

FRONTIERO v. RICHARDSON (1973)
CRAIG v. BOREN (1976)

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PRECEDENTS

Before 1971, sex-based classifications in the law were subjected to something approaching the Rational Basis Test. And then came:

Reed v. Reed (1971)

Struck down an Idaho statute that provided that males are to be given priority over females in the process of appointing estate administrators.

Idaho argued that preferring men to women in the area of estate administration was a rational means of advancing a legitimate interest

Legitimate End: Administrative Efficiency

Rational Means: In general, men are better qualified to be administrators than are women.

The Supreme Court accepted that the end was legitimate and the means rational, but found that the law violated the EP Clause because the classification was “arbitrary” insofar as it ignored the qualifications of particular applicants. So: Birth of a new standard.

EQUAL PROTECTION AND THE DP CLAUSE

The EP Clause applies to the States, and there is no explicit right to equal protection against the Federal Government. But a series of cases in the 1950’s and 60’s found that the 5th Amendment forbids “discrimination that is so unjustifiable as to be violative of due process”. [See *Bolling v. Sharpe* (1954): desegregation of D.C. schools]

Thus the guarantee of equal protection applies to the States through the EP Clause and to the Federal Government through the DP Clause.

BACKGROUND TO *FRONTIERO*

In the early 70's, two Congressional statutes required spouses of female members of the armed forces to prove that they were dependent on their wives for over half of their support in order to receive increased quarters allowances and medical/dental benefits, but automatically treated spouses of male members as "dependents", and hence eligible for these benefits.

FRONTIERO'S COMPLAINT

Sharron Frontiero, an Air Force Lieutenant, charged that these statutes violated her right to equal protection under the DP Clause.

Given that the Rational Basis Test had been discarded in *Reed*, the main question before the Court was what standard to apply in Frontiero's case.

THE FRACTURED COURT

The Court was divided over the proper Test to be applied in the evaluation of sex-based classifications.

Brennan, Douglas, White, Marshall: Strict Scrutiny

Powell, Burger, Blackmun, Stewart: No need for a new test; just base the decision on *Reed*.

Rehnquist: Rational Basis

THE ARGUMENT FOR STRICT SCRUTINY

Why Sex is like Race

History of Discrimination (see *Bakke*)

"Throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children... And although blacks were guaranteed the right to vote in 1870, women were denied even that right until [1920]."

Present Discrimination

“Women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.”

Immutable Characteristic (see *Bakke*)

“Since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept...that legal burdens should bear some relationship to individual responsibility.”

No Relation to Ability to Contribute to Society

“What differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.”

THE STRICT SCRUTINY TEST APPLIED

The Strict Scrutiny Test requires that a law bear a necessary relation to a compelling state objective in order to avoid violation of the EP guarantee of the DP Clause.

Here, the objective of the statutes is administrative convenience (based on the empirical supposition that wives are frequently dependent on their husbands, while husbands are rarely dependent on their wives). This is not a compelling interest. Moreover, the Federal Government has not shown that the statute would in fact save money.

NOTE ON THE ERA

Equal Rights Amendment (Failed: 1972-1982)

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

In 1973, the ERA had passed both Houses of Congress and was well on its way to ratification by the States. In the end, it fell 3 states shy of the 38 needed for ratification.

FRONTIERO AND THE ERA

Although Powell, Burger, and Blackmun agreed that the statute violated the equal protection guarantee of the 5th Amendment, they argued that the Court should wait until final resolution of the ERA question before deciding on which Test to apply to sex-based classifications.

CRAIG v. BOREN (1976)

BACKGROUND TO CRAIG

A 1958 Oklahoma law made it illegal to sell 3.2% beer to males under 21 and to females under 18.

A licensed vendor of 3.2% beer challenged the statute, claiming that it violates the equal protection rights of males who are 18-20.

THE NEW TEST

In Craig, the Court introduced a new standard for evaluating the constitutionality of sex-based classifications: Intermediate Scrutiny.

The Intermediate Scrutiny Test

A law that depends on a sex-based classification violates the EP Clause unless it is substantially related to the achievement of an important governmental objective.

WHY A NEW TEST?

The Intermediate Scrutiny (IS) Test, though consistent with *Reed*, contradicts *Frontiero*.

As Rehnquist rightly pointed out in his dissent, the Court gave no reasons supporting the use of the IS Test, and it is less than clear how such an “intermediate” test should be applied. This leaves open the possibility that judges will decide future IS cases based on whim, not principle.

APPLYING INTERMEDIATE SCRUTINY IN *CRAIG*

The Law's Objective, i.e., the enhancement of traffic safety, is clearly important.

The question is whether a law that prevents 3.2% beer from being sold to 18-20 year old males but not to 18-20 year old females bears a substantial relation to the enhancement of traffic safety.

Opinion: Statistics showed that 2% of 18-20 year old males were arrested for DUI. But, said the Court, "if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit'."

Dissent (Rehnquist): This is irrelevant. The real question is whether the statistical evidence suggests that "young males pose by far the greater drunk driving hazard".

Opinion: The law prohibits the sale, but not the actual drinking, of 3.2% beer by 18-20 year old males. It also does not make it illegal for 18-20 year old females to share 3.2% beer they have legally purchased with their 18-20 year old male companions. Because of this, the law does not bear a "substantial relation" to the enhancement of traffic safety. So it fails the IS Test.

The following case, *Mississippi University for Women v. Hogan* (1982), is not in your Reader. You are not responsible for the details of the case on the final examination. But the case is an important precedent for *United States v. Virginia* (1996). So I have left a summary of it here for your perusal.

MISSISSIPPI UNIVERSITY FOR WOMEN v. HOGAN (1982)

PRECEDENTS

Craig v. Boren (1976)

In *Craig*, the Court introduced a new standard for evaluating the constitutionality of sex-based classifications: Intermediate Scrutiny.

The Intermediate Scrutiny Test

A law that depends on a sex-based classification violates the EP Clause unless it is substantially related to the achievement of an important governmental objective.

Means: Rational / Substantial / Necessary

End: Legitimate / Important / Compelling

The Intermediate Scrutiny (IS) Test, though consistent with *Reed*, contradicts the plurality's application of Strict Scrutiny in *Frontiero*.

As Rehnquist rightly pointed out in his dissent, the Court gave no reasons supporting the use of the IS Test, and it is less than clear how such an "intermediate" test should be applied. This leaves open the possibility that judges will decide future Intermediate Scrutiny cases based on whim, not principle.

BACKGROUND TO MUW

In 1884, Mississippi created the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi, now known as the Mississippi University for Women (MUW).

In 1971, MUW established a School of Nursing.

In 1979, Joe Hogan was denied admission at MUW because of his sex, but was given permission to audit the courses at MUW in which he was interested. He filed a law suit in District Court claiming that the single-sex admissions policy of MUW's School of Nursing violated his rights under the EP Clause.

THE PROPER TEST: INTERMEDIATE SCRUTINY

In a 5-4 decision, O'Connor argued that the proper test to apply was Intermediate Scrutiny (as in *Craig*), and that MUW's single-sex admissions policy failed the test.

APPLYING INTERMEDIATE SCRUTINY

The Question: Whether MUW's single-sex admissions policy is substantially related to an important governmental objective.

"Exceedingly Persuasive Justification"

O'Connor glossed the Intermediate Scrutiny test as requiring that States have an "exceedingly persuasive justification" for the relevant policy.

O'CONNOR ON THE END

†Intermediate Scrutiny is designed to "smoke out" illegitimate uses of characteristics as grounds for discrimination, and to ensure against the perpetuation of negative or demeaning stereotypes. In this way, Intermediate Scrutiny resembles Strict Scrutiny (see *Grutter*)

Although Mississippi's stated end is important, the available evidence suggests that the State's stated purpose is not in fact its actual purpose.

Stated Purpose: Compensation for discrimination against women.

Actual Purpose: ???

WHY THE STATED PURPOSE IS NOT THE ACTUAL PURPOSE

General Principle

"A State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification."

The General Principle Applied

To show that its actual purpose in prohibiting men from enrolling in MUW is to compensate for discrimination against women, Mississippi must show either (a) that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field [in 1971] or (b) that women currently [i.e., in 1982] are deprived of such opportunities.

Mississippi has provided no evidence to support either (a) or (b).

O'CONNOR ON THE PERPETUATION OF STEREOTYPES

One of the byproducts of MUW's single-sex admissions policy is that it "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job".

O'CONNOR ON THE MEANS

Even assuming that Mississippi's stated purpose is its actual purpose, the State's way of compensating for discrimination against women is not substantially related to that objective.

The State claims that allowing men in the classroom would have a negative impact on the performance of female students, thereby reducing their opportunities to succeed in nursing school. But this claim is belied by the State's allowing men to audit classes at MUW, and by the absence of evidence to show that the presence of men in the classroom has a negative impact on teaching style or on the academic performance of female nursing students.

POWELL'S DISSENT ON THE PROPER TEST

Powell argued that Intermediate Scrutiny applies only to cases of sex discrimination that reveal “genuine sexual stereotyping” that reduces, rather than expands, the choices available to those who would be disadvantaged by the stereotype.

In this case, the State’s provision of an additional single-sex college for women expands, rather than reduces, the choices available to women.

Therefore, Intermediate Scrutiny doesn’t apply. What applies is the Rational Basis test, which says that the relevant policy must bear a rational relation to a legitimate governmental purpose.

Here, the end of providing additional opportunities to women in the realm of higher education is legitimate, and the State’s attempt to provide these opportunities by creating an additional single-sex school within the context of a coeducational system of higher education is rationally related to this end.

POWELL'S DISSENT ON THE APPLICATION OF INTERMEDIATE SCRUTINY

The end of providing additional opportunities to women in the realm of higher education is not only legitimate: it is also important. Moreover, the creation of a single-sex school is not only rationally related to this end: it is also substantially related (perhaps even necessary) to its achievement. Thus, MUW’s single-sex policy passes the Intermediate Scrutiny test.

Notice that Powell and O’Connor disagree about how the state end (for the purpose of applying Intermediate Scrutiny) should be identified. O’Connor focuses on the State’s stated end, claiming that the stated end is not the actual end. Powell constructs an end (not actually claimed by the State) that could be used to justify the relevant policy.