

CASE NOTES

CONSTITUTIONAL LAW — DUE PROCESS — UNITED STATES SUPREME COURT IN PLURALITY OPINION NAMES SEX A SUSPECT CLASSIFICATION REQUIRING COMPELLING INTEREST TEST — *Frontiero v. Richardson*, 411 U.S. 677 (1973).

INTRODUCTION

Recent federal cases have raised the issue of the proper test to be employed in deciding whether male/female statutory classifications meet constitutional requirements of equal protection and due process. In adjudicating these sex discrimination cases, federal courts have applied three basic tests. The traditional "rational basis" test indicates that challenged legislation need only have a modicum of reasonableness to be sustained. The "compelling interest" test forces challenged legislation to pass rigorous scrutiny. A third rational basis test enunciated by the United States Supreme Court in the sex discrimination case of *Reed v. Reed*¹ lies somewhere between the first two.² In May, 1973, the Supreme Court again faced the issue of the proper test in sex discrimination cases in *Frontiero v. Richardson*.³ The failure of the Justices to agree on the proper test signifies the confusion in this area and the need for resolution. One possible way of avoiding the present semantic quagmire is application of a balancing test that incorporates traditional equal protection guidelines.

FRONTIERO v. RICHARDSON

Lieutenant Sharron Frontiero, United States Air Force, and her civilian husband Joseph Frontiero, a full-time student, challenged the constitutionality of several federal military assistance statutes. These statutes automatically granted quarters allowance⁴ and medical/dental benefits⁵ to spouses of male armed forces members, but required female members to prove their husbands' dependency.

1. 404 U.S. 71 (1971) (invalidating Idaho statutory preference for male estate administrators).

2. See articles cited note 57 *infra*.

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

4. 37 U.S.C. § 403 (1970).

5. 10 U.S.C. § 1076 (1970).

in fact.⁶ Lieutenant Frontiero failed to receive quarters allowance for her husband because she did not provide for more than half of his monthly expenses.

Plaintiffs alleged that the assistance statutes discriminated in two ways between male and female members of the armed services. Procedurally, the statutes discriminated by requiring only female members to prove their spouses' dependency. Substantively, they discriminated by granting benefits to wives not dependent in fact, but denying benefits to similarly-situated husbands.⁷

A three-judge panel for the Middle District of Alabama held the statutes constitutional in a 2-1 decision and denied relief.⁸

The district court held that the due process clause of the fifth amendment protects against arbitrary classifications. This protection is similar to equal protection guarantees of the fourteenth amendment.⁹ It held that the proper test for this case, involving wholly economic issues, was one of minimal scrutiny: the classification must be reasonable and not arbitrary, as enunciated in *Reed v. Reed*.¹⁰ The court assumed that the congressional aim in creating

6. The statute defining dependency for purposes of determining eligibility for quarters allowance reads as follows 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.

37 U.S.C. § 401 (1970).

Dependency for medical/dental care is defined similarly:

(2) "Dependent", with respect to a member or former member of a uniformed service, means —
(A) the wife;

....

(C) the husband, if he is in fact dependent on the member or former member for over one-half of his support

10 U.S.C. § 1072 (1970).

7. Petitioner's Brief for Direct Appeal at 10, 411 U.S. at 680.

8. *Frontiero v. Laird*, 341 F. Supp. 201 (M.D. Ala. 1972).

9. *Id.* at 206, citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *District of Columbia v. Brooke*, 214 U.S. 138 (1909).

10. 404 U.S. 71 (1971). Before applying the *Reed* test of reasonableness, the district panel considered whether the statutory classification was sex-based. It said no, reasoning that the general scheme distinguished between the dependency of female spouses and minor children, presumed dependent; and adult children, parents, and male spouses, presumed nondependent. Thus, it argued, the classifications were based on the relationship of the claimed "dependent" to the military member, not on sex. 341 F. Supp. at 205-06. Even if the classification were sex-based, however, the statutes met the rational basis test. *Id.* at 206. Dissenting, Judge Frank Johnson pointed out that the parallel sections regarding dependency of spouses did indeed prescribe different procedures for males and females, and it was these sections which plaintiffs had challenged. *Id.* at 209-10.

the presumption of wives' dependency was one of economy and administrative convenience, and held that aim sufficient to meet the rational basis test.¹¹

The majority also presented a rights/privilege argument. Since Congress never intended to grant benefits to those not dependent in fact, the windfall which occurred to some non-dependent wives because of the statutory presumption was not a right to which plaintiffs were entitled.¹²

In his dissenting opinion, Judge Johnson stated the issue to be "whether Congress may legitimately distinguish between men and women in the manner in which their spouses' dependency is established."¹³ He rejected the presumed congressional aim of convenience as unreasonable. If a presumption of dependency were convenient in processing benefit applications of male armed forces members, it would also be convenient in processing applications of females. Judge Johnson also disputed the majority's interpretation of *Reed*. The Supreme Court's holding in *Reed* had rejected mere convenience as a permissible aim in legislative classifications based on sex. Judge Johnson also rejected the majority's rights/privilege argument as obsolete; once the government extended its benefits, it must do so evenhandedly.¹⁴ He concluded that Congress could not legitimately distinguish between men and women in the manner prescribed by the assistance statutes.

On direct appeal,¹⁵ the United States Supreme Court reversed the ruling of the lower court in an 8-1 decision holding the statutes unconstitutional insofar as they required only female members to prove the dependency of their spouses. The Court, like the district panel, tested the due process challenge by equal protection standards.¹⁶ However, the split in the Court's reasoning is far more significant than its general agreement about the particular statutes in question. The controversy as to which equal protection test, whether compelling interest or rational basis, was proper in deciding whether the statutes violated the fifth amendment resulted in a plurality opinion, two concurring opinions, and a dissenting opinion.

11. 341 F. Supp. at 207.

12. *Id.* at 207-08.

13. *Id.* at 210.

14. *Id.* at 211.

15. Direct appeal to the Supreme Court is permitted from a three-judge-panel's granting or denying an injunction, 28 U.S.C. § 1253 (1970).

16. 411 U.S. at 680, n.5, *citing* *Bolling v. Sharpe*, 347 U.S. 497 (1954) (racial segregation in District of Columbia violates due process); *Schneider v. Rusk*, 377 U.S. 163 (1964) (law which prevents naturalized citizens from residing three years in their native land discriminates unconstitutionally). See also *M. Forkosch*, CONSTITUTIONAL LAW 516-19 (2d ed. 1969).

The plurality opinion of Justice Brennan, joined by Justices Douglas, Marshall and White, held that sex constitutes a suspect classification requiring the compelling interest test, which the statutes failed to meet. Justice Stewart concluded in a separate concurring opinion that the statutory presumption constituted "invidious discrimination." Justice Powell, joined by Chief Justice Burger and Justice Blackmun, argued that the Court should apply the rational basis test. He rejected naming sex a suspect class because he felt state legislatures are currently considering such a stand in the ratification of the Equal Rights Amendment. However, he held that the assistance statutes failed to satisfy even the rational basis test. The sole dissenter, Justice Rehnquist, agreed with the lower court that the challenged statutes were constitutional.

This split is indicative of a major issue facing the judiciary: what test will be applied in sex discrimination cases? Whether the cases arise as challenges to state statutes or to federal legislation, it appears that equal protection standards will be utilized. Imprecise terms like "compelling interest," "invidious discrimination," and "rational basis" muddy judicial waters already opaque. If lower courts are to apply equal protection standards uniformly, they must be able to discern what those standards are. The question as to the proper test for sex discrimination cases is in dire need of an answer.

BACKGROUND OF EQUAL PROTECTION TESTS

Several equal protection tests gradually developed in response to an expanding view of the fourteenth amendment. Legislative history of the amendment clearly indicated that the framers did not intend to protect women's rights. Susan B. Anthony's petition urging protection of women, presented at the congressional hearings, was totally rejected. Even strong supporters of the amendment feared that such "revolutionary" ideas would kill all possibility of congressional acceptance.¹⁷ Elizabeth Cady Stanton, president of the Women's Rights Convention, sought woman suffrage by urging the deletion of the word "male" from section two of the amendment. She, too, was ignored.¹⁸

17. J. JAMES, FRAMING OF THE FOURTEENTH AMENDMENT 73 (1956).

18. *Id.* at 130.

Consistent with this restrictive legislative inception, the Court first declared that equal protection applied only to Negroes.¹⁹ Around the turn of the century protection was gradually extended to prevent general racial and ethnic discrimination.²⁰ Later the Court applied the equal protection clause to cases involving economic issues. The protection, however, was minimal. In economic cases not involving civil liberties, the Court held that the contested statute would stand if it were reasonable and not arbitrary.²¹ This was the beginning of the traditional rational basis test.

Employing this minimal test, the Court upheld a Michigan statute which forbade employing of women bartenders unless they were wives or daughters of male tavern owners.²² Under this lenient test, few statutes failed to pass constitutional muster.²³ Basic guidelines for this minimal standard have been summarized by the Court as follows:

- (1) States may classify so long as the classifications are not arbitrary or without rational basis.
- (2) Some inequalities do not void classifications having a rational basis.
- (3) Any conceivable rational basis is sufficient to sustain the statute.

19. *Slaughter-house Cases*, 83 U.S. (16 Wall.) 36, 81 (1872) (equal protection clause not applicable to challenge to Louisiana slaughter-house monopoly by excluded butchers):

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision [equal protection]

20. *Truax v. Raich*, 239 U.S. 33 (1915) (protecting right of aliens to employment in Arizona); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating arbitrary discrimination against Chinese laundrymen).

21. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (upholding New York ban on truck advertising unless advertising related to owner's business).

22. *Goesaert v. Cleary*, 335 U.S. 464 (1948). Prior to applying equal protection standards to sex discrimination, the Court had sustained two sex-based classifications against due process challenges. In *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), the Court upheld an Illinois ban on women lawyers. The Court also sustained an Oregon statute which limited the female work day to ten hours. *Muller v. Oregon*, 208 U.S. 412 (1908). Language in the opinion indicated that classifications based on sex were proper in order to protect the "weaker sex" and the future of the race. *Id.* at 422. The recognition of "inherent differences between the two sexes," *Id.* at 423, has proved to be a judicial albatross in the recent litigation of women's rights.

23. See *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (upholding Oklahoma ban on fitting eye lenses into frames by anyone but optometrist or ophthalmologist, in spite of overbreadth of purported health and safety objective). *Cf.* *Morey v. Doud*, 354 U.S. 457 (1957) (invalidating Illinois law requiring licensing of all sales of money orders except by U.S. Post Office, Postal Telegraph, Western Union or American Express). For further information on the history of equal protection, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-132 (1969).

(4) The burden of proof rests on the plaintiff to show the arbitrariness of the classification.²⁴

This traditional test proved insufficient protection when the challenged statute was not merely economic. The Court required closer scrutiny in cases involving "suspect classifications." Originally limited to race,²⁵ suspect classes now include alienage,²⁶ with indications that wealth²⁷ and illegitimacy²⁸ are sometimes suspect. In addition, the stricter test of compelling state interest has been applied when "fundamental rights" are affected by the challenged statutes. These rights include procreation,²⁹ voting,³⁰ travel,³¹ marital privacy,³² and access to the ballot.³³ These two prongs, suspect classes and fundamental rights,³⁴ were the bases for the compelling interest test.

24. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

25. *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (rejecting separate-but-equal schools for Negroes); *Loving v. Virginia*, 388 U.S. 1 (1967) (declaring Virginia's anti-miscegenation statute unconstitutional).

26. *Graham v. Richardson*, 403 U.S. 365 (1971) (invalidating Arizona's denial of welfare benefits to non-citizens). The Court officially named alienage a suspect class in *Graham*; however, laws affecting aliens had previously been treated with strict scrutiny. *Truax v. Raich*, 239 U.S. 33 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The *Graham* holding was echoed in recent decisions that aliens may practice law if they pass the bar exam, *In re Griffiths*, 41 U.S.L.W. 5143 (U.S. June 25, 1973), and that aliens may not be excluded from permanent positions in state civil service, *Sugarman v. Dougall*, 93 S. Ct. 2842 (1973).

27. Wealth was suggested as a suspect class by a divided Court in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (Virginia poll tax declared unconstitutional). However, recent decisions of the Court have generally rejected this suggestion, e.g., *McGinnis v. Royster*, 410 U.S. 263 (1973) (sustaining New York statute denying goodtime credit for pre-trial incarceration for prisoners unable to post bond); *Schill v. Kuebel*, 404 U.S. 357 (1971) (Illinois law requiring retention of 10% of bail bond deposit but returning all of bail if entire amount posted is reasonable); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (Maryland limit on AFDC payments is constitutional). *Cf. Tate v. Short*, 401 U.S. 395 (1971) (disallowing Texas' jailing of indigent traffic violators).

28. Illegitimacy has been rejected by the Court as a basis for the state to disallow involuntary child support, *Gomez v. Perez*, 409 U.S. 535 (1973); or Workmen's Compensation benefits for the death of the father, *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); or tort recovery for wrongful death, *Levy v. Louisiana*, 391 U.S. 68 (1968). *Cf. Labine v. Vincent*, 401 U.S. 532 (1971) (intestate succession law may exclude illegitimate children since the parent could have provided for them by will).

29. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (Court invalidated Oklahoma statute requiring sterilization of chicken thief but not embezzler).

30. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

31. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (District of Columbia's one-year residency requirement for AFDC deprives recipients of right to travel).

32. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraceptive laws invade privacy).

33. *Bullock v. Carter*, 405 U.S. 134 (1972) (Texas' excessive filing fees for primary candidates prevent access to the ballot).

34. Lower federal courts have also considered whether fundamental rights include the choice of hair styles, *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 307 (1972) (El Paso High School hair length regulation); the right to work, *Corey v. Dallas*, 352 F. Supp. 977 (N.D. Tex. 1972) (Dallas ordinance prohibiting massage by member of opposite sex); freedom from incarceration, *Bolling v. Manson*, 345 F.

In *Reed v. Reed*³⁵ the Court unanimously³⁶ applied the rational basis test in a sex discrimination challenge without squarely addressing the issue of whether that was the proper test.³⁷ Even while selecting the traditional standard of review, the Court refused to sustain Idaho's statutory presumption that men are preferable to women as estate administrators. The Court said that the presumption did not rest upon some ground of difference having a fair and substantial relation to the object of the legislation³⁸ and that administrative convenience was an insufficient reason for giving a mandatory preference to males.³⁹ In this way, *Reed* grafted an extra dimension onto the traditional rational basis test in the area of sex discrimination. No longer could a state rest secure upon any rational basis it could hypothesize. Now it also had to demonstrate a reasonable correlation between the established classification and the statutory objective.

Before *Frontiero*, the Court had not ruled on a sex discrimination case⁴⁰ in full opinion⁴¹ since *Reed*. As a result, lower courts have often seriously disagreed as to the proper application of the *Reed* holding.⁴²

Supp. 48 (D. Conn. 1972) (statute disallowing goodtime credit for prisoners serving indefinite sentence); the right to choose one's place of residence, *Cooper v. Nix*, 343 F. Supp. 1101 (W.D. La. 1972) (Policy allowing college students to live off-campus in fraternities but not in church-sponsored housing); and the right to participate in athletic competition, *Brenden v. Independent School Dist.*, 342 F. Supp. 1224 (D. Minn. 1972) (policy excluding girls from all-male tennis and cross-country teams).

35 404 U.S. 71 (1971).

36. The unanimous decision was handed down by a seven-member Court prior to the seating of Justices Powell and Rehnquist.

37. 404 U.S. at 76.

38. *Id.*, citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

39. *Id.* For a thorough analysis of *Reed* see 5 CREIGHTON L. REV. 353 (1971-72).

40. The language of *Reed* was echoed in a somewhat convoluted sex discrimination case in *Stanley v. Illinois*, 405 U.S. 645 (1972). There the Court struck down an Illinois statute which permitted children of unwed fathers to be declared wards of the court without a hearing. *Id.* at 649. The Court again stressed that administrative convenience was an insufficient basis for the stereotyped presumption that unwed fathers are neither interested in nor qualified to care for their children's welfare. *Id.* at 656. Although the statute was challenged on equal protection grounds because of the difference in treatment of unwed fathers and unwed mothers, the opinion stressed due process hearing requirements; *i.e.*, all parents are entitled to a fitness hearing. *Id.* at 649.

41. Prior to *Frontiero* the Court summarily affirmed a district panel decision that Alabama's statute requiring married women to use their husband's surname when applying for a driver's license did not violate equal protection guarantees. *Forbush v. Wallace*, 405 U.S. 970 (1972), *aff'g* 341 F. Supp. 217 (M.D. Ala. 1971). This affirmation seems puzzling in light of the fact that the district decision, two months prior to *Reed*, was based in large part on the administrative inconvenience that could result if women were allowed to use their maiden name. A possible explanation for the apparent inconsistency with *Reed* may be that the lower court, in balancing the injury to the plaintiff against the state's cost of changing records for women desiring to use their maiden name, characterized the women's injury as *de minimis*. 341 F. Supp. at 222.

The significance of *Frontiero* lies in its failure to resolve satisfactorily the problems raised by *Reed*. The lack of a clear majority indicates that the issue of the proper sex discrimination test has not been settled.⁴³ In addition, it indicates that the Court has not resolved the larger semantic quarrel over applying equal protection standards.

JUSTICE BRENNAN'S PLURALITY OPINION

Suspect Class/Compelling Interest

The plurality opinion of Justice Brennan names sex a suspect class and then applies the compelling interest test. One effect of this test is to place the burden on the state to justify the sex-based classification.⁴⁴ The quantum of proof required to sustain a statute subjected to strict scrutiny is not clear. Cases indicate that the state must show "necessity,"⁴⁵ and that "a very substantial state interest"

42. Some lower federal courts have upheld pregnancy dismissal policies. *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1972), *vacated*, 409 U.S. 1071 (1973); *Schattman v. Texas Employment Comm'n*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 901 (1973); *Gutierrez v. Laird*, 346 F. Supp. 289 (D.D.C. 1972). But others have also declared such policies "unreasonable" and thus unconstitutional. *LaFleur v. Cleveland Bd. of Educ.*, 465 F.2d 1184, 1188 (6th Cir. 1972), *cert. granted*, 93 S. Ct. 1921 (1973); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972).

In addition, some lower federal courts after *Reed* have sustained hours regulation for female college students, *Robinson v. Board of Regents*, 475 F.2d 707 (6th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3080 (U.S. Aug. 1, 1973) (No. 221); and stricter penalties for escaping male felons, *Wark v. Robbins*, 458 F.2d 1295 (1st Cir. 1972).

In contrast, other courts, presumably applying the same standard, have invalidated South Carolina's use of boys only as senate pages, *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973); a reduction of mother's recovery for son's injury because of father's contributory negligence, *Wright v. Standard Oil Co.*, 470 F.2d 1280 (5th Cir. 1972), *rehearing and rehearing en banc denied* (Feb. 6, 1973), *cert. denied*, 41 U.S.L.W. 3645 (U.S. June 12, 1973); and the policy of excluding girls from boys' athletic teams, *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973); *Brenden v. Independent School Dist.*, 342 F. Supp. 1224 (D. Minn. 1972); *Reed v. Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972).

These cases clearly indicate that the courts are not consistent in their application of the *Reed* test of reasonableness.

43. For a thorough discussion of the effect of a 4-3-1 concurrence. see *Supreme Court No-Clear-Majority Decisions—A Study in Stare Decisis*, 24 U. CHI. L. REV. 99 (1956). The article points out the minimal stare decisis effect of such a decision and that the case is frequently cited for opposing views. *Id.* at 107-14. *Frontiero* has been cited as having named sex a suspect class, *Ballard v. Laird*, 360 F. Supp. 643, 647 (S.D. Cal. 1973) (invalidating naval regulations requiring mandatory discharge for male lieutenant twice passed over but allowing thirteen years for female to advance beyond that rank). It has also been cited as rejecting the suspect classification, *Aiella v. Hansen*, 359 F. Supp. 792, 796 (N.D. Cal. 1973) (declaring "unreasonable" the denial of employment benefits to pregnant women). Both cases are California federal district court cases. It is interesting to note that California's supreme court had declared sex classifications suspect prior to *Frontiero*. *Sail'Er Inn, Inc. v. Kirby*, 5 Cal.3d 1, _____, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971) (invalidating California ban on women bartenders).

44. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (invalidating Tennessee's durational residency requirement for voting).

45. *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (filing fees for candidates).

is insufficient.⁴⁶ Chief Justice Burger has complained that nothing ever seems to meet the compelling interest test.⁴⁷

In *Frontiero*, Justice Brennan stated that concrete evidence that the presumption of female dependency results in administrative efficiency and economy would meet the compelling interest test.⁴⁸ Later in the opinion, however, he re-affirms the *Reed* ruling that mere efficiency is never a sufficient reason for different treatment of men and women similarly situated.⁴⁹ The confusion may be dispelled by recognizing a distinction between *Reed* and *Frontiero*. In *Reed* the presumption of male superiority was not based on any correlation between sex and the qualifications required in estate administrators. The sole purpose of the presumption was to eliminate a hearing to determine the best administrator. In contrast, the presumption of dependency of wives on husbands in *Frontiero* was assumed to have a basis in fiscal realities: women were assumed usually to be dependent on their husbands. What Justice Brennan may have been recognizing was that sex classifications clearly related to the legislative objective and supported by the facts may sometimes be permissible.

However, when that aim is convenience, even if statistical evidence supports the generalization on which the classification rests, any overbreadth of the statute should render it infirm under the compelling interest standard.⁵⁰ This statute's overbreadth lies in the extension of benefits to wives who are not in fact dependent. Thus, the presumption of wives' dependency is over-inclusive, even if the government could show that most wives were dependent.⁵¹ Benefits received by non-dependent wives but denied to non-dependent husbands should be sufficient, under the compelling interest test, to invalidate the statutes.

Justice Brennan suggested four reasons why the Court should name sex a suspect class. The first was that *Reed* imposed more than the traditional rational basis test; naming sex a suspect class would thus be a natural extension of *Reed*. Justice Brennan's view of *Reed*

46. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

47. *Id.* at 363-64 (dissenting opinion).

48. 411 U.S. at 689.

49. *Id.*

50. *Carrington v. Rash*, 380 U.S. 89 (1965) (Court disallowed an overboard presumption when legislative aim was to protect ballot box).

51. The government presented no statistics to prove its assertion that most wives are dependent. However, statistics presented by petitioners indicated that 50% of all male military members make \$3,686 or less, while the median income of general female employees is \$5,323. In addition, three-fifths of all women workers are married. Petitioners' Brief for Direct Appeal at 51, 62. These statistics severely strain the credibility of an overwhelming presumption of dependence of wives on military husbands.

is supported by the *Eisenstadt v. Baird*⁵² decision. In that case Massachusetts' ban on distributing contraceptives to single persons was challenged as violative of equal protection. Citing *Reed*, the Court chose to apply the rational basis test to judge the classification separating married and single persons.⁵³ Massachusetts claimed that the legislative objective was the health and safety of its citizens. Although the Court recognized the dangers inherent in certain contraceptives, it held the classification distinguishing between married and single persons unreasonable: had the state's true purpose been safety, it would have protected married as well as single persons.⁵⁴ Thus the Court indicated that the *Reed* rational basis test required more than a reasonable legislative objective. The state must also show that the objective be reasonably furthered by the challenged legislation. In *Eisenstadt* the state did not meet the additional burden.

In another case,⁵⁵ the Court held that there are "higher values than speed and efficiency,"⁵⁶ again rejecting what might have been a "reasonable" objective prior to *Reed*.⁵⁷

However, lower federal courts applying *Reed* have not been convinced it required more than the traditional rational basis test. A major controversy appears to be whether *Reed* has shifted the burden of proof to the defendant⁵⁸ or whether plaintiff retains the burden of proof that the statute is arbitrary and unreasonable.⁵⁹ Although it is clear that the plaintiff must first prove that the classification is indeed sex-based, it seems more consistent with the spirit of *Reed* to require the state to show a reasonable basis for the classification.

A second reason advanced by Justice Brennan for declaring sex a suspect class is the nation's changing attitude toward women. Once a voice of paternalism, the Court no longer stereotypes women as men's weaker sisters⁶⁰ whose divine purpose is to serve solely as wives and mothers.⁶¹ However, two recent decisions indicating that

52. 405 U.S. 438 (1972).

53. *Id.* at 447 n. 7.

54. *Id.* at 450-52.

55. *Stanley v. Illinois*, 405 U.S. 645 (1972), *supra* note 40.

56. *Id.* at 656.

57. For articles discussing a possible new rational basis test, see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); 6 CREIGHTON L. REV. 393 (1973).

58. *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501 (S.D. Ohio 1972) (maternal leave policy); *Reed v. Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972).

59. *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1972), *vacated to consider mootness*, 409 U.S. 1071 (1973); *Bravo v. Board of Educ.*, 345 F. Supp. 155 (N.D. Ill. 1972) (maternal leave policy).

60. *Muller v. Oregon*, 280 U.S. 412, 422 (1908).

61. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872).

women's household duties may interfere with jury service⁶² or employment⁶³ are redolent of old attitudes. The plurality opinion refers to economic and legal changes in the woman's role as discussed by Leo Kanowitz, Professor of Law at the University of New Mexico,⁶⁴ and *The President's Task Force on Women's Rights and Responsibilities* (1970), thereby relying on sources urging changes in the legal status of women rather than proponents of societal restructuring and value reformation. Such a choice removes the chance for critics to decry the opinion as an imposition of the personal views of these Justices on the judiciary. The opinion, like the sources it cites, limits itself to an area properly within the purview of the Court, the legal rights of women.

The plurality opinion also points out similarities between sex and other suspect classifications. Like Negroes, women's status is affected by the high visibility of the distinguishing physical characteristics.⁶⁵ In addition, both classes have been deprived of legal rights and political power.⁶⁶ Even the right to participate in the political process has not resulted in representation in any way proportionate to their number nor eliminated social barriers.⁶⁷ In addition, sex, like illegitimacy, is usually an immutable "status of birth"⁶⁸ and often unrelated to ability.

Justice Brennan's final argument for including sex in the list of suspect classifications is that Congress has indicated awareness of sex discrimination by the Equal Pay Act,⁶⁹ Title VII of the Civil Rights Act of 1964,⁷⁰ and submission of the Equal Rights Amendment⁷¹ to the states. Justice Brennan considers these statutes evidence of congressional intent to end sex discrimination.⁷² It is inter-

62. *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding purely voluntary jury service for women).

63. *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971). The Court struck down a ban on hiring women with pre-school children because of lack of evidence that children interfered with work efficiency. *Id.* at 544. However, it stated that such proof would be a sufficient basis for the no-hiring policy. *Id.* Justice Marshall's concurring opinion urged the Court to reject such "ancient canards about the proper role of women," *Id.* at 545-6.

64. L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1969).

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

66. 2 G. MYRDAL, *AN AMERICAN DILEMMA*, Appendix V, "A Parallel to the Negro Problem" (2d ed. 1962).

67. *Id.* Although the judicial system cannot be blamed for all the disadvantages encountered by women, it is responsible for providing a legal framework within which equal protection guarantees are enforceable.

68. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972).

69. 29 U.S.C. § 206(d) (1970).

70. 42 U.S.C. §§ 2000(e) *et seq.* (1964).

71. H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).

72. In addition to the statutes enumerated by Justice Brennan, employment bene-

esting to note that Justice Brennan's reliance on prior congressional action contrasts with Justice Powell's argument that it is precisely this willingness of Congress to act that makes naming sex a suspect class premature.⁷³

Justice Brennan's reliance on congressional action to support naming sex a suspect class is merely a variation of the so-called *Morgan* doctrine.⁷⁴ That doctrine recognizes that Congress may expand, but not limit,⁷⁵ the rights of persons protected by the fourteenth amendment. The source of this power is the enabling clause of the fourteenth amendment. Whenever Congress notes patterns of impermissible discrimination, it may remove such violations. Relying on prior congressional action seems a firm basis for naming sex a suspect class in order to challenge legislation burdensome to women. Whether that rationale is proper in requiring the compelling interest test for challenges to legislation protective of women is less clear. If Congress has acted solely to prevent further discrimination against women, then relying on that action to name sex a suspect class is proper only when legislation burdensome to women is being considered. If, on the other hand, Congress has acted to remove discrimination *on the basis of sex*, all sex-based classifications, including protective legislation, should be subject to the compelling interest test. This latter view seems more realistic in light of Congress' recognition of the effect that ERA passage may have on protective legislation.⁷⁶

In sum, the plurality opinion, noting prior case law, similarity of sex to other suspect classes, changing national opinion, and congressional action, held that the sex-based classification in *Frontiero* did not meet the compelling interest test required for suspect classifications.

fits have been extended to female employees. 5 U.S.C. § 7152 (1970). Widowers receive equal treatment with widows under Federal Civil Service Survivor's Annuities. 5 U.S.C. § 8431 (1970). Both men and women may claim Social Security retirement benefits at age 62. 42 U.S.C. § 402(a) (2) (1970).

Even the challenged statutes in *Frontiero* regarding dependency of spouses of military members were amended to extend the presumption to spouses of female members. S. 2738, 92d Cong., 2d Sess. (1972). However, the House adjourned before considering its comparable resolutions. Brief for Respondent at 12-13.

The Court's willingness to consider a case that might soon be mooted by legislative action may indicate an awareness of the need for Supreme Court guidelines in the area of sex discrimination.

73. 411 U.S. at 692.

74. *Katzenbach v. Morgan*, 384 U.S. 641 (1966), upheld the Voting Rights Act of 1965 (42 U.S.C. § 1973b(e) (Supp. V, 1965-69)) which forbade the use of English literacy tests to deny suffrage to Puerto Ricans residing in New York. The Court recognized Congress' power to enforce the fourteenth amendment pursuant to the amendment's enabling clause, even though the Court itself had previously upheld the constitutionality of literacy tests in *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959).

75. *Katzenbach v. Morgan*, 384 U.S. 641, 651 at n. 10 (1966).

76. 118 CONG. REC. 4395-430, 5431-37 (daily ed. Mar. 21-22, 1972) (Senate debates on proposed amendments which would leave protective legislation unaffected by ERA).

JUSTICE STEWART'S CONCURRING OPINION

Invidious Discrimination

Justice Stewart concurred with the judgment of the Court but based his decision on the belief that the statutes constituted "invidious discrimination." However, Justice Stewart did not explain his decision nor define the term, thus failing to clarify which test he would apply in sex discrimination cases.

An inconsistent application of the term has been aggravated by lack of a clear definition. "Invidious" has indicated discrimination that is "evil"⁷⁷ or is "of an unusual character"⁷⁸ or creates a "closed class."⁷⁹ It has been applied to statutes discriminatory in application⁸⁰ and to those discriminatory on their face.⁸¹ Even the degree of discrimination has been considered irrelevant where basic rights are concerned.⁸²

The place of "invidious discrimination" in the equal protection labyrinth is far from clear. Is it a limit on the rational basis test?⁸³ Or is it the reason for invoking the compelling interest test?⁸⁴ Or is it a conclusion, whichever test has been employed, that negates any

77. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 674 (1966) (Black, J., dissenting).

78. *Morey v. Doud*, 354 U.S. 457, 464 (1957).

79. *Id.* at 467.

80. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

81. *Truax v. Raich*, 239 U.S. 33 (1915). The invalidated statute was entitled "An act to protect the citizens of the United States in their employment against non-citizens of the United States, in Arizona . . ."

82. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966).

83. Use of the term in early economic cases cited invidious discrimination as the outer limits of the rational basis test:

The prohibition of the Equal Protection Clause goes no further than invidious discrimination.

Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

[Lack] of equal protection is found in the actual existence of an invidious discrimination . . . not in the mere possibility that there will be like or similar cases which will be treated more leniently.

Queenside Hills Co. v. Saxl, 328 U.S. 80, 84-85 (1946) (New York law requiring fire sprinklers in existing lodging houses but not future buildings).

84. "Invidious" also became the language of the compelling interest test describing statutes restricting fundamental rights. The Court held that Oklahoma's sterilization of certain classes of criminals was "as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment . . . [It] is a clear, pointed, unmistakable discrimination." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). See also cases affecting voting rights: e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964) (diluting votes by apportionment).

This use of the term "invidious discrimination" is credited to Justice Douglas in an article commending the activism of the Court. Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural-Law — Due Process Formula*, 16 U.C.L.A.L. Rev. 716 (1969).

alleged objective?⁸⁵

Despite such ambiguity as to the definition and proper place of "invidious discrimination," Justice Stewart's own definition is discernible from his prior decisions: the term describes the unconstitutionality of overbroad statutes. In *Carrington v. Rash*,⁸⁶ the Court struck down a Texas statute that created the irrebuttable presumption that servicemen were non-residents for voting purposes. Justice Stewart, writing for the majority, explained that the statute was overbroad because it excluded from voting servicemen who were in fact residents; it therefore constituted invidious discrimination.⁸⁷

He has also indicated that invidious discrimination is synonymous with the rational basis test. In 1966 he joined Justice Harlan's dissent in *Harper v. Virginia Board of Elections*,⁸⁸ agreeing with Justice Harlan that Virginia's poll tax was constitutional. Its purpose of protecting the voting process was a reasonable legislative objective and therefore sufficient to negate invidious discrimination.⁸⁹ Justice Stewart has continued to equate invidious discrimination with the rational basis test.⁹⁰ Writing for the majority in *Dandridge v. Williams*⁹¹ he said that the proper test of Maryland's maximum limit on aid to families with dependent children (AFDC) was whether the statute was "rationally based and free from invidious discrimination."⁹² Like *Dandridge v. Williams*, *Frontiero* is a case involving economic rights and should, according to Justice Stewart's past pronouncements, be judged by the traditional rational basis test.

The semantic confusion regarding "invidious" is exemplified in *Frontiero* by the fact that Justice Stewart uses the term to express his view that the statutes are unreasonable, while Justice Brennan declares that Congress has decided sex classifications are "inherently invidious" and must therefore be judged by the compelling in-

85. Invidious discrimination was found by the Court in statutes limiting rights of non-freehold candidates for Georgia school boards, *Turner v. Fouche*, 396 U.S. 346 (1970); welfare recipients, *Shapiro v. Thompson*, 394 U.S. 618 (1969); and illegitimates, *Levy v. Vincent*, 391 U.S. 68 (1968). However, charges of invidious discrimination were refuted in Illinois' 10% charge on bail bond deposits, *Schilb v. Kuebel*, 404 U.S. 357 (1971); and Maryland's limit on AFDC, *Dandridge v. Williams*, 397 U.S. 471 (1970).

All of these cases combine the conclusory language of "invidious discrimination" with application of both the rational basis and the compelling interest tests.

86. 380 U.S. 89 (1965).

87. *Id.* at 96.

88. 383 U.S. 663 (1966).

89. *Id.* at 684-85.

90. *Williams v. Rhodes*, 393 U.S. 23, 51 (1968) (dissenting opinion) (invalidating Ohio's procedure for admitting third parties to the ballot in Presidential elections).

91. 397 U.S. 471 (1970).

92. *Id.* at 487.

terest test.⁹³

Because of Justice Stewart's position, he should not be counted among those favoring the compelling interest test for sex classifications. Without his support the four-man plurality lacks the force desired by women's rights advocates.⁹⁴

Justice Stewart's reasons for not joining Justice Powell's opinion may only be hypothesized. However, his *Dandridge v. Williams* opinion indicates his wish to retain the traditional test, while Justice Powell's opinion only cautions restraint in employing the stricter test at this particular time. Even more intriguing is the question of why Justice Stewart, in employing the rational basis test, did not decide like Justice Rehnquist that the statute was constitutional. It is possible that he was disturbed by lack of proof that the legislative aims of convenience and economy were actually served by the sex classification. He may have considered the statutes' granting of benefits to nondependent wives overboard, as in *Carrington v. Rash*.⁹⁵ He may have felt bound by the *Reed* rejection of the sex classifications to promote administrative efficiency.

Whatever his reason, Justice Stewart's conclusion of "invidious discrimination" points out again the confusion among the Justices as to which test is proper in sex discrimination cases.

JUSTICE POWELL'S CONCURRENCE

Justice Powell, joined by Chief Justice Burger and Justice Blackmun, found the statutes unable to meet the rational basis test delineated in *Reed*, but did not give reasons for that decision. Instead he discussed the propriety of naming sex a suspect class at this time. Rejecting the appellants' argument that sex classifications should be subjected to the compelling interest test,⁹⁶ he noted that state legis-

93. 411 U.S. at 687-88.

94. See note 43, *supra*.

95. This reason seems highly plausible in light of the recent rejection by Justice Stewart of "overboard" presumptions concerning food stamps, *United States Dept. of Agriculture v. Murry*, 93 S. Ct. 2832 (1973) (irrebuttable presumption that persons claimed as dependents for IRS purposes may not receive food stamps excludes needy individuals); *United States Dept. of Agriculture v. Moreno*, 93 S. Ct. 2821 (1973) (irrebuttable presumption that households containing nonrelated persons are not eligible for food stamps excludes needy individuals).

96. Petitioners encouraged the adoption of a compelling interest test for sex discrimination cases. However, they also suggested a compromise position with narrower scope. Recognizing a difference between protective legislation and legislation which further burdens a disadvantaged class, they urged the Court to apply the strict scrutiny test only to the latter type of statute. Petitioner's Brief for direct appeal at 31-32. Neither Justice Brennan nor Justice Powell discussed the compromise test.

latures are currently considering⁹⁷ the Equal Rights Amendment. The ERA provides that "(e)quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."⁹⁸ Justice Powell's rationale that the Court is preempting the legislative function is based on the belief that ERA ratification will automatically result in naming sex a suspect class.⁹⁹

What Justice Powell does not discuss is what will happen if the ERA is not ratified. He does intimate that the Court might at that time declare sex a suspect class: "There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people."¹⁰⁰ In order to determine the probability of such a decision, it is necessary to review recent stands taken by the Justices not joining in the plurality opinion.

Justice Powell's language in *Frontiero* suggests probable amenability to the idea of judicial resolution of sex-based legislation. As a new member of the Court he did not participate in *Reed* or *Graham v. Richardson*,¹⁰¹ a recent case officially naming alienage a suspect class.

Justice Stewart's preference for traditional equal protection tests makes his support for naming sex a suspect class extremely doubtful. His agreement with the *Graham* holding is not inconsistent with this view since laws affecting aliens had been carefully scrutinized in early equal protection cases.¹⁰²

As author of the unanimous opinion in *Reed*, Chief Justice Burger seems a likely supporter of women's rights. However, his concern over "substantive due process"¹⁰³ and his belief that the compelling

97. Ratification requires approval by 38 states. At present 30 states have ratified. One of these, Nebraska, has repealed its ratification but the legal effect of repeal by a state is in question. During the next legislative session 18 states are expected to consider the amendment. Supporters of the amendment have until 1979 to gain ratification.

98. H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).

99. This view is supported in *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1520 (1971). Professor Kanowitz has suggested that only sex classifications based upon function would be acceptable under the ERA. Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131, 182 (1968), in L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* at 149 (1969).

Dr. Ralph Emerson of Yale has stated that the compelling interest test is insufficient to describe the effect of ERA ratification. Instead, sexual classifications will be impermissible unless based on physical characteristics relating only to one sex, real differences in life situations and individual characteristics, functional differences, and classifications protecting the right of privacy. Brown, Emerson, Falk, Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. REV. 871 (1971).

100. 411 U.S. at 692.

101. 403 U.S. 365 (1971).

102. *Truax v. Raich*, 239 U.S. 33 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

103. *Eisenstadt v. Baird*, 405 U.S. 438, 467 (1972) (dissenting opinion).

test is too strict¹⁰⁴ indicate that he will support a more lenient standard of review.

Justice Blackmun participated in the *Reed* decision and wrote *Graham v. Richardson*. In addition he has previously voted with Justices Marshall and Brennan in trying to protect the interests of disadvantaged groups.¹⁰⁵ He might well be the best prospect for a swing man if the ERA is not ratified.

Justice Rehnquist seems the least likely of the present Justices to vote with the plurality. Not present on the Court at the time of the *Reed* decision, he has rejected decisions which he feels are policy judgments of the Court.¹⁰⁶ It seems unlikely that he would urge naming sex a suspect class if legislatures reject such a step. In addition, Justice Rehnquist's willingness to overlook possible discrimination against Negroes and Chicanos in order to sustain the reasonableness of a limit on AFDC benefits¹⁰⁷ suggests a strong belief that the Court should not replace legislative judgments with its own.

WHAT FOLLOWS FRONTIERO?

If the Court does not name sex a suspect class in a definitive decision, the application of the *Reed* rational basis test could become determinative of future litigation regarding sex discrimination. Applying the test as Justice Powell does in *Frontiero*, the Court requires a greater justification than convenience. In contrast, Justice Rehnquist's dissent, relying on the opinion of the district panel, envisions a lesser standard of reasonableness.¹⁰⁸ His application of the test finds acceptable an unproven presumption that most wives of military men are dependent and that husbands of female members of the armed services are not. The reasonableness standard he employs is reminiscent of early equal protection cases in the area of economics.

The quantum of proof necessary to meet the *Reed* rational basis test is another area of equal protection that appears in dispute.¹⁰⁹

104. *Dunn v. Blumstein*, 405 U.S. 330, 363-64 (1972) (dissenting opinion).

105. *James v. Valtierra*, 402 U.S. 137, 143-45 (1971) (Marshall, J., dissenting) (majority upheld California statute requiring referendum for low-income housing).

106. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 179-82 (1972) (dissenting opinion).

107. *Jefferson v. Hackney*, 406 U.S. 535, 547 (1972).

108. His opinion could possibly reflect a belief that the classification is not sex-based, as held by the district panel. *See* note 10, *supra*.

109. Because of the scarcity of Supreme Court rulings on sex discrimination, other equal protection cases must be examined in order to determine the types of legislative objectives that the Court has upheld as reasonable. In litigation which challenges statutes that impose extra burdens on or limit government aid to indigents, the Burger Court has been willing to apply a very lenient standard of reasonableness.

Merely saying that the Court will use the *Reed* rational basis test for sex discrimination cases answers only half the question. There remains the issue as to whether the test will be leniently or rigorously applied.

Should the Court decide that sex is not a suspect class, it might also decide that a lenient test of reasonableness of state and federal legislation was sufficient. In that case, any state argument that legislation protects the health and safety or assists the police power would be satisfactory, even though proof of the correlation between the legislative objective and the sex-based classification was minimal, perhaps even non-existent. On the other hand, the Court might apply a more stringent rational basis test because it considered sexual equality a right protected by the fourteenth amendment. Although it is uncertain which aims would be considered reasonable under such a test, it is probable that the Court would demand greater proof that the statute does in fact serve the proposed aim. Whichever "reasonable" standard is applied it seems clear that the Court will sustain the legislation if any objective, and not just the primary purpose of the statute, is sufficient.¹¹⁰

The problems that arise in applying the *Reed* rational basis test epitomize the doctrinal struggle taking place in the Court concerning equal protection. The lack of a clear majority in *Frontiero* provides no solution to the dilemma. It merely confirms the uncertainty of the Court concerning how to maintain viability of traditional constitutional principles in light of current equal protection challenges. The Court seems to fear burdening the tests with numerous new suspect classes and basic rights. "Invidious discrimination" has lost all

For example, the better adaptability and survival capacity of the young were sufficient bases for limiting AFDC but not other assistance payments. *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972). Oregon's forcible entry and detainer statute was deemed reasonable because of the unique landlord-tenant situation, even though the rapid eviction process did not allow tenants to show the landlord's failure to repair. *Lindsey v. Normet*, 405 U.S. 56 (1972). Also, reduction of social security payments to reflect workmen's compensation but not other disability benefits was reasonable because the framers intended the programs to serve the same purpose. *Richardson v. Belcher*, 404 U.S. 78 (1971). And a legislative aim of maintaining the balance between welfare families and the working poor was a reasonable objective in limiting AFDC payments. *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). However, when the Court considered statutes affecting privacy, it rejected the purported state aim of public health and safety because it felt that was not the true objective of the act. *Eisenstadt v. Baird*, 405 U.S. 438 (1972). One should note that the strict *Eisenstadt* test was applied by a divided seven-man Court. Justices Rehnquist and Powell took no part in the decision.

The language of these cases reflects not so much a belief that the statutes are reasonable or not as it reflects a belief that food and shelter are not constitutionally protected rights in the same way that privacy is. The Court's decision that "reasonableness" is the proper test is deceptively simple. The single test covers a wide range of applications extending from the traditional hands-off policy to a more rigorous examination somewhere between rational basis and compelling interest.

110. See *McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973).

meaning as a standard; it is merely conclusory language that masks the absence of reliable guidelines. The compelling interest test is so strict that virtually no state interest can meet the standard. In addition, there is the possibility that a new rational basis test exists which is an undefined combination of reasonable and compelling.¹¹¹ Emerging litigation regarding sex discrimination is enmeshed in this doctrinal dilemma, and *Frontiero* has provided no sure footing out of the morass.

EFFECT OF CHOOSING THE PROPER TEST ON FUTURE LITIGATION

Merely recognizing the division of the Court is not sufficient. Advocates of women's rights realize that resolution of this matter of the proper equal protection test will determine how much assistance they may expect from courts in future litigation. Application of the possible tests to a hypothetical sex discrimination case may illustrate the significance of the problem: a suit by female students to compel their public high school to discontinue a policy barring girls from male athletic teams. Although this hypothetical does not represent one of the most serious areas of sex discrimination, it does readily lend itself to analysis of the possible equal protection tests.¹¹²

Under the old equal protection divisions, if sex were declared a suspect class, as urged by the plurality opinion in *Frontiero*, the court would apply the compelling interest test. The plaintiffs would first have to show that the classification was sex-based — that they were being prevented from competing because they were girls. After such a showing, the burden would shift to the defendant school or

111. *Robison v. Johnson*, 352 F. Supp. 848, 856-57 (D. Mass. 1973) (holding that veterans' educational benefits cannot be granted to former active servicemen and denied to conscientious objectors who had alternative service). The district court based its decision on a view that the congressional aim of the statute was to compensate for disrupted lives, an aim applicable to both classes of veterans. See 6 CREIGHTON L. REV. 393 (1972-73).

112. Some proponents of a strong athletic program for women believe that allowing women to try out for men's teams will be ineffective in providing equal athletic opportunities because few women will gain a place on the team. However, there is great local concern over financial inequalities in collegiate athletic programs. Prior to the 1973-74 school year, the University of Nebraska at Omaha allocated over \$200,000 for men's athletics while no funds were provided for the women's program. This year the administration allowed \$7,500 for women's athletics and indications are that this sum will be substantially increased next year. Letter from Connie Claussen, Women's Athletic Director at the University of Nebraska at Omaha to Joyce Dixon, September 27, 1973.

National concern, as well as local, is beginning to focus on funding disparities between male and female athletic programs. In addition, problems such as exclusion of girls from industrial art classes, stereotyped sex roles presented in textbooks, and sexist career counseling are under attack in schools across the country. *Wall Street Journal*, Oct. 9, 1973, at 1, col. 1.

activities association¹¹³ to prove a compelling reason for the classification. If the reasons proposed were safety of the girls, maintaining quality of competition, or supporting community athletic values, which could conceivably qualify as compelling reasons, any overbreadth of the policy in meeting those aims would make them unacceptable.¹¹⁴ With a general policy of excluding girls, such overbreadth could be found to defeat each proposed objective. The safety of girls cannot justify excluding girls from all teams, particularly for non-contact sports like golf.¹¹⁵ Some girls are superior to their male competitors and could raise the level of competition. All members of the community do not demand separate teams. With the application of the compelling interest test, the burden of proof that the statute is not overbroad in the particular case being litigated should rest on the defendant.

In addition to defeating charges of overbreadth, the defendant would also have to show that there were no less drastic means available to attain a valid state objective, such as privacy.¹¹⁶

It seems unlikely that any stated purpose would be sufficient to meet the stringent compelling interest test. However, even under the compelling interest test, the court might uphold the separate-but-equal doctrine in sex discrimination cases as it did previously in racial cases.¹¹⁷ If so, the state could defend its policy of separate teams if it could prove that the girls could compete in all-girl teams that provided equal athletic opportunities.¹¹⁸ The application of this discredited doctrine to sex discrimination cases is not unforeseeable. In a summary affirmance in 1971, the Supreme Court upheld a lower federal court decision that the policy of limiting admission to state-operated Winthrop College to females only was permissible because

113. The fourteenth amendment does not protect against private discrimination. However, a sports association that regulates high school competition has been declared state action. *Reed v. Nebraska School Activities Ass'n*, 341 F. Supp. 258, 260 (D. Neb. 1972). If the regulations were imposed by private schools, usual considerations about what constitutes state action would apply.

114. *Carrington v. Rash*, 380 U.S. 89 (1965).

115. If the school policy excluded girls from mixed competition only in contact sports like football, the safety objective might meet the compelling interest test. However, the individual plaintiff might be able to prove that the statute was overbroad as it affected her because her individual physical condition made her capable of competing without fear of serious harm. *Cf. Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972) (rejecting generalizations regarding diminished work capabilities of pregnant women).

116. The less-drastring-means approach was used to protect teachers' right of association in *Shelton v. Tucker*, 364 U.S. 479 (1960). "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488.

117. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (sustaining separate accommodations for Negroes), *questioned in Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954).

118. *Brenden v. Independent School Dist.*, 342 F. Supp. 1224 (D. Minn. 1972).

South Carolina offered a complete range of academic institutions.¹¹⁹

A further result of naming sex a suspect class might be to impose an affirmative duty on the states to remedy discriminatory situations. In the area of sports this might mean active recruitment of female team members, coaches and managers.

If, however, sex is not named a suspect class, the hypothetical case would have a far different result.¹²⁰ Applying the traditional rational basis test, plaintiffs would have to prove not only that the classification was sex-based but also that it was unreasonable and arbitrary. A stated purpose of protection of girls would suffice unless plaintiffs could prove that the separate teams did not promote safety. Even if the more stringent *Reed* rational basis test were imposed, a purpose of safety would undoubtedly suffice. However, under *Reed* the burden would be on the state to prove the correlation between the separate teams and safety. The state might also satisfy either rational basis test with proof that separate teams promote greater participation by both sexes or that they protect the quality of competition. Any overbreadth of such statutes would not offend equal protection since some inequities are acceptable under the reasonable basis test.¹²¹ Economy, if the state could prove savings by having separate teams, might be sufficient, but this is a question not satisfactorily answered by *Reed* or *Frontiero*.

No matter which rational basis test is employed, there is the possibility that any invalidated statute will be termed "invidious discrimination." As indicated earlier, the term is merely a conclusion hovering over the rational basis test.

Because of the varying results, the choice of compelling interest test, traditional rational basis, or *Reed* rational basis will have a great effect on sex discrimination litigation.

RESOLVING THE FRONTIERO DIVISION

Because the Court seems unwilling to abandon historic guidelines and because it is hesitant to expand suspect classes and fundamental freedoms, a balancing test suggested by Justice Marshall in his

119. *Williams v. McNair*, 401 U.S. 951 (1971), *aff'g mem.*, 316 F. Supp. 134 (D. S.C. 1971).

120. It is, of course, possible that the Supreme Court could refuse to name sex a suspect class but would declare that females have a "fundamental right" to be treated the same as similarly-situated males. Although this would also result in application of the compelling interest test, challenges might be more difficult under this prong of the compelling interest test because the Court might be reluctant to hold that males and females are similarly situated. See *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).

121. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). *Cf.* *United States Dept. of Agriculture v. Murry*, 93 S. Ct. 2832 (1973); *United States Dept. of Agriculture v. Moreno*, 93 S. Ct. 2821 (1973). See note 95, *supra*,

Dandridge v. Williams dissent¹²² and restated in his majority opinion in *Dunn v. Blumstein*¹²³ seems best suited to the issues of sex discrimination.

In applying this test, the courts would consider three things: (1) the character of the class, (2) the individual interest affected, and (3) the governmental interest asserted.¹²⁴ These categories are particularly apposite to basic concerns of sex discrimination cases.¹²⁵ Because Justice Marshall did not explain this test in depth, an analysis of its application in sex discrimination cases is a prerequisite to recommending its adoption.

Considering the character of the class would require judges to examine the class in light of the statute being challenged. Rather than viewing all sex classifications as suspect, courts could consider the relationship between the class (men or women) and the legislative aim. They could also determine the extent of correlation between the characteristic and the class, i.e., how many members of the class possess the characteristic. For instance, in *Frontiero* the Court would consider how many wives were actually dependent on husbands in passing on the validity of a statutory presumption favoring wives' dependency. Bona fide sex characteristics and individual traits could be taken into account and unsupported stereotypes would be rejected as not representing the true nature of the class. Thus, women's characteristic of childbearing would be noted by the court, but would be obviated if the individual woman were incapable of having children. In addition, this general characteristic would not be presumed to be a hindrance to employment efficiency absent a showing of such effect.

To weigh the individual interests affected, courts could incorporate earlier findings of fundamental rights, such as marital privacy and voting. However, unlike the present system, rights would not have to be classified as one of only two types: fundamental rights or rights unprotected except from arbitrary and capricious legislation. Courts could acknowledge levels of deprivation¹²⁶ ranging from basic rights to personal inconvenience or affront at legislative acts that represent paternalistic views toward women.¹²⁷

122. 397 U.S. 471, 521 (1970).

123. 405 U.S. 330 (1972).

124. 397 U.S. 471, 521 (1970).

125. They are also valuable criteria for judging all equal protection challenges.

126. For an interesting discussion of vertical ranking of rights, see *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969).

127. It is undoubtedly true that a ranking of rights gives judges unsympathetic to women's rights an opportunity to regard some injuries as de minimis. See *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972), see note 41, *supra*. These decisions, however, would reveal the true basis for the holding rather than disguise it behind the broad language of "rational basis" or "not invidious discrimination."

A major improvement in such a balancing system would be that issues of economics and social welfare could receive greater protection; now only minimally protected, they could be considered greater than trivial interests but still less than fundamental rights. In addition, as societal attitudes towards women's rights changed, the changes could be reflected within the bounds of this balancing test, rather than requiring bold judicial reformation of equal protection standards.

In evaluating the governmental interests asserted, courts could be more critical than the traditional tests required. The burden would rest on the state to prove the appropriateness of the legislation in meeting the objectives. Prior decisions would serve as guidelines in determining the relative importance of the state interests. Administrative convenience, as suggested in *Reed and Frontiero*, would be a minimal state objective and yet might survive a constitutional challenge if the individual interest affected were also minimal.

It is for these reasons that the balancing test recommended by Justice Marshall might mend the division of the Court as seen in *Frontiero*.

CONCLUSION

Whenever basic doctrines are in flux, as is now the case with equal protection standards, semantic battles over "rational basis," "compelling interest," and "invidious discrimination" prevent application of clear, firm guidelines. In an effort to apply past standards in accord with a changing consciousness of the Court and the nation, those standards often become twisted beyond recognition and conflict with historical meanings. Continuing division in the Court increases confusion where clarity is needed.

A balancing test can combine historical guidelines and contemporary values. It can continue to provide maximum protection for fundamental rights and still recognize societal changes that expand women's role. Such an approach is to be lauded, not feared. Particularly in the area of sex discrimination, the equal protection test advocated by Justice Marshall is a more workable guide than the Court's present controversy over whether sex is or is not a suspect class.