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Economic Discrimination; Denial of Social Security Benefits Premised on Gender-Based Classification is Unconstitutional; Violates Equal Protection; Weinberger v. Wiesenfeld

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CONSTITUTIONAL LAW

Economic Discrimination · Denial of Social Security Benefits Premised on Gender-Based Classification Is Unconstitutional · Violates Equal Protection

Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975)

AFTER HER MARRIAGE to Stephen Wiesenfeld, Paula Polatschek, who was employed as a teacher for five years prior to her marriage, continued teaching and from her earnings the maximum social security contributions were deducted. Her income was substantially larger than that of her husband and served as the couple's principal source of support. In 1972, Paula died in childbirth.

After his wife's death, Wiesenfeld applied for social security survivor benefits for himself and his infant son. While he was able to obtain benefits for his son under 42 U.S.C. Section 402(d),[1] he was denied benefits under Section 402(g) because those benefits were available only to widows and surviving divorced mothers.[2] When his application was denied, Wiesenfeld brought suit in federal district court to obtain declaratory and injunctive relief,[3] contending that the gender-based classification of 42 U.S.C. Section 402(g) violated equal protection as found within the due process clause of the fifth amendment.[4] A three-judge district court panel granted relief finding that the different treatment mandated by 42 U.S.C. Section 402(g) unjustifiably discriminated against women wage-earners by affording their survivors less protection than is provided the survivors of male wage-earners.[5]

The district court rendered its decision after struggling to determine which constitutional standard of review should be applied when confronted with a statute which denies benefits on the basis of sex. Applying the traditional equal protection analysis[6] the court determined that the classifica-

[1] 42 U.S.C. § 402(d) (1970), is entitled "Child's insurance benefits" and provides benefits for "Every child . . . of an individual who dies a fully or currently insured individual. . . ."

[2] 42 U.S.C. § 402(g) (1970), is entitled "Mother's insurance benefits" and provides benefits for the widow and every surviving divorced mother who has a child in her care who is entitled to child's insurance benefits and is the child of an individual who died a fully or currently insured individual.

[3] Wiesenfeld v. Secretary of Health, Educ. and Welf., 367 F. Supp. 981 (D.N.J. 1973). The action was originally brought as a class action which was not permitted by the court since Wiesenfeld's conceded purpose in bringing a class action was to safeguard against mootness.

[4] The fifth amendment provides that no person "shall be deprived of life, liberty, or property without due process of law." Although it does not contain an equal protection clause, the Supreme Court has applied to the federal government the same requirements imposed on the states under the fourteenth amendment. *See* Schlesinger v. Ballard, 95 S. Ct. 572 (1975); Schneider v. Rush, 377 U.S. 163 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

[5] 367 F. Supp. 981 (D.N.J. 1973).

[6] Under the traditional equal protection test a statutory classification will be upheld if

tion bore a rational relationship to a legitimate statutory purpose of correcting unequal job opportunities available to women and the need to protect women and their families who have lost the male head of the household.[7] Nevertheless, the court determined that the traditional equal protection test was inadequate and applied the higher standard of review of "close judicial scrutiny."[8] Although the court was reluctant to find classifications based on sex as conclusively "inherently suspect,"[9] it chose the higher standard despite the fact that Congress may have intended to rectify the past and present discrimination against women.

On direct appeal,[10] the Supreme Court affirmed.[11] Mr. Justice Brennan, with whom six justices[12] concurred, delivered the majority opinion. The Court determined that the classification as found within 42 U.S.C. Section 402(g) was premised upon an overbroad generalization as to dependency, namely, that male worker's earnings are vital to their families' support whereas the earnings of female wage-earners do not significantly contribute to their family's support. Justice Brennan reasoned that the legislative history of the statute clearly substantiated that the congressional purpose was not to provide benefits to widows due to economic discrimination, but to provide benefits to minor children by allowing women to elect not to work and to devote

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the Court can attribute to the legislation any reasonable conceivable purpose which would support the constitutionality of the classification. *See, e.g.,* Railway Express Agency, Inc. v. New York, 316 U.S. 106, 109-10 (1949). *See generally* Gunther, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Developments in the Law*].

[7] 367 F. Supp. 981, 989-90 (D.N.J. 1973).

[8] If the Court finds that a statute affects a "fundamental interest" or employs a "suspect classification" the legislative purpose of the statute is subject to "strict scrutiny" to determine if the legislative purpose is so compelling as to justify the classification. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969). When the traditional equal protection test is used the statute will generally be upheld, however, the use of "strict scrutiny" is generally a signal that the law will be found unconstitutional, *see* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as *The Supreme Court, 1971 Term*].

[9] "While a decision by a divided Court is as final on all issues of a case as a decision by a unanimous Court the reasoning employed by a plurality does not become the law. Frontiero demonstrates that a majority of the Supreme Court has not yet classified sex as 'inherently suspect.' " 367 F. Supp. at 988. In Frontiero v. Richardson, 411 U.S. 677 (1973), the plurality opinion found classifications based on sex "inherently suspect" and subject to close judicial scrutiny. *See* text accompanying note 17 *infra.*

[10] 28 U.S.C. § 1235 (1970), provides for direct appeal to the Supreme Court from any order granting a permanent injunction heard before a three-judge court.

[11] Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975).

[12] Justice Brennan was joined by Justices Burger, C.J., Stewart, White, Marshall, Blackmun and Powell. Justice Powell also filed a concurring opinion in which Chief Justice Burger joined. Justice Rehnquist filed an opinion concurring in result. Justice Douglas did not take part in the decision of the case.

themselves to the care of their children.[13] In his opinion, Justice Brennan relied primarily on *Frontiero v. Richardson,*[14] which involved the right of a lieutenant in the United States Air Force to claim her spouse as a "dependent" for the purpose of obtaining dependents' benefits. Under the statutes providing for such benefits the spouse of a male member was entitled to such benefits without question, whereas the spouse of a female member was required to prove he was dependent on her for over one-half of his support.[15]

In *Frontiero,* the Supreme Court reversed a three-judge court which upheld the gender-based classification under the traditional equal protection test of minimum rationality.[16] Justice Brennan, writing for a plurality, found that classifications based on sex, like those based on race, alienage and national origin, are inherently suspect and should be subjected to "strict judicial scrutiny."[17] Applying this standard, he found no compelling governmental interest that could justify the classification. Justice Powell, with whom two justices[18] joined, concurred in the judgment but declined to determine whether a classification based on sex could be a suspect classification. In his view the statute failed the minimum rationality test formulated by the Court in *Reed v. Reed*[19] and for this reason was unconstitutional.[20]

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[13] Mr. Justice Powell, in his concurring opinion found it immaterial whether the surviving parent elects to assume primary child care since benefits are available to the mother who stays at home or who works for low wages. 95 S. Ct. at 1236. Mr. Justice Rehnquist, concurring in the result, reasoned that the statutory distinction between men and women did not serve any valid legislative purpose. He did not believe it necessary to reach a decision as to whether the statute discriminated against female workers in violation of the fifth amendment.

[14] 411 U.S. 677 (1973).

[15] 37 U.S.C. § 401 (1970).

[16] Frontiero v. Laird, 341 F. Supp. 201, 207-09 (N.D. Ala. 1972), *rev'd* sub. nom. Frontiero v. Richardson, 411 U.S. 677 (1973).

[17] 411 U.S. at 682-88. A number of state courts have recognized the need for close judicial scrutiny in the sex classification area. *E.g.,* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

[18] Justice Powell was joined by Justices Burger, C.J., and Blackmun. Justice Stewart concurred on the basis of Reed v. Reed, 404 U.S. 71 (1971). Justice Rehnquist dissented, agreeing with the lower court's analysis.

[19] 404 U.S. 71 (1971). In Reed, the Court considered a fourteenth amendment equal protection challenge of an Idaho statute that gave preference to men over women when persons of equal entitlement sought appointment for administrator of a decedent's estate. The Idaho supreme court reasoned that the legislature established the automatic preference for males to relieve probate courts of the burden of hearings on qualifications of such applicants and further concluded that men generally are likely to have more business experience and would be better qualified. The classification was found not to be arbitrary or unreasonable. Reed v. Reed, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970). The United States Supreme Court reversed finding that a mandatory preference for males did not bear a reasonable relationship to a legitimate state interest. 404 U.S. at 76.

[20] 411 U.S. at 692. Justice Powell also observed that the Court had undertaken a

In applying the *Frontiero* holding, Justice Brennan avoided a declaration of the proper standard of review to be used in testing the validity of a gender-based classification. The Court's opinion simply states that the assumption that spouses of servicewomen would not normally be dependent upon their wives is identical to the overbroad generalization that the income of women wage-earners does not contribute significantly to their families' support.[21] The Court determined that, although the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support,[22] such a generalization could not deprive a woman of a portion of her earnings and deny her family the same protection which a similarly situated male worker would have received.[23]

The Government sought to uphold the statute by arguing that Congress is not obliged to provide the same benefits to a female employee as to a male employee since social security insurance is non-contractual in nature and not an accrued property right within the meaning of the fifth amendment.[24] This contention was based on *Flemming v. Nestor,*[25] in which the Court had held that social security benefits are non-contractual.

However, the *Flemming* case had not entirely abrogated a covered employee's right to benefits. The Court had determined that although the federal statute could constitutionally withhold non-contractual benefits upon the deportation of the employee, the interest of a covered employee is of sufficient substance to fall within due process protection.[26] Therefore, the Court in *Weinberger* concluded that since benefits significantly depend upon participation in the work force, and covered employees are required to pay taxes, the benefits must be distributed according to classifications which do

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decisional responsibility which had been directed to the states for their consideration by virtue of the Equal Rights Amendment.

[21] 95 S. Ct. at 1231. The Court also noted that Wiesenfeld was not given an opportunity to show whether he was dependent upon his wife as was permitted under the statutes invalidated in Frontiero. *See* note 15 *supra.*

[22] *See* Kahn v. Shevin, 416 U.S. 351, 354 (1974), where the Court relied heavily on statistical data supporting the view that widows may often find themselves thrust into the job market with which they are unfamiliar, and in which, due to former dependency upon their husbands, widows have fewer skills to offer. *See also* Murphy, *Females' Wage Discrimination: A Study of the Equal Pay Act 1963-1970,* 39 U. CIN. L. REV. 615, 616-18 (1970).

[23] 95 S. Ct. at 1232.

[24] *Id.*

[25] 363 U.S. 603 (1960).

[26] 363 U.S. 603, 611 (1960).

not "without sufficient justification differentiate among covered employees solely on the basis of sex."[27]

The Government also attempted to justify the classification as one reasonably designed to compensate women beneficiaries as a group for the economic difficulties which confront women who seek to support themselves and their families. This justification was based primarily on the Supreme Court's holding in *Kahn v. Shevin*.[28] In *Kahn*, a state statute granting widows an annual property tax exemption was upheld as being reasonably designed to further a state policy of cushioning the financially disproportionate impact of spousal loss upon women.[29] The *Weinberger* Court rejected this assertion that the social security statute was designed to compensate women for their economic difficulties. It reasoned that since Section 402(g) benefits are contingent upon responsibility to minor children,[30] and since legislative history reveals a congressional purpose[31] to aid young widows with children, the statute was intended to permit women to elect not to work and to devote themselves to the full-time care of their children. Since the statute could not be supported by a legislative purpose to provide for the special problems of women, as in *Kahn*, the classification was indistinguishable from the classification held invalid in *Frontiero*.

The majority opinion of *Weinberger* successfully avoids a declaration of the proper standard to be used when dealing with gender-based classifications. Justice Brennan, who authored this opinion and the plurality opinion declaring gender-based classifications subject to close judicial scrutiny in *Frontiero*, and who adhered to his analysis in opinions subsequent to *Frontiero*,[32] chose not to follow that analysis in *Weinberger*. Thus, Brennan appears to be joining four other Justices who have avoided the use of the strict scrutiny test in the sex-based classification area.[33]

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[27] 95 S. Ct. at 1233.

[28] 416 U.S. 351 (1974).

[29] In *Kahn*, six members of the Court joined to uphold the Florida statute granting widows an annual $500 property tax exemption. Upon challenge by a widower, the Court, after reviewing data compiled by the Women's Bureau of the United States Department of Labor, concluded that a state tax law is not arbitrary, although it discriminates in favor of a certain class, if such discrimination is founded upon a reasonable distinction or state policy. 416 U.S. at 355.

[30] *See* note 2 *supra*.

[31] 95 S. Ct. at 1233-34. Both the Advisory Council on Social Security in 1938 and 1971 referred to the benefits of § 402(g) as enabling the mother of young children to choose to stay home and care for the children instead of working. The 1971 Advisory Council saw no reason to extend the benefits to fathers reasoning that few men would choose to stay home. *See Sex Classifications in the Social Security Benefit Structure*, 49 IND. L.J. 181, 188 (1973) [hereinafter cited as *Sex Classifications*].

[32] *See* Schlesinger v. Ballard, 95 S. Ct. 572, 579 (1975) (Brennan, J., dissenting); Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting); Geduldig v. Aiello, 411 U.S. 484, 497 (1973) (Brennan, J., dissenting).

[33] *See* text accompanying note 18 *supra*.

The *Weinberger* decision and the more recent case of *Stanton v. Stanton*[34] confirm that the majority of the Supreme Court is not yet willing to decide whether a classification based on sex is inherently suspect and therefore subject to close judicial scrutiny. In *Stanton,* eight justices[35] joined to declare unconstitutional a Utah statute which established the ages of majority for females at 18 years and for males at 21 years at least for the minimum purpose of determining the duration of a divorced husband's child support obligation. Justice Blackmun, writing for the majority in *Stanton,* found *Reed* controlling and specifically stated that it was unnecessary to determine whether sex is a suspect classification.[36] The Court determined that the traditional views of the necessity of education for males as future breadwinners, whereas females generally marry earlier and do not require such education, could not sustain a statute establishing different ages of majority. While discussing the broad effects of the statute in other areas of the law,[37] the Court carefully limited its holding to the context of child support framed within a potpourri of tests: "We therefore conclude that under any test—compelling state interest, or rational basis, or something in between—Section 15-2-1 in the context of child support, does not survive an equal protection attack."[38]

An analysis of *Weinberger, Reed, Frontiero* and *Stanton,* indicates that the majority of the Court will not apply in the near future strict scrutiny in the sex classification area. In lieu of such criteria the Court has utilized the old equal protection test under a broader scope.[39] The Justices who found *Reed* to be controlling in the *Frontiero* decision necessarily utilized a more stringent test than that of the traditional minimum rationality test. In *Reed,* the mandatory preference for males when persons of equal entitlement sought assignment as administrator of an estate was weighed against a state objective of reducing the work of probate courts by eliminating a qualifications hearing. The *Reed* Court concluded that the mandatory preference was not justified merely for the elimination of a hearing.[40] The Idaho court had thought that the classification could be sustained on the basis that, as a general rule, men have more experience in business matters relevant to the administration of an estate.[41]

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[34] 95 S. Ct. 1373 (1975).
[35] Only Justice Rehnquist dissented.
[36] 95 S. Ct. at 1377.
[37] *Id.* at 1379. The Court noted several areas of law wherein the age of majority is significant: minor's ability to disaffirm a contract, tolling of the statute of limitations with a minor, necessity of the appointment of a guardian *ad litem* for a minor, and the inability of a minor to serve as an administrator of decedent's estate.
[38] *Id.*
[39] *See generally* Gunther, *Developments in the Law, supra* note 6; Gunther, *The Supreme Court, 1971 Term, supra* note 8.
[40] 404 U.S. at 76.
[41] Reed v. Reed, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970).

The United States Supreme Court was unwilling to consider this theoretical basis for the distinction, however reasonable it may appear, to sustain a statute discriminating on the basis of sex. Justice Marshall explains this analysis as something more than the traditional minimum rationality test.[42] He reasons that the *Reed* decision can only be understood as an instance where the invidious character of the classification caused the Court to pause and scrutinize with more than the traditional care, with the resulting test lying somewhere in between strict scrutiny and minimum rationality. He finds that this "in between" test, or sliding scale, is used in the areas where the Court is faced with discrimination which it implicitly recognizes to have deep social and legal roots without necessarily having any basis in actual differences.[43]

The *Frontiero* decision more clearly supports Justice Marshall's analysis.[44] The assumption in *Frontiero* that the wives of servicemen are more often dependent upon their spouses than husbands of servicewomen plausibly bears sufficient relation to reality to meet the minimum rationality test, yet the Court struck the statute down. Although a plurality of the justices utilized the strict scrutiny test, the remaining justices, relying on *Reed,* used the sliding scale against which administrative convenience was not enough to sustain the statute. In *Stanton,* the Court, citing *Reed* as controlling, struck down a statute which was based on the traditional view of a woman's role and the traditional belief that education for a male is essential but not for a female. Stereotypes, however reasonable under traditional views, generally will fall under this sliding scale approach.[45]

Even if the Court has abandoned the strict scrutiny test as formulated in the plurality opinion of *Frontiero,* this new "in between" test is sufficiently potent to overturn discriminatory legislation, as is apparent from the foregoing decisions. However, in light of the *Kahn* decision and its reaffirmation in *Weinberger,* it is also apparent that the Court will continue to recognize the constitutionality of certain governmental actions that differentiate between the sexes.[46] It appears that legislative action will serve to satisfy a legitimate interest and even the strict scrutiny test if the statute can be justified as necessary to cushion the financial impact of past economic discrimination of women.

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[42] *See* San Antonio School District v. Rodriguez, 411 U.S. 1, 106 (1973) (Marshall, J., dissenting), in which Justice Marshall delivered a forceful dissent tracing the Court's recent developments in the equal protection area. He criticized the Court's rigid approach in Rodriguez where the majority failed to recognize public education as a fundamental right.

[43] *Id.* at 107.

[44] Justice Marshall joined in the plurality opinion finding sex as a suspect classification.

[45] *See* Taylor v. Louisiana, 95 S. Ct. 692 (1975).

[46] *See generally* Getman, *The Emerging Constitutional Principle of Sexual Equality,* 1972 SUP. CT. REV. 157 (1973).

If Section 402(g) was not related to child care as found by the Court in *Weinberger*, the statute clearly would have been upheld on the *Kahn* rationale.

The significance of these decisions will have immediate effect in the social security area by virtue of its gender-based benefit structure. Following the consistency of the former decisions, the gender-based benefit structure will be subject to attack with the aid of this new more stringent minimum rationality test. However, if the statute can be reasonably pigeonholed within the rationale of compensating women for past discrimination, the statute will most likely be upheld.

In *Polelle v. Secretary of Health, Education and Welfare*,[47] a male plaintiff unsuccessfully challenged provisions of the Social Security Act which permitted use of three fewer years as a basis for calculating a female wage earner's average monthly wage, thus increasing the monthly retirement benefits for females over males.[48] A three-judge district court upheld the provisions reasoning that the provisions were reasonably designed to compensate women for past discrimination in the economic job market. The difference of treatment is to be phased out this year, 1975. As noted by the court in *Polelle*, perhaps Congress has determined that by this time women will have worked a sufficient number of years under the Equal Pay Act[49] and similar acts, that further compensation for economic discrimination is unnecessary.[50] Such an inference could have a far reaching effect when dealing with the social security benefit structure. No longer will the courts be able to rely on the *Kahn* decision and its rationale to sustain benefits for women while denying like benefits for men.[51]

One particular area within the social security structure has already fallen as a result of recent Supreme Court decisions. Until *Weinberger*, husbands and widowers could not qualify for benefits unless they were able to show they received over one-half of their individual support from their wives.[52] This presumption that husbands are not dependent upon their wives is identical to the statutes in *Frontiero* and *Weinberger*. If the Court consistently follows the *Reed*, *Frontiero* and *Weinberger* decisions with their sliding scale analysis, it

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[47] 386 F. Supp. 443 (N.D. Ill. 1974).

[48] 42 U.S.C. § 215(b)(3) (1970).

[49] 29 U.S.C. § 206(d), Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (1970).

[50] 386 F. Supp. at 445. *See also* Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), *cert. denied sub nom.* Gruenwald v. Cohen, 393 U.S. 982 (1968); Rosen v. Public Service Electric and Gas Co., 328 F. Supp. 454 (D.N.J. 1971). In Rosen a private retirement plan favoring females was found to violate provisions within the Civil Rights Act against sex discrimination in compensation or privileges of employment. 42 U.S.C. § 2000e-2(a)(1) (1970).

[51] *See Sex Classifications, supra* note 31, at 186.

[52] 42 U.S.C. § 402(c)(1)(C), (f)(1)(D)(i) (1970).

reasonably must find these provisions unconstitutional. A three-judge district court has so held in *Goldfarb v. Secretary of Health, Education and Welfare*.[53]

In *Goldfarb*, a 70-year-old widower sought survivor's benefits after the death of his wife. Although his employment had not been covered by social security, his wife had paid taxes for some 25 years. The district court determined that, since Mrs. Goldfarb had been taxed at the same rate as men, she was entitled to the dignity of knowing that her social security tax would contribute to their joint welfare, or her husband's welfare should she predecease him, regardless of the ratio of their respective contributions to the family expenses.[54] If the Supreme Court grants certiorari in the *Goldfarb* case, it will again be faced head-on with a gender-based classification precluding benefits for men. Although the statutory scheme is strikingly similar to the *Frontiero* statutes, the Court will again be forced to consider whether the rationale of past economic discrimination, as in *Kahn*, can sustain the statute.

Despite the efforts of the Court to avoid a declaration finding gender-based classification subject to strict scrutiny, the recent decisions have achieved nearly the same effect. Although Justice Marshall criticizes the vagueness of the sliding scale analysis,[55] whether gender-based distinctions are found to be suspect classifications is of little relevance if the Court intends to utilize a test nearly equivalent to strict scrutiny. Certainly in the social security area, these recent decisions will cause men and women to pause and consider court actions before accepting corresponding benefits based solely on their sex.

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[53] Case No. 74 C 1188 (E.D.N.Y. June 17, 1975). Notice of Appeal to the United States Supreme Court was filed July 15, 1975. *See also* Silbowitz v. Secretary of Health, Educ. and Welf., 44 U.S.L.W. 2030 (S.D. Fla. June 30, 1975); Jablon v. Secretary of Health, Educ. and Welf., 44 U.S.L.W. 1027 (D. Md. July 28, 1975).

[54] *Id.* at 3.

[55] Justice Marshall viewed decisions such as Reed with the sliding scale analysis as efforts by the Court to shield rather than to reveal the true basis of the Court's decision. *See* San Antonio School District v. Rodriguez, 411 U.S. 1, 110 (1973) (Marshall, J., dissenting).