SEX DISCRIMINATION AND EQUAL PROTECTION: THE QUESTION OF A SUSPECT CLASSIFICATION

I
INTRODUCTION

The concept of sexual equality has raised several controversial issues within American legal and social structures in the last decade.[1] The traditional notions of the respective roles of men and women are undergoing radical change,[2] as women increasingly demonstrate their importance and competence in formerly male-dominated areas.[3] Yet the American legal system, though often providing leadership in social evolution,[4] appears to have been somewhat hesitant to assert itself regarding the issues of sexual discrimination and equal rights.[5]

In the area of equal protection, the courts have yet to formulate a definitive doctrine to deal with all issues involving discrimination.[6] The lack of a clear standard has resulted in confusion, inconsistency and apparent illogic in judicial opinions. This is particularly conspicuous in instances of sex-based discrimination: the standard of appropriate judicial review has yet to be determined. The physical attribute of sex has neither been accepted nor rejected as a suspect classification. Without standards to guide them, neither the courts nor the community know the permissible limits of discrimination; without the greater judicial protection that a suspect classification mandates, sexually discriminatory laws and practices will continue to find support as the courts hesitate to declare them unconstitutional.[7]

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1. The issues raised by Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973), concerning a woman's right of control over her own body, are indicative of the major alterations in recent social attitudes.

2. *See* L. KANOWITZ, SEX ROLES IN LAW AND SOCIETY, (1973).

3. For example, on November 5, 1974, Ella Grasso was elected Governor of Connecticut, the first woman to be elected governor on her own merits. That same day, New York elected Mary Ann Krupsak as Lieutenant Governor; she is the first woman ever to hold that office. This trend is not limited solely to politics in the United States: on February 11, 1975, Margaret Thatcher defeated four male opponents in her bid to become the first woman to lead Britain's Conservative Party.

4. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Brown v. Bd. of Education, 347 U.S. 483 (1954).

5. *See* Kahn v. Shevin, 416 U.S. 351 (1974), and text accompanying notes 151-65 *infra*.

6. For a complete examination of the status of the doctrine of equal protection up to the end of the Warren Court era, *see Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter *Developments*].

7. It is arguable as to whether the Court wishes to act on the issue of sex as a "suspect classification" while the status of the Equal Rights Amendment, Proposed Amendment to the

This Note will consider, first, the legal history of sex-based discrimination, and second, the various standards the courts, particularly the Supreme Court, have applied to this issue. The major portion of this note will be concerned with an examination of the recent case of *Kahn v. Shevin*[8] and an analysis of its impact in the area of sex-based discrimination in light of subsequent Supreme Court decisions.[9]

II
THE HISTORICAL BACKGROUND OF SEX DISCRIMINATION: THE EARLY CASES

The debate over whether sex ought to be characterized as a suspect classification within the doctrine of equal protection is of relatively recent origin.[10] For many years, the attitude of the courts concerning laws which discriminated against women was one which encouraged "protective legislation"—legislation which served, in fact, more to restrict than to protect. One Supreme Court Justice expressed this sentiment in *Bradwell v. Illinois*,[11] an early decision concerning sex discrimination:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the ideas of a woman adopting a distinct and independent career from that of her husband . . . .
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> . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.[12]

A subsequent case, *Muller v. Oregon*,[13] echoed the *Bradwell* opinion. The *Muller* litigation, known best, perhaps, for its introduction of the Brandeis

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United States Constitution, S.J. Res. 8, S.J. Res. 9, H.R.J. Res. 208, 92d Cong., 1st Sess. (1971), has not yet been determined by the states. *See* Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring).

8. 416 U.S. 351 (1974).

9. Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484, (1974); *see* text accompanying notes 250-97 *infra*.

10. Frontiero v. Richardson, 411 U.S. 677 (1973), was the first case in which the Supreme Court even came close to regarding sex as suspect. There had, however, been a number of lower court cases that had earlier taken that position. *See* United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968); *see also* text accompanying notes 86-94 *infra*.

11. 83 U.S. (16 Wall.) 130 (1873).

12. *Id.* at 141 (Bradley, J., concurring).

13. 208 U.S. 412 (1908); *see* L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION, 152-54 (1969).

brief,[14] concerned the validity of a state law[15] which prohibited employment of females in any factory in excess of ten hours a day. An employer who had been convicted of breaking this law challenged its constitutionality on the grounds that it violated the due process and equal protection guarantees of the fourteenth amendment.[16] While reaffirming its earlier decision in *Lochner v. New York*,[17] which had struck down a law that set hour limitations on male bakers' daily and weekly employment, the Court upheld the similar Oregon statute on the grounds that differences existed between the sexes[18] and that the law was therefore a reasonable protective measure.[19] At the same time, however, the Court conceded that, were the same statute applied to men, as *Lochner* had demonstrated, it most likely "could not be sustained."[20]

It is doubtful that *Muller* would be considered good law today, but its ramifications reached well into the middle of this century. In *Goesaert v. Cleary*,[21] the Court was confronted with a Michigan statute[22] which prohibited a woman from becoming a licensed bartender unless she was the wife or the daughter of a male bar owner. The constitutional claim, as the Court saw it, was not that the prohibition of women from the bartending profession was an illegal discrimination between men and women, but that the law created discrimination among women, due to the exceptions created for a male owner's family. The Court rejected this claim, however, reasoning that Michigan could for "moral and social reasons" forbid all women from working behind a bar; it concluded that the exceptions could be seen to have a rational basis, as it was reasonable for the legislature to believe that a male bar owner could minimize any moral or social problems for his wife or daughter.[23] The *Goesaert* decision is significant for two reasons:[24] First, by deciding that "moral and social reasons" were sufficient to constitutionally exclude an entire sex from an occupation, the Court laid the foundation for the belief that this deferential standard would be used in the future for testing other sex discrimination cases. Second, the Court, in rejecting an argument that the statute's intention was to

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14. Brandeis wrote his famous brief in support of the challenged legislation.

15. ORE. SESSION LAWS, p. 148 (February 19, 1903).

16. 208 U.S. at 417-18.

17. 198 U.S. 45 (1905). The Court invalidated the law challenged in *Lochner* believing it to be "unreasonable and entirely arbitrary," and concluded "[T]he freedom of master and employee to contract with each other in relation to their employment . . . cannot be prohibited or interfered with, without violating the Federal Constitution." *Id.* at 62, 64.

18. 208 U.S. at 419-20 & n.1.

19. Mr. Justice Brewer, the author of the *Muller* opinion, could not resist improving upon Justice Bradley's observations in *Bradwell*. Brewer wrote, "[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present." *Id.* at 421.

20. *Id.* at 422.

21. 335 U.S. 464 (1948).

22. MICH. PUB. ACTS, No. 133 § 19(a), 1945; *repealed by* MICH. PUB. ACTS, No. 206, 1955.

23. The court stated: "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic." 335 U.S. at 466.

24. *See* Bilbe, *Constitutionality of Sex Based Differentiations in the Louisiana Community Property Regime*, 19 LOYOLA L. REV. 373, 382 (1973).

monopolize the bartending profession for men,[25] clearly implied that classifications based on sex could survive only if they were rationally related to a legitimate goal.[26] However, due to the fact that the general exclusion of women was based upon indefinite "moral and social" problems, the Court not indicating whether women were to be considered the cause or the victims of these problems, the decision did little to establish standards on which to decide future equal protection cases of this kind.[27]

The next significant decision in the area of sex-based discrimination, *Hoyt v. Florida*,[28] was handed down some thirteen years later. In *Hoyt*, the Court upheld a Florida law[29] which exempted women from jury service unless they filed written notice of their willingness to serve. The Court noted that the petitioner, a convicted female defendant, was entitled to protection against only arbitrary and unreasonable exclusion of potential jurors and that the Florida law did not cause such an exclusion. Therefore, the Court could not conclude that "Florida's statute [was] not 'based on some reasonable classification.' "[30] However, in its attempt to attain a "legitimate" goal—placing familial duties before civil responsibilities[31]—the law was overinclusive, because women without families lacked the "requisites" for the exemption. The Court found a basis for the statute's validity in both "historic public policy" and the fact that *ad hoc* assessments of familial responsibility were administratively unfeasible.[32] Although the Court did not openly analyze the statute in such terms, it is clearly based on a sexual classification. The decision was consequently indicative of the Court's willingness to consider sex a proper classification for statutory discrimination, for the statute was clearly overinclusive, and neither the undefined element of "historic public policy" considerations, nor the relatively minor administrative costs that would have resulted from a narrower statute appear to be sound foundations on which to uphold a sexually discriminatory law.[33]

These four cases represent the Court's early attempts to deal with gender-based statutory classifications. They clearly reflect the "protective legislation" sentiment that permeated the American judicial and legislative structures until the early nineteen sixties. Recently, however, the courts have begun to struggle with the issue of sex discrimination within the constructs of the equal protection doctrine in a more realistic and thoughtful manner.

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25. 335 U.S. at 467.

26. Bilbe, *supra* note 24, at 382.

27. The *Goesaert* Court's conclusion did little to clarify its position: "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." 335 U.S. at 466.

28. 368 U.S. 57 (1961).

29. FLA. STAT. § 40.01(1) (1959).

30. 368 U.S. at 61.

31. The Court found that allowing a woman to be "relieved from the civic duty of jury service" until she was satisfied that her responsibility to her family was fulfilled was a permissible state objective. *Id.* at 62.

32. *Id.* at 63.

33. *See* Bilbe, *supra* note 24, at 383.

III
THE EVOLVING DOCTRINE OF EQUAL PROTECTION

A. The Warren Court's Two-Tier System

1. Rational Basis

In the years of the Warren Court, there developed the "two-tier" system of testing the constitutionality of laws which discriminated among citizens. One tier, the old "rational basis" equal protection test, prescribes that a discriminatory distinction can be upheld as long as the distinction can be reasonably construed to be consistent with a legitimate governmental objective.[34] Within the framework of this test itself, two relatively different approaches to the requisite distinction-objective relationship evolved. The "passive" approach to the rational basis test was clearly described by the Court in the case of *McGowan v. Maryland*:[35]

> [T]he 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.[36]

Under this language, although the Court recognized the existence of the equal protection doctrine, the states were given wide latitude in their interpretation of its scope and effect.

In contrast to the "passive approach," the "active" approach to the rational basis test required that the 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."[37] Regardless of the approach taken, however, the rational basis test was the less restrictive of the two tiers and provided only minimal protection against discriminatory practices.

2. Compelling Interest

The complement to the rational basis test and the upper level of the Warren Court's two tier system, is the "strict scrutiny" test. This higher standard requires a state to prove that a discriminatory statute serves an "overriding, compelling governmental interest," in order for the law to be considered consistent with the precepts of equal protection.[38] Moreover, the strict scrutiny approach also requires that the statute be drafted as carefully as possible and

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34. *See generally Developments*, *supra* note 6, at 1076-87.

35. 366 U.S. 420 (1961).

36. *Id.* at 425-26 (Warren, C.J.). *See also* Dandridge v. Williams, 397 U.S. 471 (1970); Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

37. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Morey v. Doud, 354 U.S. 457 (1957); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

38. *See generally Developments*, *supra* note 6, at 1124.

that less discriminatory means to achieve the desired objective be unavailable. This standard places a greater burden on the government to prove the legitimacy of its actions than does the rational basis test.

The imposition of the higher standard of strict judicial scrutiny is activated by either of two elements: 1) the discriminatory practice involves a legal right which has been categorized as a "fundamental interest"[39] or 2) the discrimination is directed against members of a particular group which the Court has determined to be a suspect classification.[40] In the absence of these elements, the less strict rational basis standard applies.

a. Fundamental Interests——The opinions in which the Court has determined whether a particular interest is "fundamental" *vel non* do not articulate a controlling doctrine. Rather, the Court appears to have treated cases on an *ad hoc* basis, signifying in each the reasons why a particular interest demands greater judicial protection than would otherwise be accorded. One common factor in the Court's analysis seems to be an assessment of the severity of the detriment imposed upon the injured party. Detriments may occur when individuals are treated unequally, as well as when the treatment one individual receives falls below an undefined minimum standard.[41] Yet the use of the categorization of "detriment" has done little to refine the analysis of what constitutes a "fundamental interest." Consequently, the identification of fundamental interests continues to be a problematic and confused process, and the disagreement and inconsistency of the Court's opinions is fully reflective of this confusion.[42] At present, however, voting,[43] procreation,[44] travel,[45] marriage,[46] access to courts,[47] privacy,[48] association,[49] and other first amendment[50] rights have been considered "fundamental interests;" commentators have questioned whether stronger judicial protection should also extend to areas such as exclusionary zoning,[51] municipal services,[52] and school financ-

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39. *Id.* at 1127.

40. *Id.* at 1124-27.

41. *Id.* at 1130.

42. Wyman v. James, 400 U.S. 309, 338 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting); Kramer v. Union Free School Dist., 395 U.S. 621, 634 (1969) (Stewart, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting).

43. Dunn v. Blumstein, 405 U.S. 330 (1972) (in conjunction with travel); Bullock v. Carter, 405 U.S. 134 (1972) (in conjunction with primary filing fees); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964). *But see* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802 (1969).

44. Skinner v. Oklahoma, 316 U.S. 535 (1942).

45. Shapiro v. Thompson, 394 U.S. 618 (1969); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

46. Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

47. Mayer v. City of Chicago, 404 U.S. 189, 196 (1971) (nonfelony cases); Boddie v. Connecticut, 401 U.S. 371 (1971); NAACP v. Button, 371 U.S. 415 (1963); Griffin v. Illinois, 351 U.S. 12 (1956) (right to first appeal in criminal cases). *But see* Britt v. N. Carolina, 404 U.S. 226 (1971).

48. Griswold v. Connecticut, 381 U.S. 479 (1965).

49. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

50. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

51. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969).

52. Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices*

ing.[53] Thus far, however, the Court has added no other categories to the list, having ruled that housing,[54] employment opportunities,[55] welfare[56] and subsistence[57] are not "fundamental interests," while not finally determining the issues of abortion[58] and education[59] as regards this question.

b. Suspect Classifications——The second device that triggers the application of strict judicial scrutiny over questions of equal protection is that of "suspect classifications." To date, the Court has held that race,[60] lineage,[61] alienage,[62] and national origin[63] definitely fall into the "suspect" category. In contrast, the Court's position on the status of wealth,[64] legitimacy[65] and, of course, sex,[66] is presently inconclusive.

It is difficult to discover any definite standards which the Court has used in categorizing certain classes as suspect. In *McLaughlin v. Florida*,[67] the Court based its determination that race is a suspect classification on "the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the State."[68] In *Bolling v. Sharpe*[69] the Court commented that classification based solely on

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of Procedure, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 441 (1971).

53. Silard & White, *Intrastate Inequalities In Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 WIS. L. REV. 7.

54. Lindsey v. Normet, 405 U.S. 56 (1972).

55. Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552 (1947). *But see* Truax v. Raich, 239 U.S. 33 (1915).

56. Jefferson v. Hackney, 406 U.S. 535 (1972); Richardson v. Belcher, 404 U.S. 78 (1971). *But see* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (Arizona's one year residency requirement in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care at county's expense ruled unconstitutional as a restraint on travel). *See also* Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CAL. L. REV. 555, 593-600 (1970).

57. Dandridge v. Williams, 397 U.S. 471 (1970).

58. Roe v. Wade, 410 U.S. 113 (1973).

59. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). *But see* Brown v. Bd. of Education, 347 U.S. 483 (1954).

60. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

61. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

62. *In re* Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).

63. Oyama v. California, 332 U.S. 633 (1948).

64. Tate v. Short, 401 U.S. 395 (1971); Douglas v. California, 372 U.S. 353, 356-57 (1963). *See also* McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969): "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race . . . two factors which would independently render a classification highly suspect." *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

65. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (statute precluding illegitimate children from bringing workmen's compensation claims on their fathers' lives except under certain circumstances held invalid); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimate children permitted to sue for mother's wrongful death). *But see* Labine v. Vincent, 401 U.S. 532 (1971) (illegitimate children not allowed to share in intestate estate).

66. Frontiero v. Richardson, 411 U.S. 677 (1973). *But see* Kahn v. Shevin, 416 U.S. 351 (1974). *See also* text accompanying notes 131-45, 151-73 *infra*.

67. 379 U.S. 184 (1964).

68. *Id.* at 192.

69. 347 U.S. 497 (1953).

race are "contrary to our traditions,"[70] while the Court in *Loving v. Virginia*[71] held that racial classifications violated "the central meaning of the Equal Protection Clause."[72] In *Korematsu v. United States*[73] the Court noted simply that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[74] In *Hirabayashi v. United States*[75] the tone of the Court was stronger but the standards were equally obscure: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[76]

The Court's opinions point to two factors that underlie the rationale behind the application of the test of strict scrutiny to cases involving suspect classifications.[77] First, the Court appears to be more willing to require the presence of "compelling governmental interests" when the rights of a minority are being threatened, for such groups are unlikely to have much power in the legislatures which produce discriminatory laws.[78] It can be argued, however, that a majoritarian democracy can not and should not be expected to protect minority rights in *every* instance. Nevertheless, it must be realized that extending to a minority the stronger protection required by a suspect classification does not guarantee *absolute* protection but merely demands greater justification for discriminatory treatment of that minority.

Another of the main factors which the Court has considered is the amount of control an individual has over the identity trait which causes him to be the victim of discrimination. Race, like lineage and other suspect classifications, is an unalterable, congenital characteristic over which a person has no control. Moreover, such generic characteristics are often irrelevant to any legitimate governmental objective or to one's ability to perform in or contribute to society. The result of any statutory discrimination based upon such unalterable traits is that a person may be relegated to an inferior social and legal status by virtue of his membership in the group discriminated against and without regard to his individual characteristics and abilities.[79]

B. Sex As A Suspect Classification

The same factors which have caused the Court to place race and lineage within those classifications considered suspect, are equally applicable to

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70. *Id.* at 499.
71. 388 U.S. 1 (1967).
72. *Id.* at 11-12.
73. 323 U.S. 214 (1944).
74. *Id.* at 216.
75. 320 U.S. 81 (1943).
76. *Id.* at 100.
77. *See Developments, supra* note 6, at 1124-27.
78. *Id.* at 1125. *But see id.* at 1126; *see* Justice Stone's famous footnote in United States v. Carolene Products Co., 304 U.S. 144, 153 n. 4 (1938):

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

79. *See Developments, supra* note 6, at 1173-74. *See also* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d

gender-based identity traits. Although women are not a numerical minority among the American population, they remain underrepresented in the state and federal legislatures.[80] It is an indisputable fact that an individual's sex is "an immutable characteristic determined solely by the accident of birth"[81] and, in most instances, has little to do with one's capabilities.[82] Sex has also been the basis for a badge of inferiority and second-class citizenship; women, like blacks and aliens, have historically been legally, socially, and economically oppressed. For many years, they were denied the right to vote,[83] to sit on juries,[84] and, even now, they suffer from unequal pay.[85] In light of all these factors, there is consequently no reason, other than traditional views of the role of women in society, coupled with judicial reluctance, why sex should not be afforded the protection given to race, lineage, and other suspect classifications.

The view that classifications based on sex should be considered suspect was adopted by a number of lower courts near the end of the Warren Court era. In *United States ex rel. Robinson v. York*,[86] a District Court held that a statute which imposed longer prison sentences on women than on men convicted of similar crimes "must be supported by a full measure of justification"[87] and was therefore subject to strict judicial scrutiny. While noting that the Supreme Court had not explicitly ruled sex to be suspect, the court stated " . . . it is difficult to find any reason why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than a racial group."[88] Another court, in *Commonwealth v. Daniel*,[89] found a similar Pennsylvania statute to create "arbitrary and invidious discrimination,"[90] and the California Supreme Court in *Sail'er Inn, Inc. v. Kirby*[91] struck down a law[92] similar to that in *Goesaert v. Cleary*,[93] holding sex

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1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971).

80. While the percentage representation of women has increased in the state legislatures from 5.2% to 7.1% due to the 1974 elections (263 women among 3,660 legislators), and women now have prominent positions in some statehouses and courts, *see* note 3, *supra*, there are no female U.S. Senators and only 18 of the 435 U.S. Representatives are women. New York Times, Nov. 7, 1974, at 1, col. 7.

81. Frontiero v. Richardson, 411 U.S. 677, 686 (1973). *See also Developments*, *supra* note 6, at 1173-74. The fact that surgical gender alterations are now possible raises interesting, yet unanswered, questions in this area.

82. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

83. It was not until the nineteenth amendment was ratified in 1920 that women received this right.

84. Hoyt v. Florida, 368 U.S. 57 (1961). *But see* Taylor v. Louisiana, 419 U.S. 522 (1975), discussed in note 250 *infra*.

85. In 1972, the median annual earnings for women was $5,903, as opposed to $10,202 for men. Source: U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES: 1974, at 361 (95th ed. 1974).

86. 281 F. Supp. 8 (D. Conn. 1968).

87. *Id.* at 14.

88. *Id.*

89. 430 Pa. 642, 243 A.2d 400 (1968). *See also* Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974).

90. 430 Pa. at 648, 243 A.2d at 403.

91. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

92. CAL. BUS. & PROF. CODE § 25656, Stats. 1953, c. 152, p. 1024, § 1; *repealed by* Stats. 1971 c. 152, p. 203, § 1.

93. 335 U.S. 464 (1948); *see* text accompanying notes 21-27 *supra*.

to be suspect and noting, with regard to "protective legislation," that "[t]he pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."[94]

These few cases revealed the progression of the law in this area from the antiquated concept that women were in need of protection to a view which recognized the realities of the modern social and economic world. It is in this posture, within the framework of the Warren Court's two-tier system, that the issue of which standard is applicable to cases involving gender-based discrimination has confronted the present Burger Court.

C. The Burger Court's Response

The Warren Court's system of equal protection has come under increasing criticism because of the extreme differences between the standards of review and the consequently different results that they mandate.[95] Additionally, there is the feeling that many of the interests which are specially protected lack a constitutional or historical basis to validate such protection.[96] As a result of this growing discontent with the two-tier scheme, two alternative responses have emerged. One would employ a system of sliding scale scrutiny, in which the courts would adjust their judicial tolerance and testing to the relative importance of the interests involved: "[C]oncentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental interests that they do not receive, and the asserted state interests in support of the classification."[97] It is evident, however, that a majority of the Court has not yet adopted this approach.[98]

1. The Gunther Model

The second alternative to the Warren Court's "two-tier" system has been suggested in an extensive article by Gerald Gunther.[99] From his examination of fifteen equal protection decisions of the 1972 Supreme Court Term,[100] Gunther

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94. 5 Cal. 3d at 20, 485 P.2d at 541, 95 Cal. Rptr. at 341.

95. A statute subject to strict scrutiny examination because it discriminated on the basis of race (a suspect classification), for example, would have far less chance for judicial approval than a statute which discriminated on the basis of sex or age (not suspect classifications) and which was therefore only required to satisfy the rational basis test.

96. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-102 (1973) (Marshall, J., dissenting); Shapiro v. Thompson, 394 U.S. 618, 661-62 (1969) (Harlan, J., dissenting).

97. Dandridge v. Williams 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). Justice Marshall has been the chief proponent of this sliding scale standard; *see, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70-103 (Marshall, J., dissenting). *See also* Vlandis v. Kline, 412 U.S. 411, 458 (1973) (White, J., concurring); Cruz v. Beto, 405 U.S. 319, 326 (1972), (Rehnquist, J., dissenting): "I think it quite consistent with the intent of the framers of the Fourteenth Amendment, many of whom would doubtless be surprised to know that convicts came within its ambit, to treat prisoner claims at the other end of the spectrum from claims of racial discrimination." *See also* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 513 (1973); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479, 490 (1974).

98. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

99. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, (1972).

100. Police Dep't v. Mosley, 408 U.S. 92 (1972); James v. Strange, 407 U.S. 128 (1972); Jack-

has drawn the following conclusions: 1) the Burger Court is reluctant to expand the scope of the strict scrutiny language of the new equal protection, although the best established elements are preserved; 2) the Court is displeased with the Warren Court's two-tier method of equal protection; and 3) the Court is prepared to use the equal protection clause as an interventionist tool, without resorting to the use of the strict scrutiny test.[101]

In support of his first conclusion, Gunther cites[102] the decisions in *Lindsey v. Normet*,[103] *Dandridge v. Williams*[104] and *Jefferson v. Hackney*,[105] all of which refused to extend strict scrutiny protection beyond those interests already subjected to such protection by the preceding Court.[106] The refusal to expand the application of strict scrutiny has not, however, resulted in a total abandonment of that test.[107] Four[108] of the fifteen cases chosen by Gunther were decided with the use of the strict standard, because the Burger Court recognized that they involved established fundamental interests.

As noted, the Burger Court has been increasingly discontented with the two-tier system and has attempted, according to Gunther, to "blur the distinctions between strict and minimal scrutiny precedents by formulating an overreaching inquiry applicable to 'all' equal protection cases."[109] In support of this contention, Gunther cites Justice Powell's majority opinion in *Weber v. Aetna Casualty and Surety Co.*,[110] and Justice Marshall's opinion in *Police Dep't v. Mosley*:[111] "[I]n all equal protection cases, . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment."[112] Through the use of this "appropriate governmental interest" test, lying somewhere in between the deferential rational basis and the severe strict scrutiny standards, the Court has avoided the invocation of the latter test, while finding a basis for intervention in a tougher application of the "traditionally toothless" rational basis test.[113] Gunther contends that, with

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son v. Indiana, 406 U.S. 715 (1972); Jefferson v. Hackney, 406 U.S. 535 (1972); Weber v. Aetna Cas. & Sur. Co. 406 U.S. 164 (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); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter 405 U.S. 134 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Schilb v. Kuebel, 404 U.S. 357 (1971); Mayer v. City of Chicago, 404 U.S. 189 (1971); Richardson v. Belcher, 404 U.S. 78 (1971); Reed v. Reed, 404 U.S. 71 (1971).

101. Gunther, *supra* note 99, at 12.

102. *Id.* at 12-14.

103. 405 U.S. 56 (1972).

104. 397 U.S. 471 (1970).

105. 406 U.S. 535 (1972). Justice Rehnquist stated: "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straight-jacket." *Id.* at 546.

106. *See* text accompanying notes 43-50, 60-63 *supra*.

107. Gunther, *supra* note 99, at 15.

108. Police Dep't v. Mosley, 408 U.S. 92 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Mayer v. City of Chicago, 404 U.S. 189 (1971). *But see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

109. Gunther, *supra* note 99, at 17.

110. 406 U.S. 164 (1972).

111. 408 U.S. 92 (1972).

112. *Id.* at 95.

113. Gunther, *supra* note 99, at 18-19. Gunther cites 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) and Reed v. Reed, 404 U.S. 71

the use of this new approach to equal protection cases, a majority of the Justices on the Burger Court are prepared to acknowledge substantial equal protection claims on minimum rationality grounds. Tolerance of overinclusive and underinclusive classifications has decreased, and "[j]udicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished."[114] Gunther concludes:

> The model suggested by the 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.[115]

The conclusion to be drawn from Gunther's analysis is therefore that, while the Burger Court is reluctant to expand upon the Warren Court's restriction of discrimination by way of the strict scrutiny standard, it continues to limit discrimination, but by the use of a stronger interpretation of the old, formerly deferential, rational basis test.[116]

2. Cases: From Reed *to* Frontiero

The first major case involving sex discrimination to confront the Burger Court was that of *Reed v. Reed*.[117] At issue was the validity of Idaho probate provisions[118] which gave mandatory preference to males in situations where equally qualified men and women sought to be named as the administrator of a decedent's estate. Relying on the language of *Royster Guano Co. v. Virginia*,[119] the Court interpreted the equal protection clause to require that persons could not be statutorily placed in a class receiving different treatment on the basis of criteria which were unrelated to the statute's purpose.[120] The Court found that, although the objective of the statute—to select an administrator without having to hold hearings—was permissible, to give mandatory preference to makes merely to accomplish that objective was "to make the

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(1971), all of which upheld a constitutional claim of a statute's invalidity, as indicative of the Burger Court's new approach to equal protection cases.

114. Gunther, *supra* note 99, at 19-20.

115. *Id.* at 20.

116. It must be noted, however, that this inclination of the Court to toughen the old rational basis test may result in a greater tendency by the Court to find a compelling state interest, in order to uphold a statute under the strict scrutiny test; *see* Storer v. Brown, 415 U.S. 724 (1974). The Court may even show less willingness to apply strict scrutiny where it might otherwise have been applicable; *see* Geduldig v. Aiello, 417 U.S. 484 (1974). *See also* Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719 (1973).

117. 404 U.S. 71 (1971). Chief Justice Burger wrote the opinion for a unanimous Court, consisting of only seven members: the Chief Justice and Justices Douglas, Brennan, Blackmun, Marshall, Stewart and White. Justices Rehnquist and Powell did not join the Court until January 7, 1972. 404 U.S. iv (1972).

118. IDAHO CODE §§ 15-312,-314 (1948).

119. 253 U.S. 412 (1920).

120. The Court stated: "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.' " 404 U.S. at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

very kind of arbitrary legislative choice forbidden by the Equal Protection Clause . . . ."[121]

By ruling sex discrimination solely for "administrative convenience" invalid, as it did not bear a "fair and substantial relation to the object of the legislation,"[122] it is evident that the *Reed* Court was applying a tougher, "active" version of the standard rational basis test, as described by Gunther,[123] while not venturing so far as to classify sex as suspect.[124] This test was utilized in a number of lower court cases[125] and one Supreme Court case,[126] immediately following *Reed*. In two of these lower court cases,[127] both explicitly holding that sex was not an inherently suspect classification,[128] the complained of discriminatory practice was determined not to be a violation of equal protection. In two other lower court cases, the discrimination was invalidated using the *Reed* rationale, though no mention of the possible classification of sex as suspect was made.[129] In another case, *Green v. Waterford Board of Education*,[130] the possibility of applying strict scrutiny to the issues before the courts was raised. This rigid standard was discarded as unnecessary, however, as the discriminatory practice involved failed even to satisfy the more relaxed requisites of the *Reed* test.

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121. *Id.* The Court made no mention of the Idaho Supreme Court's suggestion, 92 Idaho 511, 514, 465 P.2d 635, 638 (1970), that the state legislature may have believed men to be more competent than women in the area of estate administration; *see* Bilbe, *supra* note 24, at 385.

122. 404 U.S. 71, 76 (1971), *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

123. *See* text accompanying notes 99-115 *supra*.

124. It is interesting to note that, while the appellant's brief and several *amicus curiae* briefs urged that sex be classified as suspect, the Court did not follow that course, Gunther, however, believes that the Court was applying a greater degree of scrutiny than that associated with the "old" equal protection test: "It is difficult to understand [the result in Reed] without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex-related means from the new 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." Gunther, *supra* note 99, at 34.

125. Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Robinson v. Bd. of Regents of E. Kentucky Univ., 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974); Green v. Waterford Bd. of Education, 473 F.2d 629 (2d Cir. 1973); Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972); Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973).

126. Stanley v. Illinois, 405 U.S. 645 (1972). In *Stanley*, an unmarried father successfully challenged, on due process and equal protection grounds, an Illinois statute which, without a hearing, granted the state custody of his children upon the death of the mother, even though hearings on parental fitness were required before the state assumed custody of children of married couples and unmarried mothers. For an excellent discussion of *Stanley* and its relationship to the "irrebutable presumption" doctrine, *see* Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617, 629-33 (1974).

127. Robinson v. Bd. of Regents of E. Kentucky Univ., 475 F.2d 707 (6th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974) (dormitory curfew restrictions, applicable to women university students only, ruled constitutional); Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973) (athletic association rule requiring separate teams for girls and boys in non-contact sports held valid).

128. 475 F.2d at 711; 361 F. Supp. at 932.

129. Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973) (South Carolina state resolution preventing females from being legislative pages ruled to deny equal protection); Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972) (statute allowing females under the age of eighteen benefits of juvenile court proceedings while limiting similar benefits to only those males under the age of sixteen held to violate equal protection).

130. 473 F.2d 629 (2d Cir. 1973).

The lack of a certain standard and the need to finally determine the classification status of sex confronted the Court in *Frontiero v. Richardson*.[131] Sharon Frontiero, a United States Air Force lieutenant, sought to claim her husband as a dependent in order to obtain an increased benefit allowance. Her request was denied, because under the applicable statutes,[132] female members of the armed services were required to show that their husbands were in fact dependent upon them for more than one half of their support before husbands could qualify as dependents; Ms. Frontiero was unable to meet this requirement. As no such standard applied in the case of a male officer who sought to claim his wife as a dependent,[133] Frontiero challenged the denial of increased benefits as discriminatory on the basis of the due process clause of the fifth amendment.[134] The lower court rejected her claim,[135] but the Supreme Court, without a majority opinion, reversed, eight to one. Justice Brennan, writing the plurality opinion,[136] declared that sex was a suspect classification, likening it to race and national origin, in that it is a characteristic over which the individual has no control and which "frequently bears no relation to ability to . . . contribute to society."[137] Justice Brennan found implicit support for this proposition in Congress' recent passage and submission to the states of the equal rights amendment,[138] and he considered the *Reed* decision to have represented a major change in the Court's attitude toward sex discrimination:

> [T]he Court [in *Reed*] implicitly rejected appellee's apparently rational explanation of the statutory scheme, and concluded that, by ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are . . . similarly situated." . . . This departure from "traditional" rational basis analysis with respect to sex-based classifications is clearly justified.[139]

Applying a strict standard of review, called for by the classification of sex as suspect, Justice Brennan concluded that the government's purpose of administrative convenience did not justify the different treatment of male and female officers, and he held the statute violative of the fifth amendment's due process clause.[140]

The remaining five members of the Court, however, were unwilling to join in the specifics of Justice Brennan's opinion. While concurring in the judgment, Justice Powell,[141] who also relied on *Reed*, did not interpret that earlier deci-

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131. 411 U.S. 677 (1973).

132. 10 U.S.C. § 1072(2)(C) (1970); 37 U.S.C. § 401 (1970).

133. 10 U.S.C. § 1072(2)(A) (1970); 37 U.S.C. § 401(1) (1970).

134. 411 U.S. at 680 n.5, *quoting* Schneider v. Rusk, 377 U.S. 163, 168 (1964): "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " *See also* Bolling v. Sharpe, 347 U.S. 497 (1954).

135. Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972).

136. Justices Douglas, White and Marshall joined in Justice Brennan's opinion.

137. 411 U.S. at 686 (footnote ommitted).

138. *Id.* at 687. Justice Brennan reasoned that in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e (2)(a)-(c) (1970), and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970), Congress itself had concluded that "classifications based upon sex are inherently invidious . . . ." *Id.*

139. *Id.* at 683-84, *quoting* Reed v. Reed, 404 U.S. 71, 77 (1971).

140. *Id.* at 690-91.

141. Justice Powell was joined by Chief Justice Burger and Justice Blackmun.

sion to recognize sex to be suspect. Justice Powell believed, rather, that the *Reed* test was sufficient in and of itself to declare the contested statutes invalid: he further reasoned that, in light of the status of the equal rights amendment, it was improper for the courts to interfere with the legislative process by placing sex on the suspect list at that time.[142] Justice Stewart also concurred in the result, apparently basing his decision on *Reed* as well,[143] while Justice Rehnquist dissented for the reasons stated by the district court, which had held the statute to have a rational basis.[144]

The decision in *Frontiero* is significant for two reasons: first, although the opinions of Justices Brennan, Powell and Stewart all rely on *Reed*, they reflect the diversity of the analytical approaches to the equal protection clause: second, in spite of the fact that it is only a plurality opinion, Justice Brennan's position in *Frontiero* represents the first time that the Court has extended the full judicial scrutiny of the equal protection clause (via, in this case, the fifth amendment's due process clause) to cases involving sex-based discrimination.[145]

3. *Lower Court Cases: The Aftermath of* Frontiero

The lack of a majority opinion in *Frontiero* caused great confusion and little conformity in the handling of subsequent sex discrimination cases by the lower courts. Some courts preferred to rely solely on the *Reed* rationale,[146] others decided to follow the *Frontiero* suspect classification doctrine,[147] and

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142. 411 U.S. at 691-92.

143. *Id.* at 691. Justice Stewart's statement was somewhat ambiguous, as it is not clear what standard of judicial review he felt was applicable: "[T]he statutes before us work an invidious discrimination in violation of the Constitution. Reed v. Reed . . . ."

144. *Id.*

145. *See* Comment, 24 CASE W. RES. L. REV. 824 (1973).

146. Garaci v. City of Memphis, 379 F. Supp. 1393 (W.D. Tenn. 1974) (ordinance forbidding massage parlor operators from treating persons of the opposite sex held valid); Healy v. Edwards, 363 F. Supp. 1110 (D. La. 1973), *vacated and remanded per curiam*, ___ U.S. ___, 95 S. Ct. 2410 (1975) (three-judge district court held Louisiana statute exempting women from jury service unless they filed written declarations of their desire to serve to deny all litigants due process and deprive female litigants of equal protection); Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973), *rev'd sub nom.* Geduldig v. Aiello, 417 U.S. 484 (1974), *see* text accompanying notes 252-65 *infra* (district court ruled unconstitutional state's insurance code provision exempting from coverage all pregnancy-related work loss until twenty-eight days following the end of pregnancy).

147. Gilpin v. Kansas State High School Activities Ass'n Inc., 377 F. Supp. 1233 (D. Kan. 1974) (state high school rule prohibiting boys and girls from membership on same athletic teams ruled overbroad in its reach as applied to female student); Cianciolo v. Knoxville City Council, 376 F. Supp. 719 (E.D. Tenn. 1974) (city ordinance prohibiting massages of the opposite sex ruled to be in conflict with the equal employment provisions of the Civil Rights Act and in violation of the equal protection clause); Johnston v. Hodges, 372 F. Supp. 1015 (E.D. Ky. 1974) (statute requiring father's signature for minor's driver's license application ruled invalid); Daugherty v. Daley, 370 F. Supp. 338 (N.D. Ill. 1974) (three-judge district court enjoined Illinois statute's prohibition of women bar employees from soliciting alcoholic beverages on grounds of vagueness, overbreadth, and equal protection); Andrews v. Drew Municipal Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973) (denial of employment of female solely because she was the parent of an illegitimate child held illegal); Wiesenfeld v. Sec. of HEW, 367 F. Supp. 981 (D.N.J. 1973), *aff'd sub nom.* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); *see* text accompanying notes 272-85 *infra* (district court held Social Security Act's "mother's insurance benefits" program invalid as discriminatory against women as well as husbands and children who had lost their wives and mothers); Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973) (insurer's refusal to sell

still others found the choice between the two unnecessary because the law or practice was unconstitutional under either test.[148] It was clear, therefore, that there was a need for a definite standard by which to decide sex discrimination cases;[149] the alternative was to permit each case to be decided on an *ad hoc* basis, with further inconsistency as the result. The question now before the courts is whether the decision in the case of *Kahn v. Shevin*[150] has provided the long sought definitive standard.

IV
IN SEARCH OF A STANDARD: *KAHN V. SHEVIN*

A. Facts and Decision

Appellant Kahn, a widower, applied for a tax exemption under a Florida law[151] which allowed all widows an annual property tax exemption of five hundred dollars. Kahn's application was denied by the Dade County Tax Assessor's office because the statute provided for no similar tax benefits for widowers. Kahn then sought a declaratory judgment in the Circuit Court for Dade County, which held that the tax exemption statute violated the equal protection clause of the fourteenth amendment because the classification

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disability insurance to women on same terms and conditions as men held illegal); Ballard v. Laird, 360 F. Supp. 643 (S.D. Cal. 1973), *rev'd sub nom.* Schlesinger v. Ballard, 419 U.S. 948 (1975); *see* text accompanying notes 266-71 *infra* (district court found discriminatory different procedures accorded naval officers due to gender-based classifications); State v. Chambers, 63 N.J. 287, 307 A.2d 78 (1973) (disparity of sentencing and treatment of male and female offenders ruled to violate equal protection); State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285 (Fam. Ct. 1974) (presumption that mother should have custody of young children held to violate state law and equal protection clause of the federal constitution).

148. Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056 (D. Ore. 1974) (refusal to allow women to use accumulated sick-leave time for child-birth held to violate Title VII and equal protection); Smith v. City of E. Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973) (height and weight requirements for police officers held to discriminate against women); Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973) (fact that only women applying for insurance benefits had to prove dependency-in-fact status of their children held to violate equal protection).

149. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), a case subsequent to *Frontiero* and before *Kahn*, involved a successful attack by pregnant teachers against school board rules requiring unpaid maternity leaves several months before expected childbirth. Although the EEOC had promulgated guidelines stating that mandatory pregnancy leaves presumptively violated the sex discrimination provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 1983 (1970), Justice Stewart's majority opinion did not deal with the equal protection issue; rather, he invalidated the procedure on the grounds that it involved illegal "irrebutable presumptions": "While the regulations no doubt represent a good faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child. . . ." 414 U.S. at 648. For excellent discussions of this newly fasionable procedural due process approach *see* Note *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); *Constitutional Law—Due Process and Equal Protection—Mandatory Leave Rules for Public School Teachers*, 50 N.D.L. REV. 757 (1974).

150. 416 U.S. 351 (1974).

151. FLA. STAT. ANN. § 196.191(7) (1971); *now* FLA. STAT. ANN. § 196.202 (Supp. 1975): "Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation." *See* 416 U.S. at 352 n.2.

"widow" was based solely on gender.[152] The Supreme Court of Florida, however, following the *Reed* rational basis standard, reversed the lower court.[153] The court found the classification valid, on the ground that it had a "fair and substantial relation to the object of the legislation"[154]—the object of the law being to reduce the disparity between the relative economic positions of men and women. As a result of the ruling of Florida's highest court, Kahn appealed to the United States Supreme Court.

Justice Douglas, author of the majority opinion applied the *Reed* test, as had the Florida Supreme Court.[155] Justice Douglas' approach framed precisely the same issue that had been answered affirmatively by the lower court; namely, whether the differential treatment of the sexes by the Florida statute had a reasonable relationship to the law's espoused intent. Noting that women suffer from great economic discrimination in the employment market, and commenting that a spouse's death is more likely to have a detrimental impact on a widow than on a working widower, Justice Douglas concluded that the discrimination worked by the statute had a substantial relationship to its objective.[156] Moreover, Justice Douglas found *Frontiero* easily distinguishable; whereas *Frontiero* had involved a statute which had caused blanket sex discrimination solely "for administrative convenience,"[157] such was clearly not the case in *Kahn*. Justice Douglas pointed to the benign purpose of he statute,[158] and he noted that states traditionally had been given leeway in tax classifications, as long as any resulting discrimination was founded on reasonable distinctions not conflicting with the Federal Constitution.[159] Justice Douglas concluded that in this instance the statutory discrimination in favor of widows, the intent of which was to cushion "the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden,"[160] was well within the limits of reasonable discrimination, and he therefore affirmed the decision of the Florida Supreme Court.

Only in his final footnote did Justice Douglas address the argument that the statute could have been drafted differently so that its purpose would have been accomplished "more precisely."[161] The sole issue raised by this contention was whether the lines chosen by the Florida legislature in writing its tax law were within constitutional limitations. Justice Douglas rejected the dissent's use of the equal protection clause "as a vehicle for reinstating notions of substantive due process that have been repudiated,"[162] a result which would have occurred had he substituted the Court's social and economic beliefs for the judgment of legislative bodies."[163] Justice Douglas' footnote went on to

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152. Kahn v. Tax Assessor, 37 Fla. Supp. 137 (Cir. Ct. 1972).
153. Shevin v. Kahn, 273 So. 2d 72 (Fla. 1973).
154. Reed v. Reed, 404 U.S. 71, 76 (1971).
155. 416 U.S. 351, 355.
156. *Id.* at 354.
157. *Id.* at 355, *quoting* Frontiero v. Richardson, 411 U.S. 677, 690 (1973).
158. Compare Justice Douglas' critical discussion of "benign" programs in his dissent in DeFunis v. Odegaard, 416 U.S. 312, 320-48 (1974); *see also* text accompanying notes 186-92 *infra*.
159. 416 U.S. 351, 355-56.
160. *Id.* at 355.
161. *Id.* at 356 n.10.
162. *Id.*
163. *Id.*, *quoting* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

imply that his prior endorsement of the suspect classification of sex in *Frontiero* might be less than total. He contended that "[g]ender has never been rejected as an impermissible classification in all instances,"[164] and he concluded, that "[t]hese instances are pertinent to the problem in the tax field which is presented by the present case."[165]

In a well-reasoned dissent, Justice Brennan, joined by Justice Marshall, disputed the conclusions of the majority. The primary thrust of Justice Brennan's argument focused on the issue of suspect classifications. Following the doctrine expressed by his plurality opinion in *Frontiero*, Justice Brennan maintained that a legislative classification which distinguished beneficiaries solely on the basis of their sex was analogous to one which differentiated on the basis of race, alienage, and national origin, and was thereby subject to "close judicial scrutiny."[166] Under this stricter standard, Justice Brennan would have required Florida to prove that the challenged legislation served "overriding or compelling state interests that [could not] be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means."[167]

Justice Brennan re-asserted his *Frontiero* and *Reed* positions that gender-based classifications could not be upheld merely because they were administratively convenient. While recognizing that the statute in *Kahn* did serve the governmental interest of reducing the financial impact on a widow caused by the death of her husband, Justice Brennan nevertheless found that the statute failed to satisfy the requirements of strict scrutiny:[168] Florida's failure to explain why the inclusion of wealthy widows was necessary to achieve the statute's objective, coupled with the fact that the law could have been drafted to ensure that only those widows who actually needed the tax exemption would receive it, led Justice Brennan to conclude that the statute was not sufficiently narrow to satisfy the requirements of equal protection.[169]

Justice White, dissenting along lines similar to those of Justice Brennan, raised two interesting points. Noting that Florida's stated objective was to compensate for past discrimination, Justice White questioned why the state had limited the exemption solely to women who were widows, ignoring both single women and divorcees.[170] Justice White also raised the possibility that the Florida law might represent a form of "reverse discrimination;" if past discrimination were to be the criterion for present tax exemption, the statute should not ignore those widowers who, in some ways, had similarly been the victims of economic discrimination.[171] Justice White saw this discrimination to be the result of an attempt at administrative efficiency, an objective that had been disqualified as an adequate justification for sex-based distinctions by the

164. *Id.* Justice Douglas' reference to Muller v. Oregon, 208 U.S. 412 (1908), discussed in text accompanying notes 13-20 *supra*, in support of this statement is surprising, as the *Muller* reasoning was clearly inconsistent with the results in *Frontiero* and Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); *see* note 149 *supra*.

165. *Id.*

166. *Id.* at 357.

167. *Id.* at 357-58.

168. *Id.* at 360.

169. *Id.*

170. *Id.* at 361.

171. *Id.* at 360-62.

Reed and *Frontiero* decisions.[172] Justice White concluded that the State of Florida had not sufficiently explained why women should, in this instance, be treated differently from men, and he therefore contended that the statute at issue was invalid.[173]

B. The Implications of the Kahn *Decision*

Superficially, *Kahn v. Shevin* appears to have settled the question of what is the proper standard to apply to cases involving sex-based discrimination. Moreover, the settlement seems to represent a general retreat by the Court from the position tenuously taken by the *Frontiero* plurality. The *Kahn* majority did not accept the applicability of strict scrutiny to sex-based classifications, nor did it apply the toughened *Reed* rational basis test, as Gunther's model had suggested.[174] Rather, the majority in *Kahn* seems to have withdrawn to the use of the deferential rational basis standard, in upholding the challenged legislation. However, a close examination of the opinion, in light of the subject matter and the particular plaintiff, reveals that *Kahn v. Shevin* does not, as it may have first appeared, conclude the issue.

One reason *Kahn* may not be so determinative as it initially appears is that *Kahn* is a tax case.[175] The courts traditionally have been tolerant toward the states with respect to the administration of state taxes and other economic matters.[176] As Justice Douglas himself wrote in his *Kahn* opinion: "We have long held that '[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' "[177] Justice Douglas determined that the Florida tax statute at issue in *Kahn* was "well within those limits"[178] of reasonableness, and he concluded that it should be upheld. Significantly, the opinion goes no further than the immediate issue; for Justice Douglas, this case concerns a state's remedial economic powers in the area of taxation and nothing more.

The precedential value of *Kahn* may further be diminished by the fact that the plaintiff alleging sex discrimination was male. The Court was thus faced with a man seeking equal protection in an area where constitutional claimants traditionally had been women. The controversy was therefore not unlike the

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172. *Id.* at 361.

173. *Id.* at 362. An interesting point which neither Justices Brennan nor White mention, is that this $500 exemption applied only to *property* taxes. Thus, the statute was drawn so that only *property-owning* widows, who would likely be more wealthy than those widows who did not own property, would benefit from its use.

174. *See* text accompanying note 115 *supra*.

175. The case of Edwards v. Schlesinger, 377 F. Supp. 1091 (D.D.C. 1974), *rev'd on other grounds*, 509 F.2d 508 (D.C. Cir. 1974), however, interpreted the *Kahn* decision less narrowly; *see* text accompanying notes 224-38 *infra*.

176. *See* Dandridge v. Williams, 397 U.S. 471, 484 (1971). The majority opinion in *Kahn* referred to the case of Ohio Oil Co. v. Conway, 281 U.S. 146, 159 (1930), which affirmed the latitude given to the states by the courts in the area of taxation. 416 U.S. at 356 n.10.

177. 416 U.S. at 355, *quoting* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973). *See also* Allied Stores v. Bowers, 358 U.S. 522, 526-27 (1958). There is, however, a definite weakness to Justice Douglas' reliance of these cases in *Kahn*: both *Lehnhausen* and *Bowers* noted that their results might have been different had "invidious discrimination" been shown. 410 U.S. at 359-60; 358 U.S. at 530.

178. 416 U.S. at 356.

case of *DeFunis v. Odegaard*.[179] In *DeFunis*, an unsuccessful white male applicant to the University of Washington Law School brought an action against state and university officials, claiming that the school's admission policy had unconstitutionally deprived him of his rights under the equal protection clause of the fourteenth amendment. DeFunis was able to show that he was statistically better qualified for admission than were a number of minority group applicants who had been admitted to the school. The Supreme Court of Washington, in a lengthy opinion, upheld the school's admission procedure,[180] and the United States Supreme Court granted certiorari.[181] The Court was therefore confronted with a controversy centering on the issue of "reverse discrimination", or more precisely, whether or not the equal protection clause protects members of a majority class, as well as members of a minority group. The Court, however, chose to avoid this difficult constitutional question by ruling that the case was moot, since DeFunis was in his last term of law school and would graduate regardless of the Court's decision.[182]

Justice Brennan, joined by Justices Douglas, White and Marshall, dissented,[183] arguing that the constitutional issue presented by the *DeFunis* case merited consideration: "Few constitutional questions in recent history have stirred as much debate, and they will not disappear."[184] Justice Brennan further contended that it was incorrect to rule the *DeFunis* case moot in itself, as, although DeFunis was in his last year of law school and had registered for the final term by the time the case was argued, he had not graduated. Should DeFunis leave or be dismissed from law school before obtaining his degree, Justice Brennan reasoned, the controversy would be very much alive.[185]

Only Justice Douglas, in a separate dissenting opinion,[186] addressed himself to the merits of the case. After an extensive investigation into the admissions procedure involved in the *DeFunis* litigation, Justice Douglas concluded that, because of the alleged cultural bias of the Law School Admissions Test (LSAT) utilized by the school in its selection process, it could not be said that the policy of setting aside some minority applicants for special consideration was unconstitutional. Justice Douglas rejected, however, the argument that a program based on racial quotas could be justified by its benign aims:

> There is no constitutional right for any race to be preferred. . . . There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.[187]
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> . . . .
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> The argument is that a "compelling" state interest can easily justify the racial discrimination that is practiced here. To many "compelling"

179. 416 U.S. 312 (1974).
180. 82 Wash. 2d 11, 507 P.2d 1169 (1973).
181. 414 U.S. 1038 (1973).
182. 416 U.S. 312, 319-20.
183. *Id.* at 348-50.
184. *Id.* at 350.
185. *Id.* at 348.
186. *Id.* at 320-48.
187. *Id.* at 336-37.

would give members of one race even more than *pro rata* representation. . . . The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . .[188]

. . . .

So far as race is concerned, any state sponsored preference to one race over another . . . is in my view "invidious" and violative of the Equal Protection Clause.[189]

Justice Douglas would have remanded the case for a new trial because the record was not sufficiently complete to support a conclusion that DeFunis had initially been denied admission because of his race.[190] A determination as to whether the LSAT discriminated against certain minority groups was also deemed necessary.[191] Ultimately, however, Justice Douglas would have upheld the rejection of DeFunis' application to law school, but only if it could be shown to have been the result of a racially neutral admissions procedure.[192]

On its surface, Justice Douglas' opinion in *Kahn* is in direct opposition to his position in *DeFunis*.[193] The reverse discrimination which Justice Douglas had so forcefully rejected in *DeFunis* was accepted by him without any comment in *Kahn*. Admittedly, the cases are analytically different: first, *DeFunis* involved discrimination based on race, and there is strong precedent to the effect that such discrimination is *per se* impermissible.[194] Secondly, as Professor Johnston notes,[195] the admissions policy challenged in *DeFunis* was substantially remedial both in purpose and effect. It attacked the problem of unequal educational and employment opportunities directly, by providing minorities an opportunity to study law and become members of the bar. The *Kahn* tax statute, on the other hand, evidenced no direct remedial qualities. Not only did it not provide an opportunity for women as a group to escape from past economic discrimination, its benefit, ridiculously pitiful in itself,[196] increased the inequities which existed within the class it was intended to help: only those widows who were wealthy enough to have acquired property benefited from the Florida law; there were no provisions made to aid widows without property, single women, or divorcees.[197] Given these facts, it would have

188. *Id.* at 341-42.
189. *Id.* at 343-44.
190. *Id.* at 344.
191. *Id.* at 335-36.
192. *Id.* at 336.
193. The apparent inconsistency in Justice Douglas' *Kahn* and *DeFunis* positions is all the more surprising in light of the fact that the two cases were argued and decided contemporaneously. Arguments in *Kahn* were heard on February 25-26, 1974; *DeFunis* was argued on February 26, 1974. The *DeFunis* decision was published on April 23, 1974; *Kahn* was announced the following day.
194. *See* note 60 and accompanying text *supra*.
195. Johnston, *supra* note 126, at 663-64.
196. The savings under the *Kahn* tax statute would have amounted to approximately $15. *See* Johnston, *supra* note 126, at 661 n.159.
197. This was, in part, the thrust of Justice White's dissent in *Kahn*; *see* text accompanying note 170 *supra*.

been simple, as Professor Johnston contends,[198] to reconcile a decision to uphold the *DeFunis* admissions procedure with a decision to strike down the *Kahn* tax law. The interests of equality would appear to mandate this result. Instead, Justice Douglas chose to pursue the contrary course, offering no justification for his actions. Reverse discrimination, while the object of harsh criticism in *DeFunis*, slipped by unnoticed (or perhaps with tacit approval) in *Kahn*.

The several defects in the *Kahn* decision are readily apparent. First, the fact that *Kahn* is a tax case is used by the Court as an excuse to apply the deferential rational basis test to a blatantly sexually discriminatory law; it is indeed questionable whether or not, as Justice Douglas believes, this tax statute is "not in conflict with the Federal Constitution."[199] Further, because the Florida law benefits only some women and, even then, to a miniscule degree, an assertion that its objective—the reduction of "the disparity between the economic capabilities of a man and a woman"[200]—is related to the means utilized by this law is difficult to support; it is not easy to understand how a small property tax exemption for widows bears a "fair and substantial relation"[201] to increasing the economic capabilities of women in general. Because the law concerns itself only with the symptoms and not the cause of the problem, the Court is misguided in assuming that the statute would work to decrease the economic inequalities between the sexes. Second, the majority's reliance on the generalized income statistics based on gender, which are used to justify the broad sex discrimination inherent in the Florida statute, is misplaced: relative earning power between the sexes bears little relationship to property tax exemptions for widows. Third, the complete disregard of the concepts proposed in *Reed* and *Frontiero*[202] is neither adequately explained nor justified. Finally, to the extent that Justice Douglas relies on the out-dated decision in *Muller v. Oregon*[203] to uphold the "benign" gender classification, he ignores completely the injudiciousness of "benign paternalism" and inconsistently supports the element of reverse discrimination which he justifiably criticized in *DeFunis*.

These defects and inconsistent positions notwithstanding, Justice Douglas determined to validate the challenged *Kahn* tax statute. It is obvious that were Justice Douglas to be consistent with his prior opinions, he would have found himself in the *Kahn* minority with Justice Brennan, who would subject all classifications based on gender to "close judicial scrutiny," even when such classifications were utilized for purposes of reverse discrimination. Yet Justice Douglas did not adopt the approach that one would have expected, and one must therefore inquire into the possible reasons for his seemingly inconsistent behavior. Some explanations present themselves immediately: (1) Justice Douglas did not feel constrained to apply the rigid test of strict judicial scrutiny to

198. Johnston, *supra* note 126, at 664.

199. 416 U.S. 351, 356 (1974); *see* text accompanying note 159 *supra*.

200. *Id.* at 352, *quoting* Shevin v. Kahn, 273 So. 2d 72, 73 (Fla. 1973).

201. Reed v. Reed, 404 U.S. 71, 76 (1971).

202. The dismissal of *Frontiero* as applying to only those cases involving discrimination for purposes of "administrative convenience" does little to justify the complete abandonment of the underlying rationale of that decision.

203. 208 U.S. 412 (1908); *see* text accompanying notes 13-20 *supra*.

the *Kahn* case because *Kahn*, unlike *DeFunis*, did not involve a classification that the Court had definitively determined to warrant the application of the higher standard. While this may well have been the case, this does not explain Justice Douglas' contrary behavior in *Frontiero* and the cases immediately following *Kahn*, in which he argued that all gender-based discrimination was to be afforded the highest level of judicial examination.[204] (2) Justice Douglas believed that, in some circumstances, reverse discrimination was a justifiable method by which to achieve equality. Certainly, in *Kahn*, the actual effect of his decision was minimal, if not insignificant, so that Justice Douglas need not have been concerned with causing a great disturbance of the *status quo*. Perhaps Justice Douglas saw this decision as establishing precedent in this area, albeit narrow precedent. But again, Justice Douglas' *DeFunis* position, as well as his otherwise consistent practice of characterizing sex as suspect in cases preceding and following *Kahn*, would seem to disprove any contention that he truly believed that reverse discrimination was to be condoned in the area of gender-based classifications.

Neither the deference shown to state tax laws nor the relation between the Florida statute and its expressed objective persuasively support Justice Douglas' opinion; nor is *Muller v. Oregon*[205] authority for this decision. On the whole, therefore, it appears that Justice Douglas' apparent retreat in *Kahn* from his positions in *Reed*, *Frontiero* and *DeFunis* is inexplicable. But one can not end the inquiry with an enigma.

The explanation for Justice Douglas' inconsistent behavior in *Kahn* might well be that he recognized that, had he reaffirmed his *Frontiero* position in *Kahn*, he would have found himself a member of the dissent. It is not likely that Chief Justice Burger and Justices Stewart, Powell, Blackmun and Rehnquist, who had all disavowed the classification of sex as suspect in *Frontiero*,[206] would have agreed to such a classification in *Kahn*. With Justice Douglas only a minority voice, the remaining five-man majority might have used the *Kahn* case to set significant anti-suspect classification precedent in the area of sex discrimination law. To avoid this possible result, once he had been tentatively assigned to write the majority opinion, Justice Douglas temporarily abandoned his *Frontiero* position[207] and adopted a view more acceptable to the majority, thereby retaining significant influence, as the author of the majority opinion, over the direction of the *Kahn* decision.[208] Justice Douglas' apparent aberrant opinion in *Kahn* may therefore be understood: in order to retain his position as the author of the majority opinion, he had to apply the rational basis test to the issue of sex discrimination before the Court. And in order to

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204. *See* text accompanying notes 250-85 *infra*.

205. 208 U.S. 412 (1908); *see* text accompanying notes 13-20 *supra*.

206. *See* notes 141-44 *supra*.

207. It is evident that Justice Douglas' abandonment of the *Frontiero* approach was only temporary, in light of his post-*Kahn* decisions in Schlesinger v. Ballard, 419 U.S. 498, 511 (1975) (dissenting opinion), and Geduldig v. Aiello, 417 U.S. 484, 497 (1974) (dissenting opinion). *See* text accompanying notes 259-65, 269-71 *infra*.

208. It was, of course, possible that the other members of the *Kahn* majority might have rejected Justice Douglas' attempt to limit the scope of the *Kahn* decision. Had they filed strong, anti-suspect classification concurring opinions, or had Chief Justice Burger removed Justice Douglas from his position as the author of the majority opinion, Justice Douglas could then have abandoned his strategy and joined Justice Brennan's forceful dissent.

justify the application of the rational basis test to *Kahn*, Justice Douglas was compelled to distinguish the *Frontiero* decision from the present case, ignore his *DeFunis* position which had criticized reverse discrimination, and rely, astonishingly, on the outdated *Muller* opinion.[209] Once Justice Douglas had established himself as the author of the majority opinion, however, he was able to regulate the extent and scope of the *Kahn* decision and limit its effect as precedent in the realm of gender-based discrimination.

It is evident that Justice Douglas intended the *Kahn* decision to be read narrowly—applicable only to those cases involving a state's power to tax or administer other economically-related affairs.[210] Justice Douglas carefully focused his opinion on the specific issues before the Court; there were no sweeping statements that sex discrimination cases would never be subject to strict judicial scrutiny. Rather, Justice Douglas only decided that when the Court is confronted with a sex discrimination controversy concerning state taxation, the rational basis test is appropriate. The argument that Justice Douglas intended *Kahn* to be narrowly interpreted is supported further by the fact that Justice Douglas' *Kahn* position regarding sex discrimination is neither consistent with his *Frontiero* assertions nor viewed by him as mandatory or persuasive authority in subsequent cases involving similar issues.[211] Combining this with the knowledge that Justice Douglas ordinarily supports taxpayers' claims[212] leads to the conclusion that Justice Douglas was intentionally constructing the decision in *Kahn* in such a way as to diminish its precedential value. Therefore, while he distinguished the *Frontiero* rationale from the case before him, Justice Douglas did not overrule *Frontiero*, and he consequently left intact the possibility that the Court might, at some later date, place the category of sex among those classifications that are considered suspect.

V

THE CONTINUING SEARCH: THE IMPACT OF *KAHN* ON SEX-BASED DISCRIMINATION AND EQUAL PROTECTION

A. Lower Court Cases

Since the *Kahn* decision, many lower courts have confronted the issue of sex-based discrimination, and have considered in their opinions the elements

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209. 416 U.S. 351, 356 n.10. The *Muller* litigation is discussed at notes 13-20 *supra*.

210. *See* notes 175-78 *supra*.

211. *See* Schlesinger v. Ballard, 419 U.S. 498 (1975), *discussed in* text accompanying notes 266-71 *infra*; Geduldig v. Aiello, 417 U.S. 484 (1974), *discussed in* text accompanying notes 250-65 *infra*; Frontiero v. Richardson, 411 U.S. 677 (1973), *discussed in* text accompanying notes 131-44 *supra*.

212. *See, e.g.*, Bingler v. Johnson, 394 U.S. 741, 758 (1969) (Douglas, J., dissenting); Rudolph v. United States, 370 U.S. 269, 278 (1962) (Douglas, J., dissenting); Comm'r v. Duberstein, 363 U.S. 278, 293 (1960) (Douglas J., dissenting); Comm'r v. Sullivan, 356 U.S. 27 (1958); Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 433 (1955) (Douglas, J., dissenting); United States v. Lewis, 340 U.S. 590, 592 (1951) (Douglas, J., dissenting). It is important to note that Justice Douglas' *Kahn* ruling did not result in any significant loss to the appellant. As Professor Johnston, *supra* note 126, at 661 n.159, mentions, under the challenged statute, the Florida real estate tax was assessed against the aggregate value of the subject property minus $500. The savings to eligible

which served as the basis for the *Kahn* determination.[213] An analysis of these cases, focusing primarily upon an examination of the identity of the plaintiff and the issue with which the case was concerned offers an indication of the ramifications of *Kahn*.

1. Cases Adhering to the Kahn *Rationale*

A number of significant lower court decisions have followed the *Kahn* ruling and have applied the rational basis standard to cases involving sex discrimination. In *Murphy v. Murphy*,[214] the court specifically rejected a husband's *Frontiero*-based argument that a Georgia statute,[215] which permitted courts to award alimony payments to women only, denied due process and equal protection under the fifth and fourteenth amendments. Relying directly on *Kahn*, the Georgia court held the statute constitutional, reasoning that the law was rationally related to its objective—to decrease the financial impact of divorce on women.[216] A similar result was reached in *Kohr v. Weinberger*,[217] in which a three-judge district court decided that Section 215(b)(3) of the Social Security Act[218] did not unconstitutionally discriminate against men. The challenged section, which benefitted women by allowing them to use an advantageous method to compute average monthly wages, was held to be reasonable and not arbitrary. Basing its decision on *Kahn* and on *Gruenwald v. Gardner*,[219] a case which had upheld the statute on a rational basis test, the *Kohr* court found the section to have a fair and substantial relationship to its object, "because its effect is to rectify the economic effects of past discrimination against women."[220]

Yet another case to follow the *Kahn* ruling was that of *People v. Elliott*.[221] In *Elliott*, a father convicted of non-support under a statute which placed primary responsibility for support of children on the male parent claimed that the law was discriminatory and violated the equal protection clause of the fourteenth amendment. The *Elliott* court, relying extensively on *Kahn*, reasoned that men are more economically favored than their wives and therefore better

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taxpayers was therefore $500 multiplied by the applicable tax rate. In the appellant's case, this savings would have amounted to only $15.

213. There are, of course, other cases which have decided issues related to sex-based discrimination. *See, e.g., In re* Estate of Karas, 21 Ill. App. 3d 564, 315 N.E.2d 603 (1974); People v. Robinson, 20 Ill. App. 3d 777, 314 N.E.2d 585 (1974); Tally v. City of Detroit, 54 Mich. App. 328, 220 N.W.2d 778 (1974); Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974). As none of these (and other) cases involves any substantial reliance on *Kahn* or *Frontiero*, they do not apply to the present discussion.

214. 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975).

215. GA. CODE ANN. §§ 30-201, -204, -206, -209, -212 (1969).

216. The *Murphy* court stated, "[*Kahn's*] reasons are equally applicable and cogent in the case of a dependent wife involved in the demise of a marriage who is seeking a divorce and alimony or only alimony. It is the dependent wife of a broken marriage for whom the alimony statutes of Georgia were designed to provide financial support." 232 Ga. at 353, 206 S.E.2d at 459. *See also* Dill v. Dill, 232 Ga. 231, 206 S.E.2d 6 (1974).

217. 378 F. Supp. 1299 (E.D. Pa. 1974).

218. 42 U.S.C. § 415(b)(3) (1970).

219. 390 F.2d 591 (2d Cir. 1968), *cert. denied sub nom.* Gruenwald v. Cohen, 393 U.S. 982 (1968).

220. 378 F. Supp. at 1304.

221. ___ Colo. ___, 525 P.2d 457 (1974).

able to support their children. The court also found that the statute's goal—to protect the welfare of minor children and to prevent them from becoming the wards of the state—was rationally related to the means involved, and it consequently held the law to be constitutional.[222]

Analysis of *Murphy*, *Kohr* and *Elliott* reveals that all three courts applied *Kahn* in a similar, narrow fashion. Each case involved sex-based discrimination with respect to economic matters as its main point of contention. In each case, a *male* plaintiff was challenging the discrimination. Moreover, each court upheld the statute using an argument founded on the inherent inequality of the economic positions of men and women—to wit, that, as the statute in question served to equate the two sexes in *economic* terms, its means were justifiably and reasonably related to its ends. None of the courts intimated that the *Kahn* rationale might cover instances other than those involving economic matters.[223]

There is, however, a fourth case which, though not following the pattern of the three above cases, also relied upon the *Kahn* decision. *Edwards v. Schlesinger*[224] was a suit brought on behalf of women against the Air Force and Naval Academies. The female plaintiffs contended that the academies' failure to consider women for admission denied all female applicants equal protection. The *Edwards* court, applying the *Kahn* test, found that the admissions policy of the service academies was reasonably related to the furtherance of a legitimate governmental interest—the preparation of young men for service as officers in the armed forces.[225] Rejecting a *Frontiero*-based argument on the grounds that *Frontiero* was only applicable to situations involving sex discrimination "*solely* for the purpose of achieving administrative convenience,"[226] the court held the actions of the two service academies to be constitutional.

Although *Edwards* appears on the surface to be an extension of the scope of the *Kahn* decision, since it involved women contesting a policy which is not economically based, the factual context underlying the *Edwards* decision indicates that it may not have broadened *Kahn's* impact.

Edwards concerned military matters, and as the Court recently stated in *Parker v. Levy*,[227] "[This] Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."[228] Thus, it is quite possible that, in dealing with cases concerning the military, courts will feel less bound to the requirements of civilian law, and less hesitant to apply the standards that they might otherwise reject in purely civilian matters.[229]

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222. *Id.* at 458-60.

223. It is true, of course, that the District Court's language in *Kohr* is somewhat ambiguous in this respect: "[T]he 'close judicial scrutiny' test does not apply to cases involving discrimination *of this character.*" 378 F. Supp. at 1303 (emphasis added); "We therefore decline to apply the 'close judicial scrutiny' test to the statutory provision *here in question.*" *Id.* at 1304 (emphasis added). Nevertheless, there is no indication in *Kohr* that the court intended to extend the scope of *Kahn* beyond its application to the Social Security provision involved in that case.

224. 377 F. Supp. 1091 (D.D.C. 1974), *rev'd on other grounds*, 509 F.2d 508 (D.C. Cir. 1974).

225. 377 F. Supp. at 1097-99. It should be noted, with regard to the equal protection claim, that were this case to be brought today, the Court would undoubtedly declare the issue to be moot, as the service academies have begun to admit women applicants.

226. *Id.* at 1099, *quoting* Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

227. 417 U.S. 733 (1974).

228. *Id.* at 743.

229. This factor was also present in Crawford v. Cushman, 378 F. Supp. 717 (D. Vt. 1974), in which a marine corps regulation, denying a woman re-enlistment because she had a dependent

Moreover, the court intimates[230] that the admission policy would most likely be held constitutional, even if subjected to the harsher standards of strict scrutiny. Consequently, regardless of the test imposed, the result would be the same.

Finally, and perhaps most importantly, the *Edwards* opinion takes the position that the *Kahn* decision need not be read narrowly to apply only to the field of taxation, and that it is therefore pertinent to the instant case. In support of this view, the *Edwards* court cites Justice Douglas' reference to *Lehnhausen v. Lake Shore Auto Parts Co.*,[231] claiming that this reference is "not in the context of tax cases alone."[232] However, even a cursory reading of *Kahn* and *Lehnhausen* indicates that Justice Douglas did not intend the reference to *Lehnhausen* to expand *Kahn* beyond its application to tax cases.[233] To further its broad reading of *Kahn*, the *Edwards* court cites *White v. Fleming*,[234] a case in which a city ordinance[235] prohibiting female tavern employees from socializing with male patrons was held to be invidiously discriminatory against women. The *White* decision, handed down after *Kahn*, applied the rational basis test in finding that the ordinance was not related to its objectives in any reasonable manner. The *Edwards* court evidently considered this application to be persuasive authority for the broad application of *Kahn*.[236] It is apparent, however, that the *Edwards* court's interpretation of the *White* case is incorrect. Judge Reynolds, in his *White* decision, found the ordinance "so irrational, invidious, and patently arbitrary"[237] that use of the *Reed* standard was all that was necessary to find the statute unconstitutional; he did not have to resort to the more stringent requirements of the *Frontiero* test.[238] The *White* decision, upon which the *Edwards* court partially relies to support its use of the rational basis

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child under 18 and requiring her discharge because of pregnancy, was upheld. Relying upon the decisions of *Kahn* and *Geduldig*, the *Crawford* court found that the "needs of a mother with a dependent child could not be accomodated with . . . military duty." *Id.* at 725. The *Crawford* court was apparently well aware that cases involving the military were to be handled differently from civilian cases, as can be shown by its reliance on the recent Supreme Court decision in Parker v. Levy, 417 U.S. 733 (1974): "While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community." 378 F. Supp. at 724, *quoting* Parker v. Levy, 417 U.S. 733, 751 (1974). *See also* Burns v. Wilson, 346 U.S. 137, 140 (1953); United States v. Baechler, 509 F.2d 13 (4th Cir. 1974), *cert. denied*, 421 U.S. 993 (1975).

230. 377 F. Supp. at 1097-99.

231. 410 U.S. 356 (1973).

232. 377 F. Supp. at 1096. The *Edwards* court did not elaborate on this statement, but the court apparently felt that the *Lehnhausen* reference negated any argument that *Kahn* should be read narrowly.

233. Justice Douglas' reference to *Lehnhausen* in *Kahn* was short and straightforward: "We have long held that '[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgement produce reasonable systems of taxation.' " 416 U.S. at 355, *quoting* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973). The *Lehnhausen* case itself was only a tax case.

234. 374 F. Supp. 267 (E.D. Wis. 1974), *aff'd*, 522 F.2d 730 (7th Cir. 1975).

235. MILWAUKEE, WIS., CODE OF ORDINANCES § 90-25.

236. 377 F. Supp. at 1096 n.38.

237. 374 F. Supp. at 271 (1974).

238. *Id.* at 270 n.2: "I propose herein to utilize the *Reed* approach, rather than the *Frontiero* approach, because the ordinance in question is so patently arbitrary that it must fall without subjecting it to strict scrutiny." There is no mention of the *Kahn* case in White v. Flemming.

test, therefore reflected the lack of any need for Judge Reynolds to choose between the two tests, rather than a mandate that only the *Kahn* rationale is applicable to matters involving sex-based discrimination.

2. Cases Not Following Kahn

There are a few lower court cases decided subsequently to *Kahn* which, while falling into no discernible pattern, reflect the sentiment that the *Kahn* case has not definitively determined the classification status of sex-based discrimination. In *Women's Liberation Union of Rhode Island v. Israel*,[239] the court held that a statute which mandated differential treatment for adult male and female patrons of certain types of liquor establishments violated the equal protection clause. The court, while noting both *Frontiero* and *Kahn*,[240] relied on neither; rather, the court found it unnecessary to consider whether this discrimination required strict scrutiny, as the challenged statute "fail[ed] to satisfy the less rigorous requirements of the so-called 'rational basis' test."[241] In a second case, also brought on behalf of women, *Evans v. Sheraton Park Hotel*,[242] the court found union discrimination on the basis of gender to be a *per se* violation of Title VII of the Civil Rights Act of 1964.[243] The court relied on the assertion in *Frontiero* that Congress, in legislating the Act, had found sex discrimination to be "inherently invidious."[244] There was no mention of the *Kahn* case.[245] A third case, though differing somewhat from *Evans* and *Israel*, likewise reflected the view that *Kahn* was not controlling authority. *McAuliffe v. Carlson*[246] concerned a challenge to a Connecticut statute that compelled male prisoners transferring from jails to state mental hospitals to pay the cost of their hospital stay, whereas female prisoners were not charged for costs. While both parties to the argument agreed that "strict judicial scrutiny" was not necessarily applicable to sex-based classifications, the court invalidated the law: "It is difficult to perceive how a classification based upon the sex of an inmate bears a substantial relation to the State's interest in lightening the burden of taxpayers by charging prisoners with assets for their state hospital expenses."[247] Although the court struck down the statute on other grounds,[248] it also interpreted the *Kahn* holding narrowly, so as to rule out any application of *Kahn* to *McAuliffe*: "The Supreme Court's recent upholding of a State's tax exemption for widows, Kahn v. Shevin . . . does not validate

239. 379 F. Supp. 44 (D.R.I. 1974), *aff'd*, 512 F.2d 106 (1st Cir. 1975).
240. *Id.* at 49 n.3.
241. *Id.* at 49.
242. 503 F.2d 177 (D.C. Cir. 1974).
243. 42 U.S.C. § 2000e *et seq.* (1970).
244. 503 F.2d at 185, *quoting* Frontiero v. Richardson, 411 U.S. 677, 687 (1973).
245. It is therefore not known whether the *Evans* court was aware of the *Kahn* decision, or, consequently, if it had been aware of *Kahn*, whether the *Evans* decision would have been different.
246. 377 F. Supp. 896 (D. Conn. 1974).
247. *Id.* at 902.
248. The *McAuliffe* court determined that charging male prisoners the costs of transferal to state mental hospitals from community correctional centers (jails) but not levying charges if the prisoner transferred from other penal institutions failed to further Connecticut's purpose of relieving its taxpayers from the burdens of these expenses. *Id.* at 901. The court further held that the arbitrary choice of charging only those prisoners who transfered to *mental* hosptials did not rationally aid a legitimate state interest. *Id.* at 903-04.

Connecticut's attempt to impose added charges upon prisoners simply because they are males."[249]

It is not possible to determine precisely how the lower courts have regarded the language of the *Kahn* opinion. Those cases which specifically followed *Kahn* did so only in narrow, or under special, circumstances. Similarly, those cases which did not hold to *Kahn's* rationale are limited in both number and scope. Perhaps, therefore, all that can be concluded from these present cases is that the courts find themselves in much the same position as they were following the *Frontiero* decision: they remain uncertain as to which standard applies to issues involving sex discrimination.

B. Supreme Court Cases

Since *Kahn*, the Supreme Court has handed down four significant decisions which involved sex-based discrimination.[250] While these also fail to resolve the issue of which standard the Court will apply to sex-based discrimination, the cases may nevertheless be helpful in interpreting *Kahn*. In particular, the cases appear to reflect a general attitude of the Court which can be useful in projecting future trends.[251]

Gedulgig v. Aiello[252] involved a challenge to California's disability insurance program[253] which exempted from coverage work loss due to pregnancy. The Court, *per* Justice Stewart, dismissing in only a footnote the argument that *Frontiero* should apply,[254] and, using the lenient standard of review appropriate to social welfare programs under the Dandridge doctrine,[255] held the program constitutional. Justice Stewart found the plaintiff's claim that the statute was underinclusive with respect to the persons eligible for coverage to be without merit. He commented, "This Court has held that, consistently with the Equal Protection Clause, a State 'may take one step at a time'. . . . Particularly with

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249. *Id.* at 903.

250. Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974). A fifth case, Taylor v. Louisiana, 419 U.S. 522 (1975), while concerned more with a defendant's sixth amendment rights to trial by jury than with the problem of sex discrimination, is also significant for its repudiation of the concepts advanced in Hoyt v. Florida, 368 U.S. 57 (1961), *discussed in* text accompanying notes 28-33 *supra*.

251. The decisions are also significant to an analysis of *Kahn* because of the positions taken by Justice Douglas in each of them.

252. 417 U.S. 484 (1974).

253. The purpose of this program was to pay benefits to those in private employ who were temporarily unable to work because of disabilities not covered by workmen's compensation. It was funded from monies deducted from the wages of participating employees, and each of the women plaintiffs in this case had paid sufficient amounts to the Disability Fund to be eligible for relief. *Id.* at 487-89.

254. Justice Stewart contended:

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

Id. at 496-97 n.20.

255. 397 U.S. 471, 486-87 (1970).

respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point."[256] Justice Stewart determined that the line drawn to exclude pregnancy situations from insurance coverage had a rational link to the legitimate state interests of continuing the self-supporting nature of the program and keeping the payments at a low level—objectives that would be thwarted were pregnancy benefits to be allowed.[257] Justice Stewart concluded: "There is nothing in the Constitution . . . that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has."[258]

Justice Brennan, joined by Justices Douglas and Marshall, dissented, relying on *Reed, Frontiero* and his own dissenting opinion in *Kahn*. Justice Brennan stated that dissimilar treatment of men and women on the basis of physical characteristics linked to sex constituted sex discrimination;[259] he argued that the State had created a "double standard for disability compensation," as a limitation had been placed upon recovery for a disability which indisposes only women, and no such limitations existed for disabilities peculiar to men.[260] Justice Brennan noted that the same conclusion had been reached by the Equal Employment Opportunities Act of 1972,[261] which had prohibited the "disparate treatment of pregnancy disabilities in the employment context."[262] Justice Brennan added:

> In the past, when a legislative classification has turned on gender, the Court has justifiably applied a standard of judicial scrutiny more strict than that generally accorded economic or social welfare programs . . . . Yet, by its decision today, the Court appears willing to abandon that higher standard of review without satisfactorily explaining what differentiates the gender-based classification employed in this case from those found unconstitutional in *Reed* and *Frontiero*. The Court's decision threatens to return men and women to a time when "traditional" equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex.[263]

Applying the strict scrutiny standard that he believed was appropriate to the controversy in *Geduldig*, Justice Brennan found the program clearly unconstitutional. He did not believe that California's legitimate interest in "preserving the fiscal integrity" of its disability insurance program was sufficient to overcome the compelling interest requirements mandated by the more rigid test,[264] and, in any event, Justice Brennan believed that the State's objectives

256. 417 U.S. at 495, *quoting* Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).
257. 417 U.S. at 495-96.
258. *Id.* at 496.
259. *Id.* at 503. Justice Stewart's majority opinion had rejected this sex discrimination claim, insisting that the challenged classification was not "based upon gender as such." *Id.* at 496-97 n.20.
260. *Id.* at 501.
261. 42 U.S.C. § 2000e *et seq.* (1970).
262. 417 U.S. at 501-02.
263. *Id.* at 502-03.
264. *Id.* at 504.

"could easily have been achieved through a variety of less drastic, sexually neutral means."[265]

The second case involving the issue of sex-based discrimination to confront the Supreme Court subsequent to *Kahn* was that of *Schlesinger v. Ballard*.[266] *Ballard* concerned a male naval officer's claim that different mandatory retirement procedures for men and women officers violated the due process clause of the fifth amendment. Under the applicable system, male officers who had been twice passed over for promotion were automatically subject to compulsory discharge, whereas similarly situated female naval officers were granted a minimum of thirteen years of commissioned service before mandatory retirement. The Court, in an opinion by Justice Stewart, utilized the rational basis test and held the program constitutional on a number of grounds,[267] distinguishing the *Reed* and *Frontiero* standards as being relevant only to those cases where gender-based discrimination was founded upon "administrative convenience."[268]

As in *Geduldig*, Justice Brennan, joined by Justices Douglas and Marshall, dissented, asserting that "a legislative classification that is premised solely upon gender must be subjected to close judicial scrutiny."[269] After much discussion of the Congressional intent behind the statute,[270] Justice Brennan concluded that the government had advanced no compelling interest, and the program was therefore invalid: "While we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications . . . we have recently declined to manufacture justifications in order to save an apparently invalid statutory classification."[271]

Weinberger v. Wiesenfeld[272] involved a widower who sought social security survivor's benefits for himself and his son shortly after his wife's death. Wiesenfeld, the widower, successfully secured payments for his son but was unable to claim benefits for himself. Under the relevant statutes,[273] Social Security Act benefits based on the earnings of a deceased husband and father covered by the Act were payable both to the widow and to the couple's minor children in the widow's care, but benefits based on the earnings of a deceased wife and mother were payable only to the minor children; a surviving husband was ineligible to receive payments. A three-judge district court panel found this

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265. *Id.* at 505. Justice Brennan referred to the lower court's suggestion that increased costs could be accommodated by reasonably increasing the rate of contributions, decreasing the maximum allowable benefits, and other variables which would affect the program's solvency.

266. 419 U.S. 498 (1975).

267. The majority reasoned that, as women had less opportunity for promotion than men, the longer time period allotted to them reflected Congress' attempt at promoting equality between the sexes. *Id.* at 508. The Court also concluded that the "up or out" scheme was required to motivate older officers and to reassure younger officers that they had good opportunities for promotion. *Id.* at 502-03.

268. *Id.* at 510.

269. *Id.* at 511. Justice White dissented in a very brief opinion. *Id.* at 521.

270. *Id.* at 512-17.

271. *Id.* at 520.

272. 420 U.S. 636 (1975). Justice Brennan delivered the opinion of the Court. Justices Powell and Rehnquist concurred in separate opinions, while Justice Douglas took no part in the consideration or the decision of this case.

273. 42 U.S.C. § 402(d) (1970) (child's insurance benefit); 42 U.S.C. § 402(g) (1970) (mother's insurance benefit).

differing treatment to be unconstitutional, as it unjustifiably discriminated against women wage earners by affording them less protection for their survivors than was given to male workers.[274] On appeal, the Supreme Court affirmed.

The Court, *per* Justice Brennan, found the instant gender-based discrimination to be similar to that which had been invalidated in *Frontiero*, as it reflected a "virtually identical," archaic generalization, namely, that male workers' earnings were essential to their families' support, whereas the contribution of female wage-earners to the support of their families was non-essential.[275] While the Court conceded that men were more likely to be the primary source of familial income, it held unjustifiable a gender-based generalization which denigrated the role of the female worker. Significantly, the Court chose to regard the interest asserted in *Wiesenfeld* as one which involved the rights of *women*, even though a *widower* stood to benefit financially from the invalidation of the statute. As the Court reasoned:

> [The challenged provision] 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. . . . [Mrs. Wiesenfeld] not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she was also deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. 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.[276]

One of the arguments advanced by the Government was that the classification was reasonably designed to compensate women beneficiaries for economic difficulties which especially burden women who must support their families.[277] This reasoning was similar to that which the Court accepted in the *Kahn* decision. The Court responded, however, that "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."[278] The Court's inquiry into the purpose of the challenged statute led it to the conclusion that Congress had not intended the statute to benefit all widows. Rather, the Court determined that Congress was concerned only with those widows who had minor children in their care, "because [Congress] believed that they should not be required to work."[279] Further support for the contention that the statute's primary focus was on the support for minor children came from the fact that all benefits under it cease when the children of a beneficiary them-

274. 367 F. Supp. 981, 991 (D.N.J. 1973); *see* note 147 *supra*.
275. 420 U.S. at 642-43.
276. *Id.* at 645.
277. *Id.* at 648.
278. *Id.*
279. *Id.* at 650.

selves are no longer eligible for children's benefits.[280] "Given the purpose of enabling the surviving parent to remain at home to care for a child," Justice Brennan reasoned, "the gender-based distinction of section 402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent. . . . [and] . . . this result makes no sense."[281] The Court therefore concluded, "Since the gender-based classification of section 402(g) cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero*."[282] The statute was consequently ruled to be in violation of the due process clause of the fifth amendment.

It is difficult to ascertain precisely what test the Court was applying in *Wiesenfeld*. Although there are several references to *Frontiero*,[283] Justice Brennan's opinion lacks any definite suggestion that a strict scrutiny test is being used. The *Kahn* case is noted in passing,[284] but no mention is made concerning the application of the rational basis test to the question of sex discrimination. In all probability, Justice Brennan reasoned that the nature of the applicable standard was irrelevant to the issue before the *Wiesenfeld* Court, since the statute would fail regardless of the test used. At least one Justice, however, appeared to believe that Justice Brennan was attempting to use the *Wiesenfeld* case to reaffirm his plurality position in *Frontiero*, thereby adding support to his contention that sex should be considered a suspect classification. Justice Rehnquist, in his concurring opinion, sought to limit the scope of the *Wiesenfeld* decision: " . . . I see no necessity for reaching the issue of whether the statute's purported discrimination against female workers violates the Fifth Amendment as applied in *Frontiero v. Richardson*. . . . I would simply conclude . . . that the restriction of § 402(g) benefits to surviving mothers does not rationally serve any valid legislative purpose. . . . To my mind, that should be the end of the matter."[285]

Another case recently decided by the Supreme Court, *Stanton v. Stanton*[286] does no more than *Wiesenfeld* to indicate which is the appropriate test to apply to cases involving sex-based discrimination. The controversy in *Stanton* arose from the refusal of a father to continue support payments to his daughter, pursuant to a decree of divorce, once she had attained the age of eighteen. Mrs. Stanton sought enforcement of the degree in the Supreme Court of Utah, contending that the applicable Utah statute,[287] which set different ages

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280. *Id.*

281. *Id.* at 651. The Court noted that fathers have a constitutionally protected right to the "companionship, care, custody and management" of their children, and therefore should have rights similar to those of women in providing for their families. *Id.* at 652, *quoting* Stanley v. Illinois, 405 U.S. 645, 651 (1972); *see* note 126 *supra*.

282. 420 U.S. at 653.

283. *Id.* at 638 n.2, 642-43, 645, 653.

284. *Id.* at 648. It is true that the opinion focuses on the "reasonableness" of the challenged classification, but this is no indication that the Court was applying the *Kahn* standard.

285. *Id.* at 655.

286. 421 U.S. 7 (1975). Justice Rehnquist filed the lone dissent.

287. UTAH CODE ANN. § 15-2-1 (1953): "Period of minority—The period of minority extends in males to the age of twenty-one years and in females to that of eighteen years; but all minors obtain their majority by marriage." This statute has since been amended, as a result of the Supreme Court's decision in *Stanton*, to extend the period of minority to eighteen years in both males and

of majority for males and females, was invidiously discriminatory and served to deny due process and equal protection in violation of the fourteenth amendment and the corresponding provisions of the Utah Constitution.[288] On this issue, the Utah court affirmed[289] the decision of the lower court, holding the challenged statute valid under the standards of the deferential rational basis test. Mrs. Stanton then appealed to the United States Supreme Court.

Justice Blackmun, writing for the Court, rejected the appellees initial arguments that the case was moot and that the appellant lacked the requisite standing to bring the claim,[290] and he addressed himself to the merits of the case. Although the appellee argued for the application of the rational basis test, and the appellant urged that the more rigid strict scrutiny standard be used, Justice Blackmun chose not to decide this question: "We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect."[291] Rather, relying on the relatively neutral *Reed* rationale, the Court framed the issue in narrow terms: "The test here . . . is whether the difference in sex between children warrants the distinction in the appellee's obligation to support that is drawn by the Utah statute. We conclude that it does not."[292] Notwithstanding the "old notions" of male-female differences relied upon by the Utah Supreme Court in its decision,[293] the Court "perceive[d] nothing rational in the distinction drawn by [the Utah majority statute],"[294] which, in the context of the instant divorce decree, resulted in the differing treatment of the appellant's son and daughter. Wrote Justice Blackmun, "A child, male or female, is still a child."[295] The Court further considered the changing role of women in society, and it noted that, in the vast majority of relevant Utah statutes, no distinction was drawn between males and females on the basis of age.[296] Therefore, the Court ruled that the challenged statute could not be upheld regardless of which equal protection standard the Court applied: "We therefore conclude that under any test—compelling state interest, or rational basis, or something in between—[the Utah majority statute], in the context of

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females. Utah L. 1975, ch. 39, § 1, amending UTAH CODE ANN. § 15-2-1 (1953) (codified at UTAH CODE ANN. § 15-2-1 (1975)).

288. UTAH CONST. art. 1, §§ 7, 24; art. 4, § 1.

289. 30 Utah 2d 315, 517 P.2d 1010 (1974).

290. 421 U.S. at 11-12. As to the question of mootness, the Court stated: "If appellee, under the divorce decree, is obligated for . . . [his daughter's] . . . support during . . . [her years between ages 18 an 21] . . ., it is an obligation that has not been fulfilled, and there is an amount past due and owing from the appellee. The obligation issue, then, plainly presents a continuing live case or controversy." *Id.* at 11.

On the issue of standing, the Court found that "the right to past due support money appears to be the supplying spouse's not the child's." *Id.* at 12. The Court therefore held that the appellant (Mrs. Stanton) had the requisite "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.*, *quoting* Baker v. Carr, 369 U.S. 186, 204 (1962).

291. 421 U.S. at 13.

292. *Id.* at 14.

293. *See* 30 Utah 2d 315, 319, 517 P.2d 1010, 1012 (1974).

294. 421 U.S. at 14. Such a distinction, the Court found, imposed "criteria wholly unrelated to the objective of that statute." *Id.*, *quoting* Reed v. Reed, 404 U.S. 71, 76 (1971).

295. 421 U.S. at 14.

296. *Id.* at 15-16.

child support, does not survive an equal protection attack. In that context, no valid distinction between male and female may be drawn."[297]

As is evident from these four cases, the *Kahn* rationale has not been considered by the Court to be the definitive standard for the determination of issues involving sex-based discrimination. Only two of the four cases decided after *Kahn* used the rational basis test as grounds for their decisions. In *Geduldig*, the Court continued to show deference to state decisions concerning the administration of state economic affairs, as *Kahn* had narrowly allowed,[298] this time in the area of a state benefits program.[299] The *Ballard* Court, in upholding the Navy's mandatory retirement procedure, also applied the less rigid form of review.[300] Neither case, however, relied extensively on *Kahn* as authority for its decision.[301] Of the two other cases, *Stanton*, did not concern itself with a determination of the appropriate standard of review of sex discrimination questions.[302] The remaining case, *Wiesenfeld*, appeared to find its basis in *Frontiero*, and, in fact, it arrived at a result which had economic consequences opposite to those sought in *Kahn*: whereas *Kahn* sought to reduce the economic disparity between men and women, the *Wiesenfeld* Court, by awarding social security benefits to widowers (albeit on the basis of their deceased wives' rights), helped to maintain that disparity.[303] In short, therefore, it cannot be said that the Court has found in *Kahn* the final answer to its sex discrimination questions.

The cases following *Kahn* also bear significance in the position taken by Justice Douglas. In both *Geduldig* and *Ballard*, Justice Douglas took a stance diametrically opposed to his majority opinion in Kahn, concurring in each instance with Justice Brennan's contention that sex was a suspect classification.[304] From his concurrence in the *Stanton* decision, one might well presume that he would have continued along similar lines had the issue of the appropriate equal protection test been expressly raised. Additionally, one could argue that, had he taken part in the *Wiesenfeld* decision, a case which was

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297. *Id.* at 17. The Court realized that its decision on this point did not finally resolve the present controversy. Although it had determined that the age differential was invalid, the Court believed that it was the duty of the Utah courts to decide at what age, in the context of child support issues, children of both sexes attained their majority. The Utah legislature, however, acted instead; *see* note 287 *supra*.

298. *See* text accompanying notes 175-78 *supra*.

299. There is, of course, also the fact that Justice Stewart, writing the majority opinion in *Geduldig*, refused to acknowledge the plaintiffs' contention that statutory discrimination against pregnancy-related illnesses was gender-based, even though that trait was attributable to only one sex; *see* note 254 *supra*. Had the Court been convinced of the rationality of this argument, the Court might have affirmed the lower court's finding of the program's invalidity, regardless of the state's interests in administrating its own economic affairs.

300. The Court, however, has consistently regarded the military as an organization distinct from civilian society: *see* notes 227-29 and accompanying text *supra*.

301. The main basis of authority in *Geduldig* was Dandridge v. Williams, 397 U.S. 471 (1970); the *Ballard* Court made only a minor reference to *Kahn* in its validation of the Navy's procedure. 419 U.S. 498, 508 (1975).

302. *Stanton* only briefly referred to *Kahn*. 421 U.S. 7, 13 (1975).

303. It must be mentioned again that Justice Douglas did not participate in the *Wiesenfeld* decision.

304. 417 U.S. 484, 501 (1974) (Brennan, J., dissenting); 419 U.S. 498, 511 (1975). (Brennan, J., dissenting).

analytically close to *Frontiero*, Justice Douglas would have agreed with Justice Brennan's opinion and references to *Frontiero*. It is therefore not unreasonable to conclude that, as earlier mentioned,[305] Justice Douglas, the author of the *Kahn* majority decision, appears to reflect the general sentiment of the Court: he does not regard *Kahn* as a controlling view of the Court's position on the issue of sex discrimination.

VI
CONCLUSION: PREDICTIONS AND SUGGESTIONS

A. Predictions

It is evident that a majority of the Court remains reluctant to extend to sex discrimination cases the strict scrutiny protection that would be afforded were sex to be classified suspect.[306] At present, only three Justices, Brennan, Marshall and Douglas (notwithstanding his narrow *Kahn* decision), remain firm in their belief that sex is suspect. Justice White may also share this belief; he sided with Justice Brennan in *Frontiero, Kahn*, and *Ballard*, although he agreed with the majority that the rational basis test was applicable in *Geduldig*. Justice Rehnquist has consistently opted for the lesser level of review,[307] and the remaining four Justices, the Chief Justice and Justices Powell, Stewart, and Blackmun, have also generally preferred to use rational basis rather than strict scrutiny in deciding sex discrimination cases.[308] The direction of the Court, therefore, while not certain, definitely is not toward a suspect classification approach to the gender-based discrimination problem. Whether the Court will retreat to the deferential position of the old rational basis test,[309] or whether the Court will conform to the Gunther means-ends analysis,[310] or perhaps the sliding-scale approach, is presently an unanswerable question.

B. Suggestions

It is imperative that the Court adopt an equal protection standard which will result in careful and responsible examination of statutes and procedures

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305. *See* text accompanying note 211 *supra*.

306. This is in accordance with Gunther's observations; *see* text accompanying notes 101, 103-05 *supra*.

307. Weinberger v. Wiesenfeld, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Rehnquist, J., dissenting). In Stanton v. Stanton, 421 U.S. 7 (1975), Justice Rehnquist dissented on grounds other than the appropriateness of a particular equal protection test. *Id.* at 18-20.

308. In *Frontiero*, the Chief Justice and Justices Powell, Stewart and Blackmun concurred in the result, without endorsing Brennan's plurality opinion. 411 U.S. 677, 691-92 (1973). In *Kahn, Geduldig*, and *Ballard*, these four Justices chose to apply the "rational basis" test, but in *Wiesenfeld* they did not take issue, as did Justice Rehnquist, with Brennan's references to *Frontiero*; in *Stanton*, the question of the appropriate level of review was not a central issue.

309. On April 21, 1975, the Supreme Court denied certiorari to the case of Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 421 U.S. 929 (1975). The lower court had sustained, using a "rational basis" test, a state alimony statute which awarded payments to women only. *See* text accompanying notes 214-16 *supra*. While the Court's action has no legal significance, it may nevertheless be important as an indication of future Court behavior.

310. *See* text accompanying note 115 *supra*.

which are sexually discriminatory. A submissive rational basis test can not provide significant review for sex discrimination claims. Consequently, a higher standard—Gunther's means-ends model,[311] a perceptive application of the sliding scale approach, or the test of strict scrutiny—is necessary to provide adequate protection from both discrimination and reverse discrimination based upon sex. Although both the Gunther model and the sliding scale standard can supply the requisite level of examination if rigidly applied, there is no reason why the Court should not extend the full judicial protection of strict scrutiny analysis to sex discrimination.

Several arguments in favor of the application of this highest level of protection to sex discrimination cases readily present themselves: (1) sex, as mentioned earlier,[312] shares many of those characteristics that have caused the Court to subject cases involving racial and lineal discrimination to rigorous examination; (2) any discrimination, regardless of the reason, should be questioned by the courts, and when such discrimination occurs in an area, such as sex, where the legislature has traditionally had a dismal history of discriminatory practices,[313] the highest standard of review should be utilized; (3) a substantial burden of proof to explain its actions should be placed on a government that promulgates sexually discriminatory laws; at a time when "[w]omen's activities and responsibilities are increasing and expanding. . . . [and] . . . [t]he presence of women in business, in the professions, [and] in government . . . is apparent,"[314] only a compelling governmental interest can support distinctions between men and women; (4) in sex discrimination cases, there is often little justification for adopting an imperfect fit or correlation between the means used and the ends desired; consequently, as arbitrary discrimination is disfavored, legislatures should be compelled to achieve their goals by "carefully tailored legislative classification(s) or by the use of feasible, less drastic means;"[315] (5) the Court should not fear that the classification of sex as suspect will inevitably result in the invalidation of all gender-based laws—for, if the legislature can present a compelling interest to support its actions, the challenged statute will be upheld.

The adoption by the Court of strict review of sex discrimination cases would announce the beginning of an era of increased equality between the sexes. This action by the Court becomes even more imperative in light of the precarious position of the equal rights amendment,[316] despite Justice Powell's contentions in *Frontiero*.[317] Even assuming that this amendment is ratified by the states within the requisite time. experience has shown that the mere pres-

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311. *Id.*

312. *See* text accompanying notes 80-85 *supra*.

313. The statutes invalidated in Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973), as well as the *Hoyt* statute discredited in Taylor v. Louisiana, 419 U.S. 522 (1975), are a few examples of legislatures' poor history in the area of sex discrimination.

314. Stanton v. Stanton, 421 U.S. 7, 15 (1975).

315. Kahn v. Shevin 416 U.S. 351, 357-58 (1974) (Brennan, J., dissenting).

316. As of December 1975 only thirty-four of the required thirty-eight states have ratified the proposed amendment. Of these thirty-four states, some have moved to rescind their ratifications. The defeat of the proposed state equal rights amendments in New York and New Jersey on November 4, 1975 places the ratification of the national equal rights amendment in further doubt.

317. 411 U.S. 677, 691-92 (1973) (Powell, J., concurring in the result); *see* text accompanying note 142 *supra*.

ence of an equal protection amendment has not resulted in the end of discriminatory practices.[318] Consequently, in the event of either occurrence, the ratification or the failure of the equal rights amendment, the Court must move to guarantee that the members of both sexes will receive "equal justice under the law." The classification of sex as suspect, followed by the strict scrutiny review that such a classification mandates, would greatly aid the Court in reaching that desired result.

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318. The fourteenth amendment, even when supported by the decisions in Loving v. Virginia, 388 U.S. 1 (1967), and McLaughlin v. Florida, 379 U.S. 184 (1964), has not brought an end to racially discriminatory practices.