The Burger Court Opinion Writing Database

Craig v. Boren

429 U.S. 190 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 18, 1976

Re: 75-628 - Craig v. Boren

Dear Bill:

I may decide to join you in a reversal, particularly if we do not expand the "equal advantage" clause or "suspect" classifications! In short, I am "available."

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 11, 1976

Re: 75-628 - Craig v. Boren

Dear Bill:

I thought I might be able to join a reversal in this case and I may yet do so as to the result. However, your "test" goes beyond what I could accept. More later.

Regards,

WEB

Mr. Justice Brennan
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 15, 1976

Re: 75-628 - Craig v. Boren

Dear Bill:

I advised you when I asked you to take over assignment, that I might wind up joining you if the opinion was narrowly written.

However, you read into Reed v. Reed what is not there. Every gender distinction does not need the strict scrutiny test applicable to a criminal case. Reed was the innocuous matter of who was to probate an estate.

As written, I cannot possibly join.

Regards,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 16, 1976

Re: 75-628 Craig v. Boren

Dear Bill:

This will confirm my message that I will circulate today a short statement on the standing point, while also joining Bill Rehnquist's dissent.

The case should, therefore, be ready for next Monday.

Regards,

WEB

Mr. Justice Brennan

cc: The Conference

To: Mr. Justice B
Mr. Justice
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.

From: T

Circulated: DEC

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–628

Curtis Craig et al., Appellants, *v.* David Boren, etc., et al. } On Appeal from the United States District Court for the Western District of Oklahoma.

[January —, 1977]

MR. CHIEF JUSTICE BURGER, dissenting.

I am in general agreement with MR. JUSTICE REHNQUIST's dissent, but even at the risk of compounding the obvious confusion created by those voting to reverse the District Court, I will add a few words.

At the outset I cannot agree that appellant Whitener has standing arising from her status as a saloonkeeper to assert the constitutional rights of her customers. In this Court "a litigant may only assert his own constitutional rights or immunities." *United States* v. *Raines*, 362 U. S. 17, 21 (1960). There are a few, but strictly limited exceptions to that rule; despite the most creative efforts, this case fits within none of them.

This is not *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969), or *Barrows* v. *Jackson*, 346 U. S. 249 (1953), as the plurality opinion suggests, for there is here no barrier whatever to Oklahoma males 18–20 years of age asserting, in an appropriate forum, any constitutional rights they may claim to purchase 3.2% beer. Craig's successful litigation of this very issue was prevented only by the advent of his 21st birthday. There is thus no danger of interminable dilution of those rights if appellant Whitener is not permitted to litigate them here. Cf. *Eisenstadt* v. *Baird*, 405 U. S. 438, 445–446 (1972).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 12, 1976

RE: No. 75-628 Craig v. Boren

Dear Chief:

I shall assign the above to myself.

Sincerely,

The Chief Justice

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–628

Curtis Craig et al., Appellants, *v.* David Boren, etc., et al. | On Appeal from the United States District Court for the Western District of Oklahoma.

[November —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The interaction of two sections of an Oklahoma statute, 37 Okla. Stat. §§ 241 and 245,[1] prohibits the sale of "non-intoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18–20 years of age of the Equal Protection of the Laws in violation of the Fourteenth Amendment.

This action was brought in the District Court for the Western District of Oklahoma on December 20, 1972, by appellant Craig, a male then between 18 and 21 years of age, and by appellant Whitener, a licensed vendor of 3.2% beer. The complaint sought declaratory and injunctive relief against enforcement of the gender-based differential on the ground that it constituted invidious discrimination against

[1] Sections 241 and 245 provide in pertinent part:

"241. It shall be unlawful for any person who holds a license to sell and dispense beer . . . to sell, barter or give to any minor any beverage containing more than one-half of one per cent of alcohol measured by volume and not more than three and two tenths (3.2) per cent of alcohol measured by weight.

"245. A 'minor' for purposes of Section 241 . . . is defined as a female under the age of eighteen (18) years and a male under the age of twenty-one (21) years."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 16, 1976

RE: No. 75-628 Craig v. Boren

Dear Lewis:

Thanks so much for your note of November 15. I appreciate your wish not to join anything inconsistent with your Singleton dissent and am certainly willing to revise the paragraph at the bottom of page 4 to eliminate any such inconsistency. I do not think it is necessary, however, to delete that paragraph to do so. I suggest that even if I shared the view you expressed in Singleton this case is a stronger one for allowing jus tertii standing, since the challenged statutory duty flows directly to the jus tertii litigant, Whitener.

May I offer the following to meet your concerns:

Delete the following three lines, the eighth, ninth and tenth of the paragraph reading, "It is only common sense to recognize that the rights of vendees are inextricably bound up with those of their vendors, Singleton v. Wulff, supra, so that" (thus omitting the reference to Singleton that apparently concerns you) and substitute the following: "Otherwise, the threatened imposition of governmental sanctions might deter appellant and other similarly-situated vendors from selling 3.2 percent beer to young males thereby insuring that" - and then lead into your quotation from Warth.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 30, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 75-628 Craig v. Boren

The enclosed recirculation incorporates helpful suggestions of Harry, Lewis and John.

W.J.B. Jr.

pp 4, 10, 11, 13, 17

16-

To: The Chief Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice
Mr. Justice

11/30/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–628

Curtis Craig et al., Appellants, *v.* David Boren, etc., et al. | On Appeal from the United States District Court for the Western District of Oklahoma.

[November —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The interaction of two sections of an Oklahoma statute, 37 Okla. Stat. §§ 241 and 245,[1] prohibits the sale of "non-intoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18–20 years of age of the Equal Protection of the Laws in violation of the Fourteenth Amendment.

This action was brought in the District Court for the Western District of Oklahoma on December 20, 1972, by appellant Craig, a male then between 18 and 21 years of age, and by appellant Whitener, a licensed vendor of 3.2% beer. The complaint sought declaratory and injunctive relief against enforcement of the gender-based differential on the ground that it constituted invidious discrimination against

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"245. A 'minor' for purposes of Section 241 . . . is defined as a female under the age of eighteen (18) years and a male under the age of twenty-one (21) years."

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: NOV 12 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-628

Curtis Craig et al., Appellants, *v.* David Boren, etc., et al. } On Appeal from the United States District Court for the Western District of Oklahoma.

[November —, 1976]

MR. JUSTICE STEWART, concurring.

I agree that the appellant Whitener has standing to assert the equal protection claims of males between 18 and 20 years old. *Eisenstadt* v. *Baird,* 405 U. S. 438, 443–446; *Griswold* v. *Connecticut,* 381 U. S. 479, 481; *Barrows* v. *Jackson,* 346 U. S. 249, 255–260; *Buchanan* v. *Warley,* 245 U. S. 60, 72–73; see Note, Standing To Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 431–436 (1974). I also concur in the Court's judgment on the merits of the constitutional issue before us.

Every State has broad power under the Twenty-first Amendment to control the dispensation of alcoholic beverages within its borders. *E. g., California* v. *LaRue,* 409 U. S. 109; *Seagram & Sons* v. *Hostetter,* 384 U. S. 35; *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324, 330; *Mahoney* v. *Joseph Triner Corp.,* 304 U. S. 401; *State Board of Equalization* v. *Young's Market Co.,* 299 U. S. 59. But "[t]his is not to say that the Twenty-first Amendment empowers a State to act with total irrationality or invidious discrimination in controlling the dispensation of liquor . . . ." *California* v. *LaRue, supra,* at 120, n. * (concurring opinion).

The disparity created by these Oklahoma statutes amounts to total irrationality. For the statistics upon which the State now relies, whatever their other shortcomings, wholly fail to prove or even suggest that 3.2 beer is somehow more deleteri-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 15, 1976

Re: No. 75-628 - Craig v. Boren

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 15, 1976

Re: No. 75-628, Craig v. Boren

Dear Bill:

Please join me.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

HAB

November 11, 1976

Re: No. 75-628 - Craig v. Boren

Dear Lewis:

This is a belated response to your letter of October 14. After further work on this case, I have concluded that appellant Whitener does have standing. I therefore do not intend to write on that issue.

Sincerely,

HAB

Mr. Justice Powell

cc: The Chief Justice
Mr. Justice Rehnquist

(1) Footnote 8 - delete Schware
(2) Footnote 7 - last sentence designed to accommodate dissenting views

November 11, 1976

Re: No. 75-628 - Craig v. Boren

Dear Bill:

There appears to be little activity in response to your circulation of November 2. Perhaps the Brethren are awaiting the forthcoming dissent.

Just for a starter -- and please do not hold me to this -- I believe I can go along with your opinion except perhaps for Part IID. I am contemplating having the printer run off the following as a separate concurrence.

> "I join the Court's opinion except Part IID thereof. I agree, however, that the Twenty-first Amendment does not save the challenged Oklahoma statute."

Having said this, I nevertheless would prefer that you omit footnotes 7 and 8 appearing on pages 9 and 10, respectively, and that, in any event, you omit the last sentence of footnote 7. In this connection, see Gunther, The Supreme Court 1971 Term -- Foreword, 86 Harv. L. Rev. 1, 46-47. So far as footnote 8 is concerned, I am not sure that the quotation from Schware is apposite. Although an individual's arrest record should not be taken as evidence that he has committed a crime, there is probably no reason to believe that the aggregate arrest statistics in this case are misleading. It may be that the ratios would be similar if male-female conviction statistics were considered.

Should the word "Framer's" appearing on the fourth line of the paragraph beginning on page 15 be omitted or at least placed in the plural?

Sincerely,

H A B.

Mr. Justice Brennan

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 12/1/76

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-628

Curtis Craig et al., Appellants, *v.* David Boren, etc., et al. | On Appeal from the United States District Court for the Western District of Oklahoma.

[November —, 1976]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion except Part II-D thereof. I agree, however, that the Twenty-first Amendment does not save the challenged Oklahoma statute.

October 14, 1976

No. 75-628 Craig v. Boren

Dear Chief, Harry and Bill:

After further consideration of the standing question, I am inclined to think that the standing of the beer vendor to assert the rights of young men in the 18-21 age group could be sustained. Because my tentative position at Conference was to the contrary, I write now to indicate a possibly different view.

The Court's decision in Eisenstadt v. Baird, 405 U.S. 438 (1972), is quite relevant. In Baird's prosecution under state law for giving away contraceptive devices to unmarried individuals, he attempted to assert the constitutional rights of those individuals. For reasons that seem equally applicable here, the Court sustained his right to assert those rights.

In arguing against standing, the state attempted to distinguish Griswold v. Connecticut, 381 U.S. 479 (1965), on the ground that the professional relationship present in that case was lacking. In rejecting the distinction, the Court noted the other cases in which third party standing had been sustained in the absence of such a relationship. 405 U.S., at 445. The Court did state that the relationship "between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." 405 U.S., at 445. This "advocate" relationship has not been further developed in subsequent cases, and it is not persuasive with me.

Turning to the "more important" question of "the impact of the litigation on the third-party interests", the Court noted that the enforcement of the statute would impair the ability of single persons to obtain contraceptives. The enforcement of the Oklahoma statute in the instant case would impair the ability of men 18-21 to obtain 3.2 beer. The

Eisenstadt Court commented that the persons whose rights were allegedly being violated would have difficulty in asserting their rights:

> "In fact, the case for according standing to assert third-party rights is stronger in this regard than in Griswold because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights." Id. at 446.

The instant case presents a similar situation. The Oklahoma law made it illegal for vendors to sell or give 3.2 beer to young men aged 18-21. It did not make it illegal for the young men to buy or to drink 3.2 beer.

Both the plurality opinion and my dissent in Singleton v. Wulff, 44 U.S.L.W. 5213 (1976), cite Eisenstadt with approval, indicating no thought of viewing Singleton as a modification of Eisenstadt. The primary problem in Singleton was, as I viewed it, the conferring of third party standing "in a case in which nothing more is at stake than remuneration for professional services." 44 U.S.L.W., at 5220. But Harry's opinion was careful to emphasize the narrowness of the holding, and the importance of the physician/patient relationship. Id. at 5217 n.7. Thus, I think the instant case presents a different problem from that before us in Singleton.

In sum, I am inclined to believe we could find standing here within the rationale of prior cases, particularly that of Eisenstadt.

As each of you also expressed reservations about the beer vendor's standing, I would be interested in your views.

Sincerely,

The Chief Justice
Mr. Justice Blackmun
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 15, 1976

No. 75-628 Craig v. Boren

Dear Bill:

This refers to our conversation this morning, and confirms that I will try to let you hear from me definitely this week. I simply have not yet had an opportunity to study your opinion carefully.

I have read your discussion of the standing issue. The second paragraph on page 4, commencing "As a vendor . . ," may be viewed as inconsistent with my dissent in Singleton. I would not approve third party standing where the real interest of the complainant is economic only. Nor is there any relationship comparable to the patient/doctor relationship which Harry emphasized in Singleton. In this case (Boren) there is standing under my analysis because of the distinct possibility of criminal liability.

Accordingly, I inquire whether you would be willing to omit this paragraph. It seems unnecessary in light of what preceeds and follows it.

Sincerely,

Lewis

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: DEC 6 1976

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-628

Curtis Craig et al., Appellants, *v.* David Boren, etc., et al. } On Appeal from the United States District Court for the Western District of Oklahoma.

[December —, 1976]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court as I am in general agreement with it. I do have reservations as to some of the discussion concerning the appropriate standard for equal protection analysis and the relevance of the statistical evidence. Accordingly, I add this concurring statement.

With respect to the equal protection standard, I agree that *Reed* v. *Reed,* 404 U. S. 71 (1971), is the most relevant precedent. But I find it unnecessary, in deciding this case, to read that decision as broadly as some of the Court's language may imply. *Reed* and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when "fundamental" constitutional rights and "suspect classes" are not present.*

*As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited "upper-tier"—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition

75-

Supreme Court of the United States

Memorandum

Harry 11-2, 1976

Since I was the only dissenter on the merits in Craig v Boren, I sent around a note to WJB saying I would dissent. I would prefer not to treat standing of seller you or the Chief are inclined to do so

WHR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 2, 1976

Re: No. 75-628 - Craig v. Boren

Dear Bill:

In due course I will circulate a dissent in this case.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 11/11/76

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-628

Curtis Craig et al., Appellants, *v.* David Boren, etc., et al. } On Appeal from the United States District Court for the Western District of Oklahoma.

[November —, 1976]

MR. JUSTICE REHNQUIST, dissenting.

The Court's disposition of this case is objectionable on two grounds. First is its conclusion that *men* challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review than pertains to most other types of classifications. Second is the Court's enunciation of this standard, without citation to any source, as being that "classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives." Slip. op., at 7 (emphasis added). The only redeeming feature of the Court's opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion in *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), from their view that sex is a "suspect" classification for purposes of equal protection analysis. I think the Oklahoma statute challenged here need pass only the "rational basis" equal protection analysis expounded in cases such as *McGowan* v. *Maryland*, 366 U. S. 420 (1961), and *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955), and I believe that it is constitutional under that analysis.

I

In *Frontiero* v. *Richardson, supra*, the opinion for the plurality sets forth the reasons of four Justices for concluding that sex should be regarded as a suspect clas-

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–628

Curtis Craig et al., Appellants, *v.* David Boren, etc., et al. } On Appeal from the United States District Court for the Western District of Oklahoma.

[November —, 1976]

MR. JUSTICE REHNQUIST, dissenting.

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I

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

PERSONAL

November 15, 1976

Re: 75-628 - Craig v. Boren

Dear Bill:

As I indicated to you this morning, I expect to join your circulation. I have written something additional that I want to review with my clerks before committing myself finally. In the meantime, the two minor suggestions I intended to pass on are these:

1. Would you consider revising footnote 8 on page 10 by substituting the following for the word "moreover" right after the citation of Schware:

> "Even if we assume that a legislature may rely on arrest data in some situations, these figures . . ."

2. Would you also consider revising footnote 21 on page 17 to read as follows:

> "The statement in State Board v. Young's Market Co., 299 U.S. 59, 64 (1936), that '[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth,' is, of course, inapplicable to this case. The Twenty-first Amendment does not recognize, even indirectly, any classifications based on gender or age. As the accompanying text demonstrates, that statement has not been relied upon in recent cases that have considered Fourteenth Amendment challenges to state liquor regulation."

Respectfully,

John

Mr. Justice Brennan

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: NOV 19 '76

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-628

Curtis Craig et al., Appellants, *v.* David Boren, etc., et al. } On Appeal from the United States District Court for the Western District of Oklahoma.

[November —, 1976]

MR. JUSTICE STEVENS, concurring.

There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be levelled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion. I also suspect that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of that standard than an attempt to articulate it in all-encompassing terms. It may therefore be appropriate for me to state the principal reasons which persuaded me to join the Court's opinion.

In this case, the classification is not as obnoxious as some the Court has condemned,[1] nor as inoffensive as some the Court has accepted. It is objectionable because it is based on

[1] Men as a general class have not been the victims of the kind of historic, pervasive discrimination that has disadvantaged other groups.