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Equal Protection of the Laws: Ses is not a Suspect Classification

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EQUAL PROTECTION OF THE LAWS: SEX IS NOT A SUSPECT CLASSIFICATION

Kahn v. Shevin, 94 S. Ct. 1734 (1974)

Appellant Kahn, a widower, applied for a 500 dollar property tax exemption pursuant to Florida Statutes, section 196.191(7),[1] which accords a property tax exemption to widows, blind persons, and the totally and permanently disabled.[2] After his application for the exemption was denied, Kahn filed a complaint for declaratory relief against the Dade county tax assessor.[3] He argued that the Florida statute conferred a benefit based solely on sexual criteria and provided dissimilar treatment for people similarly situated,[4] in violation of the Florida constitution's Declaration of Rights,[5] and the equal protection clause of the fourteenth amendment. The trial court ruled that the Florida statute was discriminatory, arbitrary, and unconstitutional.[6] On appeal, the Florida supreme court reversed, terming the statute in question "a valid legislative enactment."[7] The United States Supreme Court affirmed the Florida supreme court and HELD, the tax exemption for widows was reasonably designed to advance the Florida policy of reducing the "disparity between the economic capabilities of a man and a woman,"[8] and thus not violative of the fourteenth amendment.

The equal protection clause has provided the main constitutional protection of individual rights for almost twenty-five years.[9] Yet, until very recently, the traditional equal protection test was used to uphold gender-based classifications.[10] Inherent in early sex discrimination cases were presumptions re-

1. Fla. Stat. §196.191(7) (1969), *as amended*, FLA. STAT. §196.202 (1973).

2. *See* FLA. STAT. §196.202 (1973); "Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona-fide resident of this state shall be exempt from taxation." This statute exists pursuant to FLA. CONST. art. VII, §3(b): "There shall be exempt from taxation, cumulatively, to every head of a family residing in this state, household goods and personal effects to the value fixed by general law, not less than one thousand dollars, and to every widow or person who is blind or totally and permanently disabled, property to the value fixed by general law not less than five hundred dollars."

3. Complaint, Kahn v. Straughn, Civil No. 71-20673 (9th Cir. Fla., April 21, 1972).

4. Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, at 1-2, Kahn v. Straughn, Civil No. 71-20673 (9th Cir. Fla., April 21, 1972).

5. FLA. CONST. art. I, §2: "All persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property." *See also* FLA. CONST. art. X, §5.

6. Kahn v. Straughn, Civil No. 71-20673 (9th Cir. Fla., April 21, 1972).

7. Shevin v. Kahn, 273 So. 2d 72 (Fla. 1973). The trial court permitted Florida Attorney General, Robert Shevin, to intervene and he pursued the appeal.

8. 94 S. Ct. 1734, 1736 (1974).

9. *See generally* Cox, *The Supreme Court 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Note, *Irrebutable Presumptions*, 62 GEO. L.J. 173 (1974); *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1192 (1969).

10. The test assumes the validity of the legislative act and places the burden on the

garding a woman's role in society, her familial function, her economic status, and her political position.[11] The basic justification offered for the validity of sexual groupings was the judicial perception that the legislative class designated did not impermissibly deviate from the real class.[12] If the state or federal statutes captured a stereotypical sexual role, they were upheld despite actual deviation.[13] The integration of equal protection analysis with sexual presumptions, and the permissible range of deviance between the benefited or disadvantaged class and the real class are the core concepts of gender-based discrimination.

The majority of early sex discrimination cases applied the traditional equal protection test, holding legislative enactments valid if the means used to implement the act were reasonably related to its object.[14] The test questions only "whether the classifications drawn in a statute are reasonable in light of its purpose."[15] Legislative classifications "will be set aside only if no grounds can be conceived to justify them."[16] A second equal protection test, strict scrutiny, analyzes state action by first determining whether a fundamental interest or a suspect classification is present.[17] If state action impinges upon either, the state must show a compelling interest for its regulation.[18] The United States Su-

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opposing party to show that the classification is arbitrary or unreasonable. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78, 79 (1911).

11. Sexual presumptions are generalizations of behavior based on sexual stereotypes. They assume that a particular trait or characteristic that is evidenced in a majority of the sexual group is applicable to the whole group. A typical sexual presumption is that men are physically stronger than women. Such a presumption placed in a statutory classification refuses to acknowledge individual characteristics or abilities, and binds the entire group to the majority stereotype. *See generally* Goesaert v. Cleary, 335 U.S. 464 (1948).

12. The discrepancy between a class as defined by the legislature and the class as it exists in reality is often quite large. For instance, a statutory class that exempts women from jury duty because women are more interested in domestic affairs is grossly overinclusive. The legislative class, all women, is based on a generalization that bears no relation to a large number of women. The courts in most instances permitted sexual classifications to exist because they believed that the legislative generalization applied to almost all of the class. Hoyt v. Florida, 368 U.S. 57 (1961). *See generally* Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348-53 (1948).

13. Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908).

14. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78 (1911).

15. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

16. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969). This type of minimum scrutiny test has been used only once prior to 1971, and only rarely since then, to void statutory classifications. *See* James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); Morey v. Doud, 354 U.S. 457 (1959).

17. *See generally* Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1506-16 (1971).

18. An objective test to determine a fundamental interest has not yet been devised. Rather, the decision regarding the existence of a fundamental interest seems to be premised on two subjective judgments: "[T]he relative invidiousness of the particular differentiation" and the "relative importance of the subject with respect to which equality is sought." Cox, *supra* note 9, at 95. Voting, marriage and procreation, the right to appeal a criminal conviction, and the right to travel have all been denominated fundamental interests. Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (the right to travel); Harper v. Virginia Bd. of

preme Court devised a specific suspect classification test in *San Antonio School District v. Rodriguez*,[19] questioning whether the persons in the challenged class had been "subjected to such a history of purposeful unequal treatment . . . [or] relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[20] Classifications based on race, alienage, nationality, and wealth have been termed suspect.[21] Thus, the strict scrutiny model is virtually a summary determination that the classification involved is invidious and unconstitutional.[22]

Historically, discrimination based on sex has been tested under the minimum scrutiny model.[23] In *Lochner v. New York*[24] the Court denied the right of a state to limit the hours a man could work per week. Shortly thereafter, however, the Court in *Muller v. Oregon*[25] upheld an Oregon statute prohibiting a female from working more than ten hours a day in a laundry. The special protection for females permitted in *Muller* was at that time a liberal trend in the area of labor legislation,[26] but a consistent policy in the treatment of women.[27] The Court took notice of the prevailing attitude: "[W]oman has always been dependent upon man . . . . [S]he is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."[28] The rationale for gender-based discrimination seemed to run beyond the physiological differences inherent in a man and a woman to a presumption regarding the "different functions in life which they perform."[29] The *Muller* decision indicated that the distinction based on sex was valid because of the judicial perception that under minimum scrutiny the benefited class was close enough to the real class to render any deviance harmless.[30]

Elections, 383 U.S. 663 (1966) (voting); Douglas v. California, 372 U.S. 353, 356 (1963) (appeal of criminal conviction); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation).

19. 411 U.S. 1 (1973).

20. *Id.* at 28.

21. Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (wealth); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (nationality).

22. Korematsu v. United States, 323 U.S. 214 (1944).

23. Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908).

24. 198 U.S. 45 (1905).

25. 208 U.S. 412 (1908).

26. The Court was exhorted by Mr. Brandeis in his famous brief to take judicial notice of the world legislative trend to protect women from economic exploitation by regulating working periods and conditions. *Id.* at 419-20 n.2.

27. "Man is or should be woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

28. Muller v. Oregon, 208 U.S. 412, 421-22 (1908).

29. *Id.* at 423.

30. *Id.*

A proliferation of legislation protecting the physiological difference and the moral sanctity of women followed the *Muller* decision.[31] Courts consistently applied the minimum scrutiny test and accepted the need for and legitimacy of such legislation.[32] In *Goesaert v. Cleary*[33] a Michigan statute, which precluded a female from obtaining a bartender's license unless she was the daughter or wife of the owner of the bar, was upheld. While the statute purported to assist in reducing female moral turpitude, it also effectively prohibited any female owning a tavern from working in her business or from employing her daughter as a bartender. Use of the minimum scrutiny analysis in such cases provided little recourse or protection to women who were economically debilitated by the adverse effects of such benevolent and stereotypical statutes. Similarly, in *Hoyt v. Florida*[34] the United States Supreme Court upheld a Florida statute involving the differential treatment of sexes in jury selection.[35] That statute made male residents of Florida counties automatically available for jury duty, whereas females, who could rightfully serve on a jury, had to notify the clerk of the county court if they desired to be called.[36] The Court's analysis portrayed the law as protective and "confer[ring] an absolute exemption from jury service unless they [women] expressly waive that privilege."[37] Neither the burden placed on women wishing to assert their rights nor the overinclusiveness of the classification was enough to render the statutory grouping arbitrary or unreasonable.[38]

A decade after *Hoyt,* the Supreme Court used the minimum scrutiny test to overturn an Idaho law conferring a mandatory preference for males in the appointment of estate administrators. In *Reed v. Reed*[39] the Court ruled that the mandatory selection of administrators based on sex alone, the singular

31. *See generally* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. REV. 675 (1971).

32. Eskridge v. Division of Alcoholic Beverages Control, 30 N.J. 472, 105 A.2d 6 (App. Div. 1954); Calzadilla v. Dooley, 29 App. Div. 2d 152, 286 N.Y.S.2d 510 (4th Dep't 1968); State v. Hunter, 208 Ore. 282, 300 P.2d 455 (1956); Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958). *But see* Goesaert v. Cleary, 74 F. Supp. 734, 740-44 (1947) (dissenting opinion).

33. 335 U.S. 464 (1948).

34. 368 U.S. 57 (1961).

35. *But see* Healy v. Edwards, 363 F. Supp. 1110, 1113-14 (E.D. La. 1973); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966).

36. Fla. Laws 1893, ch. 4122, §1, *as amended,* FLA. STAT. §40.01(1) (1973).

37. Hoyt v. Florida, 368 U.S. 57, 60 (1961).

38. That which was a privilege was also a special burden on the woman who desired to participate in the criminal justice process. The Court explained the exemption by noting that "a woman is still regarded as the center of home and family life," and because of her "special responsibilities" she should be called for jury duty only upon her expressed desire to serve. Although the Court acknowledged that it was not certain whether the procedure employed was an outgrowth of "historic policy" or "administrative feasibility," it was convinced that the statute was based on a reasonable classification. Even a statistical illustration that in 1957 only 220 women out of 46,000 female registered voters had applied to serve on juries and only 10 had been called, was not of constitutional significance to the Court. Neither was this survey substantial evidence that Florida had arbitrarily undertaken to exclude women from jury service. *Id.* at 60-67.

39. 404 U.S. 71 (1971).

justification being judicial efficiency, was the "very kind of arbitrary legislative choice forbidden by the equal protection clause."[40] The unanimous opinion reiterated the constitutional mandate that persons similarly situated with respect to a legislative object must be similarly treated to be consistent with equal protection. Although the Court struck down the statute, its use of the minimum scrutiny test indicated that there was no fundamental change in the attitude of the Court concerning gender-based classifications.[41] The opinion, however, acknowledged a new sensitivity to the treatment of individuals based on sex and implied that gender-based presumptions would be examined more closely. Thus, the door remained open for the validity of sexual classifications if reasonably related to a valid state interest.[42]

In *Frontiero v. Richardson*[43] the Court once again failed to authoritatively delineate the legal parameters of sexual equality.[44] *Frontiero* concerned a federal statute that permitted a serviceman to claim his spouse as a dependent without an actual showing of her dependence, but forced a servicewoman claiming dependence of her spouse to prove that he in fact relied on her for over one-half of his support. The plurality opinion found that because sex, like race and national origin, was an "immutable characteristic determined solely by accident of birth" and was rarely related to "ability to perform in society," the strict scrutiny analysis was applicable.[45] The opinion indicated that the stricter model of analysis was essential to protect the class from being relegated to an "inferior legal status without regard to the actual capabilities of its individual members."[46] Analysis by the more rigid standard demanded that sexual presumptions be fully scrutinized and meant that no range of deviance between the real class and the designated class would be acceptable without a showing of compelling state interest.[47]

In the principal case the constitutional question regarding the status of sexual equality was further obfuscated by a return to the minimum scrutiny analysis.[48] The purpose of Florida Statute section 196.191(7) was to reduce the

40. *Id.* at 76.

41. Note, *The* Reed *Case: The Seed for Equal Protection from Sex-Based Discrimination or Polite Judicial Hedging?*, 5 AKRON L. REV. 251, 252-59 (1972).

42. *Id.* at 257.

43. 411 U.S. 677 (1973).

44. Getman, *The Emerging Constitutional Principle of Sexual Equality*, SUP. CT. REV. 157, 166 (1972).

45. 411 U.S. at 686.

46. *Id.* at 687.

47. Even though eight members of the Court concurred in the ruling, the lack of unanimity in the Court opinion holding sex to be a suspect class, reduced the precedential value of the case to at best an unarticulated frontier of the law. *Id.* at 692.

48. In the period between the *Reed* decision and the principal case, lower federal and state courts have displayed a marked lack of uniformity regarding a standard of analysis to be applied in sex discrimination cases. Some courts have applied the minimum scrutiny test. Schattman v. Texas Employment Co., 459 F.2d 32 (5th Cir. 1972); Bricka v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972). Other courts applied a middle-range test. Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Green v. Waterford Bd. of Educ., 473 F.2d 629, 633 (2d Cir. 1973). Finally, some courts have applied the strict scrutiny test. Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433 (E.D. Pa. 1973); Sail'r Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 52, 95 Cal. Rptr. 329 (1971).

diparity between the economic capabilities of a man and a woman by "cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[49] The Court showed statistically that women earn less than men, that they are more often discriminated against in employment opportunities, and that their median income relative to that of males has declined in the last seventeen years.[50] Using the minimum scrutiny test, the Court found that the different treatment of widows and widowers "rests upon some ground of difference having a fair and substantial relation to the object of the legislation."[51] The statistical data presented, the benevolent nature of the statute, and the lack of stigma attached to males were all considered valid justifications for assuming that a rational relation existed to uphold the statute.

The Court in earlier cases exhibited a definite proclivity toward upholding state statutes that preserved sexual presumptions and protected the female from economic exploitation and moral corruption.[52] The principal case fits neatly into that type of legislative and judicial mold. The Court presumed female economic inferiority, although 3.2 million females earn more money than their husbands.[53] It affirmed the policy of protective legislation based on a sexual stereotype and permitted a legislatively drawn class to stand though it was grossly overinclusive. Yet the Court, in *Reed* and *Frontiero,* had begun to outline the adverse implications of laws based on sexual presumptions similar to the one in the instant case, which were not narrowly drawn. Retreating from the two previous sex discrimination cases, which stated that gender-based classifications were suspect and subject to strict scrutiny, the principal case approved a return to the minimum scrutiny analysis and a tacit acceptance of sexual classifications if rationally related to a valid state interest.[54]

The minimum scrutiny test applied in the principal case is consistent with the analysis used in other taxation cases. The standard of reasonableness necessary to withstand constitutional scrutiny in the taxation area is perhaps less than that in other areas.[55] The Court in *Lehnhausen v. Lake Shore Auto*

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49. Kahn v. Shevin, 94 S. Ct. 1734, 1737 (1974).

50. The Court failed to recognize that in recent years women have made the largest increase in the civilian labor force. In fact, they have accounted for two-thirds of the increase in total employment in the 1960's, and in April 1971 approximately 32 million women were members of the American labor force. Brief for Appellant at 6-8, 94 S. Ct. 1734 (1974).

51. 94 S. Ct. at 1737, *quoting* Reed v. Reed, 404 U.S. 71, 76 (1971).

52. Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

53. Brief for Appellant at 7, 94 S. Ct. 1734 (1974).

54. The instant court did seek to distinguish *Frontiero,* arguing females in that case were denied "substantive and procedural benefits solely for administrative efficiency." 94 S. Ct. at 1739.

55. In the area of taxation and economic regulations courts have opposed overturning legislation found to be reasonable. *Compare* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), *with* Moritz v. Commissioner, 469 F.2d 466, 470 (10th Cir. 1972). Legislative classes in social security benefits are also subject to a lesser standard of scrutiny. Gruenwald v. Gardener, 390 F.2d 591 (2d Cir. 1968).

Parts[56] stated that "where taxation is concerned and no specific right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce a reasonable system of taxation."[57] Only where a classification used is "palpably arbitrary" or "invidious" will the Court invalidate a statute concerned with taxation.[58] Because of this traditional approach to equal protection arguments in tax cases, the holding of the instant Court may be limited to gender-based classifications in the realm of taxation.

Even if the principal case is limited to sexual discrimination in the taxation field, however, it adds only confusion and further impediments to a unitary concept of sexual equality. Application of the suspect class test as devised in *Rodriguez* would seem to place sex in the suspect classification permanently.[59] The Court in the principal case implicitly accepted that individuals, because of their sex, have been subjected to a history of purposeful unequal treatment, the primary test of a suspect class.[60] With this in mind, the validity of the minimum scrutiny test as a constitutional model for analyzing gender-based discrimination cases must be questioned. An analysis that permits an act to withstand constitutional review by a showing of any reasonably conceived facts with a diminished standard of reasonableness, is in reality no analysis at all. A model that permits overinclusive statutes to stigmatize and stereotype either men or women into societal roles without at least an affirmative statement of their equality, does not achieve the egalitarian goal of equal protection.[61]

Application of the strict scrutiny test in instances similar to the principal case would be an alternative with positive functional capabilities. The test would force the state to show a compelling interest for classifications based on gender, but hopefully would not be the edict of unconstitutionality it has been in the past.[62] Rather, the model should place the burden on the state to

56. 410 U.S. 356 (1973). *See* Allied Stores v. Bowers, 358 U.S. 522 (1959).

57. 410 U.S. at 359.

58. *Id.* at 360.

59. 411 U.S. 1, 28 (1973).

60. The first test of a suspect classification is whether the class has been subjected to a "history of purposeful unequal treatment." The instant Court accepted the need to compensate women precisely because of a history of unequal treatment. The statutory purpose was to ameliorate the economic disparity between a man and a woman caused by sexual discrimination. *Id.*

61. The situation in the principal case, because of its atypical nature (a male challenging a compensatory program for females), makes comprehension of the negative ramifications of the minimum scrutiny test difficult. Here, a benevolent statute was upheld, but the same minimum scrutiny analysis could also be used to uphold a law inflicting severe penalties based on sex alone. In fact a recent Colorado district court decision denied females entrance to the United States Air Force and Naval Academies by using the minimum scrutiny test and citing the principal case as authority. Edwards v. Schlesinger, 43 U.S.L.W. 2009 (U.S. June 19, 1974).

62. As Professor Getman has stated: "[I]n certain circumstances achieving equality requires specific awareness of sex." Getman, *The Emerging Constitutional Principle of Sexual Equality*, SUP. CT. REV. 157, 180 (1972). The dissent in the principal case agreed and posited that perhaps the need for compensatory assistance to women would satisfy the compelling state interest standard. The author, however, goes on to point out the necessity of the use of a