INDEX

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1694

SHARRON A. FRONTIERO AND JOSEPH FRONTIERO,
APPELLANTS

v.

MELVIN R. LAIRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the district court is reported at 341 F. Supp. 201.

JURISDICTION

The judgment of the district court was entered on April 5, 1972. A notice of appeal was filed on April 26, 1972 (App. 22a),[1] and probable jurisdiction was noted on October 10, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTION PRESENTED

Whether statutes that provide automatic dependency benefits for the wife of a male member of the

[1] "App." refers to the appendix to appellants' brief.

uniformed services, while providing benefits for the husband of a female member only if he is in fact dependent on her, violate the due process clause of the Fifth Amendment.

STATUTES INVOLVED

The pertinent provisions of 37 U.S.C. 401 and 403, and 10 U.S.C. 1072 and 1076, are set forth in the appendix to appellants' brief at pp. 23a–29a.

STATEMENT

This is a direct appeal from a decision of a three-judge district court sustaining the constitutionality of certain federal statutes relating to housing and medical benefits for the dependent spouse of a member of the uniformed services.[2] Under 37 U.S.C. 403, a member of the uniformed services with dependents is entitled to an increased "basic allowance for quarters." Under 10 U.S.C. 1076 and 1077 a member's dependents are provided medical and dental care. "Dependent" is defined by 37 U.S.C. 401 and 10 U.S.C. 1072 to include (a) the wife of any male member and (b) the husband of any female member if the husband is in fact dependent on the member for more than one-half of his support. The effect of these statutes is that a male member of the armed forces automatically obtains these benefits for his spouse, but a female member obtains them only if

[2] The "uniformed services" include the Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, and Public Health Service. 37 U.S.C. 101(3); 10 U.S.C. 1072(1). In this brief we occasionally interchange "uniformed services" and "armed forces."

she contributes more than one-half of her spouse's support.

Pursuant to these statutes, appellant Sharron Frontiero, a lieutenant in the United States Air Force, was denied medical and housing benefits for her husband, appellant Joseph Frontiero, on the ground that her application showed that her husband was not dependent upon her for more than one-half of his support.[3] Appellants brought this suit in the district court challenging the constitutionality of these statutes. Although conceding that Lieutenant Frontiero's husband was not dependent upon her (App. 50, 3a), appellants argued that these statutes, insofar as they require a female member to demonstrate her spouse's dependency while imposing no such burden upon a male member, unreasonably discriminate on the basis of sex, in violation of the Fifth Amendment. Appellants sought a permanent injunction against the

[3] The Department of Defense regulations (App. 30a), to which appellants advert (Br. 6), are thus not at issue in this case, because Lt. Frontiero's application was denied on the statutory ground that her husband was not dependent on her for more than one-half of his support.

The regulations (Department of Defense Military Pay and Allowance Entitlements Manual, § 30242) were designed to implement Comptroller General Decisions B–113093 (32 Comp. Gen. 364) and B–157559 (45 Comp. Gen. 163), each of which construed what is now 37 U.S.C. 401 to preclude benefits for a husband who, regardless of actual dependency, is capable of self-support. In Decision B–161261, July 3, 1972, the Comptroller General reexamined and prospectively overruled the earlier decisions, ruling that benefits are payable if the husband is in fact dependent on the female member for more than one-half of his support irrespective of his ability to support himself. The Defense Department Manual has since been amended to reflect that decision.

enforcement of these statutes and an order directing the appellees to give Lieutenant Frontiero the same housing and medical benefits for her spouse as a male would have received for his spouse.

A three-judge district court (with one judge dissenting) sustained the constitutionality of the statutes (App. 1a–21a). It held that, to the extent the specific provisions attacked classify on the basis of sex, there is a rational basis for the classification.

SUMMARY OF ARGUMENT

I

The standard for review of legislative classifications in the area of economic benefits is whether the classification is reasonably related to a proper legislative objective. Under this test the housing and medical benefits statutes here challenged do not violate the due process clause of the Fifth Amendment. The objective of the statutes is to provide benefits for dependents of members of the uniformed services. The Congress could reasonably conclude that the economical administration of the dependency benefits program would be better served by not requiring an individual examination of each claim for benefits by the nearly one and one-half million married male members of the services, in view of the likelihood that the wives of most members are in fact dependent on their husbands. By the same token, the Congress could reasonably determine that, since there are only some 4,000 married female members and since it is likely that their husbands are not dependent upon them, the purposes of the dependency benefits

gram would be best served by granting benefits only to those whose husbands are in fact dependent.

This Court's recent decision in *Reed* v. *Reed,* 404 U.S. 71, striking down a state statutory preference for men as administrators of estates, is distinguishable from this case. In *Reed,* the State had sought to implement a legitimate objective—"reducing the workload on probate courts by eliminating one class of contests"—by arbitrarily preferring men over women when there was no reason to think that men would perform better than women. Here, however, the presumptions of dependency are reasonably related to the legislative purpose and to the economic realities of our society.

Appellant's contention that the statutory classifications must be struck down because they reflect a "sex stereotype" that is no longer acceptable should, we submit, be addressed to the Congress, not the courts, for the challenge concerns the wisdom, not the reasonableness, of the legislative choice. The Congress has, in fact, been considering a change in the provisions at issue in this case. In the last session, the Senate passed a bill which would accord benefits to female members on the same basis as men, but the Congress adjourned before the House could consider it.

II

Although the classifications have a rational basis and are therefore constitutional under the traditional test, appellants argue that the standard for reviewing sex classifications should be the same as that applied for race, national origin, and alienage: whether

491-982—72——2

the classification is necessary to the accomplishment of compelling governmental interests. Sex, however, does not share most of the qualities that have led to the rigid scrutiny of classifications based on race, nationality, or alienage. Sex classifications do not have the especially disfavored constitutional status of race classifications; they do not affect a "discrete and insular" minority which has been excluded from the political process; they neither stigmatize nor imply a legislative judgment of female inferiority; and they are not, like race or nationality, presumptively arbitrary.

Sex classifications are, therefore, not "inherently suspect" under the Fifth Amendment. If, as appellants urge, they are frequently unwise as a matter of national policy, then the proper remedy is by legislation or constitutional amendment, rather than by abrupt judicial departure from familiar constitutional principles. We accordingly think it significant that, apart from the recent legislative activity with respect to the statutes in issue here, the Congress has approved, and 22 states have ratified, the Equal Rights Amendment to the Constitution.

ARGUMENT

I

THE CHALLENGED CLASSIFICATION HAS A RATIONAL BASIS AND IS REASONABLY RELATED TO A PROPER LEGISLATIVE OBJECTIVE

1. While the Fifth Amendment has no equal protection clause, it forbids discrimination that is "so

unjustifiable as to be violative of due process." *Bolling* v. *Sharpe,* 347 U.S. 497, 499; *Schneider* v. *Rusk,* 377 U.S. 163, 168; *Shapiro* v. *Thompson,* 394 U.S. 618, 642. In statutes dealing with economic benefits, a legislative classification must be upheld " 'if any state of facts reasonably may be conceived to justify it'." *Dandridge* v. *Williams,* 397 U.S. 471, 485; see also *Richardson* v. *Belcher,* 404 U.S. 78, 81; *Jefferson* v. *Hackney,* 406 U.S. 535, 546; *McGowan* v. *Maryland,* 366 U.S. 420, 426. Such a classification is constitutionally infirm only if it is "patently arbitrary" and bears no rational relationship to the objective sought to be advanced by the statute. *Flemming* v. *Nestor,* 363 U.S. 603, 611; *Reed* v. *Reed,* 404 U.S. 71, 76.

Under these criteria, the statutes involved here are constitutional. As the court below stated (App. 11a), the legislative objective of the dependents' living allowance and medical benefits provisions is to reimburse members for the expense of furnishing shelter to their dependents and to provide free medical care for their dependents. The challenged classification reasonably implements these goals and the legitimate interest of Congress in the effective administration of the dependency benefits program.

The legislative history of the statutes sheds little light on the reasons for the different treatment of male and female members of the service.[4] The legis-

[4] The housing provisions were enacted as part of the Career Compensation Act of 1949, which established a uniform pattern of military pay and allowances, consolidating and revising the piecemeal legislation that had been developed over the previous 40 years. See H. Rep. No. 779, 81st Cong., 1st Sess.; S. Rep. No. 733, 81st Cong., 1st Sess. The Act apparently retained in

lative plan, which extends automatic dependency benefits only to male members of the service, obviously reflects the congressional judgment that most wives are dependent upon their husbands. In view of the large number of married male members of the armed forces [5] and the likelihood that most of their wives are dependent upon them, Congress could properly determine that it would be an unnecessary burden on

---

stance the dependency definitions of Section 4 of the Pay Readjustment Act of 1942 (56 Stat. 361), as amended by Section 6 of the Act of September 7, 1944 (58 Stat. 730), which required a female member of the service to demonstrate her spouse's dependency. It appears that this provision was itself derived from unspecified earlier enactments. See S. Rep. No. 917, 78th Cong., 2d Sess., p. 4.

The medical benefits legislation, enacted as the Dependents' Medical Care Act of 1956, was designed to revise and make uniform the existing law relating to medical services for military personnel. It, too, appears to have carried forward, without explanation, the dependency provisions found in other military pay and allowance legislation. See H. Rep. No. 1805, 84th Cong., 2d Sess.; S. Rep. No. 1878, 84th Cong., 2d Sess.

Similar distinctions reflecting the economic realities in this country are found in other federal legislation. For example, old age and survivors insurance benefits under the Social Security Act are made available to husbands and widowers if they were in fact receiving one-half of their support from their wives, while wives and widows are entitled to benefits without regard to whether they were receiving one-half of their support from their husbands. Compare 42 U.S.C. 402(c)(1)(C) and (f)(1)(D), with 42 U.S.C. 402(b)(1) and (e)(1).

Moreover, in considering whether a federal statutory classification is rationally based, "it is, of course, constitutionally irrelevant whether [the] reasoning [sustaining the statute] in fact underlay the legislative decision * * *." *Flemming* v. *Nestor*, 363 U.S. 603, 612.

[5] There were as of December 31, 1970, more than 1.4 million married male members of the Army, Navy, Air Force, and Marine Corps (App. 57).

the dependency benefits program to require that each application for benefits be examined and investigated. It was therefore justified in concluding that the statutory objectives would best be served by granting benefits to all married male personnel, notwithstanding that a small proportion of servicemen whose wives are not dependent would receive a windfall in the form of unneeded benefits. Cf. *Jefferson* v. *Hackney,* 406 U.S. 535, 549.

In the case of female married members of the uniformed services, it was not unreasonable for Congress to have concluded that most of their husbands are not dependent [6] and that the federal interest in economical administration of the program would therefore be promoted by examining individually the much smaller number of claims involved.[7] Thus, while female members whose husbands are in fact dependent on them are entitled to benefits, the relatively large percentage whose husbands are not dependent receive no windfall.

2. It is the reasonableness of the classification that distinguishes this case from *Reed* v. *Reed, supra,* upon which appellants rely. In *Reed,* this Court struck down, as violative of the Fourteenth Amendment's

[6] While we have no statistics showing the percentage of service husbands who are dependent on their wives, Bureau of the Census figures for the nation's population suggest that in the large majority of families the husband is employed. In 1971, for example, 97.7 percent of married men between the ages of 25 and 44, whose wives were present, were in the civilian labor force. Statistical Abstract of the United States, 1972, p. 218, Table No. 343.

[7] There were as of December 31, 1970, 4,153 married female members of the Army, Navy, Air Force, and Marine Corps (App. 57).

equal protection clause, Idaho's statutory preference for men as administrators of estates. The State sought to justify the preference on the ground that the time and effort involved in selecting administrators could be reduced by eliminating the need to consider women for the position. The Court recognized that "the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy" (404 U.S. at 76). It held however, that the means chosen to achieve that objective were arbitrary. Since men and women are equally capable of performing the duties of an administrator, the statute sought to reduce administrative costs by establishing a classification without a rational basis.

Here, by contrast, the classification chosen by Congress to achieve administrative economies is based upon reasonable presumptions of dependency, which are in accord with the realities of American life. The statute therefore does not infringe the Fifth Amendment rights of female members of the armed forces, and *Reed* does not require that it be declared unconstitutional.

3. Appellants appear to argue (Br. 53–56) that the statutory objective of economic administration of the dependency benefits program is not of sufficient importance to justify the different treatment of male and female members of the services. Appellants rely principally upon *Carrington* v. *Rash,* 380 U.S. 89, and *Shapiro* v. *Thompson,* 394 U.S. 618.

But those decisions do not suggest that the Constitution forbids Congress to legislate in order to achieve

the effective administration of governmental affairs. See *Adams* v. *City of Milwaukee*, 228 U.S. 572. To the contrary, they stand for the proposition that administrative considerations may provide a constitutional basis for legislation except in those limited circumstances where the statute impinges upon fundamental rights, or establishes an "inherently suspect" classification. Thus, the cases relied upon by appellants involved the fundamental rights of voting (*Carrington* v. *Rash, supra*) and of travel (*Shapiro* v. *Thompson, supra*)—in stark contrast to the claim here for payment of an unneeded dependency allowance. As we show below (pp. 14–19), the rights here at issue do not qualify as fundamental and we deny that sex classifications must be treated as inherently suspect.

Appellants contend also (Br. 47–53) that the presumptions of dependency upon which the statutory classification rests are contrary to fact and therefore cannot justify the different treatment of male and female members. The argument seems to be that, because the median income of males (including those unmarried as well as married) in the armed forces is lower than that for *working* women in the general population, it is somehow unreasonable to presume that most service wives are in fact dependent on their husbands. Appellants' statistics do not undercut the apparent congressional judgment that, despite occasional exceptions where the wife of a serviceman has an independent source of income or where the husband of a servicewoman has little or no income, in

most service families the husband is the breadwinner. Cf. *Jefferson* v. *Hackney,* 406 U.S. 435, 548.

Appellants urge, however, that "the true basis for this discriminatory legislation can be traced to a sex stereotype which predominated in the heyday of the common law" (Br. 59). They argue that this stereotype of the "homebound" woman "simply does not conform to our present societal structure" and that this "mold-covered doctrine and lifestyle cannot provide a rational basis for today's sex classification" (Br. 60, 62–63). What this amounts to is an argument that time has eroded the foundation of the congressional judgment and that reexamination is called for.

We have no quarrel with the view that there have been social changes since the time the legislation in issue here was enacted. That argument, though, is appropriately addressed to the Congress, not to the Court, for when the wisdom rather than the rationality of a congressional judgment is questioned it is the political rather than the judicial process that should be invoked.

In fact, the political process has been invoked with respect to the statutes here in issue. Bills to amend Titles 10 and 37 to provide dependency benefits to female members on the same basis as male members were introduced in both the House and the Senate in the last session of Congress.[8] In response to requests from the respective Armed Services Committees, the

[8] The House bills were H.R. 2335, 2580, 4954, 8421, and 8758. The Senate bill was S. 2738.

Department of Defense commented that "the proposed changes would equalize the treatment of military personnel regardless of sex and accordingly the Department of Defense favors enactment * * *. In view of the limited number of female personnel in the military service, the proposed legislation would not have a major impact on the Department of Defense." S. Rep. No. 92–1218, 92d Cong., 2d Sess., p. 5. See, also, Hearing on S. 2738, *et al.,* Before the Subcommittee on General Legislation of the Senate Committee on Armed Services, 92d Cong., 2d Sess., pp. 12, 24–25, 31–33. The Senate passed its bill on September 27, 1972, but the Congress adjourned before it was considered by the House. The Defense Department anticipates that similar or identical legislation will be introduced in the 93d Congress.

The Defense Department thus now believes that the statutory classification at issue need not be continued and that women members should be given dependency benefits on the same basis as men. The Congress may well reach the same conclusion. But this does not establish that the judgment reflected in the statute was or is irrational and unrelated to a proper legislative objective. It is to say only that the legislature may be moving toward a revision of its original judgment, perhaps in response to the sociological changes to which appellants point. These changes in the legislative climate, however, provide no basis for concluding that the existing statute is inconsistent with the due process clause of the Fifth Amendment.

491–982—72——3

II

THE STATUTES IN ISSUE HERE NEITHER ABRIDGE A FUNDAMENTAL RIGHT NOR ESTABLISH AN INHERENTLY SUSPECT CLASSIFICATION

As the foregoing discussion demonstrates, the classification here bears a reasonable relationship to the objectives of the legislation. Under traditional equal protection principles, therefore, the statutes do not offend the Fifth Amendment's due process clause. Appellants argue, however, that legislative classifications relating in any way to sex—with the exception of those which are "protective," "remedial," or "neutral"—can be sustained only if necessary to the accomplishment of compelling governmental interests (Br. 29–33).

This strict standard of review, however, has been limited to classifications that either affect sensitive and fundamental personal rights or are inherently suspect. We do not understand appellants to argue that the interests here at issue—which are wholly economic—qualify as fundamental rights.[9] This Court has held that when, as here, the government operates in the area of economics and social welfare, legislative classifications must be sustained if they have a reasonable basis, even though they be "imperfect" or may in practice result in some inequality. *Dandridge* v.

[9] Among the interests that have been identified as fundamental are voting (*Carrington* v. *Rash*, 380 U.S. 89; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663); procreation (*Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541); interstate travel (*Shapiro* v. *Thompson*, 394 U.S. 618); and marriage (*Loving* v. *Virginia*, 388 U.S. 1).

Williams, 397 U.S. 471, 484, 485; *Richardson* v. *Belcher,* 404 U.S. 78, 81; *Jefferson* v. *Hackney,* 406 U.S. 535, 546.

Appellants do contend that sex—like race,[10] national origin,[11] and alienage [12]—must be viewed as a "suspect" basis for classification and therefore must satisfy the stricter "compelling interest" test. This Court, however, has never treated classifications based on sex as inherently suspect,[13] and we do not think appellants have borne their heavy burden of showing that it has become necessary to review sex classifications under the compelling interest standard.

It is true that sex, like race and national origin, is a visible and immutable biological characteristic that bears no necessary relation to ability. But sex does not

[10] *E.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184, 191–192; *Loving* v. *Virginia*, 388 U.S. 1, 9.

[11] See, *e.g.*, *Korematsu* v. *United States*, 323 U.S. 214, 216; *Oyama* v. *California*, 332 U.S. 633, 646.

[12] *Graham* v. *Richardson*, 403 U.S. 365, 371–372.

[13] See, *e.g.*, *Muller* v. *Oregon*, 208 U.S. 412 (upholding statute that limited women's working hours); *Radice* v. *New York*, 264 U.S. 292 (upholding statute forbidding night work by women in restaurants); *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (upholding statute that fixed minimum wages for women but not for men); *Goesaert* v. *Cleary*, 335 U.S. 464 (sustaining statute that forbade the employment of some women as bartenders); *Hoyt* v. *Florida*, 368 U.S. 57 (upholding statute that relieved women of jury duty unless they volunteered); *Williams* v. *McNair*, 401 U.S. 951, affirming 316 F. Supp. 134 (D. S.C.) (permitting state university to provide separate branches for male and female students). See also *Reed* v. *Reed*, *supra*, where this Court stated the applicable test in traditional terms: "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" (404 U.S. at 76).

share most of the other qualities that have led the Court to give rigid scrutiny to legislative classifications based on race, nationality, or alienage. First, racial distinctions, unlike sex distinctions, have an especially disfavored status in constitutional history; they "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin* v. *Florida,* 379 U.S. 184, 192. It is this "strong policy [that] renders racial classifications 'constitutionally suspect' " (*ibid.*). See, also, *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 682, n. 3 (Harlan, J., dissenting).

Suspect classifications have, moreover, invariably affected disadvantaged minorities, which, because of their minority status, have been especially vulnerable to the attempts of more powerful—and often hostile—political forces seeking to deprive them of equal rights. "[P]rejudice against discrete and insular minorities" thus calls for a more searching judicial inquiry because of the likely unresponsiveness of "those political processes ordinarily to be relied upon to protect minorities * * *." See *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152–153, n. 4. Women, of course, are a numerical majority in this country and surely are not disabled from exerting their substantial and growing political influence. Even the female members of the uniformed services, though only a small minority, are not "discrete" in the sense that ethnic minorities are discrete, and are plainly not "insular." Nor is there any

indication that the political process has excluded or ignored them. Indeed, if the recent bills to amend the dependency benefits statutes (see pp. 12–13, *supra*) are any indication, this minority has a potent political voice.

Nor is legislation affecting women, like that affecting racial or ethnic minorities, commonly perceived as implying a stigma of inferiority or a badge of opprobrium which suggests that the affected class lacks equal dignity. In *Strauder* v. *West Virginia,* 100 U.S. 303, 308, this Court held that a state statute precluding blacks from serving on juries "is practically a brand upon them, * * * an assertion of their inferiority, and a stimulant to * * * race prejudice * * *." The Fourteenth Amendment, the Court stated, prohibits "legal discriminations, implying inferiority in civil society." It is, we submit, for similar reasons that classifications based on nationality and alienage, as well as those based on race, are subjected to close scrutiny.

Classifications based on sex, however, do not express an implied legislative judgment of female inferiority. Sex classifications are commonly founded upon physiological and sociological differences, and not on social contempt for women. Statutes which, for example, limit the employment of women as bartenders (see *Goesaert* v. *Cleary*, 335 U.S. 464), or exempt women from the draft (see *United States* v. *St. Clair,* 291 F. Supp. 122 (S.D. N.Y.)), bear no connotation of female inferiority, but rather are properly regarded as based upon objective differences between the sexes.

Thus, sex classifications are no more likely to stigmatize than legislation affecting any other identifiable group, such as the elderly, veterans, or the unemployed.

The decisions of this Court suggest also that a legislative classification is inherently suspect only when it is, in effect, presumptively arbitrary. Thus, legislation imposing an unequal burden upon ethnic groups or racial minorities is immediately suspect because racial and ethnic characteristics are, except in the most extraordinary circumstances,[14] irrelevant to any proper legislative purpose.[15] Accordingly, a classification drawn in these terms fairly raises a presumption that the object sought to be attained by the statutory distinction is constitutionally impermissible, or that the means chosen are unrelated to a legitimate objective.

Such a presumption of invalidity, however, is inappropriate in the case of classifications based upon sex, for that characteristic frequently bears a reasonable relation to a legitimate governmental purpose. This Court has sustained legislative classifications predicated upon the sociological or physiological differences between the sexes, when these differences are relevant to such purpose. Thus, the Court has upheld statutes permitting a state university to pro-

[14] Where, for instance, grave issues of national security are concerned. *Korematsu* v. *United States*, 323 U.S. 214.

[15] As Mr. Justice Stewart observed, when speaking of racial classification, "* * * I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin* v. *Florida*, 379 U.S. 184, 198 (concurring opinion).

vide separate branches for male and female students (*Williams* v. *McNair,* 401 U.S. 951, affirming 316 F. Supp. 134 (D. S.C.)); relieving women of jury duty unless they volunteered, thereby permitting women to determine whether jury service would be consistent with their family responsibilities (*Hoyt* v. *Florida,* 368 U.S. 57); and limiting working hours of women on the basis of medical evidence of the injurious effect of long working hours upon a woman's constitution (*Muller* v. *Oregon,* 208 U.S. 412). By the same token, where sex differences are manifestly irrelevant to the particular objective sought to be attained by the legislature, this Court has found the classification constitutionally invalid. See *Reed* v. *Reed, supra.*

We therefore submit that the Fifth Amendment does not require application of the compelling interest test to sex classifications. It may be, apart from the requirements of due process, that as a matter of national policy legislative classifications based on sex should be discouraged or even made impermissible except in special situations. The Equal Rights Amendment to the Constitution, which may have such an effect, was approved by Congress on March 22, 1972, (118 Cong. Rec. (daily ed.) S4612), and has already been ratified by 22 of the required 38 state legislatures.[16]

[16] The Amendment provides (S. Rep. No. 92–689, 92d Cong., 2d Sess., p. 2):

> 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.
>
> SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> SEC. 3. This amendment shall take effect two years after the date of ratification.

That proposed Amendment has substantial legislative history that will, if it is adopted, aid in applying it to the innumerable state and federal statutes which establish sex classifications.[17] Both Houses of Congress gave careful consideration to the impact of the Amendment (see H. Rep. No. 92–359, 92d Cong., 1st Sess., pp. 2–4; S. Rep. No. 92–689, 92d Cong., 2d Sess., pp. 6–18), and there is extensive legislative history relating to similar proposals in prior sessions of Congress (see *id.*, pp. 4–5).

If the elimination of classifications based on sex which appellants seek is a desirable social objective, the appropriate method to accomplish it is by constitutional amendment or legislation [18] and not by abrupt judicial departure from long-applied constitutional principles. The former means would largely obviate the uncertainty that inevitably follows upon the formulation of new constitutional standards; it would provide the legislatures and the courts with a solid foundation for understanding the effect of the change.

---

[17] A recent government computer search revealed that 876 sections in the United States Code alone contain sex-based references (such as man, woman, widow, mother, wife, etc.).

[18] See, for example, Public Law 92–187, 85 Stat. 644, approved December 15, 1971, which amends 5 U.S.C. 7152 to provide that benefits granted by law or regulation to male federal civilian employees or their families shall be accorded on the same basis to female employees and their families. While these provisions do not cover members of the uniformed services (see 5 U.S.C. 2101(1) and 2105), they do suggest that Congress is not unresponsive to the need for broad remedial legislation to provide equal treatment for married women employees of the federal government. See H. Rep. No. 92–415, 92d Cong., 1st Sess.; S. Rep. No. 92–528, 92d Cong., 1st Sess.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HARLINGTON WOOD, JR.
Assistant Attorney General.
MARK L. EVANS,
Assistant to the Solicitor General.
WALTER H. FLEISCHER,
ROBERT S. GREENSPAN,
Attorneys.

DECEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972