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# Kahn V. Shevin And The "Heightened Rationality Test": Is The Supreme Court Promoting A Double Standard In Sex Discrimination Cases?

# *KAHN V. SHEVIN* AND THE "HEIGHTENED RATIONALITY TEST": IS THE SUPREME COURT PROMOTING A DOUBLE STANDARD IN SEX DISCRIMINATION CASES?

Statutes containing sex-based classifications have been challenged with increasing frequency in recent years, most often on the ground that legislation which discriminates on the basis of sex violates the equal protection clause of the fourteenth amendment.[1] Courts ruling on the constitutionality of such laws have encountered great difficulty in determining the applicable standard of judicial review[2] because the United States Supreme Court, in its decisions on equal protection and sex discrimination, has failed to provide the trial courts with an unambiguous and workable standard. In *Kahn v. Shevin*,[3] the major sex discrimination case of the Supreme Court's 1974 term,[4] the Court upheld a sex-based statutory classification by

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[1] *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974); Reed v. Reed, 404 U.S. 71 (1971). For earlier decisions see Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) (decided on the privileges and immunities clause as well).

The due process clause of the fourteenth amendment has also been applied to provisions which discriminate on the basis of sex through the use of the same analytic processes employed in applying the equal protection clause. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

Because the fourteenth amendment does not apply to the federal government, challenges to discriminatory federal laws are brought under the due process clause of the fifth amendment, again using equal protection analysis. Bolling v. Sharpe, 347 U.S. 497 (1954); District of Columbia v. Brooke, 214 U.S. 138 (1909); *see* Department of Agriculture v. Moreno, 413 U.S. 533 (1972); Frontiero v. Richardson, 411 U.S. 677 (1973); Wiesenfeld v. Richardson, 367 F. Supp. 981 (D.N.J. 1973), *argued*, 43 U.S.L.W. 3414 (U.S. Jan. 20, 1975) (No. 73-1892).

[2] For a full discussion of equal protection theory and standards of review see text accompanying notes 8-21 *infra*.

[3] 416 U.S. 351 (1974), *aff'g* 273 So. 2d 72 (Fla. 1973).

[4] Two other significant sex discrimination cases, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) and Geduldig v. Aiello, 417 U.S. 484 (1974), were recently decided by the Supreme Court. Because neither of these cases was decided upon a theory which bears directly on the issues discussed in this article, these cases will be considered only briefly.

In *LaFleur* the Court struck down mandatory maternity leave regulations promulgated by several public school boards. Using the due process clause of the fourteenth amendment, the Court held such regulations to be an unconstitutional infringement upon a female teacher's fundamental right to bear children. 414 U.S. at 648.

At issue in *Aiello* was California's disability insurance program which exempted from coverage any work loss resulting from normal pregnancy. A majority of the Court, applying the equal protection clause, upheld this legislative plan on the basis that the

which Florida granted a property tax exemption to widows, but not to widowers. The result in this case not only appeared to be inconsistent with two earlier cases in which similar sex-based classifications were invalidated, *Reed v. Reed*[5] and *Frontiero v. Richardson,*[6] but also exacerbated existing confusion over the proper standard of equal protection review to be applied to such classifications. A close reading of *Kahn, Frontiero,* and *Reed* reveals, however, that the Court did not uphold the statutory classification at issue in *Kahn* because it applied a less exacting standard of review than that used to invalidate sex-based classifications in *Reed* and *Frontiero.* Rather, the Court seemingly applied a consistent standard of review in all three cases, and the inconsistent results must be explained by examining the theories upon which the Supreme Court differentiated the facts of *Kahn* from those of *Reed* and *Frontiero.*

In reviewing discriminatory legislation under the equal protection clause, the courts must resolve a crucial issue: which standard of review is to be applied in determining whether the statute in question violates the plaintiff's constitutional rights.[7] The Supreme Court has, since the Warren Court era, generally applied a "two-tiered" test in analyzing equal protection problems.[8] Most challenged statutes, particularly those which regulate a state's social and economic matters, occupy the "lower tier" and are judged by a lenient standard of review. Under this standard, legislation is upheld unless the challenging plaintiff can establish that there exists no "rational basis" for the determination.[9] However, when a statute restricts a "fundamental

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exclusion was not based upon sex, but upon a physical condition. 417 U.S. at 496 n.20.

However, Mr. Justice Powell's concurrence in *LaFleur* was based upon equal protection analysis, 414 U.S. at 651, and the dissent in *Aiello* analyzed the challenged provision as one which discriminated on the basis of sex, not on the basis of a "neutral" physical characteristic. 417 U.S. at 497.

[5] 404 U.S. 71 (1971), *rev'g* 93 Idaho 511, 465 P.2d 635 (1970). For a full discussion of this case see text accompanying notes 22-31 *infra.*

[6] 411 U.S. 677 (1973), *rev'g* 341 F. Supp. 201 (M.D. Ala. 1972). For a full discussion of this case see text accompanying notes 39-50 *infra.*

[7] For a general discussion of equal protection law see Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection,* 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther]; Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*].

[8] Gunther, *supra* note 7, at 8.

[9] *See, e.g.,* Jefferson v. Hackney, 406 U.S. 535 (1972) (variations in welfare benefits to those in different relief categories); Richardson v. Belcher, 404 U.S. 78 (1971) (reduction in social security benefits to those who receive workman's compensation); Dandridge v. Williams, 397 U.S. 471 (1970) (maximum welfare grant regulation).

In McGowan v. Maryland, 366 U.S. 420 (1961), which involved Sunday closing

right"[10] or is based upon a "suspect classification,"[11] it rests upon the "higher tier" and must be examined under the "strict scrutiny" standard. Under this standard a defendant must demonstrate not only that the law is necessary to the achievement of a compelling state interest, but also that it promotes that interest in the manner least offensive to individual rights.[12] The Court's application of this two-tiered test has led to quite predictable results in most cases since the choice of the proper test to apply has been determinative of the outcome. Indeed, during the tenure of Chief Justice Warren, no statute containing a suspect classification or restricting a fundamental right satisfied the compelling state interest test, and no statute was ever overturned when the Court used the rational basis test.[13]

A number of courts and commentators have speculated that the Court under Chief Justice Burger is developing a "newer" equal protection standard of review to replace or augment the two-tiered test.[14] According to these observers, language in a number of equal protection cases recently decided by the Supreme Court indicates that the Court reviewed the legislation challenged in those cases with a "graduated, sliding-scale test,"[15] more flexible than the somewhat rigid

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laws, the Court gave effect to the rational basis test by stating that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426 (citations omitted).

[10] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

[11] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Sherbert v. Verner, 374 U.S. 398 (1963) (religion).

[12] *See* cases cited in notes 10-11 *supra.*

[13] "[S]crutiny that was 'strict' in theory [was] fatal in fact. . . . [and] minimal scrutiny in theory [was] virtually none in fact." Gunther, *supra* note 7, at 8. In speaking of the strict scrutiny test, Chief Justice Burger commented that "no state law has ever satisfied this seemingly insurmountable standard." Dunn v. Blumstein, 405 U.S. 330, 363 (1972) (Burger, C. J., dissenting).

[14] The Second Circuit in particular has noted and followed the "new" standard of equal protection. Bridgeport Guard, Inc. v. Members of Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973); Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd,* 416 U.S. 1 (1974); Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973); *accord,* Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); O'Neill v. Dent, 364 F. Supp. 565 (E.D.N.Y. 1973); Samuel v. University of Pittsburgh, 375 F. Supp. 1119 (W.D. Pa. 1974); McIlvaine v. Pennsylvania State Police, 145 Pa. 129, 309 A.2d 801 (1973). *But see,* Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981 (D.N.J. 1973), *argued,* 43 U.S.L.W. 3414 (U.W. Jan. 20, 1975) (No. 73-1892).

For discussion of this newly perceived standard see Gunther, *supra* note 7, at 8; Note, *The Decline and Fall of the New Equal Protection,* 58 VA. L. REV. 1489 (1972).

[15] City of New York v. Richardson, 473 F.2d 923, 931 (2d Cir. 1973). Another

two-tiered test. This test, as perceived by one lower court, considers the "nature of the unequal classification under attack, the nature of the rights adversely affected, and the governmental interest urged in support of it [to decide whether the] classification is *in fact* substantially related to the object of the statute."[16] Although the Court has not applied the test with the frequency necessary for a definitive assessment of how it may replace or complement the two-tiered test, a tentative pattern of use may be emerging. The intermediate test does not seem to have been applied to statutory schemes which would ordinarily have triggered the strict scrutiny test.[17] Rather, the Court seems on occasion to have used the more rigorous "heightened rationality" test in place of the traditionally lenient rational basis standard.[18] If a more rigorous intermediate test is indeed emerging in this form, it may enable the Supreme Court not only to justify selective use of the equal protection clause as an interventionist tool, but also to avoid further expansion of the effective, but somewhat inflexible compelling state interest test.[19]

One of the cases in which the intermediate standard is generally thought to have been applied was *Reed v. Reed,*[20] a 1971 decision which marked a significant change in the Supreme Court's view of the constitutionality of sex discrimination.[21] *Reed* was the first case

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example of this newer approach is seen in Stanley v. Illinois, 405 U.S. 645 (1972), where the Court examined an Illinois statute under which the children of unwed parents automatically became wards of the state upon the death of the mother. Under this statutory scheme the unwed father, unlike the child's other relatives, was presumed to be an unfit parent and had no opportunity for a hearing on the merits. Although the Court acknowledged that the "establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication," *id.* at 656, and admitted the possibility that "most unmarried fathers are unsuitable and neglectful parents," *id.* at 654, it stated that "the Constitution recognizes higher values than speed and efficiency," and held that the statute violated the due process clause and the equal protection clause of the fourteenth amendment. *Id.* at 656-57. *See also* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

[16] Boraas v. Village of Belle Terre, 476 F.2d 806, 814 (1973), *rev'd,* 416 U.S. 1 (1974). *See also* cases cited in note 14 *supra.*

[17] For further discussion of this point see Gunther, *supra* note 7, at 12.

[18] *See* cases cited at note 10 *supra.*

[19] *See* Gunther, *supra* note 7, at 12.

[20] 404 U.S. 71 (1971), *rev'g* 93 Idaho 511, 465 P.2d 635 (1970), *noted in, e.g.,* 43 MISS. L. REV. 418 (1972); 2 TEXAS SO. U. L. REV. 329 (1972); 25 VAND. L. REV. 412 (1972); 1972 WIS. L. REV. 626.

[21] Before *Reed,* the Supreme Court had consistently upheld the constitutionality of statutes which differentiated in their treatment of the sexes. Most of the legislation

in which a statute discriminating on the basis of sex was held by the Supreme Court to be violative of the equal protection clause of the fourteenth amendment.[22] At issue in *Reed* was an Idaho law which specified certain priorities among classes of persons who could qualify as administrators of estates.[23] The statutory scheme mandated that when a probate court was faced with competing applications "[o]f several persons claiming and equally entitled to administer, males must be preferred to females . . . ."[24]

Chief Justice Burger, who wrote for a unanimous Court, observed that legislation requiring different treatment of persons solely on the basis of sex "establishes a classification subject to scrutiny under the Equal Protection Clause."[25] The Chief Justice noted that while states could legitimately treat various classes of persons in different ways, the classifications must not be unreasonable or arbitrary, but "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ."[26] The Court concluded

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sustained was characterized by the Court as protective legislation. For example, in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), the Supreme Court upheld a statute prohibiting women from practicing law in Illinois, asserting that:

> 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 paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

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

A later case, Muller v. Oregon, 208 U.S. 412 (1908), established the principle that women can properly be placed in a class by themselves and that "legislation designed for [their] protection may be sustained, even when like legislation is not necessary for men and could not be sustained." *Id.* at 422 (upholding statute restricting women's working hours). *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding statute excluding women from jury list unless they applied); Goesaert v. Cleary, 335 U.S. 464 (1948) (prohibiting women bartenders).

[22] Prior to *Reed*, several state and federal district courts had overturned sex discriminatory statutes. United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) (sentencing disparities invalidated); Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169 (N.D. Ill. 1967) (loss of consortium damages not limited to husbands); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (statute forbidding women to be bartenders invalid because sex is a suspect classification).

[23] IDAHO CODE §15-312 (1948) (repealed 1971) provided that administration of the estate of a person dying intestate must be granted to certain classes of persons in a particular order of preference. For example, a surviving husband or wife was to be preferred over surviving children, the children over the father or mother, the father and mother over the brothers and sisters, and so on.

[24] IDAHO CODE §15-314 (1948) (repealed 1971).

[25] Reed v. Reed, 404 U.S. 71, 75 (1971).

[26] *Id.* at 76, *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

that although the state's objective of streamlining probate court proceedings was not without some legitimacy,[27] "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, [was] to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[28]

Because the Court declared the sex-based classification in *Reed* to be violative of the equal protection clause without declaring all sex-based classifications to be suspect,[29] and because the Court reached this conclusion using language characteristic of both the strict scrutiny test and the rational basis test,[30] a clear standard for judging such classifications did not emerge from the case. It did seem clear, however, that in *Reed* the Supreme Court took a significant step toward altering a century-old policy of consistently upholding legislation which discriminated on the basis of sex.

State and federal trial courts faced with multiplying sex discrimination challenges under the equal protection clause noted the *Reed* decision immediately. Many courts agreed that "[w]hat emerges [from *Reed*] is an 'intermediate approach' between rational basis and compelling interest as a test of validity under the equal protection clause."[31] "Operating upon a special sensitivity to sex as a classifying factor,"[32] these courts reached the same result as had the Supreme Court in *Reed,* and in turn invalidated challenged legislation.[33]

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[27] *Id.* at 76. If the traditional rational basis test had been applied in *Reed,* "some legitimacy" would have been sufficient to sustain the discriminatory statutes. *See* notes 9-13 *supra* and accompanying text.

[28] 404 U.S. at 76.

[29] *See* notes 9-13 *supra* and accompanying text.

[30] In analyzing the statute challenged in *Reed* the Court used a confusing assortment of phrases and catch-words. Chief Justice Burger's "subject to scrutiny" language, 404 U.S. at 75, is usually associated with application of the strict scrutiny standard. The Court's framing of the issue as "whether a difference in the sex of competing applicants . . . bears a rational relationship to a state objective," *id.* at 76, is characteristic of the minimal scrutiny test. The "fair and substantial relation" language, *id.* at 76, seems to fall somewhere in between.

[31] Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir. 1973); *accord,* Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); Samuel v. University of Pittsburgh, 375 F. Supp. 1119 (W.D. Pa. 1974); Aiello v. Hansen, 359 F. Supp. 792 (N.D. Cal. 1973), *rev'd,* 417 U.S. 484 (1974).

[32] Samuel v. University of Pittsburgh, 375 F. Supp. 1119, 1133 (W.D. Pa. 1974).

[33] The rationale for overturning statutes containing sex-based classifications on the authority of *Reed* was expressed by a lower court judge in *Samuel v. University of Pittsburgh:*

> The result, and the reasoning employed to reach that result . . . are entirely consistent with the approach of the Supreme Court in . . .

On the other hand, some courts insisted that in *Reed* the Supreme Court had applied the traditional minimal scrutiny test. Yet many of these courts, purportedly applying this lenient standard, nevertheless overturned statutes which discriminated on the basis of sex[34] if they found "justification for the discrimination lacking"[35] or if the provisions were "arbitrary," "irrational," or based on "generalities and stereotypes contrary to the requirements of the equal protection clause."[36] Although this broad application of *Reed* by the lower courts was by no means universal,[37] an examination of cases decided subsequent to *Reed* shows the willingness of many state and federal judges to apply the equal protection clause with new force to statutes which discriminated on the basis of sex. Whether trial judges felt bound by *Reed* or whether they agreed with the decision as a policy statement on sex discrimination, they began to assert that "[s]exual stereotypes [were] no less invidious than racial or religious ones."[38]

The next major sex discrimination case decided by the Supreme Court was *Frontiero v. Richardson*,[39] in which a plurality[40] of the

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> Reed v. Reed, . . . perhaps the foremost example of the application of the more rigorous rational basis test which avoids the labeling of sex as a suspect criterion . . . .

*Id.* at 1133.

[34] *See, e.g.*, Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (overturned a sex-based classification of the Internal Revenue Code); Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056 (D. Ore. 1974) (held unconstitutional the refusal of school board to allow female teacher use of sick leave for pregnancy disability); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501 (S.D. Ohio 1972) (held unconstitutional a mandatory maternity leave policy); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) (enjoined defendant from prohibiting female students from participating on golf team); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972) (held unconstitutional a mandatory maternity leave regulation).

[35] Moritz v. Commissioner, 469 F.2d 466, 470 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973).

[36] Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056, 1065 (D. Ore. 1974).

[37] *See, e.g.*, Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973) (upheld mandatory maternity leave); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972) (upheld limitations on girl's athletic contests); Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973) (upheld jury exemption available to women only).

[38] Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 505 (S.D. Ohio 1972).

[39] 411 U.S. 677 (1973), *rev'g* 341 F. Supp. 201 (M.D. Ala. 1972), *noted in, e.g., The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 116-25 (1973); 10 GA. S.B.J. 493 (1974); 51 J. OF URBAN L. 535 (1974); 59 IOWA L. REV. 377 (1973); 5 RUTGERS CAMDEN L.J. 348 (1974); 5 LOYOLA (CHI.) U.L.J. 295 (1974).

[40] Mr. Justice Brennan wrote for the plurality in *Frontiero* and was joined by Justices Douglas, White, and Marshall.

Court held sex to be a suspect classification.[41] The question before the Court in that case was whether a female member of the uniformed services had a right to claim her spouse as a dependent for the purpose of obtaining increased housing allowances and medical benefits on an equal basis with male personnel. The statutory scheme in question[42] allowed a serviceman to claim his wife as a dependent regardless of her actual dependency, but provided that a servicewoman could not claim her husband as a dependent unless she could show that he was, in fact, dependent upon her for more than half of his support.

The plurality found the government's justification for this statutory differential, that it promoted administrative efficiency, failed to saftisfy the compelling state interest test. In support of the decision to apply strict scrutiny,[43] Mr. Justice Brennan detailed the "long and unfortunate history of sex discrimination"[44] and concluded that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . . [and] bears no relation to ability to perform or contribute to society."[45] The plurality also pointed out that the statutory scheme was unconstitutional under the

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[41] For a discussion of the significance of declaring sex to be a suspect classification, see notes 8-14 *supra* and accompanying text.

[42] 10 U.S.C. §§1072, 1076 (1970); 37 U.S.C. §§401, 403 (1970).

[43] The plurality found "at least implicit support for such an approach . . . in *Reed v. Reed*," and cited the "subject to scrutiny" language of the case as authority. 411 U.S. at 682-83. The four Justices also recognized that while *Reed* did not go so far as to deem sex a suspect classification, its analysis was a "departure from 'traditional' rational-basis analysis with respect to sex-based classifications." *Id.* at 684.

The Court also noted that Congress itself, as evidenced by its passage of such legislation as Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Equal Rights Amendment, "has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of government is not without significance to the question presently under consideration." *Id.* at 687-88.

[44] *Id.* at 684. The plurality found that this sex discrimination "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Id.*

Significantly, the plurality seemed to diffentiate the statutes challenged in *Frontiero* from legislation "designed to rectify the effects of past discrimination against women," and cited with apparent approval Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968). 411 U.S. at 689 n.22. In *Gruenwald* the Second Circuit upheld a social security regulation which allowed women workers to receive full benefits at the age of 62, but allowed men to collect these benefits only after reaching the age of 65. The *Gruenwald* court cited Hoyt v. Florida, 368 U.S. 57 (1961) and Muller v. Oregon, 208 U.S. 412 (1908), *see* note 21 *supra*, as authority for the proposition that "special recognition and favored treatment can constitutionally be afforded women." 390 F. 2d at 592.

[45] 411 U.S. at 686 (citation omitted).

*Reed* test alone, since the legislation mandated dissimilar treatment for similarly situated men and women solely for administrative convenience.[46]

In a concurring opinion, written by Mr. Justice Powell,[47] three members of the Court agreed with the majority that the statutes attacked in *Frontiero* failed to satisfy the requirements of the equal protection clause.[48] However, the concurring Justices considered it unnecessary as well as injudicious to designate sex a suspect classification since the case could be correctly decided under the *Reed* standard.[49] Thus, while only four Justices held sex-based classifications to be suspect, there was a clear consensus that the statutory scheme challenged in *Frontiero* was as violative of the equal protection clause as the legislation declared unconstitutional in *Reed*.

The *Frontiero* decision seemed to reinforce the increasing use of a stricter standard by trail courts evaluating legislation which discriminated on the basis of sex. Although only a plurality of the Court had declared unequivocally that sex classifications were constitutionally suspect, many lower courts subsequently agreed that "sex is a suspect classification which must be subjected to close judicial scrutiny."[50]

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[46] The Court stated:

> [T]he statutes operate so as to deny benefits to a female member [of the uniformed services] . . . who provides less than one-half her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are . . . similarly situated."

*Id.* at 688 (citation omitted).

[47] Joining in Mr. Justice Powell's opinion were Chief Justice Burger and Mr. Justice Blackmun.

[48] Mr. Justice Stewart wrote a separate concurring opinion, and stated only that the statute worked an "invidious discrimination." *Id.* at 691. This phrase, although at times used in conjunction with the strict scrutiny test, pre-dates the use of the two-tiered test and cannot be interpreted to be the equivalent of holding sex to be a suspect classification. Rather, it is only a determination that in the instant case, the statute invidiously discriminated against the particular plaintiff.

Mr. Justice Rehnquist dissented, relying upon the traditional rational basis test as applied by the district court. *Id., referring to* Reed v. Reed, 341 F. Supp. 201 (1972).

[49] The concurring opinion said that since *Reed* was sufficient authority upon which to decide this case, "[i]t is unnecessary . . . to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." 411 U.S. at 691-92. Those that concurred also believed that for the Court to decide the very issue which the equal rights amendment would resolve if adopted would be to "pre-empt by judicial action a major political decision." *Id.* at 692.

[50] Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433, 442 (E.D. Pa. 1973); *accord,* Johnson v. Hodges, ___ F. Supp. ___, 42 U.S.L.W. 2509 (E.D. Ky.,

Some courts continued to test discriminatory statutes with traditional minimal scrutiny, which usually resulted in the validation of the statutes.[51] But a number of provisions containing sex-based classifications were overturned by trial courts even when the strict scrutiny test was not applied. In these cases, the judges apparently concluded that although a majority of the Supreme Court had not clearly espoused the compelling state interest test in *Reed* and *Frontiero,* it had nevertheless used a test which required a greater showing of a legitimate state interest than that required under the traditional lenient rational basis test.[52]

A survey of post-*Frontiero* cases thus indicates that a great many trial courts, either by espousing the strict scrutiny test of the *Frontiero* plurality,[53] or by adopting an intermediate test extracted from *Reed* and *Frontiero,*[54] had clearly rejected the once-perfunctory approval of statutes which discriminated on the basis of sex. Even those courts that resisted the abandonment of the minimal scrutiny standard in sex discrimination cases no longer relied upon pre-*Reed* cases for support.[55] Several courts and commentators, however, recognized that although the Supreme Court had strongly condemned sex discrimination in *Reed* and *Frontiero,* it had by no means clarified the legal theories by which this policy was to be implemented or the equal protection standards by which sex-based statutory classifications should be measured.[56] As one federal judge expressed the dilemma:

At best, all that can be gleaned from *Reed* and *Frontiero* is

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March 25, 1974); Daugherty v. Daley, 370 F. Supp. 338 (N.D. Ill. 1974); Andrews v. Drew Municipal Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973); Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981 (D.N.J. 1973), *argued,* 43 U.S.L.W. 3414 (U.S. Jan. 20, 1975) (No. 73-1892); Hanson v. Hutt, 83 Wash. 2d 195, 517 P.2d 599 (1974); Tang v. Ping, 209 N.W.2d 624 (N.D. 1973).

[51] *See, e.g.,* Crawford v. Cushman, ___ F. Supp. ___, 43 U.S.L.W. 2053 (D. Vt., July 12, 1974); United States v. Offord, ___ F. Supp. ___, 42 U.S.L.W. 2485 (E.D. Wis., March 7, 1974); Sumpter v. State, ___ Ind. ___, 306 N.E.2d 95 (1974); Warshafsky v. Journal Co., 63 Wis. 2d 130, 216 N.W.2d 197 (1974); People v. McCalvin, 55 Ill. 2d 161, 302 N.E.2d 342 (1973).

[52] *See, e.g.,* United States v. Yingling, 368 F. Supp. 379 (W.D. Pa. 1973); Smith v. Keator, 21 N.C. App. 102, 203 S.E.2d 411, *aff'd,* ___ N.C. ___, 206 S.E.2d 203 (1974).

[53] *See* cases cited in note 50 *supra.*

[54] *See* cases cited in note 52 *supra.*

[55] *See* cases cited in note 51 *supra.*

[56] *See, e.g.,* Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981 (D.N.J. 1973), *argued,* 43 U.S.L.W. 3414 (U.S. Jan. 20, 1975) (No. 73-1892); Comment, *Frontiero v. Richardson,* 51 J. OF URBAN L. 535, 541 (1974).

> that until the Supreme Court is faced squarely with the problem of extending *Reed* in a case where a sexual classification could be validly upheld under the "traditional" test but not under "close judicial scrutiny," we cannot be absolutely certain how statutory sex discrimination fits within equal protection doctrine.[57]

It was in this milieu that the United States Supreme Court granted certiorari in *Kahn v. Shevin*.[58]

Challenged in *Kahn v. Shevin* was a Florida statute[59] which granted an annual $500 property tax exemption to all widows who applied for the exemption. Melvin Kahn, a widower, applied for and was denied this exemption solely because the statute offered no analogous benefit to widowers. A state circuit court invalidated the statutory scheme on the ground that the statute's sex-based classification violated the equal protection clause of the fourteenth amendment. The Florida Supreme Court reversed,[60] however, finding that the statute had a fair and substantial relation to the stated legislative goal,[61] which was "the reduction of the disparity between the economic capabilities of a man and a woman."[62] A majority of the United States Supreme Court affirmed the Florida court's holding.

A terse majority opinion, written by Mr. Justice Douglas,[63] appar-

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[57] Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 988 (D.N.J. 1973), *argued*, 43 U.S.L.W. 3414 (U.S. Jan. 20, 1975) (No. 73-1892).

[58] 416 U.S. 351 (1974).

[59] The statute provided that:

> 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.

FLA. STAT. ANN. §196.202 (1971) formerly §196.191(2).

[60] Shevin v. Kahn, 273 So. 2d 72 (Fla. 1973).

[61] *Id.* at 73, *quoting* Reed v. Reed, 404 U.S. 71, 76 (1971).

[62] *Id.*

[63] Joining in the majority opinion were Chief Justice Burger and Justices Douglas, Stewart, Blackmun, Powell, and Rehnquist. It was not unexpected that Chief Justice Burger and Justices Powell, Blackmun, and Rehnquist refused to categorize sex as a suspect classification in *Kahn*, where a man complained of being discriminated against. In San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), these Justices defined the traditional indicia of suspectness in a way which would clearly not apply to the position of men in American society:

> [T]he class is . . . saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

*Id.* at 28. Professor Ginsberg, a noted commentator in the field of sex discrimination law, made a similar observation:

ently applied the *Reed* intermediate test and approved Florida's use of the sex differential in the disputed tax provision because it rested upon "some ground of difference having a fair and substantial relation to the object of the legislation."[64] *Frontiero* was cursorily distinguished on the basis that it concerned the constitutionality of benefits granted to males and denied to females, solely for administrative convenience.[65] The Court emphasized that because the statute at issue in *Kahn* was a state tax law "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden,"[66] it did not violate the equal protection clause of the fourteenth amendment. Significantly, the majority resurrected a 1908 case[67] which had established the principle that women may properly be placed in a class by themselves, and cited the fact that Congress had not yet drafted women for military service to support the contention that "[g]ender has never been rejected as an impermissable classification in all instances."[68]

Justices Brennan and Marshall joined in a dissenting opinion in *Kahn*[69] and, consistent with their holding in *Frontiero,* reiterated that sex-based legislative classifications should be subjected to close judi-

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> Suspect classification . . . relates to the group that has borne the stigma of inferiority or second class treatment; it has not been used to shield the culture's dominant group from discrimination.

Ginsberg, *Sex and Unequal Protection: Men and Women as Victims,* 11 J. FAM. L. 347, 361-62 (1972) (footnote omitted).

However, several lower courts have decided that men, as well as women, can be adversely affected by sex-based classifications. *See* Ballard v. Laird, 360 F. Supp. 643, 647 (S.D. Cal. 1973), *rev'd,* 43 U.S.L.W. 4158 (U.S. Jan. 15, 1975) (No. 73-776) (irrelevant whether the discriminatory impact favors the female or the male); Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973); Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972); Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), *argued,* 43 U.S.L.W. 3221 (U.S. Oct. 15, 1974) (No. 73-759).

[64] 416 U.S. at 355, *quoting* Reed v. Reed, 404 U.S. 71, 76 (1971).

[65] *Id.* The test which Mr. Justice Douglas applied to the sex-based classification in *Kahn* is apparently inconsistent with his holding in *Frontiero* that sex is a suspect classification which must be subjected to close judicial scrutiny. *See* Frontiero v. Richardson, 411 U.S. 677, 682 (1972). *See also* note 88 *infra.*

[66] 416 U.S. at 355.

[67] Muller v. Oregon, 208 U.S. 412 (1908), *abstracted at* note 21 *supra.*

[68] 416 U.S. at 356 n.10. A plurality of the Court in *Frontiero,* which included Mr. Justice Douglas, intimated that not all sex-based classifications would be considered suspect when it noted that the statutes challenged in *Frontiero* were "not in any sense designed to rectify the effects of past discrimination against women" and cited with apparent approval Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. denied,* 393 U.S. 982 (1968), discussed at note 44 *supra.* 411 U.S. at 689 n.22.

[69] 416 U.S. at 357.

cial scrutiny.[70] From this premise, however, they reached the atypical conclusion[71] that because the sex-based classification served a remedial purpose,[72] it could be deemed necessary to the achievement of a compelling state interest.[73] Elaborating on their reasoning, the dissenters asserted:

> [T]he purpose and effect of the suspect classification are ameliorative; the statute neither stigmatizes nor denigrates widowers not also benefitted by the legislation. Moreover, inclusion of needy widowers within the class of beneficiaries would not further the State's overriding interest in remedying the economic effects of past sex discrimination for needy victims of that discrimination.[74]

This language indicates that Justices Brennan and Marshall considered the Florida tax benefit scheme invalid only because it was so broadly drafted that it included women who did not need its benefits,[75] and not because it discriminated unfairly against men who did. Thus, but for the dissent's objection that the statute was not carefully drawn, the reasoning of the majority and that of the dissent are essentially reconcilable. Either explicitly or implicitly, all but one of the Justices[76] gave their imprimatur to what may be termed a "be-

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[70] *Id.*

[71] See notes 7-13 *supra* and accompanying text for an explanation of why the result reached by the dissent was not characteristic of the use of the strict scrutiny test.

[72] It is questionable whether the Court examined with more than perfunctory care Florida's justification for the statutory sex differential. If Florida were genuinely concerned with economic discrimination against women, its anti-discrimination laws would certainly have forbidden gender-based discrimination. However, several such laws did not include gender as a prohibited classification. FLA. STAT. ANN. §§409.026, 509.092, 590.141 (1970). Reply Brief for Appellant at 4 n.8, Kahn v. Shevin, 416 U.S. 351 (1974). Another declared purpose of the tax exemption, not discussed by the Court, was that it was to encourage the elderly to retire in the state. Reply Brief for Appellant at 7, *citing* Brief for Appellees at 25.

[73] 416 U.S. at 358.

[74] *Id.* at 358, 360.

[75] *Id.*

[76] Mr. Justice White, who agreed in *Frontiero* that sex was a suspect classification, rendered a separate dissent in *Kahn*. *Id.* at 360. He found merit in extending a tax benefit to widows, but maintained that "gender-based classifications are suspect and require more justification than the state has offered." *Id.* at 361. Mr. Justice White rejected the state's contention, relied upon by the majority and the other dissent, that the statute's purpose was to compensate for past discrimination. If that were indeed the purpose, he pointed out, the exemption should neither be limited to women who were widows nor ignore all those widowers who had felt the effects of economic discrimination because of racial or social disadvantages. *Id.* at 361-62.

nign classification" theory, whereby statutory classifications which otherwise would fail under the strict or the heightened rationality standard of review, will survive equal protection scrutiny if discriminatory only in ways determined by the Court to be ameliorative.

In attempting to understand how the Court justified this result in *Kahn* without overruling *Reed* and *Frontiero,* it is important to examine carefully the theories upon which the cases were distinguished. Both the majority and the Brennan-Marshall dissent narrowly construed *Reed* and *Frontiero,* stating that those cases dealt only with statutory discrimination against women for which the sole justification was administrative efficiency. The legislation attacked in *Kahn* was characterized not as discriminating against anyone, but as extending a remedial benefit to a gender-defined class, the members of which had suffered previous economic discrimination. Although the Court did not specifically acknowledge its use of this "benign classification" theory, it must nevertheless be considered central to the *Kahn* decision. The majority opinion also found significant the fact that the challenged statute was a tax statute, and used this characterization to further justify the result. This "taxing" theory must also be examined to understand fully the implications of *Kahn.*

When analyzed closely, the taxation theory advanced by the majority[77] appears to be nothing more than a smokescreen with which the Court avoided thorough discussion of the primary issue in the case, the constitutional validity of so-called benign classifications based upon sex. As the majority asserted, it seems well-established that in taxation matters legislatures possess great freedom in classification.[78] Thus, when testing taxing classifications, the Supreme Court has consistently applied a very permissive standard of review, requiring the party attacking the classification "to negative every conceivable basis which might support it."[79] However, every case cited by the *Kahn* majority to support this proposition dealt with a taxing classification which could have been appropriately tested by the lenient rational basis test even had it not been in a tax statute.[80]

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[77] 416 U.S. at 355.

[78] *Id., citing,* Madden v. Kentucky, 309 U.S. 83, 88 (1940).

[79] 309 U.S. at 88.

[80] 416 U.S. at 355, 356 n.9, *citing,* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (classification based on whether taxpayer was a corporation or individual); Allied Stores v. Bowers, 358 U.S. 522 (1959) (classification based on state residency); Madden v. Kentucky, 309 U.S. 83 (1940) (classification based on whether bank deposits were in state or out of state); Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932) (classification based on whether taxpayer was a corporation or individual); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (classification based on whether

Therefore it cannot be inferred from these precedents that the mere characterization of legislation as tax-related can in itself legitimatize the statute's classification system or warrant its review under a lenient test, unless the classification could be appropriately reviewed by that standard in any statutory context. In short, the taxing rationale does not seem to be a sufficient basis upon which the *Kahn* Court could logically distinguish the facts or results in *Reed* and *Frontiero.* Therefore, the result in *Kahn* must be justified, if indeed it can be justified, by the benign classification theory tacitly advanced by the Court.

Although the Court used the benign classification rationale in *Kahn* without discussing its theoretical underpinnings, that theory is of logical necessity predicated upon two premises, only one of which was made explicit in the opinion. The first premise is that the class benefitted by the statutory scheme, in this case widows, is one which has been historically discriminated against.[81] This premise was explicitly set forth in both *Frontiero* and *Kahn,* where the Court detailed the legal, social, and economic disabilities suffered by American women and took judicial notice of the extent to which they have been injured by stereotypical role models embodied in discriminatory legislation.[82] The second premise underlying the benign classification theory is that the class which does not receive the benefit in question has not been similarly discriminated against in the past, and is not now discriminated against because it does not also receive the remedial benefit.[83] This premise was never made explicit in *Kahn* but is implicit in the result of the case. As in *Reed* and *Frontiero,* the "man as breadwinner, woman as dependent" stereotype was the rationale upon which the challenged statutory classification was based.[84] That

business done in state or out of state); Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232 (1890) (classification based upon value of certain bonds).

[81] Even assuming that the Court was correct in its finding that widows have suffered economic discrimination because of their sex, and that the purpose of the statute was indeed to compensate for this discrimination, the statutory scheme was seriously under-inclusive in that it excluded all single and divorced women who had suffered the same economic discrimination as had widows. For a discussion of the effect of the under- or over-exclusiveness of the legislative classification see *Developments, supra* note 7, at 1082-87.

[82] In *Kahn,* the majority took judicial notice of statistics which showed that women working full time in 1972 had a median income of only 57.9% of the male median income. 416 U.S. at 353. In *Frontiero,* the plurality detailed the "gross, stereotyped distinctions" common to many statutes, and recognized the extent to which these statutes discriminated against women. 411 U.S. at 685. *See also* note 44 *supra.*

[83] *See* note 63 *supra.*

[84] This stereotype was exhibited in *Reed,* in which the appellee, in addition to

the Court viewed this stereotype as discriminatory in *Reed* and *Frontiero* but not in *Kahn* can only be explained by the fact that the plaintiffs in *Reed* and *Frontiero* were women, while in *Kahn* the plaintiff was a man. Upon these underlying premises, then, the Court characterized the Florida statute as one which extended a benefit to women but did not discriminatorily deny a right to men,[85] and was thus not violative of the equal protection clause.

The *Kahn* Court's conclusion that the ameliorative purpose of the Florida tax statute was sufficient to render an arguably unacceptable classification permissible is without clear precedent in equal protection doctrine. The Supreme Court has impliedly tolerated racial classifications used to promote school desegregation,[86] and several lower federal courts have authorized these classifications in connection with affirmative action plans as well as desegregation schemes.[87] However, the Supreme Court has never explicitly used a benign clas-

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attempting to justify the stautory preference for male executors as promoting administrative efficiency, also argued that this preference was reasonable since "men [are] as a rule more conversant with business affairs than . . . women." Brief for Appellee at 12, Reed v. Reed, 404 U.S. 71 (1971), *quoted* in Frontiero v. Richardson, 411 U.S. 677, 683 (1973). In *Frontiero,* the government maintained that "as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives." 411 U.S. at 689. The use of this stereotype in the Florida tax statute challenged in *Kahn* is even more blatant because the statute assumes that a woman left alone by the death of her husband is economically disabled while a man is believed to suffer little financial loss upon the death of his wife, and even to be relieved of the burden of supporting her. Brief for Appellant at 5, Kahn v. Shevin, 416 U.S. 351 (1974).

[85] The characterization of the statute as extending a privilege but not creating a right was not made explicit by the *Kahn* majority, but the Brennan-Marshall dissent specifically found that the statute "neither stigmatizes nor denigrates widowers not also benefited by the legislation." 416 U.S. at 359. However, this right-privilege dichotomy, if in fact relied upon by the Court in *Kahn,* has long been discredited in equal protection doctrine. As recently as 1971 the Court "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.' " Graham v. Richardson, 403 U.S. 365, 374 (1971); *accord,* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Moritz v. Commissioner, 469 F.2d 466, 469 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973); Bell v. Burson, 402 U.S. 535, 539 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1967).

[86] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). *See generally Developments, supra* note 7, at 1104-15.

[87] *See, e.g.,* Carter v. Gallagher, 452 F.2d 315, 318 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972); Contractor's Ass'n of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); Offermann v. Nitkowski, 378 F.2d 22, 24 (2d Cir. 1967); Joyce v. McCrane, 320 F. Supp. 1284, 1291 (D.N.J. 1970); Tometz v. Board of Educ., 39 Ill. 2d 593, 237 N.E.2d 498 (1968).

sification analysis to authorize "reverse discrimination" and, in fact, avoided its most recent opportunity to consider the issue.[88] Thus, if a sex-based classification in *Kahn* was upheld because of its remedial purpose, while indistinguishable classifications were invalidated in *Reed* and *Frontiero* because they could only be justified by administrative efficiency, the Court has chosen a rather casual manner of announcing a significant, but unexplained, change in equal protection doctrine.[89]

The Court's use of the benign classification theory to justify its holding in *Kahn* was not only unprecedented in equal protection doctrine, but was also contrary to governmental policy. Congress has legislatively prohibited sex discrimination in many contexts[90] and has

[88] The Court's most recent opportunity to consider the issue of benign classifications was in DeFunis v. Odegaard, 416 U.S. 312 (1974), a case which involved a challenge to the University of Washington Law School's policy of giving preferential treatment to minority applicants. Because the plaintiff, a white applicant who was rejected though his grades and test scores were superior to those of a number of minority applicants admitted, had been admitted pursuant to a preliminary injunction and was to graduate regardless of the outcome of the case, the Court dismissed the case as moot. Mr. Justice Douglas wrote a dissenting opinion discussing the merits of the case, however, in which he deemed benign racial classifications to be constitutionally impermissible. *Id.* at 320. For a more detailed discussion of Mr. Justice Douglas' dissent in *DeFunis* see note 89 *infra.*

[89] Mr. Justice Douglas' position on this issue is particularly inexplicable. In *Frontiero* he stated that sex-based classifications were suspect and must be tested with strict judicial scrutiny, yet when confronted with the same classification in *Kahn* he refused to apply the strict scrutiny test, apparently because the statute's classification was benign. This inconsistency is compounded when Mr. Justice Douglas' position in *Kahn* is compared with his dissent in DeFunis v. Odegaard, 416 U.S. 312, 320 (1974). In that case, which involved the benign use of the suspect classification of race, Mr. Justice Douglas emphatically affirmed that the strict scrutiny test should be applied: "A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny." *Id.* at 333. *Cf.* Graham v. Richardson, 403 U.S. 365, 372 (1971); Shapiro v. Thompson, 394 U.S. 618, 627 (1969). *But see* Katzenbach v. Morgan, 384 U.S. 641 (1966); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

[90] Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 forbid discrimination on the basis of sex in the employment context and have been applied on behalf of both men and women who have been discriminated against. *See, e.g.*, Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973); Hays v. Potlach Forests, Inc., 465 F.2d 1081 (8th Cir. 1972); Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). The Equal Employment Opportunity Commission under the authority of this Act has, for example, found unlawful a death benefit plan which provided an automatic pension to widows of male employees, but no pension for widowers of female employees unless they are incapable of self-support. EEOC Decisions, Case No. YNY9-034, CCH EMP. PRAC. GUIDE, §6050 (1969). The equal rights amendment, passed in 1972, is an indication that Congress

also taken action in recent years to remove the sex differential from government benefit schemes.[91] In *Frontiero,* the Court attached considerable significance to congressional policy.[92] The Court in *Kahn,* however, inexplicably disregarded the conclusions of a coequal branch of government.

As can be concluded from this analysis, *Kahn v. Shevin* is not a well-reasoned or well-explained opinion. The taxing rationale suggested by the Court is misleading and the benign classification theory seems contrary to established equal protection doctrine. Furthermore, even broad considerations of public policy do not provide strong support for the Court's holding. By refusing to concede that the statutory scheme challenged in *Kahn* discriminated against widowers, the entire Court, with the exception of Mr. Justice White,[93] seemingly displayed a limited view of what constitutes sex discrimination. Moreover, the Court's failure to delve into the logical underpinnings and theoretical implications of its holding offered the lower

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finds sex discrimination to be undesirable in virtually every legislative setting. For comments on the equal rights amendment see Ginsburg, *The Need for the Equal Rights Amendment,* 59 ABA J. 1013 (1973); Comment, *Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?,* 84 HARV. L. REV. 1499 (1971); *Equal Rights Amendment: A Symposium,* Vol. 1, no. 2, HUMAN RTS. 54 (1971).

[91] Congress amended the provisions of a federal employee benefit plan in 1971 to equalize the tests for payment of death benefits to widows and widowers of federal employees. Previously, widowers were entitled to such benefits only if they were wholly dependent upon their wives, while widows were entitled to such benefits if they were merely living with their spouses. 5 U.S.C. §7152 (Supp. III, 1973), *amending* 5 U.S.C. §7152 (1970).

When Congress amended 5 U.S.C. §8341 (1970), which defines persons qualified for Federal Civil Service survivors annuities, the House Committee Report stated the following reasons for the amendment:

> In the Committee's judgment, the present provision is discriminatory in that it runs counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standard of living. Accordingly, the bill removes the dependency requirements applicable to surviving widowers of female employees, thus according them the same treatment accorded widows of deceased male employees.

H.R. REP. No. 1469, 91st Cong., 2d Sess., 12 (1970). This report is contained in 1970 U.S. CODE CONG. & AD. NEWS 5934. It is also interesting to note that Congress has eliminated the sex differential from the social security regulations approved in Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. denied,* 393 U.S. 982 (1968), and apparently sanctioned by the Court in *Frontiero.* 411 U.S. at 689 n.22. 42 U.S.C. §414 (Supp. II, 1972), *amending* 42 U.S.C. §414 (1970). *See also* note 44 *supra;* Brief for Appellant at 19-21, Kahn v. Shevin, 416 U.S. 351 (1974).

[92] *See* note 43 *supra.*

[93] Mr. Justice White wrote a dissenting opinion in *Kahn* which is abstracted at note 76 *supra.*

courts little insight as to how *Kahn,* together with *Reed* and *Frontiero,* established an equal protection standard appropriate for review of sex-based statutory classifications.

In reading together these three cases to extract the appropriate standard of equal protection review, the first and most obvious conclusion which must be drawn is that a majority of the Supreme Court seems determined to use a standard less demanding than the strict scrutiny test to examine sex-based statutory classifications. Equally clear, however, is that those members of the Court do not consider the traditional rational basis test the only alternative to the strict scrutiny test. As the results in *Reed* and *Frontiero* indicate, a majority of the Court is prepared to find sex-based classifications unconstitutional under certain circumstances, and language common to all three cases[94] suggests that such classifications will be overturned if they do not "rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[95] Although when taken out of context this language could be construed as characteristic of the traditional rational basis test, the fact that in *Reed* and *Frontiero* discriminatory statutes were found unconstitutional when judged by this standard, even though the statutes were not without some rational basis, suggests that the Court applied an intermediate, heightened rationality test. It would thus seem improper for lower courts to reason that because a majority of the Supreme Court refused to apply the strict scrutiny test in *Kahn,* the Court has determined that the permissive rational basis test is appropriate for judging the validity of all sex-based classifications.[96]

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[94] *Reed, Frontiero,* and *Kahn* all contain similar language, first used in *Reed,* which evidences a stricter rationality test. "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.' " Reed v. Reed, 404 U.S. 71, 76 (1971), *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). "[T]hese statutes command 'dissimilar treatment for men and women who are . . . similarly situated.' " Frontiero v. Richardson, 411 U.S. 677, 688 (1973), *quoting* Reed v. Reed, 404 U.S. 71, 77. "Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' " Kahn v. Shevin, 416 U.S. 351, 355 (1974), *quoting* Reed v. Reed, 404 U.S. 71, 76 (1970).

[95] *See* note 94 *supra.*

[96] That *Kahn* is susceptible to misinterpretation on this point is evidenced in Edwards v. Schlesinger, 377 F. Supp. 1091 (D.D.C. 1974), in which the trial court stated, "the conclusion to be drawn from *Kahn* is that the Supreme Court has not declared sex to be an inherently suspect classification . . . . Therefore, the rational relationship test is the one properly to be applied [in this case]." *Id.* at 1096. Other sex discrimination cases decided after *Kahn* have shown varying interpretations. *See*

Lower courts attempting to apply a standard of equal protection review which is consistent with the Supreme Court's holdings in *Reed, Frontiero,* and *Kahn* may find it difficult to apply the intermediate test employed in those cases. Had the Supreme Court used the two-tiered approach, a definitive standard of review with quite predictable results would have been mandated for trial courts reviewing sex-based discriminatory legislation under the equal protection clause.[97] However, the "fair and substantial relation" test used by the Court in these cases, though not an unworkable standard, cannot be applied with nearly the certainty or consistency of the two-tiered test.

Use of the intermediate test will require an inquiry into the legislative purpose of the statute in question, an investigation which may often prove fruitless or misleading.[98] Trial judges will also have to make unavoidably subjective judgments in deciding what constitutes a "fair and substantial" relation to the purpose of the statute. Any analysis of these factors is susceptible to considerable error and variation and it is, perhaps, the necessity of making these subjective judgments that is the most serious drawback of this intermediate standard of review. The Supreme Court found the sex-based classifications at issue in *Reed* and *Frontiero* to be unconstitutional under this test, yet was able to rationalize the opposite result in *Kahn.* However, a lower court using the same test and faced with an identical set of facts could logically find the sex-based classification to be as invidiously discriminatory as the classifications in *Reed* and *Frontiero.* Such a holding could be supported by the judge finding that even benign sex-based classifications are based upon rigid sexual stereotypes,[99] are contrary to public policy,[100] or represent the very "romantic paternalism" so strongly condemned in *Frontiero.*[101] Although the Supreme Court failed to make such findings in its *Kahn* opinion, it is nevertheless arguable that though the widows' tax benefit may have an immediate favorable effect for some women, in the long run it would only serve to perpetuate the very concepts of stereotyped sex roles which caused the economic discrimination Florida sought to alleviate by its widows' tax exemption.[102]

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Women's Liberation Union of Rhode Island, Inc. v. Israel, 379 F. Supp. 44 (D.R.I. 1974); Kohr v. Wienberger, 378 F. Supp. 1299 (E.D. Pa. 1974); People v. Elliot, 525 P.2d 457, 460 (Colo. 1974).

[97] *See* note 13 *supra.*

[98] *See* note 72 *supra.*

[99] *See* note 84 *supra.*

[100] *See* notes 90-92 *supra* and accompanying text.

[101] Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

[102] Mr. Justice Douglas, in his dissent to DeFunis v. Odegaard, 416 U.S. 312, 322

*Kahn v. Shevin* would have been a more enlightened decision had the Supreme Court found the challenged legislation violative of the equal protection clause of the fourteenth amendment.[103] If the Court had reached this result by declaring sex to be a suspect classification and using the strict scrutiny, compelling state interest test, a clear and predictable standard for testing sex-based statutory classifications would have been established. However, the intermediate equal protection test utilized in *Kahn,* and the result reached by the Court in applying that standard, present serious problems of interpretation for the lower courts. It can only be hoped that trial courts testing sex-based classifications with this "fair and substantial relation" test will evidence greater sensitivity to the social and individual consequences of sex discrimination than did the Supreme Court in *Kahn.* Courts and legislators alike must become aware that legislation embodying rigid sexual stereotypes can be just as unfair to men as to women and that so-called benign sex-based classifications are just as unacceptable as clearly invidious classifications because both stem from stereotyped definitions of the proper role of men and women in society.[104]

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(1974), recognized the adverse psychological effect of granting such favors to those previously discriminated against when he noted: "One other assumption must be clearly disapproved that Blacks or Browns cannot make it on their individual merit." *Id.* at 343.

[103] Once a court has held benefit conferring legislation to be unconstitutional, it must decide whether the benefit should be extended to the excluded class or struck down entirely. In order to make this decision the trial court must "decide whether it more nearly accords with [the legislature's] wishes to eliminate its policy altogether or extend it in order to render what [the legislature] plainly did intend, constitutional." Welsh v. United States, 398 U.S. 333, 355-56 (1970); *accord,* Skinner v. Oklahoma, 316 U.S. 535, 542-43 (1942); Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525, 531 (1969). *See also* Frontiero v. Richardson, 411 U.S. 677 (1973); Hays v. Potlatch Forests, Inc., 465 F.2d 1081, 1082-83 (8th Cir. 1972); Homemakers, Inc. v. Division of Indus. Welfare, 356 F. Supp. 1111, 1113 (N.D. Cal. 1973).

[104] Since the *Kahn* decision was rendered, two subsequent Supreme Court decisions have dealt with the issue of sex discrimination and equal protection. Taylor v. Louisiana, 43 U.S.L.W. 4167 (U.S. Jan. 21, 1975) (No. 73-5744), *rev'g* ___ La. ___, 282 So. 2d 491 (1973); Schlesinger v. Ballard, 43 U.S.L.W. 4158 (U.S. Jan. 15, 1975) (No. 73-776), *rev'g* 360 F. Supp. 643 (S.D. Cal. 1973). In *Taylor* the Court, with only Mr. Justice Rehnquist dissenting, found that a criminal defendant's right to a jury trial was denied by a Louisiana law which did not include women on lists of those eligible for jury duty unless they requested that their names be listed. The Court in *Ballard,* with Justices Brennan, Marshall, Douglas, and White dissenting, upheld a statutory scheme which granted female naval officers more advantageous discharge conditions than male officers. That the Court upheld a sex discriminatory statute in *Ballard* while overturning such a statute in *Taylor* illustrates the problems the Court is having in reaching consistent results in these cases. In *Taylor* the Court managed to come to its conclusion with very little discussion of the equal protection clause, but discussed the

case in the context of the sixth amendment right of a criminal defendant to a jury trial. In *Ballard* the fourteenth amendment issue was more directly confronted and the majority found differing treatment of male and female officers was "completely rational." Yet the Court's long and thorough discussion of the government's justification for the disparity and its use of *Reed*, *Frontiero*, and *Kahn* for its authority indicate that the Court did not apply the rational basis test in its traditional manner. Thus, these two decisions shed little light on the confusion created by the Court in *Kahn* and reinforce the impression that a double standard in sex discrimination cases is evolving.

Resolution of the following cases, now pending before the Supreme Court, may also bear upon the issue with which this article is concerned: Weinberger v. Wiesenfeld, 367 F. Supp. 981 (D.N.J. 1973), *argued*, 43 U.S.L.W. 3414 (U.S. Jan. 20, 1975) (No. 73-1892) (social security provision which grants certain benefits to widows, not widowers); Edwards v. Healy, 363 F. Supp. 1110 (E.D. La. 1972), *argued*, 43 U.S.L.W. 3221 (U.S. Oct. 15, 1974), (No. 73-759) (jury service law which treats men and women differently); Stanton v. Stanton, ___ Utah. ___, 517 P.2d 1010 (1974), *argued*, 43 U.S.L.W. 3438 (U.S. Feb. 18, 1975) (No. 73-1461) (age of majority different for males and females).

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