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

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CASE COMMENTS

Constitutional Law—Due Process—Federal Law Conclusively Presuming Spouse of Serviceman To Be His Dependent While Rebuttably Presuming Spouse of Servicewoman Not To Be Her Dependent Violates Due Process Guarantee of Fifth Amendment —*Frontiero v. Richardson,* 411 U.S. 677 (1973).

In *Frontiero v. Richardson* the Supreme Court invalidated, as sexually discriminatory, federal statutory provisions requiring that military servicewomen, unlike servicemen, affirmatively demonstrate the dependency of their spouses in order to obtain various additional service benefits.[1]

Finding insufficient the proffered justification for the challenged legislation—increased convenience in the administration of the military dependency and benefit laws[2]—the Court invalidated the statutes

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1. The applicable statutory provisions, 37 U.S.C. §§ 401, 403 (1970) and 10 U.S.C. §§ 1072, 1076 (1970), provide an allowance for quarters and provide medical and dental benefits for military personnel and their "dependents." "Dependents" are defined to include spouses. An important distinction is drawn, however, between wives and husbands in the burden and kind of proof necessary to establish dependency. A serviceman seeking to claim his wife as a dependent need make no showing of actual dependency in order to obtain increased allowances and benefits. A servicewoman seeking to claim her husband as a dependent must, however, demonstrate dependency in fact in order to obtain the same benefits and allowances.

Plaintiff, Lt. Sharron Frontiero, U.S.A.F., sought to claim her husband, a full-time student, as a dependent under these provisions. Mr. Frontiero received from veterans benefits $205 of the $354 per month necessary to maintain him. Lieutenant Frontiero was thus unable to demonstrate her husband's dependency and was denied increased benefits and allowance. *See* Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972).

Since the offensive statutory provisions in *Frontiero* were federal, the challenges were brought under the due process clause of the fifth amendment rather than under the equal protection clause of the fourteenth amendment. Although the fifth amendment does not contain an equal protection clause, the Court consistently applies the same analysis to equal protection challenges brought under the due process clause of the fifth amendment as it applies to those brought under the equal protection clause of the fourteenth. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Bolling v. Sharpe, 347 U.S. 497 (1954); Faruki v. Rogers, 349 F. Supp. 723 (D.D.C. 1972).

2. The three-judge district court upheld the challenged statutory provisions in the face of the fifth amendment due process charge by finding that the laws were supported by a rational basis. Two members of the court found that administrative convenience was effectuated by the conclusive presumption in each law:

> It seems clear that the reason Congress established a conclusive presumption in favor of married service men was to avoid imposing on the uniformed services a substantial administrative burden of requiring actual proof from some 200,000 male officers and over 1,000,000 enlisted men that their wives were actually dependent upon them.

341 F. Supp. at 207.

The dissenting judge disagreed with the court's finding that the scheme of presumptions was necessarily consistent with obtaining administrative convenience. *Id.* at 210. But granting the majority's view on that point, he found in Reed v. Reed, 404 U.S.

over a single dissent.[3] The Justices divided, however, over the appropriate standard of constitutional scrutiny for judging sex-based legislative classifications. Most importantly, the decision revealed that at least four members of the Court view sex as a suspect classification that must be subjected to strict constitutional scrutiny when challenged on equal protection grounds.

Following final ratification of the fourteenth amendment, legislation challenged as offensive to equal protection was subjected to a lenient standard of review[4] and upheld if any state of facts could reasonably be conceived to justify it.[5] During its first seventy years, the equal protection clause remained a largely dormant and nearly impotent part of the Constitution, restricted in scope to racially discriminatory classifications[6] and looked upon as the "last resort of constitutional arguments."[7] Equal protection's metamorphosis, be-

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71 (1971), clear support for his position that administrative convenience is "constitutionally insufficient"—unable to supply a rational basis for sex-based classifications. *Id.* at 211. *See* p. 169 *infra.*

3. A three-judge district court, convened under 28 U.S.C. §§ 2281, 2284 (1970), heard the petition for injunction against enforcement of the military dependency provisions. *See* note 1 *supra.* The court denied the injunction. Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972). The case reached the Supreme Court on direct appeal under 28 U.S.C. § 1253 (1970).

The Supreme Court's decision produced four separate opinions resulting in an 8 to 1 reversal of the district court's decision. Justices Douglas, Marshall and White joined in an opinion by Justice Brennan for reversal. Justice Blackmun and Chief Justice Burger joined in an opinion by Justice Powell also for reversal. Justice Stewart voted separately to reverse. Justice Rehnquist voted to affirm.

4. *See* Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting); 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 533-50, 596-99 (rev. ed. 1926).

5. *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Thus the Court was willing to "imagine" a saving rational basis when the state did not articulate one. *See* note 27 *infra. See generally* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949); Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1083 (1969).

6. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872):

> 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.

See also Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177 (1972) (Rehnquist, J., dissenting).

7. Buck v. Bell, 274 U.S. 200, 208 (1927).

ginning in 1938 in *United States v. Carolene Products Co.*,[8] achieved its greatest momentum under the Warren Court of the 1960's.[9] During this latter period the traditional "passive" approach gave way to a modified "active" approach reflecting an evolving judicial sensitivity to equal protection and a heightened solicitude for certain periodically defined "fundamental" rights.[10]

The rubric of this "new" equal protection required the government to demonstrate that the challenged law was necessary to promote a "compelling" governmental interest when the legislation impinged upon "fundamental" rights or when it created "suspect" classifications.[11] If the law neither impinged upon fundamental rights nor created suspect classifications, it survived, provided the Court found some rational basis for its enactment.[12]

As the catalogue of decisions under the new equal protection grew, however, the Court's approach began to resemble a conclusionary rather than an analytical process.[13] In practice, the threshold de-

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8. 304 U.S. 144 (1938). Traditionally, legislative classifications were endowed with a presumption of validity. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). In footnote four in *Carolene Products* Justice Stone introduced what has become the "strict scrutiny" tier of the "new" equal protection when he suggested that

> [t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . .
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> It is unnecessary to consider now whether [such] legislation . . . is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
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> Nor need we enquire whether . . . prejudice against discrete and insular minorities may . . . call for a correspondingly more searching judicial inquiry.

304 U.S. at 152-53 n.4 (1938).

9. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 666 (1966); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

10. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel a fundamental right); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy a suspect classification); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting a fundamental right); Griswold v. Connecticut, 381 U.S. 479 (1965) (privacy a fundamental right); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (alienage a suspect classification).

11. *See* note 10 *supra*.

12. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948). *See* note 5 *supra*. *Cf.* Morey v. Doud, 354 U.S. 457, 463-64 (1957), *quoting from* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911): " 'One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' "

13. *See* the dissenting opinion of Chief Justice Burger in Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972), where he addressed the question of how to judge the durational residency requirements imposed by Tennessee as a precondition to the exercise of the ballot franchise by new residents:

termination of the appropriate standard of scrutiny almost invariably sealed the fate of the challenged legislation. If the rational basis (or "limited scrutiny") standard was applied, the legislation stood.[14] If the compelling state interest (or "strict scrutiny") standard was applied, the legislation fell.[15] In the period separating the genesis of the new equal protection and the Burger Court's first sex discrimination decision, only once did the Court fail to discover a rational basis to support legislation subjected to the limited scrutiny yardstick.[16] Also with one exception,[17] no law subjected to strict scrutiny was proved necessary to promote a compelling state interest.

While the Court had upheld a handful of sexually discriminatory laws,[18] it had invalidated none until 1971 when, in *Reed v. Reed*,[19] it may have signalled an important doctrinal departure from the equal protection approach of the past twenty years.[20] *Reed* was an attack upon an Idaho statute that required state probate courts to prefer males over females when persons seeking to administer an estate were otherwise equally entitled to the position. Recognizing that the state's asserted interest in the law—administrative convenience[21]—was "not without some legitimacy,"[22] a unanimous Court found the law unconstitutional because it made "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[23]

Apparently viewing *Reed* through a history of invalidating legislation only upon invoking strict scrutiny, Justices Brennan, Douglas, Marshall and White found in *Reed* "at least implicit support" for

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> Some lines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

See Note, *The Decline and Fall of New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489 (1972).

14. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948).

15. *See* note 10 *supra*.

16. *See* Morey v. Doud, 354 U.S. 457 (1957).

17. *See* Korematsu v. United States, 323 U.S. 214 (1944).

18. *See, e.g.*, cases cited in note 12 *supra*. *But cf.* Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

19. 404 U.S. 71 (1971).

20. *See* Gunther, *supra* note 9, at 29-36; Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 150-51 (1972).

21. The Idaho Supreme Court characterized the purpose of the preferential statute as the alleviation of "the problem of holding hearings by the court to determine eligibility to administer." Reed v. Reed, 465 P.2d 635, 638 (Idaho 1970).

22. 404 U.S. at 76.

23. *Id.*

their conclusion in *Frontiero* that sex is a suspect legislative classification requiring the state to bear the attendant burden of establishing a compelling state interest. Justices Powell and Blackmun, along with Chief Justice Burger, could find no support in *Reed* for an inherently "suspect" constitutional status for sex-based classifications. Justice Rehnquist, who did not participate in the unanimous *Reed* decision, dissented in *Frontiero*, apparently agreeing with the district court that a rational basis had been demonstrated.[24] Justice Stewart, potentially representing the fifth man in the sex-as-a-suspect-classification camp, remained inscrutable by simply concurring on the basis of *Reed*.

Even in viewing *Reed* as "implicit" authority for subjecting sex-based classifications to strict scrutiny, Justice Brennan may have misstated the holding of that case. The language of the *Reed* opinion would so suggest;[25] only the result, when viewed in light of the equal

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24. The district court recognized that the purpose of the conclusive presumption in favor of men furthered the legitimate legislative end of reducing the administrative burdens accompanying implementation of the military dependency laws. 341 F. Supp. at 207. The similar state interest asserted unsuccessfully in *Reed* was distinguished from the scheme for administrative convenience raised in *Frontiero*. In *Reed*, the court noted, the sex of one who administered an estate "had no relation to the statutory purpose of selecting the best qualified administrator." *Id.* at 209. A qualified female was *absolutely* excluded from serving as an administratrix in Idaho whenever a male, equally entitled by kinship to the deceased, wished to serve as administrator. The district court, however, found the presumption in *Frontiero* not a conclusive one. Qualified women could successfully obtain the dependency benefits for their spouses: "Nothing in the instant statutory classification jeopardizes the ability of a female member to obtain the benefits intended to be bestowed upon her by the statutes." *Id.* at 207.

The district court was also of the opinion that the statutory provisions under attack did not classify solely on the basis of sex, *i.e.*, a conclusive presumption of dependency was extended to both males and females claiming legitimate, unmarried, minor children. The court thus characterized the classificatory scheme as "not turn[ing] exclusively on the basis of the member's sex but rather on the nature of the relationship between the member and the claimed dependent." *Id.* at 206. The court attached significance to this in distinguishing *Frontiero* from *Reed*, where the classification was drawn solely on the basis of sex.

25. Although nowhere in its brief opinion did the Court state clearly that it was applying the rational basis or limited scrutiny standard, the discussion is replete with rational basis phraseology. In describing the standards by which the Idaho provisions were judged, the Court employed the following language:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.
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> . . . .
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> . . . 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

protection legacy of the last twenty years, suggests otherwise.[26] Part of the difficulty in deriving such authority from *Reed* lies in the increasingly persuasive argument that the doctrinal edifices of the new equal protection are crumbling.[27] If such a change is occurring, then

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to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . .

404 U.S. at 76. The decision has been widely interpreted as employing the rational basis approach. *See, e.g.*, Faruki v. Rogers, 349 F. Supp. 723, 733-34 (D.D.C. 1972); Frontiero v. Laird, 341 F. Supp. 201, 206 n.2 (M.D. Ala. 1972), *rev'd sub nom.* Frontiero v. Richardson, 411 U.S. 677 (1973); 5 CREIGHTON U.L. REV. 353, 356 (1972); 19 LOYOLA L. REV. 542, 547 (1973); 43 MISS. L. REV. 418, 421 n.26 (1972); 25 VAND. L. REV. 412, 416-17 (1972). *But see* Monell v. Department of Social Servs., 357 F. Supp. 1051, 1053 (S.D.N.Y. 1972). *See generally* Note, *Are Sex-Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481 (1971).

Yet at least one distinguished commentator has suggested that *Reed* reflects an evolving "intensified means scrutiny" approach to equal protection challenges. *See* Gunther, *supra* note 9, at 29-37.

26. *See* pp. 167-69 *supra.*

27. It seems clear that the Burger Court is committed to slowing if not halting recognition of additional suspect classifications or fundamental interests. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973) (education not a fundamental interest); Lindsey v. Normet, 405 U.S. 56 (1972) (housing not a fundamental interest); Richardson v. Belcher, 404 U.S. 78 (1971) (allocation of welfare benefits not subject to strict scrutiny).

The Court also seems dissatisfied with the polar strictures of the two-tier equal protection scheme that it has inherited. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Dandridge v. Williams, 397 U.S. 471, 519 (1970) (Marshall, J., dissenting). Reaching a seemingly "strict scrutiny" result through slightly ambiguous rational basis rhetoric, as was done in *Reed*, may prove not an atypical approach since other cases decided in the same term as *Reed* reached similar results without invoking the strict scrutiny formula. *See* Gunther, *supra* note 9, at 18. Professor Gunther attributes this blurring of the traditional standards to the gropings of a new court that is trying to rid itself of the uncomfortable, dichotomous yoke of the new equal protection while not yet sure of the ultimate contours of its conceptual framework.

He postulates that while the drift away from the two-tier system is not yet based upon a fully synthesized rationale, it does evince a deliberate change in theoretical posture towards a "means-focused" approach. *Id.* at 20. Essentially, the latter test asks whether the means legislatively chosen substantially further the legislative end. The test apparantly contemplates varying degrees of substantiality depending upon the character of the interest infringed. Rather than asking whether the chosen means are "necessary," as did the new equal protection when strict scrutiny was applied, the intensified means analysis would simply "permit the state to select any means that substantially furthered the legislative purpose." *Id.* at 21. Under this formulation, some laws that infringed "fundamental" rights could survive and others that infringed no fundamental rights could be invalidated. Instead of the all-or-nothing choice offered by the new equal protection, the evolving approach postulated by Professor Gunther vests the Court with the flexibility that it apparently desires.

Reed may thus be symptomatic of a doctrine in flux. If the new equal protection is giving way, albeit grudgingly, to a "newer" equal protection whose basic tenets are presently inchoate, to draw support in *Frontiero* for the sex-as-a-suspect-classification view may be inappropriate.

Although *Reed* was the first decision in a number of years in which the court invalidated legislation for lack of a "rational basis," *see* note 16 *supra;* Note, *supra* note

20, a number of the Court's decisions since *Reed* have involved a similar analysis. *See* USDA v. Moreno, 413 U.S. 528 (1973); James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972). The most plausible explanation for this probably lies in an increasing discontent with the new equal protection's inability to function as a flexible analytical tool. *See* Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting); Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures,* 57 CALIF. L. REV. 305 (1969); Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 441 (1971); Gunther, *supra* note 9, at 10; Note, *supra* note 13, at 1496; Note, *New Tenets In Old Houses: Changing Concepts of Equal Protection in Lindsey v. Normet,* 58 VA. L. REV. 930 (1972). The concern has primarily centered on the tremendous gap between the two standards of review. *See* Gunther, *supra* note 9, at 12; Note, *supra* note 13, at 1489. The deferential attitude embodied in limited scrutiny has proved unsatisfactory when applied to legislation attempting more than strictly economic or business regulation. *Compare* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949), *with* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Espousing a "minimal scrutiny" standard of review, *Rodriguez* upheld the Texas public school funding scheme, but only after an intensive examination of the state's underlying legislative policies. Such an approach seems inconsistent with the new equal protection practice under which only passive scrutiny was invoked unless the Court classified the relevant interests as fundamental or declared the statutory classifications suspect. Invocation of that standard uniformly resulted in deference to legislative authority. *See* pp. 168-69 *supra.* A right once adjudged fundamental or a classification once adjudged inherently suspect became irrevocably so categorized. *See* Note, *supra* note 5, at 1087-1127. The strict standard of review was brought to bear in every case involving the fundamental right or suspect classification, resulting in invalidation of the legislation. *See* note 15 *supra.* Thus the Court, in its initial decision to invalidate legislation in a single case, compelled itself to deprive the legislature forever of its power to regulate in the prohibited area. Because of their far-reaching significance, such decisions demand that they be based upon a wide range of considerations. But the determination to characterize as suspect or fundamental was often made in a case of first impression, based on a single factual situation, in an area where the Court lacked judicial experience. *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944). As a result, opinions were often less than lucid and did not convincingly justify the decisions. *See* Gunther, *supra* note 9, at 3-4; Note, *supra* note 5, at 1089.

The source of the Court's difficulty in using new equal protection where neither total judicial deference nor the affixation of a permanent stigma of strict scrutiny could be justified lay not in the new theory itself but in the results that the Court felt obliged to reach once the standard of review was established. Theoretically, the distinction between limited and strict scrutiny affected only the burden of justification imposed on the government. In applying the new equal protection model to a particular factual situation, however, the Court consistently imposed an insurmountable presumption of legislative rationality. Where the scope of scrutiny did not extend beyond the rationality of the statute, the presumption was determinative of the case. *See, e.g.,* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Madden v. Kentucky, 309 U.S. 83, 88 (1940). Where the strict standard of review was invoked, the question of rationality became inconsequential, of course, since the government had to demonstrate that the statute promoted a compelling governmental interest. But to assume that all bases are rational seriously distorts the traditional rule that the presumption of legislative rationality is rebuttable. Correspondingly, to require a "compelling governmental interest" in certain cases assumes that such an interest is demonstrable. Generally speaking, where strict scrutiny has been invoked the Court has felt obliged to supply some analysis to support its judgment that the legislation was constitutionally infirm. *See* Shapiro v.

Thompson, 394 U.S. 618 (1969). But when subjecting legislation to only limited scrutiny, the Court has frequently offered no cogent explanation of its decision to uphold the statute. *See, e.g.,* Labine v. Vincent, 401 U.S. 532 (1971). *See* Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 95 (1966).

The unsatisfactory performance of the new equal protection as a means of analysis springs from the Court's failure to consider the possibilities available under the rational basis standard. In abdicating its powers of judicial inquiry and review over large areas of legislative prerogatives, *see* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955), the Court seemingly refused to recognize that when the question becomes *does the legislation have a rational basis,* one possible answer is *no.* Perhaps this attitude may be explained as a reaction to the "substantive due process" era. *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535-37 (1949) (opinion of Black, J.); Note, *supra* note 5, at 1131-32. But the development of strict scrutiny analysis, with its value-laden selections of fundamental rights and suspect classifications, may render it an equally subjective and undesirable phenomenon. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177-85 (1972) (Rehnquist, J., dissenting); Eisenstadt v. Baird, 405 U.S. 438, 467 (1972) (Burger, C.J., dissenting); Gunther, *supra* note 9, at 42; Mendelson, *From Warren to Burger: The Rise and Decline of Substantive Equal Protection,* 66 AM. POL. SCI. REV. 1226 (1972).

The equal protection decisions of the Burger Court, beginning with *Reed,* may only indicate that the Court continues to adhere to the new equal protection model as it existed during the Warren Court era. *See In re* Griffiths, 413 U.S. 717 (1973), San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 59-62 (1973) (Stewart, J., concurring). But the force of the presumption of legislative rationality under the equal protection clause has been diminished by several recent decisions. The dilemma of requiring either rational basis "abdication" or "permanent" strict scrutiny invalidation is being avoided by undertaking a more thoughtful inquiry when engaging in rational basis analysis. Several cases have expressly noted the recent tendency of refusing to supply an imaginary justification in upholding legislation. *See* McGinnis v. Royster, 410 U.S. 263 (1973); United States v. Kras, 409 U.S. 434 (1973); James v. Strange, 407 U.S. 128 (1972). The requirement of an articulated rational basis is not inconsistent with the new equal protection; it merely discards the artificial limitations imposed by the strong, if not conclusive, presumption of rationality evidenced by earlier decisions. The advantage afforded by a more strict rational basis examination of legislation is to allow two-tier equal protection analysis to function as a flexible problem-solving device without abdication of judicial inquiry into any legislative decision not infringing upon fundamental rights or creating suspect classifications. Moreover, requiring an articulated rational basis may encourage more thoughtful legislative decisions. *See* Gunther, *supra* note 9, at 44-45.

A number of writers have asserted that the Court has abandoned the new equal protection model. *See* Gunther, *supra* note 9; Note, *supra* note 13; *New Tenets in Old Houses, supra;* Note, *supra* note 20. It appears from the Court's language in its recent equal protection opinions, however, that the new equal protection model is substantially intact although some modification of the underlying presumption of legislative rationality has occurred. That application of the model in its pristine form (*i.e.,* without the strong presumption) will provide a useful analytical framework for equal protection decisions is demonstrated by Justice Powell's approach in *Frontiero.* Although concluding that the legislation was invalid, Justice Powell was not forced to invalidate the sexually discriminatory statutes by declaring sex to be a suspect class. This approach accomplishes at least two goals not attainable under the Brennan approach: (1) a decision on the sex-as-a-suspect-classification question is postponed, possibly until the Equal Rights Amendment (hereinafter referred to as the ERA) is either ratified or clearly rejected; and (2) that decision is permitted to be grounded upon a number of cases regardless of the fate of the ERA. Justice Powell's concurring opinion in *Frontiero* indicated that

three members of the Court found additional support for their refusal to impose a strict scrutiny test upon sex-based classifications in the pendency of the ERA.

It was Justice Powell's view that the imposition of strict scrutiny would moot the ratification of the ERA. While an initial justification for a constitutional amendment was the reluctance of the Supreme Court to afford protection to women under the equal protection clause of the fourteenth amendment, *see Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. 22 (1970) (testimony of Congresswoman Griffiths), proponents of the proposed amendment contend that it will accomplish two important goals not achievable by a judicial decision holding sex to be a suspect classification. First, it is thought, the embodiment of a "profound national commitment to terminate sexual discrimination" in a constitutional amendment would "provide a powerful impetus for legislative efforts." In short, it is believed that passage of the amendment would encourage state legislatures to re-examine their laws voluntarily. Dorsen & Ross, *The Necessity of a Constitutional Amendment,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 216, 220 (1971). Secondly, under the strict scrutiny of the new equal protection a legislative justification consisting of "compelling reasons" could sustain a classification based upon sex. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871, 880 (1971). However, "[t]he basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. . . . In short, sex is a prohibited classification." *Id.* at 889.

Even the opponents of the proposed amendment have considered its terms to be an absolute prohibition of legislative sex classifications. *See* Brown, *supra,* at 894; S. REP. No. 92-689, 92d Cong., 1st Sess. 45-46 (1971) (Senator Ervin's Minority Report). The underlying problem presented by the ERA is the pervasiveness of sexually discriminatory attitudes that it will face upon ratification. *See, e.g.,* Stanley v. Illinois, 405 U.S. 645, 666 (1972) (opinion of Burger, C.J.) ("unwed mothers . . . are generally more dependable protectors of their children than are unwed fathers."); DeKosenko v. Brandt, 313 N.Y.S.2d 827, 830 (1970) (the " 'State of Womanhood' . . . prefers cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems with her landlord"). *See also* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. REV. 675 (1971). Concern over the ERA has centered upon its inability to deal flexibly with existing institutions of sexual inequality. *See,* Freund, *The Equal Rights Amendment Is Not the Way,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 234 (1971). For example, "equality of the sexes" presupposes that women have enjoyed the same opportunities for education and training as have males. In the present society, "the imposition of such a constitutional standard could be disastrous" for a large part of the female population. Kurland, *The Equal Rights Amendment: Some Problems of Construction,* 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 243, 247-48 (1971). Justice Powell's conclusion can thus be viewed as an attempt to quell the apprehension of the amendment's opponents that the Court would view ratification as mandating wholesale and immediate abandonment of existing sexually discriminatory laws without regard to the legislative problems that the amendment would precipitate. In view of the grave concerns created by the potentially far-reaching consequences of ratification, *see, e.g.,* Note, *Equal Rights and Equal Protection: Who Has Management and Control?,* 46 S. CAL. L. REV. 892 (1973) (impact on community property law); Note, *The Sexual Segregation of American Prisons,* 82 YALE L.J. 1229 (1973); *see also* Stroud, *Sex Discrimination in High School Athletics,* 6 IND. L. REV. 661 (1973); Note, *Sex Discrimination and Sex-Based Mortality Tables,* 53 BOST. U.L. REV. 624 (1973); Note, *The Equal Rights Amendment and the Military,* 82 YALE L.J. 1533 (1973), such a restrained response by the Court seems warranted, particularly in view of the uncertainty surrounding present ratification efforts. *See The Equal Rights Amendment Tally Sheet,* WOMEN'S RIGHTS L. REP. 104 (Spring, 1973).

Reed and a handful of other recent decisions[28] suggest that equal protection analysis is growing decreasingly conclusionary while growing increasingly flexible and unpredictable.

Thus, while it would then constitute an aberration from the result-oriented manner in which the Court has wielded its equal protection logic, *Reed* could be easily explained by Idaho's failure to demonstrate a rational basis supporting its law.[29] Although four members of the Court apparently viewed sex as a suspect classification in both *Reed* and *Frontiero*, established principles of judicial restraint, first catalogued in *Ashwander v. TVA*,[30] would seem, in spirit, to direct invalidation of the challenged laws under the more limited standard,

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While Justice Powell preserves the Court's ability to declare sex a suspect classification, his conclusion that such a decision would moot adoption of the ERA assumes that the amendment affords no broader protection from sex discrimination than the fourteenth amendment affords for suspect classes. The danger attending this approach to suspect classifications lies in the precedent that it might establish.

If ratification of the ERA is viewed as necessary to establish sex as a suspect classification, other groups seeking "suspect" status might also be required to obtain an amendment. This argument, however, overlooks the fact that the reason justifying, at least in part, the elevation of a particular group to a "suspect" level is often the political impotency of the group. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). Women, though perhaps somewhat politically disadvantaged, hardly seem politically impotent. *See* Note, *supra* note 5, at 1125-27. This may explain why sex has not been accorded "suspect" review. Certainly, to require all groups to attain suspect status through the amending process would impose a qualification that constitutional rights depend upon majority status, a premise hardly consonant with the Court's recent reaffirmation of its adherence to "suspect classification" analysis. *See In re* Griffiths, 413 U.S. 717 (1973). There is another reason why sex has not qualified as a "suspect" classification. At the birth of the new equal protection, *see* note 8 *supra*, Chief Justice Stone spoke of "discrete and insular minorities." Women as a class seem unlikely candidates for this category, and in view of recent language resurrecting the "discrete and insular" test, *see* Graham v. Richardson, 403 U.S. 365, 372 (1971); Gordon v. Lance, 403 U.S. 1, 5 (1971); Oregon v. Mitchell, 400 U.S. 112, 295 n.14 (1970), it appears improbable that sex will be classified as suspect absent a constitutional amendment. Since women do not seem to satisfy this characterization of a suspect class, *but see* Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1506-16 (1971), no precedent would be established requiring amendment in order to achieve "suspect" status for bona fide discrete and insular minorities.

28. *See, e.g.*, James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972).

29. Consistent with its recent "articulated basis" approach, *see* note 27 *supra*, the *Reed* Court made no effort to supply the Idaho law with a rational basis.

30. 297 U.S. 288, 341, 346-48 (1936) (Brandeis, J., concurring). In his concurring opinion Justice Brandeis summarized seven "rules" utilized by the Court in exercising self-restraint in constitutional matters. While these rules have been used largely to avoid passing upon constitutional questions when a non-constitutional ground of decision is available, it seems consonant with the restrictive spirit of the *Ashwander* rules to avoid imposing the suspect classification label in a case amenable to a rational basis analysis reaching the same result.

if possible, rather than through invocation of strict scrutiny with its far-reaching consequences.

Reed was the first decision in which the Burger Court squarely faced an equal protection assault upon sexually discriminatory legislation. It was also the first time the Supreme Court had invalidated such a law on equal protection grounds.[31] When examined in light of its potential importance, the decision is unusually imprecise in delineating the standard of constitutional scrutiny by which the Idaho law was judged. Looking backward from *Frontiero*, it seems probable that *Reed*'s ambiguity embodied the compromise necessary to produce a unanimous decision in an area of private disagreement within the Court.

The fragmented decision in *Frontiero* reflects the problems inherent in the inflexible, two-tiered approach of strict and limited scrutiny. At least four Justices seem disposed to blur the polar alternatives currently attending equal protection analysis and to deprive the sex-as-a-suspect-classification viewpoint of the ability to engraft permanently a rigid and invariably fatal standard of review upon legislation involving particular, periodically discovered rights or selected classes.[32] These Justices may soon be presented with an opportunity

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31. *See* Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948).

32. *See* note 27 *supra*. It is interesting to note the considerations upon which Justice Brennan based his opinion declaring sex-based legislative classifications inherently suspect.

First, in light of the long history of sex discrimination in this country and because of the high visibility of one's sex, women are still subjected to discrimination in the fields of education, employment and politics.

Secondly, because sex is an immutable characteristic determined by the fortuity of birth, special disabilities based on sex violate " 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.' " Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

Thirdly, sex usually bears no relation to one's ability to perform or contribute to society.

Fourthly, congressional action prohibiting discrimination on the basis of sex, *see, e.g.*, Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e-2(a)-(c) (1971); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1971), indicates that a coequal branch of government has concluded that sex-based classifications are inherently invidious. *Cf.* Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 640 (1966). *See also* Baker v. Carr, 396 U.S. 186 (1962).

The opinion noted a possible fifth basis for its conclusion:

> It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decision-making councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate and only 14 women hold seats in the House of Representatives.

Frontiero v. Richardson, 411 U.S. at 686 n.17. *See* Note, *supra* note 5, at 1125.

to temper the rigidity of strict scrutiny.[33] If this more flexible approach

33. In Shevin v. Kahn, 273 So. 2d 72 (Fla. 1973), *cert. granted,* 42 U.S.L.W. 3235 (U.S. Oct. 23, 1973), the Florida Supreme Court sustained the constitutionality of a state statute granting a $500 property tax exemption to widows. FLA. STAT. § 196.191(7) (1971). In the lower court, the taxpayer, a widower, had successfully challenged the statute as a violation of the equal protection clause of the fourteenth amendment. The question of sex as a "suspect" classification was not discussed by the court.

The *Kahn* court found that the object of the legislation was to " 'reduce the disparity between the economic . . . capabilities of a man and a woman.' " *Id.* at 73. Applying the *Reed* test, the court found the legislation to have a "fair and substantial relation" to the ability of female property owners to pay their taxes. *Id.*

The rationale of the Florida Supreme Court would appear to be consistent with either test espoused in *Frontiero.* Proponents of equality for women are at pains to point out the widespread abuses and discriminations that women have suffered as a result of inbred economic factors in our society. Justice Brennan, in his opinion in *Frontiero,* notes the problems that have resulted from a long history of sex discrimination in the employment of women. Thus a statute which operates to counteract the effects of past discrimination would seem consistent with his justification for declaring sex to be a suspect class. The situation would seem to be analogous to "benign" racial quotas, which have been upheld, *see* DeFunis v. Odegaard, 507 P.2d 1169 (Wash. 1973), *cert. granted,* 94 S. Ct. 538 (1973) despite the fact that racial classifications are "inherently suspect." *See* Loving v. Virginia, 388 U.S. 1 (1967).

Since "benign" legislation seeking to rectify the effects of past discrimination apparently meets the "compelling state interest" test, even those Justices who apply strict scrutiny to the legislation would be justified in upholding the statute. This approach would also seem to satisfy those Justices who would apply only the rational basis test as did the Florida Supreme Court. If the basis is compelling, it must, a fortiori, be rational. This approach, however, would seem to undermine the only sound basis for the new equal protection clause. The greatest virtue of the strict scrutiny standard has been the insurmountable barrier it has placed between legislatures and suspect classes. To declare that the Florida legislation in *Kahn* had pierced the barrier would be as dramatic an amputation of the strict scrutiny leg of the new equal protection as was *Reed*'s effect on the rational basis leg. However, the benefits to be derived from such an operation would be most evident in the flexibility of the resulting body of equal protection law.

If those Justices who have criticized the severity of the "strict scrutiny test" find that the state has met its burden of justification, the result would be to establish a precedent for meeting the burden of strict scrutiny. If the Court allows the strict burden to be met, the question of whether strict or limited scrutiny is involved would rapidly become moot. The test would become "In view of the importance of the competing interests, is the legislation reasonable?" This approach would have several important advantages over the new equal protection.

First, legislation found to be unreasonable would not have to be upheld merely because no fundamental rights or suspect classifications were involved.

Secondly, no initial decision that a right was fundamental or that a classification was "suspect" would have to be made. The questionable value of forever placing beyond legislative regulation a class or a right would be eliminated.

Thirdly, conclusionary opinions would give way to a more thoughtful analysis of individual cases. The question presented to the court would no longer be "Is the legislation regulating this group to be forever banned?" Instead the courts would be placed in the more established judicial role of deciding individual cases by asking "Does this legislation impermissibly deny to the individual his right to equal protection of the laws?" The depth of the decisional analysis would depend on the importance of the conflicting interests and the strength of the presumption of legislative validity.

is accepted by a majority of the Court, it may substitute useful problem-solving analysis for result-oriented fiat in the approach to a traditionally bothersome concept.

The familiar mechanism of the two-tier formula—often criticized for its lack of a clear constitutional basis[34]—may thus grow less recognizable in the near future, if it has not already. Equal protection analysis should assume an increasingly amorphous form if it does undergo the predicted modification. Whether it can quickly assume the trappings of coherent constitutional doctrine, however, may prove more important than what the ultimate substance of the new doctrine will be.

Insurance—NO-FAULT AUTOMOBILE PROPERTY PROTECTION—LEGISLATURE'S ABROGATION OF COMMON LAW TORT RIGHT TO RECOVER PROPERTY DAMAGE OF LESS THAN $550 VIOLATES FLORIDA CONSTITUTION. *—Kluger v. White,* 281 So. 2d 1 (Fla. 1973).

An automobile owned by Clara Kluger collided with another vehicle owned by Bernadette White; White was subsequently charged with failure to yield the right-of-way. Damage to the Kluger car was estimated at $250.[1] On the date of the accident, Kluger's car was insured by Manchester Insurance and Indemnity Company, but her policy did not provide for either "full" or "basic" property damage protection as described in Florida statutes section 627.738.[2] Kluger

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34. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 177, 179 (1972) (Rehnquist, J., dissenting).

1. The cost of repairing the automobile was estimated at $774.95. Since the fair market value of the 1964 Buick was only $250, however, it became necessary to apply the general rule of law that if the cost of repair exceeds the value of an automobile, the value of the automobile will be the measure of damages. *See* 15 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 480.1 (1969); 25 C.J.S. *Damages* § 82 (1966). Had the former figure been accepted, Kluger could have sued in tort for the damage she sustained.

2. FLA. STAT. § 627.738 (1971) provides essentially that the owner of a motor vehicle is *not required* to maintain security with respect to property damage to his motor vehicle. However, every insurer providing security under the Florida No-Fault Automobile Insurance Law must *offer* the owner either full or basic coverage for accidental property damage to the insured motor vehicle. Full coverage is defined as insurance without regard to fault, whereas basic coverage is limited to insurance against damage *caused by the fault of another* resulting from contact between the insured vehicle and a motor vehicle as defined in FLA. STAT. § 627.732 (1971). Moreover,