

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Equality/Gender

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**Gallagher v. City of Bayonne, 102 N.J. Super. 77 (1968)**

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*Edward Gallagher owned a bar in Bayonne, New Jersey. He objected to a 1943 city ordinance that declared:*

*No alcoholic or other beverage or food shall be served to any female except at a table where such female shall be seated. No female shall be permitted to stand or sit at a public bar at any time.*

*...*

*Gallagher sued the City of Bayonne.*

*The Superior Court of New Jersey unanimously declared the ordinance unconstitutional, and that ruling was sustained by two higher New Jersey courts. Judge Matthews's unanimous opinion insisted that the state had demonstrated no difference between men and women that justified the sex discrimination under constitutional attack. How did Matthews distinguish *Goesaert v. Cleary* (1948)? Did he rely on the state constitution? Did he claim that decision was outdated?*

*Gallagher v. City of Bayonne was one of a small but increasing number of state court cases adjudicated during the 1960s that challenged the constitutionality of state laws that discriminated against women. Most were sustained by state courts. A California appeals court in *Hargens v. Alcoholic Beverage Control Appeals Bd.* (CA 1968) upheld a restriction on women tending bar similar to the measure that the Supreme Court sustained in *Goesaert v. Cleary* (1948). Fans of the Worldwide Wrestling Federation were no doubt disappointed when a New York court, citing *Goesaert* and declaring "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same," ruled that women had no right under the state constitution to become professional wrestlers. *Calzadilla v. Dooley* (NY 1968). Other state judges became more inclined to find violations of the state and federal constitutions. In *Commonwealth v. Daniel* (PA 1968), the Supreme Court of Pennsylvania ruled that the state could not constitutionally mandate a different sentencing process for men and women convicted of the same crimes. Chief Judge Bell's majority opinion stated, "We fail to discern any reasonable and justifiable difference or deterrents [sic] between men and women which would justify a man being eligible for a shorter maximum prison sentence than a woman for the commission of the same crime."*

JUDGE MATTHEWS.

Article I, s V of the New Jersey Constitution provides:

*'No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin.'*

Under the provisions of Article 10, s IV of our Constitution, the term person or persons as used therein shall be taken to include both sexes.

My reading of these two sections of the Constitution, together with the statutory declaration as to the use of public accommodations in the Civil Rights Act, leads me to the conclusion that the people and

the legislature have created a clear prohibition against discrimination in this area of civil rights based on sex.

While I am satisfied that our organic and statutory law will not tolerate discrimination such as is established under the ordinance here in question, I am not unaware of the fact that the Supreme Court of the United States has (see e.g. *Goesaert v. Cleary* [1948]) given its approval to legislation which discriminates against women with respect to access to premises in which alcoholic beverages are sold. I will not speculate as to whether such a holding would be forthcoming today, considering changes in social customs and mores. I cannot accept, however, as a general assumption that mere sexual difference is a viable classification under equal protection concepts. I am sure that there are specific instances when such a basis may be used, especially those relating to gonadic reasons. In the majority of instances, however, we are dealing with the application of laws to humanity generally, and humanity quite clearly is comprised of both masculine and feminine elements. I cannot believe that anyone will deny that both men and women share the common elements of humanity. No doubt there are those who would seek to polarize men and women on the basis of sex differentiation alone, and to whom maleness would represent crude masculinity and femaleness fainting femininity. These examples, however, are not in my judgment truly representative of healthy men and women. The fully developed individual integrates such gross sexual attributes of personality within himself or herself. The truly mature male or female reflects the androgynous nature of humanity; he or she is, for example, at the same time strong and gentle, aggressive and passive, firm and compassionate. In short, each is composed of a wholesome synthesis of the elements of personality which perhaps we have been too prone to oversimplify and relegate to categories labeled male or female. In stating the similarity in which men and women share humanity, I do not, however, imply that there is only one sex, accidentally differentiated because of physical composition. I refer to the similarities as a signal for caution for those of us who would look no further than genital difference as a general support for classification on the basis of sex as being valid under law.

In any event, as I have noted above, there has been no factual showing before me (and I am sure there cannot be) which can support the legal necessity for the ordinance here under consideration. It seems apparent that the regulatory authority concerned here can deal effectively with any problem which may arise because of the existence of bars serving both men and women through existent general regulations which do not impair the rights of women to patronize licensed premises. . . . I determine that insofar as the ordinance here under review prohibits females from being served at public bars, it contravenes the Constitution of this State and the New Jersey Civil Rights Act. . . .

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