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Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975)

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CASE COMMENTS

Constitutional Law—EQUAL PROTECTION—DENYING SOCIAL SECURITY "MOTHER'S INSURANCE BENEFITS" TO FATHERS VIOLATES EQUAL PROTECTION COMPONENT OF FIFTH AMENDMENT DUE PROCESS CLAUSE.—*Weinberger v. Wiesenfeld,* 95 S. Ct. 1225 (1975).

Paula Polatschek worked as a teacher for five years prior to marrying Stephen Wiesenfeld in 1970. She continued teaching thereafter; her earnings were the couple's principal source of support.[1] Throughout her employment, maximum social security contributions were deducted from her salary. On June 5, 1972, Paula died in childbirth leaving Stephen with sole responsibility for the care of their infant son, Jason Paul. Shortly after Paula's death, Stephen applied for survivor's benefits for his son and himself under separate provisions of the Federal Social Security Act.[2] Although Jason's application was approved, Stephen was denied benefits under section 402(g), which provides survivor's benefits only to mothers.[3]

Stephen brought suit in a three-judge federal district court[4] seeking declaratory and injunctive relief. He contended that section 402(g), by making an impermissible gender-based classification, contravened the equal protection guarantee[5] of the Constitution. The three-judge court granted summary judgment to Stephen, declaring that section 402(g) unconstitutionally discriminated against women such as Paula who are principal breadwinners for their families, "as well as against

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1. Stephen worked as a self-employed consultant, having completed his education before the marriage. Paula's yearly earnings were in the $10,000 range, while Stephen's fluctuated around $2,500. Weinberger v. Wiesenfeld, 95 S. Ct. 1225, 1229 n.4 (1975).

2. The section of the Social Security Act relevant to Jason is 42 U.S.C. § 402(d) (1970), which provides benefits for minor dependent children of an individual who dies fully or currently insured, regardless of the gender of the deceased parent. Stephen sought benefits under 42 U.S.C. § 402(g) (1970). Headed "Mother's insurance benefits," it provides in pertinent part:

> (1) The widow . . . of an individual who died a fully or currently insured individual, if such widow . . . (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 . . . .

3. *See* note 2 *supra.*

4. Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981 (D.N.J. 1973).

5. Since § 402(g) is federal legislation, the ruling constitutional clause for an equal protection challenge is the fifth amendment. The *Wiesenfeld* Court noted:

> "[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.'" . . . This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.

95 S. Ct. at 1228 n.2 (citations omitted).

men and children who have lost their wives and mothers . . . ."[6] Reading previous Supreme Court decisions as including gender-based classifications among those labeled "inherently suspect," the court found that the alleged governmental interests could not survive the close judicial scrutiny necessitated by such "suspect" classifications.[7]

On appeal, the Supreme Court, without dissent, affirmed that section 402(g) was an unconstitutional violation of the equal protection component of fifth amendment due process,[8] but declined to rest its decision upon, or even address, the lower court's ruling that gender is an "inherently suspect" classification. Without clearly indicating what standards of scrutiny were being applied, the Court held that the statute discriminated against female wage earners by affording their survivors less protection than that afforded the survivors of male wage earners.[9] The Court found that the statute's purpose was not, as the government contended, to ameliorate economic discrimination against women attempting to provide for themselves. Rather, the Court found, the legislative intent was to permit widowed mothers to devote themselves to the care of children by electing not to work.[10] Viewing the statute from this benefit-of-the-child vantage point, the Court found the sex of the sole surviving parent irrelevant and the gender-based distinction irrational and therefore unconstitutional.[11]

Historically, the Court has used a two-tiered standard to resolve equal protection challenges to statutory classifications.[12] Strict judicial scrutiny of legislation is triggered by a classification that is "inherently suspect"[13] or one that restricts a "fundamental right."[14] When strict

6. 367 F. Supp. at 991.

7. *Id.* at 990-91.

8. Weinberger v. Wiesenfeld, 95 S. Ct. 1225, 1236 (1975).

9. *Id.* at 1232.

10. *Id.* at 1235.

11. *Id.* at 1235-36.

12. For the first comprehensive examination of these traditional standards see *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969), which uses the terms "restrained review" and "active review." *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications,* 62 GEO. L.J. 1071 (1974); Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause,* 26 STAN. L. REV. 155 (1973); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach,* 58 VA. L. REV. 1489 (1972).

13. The Court has been extremely selective as to what classifications it will term "suspect." The only classifications consistently so labeled have been race, Loving v. Virginia, 388 U.S. 1 (1967); alienage, Graham v. Richardson, 403 U.S. 365 (1971); and national origin, Korematsu v. United States, 323 U.S. 214 (1944). *See* Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

14. Only certain interests have been classified as "fundamental" by the Court. *See* Gunther, *supra* note 12, at 8-9.

scrutiny is invoked, the government must show a "compelling" or "overriding" interest to justify its statutory classification.[15] Classifications that are neither suspect nor affect fundamental rights have generally invoked only minimal scrutiny. The government then is required to offer only a "reasonable" or "rational" basis for the legislation.[16] These polar standards, though analytical in theory, have been conclusory in effect. The Court, when applying minimal scrutiny, has upheld legislation having any conceivable basis; when applying strict scrutiny, the Court has struck the legislation.[17]

The earliest gender-based classifications were upheld under the minimal scrutiny test with its concomitant deference to legislative action.[18] However, in 1971, a unanimous Court in *Reed v. Reed* invalidated for the first time state legislation that rested on a gender-based classification.[19] The language of the decision did not betray a break with the rational basis test,[20] but the Court's process of identifying the alleged governmental interest implied a stricter form of scrutiny. The only legislative objective found was administrative convenience, and the Court concluded that a sex classification was an unreasonable method of furthering that objective.[21] By thus invalidating a statute under the rational basis test, the Court broke its pattern of according the two-tiered test a conclusory effect.[22]

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15. In *In re* Griffiths, 413 U.S. 717 (1973), the Court noted:

> The state interest required has been characterized as "overriding," [McLaughlin v. Florida, 379 U.S. 184, 196 (1964)]; Loving v. Virginia, 388 U.S. 1, 11 (1967); "compelling," Graham v. Richardson, [403 U.S. 365, 375 (1971)]; "important," Dunn v. Blumstein, 405 U.S. 330, 343 (1972), or "substantial," *ibid.* We attribute no particular significance to these variations in diction.

413 U.S. at 722 n.9. *See also* Nowak, *supra* note 12, at 1074.

16. *See, e.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); REA v. New York, 336 U.S. 106 (1949). *See also* Nowak, *supra* note 12, at 1074.

17. Gunther, *supra* note 12, at 8; Nowak, *supra* note 12, at 1074. *But see* note 22 *infra* as to the development of an intermediate standard of review.

18. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (Florida statute exempting women from jury duty unless they specifically desired to serve); Goesaert v. Cleary, 335 U.S. 464 (1948) (Michigan statute prohibiting licensing of females as bartenders); Muller v. Oregon, 208 U.S. 412 (1908) (Oregon statute prohibiting female employment in any factory in excess of 10 hours per day).

19. 404 U.S. 71 (1971). The Idaho statute at issue in *Reed* required that preference be given to males when several persons seeking to administer an estate were otherwise equally entitled to be chosen.

20. "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Id.* at 76, *quoting* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

21. 404 U.S. at 76.

22. Some commentators see in *Reed* and other cases the beginnings of a new, intermediate "rational scrutiny" test. *See* Gunther, *supra* note 12, at 21. Professor Gunther

Almost two years later, in *Frontiero v. Richardson*,[23] eight Justices found a gender-based statute to be violative of the equal protection clause. Four of the Justices[24] would have included among "inherently suspect" classifications those based on gender, indicating the basis for such a move to be implicit in *Reed*.[25] Three Justices rejected such a reading of *Reed* and declined to label gender a "suspect" classification.[26] The eighth Justice stated only that the legislation was invalid under *Reed*.[27] Although the decision in *Frontiero* strengthened the notion that stricter standards are to be used in gender classification challenges, the lack of a clear majority left the question of appropriate future standards unclear.[28]

Later pronouncements of the Supreme Court dealing with gender-based classifications and equal protection challenges[29] introduced a new

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examined six Burger Court cases in which the equal protection issue was central but which dealt with neither suspect classifications nor fundamental rights. From these cases he hypothesized a model of "modest interventionism" or "intermediate standard of review" or "rational scrutiny": "In all of the cases, the Court was . . . less inclined to tolerate substantial over- and underinclusiveness in deference to legislative flexibility." *Id.* at 33. *See also* Nowak, *supra* note 12, at 1081 ("demonstrable basis" standard); Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause, supra* note 12, at 158 ("near-suspect" test); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach, supra* note 12, at 1497 ("balancing" test). These commentators attribute the emergence of this new test to the Court's disgruntlement with the rigid two-tiered standard and its conclusory effect. *Cf.* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

23. 411 U.S. 677 (1973). *Frontiero* involved a federal statute requiring military servicewomen to demonstrate affirmatively the dependency of their spouses in order to obtain additional benefits, even though servicemen's spouses were presumed dependent.

24. The plurality opinion authored by Justice Brennan was joined by Justices Douglas, White and Marshall.

25. 411 U.S. at 682.

26. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred but found it "unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding." *Id.* at 691-92. Justice Powell urged the Court to reserve for the future any expansion of its rationale in light of the pending ratification of the Equal Rights Amendment and the fact that the case could be decided simply on the authority of *Reed*. *Id.*

27. Justice Stewart concurred in the judgment, citing *Reed* and agreeing only "that the statutes before us work an invidious discrimination in violation of the Constitution." 411 U.S. at 691. Justice Rehnquist entered the only dissent.

28. *See* Erickson, *Women and the Supreme Court: Anatomy is Destiny*, 41 BROOK. L. REV. 209 (1974); Comment, *Sex Discrimination and Equal Protection: An Analysis of Constitutional Approaches To Achieve Equal Rights for Women*, 38 ALB. L. REV. 66 (1973); Note, *Evaluating Sex Classifications: The Search for Standards*, 23 CATH. U.L. REV. 599 (1974); 2 FLA. ST. U.L. REV. 166 (1974).

29. In addition to the cases discussed in the text, two cases were handed down which involved equal protection challenges but in which the Court declined to find a gender-based classification at all: Geduldig v. Aiello, 417 U.S. 484 (1974) (constitutionality of excluding pregnancy from disability insurance benefits program); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (constitutionality of mandatory maternity leaves). These

factor. *Kahn v. Shevin*[30] and *Schlesinger v. Ballard*[31] sustained gender-based legislation, apparently because of the ameliorative purpose of the statutes.[32] However, neither case precisely identified the manner in which the remedial nature of the statutory objective affected the Court's analysis.[33] It is difficult to discern whether the two cases involved a shift to less stringent standards than those applied in *Reed* and *Frontiero*, independent of the factor of remedial legislative purpose, or whether the ameliorative factor was controlling.[34] Nevertheless, the two cases

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two cases indicate an additional pitfall for equal protection challenges of gender-based classifications: if the Court is not persuaded a classification is in fact gender-based, it will invoke neither *Reed* nor *Frontiero* standards.

30. 416 U.S. 351 (1974). The Court there sustained, against a widower's equal protection challenge, a Florida statute which allowed a property tax exemption to widows but not to widowers.

31. 419 U.S. 498 (1975). The Court there sustained, against a male Navy officer's equal protection challenge, federal statutes which provided different promotion standards for males and females.

32. Interpretation of *Kahn* is complicated by the fact that the case involved a tax statute and by the Court's specific reference, 416 U.S. at 355, to the traditional leeway given classifications drawn for tax purposes. Whether state revenue measures have always received such deference may be questioned. *See* Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617, 668 n.183 (1974); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 133 n.34 (1974). In any case, the tax element appears to have been only one factor in the Court's analysis. It was not emphasized again in the opinion. *See* 14 WASHBURN L.J. 127, 129 n.16 (1975). In later opinions, *Kahn* has been cited only in reference to the compensatory statutory scheme. *See* Weinberger v. Wiesenfeld, 95 S. Ct. 1225, 1233 (1975); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); *id.* at 518 (Brennan, J., dissenting).

In *Ballard*, in addition to the remedial statutory purpose, the Court recognized the government's interest in maintaining effective leadership by an "up or out" promotional philosophy. 419 U.S. at 510. However, in the dissenting opinion Justice Brennan argued that this factor should not be relevant to ascertaining the validity of the statutory scheme. *Id.* at 519-20.

33. *Reed* was interpreted in *Kahn* as requiring that a classification bear "'"a fair and substantial relation to the object of the legislation."'" 416 U.S. at 355, *quoting* Reed v. Reed, 404 U.S. 71, 76 (1971), *and* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The test applied in *Ballard* seems to be the traditional rational basis test, under which the Court frequently will suggest a permissible rationale for legislation. "Congress *may* thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts . . . ." 419 U.S. at 508 (emphasis added). The dissent criticized this approach: "While we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications . . . [n]ever, to my knowledge, have we endeavored to sustain a statute upon a supposition . . . when the asserted justification can be shown conclusively *not* to have underlain the classification in any way." *Id.* at 520 (Brennan, J., dissenting) (citations omitted).

34. The Court may have regarded the allegedly remedial purposes of the *Kahn* and *Ballard* statutes as controlling, reasoning either that remedial legislation reflects a legitimate state interest sufficient to satisfy heightened scrutiny, or that remedial purposes justify a relaxation of scrutiny. For discussion of the ways in which the remedial purpose of the *Kahn* statute could have influenced the Court, see *The Supreme Court, 1973 Term*, *supra* note 32, at 134-35.

were consistent in two respects: neither held that *Frontiero* meant gender-based classifications would invoke strict judicial scrutiny,[35] though the dissenters in both urged such a reading;[36] and neither case required a threshold determination of whether the statute's effect was in fact remedial, likewise a source of consternation to the dissenters.[37]

Stephen Wiesenfeld's challenge to the social security survivor's benefits program seemed to offer a model case for clarification of the Court's previous holdings, especially in light of the lower court's "inherently suspect" ruling[38] and the government's contention that the challenged legislation had an ameliorative purpose.[39] Unfortunately, the Supreme Court's decision and rationale were not as enlightening as they might have been on either the question of proper equal protection standards for gender-based legislation or the significance of an allegedly ameliorative purpose. The Court declined to use, or even acknowledge, the "inherently suspect" language of the *Frontiero* plurality.[40] However, it did give support to a premise that first emerged in *Ballard*: the fatal attribute of gender-based legislation is the presence of

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35. In *Kahn,* the majority opinion distinguished *Frontiero* simply as not having dealt with ameliorative purposes. 416 U.S. at 355. In *Ballard,* the majority distinguished *Reed* and *Frontiero* as cases premised on overbroad generalizations that could not be constitutionally legitimated by claims of administrative convenience. 419 U.S. at 506-08. Neither the *Kahn* nor *Ballard* majority opinion mentioned the *Frontiero* plurality's insistence on applying strict scrutiny to gender-based classifications.

36. In *Kahn,* Justice Brennan's dissent urged that sex was a suspect classification and that the statute was overinclusive. 416 U.S. at 357-58. Justice White dissented because he felt that the statute was both overinclusive and underinclusive. 416 U.S. at 361. In *Ballard,* Justice Brennan's dissent reiterated his position that sex was a suspect classification. 419 U.S. at 511.

37. In *Kahn,* both dissents questioned whether the legislation in fact achieved its ameliorative goal. 416 U.S. at 360 (Brennan, J., dissenting); 416 U.S. at 361 (White, J., dissenting). Dissenting in both *Kahn* and *Ballard,* Justice Brennan argued that a true ameliorative purpose could meet the compelling standard, but he questioned the existence of such a purpose in the *Kahn* and *Ballard* statutes. 416 U.S. at 358-60; 419 U.S. at 518. *See* note 33 *supra.*

38. The three-judge court rejected the contention that *Reed* and *Frontiero* had established a new intermediate equal protection test. Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 988 (D.N.J. 1973). The court went on to read *Frontiero* as having decided that gender is an "inherently suspect" classification. *Id.* at 990. In addition, though *Kahn* and *Ballard* had not yet been decided by the Supreme Court, the lower court scrutinized the possible remedial purpose of Congress' statute, and indicated that it would survive a rational basis test but not the necessary strict scrutiny. *Id.* at 991.

39. The government contended that § 402(g) was designed to offset the adverse economic situation of women by providing a widow with financial assistance. 95 S. Ct. at 1233.

40. This is significant since Justice Brennan, the author of *Wiesenfeld,* wrote the plurality opinion in *Frontiero* and wrote dissents in *Kahn* and *Ballard, see* note 36 *supra,* urging acceptance of strict scrutiny for gender-based classifications.

"archaic and overbroad" generalizations based on impermissible assumptions about gender.[41]

Since the *Wiesenfeld* decision, the Court has again addressed the problem of standards for gender-based classifications. In *Stanton v. Stanton,*[42] with reference to differing ages of majority for males and females in the context of child support, the Court stated, "We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect."[43] Citing *Reed* as controlling, the Court found "nothing rational" in the sex distinction drawn by the majority age statute, which imposed " 'criteria wholly unrelated to the objective of that statute.' "[44] As to the standards applied, the *Stanton* Court stated, "[U]nder *any* test—compelling state interest, or rational basis, or something *in between*—[the statute] in the context of child support, does not survive an equal protection attack."[45] While the *Stanton* decision did not mention "archaic and overbroad" generalizations, it did find that certain "old notions" about sex roles could not support the statute's validity.[46]

The approach taken in *Wiesenfeld* and *Stanton* lends credence to the theory that, when precedent permits, the present Court will engage in some form of intermediate scrutiny of statutory classifications rather than extend the reach of the rigid two-tiered test. This approach diminishes the likelihood of gender being classified as "suspect" within the two-tiered standard. The Court seems to favor a case-by-case search for situations to which it can apply any number of key phrases, such as

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41. In *Ballard,* the Court stated:

> In both *Reed* and *Frontiero* the challenged classifications based on sex were premised on overbroad generalizations that could not be tolerated under the Constitution. In *Reed,* the assumption . . . was that men would generally be better estate administrators than women. In *Frontiero,* the assumption . . . was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.

419 U.S. at 507. In *Wiesenfeld,* the Court identified "[a] virtually identical [to *Frontiero*] 'archaic and overbroad' generalization . . . that male workers' earnings are vital to the support of their families, while the earnings of female wage-earners do not significantly contribute to their families' support." 95 S. Ct. at 1231 (citations omitted).

42. 95 S. Ct. 1373 (1975).

43. *Id.* at 1377.

44. *Id.* at 1378.

45. *Id.* at 1379 (emphasis added). Only Justice Rehnquist dissented.

46. *Id.* at 1378. The "old notions" referred to included assumptions

> "that generally it is the man's primary responsibility to provide a home and its essentials," . . . that "it is a salutary thing for him to get a good education and/or training before he undertakes those responsibilities," . . . that "girls tend generally to mature physically, emotionally and mentally before boys"; and that "they generally tend to marry earlier," . . . .

95 S. Ct. at 1376 (citations omitted).

"archaic and overbroad generalizations," drawn from its previous decisions.[47] When those phrases are not used, the Court appears content merely to cite *Reed* or *Frontiero* as controlling rather than address the question of appropriate equal protection standards.[48]

A side effect of the Court's present ad hoc approach is the more subtle form of discrimination inherent in case-by-case inquiries into the validity of gender distinctions; such inquires imply that courts—and society—are inherently more tolerant of gender-based discrimination than of discrimination based on other immutable traits, such as race. One sure remedy for this unpalatable side effect would be consistent judicial acknowledgement that classifications based on gender are greatly disfavored—or "inherently suspect."[49] An even more effective move toward elimination of this side effect would be the prohibition of *any* classification based on gender, an idea embodied in the proposed twenty-seventh amendment to the United States Constitution, the so-called ERA.[50] Commentators have urged that prohibition of gender-specific statutes would not defeat the beneficial aspects of existing gender-based legislation, since those aspects could be retained in sex-neutral language.[51] In addition, the effect of the prohibitory language

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47. In addition to "archaic and overbroad generalizations," discussed in note 41 *supra*, the Court frequently cites such key *Reed* phrases as: "dissimilar treatment for men and women who are . . . similarly situated," 404 U.S. at 77, *quoted in* Weinberger v. Wiesenfeld, 95 S. Ct. 1225, 1236 (1975); Schlesinger v. Ballard, 419 U.S. 498, 506, 507 (1975); Frontiero v. Richardson, 411 U.S. 677, 683, 688, 690 (1973); and "criteria wholly unrelated to the objective of that statute," 404 U.S. at 76, *quoted in* Stanton v. Stanton, 95 S. Ct. 1373, 1378 (1975). A key *Frontiero* phrase is *"solely* . . . for administrative convenience," 411 U.S. at 690, *quoted in* Schlesinger v. Ballard, *supra* at 506; Kahn v. Shevin, 416 U.S. 351, 355 (1974).

48. For instance, the Court stated in *Stanton*, *"Reed,* we feel, is controlling here." 95 S. Ct. at 1377; stated in *Wiesenfeld,* "The gender-based distinction made by § 402(g) is indistinguishable from that invalidated in [*Frontiero*] . . . ." 95 S. Ct. at 1230; "[I]t is indistinguishable from the classification held invalid in *Frontiero," id.* at 1236; and stated in *Kahn,* "This is not a case like *Frontiero* . . . ." 416 U.S. at 355.

49. Speaking to this problem in the context of a statute "so trivial" as to require the use of "Miss" or "Mrs." for a woman to register to vote even though a man is not required to use any particular designation, one writer pointed out the inherent symbolism of inferiority present in such legislation. He urged:

> What is required is a special judicial sensitivity to the impact of legislative symbolism on any person's sense of first-class citizenship, on any person's sense of individuality, independence and self-worth. Doctrinally speaking, such sensitivity is conveniently expressed in the notion that classification on the basis of sex is "suspect," requireing [*sic*] justification by a compelling state interest.

Karst, *"A Discrimination So Trivial": A Note on Law and the Symbolism of Women's Dependency,* 35 OHIO ST. L.J. 546, 552-53 (1974).

50. The substantive provision of the proposed amendment states: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

51. Sex-neutral classifications can be drawn by defining classes in terms of the func-

of the ERA is attractive "because it would represent the highest degree of societal commitment to the ideal of legal sexual equality."[52]

One objection voiced to the prohibitory language of the ERA is its possible effect on legislation allegedly drawn for the purpose of rectifying past discrimination against women. It is clear from *Kahn* and *Ballard* that the present Court's approach to this type of legislation is solicitous. The *Wiesenfeld* Court clarified to some extent the judicial attitude toward allegedly ameliorative legislation by rejecting the government's contention that section 402(g) was designed to offset the adverse economic situation of women by providing a widow with financial assistance. The Court cited with approval the principal of upholding such remedial legislation,[53] but indicated, "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[54] The Court concluded that the statute was linked directly to the care of minor children and was for their benefit. "Since this purpose in no way is premised upon any special disadvantages of women," the Court held, "it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work."[55]

The *Wiesenfeld* opinion indicates that the Court, notwithstanding its approach in *Kahn* and *Ballard,* will actively scrutinize allegedly remedial gender-based legislation to ascertain its true purpose and effect. However, the Court has clearly acknowledged its willingness to

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tion a statute is intended to serve rather than relying on the misleading shorthand of gender. The first article to urge such "functional analysis" was Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII,* 34 GEO. WASH. L. REV. 232, 240-41 (1965). For discussion and application of functional analysis, see Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871, 896-900 (1971); Ginsburg, *The Need for the Equal Rights Amendment,* 59 A.B.A.J. 1013 (1973), reprinted in 60 WOMEN LAW. J. 4 (1974); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?,* 84 HARV. L. REV. 1499, 1510-11 (1971).

52. Note, *supra* note 51, at 1511.

53. The Court cited *Kahn* and *Ballard* in support of the proposition that statutes " 'reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon that sex for [which] that loss imposes a disproportionately heavy burden' can survive an equal protection attack." 95 S. Ct. at 1233, *quoting* Kahn v. Shevin, 416 U.S. 351, 355 (1974).

54. *Id.* Justice Brennan has consistently taken this position. *See* note 37 *supra.*

55. 95 S. Ct. at 1233. There were two concurring opinions. Justice Powell, joined by the Chief Justice, identified a more narrow discrimination in the statute against female wage earners. *Id.* at 1236. Justice Rehnquist saw no need to reach the issue of the statute's purported discrimination against female workers since the statute was directed solely to children's care and benefit. *Id.* at 1236-37.

uphold truly ameliorative gender-specific legislation.[56] This may signal Court sanction for much of the existing gender-based legislation that purports to favor rather than discriminate against women, including other social security legislation that draws gender lines but bears no relationship to children.[57] Assuming that it is desirable to uphold ameliorative legislation, it is crucial in such cases that the Court ensure that the legislative purpose is in fact remedial. Statutes such as those in *Kahn* and *Ballard* are not "affirmative action" statutes designed to help women overcome past discrimination; they assume permanent inequality and suffer from the same archaic and overbroad generalizations that the Court has stricken.[58]

Additionally, one may question the desirability of sustaining even those gender-based distinctions with a true ameliorative purpose. The question is whether, if the ERA were passed, legislatures could use gender-specific language in statutory attempts to make equality a practical reality. A related problem was presented in *DeFunis v. Odegaard,*[59] which dealt with benign racial admission policies in state universities. In *DeFunis,* only Justice Douglas, in a dissenting opinion, reached the merits.[60] Since racial distinctions are not prohibited but are "suspect," a "compelling" reason for a racial distinction could theoretically validate the classification. Nonetheless, Justice Douglas' opinion urged the adoption of race-neutral guidelines which would not be overinclusive or underinclusive.[61]

A landmark article on the ERA addressed the problem of gender-specific language:

> [I]n a classification by sex all women or all men are included or excluded regardless of the extent to which some members of each sex possess the relevant characteristics or perform the relevant function.

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56. *See* note 53 *supra.* The dissenting opinions in *Kahn* and *Ballard* accepted the principal that ameliorative purpose may save gender-specific legislation. *See* note 37 *supra.* It is felt that even if the Court were to regard gender-based classification as "suspect," remedial gender-specific legislation would be upheld as having met the "compelling" standard. *See* Brown, *supra* note 51, at 903-04.

57. For an analysis of other gender-based legislation in the social security area see Griffiths, *Sex Discrimination in Income Security Programs,* 49 NOTRE DAME LAW. 534 (1974); Walker, *Sex Discrimination in Government Benefit Programs,* 23 HASTINGS L.J. 277 (1971); Note, *Sex Classifications in the Social Security Benefit Structure,* 49 IND. L.J. 181 (1973).

58. *See* Erickson, *supra* note 28, at 221 n.52.

59. 416 U.S. 312 (1974) (constitutional challenge to racial preferences in law school admissions dismissed as moot).

60. *Id.* at 320-44.

61. *Id.* at 334. *But see* Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723 (1974); *cf.* Getman, *The Emerging Constitutional Principle of Sexual Equality,* 1972 SUP. CT. REV. 157, 166-73.

> Such a result is in direct conflict with the basic concern of our society with the individual, and with the rights of each individual to develop his or her own potentiality. It negates all our values of individual self-fulfillment.[62]

Prohibition of gender-specific statutes need not eliminate governmental attempts to help women who are disadvantaged. Sex-neutral classifications can be used to include members of the other sex who are similarly disadvantaged.[63] A statute providing special job training, for instance, might be written so as to apply to anyone who has been absent from the work force for a specified length of time, regardless of gender or reason. Though difficult to fashion, only a statute affirmatively describing its purpose and those whom it is attempting to reach could be sure to survive a challenge of underinclusiveness or overinclusiveness.

Absent adoption of the ERA, the Court will continue analyzing gender classification challenges under the equal protection clause. It appears that this approach will entail an initial inquiry as to whether the purpose of the classification is remedial[64] and thus valid. Absent such a finding, the Court will seek to distinguish the facts from its previous cases, using the repertoire of such key phrases as "archaic and overbroad generalizations" that those cases have generated. The Court's unwillingness to provide a consistent rationale in cases like *Wiesenfeld* and *Stanton*[65] will render difficult a prediction of the constitutionality of any gender-based classification. Forty years ago a commentary was introduced with words that appear applicable today: "There is no large and general question in law which has been left in a more nebulous state than the question of how or to what extent the Federal Constitution applies to women."[66]

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62. Brown, *supra* note 51, at 890.

63. *See* note 51 *supra*.

64. The *Wiesenfeld* opinion illustrates the importance to the Court of an initial determination of remedial purpose. "Since the gender-based classification . . . cannot be explained as an attempt to provide for the special problems of women, it is indistinguishable from the classification held invalid in *Frontiero*." 95 S. Ct. at 1236.

65. It appears that the goal of providing a clear standard for gender-based equal protection challenges is subservient to a goal of unanimity. *Wiesenfeld,* though it had two concurring opinions, had no dissents; *Stanton* had a lone dissent.

66. Crozier, *Constitutionality of Discrimination Based on Sex,* 15 BOSTON U.L. REV. 723 (1935).