SEX DISCRIMINATION IN WELFARE LEGISLATION

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Welfare legislation[1] in this country has generally sought two results—to assist and to improve the recipient. The needy, it would seem, are especially dear to social engineers. Thus society has at one time or another conditioned its benevolence upon good moral behavior,[2] or upon demonstrations of willingness to help oneself,[3] or upon conformity to traditional family structures and sex roles.[4] This last condition, based on the presumption that men are breadwinners and women homemakers, continues to deny benefits to large numbers of people who do not conform to these stereotypes.[5] Under the federal Social Security Act some benefits provided to male workers and their wives are denied entirely to female workers and their husbands or are provided only if the

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1. "Welfare legislation" is used throughout this Note to mean governmental programs which provide cash payments to individuals to mitigate the hardships of poverty, old age, disability, and unemployment.

2. *See* note 126 *infra.*

3. *See* note 126 *infra.*

4. *See* notes 86-90 and accompanying text *infra.*

5. Women especially do not seem to conform to the homemaker stereotype. In May 1973, 51.5% of women aged 20 to 64 were in the work force; 53.9% of women aged 18 to 19 were in the work force. 19 EMPLOYMENT & EARNINGS 24 (1973). In 1971, 59% of women workers were married, and one-third had dependent children. 95 MONTHLY LAB. REV. 9 (1972). In 1970, working wives provided the major source of income for 3.2 million families, 7.4% of the total of 44 million two-parent families. U.S. BUREAU OF THE CENSUS, SOURCES AND STRUCTURE OF FAMILY INCOME 377 (1973). In 1972, about 15 million households were supported by women; 6.1 million families were headed by women; 8.7 million women were heads of households with no other relatives present. U.S. BUREAU OF THE CENSUS, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1972, CURRENT POPULATION REPORTS, Series P-20, No. 246 (February 1973), Table C. *See* ADVISORY COUNCIL ON SOCIAL SECURITY, REPORT 34-5 (1971); Note, *Sex Classifications in the Social Security Benefit Structure*, 49 IND. L.J. 181-84 (1973).

husbands are dependent.[6] There is a difference, too, in the method of computing benefits for some retired male and female workers.[7] And some states, under Aid to Families with Dependent Children, provide benefits to families with unemployed fathers but not to families with unemployed mothers.[8] Tradition and policy go hand in hand here: benefits based upon sex are intended to aid those who have traditionally assumed economically dependent roles, and at the same time, they reinforce these roles.[9] Many of these laws which treat welfare recipients differently solely on the basis of their sex now seem ready to fall to a well-founded equal protection attack.[10]

I. SEX DISCRIMINATION AND EQUAL PROTECTION

Traditionally, the courts have applied two standards of review to statutory classifications challenged on equal protection grounds. Under the more lenient "rational relationship" standard, the courts permit classifications rationally related to the purpose of the statute.[11] The classification is presumed valid; the plaintiff must bear the burden of proving it arbitrary and irrational.[12] Under the "strict scrutiny" standard, the courts require the government to show a "compelling interest" for the classification and the absence of a reasonable alternative for

6. *See* notes 86-90 and accompanying text *infra.*

7. *See* notes 113-125 and accompanying text *infra.*

8. *See* notes 126-134 and accompanying text *infra.*

9. *See generally* CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES (1968); HEW, REPORT OF THE WOMEN'S ACTION PROGRAM 85-93 (1972); NATIONAL ORGANIZATION FOR WOMEN, NOW GOALS (1973); THE PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, REPORT OF THE COMM. ON SOCIAL INSURANCE AND TAXES (1963).

10. The fourteenth amendment to the United States Constitution provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The federal government is similarly constrained by the due process clause of the fifth amendment. "[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.' " Frontiero v. Richardson, 411 U.S. 677, 680 n.5 (1973). The "[Supreme] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975); Jimenez v. Weinberger, 417 U.S. 628, 637 (1974); Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

11. *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Flemming v. Nestor, 363 U.S. 603, 611 (1960).

12. Under this test "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). The presumptive validity of legislative classifications is seen as essential to the legislative process. *Id. See* Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948).

accomplishing its purpose.[13] This standard is applied to certain "suspect" classifications, those based upon race,[14] alienage,[15] and national origin,[16] and to classifications affecting "fundamental rights."[17]

Until quite recently the Supreme Court of the United States consistently applied the rational relationship test to sex-based classifications.[18] And because the Court viewed women "as the center of home and family life,"[19] it never lacked a "rational" basis for differences in the rights granted to men and women. Whatever else might be said of this approach, it was precise and predictable. In 1971, however, the Court began to change this trend of decision by unanimously striking down, in

13. *See* note 35 *infra*. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). *See also* Michelman, *The Supreme Court, 1968 Term—Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20 (1969).

14. *See* Frontiero v. Richardson, 411 U.S. 677, 681 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

15. *See* Frontiero v. Richardson, 411 U.S. 677, 681 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971).

16. *See* Frontiero v. Richardson, 411 U.S. 677, 681 (1973); Oyama v. California, 332 U.S. 633, 644-46 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

17. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel interstate); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (right to procreate).

18. *See* Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (upholding statute forbidding a woman who was not the wife or daughter of the tavern owner from serving as a bartender while permitting any woman to serve as cocktail waitress in the same establishment; the Court justified the classification as preventing "moral and social problems" that might arise if women were bartenders); Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded*, 409 U.S. 1071 (1972).

19. Hoyt v. Florida, 368 U.S. 57, 62 (1961). *See* Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973).

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .
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> . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring), *quoted in* 411 U.S. at 684-85. *See also* State v. Hunter, 208 Ore. 282, 300 P.2d 455 (1956) (state may prohibit professional wrestling by women); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958), *cert. denied*, 359 U.S. 230 (1959) (state may prohibit women from attending branch of state university). *But see* Karczewski v. Baltimore & O. R.R., 274 F. Supp. 169 (N.D. Ill. 1967) (state has no rational basis for allowing men but not women to recover for loss of consortium).

Reed v. Reed,[20] an Idaho statute[21] preferring the appointment of men to women in the administration of decedents' estates. The statute wholly ignored the relative capabilities of male and female applicants for executorships.[22] While admitting "some legitimacy" to the state's objective of reducing the workload of the probate court by resolving without a hearing the competing claims of some male and female applicants,[23] the Court held that the sex-based classification did not have "a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[24] Although the state argued that men are generally more conversant with business affairs than women,[25] the Court gave no consideration to, and hence implicitly rejected, any such notion.

The difficulty in interpreting *Reed* is to decide whether the Court failed the statute under the rational relationship test or applied some new test intermediate to rational relationship and strict scrutiny.[26] On

20. 404 U.S. 71 (1971).

21. IDAHO CODE §§ 15-312, 15-314 (1948). The statutes established classes of persons entitled to administer decedents' estates and the order of the classes. Within each class, men were preferred over women. A woman could be granted letters of administration in preference to a man in a lower class. In *Reed* the competing male and female applicants were the parents of the decedent and in the same class. 404 U.S. at 72-75.

22. 404 U.S. at 74.

23. *Id.* at 76.

24. *Id.*

25. Brief for Respondent at 12, Reed v. Reed, 404 U.S. 71 (1971). The Idaho Supreme Court had suggested that the state legislature might reasonably have "concluded that in general men are better qualified to act as an administrator than are women." Reed v. Reed, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970).

26. An intermediate equal protection test seems to have been employed in Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972) (invalidating Louisiana workmen's compensation statute providing different treatment in recovery for legitimate and illegitimate children of injured workers), and in Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (invalidating athletic conference regulation prohibiting women from participating in interscholastic sports). *See* Smith v. Troyan, 520 F.2d 492 (6th Cir.), *cert. denied*, 96 S. Ct. 2646 (1976) (invalidating enactment which sets weight requirements for police officers as discriminatory to women while allowing height requirements); Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir. 1973); Wark v. Robbins, 458 F.2d 1295, 1297 n.4 (1st Cir. 1972). *Compare* Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973) (invalidating forced maternity leave statute under "substantial rationality test"), *with* Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973), *rev'd*, 414 U.S. 632 (1974) (consolidated with Cleveland Bd. of Educ. v. LaFleur) (upholding forced maternity leave statute under traditional rational basis analysis). This new test, which the Supreme Court has never acknowledged, has been described as "means-focused" scrutiny, demanding that the classification actually further the statutory goal. Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972). *See also* Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV.

the one hand, the Court purported to decide "whether a difference in the sex of competing applicants . . . bears a rational relationship to a state objective"[27] advanced by the statute, and it admitted that the state's interest in administrative convenience is "not without some legitimacy."[28] But on the other hand, the Court declared that this sex-based classification is an "arbitrary legislative choice forbidden by the [Constitution]" and that such classifications generally must bear not merely a rational, but a "fair and substantial relation to the object of the legislation."[29]

If the meaning of *Reed* is not altogether clear, the unanimity displayed by the Court was thoroughly shattered by its next encounter with sex discrimination. In *Frontiero v. Richardson*[30] the Court struck down under the due process clause of the fifth amendment[31] federal statutes providing certain benefits to servicemen and their wives, regardless of dependency, but requiring servicewomen, in order to get the same benefits, to prove their husbands actually dependent upon them for more than one-half of their support.[32] Here, too, the government argued that the sex-based classification was rationally related to administrative convenience—that it would save effort and expense in the long run to presume that all wives are dependent, rather than determine case by case those wives who are not, and to determine case by case those husbands who are dependent, rather than to presume that all husbands are.[33]

Four justices,[34] in a plurality opinion written by Justice Brennan, urged that classifications based solely upon sex be declared "inherently

157 (1973); Ginsberg, *Comment on Reed v. Reed*, 1 WOMEN'S RIGHTS L. REP. 6 (1972); Sedler, *The Legal Dimensions of Women's Liberation: An Overview*, 47 IND. L.J. 419 (1972); 27 VAND. L. REV. 551, 553-54 (1974); 1972 WIS. L. REV. 626.

27. 404 U.S. at 76.

28. *Id.*

29. *Id.*

30. 411 U.S. 677 (1973).

31. *Id.* at 688, 691. *See* note 10 *supra.*

32. 411 U.S. at 678. The benefits sought by the female plaintiff and provided to her male counterparts under 37 U.S.C. §§ 401, 403 (1970) and 10 U.S.C. §§ 1072, 1076 (1970) were medical and dental care for her dependents and increased housing allowances for herself and her family. "[T]he legislative history of these statutes sheds virtually no light on the purposes underlying the differential treatment accorded to male and female members . . . ." 411 U.S. at 681 & n.6.

33. 411 U.S. at 681, 688-89. The district court had been persuaded by this argument, because approximately 99% of all members of the uniformed services are male. 341 F. Supp. 201, 207 (M.D. Ala. 1972).

34. Justices Brennan, Douglas, White, and Marshall.

suspect" and subject not merely to the rational relationship test but instead to "strict scrutiny."[35] In order to satisfy the demands of strict scrutiny, the government, Justice Brennan said, would have had to show that it was cheaper to grant the benefits to all male servicemen than to identify those servicemen with dependent wives and grant the benefits only to them. This showing the government had failed to make, and the Court doubted that it could be made.[36] Then Justice Brennan went on to propose a new per se rule: "[A]ny statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' "[37] Administrative convenience combined with some other interest apparently would satisfy the stricter standard of review, but Justice Brennan gave no hint as to the nature of a satisfactory combination interest.[38] At the least, the plurality justices seem to have gone well beyond *Reed*, yet they professed to find "at least implicit support"[39] for their view in the earlier case. Justice Brennan argued that in rejecting the "apparently rational explanation" for the statutory

35. 411 U.S. at 688. "[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition 'of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility' . . . . And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Id.* at 686. For lower court cases applying strict scrutiny to sex-based classifications, see Andrews v. Drew Municipal Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd*, 507 F.2d 611 (5th Cir.), *cert. granted*, 423 U.S. 820 (1975); Ballard v. Laird, 360 F. Supp. 643 (S.D. Cal. 1973); United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); State v. Costello, 59 N.J. 334, 282 A.2d 748 (1971).

36. 411 U.S. at 689-90.

37. *Id.* at 690.

38. It is difficult to believe that the Court would accept, in combination with administrative convenience, an interest which was not itself compelling enough to pass the strict scrutiny test. Surely, the Court would not do so if the suspect category were, say, race. Should the plurality view prevail and sex become a suspect category, it may be that the Court will not view it as quite so suspect as the other categories. There may be a suggestion here that the Court would give the Equal Rights Amendment, should it be ratified, something less than its strongest possible effect. Some proponents of ERA argue that the amendment would make sex not merely a suspect classification, but an altogether prohibited classification. *See* Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889-91 (1971).

39. 411 U.S. at 682.

scheme in *Reed*, the Court did not merely find the explanation insufficiently rational but turned away from the rational relationship analysis of sex-based classifications.[40]

Of the five remaining justices, three concurred[41] in the judgment of the plurality on the authority of *Reed*, but expressly declined to elevate sex to a suspect category.[42] The three justices thought that as the Equal Rights Amendment had been approved by Congress and submitted to the states, the Court should not pre-empt the ratification procedure by imposing strict judicial scrutiny upon sex-based classifications.[43] Another justice took an intermediate position; also citing *Reed*, he concurred on the ground that the statute worked "an invidious discrimination in violation of the Constitution."[44]

A year later, in *Kahn v. Shevin*,[45] the Court, in a six-to-three decision, upheld a Florida statute[46] granting a $500 property tax exemption to widows but not to widowers. Writing for the majority, Justice Douglas quoted *Reed*, "There can be no doubt . . . that Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' "[47] The ground of difference, it was argued, was the greater economic loss to widows than to widowers on the death of their spouses.[48] Justice Douglas, curiously, had stood with the *Frontiero* plurality in urging that strict scrutiny be applied to sex-based classifications, and the plurality had argued that *Reed* authorized this stand and rejected the rational relationship test.[49] But here Justice Douglas returned to the *Reed* version of the test, calling for a "fair and substantial relation" between the classification and the object of the legislation,

40. *Id.* at 683-84.

41. Justices Powell, Burger, and Blackmun.

42. 411 U.S. at 691-92.

43. *Id.* The proposed Equal Rights Amendment provides that "equality of rights shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

44. 411 U.S. at 691 (Stewart, J., concurring).

45. 416 U.S. 351 (1974).

46. FLA. STAT. ANN. § 196.202 (Supp. 1976-77). A property tax exemption for widows had been incorporated into the state constitution at least as far back as 1885. 416 U.S. at 352.

47. 416 U.S. at 355.

48. *Id.* at 354. "In 1970 while 40% of males in the work force earned over $10,000, and 70% over $7,000, 45% of women working full time earned less than $5,000, and 73.9% earned less than $7,000." *Id.* at 353 n.4.

49. *See* notes 39-40 and accompanying text *supra*.

in order to uphold the different treatment of the sexes. The difference between *Frontiero* and *Kahn*, Justice Douglas proposed, is that the statute in *Frontiero* denied benefits to servicewomen and their husbands, unless the latter were dependent, "*solely* for administrative convenience" whereas the statute in *Kahn* sought to remedy the effect of past economic discrimination against women by "cushioning the financial impact of spousal loss."[50] An equally important distinction for Justice Douglas—but perhaps only a makeweight explanation for his apparent defection from the *Frontiero* plurality—is that *Kahn* deals with a state tax law:

> We have long held that '[w]here taxation is concerned and no specific federal right, apart from equal protection is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'[51]

Whether or not *Kahn* will be expressly limited to sex-based classifications in tax law remains to be seen. At this point, Justice Douglas's attempts to distinguish *Frontiero* and *Kahn* seem at least partly designed to avoid controversy among the justices over the proper standard of equal protection for the sexes.

The three other justices of the *Frontiero* plurality dissented.[52] Two believed that the purpose of remedying past economic discrimination against women satisfied the compelling interest requirement of the strict scrutiny test,[53] but all three believed that the state had not met the burden under the test of showing that this purpose could not have been achieved by a narrower statute, one which did not grant the exemption to wealthy widows while denying it to needy widowers.[54]

The conceptual difficulties with *Kahn* are large. First, the Court again failed to clarify the standard to be applied to statutory classifications based on sex. Second, the scope of the opinion, whether or not it will be applied in contexts other than taxation, is uncertain. Third, the reasons why taxation differs from other contexts in respect to the demands and standards of equal protection were not explained. And fourth, the tax exemption for widows does in fact discriminate *against women* in much

50. 416 U.S. at 355.

51. *Id.*

52. Justices Brennan, Marshall, and White.

53. Justices Brennan and Marshall. 416 U.S. at 357-58 (Brennan, J., dissenting).

54. *Id.* at 357-58, 360 (Brennan, J., dissenting); *id.* at 361 (White J., dissenting). Justice Brennan pointed out that the statute could be narrowed by excluding widows above a certain income. This change could easily be effected since widows must complete an application form prepared by the state in order to get the exemption. *See* note 13 and accompany text *supra.*

the same way as the statute struck down in *Frontiero*. It presumes that married women do not provide valuable economic support for their husbands, and it places their surviving husbands in a weaker economic position than the surviving wives of married men. In order to leave their families in the same economic position as those which lose husbands and fathers, married women must provide an additional source of income for them after they die. And it is wholly irrational to presume that married women are less concerned than married men about their estates and the protection of their families.

Next, the Court, in *Geduldig v. Aiello*,[55] upheld California's disability insurance plan, which provides benefits for unemployment resulting from injury or illness but not from normal pregnancy and childbirth.[56] All employees are required to contribute to the plan one per cent of their wages, to a maximum of $85, unless they participate in a private insurance plan approved by the state.[57] The plan does provide unemployment benefits in cases of abnormal pregnancy and childbirth.[58] In upholding the plan, the Court declared that the equal protection standard in welfare classifications is whether or not the line drawn is "rationally supportable."[59] The state, said the Court, has a legitimate interest in maintaining the employee contribution level at one per cent of earnings, and it could not do so if benefits were provided for normal pregnancy and childbirth.[60] And besides, the majority insisted, the pregnancy exclusion is not a sex-based classification:

55. 417 U.S. 484 (1974).

56. CAL. UNEP. INS. CODE § 2626 (Deering 1971). *See* Clark v. California Employment Stabilization Comm'n, 166 Cal. App. 2d 326, 332 P.2d 716 (1958).

57. CAL. UNEP. INS. CODE §§ 984, 985, 2901, 3251-54 (Deering 1971). As of 1971, four states did include pregnancy-related disabilities in their insurance plans. Walker, *Sex Discrimination in Government Benefit Programs*, 23 HASTINGS L.J. 277, 285 (1971). Thirty-one states exclude pregnancy from coverage. Some 15 states deny unemployment compensation benefits to workers who leave jobs to marry, to accompany spouses to another location, or to fulfill domestic or familial obligations. Those who lose benefits for these reasons are more often than not women. At the same time, the husband usually has a statutory right to choose the family domicile. The wife who refuses to accompany her husband to a new location may become a deserter under the state's divorce statutes. In the 11 states which provide dependents' allowances to unemployed workers, the worker may obtain them only for relatives who are wholly or partially dependent upon the worker. Since women's wages are lower than men's, the husband is seldom dependent on the wife, and hence the dependent's allowance is almost never paid when the wife is unemployed. 49 NOTRE DAME LAW. 534, 538-40 (1974).

58. CAL. UNEP. INS. CODE § 2626.2 (Deering Supp. 1975). *See* Rentzer v. Unemployment Ins. Appeals Bd., 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973).

59. 417 U.S. at 495.

60. *Id.* at 496. *See also* Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

> The California insurance plan does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. 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 . . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
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> . . . The program divides potential recipients into two groups—pregnant women and nonpregnant persons.[61]

Three justices dissented, arguing once again that *Reed* and *Frontiero* require the strict scrutiny of sex-based classifications.[62]

Geduldig, too, is not altogether persuasive. Few courts, if any, have ever doubted that pregnancy is a sex-based classification.[63] While all women are not pregnant at all times, all have virtually the same reproductive biology. To seize upon biological differences between the sexes is merely to classify by sex under another name.[64] California requires *all* women to forego pregnancy and childbirth in order to

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61. 417 U.S. at 496 n.20.

62. *Id.* at 503 (Brennan, J., dissenting).

63. The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has ever seen a male mother. A mother to oversimplify the simplest biology, must then be a woman. Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1259 (5th Cir. 1969) (Brown, C.J., dissenting from a denial of rehearing en banc), *vacated and remanded per curiam*, 400 U.S. 542 (1971). *See* Gilbert v. General Elec. Co., 375 F. Supp. 367, 381 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir.), *cert. granted*, 423 U.S. 822 (1975); 3 HOFSTRA L. REV. 141, 142 (1975).

64. In Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), the Court upheld a claim of sex discrimination under Title VII of the Civil Rights Act of 1964 against an employer with a policy of not hiring women with pre-school children but with 75 to 80% women in a certain position. The Court found this practice to be discriminatory because the employer had no policy against hiring men with pre-school children. *Id.* at 544. The discrimination was not in fact based on sex; the employer did not discriminate against women, only against women with pre-school children. That is, the Court could have analyzed the classification as women with pre-school children and persons without pre-school children. It is this kind of reasoning which the Court approved in *Geduldig. See also* Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973), in which the court invalidated a tax exemption available to women and married men, but not to unmarried men, for the care of dependents. The court could have analyzed this classification as unmarried men and all other persons, according to the method in *Geduldig*, but the court did not do so, finding instead the classification sex-based and unconstitutional.

participate on equal terms with men in the marketplace. At the same time, the state does provide unemployment compensation both for elective medical procedures (cosmetic surgery, orthodontia, sterilization) and for male-only conditions and procedures (hemophilia, gout, prostatectomy, circumcision).[65] Pregnancy, therefore, can hardly be excluded as an "elective" or as a female-only condition.[66] Further, most private employers are forbidden by Title VII of the Civil Rights Act of 1964[67] and by the guidelines of the Equal Employment Opportunity Commission[68] from treating pregnancy and childbirth differently from other temporary disabilities, yet the Court permitted California to do this very thing.[69] At present, pregnancy is a sex-based classification under the Civil Rights Act, while under the equal protection clause it is not.[70] Moreover, the Court seems to have misapplied the rational relationship test. The purpose of the legislation is to compensate for wages lost through illness or injury.[71] In effect, the Court argued that to

65. 417 U.S. at 499-500 (Brennan, J., dissenting).

66. No benefits are payable for disabilities of fewer than eight days unless the employee is hospitalized, in which case benefits are payable from the first day of hospitalization. CAL. UNEP. INS. CODE §§ 2627(b), 2802 (Deering 1971). Childbirth in the hospital, therefore, would not be excluded under the eight-day limitation.

67. Title VII of the Civil Rights Act of 1964 provides in part,

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a)(1) (1970).

Sex discrimination cases involving pregnant women have arisen most frequently in two situations; either an employer has required an employee to take a leave of absence at a prescribed stage of pregnancy, *see* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Buckley v. Coyle Pub. School Sys., 476 F.2d 92 (10th Cir. 1973); Green v. Board of Educ., 473 F.2d 629 (2d Cir. 1973); Schattman v. Texas Employment Comm'n, 459 F.2d 32 (5th Cir. 1972); Heath v. Board of Educ., 345 F. Supp. 501 (S.D. Ohio 1972), or the employer (as did the state in *Geduldig*) has denied sick leave and disability benefits to pregnant employees, *see* Gilbert v. General Elec. Co., 375 F. Supp. 367, 381 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir.), *cert. denied*, 423 U.S. 822 (1975). *See generally* 9 U. RICHMOND L. REV. 149, 154 (1974).

68. The guidelines of the Equal Employment Opportunity Commission, which enforces Title VII, *specifically* prohibit employers from treating pregnancy and childbirth differently from other temporary disabilities for all job-related purposes. 29 C.F.R. § 1604.10(b) (1975). While these guidelines do not have the force of law, the courts give them "great deference." Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

69. 417 U.S. at 501-02 (Brennan, J., dissenting).

70. In treating pregnancy as a non-sex-based classification, the Court may have cleared the way for similar treatment under § 2000e in the context of employment. *See* 3 HOFSTRA L. REV. 141 (1975). In general, the Court's approach to discrimination under Title VII has been rather different from and more liberal than the equal protection analysis of *Geduldig*. *See* note 64 *supra*.

71. The purpose of the program, as the majority pointed out by citing the state supreme

deny unemployment compensation for pregnancy and childbirth is rationally related to the purpose of providing unemployment compensation. The exclusion *is* rationally related to maintaining the regressive contribution scheme at one per cent of earnings, but *that* is not the purpose of the legislation.[72] Nor is it clear why the administrative cost of benefit programs will not justify different treatment of the sexes, but the substantive costs of the benefits themselves will. Saving money, it would seem, is no more legitimate an interest in the one case than in the other. Indeed, if saving money were a legitimate reason for discriminating against classes of citizens, the states could almost always deny equal protection.

Finally, in *Stanton v. Stanton*[73] the Court held that a Utah statute[74] fixing the age of majority for females at 18 years and for males at 21 years denied equal protection in requiring parents to support minor male children for a longer period than minor female children.[75] There was no legislative history to explain this different treatment. Rejecting "old

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court, is "to provide an insurance program to pay benefits to individuals who are unemployed because of illness or injury. . . ." 417 U.S. at 492 n.16, *citing* Garcia v. Industrial Comm'n, 41 Cal. 2d 689, 692, 263 P.2d 8, 10 (1953). The Code itself declares:

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

CAL. UNEP. INS. CODE, § 2601 (Deering Supp. 1975).

72. The Court's solicitude for the low-income wage-earner who would bear a disproportionately heavy share of any increase in the regressive one per cent contribution ignores the fact that a disproportionately large number of these wage-earners are women, many of whom may be expected to bear children, and their husbands, who would share in the loss of family income resulting from the unemployment of their pregnant wives. "Nearly two-thirds of all women who work do so of necessity: either they are unmarried or their husbands earn less than $7,000 per year." 417 U.S. at 501 n.5 (Brennan, J., dissenting). The Court also argued that because women contribute 28% of the disability fund and receive 38% of the fund in benefits, women are not discriminated against in "aggregate risk protection." *Id.* at 496-97 & n.21. This argument, too, ignores the effect of wage and job discrimination against women, which reduces the amount of their income and hence of their contribution in relation to that of men. *See* table, note 86 *infra.*

73. 421 U.S. 7 (1974).

74. UTAH CODE ANN. § 15-2-1 (1953). Both males and females attain majority at an earlier age by marriage. Utah and Arkansas are the only states which fix the age of majority at 18 for females and at 21 for males. 421 U.S. at 15.

75. The Court did not disturb other applications of the age-of-majority statute, as for example, the right of a minor to disaffirm contracts, the requirement of a guardian or guardian ad litem to appear in court on behalf of a minor, the parent's right of action for injury to a minor child, and the incompetency of a minor to serve as administrator of a decedent's estate or as executor of a will. 421 U.S. at 17. In these situations the age of majority remains at 18 for females and at 21 for males.

notions" "that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males,"[76] the Court found "nothing rational"[77] in the different classification of the sexes and condemned generally the sex-role stereotyping of women:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . 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.[78]

Reed was "controlling," said the Court, which once again cited the requirement of "a fair and substantial relation" between the classification and the object of the legislation.[79] In stating the test in terms of the case, the Court implied that minimum rationality would not justify the sex-based classification: "The test here, then, is whether the difference in sex between children warrants the distinction in the . . . obligation to support that is drawn by the Utah statute."[80] In other words, different treatment of the sexes in some situations may not be irrational, but it may be *unwarranted*, and therefore prohibited by the equal protection clause. The Court remanded to the state courts the question of whether the age of majority for the purpose of child support should be 18 or 21 years for both sexes.[81]

Notwithstanding the obfuscation and ingenuousness of the Court's approach to sex-based classifications,[82] these cases contain some

76. 421 U.S. at 14. On the basis of these "old notions" the state supreme court had upheld the statute as applied to the obligation of child support. Stanton v. Stanton, 30 Utah 2d 315, 318-19, 517 P.2d 1010, 1012 (1974).

77. 421 U.S. at 14.

78. *Id.* at 14-15.

79. *Id.* at 13-14.

80. *Id.* at 14.

81. *Id.* at 18.

82. In a rather surprising move the Supreme Court, in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), applied the due process clause of the fourteenth amendment to overturn an Ohio statute requiring mandatory maternity leave for school teachers. The irrebutable presumption of incapacitation resulting from pregnancy was found to violate due process by burdening the right to procreate. Three justices argued that the proper issue was equal protection, as it had been in the lower courts. The Court had used the due process rationale to overturn irrebutable presumptions in the past. *See* United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S.441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971); Carrington v. Rush, 380 U.S. 89 (1965). But its use here seems at least partly an attempt to avoid an equal protection analysis which might raise further questions about equal protection standards.

important lessons. The standard for testing these classifications varies between traditional rational relationship and fair and substantial relationship, although the Court has never openly acknowledged the existence of this latter standard. The former and weaker of the two is more likely to be applied to sex-based classifications in welfare laws. Administrative convenience alone will not justify such a classification, but in combination with some other governmental interest, it may. The substantive cost of benefits, as distinguished from the administrative cost of determining who is entitled to them, will justify a sex-based classification. The Court will permit different treatment of the sexes designed to remedy past economic discrimination against women.[83] Finally, the Court may well decide that some sex-based classifications, like pregnancy and childbirth, are not sex-based after all.

II. Sex Discrimination and Welfare Legislation

A. *Social Security Family Benefits*

One of the major public assistance programs, in terms of the number of recipients and the sums disbursed,[84] is the federal Social Security Act,[85] which provides old age, death, and disability benefits to workers[86]

That is, it might not be possible to reach the same result in *LaFleur* under the rational relationship test or even under an intermediate test, which the Court has not as yet acknolwedged. If the Court missed an opportunity to clarify its equal protection approach, it also provided a new weapon for the attack on irrebutable, sex-based presumptions of the kind found in the Social Security Act. *See generally* Note, *Equal Protection and the Pregnancy Leave Case*, 34 Ohio St. L.J. 628 (1973); Note, *LaFleur v. Cleveland Board of Education: An Unarticulated Application of the New Approach to Equal Protection*, 35 U. Pitt. L. Rev. 141 (1973); 28 Ark. L. Rev. 150 (1974); 22 Clev. St. L. Rev. 172 (1973); 51 N.C.L. Rev. 768 (1973); 14 Wm. & Mary L. Rev. 1026 (1973).

83. In Schlesinger v. Ballard, 419 U.S. 498 (1975), the Supreme Court upheld against an equal protection challenge federal statutes subjecting male naval officers to mandatory discharge when twice passed over for promotion while permitting female naval officers 13 years of commissioned service before subjecting them to discharge. The Court reasoned that male and female officers are not similarly situated, since female officers do not serve on the lines and have fewer opportunities for promotion. Congress could reasonably have concluded, said the Court, that the 13-year period for female officers is necessary to provide them with equivalent career opportunities to male officers. The Court, then, seems inclined to permit different treatment of the sexes which not only remedies prior economic discrimination against women but also remedies present economic inequalities of some kinds.

84. By July 1973, monthly benefit payments totalled $4.1 billion. The Act now covers 90% of all workers in paid employment. The Act does not cover federal civilian employees, some state and local government employees, voluntarily excluded self-employed farmers, and workers with income below the covered amount (*see* note 86 *infra*). 36 Soc. Sec. Bull. No. 11, 1 (1973). *See* Note, *Sex Classifications in the Social Security Benefit Structure*, *supra* note 5, at 181 n.2, 182 n.5.

85. 42 U.S.C. §§ 401-29 (1970).

86. Benefits are based upon "quarters of coverage," three-month periods in which the

in covered employment and to members of their families. The family benefit provisions are structured on the basis of sex; benefits provided to the widows,[87] wives,[88] wives with children,[89] and divorced wives[90] of

individual worker received at least $50 in wages in employment covered by the Act or at least $100 in self-employed income. To be "fully insured," the worker must have at least one quarter of coverage per year from age 21 (or from 1950, whichever is later) until the worker dies or reaches the age of 62, a total of 40 quarters. The extent of coverage is the worker's "Primary Insurance Amount" (PIA), upon which benefits for the worker and his family are based. 42 U.S.C. §§ 413(a), 414(a), 415(a) (1970).

Much criticism has been directed at the regressive contribution structure, under which all employees pay what is essentially a tax on the same fixed amount of income. The current amount subject to the contribution "tax" is $15,300. For those who earn this amount or less for the year, the tax is relatively more burdensome than for those who earn more. Women as a group earn less than men, as shown in the following table:

Year	*Median Earnings* Women	Men	Women's median earnings as percent of men's
1972	$5,903	$10,202	57.9
1971	5,593	9,399	59.5
1970	5,323	8,966	59.4
1969	4,977	8,227	60.5
1968	4,457	7,664	58.2
1967	4,150	7,182	57.8
1966	3,973	6,848	58.0
1965	3,823	6,375	60.0
1964	3,690	6,195	59.6
1963	3,561	5,978	59.6

Prepared by Women's Bureau, Employment Standards Administration, U.S. Dep't of Labor, from data published by the Bureau of the Census, U.S. Dep't of Commerce, *cited in* Kahn v. Shevin, 416 U.S. 351, 353-54 n.5 (1974). The table cited also includes statistics for the years 1955-62. The tax, therefore, falls more heavily upon women than upon men. In 1971, for example, the tax was imposed on the first $7,800 of earnings. Fifty-five per cent of all male workers, compared with 91% of all female workers, earned less than $8,000 for the year. While benefits are weighted in favor of low-income workers, each category of benefits paid to male workers and their families exceeded those paid to female workers and their families. In 1970 the median income of women workers was about 45% of men's, while the average benefit payments to women were 80% of the payments to men. Also, because most families today have two wage-earners (63% in 1971), and since the majority of workers earn less than the maximum amount upon which the tax is based, the tax falls more heavily on the family with two wage-earners than on the family with one earning the same amount. Whenever the wife in a two-parent working family is employed, the family will be taxed more heavily than the one-parent working family or the unmarried worker. The injustice of this system does not, however, rise to the level of a constitutional violation. *See* Bell, *Women and Social Security: Contributions and Benefits*, (Paper prepared for hearings of the Joint Economic Committee) (July 25, 1973); CITIZEN'S ADVISORY COUNCIL, *supra* note 9, at 67-78, 84-85; PRESIDENT'S COMM'N, *supra* note 9, at 36-39; Note, *Sex Classifications in the Social Security Benefit Structure, supra* note 5, at 185-86 nn.23-26.

87. 42 U.S.C. §§ 402(e), (f)(1)(D), (f)(3) (1970). The widow of a deceased worker receives the benefit regardless of dependency, while the widower of a deceased worker may receive the benefit only if his working wife had paid three-fourths of the family's

male workers are either denied entirely to the widowers, husbands, husbands with children, and divorced husbands of female workers or are provided only upon proof of the male spouses' dependency. Such schemes, extending benefits to the "typical" family (male-breadwinner, female-homemaker) but denying them when the sex roles are reversed, have been described as "double-edged" discrimination:[91] they treat both the female worker and her husband differently from the male worker and his wife.[92]

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expenses. The benefit is equal to the worker's PIA. As of December 1971, only 12,000 husbands and widowers received benefits based on their wives' earnings, while seven million wives and widows received benefits based on their husbands'.

The benefits for dependent wives and widows, 42 U.S.C. §§ 402(b)(1)(E), 402(b)(2), 402(e)(2) (1970), are a continuing source of irritation to working women. If both the husband and wife are retired, the wife receives a benefit equal to one-half of the husband's PIA, unless she is herself entitled to a worker's benefit which would be greater, in which case she receives the latter amount. A widow receives a benefit equal to the full amount of her husband's PIA unless she is entitled to a larger benefit as a worker. Thus, the married or widowed woman who has worked most or all of her life may receive little more in benefits than she would have received if she had never worked at all. As long as she could have received a benefit merely for staying at home, the social security taxes she paid bring her something less than their full return. Of the six million retired working women receiving benefits in 1971, one million received the larger dependency benefits, and thus, realized no return at all on their taxes. An equitable solution would be to allow credits under the social security system for work performed in the home; benefits to all individuals would then be based upon their work. Bell, *supra* note 86. *See* Clark v. Celebrezze, 230 F. Supp. 798 (D. Mass. 1964), *aff'd*, 344 F.2d 479 (1st Cir. 1965), *cert. denied*, 385 U.S. 817 (1966).

88. 42 U.S.C. §§ 402(b), 402(c)(1)(C), 402(3) (1970). Wives of male workers entitled to old age or disability benefits are entitled to a benefit equal to one-half of the worker's PIA. Husbands of female workers are entitled to the benefit only if they meet the dependency requirement. *See* note 87 *supra* and notes 110-11 and accompanying text *infra*.

89. 42 U.S.C. §§ 402(b)(1)(B), 402(d) (1970). The wife of a retired or disabled worker, who has in her care a child eligible for a benefit, is herself entitled to a benefit equal to one-half her husband's PIA. A surviving divorced wife of a worker, who has in her care a child eligible for a benefit, is also entitled to a "mother's" benefit. *Id.* §§ 402(d), 402(g)(1). Husbands of retired or disabled female workers and divorced husbands are not entitled to a "father's" benefit. However, the "mother's" benefit for widows (*id.* § 402(g)) must now be given to widowers.

90. *Id.* §§ 402(b)(1), 402(e)(1), 416(d). A divorced wife who has reached the age of 62, a surviving divorced wife who does not care for a child but has reached the age of 62, and a disabled surviving divorced wife between the ages of 50 and 60 are all entitled to benefits, while males in the same circumstances are not. Both divorced wives and surviving divorced wives must not have remarried and must have been married to the worker for twenty years in order to qualify for the benefits. The purpose of the benefit for divorced wives is to "provide protection mainly for women who have spent their lives in marriages that are dissolved when they are far along in years—especially housewives who have not been able to work and earn social security benefit protection of their own." H.R. REP. NO. 213, 89th Cong., 1st Sess. 94 (1965). Husbands are presumed not to stay at home to care for the house and are not permitted to rebut this presumption.

91. Jablon v. Secretary of HEW, 399 F. Supp. 118, 123 (D. Md. 1975).

92. Employee fringe benefits are analogous in many respects to Social Security

In *Weinberger v. Wiesenfeld*[93] the Supreme Court invalidated just such a provision granting an allowance to the widows-with-children of male workers but not to the widowers-with-children of female workers.[94] This provision, stated the Court, "deprive[s] women of protection for their families which men receive as a result of their employment."[95] While noting a basic similarity to the statute struck down in *Frontiero*,[96] the Court found the statute here "more pernicious,"[97] first, because it did not even permit the *dependent* widower to obtain benefits, and second, because the female worker contributed earnings on the same

benefits. Discrimination in the fringe benefits provided to male and female employees is prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1970), the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1970), and Executive Order No. 11,246, 3 C.F.R. 169 (1974). Title VII provides for injunctive and affirmative relief, including hiring and reinstatement awards, back pay, and attorney's fees to the prevailing party. The Equal Pay Act overlaps Title VII and extends protection to additional private employees and most government employees. The Act provides for recovery of back wages, underpayment of wages, and attorney's fees to prevailing plaintiffs. Executive Order 11,246 prohibits discrimination by private employers contracting with the federal government. Private suits by employees are not authorized; remedial action is limited to sanctions and penalties imposed against the employer on the authority of the Secretary of Labor. The fourteenth amendment would also provide some limited protection against discrimination in fringe benefits if state action can be found. Under most private retirement plans, when men and women are entitled to the same benefit, women receive a lower monthly benefit because of their longer life expectancy. This result is permitted under the guidelines for the Equal Pay Act and the Executive Order, but not under the guidelines for Title VII. Unequal pension payments would probably pass the rational relationship test of the fourteenth amendment. Employee death benefits and life insurance are not covered by the Equal Pay Act and the Executive Order, but they are covered by Title VII, under which they must be provided equally to the spouses of male and female employees. The insurance industry uses different actuarial tables for men and women in determining premium payments and pension benefits. Title VII, while it requires equal benefits for male and female employees, would seem to forbid employers from paying a higher premium to an insurance company in order to obtain the same monthly pension for the female employee as for the similarly situated male employee. The situation is troublesome and confusing to employers. *See* Haneberg, *The EEOC and Employee Benefit Plans*, 111 TRUSTS & ESTATES 726 (1972); Note, *Sex Discrimination in Employee Fringe Benefits*, 17 WM. & MARY L. REV. 109 (1975).

93. 420 U.S. 636 (1975).

94. 42 U.S.C. § 402(g) (1970). "Section 402(g) was added to the Social Security Act in 1939 as one of a large number of amendments designed to 'afford more adequate protection to the family as a unit.' " H.R. REP. NO. 728, 76th Cong., 1st Sess. 7 (1939). Monthly benefits were provided to wives, children, widows, orphans, and surviving dependent parents of covered workers. *Id.* Children of covered women workers, however, were "eligible for survivors' benefits only in limited circumstances . . . and no benefits whatever were made available to husbands or widowers on the basis of their wives' covered employment." 420 U.S. at 643. *See also id.* at 639 n.5, 644 n.12.

95. 420 U.S. at 645.

96. *Id.*

97. *Id.*

basis as the male worker to a fund from which she did not receive the same benefits.[98] The Court rejected the government's argument, essentially the same one it had accepted in *Kahn*,[99] that the statute was "reasonably designed to offset the adverse economic situation of women by providing a widow with financial assistance to supplement or substitute for her own efforts in the marketplace."[100] The scheme itself and its legislative history convinced the Court that its purpose was not to remedy past job discrimination against women, but instead, to allow women to choose *not* to work and to remain at home with their children.[101] Thus the Court did not consider whether or not the different treatment of the sexes was "reasonably designed to offset the adverse economic situation of women." Of course, it was not: to grant this benefit to the spouse of the male worker but deny it to the spouse of the female worker obviously makes the female worker's efforts in the marketplace worth less than the male worker's. As to the real purpose of the statute, the parental care of children, the differing treatment of the sexes was also "entirely irrational":[102] it discriminated among children solely on the basis of the sex of the surviving parent, denying parental

98. *Id.*

99. *See* note 50 and accompanying text *supra.*

100. 420 U.S. at 646. The Court also rejected the government's argument that social security benefits are not compensation for work done and therefore that Congress is not obliged to provide them equally to covered males and females. "From the outset, social security old age, disability, and survivors' (OASDI) benefits have been 'afforded as a matter of right, related to past participation in the productive processes of the country.' " *Id.* at 646-647.

101. *Id.* at 648-49. Sex-based classifications which favor women must be premised upon "special disadvantages of women" in order to satisfy equal protection. Since this provision is premised upon providing to women the choice of whether to work or to care personally for their children, it does not satisfy equal protection. *Id.*

See ADVISORY COUNCIL REPORT, *supra* note 5, at 30:

> The Council believes that it is unnecessary to offer the same choice [whether to work or to care for children] to a man. Even though many more married women work today than in the past, so that they are both workers and homemakers, very few men adopt such a dual role; the customary and predominant role of the father is not that of a homemaker but rather that of the family breadwinner. A man generally continues to work to support himself and his children after the death or disability of his wife. The Council therefore does not recommend that benefits be provided for a young father who has children in his care.

The recommendations of the Council as to which sex-based classifications should be retained were followed by Congress in the 1972 amendments of the Social Security Act. 420 U.S. at 652-53 n.20.

To this reasoning of the Council, the Court replied: "The fact that a man is working while there is a wife at home does not mean that he would, or should be required to, continue to work if his wife dies. It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female." *Id.* at 651-52.

102. 420 U.S. at 651.

care to those with a surviving father while permitting it to those with a surviving mother. And further, "a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' " of his children.[103]

The *Wiesenfeld* opinion, while it roundly condemned the government's rationale for the different treatment, was noticeably bare of any discussion of standards. This silence is all the more remarkable in view of the concern for standards expressed in *Frontiero*, which was so similar in its issues and so close in time. Moreover, the Court was once again fairly well united; the two brief concurring opinions were in basic agreement with the majority.[104] The Court, almost consciously, seemed to give up the search for clear, definitive standards for the sake of consensus. But the Court did not altogether cover its tracks here. Its concern for the real purpose of the statute and its rejection of the economic purpose proffered by the government went well beyond the requirements of the rational relationship test, under which the courts have traditionally presumed the validity of a challenged classification and accepted any reason or state of facts, even if the reviewing court itself had to invent them, which would conceivably justify the classification.[105] Clearly, the Court cast a burden of justifying the classification upon the government and analyzed the classification under a test somewhere between rational relationship and strict scrutiny. And just as clearly, this approach was unnecessary, for the classification could not pass a minimal rational relationship analysis as a remedy for prior economic discrimination against women. A statutory scheme which provides benefits to economically dependent women in order to remedy prior economic discrimination and which at the same time punishes them for becoming economically independent by denying them benefits for their families provided to similarly situated men is inherently irrational. As will always be the case with double-edged discrimination, whatever economic reason is adduced to justify benefits for the family which has adopted the traditional sex roles must inevitably fail when applied to the family which has adopted the reverse sex roles and has set about on its own to remedy the very evil addressed by the statute—the imbalance of the sexes in the marketplace and the home.

Wiesenfeld focused only on the discrimination against the female worker and her widower husband with children, who were absolutely

103. *Id.* at 652.

104. *Id.* at 654 (Powell, J., concurring); *id.* at 655 (Rehnquist, J., concurring).

105. *See* note 12 and accompanying text *supra.*

denied benefits granted in the reverse sex-role situation. It does not affect other sections of the Social Security Act which are parallel and discriminate in exactly the same manner.[106] Successful challenges have also been made upon some of the sections of the Act which do grant benefits to the female worker and her husband, but only upon proof of the latter's dependency. This distribution scheme is precisely parallel to the one struck down in *Frontiero*. It imposes a double burden on the female worker and her spouse relative to the male worker and his spouse: first, the procedural burden of proof of dependency, and second, the substantive burden of lower benefits when the husband is not actually dependent for more than one-half of his support.[107] This is the scheme for distributing benefits to the spouses of elderly or disabled workers and to the widows and widowers of deceased workers.[108] (The latter benefits are independent of those at issue in *Wiesenfeld*, which involved an additional benefit to the widow of the deceased male worker who has in her care children eligible for benefits.)[109] Four district courts have found the different treatment in the distribution of benefits to the spouses of elderly or disabled workers to deny equal protection.[110] The different treatment of widows and widowers has met the same fate.[111]

B. *Social Security Retirement Benefits*

Currently, retirement benefits for both male and female workers are based upon average yearly earnings over the same number of years.[112] Prior to December 1974, however, the benefits for female workers were computed upon three fewer years than were the benefits for male workers.[113] The effect of this provision was to eliminate the female worker's three years of lowest earnings and thereby increase her average monthly wage. Thus, a female worker with the same average yearly earnings as a male worker received a larger retirement benefit

106. *See* notes 87-90 and accompanying text *supra*.

107. *See* Frontiero v. Richardson, 411 U.S. 677, 680 (1973).

108. 42 U.S.C. § 402(c)(1)(C) (1970).

109. *See* note 94 and accompanying text *supra*.

110. Jablon v. Secretary of HEW, 399 F. Supp. 118 (D. Md. 1975); Silbowitz v. Secretary of HEW, 397 F. Supp. 862 (S.D. Fla. 1975); Goldfarb v. Secretary of HEW, 396 F. Supp. 308 (E.D.N.Y. 1975); Coffin v. Secretary of HEW, 400 F. Supp. 953 (D.D.C. 1975).

111. Coffin v. Secretary of HEW, 400 F. Supp. 953 (D.D.C. 1975); Goldfarb v. Secretary of HEW, 396 F. Supp. 308 (E.D.N.Y. 1975).

112. 42 U.S.C. § 415(b)(3) (Supp. IV, 1974).

113. *Id.* §§ 415(b)(2)(A)-3(A) (1970), *as amended*, 42 U.S.C. § 415(b)(3) (Supp. IV, 1974).

than the male.[114] This method of computation continues to apply to workers who reached the age of 62 before December 1974. It has been challenged several times. Initially, it was upheld on a rational basis analysis[115] affected with "romantic paternalism."[116] Later cases have upheld the different treatment, also upon a rational basis analysis, but for added measure have found the purpose of remedying past economic discrimination against women "a compelling governmental interest."[117] These cases, that is, would have passed the statute under the strict scrutiny test. A still later case upheld the statute solely upon the rational basis test, convinced that this is the proper standard.[118]

This method of computation presumes that all women entitled to benefits have been discriminated against either in pay or in opportunity during the three years of their lowest earnings. Of course not all women have suffered such discrimination, and of those who have, some have suffered it for more and some for less than three years; some, no doubt, have suffered it only in years of higher earnings. The statute, therefore, advantages all female workers without regard to the discrimination actually suffered; those who have suffered none receive a windfall. *Reed* and *Frontiero*, however, forbid different treatment of the sexes merely for the sake of administrative convenience.[119] *Kahn*, on the

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114. *See* Gruenwald v. Gardner, 390 F.2d 591, 592 (2d Cir. 1968); Polelle v. Secretary of HEW, 386 F. Supp. 443, 444-45 (N.D. Ill. 1974). In spite of this favorable treatment for females, as of December 1972, the average monthly retirement benefit for males was $179.60 and for females, $140.50. *Id.* at 444. Originally, both men and women became eligibile for benefits at age 65. In 1956, women became eligible for benefits at age 62 (at a reduced monthly rate), and the computation period was shortened three years. In 1961, men, too, became eligible for the early, reduced benefits at age 62, but the computation period was not shortened. For men who retired between the ages of 62 and 65, each of the years of retirement was considered a year of low earnings in computing the average monthly wage. This differential treatment, in addition to providing proportionately larger benefits for women with the same earnings records as men, encouraged women, and discouraged men, to retire at the earlier age. In June 1962, 61.2% of retired female workers and 40% of retired male workers received the reduced early retirement benefits. The differential was phased out one year at a time between 1973 and 1975. *See* Note, *Sex Classifications in the Social Security Benefit Structure*, *supra* note 5, at 182-84.

115. Polelle v. Secretary of HEW, 386 F. Supp. 443, 445 (N.D. Ill. 1974). *See also* Frontiero v. Richardson, 411 U.S. 677, 684, 689 n.22 (1973).

116. There is here a reasonable relationship between the objective sought by the classification, which is to reduce the disparity between the economic and physical *capabilities* of a man and a woman—and the means used to achieve that objective. . . . [V]ariation in amounts of retirement benefits based upon *differences in the attributes* of men and women is constitutionally valid.

Gruenwald v. Gardner, 390 F.2d 591, 592-93 (2d Cir. 1968) (emphasis added).

117. Polelle v. Secretary of HEW, 386 F. Supp. 443, 445-46 (N.D. Ill. 1974).

118. Kohr v. Weinberger, 378 F. Supp. 1299, 1304 (E.D. Pa. 1974).

119. *See* notes 23, 24 & 37 and accompanying text *supra*.

other hand, would seem to permit it when "fairly and substantially" designed to remedy the effect of prior economic discrimination against women.[120] The presumption here, however, that all female workers have suffered job discrimination in the three years of lowest earnings, has been seen not as administrative convenience, but as administrative *necessity*: it would be administratively impossible to determine for each year of each woman's employment how much earnings she had actually lost through discrimination.[121] The presumption is thus said to bear a reasonable relationship to the remedial purpose of the statute.[122] At this point it might well be asked why Congress has given over this remedy by equalizing the retirement benefits for male and female workers. The answer suggested[123] is that the remedy is no longer necessary after ten years of the Equal Pay Act and of Equal Employment Opportunity under the Civil Rights Acts.[124] But the simple fact of the matter is that the economic position of women workers has remained virtually unchanged over the last ten years.[125]

C. *Aid to Families with Dependent Children*

AFDC is a joint federal-state effort which provides benefits to families on behalf of "needy children."[126] The state develops its own

120. *See* note 50 and accompanying text *supra.*

121. Polelle v. Secretary of HEW, 386 F. Supp. 443, 446 (N.D. Ill. 1974).

122. *Id.* at 446-47.

123. *Id.* at 445; Kohr v. Weinberger, 378 F. Supp. 1299, 1305 (E.D. Pa. 1974).

124. *See* notes 67, 92 *supra.* Another answer might be that Congress, having prohibited different treatment of male and female employees in the pension programs of private employers under Title VII and EEOC guidelines, might have found it somewhat inconsistent to allow such treatment in the Social Security Act by the federal government.

125. Data published by the Bureau of Census show that the economic position of women relative to men for the years 1963-1972 actually worsened. *See* table, note 86 *supra.* Relying on the same source, the Court, in Kahn v. Shevin, 416 U.S. 351, 354 n.6 (1974), pointed out:

> [I]n 1972 the median income of women with four years of college was $8,736—exactly $100 more than the median income of men who had never even completed one year of high school. Of those employed as managers or administrators, the women's median income was only 53.2% of the men's, and in the professional and technical occupations the figure was 67.5%. Thus the disparity extends even to women occupying jobs usually thought of as well paid.

126. 42 U.S.C. § 601 (1970). Some remarkable instances of different treatment of the sexes have occurred in state AFDC programs. Several states have sought to deny or reduce benefits to children who lived with their mothers and with unrelated adult males. The most notorious of these "man-in-the-house" provisions was Alabama's, which denied benefits to the child when an "able-bodied man, married or single" (1) "lives in the home with the child's natural or adoptive mother for the purpose of cohabitation," (2) "visits [the home] frequently for the purpose of cohabiting with the child's natural or adoptive mother," or (3) "does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere." Alabama Manual for Administration of Public Assistance, pt. I, c. II, § VI.

plan of benefits, which must conform to federal statutes;[127] both state and federal governments provide the funds.[128] Until 1961, the federal statutes recognized three situations qualifying a family for AFDC benefits: the death of a parent, the continued absence of a parent from the home, and the mental or physical incapacity of a parent.[129] In 1961, Congress provided further that the state could, at its option, grant benefits for the unemployment of a parent.[130] This addition, however, was intended to assist only families with unemployed fathers,[131] and in 1967 the statute was specifically limited to such families.[132] Thus, where the mother earns less than a subsistence income and the father is unemployed, the family may receive benefits, but where the father earns less than a subsistence income and the mother is unemployed, the family may not receive benefits.[133] In short, mothers are presumed not to provide substantial support to the family. To date, two such state programs have withstood challenges, but neither challenge was based squarely upon equal protection grounds.[134]

State administrators differed as to the frequency of the mother's sexual relations which would result in disqualification, opinions ranging from once a week to once in six months. The Supreme Court struck down the statute in an opinion based narrowly upon the construction and purpose of the federal statute establishing the program (42 U.S.C. § 606(a) (1970)). King v. Smith, 392 U.S. 309, 316-27 (1968). Thereafter, such state regulations were directly forbidden by federal regulation. 45 C.F.R. § 233.90(a) (1975). *See also* VanLare v. Hurley, 421 U.S. 338 (1975); Lewis v. Martin, 397 U.S. 552 (1970).

Current federal statutes (42 U.S.C. § 602(a)(17)(A)(2) (1970)) require state plans for AFDC to provide that as a condition for aid recipients cooperate with the state in establishing the paternity of illegitimate children and in obtaining support payments for such children. The recipient's failure to cooperate results in protective payments for the child. Several states have attempted to go further, to make such cooperation a condition of aid, or even to impose prison sentences and fines for non-cooperation. The Supreme Court has resisted these severe state sanctions for failure to comply with the federal statute. *See* Roe v. Norton, 422 U.S. 391 (1975); Lascaris v. Shirley, 420 U.S. 730 (1975); Note, *Developments in Welfare Law: AFDC Shelter Reductions*, 10 URBAN L. ANN. 213 (1975).

Related to AFDC is a program to provide employment incentives, opportunities, and training to the members of families receiving AFDC benefits. As written, the federal statutes required that "priority be given to such individuals in the following order . . . first, unemployed fathers; second, mothers . . . who volunteer . . . ." 42 U.S.C. § 633(a) (Supp. IV, 1974). The statute was held to violate equal protection. Thorn v. Richardson, 4 EMPLOYMENT PRACTICE DECISIONS 7,630 (W.D. Wash. Dec. 10, 1971).

127. 42 U.S.C. § 602 (1970).

128. *Id.* §§ 635, 643.

129. *Id.* § 606(a).

130. Act of May 8, 1961, Pub. L. No. 87-31, § 1, 75 Stat. 75.

131. U.S. CODE CONG. & ADM. NEWS 2997 (1967); *see* Burr v. Smith, 322 F. Supp. 980, 983 n.4 (W.D. Wash. 1971), *aff'd*, 404 U.S. 1227 (1972).

132. 42 U.S.C. § 607(a) (1970), *formerly* Pub. L. No. 87-31, § 1, 75 Stat. 75 (1961).

133. *See* note 143 and accompanying text *infra*.

134. Burr v. Smith, 322 F. Supp. 980 (W.D. Wash. 1971), *aff'd*, 404 U.S. 1227 (1972);

III. Future Attacks upon Sex-Based Discrimination in Welfare Legislation

Frontiero and *Wiesenfeld* are the major authorities for challenging the distribution schemes of the family benefits provisions of the Social Security Act.[135] Presumably, they will be fatal to discrimination of the "double-edged" type. *Kahn*, however, stands as an important qualification: it may permit discrimination in favor of women which is, or seems, fairly designed to remedy the effects of prior negative discrimination. It is essential, therefore, in attacking double-edged schemes to stress the double harm, to both men and women, resulting from the sex-role presumption. Such schemes cannot survive the rational relationship test (or if in fact there is one, an "intermediate" test) because they are inherently irrational: they benefit some individuals and punish or inhibit others merely because they are members of the same sex.[136]

Where divorce is not a requirement for the family benefit,[137] the differing treatment of male and female workers and their spouses is eminently vulnerable. Where divorce is a requirement,[138] the attack may fail if the female worker is found to have little or no interest in obtaining benefits for her divorced husband. The benefits provided to the divorced wife of the male worker could be defended, however, as an attempt to remedy past economic discrimination against women.[139] The

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Graham v. Shaffer, 17 Ariz. 497, 498 P.2d 571 (Ct. App. 1972). In both cases a father sought AFDC benefits and was denied. It is possible for a father to obtain AFDC in order to remain at home with his children; in 1971, 1% of AFDC children had a father and no mother present in their homes. B. Babcock, A. Freedman, E. Norton, S. Ross, Sex Discrimination and the Law 769 (1975).

135. To obtain judicial review of a claim for old age, survivors, or disability insurance, the claimant must follow the procedure set forth in 42 U.S.C. § 405(g) (1970), which requires (1) a final decision of the Secretary after a hearing unless the Secretary determines a hearing to be useless; (2) "commencement [of a civil action] within 60 days after the mailing . . . of notice of such decision or within such further time as the Secretary may allow"; and (3) filing of the action "in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business." *See* Weinberger v. Salfi, 422 U.S. 749, 763-65 (1975). Such a claim may not be raised on the federal jurisdiction statute, 28 U.S.C. § 1331 (1970), even though the claim involves constitutional issues. 42 U.S.C. § 405(h); Weinberger v. Salfi, *supra* at 760-61. No class claim is permissible unless all claimants have satisfied the requirements of § 405(g). *Id. Wiesenfeld* proceeded under § 1331, but the government did not challenge the Court's jurisdiction under this statute. 420 U.S. at 641-42 nn.8 & 10.

136. Where the sex-role presumption is irrebutable, it may also deny due process. *See* note 82 *supra.*

137. *See* notes 87-89 and accompanying text *supra.*

138. *See* note 90 and accompanying text *supra.*

139. For Congress's purpose in providing benefits to divorced spouses see note 90 *supra.*

divorce, in other words, changes the double-edged discrimination into remedial discrimination; the real cutting edge, the discrimination against the female worker, has been lost. Of course it should be argued that the female worker does have an interest in obtaining benefits for a divorced spouse, especially if she is liable, under statute or divorce decree, for any portion of his support.

Benefits provided to the divorced female spouse because a child in her care is eligible for benefits are even more problematic. *Wiesenfeld* insisted that comparable benefits to widows on behalf of their children were intended, not to remedy past economic discrimination against women, but to allow them to remain at home and care for their children.[140] But even though benefits provided to divorced female spouses on behalf of children were similarly intended to permit them to remain at home, the Supreme Court could conceivably approve the remedial argument where divorce removes the female worker's claim of discrimination as to spousal benefits. In other words, the Court might decide that divorced male and female spouses, like widows and widowers, have equal rights to remain at home caring for children, and further, that the children have equal rights to the personal care of the custodial parent. Or the Court might decide that benefits provided only to divorced female spouses are remedial and do not treat the female worker differently from the male worker since neither has an interest in obtaining benefits for a divorced spouse. But here, too, it should be argued that male and female workers have an equal interest in obtaining benefits for divorced spouses, especially where the spouses obtain custody of the children and the workers are required to provide support to the spouses or the children or both.

As to classifications directed solely against one sex or the other, the outcome of any challenge will turn upon which sex is discriminated against and for what purpose. The previous method of computing retirement benefits, which continues to discriminate against men and in favor of women who reached the age of 62 before December 1974, will no doubt survive future attacks as an attempt to remedy prior economic discrimination against women.[141] The AFDC-UP program, which seems on its face to discriminate against women and in favor of men by

140. *See* notes 100-01 and accompanying text *supra*.

141. *See* notes 113-25 and accompanying text *supra*. Absence of employment opportunities for older women seems to have been a factor in reducing the retirement age of women to 62 and in shortening the computation period. *See Executive Hearings before the House Comm. on Ways and Means*, 87th Cong., 1st Sess. (1961); H.R. REP. No. 1189, 84th Cong., 1st Sess. 7 (1955).

granting unemployment benefits only to fathers of needy children,[142] may be vulnerable from two directions. In some instances, the program will function as a form of double-edged discrimination favoring some families but not others with the same income depending on which parent earns the income. The program discriminates in favor of the family in which the mother earns less than a subsistence income and the father is unemployed and against the family in which the father earns less than a subsistence income and the mother is unemployed. The total income of the former, but not the latter, will be increased by the amount of the benefit. The result is inherently irrational. The benefit structure also discriminates among the children of these two hypothetical families according to the sex of the parent who is employed (or unemployed) and is therefore not rationally related to the purpose of the program—to benefit these children.[143]

In the attack upon sex-based classifications, much will depend on the purposes of the classifications. To a large extent, the uncertainty surrounding the rational relationship test results from the impossibility of defining in the abstract what is or is not a rational purpose, the standard seeming to shift as one purpose seems a little more or less reasonable than another. The Supreme Court has become increasingly wary of "face value assertions of legislative purposes."[144] It is important, therefore, in attacking these classifications to argue not only the discriminatory effect of the classification but also the discriminatory purpose of the legislature. The Court, as it did in *Wiesenfeld*, may cast upon the government the burden of adducing a valid purpose for the classification. Some purposes, whether actual or hypothetical, will not satisfy the Court. Administrative convenience—the reduction of cost and effort—will not. Nor is the Court likely to accept a classification directed against one sex or the other founded only upon the unexamined presumption that men are more adept in the marketplace and women more adept in the home. The Court does, however, seem inclined to permit different treatment of the sexes designed to remedy past economic discrimination against women. Administrative necessity—the overwhelming task of making a very large number of complicated

142. *See* notes 126-34 and accompanying text *supra.*

143. 42 U.S.C. § 602(a) (1970).

144. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975). *See also* Jimenez v. Weinberger, 417 U.S. 628, 633-34 (1974); United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 536-37 (1973); Police Dep't v. Mosley, 408 U.S. 92 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Gunther, *supra* note 26, at 19.

determinations—may also persuade the Court to uphold a classification designed to benefit women economically. Finally, the Court may accept the substantive cost of a benefit, as distinguished from the cost of determining those entitled to it, as a rational basis for different treatment of the sexes, especially where the classification is in any way susceptible to characterization on a basis other than sex.

CONCLUSION

Much welfare legislation in this country, especially the family benefits provisions of the Social Security Act, presumes the stereotypic family structure of male breadwinner and female homemaker. A significant and increasing number of people, both men and women, do not conform to these stereotypes and are deprived of valuable benefits for no other reason than their sex. Many others who do or expect to receive benefits are no doubt inhibited from changing their roles for fear of losing them. Recent court decisions show that some of these provisions are ready to fall to the first equal protection challenge. The controversy over the proper standard to apply in such cases seems resolved, for the time being, in favor of the rational relationship test or its unacknowledged, intermediate offspring. Future controversies are likely to focus on the purpose and effect of such provisions. The proper solution to the inequities of welfare law, however, lies with legislatures rather than courts. The proper solution will begin with a new Social Security Act which not only eliminates different treatment of the sexes but also discards the regressive method of contribution,[145] closes gaps in coverage,[146] and takes account of work in the home as well as in the marketplace.[147]

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145. *See* note 86 *supra.*

146. For example, a divorced wife cannot receive benefits unless she was married to the worker for 20 years (42 U.S.C. §§ 402(b), 416(d)(1) (1970)); a widow cannot receive benefits until she reaches the age of 60, unless she is caring for a child under 18 years (*id.* §§ 402(e), 416(c)); a disabled widow cannot receive benefits until she is 50 years old (*id.* §§ 402(e), 423).

147. *See* Bell, *supra* note 86.