University of Michigan Journal of Law Reform

Volume 9

1975

Presumption of Dependence in Workers' Compensation Death Benefits as a Denial of Equal Protection

A. Russell Localio
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Civil Rights and Discrimination Commons, Labor and Employment Law Commons, Law and Gender Commons, and the Workers' Compensation Law Commons

Recommended Citation
A. R. Localio, *Presumption of Dependence in Workers' Compensation Death Benefits as a Denial of Equal Protection*, 9 U. MICH. J. L. REFORM 138 (1975).
Available at: https://repository.law.umich.edu/mjlr/vol9/iss1/5

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

PRESUMPTION OF DEPENDENCE IN WORKERS' COMPENSATION DEATH BENEFITS AS A DENIAL OF EQUAL PROTECTION

Workers' compensation laws have widespread application to employment relationships in the United States, covering 84.4 percent of the labor force.[1] One objective of these compensation statutes is to provide funds to support the families of workers killed on the job.[2] Each year employment results in an estimated 11,000 to 14,000 fatalities;[3] while women workers comprise 37 percent of the labor force,[4] the vast majority of workers killed on the job are men.[5] Nevertheless, a significant number of women die from compensable employment-related accidents each year.[6] Often, death benefits provided for the family of a female employee are lower than benefits provided for the similarly situated family of a male employee.

---

1 Skolnik & Price, *Workmen's Compensation Under Scrutiny*, 37 SOCIAL SECURITY BULL. NO. 10, at 5 (1974) (1969 data projected to 1972). *See also* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1974, at 336 (1974) (1972 figures) [hereinafter cited as STATISTICAL ABSTRACT 1974].

2 W. MALONE, M. PLANT & J. LITTLE, THE EMPLOYMENT RELATION 422 (1974) [hereinafter cited as W. MALONE].

3 U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1830, OCCUPATIONAL INJURIES AND ILLNESSES BY INDUSTRY, 1972 at 3, 13 (1974); U.S. NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 3 (1973). Exact statistics are not yet available. The Bureau of Labor Statistics and the National Safety Council estimates differ by 3000 deaths.

4 STATISTICAL ABSTRACT 1974, *supra* note 1, at 336.

5 *See* statistics cited in note 6 *infra*. Very roughly, about 95 percent of fatalities involve men.

6 The Bureau of Labor Statistics does not break down its statistics by sex, nor are there any recently published national studies of work-related fatalities broken down by sex. Telephone interview with John T. Inzana, U.S. Bureau of Labor Statistics, Washington, D.C., Aug. 20, 1975. However, HEW studies of fatalities broken down by sex and place of accident show the following: (1) industrial places and premises—2080 males, 62 females; (2) mine and quarry—354 males, 8 females; and (3) farm (excluding farm home and home premises)—1649 males, 146 females. 2 U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, VITAL STATISTICS OF THE UNITED STATES, 1970, pt. A, at 4-32, 4-33 (1974) [hereinafter cited as VITAL STATISTICS]. Another suggestive figure is "accidents mainly of an industrial type"—5430 males, 538 females. VITAL STATISTICS, *supra*, at 1-256.

Statistics from individual states also shed light on the breakdown by sex. California work-related fatalities for the period 1968 to 1973 involved 4190 males and 121 females. DIVISION OF LABOR STATISTICS AND RESEARCH, DEP'T OF INDUSTRIAL RELATIONS, CALIFORNIA AGRICULTURE AND SERVICES AGENCY, CALIFORNIA WORK INJURIES 1973, at 65 (1974); CALIFORNIA WORK INJURIES 1972, at 65 (1973); CALIFORNIA WORK INJURIES 1971, at 69 (1972); CALIFORNIA WORK INJURIES 1969, at 44 (1970); Letter from Ms. Karen Jones, California Division of Labor Statistics and Research to author, Aug. 29, 1975, on file with the *University of Michigan Journal of Law Reform*. In Michigan from 1970 to 1973, 1055 males and 28 females became work-related fatalities. Letter from Albert L. Osborn, Michigan Department of Labor, Bureau of Safety and Regulation to author, Sept. 9, 1975, on file with the *University*

This note will examine the sex bias prevalent in many workers' compensation statutes and the constitutionality of these statutes in light of recent Supreme Court decisions on sex discrimination. After this examination, alternative methods for effecting reform of the sex-biased death benefit provisions will be analyzed.

I. THE CURRENT STATUS OF WORKERS' COMPENSATION DEATH BENEFITS

A. The Overall View

The right of the survivors of a worker killed in a work-related accident to receive death benefits is conferred exclusively by statute; the award does not arise from a common-law survival or wrongful death action.[7] The amount of the award under the typical statute depends on two factors. First, the award varies as a percentage of the average weekly wage of the employee.[8] Secondly, statutes frequently apportion benefits according to the dependence of the claimants on the deceased employee by dividing claimants into three groups: (1) those who recover solely on the strength of their relationship to the decedent; (2) those who recover only if they can prove proper relationship and then only to the extent they can show actual dependency on the employee; and (3) those who cannot recover under any circumstances even if dependent in fact.[9] In some jurisdictions the husband of a deceased female worker must qualify as a claimant in group (2) while the wife of a deceased male employee falls into group (1) on the basis of a conclusive presumption of dependency.

Nearly all jurisdictions grant benefits to the widow of a deceased employee if she was living with the worker at the time of his death,[10] conclusively presuming her to be dependent on her deceased husband. Of fifty-four statutes, which represent the laws of the fifty states and Puerto Rico as well as several federal benefit provisions, twenty-nine are sex-neutral and grant similarly situated widowers identical benefits by applying a conclusive presumption of dependence to both sexes when such a pre-

---

of Michigan Journal of Law Reform. New York State does not compile statistics by sex, but an unpublished study has revealed that during the years 1971 and 1972 the deaths of 1523 males and 57 females resulted in compensated claims under the workers' compensation program. Telephone interview with Rita Israel, New York State Department of Labor, Division of Research and Statistics, New York City, Aug. 29, 1975. In Pennsylvania the number of work-related fatalities in 1974 was 388 male and 17 female. Letter from Raymond P. Steckler, Pennsylvania Department of Labor and Industry, Bureau of Occupational Injury and Disease Compenssation, Data Input Section to author, Aug. 28, 1975, on file with the *University of Michigan Journal of Law Reform.*

[7] Survival and wrongful death actions are barred when a workers' compensation statute is applicable. 2 A. LARSON, WORKMEN'S COMPENSATION LAW § 64.10 (1974) [hereinafter cited as A. LARSON].

[8] *Id.* § 64.20, app. B, table 15.

[9] *Id.* § 62.10.

[10] *See* notes 11, 12 *infra.* This grant is based on the legislative assumption that women are dependent on their husbands' income.

sumption is used.[11] The remaining twenty-five statutes are sex-biased: while a widow enjoys a presumption of dependence, a widower must prove dependency in fact, or, under some statutes, both actual dependence and incapacity to work.[12] The states with the sex-biased laws include most of the heavily populated states and provide 62 percent of all workers' compensation benefits.[13]

---

[11] 5 U.S.C.A. §§ 8101(11), 8133 (Supp. 1975) (Federal Employees' Compensation Act); ALA. CODE tit. 26, § 280 (Cum. Supp. 1973); ALASKA STAT. § 23.30.215 (Cum. Supp. 1974); ARIZ. REV. STAT. ANN. § 23-1046 (Supp., 1974); CONN. GEN. STAT. ANN. § 31-306 (1972); DEL. CODE ANN. tit. 19, § 2330 (Supp. 1974); FLA. STAT. ANN. § 440.16 (Supp. 1974); HAWAII REV. STAT. § 386-42 (Supp. 1974); ILL. ANN. STAT. ch. 48, § 138.7 (West's 1975 Ill. Legis. Serv. No. 2 at 92); IOWA CODE ANN. § 85.42 (Supp. 1975); KAN. STAT. ANN. § 44-508 (Cum. Supp. 1974); KY. REV. STAT. ANN. § 342.075 (Cum. Supp. 1974); ME. REV. STAT. ANN. tit. 39, § 2 (Supp. 1974); MD. ANN. CODE art. 101, § 36 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 152, § 32 (1965); MONT. REV. CODES ANN. § 92-413 (Supp. 1975); NEB. REV. STAT. § 48-124 (1974); NEV. REV. STAT. § 616.615 (1973); N.H. STAT. ANN. § 281:2(IX) (Supp. 1973); N.M. STAT. ANN. § 59-10-12.10 (1974); N.C. GEN. STAT. § 97-39 (1972); ORE. REV. STAT. § 656.204 (1974); R.I. GEN. LAWS ANN. § 28-33-13 (1956); S.C. CODE ANN. § 72-161 (1962); TEX. REV. CIV. STAT. art. 8306, § 8a (Supp. 1974); VA. CODE ANN. § 65.1-66 (Cum. Supp. 1975); WASH. REV. CODE § 51.32.050 (1974); WIS. STAT. ANN. § 102.51 (1973); WYO. STAT. ANN. § 27-342 (Supp. 1975).

Under the statutes of Maine, Massachusetts and Rhode Island widowers who were living with their spouses enjoy the same basic presumption of dependency as widows. As a secondary presumption, widows are considered to be dependent if they were living apart from their husbands for justifiable cause or if they had been deserted. Widowers do not enjoy this secondary presumption.

[12] 30 U.S.C.A. §§ 902, 922 (1971), *as amended,* (Supp. 1975) (Black Lung Benefits Act of 1972); 33 U.S.C.A. §§ 902, 909 (Supp. 1975); (Longshoremen and Harbor Workers' Act); ARK. STAT. ANN. §§ 81-1302(m), 81-1315(c) (1960); CAL. LABOR CODE § 3501 (West 1971); COLO. REV. STAT. ANN. § 8-50-101 (1973); GA. CODE ANN. § 114-414 (1973); IDAHO CODE § 72-410 (1973); IND. ANN. STAT. § 22-3-3-19 (Burns 1974); LA. REV. STAT. ANN. § 23:1251 (1964); MICH. COMP. LAWS ANN. § 418.331 (Supp. 1975); MINN. STAT. ANN. § 176.111 (Supp. 1975); MISS. CODE ANN. § 71-3-25 (Supp. 1974); MO. ANN. STAT. § 287.240 (Vernon Supp. 1975); N.J. STAT. ANN. § 34:15-13 (Supp. 1975); N.Y. WORKMEN'S COMP. LAW § 16 (McKinney 1965), *as amended,* (McKinney Supp. 1975); N.D. CENT. CODE § 65-05-17 (Supp. 1975); OHIO REV. CODE ANN. § 4123.59 (Page 1973); OKLA. STAT. ANN. tit. 85, § 48 (1970); PA. STAT. ANN. tit. 77, § 562 (Supp. 1975); P.R. LAWS ANN. tit. 11, § 3(5) (Cum. Supp. 1974); S.D. COMP. LAWS ANN. § 62-4-12 (Supp. 1974); TENN. CODE ANN. § 50-1013 (Cum. Supp. 1974); UTAH CODE ANN. § 35-1-71 (1974); VT. STAT. ANN. tit. 21, § 634 (1959); W. VA. CODE ANN. § 23-4-10 (Supp. 1974). The Puerto Rico statute and the Black Lung Benefits Act make no provision for widowers. The Longshoremen and Harbor Workers' Act was recently amended and no longer requires widowers to prove dependence in fact. Act of Oct. 27, 1972, Pub. L. No. 92-576, §§ 10(b), 20(c)(1), (2), 86 Stat. 1265. But since the benefit in the amount of 50 percent of wages is to continue only during "dependent widowerhood" (33 U.S.C.A. §§ 902(16), 909(b) (Supp. 1975)), the statute remains biased against husbands.

[13] STATISTICAL ABSTRACT 1974, *supra* note 1, at 296. Of the eight largest states in terms of both number of employees covered and amount of compensation benefits paid (California, Illinois, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Texas, *id.* at 296, 346), only Illinois and Texas provide sex-neutral treatment for the surviving spouse. ILL. ANN. STAT. ch. 48, § 138.7 (West's 1975 Ill. Legis. Serv. No. 2 at 92); TEX. REV. CIV. STAT. art. 8306, § 8a (Supp. 1974). The remaining six states account for 47.3 percent of the total compensation paid by all states and 38.9 percent of the total industrial employment. STATISTICAL ABSTRACT 1974, *supra* note 1, at 296, 346.

B. Sex-Biased Presumptions of Dependency in Six Major States

In Michigan, New Jersey, California, New York, and Ohio, the widow of a deceased male employee is presumed to have been dependent on her husband and is automatically entitled to full death benefits if she was living with him at the time of his death, while the widower must prove at least some degree of dependency on his wife to receive even partial benefits.[14] In Michigan, for instance, a widower receives benefits commensurate with those a widow receives in like circumstances only upon a showing that he was "wholly dependent" upon the deceased employee.[15] If a widower is unable to make this showing, the benefits to which he is entitled will be lower than the benefits to which a similarly situated widow is entitled. Consider, for example, a family consisting of husband, wife, and one child under age sixteen. Young children, like widows, are conclusively presumed to be wholly dependent.[16] Therefore, if a female employee is survived by a child under sixteen, her widower, as guardian, receives on behalf of the child the award for a wholly dependent person.[17] Even if the widower receives the full award, on account of the minor child in the family, the widower is disadvantaged as compared with a similarly situated widow in two respects. First, the minimum and maximum awards[18] are higher for widow and child than for widower and child.[19] Second, when the child reaches age twenty-one, the benefits paid to the widower qua guardian cease while benefits paid to a widow with a child continue for a period of 500 weeks from the date of the employee's death regardless of the child's age.[20]

If the deceased wife had no children, then the widower, to receive any award, must show at least partial dependence. Even if he can demonstrate partial dependence, compensation is not the full benefit which all widows

---

[14] CAL. LABOR CODE § 3501 (West 1971); MICH. COMP. LAWS ANN. § 418.331 (Supp. 1975); N.J. STAT. ANN. § 34:15-13 (Supp. 1975); N.Y. WORKMEN'S COMP. LAW § 16 (McKinney 1965), *as amended,* (McKinney Supp. 1975); OHIO REV. CODE ANN. § 4123.59 (Page 1973).

[15] MICH. COMP. LAWS ANN. § 418.331 (Supp. 1975).

[16] *Id.*

[17] *Id.* § 418.321. The award equals two-thirds of the wife's wages.

[18] Although the standard measure for the death benefit award is two-thirds of the wages of the deceased employee, the legislature has set maximum and minimum limits to the weekly benefit payments. MICH. COMP. LAWS ANN. § 418.321 (Supp. 1975).

[19] *Id.* The maxima and minima are periodically increased. MICH. COMP. LAWS ANN. § 418.355 (Supp. 1975). The current figures are $107 and $70 for one dependent and $112 and $73 for two dependents (a widow and a child for example). BUREAU OF WORKMEN'S COMPENSATION, MICHIGAN DEP'T OF LABOR, WORKMEN'S COMPENSATION ACT OF 1969 AND RULES OF PRACTICE 101 (1975).

[20] MICH. COMP. LAWS ANN. §§ 418.331, .335 (Supp. 1975). If the worker leaves one relative partially dependent and another wholly dependent, the wholly dependent person receives the entire benefit, and the partially dependent person cannot receive any award until the death of the totally dependent person. *Id.* § 418.331. Therefore, as the statute reads, when the child reaches age twenty-one, the partially dependent widower qua guardian is cut off completely until the child dies. By contrast, the widow qua guardian receives the full award, allocated half to her and half to the child, and may continue to receive the full award after the child reaches twenty-one.

receive,[21] but is only a fraction of the full benefit, the fraction equalling the amount contributed by the wife to the husband for his support divided by the annual earnings of the wife at her death.[22] Moreover, while the wife receives her full benefit automatically, the husband must present evidence on income and expenses to prove dependency.[23]

Under the California statute, if the deceased female employee had a partially dependent husband and one child, for example, the award is $17,500, allocated to the child, in contrast to $20,000 for a widow and child similarly situated. If there are no children, the partially dependent widower receives an award equal to four times the annual amount of his deceased wife's earnings allocated to his support, up to a maximum of $15,000, while a widow similarly situated receives $17,500.[24]

The differential is even more striking in New York. If a deceased female worker leaves a child and a husband who cannot show actual dependency, the award is 30 percent of the decedent's wages, allocated solely to the child, but a widow and child in identical circumstances receive 50 percent of the deceased employee's wages.[25]

Unlike the statutes discussed above, the Ohio workers' compensation law allows the partially dependent widower to qualify for the same award as the widow, who, conclusively presumed to be dependent, receives an award in the amount of two-thirds of the deceased spouse's wages.[26] However, the compensation commission has discretion to determine the widower's dependency on an ad hoc basis and to apportion the benefits between a child, who is conclusively presumed wholly dependent, and a partially dependent husband.[27] By means of a conclusive presumption of total dependency, the widow avoids a hearing and a possibly unfavorable ad hoc determination of the degree of her dependency.[28]

---

[21] *Id.* § 418.331.

[22] *Id.* § 418.321. How partial dependence is proven is especially confusing in the case of a household of a husband and wife only. For the widower to receive any benefits as a partially dependent claimant, he must demonstrate that his wife contributed to his support, *i.e.*, paid a portion of his share of the family expenses. If, for example, the husband had an income of only $500 per year, while the wife's income was $9500, and family expenses were a full $10,000, $5000 allocated to each spouse, then the fraction for computing the partial benefit would be ($5000-$500)/$9500, or 0.47. But if the husband had no earnings, he would receive 100 percent of the full benefit. The results are incongruous. Evidently, the statutory provisions on partial dependency simply were not drafted to take care of the situation of a household with no children and both spouses working, yet it is precisely this situation which breeds the greatest inequality in treatment between the surviving male spouse and female spouse.

[23] The New Jersey compensation statute is similar to Michigan's in its treatment of partial dependents as well as in its conclusive presumption in favor of widows and children. N.J. STAT. ANN. § 34:15-13 (Supp. 1975).

[24] CAL. LABOR CODE §§ 3501, 3502, 4702, 4703 (West 1971).

[25] N.Y. WORKMEN'S COMP. LAW § 16(1)(b), (2), (3) (McKinney 1965), *as amended,* (McKinney Supp. 1975). The widower must prove actual financial dependency if not physical incapacity to work. *See, e.g.,* Nagy v. Goldstein, 261 App. Div. 1030, 26 N.Y.S.2d 46 (1941).

[26] OHIO REV. CODE ANN. § 4123.59(B), (C) (Page 1973).

[27] *Id.* § 4123.59(D).

[28] *Id.*

To receive compensation in Pennsylvania, a widower must prove both that he was dependent upon his wife for support and that he is incapable of self-support.[29] Because of this requirement, a widow with a child receives a benefit of 60 percent of the deceased's weekly wages, but a similarly situated widower, unable to show both dependency and inability to support himself, collects only the 32 percent of his spouse's wages to which the child is presumptively entitled.[30]

The sex-biased statutes award unequal benefits to similarly situated men and women solely on the grounds of sex. Female employees earn less in terms of dollar benefits for their families than do similarly situated male employees. In addition, widowers who qualify for some benefits face the burden of proving partial dependency, total dependency, or, in some states, incapability of self-support.

II. EQUAL PROTECTION: A BACKGROUND

A. Traditional Equal Protection

The analysis of discrimination cases through the Warren Court era proceeded under a "two-tier" approach.[31] The Court reviewed economic and social welfare legislation under the lenient, four-point rational basis test announced in *Lindsley v. Natural Carbonic*.[32] Under this first test, the Court struck down a classification only if it was arbitrary and without any reasonable basis. Under the second approach, the Court scrutinized statutes strictly where a classification was suspect[33] or where a fundamental interest was affected.[34] Under this stricter standard, the statute was upheld only if

[29] PA. STAT. ANN. tit. 77, § 562 (Supp. 1975). Georgia, Idaho, and Vermont impose similar restrictions on the survivors of deceased women employees. GA. CODE ANN. § 114-414 (1973); IDAHO CODE § 72-410 (1973); VT. STAT. ANN. tit. 21, § 634 (1959), *as amended,* (Supp. 1974). Arkansas, Louisiana, Missouri, and West Virginia describe the requirement of incapability of self-support as physical incapability. ARK. STAT. ANN. §§ 81-1302(m), 81-1315(c) (1960); LA. REV. STAT. ANN. § 23:1251 (1964); MO. STAT. ANN. § 287.240 (Vernon Supp. 1975); W. VA. CODE ANN. § 23-4-10 (Supp. 1974).

[30] PA. STAT. ANN. tit. 77, § 561 (Supp. 1975).

[31] *See generally* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8-10 (1972); *Developments of the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

[32] 220 U.S. 61, 78-79 (1911). The four points were as follows: (1) States could exercise wide discretion in classifications; classifications violated equal protection only if they were without any reasonable basis and purely arbitrary. (2) Classifications with a reasonable basis were not offensive merely because some inequality resulted in practice. (3) The Court would assume the existence of any state of facts that could sustain the classification. (4) The person who challenged the classification had the burden of showing that it was arbitrary and without any reasonable basis. For more recent applications of the traditional test see McGowan v. Maryland, 366 U.S. 420 (1961) and Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955).

[33] Held to be suspect classifications were: race, Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954); alienage, Graham v. Richardson, 403 U.S. 365 (1971); and national origin, Oyama v. California, 322 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944).

[34] Fundamental interests include: voting, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); criminal appeals, Griffin v. Illinois, 351 U.S. 12 (1956); travel, Shapiro v. Thompson, 394 U.S. 618 (1969); and privacy, Griswold v. Connecticut, 381 U.S. 479 (1965).

the state could show a compelling interest which justified the classification. Sex-based classifications were held to involve neither a fundamental interest nor a suspect classification, thus falling under the four-point rational basis test, and state laws which drew lines on the basis of sex were consistently upheld.[35]

This two-tier approach was the generally accepted analysis at the time the Illinois Supreme Court decided *Holiday Inns of America v. Industrial Commission.*[36] The court upheld the state's former workers' compensation statute which automatically gave full benefits to widows, but which required a widower to show total dependency on his deceased spouse in order to qualify for any award.[37] Reversing the award of the lower court, the Illinois Supreme Court upheld the statute by applying the lenient, four-point test, which required only a rational relationship between the classification and a possible legislative purpose.[38] The court explained that, although arguably the legislature should have provided differently for widowers, it was not for the judiciary to hold the statute unconstitutional on the grounds of this deficiency. The legislature was not required to provide benefits to the decedent's widower in every instance.[39]

B. The New Rational Basis Test

The lenient approach to sex discrimination continued until the Burger Court decision in *Reed v. Reed.*[40] There the Supreme Court enunciated a new interpretation of the rational basis test, as applied to sex-based classifications, under which the Court looks more critically at legislative reasoning and purpose.[41]

---

[35] *See, e.g.,* Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Radice v. New York, 264 U.S. 292 (1924); Muller v. Oregon, 208 U.S. 412 (1908). For a thorough critique of the sex discrimination decisions prior to 1971 see Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. REV. 675 (1971).

[36] 48 Ill. 2d 528, 271 N.E.2d 884 (1971).

[37] ILL. REV. STAT. ch. 48, § 138.7(b) (1967). The statute has since been made sex-neutral. *See* ILL. ANN. STAT. ch. 48, 138.7 (West's 1975 Ill. Legis. Serv. No. 2 at 92).

[38] 220 U.S. 61 (1911). *See* note 32 *supra.*

[39] 48 Ill. 2d at 532-33, 271 N.E.2d at 887. This former statutory provision was also attacked in Duley v. Caterpillar Tractor Co., 44 Ill. 2d 15, 253 N.E.2d 373 (1969). In that case, after challenging the exclusive nature of the workers' compensation remedy, the plaintiff husband secondarily challenged the benefit provision as a denial of equal protection. Upholding the sex classification, the court reasoned that different compensation to widows conformed to the economic situation present in American society. *Id.* at 19, 253 N.E.2d at 375. For a brief discussion of the shortcomings of the *Duley* holding see 65 Nw. U.L. REV. 1024 (1971).

[40] 404 U.S. 71 (1971). *See generally* Johnston & Knapp, *supra* note 35, at 694-769.

[41] *See generally* Gunther, *supra* note 31, at 18-20; Johnston, *Sex Discrimination and the Supreme Court 1971-1974,* 49 N.Y.U.L. REV. 617 (1974); 7 CREIGHTON L. REV. 69, 75 (1973). The shift in the Court away from the lenient rational basis standard has involved more than the area of sex discrimination. *See* Gunther, *supra* note 31, at 18 n.88. This note concentrates only on the application of the new rational basis test to sex discrimination cases.

Reed arose when an adoptive mother and father each petitioned to be appointed administrator of the estate of their deceased son. After a hearing on the two petitions, the Idaho probate court appointed the father, relying on an Idaho statute which required that male applicants be preferred. The Idaho Supreme Court affirmed, declaring the preference mandatory and not subject to the discretion of the lower courts.[42] On review the Court, in an opinion by Chief Justice Burger, identified the purpose of the classification as administrative convenience: the preference eliminated the need for a hearing and reduced the case load of the probate court. The Court then examined whether the presumption in favor of males advanced the purpose of the statute in a manner consistent with the equal protection clause of the fourteenth amendment. Citing a fifty-year-old decision, *F.S. Royster Guano Co. v. Virginia*,[43] the Court held that the classification had no "fair and substantial relation" to the legislative purpose of finding a competent administrator with a minimum of judicial effort. Because of the sex-based classification, the statute did not treat persons in similar circumstances alike, namely, those equally competent to administer the estate of a deceased person, and thereby contravened the equal protection clause.[44]

Reed marked the first step toward a new examination of sex discrimination under the equal protection clause; the Court no longer accepts any possible legislative purpose as a sufficient basis for upholding a statute, but rather the Court ascertains the actual purpose or purposes and determines whether the classification is substantially related to that goal.

The statute in *Reed* denied a woman the opportunity to prove her competency as an administrator; such a conclusive presumption against a sex is clearly pernicious. Not until *Frontiero v. Richardson*[45] however, did the Court examine the problem of a conclusive presumption in favor of a sex. In that case, the challenged statute, which provided living quarters, allowances, and medical benefits for the families of members of the uniformed services, permitted a serviceman to claim his wife as a dependent for such benefits without regard to dependency in fact, while a servicewoman could obtain identical benefits only by proving that her husband in fact depended on her for over one-half of his support.[46] The statute resulted in two types of discrimination: (1) procedural, in that the servicewoman had to prove her spouse's dependence in fact while the serviceman did not; and (2) substantive, in that the servicewoman did not receive any benefits if her spouse was not dependent in fact while the serviceman in like circumstances did.[47] Upholding the statute against an equal protection challenge, the lower court

---

[42] 93 Idaho 511, 465 P.2d 635 (1970).

[43] 253 U.S. 412 (1920).

[44] 404 U.S. at 76, 77. Significantly, in *Reed* the Burger Court intruded into an area of law, decedents' estates, which the Court usually chooses to avoid in deference to state court determinations. Gunther, *supra* note 31, at 32-33.

[45] 411 U.S. 677 (1973). *See generally* Note, *Sex Discrimination by Federal Government in Payment of Fringe Benefits to Armed Service Personnel*, 87 HARV. L. REV. 116 (1973).

[46] 37 U.S.C. § 401 (1970); 10 U.S.C. § 1072(2) (1970).

[47] 411 U.S. at 680. Mr. Frontiero was not dependent on his wife for over half of his support. 411 U.S. at 680 n.4.

found the purpose of the sex-based classification to be administrative convenience; since 99 percent of the uniformed services personnel were males, and since most working men, even those with working wives, made more than their wives, the presumption that wives of servicemen rely on their husbands for more than one-half of their support resulted in considerable savings of administrative expense.[48]

The Court reversed, holding that the statute denied women equal protection of the law. Justice Brennan, in a four-Justice plurality opinion, departed from the traditional treatment of sex discrimination by declaring sex a suspect classification subject to strict judicial scrutiny.[49] The plurality determined that the sole purpose of the statutes was administrative convenience; the provisions did not have a remedial goal of rectifying the past economic and employment discrimination against women. On the contrary, the statutes actually discriminated against women in uniform by depriving them of benefits accorded to men.[50] If the sole legislative purpose is administrative convenience, Justice Brennan stated, then the burden is on the government to demonstrate that it is less expensive to grant benefits to the wives of all servicemen than to determine which wives were actually dependent.[51] The government failed to present evidence on administrative costs; moreover, the plaintiff's evidence indicated that many wives would fail to qualify as dependents if the one-half support test were applied to them.[52] Therefore, Justice Brennan concluded, such a distinction based upon sex was an arbitrary legislative choice forbidden by the Constitution.[53] The opinion left open the possibility that the government could have a "compelling interest" in administrative convenience if it could show that the classification actually furthered efficiency in operation. Classifications by sex were not flatly prohibited.

Justice Stewart concurred in the plurality's result on the ground that

---

[48] 411 U.S. at 681-82. The government argued that Congress could properly make such a classification for administrative convenience based on assumptions of the dependence of wives on husbands and the lack of dependence of husbands on wives. Brief for Appellee at 8, 9.

[49] 411 U.S. at 686. The plurality reasoned that, like race, sex is an immutable characteristic, and any classification based on sex should be strictly scrutinized. Society's increased sensitivity to sex as a classification is reflected in Congress' enactment of Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the Equal Rights Amendment.

[50] 411 U.S. at 688, 689 n.22. *See also* Brief for Appellant at 11.

[51] 411 U.S. at 689. This may be essentially an argument of overbreadth, *i.e.*, classifying wives as automatically dependent includes in that category wives who in fact are not dependent on their husbands for support. *See* 7 CREIGHTON L. REV. 69, 77 (1973).

[52] 411 U.S. at 689 n.23. Brief for Appellant at 45 n.55.

[53] 411 U.S. at 690. The government had argued that, in contrast to *Reed*, the classification at issue in *Frontiero* was not arbitrary but rather was "based upon reasonable presumptions of dependency, which are in accord with the realities of American life." Brief for Appellee at 10. Further, the government asserted that, even if the stereotype of the housewife was no longer in conformity with reality, any change in reality was solely for legislative consideration and not a reason for judicial action. Brief for Appellee at 12.

the statute engendered invidious discrimination.[54] In a separate opinion, Justices Powell, Blackmun, and Burger also concurred in the result, but relied solely on the analysis articulated in *Reed*.[55] Since the classification at issue had no "fair and substantial relation" to the legislative purpose,[56] the statute was invalid under the *Reed* test. All told, a majority of the Justices deciding *Frontiero*, unwilling to declare sex a suspect classification, used the new rationality test to strike down a presumption which, for the sake of administrative convenience, favored one sex.

In *Weinberger v. Wiesenfeld*[57] the Court applied the *Reed-Frontiero* rational basis test to classifications in social security legislation. In *Wiesenfeld* a widower attacked a social security provision which conferred a "mother's insurance benefit" on the widow of an insured male who died leaving a minor child, but which failed to grant a similar father's insurance benefit to a widower.[58] The Court held that the classification was indistinguishable from the classification at issue in *Frontiero*.[59] The generalization that men are more likely than women to be primary family supporters, the Court reasoned, could not justify treating men and women differently.[60] As a result of the statute, women failed to receive protection for their families commensurate with the benefits accorded the families of insured males, who had made equal contributions in the form of social security premiums.[61] The purpose of the statute was not remedial; it was not designed to compensate widows for economic discrimination against women.[62] Rather, the statutory purpose was to enable the surviving parent

[54] 411 U.S. at 691. Apparently, Justice Stewart equates an invidious discrimination test with a rational basis test. *See* Dandridge v. Williams, 397 U.S. 471, 486, *reh. denied*, 398 U.S. 914 (1970); 7 CREIGHTON L. REV. 69, 82-83 (1973). Therefore, Justice Stewart essentially determined the sex classification to be invalid under a new rational basis test articulated in *Reed*.

[55] 411 U.S. at 692. Unwilling to declare sex a suspect classification, the Justices felt that the Court should defer any judicial resolution until the state legislatures had acted on the Equal Rights Amendment. *See* text accompanying notes 155-56 *infra*.

[56] Reed v. Reed, 404 U.S. 71, 76 (1971). *See* notes 43-44 and accompanying text *supra*.

[57] 420 U.S. 636 (1975).

[58] 42 U.S.C.A. § 402(g) (1974).

[59] 420 U.S. at 642-43. Actually, the classification was distinguishable from that in *Frontiero*. In this case the statute provided no benefits for the husband. By contrast, the statute at issue in *Frontiero* provided that a husband could obtain a benefit if he were dependent on his wife for over one-half of his support. *Compare* 42 U.S.C.A. § 402(g) (1974) *with* Act of Sept. 7, 1962, Pub. L. No. 87-649, § 401, 76 Stat. 469. The Court noted this difference later in its opinion. 420 U.S. at 645.

[60] 420 U.S. at 645.

[61] For the computation of social security benefits see 42 U.S.C.A. § 415 (1974).

[62] Discussion of the statute as it affects women as insured wage earners rather than as widow-beneficiaries reflects a fundamental difference in perceiving discrimination. Which side of the coin does one view—the compensation side or the benefit side? The government focused on the economic plight of widows as beneficiaries in order to find a remedial purpose of the legislation to favor women (Brief for Appellant at 11-15), and argued against the view of the statute as discriminating against women in compensation by insurance fringe benefits. Brief for Appellants at 20, 22. The government presented this remedial purpose argument in order to come within the ambit of Kahn v. Shevin, 416 U.S. 351 (1974). *See* notes 111-12 and accompanying text *infra*.

to care for the child personally rather than to work and pay for child care.[63] The statute consequently sustained economic discrimination by providing dissimilar treatment for men and women similarly situated.[64]

Reed, *Frontiero*, and *Wiesenfeld* portend a change in the test under which the Court scrutinizes equal protection challenges in sex discrimination cases.[65] Under the new test the Court first identifies the purpose of the challenged legislation[66] by examining the statutory scheme and legislative history.[67] It next determines whether there is a rational connection between the classification and purpose of the statute.[68] If classification by sex is used as a shortcut for administrative convenience purposes, it cannot be predicated on outmoded generalizations about sex roles.[69] The burden is on the government to show both the purpose of the statute and the rational relationship between the classification and the purpose.[70] These recent cases mark a departure from a two-tier analysis and the beginning of a new intermediate ground of scrutiny for sex-based statutory classifications.[71]

---

[63] 420 U.S. at 648-49. The Court refused to accept the government's argument that the legislative intent was to aid widows. *See* Brief for Appellant at 13-14.

[64] 420 U.S. at 653. Justice Powell, concurring in the result, emphasized the factor of discrimination against women as wage earners. *Id.* at 654.

[65] Still another mode of equal protection analysis, which weighs competing public policies outright without delving into identification of purpose or examining rational relationships, appears in Note, *Legislative Purpose, Rationality, and Equal Protection,* 82 YALE L.J. 123 (1972). This note discusses only the new rational basis analysis because, while the above-cited note makes the substantial claim that courts actually use a policy analysis when deciding cases, no court has yet advanced that approach in a written opinion.

[66] For example, in *Reed* and *Frontiero* the purpose of the statute was found to be solely administrative convenience; in *Wiesenfeld* it was to permit child care by the surviving spouse. *See* notes 42-63 and accompanying text *supra.*

The purpose advanced to justify the classification need not be the primary purpose of the statute. McGinnis v. Royster, 410 U.S. 263 (1973). For example, if the primary purpose is administrative convenience, but the government successfully proves an ancillary purpose to justify the discrimination, then the classification can withstand equal protection scrutiny.

[67] *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

[68] In Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973), a woman was denied employment as a page in the South Carolina State Senate on the basis of her sex. The state wanted to avoid any appearance of impropriety in its legislature and, therefore, prescribed the hiring of female pages. The court held that there was no "fair and substantial relation" between the basis of the classification (sex) and the object of the classification (avoiding impropriety).

[69] In Stanton v. Stanton, 421 U.S. 7 (1975), for example, a Utah statute extended the majority age for males to twenty-one while keeping the age for females at eighteen. As a result, a divorced father cut off payments for his daughter at age eighteen. The Utah court upheld the statute as being founded on "old notions" that (1) boys had to be educated to become providers, and (2) girls tend to mature physically and emotionally before boys. The Supreme Court reversed, finding that under any test the criterion of sex of the child was wholly unrelated to the objective of the statute (child support), since women were no longer destined to become housewives.

[70] Weinberger v. Wiesenfeld, 420 U.S. 636, 643-44 (1975) (identification of purpose); Frontiero v. Richardson, 411 U.S. 677, 689 (1973) (connection between classification and purpose).

[71] Gunther, *supra* note 31, at 8. Future challenges are not likely to have the advantage of a view of sex as a suspect classification. The present Court has shown a reluctance to scrutinize new areas strictly, and changes in Court personnel are not

C. *Holiday Inns Reconsidered Under the New Rational Basis Test*

In view of the changes in analysis of sex discrimination cases, it is likely that a state court, if given the opportunity to consider the facts in *Holiday Inns*[72] would view the presumption of dependence differently today.[73] Courts no longer routinely approve lines drawn according to sex;[74] contrary to the statement in the Illinois opinion,[75] the burden is now on the government to show that the classification rests on a reasonable basis.[76] Moreover, a court must now examine the facts presented and can no longer assume a state of facts sufficient to sustain the legislation.[77] The four years since *Holiday Inns* have witnessed major changes in judicial review of sex-based classifications; death benefits legislation can no longer rely on *Holiday Inns* as a certain precedent for judicial approval.

III. THE NEW RATIONAL BASIS TEST AND WORKERS' COMPENSATION DEATH BENEFITS

A. *Purpose of Death Benefits*

Underlying workers' compensation is the theory that, since employment-related injuries are inevitable, the price of a product or service should

---

likely to bolster the plurality bloc in the *Frontiero* case. *See* Gunther, *supra* note 31, at 12-15; 59 IOWA L. REV. 377, 382 nn.58 & 59 (1973); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1506-16 (1971). Nor are future cases likely to return to the discredited substantive due process analysis, under which the Court freely scrutinized legislative purposes; the Court will limit its examination to the means of the legislation. *See* Gunther, *supra* note 31, at 43-44.

[72] *See* notes 36-39 and accompanying text *supra*.

[73] Although the Illinois legislature has recently amended the state compensation statute to overcome the holding in *Holiday Inns*, that decision still represents the traditional judicial determination of the issue of sex discrimination in compensation death benefits.

[74] Many of the precedents cited by the Illinois court are now without force; a few were invalid at the time of the decision. For example, Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968), has been undermined by congressional action. 42 U.S.C.A. § 415(b)(3) (1974) (the retirement age for both men and women is now sixty-two). Hoyt v. Florida, 368 U.S. 57 (1961), is ineffective after the jury-selection decision in Taylor v. Louisiana, 419 U.S. 522 (1975). The frequently cited case upholding the Michigan law which prohibited barmaids from soliciting drinks, Goesaert v. Cleary, 335 U.S. 464 (1948), has been thoroughly discredited in several decisions. *See, e.g.*, White v. Fleming, 44 U.S.L.W. 2052 (7th Cir. July 24, 1975); Daugherty v. Daley, 370 F. Supp. 338 (N.D. Ill. 1974). The Indiana rule which allowed a wife no cause of action for loss of consortium upheld in Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969), was changed prior to *Holiday Inns*. England v. Dana Corp., 428 F.2d 385 (7th Cir. 1970); Troue v. Marker, 252 N.E.2d 800 (Ind. 1969). Finally, the Illinois court failed to mention a state equal rights amendment which had passed by referendum six months before the decision. *See* note 155 and accompanying text *infra*.

[75] Holiday Inns of America v. Indus. Comm'n, 48 Ill. 2d 528, 532-33, 271 N.E.2d 884, 887 (1971).

[76] *See* note 70 and accompanying text *supra*.

[77] 48 Ill. 2d at 532-33, 271 N.E.2d at 887.

reflect the cost of injury or death to the workers just as it bears the cost of breakage to the machinery.[78] Workers' compensation differs from social security in that covered employees contribute no part of the cost of the program; the entire cost is borne by the employer as a business expense and, in theory, passed on to the consumer through the price of the product.[79] Therefore, workers' compensation is not amenable to the argument made in social security cases that since all employees pay the same premium, all should receive the same benefits regardless of sex.[80]

Nor are compensation awards like benefits received from private pension plans; they are not fringe benefits because individual employers cannot be compelled through collective bargaining to add to hourly wages the amount equivalent to the benefits.[81] Most private employer pension plans are subject to the strict prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964,[82] a completely separate standard from fourteenth amendment equal protection.[83] While reference to the congressional mandate forbidding sex discrimination may have the residual effect of persuading judges to rethink their traditional positions on the equal protection argument,[84] Title VII does not apply directly to workers' compensation programs.

Rather, compensation benefits are a type of income insurance, a weekly stipend to replace wages lost from the accident.[85] The level of benefits, set by statute, usually varies with the wages of the covered employee and the number of beneficiaries.[86] Thus the system falls somewhere between a strict

---

[78] W. MALONE, *supra* note 2, at 47; Honnold, *The Theory of Workmen's Compensation*, 3 CORNELL L. REV. 264, 268 (1918).

[79] *Id.*

[80] The argument that women are being deprived of paid-for benefits for their families, a factor in *Wiesenfeld,* became a recurring theme in later social security decisions. *See* Jablon v. Secretary of HEW, 399 F. Supp. 118 (D. Md. 1975); Goldfarb v. Secretary of HEW, 396 F. Supp. 308 (E.D.N.Y. 1975).

[81] 1 A. LARSON, BASIC CONCEPTS & OBJECTIVES OF WORKMEN'S COMPENSATION, SUPPLEMENTAL STUDIES FOR THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, 32 (1973) [hereinafter cited as CONCEPTS & OBJECTIVES].

[82] 42 U.S.C.A. § 2000(e)-2 (1974) (an employer may not discriminate on the basis of sex in compensation, terms, conditions or privileges of employment); 29 C.F.R. § 1604.9(d) (1974) (an employer may not provide fringe benefits for the wife and family of a male employee without providing the same benefits for the husband and family of a female employee). *See also* Decision of EEOC No. 70-513, Case No. AT 7-3 244, CCH EEOC DECISIONS (1973) para. 6114 (Feb. 4, 1970).

[83] Gilbert v. Gen. Elec. Co., 44 U.S.L.W. 2013 (4th Cir. June 27, 1975). *Compare* Communications Workers of America v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975) *and* Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199 (3d Cir. 1975) *with* Geduldig v. Aiello, 417 U.S. 484 (1974) (pregnancy-related disability payments). *Compare* Rosen v. Publ. Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973) *with* Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. denied,* 393 U.S. 982 (1968) (different retirement ages for men and women).

[84] *See* Johnston & Knapp, *supra* note 35, at 675, 701. This type of argument was made in Brief for Appellee at 38 *et seq.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[85] 1 A. LARSON, *supra* note 7, §§ 2.20, 3.30, 3.40; W. MALONE, *supra* note 2, at 82; CONCEPTS & OBJECTIVES, *supra* note 81, at 31, 32, 34.

[86] A. LARSON, *supra* note 7, § 3.30. *E.g.*, MICH. COMP. LAWS ANN. § 418.321 (Supp. 1975).

replacement for a tort recovery and a form of social insurance: it generally compensates for job-related accidents as a tort action does by varying the award with the earning power of the deceased employee, but it adjusts the level of compensation to the size of the employee's family as would a welfare scheme.

B. Death Benefits Presumption of Dependency

Under virtually all compensation statutes, the widower has at least some opportunity to qualify for benefits by showing dependency in fact or both dependency and incapacity for self-support.[87] If the statute gives one sex no means of proving dependency, then there is at work a conclusive presumption against that sex.[88] The legislation challenged in both *Reed* and *Wiesenfeld* bore elements of this conclusive negative presumption. The Idaho statute in *Reed* gave preference to a male applicant without granting the female applicant a hearing.[89] The social security provisions challenged in *Wiesenfeld* provided no father's insurance benefit, thus denying fathers the chance to prove child care needs similar to those of mothers.[90]

The conclusive presumption of dependency in workers' compensation is a positive presumption in favor of one sex, like that in *Frontiero*.[91] Since *Frontiero* the presumption in favor of one sex has been struck down in two federal district court cases involving social security.[92] There is no indica-

---

[87] Two exceptions are the Puerto Rico compensation law and the federal Black Lung Benefits Act, neither of which make any provision for widowers. 30 U.S.C.A. §§ 902, 922(a)(2); P.R. LAWS ANN. tit. 11, § 3(5) (Supp. 1974).

[88] In Stanley v. Illinois, 405 U.S. 645 (1972), for example, under the statute at issue an unwed father had no opportunity to establish his fitness as a parent to gain custody of his child, but an unwed mother enjoyed a presumption of fitness.

[89] *See* notes 41-44 and accompanying text *supra*.

[90] *See* notes 56-64 and accompanying text *supra*. Another social security case in which a similar distinction existed is Jiminez v. Weinberger, 417 U.S. 628 (1974). Under the statutory provision challenged there, illegitimate children who were not acknowledged until after the onset of the father's disability were denied benefits. The Court held that the blanket exclusion of these illegitimates was not reasonably related to the purported purpose of preventing spurious claims. 417 U.S. at 636. In a workers' compensation case, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), the Court struck down a Louisiana provision which relegated unacknowledged, illegitimate children of a deceased employee to a lower priority of right to benefits than legitimate children without allowing illegitimate children to prove economic loss as a result of the death. *See also* Kinney v. Kaiser Aluminum & Chem. Corp., 41 Ohio St. 2d 120, 322 N.E.2d 880 (1975).

[91] *See* notes 46, 47 and accompanying text *supra*. *See also* 59 IOWA L. REV. 377, 384 (1973).

[92] In Goldfarb v. Secretary of HEW, 396 F. Supp. 308 (E.D.N.Y. 1975), a district court ruled that the widower's benefit provisions (42 U.S.C.A. § 402(f) (1974)), which required a widower to prove that he was receiving over one-half of his support from his wife, discriminated unconstitutionally on the basis of sex, since widows did not have to prove any support from their husbands to qualify for the analogous widow's insurance benefit, 42 U.S.C.A. § 402(e) (1974). One month later a three-judge district court in Jablon v. Secretary of HEW, 399 F. Supp. 118 (D. Md. 1975), for similar reasons, struck down the requirement that a husband prove he was receiving over one-half of his support from his wife to qualify for the husband's insurance benefit. *Compare* 42 U.S.C.A. § 402(c)(1) (1974) *with* 42 U.S.C.A. § 402(b)(1) (1974).

tion that a statute which employs only a presumption in favor of one sex and allows the other sex to qualify by showing actual need is any more likely to be upheld than a statute which employs a conclusive presumption against one sex. Both types of presumptions result in a denial of equal protection.[93]

C. Identification of Purpose

Identifying the specific purpose or purposes of a statute is crucial to any equal protection analysis.[94] While the purpose which the government proffers in justifying a classification need not have been the legislature's primary purpose in enacting the statute, but may have been an ancillary motive,[95] a mere recitation of possible purposes by the government is not sufficient.[96] The burden of identifying a purpose is on the government,[97] and courts have been willing to reject a profferred purpose as being unlikely or impossible.[98] The following discussion examines various purposes which may be advanced to justify presumptions of dependency in workers' compensation.

1. Administrative Convenience—If the purpose of death benefits is to provide for persons economically dependent on the deceased employee,[99] the most obvious purpose behind a classification based on sex and a conclusive presumption in favor of widows is administrative convenience. The presumption is a shortcut way to determine which persons were actually dependent on the deceased. The presumption is based on an assumption that typically husbands are family providers and wives are full-time homemakers.[100] The sex-based classification employed in the compensation statutes is in many respects like the classification at issue in

---

[93] The effect of the difference is one of degree only. One results in an absolute exclusion of one sex; the other results in both procedural burdens on, and substantive discrimination against, one sex.

[94] *See, e.g.,* Fortin v. Darlington Little League, 376 F. Supp. 473 (D.R.I. 1974) (purpose of ban against girls on little league was safety in a "contact" sport); Norton v. Weinberger, 364 F. Supp. 1117 (D. Md. 1973) (purpose of social security child's insurance benefit was to compensate for "loss of support" rather than the "loss of right to support"); M. v. M., 321 A.2d 115 (Del. 1974) (basis for classification was the "fundamental concepts of family life" in addition to administrative convenience). *Cf.* Brief for Appellant at 55 & n.56, Frontiero v. Richardson, 411 U.S. 677 (1973).

[95] McGinnis v. Royster, 410 U.S. 263, 276 (1973).

[96] Jablon v. Secretary of HEW, 399 F. Supp. 118 (D. Md. 1975).

[97] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 & n.16 (1975); Jablon v. Secretary of HEW, 399 F. Supp. 118, 129 (D. Md. 1975) (the government did not refer the court to any legislative history on the remedial purpose of the statute).

[98] Weinberger v. Wiesenfeld, 420 U.S. 636, 643-44 (1975). *See* Eisenstadt v. Baird, 405 U.S. 438 (1972).

[99] *See* W. MALONE, *supra* note 2, at 422.

[100] *See, e.g.,* Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973), involving a Rhode Island unemployment compensation statute which automatically gave an unemployed male an additional $5 per month per child, but which required an unemployed woman to demonstrate that her child was totally dependent upon her for support. Striking down the statute as a violation of equal protection, the court found that the legislative recognition that in most cases the father is the main support for minor children was just a rephrasing of the concept of convenience. 361 F. Supp. at 861.

Frontiero,[101] and the impetus to make use of shortcuts is equally strong in both the compensation statutes and the benefit provisions challenged in *Frontiero*. Just as most service personnel are males,[102] and a provision to eliminate a hearing for ascertaining their benefits greatly eases the administration process, so the great majority of employment-related fatalities involve men,[103] and any procedure which facilitates the automatic resolution of the majority of compensation cases minimizes the costs of disbursing benefits to the claimants. The relatively expensive hearing process is then reserved for the minority of cases, which involve deceased women, and the overall administrative costs of the program are minimal.[104]

2. *Remedial Purpose*—Another defense often advanced to justify sex-based classifications is that the suspect legislation is remedial in purpose. In *Kahn v. Shevin*,[105] the Court upheld a Florida statute which granted a property tax exemption to widows but not to widowers on the ground that the purpose of the statute was to rectify past economic discrimination against women by "cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[106] The *Kahn* argument has also been used successfully to uphold sex-based classifications in the social security area. In *Gruenwald v. Gardner*,[107] the Second Circuit upheld the difference in retirement ages of sixty-five and sixty-two for men and women respectively[108] on the ground that older women face special job discrimination as compared with men similarly situated. The possibility of having a remedial purpose, which was recognized in *Frontiero*,[109] may justify and legitimate an otherwise unconstitutional classification.[110]

Whether a remedial purpose should be assigned to workers' compensa-

---

[101] *See* note 46 and accompanying text *supra*.

[102] *See* Frontiero v. Richardson, 411 U.S. 677, 681-82 (1973).

[103] *See* note 5 *supra*.

[104] The statutory scheme of compensation laws also suggests a purpose of convenience. Presumptions of dependence in favor of children usually follow immediately the widow's presumption. *E.g.*, CAL. LABOR CODE § 3501 (West 1971); MICH. COMP. LAWS ANN. § 418.331 (Supp. 1975). The placement of the two presumptions together indicates that legislatures are assuming that the usual employee's immediate family consists of a wife and children.

[105] 416 U.S. 351 (1974).

[106] 416 U.S. at 355. In Schlesinger v. Ballard, 419 U.S. 498 (1975), the Court upheld a statutory system for the automatic dismissal of U.S. Navy officers who had not achieved promotion within a specified time which allowed female officers a longer term of service without promotion than that allowed for male officers, because Congress may have believed that women have less opportunity for promotion than men. An implicit alternative justification was that Congress has extensive powers over the armed services for national security reasons.

[107] 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968). *See also* Polelle v. Secretary of HEW, 386 F. Supp. 443 (N.D. Ill. 1974); Kohr v. Weinberger, 378 F. Supp. 1299 (E.D. Pa. 1974).

[108] Act of June 30, 1961, Pub. L. No. 87-64, § 103(a), 75 Stat. 137. The provision is now sex-neutral. 42 U.S.C.A. § 415(b)(3) (1974).

[109] 411 U.S. 677, 689 n.22 (1973).

[110] In *Frontiero* the government conceded that the statute had no remedial purpose; administrative convenience was the sole purpose of the classification. 411 U.S. at 688 & n.22.

tion depends on whether the award is viewed as analogous to a remuneration to the employee or to a welfare payment to the beneficiaries.[111] If one takes the view that the working woman does not earn by her employment as many benefits for her family as the working man earns, then the statute does not remedy but actually adds to economic discrimination. If, however, one takes the view that the legislation benefits widows more than widowers, then it can be viewed as remedial, and as discriminating against men rather than against women.[112] Because workers' compensation falls somewhere between tort compensation for loss of earning power and social welfare,[113] either perspective can be taken. Since benefits increase with the number of dependents surviving, there must be a limited social welfare function behind the system. But the question to ask is whether this limited welfare function justifies the classification by sex. The inclusion of the presumption for widows together with a similar provision in favor of minor children[114] suggests that the true purpose is not to remedy economic discrimination against women but rather to provide a shortcut to determine those persons in the family of the deceased employee who are actually dependent on the lost wages of the worker.[115] Nevertheless, both *Kahn* and *Gruenwald* constitute strong precedents for the legitimacy of a remedial purpose for any state which is able to identify that purpose behind the enactment of the death benefits legislation, even if the primary motive for the presumption is administrative convenience.[116]

3. Protection of Fiscal Integrity of Finite Welfare Funds—Another possible purpose for requiring factual proof of dependency of widowers is to limit the scope of the compensation program and maintain the limited funds available. Traditionally, the Supreme Court has deferred to the judgment of the state legislatures in allocating finite welfare funds even if that allocation has been based on broad classifications.[117] In *Geduldig v. Aiello*,[118] the Court upheld a provision of the California Unemployment Disability Fund which was designed to compensate for wage loss due to disability not covered by workers' compensation, but which specifically

---

[111] *See* Brief for Appellant at 20-22, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[112] In an informal discussion with law students two years ago, Justice Stewart noted that "the female of the species has the best of both worlds. She can attack laws that unreasonably discriminate against her while preserving those that favor her." HARV. L. SCHOOL RECORD, March 23, 1973, at 15, in Ginsburg, *The Need for the Equal Rights Amendment*, 59 A.B.A.J. 1013, 1017 (1973). *See also* 23 KANSAS L. REV. 534, 537 & n.27 (1975).

[113] *See* notes 87-88 and accompanying text *supra*.

[114] *See, e.g.*, CAL. LABOR CODE § 3501 (West 1971); MICH. COMP. LAWS ANN. § 418.331 (Supp. 1975); PA. STAT. ANN. tit. 77, § 562 (Supp. 1975).

[115] *See* note 104 *supra*.

[116] *See* 23 KANSAS L. REV. 534, 543 (1975).

[117] *See, e.g.*, Jefferson v. Hackney, 406 U.S. 535 (1972) (Texas, in computing AFDC benefits, paid recipients a smaller percentage of the standard of need than provided to other categories of beneficiaries); Dandridge v. Williams, 397 U.S. 471, *reh. denied*, 398 U.S. 914 (1970) (Maryland statute set a maximum limit on the amount of welfare which any family could receive regardless of family size).

[118] 417 U.S. 484 (1974). *See generally* Johnston, *supra* note 41, at 673-81.

excluded disability associated with normal pregnancy.[119] The Court emphasized that the Fund was self-supporting, was designed to be financed by a deliberately low rate of contribution of 1 percent of employees' salaries, and could be placed in fiscal jeopardy if burdened with the increased costs of pregnancy-related disability.[120]

Cost limitation has always been a purpose of workers' compensation legislation because of the fear that any expansion of coverage will induce businesses to leave the more costly jurisdictions.[121] For example, opponents of a proposed amendment to the New York compensation act to provide for pregnancy disability have argued that the change would be too costly.[122]

Compared with the federal social security program, which has enormous resources, the state social welfare funds have enjoyed more leeway under the Court's scrutiny. In *Jiminez v. Weinberger*,[123] for example, the Court reasoned that since the federal trust fund was better able to withstand added costs than were state funds, a classification which excluded illegitimates as a shortcut to detecting spurious claims was not justified as a method of protecting the fund financially. Therefore, a sex-based classification is more easily justified when it clearly appears that without the classification a limited fund would be imperiled.

D. Connection Between Classification and Purpose

Once the true purposes of the compensation statutes have been identified, the state faces the burden of establishing a rational relationship between statutory classifications and the legislative objectives of administrative convenience, remedy for discrimination, or cost limitation.[124]

1. Administrative Convenience—If the purpose of the presumption is administrative convenience in ascertaining deserving beneficiaries, the ques-

---

[119] CAL. UNEP. INS. CODE § 2601 *et seq.* (West 1972), *as amended,* (West Supp. 1975).

[120] 417 U.S. at 492-96.

[121] *See* J. BURTON, INTERSTATE VARIATIONS IN EMPLOYERS' COST OF WORKMEN'S COMPENSATION 75 (1966).

[122] N.Y. Times, Feb. 15, 1975, at 33, col. 3.

[123] 417 U.S. 628 (1974). *See also* Jablon v. Secretary of HEW, 399 F. Supp. 118 (D. Md. 1975). This cost limitation purpose was also argued by the government in Brief for Appellant at 22, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[124] Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp 1233, 1242 (D. Kan. 1974); Bowen v. Hackett, 361 F. Supp. 854, 861 (D.R.I. 1973) (burden was on Rhode Island to show both administrative convenience and cost savings); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 506 (S.D. Ohio 1972) (burden was on Board to show rational relationship between mandatory pregnancy-leave regulations and the ends sought to be achieved); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258, 262 (D. Neb. 1972) (sex-based classification which prohibited female student from playing on boys' golf team; burden was on the state to show a rational relationship between the classification and the objective of financial savings). *Contra,* State v. Duvall, 302 So. 2d 909, 911 (La. 1974) (challenge to prostitution law). *See also* Note, *supra* note 45, at 122, 125. If whether a statute uses a sex-based classification is at issue, then the plaintiff bears the burden of showing that the classification is in fact sex-based. Wark v. Robbins, 458 F.2d 1295 (1st Cir. 1972); Bravo v. Bd. of Educ. of Chicago, 345 F. Supp. 155 (N.D. Ill. 1972).

tion becomes whether there is a "fair and substantial relation"[125] between the basis for the classification (sex) and the object of the classification (convenience). Statements in lower court decisions following *Frontiero* that administrative convenience alone is never a sufficient justification for sex-based classifications are misleading.[126] In *Frontiero*, the government failed to demonstrate that classification on the basis of sex furthered the goal of administrative convenience by making the task of ascertaining dependency easier and less expensive. If the cost of determining which widows are actually dependent exceeds the cost of granting benefits to widows who are not actually dependent, then a presumption based on sex in a compensation statute may be justified.[127] In other words, if the classification results in administrative efficiency, then it may be constitutional. The ultimate purpose, administrative convenience, is itself legitimate, but to satisfy the *Reed-Frontiero* test, the classification must bear a rational connection to this purpose.

Perhaps a stronger case can be made in support of sex-based presumptions in compensation laws than for the classification employed in the uniformed services benefits provisions found unconstitutional in *Frontiero*. While the median income of male service personnel at the time of *Frontiero* was only $3686, for civilian employees the median income for males was $6670 in the same year.[128] Therefore, the assumption that the husband is the principal wage earner is more likely to be true in the civilian setting than in the military setting.[129] Moreover, since the wife's income exceeds the husband's in only 7.4 percent of all families,[130] a classification which assumes that the husband is the provider appears prima facie rational, especially where a civilian family is involved.

If a sex-based presumption is to be upheld as rationally connected to the goal of administrative convenience, however, the state must prove more than a statistical likelihood that husbands earn more income than wives; it must also demonstrate that if widows were required to prove dependency in the same manner as widowers, they would still qualify as dependents.[131] If a substantial number of widows would not so qualify, then a presumption which qualifies them automatically will result in the granting of benefits to many claimants without justification. If the amount of these excess benefits

---

[125] Reed v. Reed, 404 U.S. 71, 76 (1971).

[126] *See, e.g.*, United States v. Reiser, 394 F. Supp. 1060, 1067 (D. Mont. 1975) (holding Selective Service Act unconstitutional); United States v. Yingling, 368 F. Supp. 379, 385 (W.D. Pa. 1973) (dictum) (holding Selective Service Act constitutional); M. v. M., 321 A.2d 115 (Del. 1974) (dictum) (upholding statute which permitted wife upon divorce to share in husband's property, but did not permit husband to share in wife's property).

[127] 411 U.S. at 689. *See* Note, *supra* note 45, at 125. *See also* Bowen v. Hackett, 361 F. Supp. 854, 861 (D.R.I. 1973).

[128] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1973, at 334 (1973) [hereinafter cited as STATISTICAL ABSTRACT 1973].

[129] These figures are somewhat misleading because part of service compensation is in the form of fringe benefits.

[130] N.Y. Times, March 19, 1973, at 40, col. 1.

[131] *See* Frontiero v. Richardson, 411 U.S. 677, 689 n.23 (1973).

is greater than the cost of determining which widows qualify without a presumption, then the classification is not administratively efficient and is not rationally related to the goal of administrative convenience.

In Michigan, for example, a wife would be required to prove dependency in fact to qualify for even a partial award.[132] Only if she had no income could she receive the full award which she currently receives as a result of the presumption. But 42.2 percent of the total number of married women with husbands present are in the labor force.[133] Therefore, in nearly one-half of the cases, widows are receiving more benefits under the presumption than they would if required to demonstrate actual dependency. Consequently, the cost of using the presumption is substantial. Similarly, in Pennsylvania a widow would have to show incapacity for self-support.[134] Especially in Pennsylvania, therefore, it would be difficult to prove the administrative efficiency of the presumption, since few married women are invalids. Accordingly, if the sole purpose of the presumption is administrative convenience, then under any of the above statutory schemes the classification is probably not rationally related to that purpose. Furthermore, if the number of women in the labor force continues to increase, these sex-biased classifications will become less rational and more arbitrary and invidious.

2. *Remedial Purpose*—If a state can identify a remedial purpose in addition to the goal of administrative convenience, then courts, under the rationale of *Kahn v. Shevin*, will require a fair and substantial relation to the object of "cushioning of the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[135] The facts presented in *Kahn* concerning the economic standing of women in the United States[136] would also apply to cases of fatalities under workers' compensation acts. However, *Kahn* was a tax case with persuasive dissenting opinions by Justices Brennan and White, and its holding might be limited to the narrow area of public finance.[137]

A different approach to the remedial purpose question was taken in *Polelle v. Secretary of Health, Education & Welfare*,[138] where the district court, upholding a social security provision which set different retirement ages for men and women,[139] required a direct and immediate relation between the corrective factor and the known discrimination. *Kahn*, by

---

[132] MICH. COMP. LAWS ANN. § 418.321 (Supp. 1975). For example, taking the median incomes of men and women in the United States (STATISTICAL ABSTRACT 1973, *supra* note 128, at 334), if the husband earns $6903 and the wife earns $2408, and the wife's expenses are one-half of the total income, then the wife could receive a benefit of only 32.6 percent of the full award.

[133] STATISTICAL ABSTRACT 1974, *supra* note 1, at 341. Of these married women with husbands present and children aged six to seventeen years, 50.1 precent work. *Id.*

[134] PA. STAT. ANN. tit. 77, § 562 (Supp. 1975).

[135] Kahn v. Shevin, 416 U.S. 351, 355 (1974).

[136] 416 U.S. at 353 nn.4 & 5.

[137] *See* Johnston, *supra* note 41, at 661-72. Justice Douglas noted in his majority opinion that states, when structuring systems of taxation, have "large leeway" to make classificatons where no specific federal right, other than equal protection, is jeopardized. 416 U.S. at 355.

[138] 386 F. Supp. 443 (N.D. Ill. 1974).

[139] Act of June 30, 1961, Pub. L. No. 87-64, § 103(a), 75 Stat. 137.

contrast, did not mandate that the remedy be so specifically focused on the discriminating situation.[140] The *Polelle* court recognized that the "romantic paternalism" which had characterized earlier decisions upholding the same social security provision was, after *Frontiero,* insufficient to justify the discrimination.[141] In addition, the court interpreted a subsequent amendment to the Social Security Act which made retirement ages the same for men and women[142] as a congressional determination that women had worked long enough under the Equal Pay Act and the Civil Rights Act of 1964 to make further compensation for discrimination unnecessary.[143]

Even if the argument that social welfare legislation should be treated differently from tax law is accepted, the rational relationship between the classification and the legislative objective is more difficult to refute once the purpose is deemed to be remedial rather than solely administrative convenience. While a sexually discriminatory legislative classification based on administrative convenience assumes that men are providers and women are homemakers, a clearly inaccurate proposition, a classification which seeks to remedy economic disadvantages assumes only that working women have been earning lower wages than men, a clearly more valid proposition.[144]

3. Protection of Fiscal Integrity of Finite Welfare Funds—If limiting the costs of the program is a recognized purpose of sex-based classifications in workers' compensation benefits, then an effort to refute a rational connection faces the challenges based on *Aiello.*[145] However, whereas inclusion of pregnancy disability in the program at issue in *Aiello* would have increased costs by between $120 million to $131 million, or 33 percent to 36 percent,[146] in workers' compensation both absolute and percentage cost increases arising out of sex-neutral legislation would be minimal.[147] *Aiello* is further distinguishable in that there is no specific policy of keeping individual employee premiums low in the workers' compensation area since the cost of the program is borne directly by the employer. Moreover, if an industry employs women, and the dangers of production result in fatalities, then that industry should not enjoy a windfall savings merely because of the deceased employee's sex. If the price of the product is supposed to reflect the cost of injury or death to the production workers,[148] then widowers as a group should not have to bear part of the human costs of production.

---

[140] 416 U.S. 351 (1974).

[141] 386 F. Supp. at 445.

[142] 42 U.S.C.A. § 415(b)(3) (1974).

[143] 386 F. Supp. at 445.

[144] *See* STATISTICAL ABSTRACT 1973, *supra* note 128, at 334.

[145] 417 U.S. 484 (1974).

[146] 417 U.S. at 494 n.18.

[147] Death benefits account for less than 10 percent of all compensation benefits. UNITED STATES NAT'L COMM'N ON WORKMEN'S COMPENSATION LAWS, REPORT 71 (1972). Since women at present account for only a small percentage of total fatalities (*see* note 5 *supra*), the cost of providing equal treatment to their survivors is only a small fraction of 10 percent.

[148] *See* note 78 and accompanying text *supra.*

E. Balancing Governmental and Personal Interests

Any examination of the rationality of legislative means chosen to effect a purpose inevitably weighs, overtly or implicitly, the governmental and personal interests involved.[149] In some cases the individual imposition may be so minimal that it does not justify barring a sex-based classification.[150] In other cases, though the personal interest is substantial, the governmental interest is crucial.[151]

The individual interest in collecting compensation benefits in the same manner as others similarly situated and the governmental interest in providing, at a reasonable cost and as conveniently as possible, wage-loss insurance for the victims of work-related accidents are both substantial. Whenever a wife works, her income, whether large or small in relation to that of her spouse, benefits her family economically; when the woman provider dies, the family is deprived of that income. If, as under the present sex-biased compensation statutes, the family is unable to recoup her income, then the wage loss is only partially insured, depending on the sex of the employee. A state cannot, therefore, fully accomplish its underlying purpose of providing wage-loss insurance under the present system of broad and inaccurate classification by sex. At a time when few women worked, the sex classification may have furthered the underlying state interest; today, when many women are employed, the classification no longer advances the state interest effectively.[152] Although individual and state inter-

---

[149] *See, e.g.*, Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1974). *See* Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1512 (1971).

[150] *See, e.g.*, Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972) (married woman sought to use her maiden name rather than her husband's surname on her driver's license application).

[151] In United States v. Offord, 373 F. Supp. 1117 (E.D. Wis. 1974), the governmental interest in national security was deemed to be so urgent as to justify sex discrimination in the Selective Service Act. "Just as different individual rights invoke different judicial responses, different governmental interests require diverse judicial treatment." 373 F. Supp. at 1118. *But see* United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975) (Selective Service Act was unconstitutional because the government did not show how national security would be affected if women were drafted).

In the extreme example of this balancing process, Korematsu v. United States, 323 U.S. 214 (1944), the threat to national security justified the wholesale exclusion of Japanese-Americans from the West Coast during wartime without regard to any case-by-case determinations of loyalty to the United States.

[152] Another indication that the classification is obsolete with regard to the state policy is that today a wrongful death action is usually available upon the death of either spouse. *E.g.*, CAL. CIV. PRO. CODE § 377 (West 1973); Burke v. City & County of San Francisco, 11 Cal. App. 2d 314, 244 P.2d 708 (1952); MICH. COMP. LAWS ANN. § 600.2922 (Supp. 1975). Workers' compensation benefits are in lieu of this tort action. *See* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972). Cataldo v. Admiral Inn., Inc., 102 R.I. 1, 227 A.2d 199 (1967) (upheld statutory conclusive presumption of dependence in favor of widower on the grounds that the award compensated for loss of a wrongful death action). The compensation statute then becomes the exclusive remedy. 2 A. LARSON, *supra* note 7, §§ 65.10, 65.20, 66.30. For examples of exclusivity provisions see CAL. LABOR CODE § 3601 (West Supp. 1975); MICH. COMP. LAWS ANN. § 418.131 (Supp. 1975). *See, e.g.*, Duley v. Caterpillar Tractor Co., 44 Ill. 2d 15, 253 N.E.2d 373 (1969). The reason for the replacement was that the traditional tort remedies compensated inadequately for

ests are to some extent opposed, in that full benefits to the families of the deceased female employees will boost program costs, making compensation provisions sex-neutral may actually further both interests by allowing the state to realize fully its wage-loss insurance objective.

IV. LEGISLATIVE INITIATIVE TOWARD SEX-NEUTRAL STATUTES

A. Federal and State Constitutional Amendments

One reason cited for judicial abstention in the sex discrimination area is deference to the action of state legislatures on the Equal Rights Amendment.[153] However, whether the amendment will pass is uncertain. Ratification of the proposal has slowed, with four states still needed for passage and only one approval as against eleven rejections in the first six months of 1975.[154] To wait for the political process is not the complete solution to existing sex discrimination issues.

Some states, unwilling to wait for the federal Equal Rights Amendment, have enacted state equal rights amendments. Illinois, for example, amended its constitution to bar specifically the denial of equal protection on the basis of sex.[155] In light of the amendment, the courts now view sex as a suspect classification which must withstand strict judicial scrutiny.[156] Pennsylvania has a similar equal rights provision,[157] which the Pennsylvania Supreme Court has invoked in striking down a presumption of ownership of household goods in favor of the husband,[158] but the exact test which will be applied to future cases in Pennsylvania remains to be settled.[159] Apart from the

---

work-related losses. *See* Boyd, *The Economic and Legal Basis of Compulsory Industrial Insurance for Workmen, Part I*, 10 MICH. L. REV. 345, 354-58, 368-69 (1912). In effect, the sex-based classifications in compensation statutes frustrate this underlying policy of substituting one type of claim for another by failing to provide a replacement for a wrongful death action for the lost wages of the female employee.

[153] *See* H.R.J. Res. No. 208, 92d Cong., 2d Sess. (1972).

[154] 25 NAT'L VOTER No. 2, at 16-17 (1975). As of July 1975, only South Dakota ratified, bringing the total to thirty-four states. Thirty-eight states are required to ratify before 1979 for passage. *See* N.Y. Times, April 17, 1975, at 41, col. 1.

[155] ILL. ANN. CONST. art. 1, § 18 (1971). The amendment reads:

> The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts.

[156] *See, e.g.*, People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974) (holding unconstitutional a penal law which treated seventeen-year-old males as adults while processing seventeen-year-old females as juveniles); People v. Boyer, 24 Ill. App. 3d 671, 321 N.E.2d 312 (1975) (holding unconstitutional a statute which made incest between father and daughter a more serious offense than incest between mother and son). Although *Holiday Inns* was decided six months after the Illinois electorate ratified the state equal rights provision, the Illinois Supreme Court failed to discuss the new amendment's bearing on the presumption of dependence issue. *See* Witwer, *Introduction to* ILL. ANN. CONST. art. 1 (Smith-Hurd 1971).

[157] PA. STAT. ANN. CONST. art. 1, § 28 (Supp. 1975). The section reads: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

[158] DiFlorido v. DiFlorido, — Pa. —, 331 A.2d 174 (1975).

[159] *See* Comment, *The Support Law and the Equal Rights Amendment in Pennsylvania*, 77 DICK. L. REV. 254 (1973). *But see* Conway v. Dana, 456 Pa. 536, 318 A.2d

difficulties in interpreting the new state amendments, the impediments to proposing and passing such amendments are still substantial,[160] and such provisions do not therefore offer adequate assistance in the area of sex-based discrimination in workers' compensation laws.

B. Statutory Amendments

Legislatures have recently been active in amending sex-biased compensation provisions. In the last three years, eleven jurisdictions have changed discriminatory statutes into sex-neutral laws.[161] In each instance the legislature chose to extend the widows' presumption to the widowers rather than to eliminate the presumption for either sex and force both husband and wife to show dependency in fact.[162] While this movement toward reform is significant, legislative efforts have shortcomings.[163] Some lawmakers

---

324 (1974). *See also* Commonwealth v. Pennsylvania Interscholastic Athletics Ass'n, 334 A.2d 839 (Pa. Commonwealth Ct. 1975) (bylaw forbidding girls from competing with boys in athletic contests was unconstitutional on its face under the state equal rights amendment).

[160] A major setback in the equal rights movement occurred when, on November 4, 1975, the voters of both New York and New Jersey defeated proposed state equal rights amendments. N.Y. Times, Nov. 5, 1975, at 1, col. 8. In New York the effort to place the provision on the ballot had encountered considerable opposition. N.Y. Times, May 1, 1975, at 45, col. 1.

In addition, legislatures are not always consistent in their policies and actions. For example, while Texas has a state equal rights provision (TEX. ANN. CONST. art. I, § 3(a) (1974)), the legislature has considered rescinding its ratification of the federal amendment. N.Y. Times, April 17, 1975, at 41, col. 1.

[161] Act of Sept. 7, 1974, Pub. L. No. 93-416, §§ 1(e), 16(a), 88 Stat. 1144, 1147 (codified at 5 U.S.C.A. §§ 8101, 8133 (Supp. 1975) (Federal Employees' Compensation Act)); Act of Sept. 17, 1973, Act No. 1062, § 15, [1973] Ala. Laws 1763 (codified at ALA. CODE tit. 26, § 280 (Cum. Supp. 1973)); Ch. 127, § 88, [1974] Alaska Laws— (codified at ALASKA STAT. § 23.30.215 (Cum. Supp. 1974)); Ch. 133, § 27, [1973] Ariz. Laws 943 (codified at ARIZ. STAT. ANN. § 23-1046 (Supp. 1975); Ch. 454, § 14, [1974] Del. Laws—(codified at DEL. CODE ANN. tit. 19, § 2330 (Supp. 1974)); Ch. 74-197, § 11, [1974] Fla. Laws 549 (codified at FLA. STAT. ANN. § 440.16 (Supp. 1974)); Ch. 386, § 60, [1974] Ky. Acts 780 (codified at KY. REV. STAT. ANN. § 342.075 (Supp. 1975)); Ch. 47, § 1, [1973] N.M. Laws 169 (codified at N.M. STAT. ANN. § 59-10-12.10 (1974)); Ch. 401, [1973] Va. Laws—(codified at VA. CODE ANN. § 65.1-66 (Supp. 1975)).

[162] *See* statutes cited in note 161 *supra*. Either type of change would result in a sex-neutral statute. The advantage of extending the presumption to both sexes is that the compensation system becomes more efficient: more premium dollars are paid out in benefits and fewer dollars are wasted on hearing, litigation, and other administrative costs involved in proving dependency in fact.

[163] In the equal protection area, legislative action frequently complements judicial initiative. By the time that *Reed* reached the high court, Idaho had adopted the Uniform Probate Code, which bears no sex preference in the selection of estate administrators. Reed v. Reed, 404 U.S. 71, 74 & n.4 (1971). *See also* Taylor v. Louisiana, 419 U.S. 522, 523 n.2 (1975); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 416-17 (1920); Kohr v. Weinberger, 378 F. Supp. 1299, 1305 (E.D. Pa. 1974); Bowen v. Hackett, 361 F. Supp 854 (D.R.I. 1973). Before the Court decided *Frontiero,* Congress was considering amendments to the quarters allowance and medical benefits provisions challenged there. Brief for Appellee at 12, 13. Unfortunately, Congress failed to carry through its intention even after the Court's action. When *Frontiero* held both the quarters allowance presumption (37 U.S.C. § 401) and the medical benefits presumption (10 U.S.C. § 1072) unconstitutional, Congress promptly

recognize the need for change but fail to institute accurate and effective amendments.[164] California evidently felt pressure for change but opted for only cosmetic alteration. The term "workmen's compensation" is now to be known as "workers' compensation,"[165] but the bias in the presumption of dependency remains.[166] Likewise, the Council of State Governments has assembled a model compensation code for legislative reform with no reform of sex-biased presumptions.[167] Legislative action alone is insufficient, and the responsibility for examining the alleged bias of sex-based classifications must remain in the courts.[168]

V. CONCLUSION

The presumptions underlying sex-biased workers' compensation death benefits provisions are no longer in line with social and economic reality. Twenty-five statutes to some degree discriminate against working women, who comprise an increasing part of the labor force, and against their families. The impetus for reform of these statutes must come from the courts; the process of legislative and constitutional change has proven too cumbersome and uncertain for the task. Ample precedents for judicial intervention exist.

—*A. Russell Localio**

amended the quarters allowance statute by deleting the requirement of support of the husband of a servicewoman. Act of July 9, 1973, Pub. L. No. 93-64, Title I, § 103(2), 87 Stat. 148. Nothing was changed, however, on the medical benefits provision; it still contains the unconstitutional proof requirements. 10 U.S.C.A. § 1072 (1975).

[164] For example, the Longshoremen and Harbor Workers' Act was amended so that, as the statute now reads, death benefits for the husband of a deceased female employee are payable only throughout "dependent widowerhood." 33 U.S.C.A. § 909(b) (Supp. 1975). Illinois experienced a halting amendment process which involved an inartfully amended death benefit provision in 1973 and finally a comprehensive revision in 1975. *See* ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, WORKMEN'S COMPENSATION PRACTICE §§ 8.1, 8.5 (1975).

[165] CAL. LABOR CODE § 3200 (West Supp. 1975).

[166] *See* note 24 and accompanying text *supra*.

[167] ADVISORY COMMITTEE ON WORKMEN'S COMPENSATION LAWS, COUNCIL OF STATE GOVERNMENTS, WORKMEN'S COMPENSATION AND REHABILITATION LAW §§ 2(t) (1), (2) (1974).

[168] *See* Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring).

* J.D., 1975, University of Michigan.