

upon dissolution of marriage and the Kentucky statute's broad definition of marital property. In refusing to be "hamstrung by narrow definitions of property,"<sup>33</sup> the *Inman* court has taken a major step toward insuring that a person who puts his or her spouse through professional or graduate school will not be economically handicapped upon dissolution of the marriage.

CONSTITUTIONAL LAW—SEX DISCRIMINATION—WORKMEN'S COMPENSATION PRESUMPTION OF WIDOW'S DEPENDENCY DOES NOT VIOLATE EQUAL PROTECTION CLAUSE. *Wengler v. Druggists Mutual Insurance Co.*, 583 S.W.2d 162 (Mo. 1979). Respondent Wengler claimed workmen's compensation benefits<sup>1</sup> for the death of his wife in a work-related accident. Because Wengler was unable to demonstrate the requisite dependency,<sup>2</sup> the referee denied him compensation. The Labor and Industrial Relations Committee affirmed the referee's decision, but the circuit court reversed, holding the statute unconstitutional.<sup>3</sup> On appeal, the Missouri Supreme Court reversed and *held*: The Missouri workmen's compensation statute, which affords a widow

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33. 578 S.W.2d at 269.

1. Wengler filed his claim under MO. REV. STAT. § 287.240 (1978). Subsection 2 provides that "[t]he employer shall also pay to the total dependents of the employee a single total death benefit. . . ." Subsection 4 defines

"dependent" . . . to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them, to the exclusion of other total dependents:

(a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; provided, that on the death or remarriage of a widow, the death benefit shall cease unless there be other total dependents entitled to any unpaid remainder of such death benefit under this chapter.

2. *Id.* § 287.240. Widows, under the conclusive presumption of dependency, are immediately eligible for workmen's compensation benefits. The same presumption is denied widowers. Only a husband who is unable to work because of mental or physical deficiencies is presumed dependent for support; all other widowers must prove dependency on their deceased wives' wages.

3. The circuit court held that the statute denied equal protection to the widower by requiring proof of dependency while affording a widow the conclusive presumption of dependency at the death of her husband. Thus, the circuit court's analysis emphasized the disadvantages felt by the widower, instead of the detriment imposed upon the woman worker whose employment did not produce the same benefits as that of a male worker. *Wengler v. Druggist Mut. Ins. Co.*, 583 S.W.2d 162, 167 (Mo. 1979).

a conclusive presumption of dependency but requires a widower to prove dependency upon his deceased spouse, does not violate the equal protection clauses of the fourteenth amendment<sup>4</sup> or the Missouri constitution.<sup>5</sup>

Pursuant to the equal protection clause's requirement that similarly situated persons be treated similarly, courts scrutinize all legislative classifications that distinguish between groups of people. The threshold question in any equal protection case is the degree of scrutiny the court will adopt. The appropriate level of scrutiny depends on the type of interest affected by the classification. The traditional rational relationship test is highly deferential and requires only that the legislative classification be rationally related to a legitimate state end.<sup>6</sup> In contrast, "suspect" classifications or those that infringe on fundamental rights receive strict scrutiny, which demands a high degree of judicial involvement in ensuring that the classification is necessary to achieve a "compelling" state interest.<sup>7</sup>

During this decade, the Supreme Court has gradually elaborated a middle-tier test that requires gender-based classifications to serve "important governmental objectives and [to] be substantially related to the achievement of those objectives."<sup>8</sup> Three important aspects of the test

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4. "[N]or shall any state deprive any person of life, liberty, or, property, without due process of law." U.S. CONST. amend. XIV.

5. "[A]ll persons . . . are entitled to equal rights and opportunities under the law." MO. CONST. art. 1, § 2.

6. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) stated the test: "a classification must be reasonable, not arbitrary and must rest upon having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." The Court has traditionally invoked the rational relationship test in areas of economic legislation, resulting generally in complete deference to legislative determinations. The test does not require that the classification be closely related to the statutory goal, only that there be some possible rational basis for the statutory formulation. "Extreme deference to imaginable supporting facts and conceivable legislative purpose was characteristic of the 'hands off' attitude of the old equal protection." Gunther, *The Supreme Court, 1972 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972). See also 25 DEPAUL L. REV. 210 (1975).

7. Courts first invoked strict scrutiny in response to statutes that were on their face racially discriminatory. At one point, the Supreme Court applied strict scrutiny to gender-based classifications. See *Frontiero v. Richardson*, 411 U.S. 677 (1973). The Court also used this test for statutes involving fundamental rights. Unlike the rational relationship test, strict scrutiny demands extensive judicial questioning and determination of legislative purpose. In addition, there must be a very close correlation between the classification and the goal that the legislature hoped to achieve. See Gunther, *supra* note 6. See also Note, *Gender-Based Legislative Classifications*, 57 NEB. L. REV. 555 (1978).

8. *Craig v. Boren*, 429 U.S. 190, 197 (1976). See generally Gunther, *supra* note 6, at 17:

appear to emerge from the cases. If there are alternative possible bases for the classification—if, for example, the classification might be viewed as distinguishing female from male workers or, alternatively, female from male surviving spouses<sup>9</sup>—the Court's choice between these alternative perspectives is significant.<sup>10</sup> Second, the Court carefully scrutinizes the actual purpose of the classification, instead of accepting the stated purpose or deferring to conjectural legislative justifications.<sup>11</sup> Last, in looking at the means-ends relationship, the Court finds traditional gender-based stereotypes and generalizations insufficient to meet the "substantial relationship" requirement.<sup>12</sup>

Before 1971 courts applied minimal scrutiny to gender-based classifications and upheld most statutes.<sup>13</sup> In *Reed v. Reed*,<sup>14</sup> decided in 1971,

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The dichotomy between strict and minimal scrutiny repeatedly surfaced during the past term, to be sure. But there was also an undercurrent of resistance to the sharp difference between deferential old and interventionist new equal protection: a number of Justices, from all segments of the Court sought formulations that would narrow the gap between the widely separate tiers of the Warren Court's equal protection.

9. The classifications in the following cases fit the example: *Califano v. Goldfarb*, 430 U.S. 199 (1977) (widower must prove dependency to qualify for social security survivor's benefits; widow presumed dependent); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (widower with dependent children cannot receive social security surviving-parent benefits; widows in same situation automatically receive); *Wengler v. Druggists Mut. Ins. Co.*, 583 S.W.2d 162 (Mo. 1979) (widowers must prove dependency to receive workmen's compensation death benefits; widows conclusively presumed to be dependent). Other cases involving the same type of alternative bases for the classifications are: *Califano v. Westcott*, 99 S. Ct. 2655 (1979) (AFDC benefits available to families deprived of support of male parent; unemployment of mother not sufficient); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (husband of female armed service member must prove dependency to receive dependent's benefits; wife of serviceman automatically receives). Some gender-based classifications, of course, raise no question of alternative bases because they do not involve situations in which the activities of one person (the male or female worker) affect the rights of another person (the male or female dependent or survivor). See, e.g., *Califano v. Webster*, 430 U.S. 313 (1977) (women receive higher social security benefits upon retirement); *Craig v. Boren*, 429 U.S. 190 (1976) (females may purchase beer at age 18 but males must be 21); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (female armed services officers are allowed four years more than males before being ousted for nonpromotion).

10. See notes 17-21 *infra* and accompanying text.

11. See notes 14-16 *infra* and accompanying text.

12. See notes 22-24 *infra* and accompanying text.

13. Deference to legislative means and conjecture of legislative purpose, both characteristics of the rational basis level of scrutiny, rarely resulted in the overturning of gender-based classifications. "Applying the standard of minimal scrutiny the court invariably held that the distinction under attack was reasonable in view of the proper role of women in society or the need of the female for greater protection." *Equal Protection and the Middle-Tier: The Impact on Women and Illegitimates*, 78 NOTRE DAME LAW. 303, 313 (1978). See also Gunther, *supra* note 6; 25 DEPAUL L. REV. 210 (1975).

14. 404 U.S. 71 (1971).

the Court, although enunciating the traditional rationality test, held that administrative convenience could not justify a gender-based classification.<sup>15</sup> After *Reed* the Court sustained gender-based classifications only if the purpose was compensatory.<sup>16</sup>

*Frontiero v. Richardson*<sup>17</sup> invalidated a fringe benefit provision that presumed dependence of a wife of a serviceman but required proof of dependency of the husband of a servicewoman. For the first time the Supreme Court viewed the classification from the perspective of the woman worker and thus recognized that she did not receive the same compensation as did her male coworker. Had the Court viewed the classification from the perspective of the serviceman's wife and the servicewoman's husband, it would have deemed the presumption as favoring the female and thus compensatory.<sup>18</sup> The importance of *Frontiero*'s

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15. *Id.* That the Court was, in fact, using a higher level of scrutiny than the rational basis test is clear from the Court's recognition that the classification had "some legitimacy." *Id.* at 76. The statutory preference of appointing men instead of women as estate administrators reduced the number of contested appointments and thus was rationally related to the administrative convenience goal.

16. The Court has approved three gender-based statutory provisions on the theory that the purpose of the classification was to compensate women for past wrongs. *See Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974). The last two cases employed the rational basis test, as shown in *Kahn*: "We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Id.* at 355. The two cases represent a retreat from an earlier stance of increased scrutiny. Commentators have criticized them as "poorly reasoned opinions that have legitimized reverse discrimination." *See* 23 N.Y.L.S. L. REV. 503, 508 (1978). These cases are nevertheless significant because the statutes did not impose a burden on women as a minority group. In *Ballard* female armed service officers were entitled to four extra years of commissioned service before discharged for want of promotion, and in *Kahn* widows were given a special tax exemption on the death of their spouses. More recently, in *Webster* the Court upheld a classification that resulted in the computation of higher benefits for women under the Social Security Act: "The only discernible purpose of [215's more favorable treatment is] the permissible one of redressing our society's longstanding disparate treatment of women." 430 U.S. at 317 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977)).

17. 411 U.S. 677 (1973).

18. Subsequent cases have adopted *Frontiero*'s analytical framework. *See, e.g., Califano v. Westcott*, 99 S. Ct. 2655 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); notes 27-31 *infra* and accompanying text. In *Weinberger* the Court analyzed a social security statute from the perspective of a female worker whose earnings did not ensure her spouse and children the same benefits on her death as a male worker similarly situated. The alternative perspective would have involved examining the benefits received by the wife of a deceased workman and would have allowed the Court to pronounce the statute compensatory. In *Goldfarb* the analysis was the same. The Court pronounced that the section of the Social Security Act under scrutiny

discriminates against one particular category of family—that in which the female spouse

analytical development is threefold: first, the Court recognized that women are in the marketplace and that their efforts must be treated equally to those of men;<sup>19</sup> second, the Court pronounced that it would invalidate any statutory provision that denigrates a woman's efforts;<sup>20</sup> and finally, the Court rejected the traditional stereotypes and generalizations of female dependency and male independence and announced that any classification based on these generalizations would fall.<sup>21</sup>

In *Weinberger v. Wiesenfeld*<sup>22</sup> the Court demonstrated that it would no longer defer to the legislature when looking to the purpose of a gender-based classification.<sup>23</sup> The Court determined that the true purpose of the classification in this case was not sufficiently related to the sex of the parties classified.<sup>24</sup>

is a wage earner covered by social security. Therefore, decision of the equal protection challenge in this case cannot focus solely on the distinction drawn between widowers and widows but as *Wiesenfeld* held, upon the gender-based discrimination against covered female wage earners as well.

*Id.* at 209. In *Westcott* the Court invalidated a statutory provision that provided benefits to families whose dependent children lacked parental support because of their father's unemployment. A family did not receive the same benefits when the mother was unemployed. Instead of noting the automatic receipt of benefits by a wife and her children when her husband became unemployed, the Court invalidated the classification on the basis of the detriment felt by the female worker whose work did not result in the same benefits as a male worker. 99 S. Ct. at 2660-61.

19. 411 U.S. at 686. "The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice." *Stanton v. Stanton*, 421 U.S. 7, 15 (1975).

20. 411 U.S. at 688.

21. *Id.* at 689-90.

22. 420 U.S. 636 (1975). The Court clearly announced that any gender-based classification that "denigrated" the efforts of female workers was invalid.

[S]uch a gender based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

Section 402(9) clearly operates as did the statutes invalidated by our judgment in *Frontiero*, to deprive women of protection for their families which men receive as a result of their employment.

*Id.* at 645.

23. *Id.* at 648.

The 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. . . . This court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislature.

*Id.* at 648 & n.16.

24. *Id.* The statute allowed social security benefits to a widow with dependent children but denied the benefits to a widower with dependent children. The Court characterized the actual purpose of the statute as allowing the widow to stay home with the children. The Court found

It was not until 1976, however, in *Craig v. Boren*<sup>25</sup> that the Supreme Court clearly articulated the middle-tier standard that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives."<sup>26</sup>

Two cases decided after *Craig* best demonstrate the use and consequences of middle-tier scrutiny. In both *Califano v. Goldfarb*<sup>27</sup> and *Califano v. Westcott*,<sup>28</sup> the Court analyzed the statutory classification from the perspective of the female worker, and concluded that the statute placed a burden upon her and denigrated her efforts as a worker.<sup>29</sup> The next step of the analysis involved a judicial determination of the purpose of the gender-based classification beyond that apparent from the face of the statute.<sup>30</sup> The Court rejected administrative ease as a suitable goal. The final step of the analysis scrutinized the means-end relationship and held that the classifications were based on stereotypes

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that the goal of allowing a surviving parent to stay home with minor children was in no way related to the sex of that parent. *Id.*

25. 429 U.S. 190 (1976).

26. *Id.* at 210 n.24. The court stated:

As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited "upper-tier"—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases.

*Id.*

27. 430 U.S. 199 (1976).

28. 99 S. Ct. 2655 (1979).

29. The Court in *Califano v. Goldfarb*, 430 U.S. 199 (1976), struck down the statutory provision that required a widower to prove he had been receiving at least half his support from his spouse before he qualified for survivor's benefits. A widow was presumed dependent. In *Califano v. Westcott*, 99 S. Ct. 2655 (1979), the Court invalidated a provision stipulating that benefits to families with children would be provided only if the family was deprived of male parental support.

30. The Court found that the real reason for the gender distinction in *Goldfarb* was a desire for "certainty of result and administrative convenience," neither of which is important enough to justify the continued existence of a gender-based classification that has a detrimental effect on the female worker. In *Westcott* the purpose of the classification was to deter paternal desertion. The Court responded that "evidence indicates that the gender distinction was inserted to reduce cost to eliminate what was perceived to be a type of superfluous eligibility for AFDC-VF benefits. There is little to suggest that the gender qualification had anything to do with reducing the father's incentive to desert." 99 S. Ct. at 2662.

or overgeneralizations and could not meet the substantial relationship requirement.<sup>31</sup>

In *Wengler v. Druggists Mutual Insurance Co.*<sup>32</sup> the Missouri Supreme Court asserted that it would apply the Supreme Court's middle-tier standard of scrutiny.<sup>33</sup> The Court characterized the purpose of the statutory distinction between widows and widowers as compensatory,<sup>34</sup> and relied on statistics in *Kahn v. Shevin* as empirical evidence that a widow faced greater hardship upon the death of her spouse than that faced by a widower.<sup>35</sup> It distinguished the social security cases on the ground that the employer, rather than the employee, pays the cost of workmen's compensation benefits.<sup>36</sup> The Court refused to follow three other states that have invalidated similar statutes.<sup>37</sup>

Although the Missouri court purported to follow the Supreme

31. In *Westcott* the Court accused Congress of enacting a statute on the premise that the father of the family is the breadwinner and the woman is dependent upon him for support; as a result the distinction fell. *Id.* at 2663.

32. 583 S.W.2d 162 (Mo. 1979).

33. Early in the opinion, the Court clearly announced the standard of scrutiny to be applied in gender discrimination cases: "To withstand scrutiny under the equal protection clause, classification by gender must serve important governmental objectives. . . ." *Id.* at 164. (citing *Califano v. Webster*, 430 U.S. at 316-17). When discussing the justification of a gender basis classification, however, the Court regressed to a rational basis standard of scrutiny: "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Id.* at 166 (quoting *Weinberger v. Salfi*, 422 U.S. 749, 769 (1975)) (citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

34. On its face, sec. 287.240(4)(a) appears to favor a woman (widow) rather than discriminate against her, in that it affords the widow death benefits on her husband's compensable death without further proof of dependency. . . . [D]ata available. . . . at that time no doubt supported the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower.  
583 S.W.2d at 168.

35. *Id.* The statistics in *Kahn* showed that the median income of a woman was 57.9% of the median for men, and that in a majority of families in which both spouses are present the woman did not work. 461 U.S. at 353.

36. The purpose of the workmen's compensation act was not to provide for blanket "social insurance." It is substitutional to the common law creating rights and remedies in favor of the injured employee or dependents for accidents in the course of employment. The employer is the sole contributor to the fund, as opposed to the social security scheme of mandatory employee contributions (taxes) based on an income scale. Therefore the United States Supreme Court cases of *Weinberger v. Wiesenfeld*, and *Califano v. Goldfarb* are not controlling in the case at bar.  
583 S.W.2d at 167 (citations omitted).

37. *Id.* at 166-67. Three other state court jurisdictions have invalidated workmen's compensation provisions similar to the one in question in Missouri. *See* *Arp v. Worker's Comp.* Appeals Bd., 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977); *Tomarchio v. Township of Green-*

Court's rulings,<sup>38</sup> it failed to follow the three-step analysis used by the High Court in sex discrimination cases. The most significant departure is its examination of the statutory classification from the perspective of the surviving spouse rather than from that of the deceased wage-earner. This perspective, combined with the purported distinction between workmen's compensation and other social insurance,<sup>39</sup> enabled the court to ignore the *Weinberger* principle that a female employee is entitled to make the same assurances of economic security to her family as any male worker may make to his family.<sup>40</sup>

The *Wengler* court also failed to apply the second part of the middle-tier test, which necessitates a close examination of the true purpose of the gender-based classification. The court stated that "on its face section 287.240(4)(a) appears to favor a woman (widow) rather than discriminate against her, in that it affords the widow death benefits on her husband's death without further proof of dependence."<sup>41</sup> The mere recitation of a benign goal, however, is not sufficient to sustain gender-based classifications.<sup>42</sup> *Califano v. Goldfarb* clearly indicated that the courts should independently determine the true reason for the classification,<sup>43</sup> but the *Wengler* court's analysis is more like that used under the rational basis test.<sup>44</sup>

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wich, 75 N.J. 62, 379 A.2d 848 (1977); *Passante v. Walden Printing Co.*, 53 A.D.2d 8, 385 N.Y.S.2d 178 (1976).

38. See note 33 *supra*.

39. The Missouri court ignored the reasoning in *Westcott*, in which the Supreme Court emphasized that it is unimportant that work-related benefits are not the result of contributions by employees.

[T]his Court has not hesitated to strike down gender classifications that result in benefits being granted or denied to family units on the basis of the sex of the qualifying parent. . . .

. . . . This does not mean, however, that the Constitution is indifferent to a statute that conditions the availability of noncontributory welfare benefits on the basis of gender. . . .

99 S. Ct. at 2660-61 (citations omitted).

40. See note 18 *supra*.

41. 583 S.W.2d at 167.

42. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

43. 430 U.S. 199 (1977).

44. See notes 6-7 *supra* and accompanying text. The *Wengler* court said:

It seems rather obvious therefore that the purpose of the conclusive presumption of dependency was to satisfy a perceived need widows generally had, which need was not common to men whose wives might be killed while working.

. . . This hardship was seen by the legislatures as more immediate and pronounced on women than on men.

583 S.W.2d at 168.

Finally, the *Wengler* court failed to discuss whether the classification "substantially" related to the achievement of the statutory end.<sup>45</sup> This failure is in sharp contrast to the Supreme Court's position that all classifications based upon " 'archaic and overbroad' generalizations"<sup>46</sup> by their nature are not substantially related to the achievement of important statutory goals. It is at this juncture that the analysis of the Missouri Supreme Court significantly departs from precedent. The Court not only accepted a classification that assumed a widow's dependency to be substantially related to the major goals of workmen's compensation, but also sustained two propositions specifically refuted by the Supreme Court:<sup>47</sup> first, that women are less likely to be found in the work force; and second, that the work of a female employee is less essential to her family's welfare than that of her male counterpart. Thus, the Missouri court based its approval of this legislation on the same propositions that have previously caused the Supreme Court to invalidate similar gender-based statutory classifications.

The United States Supreme Court should reverse *Wengler v. Drug- gists Mutual Insurance Co.* because it is not consistent with the Court's previous gender discrimination decisions. The degree of scrutiny applied by the Missouri court is much less than that demanded by the Supreme Court in its application of the middle-tier standard. In effect, *Wengler* results in the continued existence of Missouri statutes that

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45. See note 33 *supra*. When stating that classifications can never fit perfectly, the Court quotes a standard of scrutiny used for classifications measured by the rational relationship test, instead of quoting the middle-tier standard imposed upon gender-based classifications. 583 S.W.2d at 166.

46. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

47. In *Weinberger* the Supreme Court suggested that dependency of widows was no longer a valid rationale for a gender-based classification, but instead that it was an " 'archaic and overbroad' generalization 'not . . . tolerated under the Constitution.'" *Id.* (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)). One of the reasons for the Supreme Court's invalidation of the gender-based classification in *Goldfarb* was the statute's use of the dependency stereotype rather than actual need as a criterion for receipt of benefits.

On the face of the statute, dependency, not need, is the criterion for inclusion.

Moreover, the general scheme of OASDI shows that dependence on the covered wage earner is the critical factor in determining beneficiary categories. OASDI is intended to insure covered wage earners and their families against the economic and social impact on the family normally entailed by loss of the wage earner's income due to retirement, disability, or death, by providing benefits to replace the lost wages.

430 U.S. at 213.

place undue burdens on the female worker in violation of her constitutional right to equal protection.

**TORTS—PARENTAL IMMUNITY—UNEMANCIPATED MINOR CHILD OF DIVORCED PARENTS MAY SUE NONCUSTODIAL PARENT.** *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979) (en banc). An unemancipated minor sought damages in a wrongful death suit<sup>1</sup> against her father, alleging that his negligent operation of an automobile caused the death of her mother. Defendant and the deceased were divorced prior to the accident. The divorce decree gave the deceased custody of plaintiff and granted visitation and temporary custody rights to defendant. The circuit court, in an evidentiary hearing, found that the suit had not disrupted the harmonious relationship between plaintiff and defendant,<sup>2</sup> but nevertheless dismissed the action on the basis of parental immunity. The court of appeals transferred plaintiff's appeal<sup>3</sup> and the Missouri Supreme Court *held*: The parental immunity doctrine does not bar an unemancipated minor child's tort suit against a parent who, pursuant to a divorce decree, does not have general custody of the child at the time the tort occurs.<sup>4</sup>

The parental immunity rule first appeared in the United States<sup>5</sup> in

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1. Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, which damages may be sued for and recovered

(1) By . . . minor children . . . of the deceased

MO. REV. STAT. § 537.080 (1978) (amended 1979).

2. Witnesses at the hearing included defendant, plaintiff's paternal grandmother, and a close family friend. All testified that the parties' relationship was good both before and after the suit was filed. Brief for Appellant at 2, *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979) (en banc).

3. The Missouri Court of Appeals decided that the "statewide interest and importance" of the matter required its transfer to the Missouri Supreme Court. 582 S.W.2d at 664.

4. *Id.* at 669.

5. Apparently, there were no reported English cases of parent-child tort actions for negligence. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 865 (4th ed. 1971); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1059 (1930); Comment, *Tort Actions Between Members of the Family—Husband & Wife—Parent & Child*, 26 MO. L. REV. 152, 180 (1961).