court pursued an activist agenda, reviewing gender-based distinctions factually and hinging its decisions on judicial determinations of states' needs for gender-based distinctions. As a result, in several cases the Court's review led to invalidation of state statutes.[40] Nonetheless, the Court's reasoning, similar to legislative rationales, continued to perpetuate gender discrimination by incorporating and relying upon societal stereotypes and myths in its review of statutory classifications.

2. *Goesaert v. Cleary*

In *Goesaert v. Cleary*,[41] pursuing a new philosophy of greater judicial deference to legislative judgments, the Court upheld a Michigan statute that prohibited females from being licensed as bartenders unless they were the wife or daughter of a male owner of a liquor establishment.[42] The plaintiff alleged that the statute violated the Fourteenth Amendment because it denied the plaintiff equal protection of the laws and created an unreasonable and arbitrary classification.[43] According to the plaintiff, the statute was discriminatory because the wives and daughters of owners were treated differently than the wives and daughters of non-owners.[44]

The Court, implicitly acknowledging through its analysis the applicability of the Equal Protection Clause, upheld the Michigan statute.[45] Recognizing the regulation of liquor as "one of the old-

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38. *Bradwell*, 83 U.S. at 139.

39. *See, e.g.*, *In re* Griffiths, 413 U.S. 717, 729 (1973) (holding that Connecticut statute, which required U.S. citizenship before taking state bar, violated Equal Protection Clause).

40. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (finding state statute maintaining all-female nursing school unconstitutional); Kirchberg v. Feensta, 450 U.S. 455, 461 (1981) (striking Louisiana mortgage lender statute allowing married men to mortgage marital property); Reed v. Reed, 404 U.S. 71, 76 (1971) (invalidating probate statute giving preference to men).

41. 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S. 190, 210 (1976).

42. *Goesaert*, 335 U.S. at 467.

43. *Id.* at 465.

44. *Id.*

45. *Id.* at 467.

est and most untrammeled of legislative powers," the Court stated that Michigan could rightfully ban the employment of all women as barmaids in its regulation of the subject.[46] The Court thus evaluated what it considered the true issue: whether Michigan could treat differently situated groups of women unequally.[47]

Addressing the distinction in the statute's treatment of the groups of women, the Court applied a lenient test in its review of the legislature's rationale. The Court speculated that the legislature had drawn the distinction because females who were related to the owner of a liquor establishment would enjoy greater safety and supervision, which would in turn minimize potential hazards that might confront a barmaid.[48] Without dwelling on the specific rationale, however, the Court liberally stated that "[i]f [the motive for the distinction] is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws."[49] The Court concluded that "[s]ince the line they have drawn is not without a basis in reason" the statute survived the Court's review.[50] Thus, the Court applied in *Goesaert* the same rational basis test that it had used to review purely economic and social classifications thereby denying gender any special treatment. The Court continued to apply this lenient and deferential standard of scrutiny in its review of gender-based classifications until 1971.[51]

B. *Emergence of the Intermediate Standard of Scrutiny*

In 1971, the Court significantly changed its approach to gender classification cases. Starting with *Reed v. Reed*,[52] the Court began to apply intermediate scrutiny to gender-based classifications. This new level of scrutiny, higher than the rational basis standard used to review economic and social classifications, but short of the strict scrutiny applied to suspect classifications such as those based on race, was fashioned specifically for the treatment of gender-based classifications.

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46. *Goesaert*, 335 U.S. at 465.
47. *Id.* at 466.
48. *Id.*
49. *Id.*
50. *Goesaert*, 335 U.S. at 467.
51. *See* Hoyt v. Florida, 368 U.S. 57, 68 (1961) (refusing to acknowledge necessity for stricter scrutiny when discrimination is based on gender).
52. 404 U.S. 71 (1971).

While the new, heightened level of scrutiny provided a long-needed standard of review that specifically addressed the unique status of gender-based classifications, its novelty assured unpredictability in its application. In fact, for several years following *Reed*, the Court wrestled with the application of the new standard, refining the language of the test while struggling to maintain its intermediate character.[53] Arguably, the intermediate standard resisted by its very definition any attempt to generalize its effect in application. The cases that formed the early evolution of the intermediate scrutiny standard outline the Court's early struggle with the standard's application.

1. *Reed v. Reed*

Reed v. Reed represents the first time that the Equal Protection Clause was successfully used to challenge a gender-based classification.[54] In *Reed*, the plaintiff challenged Section 15-314 of the Idaho Probate Code, which expressly preferred men over women in the appointment of the administrator of a decedent's estate.[55]

Section 15-312 of the Idaho Probate Code delineated classes of individuals who were eligible to serve as administrators.[56] Section 15-312 also ranked the eligible classes of individuals, setting forth an order of preference among competing individuals from different classes.[57] Section 15-314 stated that, when two competing individuals fell within the same class, "males must be preferred to females."[58]

In *Reed*, the adoptive parents of a deceased minor each sought appointment as the administrator of the decedent's estate.[59] Pursuant to Section 15-312, the father and mother of a decedent fell within the same entitlement class.[60] Thus, neither the decedent's mother nor the father enjoyed a preference for appointment.[61]

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53. *Compare* Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion) (identifying gender as suspect class) *with* Craig v. Boren, 429 U.S. 190, 197 (1976) (clarifying gender classification standard).

54. 404 U.S. 71, 77 (1971).

55. *Reed*, 404 U.S. at 73.

56. *Id.* at 72.

57. *Id.* at 72–75.

58. *Id.* at 73.

59. *Reed*, 404 U.S. at 71–72.

60. *Id.* at 73.

61. *Id.*

However, the Idaho probate court concluded that, pursuant to the statute, the father was entitled to preference over the mother.[62]

In reviewing the constitutionality of Section 15-314, the Supreme Court began by restating its position that the Fourteenth Amendment does not prohibit states from treating "different classes of persons in different ways."[63] The Equal Protection Clause, however, does prohibit a state from placing individuals into different classes based on grounds wholly unrelated to the objective served by a statute.[64] To withstand constitutional review, the Court stated, the classification must not be arbitrary and must bear a fair and substantial relationship to the statute's objective.[65]

Having articulated the legal framework, the Court next addressed whether Section 15-314 met the requirements. The Court held that a difference in the gender of applicants for letters of administration did not bear a rational relationship to the objective sought to be advanced by the Idaho statute.[66] The Idaho Supreme Court had stated that the gender-based preference was necessary to "resolve an issue that would otherwise require a hearing as to the relative merits . . . of the two or more petitioning relatives."[67] The Court agreed that the reduction of the workload of the probate courts by eliminating a class has "some legitimacy."[68] The elimination of such a class on the basis of gender, however, was arbitrary and unrelated to the goals of the statute.[69] Thus, the Court concluded that the Equal Protection Clause of the Fourteenth Amendment forbade the arbitrary gender-based distinction of Section 15-314.[70]

In *Reed*, the Court failed to specifically articulate a new standard of intermediate scrutiny. Nevertheless, *Reed* clearly signified a turning point in the Court's treatment of gender-based classifications. Key to the decision was the Court's subtle adoption of the "substantial relationship" language from the Idaho Supreme

62. *Id.*
63. *Reed*, 404 U.S. at 75.
64. *Id.* at 75–76.
65. *Id.* at 76.
66. *Id.*
67. Reed v. Reed, 465 P.2d 635, 638 (1970), *rev'd*, 404 U.S. 71 (1971).
68. *Reed*, 404 U.S. at 76.
69. *Id.* at 76–77.
70. *Id.* at 76.

Court's opinion.[71] Also important was the Court's finding that, although the legislative rationale enjoyed "some legitimacy," the Court deemed it insufficient in light of its arbitrariness.[72] Thus, the Court rejected the rational basis test as the appropriate standard of review for gender-based classifications.

Notably, unlike most instances when the Court has initiated a major change in stance, the Court's opinion in *Reed* was unanimous.[73] However, while all the Justices apparently agreed in *Reed* that the standard of review should be higher than the rational basis test, the cases that followed *Reed* demonstrate the disagreement within the Court regarding what the correct standard of review should be.

2. *Frontiero v. Richardson*

In *Frontiero v. Richardson*,[74] the plaintiff, a married servicewoman, challenged a federal statute governing the administration of armed forces benefits. The statute entitled a serviceman to claim his wife as a dependent and receive applicable benefits without having to prove actual dependency.[75] On the other hand, the statute required a servicewoman to prove that her husband was in fact dependent to receive dependent benefits.[76] The plaintiff claimed that the statute unconstitutionally discriminated against servicewomen in violation of the Due Process Clause of the Fifth Amendment.

Surprisingly, Justice Brennan, in a plurality opinion, appeared to swing the pendulum to the opposite extreme by classifying gender as a suspect class.[77] Justice Brennan accepted the plaintiff's contention that gender-based classifications are inherently suspect and thus require strict scrutiny similar to that given to classifications based on race, alienage, and national origin.[78] The plurality found support for this standard of scrutiny under *Reed*.[79] Additionally,

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71. *Id.*
72. *Reed*, 404 U.S. at 76.
73. *Id.* at 71.
74. 411 U.S. 677 (1973).
75. *Frontiero*, 411 U.S. at 678.
76. *Id.*
77. *Id.* at 682.
78. *Id.*
79. *Frontiero*, 411 U.S. at 682 (citing *Reed*, 404 U.S. at 76).

the plurality expounded on the view that women shared the history of discrimination common to other suspect classes such as race.[80]

Having found that gender merits strict scrutiny, the plurality easily rejected the Government's rationale of efficiency and "administrative convenience" as insufficient grounds for the disparate treatment.[81] Questioning the Government's rationale, Justice Brennan stated that the Government had not submitted sufficient evidence proving the distinction in treatment actually was more efficient.[82] Importantly, the plurality concluded that even if the statute had furthered administrative efficiency, this basis for treating men and women dissimilarly was arbitrary and thus unconstitutional.[83]

Frontiero is instructive for its demonstration of the uncertainty surrounding the Court's creation of a new standard for reviewing gender-based classifications. *Frontiero* seems to represent an overreaction by some Justices to the Court's general desire to give heightened protection to gender-based classifications. However, the strict scrutiny *Frontiero* afforded gender classifications did not last.

Justice Powell's concurrence, joined by Chief Justice Burger and Justice Blackmun, agreed with the plurality that the statute was unconstitutional.[84] Justice Powell argued, however, that *Reed* had not identified gender as a suspect class, and that *Frontiero* should not do so because no such identification was necessary to find the statute unconstitutional under *Reed*.[85] Thus, the concurrence implicitly advocated the existence and application of an intermediate standard. This position of restraint eventually formed the middle ground that emerged as the intermediate scrutiny standard.

3. *Craig v. Boren*

In *Craig v. Boren*,[86] a majority of the Justices agreed for the first time on a specific definition of the intermediate standard of review that should be applied to gender-based classifications. In *Craig*,

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80. *Id.* at 684–88.
81. *Id.* at 689–90.
82. *Id.* at 689.
83. *Frontiero*, 411 U.S. at 690.
84. *Id.* at 691 (Powell, J., concurring).
85. *Id.* at 692.
86. 429 U.S. 190 (1976).

the Court reviewed the constitutionality of two Oklahoma statutes that prohibited the sale of beer to males under the age of twenty-one and to females under the age of eighteen.[87]

The State supported the gender-based distinction because statistics showed that males were more likely to drive while under the influence of liquor and more likely to be involved in accidents caused by driving while intoxicated.[88] Taking into account the precision of the statistics offered, the Court concluded that, even if the statistics were accepted as accurate, they would not make the gender-based distinction immune from the equal protection claim.[89] In sum, the Court deemed the type of statistics offered insufficiently specific to avoid the claim of discrimination.[90]

The State also argued that the Twenty-First Amendment to the United States Constitution[91] insulated the statutes in question from equal protection review.[92] The Court rejected this argument, holding that the Twenty-First Amendment does not nullify, reduce, or affect in any other way rights that are otherwise protected by the Constitution.[93]

Most importantly, *Craig* denotes the first instance in which the Court based its conclusion on a clear and explicit articulation of the intermediate scrutiny standard. In *Craig*, the Court reviewed several of its recent cases regarding gender-based classifications.[94] In its review, the Court cited *Reed* as the original source for establishing the heightened standard of scrutiny for gender discrimination cases.[95] Finally, the Court concluded that *Reed* applied to the case before it as well.[96] Thus, considering the evolution of the intermediate scrutiny standard since *Reed*, the Court articulated the applicable standard: "To withstand constitutional challenge, . . .

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87. *Craig*, 429 U.S. at 191–92.

88. *Id.* at 199202.

89. *Id.* at 204.

90. *Id.*

91. The Twenty-First Amendment to the United States Constitution repealed the Eighteenth Amendment, thereby ending the prohibition against manufacture, sale, and transport of intoxicating liquors. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXXI.

92. *Craig*, 429 U.S. at 204–05.

93. *Id.* at 206–07.

94. *Id.* at 197–99.

95. *Id.* at 199.

96. *Craig*, 429 U.S. at 197.

classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[97] Notably, the *Craig* Court found that the statutes violated the Equal Protection Clause because they discriminated against men.[98] This conclusion is important because it demonstrated that the Court intended its intermediate standard to apply in all gender-based classifications regardless of which gender was disadvantaged.

C. *Application of the Intermediate Standard of Scrutiny*

The intermediate standard of scrutiny, by its very definition, requires a case-by-case factual inquiry to determine the constitutionality of a gender-based classification. In fact, since articulating the standard, the Court has applied it on a fact-specific basis, thus providing little guidance on how the Court will rule in any given case. Nevertheless, several of the Court's decisions are useful in an analysis of the constitutionality of women's international human rights treaties. Some examples of the Court's application of the intermediate scrutiny standard are discussed below. The language and analysis employed by the Court in various cases will be used in Part IV to address the constitutionality of the Women's Convention.

1. *Orr v. Orr*

In *Orr v. Orr*,[99] a husband who owed alimony challenged Alabama's alimony statutes, which provided that only husbands, not wives, could be ordered to pay alimony.[100] After addressing several jurisdictional questions, the Court turned to the merits of the claim to consider whether the gender-based classification survived the intermediate scrutiny standard of review.[101]

Similar to the Court's earlier cases setting out the standard of review, the Court stated that, to survive an equal protection challenge, the gender-based classification in the alimony statutes "must serve important governmental objectives and must be substantially

97. *Id.*
98. *Id.* at 204.
99. 440 U.S. 268 (1979).
100. *Orr*, 440 U.S. at 270–71.
101. *Id.* at 278–79.

related to achievement of those objectives."[102] The Court's opinion is unclear regarding what objective the State offered to justify the statutes. However, based on the lower court's ruling, the Court determined that Alabama's position was that the statutes served at least one of two possible important state interests.[103] The Court reasoned that the first objective of the statutes could be to assist needy spouses by "using sex as a proxy for need."[104] Alternatively, the legislature may have designed the statutes to compensate women for past discrimination during marriage that resulted in women being unprepared for independence in the working world.[105] The Court found it unnecessary, however, to determine which of these two objectives Alabama actually asserted; in either case, the objective satisfied the "important governmental objective" requirement.[106]

Next, the Court turned to the second prong of the intermediate scrutiny test: whether the classification was substantially related to achievement of the asserted objectives.[107] The Court found several problems with the alimony statutes. The Court determined that, if the statutes' objective was to assist needy spouses, then the gender-based classification was unnecessary in light of Alabama's existing system of alimony determination.[108] Under Alabama statutes, individualized hearings to assess the parties' relative financial conditions were held as a matter of course.[109] Thus, the determination of need was already made on a case-by-case basis, and the use of gender as a proxy for need was unnecessary.[110] Similarly, the Court reasoned that, if the statutes' objective was to remedy past discrimination, this same goal would be achieved through the individual hearings that were already a part of Alabama's statutory alimony scheme.[111]

In sum, the Court concluded that even statutes that purport to compensate for symptoms of past discrimination against one gen-

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102. *Id.* at 279.
103. *Id.* at 280.
104. *Orr*, 440 U.S. at 280.
105. *Id.* at 281.
106. *Id.* at 281–82.
107. *Id.* at 279, 281–82.
108. *Orr*, 440 U.S. at 281–82.
109. *Id.* at 281.
110. *Id.*
111. *Id.* at 281–82.

der must be carefully tailored and necessary to the accomplishment of that objective.[112] When, as in the case of Alabama's alimony statutes, the asserted compensatory or ameliorative objectives are equally served by a gender-neutral classification, the gender-based classification is invalid.[113]

2. *Kirchberg v. Feenstra*

If any general rule can be derived from the Court's application of the intermediate standard, it is that laws allocating economic rights on the basis of gender are usually held invalid. For example, in *Kirchberg v. Feenstra*,[114] the Court considered a Louisiana statute that gave a husband the right to unilaterally dispose of property held jointly by the husband and wife.[115]

In *Kirchberg*, a husband executed a mortgage on a home he jointly owned with his wife.[116] Although the wife was never informed of the mortgage, her consent was not required; under a state statute, the husband was entitled to unilaterally dispose of community property.[117] The wife first learned of the mortgage when the mortgagor threatened foreclosure unless she paid the outstanding amount.[118] Thereafter, the mortgagor instituted foreclosure on the property, and in the ensuing action, the wife challenged the constitutionality of the statute that had allowed her husband to unilaterally execute the mortgage.[119]

Because the statute in question clearly discriminated on the basis of gender, the United States Court of Appeals for the Fifth Circuit measured "whether the statutory grant to the husband of exclusive control over disposition of community property was substantially related to the achievement of an important governmental objective."[120] The State argued that "[o]ne of the two spouses had to be designated as the manager of the community."[121] The Fifth Circuit

112. *Orr*, 440 U.S. at 283.
113. *Id.*
114. 450 U.S. 455 (1981).
115. *Kirchberg*, 450 U.S. at 456.
116. *Id.* at 457.
117. *Id.*
118. *Id.*
119. *Kirchberg*, 450 U.S. at 457–58.
120. *Id.* at 459.
121. *Id.*

concurred that the State had an interest in controlling the management of community property, but found that the State had failed to demonstrate why the designation of the husband as manager of joint property furthered that interest.[122] Thus, the Fifth Circuit found that the statute violated the Equal Protection Clause and reversed the district court's summary judgment.[123]

On appeal to the Supreme Court, the mortgagor argued that the statute in question was constitutional because a separate state statute would have allowed the wife to prevent the husband from unilaterally executing a mortgage on jointly held property.[124] According to the mortgagor, the wife was at fault for failing to take advantage of the statute that would have prevented her husband from acting without her consent, and thus, she was not entitled to challenge the statute's constitutionality.[125] The Court, however, rejected this argument, citing a line of cases which held that the " 'absence of an insurmountable barrier' will not redeem an otherwise unconstitutionally discriminatory law."[126]

3. *Michael M. v. Superior Court*

In *Michael M. v. Superior Court*,[127] the Supreme Court addressed whether a state statutory rape law, which on its face discriminated on the basis of gender, violated the Equal Protection Clause of the Fourteenth Amendment. Michael M., a seventeen-year-old male, was charged with engaging in consensual intercourse with a sixteen-year-old female.[128] The complaint accused Michael M. of violating California Penal Code Section 261.5, which criminalized statutory rape.[129]

Section 261.5 defined unlawful sexual intercourse as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."[130] Thus, the statute expressly imposed criminal liability for the act of

122. *Id.*
123. *Kirchberg*, 450 U.S. at 459.
124. *Id.* at 459–60.
125. *Id.* at 460–61.
126. *Id.* at 461 (quoting Trimble v. Gordon, 430 U.S. 762, 774 (1977)).
127. 450 U.S. 464 (1981).
128. *Michael M.*, 450 U.S. at 466.
129. *Id.* (citing CAL. PENAL CODE ANN. § 261.5 (West Supp. 1981)).
130. *Id.*

sexual intercourse only upon men. Michael M. challenged the California law on the ground that it unlawfully discriminated on the basis of gender in violation of the Equal Protection Clause.[131]

In its opinion, the Supreme Court unequivocally rejected the California Supreme Court's use of strict scrutiny in its analysis of whether this gender-based law passed constitutional muster.[132] The Supreme Court stated that, because a majority had never held gender-based classifications to be inherently suspect, strict scrutiny did not apply.[133] Instead, the Court attempted, as it had in previous cases, to apply an intermediate standard of judicial review.[134]

In defining the appropriate standard, the Court reviewed some of its earlier cases that established the intermediate scrutiny standard.[135] For example, the Court reviewed its statement in *Reed v. Reed* that a gender-based classification must bear a "fair and substantial relationship" to legitimate state ends to be upheld.[136] The Court also considered its subsequent statement in *Craig v. Boren* that the classification must bear a "substantial relationship" to "important governmental objectives."[137] Notwithstanding the rationale behind these cases—that the legislature may not make arbitrary gender-based classifications—the Court explained that the Equal Protection Clause does not prohibit gender-based classifications that are not invidious and that do relate, in fact, to real differences between genders.[138] In essence, the Court stated that the legislature may create discriminatory laws if the laws are intended and designed to address issues or problems that are unique to women.[139]

Applying this analysis to the facts of *Michael M.*, the Court first considered the California Legislature's intent in creating the statute.[140] The Court accepted the California Supreme Court's finding

131. *Id.* at 467.
132. *Michael M.*, 450 U.S. at 468.
133. *Id. Contra* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (concluding that gender-based classifications are inherently suspect).
134. *Michael M.*, 450 U.S. at 468–69.
135. *Id.*
136. *Id.* (citing Reed v. Reed, 404 U.S. 71, 76 (1971)).
137. *Id.* at 469 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)).
138. *Michael M.*, 450 U.S. at 469.
139. *See id.* (noting that legislature may "provide for the special problems of women").
140. *Id.*

that the state intended to prevent illegitimate teenage pregnancies.[141] Holding this to be a sufficiently strong state interest, the Court then turned to whether the statute's gender-based distinction was a valid means of achieving that interest.[142]

Reviewing each kind of harm that results from illegitimate teenage pregnancies, the Court was persuaded that the harm fell disproportionately on women.[143] In light of this harm and the deterrent effect it had on women, the Court determined that a criminal sanction that punished only men served to "equalize the deterrents on the sexes."[144] Furthermore, despite the burden placed solely on males by the statute, the Court found that the gender classification was not designed merely for administrative convenience.[145] Rather, the Court identified the statute as a reasonable legislative effort to prevent illegitimate teenage pregnancies in light of the fact that the consequence of such pregnancies fall more heavily on females than on males.[146]

Michael M. is an important case because the Court upheld the constitutionality of a criminal statute that provided different treatment on the basis of gender. The Court upheld the statute after finding that the disparate treatment served a legitimate legislative goal and was a valid means of achieving that goal. *Michael M.* thus provides a framework for reviewing other efforts to criminalize behavior on the basis of gender.

4. *Mississippi University for Women v. Hogan*

In *Mississippi University for Women v. Hogan*,[147] a male applicant to a state-supported nursing school was denied admission based on a state statute limiting admission to female applicants.[148] The male applicant challenged the school's gender-specific admissions policy on the ground that it violated the Equal Protection Clause.[149]

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141. *Id.* at 469–70.
142. *Michael M.*, 450 U.S. at 470–73.
143. *Id.* at 471–72.
144. *Id.* at 473.
145. *Id.* at 476.
146. *Michael M.*, 450 U.S. at 476.
147. 458 U.S. 718 (1982).
148. *Hogan*, 458 U.S. at 721.
149. *Id.*

At the outset of its analysis the Court set forth the standard of review for gender-based classifications, requiring that they serve important governmental objectives and be "substantially related to the achievement of those objectives."[150] Importantly, however, the Court regarded this standard of review as the minimum that a party must show to maintain a gender-based classification.[151] Thus, the Court's language implied a potential elevation of the standard of review to be applied to these types of cases or at least a stricter application of the intermediate standard. The Court also expressly stated, as it had in *Craig* and *Orr*, that it made no difference whether the gender-based distinction operated against men or women.[152] Finally, in presenting the analytical framework, the Court cautioned that the standard of review must be applied in such a manner as to avoid perpetuating stereotypical roles of males and females.[153] The Court stated that, "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[154]

Turning to the facts of the case, the Court considered the State's arguments that the statute served the important interest of compensating women for historical discrimination and that the exclusion of men from the nursing school substantially furthered that interest.[155] First, the Court reviewed the historical statistics regarding discrimination against women in the nursing field.[156] The Court found that in Mississippi, as well as nationwide, women had filled virtually every nursing position in schools and in the labor force.[157] Based on this finding, the Court rejected Mississippi's compensatory-discrimination rationale.[158] Thus, the Court determined that the statute failed the first prong of the intermediate scrutiny test in that it did not serve an important state interest.[159] Instead, the Court stated that Mississippi's efforts to maintain the predomi-

150. *Id.* at 723–24.
151. *Id.* at 724.
152. *Hogan*, 458 U.S. at 724–25.
153. *Id.* at 725.
154. *Id.*
155. *Id.* at 727.
156. *Hogan*, 458 U.S. at 727 n.13.
157. *Id.* at 729.
158. *Id.* at 729–30.
159. *Id.*

nance of females in the nursing profession contributed to the perpetuation of the stereotype of nursing as a "woman's job."[160]

Continuing its analysis, the Court next addressed whether the State had sufficiently shown that the gender-based classification was substantially and directly related to its stated objective.[161] The Court found that the admission of men to "audit" courses undermined any argument that the presence of males presented an obstacle to women's ability to learn.[162] In addition, the Court considered evidence offered in the lower court which demonstrated that the presence of men had no impact on the learning environment.[163] Thus, the Court held that Mississippi had failed to satisfy both prongs of the intermediate scrutiny test.[164]

IV. RATIFICATION OF THE WOMEN'S CONVENTION IN THE UNITED STATES

A. *The Treaty Ratification Process*

Generally, international treaties and agreements to which the United States has acceded constitute binding law.[165] Treaties enjoy the same normative rank as federal statutes.[166] Thus, when they are inconsistent, the latter in time prevails.[167] Treaties, similar to federal statutes, are superior to state laws.[168]

Only the President can enter into a treaty.[169] However, the President can only ratify a treaty after receiving the advice and consent of the Senate.[170] In practice, a state initially signs a treaty subject

160. *Hogan*, 458 U.S. at 729.

161. *Id.* at 730.

162. *Id.*

163. *Id.* at 731.

164. *Hogan*, 458 U.S. at 731.

165. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987) (stating that international agreements constitute law of United States and are supreme over state laws).

166. *Id.*

167. *See id.* § 303 cmt. c (explaining that treaty and statute may address same subject).

168. U.S. CONST. art. VI, cl. 2.

169. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (1987) (detailing President's authority to enter into treaty).

170. U.S. CONST. art. II, § 2; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d (1987) (noting requirement of Senate's advice and consent).

to later ratification.[171] This initial signature is not binding, but rather represents the state's political approval and intent to seek ratification.[172] The President then presents the treaty to the Senate for its advice and consent,[173] upon which the Senate evaluates and votes on the treaty.[174] Once the President obtains Senate consent, the President takes the final step of ratifying the treaty.[175]

In giving its consent, the Senate may attach certain conditions or reservations to the treaty.[176] In this case, the President may only sign the treaty subject to the reservations or conditions.[177] However, reservations may not be such that they are inconsistent with and thereby subvert a fundamental goal, objective, or purpose of the treaty.[178]

Even if a treaty is ratified by the Senate and ultimately signed by the President, the treaty must be constitutional.[179] An international treaty will not be enforceable as law in the United States if it is inconsistent with the United States Constitution.[180] Treaties are thus subject to the same constitutional restraints as any other domestic law. Therefore, excluding all potential, valid reservations that may be made to the Women's Convention, the constitutionality of the treaty must be addressed. One major aspect of this question is whether the Women's Convention is consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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171. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 cmt. d (1987) (explaining that signature is usually *ad referendum*, representing political approval of treaty).

172. *Id.*

173. *See id.* §§ 111–115, 301–303 (relating status of international agreements and definition, nature and scope of international agreements).

174. *See id.* (reminding that treaties are subject to constitutional restraints).

175. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. d (1987) (stating that President retains discretion whether to ratify treaty even after Senate consents).

176. *See id.* (demonstrating that Senate often gives conditional consent).

177. *See id.* § 314 (asserting that ratification instrument must include Senate's conditions).

178. *See id.* § 313(1)(c) (stressing necessity that objectives be compatible with reservations or conditions).

179. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(3) (1987) (stating rule of international law is not given effect if it is inconsistent with United States Constitution).

180. *Id.*

B. *Current Status of the Women's Convention in the United States*

Although 136 countries have ratified the Women's Convention,[181] the United States is not among the signatories. In fact, since its arrival in the Senate more than fourteen years ago, the Senate showed little promise of ratifying the Convention until 1994. Prior to 1994, discussion of the Convention was limited to one field hearing in 1988 and one hearing in 1990. Otherwise, the Convention lay dormant in the Committee on Foreign Relations.[182]

On June 14, 1993, at the World Conference on Human Rights, U.S. Secretary of State Warren Christopher announced that the Clinton Administration would pursue U.S. ratification of the Women's Convention.[183] Based largely on this newfound support from the Clinton Administration, the Senate finally took action. On September 27, 1994, the Senate Committee on Foreign Relations held a public hearing on the status of the Convention.[184]

During the hearing, the Committee heard testimony from the Clinton Administration regarding reservations, understandings, and declarations. Specifically, the Administration proposed that the Committee adopt four reservations, three understandings, and two declarations.[185] The four declarations relate to the Women's Convention's reach regarding private conduct, combat assignments, comparable worth, and paid maternity leave.[186] The three understandings proposed by the Administration relate to the Convention's effect on the balance between federal and state laws in the United States; the effect on freedom of speech, expression, and association; and the provision of free health care services.[187] The two declarations proposed by the Administration designate that the Women's Convention be non-self-executing, and by election pursuant to Article 29(1) of the Convention, that the United States

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181. SENATE REPORT, *supra* note 4, at 2.

182. SENATE REPORT, *supra* note 4, at 2.

183. Warren Christopher, Address Before the World Conference on Human Rights (June 14, 1993), *in* DEP'T ST. DISPATCH 441 (1993).

184. SENATE REPORT, *supra* note 4, at 3.

185. SENATE REPORT, *supra* note 4, at 5–11.

186. SENATE REPORT, *supra* note 4, at 6–7, 10.

187. SENATE REPORT, *supra* note 4, at 7, 10–11.

will not be bound by the jurisdiction of the International Court of Justice.[188]

After hearing testimony, the Committee met on September 29, 1994 and voted thirteen to five to recommend ratification by the Senate subject to the reservations, understandings, and declarations proposed by the Clinton Administration.[189] Interestingly, the Senate Report from these hearings does not directly address the issue of potential equal protection conflicts between the Women's Convention and the United States Constitution. Where the Convention's constitutionality is mentioned, the Senate Report simply addresses the question of whether U.S. law regarding gender discrimination is sufficiently comprehensive to comply with the requirements set forth in the Convention.[190] The obvious question left unanswered is whether the Convention violates the Equal Protection Clause of the Fourteenth Amendment.

C. *Equal Protection Conflicts*

The potential for U.S. ratification of the Women's Convention raises many constitutional issues. Several of the specific articles in the Convention present direct conflicts on issues ranging from federalism to affirmative action. More generally, however, the Convention's inherent gender-based classifications may conflict with the Equal Protection Clause. The Convention poses potential equal protection problems in light of past Supreme Court jurisprudence on the subject of gender-based classifications.

Although the 1994 Senate Report recommends several reservations that should be made to the Women's Convention, the reservations mechanism is inadequate for addressing the Convention's equal protection problems. If the Women's Convention violates the Equal Protection Clause, it cannot be cured simply through use of the treaty reservations mechanism.[191] State parties properly use

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188. SENATE REPORT, *supra* note 4, at 7–11.

189. SENATE REPORT, *supra* note 4, at 3.

190. SENATE REPORT, *supra* note 4, at 4, 9, 14–15, 17–18, 49, 51–52.

191. *See* Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 281–89 (1991) (discussing application of regime or reservations that inspired controversy inside and outside of United Nations); Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 679–80 (1990) (noting that reservations incompatible with treaty objectives are unacceptable).

reservations to international treaties to limit the applicability and enforceability of particular provisions of those treaties. However, pursuant to the Vienna Convention on the Law of Treaties, reservations that are incompatible with the "object and purpose" of a treaty are impermissible since they fundamentally contravene the treaty itself.[192] Thus, if the Women's Convention is unconstitutional on equal protection grounds, it cannot be cured through reservations because its unconstitutionality would be tied to the Convention's very object and purpose.

The intermediate scrutiny test is the current test used by the Supreme Court to determine whether a gender-based classification is constitutional.[193] In application, this test is composed of two prongs: (1) whether the gender distinction serves an important governmental objective; and (2) whether the classification bears a fair and substantial relationship to the state's objectives.[194] To evaluate the constitutionality of the Women's Convention, each of these inquiries must be addressed separately.

Based on U.S. case law, the stated goals of the Women's Convention[195] most likely serve sufficiently important and specific governmental interests to satisfy the requirements of the first prong of the intermediate scrutiny test. Support for this conclusion can be found in *Orr v. Orr*.[196] The Supreme Court in *Orr* considered whether either of two potential state interests satisfied the important governmental objectives prong.[197] The Court concluded that either of the possible state interests, assisting needy female spouses or compensating women for past discrimination resulting in dependency, was sufficient to satisfy the requirement for an important state interest.[198]

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192. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 19(c) (entered into force Jan. 27, 1980); Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 679 (1990).

193. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1424 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982).

194. *Hogan*, 458 U.S. at 724; Michael M. v. Superior Court, 450 U.S. 464, 469 (1981).

195. For a complete list of the Convention's objectives, see *supra* text accompanying note 11.

196. 440 U.S. 268 (1979).

197. *Orr*, 440 U.S. at 279.

198. *Id.* at 280.

The Women's Convention implicitly relies on governmental interests that are similar to those in *Orr*. For example, by identifying one of its objectives as ensuring women's access to food, health, education, training, and opportunities for employment, the Convention implies that women as a class suffer deficiencies in access to these rights and benefits. The Convention uses gender as a proxy for identification of the class of persons that is denied these and other rights identified in the Convention.

Similarly, the Convention's goals of changing traditional roles of men and women in society and in the family, and of providing for maximum participation of women on equal terms with men in all fields, are similar to the goal in *Orr* of compensating women for past discrimination during marriage, which caused them to be unprepared for independence in the working world. Thus, based on *Orr* and relying on only a few of the specific stated goals in the Convention, the Convention's goals satisfy the first prong of the intermediate scrutiny standard.

In *Mississippi University for Women v. Hogan*,[199] the Supreme Court cautioned that governmental objectives must not create or perpetuate gender stereotypes.[200] The Court stated that, "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[201] None of the Convention's objectives, however, relies on a specific instance of discrimination against women. Instead, the objectives are based on narrow goals that are postulated without reference to specific problems.[202] Thus, unlike *Hogan*, there is no particular gender inequality to test. Rather, the Convention uses general language stating that "discrimination against women continues to exist."[203] This approach allows the Convention's goals to stand free of reliance on the continued existence of any particular problem of gender inequality.

Even if the governmental interests in the Women's Convention are sufficiently important to survive the first prong of intermediate

199. 458 U.S. 718 (1982).

200. *Hogan*, 458 U.S. at 725.

201. *Id.*

202. *See* Women's Convention, *supra* note 2, pmbl., 19 I.L.M. at 33–35 (promoting universal respect for all people without gender distinction).

203. Women's Convention, *supra* note 2, pmbl., 19 I.L.M. at 33–35.

scrutiny, the second prong requires that the gender-based classification bear a fair and substantial relationship to the state's objectives.[204] The Court's conclusion in *Orr* poses a potential constitutional problem for the Women's Convention regarding this part of the intermediate scrutiny test. In *Orr*, the Court's analysis focused on the lack of necessity for a gender-based classification.[205] The *Orr* Court determined that, notwithstanding the admittedly important state interest in assisting needy women or in compensating women for past discrimination, Alabama's statutory scheme obviated these objectives since it accomplished these goals without using a gender distinction.[206]

The Women's Convention is by no means the only international treaty to condemn gender discrimination. The Universal Declaration of Human Rights,[207] the International Covenant on Civil and Political Rights,[208] and the International Covenant on Economic, Social and Cultural Rights[209] all prohibit gender discrimination. Beyond these, at least one document, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women,[210] addresses specific rights and issues unique to women. Thus, as in *Orr*, the Women's Convention may protect only rights that are protected by other treaties currently in place.

Considering that the issues and problems of international human rights are not individualized, however, the holding in *Orr* may not be dispositive. The nature of human rights issues favors treatment on a classwide basis. Furthermore, even if human rights issues are susceptible to individual treatment, the mechanism for individualized review that was present in *Orr*[211] does not exist in the international sphere. As such, *Orr* does not preclude a finding that a fair

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204. *Hogan*, 458 U.S. at 724.

205. *See Orr*, 440 U.S. at 282 (reasoning that compensatory purposes could be fulfilled without placing burdens solely on husbands).

206. *See id.* (calling gender distinction "gratuitous").

207. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

208. Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. at 368 (entered into force Mar. 23, 1967).

209. Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. at 360 (entered into force Jan. 3, 1976).

210. Inter-American Commission of Women, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, OEA/SER.L 11.3.6, CIM Doc. 20/94 (April 19, 1994) (on file with the *St. Mary's Law Journal*).

211. *See Orr*, 440 U.S. at 281–82 (recognizing Alabama's requirement for hearing to determine need in each case).

and substantial relationship exists between the gender-based classification and the objectives of the Women's Convention.

In addition, while the general human rights treaties such as the Universal Declaration of Human Rights prohibit gender discrimination,[212] these treaties do not provide the specificity contained in the Women's Convention. Arguably, the Convention's specificity brings within its scope certain rights that may or may not be protected by the more general human rights treaties. Thus, the Women's Convention identifies new rights and an enforcement system, as in *Orr*, to provide protection of those rights unique to the Convention.[213] Of course, a counter argument is that the specific rights in the Women's Convention are implicitly subsumed within the human rights identified in the general human rights treaties. This view admonishes that the Women's Convention is simply an exposition of the general human rights applied to women. The danger in specifying a discrete set of rights as "women's human rights" is that the Convention thereby implicitly limits the scope of women's rights to only those rights contained within the Convention.

Another Supreme Court case that implicitly questions the constitutionality of the Women's Convention is *Reed v. Reed*.[214] In *Reed*, the Court invalidated an Idaho statute because its gender-based classification was unnecessary to the accomplishment of the state's objectives.[215] The Court held that the same objectives could be accomplished without a gender-based classification.[216]

The holding in *Reed* can be extended to challenge the constitutionality of the Women's Convention. Arguably, the Convention as a whole could have been written as a "Gender Convention" designed to protect and advance equality of both genders. By protecting all gender rights, the Convention would presumably protect women's rights to the same degree without the need to survive

212. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., art. 2, U.N. Doc. A/810 (1948).

213. *See* Women's Convention, *supra* note 2, arts. 10–14, 19 I.L.M. at 38–41 (specifying benefits and protections to be afforded to women); Women's Convention, *supra* note 2, arts. 17–22, 19 I.L.M. at 42–44 (requiring that committee be formed to compile reports on implementation of Convention).

214. 404 U.S. 71 (1971).

215. *Reed*, 404 U.S. at 76.

216. *Id.* at 76–77.

scrutiny as a gender-based classification. The success of this argument, however, ultimately depends on whether a "Gender Convention" would actually provide the same level of protection to women as the Women's Convention can.

An example of how the Women's Convention might be drafted in a gender-neutral fashion helps to crystalize this argument. For example, Article 8 of the Convention provides that "State Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their governments at the international level and to participate in the work of international organizations."[217] Article 8 does not, however, depend on its gender-specific language to make its point. To demonstrate, the Article might be rewritten as "State Parties shall take all appropriate measures to ensure to *all citizens* complete equality, *without any gender discrimination*, the opportunity to represent their governments at the international level and to participate in the work of international organizations." If this method of "gender neutralization" can be successfully applied throughout the Women's Convention, then the gender-based classification inherent in the Convention appears unnecessary. Therefore, if the classification is unnecessary pursuant to *Reed*, the general, gender-specific provisions of the Women's Convention are unconstitutional.[218]

A review of the Women's Convention reveals that most, if not all, of the Convention is amenable to gender-neutral language. In fact, some of the current articles in the Convention are already gender-neutral. For example, Article 5(a) currently reads:

> State Parties shall take all appropriate measures [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[219]

This passage supports the idea that the entire Convention could be written in a gender-neutral manner.

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217. Women's Convention, *supra* note 2, art. 8, 19 I.L.M. at 38.

218. *See Reed*, 404 U.S. at 76–77 (finding gender-distinctive statute unnecessary and thereby unconstitutional in application).

219. Women's Convention, *supra* note 2, art. 5(a), 19 I.L.M. at 37.

There are a few notable exceptions, however, to the possibility of gender-neutral language. For example, maternity issues contained in Article 4 must remain as written in the Women's Convention since they are issues exclusive to women. This is precisely what the holding in *Reed* requires—that, when possible, the Convention's objectives should be served by gender-neutral methods.[220] Pursuant to *Reed*, the only gender-specific parts of the Convention that survive equal protection analysis are those in which a gender-based distinction is necessary to achieve an important governmental interest.[221]

Finally, *Michael M. v. Superior Court*[222] also raises potential problems with the Convention's constitutionality. In *Michael M.*, the Court upheld a statute that imposed criminal liability for statutory rape only upon men.[223] The Court based its holding on what it considered to be real differences between men and women.[224] The statute's objective was to prevent teenage pregnancies, and the State argued that, because the burdens of teenage pregnancy fell so overwhelmingly on females, that females needed no additional deterrent.[225] Conversely, since the burdens of teenage pregnancy were not as great for males, the State argued that the statute was necessary as a deterrent to males.[226] Importantly, in *Michael M.*, the Court agreed that a male-specific deterrent was needed based on the effect of real differences between males and females, not on differences in status.[227]

Therefore, whether *Michael M.* can be used to support the existence of an enforceable gender-specific human rights treaty remains unclear. The Convention, with the exception of its maternity provisions, is not based on real physical differences, but instead is based on socialized differences. Although the differences highlighted by the treaty are real in the sense that they actually exist,

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220. *See Reed*, 404 U.S. at 76–77 (invalidating state probate law because of its dissimilar treatment of men and women).

221. *See id.* at 76 (requiring "reasonable . . . ground of difference" to uphold statute that differentiates between genders).

222. 450 U.S. 464 (1981).

223. *Michael M.*, 450 U.S. at 472–73.

224. *See id.* at 471 (discussing substantially different consequences of teenage pregnancies on young men and women).

225. *Id.* at 470.

226. *Id.* at 473.

227. *Michael M.*, 450 U.S. at 473.

they are not "real" in an innate, physical, or immutable way as seen in the *Michael M.* case.[228]

D. *Suggestions for Gaining Ratification*

Although the issue of whether the Women's Convention would survive equal protection review remains unclear, several Supreme Court cases suggest that the Convention is unconstitutional. The following suggested alternatives may help the Convention avoid constitutional objections based on the Equal Protection Clause.

First, to survive constitutional review, several articles of the Women's Convention must be rewritten in a gender-neutral form. In practically every article, language that is gender-specific can be made gender-neutral without sacrificing the objective of the article. In those cases in which the rights protected are exclusively female, such as the article dealing with maternity rights, the language may remain female specific, keeping in mind that the Convention's goals and objectives must be maintained.

If the goals of the Women's Convention are assumed to be those expressly identified in its preamble, they might be equally served by a gender-neutral Convention. These goals, such as the removal of obstacles to the full development of women's potential in political, social, and cultural arenas,[229] or providing "the maximum participation of women on equal terms with men" in all fields,[230] would not be diminished by gender-neutral articles within the Convention.

Second, the implicit goals of the Women's Convention, beyond those expressed in its preamble, must be identified. One obvious, if implicit, goal of the Convention is to raise awareness of violations of women's human rights. A widely accepted view holds that general human rights treaties, in practice, ignore women's human rights. The Women's Convention, and other women's treaties, are designed to underscore this issue by promoting women's human rights exclusively. The very existence of a women's human rights treaty draws attention to the failings of general, gender-neutral human rights treaties. This effort to bypass the inadequate protection general human rights treaties offer to women, however,

228. *See id.* at 471 (comparing affect of teenage pregnancy on males and females).
229. Women's Convention, *supra* note 2, pmbl., 19 I.L.M. at 33–35.
230. Women's Convention, *supra* note 2, pmbl., 19 I.L.M. at 33–35.

presents another major constitutional problem: the rights protected in the Convention duplicate many rights already protected in other treaties that are gender-neutral.

The important goal of raising awareness of women's human rights could easily be integrated into the Convention's preamble. Thus, the Convention would be reformed such that its preamble would contain explicit references to the goals of advancing female human rights and pointing out the failings of general human rights treaties in their protection of rights as applied to women. At the same time, the Convention's body would contain the specific, gender-neutral rights that are protected. Thus, in operation, the Convention would retain its definite character as a women's convention, but would not be held to the intermediate scrutiny standard applied to gender-based classifications.

In contrast to these suggestions, some commentators have argued that women's human rights should be raised to a level parallel to and separate from general human rights and that the failure to do so reflects the idea that women's rights are deemed less important than the rights of men.[231] This view, a more dogmatic version of the goal of raising awareness of women's human rights, is presumably asserted solely for its rhetorical effect. The obvious fallacy in this view is the equating of human rights with men's rights. If, in practice, human rights have been applied as if the term referred to "male rights," then the solution is to correct the misperception and misapplication of the term and the instruments that enforce those rights. Some cases will merely require changing male-specific language in treaties. However, most cases will involve the difficult task of removing entrenched cultural biases.

Isolating women's rights within the human rights sphere may carry an additional hidden danger harmful to the cause of women's human rights. If a human rights treaty is presented to the world as the embodiment of women's human rights, organizations that enforce the general human rights instruments may consider themselves absolved of whatever duty they felt to protect women's rights.

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231. *See* Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 487 (1990) (arguing that specific concerns of women should be included in concept of human rights).

Furthermore, reliance on the Women's Convention to protect women's human rights will prove unsatisfactory. Current international women's human rights treaties, including the Women's Convention, offer limited enforcement mechanisms. The extent of the Convention's enforcement authority lies with the Committee on the Elimination of Discrimination Against Women.[232] The Committee's enforcement power is limited to its filing of an annual report to the General Assembly of the United Nations.[233] Because of the weak enforcement powers, the Convention will work against the protection of women's human rights to tie those rights too closely to the Convention.[234] Thus, in addition to its constitutional infirmities, there are hidden dangers in relying on the Women's Convention as a remedy to women's human rights violations.

As a result of the Committee's lack of enforcement power, the Women's Convention appears to represent more of a political and policy statement than an enforceable bill of women's rights. Notwithstanding almost unanimous support for expanding the Committee's authority and strengthening the Convention's enforcement mechanisms, the Convention's lack of enforceability might have been intentional. This interpretation is supported by the unprecedented number of reservations that have accompanied many of the ratification instruments. If the Women's Convention is adopted as an unenforceable statement of goals used by the United Nations as a means to raise awareness and strengthen global commitment to eradicating gender discrimination, perhaps it would avoid becoming mired in reservations by ratifying state parties.

The Convention's equal protection problems and enforcement difficulties indicate the need to reshape its form and mission. Using the Convention as a supplemental vehicle for women's human rights, pursuing a two-tiered strategy of changing the Convention and changing the gender-neutral human rights treaties, provides one such alternative. First, the Convention should be cured of its gender bias in such a way that it will survive equal protection re-

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232. *See* Women's Convention, *supra* note 2, art. 17, 19 I.L.M. at 42–43 (requiring each state party to establish committee to monitor progress).

233. Women's Convention, *supra* note 2, art. 18, 19 I.L.M. at 43.

234. Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 632 (1991).

view. This end can be accomplished by making the Convention's goals more overtly focused on women's rights and by changing the body of the Convention to encompass a gender-neutral format and application process. Second, the existing general human rights treaties should be aggressively modified in text and application. In this regard, the Women's Convention can be used as the catalyst for change.

As a first step to expanding the use of the Women's Convention, one of the express goals should be to make gender-neutral human rights treaties truly gender neutral in their application. Furthermore, the Women's Convention should be applied as an agreement by signatory state parties to implement all gender-neutral treaties in accordance with the Convention's goals. Those rights within the Convention that are specific to females should be submitted as amendments to the gender-neutral human rights treaties.

Ultimately, the Women's Convention should be preserved as a tool to raise global awareness of how gender-neutral human rights treaties ignore women's human rights. In promoting the application of existing treaties in a manner that does not discriminate against women, the goals and objectives of the Convention will be preserved along with the enforcement mechanisms of several other U.N. organizations and treaties.

V. CONCLUSION

The Women's Convention appears to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Although the Convention advances what appear to be important governmental interests, the Convention probably does not bear a fair and substantial relationship to the achievement of those goals. The Convention enumerates rights that apply solely to women, ignoring the ability to accomplish its goals without gender specificity. Thus, while the Convention's gender-based goals may be constitutional, its gender-specific articulation of rights is not.

Additionally, application of the Women's Convention may be counterproductive to the advancement of women's human rights. By isolating women's human rights as distinct from general human rights, the Convention releases the enforcement bodies of the gender-neutral human rights treaties from any moral obligation to protect women's human rights.

To address these two problems, the Convention should be refashioned as a policy instrument to be used for raising awareness of women's human rights and the failure of general human rights treaties to protect women's human rights. This can be accomplished by defining the Convention's goals more clearly, by changing the rights in the Convention to make them gender-neutral, and by using the Convention as a political and moral tool to prompt state parties to apply general human rights treaties in a manner that does not discriminate against women.