INTERPRETATIONS OF THE EQUAL PROTECTION CLAUSE

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I will make three quick observations about gender and the Constitution; I hope these comments will stimulate further thought and discussion. Then, I will pose a rather provocative question. Finally, I will mention some bright notes written about the labels "liberal" and "conservative."

On gender and the Constitution, first, a page of Fourteenth Amendment history. Leading feminists of the mid-1860s, although long allied with abolitionists and Republicans, were appalled by the text of the amendment.[1] Susan B. Anthony and Elizabeth Cady Stanton worked hard to secure petitions against ratification. Their opposition was sparked by the now nearly forgotten second section of the amendment, the only place in the entire Constitution where one finds the word "male." The point has already been made that the word "equal" appears in the Fourteenth Amendment and nowhere else in the Constitution. It appears there only once. "Male" appears in the Fourteenth Amendment's second section three times, each time in conjunction with the word "citizens." The gender equality advocates of the 1860s were understandably apprehensive. The coupling of "male" with "citizens" suggested to them that the grandly general phrases of the Fourteenth Amendment's first section, including the Due Process and Equal Protection Clauses, would have, at best, muted application to women.

My second observation is that Susan B. Anthony and Elizabeth Cady Stanton forecasted accurately. Every woman who came before the Supreme Court with a gender equality plea in the next one hundred years lost her case. The Court confirmed that, so far as the Constitution was concerned: a woman had no right, until 1920, to vote;[2] no right to work at the bar as a lawyer, however well qualified she might be;[3] or to work behind a bar as a bartender, even if the woman owned the establishment and preferred not to hire a man for a job she was fully able to

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1. *See* E. FLEXNER, CENTURY OF STRUGGLE 145-52 (rev. ed. 1975).
2. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).
3. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

do for herself.[4] Government, in those days, was not "neutral" about what women could or should do.[5]

A unanimous Warren Court, in its 1961 decision in *Hoyt v. Florida*,[6] adhered to that tradition. The complainant told this story. She had been engaged in a verbal bout with her husband. He taunted, insulted, and humiliated her to the breaking point. In desperation, she seized a baseball bat and administered the blow that both ended the altercation and led to her prosecution for murder.

There were no women on her jury. In those ancient days, about the time I was graduating from law school, Florida put women on jury rolls only if they voluntarily registered for service. Few women did. Few men would, I suspect, absent compulsion. The all-male jury returned a verdict of second-degree murder. Widow Hoyt argued that with some women on the jury, her state of mind at the time of the fatal blow might have been comprehended more accurately by her triers, and her crime perhaps reduced to manslaughter. To no avail. The Warren Court followed a 1947 Vinson Court precedent—a decision explaining that, while a woman's place in the community was indeed changing, the change entailed federal constitutional compulsion on the states in only one particular—the grant of the franchise by the Nineteenth Amendment.[7] The Warren Court certainly displayed no "activism" in this area.

My third observation is that it was the current Supreme Court, headed by Chief Justice Burger, that broke the tradition. The Burger Court does not have the "liberal" reputation that Chief Justice Warren's Court had. From 1971 to 1981, however, the Burger Court struck down one law after another, both federal and state, in response to complaints that the statutes discriminated overtly and unfairly on the basis of gender.[8]

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4. Goesaert v. Cleary, 335 U.S. 464 (1948).
5. *See* Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 2-8 (1975).
6. 368 U.S. 57 (1961).
7. Fay v. New York, 332 U.S. 261 (1947).
8. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (estate administration); Frontiero v. Richardson, 411 U.S. 677 (1973) (military fringe benefits); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (social security); Stanton v. Stanton, 421 U.S. 7 (1975) (parental support); Craig v. Boren, 429 U.S. 190 (1976) (3.2 beer purchase); Califano v. Goldfarb, 430 U.S. 199 (1977) (social security); Orr v. Orr, 440 U.S. 268 (1979) (alimony); Califano v. Westcott, 443 U.S. 76 (1979) (aid to families with dependent children); Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1981), (worker's compensation); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (Louisiana "head and master" rule); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (admission of males to state

Should the Court have resisted? Should it have held, in Sally Reed's case[9] for example, that it was consistent with the Equal Protection Clause for Idaho law to say "of several persons equally qualified to administer a decedent's estate, 'males must be preferred to females' "? Or, most recently, should the Court have resisted Justice O'Connor's opinion[10] declaring that Mississippi, to meet the equal protection prescription, must admit men to a state nursing school? Was the Court wrong—unduly "activist," insufficiently "restrained"—in these instances? Or, on the contrary, was it legitimate for the Court, in the 1971-1981 series of gender discrimination cases, to interpret the equal protection principle with a view to conditions in society as it has evolved? The reader may ponder these questions in unoccupied moments. I emphasize only that the entire development is one in which the Warren Court had no part and I note that both the turning point 1971 *Reed* decision and the important 1975 judgment in *Weinberger v. Wiesenfeld*[11]—in my view, the most critical case in the series—were unanimous Burger Court dispositions.

Next, my provocative question; it goes beyond equal protection to a larger domain. The issue became vivid in my mind when Senator Hatch criticized the Supreme Court for its recent refusal to declare what Congress had done unconstitutional in the *Garcia* Tenth Amendment case.[12] In a lecture a few years ago at the University of Georgia Law School,[13] I mentioned the range of cases in which my court's bold intervention had been sought by litigants on the left and the right—including pleas (under "liberal" auspices) to decree United States military engagement in Indochina unlawful,[14] and (under "conservative"

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nursing school). *But see* Kahn v. Shevin, 416 U.S. 351 (1974) (widow's property tax benefit); Michael M. v. Superior Court, 450 U.S. 464 (1981) (statutory rape); Rostker v. Goldberg, 453 U.S. 57 (1981) (draft registration).

9. Reed v. Reed, 404 U.S. 71 (1971).

10. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

11. 420 U.S. 636 (1975).

12. Garcia v. San Antonio Metropolitan Transit Auth., — U.S. —, 105 S. Ct. 1005 (1985). For discussions of the *Garcia* case, see Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); Comment, Garcia v. San Antonio Metropolitan Transit Authority *and the Manifest Destiny of Congressional Power*, 8 HARV. J.L. & PUB. POL'Y 745 (1985).

13. Ginsburg, *Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?*, 15 GA. L. REV. 539 (1981).

14. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

banners) to declare unconstitutional use of the treaty process to return the Canal Zone to Panama,[15] to enjoin the President's termination of the U.S.-Taiwan Mutual Defense Treaty without Senate advice and consent,[16] and, more recently, to stop the United States from relieving commercial banks of overdue loans owed by Poland.[17] I asked then, and I ask again now, whether it is fair to conclude from the business that litigants of various political persuasions bring to court that, in the United States legal system, calls for judicial intervention, for intrusive review of legislative and executive decisions, depend less upon the challenger's "liberal" or "conservative" ideology, and more upon the practical question of whose ox is being gored. My colleague Judge Scalia put the question this way in recent remarks: Do conservatives "really believe, as they have been saying, that the courts are doing too much, or [are they] actually nursing only the less principled grievance that the courts have not been doing what *they* want?"[18] One might compare with Judge Scalia's challenging remark Walter Goodman's question in the March 1985 issue of Harper's: Will conservative attitudes "toward the judiciary's playing fast and loose with the language of the Constitution and of legislation . . . slacken [if the Supreme Court] list[s] rightward?"[19]

Finally, my bright notes. I take them, with slight modulations of my own, from Gilbert & Sullivan—lines from *Iolanthe* that I think of whenever asked to identify myself as "liberal" or "conservative." The scene places Private Willis on night-long sentry duty before Westminster Hall. To occupy the hours, he speculates in song on Britain's parliamentary system:

> When in that House M.P.'s divide,
> . . . .
> They've got to leave . . . [their] brains outside
> And vote just as their leaders tell 'em to.
> . . . .
> . . . Nature always does contrive
> That ev'ry boy and ev'ry gal
> That's born into the world alive

15. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978).
16. Goldwater v. Carter, 444 U.S. 996 (1979).
17. Capital Legal Found. v. Commodity Credit Corp., 711 F.2d 253 (D.C. Cir. 1983).
18. Scalia, *On the Merits of the Frying Pan*, REGULATION, Jan./Feb. 1985, at 10, 12.
19. Goodman, *The Rights Game: Courts, quotas, and the corruption of equality*, HARPER'S, Mar. 1985, at 71, 74.

> Is either a little Liberal
> Or else a little Conservative . . . .

Were this not the case, Private Willis confides, then there would be what no one "can face with equanimity"—"a lot of M.P.'s, in close proximity, all thinking for themselves."[20]

However it may be in *Iolanthe*, that description, I believe, is the hallmark of the federal judiciary in which I am privileged to serve. Its greatest figures—Learned Hand perhaps is the best example in this century—have not been born once or reborn later liberals or conservatives. They have been independent-thinking individuals with open, but not drafty, minds, individuals willing to listen and, throughout their days, to learn. They have been notably skeptical of all party lines; above all, they have exhibited a readiness to reexamine their own premises, liberal or conservative, as thoroughly as those of others. They set a model I strive to follow.

20. W. Gilbert & A. Sullivan, *Iolanthe*, Act II, No. 14, second verse & refrain (Kalmus ed.) ("Fa, la, la's" omitted).