WEINBERGER v. WIESENFELD

CONSTITUTIONAL LAW—*Gender-Based Classifications—Provision of Social Security Act which provided less insurance protection to females than to males denied equal protection of the law as secured by the due process clause of the fifth amendment.* 420 U.S. 636 (1975).

Notwithstanding the old saw that "the road to hell is paved with good intentions," beneficial purposes are often cited as justification for policies which discriminate on the basis of gender. The United States Supreme Court has ruled that such purposes will suffice to defeat an equal protection challenge to legislative, gender-based classifications.[1] In *Weinberger v. Wiesenfeld*,[2] however, the Court indicated its unwillingness to blindly accept the rationale of good intention.

In *Wiesenfeld*, the Court ruled that:[3]

> Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in *Frontiero*, the Constitution also forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men.

The Supreme Court, in a decision delivered by Justice Brennan,[4] thus held that the gender-based distinction under 42 U.S.C. § 402(g) of the Social Security Act which permitted widows but not widowers to collect special benefits while caring for minor children,[5] violated the right to equal protection secured by the due

1. Kahn v. Shevin, 416 U.S. 351 (1974). For a discussion of Kahn v. Shevin see note 23 *supra* and accompanying text.

2. 420 U.S. 636 (1975).

3. *Id.* at 645.

4. Justice Brennan expressed the view of five members of the Court. Justice Powell filed a concurring opinion in which Chief Justice Burger joined. Noting that he attached less significance to the conclusions suggested by the legislative history of section 402(g) than did the majority (*see* text accompanying notes 26-29, 51 *supra*), Justice Powell asserted that the statute was unconstitutional because there was no legitimate governmental interest to support the classification at issue.

Justice Rehnquist, in a separate opinion, concurred in the result, noting that there was no need for the Court to have gone so far as to state that the discrimination in the challenged provision of the Social Security Act violated the fifth amendment as applied in Frontiero v. Richardson, 411 U.S. 677 (1973). Justice Rehnquist argued that it would have been sufficient to base the decision on the ground that restricting these social security benefits to widows did not rationally serve any valid legislative purpose. Justice Douglas did not participate in either the consideration or decision of the case.

5. The relevant portion of 42 U.S.C. § 402(g) (1974) provides:

process clause of the fifth amendment.[6]

The Court affirmed on direct appeal[7] the decision of a three-judge district court.[8] The district court held that section 402(g) unjustifiably discriminated against women wage earners by affording them less protection for their survivors than is provided to male wage earners.[9] The district court stated:[10]

> During her employment as a teacher, maximum social security payments were deducted from her salary. Yet, upon her tragic death, her surviving spouse and child receive less social security benefits than those of a male teacher who earned the same salary and made the same social security payments.

The appellee, Stephen Wiesenfeld, was married to a woman who died in childbirth leaving him with the responsibility of caring for their infant son. Mr. Wiesenfeld's wife was a teacher whose earnings were the couple's principal source of support during their marriage. Maximum social security contributions were de-

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Mother's Insurance Benefits

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

(A) is not married,

(B) is not entitled to a widow's insurance benefit,

(C) is not entitled to old-age insurance benefits . . . each of which is less than three-fourths of the primary insurance amount of such individual,

(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

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

shall . . . be entitled to a mother's insurance benefit . . . .

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

6. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process." Schneider v. Rusk, 377 U.S. 163, 168 (1964). The equal protection clause of the fourteenth amendment is not directly applicable to federal legislation such as Federal Old-Age, Survivors, and Disability Insurance Benefits, but the concepts surrounding it have been incorporated by the Supreme Court into the due process clause of the fifth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954). *See also* Schlesinger v. Ballard, 95 S. Ct. 572 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

7. Pursuant to 28 U.S.C. § 1252 (1966).

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

9. *Id.* at 991.

10. *Id. See generally* Note, *Sex Classifications in the Social Security Benefit Structure*, 49 IND. L.J. 181 (1973).

ducted from Mrs. Wiesenfeld's earnings during her working career.[11] A short time after the death of his wife, the appellee applied for Social Security Survivor's Benefits for himself and his son.[12] The Social Security office granted insurance benefits to the child,[13] but denied Mr. Wiesenfeld's application for benefits for himself on the ground that such benefits were available only to women under section 402(g).[14]

Mr. Wiesenfeld brought suit in February 1973, seeking a judgment declaring section 402(g) unconstitutional and enjoining the Department of Health, Education, and Welfare from denying benefits under section 402(g) solely on the basis of the gender of the applicant.[15] The three-judge district court granted summary judgment in favor of Mr. Wiesenfeld, and issued an order providing the relief sought.[16] From this decision, the defendant appealed to the United States Supreme Court.

On appeal, the Government advanced two arguments in support of its claim that section 402(g) was constitutional. First, it postulated that because benefits under the section are not compensation for work done, Congress was not obligated to provide female contributors with the same coverage as is provided to males.[17] This argument was premised on *Flemming v. Nestor*,[18] where the Court held that social security benefits are "noncontractual."[19] The Government contended that the benefits an individual receives do not actually compensate that person for

11. When Paula Wiesenfeld died on June 5, 1972, she was a "currently insured" individual. *See* note 5 *supra*. She had "not less than six quarters of coverage during the thirteen-quarter period ending with . . . the quarter in which [she] died." Weinberger v. Wiesenfeld, 420 U.S. 636, 639 n.3 (1975). *See also* 42 U.S.C. § 414(b) (1974). A "quarter of coverage" means a three month period in which the individual has received at least $50 in wages in covered employment or has received at least $100 of self-employed income. 42 U.S.C. § 413(a) (1974).

12. Federal Old-Age, Survivors, and Disability Insurance Benefits, 42 U.S.C. §§ 401-31 (1974), are commonly referred to as Social Security Benefits.

13. Child's Insurance Benefits were obtained under 42 U.S.C. § 402(d) (1974). Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 984-85 (D.N.J. 1973).

14. Appellee's affidavit stated that he was orally informed at the Social Security office that he could not file for benefits in his own behalf. Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 984-85 n.5 (D.N.J. 1973).

15. A woman without an income would be entitled to a grant equal in sum to the amount received by an infant child. 42 U.S.C. §§ 402(d)(2), 402(g)(2) (1974); Weinberger v. Wiesenfeld, 420 U.S. 636, 640-41 (1975).

16. The three-judge district court refused to allow the suit to be brought as a class action. Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 986-87 (D.N.J. 1973).

17. Weinberger v. Wiesenfeld, 420 U.S. 636, 646 (1975).

18. 363 U.S. 603 (1960).

19. *Id.* at 609-10.

work performed, nor do such benefits correlate with contributions made to the program in the form of withholding taxes. Thus, the Government argued, an employee has "no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment."[20] The Court rejected this argument, noting that the "non-contractual" nature of social security benefits could not justify the differential based solely upon the gender of the protected individual.[21]

The Government based its second argument upon the characterization of the classification at issue as one "designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families."[22] It was urged that the case should therefore be controlled by the Court's prior decision in *Kahn v. Shevin*.[23] In *Kahn*, the Court upheld a state statute which conferred a tax benefit on widows, but not widowers, on the ground that the differentiation was reasonably designed to further the state policy of ameliorating the greater hardship which women suffer upon the death of a spouse. The Court in *Kahn* relied upon statistical data to support its conclusion that men are still the primary breadwinners of their families.[24]

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20. Weinberger v. Wiesenfeld, 420 U.S. 636, 646 (1975).

21. *Id.*

22. *Id.* at 648.

23. 416 U.S. 351 (1974). The *Kahn* Court distinguished Frontiero v. Richardson, 411 U.S. 677 (1973) (discussed in text accompanying notes 33-35 *infra*), on the ground that women could be treated differently from men in receiving certain statutory benefits, where the statute is "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." 416 U.S. 351, 355 (1974). The Court upheld a Florida personal property tax exemption of $500 that is granted to widows and not to widowers. Justice Douglas, speaking for the majority, noted that women could be treated differently than men because the tax statute was designed to rectify past and present economic discrimination against women. *Id.* at 355-56.

Justice Brennan, in a dissent joined in by Justice Marshall, adhered to the view that gender-based classifications should be subject to the stricter equal protection test because they are inherently suspect. *Id.* at 357-58. *See* note 43 *infra*. Justice Brennan asserted that the Supreme Court is not:

> [F]ree to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classification can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves . . . compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means.

Id. at 357-58. *See also* note 43 *infra*.

24. Kahn v. Shevin, 416 U.S. 351, 354 n.7 (1974). *But see* F. LINDEN, WOMEN-A DEMOGRAPHIC AND ECONOMIC PRESENTATION 22 (1973).

Arguably, the statute considered in *Wiesenfeld* has ameliorative consequences similar to the statute considered in *Kahn*. Since women as a class suffer a greater financial hardship upon the loss of a spouse, their need for assistance is greater. That Congress has chosen to speak to these greater needs by insuring the life of the husband does not realistically alter the situation. The *Wiesenfeld* Court avoided this issue by discussing the statute not in terms of its discrimination against male beneficiaries, but rather in terms of its discrimination against insured females.

The Court departed from its analysis in *Kahn* by stating that although there is some evidence to support the notion that men are more likely than women to be the primary supporters of their families, such generalizations could not justify the gender-based distinction made by section 402(g).[25] Speaking for the majority, Justice Brennan concluded that the appellee's wife was "deprived of her own earnings in order to contribute to the fund out of which benefits would be paid to others."[26] This conclusion rested upon the Court's interpretation of congressional intent as gleaned from the legislative history of section 402(g).[27] The Court determined that the history of this section revealed a clear intent on the part of Congress to allow women a choice of working or devoting their time to the care of minor children.[28] It was concluded that:[29]

> [The] distinction among women is explicable only because Congress was not concerned in § 402(g) with the employment problems of women generally but with the principle that children of covered employees are entitled to the personal attention

25. Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975). For a more extensive discussion on the role of working women in contemporary society, see F. LINDEN, *supra* note 24. The author notes that:

> Today there are approximately 20 million wives working outside the home making substantial contributions to their families [*sic*] aggregate earnings. This figure is about twice the amount as two decades ago. In fact, married women have accounted for almost three quarters of the recent growth in the female labor force.

Id. at 23. In 1971, 59 percent of women workers were married and one third of working women had both a husband and dependent children. Randolph, *Sex Discrimination in the Family Benefits Sections of the Social Security Act*, 8 CLEARINGHOUSE REV. 535 n.6 (1974).

26. Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

27. *Id.* at 648-51.

28. *Id.* at 649. Section 402(g) benefits terminate when all the children of a beneficiary are no longer eligible to receive children's benefits under 42 U.S.C. § 402(d) (1974). The relevant portion of section 402(d) is set out at 420 U.S. 636, 639 n.5 (1975). Widows without children cannot obtain benefits on the basis of their husband's earnings until the age of 60 (or, in cases of specified disability, age 50). 42 U.S.C. § 402(e)(1) and (5) (1974).

29. Weinberger v. Wiesenfeld, 420 U.S. 636, 651 (1975).

> of the surviving parent if that parent chooses not to work.
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> . . . [T]he gender-based distinction of § 402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent.

Relying on *Stanley v. Illinois*,[30] the Court emphasized that Mr. Wiesenfeld had the right to elect to stay home with his infant son and receive survivor's benefits. In *Stanley*, the Court stated that the interests "of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[31] Similarly, the *Wiesenfeld* Court noted its concern for the welfare of the appellee's son:[32]

> 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. And a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of [his children] . . . .

The Court concluded that *Frontiero v. Richardson*,[33] not *Kahn*, was controlling of the equal protection issue presented in *Wiesenfeld*. In *Frontiero*, the Court declared unconstitutional certain federal statutes which provided, solely for administrative convenience, that spouses of male members of the armed services are dependents for purposes of obtaining increased quarter allowances and medical benefits, but that spouses of female members would not be treated as dependents unless they were, in fact, dependent upon their wives for more than one half of their support.[34] The *Wiesenfeld* Court declared that section 402(g) functioned, as did the statutes invalidated in *Frontiero*, to "deprive women of protection for their families which men receive as a result of their employment."[35] Justice Brennan observed that:[36]

> A virtually identical "archaic and overbroad" generalization, "not . . . tolerated under the Constitution" underlies the dis-

30. 405 U.S. 645 (1972). The Court in *Stanley* concluded that:

> [A]ll Illinois parents are constitutionally entitled to a hearing on their fitness. . . . It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.

Id. at 658.

31. *Id.* at 651.

32. Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975).

33. 411 U.S. 677 (1973).

34. *Id.* at 689 n.22.

35. 420 U.S. 636, 645 (1975).

36. *Id.* at 643, *citing* Schlesinger v. Ballard, 95 S. Ct. 572 (1975).

> tinction drawn by § 402(g), namely, that male workers' earnings are vital to the support of their families, while the earnings of female wage-earners do not significantly contribute to their families' support (citation omitted).

Under the traditional equal protection standard of review — the rational (reasonable) relationship test — legislation will be upheld when challenged unless the classification involved is patently arbitrary or bears no rational relationship to a legitimate state or federal interest.[37] Statutes subject to review under this test bear a presumption of constitutionality; the requisite rational relationship will be assumed "even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent," and their "classifications will be set aside only if no grounds can be conceived to justify them."[38]

The three-judge district court[39] below concluded that section 402(g) satisfied the traditional rational basis test.[40] The court held, however, that statutory classifications based upon gender are inherently suspect, and therefore must be struck down unless justified by a compelling governmental interest.[41] Finding that the classification at issue served no such interest, the district court concluded that the disparate protection afforded by section 402(g) violated the constitutional guarantee of equal protection.

The district court was constrained to rule on the question of whether sex is a suspect basis of classification only because it concluded that the Supreme Court had not sanctioned the resolution of equal protection cases except by the application of either the traditional or the strict scrutiny test.[42]

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37. *See, e.g.*, Richardson v. Belcher, 404 U.S. 78, 81, 83 (1971); Dandridge v. Williams, 397 U.S. 471, 485, 487 (1970); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). *See also Developments in the Law— Equal Protection*, 82 HARV. L. REV. 1065, 1076-87 (1969).

38. McDonald v. Board of Elections, 394 U.S. 802, 809 (1969).

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

40. *Id.* at 990.

41. *Id. See also* United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), where the courts have also concluded that sex is indeed a "suspect" classification.

42. Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 988 (D.N.J. 1973). The district court rejected the suggestion that the Supreme Court had applied an intermediate equal protection test in Reed v. Reed, 404 U.S. 71 (1971). The Court in *Reed* explained the requirements imposed by the equal protection clause by quoting from the case of Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). Reed v. Reed, *supra* at 76. The *Wiesenfeld* district court concluded that *Royster* was not a "strong foundation" for a new equal protection test because that case depended upon the traditional, rational basis standard of review.

Prior to its decision in *Frontiero*,[43] the Supreme Court in *Reed v. Reed*[44] had for the first time held unconstitutional a state statute which treated women differently than men. The Court declined the invitation by the appellant in *Reed* to hold that statutory classifications based on gender are constitutionally suspect. The Court resolved the case by the application of a standard more lenient than would have been applied had gender been declared suspect. The language of Mr. Chief Justice Burger's opinion, however, appears to indicate that the Court went beyond the rational basis test and instead applied an intermediate standard of review.[45]

In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices suggested that *Reed* did in fact mark a "departure from [the] 'traditional' rational-basis analysis." 411 U.S. 677, 684 (1973). *See also* Eslinger v. Thomas, 476 F.2d 225, 230-31 (4th Cir. 1973); Wark v. Robbins, 458 F.2d 1295, 1297 n.4 (1st Cir. 1972) (dictum); Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model of Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

43. Frontiero v. Richardson, 411 U.S. 677 (1973). The *Frontiero* Court was unable to agree on what standard of review should be applied where the classification at issue is based on gender.

A plurality of four Justices concluded that gender-based classifications are constitutionally suspect and therefore must be struck down unless they further a compelling governmental interest. Expressing the view of this plurality, Justice Brennan explained that:

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

Id. at 686-87.

Justice Powell, joined by the Chief Justice and Justice Blackmun, filed a concurring opinion disagreeing with the plurality's characterization of sex as a suspect classification. Justice Powell stated that based on the holding in Reed v. Reed, 404 U.S. 71 (1971), there were narrower grounds presented to find that the federal statutes at issue were unconstitutional. 411 U.S. 677, 691-92 (1973). The opinion urged that the Court should abstain from adopting the view that sex is a suspect classification while the Equal Rights Amendment is in the process of ratification by the states. *Id.* at 692. *See* note 55 *infra* for the text of the proposed 27th amendment.

Justice Stewart concurred separately in the judgment on the basis of Reed v. Reed, *supra*. 411 U.S. 677, 691 (1973). Justice Rehnquist dissented, indicating that he shared with the district court the view that the classifications at issue were based on a rational presumption of dependency.

Subsequent Supreme Court decisions have failed to resolve this issue. Courts continue to grapple with gender discrimination cases without clear guidance as to the applicable standards. *See* notes 41 and 42 *supra*.

44. 404 U.S. 71 (1971). In this case, a provision of the Idaho Probate Code which gave preference to men as administrators of decedents' estates was invalidated on the ground that it violated the equal protection clause of the fourteenth amendment.

45. *See* Gunther, *supra* note 42; Nowak, *Realigning the Standards of Review under*

Under this new, intermediate standard of review, a court would be "less willing to supply justifying rationales by exercising its imagination."[46] In his dissent in *Dandridge v. Williams*,[47] Justice Marshall proposed that equal protection issues be decided by balancing the following factors rather than by application of the two-tier approach: (1) the character of the classification being challenged; (2) the relative importance to persons in the class discriminated against of the statutory benefits they do not receive; and (3) the asserted government interests in support of the classification.[48] Although the Supreme Court has never explicitly embraced this approach, several cases decided by it appear to apply the "sliding scale" approach advocated by Justice Marshall.[49] Under this test, courts are[50]

> required to focus on the actual rationality of the legislative

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the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications, 62 GEO. L.J. 1071 (1974). The district court in *Wiesenfeld* rejected this view of *Reed*. *See* note 42 *supra*.

46. Gunther, *supra* note 42, at 20-21. *See, e.g.*, Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973); Wark v. Robbins, 458 F.2d 1295 (1st Cir. 1972); Samuels v. University of Pittsburgh, 375 F. Supp. 1119 (W.D. Pa. 1974).

Some courts have, however, suggested that the so-called new intermediate test is only a modification of the rational basis test. These courts indicate that the traditional test has undergone a shift to a "slightly, but perceptibly more rigorous" standard of equal protection review. *See, e.g.*, Green v. Waterford Bd. of Educ., 473 F.2d 629, 633 (2d Cir. 1973); Aiello v. Hansen, 359 F. Supp. 792, 796 (N.D. Cal. 1973), *rev'd sub nom.* Gedulig v. Aiello, 417 U.S. 484 (1974).

47. 397 U.S. 471 (1970)(Marshall, J., dissenting).

48. *Id.* at 520-21. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting). Justice Marshall advocated that the use of the two-tier equal protection standard of judicial review be abandoned in favor of a "sliding scale" approach.

Justice White, in a concurring opinion, endorsed the analysis of Justice Marshall. He commented that "it is clear that we employ not just one, or two, but, as my Brother Marshall has so ably demonstrated, a 'spectrum of standards in reviewing discriminations. . . .'" Vlandis v. Kline, 412 U.S. 441, 458 (1973), *quoting in part* San Antonio Independent School Dist. v. Rodriguez, *supra* at 98-99.

49. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974), where the Court appears to have applied the intermediate test basing its decision in large part upon the idea of affirmative action legislation, as well as the notion that the state has a valid interest in formulating its own tax structure. The decision did not specifically identify which standard of review it applied to the Florida statute. *See also* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971) (discussed in note 42 *supra*); Gunther, *supra* note 42, at 18-34.

50. Boraas v. Village of Belle Terre, 476 F.2d 806, 815 (2d Cir. 1973), *rev'd on other grounds*, 416 U.S. 1 (1974). *See also* O'Neill v. Dent, 364 F. Supp. 565, 578 (E.D.N.Y. 1973).

> means under attack . . . [and to] apply the law to factual contexts rather than accept one hypothetical legislative justification to the exclusion of others . . . .

The decision of the Supreme Court in *Wiesenfeld* should resolve any remaining doubts as to whether the Court has indeed abandoned a rigid two-tier approach to equal protection. The majority stated that it was not willing to "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 the goal of the legislation."[51] The decision in the instant case indicates the Court's unwillingness to "rubber stamp" its approval of a federal benefit statute merely because it purports to be in furtherance of some benign legislative objective.

This approach is clearly inconsistent with an application of the traditional test; the Court was not willing to speculate as to whether Congress formulated section 402(g) in pursuit of the amelioriative goals postulated by the Government's attorneys. Rationality was not presumed where "source materials normally resorted to for ascertaining their grounds for action [were] otherwise silent."[52] Instead, the Court found its decision in *Kahn* distinguishable because its review of the legislative history failed to reveal an actual underlying compensatory purpose.

The decision in *Wiesenfeld* is perhaps the clearest application of the intermediate equal protection test by the Supreme Court. That the Court refrained from explicitly adopting this approach is regretable, given the confusion existing in the lower courts.[53] Whether this test is to supersede the traditional approach or merely supplement it remains unclear.

In *Alexander v. Louisiana*,[54] decided shortly after *Reed*, Justice Douglas strongly stressed the need to reevaluate old presumptions about a woman's role in society, and to place a stricter standard of review on gender-based classifications:[55]

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51. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975).

52. McDonald v. Board of Elections, 394 U.S. 802, 809 (1969).

53. *See* notes 42, 46 *supra*.

54. 405 U.S. 625 (1972).

55. *Id.* at 639-41 (concurring opinion). Eleven years earlier, the Court concluded that there was a rational basis for gender-based classifications and stated that "[women are] still regarded as the center of home and family life." Hoyt v. Florida, 368 U.S. 57, 62 (1961)(upholding a law making it more difficult for women than men to be jurors). *But see* Taylor v. Louisiana, 95 S. Ct. 692 (1975) (holding that the sixth amendment right to trial by jury was denied by a statute automatically excluding women from jury panels).

> The absolute exemption provided by Louisiana . . . betrays a view of a woman's role which cannot withstand scrutiny under modern standards.
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> . . . .
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> Classifications based on sex are no longer insulated from judicial scrutiny by a legislative judgment that "woman's place is in the home," or that woman is by her "nature" ill-suited for a particular task.

The mechanics of modernizing the judicial response to sex discrimination have yet to be clearly expressed. Pending the ratification of the proposed 27th amendment,[56] or a clear resolution of the issue of whether gender is a constitutionally suspect basis of classification, application of the flexible intermediate equal protection test will allow courts to hold statutes unconstitutional when they operate to convert genetic happenstance into a legal disadvantage.[57] The Court's decision in *Wiesenfeld* offers clear support for the application of this test.

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56. Thirty-four of the requisite thirty-eight states have ratified the 27th amendment to the Constitution. The amendment provides that:

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

H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972).

There are two exceptions that would not make sex a prohibited classification within the meaning of the 27th amendment: first is the area of personal privacy, and second is physical characteristics which are "unique" to only one gender. SENATE COMM. ON THE JUDICIARY, EQUAL RIGHTS FOR MEN AND WOMEN, S. REP. No. 689, 92d Cong., 2d Sess. 12 (1972).

57. Since the decision in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), several district courts have invalidated other provisions of the Social Security Act pertaining to the one-half support requirements. *See, e.g.*, Silbowitz v. Secretary of HEW, 44 U.S.L.W. 2030 (S.D. Fla. June 20, 1975); Goldfarb v. Secretary of HEW, 396 F. Supp. 308 (E.D.N.Y. 1975), where the courts have held unconstitutional 42 U.S.C. §§ 402(b), (c)(1)(C), (e), and (f)(1)(D) (1974), which require a male to show at least one-half support from his spouse before he is entitled to receive certain benefits.