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# Preferential Economic Treatment for Women: Some Constitutional and Practical Implications of Kahn v. Shevin

Margaret E. Clark

# Preferential Economic Treatment for Women: Some Constitutional and Practical Implications of *Kahn v. Shevin*

"The tax being upon persons, women may be exempted on the basis of special considerations to which they are naturally entitled."

Butler, J., in *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937).

"It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account."

Holmes, J., dissenting, in *Adkins v. Children's Hospital*, 261 U.S. 525, 569-70 (1923).

## I. INTRODUCTION

For nearly one hundred years the legal status of American women has been undergoing a painfully slow and haphazard process of redefinition in state and federal courts. Long-regarded by the judiciary as having her primary (and proper) place in society as wife and mother[1] and as requiring special legislative protections for her welfare when she did work outside the home,[2] the American woman has frequently found herself subjected to stereotyped treatment by laws that, although allegedly enacted for her benefit, in reality served to bar her completely from numerous occupations[3] or hampered her ability to obtain lucrative overtime pay.[4]

With the enactment of Title VII of the Civil Rights Act of 1964,[5] a viable means of attacking "protective" labor legislation became available to women. Furthermore, Title VII soon proved its worth to men seeking to abolish sex-based discrimination against them in areas such as employment[6] and retirement benefits.[7] The Supreme

1. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) (upholding a state statute excluding women from jury service unless they applied); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (approving the state's exclusion of women from the legal profession).

2. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (upholding a state statute fixing maximum hours of work for women).

3. *E.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948) (statute prohibiting women from serving as bartenders unless they were the proprieter's wife or daughter).

4. *E.g.*, Miller v. Wilson, 236 U.S. 373 (1915); Riley v. Massachusetts, 232 U.S. 671 (1914).

5. 42 U.S.C. §§ 2000e *et seq.* (1970).

6. *E.g.*, Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1970) (being female not a bona fide occupational qualification for job of flight cabin attendant and airline's refusal to hire men solely because of their sex violated Title VII).

7. *E.g.*, Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973) (Title VII

Court decisions of *Reed v. Reed*[8] and *Frontiero v. Richardson*[9] also appeared to indicate that equal protection under the fifth and fourteenth amendments demanded governmental treatment of men and women on an individual basis and that traditional sex-stereotyping could no longer serve as a valid legislative foundation for different treatment of the sexes in areas in which individuals were similarly situated.

In April 1974, however, a Supreme Court decision appeared that cast some doubt on the precise standard to be used in evaluating legislation granting women economic benefits that are withheld from men. In upholding a property tax exemption statute for widows in *Kahn v. Shevin*,[10] the Court used language that suggested a retreat from the "strict scrutiny" approach of the *Frontiero* plurality[11] and appeared once again to accept the concept of a society in which men are the breadwinners and women are full-time homemakers. While *Kahn* can arguably be limited to its facts,[12] its underlying rationale[13] could easily be extended to areas other than state tax law— for example, divorce and property settlement laws, the social security benefit structure, and other areas in which laws traditionally have discriminated economically in favor of women. This Note will attempt to analyze the legal soundness and social utility of the underlying premise of the *Kahn* decision, and to evaluate, to a limited extent, the case's potential impact on other areas of the law. Toward this end, a number of relevant state and lower federal court cases arising before and after *Kahn* will be examined, including several decided by the Supreme Court this term.

## II. FROM *Bradwell* TO *Frontiero*: GRADUAL EROSION OF "THE LAW OF THE CREATOR"

It has recently been suggested that the performance of the American judiciary in most pre-1971 sex discrimination cases could be described as "ranging from poor to abominable."[14] To a

violated by pension arrangement allowing women to retire earlier on full pension).

8. 404 U.S. 71 (1971).

9. 411 U.S. 677 (1973).

10. 416 U.S. 351 (1974).

11. 411 U.S. 677, 688 (1973).

12. The majority opinion noted that the case involved a state tax law, a particular type of legislation traditionally accorded substantial deference by courts, even where equal protection challenges are involved. 416 U.S. 351, 355-56 & n.9 (1974).

13. *Id.* at 354 & n.7 & 360-61 (White, J., dissenting).

14. Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675, 676 (1971).

twentieth-century reader of an 1873 Supreme Court decision upholding Illinois' right to bar women from the practice of law, Justice Bradley's pronouncements on the fundamental distinctions between the natures and destinies of the sexes are the hallmark of the nineteenth century bench's view of the rights of women:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.
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> . . . .
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> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[15]

Thus characterized and categorized by the laws of both the Creator and the United States Supreme Court, women continued to be viewed by state legislatures and courts as fragile, delicate creatures who unquestionably were destined for roles as wives and mothers. Given this basic assumption, the state naturally had a duty to protect the health of women who for some reason were financially compelled to work outside the home, and, consequently, many states enacted so-called "protective labor laws" for the benefit of working women. Although differing in various respects, the majority of these statutes set maximum hours or minimum wages for women workers or completely barred women from certain occupations that the legislature deemed dangerous or potentially injurious to the health, morals, or general welfare of women.

In 1908 the Supreme Court sustained the first constitutional challenge to one of these statutes in *Muller v. Oregon*.[16] In sanctioning the state's right to impose a maximum hours per day restriction on female employees, the Court reasoned that Oregon had legitimately exercised its police powers since "[A woman's] physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of men . . . ."[17] *Muller* was followed by other Supreme

15. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1873).
16. 208 U.S. 412 (1908).
17. *Id.* at 422.

Court cases that sanctioned a wide variety of protective labor laws aimed at women, ranging from regulation of their working hours[18] to minimum wage requirements.[19] And in 1948, the Court in *Goesaert v. Cleary*[20] upheld a statute prohibiting, in cities over a certain size, the employment of a woman bartender unless she was the proprietor's wife or daughter.

Despite the judicial assumptions underlying the decisions upholding protective legislation that all women could validly be treated as equally possessing the same physical capabilities and that they were benefitted by the laws in question, it was soon realized that in many instances "protective" labor legislation prevented women from obtaining jobs for which they were actually well-qualified and enabled employers to reserve higher-paying jobs for men by including in the job classification duties that women were statutorily forbidden to perform. With the enactment of Title VII of the Civil Rights Act of 1964,[21] however, and the subsequent promulgation of federal guidelines stating that all "protective" restrictions on employment of women conflicted with Title VII,[22] many of the statutes began to be either invalidated by court decisions[23] or repealed by state legislatures.[24] The courts interpreted the policy of Title VII to require employers to consider only the abilities of the individual and to forbid stereotypical treatment on the basis of sex.[25]

Title VII's legislative mandate of individual treatment extended equally to private employment practices[26] as well as state

18. *See, e.g.*, Radice v. New York, 264 U.S. 292 (1924) (statute prohibiting employment of women in restaurants during the late evening and early morning hours); Bosley v. McLaughlin, 236 U.S. 385 (1915)(maximum hour law for female hospital employees); Miller v. Wilson, 236 U.S. 373 (1915)(maximum hour law for women working in hotels); Riley v. Massachusetts, 232 U.S. 671 (1914)(maximum hour limitations for women factory workers).

19. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

20. 335 U.S. 464 (1948).

21. 42 U.S.C. §§ 2000e *et seq.* (1970).

22. 29 C.F.R. 1604.2(b)(1)(1974).

23. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971)(weight-lifting restrictions); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329, 485 P.2d 529 (1971)(statute prohibiting employing women in bars); Jones Metal Products Co. v. Walker, 29 Ohio St. 2d 173, 281 N.E.2d 1 (1972)(statute limiting maximum hours of work for women).

24. *See, e.g.*, ARIZ. SESS. LAWS ch. 133, §§ 35, 58 (1973), *repealing* ARIZ. REV. STAT. ANN. § 23-261 (1971); ARIZ. SESS. LAWS ch. 69, § 1 (1970), *repealing* ARIZ. REV. STAT. ANN. § 23-281 (1956); 55 DEL. LAWS, ch. 218 (1965), *repealing* DEL. CODE ANN. tit. 19, §§ 301-35 (1953).

25. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969); Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1096 (S.D. Ohio 1971); Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 340 (D. Ore. 1969); *see* 29 C.F.R. 1604.2(a)(1)(ii)(1974).

26. Title VII was amended in 1972 to cover employers (in commerce-affecting industries) who have 15 or more employees, as opposed to the original Act's coverage of only those employers with 25 or more employees. 42 U.S.C. § 2000e(b) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e(b)(1970).

legislation, and to discrimination against men as well as against women. Consequently, male plaintiffs began to bring Title VII suits to force employers to consider them, on the basis of their qualifications, for jobs traditionally available only to women. In *Diaz v. Pan American World Airways*,[27] the Fifth Circuit Court of Appeals held that the defendant airline's policy of hiring only women as flight cabin attendants violated Title VII. The court stressed Pan Am's right to "take into consideration the ability of *individuals*" to perform the job, but held that the airline could not exclude all males simply because some or even most could not perform certain duties adequately.[28] Two years later, in *Rosen v. Public Service Electric & Gas Co.*,[29] the Third Circuit relied on Title VII to invalidate a pension plan that allowed women to retire earlier, with full benefits, than could their male counterparts.

An examination of these and other Title VII cases reveals a judicial shift of attitude in sex-discrimination cases; a shift brought on, however, only by Congressional legislation directed almost exclusively at employment discrimination. In other areas not affected by Title VII, the separate and protected status traditionally accorded women and formerly evidenced in protective labor legislation has persisted and until recently easily withstood equal protection challenges in the courts. In *Gruenwald v. Gardner*,[30] the Second Circuit upheld the validity of a social security provision[31] under which the benefits computation formula for women allowed them to use three fewer "elapsed years" than could similarly situated men. By effectively eliminating years of lower earnings in the computation of the "average monthly wage" from which the primary insurance amount was determined, the challenged section economically favored women over men, but the court held the statute did not violate equal protection under the fifth amendment.[32] Using the "rational relationship"[33] rather than the "strict scrutiny"[34] test, the

27. 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

28. *Id.* at 388 (emphasis in original).

29. 477 F.2d 90 (3d Cir. 1973).

30. 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968).

31. 42 U.S.C. § 415(b)(3)(1970).

32. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " Schneider v. Rusk, 377 U.S. 163, 168 (1964). *See also* Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954).

33. Under this test, a legislative classification will be sustained whenever it bears a rational relationship to a legitimate state interest. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969).

34. A legislative classification based on a suspect category (race, national ancestry or alienage), or impinging on a fundamental interest (*e.g.*, the right to vote, to procreate, or to

court found that the more lenient benefits computation formula for women workers was a reasonable means to achieve the objective of the statute—the "reduction of the disparity between the economic and physical capabilities" of men and women.[35]

In reaching its decision, the *Gruenwald* court relied on a 1961 Supreme Court case, *Hoyt v. Florida*,[36] for the proposition that special recognition and favored treatment constitutionally could be afforded to women.[37] In *Hoyt*, the Supreme Court was asked to invalidate a statute exempting all women from jury duty unless they voluntarily placed themselves on an eligible list. In an opinion uncannily reminiscent of Justice Bradley's concurring opinion in *Bradwell* ninety years previously, the majority upheld the challenged statute:

> Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is inconsistent with her own special responsibilities.[38]

Not until ten years after *Hoyt* did the Supreme Court finally seem to recognize the inequities that can be perpetuated by judicial adherence to the type of stereotypical assumptions about the sexes so clearly evidenced in *Bradwell* and *Hoyt*. In 1971 and 1973 the Court heard and decided two sex-discrimination cases that seemed to herald a more contemporary and enlightened approach to the validity of sex-based classifications—an approach requiring inquiry into individual qualifications rather than permitting legislation on the basis of assumed class characteristics.

In *Reed v. Reed*,[39] the Court invalidated an Ohio probate statute providing that, when two individuals were otherwise equally entitled to appointment as administrator of an estate, the male applicant was to be preferred over the female. The state argued that the statute was a reasonable measure designed to reduce the workload on probate courts by eliminating one class of contests, and that the mandatory preference for males was in itself reasonable since

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travel interstate) will be sustained only if it is narrowly drawn to achieve a compelling state interest. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); *Developments—Equal Protection*, *supra* note 33, at 1120-23, 1127-31.

35. Gruenwald v. Gardner, 390 F.2d 591, 592 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968).
36. 368 U.S. 57 (1961).
37. 390 F.2d at 592.
38. Hoyt v. Florida, 368 U.S. 57, 61-62 (1961).
39. 404 U.S. 71 (1971).

men are as a rule more conversant with business affairs than are women and therefore in general are better qualified to act as administrators. Applying what some courts and commentators subsequently characterized as a "new" or "strengthened" rational relationship test,[40] the Court held the statute violative of the equal protection clause of the fourteenth amendment, since it failed to bear a "fair and substantial relation to the object of the legislation."[41]

The following term, in *Frontiero v. Richardson*,[42] a plurality of the Supreme Court declared sex to be a suspect category in invalidating a federal statute under which female members of the armed forces were required to demonstrate that their spouses were actually dependent upon them in order to obtain certain dependents' benefits, whereas male members' spouses were automatically considered dependents for purposes of the statute. Finding "implicit support"[43] in *Reed* for its holding that sex constituted a suspect category, the plurality rejected the government's administrative convenience justification offered in support of the statute.[44] Furthermore, after expressly disapproving *Bradwell*'s "law of the Creator" language as a classic example of "romantic paternalism,"[45] the plurality identified the crucial defect underlying sex-based classifications:

> . . . [W]hat differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.[46]

Careful analysis of the *Reed* and *Frontiero* opinions fails to yield significant guidance as to the precise standards to be used in evaluating sex-based classifications. Clearly, the plurality opinion in *Frontiero* did not definitively determine that sex-based classifications were suspect, and the first sex discrimination cases that followed *Frontiero* evidenced judicial uncertainty over the import of

40. *See, e.g.*, Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir. 1973); Wark v. Robbins, 458 F.2d 1295, 1297 n.4 (1st Cir. 1972)(dictum). *See generally* Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1 (1972); Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV. 157.

41. 404 U.S. at 76 (quoting from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

42. 411 U.S. 677 (1973).

43. *Id.* at 682.

44. *Id.* at 688-90.

45. *Id.* at 684-85.

46. *Id.* at 686-87.

both *Reed* and *Frontiero*.[47] As one court stated, however, regardless of the lack of definitive guidelines in the two decisions, *Reed* and *Frontiero* may be read as "an expression of deep concern by the Supreme Court to analyze statutory classifications based upon sex in more pragmatic terms of this everyday modern world rather than in the stereotyped generalizations of the Victorian age."[48] Such a reading easily comports with the Court's explicit reference in *Frontiero* to "actual capabilities of individual members"[49] of the two sexes, a phrase clearly calling for individualized treatment of similarly situated women and men rather than legislation grounded in stereotyped sex-based assumptions.

If *Frontiero* can justifiably be read as requiring narrowly drawn legislation designed to reach similarly situated persons of both sexes, then statutes granting women special benefits not conferred upon men would seem to be constitutionally impermissible. The plurality opinion in *Frontiero*, however, while unhesitatingly characterizing sex as a suspect category and stating that sex-based classifications must be subjected to "strict judicial scrutiny,"[50] observed in a footnote that the statutes considered in *Frontiero* were not "in any sense designed to rectify the effects of past discrimination against women."[51] This observation could be interpreted as implying that statutes with "ameliorative" purposes might not be found to violate equal protection, an implication somewhat at odds with the traditional "strict scrutiny" standard unless the ameliorative purpose and the means used to effect it could be held to pass the "compelling state interest" test—a test which has seldom, if ever, been met.[52]

47. *See, e.g.*, Ballard v. Laird, 360 F. Supp. 643 (S.D. Cal. 1973), *rev'd*, 43 U.S.L.W. 4158 (U.S. Jan. 14, 1975) (district court relied on *Frontiero* as establishing sex as a suspect category); Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973) (court admitted difficulty in determining appropriate standard of review from *Frontiero* opinion but concluded that statute at issue failed to meet even *Reed*'s rational basis test); M. v. M., ___ Del. ___, 321 A.2d 115 (1974) (court characterized *Frontiero*'s plurality opinion as "enlightening but not controlling" and held that statute in question met both the rational basis and strict scrutiny tests); State v. Chambers, 63 N.J. 287, 307 A.2d 78 (1973) (using *Frontiero* as the basis for invoking the strict scrutiny test). For an analysis of the standard of review used in 6 federal and state court sex discrimination cases (including *Ballard* and *Chambers*) decided shortly after *Frontiero*, see 23 CATH. U.L. REV. 599 (1974).

48. Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 988 (D.N.J. 1973), *aff'd*, 43 U.S.L.W. 4393 (U.S. Mar. 18, 1975).

49. Frontiero v. Richardson, 411 U.S. 677, 687 (1973).

50. *Id.* at 688.

51. *Id.* at 689 n.22. The Court cited *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968) and some school desegregation cases.

52. *See* Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972)(Burger, C.J., dissenting). *But see* Roe v. Wade, 410 U.S. 113 (1973), in which the Court apparently found that the states

Following *Frontiero*, equal protection attacks on statutes granting women preferential treatment met with varying degrees of success. In at least three areas—social security legislation, divorce and property settlement law, and military promotion regulations—*Frontiero* was relied on by plaintiffs seeking extension of "women only" legislative benefits to men. It is not remarkable that the results of these cases are far from uniform, given the lack of a definitive holding in *Frontiero*. Nevertheless, an examination of some selected cases in these areas is instructive in demonstrating the continuing reluctance on the part of some courts to accept a standard of individualized treatment of the sexes and to abandon the kinds of assumptions supposedly left behind in *Bradwell*.

### *A. The Social Security Benefits Cases*

The social security benefits computation formula[53] upheld by the Second Circuit in 1968 in *Gruenwald v. Gardner*[54] was again challenged, subsequent to *Frontiero*, in three federal district court cases, two of which preceded the *Kahn* decision. In both *McEvoy v. Weinberger*[55] and *Polelle v. Secretary of HEW*[56] the courts held that the benefits provision in question met both the strict scrutiny and rational basis tests. Characterizing the statutory formula as "designed to rectify the effects of past discrimination against women,"[57] the *McEvoy* court simultaneously held the classification "reasonably related" to achieving a legitimate legislative purpose, while finding a "compelling governmental interest" present in the reduction of economic disparity between the sexes.[58] In a slightly more limited holding, the *Polelle* court found that reduction of economic disparity between the sexes that is the result of past or present discrimination provided a compelling governmental interest in sustaining the statute.[59] Thus both courts seemed to accept as viable the premise that *Frontiero* could require a "strict scrutiny" standard of review for statutes granting women preferential treatment. Both courts, however, also apparently felt (although without articu-

could have a compelling interest in safeguarding the health of the mother and the life of the foetus and thus prohibit abortions after the second trimester of pregnancy.

53. 42 U.S.C. § 415(b)(3)(1970).

54. 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968).

55. Civ. No. 72-1727-Civ.-JE (S.D. Fla., Aug. 28, 1973).

56. Civ. No. 73-C-774 (N.D. Ill., Apr. 19, 1974)(three-judge panel).

57. McEvoy v. Weinberger, Civ. No. 72-1727-Civ.-JE (S.D. Fla., Aug. 28, 1973), slip opinion at 2. The quoted language appears to have been taken directly from footnote 22 in *Frontiero*, although no direct citation was made by the court.

58. *Id.*

59. Civ. No. 73-C-774 (N.D. Ill., Apr. 19, 1974), slip opinion at 6-7.

lating the rationale or authority supporting their conclusions) that reducing the economic disparities between the earning capabilities of the sexes (by compensating for the effects of past discrimination against women in the job market) was a sufficiently compelling governmental interest to justify use of a "suspect category" as the basis for classification.

A much more careful examination of *Frontiero* and its implications was conducted by a district court in another social security benefits case, *Wiesenfeld v. Secretary of Health, Education, and Welfare.*[60] The plaintiff, a widower, attacked the constitutionality of the "mother's insurance benefits" provision[61] of the social security statute, which grants certain additional benefits to widows with children and "surviving divorced mothers" but does not provide similar benefits for widowers with children or surviving divorced fathers. During his wife's employment as a teacher, maximum social security payments had been deducted from her paychecks, whereas the plaintiff had been employed only sporadically during the few years of their marriage, his wife's total earnings far exceeding his.

In ascertaining the proper standard of review for judging the statute's constitutionality, the district court in *Wiesenfeld* carefully reviewed the various opinions in *Frontiero* and noted that a majority of the Supreme Court had not yet declared sex to be a suspect category. The district court examined and rejected the interpretation of *Reed* and *Frontiero* as creating an "intermediate test" for sex-based legislative discrimination.[62] The court then analyzed the statutory benefits provision, using the traditional rational basis test. While noting that "[i]t is often difficult for courts to determine the specific purpose behind congressional legislation especially

60. 367 F. Supp. 981 (D.N.J. 1973), *aff'd*, 43 U.S.L.W. 4393 (U.S. Mar. 18, 1975).

61. 42 U.S.C. § 402(g)(1970) provides in pertinent part as follows:

(1) The widow and every surviving divorced mother . . . of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—

. . .

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit . . .

. . . shall . . . be entitled to a mother's insurance benefit for each month [until the occurrence of certain specified events such a remarriage, the failure of the child to continue to qualify for child's insurance benefits, etc.]

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

62. 367 F. Supp. at 988. The *Wiesenfeld* court examined *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), from which Chief Justice Burger quoted in *Reed* to obtain the "fair and substantial relation" language that later received much attention from commentators, and concluded that *Royster Guano Co.* "depended upon the 'traditional' equal protection standard which evolved during that era . . . when governmental economic regulations were constantly being challenged on equal protection grounds." 367 F. Supp. at 988.

where, as here, the legislative history is subject to different interpretations,"[63] the court accepted the government's contention that the provision in question was reasonably related to the purpose of rectifying effects of past discrimination against women.

Having determined that the mother's insurance benefits section satisfied the traditional equal protection test, the *Wiesenfeld* court was nevertheless persuaded by the plurality opinion in *Frontiero* that sex was a suspect category. The court then found that under the strict scrutiny review standard the benefits provision violated the equal protection component of the fifth amendment. The court pointed out that in reality the section operated to create additional economic disadvantages for women wage earners such as Paula Wiesenfeld, since, on their deaths, their families received less financial protection than would the families of male wage earners who had paid the same amounts into the social security fund as had Ms. Wiesenfeld.[64] Disposing of a possible "compelling state interest" argument, the court stated:

> While affirmative legislative or executive action may satisfy a compelling governmental interest to undue [sic] the past discrimination against such suspect groups as racial minorities, such action cannot meet the higher equal protection standard if it discriminates against some of the group it was designed to protect.[65]

The district court opinions in *McEvoy*, *Polelle*, and *Wiesenfeld* demonstrate the sex-stereotyped assumptions upon which American social security laws are based.[66] Despite the ambiguity fostered by *Reed* and *Frontiero* concerning the appropriate standard of review in sex discrimination cases, the courts in *McEvoy* and *Polelle* appeared overly ready to accept the argument that the provisions at issue were in fact designed to remedy the effects of past discrimination against women and were thus permissible under the reasoning of footnote twenty-two in *Frontiero*.[67] The *Wiesenfeld* district

63. *Id.* at 990.

64. *Id.* at 991. *See also* Ginsburg, *The Need for the Equal Rights Amendment*, 60 WOMEN LAW. J. 4, 11 (1974); Griffiths, *Sex Discrimination in Income Security Programs*, 49 NOTRE DAME LAW. 534, 537 (1974).

65. 367 F. Supp. at 991 (footnotes omitted).

66. "The income security programs of tbis nation were designed for a land of male and female stereotypes, a land where all men were breadwinners and all women were wives or widows; where men provided necessary income for their families but women did not; in other words, where all of the men supported all of the women. This view of the world never matched reality, but today it is furtber than ever from the trutb. About fifteen million households are not supported by a man. Among families which are supported by a man . . . almost half of the wives are in the labor force. Forty-three per cent [sic] of scbool-age children and almost thirty percent of pre-school children have mothers who work outside the home." Griffiths, *supra* note 64, at 534 (footnotes omitted).

67. *Cf.* Polelle v. Secretary of HEW, NO. 73-C-774 (N.D. Ill., Apr. 19, 1974) (McMillen, J., dissenting).

court alone found the benefits provision before it violative of equal protection on the basis of *Frontiero* since it discriminated against working women as well as against men, a view shared by the Supreme Court in affirming the lower court's decision.[68] The *Wiesenfeld* district court thus did not have to confront the broader issue of whether a statute with a clearly ameliorative purpose with respect to effects of past discrimination against women in employment could or should be found to pass the "compelling governmental interest" test.[69] Not until the appearance of *Kahn* did such a question surface, although neither that decision nor any subsequent one offered any clear indication of the eventual answer.

### *B. Domestic Relations Cases*

On the state level, *Frontiero* had an impact in at least two cases challenging alimony and property settlement statutes giving preferential treatment to women solely on the basis of sex. In *Murphy v. Murphy*,[70] a superior court in Georgia declared unconstitutional on its face the state alimony statute that defined "alimony" as "an allowance out of the husband's estate, made for the support of the wife when living separate from him."[71] Based on its readings of *Reed* and *Frontiero*, the court found that the statute, since it awarded alimony to wives only, violated the fifth and fourteenth amendments of the federal constitution and similar provisions of the state constitution.[72]

In *M. v. M.*,[73] however, the Delaware Supreme Court denied an equal protection challenge to a statutory property settlement scheme allowing a wife to share her husband's property after divorce but not permitting the husband similarly to share the wife's prop-

68. Weinberger v. Wiesenfeld, 43 U.S.L.W. 4393, 4396 (U.S. Mar. 18, 1975). *See* notes 136 & 137 *infra* and accompanying text.

69. *But see* 367 F. Supp. at 991 & n.29, in which the court analogized to affirmative action race discrimination cases.

70. 42 U.S.L.W. 2393 (Ga. Super. Ct., Jan. 24, 1974), *rev'd*, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 43 U.S.L.W. 3571 (U.S. Apr. 21, 1975).

71. GA. CODE ANN. § 30-201 (1969).

72. The court held that the alimony statute violated the following state constitutional provisions:

"No person shall be deprived of life, liberty, or property, except by due process of law." GA. CONST. art. 1, par. 3.

"All citizens of the United States, resident in this State, are hereby declared citizens of this State, and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges and immunities due to such citizenship." GA. CONST. art. 1, par. 25.

73. ___ Del. ___, 321 A.2d 115 (1974). This case was decided less than a week prior to the *Kahn v. Shevin* decision.

erty.[74] Construing the *Frontiero* plurality opinion as "enlightening, but not controlling,"[75] the court stated that it need not choose between the traditional and strict scrutiny standards of review since in its opinion the statute withstood both tests. In a somewhat unclear line of reasoning, the court began by dismissing the plaintiffs' equal protection argument as being based on the flawed assumption that "husbands and wives are physically and economically similarly circumstanced"[76]:

> In the vast majority of marital situations in Delaware . . . it is the husband who is the "breadwinner", upon whom the principal financial burdens fall; it is his income and his opportunity and ability to accumulate wealth upon which the economic stability of the household and the prosperity of the family chiefly depend. In contrast, as a general rule, the wife is the "homemaker", responsible for managing the home and family and performing the domestic functions which enable the husband to act as the main provider of income and wealth. Generally speaking, each contributes in a characteristic and essential way to the development of the marital property, much of which may become titled in the husband's name alone. The financial realities of this time-honored, husband-wife dichotomy are reflected, and compensated for in the provisions of [the property settlement statute] which recognize[s] the differing physical capabilities and economic contributions of the parties.[77]

The court then characterized the objective of the statute as assuring that the wife's contribution to the prosperity of the union would be justly credited to her, and disposed of the claim that the statute discriminated arbitrarily against husbands by stating, somewhat illogically, that an award to the wife of a portion of her husband's property was, "by definition, an award to the husband of the remainder."[78] While conceding that exceptions might exist to the "general scheme of family life" it had described, the court stated that the statute nevertheless was not infirm merely because better legislative means of effecting the intended goals might exist. On the basis of this somewhat disjointed line of analysis, the court concluded that the sex-based statutory classification scheme met both

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74. DEL. CODE tit. 13 § 1527(a) (1975) provides as follows:

(a) When a divorce shall be decreed in this State:

(1) At the suit of the husband or the wife, whatever the grounds, the wife shall he restored to all her real estate;

(2) At the suit of the wife on grounds other than nonage, voluntary separation or incompatability, the wife shall he allowed out of her husband's real estate, personal estate, or hoth, such share as the Court deems reasonable;

(3) At the suit of the husband or the wife except as otherwise provided in this subsection, whatever the grounds, the wife may be allowed out of her husband's real estate, personal estate, or both, such share as the Court deems reasonable.

75. 321 A.2d at 118.

76. *Id.*

77. *Id.*

78. *Id.* at 119.

the traditional and strict scrutiny equal protection standards of review. In an interesting footnote, however, the court expressed the opinion that a "constitutionally mandated exception" to this conclusion might arise when there was actual prejudice to a husband-petitioner who did not fit into the husband-wife hypothesis on which the conclusion was based,[79] and cited *Murphy v. Murphy* for comparison.

*Frontiero* clearly held impermissible a statutory grant of economic benefits to men based on the assumption that most men do in fact provide the majority of their spouses' financial support. It would follow, therefore, that state-designed or maintained alimony or property settlement statutes grounded in the corollary assumption that all women are dependent on their husbands for support during the period of the marriage and that upon its termination they have no means of obtaining employment and own little, if any, property in their own names should be equally impermissible. Today many married women work and are fully capable of supporting themselves after divorce; not infrequently there are instances where, as with the marital situation forming the basis of *Wiesenfeld*, the wife has a higher and steadier income than her husband and has, in actuality, supported him during the marriage. Moreover, in many modern families it is not uncommon for the house or other substantial pieces of real or personal property to be owned in the wife's name for estate tax reasons. Upon divorce, however, if the state has a law similar to Delaware's, the husband would not be entitled to part of that property even if he had contributed substantially or exclusively to its acquisition. The wife nevertheless would have a statutory claim (limited by the court's discretion) to a portion of whatever property remained in her husband's name.

Despite the existence of such increasingly common contemporary marital lifestyles, and the *Frontiero* Court's recognition of them as invalidating the use of nineteenth-century stereotypes as the basis for legislative classifications, the Delaware Supreme Court decision demonstrates that, for at least some courts, *Bradwell*'s "law of the Creator" continues to exert a powerful influence. *Murphy v. Murphy*, while appearing to signal a possible break in the area of certain outmoded domestic relations laws, was reversed on appeal on the basis of *Kahn*,[80] and the only remaining hope for men seeking to challenge divorce and alimony statutes granting

79. *Id.* at n.5.

80. Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 43 U.S.L.W. 3571 (U.S. Apr. 21, 1975). *See* notes 120-22 *infra* and accompanying text.

women preferential treatment may be the eventual passage of the Equal Rights Amendment,[81] or resort to state equal rights amendments in those jurisdictions so providing.[82]

### C. *Preferential Promotional Practices for Women Naval Officers*

In June of 1973, a three-judge district court in California unequivocally rejected the proposition that statutes granting women preferential treatment should be tested by constitutional standards different from those applied in *Frontiero*. In a decision that was ultimately reversed by the Supreme Court, the lower court in *Ballard v. Laird*[83] held that naval regulations[84] granting women officers a minimum tenure of thirteen years commissioned service before mandatory discharge while granting male officers in like grade and situation no minimum tenure violated fifth amendment equal protection guarantees.

Examining the rationale underlying the challenged statutes, the court concluded that the discharge provisions were in no way related to the quality of service on the part of individual officers, male or female, but were rather "legislative fiscal outlay saving devices for the weeding out of a surplus of USN officers in a given grade before the vesting of retirement benefits."[85] Also mentioned,

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81. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 944-45 (1971) (hereinafter cited as Brown). The proposed Equal Rights Amendment provides as follows:

> Section 1. Equality of rights under the law shall not he denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

82. *See, e.g.*, Wiegand v. Wiegand, 226 Pa. Super. 278, 310 A.2d 426 (1973). *But see* Sampson, *The Texas Equal Rights Amendment and The Family Code: Litigation Ahead*, 5 TEXAS TECH. L. REV. 631 (1974).

83. 360 F. Supp. 643 (S.D. Cal. 1973), *rev'd*, 43 U.S.L.W. 4158 (U.S. Jan. 14, 1975).

84. The pertinent statutes involved provide in pertinent part as follows:

> Each officer on the active list of the Navy serving in the grade of lieutenant, except an officer in the Nurse Corps . . . shall be honorably discharged on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of lieutenant commander . . . for the second time.

10 U.S.C. § 6382(a)(1970).

> Each woman officer on the active list of the Navy, appointed under section 5590 of this title, who holds a permanent appointment in the grade of lieutenant . . . shall be honorably discharged on June 30 of the fiscal year in which—
>
> (1) she is not on a promotion list; and
>
> (2) she has completed 13 years of active commissioned service in the Navy . . . .

10 U.S.C. § 6401(a)(1)-(2)(1970).

85. 360 F. Supp. at 646.

but not discussed at any length, was the government's apparent contention that the thirteen-year commission tenure for women was "a recruiting measure;"[86] the court simply stated that if this was the case, the "invidious discriminatory impact" was compounded.

The *Ballard* district court, citing *Frontiero* as controlling, quoted from that portion of the plurality opinion holding that sex is a suspect category, and rejected the argument that the administrative and fiscal interests advanced in support of the naval regulations could justify them under the strict scrutiny review standard.[87] The court expressly rejected any argument that laws favoring women should be judged by different standards than those discriminating against them:

> Whether the discriminatory impact results in favoring the female rather than the male is no logical differential in the utilization of the teachings of *Frontiero*. *Diaz* . . . and *Rosen* . . . each found no handicap in striking down female favoritism under the civil rights act—a legislative implement of the equal protection clause, nor do we here in a judicial implementation of the equal protection clause.[88]

The *Ballard* court thus did not attempt to justify the regulations as having as a possible purpose the rectification of past underrepresentation of women as officers in the armed services, an interpretation that would have arguably allowed the provisions to be upheld under footnote twenty-two of *Frontiero*.

The government appealed the lower court decision, but during the pendency of the appeal the subsequent decision of *Kahn v. Shevin*,[89] in April 1974, cast some unexpected doubt on the appropriate standard of review for legislation favoring women. Given the appellate dispositions of *Wiesenfeld* and *Ballard* and the recent reliance on *Kahn* by lower federal and state courts in upholding statutes granting women preferential treatment, a close analysis of the Court's decision in *Kahn* is a prerequisite for assessing its subsequent and continuing effect on other sex discrimination cases involving legislation that favors women.

## III. *Kahn v. Shevin*: A Retreat From Strict Scrutiny

Melvin Kahn, a Florida widower, applied for a state property tax exemption of five hundred dollars at the county tax assessor's office, but his application was denied because the statute under which he applied, while granting such an exemption to widows, had

86. *Id.* at 647 n.1.
87. *Id.* at 648.
88. *Id.* at 647.
89. 416 U.S. 351 (1974).

no similar provision for widowers.[90] Kahn then sought, and won, a declaratory judgment in the state circuit court that the statute violated equal protection because the classification "widow" was based on gender. Using *Reed*'s "fair and substantial relation to the object of the legislation" standard, the Florida Supreme Court reversed, finding the object of the challenged legislation to be the reduction of "the disparity between the economic capabilities of a man and a woman."[91] Kahn then appealed to the United States Supreme Court.

Writing the majority opinion, Justice Douglas, a member of the *Frontiero* plurality, adhered to the *Reed* standard[92] in holding the challenged statute valid. Ignoring the issue of whether sex constituted a suspect category, the majority distinguished *Frontiero* on the ground that the sole purpose of the *Frontiero* statute was administrative convenience, whereas 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 whom that loss imposes a disproportionately heavy burden."[93] Justice Douglas cited figures revealing significant discrepancies between median earnings of men and women as evidence of past and present discrimination against women in employment, noting that the disparity in earning power was "likely to be exacerbated" for the widow, since most widows on their husbands' deaths would be faced with an unfamiliar job market and few skills to offer an employer because of "[their] former economic dependency." In a footnote the majority also referred to footnote twenty-two of *Frontiero*, which had impliedly excluded from its holding statutes aimed at rectifying the effects of past discrimination against women.[94] Concluding with the observation that state tax laws have traditionally been granted great deference on review, so long as the classifications involved are founded upon a reasonable distinction in terms of state policy,[95] the Court affirmed the judgment of the Florida Supreme Court.

Justices Brennan, Marshall, and White, the other members of the *Frontiero* plurality, dissented in two separate opinions. Brennan

90. FLA. STAT. ANN. § 192.06(7)(1972) provides as follows:
"The following property shall he exempt from taxation:
. . . .
"(7) Property to the value of five hundred dollars to every widow, and to every person who is a bona fide resident of the state, and has lost a limb or been disabled, in war [or military hostilities] or by misfortune."

91. 273 So. 2d 72, 73 (Fla. 1973)(citing *Gruenwald*).

92. 416 U.S. at 355.

93. *Id.*

94. *Id.* at n.8.

95. *Id.*

and Marshall, adhering to the basic premise that the statute in question should be subjected to strict judicial scrutiny since the classification "widow" was based on gender, stated that the Court was not free to sustain the tax statute on the traditional "rational basis" grounds. They further reasoned that the classification could be sustained only if the State could demonstrate that the statute served overriding or compelling interests that could not be achieved either by a more carefully drawn legislative classification or by the use of less drastic means. The two Justices then proceeded to find a compelling state interest present in the goal of achieving equality for a societal group traditionally "the victim of purposeful discrimination and neglect," and agreed that in providing special benefits for such a group the statute served a compelling state interest.[96] Moreover, Brennan and Marshall agreed that inclusion of needy widowers would not further the State's overriding economic interest in remedying the economic effects of past discrimination for women, since no one had suggested that needy widowers had suffered from sex discrimination. Nevertheless, the Justices argued that the statute failed the strict scrutiny test since the state's compelling interest could have been achieved by a more precisely tailored statute or by less drastic means. The section, they argued, was "plainly overinclusive" since the tax exemption could be obtained by a financially independent widow as well as an unemployed widow with dependent children; they also pointed out that by redrafting the exemption application form to exclude widows earning annual incomes or possessing assets in specified amounts, the State could narrow the class of beneficiaries to those widows who had actually been victims of past economic discrimination.

In a separate dissenting opinion, Justice White argued that gender-based classifications were suspect and that the State had failed to prove a compelling state interest. Perceiving the purpose of the statute to be "to alleviate current economic necessity," White found it unconstitutionally both overinclusive and underinclusive since it extended aid to widows who did not need it while denying it to widowers with greater financial need and less access to jobs than many widows.

In response to the "ameliorative purpose" arguments relied upon by both the majority and Justices Brennan and Marshall, Justice White refused to accept those arguments as a credible interpretation of the statutory purpose of the tax exemption provision: "for if the State's purpose was to compensate for a past discrimina-

96. *Id.* at 358-59.

tion against females, surely it would not have limited the exemption to women who are widows."[97] White further asserted that, even accepting *arguendo* past discrimination as the criterion for current tax exemption the statute ignored all widowers who had felt the impact of economic discrimination, whether as a member of a racial group or "as one of the many who cannot escape the cycle of poverty." In sum, the Justice clearly felt the equal protection clause mandated nothing less than equal treatment for *all* persons similarly situated:

> It may be administratively inconvenient to make individual determinations of entitlement and to extend the exemption to needy men as well as needy women, but administrative efficiency is not an adequate justification for discriminations based purely on sex. *Frontiero v. Richardson . . .*; *Reed v. Reed . . . .*[98]

### *A. An Analysis of the Opinions*

A careful analysis of the majority and dissenting opinions in *Kahn* reveals, when compared with *Frontiero*, some disturbing and unexpected analytical inconsistencies. Upon close examination, *Kahn* appears to raise more questions than it settles and indeed, leaves as unclear as ever the appropriate standard of review for gender-based classifications.

The author of the majority opinion was Justice Douglas, who had joined in the plurality opinion in *Frontiero* in stating that sex-based classifications were inherently suspect and should be subjected to strict judicial scrutiny. While Marshall, Brennan, and White adhered in their dissenting opinions to this mode of analysis in judging the gender-based classification in *Kahn*, Douglas's majority opinion employed language from *Reed*[99] and sustained the statute on the ground that it was reasonably designed to further a legitimate state interest. Douglas's refusal to adhere consistently to the standard of review for sex discrimination he adopted in *Frontiero* might be due to reluctance on his part to accept "remedying the past effects of discrimination" as a compelling state interest in order to uphold the statute.[100] Yet his retreat from the position taken in *Frontiero* not only creates a logical inconsistency with respect to his own stand in the two cases, but also substantially weakens the previous trend in the Court towards treating sex as an inherently suspect category.

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97. *Id.* at 361
98. *Id.*
99. *Id.* at 355.
100. *See* note 112 *infra* and accompanying text.

Although *Frontiero* ringingly denounced the "romantic paternalism" inherent in early sex discrimination cases such as *Bradwell*, the majority opinion in *Kahn v. Shevin* suffers from a more subtle variation of that same attitude. As pointed out in Justice White's dissent,[101] the presumption behind both the statute at issue and majority opinion upholding it is that all widows are financially more needy and less trained or less ready for the job market than men. Both *Reed* and *Frontiero*, however, explicitly rejected the argument that legislatures should be allowed to pass laws grounded in the assumption (and purely apart from the arguments of administrative convenience) that men as a group are more likely to be better qualified as administrators because they are usually more conversant in business affairs,[102] or that American wives are more likely to be financially dependent on their husbands, while husbands are rarely likely to be dependent upon their wives.[103]

From the foregoing analysis of *Reed* and *Frontiero* it appears likely that the primary argument saving the tax exemption statute at issue in *Kahn* was that it was designed to rectify the effects of past discrimination against women in the job market. Upon close examination, however, several problems are inherent in accepting this explanation as a "saving" statutory purpose.

First, ascertaining the purpose of a statute such as the one involved in *Kahn* is never an easy task, since few states maintain documented legislative histories of their adopted laws. The majority opinion itself stated that Florida had provided some form of property-tax exemption for widows since at least 1885,[104] and that the statute at issue had been essentially unchanged since 1941.[105] Thus to construe the tax exemption statute as having been designed by the state's founding fathers or by the 1941 legislature to alleviate the past effects of job market discrimination against women would attribute to those groups a degree of concern and enlightened attitude toward the status of women outside the home that taxes credulity. White's reading of the exemption as designed "to alleviate current economic necessity" seems equally as arguable if not more plausible.

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101. 416 U.S. at 360-61.

102. Frontiero v. Richardson, 411 U.S. 677, 683 (1973) (discussing *Reed*).

103. *Id.* at 689 & n.23.

104. Article IX, § 9 of the 1885 Florida Constitution provided that:

> There shall be exempt from taxation property to the value of two hundred dollars to every widow that has a family dependent on her for support, and to every person that has lost a limb or been disabled in war or by misfortune.

Kahn v. Shevin, 416 U.S. 351, 352 n.1 (1974).

105. 416 U.S. at 352.

Even assuming *arguendo* that rectification of past discrimination *was* the legislative purpose in enacting the statute at issue in *Kahn*, other questions, unsatisfactorily treated by the majority opinion, deserve consideration. The majority, as noted previously, failed to articulate the precise standard of review to be used in judging statutory sex-based classifications. Douglas's apparent use of the "strengthened rational basis" standard in *Reed* allowed him to accept as sufficient the proferred "ameliorative" statutory objective without having to elevate that objective to the level of a compelling state interest. Had he adhered to the strict scrutiny standard he advocated in *Frontiero*, Douglas would have at least had to join Justices Brennan and Marshall in insisting on a more precisely drawn statute or the employment of less restrictive alternatives. Justice White's dissent raises another telling point not answered even by the Brennan and Marshall dissent: even accepting as the statutory purpose the alleviation of the effects of past economic discrimination against women, should not the legislature have granted such a tax exemption to all women, not just to widows? The statute does indeed create intra-class discrimination analogous to that rejected by the *Wiesenfeld* court, and the kind sustainable only under the traditional equal protection "rational basis" standard of review.

The Court's disposition of *DeFunis v. Odegaard*[106] only one day prior to its decision in *Kahn* suggests some interesting problems. Although *DeFunis* was vacated as moot,[107] Justice Douglas reached the merits of the case in a dissent dealing with the central issue both there and arguably in *Kahn*—whether a state may constitutionally grant preferential treatment to a group which has traditionally been the victim of economic and political discrimination to rectify or alleviate some of the past effects of that discrimination.

In *DeFunis*, Douglas argued vehemently against the use of race as a balancing factor, in and of itself, in passing on the qualifications of applicants to a state law school, and contended that decisions should be made "on the basis of individual attributes."[108] Douglas stressed that clearly this method would not proscribe a law school's evaluation of a candidate's prior accomplishments in light of barriers he had to overcome, but insisted that "[t]he key to the problem is the consideration of each application *in a racially neutral*

106. 416 U.S. 312 (1974).

107. The plaintiff, Marco DeFunis, was in his last semester at the University of Washington Law School and the majority found that he was almost certain to graduate, regardless of the decision reached by the Supreme Court.

108. 416 U.S. at 332.

*way*."[109] Douglas carefully distinguished school desegregation cases such as *Swann v. Charlotte-Mecklenburg Board of Education*,[110] which had held that public school authorities could prescribe a specific ratio of black to white students for each school in the district, matching the proportion for the district as a whole, on the ground that the *Swann* policy impinged on no constitutional rights because no one was excluded from school and there is no right to attend a segregated school.[111]

Although Douglas stated that there was "no showing that the purpose of the [law] school's policy was to eliminate arbitrary and irrelevant barriers into the legal profession,"[112] that statement alone is not sufficient to bring his *DeFunis* opinion in line with his stand in *Kahn*. First, from his treatment of the "compelling state interests" argument raised by the state it is doubtful that Douglas would necessarily find such a purpose sufficient to overcome the use of a suspect category:

> The argument is that a "compelling" state interest can easily justify the racial discrimination that is practiced here. To many "compelling" would give members of one race even more than *pro rata* representation. The public payrolls might then be deluged say with Chicanos because they are as a group the poorest of the poor and need work more than others. . . . The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.
> . . . If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality . . . . It may well be that racial strains, racial susceptibility to certain diseases, racial sensitiveness to environmental conditions that other races do not experience may in an extreme situation justify differences in racial treatment that no fair minded person would call "invidious" discrimination. Mental ability is not in the [sic] category.[113]

Even accepting *arguendo* Douglas's reference to the elimination of "arbitrary and irrelevant" barriers into the legal profession as signifying his willingness to find a compelling state interest in that purpose, such a purpose makes the preferential admissions policy at issue in *DeFunis* at least somewhat analogous to the types of affirmative action plans usually upheld by federal courts in recent employment discrimination cases.[114] The tax exemption statute in

109. *Id.* at 340 (emphasis in original).
110. 402 U.S. 1 (1971).
111. 416 U.S. at 336 n.18.
112. *Id.*
113. *Id.* at 341-43.
114. *E.g.*, Contractors' Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). *Contra*, Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972). For a good discussion of these and other racial "reverse discrimination" cases and

*Kahn*, however, does not constitute state action aimed directly at eliminating discrimination (for example, legislation dealing with employment opportunities for women). Since it deals with the *effects* of discrimination rather than the elimination of the problem itself, it is one step removed. At most, the Florida law at issue in *Kahn* grants widows an economic benefit that when analyzed in terms of its actual net effect cannot reasonably be said to be of significant help to any taxpayer,[115] male or female. Thus, the statute's practical utility as a device to "[cushion] the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden"[116] must consequently be characterized as minimal at best.

The question thus remains why Justice Douglas is willing to accord blanket preferential treatment to a group that in *Frontiero* he characterized as suspect, analogizing sex to race,[117] while strongly refusing to accord such treatment to racial minority groups in *DeFunis*. Similarly, Brennan and Marshall, neither of whom wrote an opinion reaching the merits in *DeFunis*, would have condoned the granting of such treatment to needy widows in *Kahn* had the statute been more narrowly drawn, although they explicitly adhered to a strict scrutiny standard of review and found the ameliorative purpose of the statute to furnish a "compelling state interest." The apparent willingness on the part of three members of the Supreme Court to sustain legislation granting economic benefits to a selected subgroup of women, while failing to deal with the similar racially suspect classification issue in *Defunis*, is simultaneously puzzling and disturbing. The key to the result reached in *Kahn* may be the size of the benefit involved, or the fact that a state tax statute was involved;[118] yet the underlying principles in the two cases are logically indistinguishable and the differing approaches taken by certain members of the Court in the two cases are difficult to reconcile.

### *B. Post-Kahn Decisions*

The effects of the *Kahn* ruling quickly appeared. Less than a month after the Supreme Court announced its decision in the Flor-

a comparison with the Washington State Supreme Court's opinion in *DeFunis*, see Note, *But Some Animals Are More Equal Than Others: A Look at the Equal Protection Argument Against Minority Preferences*, 12 DUQUESNE L. REV. 580 (1974).

115. At the applicable tax rate in Florida, the savings to a widow applying under the statute challenged in *Kahn* would be approximately $15. Letter from Ruth Bader Ginsburg, Counsel for Appellant, to author of this Note, Oct. 17, 1974.

116. Kahn v. Shevin, 416 U.S. 351, 355 (1974).

117. Frontiero v. Richardson, 411 U.S. 677, 682, 686, 688 (1973).

118. *See* Kahn v. Shevin, 416 U.S. 351, 355 (1974).

ida case, the Georgia Supreme Court, relying heavily on *Kahn* to reverse the result reached by the trial court in *Murphy v. Murphy*, held that the Georgia alimony statute did not violate either the state or federal constitutions.[119] The court stated that the reasons given in *Kahn* for upholding the widow's exemption statute were equally applicable to Georgia's alimony statute, since that law was designed to protect "the dependent wife of a broken marriage" who, like the hypothetical widow in *Kahn*, would upon divorce find herself suddenly forced into an unfamiliar job market in which, because of her economic dependency during the marriage, she would have fewer skills to offer.[120] Quoting from a footnote in the majority opinion in *Kahn*, which stated, "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws,"[121] the Georgia Supreme Court reversed the judgment of the lower court, observing that it was deciding "only that . . . any modification or repeal of these alimony laws must be made by the General Assembly of Georgia and not by the court."[122]

The reasoning used by the Georgia Supreme Court in reversing *Murphy* appears questionable at best. Even granting that the *Kahn* tax exemption statute was grounded in a valid assumption that most widows are older and have indeed been removed from the job market for a significant period of time, a similarly valid assumption cannot be made with respect to divorced women. Given the regrettable fact that in modern society many marriages end in divorce after only a few years, it is much more likely that in most of these particular cases the wife has been employed during all or most of the marriage and is perfectly capable of continuing to work and support herself without an automatic grant of alimony. Indeed, the situation that the Georgia alimony statute is allegedly designed to protect is completely reversed in the not uncommon situation of a marriage in which the wife has provided the entire financial support while the husband has been completing a graduate or professional degree, and the statutory assumptions are totally invalid. In such a case the imposition of alimony payments on an ex-husband struggling to complete his education would be not only unfair but probably finan-

119. Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 43 U.S.L.W. 3571 (U.S. Apr. 21, 1975).

120. *Id.* at ____, 206 S.E.2d at 459.

121. *Id.* at ____, 206 S.E.2d at 460, quoting from Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974) (citations omitted).

122. *Id.* The court concurrently dismissed a constitutional attack on a provision in the alimony statute permitting an award of attorneys' fees in divorce actions to wives but not to husbands. Shepherd v. Shepherd, 232 Ga. ____, 260 S.E.2d 460 (1974).

cially disastrous, and an argument can easily be made that in this kind of divorce situation it is the wife who might be in a better position to make alimony payments.

The *Murphy* court's reference to language in the *Kahn* majority opinion that implied a return to substantial deference to state social and economic legislation is disturbing since that language suggests a possible retreat by the Supreme Court from a strict scrutiny review standard for sex-based classifications not only with respect to those statutes favoring women, but in general.[123] At least one other court appears to have read *Kahn* and another recent Supreme Court sex discrimination case, *Geduldig v. Aiello*,[124] in the same manner, and relied heavily on *Kahn* in sustaining a fourth (and probably final) challenge to the benefit-computation formula in the social security laws. In that case, *Kohr v. Weinberger*,[125] a three-judge federal court granted summary judgment for the government, holding that Section 205(g) of the Social Security Act (the same provision previously challenged in *Gruenwald*, *McEvoy*, and *Polelle*) did not violate fifth amendment equal protection guarantees by permitting a woman to use three fewer "elapsed years" in computing her benefit-computation years than could a similarly situated man. The court reviewed the decisions in *Gruenwald*, *McEvoy*, and *Polelle*, noting the intervention of the *Reed* and *Frontiero* decisions between *Gruenwald* and the latter two cases, but ultimately rested its decision on *Kahn v. Shevin*. Declining to follow the *Wiesenfeld* district court[126] and apply the strict scrutiny test, the *Kohr* court instead found the provision to be "well within the constitutional limits" set in *Reed* and *Kahn*, since it was reasonably designed to rectify the economic effects of past discrimination against women. The court

123. *See also* Geduldig v. Aiello, 417 U.S. 484, 503 (1974)(Brennan, J., dissenting).

124. 417 U.S. 484 (1974). In *Geduldig*, the Supreme Court held in a 6-3 decision that California's disability insurance program, exempting from coverage any work loss resulting from a normal pregnancy, did not violate the equal protection clause. Justice Stewart, writing for the majority, held that the program did not discriminate on the basis of sex, since potential recipients were divided into two groups—pregnant women and nonpregnant persons—and while the first group was exclusively female, the second was not, and thus the benefits of the program accrued to both sexes. *Id.* at 2492 n.20. In a dissenting opinion, Justices Brennan, Marsball, and Douglas argued that the program did discriminate on the basis of sex and that consequently a strict scrutiny standard of review was required by *Frontiero*. *Id.* at 2495. It is interesting to note that Justice Douglas thus reversed his position from *Kahn* and subscribed to a dissenting opinion which stated, *inter alia*, "[t]he Court's decision threatens to return men and women to a time when 'traditional' equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex." *Id.* (citations omitted).

125. 378 F. Supp. 1299 (E.D. Pa. 1974).

126. 367 F. Supp. 981 (D.N.J. 1973), *aff'd*, 43 U.S.L.W. 4393 (U.S. Mar. 18, 1975). *See* notes 59-65 *supra* and accompanying text.

stated that because women indisputably have suffered discrimination in the job market in past years, the benefits paid out to women workers, dependent on the individual's earning history, would necessarily reflect the effects of such discrimination. To the extent that the challenged benefits computation formula corrected the imbalance caused by such discrimination, reasoned the court, it violated no constitutional principle. In closing, the *Kohr* court noted that the section at issue had been amended by Congress[127] to equalize treatment of the sexes with respect to the formula as of the end of 1974, and stated that this might be taken as evidence of Congressional judgment that after ten years of experience under such remedial legislation as the Equal Pay Act[128] and Title VII of the 1964 Civil Rights Act,[129] further compensation for past discrimination in the job market was unnecessary.

In addition to passing on the constitutional validity of Section 205(g) of the Social Security Act, the *Kohr* opinion engaged in an analysis of *Kahn* and *Geduldig v. Aiello* that came to a disturbing, if possibly reasonable, conclusion similar to that apparently reached by the Georgia Supreme Court in *Murphy* regarding the appropriate review standard for sex-based classifications. Both cases, the *Kohr* court stated, "make it clear that the 'close judicial scrutiny' test does not apply to cases involving discrimination [based on sex]."[130] The validity of drawing such a broad conclusion from the two cases is technically arguable, since *Kahn* involved a gender-based statute that favored women and had been implicitly excluded from the holding in *Frontiero*, and the Supreme Court majority opinion in *Geduldig* purported to find no sex discrimination at all.[131] Direct support for the *Kohr* court's conclusion can be found in both the *Kahn*[132] and *Geduldig*[133] decisions, however, leaving would-be liti-

127. Pub. L. No. 92-603, § 104 (Oct. 30, 1972).

128. 29 U.S.C. § 206(d) (1970).

129. 42 U.S.C. §§ 2000e *et seq.* (1970).

130. Kohr v. Weinberger, 378 F. Supp. 1299, 1303 (E.D. Pa. 1974). *See also id.* at 1304 n.6.

131. *See* note 124 *supra*.

132. "The dissents argue that the Florida legislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely. But the issue of course is not whether the statute could have been drafted more wisely, but whether the lines chosen are within constitutional limits. The dissent would use the Equal Protection Clause for reinstating notions of substantive due process that have been repudiated. 'We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'" 416 U.S. at 3356 n.10 (citations omitted).

133. "The Court's decision threatens to return men and women to a time when 'traditional' equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex. See, *e.g.*, Muller v. Oregon . . .;

gants in future sex discrimination cases with legitimate doubts as to the constitutional standard their challenges will have to meet.

Thus, at least with respect to statutes economically favoring women over men, and possibly with respect to sex discrimination in general, *Kahn* appears to have generated the impression among lower state and federal courts that romantic paternalism is once again an acceptable basis for legislation—that legislatures may validly pass laws based on traditional assumptions of economic dependency of women as wives and mothers and economic superiority of men as breadwinning husbands and fathers, without regard to the economic realities of modern life.

Certain questions remain unresolved, demanding at least a brief exploration: the effect of *Kahn* on subsequent Supreme Court sex discrimination cases decided this term; further possible effects of the decision on various state domestic relations laws; and whether, apart from the question of its analytical soundness, *Kahn* represents either a socially or legally desirable and workable standard of treatment for women or any other previously disadvantaged minority group.[134] The last section of this Note will attempt to deal with these questions, although it does not purport to provide the best or only answers.

## IV. *Kahn's* Implications for the Future

### A. *The Recent Supreme Court Cases*

The impact of *Kahn*'s underlying principle was evidenced again this term in the Supreme Court's disposition of *Ballard* and *Wiesenfeld*. The Court's opinions in these two sex discrimination cases[135] indicate a further retreat from acceptance of sex as a "suspect category" by a majority of the Court, at least in cases in which five justices could be persuaded that the statute at issue was de-

Goesaert v. Cleary . . .; Hoyt v. Florida . . . ." 417 U.S. at 503 (Brennan, J., dissenting), (citations omitted).

134. Although constituting 51% of the American population, women can legitimately be considered a minority group in terms of having been singled out from society on the basis of physical or cultural characteristics, for differential and unequal treatment. *See* Hacker, *Women as a Minority Group*, in Sex Roles in Law and Society (L. Kanowitz ed. 1973).

135. In a third major sex-based classification case heard this term, *Taylor v. Louisiana*, 43 U.S.L.W. 4167 (U.S. Jan. 21, 1975), the Supreme Court effectively overruled *Hoyt v. Florida* by invalidating a jury duty exemption statute for women virtually identical to that in *Hoyt*. While the statutory exemption at issue in *Taylor* was undoubtedly based on the same kind of stereotyped assumptions concerning the role of women that were unhesitatingly expressed in *Hoyt*, and which also underpin the majority's reasoning in *Kahn*, the Court's decision in *Taylor* was based on the sixth amendment guarantee of a fair and impartial jury trial, which the Court construed to encompass the right to a jury drawn from a fair cross-section of the community, including women. *Id.* at 4170.

signed to compensate women disadvantaged with respect to career advancement or job placement.

In *Weinberger v. Wiesenfeld*,[136] the Court unanimously affirmed the district court's decision, holding that the social security "mother's insurance benefits provision" violated the equal protection component of the fifth amendment. Relying heavily on *Frontiero*, the majority opinion characterized the statute as being impermissibly based on the "archaic and overbroad" generalization that the husband is always the primary provider in the family unit, and rejected the government's *Kahn*-based argument that the statute was designed to compensate women beneficiaries as a group for the economic difficulties faced by women in the job market. The Court stated that "the mere recitation of a benign, compensatory purpose" would not suffice, and concluded after an examination of the relevant legislative history that the purpose behind section 402(g) was "to provide children deprived of one parent with the opportunity for the personal attention of the other"[137] by providing benefits that would enable the surviving parent to stay home and care for the children in lieu of working. The Court also emphasized that the statutory provision in question actually discriminated against working women, since they not only failed in the event of their deaths to get an equal return for their families in comparison with similarly situated men, but also were forced to make contributions to a fund out of which benefits would be paid to others. *Kahn* was thus logically distinguished on two grounds: lack of a compensatory purpose for the challenged statute, and a discriminatory effect on working women, as well as men.

The Court's decision in *Schlesinger v. Ballard*,[138] however, provides a sharp contrast to the approach taken in *Wiesenfeld*. By a five-to-four margin[139] the Court reversed the three-judge district court, ruling that the challenged mandatory discharge regnlations did not violate fifth amendment equal protection guarantees. The majority recognized that, since female line officers are subject to restrictions on participation in combat and sea duty, they do not have opportunities for professional service equal to those of male officers. Given this state of affairs, the Court hypothesized that Congress "may . . . quite rationally have believed that women line officers had less opportunity for promotion than did their male

136. 43 U.S.L.W. 4393 (U.S. Mar. 18, 1975).

137. *Id.* at 4397.

138. 43 U.S.L.W. 4158 (U.S. Jan. 14, 1975).

139. Justice Stewart wrote the majority opinion, joined by Justices Blackmun, Powell, Rehnquist, and Chief Justice Burger; Justices Brennan, Douglas, Marshall, and White dissented.

counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal [of providing] woman officers with fair and equitable career advancement programs."[140] Disagreeing with the lower court's conclusion that the challenged regulations could be justified only on the basis of administrative convenience, the majority stated that the mandatory discharge provisions furthered a flow of promotions commensurate with the Navy's current needs and served to motivate commissioned officers in a competitive manner likely to result in promotion.[141]

Justice Brennan, writing for the dissent as he had in *Kahn*, began by reiterating the *Frontiero* plurality position that legislative classifications premised solely on gender must be subjected to close judicial scrutiny. Taking issue with the majority's assertion of the existence of a compensatory purpose behind the statutory scheme, the dissent examined both the statute itself and pertinent portions of legislative history, making a highly persuasive argument that Congress did not have the intent imputed by the majority.[142] Furthermore, noted the dissent, even if the majority was correct in its reading of Congressional intent, *Kahn* would furnish no support for upholding the challenged regulations since, contrary to the assertions of the majority opinion, women do not compete directly with men for promotion in the Navy.[143] Thus unable to find a factual basis upon which a compensatory purpose could operate, the dissent concluded that the sex-based discrepancy in the regulations served no rational, much less compelling purpose.

While the Court's unanimous decision in *Wiesenfeld* was logically inescapable, even under *Kahn*, given the relatively clear legislative history of the statutory provision and its discriminatory effect on part of the group it allegedly benefitted, the *Ballard* opinion demonstrates the subtle but important aftereffects of *Kahn*. A majority of the Court has demonstrated its willingness to hypothesize (in its own words) a compensatory purpose for regnlations that, although not grounded in a presumption of female dependency as in *Kahn* or *Frontiero*, result in a highly significant discrepancy in terms of the size of the benefits available solely to women.[144] Even

140. 43 U.S.L.W. 4158, 4161-62 (U.S. Jan. 14, 1975).

141. *Id.* at 4162.

142. *Id.* at 4163-64.

143. "[S]election boards for women are separately convened, 10 U.S.C. § 5704, the number of women officers to be selected for promotion is separately determined, 10 U.S.C. § 5760, promotion zones for women are separately designated, 10 U.S.C. § 5764, and women's fitness for promotion is judged as compared to other women, 10 U.S.C. § 5707." *Id.* at 4165.

144. As one of its findings of fact, the lower court in *Ballard* stated that the plaintiff's discharge under the challenged regulations would entitle him to severance pay of approximately $15,000, as opposed to the approximately $200,000 of benefits that would accrue to

more significant and alarming is the confusion engendered by the apparent virtual abandonment of the *Frontiero* "suspect classification" approach by a majority of the court in *Ballard*, in favor of a standard that appears to be no more stringent than the traditional "rational basis" test.[145] The willingness of a majority of the Court to adhere to a principle upholding statutes favoring women when the stakes are indisputably high once again raises the inconsistency of these decisions with *DeFunis*, in which the Court was reluctant to adopt a similar stance.

### *B. State Domestic Relations Laws After Kahn*

As demonstrated by the Georgia Supreme Court's decision in *Murphy v. Murphy*,[146] examined above, *Kahn*'s underlying principle could be extended to state divorce and alimony statutes grounded not only in the husband's marital obligation of support[147] but also in the questionable (in light of modern employment patterns) assumption that married women devote themselves exclusively to work in the home, not outside it. By arguing that alimony and property settlement statutes favoring women are designed to alleviate the effects of past discrimination in the job market, the states in most instances will be able to come within the ambit of *Kahn* and successfully defend against equal protection challenges similar to those raised in *Murphy*. *Kahn* also offers courts in cases such as *M. v. M.*[148] a much simpler analytical approach for reaching the desired result of upholding the statute than would be possible under a *Reed-Frontiero* line of analysis. No longer will a court have to wrestle with the issue of the precise meaning of those two earlier cases; instead, as long as it can plausibly analogize the statutory purpose behind

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him if allowed to serve in commissioned status the minimum 13 years guaranteed to women officers similarly situated. Ballard v. Laird, 360 F. Supp. 643, 645 (S.D. Cal. 1973).

145. Schlesinger v. Ballard, 43 U.S.L.W. 4158, 4162 (U.S. Jan. 14, 1975). It is interesting to note in passing, however, that in *Ballard* Justice Douglas joined Brennan's dissenting opinion arguing that all gender-based classifications are constitutionally suspect, a change in position from his *Kahn* opinion that is explicable only in terms of his willingness or unwillinguess to find a compensatory purpose behind the 2 statutes involved—a distinction that demonstrates even more clearly the danger inherent in *Kahn*'s invitation to judges to interpret amibguous legislative histories in favor of finding an ameliorative purpose when none exists.

146. 232 Ga. 352, 206 S.E.2d 458 (1974), *cert. denied*, 43 U.S.L.W. 3571 (U.S. April 21, 1975); *see* notes 119-22 *supra* and accompanying text.

147. *See, e.g.*, Kerner v. Eastern Dispensary & Cas. Hosp., 210 Md. 375, 123 A.2d 333 (1956); Henderson v. Henderson, 208 Miss. 98, 43 So. 2d 871 (1950); Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961); Milliron v. Milliron, 9 S.D. 181, 68 N.W. 286 (1896). *See generally* H. CLARK, DOMESTIC RELATIONS 181-87 (1968); Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709 (1956).

148. ___ Del. ___, 321 A.2d 115 (1974); *see* notes 72-78 *supra* and accompanying text.

the domestic relations law at issue to that purpose successfully advanced on behalf of the Florida property-tax exemption, the statute may be upheld with a simple citation to *Kahn*. That such an approach can serve only to perpetuate the sort of inequities discussed previously is clear, but the existence of *Kahn* provides an inviting escape hatch for state courts that in the future face challenges to domestic relations statutes favoring women.

States that have passed equal rights amendments to their own constitutions,[149] however, may find that such statutes violate those amendments even though they do not violate the equal protection clause of the fourteenth amendment. In *Wiegand v. Wiegand*,[150] for example, the Pennsylvania Superior Court interpreted the Equality of Rights Amendment to the Pennsylvania Constitution[151] as requiring the invalidation of sections of the state's divorce laws granting wives in a divorce action, but not husbands, divorce from bed and board, along with alimony pendente lite, counsel fees, and costs.[152] A divided court held that the amendment specifically stated that equality of rights under the law was not to be abridged on the basis of sex, and that no exception was made for rights in the area of domestic relations.[153] The court quoted with approval from an earlier lower court case holding the same statutory provisions violative of the amendment:

> The basic principle of the Pennsylvania Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men . . . . [T]he treatment of any person by the law may not be based upon the circumstances that such person is of one sex or the other. The law does, of course, impose different benefits or different burdens upon different members of the society. That differentiation in treatment may rest upon particular traits of the persons affected, such as strength, intelligence, and the like. But under the Pennsylvania Equal Rights Amendment the existence of such a characteristic . . . to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic or trait . . . .[154]

*Wiegand* was not appealed and thus the highest court in Pennsylvania has yet to interpret the effect of the state's equal rights amendment on its domestic relations statutory scheme, but the superior court's decision remains good law and demonstrates the added utility of such a constitutional amendment in the face of the

149. *See* note 155 *infra*.

150. 226 Pa. Super. 278, 310 A.2d 426 (1973).

151. "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." PENN. CONST. art. 1, § 27.

152. 23 PENN. STAT. ANN. §§ 11 & 46 (1955).

153. 226 Pa. Super. at ___, 310 A.2d at 429.

154. *Id.* at ___, 310 A.2d at 430 (quoting from Corso v. Corso, 120 P.L.J. 183, ___ (Penn. Ct. Cmn. Pleas 1972)).

*Kahn* decision. Since the number of states with similar equal rights amendments continues to grow,[155] *Wiegand* could conceivably presage a change in challenges to divorce and property settlement laws favoring women.

### C. *The Case Against Extending Kahn*

The analytical and conceptual inconsistencies between *Kahn* and *Frontiero* have already been discussed,[156] and need not be repeated here. A continued acceptance and extension of *Kahn* by the courts, however, is likely to raise certain practical problems and policy questions that will likely be difficult to resolve. Furthermore, unquestioning judicial adherence to the underlying assumptions in *Kahn* and reliance upon them in other contexts will act as a barrier to the full development of a legal system in which individual rights are governed not solely by sex but by individual capabilities and characteristics. The following problems will demonstate some of the sociological and legal implications inherent in any further extension of *Kahn*.

One of the initial problems created by *Kahn* is its implicit invitation to courts and litigants to attribute "ameliorative" purposes that may or may not have a basis in fact to gender-based statutes. The Florida property tax exemption provision for widows, as even the *Kahn* majority admitted, had its origins in the 1880's and has been virtually unchanged since 1941, two dates which scarcely lend support to the successfully asserted construction that it had been designed to rectify the effects of past discrimination against women in the job market. In *Polelle v. Secretary of HEW*,[157] the dissent observed that the majority had simply assumed, without any supporting evidence in the record, that the Congressional purpose in adopting the sex-based differential in the benefits computation formula was to compensate women for the lower wages which they had previously earned, and argued that the differential might have been adopted for other reasons, including the impermissible motive of "romantic paternalism" that formed the basis of the *Gruenwald* decision but was implicitly rejected in *Frontiero*.[158] State

155. As of late 1974, 15 states had enacted equal rights provisions or amendments to their own constitutions. ALAS. CONST. art. 1, § 3; COLO. CONST. art. 2, § 29; CONN. CONST. art. 1, § 20; HAWAII CONST. art. 1, § 21; ILL. CONST. art. 1, § 18; MD. CONST. art. 46; MASS. CONST. art. 1; MONT. CONST. art. 2, § 4; N. M. CONST. art. 2, § 18; PENN. CONST. art. 1, § 28; TEX. CONST. art. 1, § 3a; UTAH CONST. art. 4, § 1; VA. CONST. art. 1, § 11; WASH. CONST. art. 31, § 1; WYO. CONST. art. 1, § 2 *et seq.* *See generally* 1 WOMEN L. REP. 1.63-.70 (Nov. 15, 1974).

156. *See* notes 98-118 *supra* and accompanying text.

157. No. 73-C-774 (N.D. Ill., Apr. 19, 1974). *See* notes 56-58 *supra* and accompanying text.

158. *Id.*, dissenting opinion at 2.

divorce laws regulating alimony and property settlement payments are more likely to be rooted in the traditional common-law obligation of marital support running from the husband to the wife[159] (and indeed, are likely to be intended to allow the ex-wife to remain unemployed and take care of the children) rather than being the product of enlightened legislative concern over alleviating the past effects of economic discrimination against women. Most recently, *Schlesinger v. Ballard* demonstrated the continued willingness of at least five justices to attribute to a statute a compensatory purpose that the dissenting members clearly proved to be neither supportable from the legislative history nor as having any logical basis in fact under the separate promotion channels for men and women naval officers. Only in the Supreme Court's disposition of *Wiesenfeld*, in which the statute's purpose was clear from the legislative history, was the government unable to assert successfully the existence of a "benigu compensatory purpose."

Secondly, *Kahn* raises practical problems of the sort articulated by the dissenting opinion in *Polelle*:

> The majority . . . assumes that Congress has abandoned the different benefits between men and women as of 1975 because the effects of discrimination will have been dissipated by then. This involves a doubly unsupported assumption, first that wage discrimination generally occurred against women in employments covered by the Social Security Act and secondly that its effects will disappear in 1975 . . . . [I]f discrimination against women has been remedied, will a court hold that Congress can then use Social Security benefits to compensate such minority groups as blacks or convicted felons for the wage discriminations which they have presumably suffered? There is no end to the problems which can be foreseen . . . .[160]

The analogy to the *DeFunis* issue is clear. The controversy that raged[161] prior to that case's disposition by the Supreme Court, which remains unsettled because of the Court's failure to reach the merits, is highlighted by the apparent willinguess of at least seven members of the Court in *Kahn* (although basing their opinions on differing grounds)[162] and five members (or perhaps all)[163] in *Ballard* to sanc-

159. *See* cases and materials cited in note 149 *supra*.

160. Polelle v. Secretary of HEW, No. 73-C-774 (N.D. Ill., Apr. 19, 1974), dissenting opinion at 4-5 (McMillen, J.).

161. *See, e.g.*, Comment, *The Myth of Reverse Race Discrimination: An Historical Perspective*, 23 CLEV. ST. L. REV. 319, 331-35 (1974); Note, *But Some Animals Are More Equal Than Others: A Look at the Equal Protection Argument Against Minority Preferences*, 12 DUQUESNE L. REV. 580, 583-86 (1974); Note, *Ameliorative Racial Classifications Under the Equal Protection Clause: DeFunis v. Odegaard*, 1973 DUKE L.J. 1126 (1973).

162. The majority Justices apparently accepted the ameliorative purpose as a legitimate state interest, while Justices Brennan and Marshall indicated a willingness to consider the same goal as a compelling state interest, although they still would have required the statute to be more narrowly drawn in order to pass constitutional muster under the strict scrutiny test.

163. Brennan's dissent, in which Douglas, Marshall, and (to a large extent) White

tion preferential treatment for one previously disadvantaged minority, in contrast to their almost unanimous failure to take a stand on the same issue in *DeFunis*. The two cases may be distinguished on the basis of the size and nature of the benefit or preferential treatment involved, but such analysis is questionable after *Ballard*. More importantly, it does not provide a ready answer to the questions of where to draw the line and upon what basis—the particular minority group receiving preferential but compensatory treatment? Whether the state action is in the form of a tax exemption or a preference in admission to its institutions of higher learning?[164] If the former, is the preference any less permissible if women are totally exempt from paying any property tax at all, as opposed to receiving the effectively *de minimus* tax break granted them[165] by the statute in *Kahn*? How can a court ascertain whether the alleged "legislative purpose" of remedying the effects of past discrimination has been accomplished? As Judge McMillen noted in *Polelle*, there would indeed appear to be no end to the problems raised by the seemingly harmless and "benign" principle underlying the decision in *Kahn*.

Finally, it is submitted that *Kahn* is fundamentally at odds with the slow but consistent progress evidenced in sex discrimination decisions in the courts of this country for the past century. By subscribing to an underlying assumption that all or most women are economically dependent on men, the Court has ignored significant trends in the working patterns of American women,[166] undercutting

joined, included the following statement: "[W]hile *I believe that '[p]roviding special benefits for a needy segment of society long the victim of discrimination and neglect' can serve 'the compelling . . . interest of achieving equality for such groups,' Kahn v. Shevin, supra*, 416 U.S. at 358-59 (BRENNAN, J., dissenting), I could not sustain this statutory scheme even if I accepted the Court's supposition that such a purpose lay behind this classification." 43 U.S.L.W. 4158, 4165 (U.S. Jan. 14, 1975) (emphasis added).

164. It should be noted that the University of Washington Law School gave no preference in its admissions policies to women. DeFunis v. Odegaard, 416 U.S. 312, 324 n.5 (1974).

165. *See* note 115 *supra*.

166. In April 1971, approximately 32 million women, 42.7% of all women 16 years of age or older, were in the labor force, compared with 28.9% in March 1940. U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, EMPLOYMENT AND EARNINGS 34-35 (May 1971). By 1973, 58.5% of working women (whose numbers totalled 33 million) were married and living with their husbands. U.S. WOMEN'S BUREAU, DEPT. OF LABOR, WHY WOMEN WORK 1 (rev. ed. June 1973). This is almost twice the rate of 1940. U.S. WOMEN'S BUREAU, DEPT. OF LABOR, BULL. NO. 294, HANDBOOK OF WOMEN WORKERS 39 (1969). From 1960 to 1970, nearly half of the increase in the labor force was accounted for by married women. Waldman, *Changes in the Labor Force Activity of Women*, 93 MONTHLY LABOR REV. 10, 11 (June 1970).

Moreover, despite the discrimination against women workers still prevalent in the labor market, many married women, like Paula Wiesenfeld, earn more than their husbands. The Census Bureau reports that in 1970, wives earned more than husbands in 3.2 million or 7.4% of American families. *See* N.Y. Times, Mar. 19, 1973, at 40, col. 1.

the force of the mandate of individual treatment on the basis of individual capabilities and characteristics implicit in Title VII[167] and in the Court's own previous decisions of *Reed v. Reed*[168] and *Frontiero v. Richardson.*[169] The decision, while purporting to benefit women, in reality helps to perpetuate the type of sex-stereotyped judicial thinking that is reminiscent of the *Bradwell-Hoyt* eras. In *Kahn*, however, the result of the stereotyping was to reverse the usual pattern of discrimination, and to make men equal victims with women.

## V. Conclusion

At this point, it seems somewhat unclear precisely what standards are appropriate in reviewing gender-based legislative classifications. The recent disposition of *Ballard* by the Supreme Court appears to bear out the interpretation placed on *Kahn* by certain state and federal cases[170] as signalling a return to, at most, the *Reed* "fair and substantial relation" standard of review for gender-based classification. Indeed, in *Ballard* the majority opinion appeared to employ the traditional "rational relation" test, and made only an oblique and limited reference[171] to *Kahn* and the alleged compensatory purpose of the naval regnlations at issue, thus casting some doubt on the significance of the preferential treatment aspect of the case.

Should the courts continue to rely upon and expand *Kahn* in validating statutes favoring women in areas other than state tax laws, it is conceivable that passage of the Equal Rights Amendment could require invalidation of such court decisions. This result, however, is far from certain.[172] The Supreme Court's unanimous decision

167. *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969); Ridinger v. General Motors Corp., 326 F. Supp. 1089, 1096 (S.D. Ohio 1971); Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 340 (D. Ore. 1969).

168. Frontiero v. Richardson, 411 U.S. 677, 683 (1974).

169. *Id.* at 686-87.

170. *E.g.*, Kohr v. Weinberger, 378 F. Supp. 1299, 1303 & 1304 n.6 (E.D. Pa. 1974); Murphy v. Murphy, 232 Ga. 352, ___, 206 S.E.2d 458, 459-60 (1974), *cert. denied*, 43 U.S.L.W. 3571 (U.S. Apr. 21, 1975).

171. Schlesinger v. Ballard, 43 U.S.L.W. 4158, 4162 (U.S. Jan. 14, 1975).

172. It has been suggested that "[a]uthority to remedy the effects of past discriminations as well as to implement the provisions of the Equal Rights Amendment is available and unquestioned," and that courts would continue to have power to grant affirmative relief in framing decrees in particular cases. Brown, *supra* note 81, at 904. The inference seems to be, however, that "affirmative action" programs of the sort used to alleviate racial discrimination in employment and education are the kinds of measures to which reference is being made, rather than the legislative grant of purely economic benefits to women because of the past effects of discrimination. The authors of this article, however, have postulated that at least in the area of domestic relations issues such as those raised in *Murphy, M. v. M.*, and

in *Weinberger v. Wiesenfeld* is unlikely to prove a panacea or a substitute vehicle for passage of the ERA, despite the initial reaction from some voices in the news media.[173] Despite repeated references to *Frontiero*, the majority and concurring opinions clearly applied some kind of "rational basis" test, since they characterized the gender-based distinction at issue in *Wiesenfeld* as "entirely irrational."[174] None of the opinions stated or even suggested that gender-based legislative classifications were constitutionally suspect. *Wiesenfeld*'s result, therefore, while laudable, does not counteract the erosion of *Frontiero* brought about by *Kahn* and *Ballard*.

The decision in *Ballard*, and the apparent willingness of many courts to find compensatory purposes for statutes granting women preferential treatment indicates that *Kahn* is not a constitutional aberration but a potential continuing influence on courts faced with challenges to sex-based discrimination. Hopefully, the trend in judicial attitude initiated by *Kahn* will not continue to develop because not only men, but also women, suffer from the judiciary's unquestioning reliance on outmoded assumptions about the economic capabilities of the sexes. Only by a return to the implicit requirement of *Reed* and *Frontiero* to sustain only that legislation based upon inquiry into an individual's abilities without regard to sex can the commands of equal protection be fully effectuated and judicially protected.

MARGARET ELIZABETH CLARK

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*Wiegand, supra*, the Equal Rights Amendment would not require that alimony he abolished but only that it be made equally available to both spouses. *Id.* at 952.

173. *See, e.g.*, NEWSWEEK, Mar. 31, 1975, at 37.

174. Weinberger v. Wiesenfeld, 43 U.S.L.W. 4393, 4398 (U.S. Mar. 18, 1975); *See also id.* at 4399 (Powell, J., and Burger, C.J., concurring) ("no legitimate governmental interest . . . supports this gender classification"); *id.*, (Rehnquist, J., concurring) ("[T]he Government's proferred legislative purpose is so totally at odds with the context and history of § 402(g) that it cannot serve as a basis for judging whether the statutory distinction between men and women rationally serves a valid legislative objection.").

In the most recent sex discrimination case to be decided by the Supreme Court, the Court expressly left open the question whether a sex-based classification is inherently suspect, and relied on *Reed* in striking down a Utah statute setting different ages of majority for males and females in the context of child support obligations. Stanton v. Stanton, 43 U.S.L.W. 4449 (U.S. Apr. 15, 1975).