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## TAX BENEFITS FOR WIDOWS, THE SUPREME COURT'S ATTITUDE TOWARD REMEDIAL SEX LEGISLATION—KAHN *v.* SHEVIN

Significant progress has been made in the past few years in the battle to subdue all forms of discrimination based on sexual classifications.<sup>1</sup> The opponents of such discrimination have been moving both on the legislative front to pass the Equal Rights Amendment<sup>2</sup> and on the judicial front to get sex declared a suspect classification, subjecting any sex-based legislation to the strict scrutiny, compelling state interest test.<sup>3</sup> However, the United

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1. This is particularly true on the federal level. In the area of legislation *see* CIVIL RIGHTS ACT of 1970, TITLE VII, 42 U.S.C. § 2000e *et seq.* (1970), *as amended*, EQUAL EMPLOYMENT OPPORTUNITIES ACT of 1972; EQUAL PAY ACT of 1963, 29 U.S.C. § 206(d) (1970). Congress has also amended many United States Code provisions which formerly contained distinctions based on sex. *See, e.g.*, 5 U.S.C. § 2108(3) (1970), *as amended*, (Supp. I, 1971) (making widowers and husbands eligible for veterans preference in the federal civil service under the same conditions as widows and wives), 5 U.S.C. § 5924 (1970), *as amended*, (Supp. I, 1971) (cost of living allowance to dependents of federal employees living in a foreign area formerly payable to "wife or his dependents" now payable to "employee's spouse or dependents"), 5 U.S.C. § 8341 (1970), *as amended*, (Supp. II, 1972) (granting widowers same automatic qualification as widows for federal civil service survivor's annuities); 38 U.S.C. § 102(b) (1970), *as amended*, (Supp. II, 1972) (redefines dependent to automatically include husbands of veterans for educational assistance purposes); 42 U.S.C. § 414(a)(1) (1970), *as amended*, (Supp. II, 1972) (more favorable method of computing social security benefits upon retirement extended to men); 37 U.S.C.A. § 401 (1970), *as amended*, (Supp. 1974) (authorizing automatic veteran benefits for husbands or widowers, already enjoyed by wives and widows, regardless of dependency).

On the executive level *see* EXEC. ORDER No. 11,246, 3 C.F.R. 169 (1974), 42 U.S.C. § 2000e (1970) (nondiscrimination by government contractors); EXEC. ORDER No. 11,478, *as amended*, 3 C.F.R. 207 (1974), 42 U.S.C. § 2000e (1970) (equal employment opportunity in the federal government); 29 C.F.R. § 800 *et seq.* (1974) (Dept. of Labor interpretations of the EQUAL PAY ACT).

2. At the time of this writing thirty-four states have passed the Equal Rights Amendment. Proposed Amendment to the United States Constitution, H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971). Four more states must ratify it before the 1979 deadline.

3. Under this higher standard of review the Court examines the articulated legislative purpose served and only upon a determination that such purpose is of overwhelming public interest and significance will the statute in question be upheld. Strict scrutiny is called into effect whenever a statute infringes upon certain "fundamental" rights, or is based on "suspect" classifications. For a compilation of cases involving fundamental rights and suspect classifications *see* Note, *No Dogs, Cats, or*

States Supreme Court has stalled progress along the latter line of attack, at least temporarily, with its recent decision in *Kahn v. Shevin*, 416 U.S. 351 (1974) by upholding a Florida statute that grants a \$500 property tax exemption to widows while refusing the same exemption to widowers.

In 1971 Mel Kahn, a widower living in Florida, applied for a \$500 property tax exemption which was made available to widows under Florida Statute § 196.191(7).<sup>4</sup> He was denied the tax exemption by the assessor's office and sought relief in the Circuit Court for Dade County, Florida. The Circuit Court held that the statute, as it applies to women only, was discriminatory and therefore was unconstitutional under the equal protection clause of the fourteenth amendment to the United States Constitution.<sup>5</sup> However, the Supreme Court of Florida reversed, holding the statute to be a valid legislative enactment.<sup>6</sup> On appeal the United States Supreme Court, Justice Douglas writing for the majority, held that the law was valid as being "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."<sup>7</sup>

In his opinion, Justice Douglas emphasized the realities of female employment in the United States.<sup>8</sup> The job market is, at best, "inhospitable to the woman seeking any but the lowest paid job."<sup>9</sup> Indeed, even when a woman obtains a job, she usually earns considerably less than her male counterpart, despite federal legislation to the contrary.<sup>10</sup> Justice Douglas argued further that

[t]he disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's

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*Voluntary Families Allowed*—*Village of Belle Terre v. Boraas*, 24 DEPAUL L. REV. 784, 792-93 nn. 47-48 (1975).

4. FLA. STAT. § 196.191(7) (1971), *as amended*, FLA. STAT. § 196.202 (1973) provides:

Property to the value of five hundred dollars (\$500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation.

*Id.*

5. *See Note*, 88 HARV. L. REV. 129 n.5 (1974) *citing Kahn v. Straughn*, No. 71-20673 (Dade County Cir. Ct., Apr. 21, 1972), *reprinted in Jurisdictional Statement for Appellant at AI*.

6. *Shevin v. Kahn*, 273 So. 2d 72 (Fla. 1973). The Florida Supreme Court felt that since women workers earn less than men, this statute was rationally related "to the ability of women property owners to pay taxes on property of even minimal value." *Id.* at 73.

7. 416 U.S. at 355.

8. *See notes 34-36 and accompanying text infra.*

9. 416 U.S. at 353.

10. *Id.* & n.4.

death in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.<sup>11</sup>

Finally, in the last paragraph of his opinion, Justice Douglas emphasized that taxation is traditionally an area in which the Supreme Court gives great leeway to the states in structuring their own programs.<sup>12</sup> In reality, however, the taxation argument appears to have been included almost as an afterthought.<sup>13</sup> Justice Douglas' opinion leaves the distinct impression that the fact that a tax program is involved in *Kahn* is valuable only to the extent it renders a decision made on other grounds easier to justify. The traditional deference shown to state tax programs is invoked to, first, help bolster the validity of this statute in the eyes of those not already totally convinced by the statistical analysis of female employment and wages in the United States,<sup>14</sup> and second, to justify the Court's lack of analysis as to those statistics and as to the possible adverse effects of this statute.<sup>15</sup>

The major issue raised by *Kahn* is what standard of review is to be applied to future claims of sex discrimination under the equal protection clause of the fourteenth amendment.<sup>16</sup> Where, if at all, does *Kahn* fit

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11. *Id.* at 354.

12. See *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Madden v. Kentucky*, 309 U.S. 83 (1940); *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932); *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1930); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Bell's Gap R.R. v. Pennsylvania*, 134 U.S. 232 (1890).

13. Although taxation is traditionally given a wide berth by the Court, it cannot justify what would otherwise be unconstitutional. See Note, 88 HARV. L. REV. 129, 133-134 n.34 (1974) citing *Falkenstein v. Dep't of Revenue*, 350 F. Supp. 887 (D. Ore. 1972), appeal dismissed, 409 U.S. 1099 (1973) (state tax exemption for discriminatory organization violates equal protection clause).

Neither can statutory classifications be justified on the basis that the tax is a privilege, as opposed to a right. See *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969).

14. *Kahn* apparently leaves us with a program that is constitutional only so long as the statistics concerning female employment remain constant. If in five or ten years female employment and wages were to be equal to or greater than that of males, then this statute would appear to be unconstitutional. The only available justification at that point would be that tax programs are given great leeway by the Court. Even on this basis, however, the affirmance of such a program would still be doubtful. The appellants raised a similar argument by noting that "[i]f appellee's [taxation] rationale is accepted, then Florida could, with at least equally 'compelling' justification, dispense tax exemption solely on the basis of race or national origin." Reply Brief for Appellant at 3. Thus, unlike affirmative action programs which attack the source of a problem and then are phased out of operation, the statute involved in *Kahn* faces the interesting prospect of becoming increasingly unconstitutional as the years pass.

15. See notes 51 through 55 and accompanying text *infra*.

16. This issue is enveloped in the much larger question of the fate of the equal

under the two-tier equal protection analysis traditionally invoked by the Court, and how does it change those standards?

Most obviously *Kahn* removes sex from any imminent "danger" of being declared a suspect classification and therefore being subjected to a strict scrutiny analysis, if indeed it was ever in such "danger."<sup>17</sup> Traditionally, the failure to invoke strict scrutiny would then relegate sex discrimination to review under minimal rationality—the less stringent level of the two-tier equal protection analysis traditionally employed by the Court.<sup>18</sup> However, the past few years have seen the Court produce decisions which depart from this strict two-tier equal protection analysis.<sup>19</sup> In *Reed v. Reed*<sup>20</sup> and *Frontiero v. Richardson*<sup>21</sup> the Court seemed willing to subject claims of sex discrimination to some type of vague, undefined "middle-tier" analysis.<sup>22</sup> The Court, however, has been exceedingly reluctant to

protection clause in general under the Burger Court. For a fuller treatment of this question see G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW*, SECTION 5 (8th ed. Supp. 1974) [hereinafter cited as GUNTHER & DOWLING]; Gunther, *The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther]. See also Note, *Cost and Judicial Management Considerations in the Right to Counsel for Indigents' Discretionary Appeals—Ross v. Moffitt*, 24 DEPAUL L. REV. 813 (1975); Note, *No Dogs, Cats, or Voluntary Families Allowed—Village of Belle Terre v. Boraas*, 24 DEPAUL L. REV. 784 (1975).

17. In *Frontiero v. Richardson*, 411 U.S. 677 (1973) four justices, in a plurality opinion written by Justice Brennan, declared themselves willing to accept sex as a suspect classification. Of those four justices, three dissented in *Kahn* (Justices Brennan, Marshall, and White). These justices retained their view that sex was indeed a suspect classification, though Justices Brennan and Marshall might have affirmed if the statute had been more narrowly tailored to meet its objectives. See 416 U.S. at 358 (Brennan, J., dissenting).

18. Minimal rationality essentially refers to the deferential old equal protection standard under which a statute that appeared to further some conceivably legitimate state interest would be upheld. See Note, *No Dogs, Cats, or Voluntary Families Allowed—Village of Belle Terre v. Boraas*, 24 DEPAUL L. REV. 784, 792 n.45 (1975).

19. Such "deviations" are by no means limited to sex discrimination cases. See *id.* at n.18 (1975).

20. 404 U.S. 71 (1971) (invalidating provision of Idaho probate code which gave preference to men over women when persons of same priority class apply for appointment as administrator of an estate).

21. 411 U.S. 677 (1973) (invalidating provision of UNITED STATES CODE allowing servicemen to automatically claim spouse as dependent while requiring service-women to prove the dependency of their spouses).

22. Note, 87 HARV. L. REV. 116, 121 (1973). *But see* *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd mem.*, 405 U.S. 970 (1972) (upholding the requirement that a wife upon marriage take her husband's surname and that she use that name in order to obtain a driver's license), and *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd mem.*, 401 U.S. 951 (1971) (upholding the operation of a state school for girls only).

announce the ingredients involved in this new standard<sup>23</sup> and, indeed, has denied creating a new standard at all.<sup>24</sup> Even though its decisions appear to reflect a "mounting discontent with the rigid two-tier formulations of the Warren Court's equal protection doctrine,"<sup>25</sup> the unwillingness of the Court to clearly pronounce its true standards of review is continued in *Kahn*.

Despite the refusal of the Court to declare sex a suspect classification, *Kahn* should not be read as returning sex-based classifications to the minimal rationality-old equal protection standard of review.<sup>26</sup> Yet, as a result of the aforementioned reluctance of the Court to enunciate its standard of review, establishing a workable "middle-tier" analysis is perhaps an

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Although *Forbush* and *Williams* appear to apply minimal scrutiny to sex classifications, both can be reconciled with the hypothesis that a middle-tier standard of review exists. In each case the court emphasized the options open to appellants. In *Forbush*, a woman could easily apply to probate court to have her name legally changed, while in *Williams*, there were seven other state schools which admitted men, and appellants could show no difference between the programs offered at these schools and the programs offered at the school to which they sought entrance. Actually *Forbush* and *Williams* appear to uphold the "sliding scale" approach described in note 24 *infra*, whereby the Court weighs the interests of the state against the interests of the individual infringed upon. Thus, although upholding classifications based on sex, these cases also lend credence to the view that something other than a strict two-tier analysis is being used by the Court in equal protection cases.

23. Such reluctance has resulted in the confusion of lower courts as to which standard to apply. See Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071, 1092 (1974) [hereinafter cited as Nowak]. For a clear example of such lower court confusion see *Wiesenfeld v. Secretary of HEW*, 367 F. Supp. 981 (D.N.J. 1973), *aff'd sub nom.* Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975).

Likewise, such vagueness has produced increased speculation by commentators trying to outline models to fit the Court's recent decisions. See Gunther, *supra* note 16; Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV. 157; Note, 87 HARV. L. REV. 116 (1973); Comment, "Newer" Equal Protection: *The Impact of the Means-Focused Model*, 23 BUFF. L. REV. 665 (1974); Nowak, *supra*. At least one authority has even suggested that the Court, in reaching for alternatives to equal protection analysis, has resurrected substantive due process. See Tribe, *The Supreme Court, 1972 Term, Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) [hereinafter cited as Tribe].

24. Only Justice Marshall has been willing to openly pronounce a break with the strict two-tier approach. In *San Antonio School District v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting), and *Dandridge v. Williams*, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting), Justice Marshall describes the "sliding scale" approach which he has advocated in other equal protection cases. The main ingredients of such an approach are that the Court analyzes and balances the classifications used, the individual interests infringed upon, and the governmental interests upheld by such infringement.

25. Gunther, *supra* note 16, at 12.

26. See Note, 88 HARV. L. REV. 129, 135 (1974).

even more unenviable task now than it has proven to be in the past. After the *Reed* decision it was suggested that the Court was using a "means" test to suddenly put "consistent new bite into the old equal protection."<sup>27</sup>

The model requires that there be an affirmative relation between means and ends—or, in more traditional equal protection terms, that there be a genuine difference in terms of the state's objective between the group within the classification and those without.<sup>28</sup>

This proposed test was further modified after the *Frontiero* decision, when it was suggested that a "strict rationality" test was being employed by the Court.<sup>29</sup> The modification lies in the Court's requirement of actual, affirmative proof that the challenged legislation meet its proposed objectives.<sup>30</sup> If the goals of the legislation are being met by the statute in question then that statute would be valid. If these tests were, in reality, the standards of review involved in the *Reed* and *Frontiero* decisions, the Court was able to determine that the Florida statute in question in *Kahn* satisfied those standards; that it bore "a fair and substantial relation to the object of the legislation."<sup>31</sup> Does such a finding have any effect on the middle-tier standard proposed after the Court's decisions in *Reed* and *Frontiero*? Does it alter the new "means-focused" model, or does it merely echo it?

As indicated, it was a statistical analysis which convinced the Court that the statute in question was indeed meeting its articulated purpose.<sup>32</sup> Despite the fact that the number of married women working full-time is

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27. Gunther, *supra* note 16, at 21.

28. *Id.* at 47.

29. Note, 87 HARV. L. REV. 116, 124 (1973). This strict rationality test hypothesizes that as long as there is *actual* proof to show that the legislative goal is furthered, the statute will be upheld.

30. *Frontiero v. Richardson*, 411 U.S. 677 (1973) might have been decided differently if the government had been able to show significant economic savings in addition to administrative convenience. *Id.* at 689; Brief for Appellees at 25.

Although evidence was adduced in *Frontiero*, it was inconclusive as to whether the ostensible goal of economy was served. The Government offered no evidence to support the contention that it was uneconomical to require servicemen to produce proof of their wives' dependency, and instead relied on the stereotype that a man is almost always the breadwinner in his family.

Note, 87 HARV. L. REV. at 122.

31. 416 U.S. at 352 quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971).

32. As to the importance of the seemingly insignificant point that the statute meet the articulated state purpose see GUNTHER & DOWLING, *supra* note 16, at 221. The idea that the Court will not supply a statutory objective but will merely examine those articulated by the state itself is an improvement over old equal protection minimal rationality.

greater than ever before,<sup>33</sup> of greater significance for the Court were facts such as the following:

- (1) In 1970, 40% of the males in the work force earned over \$10,000, and 70% over \$7,000, while 45% of the females working full-time earned less than \$5,000, and 73.9% earned less than \$7,000;<sup>34</sup>
- (2) In 1955 women's median earnings were 63.9% of men's median earnings, while in 1972 the same percentage ratio was only 57.9%;<sup>35</sup>
- (3) In 1972 the median income of women with four years of college was \$8,736—exactly \$100 higher than the median income of men with less than one year of high school, thus indicating that the disparities extend to women employed in jobs that are usually thought of as being well paid.<sup>36</sup>

Unfortunately, the Court's acceptance of these statistics is unquestioning, when perhaps it should not have been so. Indeed it could be the long-awaited advances made by women in gaining entrance to the labor market that are partially responsible for such disparate statistics. If the number of working women had remained relatively constant, then the median income of women would most likely be higher, since there would be fewer "starting scale" wages to balance against the wages earned by more experienced women. However, since the number of women entering the labor force has increased markedly, there obviously are more "starting scale" wages being earned, which in turn decreases any median income figure. Thus the Court's figures may not be as discouraging as would appear at first glance,<sup>37</sup> for they may well bear somewhat of an inverse relationship to the progress of women in the labor market. As increased numbers of working women gain skill and experience, an increase in their wages can be expected. In turn the percentage ratio between men's and women's median earnings may be expected to shift more towards an equilibrium.

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33. See Brief for Appellants at 6-7 citing Bureau of Labor Statistics U.S. Dep't of Labor, *Employment and Earnings*, 34-35 (May, 1971). By 1973 over 33 million women were in the labor force and 58.5% of these were married.

34. 416 U.S. at 353 & n.4, citing United States Bureau of the Census: *Current Population Reports*, Series P-60, No. 80.

35. *Id.* at 353-54 & n.5, citing Table prepared by Women's Bureau Employment Standards Administration, United States Dep't of Labor, from data published by Bureau of Census, U.S. Dep't of Commerce.

36. *Id.* at 354 & n.6, citing Tables prepared by Women's Bureau, Employment Standards Administration, United States Dep't of Labor.

37. See Note, 88 HARV. L. REV. 129, 132 & n.29 (1974).

Perhaps more importantly, the Court fails to analyze the relative economic strengths of widowers, who may continue working or receive their retirement benefits, and widows, who may receive their husbands' benefits, insurance money, and perhaps work themselves. It may be that, relatively speaking, widows are better off than widowers.<sup>38</sup> Such conclusions, though not necessarily true, are illustrative of the type of analysis in which the Court chose not to engage.<sup>39</sup> Realistically, of course, there can be no denial of the fact that women are discriminated against in the job market, and such a position is not advocated or argued here. Yet until factors such as work experience and length of employment are accounted for, the statistics are indeed misleading and the need for legislation such as that involved in *Kahn* can be legitimately questioned.<sup>40</sup>

Having eschewed any in depth analysis of the statistics, the Court deemed that since the strict scrutiny standard of review was not being used, the "best means" test<sup>41</sup> was inapplicable.<sup>42</sup> The state can attack the problem of women's limited economic capabilities in essentially any manner it sees fit. It need not deal with the entire problem at once, but can limit itself to dealing with that aspect of the problem that concerns widows only. Such a doctrine is not new.<sup>43</sup> It adds nothing new to the Court's

38. *Id.*

39. Perhaps the Court feared that such an examination would be tantamount to the application of strict scrutiny. However, to guard against being misled by statistics is far different from requiring a compelling state interest. Any legitimate interest should be based on at least some real evidence.

40. As indicated, text accompanying note 36 *supra*, wage disparities extend to women in "high paying" jobs. Yet even these disparities are in part explained by the experience and length of employment factors. Perhaps more indicative of the true situation in these fields is a comparison of starting salaries.

The jobs and salaries expected to be offered . . . [to] college graduates [in 1971] were reported in a survey conducted in November 1970. Salaries to be offered to women were consistently below those to be offered to men with the same college major. A comparison with 1970, however, shows a marked reduction in the spread between salaries for women and men. For 1970 the monthly gap ranged from \$86 down to \$18; for 1971 the gap ranged from \$68 down to only \$1.

*Fact Sheet on Earnings Gap*, Women's Bureau, Employment Standards Administration, United States Dep't of Labor (1972).

41. This test is an integral part of the strict scrutiny tier of analysis. Such a standard requires the legislature's choice of means to be tailored as precisely as possible to meet the proposed ends. Obviously the statute involved in *Kahn* would not meet this test since it indiscriminately included wealthy widows and excluded deserving females who were not widows. See 416 U.S. at 360 (Brennan, J., dissenting).

42. See *id.* at 356 & n.10, where Justice Douglas emphasizes this inapplicability in response to the dissents.

43. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974); *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483,

standards of review, and indeed there seems to be little difference between the proposed *Reed* and *Frontiero* means-tests and the unnamed test used to decide *Kahn*. For although the Court did not strictly compare the economic needs of widowers vis-a-vis widows it could safely conclude that the legislatively chosen means did meet the chosen ends of easing the economic burden on widows. Thus the *Reed* and *Frontiero* tests would be satisfied.

However, there is an added ingredient in the Court's view of *Kahn* which does indeed affect the proposed *Reed* and *Frontiero* tests. In addition to finding that the means fit the proposed end, it is obvious that the Court also approved the admirable end of this statute. Thus it appears that the Court is using a "demonstrable basis" standard of review<sup>44</sup> under which it examines not only the means by which a statute accomplishes its goal, but it also examines the goal itself.<sup>45</sup> It is the proposed "remedial" purpose<sup>46</sup> of this legislation that leads to its easy affirmance.<sup>47</sup> Therefore, the focal area for analysis is the degree to which a remedial or benign purpose will allow, or aid in, the affirmance of a challenged statute.<sup>48</sup>

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489 (1955); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 81 (1911). See also Note, *No Dogs, Cats, or Voluntary Families Allowed—Village of Belle Terre v. Boraas*, 24 DEPAUL L. REV. 784, 792 n.45 (1975).

44. Nowak, *supra* note 23. Under Prof. Nowak's proposed standard the minimal scrutiny and strict scrutiny standards of review of the old two-tier approach would still exist, but a third tier would be added. This middle-tier analysis, which examines means and ends, would be used to analyze those classifications, like sex, based upon the personal characteristics or status of a group (other than racial heritage). Prof. Nowak refers to such classification as "neutral classifications" and it is only these that would call the "demonstrable basis" standard of review into effect.

45. Such a view of the Court's actions might also lend credence to the suggestion that substantive due process has returned. See Tribe, *supra* note 23.

46. It is interesting to compare the Court's acceptance of this Florida statute with its rejection of those involved in *Reed* and *Frontiero*. Certainly the underlying assumption that men generally earn more money than women is no more valid than the assumption in *Reed* that men in general are more familiar with business matters, or the assumption in *Frontiero* that husbands of servicewomen are not generally dependent on their wives, while wives of servicemen are generally dependent on their husbands. However, the Court reduced the latter two assumptions to mere pretexts being used to justify statutes advancing only administrative efficiency, while refusing to do the same in *Kahn*. The only difference appears to be the supposedly remedial purpose and effect of the statute involved in *Kahn*. See 416 U.S. at 361 (White, J., dissenting) where the claim is made that administrative efficiency is the true purpose of this statute.

47. Such a result was foreshadowed by Justice Brennan in his *Frontiero* opinion. It should be noted that these statutes are not in any sense designed to rectify the effects of past discrimination against women . . . . On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages.

411 U.S. at 689 n.22.

48. Despite the supposed death of substantive due process, the Court has not hesi-

The law involved in *Kahn* is a typical example of so-called "protective" legislation.

These laws may be classified into three types:

1. those which restrict the employment of women (restrictive legislation)
2. those which prohibit the employment of women (prohibiting legislation)
3. those which provide additional benefits to women (conferring legislation).<sup>49</sup>

Obviously the statute involved in *Kahn* is a subcategory of conferring legislation. It confers a benefit on one particular class of women—widows.

For many years legislation in all three categories was thought to be in the best interests of women, and therefore was thought to be both acceptable and necessary.<sup>50</sup> However, more recently it has been argued that such legislation actually burdens women instead of helping them.<sup>51</sup> The possible ill effects of restrictive or prohibitive legislation are self-evident. Yet even conferring legislation can produce problems for the recipients of its benefits.

Even laws providing benefits such as minimum wage and a required rest period have operated to discriminate against . . . women . . . . Women are sometimes discriminated against when, for example, they are put on a schedule which includes the required rest periods, while men are not; this

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tated to examine legislative purposes in the past. *See, e.g.*, *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

49. Kennedy, *Sex Discrimination: State Protective Laws Since Title VII*, 47 *NOTRE DAME LAW.* 514, 515 (1972).

50. *See Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesart v. Cleary*, 335 U.S. 464 (1948); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

51. For commentaries on the adverse impact of protective legislation *see* Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 216, 222-23 (1971); Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871, 923 (1971) [hereinafter cited as Brown]; Durant, *The Validity of State Protective Legislation for Women in Light of Title VII of the Civil Rights Act of 1964*, 6 *SUFFOLK L. REV.* 33, 34 (1971); Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 *CORNELL L. REV.* 262, 265-66 (1970); 29 *C.F.R.* § 1604 *et seq.* (1974) (Equal Employment Opportunity Commission's guidelines on discrimination because of sex). *See also* Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), *prob. juris. noted*, 415 U.S. 911 (1974) (exemption of women from jury service held unconstitutional); *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971) (hour and weight restrictions on women employees declared invalid); *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970) (hour and weight restrictions on women invalid); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (invalidating state statute prohibiting certain women from tending bar); *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970) (municipal restrictions against women bartenders held invalid).

arrangement is then used to justify paying women less and limiting them to certain jobs.<sup>52</sup>

Even if the sole harm of such statutes is the perpetuation of the sexual stereotypes upon which they are based, this in itself can have serious effects. Not only does the perpetuation of such sexual stereotypes provide employers with a handy tool for rationalizing their hiring and compensation policies, but the psychological effects on women themselves can be significant.<sup>53</sup> Women are discouraged from breaking out of the pattern set for them. "A weak sense of self is consistent with the woman's perception that the culture devalues her."<sup>54</sup> Even the woman who does break the pattern may not be secure.

Women's image as passive, non-competitive, and intellectually inferior is so pervasive that competitive excellence is likely to contradict even the woman's internal definition of femininity. Superior performance may signify to the competing woman that she is not truly "female."<sup>55</sup>

It is in just this crucial area, the true effect of protective legislation, that the Court in *Kahn* once again fails to produce any meaningful analysis.<sup>56</sup> Although it examines the statutory objectives in the sense of overall approval or disapproval, the Court eschews any real analysis of whether this statute harms women more than it helps them, or even harms at all those it purports to help.<sup>57</sup> Perhaps this lack of analysis is explained by the fact that, although theoretically advanced by appellant,<sup>58</sup> no concrete example was offered to show how this statute could possibly harm women.<sup>59</sup> Possibly, since appellant was a male seeking the benefits of this legislation,

52. Brown, *supra* note 51, at 927.

53. See Note, "A Little Dearer Than His Horse": Legal Stereotypes and the Feminine Personality, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260, 273-83 (1971).

54. *Id.* at 274.

55. *Id.* at 279.

56. See Note, 88 HARV. L. REV. 129, 138 (1974).

57. One may in theory question whether a court should examine the "true effects" of legislation once the purpose has been found constitutionally acceptable. Yet, in reality, courts must examine such effects to guard against "sham statutes" which have the purported purpose of benefiting a group while actually harming them. Thus in order for a court to truly examine the purpose of a statute it must also examine the real world effects of that statute. *Cf.* *Wiesenfeld v. Secretary of HEW*, 367 F. Supp. 981 (D.N.J. 1973), *aff'd sub nom. Weinberger v. Wiesenfeld*, 95 S. Ct. 1225 (1975).

58. Brief for Appellants at 12-13.

59. See Note, 88 HARV. L. REV. 129, 138 & n.58 where it is suggested that even though this Florida statute by itself might be of minimal influence, the accumulation of such statutes could strengthen the desire of a husband to work while his wife stays at home.

More importantly, however, is the perpetuation of the stereotype inferiority mentality which gives incentives to and justifications for employers to pay women less. It is such a mentality that really inhibits women from making even more significant advances on the equal work and pay front.

such examples would be inappropriate if raised by him. Indeed, the fact that appellant seeks the benefits of this exemption obviously clouds the issue of possible harmful effects. Apparently, to the Court's way of thinking, if appellant desires to be included within the purview of this statute, then those already within that purview must be benefiting.

Perhaps the Court is correct in these assumptions.<sup>60</sup> The lack of analysis concerning the benefits of this legislation, coupled with the lack of analysis concerning the employment statistics, is perhaps indicative of the Court's unwillingness to remove such benefits by eradicating such legislation. Yet the Court need not have feared such a result. There is abundant argument and precedent for extension of such beneficial legislation, as opposed to its eradication.<sup>61</sup> If these benefits were extended to widowers, then not only would the discriminatory feature of this statute disappear, but any possible adverse effects would also disappear. The sexual stereotype would no longer be perpetuated and the psychological effects therefrom could be expected to decrease. Yet the Court totally ignores the alternative of extension.<sup>62</sup>

The failure of the Court to attempt a critical evaluation of the true effects of this statute has further significance. It indicates not only that the Court is very willing to uphold remedial legislation, but that the important threshold determination of whether a statute is indeed remedial in nature will receive only a cursory examination by the Court. As long as a classification is not involved which requires strict scrutiny,<sup>63</sup> little justification

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60. Widows certainly do benefit from this statute, but the issue ignored by the Court is the weighing and balancing of benefits received against the harms inflicted.

61. See, e.g., *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (federal food stamps); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (dependents' benefits for armed services personnel); *Gomez v. Perez*, 409 U.S. 535 (1973) (child support under state law); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (workmen's compensation and illegitimates); *Graham v. Richardson*, 403 U.S. 365 (1971) (state public assistance). *But see* *Homemakers, Inc. v. Division of Indus. Welfare*, 356 F. Supp. 1111 (N.D. Cal. 1973) (maximum hours and overtime pay for women); *Burns v. Rohr Corp.*, 346 F. Supp. 994 (S.D. Cal. 1972) (rest breaks for women). See also Note, *Employment Practices and Sex Discrimination: Judicial Extension of Beneficial Female Protective Labor Laws*, 59 CORNELL L. REV. 133 (1973).

62. The conclusion to be drawn is that extension of laws only comes into consideration after a statute has been found unconstitutional. The fact that an alternative to eradication of the statute exists will not influence the Court in its initial determination of constitutionality. However, the Court should similarly not let the prospect of eradication inhibit its examination of the true effects of a statute.

63. Even where suspect classifications have been involved, affirmative action programs have never been ruled unconstitutional *per se*. Courts often impose such programs themselves. See, e.g., *Southern Ill. Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *United States v. Iron Workers Local 86*, 443 F.2d 544 (9th Cir. 1971),

will be required for the approval of such legislation.<sup>64</sup> The Court will not be very demanding even though such legislation merely attempts to ameliorate the effects of an inequitable situation without in any way attacking the root causes of that inequity.<sup>65</sup> Yet such deference will only apply where the purpose served<sup>66</sup> is approved by the Court, and is actually furthered by the means chosen.

### CONCLUSIONS

The legitimate conclusions to be drawn from *Kahn* are, in reality, few in number and speculative in nature. The safest and most straight-for-

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*cert. denied*, 404 U.S. 984 (1971); *Contractors Ass'n of E. Pa. v. Hodgson*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); *United States v. Electrical Workers Local 38*, 428 F.2d 144 (6th Cir. 1970).

64. The difference in the justification required can be seen by comparing Justice Douglas' opinion in *Kahn* with his opinion in *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting). In *DeFunis* Justice Douglas continually emphasized that the University of Washington Law School should treat all applicants "in a racially neutral manner." *Id.* at 337. No such consideration of neutral treatment came into play in *Kahn*.

Justice Stewart hinted at the Court's mentality in an informal discussion with Harvard students in March, 1973. Justice Stewart wondered why women would want the passage of the Equal Rights Amendment. Today "the female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her." Ginsberg, *The Need for the Equal Rights Amendment*, 60 WOMEN LAW. J. 4 (1974).

65. Such mere treatment of effects is very carefully guarded against in racial discrimination cases. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Although the line is not always easily drawn between permissible and impermissible affirmative action programs, if such distinctions were not drawn the result would be obvious. Either past discrimination would never be remedied or else affirmative action programs would be reduced to the absurd.

Obviously, it is only a question of time before everyone will declare an ethnic identity in order to get priorities. Within a very short period, the only group without priorities will be the WASPS, who by then should be sufficiently legally disadvantaged to qualify as members of a legally disadvantaged minority group, so they too, will be finally declared a disadvantaged minority.

Flaherty & Sheard, *DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas*, 12 DUQUESNE L. REV. 745, 786 (1974). But see Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being usually suspicious, and, consequently, employing a stringent brand of review, are lacking.

*Id.* at 735.

66. Apparently the one interest which can be most easily rejected as being acceptable is administrative convenience, although in the end many of the remedial statutes may be reduced to the level of administrative convenience; see note 37 *supra*.

ward conclusion is that sex will not be declared a suspect classification by the United States Supreme Court. However, this does not indicate that all claims of sex discrimination are to be relegated to the old equal protection minimal rationality standard of review. The implication is that the Court will treat remedial legislation with deference. More importantly, the threshold requirement that the interests served truly be remedial in nature can apparently be rather easily met. When faced with programs which are not remedial in nature, or which clearly harm women while claiming to help them, the Court may very well strike down challenged statutes, although probably on grounds other than equal protection.<sup>67</sup>

Justice Douglas himself perhaps best personifies this "split-personality" profile of the Court. In the recent case of *Geduldig v. Aiello*<sup>68</sup> Justice Douglas, in dissent, returned to his *Frontiero* view that sex is indeed a suspect classification.<sup>69</sup> While for the rest of the Court the difference between a non-remedial and remedial program is not so drastic as to make sex a suspect classification in the former while not in the latter, nonetheless there can be little doubt that the Court as a whole views non-remedial legislation with a much sterner eye.<sup>70</sup> Without Supreme Court guidance

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67. It appears that the Court is studiously trying to avoid equal protection clause decisions, especially in the area of sex discrimination. As often as possible the Court is turning to procedural due process analysis. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972). See also GUNTHER & DOWLING, *supra* note 16, at 268.

68. 94 S. Ct. 2485 (1974). In *Geduldig* the Court upheld the California employee funded disability program which did not include normal pregnancies in its coverage. However, the Court side-stepped the issue of permissible versus impermissible classifications based on sex by specifically finding that the California program did not contain any sex based classifications.

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed . . .* and *Frontiero . . .*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics.

*Id.* at 2492 n.20. For a fuller discussion of pregnancy benefits see Comment, *Current Trends in Pregnancy Benefits—1972 EEOC Guidelines Interpreted*, 24 DEPAUL L. REV. 127 (1974).

69. 94 S. Ct. at 2492 (Brennan, J., dissenting, joined by Douglas, J.).

70. An indication of the Court's willingness to accept programs especially benefiting women is the recent decision of *Schlesinger v. Ballard*, 95 S. Ct. 572 (1975). The Court upheld the Navy's mandatory discharge policy for male line officers twice passed over for promotion, but allowing female line officers to serve 13 years regardless of promotion. Interestingly enough, once again the existence of such a policy could be a significant factor in preventing deserved female promotions since their jobs are "guaranteed" by statute. Note also that Justice Douglas dissented in *Ballard*, though the distinction between this case and *Kahn* is not at all clear. Although *Ballard* was brought and decided under the fifth amendment due process clause, it is still indicative of the Court's attitude toward protective legislation.

in this area the eradication or extension of such legislation is bound to be haphazard, at best.<sup>71</sup> Apparently if such protective legislation is to be consistently dealt with it will be necessary for state courts to declare sex a suspect classification<sup>72</sup> or for state legislatures to pass the Equal Rights Amendment.<sup>73</sup>

In addition to the Court's analysis in relation to remedial legislation, *Kahn* is an apparent continuation of that line of cases beginning with *Reed* and *Frontiero* which, while claiming to use minimal rationality, appear to examine both the ends and means of a questioned statute. Such a middle-tier analysis requires a legitimate, articulated state interest which is in fact demonstrably met by the means chosen—the “demonstrable basis” standard. Although this generalization of a standard analysis to be used in all sex discrimination-equal protection cases is the most tenuous of all the conclusions drawn, there is nothing as yet to indicate that the proposed model<sup>74</sup> is invalid. Whether the Court will provide more decisions with which to test this middle-tier standard remains to be seen.<sup>75</sup>

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71. Compare *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974) (Ga. statute allowing alimony for wives only violates equal protection and due process) with *Husband M. v. Wife M.*, 321 A.2d 115 (Del. 1974) (upheld statute authorizing divorce courts to award a wife, but not a husband, a reasonable share of spouse's property).

72. At least three states have declared sex a suspect classification. See *People v. Ellis*, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); *Hanson v. Hutt*, 83 Wash. 2d 195, 517 P.2d 599 (1973); *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). Of course, even the application of strict scrutiny will not overcome protective legislation which meets a compelling state interest. Even TITLE VII allows discrimination if the reason for the discrimination constitutes a bona fide occupational qualification [bfoq]. TITLE VII § 703(e), 42 U.S.C. § 2000e-2(e). However, the scope of the bfoq exception has been fairly narrowly construed to date. See *Oldham, Questions of Exclusion and Exception Under Title VII—"Sex Plus" and the BFOQ*, 23 HASTINGS L.J. 55 (1971).

73. The effect of the Equal Rights Amendment on such legislation is not entirely clear, however, the particular statute involved in *Kahn* would appear to be invalid.

So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex.

*Brown*, *supra* note 51, at 893. Clearly the *Kahn* statute does not meet this standard. However, programs such as the one involved in *Geduldig* could still very well meet this standard and therefore be valid under the Equal Rights Amendment.

74. For a full illustration of how the demonstrable basis standard applies to all equal protection clause cases (in addition to sex discrimination claims) see *Nowak, supra* note 23, at 1093-97.

75. *Healy v. Edwards*, 363 F. Supp. 1110 (E.D. La. 1973), *prob. juris. noted*, 415 U.S. 911 (1974) (invalidating a La. statute which exempted women from jury serv-

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ices unless they file a written declaration of their desire to serve) is now awaiting decision by the Supreme Court, *see* 43 U.S.L.W. 3262 (U.S. Nov. 5, 1974). For a summary of oral argument in *Healy* *see* 43 U.S.L.W. 3221 (U.S. Oct. 22, 1974). However, in the companion case of *Taylor v. Louisiana*, 95 S. Ct. 692 (1975) the Court has decided that the statute at issue in *Healy* is indeed unconstitutional. The Court based its decision on a finding that such a jury system deprives a criminal defendant of his right to an impartial jury as guaranteed by the sixth and fourteenth amendments. Thus, the Court did not reach the issue of sex discrimination. The disposition of *Healy*, in light of the decision in *Taylor*, is not likely to reach this issue either.

*Wiesenfeld v. Secretary of HEW*, 367 F. Supp. 981 (D.N.J. 1973), *aff'd sub nom. Weinberger v. Wiesenfeld*, 95 S. Ct. 1225 (1975) (extending certain social security benefits to widowers) was thought to be the needed test case. The lower court in *Wiesenfeld* squarely faced the issue of what standard of review to apply to claims of sex discrimination, and rejected the concept of any middle-tier standard. The court chose to view sex as a suspect classification and thus subjected the statute to the strict scrutiny standard of review. For a summary of the anticipated significance of a Supreme Court decision in *Wiesenfeld* *see* PREVIEW OF UNITED STATES SUPREME COURT CASES, Jan. 28, 1975 (No. 24).

In the weeks since the original writing of this Note the Court has affirmed the *Wiesenfeld* decision in *Weinberger v. Wiesenfeld*, 95 S. Ct. 1225 (1975) and studiously avoided the mention of any standard of review in its decision. It should be noted that the *Weinberger* decision would not appear to affect this note's analysis of the Court's attitude toward benign legislation. The Court rejected the government's claim that the statute was motivated to protect widows unable to obtain a job in the labor market, and found that its purpose was to afford a single parent with children the option to stay at home or work. Thus the statute was not examined from the point of view being protective legislation and the differentiation based on sex was found irrelevant.