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Constitutional Law - Fifth Amendment Due Process - Sex Discrimination - Suspect Classification

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CONSTITUTIONAL LAW—FIFTH AMENDMENT DUE PROCESS—SEX DISCRIMINATION—SUSPECT CLASSIFICATION—In a plurality opinion, the United States Supreme Court has held that classifications based on sex violate due process guarantees where female, and not male, members of the armed services are required to prove dependency of their spouses as a condition for receiving benefits.

Frontiero v. Richardson, 411 U.S. 677 (1973).

Appellants Sharron Frontiero, an Air Force officer, and her husband, Joseph Frontiero, sought increased quarters allowance and medical and dental benefits under federal statutes.[1] While Sharron Frontiero could claim her husband as a "dependent" for the purpose of obtaining increased benefits only if he were in fact dependent upon her for over one-half of his support,[2] a male officer, may claim his wife as a dependent without showing actual dependency.[3] Joseph Frontiero's living expenses were $354.00 per month, and he received $205.00 per month in veteran's benefits; since he was not dependent on Lt. Frontiero for more than one-half of his support, her requests for increased allowances were denied.

The Frontieros sought a permanent injunction in federal district court against the enforcement of the provisions. A three-judge court, applying a traditional equal protection standard,[4] found the provisions constitutional[5] and nonviolative of the due process clause of the fifth amendment.[6] The Supreme Court noted probable jurisdiction[7] and

1. 10 U.S.C. §§ 1072, 1076 (1970) (medical and dental benefits); 37 U.S.C. §§ 401, 403 (1970) (quarters allowance). These statutes cover the uniformed services, defined as the armed forces, the Environmental Services Administration and the Public Health Service.

2. 10 U.S.C. § 1072(2)(C) (1970); 37 U.S.C. § 401 (1970) (both provisions define husband as a dependent for purposes of the statutes).

3. 10 U.S.C. § 1072(2)(A) (1970); 37 U.S.C. § 401(1) (1970) (both provisions include wife as a dependent for purposes of the statutes).

4. Under a traditional equal protection standard, a statute which does not involve a fundamental right or a suspect classification must be upheld ". . . if any state of facts reasonably may be conceived to justify it . . . ." Frontiero v. Laird, 341 F. Supp. 201, 206-07 (M.D. Ala. 1972), *citing* Dandridge v. Williams, 397 U.S. 471, 485 (1970); or unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535, 546 (1972); McGowan v. Maryland, 366 U.S. 420 (1961).

5. 341 F. Supp. at 201.

6. Although the fifth amendment due process clause does not expressly contain an equal protection guarantee, it does prohibit discrimination which violates due process. *See* Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Bolling v. Sharpe, 374 U.S. 497 (1954).

7. 409 U.S. 840 (1972).

reversed,[8] four justices joining in the court's opinion, four concurring in the judgment and one justice dissenting.

Justice Brennan, speaking for a plurality,[9] adopted appellants' contention that classifications based on sex, like classifications based on race,[10] alienage,[11] and national origin[12] are inherently suspect and therefore subject to strict judicial scrutiny.[13] Justice Brennan based his decision to use a stricter standard on *Reed v. Reed*,[14] in finding justification for *Reed's* departure from traditional equal protection analysis in the similarities between sex and race (a suspect classification),[15] and in Congressional legislation sensitive to sex-based classifications.[16] Having determined that the classification was based solely on sex[17] and that strict scrutiny was the applicable standard, the Court examined the facts in *Frontiero* and found that the classification violated the due process clause.

The lower court concluded, and the government contended, that Congress might reasonably have based its classification scheme on the

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8. Frontiero v. Richardson, 411 U.S. 677 (1973).
9. Justice Brennan was joined by Justices Douglas, White and Marshall.
10. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1823).
11. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).
12. *See, e.g.*, Oyama v. California, 332 U.S. 633, 644-46 (1948).
13. A suspect classification is one means by which the stricter standard may be triggered; classifications involving a fundamental right are also afforded the benefit of a stricter standard. The result of such an application is that the proponent of the statute must show a compelling state interest. *See generally* Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1067-1192 (1969) [hereinafter cited as *Developments*], for a discussion and comparison of the traditional and strict standards.
14. 404 U.S. 71 (1971).
15. 411 U.S. at 685. *See* Comment, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507 (1971) [hereinafter cited as *Sex Discrimination*], where the author points out:

> The similarities between race and sex are striking. Both classifications create large, natural classes, membership of which is beyond the individual's control; both are highly visible characteristics on which legislators find it easy to draw gross, stereotypical distinctions. Historically, the legal position of black slaves was justified by analogy to the legal status of women.

In *Developments*, *supra* note 13 at 1173, it is noted that:

> What is apparently suspect about the use of such [sex-based] characteristics is that on their face they bear no relation to one's ability to perform or contribute to society.

16. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a),(b),(c) (1970), provides that organizations subject to the Act cannot discriminate on the basis of race, color, religion, sex, or national origin. Under the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970), no employer covered by the Act can discriminate between employees on the basis of sex. The Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the states for ratification, S.J. Res. 8, 92d Cong., 2d Sess., 118 CONG. REC. 4612 (daily ed. Mar. 22, 1972), reads:

> Section 1. Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

17. 411 U.S. at 688. The lower court opinion, which Justice Rehnquist cites as the basis for his dissent, did not agree with appellants that the sole basis for the classification was sex. 341 F. Supp. at 205-06.

premise that wives are generally dependent on their husbands in our society and that it "would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency afforded males to such members."[18] The government, however, offered no concrete evidence to prove that the presumption of dependency of wives worked more savings than granting benefits only to those males who demonstrated their wives' dependency by supplying affidavits. The Court noted the low cost of this procedure and evidence that, if put to the test, many wives would actually fail to qualify for the benefits.[19] Although the proffered purpose, administrative efficiency, is not without some importance, the Constitution recognizes higher values, especially when strict scrutiny is the standard to be met. Any scheme which draws a line between the sexes solely for this purpose involves "the very kind of arbitrary legislative choice forbidden by the [Constitution]."[20]

In basing its decision on *Reed v. Reed*,[21] the Court found implicit support for its approaches. Both Justice Brennan in his opinion, and the concurring opinion of Justice Powell, seem to view *Reed* as a departure from the traditional equal protection analysis. The real question in *Frontiero* involved the extent to which *Reed* represents a rejection of the "traditional" or "rational basis" test as applied to sex-based classifications; it is this question which divided the court. In *Reed*, the Court examined a state statute providing for the appointment of estate administrators which gave a mandatory preference to males over females.[22] The Court held that the statute violated the equal protection clause of the fourteenth amendment when individuals of different sexes were otherwise equally qualified to serve in that capacity.[23]

In analyzing the approach taken in *Reed*, the plurality in *Frontiero* noted that "traditional" equal protection analysis was not followed.[24] Although administrative efficiency was considered as being "not without some legitimacy,"[25] the Court in *Reed* did not accept the conten-

18. 341 F. Supp. at 207.
19. 411 U.S. at 689 n.23.
20. *Id.* at 690.
21. 404 U.S. 71 (1971).
22. IDAHO CODE § 15-312 (1948) (father and mother are given the same priority to administer an estate); *id.* § 15-314 (gives a preference to males over females where persons are equally entitled to administer an estate).
23. 404 U.S. at 77.
24. 411 U.S. at 683. Justice Rehnquist, who dissented for the reasons stated in the district court opinion, would apparently support the "traditional" test.
25. 404 U.S. at 76.

tion that a mandatory preference for males over females was a reasonable means to reduce the administrative workload by obviating the necessity of examining individual applicants. Nor did the plurality accept the preference as reasonable because men generally have more experience in business affairs than do women.[26] Those members of the *Frontiero* Court who joined Justice Brennan saw in *Reed* something more than the relaxation of the traditional standard of equal protection. The opinion points to language in *Reed* which states that dissimilar treatment for persons similarly situated results in the "very kind of arbitrary legislative choice forbidden by the [Constitution]."[27] This language suggests a sensitivity to sex-based classifications which may be viewed as foreshadowing the plurality strict scrutiny approach in *Frontiero*.[28]

It might thus be argued that the extension was predictable. Although the Court has recently refused to expand the categories of "fundamental rights" and "suspect classification,"[29] it showed no hesitation in using the revitalized traditional equal protection standard in an area (decedents' estates) into which it has little occasion to venture.[30]

The nature of the rights involved might also have played a part in *Reed's* refusal to venture into strict scrutiny. In the area of estate administration, the interest of a personal representative is necessarily limited in scope and duration. In *Frontiero,* on the other hand, the right involved was a continuing benefit dispersed by the government and incidental to employment.

Justice Powell, in his concuring opinion,[31] mentions two factors responsible for his refusal to hold that sex is a suspect classification. First, he states that *Reed* did not add sex to the group of classifications which were suspect, and that the case should be decided on the authority of *Reed,* reserving for the future any expansion of its rationale.

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26. Brief for Appellee at 12, 404 U.S. 71 (1971). While the *Reed* Court did not discuss this specific justification for the statute, the Court in *Frontiero* seems to view appellee's argument as a basis for the *Reed* decision. 411 U.S. at 683 nn.10 & 11.

27. 411 U.S. at 690, *citing* 404 U.S. at 76.

28. Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 34 (1972) [hereinafter cited as Gunther].

29. *Id.* at 12-15.

30. *Id.* at 32-33.

31. The Chief Justice and Justice Blackmun joined Justice Powell. Justice Stewart concurred separately,

> agreeing that the statutes before us work an invidious discrimination in violation of the Constitution. Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225.

411 U.S. at 691.

Generally, the Court will choose the narrowest possible ground for decision as an expression of its policy of self-limitation.[32] The rationale for this policy is to restrict the degree of interference with the actions of other branches of government.[33] A comparison of *Reed* and *Frontiero* suggests that *Reed* can be interpreted as providing a narrower ground for decision. Justice Powell, however, does not give us further insight into what test he believes was applied in that case. One commentator has suggested that the Court seems to have tentatively reached a middle ground between the extremes of the two-tiered system.[34] This "new" test employs the language of the traditional equal protection analysis but reaches a result which is inconsistent with the extreme deference to the legislature that the "rational basis" test traditionally employed.[35] This approach is characterized by an inquiry into the means used to further legislative purposes. If the Court can invalidate the legislation because the means do not have a substantial relation to the end sought to be achieved, the Court need never inquire into the legitimacy of the end itself. For example, the Court in *Frontiero* could look to the means used to effectuate the end (the statutory scheme) and decide if it has a reasonable relation to the end sought to be achieved (here, increased efficiency). Justice Powell could find that no reasonable relation existed, thereby obviating the need to examine administrative efficiency to determine its value as a governmental purpose.[36] In other words, the concurring opinion can be viewed as implicitly espousing this "newer" equal protection analysis.[37] If so, it would explain Justice Powell's "narrow ground" language.

If the decision is viewed through the plurality opinion, the "narrow ground" criticism loses its force. Since the plurality sees *Reed* as a foreshadowing of the application of the standard in *Frontiero,* the distinction between the two cases would be a matter of degree, and

32. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

33. Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 HARV. L. REV. 1773, 1803-06 [hereinafter cited as Dershowitz].

34. *See generally* Gunther note 28 *supra.* For other decisions which can be characterized as employing this test, *see id.* at 11 n.48.

35. *Id.* at 19.

36. Administrative efficiency as a legitimate legislative purpose has been called into question by the Court. *See, e.g.,* Stanley v. Illinois, 405 U.S. 645, 656 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971). The relatively little weight which the Court seems to put on administrative efficiency may in part account for its decisions invalidating sex-based classifications.

37. For purposes of this note, "new" equal protection refers to the two-tiered system developed under the Warren Court, while "newer" equal protection is used to describe the Burger Court's developing standard.

Reed could be seen as generating a broader principle which is to be explicitly applied later.[38]

Justice Powell's second point was that, in enunciating a strict standard, the Court pre-empted a major political decision which will be resolved by the states' ratification or rejection of the equal rights amendment. Once again, the purpose of the doctrine of judicial restraint is a desire not to interfere with other branches of government. The question which must be asked is whether that purpose would be furthered by deciding not to apply strict scrutiny.

First, it must be recognized that the nature of a "pending" amendment is unique. Unlike legislation, an amendment has no force until ratified by the requisite number of states subsequent to its passage by Congress. In this sense, ratification is the ultimate manifestation of the will of the people. In *Rice v. Sioux City Memorial Park Cemetery*,[39] the issue was whether a privately owned cemetery could defend a suit for breach of contract on the ground that the decedent was a Winnebago Indian and the contract restricted burial privileges to Caucasians. The Supreme Court found that there was a statute which prohibited cemeteries from discriminating, and it dismissed the writ of certiorari even though that statute excepted cases involved in pending litigation and, for that reason, did not apply to the case. The Court reasoned that the case "would have assumed such an isolated significance that it would hardly have been brought here in the first instance."[40]

The equal rights amendment is in a somewhat different position. Its passage is hardly assured; in no way can adjudication be considered of isolated significance where it touches on subjects which would come under the purview of the amendment. Consideration of a proposed constitutional amendment which may or may not be ratified in an indeterminate number of years should not be controlling where social needs are pressing and an issue is properly presented under existing law. Legislation passed by Congress[41] demonstrates that changes are being sought in the area of sexual discrimination and that there is an increased sensitivity to sex-based classifications. In such a situation the Court should perhaps consider balancing the virtues of judicial re-

38. *Cf.* Dershowitz, *supra* note 33, at 1804-05.
39. 349 U.S. 70 (1955).
40. *Id.* at 76-77.
41. See discussion in note 16 *supra*

straint against the danger that the Court may become irrelevant as an institution to pressing social issues.[42]

Secondly, there seems to be a presumption that the application of strict scrutiny would moot the equal rights amendment. The amendment, however, has been viewed as broader in its possible effect than the standard of strict scrutiny as applied to suspect classifications.[43] In fact, it has been suggested that the amendment is needed because the strict scrutiny standard, even if adopted, would not be adequate to protect persons from sex-based classifications.[44]

Under the strict scrutiny equal protection analysis the state can defend a classification by showing a "compelling interest" in the discrimination. Since the determination essentially calls for a value judgment in regard to the legislative purpose, "compelling interest" is a slippery term which changes with the views of the court which applies it.[45] While the judicial qualifications which may be read into the equal rights amendment are as yet only a matter of speculation, it is conceivable that classifications which could survive equal protection attack might not fare so well under the equal rights amendment.[46] Further, the application of strict scrutiny could have beneficial effects. It would give notice that justifications for sex discrimination were rejected and that a national commitment to sexual equality will be given greater weight by the courts in the future.[47] The "newer" equal protection cannot serve this function, whether or not it invalidates sex-based classifications, as long as the strict scrutiny standard is still applied to other groups. Moreover, attempts to apply the "newer" standard may cause considerable confusion.[48]

Frontiero, by virtue of its plurality, holds no more than did *Reed*.

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42. *See* THE DEFENSES OF FREEDOM, THE PUBLIC PAPERS OF ARTHUR J. GOLDBERG 150 (D. Moynihan ed. 1966).

43. Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 884-85 (1971) [hereinafter cited as Brown]; *Sex Discrimination, supra* note 15, at 1519; *contra*, Gelman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV. 157, 166-73 [hereinafter cited as Gelman].

44. Brown, *supra* note 43, at 880.

45. *See* Gunther, *supra* note 28, at 21; *Sex Discrimination, supra* note 39, at 1509-16, for the view that strict scrutiny would involve a balancing test which itself would create problems in dealing with sex-based classifications.

46. Brown, *supra* note 43, at 904.

47. Gelman, *supra* note 43, at 165.

48. *See, e.g.*, Borass v. Village of Belle Terre, 476 F.2d 806 (2d Cir.), *cert. granted*, 414 U.S. 907 (1973). *See* Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 819-22 (1973), for the view that, as applied in *Borass*, the "newer" approach was equivalent to the strict scrutiny approach.

Its reasoning, however, has informed us that four members of the Court are willing to expand the category of "suspect classification" to include sex. While the Court's future action is uncertain, increasing pressure on the judiciary to deal more effectively with sex-based classifications may induce the Court to adopt strict scrutiny as its standard in dealing with sex discrimination.

Janice M. Holder

CONSTITUTIONAL LAW—VALIDITY OF THE LOCAL PROPERTY TAX FOR FINANCING EDUCATION—The New Jersey Supreme Court has held that the local property tax system of financing education does not afford students the level of education mandated by the state constitution because it does not guarantee each student an adequate education.

Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).

This action was brought by residents, taxpayers, and various municipal officials, challenging the constitutionality of the New Jersey system of financing public education.[1] The New Jersey Superior Court determined that the use of the local property tax system for financing education discriminated against taxpayers and those students living in districts with low property ratables by imposing on them unequal tax burdens. Taxpayers living in different school districts were paying taxes at different rates in order to finance their school systems. The superior court held that the discrimination violated the equal protection provisions of the federal and state constitutions.[2] The superior court also held that the system violated state constitutional provisions related to education and the assessment of real property for taxation.[3] The defendants appealed this decision to the Supreme Court of New Jersey.

The New Jersey system of educational financing derives its funds from three major sources. The principle portion, 67 per cent of the state-wide total operating expenditures, is raised through the local ad valorem taxation of real property.[4] State financial aid which consists

1. Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187 (L. Div. 1972), *rev'd*, 62 N.J. 473, 303 A.2d 273 (1973).
2. 118 N.J. Super. at 275, 287 A.2d at 214.
3. *Id.* at 277, 287 A.2d at 215.
4. *Id.* at 229, 287 A.2d at 190.