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Gender-Based Mortality Tables and Code: An Equal Protection Analysis

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GENDER-BASED MORTALITY TABLES AND THE CODE: AN EQUAL PROTECTION ANALYSIS

"The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother."

Bradwell v. Illinois (1873)

Bradley, J., concurring

"No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."

Stanton v. Stanton (1975)

Blackmun, J.

The Department of the Treasury currently determines individual tax liability, under certain sections of the Internal Revenue Code, through the use of sex-differentiated mortality tables.[1] The result of the use of these tables is an unequal assessment of tax liability predicated solely on the gender of the taxpayer.

As a constitutional issue,[2] the permissibility of using gender as the sole determinative factor is tested under doctrines established in the area of fifth amendment due process[3] and fourteenth amendment equal protection. In recent years, the level of scrutiny to which gender-based classifications are subject has changed dramatically. As the level of judicial inquiry has increased, many traditional gender-oriented legislative enactments have been found to be

1. As used in this paper, the term mortality table refers to tables used to predict life expectancy at fixed or given ages. The term mortality table shall be synonymous with the term life table both of which may be referred to simply as the table or tables.

2. The issue of the permissibility of the use of gender-based mortality tables has arisen in a non-constitutional challenge under Title VII of the Civil Rights Act of 1964. In City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), the Court, through Mr. Justice Stevens, struck down the use of the tables primarily on the grounds of overbreadth. While finding that women as a class live longer than men, the Court nonetheless found that the generalization is inaccurate with respect to many individuals within the class. Since the statute in question required fairness to individuals, and not just the larger class, the use of the tables could not be sustained where unfairness to many individuals resulted.

3. Fourteenth amendment equal protection, by its own terms, applies only to the states. There is no explicit consitutional provision that prohibits the federal government from discriminating in a manner prohibited to the states under the fourteenth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954). However, the Supreme Court has held that, while not interchangeable, the concepts of equal protection and due process of law stem from the same ideal of fairness and, therefore, a violation of one may well be a violation of the other. *Id.* at 499. *See also* Mathews v. De Castro, 429 U.S. 181 (1976); Washington v. Davis, 426 U.S. 229 (1976) (finding the due process clause to have an equal protection component). The Supreme Court has addressed this issue, albeit only briefly, in the gender discrimination case of Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975), in which it noted, "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."

unconstitutional.[4] It is within the context of this "new" equal protection that the Treasury's tables will be examined.

THE CODE AND THE USE OF MORTALITY TABLES

In order to determine tax liability under certain income, estate and gift tax sections of the Code, it is sometimes necessary to ascertain the life expectancy of the taxpayer.[5] The Treasury makes this calculation by employing gender-based mortality tables.[6] By referring to the sex and present age of the taxpayer, the tables provide an assumption about the age to which the individual can expect to live.

The use of gender-based mortality tables results in differing tax consequences to men and women who are otherwise similarly situated with respect to age and economic circumstances. This disparity is best illustrated through the use of examples demonstrating how these tables function in determining an individual's tax liability.[7]

Section 72 is the income tax provision relating to the inclusion in gross income of an amount received as an annuity. When an individual purchases a life annuity, and at some point begins to receive a return on that investment, it is important to know how much of the amount received represents a recovery of the investment and how much is income from that investment. The latter amount is included in gross income of the taxpayer, the former is not.[8]

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4. For example, in Orr v. Orr, 440 U.S. 268 (1979), the Alabama statute at issue only required men to pay alimony. This traditional statutory assumption of female need was struck down. Similarly, in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), Frontiero v. Richardson, 411 U.S. 677 (1973); and Califano v. Goldfarb, 430 U.S. 199 (1977), presumptions of female dependency were found to be archaic and overbroad.

The issue of outdated traditional and paternalistic legislation received a great deal of attention in Stanton v. Stanton, 412 U.S. 7 (1975). In *Stanton*, the Court struck down a gender-based age-of-majority statute which was premised upon such stereotypes as: women will be homemakers while men will work and provide support; women marry earlier than men; men will pursue a higher education and career while women will not. The statute was found to be unconstitutional.

5. Not all Code sections that use or make reference to the use of mortality tables are discussed in this paper. Rather, only representative sections will be discussed in order to demonstrate the various ways in which the tables are used to determine taxability for individuals in specific situations. However, the same basic principles are equally applicable to the following: I.R.C. §§170, 664, 2031; Reg. §§1.170A-12(f), 1.664-4(b), 20.2031-10.

6. The Service has not always used gender-based mortality tables in all the situations in which tables could be used. For example, both I.R.C. §§2031 and 2512 (which now employ gender-based tables) used unisex tables prior to 1971. *See* Reg. §§20.2031-7(f), 25.2512-5(f).

7. With respect to each of the examples given, only representative illustrations, fundamental in nature, will be shown. Each Code section could have an intricate variety of fact patterns requiring greater or lesser complexity. For example, only single lives are used in the examples. If multiple lives were used, some male and some female, the complexity is compounded without any corresponding clarity. Therefore, only the most basic examples are given which demonstrate how the tables are used and, as a result of such use, what tax result obtains.

8. *See* I.R.C. §72(b); Reg. §1.72-3. The computation of the exclusion ratio is determined by the rules set forth in Reg. §1.72-4. The computation shown here is for a single life annuity with no refund feature.

A key factor in ascertaining the ratio of inclusion to exclusion from gross income is a threshold actuarial determination of the number of years the taxpayer will receive the life annuity. Section 72 allows the taxpayer gradually to recoup the principal of the investment by amortizing it over an assumed period of receipt.[9] This makes the actuarial assumption about the longevity of the individual an important issue. The longer the life expectancy of the individual, the longer it theoretically will take to fully recover principal. Where a fixed amount is paid annually, the principal component will be smaller and the income component larger.[10] It is, therefore, very beneficial to be in a group or class where life expectancy actuarially is determined to be low, since actuarially the taxpayer would have fewer years in which to recover the principal of the investment.[11]

The Treasury has divided all taxpayers into two classes based solely upon the actuarial assumption that women live an average of five years longer than Men.[12] This assumption prevails in all cases without exception.[13] The result of

9. This is how I.R.C. §72 works theoretically. If everyone lived to, but only to, one's expected age at death, I.R.C. §72 would function precisely. However, people die before or well beyond their expected age at death. This does not affect the exclusion ratio since it has been established. If the taxpayer lives beyond the projected age of death, the exclusion ratio is still given effect, even though the principal of the investment has been fully recouped. Reg. §1.72-4. Conversely, if the taxpayer dies before the expected age of death, neither loss nor change of tax character for prior years is allowed. William Waller, 39 T.C. 665 (1963); Reg. §1.72-4(a).

10. The longer the assumed recovery period will be, the longer the taxpayer will theoretically have to recover the cost of purchasing the annuity contract. If the life expectancy of the individual is shorter, there are fewer years within which to recover the same amount. For example: *X* and *Y* each purchase an annuity contract for $10,000 and both are the same age. Each received $1,000 per year under the terms of the contract. Actuarially, it is determined that *X* will live for 15 more years and *Y* will live for 20 more years. Because *X* has fewer years within which to recover his original investment, the percentage of his annual $1,000 return allocated to the cost of his annuity will be higher than *Y*'s. On the other hand, *Y* has more years to live. Thus, the percentage of her $1,000 annual return allocated to the cost of the annuity will be lower.

Ignoring that the exclusion ratio is actually a percentage and assuming that *X* and *Y* die on schedule, *X*'s amortized cost per year would be $666 while *Y*'s would be $500. This means the balance of the amount received is income to the recipient. Since *X* amortizes the same cost as *Y*, but over fewer years, his income component is smaller (only $334 compared to *Y*'s $500).

11. Under Reg. §1.72-4(a)(4), the exclusion ratio never changes; thus it is much better to have an actuarial prediction which shows a probability of short life. If the prediction is wrong because of premature death, there is no tax loss, but rather just a poor investment. William Waller, 39 T.C. 665 (1963). On the other hand, if the prediction is wrong because the taxpayer outlives the prediction, there are tax and economic benefits inherent in the miscalculation (continued exclusion after recovery of cost). The key is to get into that favorable classification. Under the regulations, this is accomplished by being born male. *See* Reg. §1.72-9.

12. Reg. §1.72-9. The expected return multiples for single life computations are the same for males five years younger than females. For example, the expected return multiple for a male, age 6, and a female, age 11, is 65. The five year difference is constant throughout the table. *See* Reg. §1.72-9, Table I.

13. Even where the tables in the regulations do not fit the taxpayer's particular situation, the factors of age and sex must be supplied to the Service for its computation of the appropriate factor. *See* Reg. §§1.72-9, 20.2031-10(e).

this policy is that women who are similarly situated to men with respect to age and economic status[14] will have more burdensome tax consequences based solely on an accident of birth.[15]

The following example illustrates the basic principles of Section 72. *F* is a female, age 65. *M* is a male, age 65. *M* and *F* each purchase a single life annuity contract for $100,000. The annual annuity paid is $10,000 under the agreement. The annual exclusion from gross income for *F.* is $5,495, while the amount excluded for *M* is $6,667.[16] *F* will include $1,172 more in her gross income annually than *M* solely because of her gender.

Sections 642[17] and 644[18] deal with two kinds of split interest trusts as defined in section 4947(a)(2). In order to determine the amount of the charitable deduction allowable for tax purposes,[19] the present value of the remainder interest passing to a qualified charity must be calculated. The amount of the charitable deduction allowable depends upon the value of the precedent life estate.[20] The longer the life tenant can be expected to live, the larger the value of the life estate will be. This, of course, reduces the value of the remainder

14. The term economic status as used in this paper means that in every economic respect without regard to tax consequences, individuals are precisely similarly situated.

15. Part of the focus of this paper will be a statistical examination of the legitimacy of this assumption, as well as the legal legitimacy. See notes 110-124 and accompanying text, *infra.*

16. *See* Reg. §1.72-4, -5, -9. The formula used to arrive at this computation is as follows: the amount invested in the annuity contract divided by the expected return (expected return multiple times annual annuity payment) times the annual amount received equals the amount excluded from gross income. The computation for *M* is: $100,000/(15 X $10,000) X $10,000 = $6667. The computation for *F* is: $100,000/(18.2 X $10,000) X $10,000 = $5495. The expected return multiple is different for males and females age 65, and it is this factor alone which causes differing tax consequences.

17. I.R.C. §642 governs pooled income funds. For an explanation and definition of a pooled income fund, see Tomeo, *Charitable Deferred Giving,* 48 CONN. B.J. 30 (1974).

18. I.R.C. §664 governs charitable remainder trusts in general. This discussion is concerned only with the charitable remainder unitrust as defined in §664(d)(2). For a further analysis of the charitable remainder unitrust, see Teitell, *Charitable Remainder Unitrusts under the Tax Reform Act,* 111 TRUSTS & EST. 858 (1972).

19. The value of the remainder interest must be determined for the purposes of the income, estate, and gift tax charitable deduction. I.R.C. §§170(f)(2)(A), 2055(e)(2)(A), 2522(c)(2)(A). For the purposes of §170, the value of the remainder is the total amount allowable for income tax purposes. The amount allowable is then subject to reduction under §170(e) and the percentage limitations of §170(b).

20. The fair market value of the assets placed in trust are viewed as having two components: the life estate and remainder. These two components when reduced to a percentage figure will always equal 100%. This scheme assumes the life estate will be drawn out of corpus because no income is produced. Technically, this is possible in a charitable remainder unitrust because the amount to be paid is a percentage of the fair market value of the assets, valued at least annually. *See* Reg. §1.664-3(a)(1). *But see* Reg. §1.664-3(b). If the assets do not produce income or otherwise increase in value, the unitrust amount will be paid out of corpus. The unitrust amount is the life estate portion (to be paid to the non-charitable beneficiary). The balance is the actuarially computed value of the remainder interest passing to charity. The longer the life tenant is expected to live, the smaller the percentage value of the total assets that will be attributed to the remainder interest.

interest. Conversely, the shorter the life expectancy of the life tenant, the larger the value of the corresponding remainder interest will be.

The regulations, under both sections 642 and 644, allow the taxpayer to determine the value of the remainder interest.[21] Again, however, the actuarial tables provided by the Treasury distinguish taxpayers solely on the basis of gender.[22] The following example illustrates the resulting disparate tax treatment. *F* is a female taxpayer, age 65. *M* is a male taxpayer, age 65. In each case, the amount of the contribution in trust is $100,000. The annual rate of return for each is five percent. For the purposes of section 642, the present value of the remainder interest for *M* is $56,928 while the value of the same interest for *F* is $49,777.[23] *M* receives a greater deduction in the amount of $7,151 solely on the basis of gender. For the purposes of section 644, the present value of the remainder interest for *M* is $55,499 while the value of the same interest for *F* is $48,214.[24] Again, *M* receives a greater allowable deduction in the amount of $7,281.

Not every application of gender-based mortality tables results in an economic disparity that is burdensome to women. In the Code sections discussed above, the disparity discriminated against women because favorable tax results were linked directly to short actuarial assumptions of longevity.[25] In at least one case,[26] however, the reverse is true and women, as a class, are favored.

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21. Reg. §§1.642(c)-6, 1.664-4. See note 20 *supra*.

22. Reg. §§1.642(c)-6(d)(3), 1.664-4(b)(5).

23. The value of the property placed in a pooled income fund is multiplied times the factor supplied in the applicable table in Reg. §1.642(c)-6 to obtain the present value of the remainder interest. For *M*, Table G(1) is used. The factor for a male, age 65 with a 5% payout rate is .56928. This factor times the value of the property equals $56,928. For *F*, Table G(2) is used. The factor for a female, age 65 with a 5% payout rate is .49777. This factor times the value of the property is $49,777.

24. The value of the property placed in a charitable remainder unitrust is multiplied times the factor supplied in the applicable table in Reg. §1.664-4(b)(5) to obtain the present value of the remainder interest. For *M*, Table E(1) is used. The factor for a male, age 65 with an adjusted payout rate of 5% is .55499. This factor times the value of the property is $55,499. For *F*, Table E(2) is used. The factor for a female, age 65, with an adjusted payout rate of 5% is .48214. This factor times the value of the property is $48,214.

25. See note 10 *supra*.

26. I.R.C. §2512. This appears, however, to be the only Code section which operates in this manner. The analogue to I.R.C. §2512 is I.R.C. §2031 in the estate tax area. This section will again result generally in discrimination based upon the gender of life tenants or annuitants. For example, I.R.C. §664(d)(1), the operative provision for charitable remainder annuity trusts, refers the taxpayer to the tables under I.R.C. §2031 to determine the value of the remainder interest passing to charity. That value, of course, depends upon the value of the precedent life estate. See note 20 *supra*.

For example: *M* is a male, age 65, and *F* is a female, age 65. Both create a charitable remainder annuity trust and fund it with $10,000. The annual annuity payable to each is $6,000 per year. The present value of the remainder interest for *M* is $51,788 determined as follows. The Table A(1) factor for a male, age 65, is 8.0353. This factor times $6,000 per year equals $48,212, the value of the life estate. The remainder is $51,788 ($100,000 − $48,212). *See* Reg. §20.2031-10. The present value of the remainder interest for *F* is $44,197 determined as follows. The Table A(2) factor for *F* is 9.3005. This factor times $6,000 per year equals $55,803, the value of the life estate. The remainder is $44,197 ($100,000 − $55,803). *See* Reg. §20.2031-10. *M* will receive a larger deduction in the amount of $7,591 solely because of his gender.

A basic premise of the gift tax law is that a taxpayer makes a gift only to the extent that the individual ceases to control all or any portion of property transferred away.[27] Thus, in the simplest example, where an individual establishes an irrevocable trust with a retained life estate and remainder over to a third party, there is a gift tax due only upon the value of the remainder interest.[28] No gift tax is due on the value of the life estate because control[29] still remains in the hands of the taxpayer-transferor.[30]

The regulations under section 2512 provide the means to calculate the value of the retained and transferred interests.[31] Since the tax burden rests with a large remainder rather than life estate, the result differs dramatically from the examples previously stated.[32]

Assume the following facts: *F* is a female taxpayer, age 65, and *M* is a male taxpayer, age 65. Each creates an irrevocable trust and funds it with $100,000. Each retains a life estate. The remainder is given to an unrelated party and the gift tax credit is not used.[33] Under these facts, *M* has made a taxable gift[34] in the amount of $51,788 while *F* has made a taxable gift in the amount of

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27. *See* Reg. §25.2511-2. To the extent that a taxpayer controls property, nothing in effect has been transferred away. Thus, if the donor retains a beneficial interest in the transferred property, control in the donor exists even though it is something less than a fee simple interest (absolute ownership).

28. This assumes that other forms of control have not been retained over the remainder interest, such as a testamentary power of appointment. If such were the case, no completed gift would have been made. *See* Reg. §25.2511-2(b).

29. Control may also be the ability of the donor to change a disposition already made, either in favor of the donor or some third party. *See* Reg. §25.2511-2(b)-(c). *But see* Reg. §25.2511-2(d) (time or manner controls do not prevent gift treatment). A power over transferred property shared with any person having a substantial adverse interest is deemed a sufficient causation of control to complete the gift. *See* Reg. §25.2511-2(e). When the donor initially retains control but later relinquishes it, the gift is deemed complete at that later time. Reg. §25.2511-2(f).

30. See note 20 *supra.*

31. Reg. §25.2512-9.

32. The result differs here only because it is assumed that the woman will retain the life estate and make a gift of the remainder. However, if a gift is made of the life estate to another woman with the taxpayer retaining a reversion only, the gift will be larger than if it were given to a male the same age. This is due to the fact that the portion of the assets retained (or, more precisely, their value) will vary according to the projected life span of the life tenant. If the life span is long (i.e., female life tenant), more value will be allocated to the life estate and less to the retained portion (the reversion). If the life span is short (i.e., male life tenant), the reverse is true.

33. *See* I.R.C. §2502.

34. The definition of the term taxable gift is found in I.R.C. §2503. Very generally, it is the total amount of gifts made during the calendar quarter minus certain deductions. The total amount of gifts means the sum of the value of the gifts made during the calendar quarter minus the amounts excludable under I.R.C. §2503(b). Reg. §25.2503-1. I.R.C. §2503(b) provides an exclusion of up to $3,000 per year per donee for gifts of other than future interests in property. Thus, for example, a single gift of $2,500 in cash would not be included in the total amount of gifts and therefore would not be a taxable gift. However, if a remainder interest valued at $2,500 is given, it is both included in the total amount of gifts and would constitute a taxable gift because it is a future interest. Reg. §25.2503-2.

$44,197.[35] Under exactly the same facts, *M* has made a larger gift in the amount of $7,591.

In view of the tax consequences which attend the use of gender-based mortality tables, a number of issues could be raised which are not within the scope of this article. For example, one might question the use and validity of mortality tables either as empirical[36] or legal matter.[37] It should be noted, however, that the use of actuarial prediction in general is not being challenged here. In fact, it is very doubtful that any challenge could be mounted which would invalidate its use. At the same time, neither Code sections which directly employ mortality tables, nor those which indirectly rely upon them are being challenged here. This article does not question the constitutionality of any Code section which has heretofore been discussed.

However, the issue which this article does seek to resolve is whether the use of gender based mortality tables is constitutionally permissible. This will require an exploration of both the governing legal principles relating to gender classifications and the factual or statistical underpinnings of the tables.[38] As a

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35. *See* Reg. §25.2512-9. For *M* the value of the life estate is the value of the trust assets times the factor found in Table A(1). This is $100,000 x .48212 or $48,212. For *F*, the value of the life estate is the value of the trust assets times the factor found in Table A(2). This is $100,000 x .55803 or $55,803. In each case, the difference between the value of the trust assets and the life estate is a taxable gift.

36. If a distinction is warranted, it may be less than that currently imposed. This may be without legal redress, however, as only a matter of degree.

The larger question from both an empirical and legal standpoint is whether qualitatively the distinction is warranted at all. For example, the quantitative difference may be essentially de minimus and therefore qualitatively unjustified. On the other hand, there may be other compelling reasons aside from empirical data alone which suggest abolishing the distinction.

One such possibility exists within the confines of statistical theory. As a theoretical proposition, predictions about individuals based on class-wide data have generally posed a problem of accuracy. What may be an accurate statement about a class of individuals may be completely inaccurate about many individuals within that class. This is only to say that not all individuals within a given class share the class-wide characteristics equally.

This results in a danger of misclassification for significant numbers of individuals within a group. Statistically, one seeks to formulate a class which is comprised of individuals with traits relevant to the attribute sought to be predicted.

If the attribute is longevity to age 76, the class should be comprised of only those individuals who possess traits relevant to that attribute. The issue becomes whether gender alone formulates the most accurate classes possible. If it does not, then aside from the class-wide statistics there is a serious defect in the methodology employed.

For a further and more detailed discussion of the statistical theory discussed above, see W. SALMON, THE FOUNDATIONS OF SCIENTIFIC INFERENCE (1971).

37. *But see* William Waller, 39 T.C. 665, 678-80 (1963), which found the use of actuarial prediction in general to be reasonable with respect to the determination of expected return under I.R.C. §72. There is probably little question that, for example, a gender-neutral mortality table would survive an equal protection challenge. *Compare* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory pregnancy leave policy created irrebutable presumption of physical incapacity in violation of fourteenth amendment) *with* Massaschusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (mandatory retirement age created irrebutable presumption of physical incapacity but did not violate fourteenth amendment).

38. Ultimately, this issue must be resolved on the basis of legal principles rather than statistical theory. Under one of the three legal standards discussed *infra* (the rational basis

preliminary matter, it is worth noting that while some regulations have consistently used gender-based tables, others have only relatively recently been changed over from a gender-neutral to a gender-based formula.[39] The reasons for the change are as yet undisclosed[40] and probably will remain so until and unless the issue is litigated.[41]

EQUAL PROTECTION AND THE USE OF GENDER

It is a general precept of fifth amendment due process[42] and fourteenth amendment equal protection that individuals who are similarly situated should be treated similarly.[43] It is apparent, however, that legislatures do create classifications which accord dissimilar treatment to similarly situated individuals.[44] This creates a natural state of tension between legal theory on one hand and political reality on the other.

In order to harmonize this conflict, the Supreme Court of the United States has formulated legal tests or standards which, if satisfied, allow a legislative body to enact discriminatory laws. The two traditional tests have been the rational basis test, which involves minimal judicial scrutiny, and the compelling state interest test, which involves the strictest judicial scrutiny. The present test or standard employed in the area of gender discrimination has evolved through a series of significant Supreme Court decisions.

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test), even if the methodology employed were inaccurate, it still probably would stand as a "rational" solution to the problem sought to be solved.

39. The regulations under I.R.C. §§2031 & 2512 were changed in 1970 from a gender-neutral table to a gender-based table. Section 664 has always used a gender-based table, but that section only became law in 1969. Section 72, however, always used a gender-based formula.

40. The Treasury gave no clue as to why it made the change from gender-neutral tables to gender-based tables. Neither the publication of the final regulation in the Federal Register, 35 Fed. Reg. 18,461 (1970), nor the publication of the proposed regulation in the Federal Register, 35 Fed. Reg. 10,862 (1970), disclosed the reason for the change. No other official publication has explained the change either. In a conversation with an attorney who was with the Internal Revenue Service at the time the change was made, certain reasons were given. The Internal Revenue Service had been criticized for not having the dual table system which was generally assumed to be more accurate. The accuracy of the single table system was doubted. Because the Service also tended to lose in court on the issue of not having the dual system, it was decided that there should be a change. These reasons do not represent the position of the IRS or the Treasury as to the reason for the change.

41. In a conversation with an attorney with the Internal Revenue Service, it was suggested that the current dual system may not remain permanently. It was noted that some pressure has been brought on the Treasury to switch all tables over to gender-neutral ones. He also noted that even if the decision to do so were done soon, it would be some time before the Service could produce entirely new tables. Because the decision has not been made to change, the quickest route to change would be litigation.

42. *See* Wescott v. Califano, 460 F. Supp. 737, 747 n.10 (D. Mass. 1978). See note 3 *supra.*

43. Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

44. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961). "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *Id.* at 425. But the degree to which discrimination will be tolerated depends upon which standard of review is employed. See text accompanying notes 42-56 *infra.*

The Middle Tier Test

Reed v. Reed[45] first suggested that gender-based classifications would receive stringent judicial scrutiny. In *Reed,* the Court struck down an Idaho statute requiring a mandatory preference for males in contested administrator appointment proceedings. While the Court purported to apply the traditional rational basis test, the language of the opinion indicated a different attitude by the Court: "In such situations, [the Idaho statute] provides that different treatment be accorded to the applicants on the basis of their sex; *it thus establishes a classification subject to scrutiny under the Equal Protection Clause.*[46]

The Court, while purporting to apply the rational basis test, clearly departed from a traditional rational basis analysis. Instead, the Court first identified the state's legitimate interest (that of reducing the workload of probate courts by eliminating one class of contestants) and then proceeded to analyze the means chosen to achieve that end. It was at this level of inquiry that the Court found constitutional infirmity. After stating that the means chosen by the state did not advance the objective in a manner consistent with the equal protection clause, the Court said, "To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[47] While *Reed* established that gender was to receive heightened judicial scrutiny, its parameters were far from clear.

In an apparent attempt to resolve the issue of the proper standard of review within a traditional context, the Supreme Court in 1973 decided *Frontiero v. Richardson.*[48] In striking down a proof of dependency requirement for the spouses of female military personnel, a plurality of the Court sought to establish that gender-based classifications were inherently suspect and thus subject to the compelling state interest test.[49] This approach was rejected by a majority of the Court and was never seriously raised again.[50]

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45. 404 U.S. 71 (1971).

46. *Id.* at 75 (emphasis added).

47. *Id.* at 76.

48. 411 U.S. 677 (1973).

49. The plurality opinion sought to show that, just like race and natural origin, gender has the same characteristics that make classifications inherently suspect. The Court said, "Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in all educational institutions, in the job market and perhaps most conspicuously, in the political arena." The Court followed this general observation with a more exacting definition of the essence of suspectness: "Moreover, since sex, like race and national origin, is an *immutable characteristic* determined solely by accident of birth, the imposition of special disabilities upon the members of a particular sex, because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.' " *Id.* at 686 (emphasis added). Thus, the Court found, as with race and national orgin, that gender shared the attributes of (1) political powerlessness, (2) immutable characteristics determined at birth, and (3) burdens imposed without regard to individual merit. *See also,* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) (which also discusses the interrelationship between race, national origin and gender discrimination).

50. The plurality opinion, written by Mr. Justice Brennan, was joined only by Justices Douglas, White and Marshall. Justices Stewart, Powell, Blackmun and Chief Justice Burger

The cases that followed *Frontiero* did not clearly establish an intermediate standard, but rather adhered to *Reed* formulation with somewhat mixed and often confusing results.[51] In 1976, however, the Court attempted to establish a definitive equal protection standard for classifications based upon gender. The issue in *Craig v. Boren*[52] was the validity of an Oklahoma criminal statute fixing the age of majority for the purchase of beer at eighteen for women and twenty-one for men. In striking down the statute, the Court propounded the following test: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives."[53]

This middle tier standard has two prongs, both of which must be satisfied to sustain the challenged classification. While it was unclear whether *Craig* was a majority decision, the Supreme Court in *Califano v. Webster*[54] grounded its decision on the *Craig* standard. The 5 to 4 majority in *Webster* put to rest any doubts of the continued vitality of the standard, while the dissent failed even to raise the issue.[55]

The Important Governmental Objective Prong

Assuming a classification based on gender,[56] the first prong of the test re-

concurred in the judgment only, preferring not to reach the issue and instead deciding the case on the authority of *Reed v. Reed*. Justice Rehnquist dissented.

51. Between 1973 when *Frontiero* was decided and 1976 when *Craig v. Boren* was decided, a number of decisions came down, all basically following the *Reed v. Reed* formulation. However, the *Reed* formulation is less than concrete, and little could be said about it other than it was something more than the rational basis analysis and very flexible. For example, right after the *Frontiero* decision, in which Justice Douglas was in the plurality, came the Kahn v. Shevin, 416 U.S. 351 (1974) decision. The majority, per Justice Douglas, upheld a Florida statute that favored women by granting a property tax exemption for widows but not widowers. The Court, however, applied only the rational basis test to the classification even though it purported to apply *Reed*. The dissent was very quick to point this out. Justices Brennan, Marshall and White felt that the appropriate standard was that unsuccessfully applied in *Frontiero*, the strict scrutiny test. *Id.* at 357.

52. 429 U.S. 190 (1976).

53. *Id.* at 197.

54. 430 U.S. 313 (1977).

55. *Id.* at 321 (Burger, C.J., concurring).

56. At issue in Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) was the validity of a Massachusetts mandatory veterans' preference in employment for state positions. While apparently neutral on its face, the preference operated overwhelmingly to the advantage of males. *Id.* at 257. Thus, the Court was faced with the issue of whether to apply the *Craig* standard to a classification that, while neutral on its face, resulted in a substantial disparate impact in operation.

The Court, following precedent earlier established in the area of racial discrimination, found that where there is a gender-neutral statute challenged on the ground of disproportionate impact, a two-fold inquiry is required. *Id.* at 274. *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). The first question is whether the statutory classification is truly neutral in the sense that it is not gender-based. If the calssification is overtly or covertly based on gender, the *Craig* standard will be applied. The second inquiry, assuming a gender-neutral statute, is whether the classification reflects invidious gender-based discrimination. Thus, as in the area of racial discrimination, disparate impact must be coupled with a showing of purposeful dis-

quires that the government state an important reason for creating the classification.[57] The government interest need not be overriding or compelling, yet at the same time it cannot be minimal.[58] The Court has been willing to permit the proponent of the classification to articulate several goals in order to meet the first prong rather than require the proponent to justify the classification with a single articulated goal.[59] This indicates that there need not necessarily be a particular interest in mind from the inception of the classification so long as some important justification can later be articulated. It also would appear that the presence of mixed motives, that is, important and unimportant governmental objectives, will not in itself defeat the classification at the first prong level.[60] If the Court can find that at least one goal articulated is theoretically important,[61] it will proceed to the second prong analysis.

One interest found by the Court to be important is the protection of public health and safety.[62] Even though the Court has not accorded much discussion to this interest,[63] it seems clear that any police power interest will be deemed sufficiently important to obviate further analysis.[64]

Another legitimate goal often accepted by the Court is that of reduction in

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crimination. 442 U.S. at 274. The latter showing, also characterized as intent to discriminate, can be a difficult evidentiary obstacle to the application of the *Craig* standard. *See, e.g.*, 426 U.S. at 239-45. A showing of disparate impact alone will result not in the application of the more favorable *Craig* standard, but rather in the application of the rational basis test.

It is very clear that this threshold requirement is met when the *Feeney* test is applied to the facts presented in this paper. The tables used in the Regulations employ a gender criterion. No serious argument could be made denying that the tables create a classification based on gender and are thus subject to the *Craig* standard.

57. Craig v. Boren, 429 U.S. at 197 (1976).

58. *See* Comment, *Gender-Based Discrimination and Equal Protection: The Emerging Intermediate Standard*, 29 U. FLA. L. REV. 582 (1977). In many respects, the first prong of the intermediate or *Craig* standard more closely approximates the first prong of the rational basis test. While governmental interest needs to be stronger (important rather than merely legitimate), there appears to be no balancing of interests as in fundamental right cases employing the strict scrutiny test. *See* Orr v. Orr, 440 U.S. 268, 277-81 (1979); Craig v. Boren, 429 U.S. at 199-200; Note, *Compelling State Interest Test and the Equal Protection Clause — An Analysis*, 6 CUM. L. REV. 109, 113-18 (1975).

59. *See* Orr v. Orr, 440 U.S. 268 (1979); Caban v. Mohammed, 441 U.S. 380 (1979).

60. *See* Caban v. Mohammed, 441 U.S. 380 (1979) (the state offered two objectives, one of which was rejected).

61. In this regard, the state must offer an interest with which it is legitimately concerned. This analysis, however, is subject to much second guessing about the true objectives of the state in creating the classification and is necessarily very subjective. *Compare* Craig v. Boren, 429 U.S. at 199 n.7 (1976), *with* Orr v. Orr, 440 U.S. 268, 280 n.10 (1979). *See also* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975).

62. 429 U.S. at 199-200.

63. *Id.*

64. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979). In that case, the consent of the natural but unacknowledged father of illegitimate children in adoption proceedings was not necessary for adoption by the new spouse of the natural mother. However, New York law did not confer identical rights when the natural father and his new spouse sought to adopt. Instead, lack of consent by the natural mother foreclosed the adoption proceeding. After rejecting a first interest as unsatisfactory, the Court accepted as important the state's interest in providing for the well-being of illegitimate children, a clear police power interest. *Id.* at 391.

the disparity in the economic conditions between men and women.[65] The Court has been willing to accept the premise that there has been a long history of discrimination against women in the economic sphere.[66] Therefore, legislative attempts to redress such past discrimination has received judicial sanction.[67] For example, in *Kahn v. Shevin*[68] a property tax exemption was granted to widows but not widowers. The justification given and accepted by the Court was the demonstrated inability of many women to enter the job market effectively following the death of their husbands. Lack of marketable skills was seen as a form of economic disparity that could be remedied in part by a state property tax exemption for widows.

In *Schlesinger v. Ballard*,[69] a related issue was decided. Under Navy regulations, women were given thirteen years to achieve a certain promotion level while men were given only eleven. The Court upheld the classification, finding that women had fewer opportunities for promotion than men, thus warranting the distinction created. This indicates that where benefits are granted to women and not to men, either as compensation for historic discrimination or for present real differences, such practices will be sustained.

One should not assume, however, that the mere recitation of a neutral or compensatory purpose will prevent further inquiry. In the past the Court has rejected claims by the proponent of the classification that it was enacted to compensate women when it was in fact shown to penalize women.[70] For example, in *Califano v. Goldfarb*[71] the Court rejected the claim that requiring proof of dependency for male survivors, but not for female survivors in social security survivor's benefits claims was designed to benefit women. The Court found that the classification was discriminatory in that a now deceased working woman could not provide the same benefits for her survivors as could a male. Thus, whether a classification is viewed as benign or malign is a matter of perspective.[72]

The Court has articulated several objectives which will not satisfy the first

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65. *See* Orr v. Orr, 440 U.S. 268, 281 (1979); Califano v. Webster, 430 U.S. 313, 318 (1977); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Kahn v. Shevin, 416 U.S. 351, 355 (1974).

66. *See* Califano v. Webster, 430 U.S. at 317 in which the Court stated "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." It is now well established that this potential reverse discrimination objective is valid. Nevertheless, the means employed to achieve this objective must still presumably be somewhat tailored to achieve the objective. *But see* Kahn v. Shevin, 416 U.S. 351, 355 (1974).

67. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351, 353-55 (1974). *See also* Schlesinger v. Ballard, 419 U.S. 598 (1975). In *Ballard* the discrimination was present, not past. Female officers were given more years on an "up or out" policy than male officers, but because women could not generally be combat or sea duty line officers, i.e., on board ship, the favorable treatment was justified.

68. 416 U.S. 351 (1974).

69. 419 U.S. 498 (1975).

70. Califano v. Goldfar, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

71. 430 U.S. 199 (1977).

72. *See id.*; Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

prong of the *Craig* test. One is that of administrative convenience[73] which was rejected in both *Frontiero v. Richardson* and *Reed v. Reed.* The mere fact that the government can save time or expense by conveniently classifying on the basis of gender will not save the practice from invalidation.

The Court has been willing to examine the legislative history of a statute in order to determine the true purpose for its enactment. In *Weinberger v. Wiesenfeld,*[74] the Court determined that the purpose of a portion of the Social Security Act was to provide benefits to surviving parents with young children, rather than just surviving mothers. Thus, the objective offered by the government (that of compensation to women for special disadvantages) was rejected as inconsistent with the true purpose of the legislation.

As in the *Wiesenfeld* case, the Court has attempted, whenever possible, to frame in gender-neutral terms the purpose of a statutory classification.[75] When the Court reformulates the objective in gender-neutral terms, the purpose is most often found to be important. But the classification may nevertheless be invalidated by the second prong of analysis.[76]

In order to apply these legal guidelines to the issue addressed by this note, the objective the Treasury seeks to accomplish through the use of gender-based mortality tables must first be delineated.[77] The Treasury might well posit as its important governmental objective the fair and equitable distribution of tax liability in those cases which are dependent upon a determination of the taxpayer's life expectancy. Thus, if it is more fair and equitable to distribute tax burdens based on gender-distinct tables, it would seem that this objective would be important and substantial.

The Treasury also could suggest that the goal sought to be achieved through the use of the tables is an accurate prediction of longevity. Again, this objective would appear to be important in light of its relationship to taxability under the Code sections discussed earlier.

This, however, raises an important issue. If accuracy in prediction of life expectancy is the purported objective sought to be achieved, then one must seriously consider whether or not administrative convenience is the true reason

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73. *See, e.g.*, Craig v. Boren, 429 U.S. at 198; Frontiero v. Richardson, 411 U.S. at 690-91.

74. 420 U.S. 636 (1975).

75. *See* Orr v. Orr, 440 U.S. 268, 279-81 (1979); Califano v. Goldfarb, 430 U.S. at 212-13.

76. *See* Orr v. Orr, 440 U.S. 268, 279-85 (1979); Califano v. Goldfarb, 430 U.S. at 216-17; Weinberger v. Wiesenfeld, 420 U.S. at 651-53. The *Goldfarb* case is indicative of some of the problems inherent in analyzing the Supreme Court cases on this subject decided since 1971. The conclusion in *Goldfarb* seemed to blend together the two-pronged analysis of both the *Reed* and *Craig* cases (*Goldfarb* did not expressly follow *Craig*, it was a plurality decision) so that it is somewhat confusing which prong has been failed. Apparently, some objectives were articulated and rejected while one was accepted (intent to aid dependent spouses). Since that objective, however, was not achieved by the classification (using sex as a proxy for dependency), the classification failed.

77. There is no history for the Regulations that explains why gender-based tables are used. Therefore, in the discussion of exactly what important governmental objective is sought to be achieved, one can only guess what would be put forth. Whatever objective is articulated, the issue of whether that goal is truly the one sought to be achieved will be raised and probed. See note 61 *supra.*

for the use of the tables.[78] The life tables for the years 1959-1961, which form the basis for the tables in the subject regulations, summarize statistics only on the basis of race, sex, and age.[79] No one would question the relevance of age to the prediction of longevity. The use of race is both clearly and presumptively invalid and is therefore unlikely to be used.[80] The only other major basis upon which to base the tables is sex. At the time the current regulations were promulgated, sex had not yet achieved a protected status and, therefore, along with age, was probably assumed to be a legally permissible basis of classification.

It should be noted, however, that race, sex, and age are not the only bases upon which tables can be founded. Statistics are available which link race, sex, and age to cause of death and geographical location.[81] Innumerable subgroupings are possible which may have much higher predictive value than sex alone. Moreover, groupings could be made based on attributes such as history of heart disease or lung and respiratory ailments; smokers and non-smokers could be similarly classified. It is equally clear, though, that the burdens of creating such subgroupings would be so great as to be prohibitive. Cost of creation as well as enforcement problems probably dictate that from a practical standpoint such tables would be both unrealistic and unworkable.[82] It is possible that in terms of both historical legal development and readily available statistics, the use of gender in the tables is merely the product of administrative convenience.[83] And, if this conjecture is accurate, the classification is no doubt invalid.[84]

78. While completely individualized predictions taking into account family history, state of health, physical condition, and other personal factors would probably not be permissible, *see* Estate of Roy, 54 T.C. 1317 (1970), this does not obviate the use of health-related groupings (by, for example, certain traits such as smoker or non smoker, obesity, etc.). To create such subgroup classifications, however, probably would be time consuming, complicated, and very expensive. There would probably be a significant amount of either good faith disagreement or outright cheating and tax fraud. Enforcement would probably be horrendous and expensive. On the other hand, identification of the traits of maleness and femaleness is quite inexpensive, certain, and easy to administer.

79. *See, e.g.*, Reg. §§20.2031-10(e), 25.2512-9(e). These regulations explicitly refer to the life tables for the years 1959-61 and were adopted in 1970. Regulations under §642 were adopted in 1971, and the Regulations under §664 were adopted in 1972. Reg. §§1.642(c)-6(d)(3), 1.664-4(b)(5). Neither of the latter Regulations explicitly refers to the life tables mentioned above. For the purposes of discussion, it will be assumed that the life tables for 1959-61 were used and are the applicable tables. Section 72, on the other hand, still uses the life tables for 1937. Reg. §1.72-9. Again, for the purposes of discussion the 1959-61 life tables will be the point of reference. *Compare* U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, UNITED STATES LIFE TABLES: 1959-61 (1964) *with* 2 NATIONAL CENTER FOR HEALTH STATISTICS, VITAL STATISTICS OF THE UNITED STATES, 1970, MORTALITY, Part A (1970).

80. *See* Loving v. Virginia, 388 U.S. 1 (1967) (race found to be a suspect classification).

81. The Public Health Service publishes statistics cross referencing age, sex, race, cause of death, place of death and many other factors which currently and readily are available. *See* NATIONAL CENTER FOR HEALTH STATISTICS, note 79, §1, *supra*.

While subgroups would therefore be feasible, the task of formulating the subgroups followed by construction of tables based thereon would likely be enormous. Depending upon the combination of variables affecting health, the ultimate product could be literally volumes and volumes of life tables.

82. See notes 78 & 81 *supra*.

83. See note 78 *supra*.

84. Frontiero v. Richardson, 411 U.S. at 690.

For the purposes of analysis of the second prong of the *Craig* standard, the two objectives thought to be permissible will be assumed valid.[85] It is this prong which generally has not been met and therefore results in invalidating the classification.[86]

The Substantial Relation Prong

The second prong of the *Craig* test requires that the relationship between the objective sought to be accomplished and the means employed to achieve that objective be substantial.[87] There is no formula which clearly establishes how substantial the relationship must be, but certain concepts have developed which make the requirement more than simple judicial guesswork.[88]

Analytically, the second prong of the *Craig* test seems to have its roots in the second prong of the compelling state interest test.[89] The compelling state interest test requires extreme precision in the formulation of classifications.[90] One reason this precision is required is that certain bases of classification, such as race, are so fundamentally objectionable that they will be allowed only if they are absolutely necessary.[91] Thus, classifications may be overbroad. They regulate not only the individuals who are the object of the classification, but also others who, while sharing a common characteristic upon which the classification is based, are not the intended objects of the classification. Clearly, including more individuals in a classification than is necessary to accomplish the goal results in serious burdens upon the individuals so misclassified.[92]

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85. In order to test the classification at the second prong analysis, a valid first prong governmental interest is required. The classification must be somewhat tailored so as to achieve the objective. *See* Craig v. Boren, 429 U.S. at 197-98.

86. *See* Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 429 U.S. 190 (1970).

87. *See* Craig v. Boren, 429 U.S. at 191.

88. See note 93 *infra*.

89. Very little inquiry is allowed into the precision of the classification in the rational basis test, while it is a main inquiry for the compelling state interest test. See notes 48-53, 56 *supra*. The precision with which a statute is drafted is clearly a salient feature of the *Craig* test. *See* Craig v. Boren, 429 U.S. at 204. "Suffice to say that the showing offered by the appellees does *not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving.*" *Id.* (emphasis added).

90. *See* Note, *supra* note 58, at 113-18.

91. Classifications have been found to be suspect if they exhibit some of the following indicia: (1) immutable characteristics over which the individual has little or no control, (2) history of purposeful unequal treatment, and (3) political powerlessness. *See* Note, *supra*, note 58, at 111-12. *See also* Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court, A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

92. This may only be generally true. The more common situation is one in which by virtue of misclassification an individual is denied a benefit otherwise available to other individuals. The issue in this paper is an example. Two very broad classifications are created, male and female. Membership in one class will generate preferential tax treatment while the reverse is true for membership in the other. See notes 8-35 and accompanying text, *supra*. However, the fact of gender does not determine longevity. Therefore, for those women in high tax brackets receiving a §72 annuity who will die, for example, at age 60, the significance of misclassification is a high tax penalty. *See also, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979)

The essence of this reasoning has been injected into the second prong of the *Craig* test for essentially the same reasons. Where gender is to form the basis of a classification, it must be shown that there is sufficient agreement between the goal sought to be achieved and the use of gender as a proxy for a more neutral classification.[93] The degree of precision required probably cannot be quantified,[94] but must instead be decided on a case-by-case basis.

As is true in the compelling state interest test, the concern for the interests of the individual remain paramount in the second prong of the *Craig* test. While in some limited circumstances certain individuals may be burdened,[95]

(burden of misclassification was exclusion from adoption proceedings of the natural father); Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Goldfarb, 430 U.S. at 211 n.9; Kahn v. Shevin, 416 U.S. at 360 (Brennan, J., dissenting); Owens v. Brown, 455 F. Supp. 291, 305 n.4 (D.C. 1978).

93. *See, e.g.*, Craig v. Boren, 429 U.S. at 199. The Court said, "In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact." *Id. See also* Blake v. City of Los Angeles, 595 F.2d 1367, 1385 (9th Cir. 1979) "The fact that persons of one gender are less likely to possess certain traits than persons of the other gender cannot justify a gender-based classification unless the congruence between gender and possession of the traits is so great, and the prospects of developing more accurate proxies so small, that the gender-based classification cannot be said to be based on administration ease or convenience." *Id.* at 1385.

94. Craig v. Boren, 429 U.S. at 201-02. The Court noted, "Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. . . . While such disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device." *Id.* at 201. The Court after going from the specifics of the statistics before it, went on to discuss the general use of statistical evidence in an equal protection challenge. After raising the issue of the methodological problems, see note 36 *supra*, the Court ended the discussion by saying, "It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlines the Equal Protection Clause." *Id.* at 209. The basic message of the Court appears to be that statistics will not guide underlying policy decisions made under the equal protection clause. Statistical evidence is necessarily oriented toward the status quo while, as the Court noted, the underlying philosophy of the equal protection clause is normative (i.e., establishing a model or standard of conduct). Therefore, even very good statistical evidence may be outweighed by the perception that as a model or policy, government ought not to treat individuals inconsistently. *Id.* at 202 nn.13 & 22.

95. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. at 509; Kahn v. Shevin, 416 U.S. at 353-55. In both cases there were clearly individual men who suffered as a result of their classification without regard to their individual circumstances. But in *Schlesinger*, women as a class were foreclosed an opportunity available to men (sea and combat duty) while in *Kahn* the legislation was designed to ameliorate the effects of past economic discrimination.

The concern for creating a carefully tailored classification, *see* Orr v. Orr, 440 U.S. 268 (1979), is really the issue of individual rights. For example, in Stanton v. Stanton, 427 U.S. 7 (1975), the Court, in commenting on the evil struck down in *Reed*, stated, "No regard was paid under the statute to the applicants' respective individual qualifications." *Id.* at 13. Similarly in Frontiero v. Richardson, 411 U.S. 667 (1973), the Court said, "As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to unfair legal status without regard to the actual capabilities of its indi-

the general rule in the area of gender discrimination is that it is impermissble to burden men or women by placng them in an overbroad classification (gender only). One reason for this general rule is that certain permissible goals (important governmental objectives) are in fact gender-neutral; that is, both men and women share common traits which are either being advanced or discouraged. The classification should thus be tailored to include only those individuals (both males and females) who are the object of the classification.[96] For example, in *Orr v. Orr*,[97] the Court found that one of the permissible goals was providing for needy spouses in the divorce context. The gender-based Alabama statute was struck down in part for failing sufficiently to accomplish this goal. In both *Weinberger v. Wiesenfeld*[98] and *Califano v. Goldfarb*,[99] the Court found that where the goal sought to be accomplished employed dependency as the criteria, gender was an imprecise way of classifying who qualified.

With regard to misclassification of individuals, the Supreme Court has stressed that "legal burdens should bear some relationship to individual responsibility or wrongdoing"[100] and that the "advancement sanctioned, sponsored or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of the individual."[101]

Since as early as *Reed v. Reed* and *Frontiero v. Richardson*, the cases that have outlined and developed the standards in the area of gender discrimination have accepted this premise. Thus, in *Schlesinger v. Ballard*, the Court commented upon the *Reed* and *Frontiero* decisions by stating:

> In both *Reed* and *Frontiero* the challenged classifications based on sex were premised on overbroad generalizations that could not be tolerated under the Constitution. In *Reed*, the assumption underlying the Idaho statute was that men would generally be better estate administrators than women. In *Frontiero*, the assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands while male spouses of servicewomen would not.[102]

Therefore, even prior to the precise formulation required by *Craig*, patently overinclusive gender classifications were considered invalid. In all seven major

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vidual members." *Id.* at 686-87. The concern for the plight of the misclassified individual also pervades the analysis in other cases. *See* Caban v. Mohammed, 441 U.S. 380, 393-95 (1979); Weinberger v. Wiesenfeld, 420 U.S. at 644-45.

96. *See* Orr v. Orr, 440 U.S. 268, 281-83 (1979); Califano v. Goldfarb, 430 U.S. at 211. In both cases, important governmental objectives were found which were gender-neutral. In both instances the Court found that the means employed to achieve those objectives should also have been gender-neutral. They were not and were therefore invalid.

97. 440 U.S. 268 (1979).

98. 420 U.S. 636 (1975).

99. 430 U.S. 199 (1977).

100. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

101. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (Brennan, White, Marshall and Blackmun, J.J., concurring).

102. Schlesinger v. Ballard, 419 U.S. at 507.

gender cases, including *Craig*, that have been decided since 1976, the statutes involved were struck down at the second prong level of analysis.[103]

A related problem attending the use of inaccurate gender classifications focuses not on those burdened by the classification, but on those benefitted. Certain individuals who have no reason to be preferred by the statutory scheme may be provided with unwarranted benefits. In *Orr v. Orr*,[104] for example, the Alabama statute required only men to pay alimony in appropriate cases. Women were never required to shoulder this obligation, even under appropriate circumstances. The Court, in striking down the classification, noted that not only would needy men not be able to obtain support in the form of alimony, but women, who under a gender-neutral statute would be required to pay alimony, were exempted from this obligation under the Alabama statute. As a result, financially able women were placed in a classification with needy women and were therefore able to obtain preferential treatment that they did not need. The Court found this to be a "perverse result."

The Court has employed very similar reasoning in striking down what it has labelled "gratuitous" classifications. Such a classification exists if the government would not be burdened with much additional expense by changing the statutory scheme from one that is gender-based to one that is gender-neutral.[105] For example, in *Weinberger v. Wiesenfeld*,[106] the Court specifically noted that the extension of social security benefits to men not previously covered would result in a negligible economic burden to the government.[107]

Consistent with the philosophy outlined above is a preference for individualized hearings as an alternative to a broad-based gender classification. For example, in *Orr* individualized hearing already were being employed to determine the relative financial circumstances of the parties.[108] A gender-based statutory scheme served no purpose where a hearing could easily be provided for a man who sought financial assistance from his former spouse. In a long line of cases beginning wth *Reed*,[109] the courts have consistently expressed their preference for a due process-type hearing wherever feasible.

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103. The seven cases decided since 1976 were Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Caban v. Mohammed, 441 U.S. 380 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976).

Of these seven, *Feeney* and *Parham* were determined not to involve gender classifications. In *Califano*, the Court upheld the classification. *Craig*, *Orr*, *Goldfarb*, and *Caban* all failed the second prong of the *Craig* test.

104. 440 U.S. 268 (1979).

105. *See id.* at 281-82.

106. See text accompanying notes 98-99 *supra*.

107. 420 U.S. at 653.

108. 440 U.S. at 281-82.

109. The genesis of this attitude began in *Reed*. While not expressly calling for individualized hearings where feasible, the Court struck down the Idaho statute. The reason for the mandatory male preference was the elimination of a hearing where the machinery was already in place to accommodate it.

In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), there was a presumption of female dependency which precluded male survivors of deceased female wage earners from obtaining certain benefits. In striking down the statute, the Court noted one of the more pernicious

The Treasury has chosen gender-based mortality tables as the sole and exclusive means to achieve the objectives earlier assumed to be important.[110] Even a very cursory examination of the underlying statistical data upon which the tables are founded will disclose that the tables are based upon class-wide statistics for the classes of all males and all females.[111] The tables, therefore, represent nothing more than a generalization about the class of men or women that may or may not be accurate with respect to many individuals within each respective class.[112] This generalization will be explored further, since, to some extent, its accuracy may well determine the constitutional validity of the tables.[113]

Using the mortality tables under section 72 as the relevant point of departure, the Treasury adopts the position that women will live an average of five years longer than men.[114] While the hypothetical average woman is deemed to live to age 76, the hypothetical average man will reach only age 71.[115] Having now established the essence of the class-based generalization, its accuracy will now be assessed.

The Treasury employs the life tables for the years 1959-1961.[116] Column

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aspects of the classification: "Here, Stephen Wiesenfeld was not given the opportunity to show, as may well have been the case, that he was dependent upon his wife for support." *Id.* at 645.

In Craig v. Boren, 429 U.S. 190 (1976), the Court noted that legislatures have basically two options where there is weak congruence between gender and the object of the classification. One is to realign their substantive law in a gender-neutral fashion. The other is "to adopt procedures for identifying those instances where the sex centered generalization actually comported with fact." *Id.* at 199. Finally, in Orr v. Orr, 440 U.S. 268 (1979), the Court said, "Under the statute, individualized hearings at which the parties relative financial circumstances are considered already occur. . . . There is no need, therefore, to use sex as a proxy for need." *Id.* at 281. One of the fundamental notions of the due process clause is the opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Such hearings must be granted at a meaningful time and in a meaningful manner. *Id.*

110. See text accompanying notes 1-41 *supra.*

111. *See* U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, *supra* note 79.

112. Even where the generalization about the class is true, this does not save a classification which misclassifies many individuals within the group. As Justice Stewart has stated, "Such laws cannot be defended, as can the bulk of the classifications that fill the statute books, simply on the ground that the generalizations they reflect may be true of the majority of members of the class, for a gender-based classification need not ring false to work a discrimination that in the individual case might be invidious." Caban v. Mohammed, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting). This recognizes that a true generalization may pass the rational basis test, but at any other higher level of scrutiny, imprecision will likely be rewarded with invalidation.

113. There is no question that inaccuracy will undoubtedly result in invalidating the tables. *See* Craig v. Boren, 429 U.S. at 201-02. It is far from clear, however, whether accuracy alone will result in sustaining the tables. The reason is that accuracy would only be an empirical defense to an equal protection challenge. *See id.* at 204. Unless the methodology is faulty, however, the statistics may help serve to show that gender is an accurate proxy for achievement of the governmental objective. *Contrast* notes 78 & 81 *supra.*

114. See note 12 *supra.* The same is true for the other Code section discussed in text accompanying notes 8-35 *supra.*

115. *See* Reg. §1.72-9, Table I.

116. *See* U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, *supra* note 79.

three of tables two and three give the number of males or females per 100,000 who are alive at the beginning of each age interval given.[117] Upon inspection, the life tables disclose that at the beginning of the first age interval after the age of seventy-one for the class of males, approximately forty-seven percent of the class is still alive.[118] This means that the generalization the Treasury uses to tax individual males is incorrect as to forty-seven percent of the class.[119] In concrete terms, forty-seven percent of the class of males will in fact live longer than they are assumed to live for tax purposes and therefore will receive an additional benefit based solely upon their gender.[120] Conversely, for the class of females, the Life Tables disclose that approximately forty-four percent of the class will die before reaching the age of seventy-six.[121] As a result, a very high percentage of women are burdened significantly by virtue of their inclusion in a generally disadvantageous class.[122]

It is apparent after examining the underlying statistical data upon which the tables are founded that a significant number of individual men and women are misclassified with respect to the underlying assumption about their mortality.[123] Where gender is used to predict longevity, it is a highly inaccurate substitute for more germane bases of classification.[124]

As a matter of constitutional law, it is difficult to conclude that there is

117. *Id.*

118. *Id.*

119. See note 120 *supra.* In an article dealing with the use of actuarial tables in the pension area, two authors noted "Moreover, the per se nature of sex classifications in pension programs proves upon investigation to be quite significant; sex-based actuarial assumptions prove to be more a convenience that papers over wide variations than a finely focused necessity, rendering quite arbitrary the application of differing average longevities to individual men and women. While actuarial tables may be relatively accurate in predicting the average longevity of men and women respectively, quite a substantial standard deviation occurs within either class. Bernstein & Williams, *Title VII and the Problem of Sex Classifications in Pension Programs*, 74 COLUM. L. REV. 1202, 1202 (1974).

The authors explained the significance of standard deviation in making predictions about individuals within a class. "The standard deviation measures how much the statistic of the individual member of the class varies, on the average, from the average of the class. Thus, the greater the standard deviation, the more likely it is that the average longevity will not accurately predict the longevity of a particular man or woman. In other words, standard deviation measures the per se character of the classification." *Id.* at 122.

The authors also discussed a mortality study showing that a very large percentage of men and women studied actually died at the same age. "Dr. Barbara Bergmann points out that a sizeable percentage of men and women will live the same length of time. According to her data, taking 1000 men and 1000 women aged 65 in the general population, the death ages of 68.1 percent of each group can be paired. The remaining 32 percent of the women with later death ages constitute 16 percent of the entire group of 2,000 as do the remaining men with earlier death ages." *Id.* at 1221-22. If figures are fairly accurate, a very high degree of inaccuracy attends the use of the tables to make predictions about individuals. See note 36 *supra. See also,* Henderson v. Oregon, 405 F. Supp. 1271, 1275 n.5 (D. Or. 1975).

120. *Cf.* Orr v. Orr, 440 U.S. at 281-83 (gender-based classification benefitting persons not preferred is invalid).

121. See note 79 *supra.*

122. See text accompanying notes 7-24 *supra.*

123. See notes 79 & 113 *supra.*

124. See text accompanying notes 87-124 *supra.*

sufficient congruence between the stated objectives of the classification and the means employed to achieve those objectives. The classification is difficult to sustain as either fair or accurate. In light of the emphasis the Court has placed on the role of individual rights in the gender area, a classification as patently overbroad and overinclusive as this cannot be sustained. Thus, one can only conclude that even if the stipulated objectives are important, this classification is not substantially related to achievement of those objectives.

Craig *and the Use of Statistics*

In *Craig v. Boren*,[125] one of the justifications the State of Oklahoma gave for its gender-based age-of-majority differential was an empirical argument tending to show a higher correlation between male drivers and alcohol related traffic offenses than was true for young female drivers. The Court was not persuaded by the statistics offered by the state. The Court, however, appeared to go well beyond merely rejecting these particular statistics and summarized its attitude by stating:

> It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.[126]

The Court here recognizes there are significant problems inherent in attempting to quantify the requirements of the equal protection clause. Since the underlying philosophy of the clause is essentially normative, that is seeking to establish what legal standards of conduct should be, any attempt to answer an equal protection challenge statistically simply misapprehends the essential nature of the problem.

The equal protection clause attempts to delineate how individuals should be treated in conjunction with a statutory classification. It thus strives toward a model of conduct. On the other hand, statistics tend only to report what has in fact happened in the past as a basis for future prediction. This poses a major philosophical problem: whether the science of predicting how things *may* occur is useful in attempting to decide how things *should* occur. The Court in *Craig v. Boren* seemed to indicate that the two perform essentially differing functions and thus may be generally incompatible.

The application of the discussion to the issues raised here is specifically one of policy. Even if some justification can be found empirically for the use of gender-based tables, this may ignore the broader equal protection issue of whether under these circumstances, there should be a national policy of taxing similarly situated individuals differently. The conclusion in this paper is that such a policy is not worthy of support.

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125. 429 U.S. 190 (1976).
126. *Id.* at 204.

Equal Protection and the Manhart *Decision*

It may be somewhat difficult to accept that classifications drawn on the basis of empirically sound generalizations can nonetheless be constitutionally infirm. If one bears in mind, however, that the validity of the generalization is not really the issue, but rather the accuracy of the generalization in relation to individuals, then the results are far more understandable.

This was precisely the issue in *City of Los Angeles, Department of Water & Power v. Manhart*.[127] The case involved the permissibility of the use of gender-based mortality tables under Title VII of the Civil Rights Act of 1964. The mortality tables were being used to determine pension retirement benefits. While men and women similarly situated received the same retirement benefits, the amounts deducted from each employee's salary to fund these benefits were unequal. Larger contributions were required of female employees based on the class-wide assumption that women live longer than men. Thus, since women as a class could be expected to receive benefits for a longer period of time, their premium rate was higher. The Supreme Court, in a 6-3 decision per Justice Stevens, struck down the use of the tables. It began by stating: "This case does not, however, involve a fictional difference between men and women. It involves a generalization that the parties accept as unquestionably true: women, as a class, do live longer than men."[128] The Court made clear that the basis of the judgment would assume the basic soundness of this premise. However, the Court went on to say:

> The Department treated its women employees differently from its men employees because the two classes are in fact different. It is equally true, however, that all individuals in the respective classes do not share the characteristic which differeniates the average class representative. Many women do not live as long as the average man and many men outlive the average woman.[129]

The Court thus set the stage for deciding upon which basis the decision would be grounded: "The question, therefore, is whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics."[130] The Court decided that, under the federal statute in issue, fairness to individuals, rather than just to the larger classes of which they form a part, was required. The reasoning of the Court was remarkably similar to the reasoning employed under the middle-tier standard of the equal protection clause: class-wide generalizations, even if true, may not be used to burden individuals who do not share the class characteristic. If the parallel in reasoning is as dramatic as it appears to be, the logical extension of the *Manhart* equal protection rationale would be to invalidate the tables currently used by the Treasury.

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127. 435 U.S. 702 (1978).
128. *Id.* at 707.
129. *Id.*
130. *Id.*

ALTERNATIVES TO THE GENDER-BASED TABLES

Short of abandoning the use of mortality tables in general, there are two alternatives to the tables employed. The first was suggested earlier. If the Treasury seeks to be as accurate as possible in predicting longevity, it could produce tables essentially based on health related characteristics. This data is currently available for use.[131] However, the problems that would be engendered in terms of constructing the tables as well as enforcement issues probably rule out this approach as both unrealistic and cost prohibitive.[132] On a positive note, such tables would only be subject to the rational basis test and would therefore not be easily challenged.

The other and far more acceptable alternative is a return to the use of gender-neutral tables by the Treasury.[133] The data required to do so is available and probably could be readily abridged for use by the Treasury.[134] In addition to the relative facility of conversion, these tables would be subject only to the rational basis test and could not be overturned easily.

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131. See note 81 *supra*.
132. See notes 78 & 81 *supra*.
133. See notes 6 & 39 *supra*.
134. The data is already summarized in gender-free form and would need only to be adopted for use by the Treasury. See note 81 *supra*.