Constitutional Law - *Frontiero v. Richardson*, Uniform Services Fringe Benefit Statute which Presumes Spouses of Male Members to be Dependent, but Requires Spouses of Female Members to Be Dependent in Fact, is Violative of Due Process

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CONSTITUTIONAL LAW—Frontiero v. Richardson, Uniform Services Fringe Benefit Statute which Presumes Spouses of Male Members to be Dependent, but Requires Spouses of Female Members to be Dependent in Fact, is Violative of Due Process

Sharron Frontiero, a married air force servicewoman, applied for an increase in quarters allowance and for medical and dental benefits for her husband, Joseph, pursuant to statutory regulation.¹ Lt. Frontiero's request was denied on the basis that she failed to prove that her husband was dependent upon her for more than half of his support. Under the applicable statutes, the dependency of a serviceman's wife is presumed by definition, but a married servicewoman must demonstrate her spouse's financial need in order to receive dependent's benefits.² At the time his wife applied for benefits, Joseph Frontiero was a full-time college student. His expenses were approximately $354.00 per month and he was receiving approximately $205.00 per month in veteran's benefits.³ Lt. Frontiero brought suit seeking injunctive and declaratory relief and back pay, claiming that the dependency classifications operated to deny due process under the fifth amendment to married women in the military since they differentiated between similarly situated members of the uniformed services on the basis of sex.⁴ The three-judge district court determined that the statutory classifications pertaining to dependents were not based solely on sex, but were also based on the nature of the relationship between the service member and his dependent.⁵ The court concluded that the classifications were rationally related to the legislative purpose involved, admin-

1. 37 U.S.C. §§ 401, 403; 10 U.S.C. § 1072, 1076 (1964); 10 U.S.C. § 1072(c) “Dependent”, with respect to a member of a uniformed service means—
(A) the wife; . . .
(C) the husband, if he is in fact dependent on the member or former member or for over one-half of his support.
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.
5. 341 F. Supp. at 205-06.
istrative convenience and economy of public funds.\textsuperscript{6} Although the court recognized that as a consequence of the statute married women were burdened in qualifying for dependent's benefits where married men were not, it felt that the resulting inequity was not invidious discrimination.\textsuperscript{7}

On direct appeal the United States Supreme Court reversed the lower court in an eight-to-one decision.\textsuperscript{8} The judgment of the Court was announced by Justice Brennan. Although eight members of the Court concurred in the judgment, the three supporting opinions showed a distinct and decisive split in the formulation of the equal protection rationale which supported their conclusions. Justice Brennan, in an opinion joined by Justices Douglas, White, and Marshall, concluded that statutory classifications based solely upon sex are inherently suspect and therefore require strict scrutiny on review by the courts.\textsuperscript{9} Justice Powell, in a brief opinion joined by Chief Justice Burger and Justice Blackmun, expressly refused to characterize classification based on sex as inherently suspect; however, he determined that the statutes violated the due process clause of the fifth amendment because they invidiously discriminated against women.\textsuperscript{10} Justice Stewart summarily stated in a one sentence concurrence that the statutes were unconstitutional since they invidiously discriminate.\textsuperscript{11} Thus, the eight concurring Justices disagreed as to the proper standard of review to be applied to the equal protection claim.

The \textit{Frontiero} case represented the second time in which the Supreme Court has applied the equal protection clause to sustain a claim against laws with sex-based classifications.\textsuperscript{12} The two major areas of significance in the resolution of the case were the extent to which \textit{Frontiero} represented a change in judicial attitudes toward sex as a rational basis for classification and the Burger Court's evaluation of its equal protection policy. This comment will examine the Court's analysis in \textit{Frontiero} in order to determine what standard of review the Court is formulating in an area of increasing social and political importance—legislative discrimination on the basis of sex.

\begin{itemize}
  \item \textsuperscript{6} Id. at 207.
  \item \textsuperscript{7} Id. at 207-08.
  \item \textsuperscript{8} \textit{Frontiero} v. Richardson, 411 U.S. 677 (1973). Only Justice Rehnquist dissented for reasons stated in the district court opinion.
  \item \textsuperscript{9} Id. at 688 (Brennan, J., announcing the Court's judgment and an opinion in which Douglas, White, and Marshall, JJ., joined).
  \item \textsuperscript{10} Id. at 691-92 (Powell, J., concurring in judgment).
  \item \textsuperscript{11} Id. at 691 (Stewart, J., concurring in judgment).
  \item \textsuperscript{12} Reed v. Reed, 404 U.S. 71 (1971), was the first case in which the Supreme Court found a classification based on sex discriminatory.
\end{itemize}
Equal Protection

In order to discuss the significance of the Court's analysis in Frontiero, it is appropriate to review the background of past Court formulations in the equal protection area. The equal protection claim in Frontiero was based on the due process clause of the fifth amendment. The equal protection clause pertaining to the states in the fourteenth amendment has no explicit counterpart applicable to federal laws; but the due process clause of the fifth amendment has been construed to contain a comparable guarantee of "fairness" which precludes invidious discrimination. In 1954, the Court stated:

The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law", and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

The Court, in the past as in Frontiero, has used an equal protection analysis to resolve fifth amendment due process claims. The Court's approach is to analyze the legislature's classification in the law to determine whether or not it affords "equal protection under the laws." By allowing legislative bodies to make statutory classifications, the Court permits inequalities to exist, since classifications by their nature create disparate treatment. However, the Court does require that the classification be reasonable.

The test traditionally applied in reviewing social and economic equal protection claims is that the classification be reasonable, not arbitrary, and have a rational relationship to the legislature's objectives. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." The Court presumes that the legislature has acted constitutionally unless it can perceive that the classification is unrelated to the purpose of the law.

21. Id. at 425; see generally, Legislative Purpose, Rationality and Equal Protection, 82 Yale L.J. 123 (1972), for discussion of how the Court has used the rationality test as a diversionary technique to obscure policy issues.
In addition to the traditional test, which requires minimum scrutiny of the challenged legislation, the Warren Court developed a new equal protection standard invoked where a fundamental right or suspect classification was involved. This test required the Court to invalidate the classification unless it was necessary to promote a permissible, compelling state interest. This standard was developed in recognition that there are certain rights which the Court must protect with special care from legislative interference. In effect, when the Warren Court applied the traditional standard, it was willing to permit any possible rationale to uphold a statute. But when the Court found a fundamental right or suspect classification, the classification invariably was struck down, since the legislature's justification was inadequate to meet the more stringent standard. Under this two-tier process of review by the Warren Court, the choice of the standard used to review a case often determined the outcome.

WOMEN'S RIGHTS AND THE COURT

The Supreme Court's past refusal to apply existing due process and equal protection guarantees to women has generated a movement for an Equal Rights Amendment. Early Supreme Court decisions showed a biased judicial attitude toward women which hindered the attainment of equal rights under the law. In an 1872 case, Bradwell v. Illinois, the Court upheld the state's exclusion of women from admission to the bar. In a concurring opinion Justice Bradley espoused a weaker-sex

29. "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." S.J. Res. 8, 92d Cong., 1st Sess. (1971). See Martin, Equal Rights Amendment: Legislative Background, 11 J. FAM. L. 363, 363 (1972), which noted that an equal rights provision has been introduced into every Congress since 1923.
30. 83 U.S. (16 Wall.) 130 (1872).
philosophy giving the state the right to protect women from occupations for which they are unsuited, as well as protecting society's interest in family life. In *Minor v. Happersett*, the Court refused to construe the privileges and immunities clause to give women the right to vote as citizens, which led eventually to the passage of the nineteenth amendment. In *Muller v. Oregon* the Court upheld a state law limiting the hours of employment of women three years after it invalidated a similar law which applied to both male and female workers. The Court concluded that the inferior physical strength of women justified placing them in a class by themselves:

... [H]istory discloses the fact that woman has always been dependent upon man. ... As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights.

The language of the Court in *Muller* has been used to uphold a wide range of laws which differentiate on the basis of sex.

As late as 1961, the Court was willing to uphold a state statute automatically relieving women from jury duty under the justification that the "woman is still regarded as the center of home and family life ... with her own special responsibilities." Despite the new equal protection policies, no effort was made to bring classifications based on sex within the purview of strict judicial scrutiny.

*Reed: A New Direction*

The Court first departed from its past position on women's rights in

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31. *Id.* at 141-42 (Bradley, J., concurring).
32. 88 U.S. (21 Wall.) 162 (1874).
33. 208 U.S. 412 (1908).
35. 208 U.S. at 422.
36. *Id.* at 421-22.
37. In Murray and Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 237 (1965), the language in *Muller v. Oregon* has been cited as support for excluding women from juries, giving them different licensing treatment, and excluding them from state-supported colleges.
1971, in *Reed v. Reed*, when it invalidated a state law through equal protection principles. In *Reed* the Burger Court unanimously agreed that the classification contained in Idaho Code § 15-314 was unconstitutional: the statutory provision gave compulsory preference to men over women when both were equally entitled to be appointed the administrator of a decedent's estate. The Idaho Supreme Court, applying the traditional equal protection test of minimum scrutiny, upheld the statute. It found that the classification based on sex was reasonably related to the legislative purpose: to expedite administration of estates. The court concluded that the classification was reasonable since most men in the community have more business experience than women and consequently are better qualified to be administrators.

Similarly, the United States Supreme Court purported to resolve whether the classification based solely on sex "bears a rational relationship to a state objective that is sought to be advanced by the operation" of the statute under question. The Court acknowledged the legitimacy of reducing the number of people competing to receive letters of administration within the same entitlement class, but it nevertheless did not find the classification permissible.

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

The Court did not discuss whether or not men as a class are more qualified in business affairs than women, although it did take judicial notice that a large number of women, mainly surviving widows, administer estates in this country.

The *Reed* decision indicated a subtle change in the Court's attitude and examination of sex-based classifications. The Court purported to use a traditional minimal scrutiny standard of review. Under that
standard it could have found that the classification was rational in itself and reasonably related to a permissible state objective. However, its conclusion could not be reached without applying a standard of greater scrutiny. The decision was devoid of any explanation of how the Court reached its incongruous result. The Court not only failed to refute the weaker-sex philosophy of past decisions, but it also neglected to discuss sex as a basis for classification. The Court merely found that the classification was "arbitrary." As a result of the Court's failure to explain its reasoning, the utility of the Reed decision in producing a change in judicial policy in sex discrimination cases was severely limited. Thus, the Burger Court's decision in Reed v. Reed was an unsatisfactory attempt to articulate a change in the Court's equal protection policy in the area of sex-based classifications in the law.

After Reed

Predictably Reed engendered confusion among the lower courts as to what standard of review it demanded. Three views emerged from the lower courts in subsequent cases; some courts followed the traditional rational basis test and others, the compelling state interest test. However, a third group of courts interpreted Reed to set forth a new intermediate test which applied a degree of judicial scrutiny between that demanded by the other two tests.

The courts which cited Reed as expounding the traditional minimum scrutiny test saw no change in the Supreme Court's standard of review. In Schattman v. Texas Employment Commission, the Court of Appeals for the Fifth Circuit reversed the lower court to hold that a compulsory maternity leave which required termination of employment two months prior to delivery was reasonably and rationally related to a permissible state purpose. The court felt that the statute was reasonable since it terminated employment only because the pregnancy was far advanced. The court rejected the claim that pregnancies should be treated on an individual basis like any other medical incapacity:

Is it conducive to the reasonably efficient operation of a state agency that it should involve itself in strife, discord, unhappiness,

49. Id. at 163.
jealousies, and recriminations caused by allowing one woman to work through the eighth or ninth month of pregnancy as a matter of opinion on the part of some supervisor while requiring another to stop at the end of the seventh?\textsuperscript{51}

In \textit{Bucha v. Illinois High School Association},\textsuperscript{52} the federal district court for the Northern District of Illinois considered the physical and psychological differences between male and female athletes to be a reasonable basis for prohibiting interscholastic competition between high school boys and girls and for imposing certain restrictions on girl's athletic contests. In \textit{Robinson v. Board of Regents of Eastern Kentucky University},\textsuperscript{53} the Court of Appeals of the Sixth Circuit upheld restrictions applicable only to women college students, finding that under the traditional standard as applied in \textit{Reed}, the state's assertion that "women are more likely to be criminally attacked later at night and are physically less capable of defending themselves than men" justified the differentiation based on sex. In all of these cases, the courts used the rational basis test as set forth in \textit{Reed} to deny relief under the equal protection claim.

A number of lower courts concluded that the Supreme Court was devising a new intermediate test which applied a degree of judicial scrutiny between that of the traditional rational basis test and the compelling state interest test. These courts decided that \textit{Reed} required a "fair and substantial relation" to the legislative purpose rather than a mere reasonable relation.

In \textit{Green v. Waterford Board of Education},\textsuperscript{54} the Court of Appeals for the Second Circuit reversed the lower court and held that a regulation requiring a teacher to cease employment when six months pregnant was arbitrary and discriminatory. The court found that the "definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest seems to have become slightly, but perceptibly, more rigorous."\textsuperscript{55} Accordingly, the court evaluated the state's concern with the health and safety of the unborn child and with the classroom distractions caused by a pregnant teacher and decided that they were not a reasonable basis for the regu-

\textsuperscript{51} 459 F.2d at 39.
\textsuperscript{52} 351 F. Supp. 69 (N.D. Ill. 1972). The restrictions on girls' contests included a prohibition on cheerleading, a one dollar limitation on rewards, and prohibition of overnight trips to participate in athletic contests.
\textsuperscript{53} 475 F.2d 707, 711 (6th Cir. 1973), \textit{petition for cert. filed}, 42 U.S.L.W. 3080 (U.S. Aug. 14, 1973); see Archer v. Mayer, 213 Va. 633, 194 S.E.2d 707 (1973), which upheld a statute allowing women to claim an automatic exemption from jury duty because of women's special role in family life.
\textsuperscript{54} 473 F.2d 629 (2d Cir. 1973).
\textsuperscript{55} \textit{Id}. at 633.
lation. It concluded that the state’s interest in the continuity of classroom education and administrative convenience were not substantial enough to uphold the requirement under the new Reed standard. In Heath v. Westerville Board of Education, again involving a regulation pertaining to employment of a pregnant teacher, the federal district court for the Southern District of Ohio applied an intermediate analysis in holding the regulation to violate equal protection. The court stated: “Sexual stereotypes are no less invidious than racial or religious ones.” It felt that the Board of Education’s failure to treat pregnant women as individuals was “dehumanizing.” However, the court explicitly refused to decide whether a stricter standard applied in this area since the Board of Education failed to produce any reasonable justification.

In Eslinger v. Thomas, a female law student was denied a job as a page in the South Carolina state senate on the ground that the duties involved might lead to an “appearance of the impropriety” between a male elected official and a female page. The court found that this justification was not sufficient since the classification was held to have less than a “fair and substantial relationship” between the purposes of the resolution and its justification. The new standard held that “[a] classification based upon sex is less than suspect; a validating relationship must be more than minimal.”

A third interpretation of Reed suggested that the compelling state interest test should be applied. On a motion to dismiss and for summary judgment, the federal district court for the Southern District of New York said, in Monell v. Department of Social Services of City of New York, “Sex legislation is . . . automatically suspect.”

THE SPLIT IN FRONTIERO

In the midst of this confusion, it was not surprising that the Court in Frontiero attempted to clarify what it said in Reed. Significantly,

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57. Id. at 505.
58. Id. at 505; cf. La Fleur v. Cleveland Bd. of Education, 465 F.2d 1184 (1972), aff’d, 42 U.S.L.W. 4186, (U.S. Jan. 22, 1974), which held a substantially similar regulation applying to pregnant teachers arbitrary and unreasonably overbroad. The court rejected continuity of classroom instruction and relief of administrative problems as reasonable objectives of the regulation.
59. 476 F.2d 225 (4th Cir. 1973).
60. Id. at 231.
62. The Court had passed up several other chances to expound its views on sex-based classifications. In Forbush v. Wallace, 405 U.S. 970 (1972), the Court affirmed
three opinions supporting the judgment in *Frontiero* all find support for their rationale in the unanimous *Reed* opinion despite their differing conclusions as to what standard of review should be applied. Justice Brennan found implicit support in *Reed* for his conclusion that *Reed* rejected a traditional equal protection approach by its analysis. Justice Brennan pointed out that the Court, by its conclusion in *Reed* that the classification was arbitrary, rejected the assumption made by the Idaho Supreme Court that the classification was reasonable since men are better qualified in business affairs than women. Justice Brennan's discussion of the lack of appropriateness of sex as a basis for classification is a departure from the Court's past weaker-sex philosophy. His rationale as well as his conclusion that classifications based on sex are inherently suspect is in contrast with the Court's silence in *Reed* but is not inconsistent with it.

Justice Powell refused to explain his views as to whether or not sex is an inherently suspect classification and preferred instead to decide the case on the authority of *Reed*. Justice Stewart also cited *Reed* as the authority for his conclusion that the statute unconstitutionally discriminates. Justices Powell and Stewart's opinions are troublesome: their unexplained conclusions in *Frontiero*, like the wording of the decision in *Reed*, indicate that no change in the Court's perception of sex classifications in equal protection claims had occurred.

That Justice Brennan looked for support to the Court's conclusion in *Reed*, while Justices Stewart and Powell also found support on the face of the opinion, emphasizes the difficulty which *Reed* introduced in signifying the Court's change in policy.

To further justify his unprecedented views that sex-based classifications are inherently suspect, Justice Brennan capsulized the history of paternalistic attitudes toward women which resulted in the stereotypes upon which sex discrimination is founded. By characterizing sex as a highly visible trait which has no relation to one's ability to function in society, Justice Brennan argued that sex is similar to race and national
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origin, which are clearly established as suspect classifications by firm precedents. Thus, he concluded that pervasive sex discrimination which politically, socially and economically discriminates against women entitles them to the Court's utmost protection.

Since the statute at issue in *Frontiero* is a federal one, Justice Brennan took cognizance of the Court's past deferential attitude toward Congressional judgments. Thus, he attempted to strengthen his position by finding that Congress' more recent efforts, such as the proposal of the Equal Rights Amendment, indicate that it considers discrimination based on sex invidious. Justice Brennan apparently wished to avoid making the Court appear as a "super legislature."

Justice Powell was also concerned with the Court's apparent interference in legislative affairs. He was critical of Justice Brennan's stance in interjecting the Court in what he considers legislative matters. Justice Powell did not believe it proper that the Court decide whether the strictest standard of review accorded to suspect classifications should apply, since this is the matter at issue in the Equal Rights Amendment currently being debated in the state legislatures. Justice Powell's reasoning is support for the view that the Equal Rights Amendment is necessary to eliminate sex discrimination in law, since the Court is sensitive about moving too aggressively in "frontier areas" of the law without the ideological support of the country and its institutions. Therefore, rather than indicating the standard of re-

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67. Id. at 686. See Comment, *Are Sex-Based Classifications Constitutionally Suspect?,* 66 NW. U.L. REV. 481, 495-501 (1971), for discussion of sex as a classification based on status; *See also Sail'er Inn Inc. v. Kirby,* 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), which supports the view that classifications based on sex should be treated as inherently suspect; *cf. Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175-76 (1972), in which illegitimacy was considered a classification based on status which has no relationship to a person's ability to function in society.


69. 411 U.S. at 687-88; *cf. Oregon v. Mitchell,* 400 U.S. 112, 240 (1970) (opinion of Brennan, White, and Marshall, JJ.), and Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966). In Oregon v. Mitchell, the opinion indicated that Congress had the right to determine legislative facts without the Court's interference, but there was no evidence that Congress had in fact found that reducing the voting age from 21 to 18 was rational.


71. 411 U.S. at 692 (Powell, J., concurring in judgment).

view he perceived *Reed* to set forth, Justice Powell decided *Frontiero* solely on the authority of *Reed* in a few terse paragraphs.\(^7\)

In order for the Court to review the dependency classification challenged in this case, the legislative objectives of the disparities in the classifications had to be determined. Since there was no legislative history indicating the reasons for differentiation between male and female service members within the dependency scheme, the district court surmised the legislature’s objectives from the face of the statute: the scheme was intended to save administrative expense and manpower by requiring only service women to prove their spouses’ dependency.\(^7\)

Underlying this objective was the assumption that few husbands are economically dependent upon their service wives.\(^7\) Accepting these objectives for his analysis, Justice Brennan concluded that the classification was based solely on sex\(^7\) and that it treated similarly situated service members dissimilarly for mere administrative convenience.\(^7\) Justice Brennan could not find a compelling governmental interest to justify the differentiation.\(^7\)

If Justices Stewart and Powell had applied the traditional equal protection test as recited in *Reed*, they would have concluded that the classification was reasonably related to the Congressional purpose of administrative convenience. The denial of benefits to a relatively small group of personnel, most of whom would not qualify as dependents, would result in a considerable saving of benefit payments and allowances at very little administrative expense.\(^7\) Only by using greater scrutiny to forbid the “arbitrary” choice among similarly situated service members does it appear that the discrimination was invidious.

Thus, the result in *Frontiero* cannot be justified without concluding that despite their silence on the matter, Justices Stewart and Powell used stricter judicial scrutiny than the traditional standard warranted; therefore, the disagreement between Justices Powell and Stewart, on the one hand, and Justice Brennan on the other is less than the language of their opinions indicates.

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73. 411 U.S. at 691-92 (Powell, J., concurring in judgment).
75. 411 U.S. at 688-89.
76. *Id.* at 688.
77. *Id.* at 688-90; accord, *Stanley v. Illinois*, 405 U.S. 645, 656 (1972): “...the Constitution recognizes higher values than speed and efficiency.”
78. 411 U.S. at 690-91.
79. An estimate of the cost of extending quarters allowances under changes in dependency criteria to women in the Navy is approximately $1 million, to women in the Marines, $0.5 million, and to women in the Air Force, $3.5 million annually. *Hearings Before the Special Subcomm. on the Utilization of Manpower in the Military of the House Comm. on Armed Services*, 92d Cong., 1st & 2d Sess. 12439, 12502-503 (1972).
THE BURGER COURT AND EQUAL PROTECTION

In order to assess the Burger Court's treatment in the area of equal protection and to predict its future actions, Gerald Gunther examined fifteen basic equal protection cases of the 1971 term. He found that generally the Burger Court's decisions reveal continuity with the Warren Court's new equal protection; but the decisions also show a definite though gradual trend toward a "newer" equal protection doctrine. A comparison of Frontiero with Gunther's observations and predictions puts the case in the perspective of the Court's treatment of other equal protection cases and indicates the development of the Court's policies in the area of sex discrimination.

First, Gunther observed that the Burger Court has no inclination to overturn the established aspects of the new equal protection, but it refuses to expand its interventionist stance. Thus the Burger Court would not find new fundamental interests and suspect classifications in which to apply strict scrutiny unless values were already rooted in the Constitution. The Court's unanimous decision in Reed that it was not considering sex-based classifications as inherently suspect suggests this conclusion. However, Frontiero only partially supports this observation, since of the eight Justices concurring in the judgment, four wished to extend the compelling state interest test devised by the Warren Court to sex-based classifications. This, as noted above, was a complete departure from previous Supreme Court precedent. Notably none of the four Nixon appointees wished to invoke the compelling state interest test. In Gunther's terms, this indicates their reluctance to "... articulat[e] values not clearly rooted in the Constitution [which] is, after all, the clearest element of the elusive 'strict construction' theme so prominent in the selection of new appointees."

The second factor which Gunther noted in previous equal protection cases was that there is discontent with the two-tier formulation within the Court. However, there is no indication in Frontiero that the Court was rejecting the rigid two-tier test. The main critic of this

80. Gunther at 11.
81. Id.
82. Gunther at 12-16; e.g., the Court continued to uphold alienage as a suspect classification in Graham v. Richardson, 403 U.S. 365 (1971), and voting rights as fundamental in Dunn v. Blumstein, 405 U.S. 330 (1972), but refused to find education a fundamental right in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
83. Note pp. 304-06 above.
test, Justice Marshall, has advocated a more flexible standard which applies a level of judicial scrutiny in proportion to the interests involved in the particular case.\textsuperscript{86} But in \textit{Frontiero} Justice Marshall joined in Justice Brennan's opinion, indicating that the elimination of sex discrimination is best served by the application of the compelling state interest test.

The third element which Gunther observed is that in seven of the fifteen cases examined, the Burger Court, rather than passively reciting the traditional standard and deferring to the legislature's judgment, as did the Warren Court,\textsuperscript{87} revitalized the traditional minimum scrutiny test and used it as a tool to uphold equal protection claims.\textsuperscript{88} These observations led Gunther to theorize that the Burger Court was evolving a new moderate interventionist doctrine of its own—a "newer" equal protection. The model which he sees developing is "[a] means-oriented inquiry applicable to a wide range of laws, often attractive as a narrower ground avoiding Court confrontations with broader value choices, and limited only by considerations of judicial competence."\textsuperscript{89} This approach would do more to assure that the legislature's classification be reasonable through an honest inquiry by the Court into the facts and circumstances supporting it. This technique would also permit the legislatures to achieve a wider range of objectives without the Court's interference.\textsuperscript{90} This intermediate approach applies a degree of judicial scrutiny which lies between that of the compelling state interest and traditional minimum scrutiny tests as formerly applied by the Warren Court.

A means-focused equal protection standard would be used as a technique to avoid more difficult issues of constitutional values by relying on a narrower ground of constitutional doctrine.\textsuperscript{91} As \textit{Reed} demonstrated, the Court did not wish to plunge itself into broad policy

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\textsuperscript{86} Instead of the two-tier test, Justice Marshall advocates a sliding scale test: As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 102-103 (1973) (Marshall, J., dissenting).

\textsuperscript{87} See, \textit{e.g.}, McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969).

\textsuperscript{88} Gunther at 18-20.

\textsuperscript{89} Id. at 24.

\textsuperscript{90} Id. at 23. See generally Legislative Purpose, Rationality, and Equal Protection, 82 \textit{Yale L.J.} 123 (1972).

\textsuperscript{91} Gunther at 26-30. See, \textit{e.g.}, James v. Strange, 407 U.S. 128 (1972), where Court did not reach the issue of whether the state's method of recouping legal expenses for indigents burdened the right to counsel.
issues in a controversial area such as sex discrimination. In *Frontiero* the opinions of Justices Powell and Stewart support this aspect of the Court's new doctrine by relying on a narrower ground and refusing to discuss the broader issues of sex discrimination. In contrast, Justice Brennan was willing to decide the case on the larger social and political policy questions involved.

The result in *Reed* did not strictly support Gunther's model. If the Court had used the invigorated minimum scrutiny standard which Gunther speculates is developing, it would have concluded that the means chosen to reduce family quarrels and alleviate court dockets bear a fair and substantial relationship to the legislature's objective. But by describing the statute as "arbitrary" the Court appears to have been using an even stricter scrutiny. Examination of the result in *Frontiero* leads to the same conclusion. Justice Brennan, of course, used the compelling governmental interest test which requires the strictest judicial scrutiny. However, the opinions of Justices Stewart and Powell could not have been made by applying the newer equal protection model without further sensitivity to sex-based classifications. Thus, a proper analysis of *Frontiero* according to Gunther is: Did the requirement of proof of a spouse's dependency by the servicewoman, where no such proof was required by the serviceman, bear a rational relationship to the Congressional objectives of reducing the administrative burdens of cost and manpower? Under this test, it appears that the classification is rational and should be permitted. The statutory scheme only roughly attempts to give some additional benefits comparable to the need of service members with dependents.

Obviously it is more efficient for the government to require only the spouses of servicewomen to prove dependency since women comprise approximately one percent of the total number of members of the uniformed services. Underlying this scheme is the assumption that since few husbands would be able to qualify as dependents, few would even apply. Therefore Congress would be able to save money by denying additional income to a discernible majority of members of a subgroup at a very low administrative expense.

As in *Reed*, it is only when sex-based classifications are considered

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92. Gunther at 30-33.
94. Id. at 682-91.
95. Gunther at 33-34.
96. A two per cent limit on the number of women in the Women's Army Corps was amended in 1967 to permit the Secretary of Defense to prescribe the limit. 10 U.S.C. § 209(b) (Supp. IV, 1967). However, under regulation 32 C.F.R. 580.4 (1973) the WAC strength is limited to two percent.
with even greater scrutiny than Gunther's model indicates that the classification in *Frontiero* is impermissibly discriminatory. The apparent difference between the decisions in *Reed* and *Frontiero* and Gunther's model is that even where a fair and substantial relation exists between the classification and the legislative purpose, the Court is inclined to view the classification based on sex with an even greater judicial sensitivity. The important fact to note, however, is that the Court has failed to articulate a change in the test to be applied. Therefore the traditional rational basis test on the face of *Reed* appears to remain the Court's standard of review.

**Comparison of Classifications in Reed and Frontiero**

*Reed* and *Frontiero* can be evaluated to determine if the Court is formulating a new policy in the area of equal protection of sex-based classifications. It is important to consider factors upon which the decisions can be differentiated in order to ascertain whether or not they can be validly compared.

The probate statute in *Reed* was a state law; the provisions under scrutiny in *Frontiero* were passed by Congress. As noted above, the equal protection guarantee applicable to the federal government is not identical with that of the states, but it is substantially the same.\(^7\) In practice the Court has not differentiated between an equal protection claim as applied to the states and one as applied to the federal government.\(^8\) The point should also be considered whether in practice the Supreme Court treats Congressional judgment of the rationality of the classification with greater deference than it treats judgments made by the state legislatures. It does not appear that the Supreme Court has, in fact, made such a distinction.\(^9\) Therefore, the Court's application of the equal protection standard and its consideration of the classification's rationality as ascertained by the legislature does not appear to differ significantly between a state and a federal law.

The classification dealt with in *Reed* was part of a probate statute. PRESUMABLY THE COURT WOULD BE HESITANT TO INTERFERE WITH THE STATE'S

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\(^7\) Note pp. 297-98 above.


process for disposing of property at death. As the Court noted recently, the state has traditionally been given great deference in this area. However, the Court apparently will interfere with the probate provisions if it feels that those provisions invidiously discriminate.

In contrast, *Frontiero* involved a denial of fringe benefits to military personnel. The district court attempted to characterize the dependent's allowance as a mere "windfall," implying that the denial of such "undeserved benefits" is not as great a deprivation as it would be if such benefits were considered a right in themselves. The United States Supreme Court, however, has acknowledged that constitutional rights in an equal protection claim cannot be decided on the basis of whether a right or privilege is being denied. Notwithstanding this pronouncement, the circumstances under which the dependent's allowance is given indicate that it is considered an integral part of the service person's contract of employment, and not a mere gratuity. The additional benefits are given to reduce the disparity between the salary paid to military personnel and that paid in business.

The same dependency provision under scrutiny in *Frontiero* exists in the social security laws: a husband or widower must prove his dependency for one-half of his support to qualify for benefits, whereas a wife's or widow's dependency is presumed. However, the Court has recognized that the social security program provides a non-contractual benefit and therefore that Congress has great leeway in authorizing benefits.

In *Gruenwald v. Gardner*, the Court of Appeals for the Second Circuit recognized that differentiation on the basis of sex in computing social security benefits is justified to "reduce disparity between the economic and physical capabilities of a man and a woman."

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103. Id. at 208.
106. The stated purpose of the medical and dental provisions is to "create and maintain high morale." 10 U.S.C. § 1071 (1964).
107. 42 U.S.C. § 402(b)(1), (c)(1)(C), (e)(1) and (f)(1) (1964).
109. 390 F.2d 591, 592 (2d Cir. 1968), cert. denied, 393 U.S. 982 (1968). But cf. Bartmess v. Drerys, U.S.A., Inc., 444 F.2d 1186 (7th Cir.), cert. denied, 404 U.S. 939 (1971), in which the court held that a retirement plan of a private employer in which women were to retire at 62 and men at 65 violated Title VII of the Civil Rights Act of 1964. See also § 1604.9 (a) and (b), 37 Fed. Reg. 6837 (1972), where EEOC regulations prohibit "an employer to discriminate between men and women with regard to fringe benefits," which include "medical, hospital, accident, life insurance and retirement benefits. . . ."
The court held that women are allowed favored treatment to compensate for the fact that they earn less as a group than men. It is only invidious discrimination that will not be permitted. Since the right to social security benefits has not been considered to be comparable to other contract rights, it cannot be analogized with the right to benefits under the dependency provisions in Frontiero.

A more comparable situation to that of Frontiero is shown in Moritz v. Commissioner of Internal Revenue in which a tax deduction provision was challenged by an unmarried man. He was denied a deduction for expenses incurred in caring for a dependent given to women, widowers, divorcés and husbands under certain circumstances. The court held that the provision was unconstitutional on the basis of sex since "[t]he statute did not make the challenged distinction as part of a scheme dealing with the varying burdens of dependents' care borne of taxpayers, but instead made a special discrimination premised on sex alone which cannot stand." The classification in Reed did not completely bar women from becoming administrators. It was only when equally entitled men and women competed for the same position that the statute required that the male applicant be chosen. The dependency criteria in Frontiero were even more discriminatory in effect, since spouses of male service members qualified for benefits, although some were in fact dependent for more than one-half of their support and some were not. In contrast, spouses of female service members qualified for benefits only if shown to be dependent. Thus the effect of the statute was to bar a group of non-dependent male spouses from ever receiving benefits whereas non-dependent female spouses would always receive the benefits. In Reed, women were not completely barred from being administrators but relegated to an inferior position of entitlement when competing with men. In Frontiero, women with husbands who were not actually dependent were completely denied benefits. This fact should not make any difference in the Court's determination as to whether the discrimination is or is not invidious.

CONCLUSION

The Frontiero decision did little to clarify the Court's equal protection policies in the area of sex discrimination. The opinions support-
ing the judgment indicated that four Court members advocated the strictest judicial scrutiny since they considered sex-based classifications as inherently suspect. Another four members appeared to apply greater scrutiny than demanded by the traditional rational basis test stated in *Reed*, but less than required by the compelling state interest test.

The decisions in both *Reed* and *Frontiero* showed some support for Gunther's theory that the Burger Court is formulating a new intermediate standard of review in equal protection cases. But Justice Brennan's opinion in *Frontiero* indicated that the compelling state interest test should be applied to overcome sex discrimination. However, the failure of a majority of the Court's members to actively voice their standard of review will result in continued confusion in the lower courts. "Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process."114 Furthermore, the Court's failure to announce a change in policy will apparently continue until the final disposition of the Equal Rights Amendment.

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which the Court noted that the fact that illegitimate children were absolutely barred from recovery under one statute and only relegated to a lower status of recovery under another workmen's compensation statute makes no difference in the determination of whether a statute is discriminatory.
