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Fifth Amendment - Due Process Clause - Sex Discrimination - Sex: A Suspect Classification; Frontiero v. Richardson

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CONSTITUTIONAL LAW—FIFTH AMENDMENT
DUE PROCESS CLAUSE—SEX DISCRIMINATION—
SEX: A SUSPECT CLASSIFICATION

Frontiero v. Richardson, 93 S. Ct. 1764 (1973).

SHARON A. FRONTIERO, a lieutenant in the United States Air Force, sought increased benefits for her husband as a "dependent" under 37 U.S.C. Sections 401, 4031 and 10 U.S.C. Sections 1072, 10762 Those statutes provide that spouses of male members of the uniformed services are always dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are, in fact, dependent for over one-half of their support.3

When her application was denied for failure to satisfy the dependency standard, appellant and her husband4 brought suit in the District Court against the Secretary of Defense, seeking declaratory and injunctive relief and contending that the difference in treatment under these statutes constitutes an unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment.5 The District Court, relying on Reed v. Reed,6 rejected appellant's constitutional challenge and concluded that the statutory scheme on a whole was

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1 37 U.S.C. § 401 (1962) provides in pertinent part: "In this chapter, 'dependent,' with respect to a member of a uniformed service, means... (1) his spouse;... However, a person is not a dependent of a female member unless he is in fact dependent on her for over one-half of his support...."

2 10 U.S.C. § 1072 (1958) provides in pertinent part:
   (1) 'Uniformed services' means the armed forces and Commissioned Corps of the Coast and Geodetic Survey and of the Public Health Service. (2) 'Dependent,' with respect to a member... of a uniformed services, means...
   (A) the wife;... (C) the husband, if he is in fact dependent on the member... for over one-half of his support;....


4 Joseph Frontiero was a full-time college student at the time of the suit. He received $205 per month in veterans' benefits while his total expenses were $354 per month. Thus, it was clear that he was not dependent upon his wife for more than one-half of his support.


6 404 U.S. 71 (1971).
not one which classifies on the basis of sex and that there was a rational basis for the different treatment.\footnote{341 F. Supp. at 209. The District Court determined the constitutionality of the statute by inquiring whether the classification established by the legislation was reasonable, not arbitrary, and whether there was a rational connection between the classification and a legitimate governmental end. The District Court stated that Reed did not require states which allegedly discriminated on the basis of sex to meet the compelling interest test but need only satisfy the rational connection standard. Compare Shapiro v. Thompson, 394 U.S. 618 (1969).}

On direct appeal, the Supreme Court reversed.\footnote{Frontiero v. Richardson, 93 S. Ct. 1764 (1973).} Speaking for four members of the Court,\footnote{Mr. Justices Douglas, Marshall and White concurred with the Brennan opinion.} Mr. Justice Brennan rejected the rational basis test on which the lower court relied and concluded that classifications based upon sex, as classifications based upon race, alienage, and national origin, are inherently suspect and must be subjected to strict judicial scrutiny.\footnote{93 S. Ct. at 1768. See also Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); and Oyama v. California, 332 U.S. 633 (1948) (national origin).} Brennan further concluded that administrative convenience, although not without some importance, is not a “shibboleth” and any statute which draws a sharp line between the sexes solely for the purpose of achieving administrative convenience is arbitrary and violates the Due Process clause of the Fifth Amendment.\footnote{93 S. Ct. at 1772. See also Stanley v. Illinois, 405 U.S. 645 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Carrington v. Rash, 380 U.S. 89 (1965).}

Mr. Justice Powell concurred in the judgment agreeing that the statutes constitute an unconstitutional discrimination against service-women in violation of the Due Process Clause of the Fifth Amendment, but refused to extend Reed to hold that all classifications based upon sex are inherently suspect.\footnote{93 S. Ct. at 1773. Concurring with Mr. Justice Powell were the Chief Justice and Mr. Justice Blackmun.} Justice Stewart, relying on Reed, concurred in the judgment\footnote{93 S. Ct. at 1772.} while Mr. Justice Rehnquist was the sole dissenter.\footnote{Id. at 1773.}

In Reed,\footnote{404 U.S. 71. The Reed opinion by Chief Justice Burger was for a unanimous court.} the mother and father of a deceased son filed separate petitions for administration of decedent's estate. Involved was an Idaho statute that compelled a preference for males over females of equal
entitlement. The Court held that regardless of their sex, persons within any one of the enumerated classes are similarly situated and in providing dissimilar treatment for men and women thus similarly situated, the challenged sections of the statute violated the Equal Protection Clause.

The Court in Reed applied the rational basis test and inquired whether the classification established by the legislation was reasonable, not arbitrary, and whether there was a rational connection between the classification and a legitimate governmental end. Classifications based upon sex were not declared inherently suspect and the Court found it sufficient in Reed to hold only that the mandatory preference for males, merely to eliminate hearings, was the “very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.”

Up to and including the Reed decision, no federal court had ever held sex a suspect classification although there had been important decisions which, however limited in their holdings, did help to eradicate sexual discriminations. Now for the first time members of the Supreme

16 Idaho Code § 15-312 (1948) provided in part:
Priorities in right of administration: Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order: 1. The surviving husband or wife or some competent person whom he or she may request to have appointed. 2. The children. 3. The father or mother.

17 404 U.S. at 77.

18 The reasonableness test as used in Goesaert v. Cleary, 335 U.S. 464 (1948) is the traditional test. This is similar to the test applied by the District Court, see note 7, supra. See also Morey v. Dowd, 354 U.S. 457 (1957); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

19 404 U.S. at 76.

20 Id.

21 There were some high state court decisions which recognized the need for close judicial scrutiny. See 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). In Sail'er Inn the court overruled a statute which barred females from working as bartenders and blasted the reasonableness test used by the Supreme Court adopting instead the more stringent “suspect classification” and “compelling interest” tests.

Court have declared sex a suspect classification and subject to strict judicial scrutiny. Although the Brennan opinion did not obtain a majority vote, the *Frontiero* decision, read in its entirety, appears to be the coup de grâce against sexual discrimination.

The Brennan opinion effectively reviews the history of our nation's prejudicial treatment of women. Beginning with Mr. Justice Bradley's famous statement made over a hundred years ago, which fostered this paternalistic attitude, and then reviewing some of the biased distinctions which have burdened the freedom of women, Justice Brennan concludes that sex is an "immutable characteristic determined solely by the accident of birth." He further states that the imposition of special disabilities upon members of a particular sex would seem to violate the basic concept of our system that "legal burdens should bear some relationship to individual responsibility." This strong language continues when Brennan states that sex characteristics "frequently bear no relation to ability to perform or contribute to society."

The decision to declare sex a suspect classification will find support from most legal writers. Brennan cites the increased sensitivity which Congress has manifested towards sex-based classifications and Congress' conclusion that classifications based upon sex are inherently invidious. This is of particular interest since Mr. Justice Powell felt that Congressional action precluded the Court from entering this field while Mr. Justice Brennan finds it authority for his decision.

In concurring, Mr. Justice Powell refused to extend the *Reed* holding to include sex as a suspect classification but preferred to reserve such

23 Bradwell v. Illinois, 83 U.S. [16 Wall] 130, 141 (1873). The statement reads in part: "[T]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."
24 *Id.*
25 *Id.*
27 *Id.*
28 *Id.*
29 93 S. Ct. at 1770, citing Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963 and § 1 of the Equal Rights Amendment.
30 93 S. Ct. at 1773.
expansion for the future since he found the authority of Reed sufficient to decide the case. He also stated that the Equal Rights Amendment which Mr. Justice Brennan specifically cites as authority, if adopted, will represent the will of the people "accomplished in the manner prescribed by the Constitution" and determine the precise question presented by the case.

Therefore, while Mr. Justice Powell preferred to allow any change at the present time to come from Congress and through the prescribed constitutional process, Mr. Justice Brennan viewed this process as authority on which to base a judicial decision. The crux of the problem is whether or not the court, by declaring sex a suspect classification, is pre-empting the legislative field. Sex is similar to race, national origin, and alienage, and as has been established previously, the Supreme Court has not found it necessary to wait for a constitutional amendment before declaring these classifications suspect. It has also been stated that if the Court had taken such a position (holding sex as a suspect classification), an Equal Rights Amendment would not be necessary. One can view the Equal Rights Amendment as a mini equal protection clause and a legislative reaction to the court's failure to provide sufficient legal protection for females. It therefore appears that it is the legislature attempting, via the Equal Rights Amendment, to fill a void left by the Court rather than, as Mr. Justice Powell contends, the Court pre-empting the legislative field by holding sex a suspect classification.

The Powell opinion does raise some question as to what the Frontiero decision would have been had there been no Equal Rights Amendment pending ratification or had it already been accepted or rejected. It is possible that had any of the foregoing situations existed, the Brennan opinion would have commanded a majority of the court. Speculation aside the fact is that four Justices have already held sex as a

31 Id.
32 Amendment XXVII [Proposed]: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." This proposed amendment was passed by Congress on March 22, 1972. See H. J. Res. No. 208, 92d Cong. 2d Sess. (1972).
33 The proposed amendment was given seven years to be ratified by three-fourths of the states. On March 15, 1973, Connecticut became the twenty-ninth state and on March 22, 1973, Washington was the thirtieth to ratify the amendment. As of August 18, 1973, ten states have rejected the amendment. See 31 Cong. Q. W. Rep. 43 (Jan. 13, 1973); 305 (Feb. 10, 1973); 500 (March 10, 1973); 820 (April 14, 1973).
34 93 S. Ct. at 1773.
suspect classification\textsuperscript{37} and three others\textsuperscript{38} seem to say that it is now improper for the court to do so. Only Stewart and Rehnquist offer no indication of joining the Brennan view in a future decision.\textsuperscript{39} If any of these Justices would join the Brennan view, this view would then become a majority and add a tremendous force to women's rights and completely abolish sexual discrimination. This had been the hope in Reed which, however, failed to materialize.\textsuperscript{40}

Even though the Brennan view did not obtain a majority vote, it nonetheless commands notice and hopefully is an indication of future holdings in this area. The Brennan opinion is important whether or not the Equal Rights Amendment is ratified. Assuming that the Amendment is ratified by the requisite number of states, it will only be applicable to governmental action and will not affect private action or purely social relationships between men and women.\textsuperscript{41} This is also true concerning other Constitutional Amendments such as the Equal Protection Clause and the Due Process Clause.\textsuperscript{42} Nonetheless, even though the E.R.A. will not be applicable, the holding of sex as a suspect classification by the Court brings a psychological lift to the women's rights movement. Of course if the E.R.A. fails to obtain the necessary number of state ratifications, then such a holding would become even more important since it would then be the basis of any attack against sexual discrimination.

The Frontiero decision is a constitutional landmark. In recent years, both federal and state courts have been intensely skeptical of distinctions based on sex.\textsuperscript{43} That the general trend in the country is the abolition of sexual discrimination is evidenced by the E.R.A. With the Frontiero decision attorneys will be able to cite a judicial holding which will

\textsuperscript{37} They being Justices Douglas, Marshall, White and Brennan.

\textsuperscript{38} These Justices are Powell, Blackmun, and Chief Justice Burger.

\textsuperscript{39} Rehnquist for the obvious reason that he dissented from the majority holding and affirmed the lower court's view and Stewart since his brief opinion merely reaffirms Reed and does not allow much room for speculation.

\textsuperscript{40} 5 Creighton L. Rev. 353 (1972); 25 Vand. L. Rev. 412 (1972); 1972 Wis. L. Rev. 626.


carry great weight in any litigation. The *Frontiero* holding in effect will supplant all of the previous decisions which have slowly eroded the ghost of Mr. Justice Bradley.44

The only step remaining for complete judicial success in equal rights for women is obtaining a fifth and therefore a majority vote of the Court. If, and when this will be achieved remains to be seen, but a prediction based upon the *Frontiero* decision must result in forecasting the Brennan view as the future majority of the court.45

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44 For a review of these decisions and Mr. Justice Bradley's remark, see notes 22 and 23, *supra*.

45 How the Frontiero decision will affect the Equal Rights Amendment is difficult to foresee. It is possible that this surprise decision could hinder the passage of the proposed amendment. See Martin, *The Equal Rights Amendment, supra* note 28, at 16.