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WEINBERGER v. WIESENFELD: EQUAL PROTECTION AND SEX CLASSIFICATIONS IN GOVERNMENT BENEFIT PROGRAMS

The Supreme Court's recent decision in *Weinberger v. Wiesenfeld*[1] has positive implications for the developing application of equal protection criteria to sex discrimination. First, it clearly establishes that the Burger Court, despite its refusal to declare sex a suspect classification, will apply a relatively high level of scrutiny in cases involving claims of sex discrimination. Second, it confirms the inference to be drawn from other recent cases that the Court is inclined to give a favorable reception to constitutional attacks on sex-based classifications in government benefit programs.

THE EQUAL PROTECTION ANALYSIS

In the *Wiesenfeld* decision, the Supreme Court closely analyzed the legislative ends behind certain sections of the Social Security Act and the statutory means that were used to achieve those ends. Having found that a sex-based classification in the Act had no rational relationship to the legislative ends, the Court held unconstitutional the provision of the Social Security Act[2] that grants mother's benefits to the widow of a deceased wage earner with a dependent child, but that grants no corresponding father's benefits to the widower of a deceased wage earner with a dependent child.

Looking at the decisions of the first term in which all four of the Nixon-appointed Justices participated, Professor Gunther presciently forecast several years ago what direction the new Court's equal protection decisions would take.[3] Given the shift toward conservatism in the membership of the Court, Gunther reasoned that some middle ground would be found between following the Warren Court's policy of vigorous expansion of equal protection doctrines and returning to the discredited permissive standard of the "old" equal protection. The Warren Court's "two-tier" standard had become so rigid that "suspect classification" and "minimum rational basis" had become mere conclusory labels rather than tests. Analyzing the equal protection decisions of the 1971 Term, Gunther concluded,

1. 95 S. Ct. 1225 (1975).
2. 42 U.S.C. § 402(g) (1970), *as amended* 42 U.S.C. § 402(g) (Supp. II, 1972).
3. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

> The model suggested by recent developments would view equal protection as a means-focused, relatively narrow, preferred ground of decision in a broad range of cases. Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends. . . . The yardstick for the acceptability of the means would be the purposes chosen by the legislatures, not "constitutional" interests drawn from the value perceptions of the Justices.[4]

The case that caused Gunther the most difficulty was *Reed v. Reed*,[5] which invalidated an Idaho statute giving preference to men over similarly-sitated women as administrators of estates, on the ground that the sex criterion was "arbitrary."[6] The State's argument that the classification had a reasonable purpose of reducing administrative disputes would have stood up under previous applications of the requirement that a classification bear a rational relationship to the State's interest. Justice Burger's opinion eschewed the established rational basis-suspect classification dichotomy, but it also avoided enunciating any new or intermediate standard of review. With apparent perplexity, Gunther concluded,

> Only by importing some special suspicion of sex-related means from the new [Warren Court] equal protection area can the result be made entirely persuasive. Yet application of the new equal protection criteria is precisely what *Reed v. Reed* purported to avoid.[7]

Despite the fact that Gunther found his crystal ball a bit misty, his prognostications turned out to be highly accurate. The Burger Court has worked toward an intermediate, means-focused level of scrutiny in equal protection cases, and—with some lapses—it has shown a considerable degree of suspicion of sex-related classifications.

In 1973, the Supreme Court denied certiorari in *Moritz v. Commissioner of Internal Revenue*.[8] In that case, the Tenth Circuit had found unconstitutional on equal protection grounds a provision of the Internal Revenue Code[9] that allowed a deduction for the care of dependents to all women, but only to those men who were widowers or husbands whose wives were incapacitated. A single man whose invalid mother was dependent on him challenged the classification in

4. *Id.* at 20, 21.
5. 404 U.S. 71 (1971).
6. *Id.* at 76.
7. Gunther, *supra* note 2, at 34.
8. Moritz v. Commissioner, 469 F.2d 466, 470 (1972); *cert. denied*, 412 U.S. 906 (1973).
9. Int. Rev. Code of 1954, § 214, 26 U.S.C. § 214 (1970), *as amended*, 26 U.S.C. § 214 (Supp. I, 1971).

the statute. The Tenth Circuit discreetly cited *Reed* to the effect that the classification was "subject to scrutiny" (without specifying the level of scrutiny) and found that other means were available to achieve the legislative purpose without using "invidious discrimination based solely on sex."[10] The Supreme Court was not persuaded to grant certiorari by the Commissioner's argument that women's lesser earning power and traditional role in the home made it reasonable to use a classification that favored all women over single men.[11]

Frontiero v. Richardson, also in 1973, denounced sex discrimination as "romantic paternalism" which "put women, not on a pedestal, but in a cage."[12] The Court found unconstitutional statutes[13] allowing a male member of the armed forces to claim his wife as a dependent, whether or not she actually depended on him for support, while requiring a servicewoman to prove that her husband was dependent on her for over one-half of his support before she might claim him as a dependent. When a spouse was classed as dependent, the couple received increased quarters allowances and the spouse received medical and dental benefits.[14]

The Court's eight-to-one vote indicated that there was strong support for striking down a sex-based classification whose only justification was administrative convenience. The theoretical basis for the holding, however, is unclear. A four-justice plurality declared sex a suspect classification; yet Justice Brennan's opinion for the plurality seems to hint that the sex-based classification might withstand even the strict scrutiny applied to a suspect classification if the Government could show that use of the classification actually saved the Government any money:

> [T]he Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact.
>
> The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example,

10. 469 F.2d at 470.

11. Petitioner's Brief for Certiorari at 8-9, Commissioner v. Moritz, 412 U.S. 906 (1973); *quoted in* Davidson, Ginsburg, & Kay, Sex-Based Discrimination 54 (1974).

12. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

13. 37 U.S.C. § 401 (1970), *as amended,* 37 U.S.C. § 401 (Supp. III, 1973); 10 U.S.C. § 1072 (1970).

14. 37 U.S.C. § 403 (1970), *as amended,* 37 U.S.C. § 403 (Supp. I, 1970); 10 U.S.C. § 1076 (1970).

> that it is actually cheaper to grant increased benefits with respect to *all* male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependency requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits.[15]

Justice Stewart's one-sentence concurring opinion enigmatically cited *Reed v. Reed.* Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment but cited the pendency of the Equal Rights Amendment as his reason for not subscribing to a classification of sex as suspect.

The decisions of *Kahn v. Shevin* in 1974 and *Schlesinger v. Ballard* early in 1975 temporarily weakened expectations that the Court was moving toward a fairly stringent application of the rational basis test to sex classifications. In his majority opinion in *Kahn v. Shevin,*[16] Justice Douglas seemed to lapse into the "romantic paternalism" he had joined in denouncing in *Frontiero,* by upholding a Florida law granting a property tax exemption to widows but not to widowers on the ground that it compensated for the heavier burden of spousal laws on women. The three Justices (Brennan, Marshall, and White) who had joined Justice Douglas in the plurality opinion in *Frontiero* disagreed with him in this case. In two dissenting opinions they objected to the standard of review, pointing out that the law was overinclusive by including all women and underinclusive by excluding all needy men.

In *Schlesinger v. Ballard,*[17] the Court again found a sufficiently rational and benign purpose in a sex-based classification to meet an equal protection challenge. In response to a male naval officer's complaint that women officers were given four years longer than men to achieve promotion or receive a mandatory discharge, Justice Stewart's majority opinion held that the classification was reasonable in view of women's lesser opportunity to achieve promotion through combat and sea duty. The sex classifications in *Reed* and *Frontiero* were distinguished as being based on "archaic and overbroad generalizations,"[18] while the classification in *Ballard* served to equalize opportunity between the sexes. The four justices[19] who had wanted to adopt sex as a suspect classification in *Frontiero,* and who had

15. 411 U.S. at 689 (footnote omitted).
16. 416 U.S. 351 (1974).
17. 95 S. Ct. 572 (1975).
18. *Id.* at 577.
19. Brennan, Douglas, Marshall, and White.

divided in *Kahn v. Shevin,* joined forces again as dissenters in *Ballard.* They found no sufficient governmental interest served by the statutory classification and pointed out that the Court has "recently declined to manufacture justifications in order to save an apparently invalid statutory classification."[20]

After *Kahn v. Shevin* and *Ballard,* the equal protection waters were rather muddy. But one analyst argued that *Reed* and *Frontiero* would retain their importance and that, in *Ballard,*

> the majority's insistence that Congress had in fact squarely faced the sex-discrimination issue and explicitly chose to differentiate between the sexes only to achieve specific ends not related to sex discrimination holds out the possibility that similar efforts may be demanded of all legislative sex discrimination before it may pass constitutional muster.[21]

This optimistic conclusion was justified within a few weeks when the decision in *Weinberger v. Wiesenfeld* was announced.[22] With no dissenters, the Court found it a denial of equal protection to make sex the sole determinant of whether a widowed spouse of a wage earner receives social security benefits while caring for a dependent child. Justice Brennan's opinion avoided the theoretical wrangling about standards of review that characterized *Frontiero.* No attempt was made to commit the Court to treat sex as a suspect classification, but the opinion makes it clear that a highly rational connection between legitimate legislative ends and statutory means will have to be shown in order for a sex-based classification to withstand an equal protection challenge.[23]

Comparing the failure to provide widower's benefits in this case to the dependency test for husbands in *Frontiero,* the Court reasoned:

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20. 95 S. Ct. at 584.

21. Krattenmaker, *Sex Not Suspect: Sub Silentio,* 1 Women L. Rep. 1.155, 1.156 (1975).

22. March 19, 1975, two months after *Ballard.*

23. It is highly instructive to compare the Supreme Court's *Wiesenfeld* opinion to the opinion of the three-judge Federal District Court that first heard the case. The District Court adheres strictly to the two-tier equal protection analysis. It finds that the statutory classification in the Social Security Act is sufficiently reasonable to meet the minimum rational basis test, but it decides that sex is a suspect classification (citing *Frontiero*) and invalidates the statutory provision on a strict scrutiny test. Wiesenfeld v. Secretary of Health, Education & Welfare, 367 F. Supp. 981 (D.N.J. 1973). Justice Brennan's complete disregard for the District Court's two-tier analysis, precisely the type of analysis he himself had employed in *Frontiero,* seems to indicate that he has joined the Court's trend toward applying an intermediate level of scrutiny in sex-discrimination cases. The other justices who argued for "suspect classification-strict scrutiny" in *Frontiero* subscribed to Justice Brennan's opinion in *Wiesenfeld* (with the exception of Justice Douglas, who did not participate in the *Wiesenfeld* decision).

> Section 402(g) clearly operates, as did the statutes invalidated by our judgment in *Frontiero*, to deprive women of protection for their families which men receive as a result of their employment. Indeed, the classification here is in some ways more pernicious.[24]

This classification was more pernicious because Stephen Wiesenfeld was not even allowed to try to prove that he was dependent on his wife, as Joseph Frontiero had been; and because Paula Wiesenfeld had paid social security taxes on her salary whereas Sharron Frontiero had paid no tax for the benefits she demanded.

The Court analyzed the legislative purpose behind Section 402(g) and the rationality of the statute for carrying out that purpose. From an analysis of legislative history and the statutory scheme of the Social Security Act, the Court concluded that Section 402(g) was not part of a comprehensive plan to compensate women in general for economic discrimination, since many classes of women were ineligible for social security benefits.[25] To the Government's arguments that the sex-based classification in 402(g) was part of a benign, compensatory scheme, the Court replied tartly,

> the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme. . . . This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.[26]

The purpose behind Section 402(g), the Court concluded, was "to provide children deprived of one parent with the opportunity for the personal attention of the other. . . ."[27] If the parent chose to stay at home and care for the child, the parent received a living allowance. If he or she chose to go to work, the Section 402 allowance was reduced one dollar for every two dollars earned above $2,400 annually.[28] Given the purpose of enabling the surviving parent to stay at home with the child, the sex-based classification of Section 402(g) was "entirely irrational"[29] and the classification had to fall.

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24. 95 S. Ct. at 1232.

25. *See* Walker, *Sex Discrimination in Government Benefit Programs*, 23 Hastings L. J. 277, 278 (1971), for an account of the "blackout period" when a housewife is ineligible for any government benefits between the time her last dependent child leaves home and age sixty-two (sixty for widows).

26. 95 S. Ct. at 1233. This pronouncement seems to be a virtual renunciation of the old, permissive "minimum rational basis" test in the equal protection area.

27. *Id.*

28. 95 S. Ct. at 1229; 42 U.S.C. § 403(b) & (f) (1970).

29. 95 S. Ct. at 1235.

Although *Kahn v. Shevin* and *Schlesinger v. Ballard* indicate that the Supreme Court will not uniformly strike down statutory classifications based on sex as violations of equal protection, the level of scrutiny accorded to such classifications in recent years has been relatively strict. Looking at *Moritz* (tax deductions), *Frontiero* (military dependent's benefits), and *Wiesenfeld* (social security benefits), one can infer that any government benefit which is awarded on the basis of classification by sex is now vulnerable to constitutional attack.

THE IMPACT OF *WIESENFELD*

As one of the attorneys for Stephen Wiesenfeld described the decision,

> The *Wiesenfeld* opinion is a clear statement that the Court will no longer accept at face value, as an automatic shield for discrimination, recitation of woman-protective purposes for laws that associate women with the hearth, men with the wide world outside the home.[30]

Indeed, the opinion contains a passage that, taken in isolation, seems scarcely less than an equal rights amendment to the Social Security Act:

> Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in *Frontiero,* the Constitution also forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men.[31]

The provision of the Social Security Act that was found unconstitutional in *Wiesenfeld* is only one of many in the Act that attributes benefits in an inequitable fashion based on sex classifications. Women are the chief victims of these inequities, but men too are deprived of benefits, as the *Wiesenfeld* case illustrates. The reason the Social Security Act treats men and women so differently is not far to seek, as former Congresswoman Martha Griffiths points out:

> The income security programs of this nation were designed for a land of male and female stereotypes, a land where all men were breadwinners and all women were wives or widows; where men provided necessary income for their families but women did not; in

30. American Civil Liberties Union, Memorandum (Mar. 1975) (prepared by Ruth Bader Ginsberg).

31. 95 S. Ct. at 1232.

other words, where all of the men supported all of the women. This view of the world never matched reality, but today it is further than ever from the truth.[32]

The percentage of women in the labor force has doubled in the last half-century, from 20 percent of all workers in 1920[33] to 39 percent in 1973;[34] and the percentage of married women who work nearly tripled from 1940 (14%) to 1970 (40%).[35] The women who work do so to a great extent because their earnings are needed:

> Millions of women who were in the labor force in March 1973 worked to support themselves or others. This was true of most of the 7.7 million single women workers. Nearly all of the 6.3 million women workers who were widowed, divorced or separated from their husbands—particularly the women who were also raising children—were working for compelling economic reasons. In addition, the 3.7 million married women workers whose husbands had incomes below $5,000 in 1972 almost certainly worked because of economic need. Finally, about 3 million women would be added if we take into account those women whose husbands had incomes between $5,000 and $7,000.[36]

Because women's average earnings are far less than those of men,[37] it is of special concern to women that their social security benefits be computed on the most equitable basis possible. Every worker, of course, male or female, has an interest in seeing that his or her contributions to social security result in the best possible range of benefits for the worker and his or her dependents. In looking at the benefits of married couples, it is often difficult to say which spouse is being deprived because the presumption of a wife's dependency causes her benefits to be defined or computed on a different basis from those of her husband. Under the provision challenged in *Wiesenfeld,* the wife lost because she paid social security taxes that did not obtain the same amount of benefits for her surviving dependents as a man's contributions would have; and the husband lost because he was not allowed to collect benefits in a situation where a similarly situated woman would have been able to collect.

Although wives are penalized in certain ways by the presumption

32. Griffiths, *Sex Discrimination in Income Security Programs,* 49 Notre Dame Lawyer 534 (1974).

33. Women's Bureau, U.S. Dep't of Labor, Women Workers Today 6 (1971).

34. Women's Bureau, U.S. Dep't of Labor, Highlights of Women's Employment and Education: Employment in 1973 1 (1974).

35. Research and Statistics Note, U.S. Dep't of Health, Education, and Welfare, Wife's Earnings as a Source of Family Income 1 (April 30, 1974).

36. Women's Bureau, U.S. Dep't of Labor, Why Women Work 2 (1974).

37. Research and Statistics Note, *supra* note 35, at 6.

that they are dependent on their husbands, men may be penalized by the presumption that they are *not* dependent on their wives: in order to qualify for benefits on his wife's wage record, a husband or widower must prove that he received over one-half of his individual support from the wife.[38] This dependency requirement is exactly like the requirement struck down in *Frontiero*,[39] hence, the social security requirement is open to constitutional attack.[40] One must keep in mind, however, the implication in Justice Brennan's *Frontiero* opinion that a sex-based classification might survive even if the strict scrutiny accorded to a suspect classification if it could be shown that employing the classification would save the Government money.[41] It was not expected that many widowed fathers of dependent children would qualify for benefits under the provision at issue in *Wiesenfeld*;[42] therefore it is not yet clear how heavily the Court would weigh major costs to the social security system against a constitutional challenge to sex classifications in the benefit structure.

Divorced husbands and wives both have grounds to attack the classifications used in the social security structure, but for different reasons. Divorced husbands have no entitlement whatever to benefits derived from their former wives' earnings, even if they could meet the one-half support requirement for dependent husbands and widowers discussed above. Divorced wives and surviving divorced wives, on the other hand, need not show any degree of dependency on their former husbands' past or present earnings, but they cannot collect dependents' benefits unless they were married for at least 20 years before divorcing.[43] A surviving divorced wife who is the mother of the covered employee's child comes in yet another category: no matter how long she was married or to what extent she or her child was dependent on the employee, she is entitled to benefits based on her deceased former husband's earnings.[44] All of these categories are clearly based on stereotypical ideas, "archaic and overbroad generalizations" that are as constitutionally infirm as the generalization behind the provision challenged in *Wiesenfeld*.

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38. 42 U.S.C. § § 402(c)(1)(C), (f)(1)(D) (1970).

39. Note, *Sex Classifications in the Social Security Benefit Structure*, 49 Ind. L. J. 181, 193 (1973).

40. *Id.* at 193. Disabled widowers (in contrast to disabled widows) must also prove dependence in order to receive benefits based on their wives' earnings. 42 U.S.C. § 402(f) (Supp. II, 1972).

41. 411 U.S. at 689. The passage from the *Frontiero* opinion referred to is quoted in the text accompanying note 15, *supra*.

42. 95 S. Ct. at 1236.

43. 42 U.S.C. § § 402(b) & (e), 416(d) (Supp. II, 1972).

44. 42 U.S.C. § § 402(g), 416(d)(3) (Supp. II, 1972).

Computation of benefits for families where both spouses are wage earners is highly inequitable, as Representative Griffiths explains:

> . . . the social security tax imposes an inequitably heavy burden on families with two earners. A retired couple where both husband and wife have worked may receive less in benefits than a single-earner family which had the same total earnings and paid no more in social security taxes. . . . Moreover, a retired couple where both husband and wife have worked may have paid more in social security taxes and yet receive less in benefits than a single-earner family which had lower earnings.[45]

This anomaly in benefits, like that challenged in *Wiesenfeld,* results from classifications in the social security benefit structure that have the effect of depriving working wives of an equitable return for the contributions they make.

Congress has made many amendments to the Social Security Act since its creation in 1939, and most of them have served to ameliorate inequities even more severe than those which exist today. There are bills before the 94th Congress to deal with some of the problems discussed here,[46] but the prevailing climate of concern over the future solvency of the Social Security system[47] makes it unlikely that Congress will take the initiative to remove any of the sex-based inequities from the Act in the near future. The decision in *Wiesenfeld,* then, with *Reed* and *Frontiero* behind it, implies that the courts may offer the best hope of dealing with the equal protection problems posed by social security and other government benefit programs.

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45. Griffiths, *supra* note 32, at 537.

46. Among the Social Security reforms proposed in bills before Congress in 1975 were payment of benefits to a married couple on their combined earnings record; eliminating the special dependency requirement for entitlement to husband's or widower's benefits; providing for payment of benefits to widowed fathers with minor children; and reducing from 20 to 5 years the length of time a divorced woman's marriage to an insured individual must have lasted in order for her to qualify for wife's or widow's benefits on his wage record. H.R. 156, 775, 901, 1938, 1948, 2012, 2529, 4357, 4359, 4501, 4565 & S. 277, 278, 94th Cong., 1st Sess. (1975).

Many of these reforms have been proposed repeatedly in the past (notably by former Rep. Martha Griffiths and by Rep. Bella Abzug) and have failed to pass.

47. See *Social Security: Trouble Ahead,* Newsweek 75 (Mar. 24, 1974); *Social Security: Financial Woes Ahead,* Albuquerque Journal, Apr. 6, 1975, § B, at 1, col. 1; Samuelson, *Social Security: A-OK,* Newsweek 74 (Apr. 14, 1975).