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Leslie Dolin Wiesenberger

Recent Case

CONSTITUTIONAL LAW — EQUAL PROTECTION — DISCRIMINATION BASED ON SEX IN THE PROVISION OF ARMED SERVICES DEPENDENTS' BENEFITS

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

For almost a century the Supreme Court consistently upheld legislation the purpose and effect of which were to treat women differently from men.[1] In 1971, the Court for the first time decided otherwise, when it held that a statute the effect of which was to disadvantage women in the selection of the administrator of an estate was unconstitutional.[2] Recently, in *Frontiero v. Richardson*[3] it again invalidated legislation based on classification by sex by holding that statutes treating male and female members of the uniformed services[4] differently for purposes of determining housing allowances and medical and dental benefits violate the due process clause of the fifth amendment. A plurality of four justices in the 8-to-1 decision went so far as to hold that sex is a suspect classification and that statutes distinguishing between the sexes must be subjected to strict scrutiny.[5]

Appellant Sharron Frontiero, a lieutenant in the United States Air Force, sought to claim her husband as her "dependent" in order to obtain an increased allowance for quarters[6] and medical and dental care benefits.[7] Her request was denied, for under the applicable statutes,[8] female members of the uniformed services were required to show that their spouses were in fact dependent upon them for over one-half of their support — a standard which the appellant

[1] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872). *See* text accompanying note 63 *infra*. *See generally* Brown, Emerson, Folk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Sexual Equality*, 80 YALE L.J. 871 (1971) [hereinafter cited as Brown]; Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971).

[2] Reed v. Reed, 404 U.S. 71 (1971).

[3] 411 U.S. 677 (1973).

[4] The "uniformed services" include the armed forces, the Environmental Science Services Administration, and the Public Health Service. 10 U.S.C. § 1072(1) (1970); 37 U.S.C. § 101(3) (1970).

[5] 411 U.S. at 682.

[6] 37 U.S.C. § 403 (1970).

[7] 10 U.S.C. § 1072 (1970).

[8] 10 U.S.C. § 1072(2)(c) (1970); 37 U.S.C. § 401 (1970).

could not satisfy.[9] The spouse of a male member, on the other hand, was automatically presumed to be a "dependent" under the statute. Lt. Frontiero and her husband challenged the denial before a three-judge district court on the ground that this statutory difference in treatment constituted an unconstitutional discrimination against servicewomen in violation of the due process clause of the fifth amendment.[10]

The district court rejected their claim,[11] but the Supreme Court reversed in an 8-to-1 decision without a majority opinion. Mr. Justice Brennan, writing for a plurality of four,[12] upheld the appellants' contention "that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny."[13] He likened sex to race and national origin in that it is a characteristic over which the individual has no control and which "frequently bears no relation to ability to perform or contribute to society."[14] He found at least implicit support for this decision in *Reed v. Reed*,[15] which held that a sex-based classification, the only purpose of which was to accomplish administrative convenience, was arbitrary and therefore violative of the equal protection clause of the fourteenth amendment.[16] In addition, Justice Brennan pointed to Congress' recent passage and submission to the states of the Equal Rights Amendment (ERA)[17] as an indication that Congress itself recognized the invidious nature of sex discrimination. In applying the strict standard of judicial review, mandated by his finding that sex was a suspect classification,[18] Justice Brennan concluded that the government's purpose of achieving administrative convenience did not justify the differential treatment afforded male and female mem-

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[9] 411 U.S. at 680 n.4.

[10] *Id.* at 679.

[11] Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972). The district court's opinion is discussed in notes 30-32 *infra.*

[12] Justices Brennan, Douglas, White, and Marshall.

[13] 411 U.S. at 682 (footnotes omitted). For a discussion of the Court's treatment of other suspect classifications, see note 33 *infra.*

[14] *Id.* at 686 (footnotes omitted).

[15] 404 U.S. 71 (1971). *See* text accompanying notes 40-45 *infra.*

[16] 404 U.S. at 76-77.

[17] S.J. Res. 8, 92d Cong., 2d Sess., 118 CONG. REC. 4612 (daily ed. Mar. 22, 1972); H.R.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 9392 (daily ed. Oct. 12, 1971). For text of the proposed amendment, see note 78 *infra.*

[18] The issue of whether classification by sex is suspect is discussed further at notes 46-59 *infra* and accompanying text.

bers of the military and that the statutes therefore violated the due process clause of the fifth amendment.[19]

Mr. Justice Powell, writing for the Chief Justice and Mr. Justice Blackmun, concurred in the judgment. He relied on *Reed* as controlling, but he did not interpret that case, as the plurality did, as implicitly recognizing sex as a suspect classification. Rather, he found that it was unnecessary to designate sex as a suspect classification[20] and inappropriate to do so, since the Equal Rights Amendment was then pending before many state legislatures.

Mr. Justice Stewart voiced his separate concurring opinion in a terse and ambiguous statement: "[T]he statutes before us work an invidious discrimination in violation of the Constitution. *Reed v. Reed* . . . ."[21]

Finally, Mr. Justice Rehnquist dissented "for the reasons stated by Judge Rives in his opinion for the District Court."[22] The district court had held that if the statutes are read as creating classifications by sex,[23] they are valid because they have a rational basis. It decided that (1) it was reasonable to assume that men usually are the breadwinners for their families, and (2) if in some cases men without actual dependents received windfall benefits, servicewomen were not in any way deprived.

While *Frontiero* evinces no clear majority holding on the constitutionality of sex discrimination, the case is notable in two respects. First, though three of the four opinions rely on the same case as precedent, *Frontiero* contains the whole range of analytical approaches used by the Court in equal protection cases.[24] Second,

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[19] 411 U.S. at 688-91.

[20] *Id.* at 691-92.

[21] *Id.* at 691.

[22] *Id.*, *citing* Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972).

[23] The district court dealt with the constitutionality of classification by sex only in the alternative. Its primary reasoning was that the statutory scheme did not discriminate on the basis of sex. Under the scheme, the availability of the conclusive presumption of dependency was a function of two factors: the sex of the servicemember and the relationship between the servicemember and the purported dependent. For some relationships, the result did not vary with the sex of the servicemember. To establish the dependency of an adult child, for example, a showing of dependency in fact was required regardless of whether the servicemember was male or female. Since the classifications were not drawn exclusively on the basis of sex, the district court believed they were constitutionally permissible. 341 F. Supp. at 205-06.

[24] Since the fifth amendment does not contain an equal protection clause, the Supreme Court has said that Congress is not subject to the same limitations against discriminatory action as are the states. Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 401 (1940); Steward Mach. Co. v. Davis, 301 U.S. 548, 584 (1937). Yet, the Court has found

while *Frontiero* may not be an emphatic grant of increased constitutional protection to women, it shows an evolving concern for equality of the sexes.

Traditionally the Court has used two approaches to reviewing challenges to legislative classifications.[25] Where legislation involves mere economic or social interests, as opposed to a fundamental right, and does not create a suspect classification,[26] all that is required is that the classification be reasonable and bear some *conceivable* rational relationship to any legitimate state purpose.[27] There is a presumption in favor of the validity of the legislation, and the party attacking the classification bears the burden of showing that it does not rest upon any rational basis.[28] The classification need not be perfect; the legislature may adopt a scheme that attacks only one aspect of a larger problem. So long as the judgments underlying the classification rest on some rational basis, the statute will be upheld.[29]

The district court's opinion, which Justice Rehnquist adopts in his dissent, is an example of this approach. The district court found a conceivable rational basis in the possible administrative and economic convenience which a scheme of different legislative treatment for men and women might afford the government.[30] The court noted that "legislation may impose special burdens upon defined classes to achieve permissible ends."[31] Under the district court's reasoning, however, there was no need to reach this conclusion. It did not consider it to be a burden to servicewomen to be denied

that some discrimination is "so unjustifiable as to be violative of due process" under the fifth amendment. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See also* Truax v. Corrigan, 257 U.S. 312, 331-32 (1921). Although the Court has indicated that discrimination must be more unjustifiable to violate the fifth amendment than the fourteenth, no cases exist that illustrate the difference. Some cases have had the same result under both amendments. *Compare* Brown v. Board of Educ., 347 U.S. 483 (1954), *with* Bolling v. Sharpe, 347 U.S. 497 (1954), *and* Shapiro v. Thompson, 394 U.S. 618 (1969). Since all three concurring opinions in *Frontiero* rely on Reed v. Reed, 404 U.S. 71 (1972), a case based on the fourteenth amendment, the Court may believe that in some situations, at least, the difference is negligible. *See also* Schneider v. Rusk, 377 U.S. 163, 168 (1964).

[25] *See generally Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*].

[26] *See* note 33 *infra.*

[27] McGowan v. Maryland, 366 U.S. 420, 426 (1961); Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

[28] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

[29] Jefferson v. Hackney, 406 U.S. 535, 546 (1972), *citing* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[30] 341 F. Supp. at 208.

[31] *Id.* at 207, *quoting* Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) (dictum).

the windfall benefits received by those servicemen whose wives were not in fact dependent.[32]

Because the district court found neither a suspect classification[33] nor an infringement of a fundamental right,[34] it had no need to subject the legislation to strict judicial scrutiny. But had the challenged legislation involved either of these elements, the statute would not have been presumed valid. Rather, the burden would have been on the state to show that an actual compelling governmental interest[35] was promoted by the classification and that there was no less onerous means of advancing that interest.[36] This burden is not light: "And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."[37] Thus, when Justice Brennan declared sex a suspect classification, that decision mandated strict judicial scrutiny of the legislation, a test so stringent that, when it applies, an outcome adverse to the statute is usually assured.[38]

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[32] 341 F. Supp. at 207.

[33] At the time *Frontiero* was decided, the Court had held only race, lineage, and alienage to be inherently suspect classifications. *See, e.g., In re* Griffiths, 413 U.S. 717 (1973) (alienage); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Oyama v. California, 332 U.S. 633 (1948) (alienage); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (alienage); Korematsu v. United States, 323; U.S. 214 (1944) (national origin). Classifications based on wealth or indigency have been treated as suspect only when they have been tied to a denial of important rights provided by the state. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote in state election). There is also some indication that illegitimacy or bastardy is being treated as a suspect classification by the Court. Levy v. Louisiana, 391 U.S. 68 (1968); *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 107-09 (1973) (Marshall, J., dissenting, discussing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), as an example of the Court's sensitivity to classifications based on legitimacy).

[34] Fundamental rights are those expressly and impliedly guaranteed by the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973); *see, e.g., id.* at 35-37 (no fundamental right to education); Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right to travel interstate); Skinner v. Oklahoma, 316 U.S. 535 (1942) (fundamental right to procreate).

[35] "The state interest required has been characterized as 'overriding,' [*McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964)] . . . ; 'compelling,' *Graham* v. *Richardson*, [405 U.S. 365, 375 (1971)]; 'important,' *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972), or 'substantial,' *ibid.* We attribute no particular significance to these variations in diction." *In re* Griffiths, 413 U.S. 717, 722 n.9 (1973).

[36] Shapiro v. Thompson, 394 U.S. 618, 634-38 (1969); for discussion see San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973). *See generally Developments, supra* note 25, at 1076-87.

[37] 411 U.S. at 690.

[38] In some cases, though, a compelling governmental interest has been found, and the statute has therefore survived the strict judicial scrutiny test. *E.g.*, Roe v. Wade,

Prior to *Frontiero*, through the use of an intermediate approach to equal protection analysis, the Court in *Reed* was able to find the use of a sex-based classification to be a denial of equal protection without going so far as categorizing sex as suspect.[39] Using this intermediate approach, which is of more recent origin than the rational basis and compelling interest approaches, the Court does not settle for *any conceivable* rational basis. Rather, it critically examines the rationales proferred by the proponent of the statute. As in strict judicial scrutiny, the burden is on the proponents of the legislation, but they must show only a bona fide rational basis, not a compelling interest.

At issue in *Reed* was an Idaho statute requiring that, where candidates for estate administration are of equal relationship to the decedent, males are to be preferred to females. Using the intermediate approach, later labelled a "departure from 'traditional' rational basis analysis,"[40] the Court acknowledged that the statute had two rational bases: administrative convenience in avoiding a hearing on the merits and avoidance of intrafamily controversy.[41] Yet the Court found neither rationale strong enough to overcome the challenge to the use of a sex-based classification.[42] Since either of these

410 U.S. 113, 162-64 (1973) (fundamental right of privacy); Barenblatt v. United States, 360 U.S. 109, 126-34 (1959) (fundamental first amendment rights); Korematsu v. United States, 323 U.S. 214 (1944) (suspect classification of national origin). *See* note 106 *infra.*

[39] *See also* Stanley v. Illinois, 405 U.S. 645 (1972).

[40] Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

A prototype of this intermediate review technique is found in Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court held that a Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting distribution to unmarried persons for that same purpose violates the equal protection clause. The Court systematically examined the bases offered by the state in support of the statute, (1) deterrence of premarital sex, and (2) protection of public health through the regulation of potentially harmful drugs, and concluded that they "[could] not reasonably be regarded as legislative aims" of the statute. *Id.* at 443. The Court further concluded that, viewed as a prohibition of contraception *per se*, the statute violated the rights of single persons under the fourteenth amendment. The Court's opinion in *Reed* is less methodical than in *Eisenstadt.* In *Eisenstadt* the Court rebutted the reasonableness of the state's case point by point, while in *Reed* it merely found the reasons were not strong enough to support the legislation.

[41] 404 U.S. at 76-77.

[42] In cases like *Reed*, two distinct classes of state interests must be distinguished in assessing the rationales advanced in support of the statutory classification. The two state interests in the first class considered by the Supreme Court in *Reed* were avoiding intrafamily controversy and expediting probate proceedings by eliminating the need for hearings. These, balanced with an insignificant personal interest in acting as an estate administrator, both support the drawing of *any* classification, so long as the classifying factor is easily identifiable. But they no more support the drawing of a sex-based classification than they do a classification scheme based, for example, on whether a person is blue- or brown-eyed. It seems, therefore, that before

rationales would appear to constitute a "rational basis" in the traditional sense of the phrase, the Court's rejection of both rationales as sufficient bases for sustaining the statute indicates that it was adopting a stricter test.[43] Apparently the interest of an individual in administering an estate and the nature of the classification were deemed on balance to outweigh the state's interest in the legislation.[44] The Court did not find sex to be a suspect classification.

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a discriminatory statute such as the one in *Reed* can be upheld on the ground that the easy applicability of its classification scheme affords administrative convenience, a second class of state interests must also be found to support it, a class of interests that provides a rational basis for selecting the particular classification scheme adopted. The operation of these two classes of interests can be illustrated by examining the Supreme Court of Idaho's opinion in *Reed*, which upheld the state statute. Reed v. Reed, 93 Idaho 511, 465 P.2d 635 (1970). After concluding that the legislature's probable purpose was the legitimate one of expediting the prompt administration of estates, the Idaho court stated that the classification scheme was permissible because the legislature might justifiably assume that men are in general better qualified to act as administrators than are women. *Id.* at 514, 465 P.2d at 638. Once this conclusion on the relative qualifications of males and females is accepted and coupled with the state's legitimate interest in securing the most competent administration for estates, a rational basis for selecting the male-female scheme can be found. *See The Supreme Court, 1972 Term*, 87 HARV. L. REV. 55, 118-19 n.16 (1973). This is not to say that only this second type of interest may be considered in examining whether the state's interests outweigh the discriminatory effects of the statute. For this calculation, the entire aggregate of state interests furthered by the statutory scheme, as well as the individual interests at stake, may be included in the balance.

[43] For a discussion of the Court's shift from its traditional two-level standard of judicial review of equal protection cases to an intermediate approach, see Gunther, *Supreme Court 1971 Term: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-20 (1972). *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting). This intermediate approach has been employed in cases affecting what the Court has called "personal rights." *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972). "Personal rights" tend to fall somewhere between fundamental rights, which receive strong judicial protection through a strict standard of judicial review, and economic rights, which receive the least in the way of judicial protection. In Stanley v. Illinois, 405 U.S. 645 (1972), the Court recognizes that personal rights are a gradient above economic rights: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Id.* at 651. *See generally* Note, *Personal Rights as an Emerging Approach to Equal Protection*, 24 CASE W. RES. L. REV. 163 (1972). These "personal rights" cases have involved legislative classifications providing for the different treatment of married and unmarried persons in the sale or distribution of contraceptives, Eisenstadt v. Baird, 405 U.S. 438 (1972); of married and unmarried fathers in guardianship proceedings, Stanley v. Illinois, *supra*; of legitimate and illegitimate children in wrongful death proceedings, Weber v. Aetna Cas. & Sur. Co., *supra*; and of length of residency in a state in determining status at state universities, Vlandis v. Kline, 412 U.S. 441 (1973).

[44] Prior to *Reed* the Court had explained that "[t]o decide whether a law violates the Equal Protection Clause, [it looks], in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." Dunn v. Blumstein, 405 U.S. 330, 335 (1972). *See also* note 90 *infra.*

But in view of the questionable importance of the right to administer an estate, the Court's refusal to uphold the statute indicates that it must have been somewhat disturbed by the classification.[45]

Although Justice Powell's concurring opinion in *Frontiero* does not go through the mechanics of the active-review approach, its reliance on *Reed* indicates an adoption of active review. The rationale, as in *Reed*, was that administrative convenience did not justify the distinctions by sex contained in the statute which involved an interest less significant than a fundamental right.

In sum, one or more members of the Court relied on each of the three approaches available to it, and good arguments can be made for the appropriateness of each. The statutes in *Frontiero* appeared to involve merely an economic interest, and since the Court had never explicitly held that strict review was warranted for classification by sex, the rational-basis test could have sufficed. The approach of the concurring opinion likewise is tenable, in that *Reed*, which involved a relatively insubstantial right, was nonetheless precedent for active review in the case of statutory classification by sex.

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[45] Gunther, *supra* note 43, at 34.

> [T]he apparent conformity of the *Reed* opinion to the model is thrown into doubt by the holding that the sex criterion was "arbitrary." It is difficult to understand that result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. Clear priority classifications are plainly relevant to the State's interest in reducing administrative disputes. . . . Only by importing some special suspicion of sex-related means from the [suspect classification] area can the result be made entirely persuasive.

Id. (footnotes omitted). An alternative explanation for the Court's decision in *Reed* might be derived from the analysis set forth in note 42 *supra*. Professor Gunther's reasoning appears to be that since the state's interest in simplifying probate proceedings is a legitimate one and the statutory scheme furthered that interest, the Court's result cannot be supported by a pure means-oriented, minimum-rationality test. *Id.* at 33-34. But as has been discussed, in the "administrative convenience" cases, the rationality of the particular classification drawn must be tested independently. Note 42 *supra*. Were the rational-relationship test to require only the furtherance of the state's legitimate interest in procedural convenience, even the hypothetical blue-eyed–brown-eyed scheme might be constitutionally permissible. Thus, there must be a second part to the test. And perhaps it was under this part that the Idaho statute considered in *Reed* failed. Chief Justice Burger might well have concluded, contrary to the Idaho court, that there was no support for the assumption that men were better qualified to administer estates than women. If this was the basis for his decision in *Reed*, it would account for his use of the phrase "arbitrary legislative choice" (404 U.S. at 76), which troubled Professor Gunther. Moreover, if the outcome in *Reed* turned on Burger's conclusion as to the arbitrariness of this particular classification scheme, then it is conceivable, at least prior to *Frontiero*, that some sex-based discriminations for purposes of administrative convenience may be upheld, so long as there is some concrete basis for drawing the classification along sexual lines. This issue is discussed further in note 94 *infra*.

The compelling-interest test, applied by the plurality on the ground that sex is a suspect classification, is also arguably appropriate, although the Court has never before treated sex discrimination in suspect-classification terms. To date, no precise set of criteria have been articulated for determining what constitutes a suspect classification,[46] and the plurality reached its decision principally by concluding that sex shared certain fundamental characteristics with other classifications previously recognized as suspect: race, alienage, and national origin.[47] Three separate factors were relied upon by the plurality: First, sex, even more than race, is a highly visible and distinctive characteristic. Presumably, the plurality was concerned that because of this identifiability legislators could easily use sex as a classifying criterion to embody unwarranted stereotypical notions[48] and the prospect of effective informal discrimination is great. Second, sex is immutable and congenital. And third, it typically bears no rational relation to an individual's ability to perform. The plurality appears to regard the coexistence of the latter two elements as particularly invidious;[49] the combination produces a class of people who, from birth, are automatically relegated to a lifetime inferior status, a status which bears no logical connection to their propensities or capabilities. Finally, the plurality drew support for its decision from statutes demonstrating what it viewed as an increased sensitivity on the part of Congress to sex-based classification.[50]

Two distinct dimensions appear to underlie the plurality's articulated views concerning the composition of the area where traditional rational basis protection is no longer adequate, and a suspect-classification label must therefore be imposed. The first, and more obvious, dimension is the idea that the classification must be typically arbitrary; that is, a resort to the classification in almost any context will characteristically lack a rational relationship to a permissible legislative goal. But before the suspect-classification doctrine is triggered, some other factor must be present. If the problem is merely

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[46] Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507 (1971).

[47] 411 U.S. at 686-87.

[48] Note, *supra* note 46, at 1507.

[49] The California Supreme Court, in holding that sex was a suspect classification under the equal protection clause of the federal and state constitutions, had also given strong weight to these two factors. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 17-20, 485 P.2d 529, 539-41, 95 Cal. Rptr. 329, 339-41 (1971).

[50] This argument loses much of its persuasiveness in view of the fact that it was Congress that had enacted the discriminatory statute under review.

that the scheme is typically irrational, then traditional equal protection analysis or the intermediate approach of *Reed* will be sufficient to correct abuses without imposing upon the state the requirement that it show a compelling interest to uphold the statute in those cases where it is justified in employing the scheme.

The additional dimension that is apparently necessary focuses upon the severity of the consequences of the discriminatory scheme. Several factors might be relevant to this determination: the ease and the frequency with which the classification is implemented, whether the statute perpetuates a significant differential in the welfare of the two classes, and any other characteristics which would establish that it is overly burdensome to require the class member continually to litigate whether the classification, in each new implementation, possesses a rational basis. Furthermore, from the *Frontiero* plurality's emphasis upon characteristics that are immutable and arise by accident of birth, there is an indication that where traits over which an individual has no control are used to produce an unnecessary impact upon his fate, notions of equality of opportunity might lead the Court to declare that the troublesome classifications, even though they might have a rational basis in some instances, are nonetheless suspect.[51]

One other consideration useful in assessing severity, not treated by the *Frontiero* plurality but viewed by some commentators as the acid test of a suspect classification,[52] is whether the classification has some stigmatizing effect upon the circumscribed class. If this requirement of stigma is read restrictively to mean a "badge of opprobrium," as some have suggested,[53] perhaps classification by sex is not sufficiently troublesome; sex does not present the potential for social scorn attendant to race or illegitimacy, for example. If, on the other hand, the appropriate inquiry under this test is whether the classifying scheme is one that reflects beliefs regarding the relative inferiority or unfitness of the class, then sex may be covered. And this latter approach appears the more logical. The line of analysis thus far has been: given a classification which in its more typical

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[51] *See Developments, supra* note 25, at 1127, where the authors state that similar considerations may explain why classifications based upon race have received more restrictive treatment than those based upon poverty or alienage, factors over which the person exercises some control.

[52] *E.g., id. See also* Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20 (1969).

[53] *See Development, supra* note 25, at 1127.

implementation is arbitrary, what additional quantum of harmfulness is necessary before the Court requires the state to support its position by a compelling interest? The troublesome areas would seem to be those where the statutory scheme parallels harbored notions that there is a natural difference in the abilities, worth, and interest of the two groups.[54] Where this occurs, there is a particular danger that unfounded stereotypes rather than legislative necessities were the guiding force behind the statutory scheme, and, because the statute makes express recognition of the distinctions in the capabilities of the two groups, it tends to perpetuate already rooted prejudices. It is in these situations that the pervasive prohibition afforded by imposition of the suspect-classification label is necessary in order to counteract the effects of the abusive stereotypes that are at the heart of the classification scheme.

Under this latter view of the stigma requirement, a strong case can be made that classification by sex is suspect. The problems inherent in employing sex as a classifying factor are more closely akin to those involved with using race than those with poverty or illegitimacy; at close scrutiny, the beliefs underlying the statutory distinction in *Reed*, as phrased by the Idaho court,[55] are suspiciously similar to the kind of thinking that denied women the right to vote or restricted the rights of married women to hold property or make contracts.[56]

The principal difficulties in subjecting sex to suspect classification treatment, though, are not those encountered in applying the stigma requirement; rather, they arise under the other dimension of the Court's concern: inherent arbitrariness. Unlike race and other traditionally suspicious classifications, sex, because of physical differences such as strength and childbearing capacity,[57] can present the state with valid reasons for differentiating. And it might be difficult to fit distinctions this fundamental into the narrow compelling-state-interest doctrine.[58] But, insomuch as classification by sex presents the same potential for abuse that has led the Court to de-

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[54] *Cf.* Comment, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481, 496 (1971).

[55] *See* note 42 *supra.*

[56] *See* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 19 & nn.17-20, 485 P.2d 529, 540-41, 95 Cal. Rptr. 329, 340-41 (1971).

[57] *See* Comment, *supra* note 54, at 497.

[58] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 224-25 (Frankfurter, J., concurring; classification permissible as exercise of the presidential and congressional war powers).

clare other classifications suspect, reasonable bounds could be fashioned to contain the states' use of the physical-differences rationale,[59] and any sex discriminations falling outside these bounds could be analyzed under classic suspect-classification reasoning.

The plurality's opinion in *Frontiero* demonstrates that members of the Court are coming to believe that a special potential for harm inheres in sex-based classification. To decide in favor of the Frontieros, it was not necessary for the plurality to hold that all sex-based classifications are constitutionally suspect under the fifth amendment. Moreover, its decision to that effect significantly expands the treatment that any member of the Court has been willing to accord such classifications. As authority for this decision the plurality relied heavily on *Reed* and stated that *Reed* gave "at least implicit support" for finding sex a suspect category.[60] But in view of the fact that the government conceded in *Frontiero* that administrative convenience was the sole purpose behind Congress' differential treatment of men and women,[61] *Frontiero* appears to present the same issue as *Reed*. A significant question, then, is why the plurality went beyond *Reed*, which did not reach the suspect-classification issue.[62]

The answer appears to be that the case involved a classification of increasing importance. Tracing the cases that have reviewed legislation directed at women shows a change in the Court's posture toward women's status. Although not all of the early cases presented equal protection issues, the same rationale is pervasive in all the opinions.[63] In 1872 in *Bradwell v. Illinois*,[64] a married woman

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[59] One such endeavor has already been made in the context of the Equal Rights Amendment. Brown, *supra* note 1.

[60] 411 U.S. at 682.

[61] *Id.* at 688.

[62] In fact, comparing the persuasiveness of the administrative convenience arguments in the two cases, *Frontiero* might have been an easier case than *Reed*. If the treatment of servicemen and servicewomen were equalized by requiring that both sexes prove dependency in fact, it is likely that the funds saved by denying benefits to servicemen who failed to make the necessary showing would greatly exceed the cost of conducting the additional hearings. *See The Supreme Court, 1972 Term, supra* note 42, at 122 & nn.37-39. Neither of the parties submitted figures on the actual costs involved. As something of a concession, however, the government in its brief quoted from a statement made by the Department of Defense in response to proposed amendments to the statutes at issue in *Frontiero*: "In view of the limited number of female personnel in the military service, the proposed legislation [to equalize treatment of military personnel by dropping the factual dependency test for servicewomen] would not have a major impact on the Department of Defense." S. REP. NO. 1218, 92d Cong., 2d Sess. 5 (1972), *quoted in* Brief for Appellee at 13.

[63] Brown, *supra* note 1, at 875-76.

was denied a license to practice law because the Supreme Court of Illinois believed that the legislature could not have intended that the license be conferred on classes of persons who had never been licensed under the common law, and the United States Supreme Court affirmed because a professional license was not a privilege or immunity of citizenship. The concurring opinion of Justice Bradley in that case provided the philosophical basis for later decisions that upheld legislation segregating the sexes. Justice Bradley, in his concurring opinion, wrote: "[T]he civil law as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."[65] His language of separateness and uniqueness was used again in *Muller v. Oregon*,[66] which sustained maximum hour legislation for women when only 3 years earlier in *Lochner v. New York*[67] the Court had found such legislation, as applied to male bakery workers, to be an unconstitutional impairment of freedom of contract. In order to resolve what appeared to be an inconsistency in its earlier reasoning, the *Muller* Court relied on the unique position of women in society as a basis for distinguishing *Lochner* without overruling it.[68]

This "sharp line between the sexes"[69] was perpetuated as the rationale behind the Court's rejecting a claim of sex discrimination under the equal protection clause almost 40 years later. In *Goesaert v. Cleary*[70] a Michigan statute, which prohibited the granting of a bartending license to any woman but the wife or daughter of a male bar owner, was challenged. Using traditional rational-basis

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[64] 83 U.S. (16 Wall.) 130 (1872).

[65] Justice Bradley's opinion continues:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . .
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> . . . .
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> . . . It is the prerogative of the legislator to prescribe regulations founded on the nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. . . . [I]n my opinion, in view of the peculiar characteristics, destiny and mission of women, it is within the province of the legislature to ordain what offices, positions, and callings shall be filed and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate on the sterner sex.

83 U.S. (16 Wall.) at 141-42. Parts of this passage are cited by the plurality in *Frontiero*, 411 U.S. at 684-85.

[66] 208 U.S. 412 (1908).

[67] 198 U.S. 45 (1905).

[68] 208 U.S. at 422-23.

[69] Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

[70] *Id.*

analysis, the Court was satisfied with finding a *conceivable* rational basis for the prohibition and upheld the legislation. The possibility that such legislation was designed to protect the health, morals, and safety of women was adequate to sustain the legislation despite the effect of virtually monopolizing the trade for men. The same protective attitude flourished into the 1960's with the Court's decision in *Hoyt v. Florida*,[71] which upheld a Florida statute excluding women from jury service unless they voluntarily applied. The Court's view of women as the center of home and family life made it possible for it to find a rational basis in the state's interest in preserving the general welfare by not requiring women to leave the home.[72]

Reed was a departure from this line of cases. In contrast to them, the Court's emphasis in *Reed* was on the similar situation of men and women,[73] and the Court refused to supply the conceivable reasons why the statute should be upheld. *Reed* provided the first indication that the Supreme Court was discarding its traditional "protectionist" philosophy toward women; by the time *Frontiero* was decided one term later, a new type of protectionist philosophy was in evidence in the plurality opinion.

Were Mr. Justice Stewart's brief concurring opinion, which found the challenged statutes simply to be invidiously discriminatory, less enigmatic, *Frontiero* would be a landmark decision. If one were able to conclude that he found the statutes resulted in an "invidious discrimination" as the consequence of Congress' use of a suspect statutory classification, then a majority of the Court would be on record as putting sex in the suspect category. But if Justice Stewart's use of "invidious" was not meant to indicate the suspect nature of the category, then *Frontiero* leaves eight members of the Court finding a violation of due process under the fifth amendment, four of them agreeing that sex is a suspect classification, but five justices, including the dissenting Justice Rehnquist, disagreeing. To find a possible majority position for the Court on this issue, an understanding of Justice Stewart's opinion is of central importance.

In relying solely on *Reed*, Justice Stewart may have accepted the active-review approach taken in that case. On the other hand, the word "invidious" combined with the citation to *Reed* could mean more than an adoption of active review, for Justice Stewart

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[71] 368 U.S. 57 (1961).

[72] *Id.* at 62.

[73] 404 U.S. at 77.

has used that term in describing discrimination on the basis of race.[74] However, he has recently defined the term in a case not involving a fundamental right or a suspect classification. In *San Antonio Independent School District v. Rodriguez*[75] he stated: "[I]t has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory — only by classifications that are wholly arbitrary or capricious."[76] It is more likely therefore that in using the word "invidious" in *Frontiero* Justice Stewart was referring to arbitrary discrimination as in *Reed*[77] and was not using the term as shorthand for finding a suspect classification. When this factor is added to the fact that he did not join in Justice Brennan's plurality opinion, it seems clear that one cannot confidently ally Justice Stewart with the plurality.

In that case, however, the question remains why he did not join Justice Powell's concurring opinion. A possible explanation for his not doing so is that he may not have agreed with Justice Powell that the Court should reserve a far-reaching women's rights decision pending ratification of the Equal Rights Amendment.[78] But since

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[74] McLaughlin v. Florida, 379 U.S. 184 (1964): "And I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of the act depend upon the race of the actor. Discrimination of that kind is invidious *per se*." *Id.* at 198.

[75] 411 U.S. 1 (1973).

[76] *Id.* at 60.

[77] *See also* Rinaldi v. Yeager, 384 U.S. 305, 309 (1966), in which Justice Stewart in writing the opinion of the Court concluded that a New Jersey statute requiring persons imprisoned for a crime to repay the cost of an appeals transcript while placing no such burden on others who were convicted yet not imprisoned, lacked any supportable rational basis (therefore was arbitrary) and was an "invidious discrimination."

If invidious means arbitrary, as Justice Stewart suggests, and arbitrary discrimination violates the due process clause of the fifth amendment, then the same standard presumably could trigger a violation of the due process clause of the fourteenth amendment. Such a definition of invidious would thus seem to make the equal protection clause of the fourteenth amendment superfluous. But arguably the issue of standing is different under the due process and the equal protection clauses. The fourteenth amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." Thus, there must be a sufficient interest in liberty or property to trigger the amendment's due process guarantees. Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972); Perry v. Sindermann, 408 U.S. 593, 599 (1972). The wording of the equal protection clause seems to require no such showing to allege a denial of equal protection.

[78] The ERA provides:

> 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.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

Justice Powell asserted that there was no need to create a suspect classification when *Reed* presented an adequate basis for granting relief, apart from his deference to the pending ERA, his position and that of Justice Stewart cannot be distinguished.

The future posture of the Court with respect to sex classification is open. Possibly the split of opinions in *Frontiero* will reoccur. But there are also conflicting signs of where the Court presently stands on its use of the *Reed* approach to judicial review of equal protection challenges. In its decision in *San Antonio Independent School District v. Rodriguez*,[79] the Court appeared to abandon its "spectrum of standards"[80] and to return to the two traditional tests, the rational-basis test and the compelling-interest test. In *Rodriguez*, where the issue was whether the Texas system of school financing violated the equal protection clause, the Court spoke only

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S.J. Res. 8, 92d Cong., 2d Sess., 118 CONG. REC. 9598 (1972); H.R.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 35815 (1971). The states have until March 22, 1979, to complete the ratification of the amendment.

The pending ratification of the Equal Rights Amendment was considered a significant factor by both Justices Powell and Brennan in reaching their conclusions. Justice Brennan saw Congress' passage of the amendment as a decision on their part "that classifications based upon sex are inherently invidious." 411 U.S. at 687. To him this was "not without significance" in coming to his finding that sex is a suspect classification. Justice Powell, on the other hand, viewed the plurality's action not as a reinforcement of Congress' decision but as an infringement on the legislative prerogative of the states. *Id.* at 692. Both these views on the significance of pending legislation have found expression in prior cases decided by the Court. Justice Brennan's approach is similar to the Court's approach in Cheff v. Schnackenberg, 384 U.S. 373 (1966), where the Court accepted Congress' statutory definition of petty offense in determining the applicability of the constitutional requirement of jury trial to criminal contempt proceedings.

Justice Powell's hesitance "to pre-empt by judicial action a major political decision which is currently in process of resolution [through the legislative process]," 411 U.S. at 692, is similar to positions that have been taken by other members of the Court. In Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), where the Court held that certain housing practices were within the reach of the broadly phrased prohibitions of the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970), Mr. Justice Harlan dissented on the ground that Congress had enacted a detailed and comprehensive fairhousing statute to deal with the sorts of discriminations alleged. 396 U.S. at 247-51; *cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 450 (1968) (Harlan, J., dissenting; writ of certiorari should be dismissed because recent congressional legislation had rendered the Court's decision of insufficient public importance). For a discussion of other issues on which Mr. Justice Powell's views are similar to those of the late Justice Harlan, see Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972). Another aspect to Justice Powell's willingness to defer to legislative action is that the problem of delineating impermissible sex discrimination will require considerable line drawing, *see* text accompanying note 59 *supra*, which has traditionally been a function better suited for legislatures than for courts. *See* Bell v. Maryland, 378 U.S. 226, 317 (Goldberg, J., concurring).

[79] 411 U.S. 1 (1973).

[80] *Id.* at 98 (Marshall, J., dissenting).

in terms of the two traditional approaches to equal protection. After rejecting the arguments that the poor are a suspect classification[81] and that education is a fundamental right,[82] it concluded that the rational-basis test was therefore applicable.[83] It did not consider a balancing or active-review approach, though it acknowledged that education is an important societal and judicial concern.[84] Justice Marshall, dissenting, strongly took issue with what he termed "the Court's rigidified approach to equal protection analysis" and stated that a "principled reading of what [the] Court has done [in prior cases] reveals that it has applied a *spectrum* of standards."[85]

Despite *Rodriguez*, *Frontiero* indicates that the hybrid approach used in *Reed* is not dead. Justices Powell and Blackmun and the Chief Justice all joined in the opinion of the Court in *Rodriguez*. But less than 3 months after *Rodriguez* they again used the hybrid approach in their concurring opinion in *Frontiero* by relying on *Reed*.[86] More recently, in *Vlandis v. Kline*[87] the Court appeared to be using the *Reed* approach to resolve a challenge to a legislative classification under the due process clause of the fourteenth amendment.[88] The Court there struck down a Connecticut statute creating an irrebutable presumption that persons who were nonresidents at the time of application to a state university would be so for the remainder of their enrollment. The Court explored and rejected each of the three justifications given by the state[89] in support of the statute and proceeded to speculate on other less onerous methods of accomplishing the state's objectives. The usual presumption of validity of the legislative enactment was not present in *Vlandis*. As in *Reed*, the state had to prove the actual rational basis for the legislation; its offers met with thorough scrutiny and were rejected.

Based on the Court's recent behavior, notwithstanding its resort

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[81] *Id.* at 18.

[82] *Id.* at 29-39.

[83] *Id.* at 55. Elsewhere in *Rodriguez* the Court viewed Eisenstadt v. Baird, 405 U.S. 438 (1972), as a case where the law failed to satisfy "the more lenient equal protection standard." 411 U.S. at 34, n.73. Yet this case is cited by commentators as an archetype of active review. *See* note 40 *supra.*

[84] 411 U.S. at 29-30. *See* note 43 *supra.*

[85] *Id.* at 98 (emphasis added).

[86] *See* text following note 45 *supra.*

[87] 412 U.S. 441 (1973).

[88] *Vlandis* is a due process case, but the Court in some situations uses the same analysis or tests when it is hearing a claim of deprivation of due process as it does when denial of equal protection is alleged. *See* Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring). *See also* note 90 *infra.*

[89] 412 U.S. at 448-51.

to the strict two-tiered approach in *Rodriguez*, it is likely that the *Reed* active-review approach will continue to be important.[90] In the area of sex discrimination, the plurality's opinion in *Frontiero* suggests that the Court will continue the evolution begun in *Reed* of treating sex as a class to be afforded judicial protection.[91] Taken together *Reed* and *Frontiero* indicate that a majority of the Court would now subscribe to the proposition that a state's interest in enhancing administrative convenience through the avoidance of case-by-case hearings upon the existence of particular attributes does not justify the use of presumptions, whether conclusive or rebuttable, that are based on sexual stereotypes[92] — at least, so long as the hearings can reasonably be conducted.[93] This is true regardless of whether the stereotypes have some basis in fact,[94] and regardless

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[90] [I]t is clear that we employ not just one, or two, but, as my Brother MARSHALL has so ably demonstrated, a 'spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.' *San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1, 98-99 [1973] (MARSHALL, J., dissenting). Sometimes we just say the claim is 'invidious' and let the matter rest there, as MR. JUSTICE STEWART did, for example, in concurring in the judgment in *Frontiero*. But at other times we sustain the discrimination, if it is justifiable on any conceivable rational basis, or strike it down, unless sustained by some compelling interest of the State . . . . I am uncomfortable with the dichotomy, for it must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.

Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring).

[91] *Frontiero* has already had an effect on lower court decisions. In Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), the district court found the Louisiana state law excusing women from jury service unless they elected to serve denied equal protection to women who have suits pending in courts of the state and denied due process to all litigants in the state courts. As an explanation for its departure from the Supreme Court's earlier ruling in Hoyt v. Florida, 368 U.S. 57 (1961), the district court said: " 'This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions [*Reed* and *Frontiero*] have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case.' " 363 F. Supp. at 1117, *quoting* Rowe v. Peyton, 383 F.2d 709, 714 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968).

[92] *But see The Supreme Court, 1972 Term*, *supra* note 42, at 123-24.

[93] *But see* text preceding note 98 *infra*.

[94] In this respect, *Frontiero* might pose a significant step beyond *Reed*. In *Reed*, it could be argued that the legislature's implicit conclusion that men were generally better qualified to administer estates than women was purely speculative. Although men might be more likely to have business careers, women, by virtue of their experience in administering personal or family finances, might be equally or better qualified. In the *Frontiero* situation, on the other hand, there existed facts from which Congress could reasonably infer that the average serviceman's wife is more likely to be dependent on her spouse than is the average servicewoman's husband. For example, while

of whether using the scheme as a substitute for case-by-case hearings affords significant administrative convenience.

The question remaining after *Reed* and *Frontiero* is in what situations, if any, will classifications based upon sexual stereotypes be allowed? The only possibility where the administrative convenience rationale might be sufficient to justify the discrimination would be where the presence of the qualities or attributes that underlay the legislature's decision to classify by sex are not easily proven and therefore requiring the state to conduct case-by-case hearings would be excessively onerous. For example, suppose a state permits females to marry without parental consent after attaining age 18, but requires males to be 21.[95] This distinction might be supportable as an embodiment of the state's legitimate interest in assuring that those who marry without parental consent are of sufficent mental and emotional maturity. In view of the burden to the state of conducting case-by-case hearings on the issue of maturity for marriage, the state could argue that its interest in assuring maturity coupled with its interest in adminstrative efficiency permitted its use of presumptions based upon age, presumptions which, because adolescent women generally mature more rapidly than adolescent men, distinguished between the sexes.[96] The state could attempt to distinguish *Frontiero*, where it would have been relatively easy to determine dependency on a case-by-case basis,[97] by asserting that because the issue of maturity sufficient for marriage is a complex one, and a conclusive presumption of different maturity levels might be an acceptable means of accomplishing the legislative goal. This argument probably must be rejected in view of *Reed*, however, where the issue whether an individual was the most competent person to administer an estate was similarly, though perhaps less, com-

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85.5 percent of all married men are employed, only 41.5 percent of all married women are. Moreover, in 63.0 percent of the households headed by a married couple, only the husband is employed. In only 1.3 percent of the households is the wife the only wage earner. U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT 164, 167 (1973).

[95] Forty states and the District of Columbia presently fix different ages for males and females to marry without parental consent. Friedrich v. Katz, 73 Misc. 2d 663, 664, 341 N.Y.S.2d 932, 934 (Sup. Ct. 1973).

[96] *See* Brown, *supra* note 1, at 938-39.

[97] To prove dependency all that was required of the servicewoman was the submission of an affidavit stating the income and personal expenses of her spouse. One source has estimated the processing cost of each affidavit at $5. *The Supreme Court, 1972 Term*, *supra* note 42, at 122 nn.37, 39.

plex, and the Court nonetheless branded the statute as arbitrary and required the probate courts to hold hearings on the issue.[98]

The preceding discussion suggests that a state's interest in administrative convenience will rarely if ever be sufficient to permit the use of a classification scheme based upon sexual stereotypes. But conceivably, presumptions based upon sex might still be permissible in situations where no individual hearing on the attributes is possible. Examples are the statutory rape laws which punish men for having sexual intercourse with women under a specified age. Although a legislature's decision to extend protection to females only could be supported by its conclusion that young women are more likely than young men to engage in early consensual sexual intercourse, and more likely to suffer serious emotional harm as a consequence,[99] this scheme is no less a sexual stereotype than the statutes involved in *Reed* and *Frontiero*. But because the state's criminal prohibitions must be comprised of unambiguous and readily ascertainable elements, and there is no opportunity for the state to conduct a hearing to determine whether a potential victim in fact needs the protection the legislation is intended to give, the sexual stereotype in this case is probably allowable even after *Frontiero*, as the only reasonable means of attaining the legislative goal.

Under the ERA, however, even the discrimination in the preceding hypothetical would not be permitted.[100] Also, if the ERA is adopted, the use of "benign" legislation by the state,[101] permitted under *Reed* and *Frontiero* so long as the means are reasonably related to a legitimate legislative objective,[102] may no longer be allowable.[103] Much of this gap between the coverage of the active-review

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[98] A challenge to a similar New York statute was recently made by an 18-year-old male. In a decision written after *Reed* but before *Frontiero* the court determined the statute did not unconstitutionally discriminate against males under the age of 21. Using a traditional rational basis test, the court found that the state had a legitimate interest in the marriage relation and that the conceivable fact that the male will be the provider in the usual marriage relationship "is sufficient reason to require males to be older and generally more suited to their duty before they may independently decide to marry." Friedrich v. Katz, 731 Misc. 2d 663, 664-65, 341 N.Y.S.2d 932, 934 (Sup. Ct. 1973). The case is currently being appealed.

[99] *See* Brown, *supra* note 1, at 957-58.

[100] *Id.*

[101] *See generally Developments*, *supra* note 25, at 1072-75, 1104-17. Legislation which singles out individual race or ethnic minority groups to redress the effects of past discrimination by giving special treatment to those groups is known as benign. *Id.* at 1104-05.

[102] *See* text accompanying notes 111-12 *infra*.

[103] *See* Brown, *supra* note 1, at 903-05. But as to benign discrimination through federal legislation see text accompanying notes 110-14 *infra*.

doctrine and that of the ERA would be overcome if, through a liberal reading of Mr. Justice Stewart's opinion,[104] a majority of the *Frontiero* Court could be viewed as deeming sex to be a suspect classification. Still, the protection provided by the ERA is more secure than that resulting from a judicial decision, which may subsequently be overruled. And even if sex were considered a suspect classification, the fifth and fourteenth amendments might not afford the same protection promised by the ERA.[105] The Court has recognized a compelling interest great enough to overcome the suspect nature of a legislative classification based on national origin.[106] In contrast, since *Brown v. Board of Education*,[107] the Court has not found an interest compelling enough to justify the use of racially based classifications. A principal reason is that in the background of the racial discrimination cases is a judicial recognition that the purpose of the fourteenth as well as the thirteenth and fifteenth amendments was the protection of the black race.[108] This distinction at least suggests that judicial imposition of suspect classification treatment, by itself, will not provide the same protection as an amendment explicitly passed to end state sanctioned sex discrimination.[109]

An additional advantage under the proposed amendment could come from its second section: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This is verbatim the wording of section 5 of the fourteenth amend-

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[104] *See* note 74 *supra* and accompanying text.

[105] Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 225, 228-31 (1971).

[106] Korematsu v. United States, 323 U.S. 214 (1944). Recently, the Court in *In re* Griffiths, 413 U.S. 717 (1973), stated: "We did not decide in *Graham* [*v. Richardson*] nor do we decide here whether special circumstances, such as armed hostilities between the United States and the country of which the alien is a citizen, would justify the use of a classification based on alienage." *Id.* at 722 n.11.

[107] 347 U.S. 483 (1954).

[108] Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).

[109] Various other reasons are given why a constitutional amendment is preferable to the protection the Court can grant by finding sex to be a suspect classification. An amendment would insulate the Court from criticism that it was legislating, would have a greater political and psychological impact, and would have effects on the status of women beyond the legal system. Brown, *supra* note 1, at 884-85.

Opponents of the ERA argue that the fifth and the fourteenth amendments provide adequate protection. They rely on the fact that although the primary purpose of the fourteenth amendment was to eliminate racial discrimination, the protection of the amendment has been extended to lineage and alienage. This argument assumes, of course, that in time the Court will consider sex a suspect classification. Note, *supra* note 46, at 1507. *See also* S. REP. NO. 92-689, 92d Cong., 2d Sess. 29-30 (1972) (minority views of Senator Ervin).

ment. Its significance lies in the power it gives Congress to effectuate the goals of the amendment through benign legislation.[110] From the Court's opinion in *Katzenbach v. Morgan*,[111] it has been suggested that legislation extending a preference to a group discriminated against in the past might not be struck down for using a discriminatory classification if it is viewed as benign.[112] In such a case, the legislation might only have to undergo the traditional rational basis standard of review. But there is some indication in *Oregon v. Mitchell*[113] that the power of Congress to take these remedial steps is limited to matters of racial discrimination, where Congress has passed a law to enable a racial minority to resist violations of the fourteenth amendment.[114] This limitation is apparently a function of the fourteenth amendment's basic purpose to assure equal protection of the laws to the black race. Similarly, the enforcement section of the equal rights amendment, designed specifically to assure equality of rights between the sexes, should give Congress the power to take positive steps toward equalizing the position of women relative to that of men in areas of American life where government has a legitimate presence.

LESLIE DOLIN WIESENBERGER

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110 Absent the enforcement clause, the ERA would probably preclude the use of all benign legislation. Brown, *supra* note 1, at 903-05. With the clause, Congress is permitted to act, but the states continue to be precluded. *See* text accompanying notes 101-03 *supra.*

111 384 U.S. 641 (1966).

112 *Developments, supra* note 25, at 1109-10.

113 400 U.S. 112 (1970).

114 *Id.* at 126-31. *See also* Note, *supra* note 46, 1517-18. *Cf.* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971); Mancari v. Morton, 359 F. Supp. 585 (D.N.M. 1973).