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. Courts ruling on the constitutionality of such laws have encountered great difficulty in determining the applicable standard of judicial review 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, the major sex discrimination case of the Supreme Court's 1974 term, the Court upheld a sex-based statutory classification by

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2 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).


3 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 and Frontiero v. Richardson, 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. The Supreme Court has, since the Warren Court era, generally applied a "two-tiered" test in analyzing equal protection problems. 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. However, when a statute restricts a "fundamental 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.


8 Gunther, supra note 7, at 8.


In McGowan v. Maryland, 366 U.S. 420 (1961), which involved Sunday closing
right” or is based upon a “suspect classification,” 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. 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.

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. 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,” more flexible than the somewhat rigid

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12 See cases cited in notes 10-11 supra.


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 substan-
tially related to the object of the statute." 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. Rather, the Court
seems on occasion to have used the more rigorous "heightened ration-
ality" test in place of the traditionally lenient rational basis stan-
dard. 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.

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

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 constitu-
tional adjudication," id. at 656, and admitted the possibility that "most unmarried
fathers are unsuitable and neglectful parents," id. at 654, it stated that "the Constitu-
tion 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.
Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed

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. At issue in Reed was an Idaho law which specified certain priorities among classes of persons who could qualify as administrators of estates. 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 . . .."

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." 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 . . .." The Court concluded 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 unfit 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).


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.


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

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, but to 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."

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, and because the Court reached this conclusion using language characteristic of both the strict scrutiny test and the rational basis test, 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 "what emerges [from Reed] is an 'intermediate approach' between rational basis and compelling interest as a test of validity under the equal protection clause." Operating upon a special sensitivity to sex as a classifying factor, these courts reached the same result as had the Supreme Court in Reed, and in turn invalidated challenged legislation.

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.


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 if they found "justification for the discrimination lacking" or if the provisions were "arbitrary," "irrational," or based on "generalities and stereotypes contrary to the requirements of the equal protection clause." Although this broad application of Reed by the lower courts was by no means universal, 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."

The next major sex discrimination case decided by the Supreme Court was Frontiero v. Richardson, in which a plurality of the
Court held sex to be a suspect classification. 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 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 satisfy the compelling state interest test. In support of the decision to apply strict scrutiny, Mr. Justice Brennan detailed the "long and unfortunate history of sex discrimination" 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." The plurality also pointed out that the statutory scheme was unconstitutional under the

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


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.

"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 differentiate 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.

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 trial 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

The Court stated:

[The 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).

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Id. at 688 (citation omitted).

44 Joining in Mr. Justice Powell's opinion were Chief Justice Burger and Mr. Justice Blackmun.

44 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).

44 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.

Some courts continued to test discriminatory statutes with traditional minimal scrutiny, which usually resulted in the validation of the statutes. 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.

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, or by adopting an intermediate test extracted from Reed and Frontiero, 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. 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. As one federal judge expressed the dilemma:

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


See cases cited in note 50 supra.

See cases cited in note 52 supra.

See cases cited in note 51 supra.
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.\textsuperscript{57}

It was in this milieu that the United States Supreme Court granted certiorari in *Kahn v. Shevin*.\textsuperscript{58}

Challenged in *Kahn v. Shevin* was a Florida statute\textsuperscript{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,\textsuperscript{60} however, finding that the statute had a fair and substantial relation to the stated legislative goal,\textsuperscript{61} which was "the reduction of the disparity between the economic capabilities of a man and a woman."\textsuperscript{62} A majority of the United States Supreme Court affirmed the Florida court's holding.

A terse majority opinion, written by Mr. Justice Douglas,\textsuperscript{63} appar-


\textsuperscript{58} 416 U.S. 351 (1974).

\textsuperscript{59} The statute provided that:

\begin{quote}
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.
\end{quote}

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

\textsuperscript{60} Shevin v. Kahn, 273 So. 2d 72 (Fla. 1973).

\textsuperscript{61} \textit{Id.} at 73, \textit{quoting} *Reed v. Reed*, 404 U.S. 71, 76 (1971).

\textsuperscript{62} \textit{Id.}

\textsuperscript{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."44 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.45 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,"46 it did not violate the equal protection clause of the fourteenth amendment. Significantly, the majority resurrected a 1908 case47 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 impermissible classification in all instances."48

Justices Brennan and Marshall joined in a dissenting opinion in Kahn49 and, consistent with their holding in Frontiero, reiterated that sex-based legislative classifications should be subjected to close judi-

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).


46 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.

44 416 U.S. at 355.

45 Muller v. Oregon, 208 U.S. 412 (1908), abstracted at note 21 supra.

46 416 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.

47 416 U.S. at 357.
cial scrutiny. From this premise, however, they reached the atypical conclusion that because the sex-based classification served a remedial purpose, it could be deemed necessary to the achievement of a compelling state interest. 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.

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, 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 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 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. 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.” 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.

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77 416 U.S. at 355.
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 benefited by the statutory scheme, in this case widows, is one which has been historically discriminated against. 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. 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. 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. That

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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).

11 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.

12 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.

13 See note 63 supra.

14 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, 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, and several lower federal courts have authorized these classifications in connection with affirmative action plans as well as desegregation schemes. However, the Supreme Court has never explicitly used a benign clas-
sification analysis to authorize "reverse discrimination" and, in fact, avoided its most recent opportunity to consider the issue. 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.

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 and has

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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 (6th 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. PRACT. 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. In *Frontiero*, the Court attached considerable significance to congressional policy. 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, 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
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 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." 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.46


46 See note 94 supra.

42 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. 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. 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, are contrary to public policy, or represent the very "romantic paternalism" so strongly condemned in Frontiero. 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.


7 See note 13 supra.
8 See note 72 supra.
9 See note 84 supra.
10 See notes 90-92 supra and accompanying text.
12 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. 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.

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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.

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).

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. 4156 (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
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.

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