Benign Sex Discrimination: Its Troubles and Their Cure

Leo Kanowitz

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol31/iss6/4

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.
"Benign" Sex Discrimination: Its Troubles and Their Cure

By Leo Kanowitz*

The decision of the United States Supreme Court in Regents of the University of California v. Bakke¹ left the constitutional fate of race-based "benign" discrimination unresolved. Although Bakke granted the relief sought by the plaintiff, admission to the medical school at University of California at Davis, benign discrimination in the racial context was neither approved nor disapproved by a majority of the justices. Whether benign, compensatory, or preferential treatment by government is constitutionally permissible when it favors groups that have been victims of past societal and legal discrimination based on race is thus a question that will have to be determined in future cases.²


² The Supreme Court in its most recent decision involving benign discrimination, Fullilove v. Klutznick, 48 U.S.L.W. 4979 (1980), failed to shed new light on the question. In Fullilove, a group of white contractors challenged the Mitchell amendment to the Public Works Employment Act of 1977 under the equal protection aspect of the Fifth Amendment. The Mitchell amendment requires 10% of each federal grant for any local public works project to "be expended for minority business enterprises"—generally enterprises "at least 50 per centum of which [are] owned by minority group members." 42 U.S.C. § 6705(f)(2) (Supp. II 1978). The Act defines “minority group members” as United States citizens “who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts.” Id. While a plurality of the Court upheld the constitutional validity of the Minority Business Enterprise program, 48 U.S.L.W. at 4991, the Court failed to reach a majority consensus as to the proper standard for judicial review in benign discrimination cases. Chief Justice Burger, announcing the judgment of the Court, joined by Justices White and Powell, refrained from adopting any of the analyses articulated in cases such as Bakke, stating only that the Minority Business Enterprise "provision would survive judicial review under either 'test' articulated in the several Bakke opinions." Id. Concurring in the opinion, Justice Powell found that because Congress was given the unique constitutional role of implementing the post-Civil War amendments, it need only choose a "reasonably necessary means to effectuate its purpose." Id. at 4997-98. Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment reiterating the intermediate standard of review they set forth in Bakke. Id. at 4998-99. Finally, Justice Stewart, joined by Justice Rehnquist, dissented on the grounds that the equal protection standard absolutely prohibits invidious discrimination by government. Id. at 4999.

[1379]
By contrast, in the realm of sex discrimination, the Court has to date approved and applied the principle of benign discrimination in at least three cases and has approved, but found reasons for not applying, the doctrine in several others as well. The thesis of this Article is that, whatever the ultimate fate or propriety of "benign" discrimination in the racial area, it has no place in the realm of sex discrimination. The two phenomena differ in their legal and sociological dimensions in that men as well as women have been historical victims of severe and pervasive de jure sex discrimination, whereas historically white people have not been discriminated against because they are white. In addition, the dual aspect of any purportedly benign discrimination, that is, its inevitable tendency to impose burdens, as well as to confer benefits, upon the class it seeks to aid, is much more pronounced in the realm of sex discrimination than in the area of racial discrimination.

Elimination of the benign discrimination doctrine in the sex bias area would be consistent with the intended effect of the proposed equal rights amendment to the Federal Constitution, as that intention is set

3 Califano v. Webster, 430 U.S. 313 (1977); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). See also Mueller v. Oregon, 208 U.S. 412 (1908), for earlier approval and application of the benign discrimination principle in the context of a due process, rather than an equal protection, challenge to a statute that prohibited overtime work (no more than ten hours a day) for women, but not for men.


See text accompanying notes 115-21 infra for a discussion of the pro-male benign discrimination implication in the dissenting opinion of Justices Marshall and Brennan in Feeney.

5 The proposed equal rights amendment provides:

"Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"Section 3. The Amendment shall take effect two years after the date of ratification."

Congress adopted the joint resolution proposing the equal rights amendment to the Federal Constitution on March 22, 1972 and set a seven-year limit within which the necessary thirty-eight state legislative ratifications were to have occurred. See S.J. Res. 8, 92d Cong., 2d Sess. (1972); H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). By the middle of 1978, only 35 states had ratified the amendment, and among those, several had purported to rescind their earlier ratifications. See Kanowitz & Klinger, Can A State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?, 28 Hastings L.J. 979 (1977). When it became apparent that the necessary 38 ratifications would not be forthcoming by the original deadline, Congress, in 1978, extended the deadline by an additional 39 months until July, 1982. See Note, The Amending Process: Extending the Ratification Deadline of the Proposed Equal Rights Amendment, 10 Rut.-Cam. L.J. 91, 94 n.11 (1978). Why the equal rights amendment failed to achieve ratification within the original seven-year period that Congress had prescribed, and the difficulties that ratification efforts are likely to encounter during the extended period, are examined in Kanowitz, The ERA: The Task Ahead, 6 Has-
forth by the amendment's most authoritative doctrinal supporters. In addition, disapproval of sex-based benign discrimination need not deprive women of many of the special benefits they might enjoy under present or future law; it could, in most cases, simply mean that men too would enjoy those same benefits.

The dual aspect of laws that purport to accord preferential treatment to women often arises only because those laws do not apply to men as well. The mechanics of this dual aspect of "benignly" discriminatory laws will also be examined in this Article. Once these mechanics are understood, it will become clear that courts as well as legislatures can be faithful to the principle of equal treatment without regard to sex while preserving for women the benefits they may derive from laws designed to grant them benign or preferential treatment. One way courts can do this is through judicial restructuring of a statutory scheme, a device impliedly approved for use in appropriate circumstances by the United States Supreme Court in the recent case of Califano v. Westcott.

The Evolution and Scope of the Sex-Based Benign Discrimination Doctrine

In 1971, the United States Supreme Court, in Reed v. Reed, invalidated as a violation of the fourteenth amendment's equal protection guarantee an Idaho statute that preferred males over similarly situated females for appointment as administrators of decedents' estates. Although purporting to apply the "any-rational-basis" test that it long had applied in sex discrimination cases, the Court, both in its result and in some of its language, left the strong impression that it was applying...
a more stringent standard in judging this sex-based classification than any of the standards it had applied in the past. 10

By 1976, a majority of the Court in Craig v. Boren, 11 striking down an Oklahoma statute that appeared to favor females over males, 12 openly acknowledged that a more demanding test was indeed to be applied to sex-based classifications challenged on equal protection grounds. 13 Since Craig, "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives." 14

The Craig test often is described as an "intermediate test," 15 lying between the traditional rational basis test of earlier cases and an "overwhelming interest" test, long sought by sex-equality advocates, under which sex-based classifications could pass muster only if they were necessary to implement overwhelming or compelling governmental interests. Such a test has been applied when the interest being infringed by the classification is regarded by the Court as "fundamental" or when the classification itself is regarded as "suspect." 16 The Supreme Court to date has held that classifications based on race, 17 national origin, 18

---

10. The major pre-Reed sex classification cases were Hoyt v. Florida, 368 U.S. 57 (1961) (equal protection is not violated by a statute permitting women to serve on juries only if they volunteer, but requiring men to serve unless they have a recognized excuse); Goesaert v. Cleary, 335 U.S. 464 (1948) (equal protection is not violated by a state statute limiting the right of women to work as bartenders to the wives and daughters of the bar owners); Muller v. Oregon, 208 U.S. 412 (1908) (a maximum-hours law for women, but not for men, does not violate the fourteenth amendment's due process guarantee). For criticism of the Court's decisions in these cases, see L. Kanowitz, Women and the Law: The Unfinished Revolution passim (1969) [hereinafter cited as Kanowitz, Women and the Law].


13. 429 U.S. at 197. This more demanding test is to be applied under either the fourteenth amendment's equal protection clause or the equal protection aspect of the fifth amendment. Cf. Bolling v. Sharpe, 347 U.S. 497 (1954) (applying fifth amendment due process to prohibit racial segregation in District of Columbia schools where equal protection clause would apply against states).

14. 429 U.S. at 197 (emphasis added).


17. See e.g., Loving v. Virginia, 388 U.S. 1 (1967).

and alienage are "suspect."

Despite strong efforts by litigants challenging official sex discrimination in recent years, they have been unable to convince a Court majority to adopt the "suspect" characterization for sex-based classifications. The closest these litigants have come was in *Frontiero v. Richardson*, a 1973 case decided after *Reed* and before *Craig*. In *Frontiero*, four members of the Court opined that sex is a suspect classification because, like race, national origin, and alienage, it is an "immutable" characteristic and "frequently bears no relation to ability to perform or contribute to society," so that statutory distinctions based upon sex often have an "invidious" effect. Four members of the Court do not a majority make. But because four other justices concurred in the judgment on other grounds, *Frontiero* struck down, as a violation of the equal protection aspect of fifth amendment due process, a federal law that granted greater dependents' benefits to male members of the Army than to female members.

Less than one year after the *Frontiero* decision, the Court decided *Kahn v. Shevin*, the first modern case to approve the benign dis-


21. Id. at 686.

22. Id. at 686-87. A holding substantially similar to the *Frontiero* plurality opinion had been rendered two years earlier, under the equal protection clauses of the fourteenth amendment and the California Constitution, *inter alia*, by the California Supreme Court in *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). The California court cited essentially the same reasons as the *Frontiero* plurality did two years later for holding sex to be a suspect classification. *Sail'er Inn* is marred by its confused conclusion that "sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment." 5 Cal. 3d at 20, 485 P.2d at 541, 95 Cal. Rptr. at 341. Classifications are either suspect or they are not. That a classification is made with respect to a fundamental interest may be an alternative reason for triggering the overwhelming interest test, see text accompanying note 16 *supra*, but it should not have any bearing on whether the classification is suspect.

23. Under 37 U.S.C. § 403 (1976), a member of the uniformed services with dependents was entitled to an increased "basic allowance for quarters" and, under 10 U.S.C. § 1076 (1976), a member's dependents were provided comprehensive medical and dental care. A serviceman could claim his wife as a "dependent" without regard to whether she was in fact dependent upon him for any part of her support. 37 U.S.C. § 401(1) (1976): 10 U.S.C. § 1072(2)(A) (1976). A servicewoman could not claim her husband as a "dependent" under these programs unless he was in fact dependent upon her for over one-half of his support. 37 U.S.C. § 401 (repealed by Act of July 3, 1973, Pub. L. No. 93-64, § 103(2), 87 Stat. 147; 10 U.S.C. § 1072(2)(C) (1976)).


25. Cf. Muller v. Oregon, 208 U.S. 412 (1908) (earlier decision addressing application
crimination principle in the sex discrimination area. In *Kahn*, a widow challenged as an equal protection violation a Florida statute granting widows, but not widowers, a $500 annual property tax exemption. Writing for the majority, Justice Douglas, who had on the previous day strongly rejected the notion of benign discrimination in a racial context, held that this patently sex-based discrimination was permissible under what appeared to be a "rational basis" standard. Justice Douglas and the five other members of the majority believed that the Florida legislature had been aware of the generally lower economic opportunities available to women than those available to men when it enacted the statute and had designed the tax preference to compensate widows for such past and present societal discrimination. In Justice Douglas' words:

> There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.

Subsequently, in *Schlesinger v. Ballard*, the Court applied the same principle to uphold a federal statute that permitted women naval officers to remain in the Navy longer than men without being promoted. This preferential treatment, concluded the Court in a five to four decision, was designed by Congress to compensate women naval officers for their reduced opportunity to demonstrate their competence as a result of being excluded from sea duty—an exclusion not challenged by any of the litigants in the case. In *Califano v. Webster*, of benign discrimination principle in the context of a due process challenge). *Muller* is discussed at note 3 *supra*.


27. "There can be no doubt, therefore, that Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation....'" 416 U.S. at 355 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)) (brackets by the Court). But see text accompanying notes 14-15 *supra*, suggesting that similar language in *Craig v. Boren*, 429 U.S. 190 (1976), later was construed as creating an "intermediate" test.

28. 416 U.S. at 353 (emphasis added). Since Justice Douglas did not identify "the" woman and "the" man to whom he referred, he obviously was talking about the average woman and the average man, thus overlooking the extent to which individual men and women do not conform to his model.


30. *Id.* at 508-09.

31. *Id.* at 508.

32. Three years later, a federal district court held that the exclusion of women from sea duty violated the equal protection aspect of fifth amendment due process. *Owens v. Brown*,
the Court applied the benign discrimination rationale once again to uphold a method, since repealed, of computing women's Social Security retirement benefits so as to yield a higher pension for them than for men with the same earnings record.\textsuperscript{34}

Since adopting the benign discrimination doctrine in the sex discrimination area, the Court has on several occasions refined the method for determining whether a claimed benign sex discrimination is benign in fact. In \textit{Weinberger v. Wiesenfeld},\textsuperscript{35} it invalidated a Social Security Act provision which denied a surviving spouse of a covered female employee with children a benefit that would have been available to a similarly situated surviving spouse of a covered male employee. Analyzing the statute as discriminating against the covered female employee in giving less protection for her survivors than it gave to survivors of similarly situated male employees, the Court first examined the statutory scheme and legislative history. It then concluded that Congress' \textit{purpose} in enacting the statute was not, as contended by the government, "to provide an income to women who were, because of economic discrimination, unable to provide for themselves."\textsuperscript{36} Rather, the statutory purpose was to permit widows, but not widowers, with minor children, "to elect not to work and to devote themselves to the care of children."\textsuperscript{37} Finding that it "is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female,"\textsuperscript{38} the Court struck down the gender-based distinction in the statute because it was "entirely irrational"\textsuperscript{39} and extended the benefits of the statute to cover female employees.\textsuperscript{40}

\textsuperscript{33} 430 U.S. 313 (1977).
\textsuperscript{35} 420 U.S. 636 (1975).
\textsuperscript{36} \textit{Id} at 648.
\textsuperscript{37} \textit{Id}.
\textsuperscript{38} \textit{Id} at 652.
\textsuperscript{39} \textit{Id} at 651-52. That the classification was seen by the majority in \textit{Wiesenfeld} as "entirely irrational" rendered it violative of equal protection even under the traditional "any-rational-basis" test.
\textsuperscript{40} Benefits also were extended to the surviving spouses of deceased covered female employees. See discussion of "dual aspect" laws at notes 165-73 & accompanying text infra. As to the propriety of extending the benefits of a statute, rather than invalidating it, to cure a
Most important for present purposes was the Court's observation that since the purpose of the statute "in no way is premised upon any special disadvantages of women, it cannot serve to justify a gender-based distinction which diminishes the protection afforded to women who do work."41 Similarly, in Califano v. Goldfarb,42 the Court rejected a claim that another provision of the Social Security Act43 was designed to implement a benignly discriminatory purpose in favor of women, finding that the claim was merely an afterthought and had not entered into congressional consideration when the statute was enacted.44

Aside from rejecting, in Goldfarb and Wiesenfeld, post-hoc characterizations of sex-discriminatory classifications as benignly-inspired and insisting upon proof of an original benign purpose on the part of the law-making authority,45 the Court has more recently, in Orr v. Orr,46 appeared to have severely narrowed the operational scope of the benign discrimination doctrine. At issue in Orr was the validity of Alabama statutes permitting wives but not husbands to receive alimony.47 Holding that the sex-based statutory scheme violated the fourteenth amendment's equal protection clause, the Court, in an opinion by Justice Brennan, remanded the case so that the Alabama courts might determine whether the unconstitutional inequality was to be cured by allowing alimony to be awarded to husbands as well as wives, or by denying alimony to both groups.48

---

41. 420 U.S. at 648 (emphasis added). This observation demonstrates the majority's willingness to permit one large group of women to be deliberately discriminated against by the government if its purpose is to "benignly" discriminate in favor of another large group of women. See text accompanying notes 161-65 infra.
44. 430 U.S. at 214-16.
45. Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Although both involved classifications created by Congress, there is no reason to believe that the same standards would not apply if such classifications were created by state legislatures or local governments, or even by state and federal courts exercising their common law powers.
48. On remand, the Alabama Court of Civil Appeal validated the alimony statutes by extending their benefits to needy husbands as well as wives. Orr v. Orr, 374 So. 2d 895 (Ala. Civ. App. 1979), cert. denied, 100 S.Ct. 993 (1980).
The Alabama appellate court had stated in *Orr* that "the Alabama statutes were 'designed' for 'the wife of a broken marriage who needs financial assistance.'"49 Reading this as asserting a legislative purpose of "compensating women for past discrimination *during marriage*, which assertedly has left them unprepared to fend for themselves in the working world following divorce,"50 Justice Brennan nevertheless did not undertake even the initial inquiry required in the face of a claim of benign discrimination, namely, to determine whether the intended beneficiaries of the classification had in fact been the victims of past discrimination.51 In his view, even if past discrimination could have been demonstrated, there was still no reason for the sex-based rule, because the state already conducted individualized alimony hearings.52 Since those hearings "can determine which women are in fact discriminated against *vis-a-vis their husbands*, as well as which family units defied the stereotype and left the husband dependent on the wife, Alabama's alleged compensatory purpose may be effectuated without placing burdens solely on husbands."53 The inquiry not pursued in *Orr* because of the occurrence of individualized hearings was, in Justice Brennan's words, "whether women had in fact been significantly discriminated against *in the sphere* to which the statute applied a sex-based classification, leaving the sexes 'not similarly situated with respect to opportunities' *in that sphere.*"54

These two limitations of the *area* in which data as to prior discrimination must be sought as an initial step in justifying a benignly discriminatory classification—coupled with Justice Brennan's earlier references to discrimination "*during marriage*"55 and to whether women were discriminated against "*vis-a-vis their husbands*"56—suggest a conscious determination on the part of the Court majority to narrow substantially the scope of the benign discrimination doctrine.57

50. 440 U.S. at 280 (emphasis added).
51. Such inquiries had been expressly or impliedly made in all previous sex-based benign discrimination cases. See generally id. at 290-91, 296-97 (Rehnquist, J., dissenting).
52. Id. at 281.
53. Id. at 281-82 (emphasis added).
54. Id. at 281 (emphasis by the Court omitted; emphasis added). See text accompanying note 50 supra.
55. See text accompanying note 53 supra.
56. See text accompanying note 53 supra.
57. Justice Blackmun's insistence in his *Orr* concurrence that the Court's language concerning discrimination "*in the sphere* of the relevant preference statute . . . does not imply that society-wide discrimination is always irrelevant," and "that the language in no way cuts back" on *Kahn* appears in context to be a valiant, but futile, attempt to deny the obvious. 440 U.S. at 284.
The Existence, and Significance for Benign Discrimination, of Past Discrimination Against Males

The impulse to narrow its scope undoubtedly reflects the dissatisfaction with the benign sex discrimination doctrine that has been expressed by members of the Court from the day it was first announced. Justices White \(^{58}\) and Stevens \(^{59}\) have come close to identifying what, in this author's opinion, is the doctrine's central defect. And in Orr, Justice Brennan also identified some dangers in the doctrine, \(^{60}\) expanding upon earlier observations of Justice Stevens. But no Justice, it is submitted, has ever seen the problem of benign sex discrimination in its full dimensions. The Justices' most serious error has been their failure to appreciate the extent of the societal and legal discrimination that males have suffered because of their sex and the significance of that discrimination for the benign discrimination doctrine.

Two dissenting opinions were filed in Kahn. One, by Justice Brennan, in which Justice Marshall joined, objected to Florida's $500 annual exemption for widows not because widowers did not receive the same benefit, but because too many widows did. In Justice Brennan's view, the classification was constitutionally defective because of its overinclusiveness—it benefited rich widows as well as needy ones. \(^{61}\) Had the statute been drawn more narrowly so as to exclude non-needy widows from its coverage, it would have met with his approval, for "in providing special benefits for a needy segment of society long the victim of purposeful discrimination and neglect, the statute serves the compelling state interest of achieving equality for such groups." \(^{62}\)

As for Mr. Kahn, the Florida widower who had sued to have the benefit of the statute extended to him, and his claim that the statute's major constitutional defect was its underinclusiveness in failing to grant widowers the same property tax benefits it granted to widows, Justice Brennan's reply is especially significant. First he noted that "the statute neither stigmatizes nor denigrates widowers," \(^{63}\) a questionable proposition, especially when one considers the implications of the statute for the public perception of widowers who had been homemakers or otherwise dependent on their wives for financial support. He

---

61. 416 U.S. at 360 (Brennan, J., dissenting).
62. Id. at 358-59.
63. Id. at 359.
then added that, were widowers included, it "would not further the
State's overriding interest in remedying the economic effects of past
discrimination for needy victims of that discrimination. While doubt-
less some widowers are in financial need, no one suggests that such need
results from sex discrimination as in the case of widows." 64

It is ironic, considering their usual alignment on issues of social
concern, that a view similar to Justice Brennan's was reiterated by Jus-
tice Rehnquist, dissenting two years later in Craig v. Boren. 65 Justice
Brennan's majority opinion in Craig 66 held that discrimination against
males, as well as discrimination against females, because of sex was
subject to heightened scrutiny under the fourteenth amendment. 67
While appearing to concede in Craig that women had been the histori-
cal victims of social and legal discrimination, Justice Rehnquist insisted
in dissent:

Most obviously unavailable to support any kind of special scrutiny in
this case, is a history or pattern of past discrimination, such as was
relied on by the plurality in Frontiero to support its invocation of
strict scrutiny. There is no suggestion in the Court's opinion that
males in this age group are in any way peculiarly disadvantaged,
subject to systematic discriminatory treatment, or otherwise in need
of special solicitude from the courts. 68

Three members of the Court, Justices Brennan, Marshall, and
Rehnquist, thus have asserted categorically that males have not been
historical victims of sex discrimination. Justice Stevens also has as-
serted that men as a general class historically have not been victims of
sex discrimination. 69 Although no similar assertion has been made by
any other Justice, that the others harbor such views or at least assume
the proposition to be true, is not unlikely. This conclusion is war-
ranted, among other reasons, by Justices Stewart, Blackmun, Powell,
Rehnquist, and Chief Justice Burger having joined Justice Douglas'
majority opinion in Kahn. A contrary implication is raised, however,
by the position assumed by several Justices, including Justice Brennan
himself, in the majority decision of Craig v. Boren, 70 discussed below. 71

As for Justice White, although his was the second dissenting opin-

64. Id. at 359-60 (emphasis added).
66. Justice Blackmun concurred in Justice Brennan's opinion in Craig except as to part
II-D thereof, which is not relevant here.
67. 429 U.S. at 197.
68. Id. at 219 (Rehnquist, J., dissenting).
69. See text accompanying notes 75-78 infra.
70. 429 U.S. 190 (1976).
71. See notes 79-80 & accompanying text infra.
ion in *Kahn*, and although he would have invalidated the statute because of its underinclusiveness in failing to cover needy widowers, he nevertheless did not dispute the expressed or implied views of the other Justices that men *as such* had not been victims of past societal and legal discrimination.

Justice White came tantalizingly close to seeing the defect of benign discrimination when he stated in *Kahn* that "even if past discrimination is considered to be the criterion for current tax exemption, the State nevertheless ignores all those widowers who have felt the effects of economic discrimination, whether as a member of a racial group or as one of the many who cannot escape the cycle of poverty." Nowhere, however, did he suggest that some, perhaps many, Florida widowers may have felt the effects of an economic discrimination that was directly and overwhelmingly related to discrimination they had previously suffered solely because of their *sex*.

Only Justice Stevens, of all the members of the Court, has stated positively that males have been the victims of some past sex discrimination, but even he has thus far not indicated an adequate appreciation of the full extent of anti-male sex discrimination or its implications for the benign discrimination doctrine. Justice Stevens' recognition that sex discrimination has been a reality for males appears in his concurring opinion in *Craig v. Boren*. Agreeing with the majority, although for somewhat different reasons, that the equal protection guarantee of the fourteenth amendment was violated by the Oklahoma statute that permitted females between the ages of eighteen and twenty-one, but not males in that age bracket, to purchase 3.2 percent beer, Justice Stevens condemned the classification, because, *inter alia*, "it is based on an accident of birth [and] because it is a *mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket . . . " In a footnote to this reference to anti-male discrimination, however, Justice Stevens emphasized that he was referring only to the long-standing disparity between the age of majority for males and females. And in still another footnote, he stated categorically: "Men as a general class have not been the victims of the kind of historic, pervasive discrimination that has disadvantaged other groups."
Stevens' recognition of a specific historical legal discrimination against males, although limited, is still the only instance of a Supreme Court Justice acknowledging that anti-male discrimination exists. Certainly, this acknowledgment is much more forthright than the mere implication in the *Craig* majority opinion, ambiguous at best because of the contrary implication in the *Kahn* majority opinion, that males have been the historical victims of sex discrimination. The implication in *Craig* arises from the majority's subjecting what they characterize as an anti-male discrimination to a heightened level of scrutiny for equal protection purposes,\(^7\) over Justice Rehnquist's strong objections that such heightened scrutiny had previously been reserved for groups that have been the historical victims of discrimination.\(^8\)

Thus, only one member of the Court, Justice Stevens, has expressly acknowledged the existence of a past legal discrimination against males, but only in the very limited area of the long-standing sex-based disparity in age of majority.\(^8\) Justices Brennan, Marshall, and Rehnquist have categorically denied the existence of social or legal anti-male discrimination,\(^9\) and even Justice Stevens has rejected the idea that men as a class have been victims of "historic, pervasive discrimination."\(^9\) As seen from the conflicting implications of *Kahn*, on the one hand, and *Craig* and *Frontiero*, on the other, many of the other members of the Court, and at times even Justices Brennan and Marshall, have emitted conflicting signals as to their views on this question.

What, then, has been the extent of legal and societal sex discrimination suffered by males? What are the implications of such discrimination for the benign discrimination doctrine? And how does sex discrimination differ from racial discrimination? Examining these questions in reverse order, we observe first that although sex and race discrimination share many social and legal characteristics, they also differ in ways that are crucial for the benign discrimination question.

The similarities between sex and race discrimination are probably best described in Justice Brennan's plurality opinion in *Frontiero v.*

---

\(^7\) *Craig v. Boren*, 429 U.S. at 218-19 (Rehnquist, J., dissenting).

\(^8\) Whether a lower age of majority for females discriminates against males *rather than against females* is problematical; because of the classification's dual aspect it does both. See notes 138-73 & accompanying text infra.

\(^9\) See notes 61-69 & accompanying text supra.

\(^*\) *Craig v. Boren*, 429 U.S. at 212 n.1. See text accompanying note 78 supra.
Richardson, which postulated a suspect classification analysis for sex-based classifications. Suspect status, and the heightened level of scrutiny it triggers, had previously been assigned by the Court to classifications based upon race, alienage, and national origin. Comparing these various types of discrimination, Justice Brennan sought to identify the characteristics that were common to them and sex discrimination.

Sex-based classifications are like other recognized suspect classifications, Justice Brennan suggested, because in each, the classification is based upon a person's "immutable characteristics." In other words, one can no more change the fact that one is a male or a female than one can change one's membership in the black race or the white race, or one's nativity in Mexico, China, or France. A second characteristic shared by classifications based on sex and those based on race, national origin, and alienage, suggested Justice Brennan, is that the discrimination that has historically operated in these realms has been of an "invidious" character. "Invidiousness" in this context has been variously defined by different members of the Supreme Court. In Frontiero, Justice Brennan saw the invidiousness that linked sex-based classifications with suspect classifications, and differentiated them from such non-suspect statuses "as intelligence or physical disability," as residing in the fact that a person's sex bears "no relation to ability to perform or contribute to society. . . [thus] relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."
To these shared characteristics can be added another similarity between race and sex discrimination, one that sets them apart from all other kinds of discrimination: members of both groups "carry an obvious badge." An alien, an illegitimate child, or a person whose national origin is in a country other than the United States cannot by sight be distinguished from a citizen, a legitimate child, or an American-born person. Not so with a person who is black or one that is white; not so with a person who is female or one that is male. If the extremely rare instances of transvestism or sex-change operations are put aside, a person's race or sex is always immediately apparent. Among other consequences flowing from this special visibility in the case of race or gender is the increased difficulty of escaping from the destructive effects of societal biases about these statuses.

What then are the essential differences between discriminations based upon race and those based upon sex? With respect to race discrimination, no one can contend that white people have in the past been systematic victims of either social or legal discrimination because they were white. Many white people have no doubt been the victims of past societal discrimination because of their ethnicity or their religion, but they have not been discriminated against because of their race. Furthermore, to whatever extent white people have suffered from ethnic or religious discrimination, it has always been the result of societal behavior, that is, a de facto discrimination. It has never been a de jure discrimination; it has never been the result of state and federal laws or official practices of state and federal governments.

---

By contrast, a casual glance at the treatment males have received at the hands of the law solely because they are males suggests that they have paid an awesome price for other advantages they have presumably enjoyed over females in our society. Whether one talks of the male’s unique obligation of compulsory military service, his primary duty for spousal and child support, his lack of the same kinds of protective labor legislation that have traditionally been enjoyed by women, or the statutory or judicial preference in child custody disputes that has long been accorded to mothers vis-à-vis fathers of minor children, sex discrimination against males in statutes and judicial decisions has been widespread and severe.

Moreover, to the extent that societal discrimination, as opposed to governmental discrimination, is a factor to be considered in determining whether a benign discrimination may appropriately be administered, it is clear that males have been subjected to massive social and economic discrimination. The general social expectation that men will perform the breadwinner’s role, the equanimity with which men’s exclusive liability for military service is regarded by the general population, even during times of violent combat; the philosophy that a man’s life is less precious than that of a woman, as expressed in the tradition of “women and children first” when ships are about to go beneath the sea, and the raised eyebrows at the prospect of a male who, breaking the shackles of his traditional sex role, determines to expend most of his daily energies in caring for his children and doing what have traditionally been regarded as wifely chores within the home, all suggest that men at all ages have been victims of virulent sex discrimination comparable to the kinds of discrimination that women as a group have suffered.

92. See Kanowitz, Women and the Law, supra note 10, at 69-75.
93. Id.
94. Id. at 111-31, 178-92. See text accompanying notes 200-12 infra.
95. See Kanowitz, Women and the Law, supra note 10, at 3.
96. Id.
97. In Kahn v. Shevin, 416 U.S. 351 (1974), the Court nowhere limits its inquiry to previous legal discrimination against women before approving the benign discrimination at issue here. On the contrary, it is primarily the employment discrimination faced by women, essentially in the private sector of the economy, that in the Court’s view appears to justify the preferential treatment granted by Florida in the form of a widows-only property tax exemption. See text accompanying note 28 supra. Although considerable doubt has been cast by Orr on the relevance of past societal discrimination against women as a justification for a benign discrimination in their favor, see text accompanying notes 54, 57 supra, societal discrimination against one sex is still relevant to determining the propriety of a benign discrimination in favor of the other sex.
Herein lies the essential difference between the social and legal phenomena of sex discrimination and racial discrimination. Notwithstanding the similarities between them, in no other kind of discrimination other than that based upon sex, whether it be racial, age, religious, or any other discrimination, can the group that is alleged to be the beneficiary of such discrimination be so accurately described also as its direct victim.

The willingness of society and the legal system to subject males to the risk of early death, as seen in their exclusive draft and combat liability under federal law and in the social expectation that they will be the last to leave the ship, as well as the unwillingness to subject females to such risks, are also reflected in the male's role as the family's primary breadwinner. Although this role, thrust upon males by both society and the legal system, is changing somewhat, it is far from ended. Justice Stevens has indicated, imperfectly and indirectly, that he understands the relationship between the male's enforced role as family breadwinner and his shorter life expectancy than that of the female.98

In *Los Angeles Department of Water & Power v. Manhart*,99 Justice Stevens wrote the opinion of the Court striking down as a violation of Title VII's prohibition against sex-based employment discrimination an employer's practice of requiring its female employees to make larger monthly contributions to its pension fund than its male employees. The employer sought to justify this practice by pointing to the female's higher average life expectancy. Exploring various reasons for this sex-based difference in life expectancy, Justice Stevens, after noting that sex-based differences in smoking habits might be a contributing factor, added: "Other social causes, such as drinking or eating habits—perhaps even the lingering effects of past employment discrimination—may also affect the mortality differential."100

Because Justice Stevens was exploring why women live longer than men, his reference to "employment discrimination" as a mortality factor clearly refers to discrimination against men. Conceivably, he might have been referring to racial, religious, or national origin discrimination in the work place. Although both men and women would be prey to these discriminations, men presumably would have suffered greater overall effects of such discrimination because, in the past, they have substantially outnumbered women in the work force. There is, however, another possible meaning to Justice Stevens' linkage of the

---

98. See notes 99-100 & accompanying text infra.
100. *Id.* at 710 n.17 (emphasis added).
male's shorter life expectancy and employment discrimination. He could have meant—and he should have meant—that there is also a direct sex-based discrimination against males in the work place that plays a significant role in their lower life expectancy.

How many males, for example, died earlier than they otherwise would have only because they did not enjoy the same statutory protections as women? How many men, unable to benefit from state laws that limited women's working hours and lifting requirements, and prescribed minimum wages for women only, had their health impaired by being forced by their employers to work excessively long hours, lift excessively heavy weights, under excessively onerous conditions, at whatever wage their employer was willing to pay?

Indeed, how many such men lived in Florida when Kahn was decided? Given the male's overall shorter life expectancy, the likelihood that a surviving spouse in Florida, or any other state, would be a widow rather than a widower was rather slim to begin with. If a male had lost his life in World War II or Korea or Vietnam, the relationship between his death and a sex-discriminatory law that, because it narrowed the draftee pool by excluding females, increased his chances of being selected by his "neighbors and friends" for hazardous military service would not be difficult to understand. Even in the case of husbands who died before their wives as a result of "natural causes," in how many instances were their earlier deaths hastened by their efforts not to disappoint societal and legal expectations about appropriate male behavior, brought about by social and legal institutions that locked both sexes into fixed, predetermined roles?

How many men, for example, were crushed both emotionally and physically by their striving to meet their exclusive legal obligation to provide for their wives' and children's financial needs? How many could not break the bonds of chronic unemployment because certain jobs—secretary, clerk-typist, airline stewardess, elementary school teacher, nurse, telephone operator—were regarded as unsuited for the male? How many qualified men were denied such jobs by governmental employers so that anti-male discrimination, based on "archaic and overbroad generalizations" about the appropriate roles of men and women, transcended private, societal behavior and became de jure, state action? And how many men, although not having lost their lives in World War II, Korea, or Vietnam, returned from those wars psycho-

---

101. See notes 226-30 & accompanying text infra.
logically, physically, and economically maimed because of a legal system that subjects males, and only males, to the duty of compulsory military service? In light of these and similar considerations, the Brennan-Marshall view that a more narrowly drawn Kahn-type benign discrimination statute favoring needy widows would be permissible, although it did not include needy widowers because their need did not result from sex discrimination,\textsuperscript{103} appears to have been adopted without adequate thought.

The Court's failure to understand the implications of past legal and social anti-male discrimination for the benign discrimination doctrine unfortunately has not been confined to the Kahn case. That failure pervades every Supreme Court decision approving the benign discrimination doctrine in the area of gender bias. Thus, in \textit{Schlesinger v. Ballard,}\textsuperscript{104} the Court upheld a law permitting women naval officers to remain in the Navy longer than men without being promoted, finding a benign purpose to compensate women for their reduced opportunity to demonstrate their competence as a result of being excluded from sea duty. As noted above, no one in the case challenged this exclusion.\textsuperscript{105} Had women officers' exclusion from sea duty been challenged, it would have focused attention on the fact that men officers not only had an opportunity, but also were required, to participate in sea duty, and that sea duty is not an unmixed blessing. While sea duty conferred some advantages on males, such as permitting them to demonstrate their competence in a shorter time than women, it also subjected men to numerous disadvantages,\textsuperscript{106} including the hardship of prolonged absences from shore-side friends and relatives and increased exposure to death and injury.\textsuperscript{107}

\begin{thebibliography}{100}
\bibitem{104} 419 U.S. 498 (1975).
\bibitem{105} See notes 29-32 & accompanying text \textit{supra}.
\bibitem{106} In other words, it was a dual aspect law. See text accompanying notes 138-74 \textit{infra}.
\bibitem{107} These were anti-male discriminations \textit{within the sphere} of the purported benign discrimination favoring women. Male naval officers also were prey to all the other anti-male social discrimination discussed in reference to Kahn. It should be noted that the requirement in \textit{Orr} of a showing that the beneficiary of the benign discrimination has been the object of past discrimination \textit{within that sphere} goes only to the justification for the benign discrimination. That requirement should not prevent males from showing a generalized past discrimination against them as a reason for rejecting a benign discrimination for females. Nor should it prevent females from showing a generalized discrimination against them as a reason for resisting a benign discrimination favoring males. See text accompanying notes 116-20 \textit{infra} for a discussion of the pro-male benign discrimination implications of the veterans preference laws in Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 281 (1979) (Marshall, J., dissenting).
\end{thebibliography}
Similarly, in *Califano v. Webster*, the Court, by permitting women who retire at the same age and with the same earnings record as men to receive a higher Social Security pension, simply ignored the social and legal discrimination that men have suffered both within and without the employment sphere. To the extent that a majority in *Wiesenfeld* and a plurality in *Goldfarb* would have been willing to approve the discrimination in those cases, had they been able to find a congressional purpose to prefer needy widows of covered male employees over needy widowers, they revealed the same inability to understand the existence and significance of past discrimination against males.

The recent case of *Personnel Administrator of Massachusetts v. Feeney* further illuminates the major defect in benignly discriminatory statutes and official rules that purport to favor one sex while overlooking past social and legal discrimination against the other sex. In *Feeney*, the question before the Court was the validity vel non, under the fourteenth amendment’s equal protection clause, of Massachusetts statutes that, using sex-neutral terms, gave military veterans an absolute preference over non-veterans for the most desirable civil service jobs. Although the negative impact of the preference was much more severely felt by women (over 98% of Massachusetts veterans were male and only 1.8% were female), a majority of the Court, applying the discriminatory purpose test of *Washington v. Davis* for alleged unconstitutional discrimination, held that no unconstitutional discrimination had occurred as a result of these veterans preference statutes.

Justice Marshall, in a dissenting opinion joined by Justice Bren-
nan, disagreed. As he saw it, a purpose to discriminate against women in enacting and applying these statutes was readily discernible. Having decided this, Justice Marshall, unlike the majority, reached the question of whether the discrimination was justifiable. Although he did not discuss the issue in precisely these terms, Justice Marshall was prepared to justify what he perceived as an anti-female, pro-male discrimination only if it was designed to compensate males, presumably for the past discrimination they had suffered as a result of being exclusively liable for compulsory military service, and then only if an appropriate standard of justification had been met by the statutes. Justice Marshall's failure to discuss explicitly the past anti-male discrimination inherent in an all-male draft resulted from his conclusion that his test, which appears to be a blend of the intermediate and overwhelming interest tests, was not met by the statutes. To the extent that the statutes' goals were "important," he asserted, they could be achieved by alternative methods less drastic than an absolute job preference for veterans, which he perceived as essentially an absolute job preference for males. Had Massachusetts adopted less drastic alternatives, such as an absolute preference for a limited duration or merely a point preference rather than an absolute preference, Justice Marshall made it clear that he would approve the scheme despite his earlier conclusion that it in fact discriminated against women.

Two important points emerge from the Marshall-Brennan dissent in *Feeney*. The first is that benign discrimination in the gender area is a two-way street. Had the state chosen less drastic ways to be discriminatory, Justices Marshall and Brennan would have upheld the discrimination although, as they saw it, it favored males and disfavored females. Secondly, in *Feeney*, Justices Marshall and Brennan were prepared to approve pro-male compensatory discrimination without considering the full implications of past discrimination against women.

116. *Id.* at 281.
117. *Id.* at 285.
118. *Id.* at 286-88.
119. In exploring whether the goals of the statute were "important," Justice Marshall appears to have applied an intermediate test. *Id.* at 286. But in insisting that the implementation of those goals be by a least drastic alternative classification Justice Marshall appears to apply the overwhelming interest test. *Id.* at 287-88.
120. *Id.* at 286-88.
121. Although the Marshall-Brennan dissent in *Feeney* recognized that the past discrimination against women is a reason for not allowing the absolute veterans' preference in that case, *id.* at 281, their willingness to accept a lesser pro-male compensatory discrimination suggests that they have not accorded as much weight to the fact of prior anti-female discrimination as it deserves.
just as in *Kahn* they had previously approved pro-female benign discrimination without considering the implications of past anti-male discrimination.\(^\text{122}\)

It is clear from the *Feeney* dissent that the exclusive draftability of men—and not just the hardships of military service—justifies in Justices Marshall's and Brennan's opinion what they regard as a discrimination favoring men over women, rather than one favoring veterans over non-veterans of either sex. Women have never been subject to the draft. While they have been spared the hazards and burdens of military service, they have also been deprived of any benefits that might flow from being drafted, such as job training, employment opportunities, veterans benefits, and the like. For the draft, like other laws that apply only to one sex, is a dual aspect law. In indicating a willingness to uphold some forms of veterans' preference as a benign discrimination designed to compensate male veterans for the sex discrimination inherent in their military experience, Justices Marshall and Brennan thus overlook the implications of anti-female discrimination *in the very sphere* of the alleged benign discrimination, not to speak of the generalized past discrimination against women in American law and society.

*Feeney* is the rare case in which benign discrimination is discussed, or at least hinted at, by members of the Court as compensation for past anti-male discrimination. In all the other Supreme Court cases in which the doctrine has been applied, it has been in the context of compensating women for past discrimination. As discussed earlier,\(^\text{123}\) in none of these cases had the Court ever indicated an understanding of the existence of past social and legal discrimination against men.

If and when the Court finally acknowledges the full extent of past anti-male discrimination, what should this mean for the benign discrimination doctrine? An answer to that question can be found in a footnote to Justice Brennan's plurality opinion in *Frontiero v. Richardson*,\(^\text{124}\) which foreshadowed the benign discrimination doctrine ultimately approved in *Kahn* and applied in other cases. In that footnote, Justice Brennan stated:

> It should be noted that these statutes [giving male Army personnel greater dependents' benefits than female personnel] are not in any sense designed to rectify the effects of past discrimination. . . . On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on

---

123. See notes 58-81 & accompanying text *supra*.
additional economic disadvantages.\textsuperscript{125} In every Supreme Court case of benign discrimination favoring women, including \textit{Kahn}, \textit{Ballard}, and \textit{Webster}, that discrimination also has disfavored men.\textsuperscript{126} In essence, in each of these cases, reliance has been placed on past discrimination against men "as a justification for heaping on additional economic disadvantages."\textsuperscript{127} This practice was specifically disapproved in Justice Brennan's \textit{Frontiero} footnote,\textsuperscript{128} and has been disapproved by the Court in other contexts.\textsuperscript{129} Recognition of the past discrimination against men—pervasive, de jure, and societal discrimination—should therefore lead to the abrogation of benign discrimination that purports to favor women. Conversely, the longstanding discrimination against women in law and society should dampen any tendency to justify benign discrimination favoring men such as was reflected in Justice Marshall's dissent in \textit{Feeney}.

Some will no doubt question whether any account should be taken of the implications of past anti-male discrimination for pro-female benign discrimination. They will point out that ours has been a male-dominated culture, that males have always been able to change the laws on the draft, spousal and child support, protection in the workplace, and the like. In short, they will say that males have not been a "discrete and insular minority,"\textsuperscript{130} powerless to alter the past discrimination against them. They will argue that the discrimination against men was thus not "invidious"\textsuperscript{131} and that it therefore should not be taken into account in assessing the propriety of preferential treatment for females, who were in fact politically powerless with not even the right to vote until 1920.\textsuperscript{132}

There are several answers to such contentions. First, whether past discrimination against men has been invidious is irrelevant to this Article's central thesis. That thesis is not that the benign discrimination

\textsuperscript{125} Id. at 689 n.22 (citations omitted).
\textsuperscript{126} \textit{Cf.} Personnel Adm'r of Mass. v. \textit{Feeney}, 442 U.S. 256, 282 (1979) (Marshall, J., dissenting) ("[t]hat a legislature seeks to advantage one group does not, as a matter of logic or common sense, exclude the possibility that it also intends to disadvantage another").
\textsuperscript{127} 411 U.S. at 689 n.22.
\textsuperscript{128} Id. See text accompanying note 125 supra.
\textsuperscript{129} \textit{See} Gaston County v. United States, 395 U.S. 285, 296-97 (1969). \textit{Cf.} \textit{Kanowitz, Women and the Law}, supra note 10, at 199 ("in one area of legal regulation after another, they will find women continuing to be treated either differently from men or less favorably, and judges and legislators continuing to emphasize distinctions between the sexes which, though they are the results of prior unequal treatment, are often presented as justifications for such unequal treatment in the future").
\textsuperscript{130} United States v. \textit{Carolene Prods.}, 304 U.S. 144, 152-53 n.4 (1938).
\textsuperscript{131} For a consideration of different meanings of "invidious," see note 88 supra.
\textsuperscript{132} U.S. \textit{Const.} amend. XIX.
doctrine should be extended to men because they have been victims of past discrimination. Rather, what is urged is that past discrimination against men is a sufficient reason for denying benign, compensatory, or preferential legal treatment to women—just as past discrimination against women should be a sufficient reason for denying benign discrimination in favor of men.

Second, despite the apparent political and practical power of men to have at any time changed the situation, men have been victims of past invidious discrimination. Appearances here simply do not match reality. Our nation has always needed an armed force to defend it, for example, but until recently, it was inconceivable to anyone, male or female, that the duty of military service should or could devolve upon women as well as men.\(^\text{133}\) Centuries of sex-role allocation, based on "habit, rather than analysis,"\(^\text{134}\) simply disabled Americans of either sex from restructuring the duties of military service, family support, and protections in the work place so as to permit men and women to share the burdens and benefits of social existence more equitably. Viewed in this light, the apparent power of men to change their sex-based roles in the past can be seen as being more theoretical than real. In this respect, men were as powerless as any other discrete, insular minority; past discrimination against them was invidious in every sense of the word.\(^\text{135}\)

Recognition of these realities of male powerlessness is, moreover, implicit in Justice Brennan's majority opinion in *Craig v. Boren*.\(^\text{136}\) *Craig*, it will be recalled, upheld a heightened level of scrutiny—the "intermediate" test—for what was characterized by the majority as anti-male discrimination. The majority did so over the protest of Justice Rehnquist, who, citing the celebrated *Carolene Products* footnote,\(^\text{137}\) argued that such active review had always been reserved for groups that had been discriminated against and had been members of a discrete, insular minority. Although Justice Brennan's opinion ignored

\(^\text{133}\) Registration of men for military service recently was instituted by Congress. H.R.J. Res. 521, 96th Cong., 2d Sess. (1980). A three judge federal district court in Pennsylvania declared the registration statute unconstitutional as a violation of the guarantee of equal protection of law because of its failure to include women. With grant of a hearing by the Supreme Court probable, Justice Brennan stayed the execution of the lower court order that had declared the statute unconstitutional. New York Times, July 20, 1980, at 1, col. 6.


\(^\text{135}\) The powerlessness of males, despite their apparent control of the levers of political and economic power, is not unlike the powerlessness of females, who represent approximately 53% of the United States population.

\(^\text{136}\) 429 U.S. 190 (1976).

\(^\text{137}\) See note 130 & accompanying text supra.
these arguments, his approval of heightened scrutiny of anti-male discrimination represents a tacit acknowledgement of the actual past powerlessness of males to break the bonds of inherited sex-role stereotyping.\textsuperscript{138}

In sum, a major reason for ending sex-based benign discrimination is the record of past legal and societal discrimination against men. No Supreme Court Justice has indicated that he understands the dimensions of such past anti-male discrimination, and several appear to be totally oblivious to it. In addition, no member of the Court has ever considered the significance of past discrimination against one sex for a doctrine that permits law-based discrimination that favors the other sex.

A second major reason for abrogating the benign discrimination doctrine in the gender area, as the following section demonstrates, is that laws that purport to grant preferential treatment to one sex also impose direct burdens or detriments on members of that same sex.

The Perverse Effects Caused by the Dual Aspect of Benign Discrimination in the Gender Area

In 1964, the statutory age of majority for most purposes in Illinois, as in many other states, was eighteen for women and twenty-one for men.\textsuperscript{139} In permitting a female to engage in unfettered buying and selling and other commercial activities three years earlier than a male, the Illinois statute clearly granted the former a benefit.\textsuperscript{140} At the same time, the lower age of majority frequently represented a burden or detriment for females. Thus, in the 1964 case of Jacobson \textit{v. Lenhart},\textsuperscript{141} the Illinois Supreme Court upheld against an equal protection attack the earlier termination—because of the running of a limitations period—of a female's right to sue on a tort claim, which reflected the

\textsuperscript{138} See also Orr \textit{v. Orr}, 440 U.S. 268 (1979), wherein the Court once again applied a heightened level of scrutiny to strike down what was perceived as an anti-male discrimination in statutes that permitted females, but not males, to receive alimony.


\textsuperscript{140} In the words of former United States Senator Sam Ervin: "Legally speaking [the lower age of majority] made a woman an adult 3 years before a man. It gave her the right 3 years earlier to manage her own affairs, to make contracts to dispose of her property, and even to bring lawsuits, while it left the man under a disability. He couldn't bring a lawsuit without a legal guardian or aid of a friend. He couldn't make a contract. And he couldn't dispose of property." \textit{Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 182} (1970) (statement of Sam Ervin).

\textsuperscript{141} 30 Ill. 2d 225, 195 N.E.2d 638 (1964).
differences in the ages at which females and males attained majority. To the extent that many young people needed protection against acquiring oppressive obligations, because of their lack of discretion and knowledge of business matters, the female's lower age of majority also meant that the state was offering this protection to young men between the ages of eighteen and twenty-one, but not to young women in the same age bracket. A nineteen year old male who entered into a disadvantageous contract could in most instances disaffirm that contract before reaching the age of twenty-one, but a nineteen year old female would be bound by that contract.

The female's lower age of majority thus confers an advantage or benefit on women while also imposing a detriment, burden, or disadvantage upon them. It is, in other words, a dual aspect law, its dual aspect arising primarily from the fact that similarly situated men and women are accorded differential treatment.

Another useful way of visualizing the law's dual aspect—one that will be important when the cure for an unconstitutional sex-based inequality is considered—is to look upon it as two separate laws enacted in the guise of a single law. One of the two laws confers the advantage on women mentioned above. In effect, it states: Women, but not men, between the ages of eighteen and twenty-one, shall have the right to engage in business, commercial, property, and other legal transactions to the fullest extent permitted to any person subject to the laws of this state. The other unstated, but implied, separate law creates the disadvantage. It states: Men, but not women, between the ages of eighteen and twenty-one, shall be protected against imposition by third parties.

In 1905, the United States Supreme Court, in *Lochner v. New York*, 142 invalidated a New York statute that limited working hours of men and women bakery employees to ten a day, holding that the statute violated the freedom of contract impliedly guaranteed to an employer and its employees by the fourteenth amendment's due process clause. But three years later, in *Muller v. Oregon*, 143 the Court held that due process was not violated by an Oregon statute limiting women's working hours in certain enterprises to ten hours a day. Although not discussed in precisely these terms, the Oregon law was perceived by the Court as a species of benign discrimination, designed to compensate women for the past discrimination they had suffered at the hands of nature (their generally frailer physiques than men's and

---

142. 198 U.S. 45 (1905).
143. 208 U.S. 412 (1908).
their child-bearing functions)\textsuperscript{144} and of society (their inability to assert themselves as well as men in the market place).\textsuperscript{145}

There is no doubt that the women-only hours limitations law in \textit{Muller}, in one of its aspects, conferred a positive benefit on women. As a result of such laws, which soon were enacted in other states on a "half-a-loaf" theory\textsuperscript{146} because of the \textit{Lochner-Muller} sequence of decisions, female, unlike male, workers did not have to fear being forced to work unwanted overtime hours. Because of these laws, employers either would not ask females to do so, or, if they did, female workers could refuse the request with relative impunity. By contrast, a male risked being discharged or otherwise disciplined if he refused his employer's request or demand that he work overtime hours. Working women covered by such laws thus could spend part of their days with their families and children;\textsuperscript{147} they also had more time than men for leisure, recreation, rest, the life of the mind, or any other endeavour they wished to pursue.

Once again, the laws which so clearly benefited women also burdened them in ways they did not burden men.\textsuperscript{148} One probable effect of these laws was to discourage employers, whose operations occasionally or frequently required employees to work overtime, from hiring women, since they were prohibited from permitting or requiring those women to work the needed overtime. A major impact of the women-only hours limitations laws was thus to reduce women's employment opportunities. Moreover, those women who desired overtime work for the extra compensation such work might yield were also denied this opportunity by women-only hours limitations laws.\textsuperscript{149}

\textsuperscript{144} Id. at 421.

\textsuperscript{145} Id. at 422.


\textsuperscript{147} Many women who worked outside the home undoubtedly were expected then, as they often are now, to bear the major family responsibility for myriad tasks within the home as well.

\textsuperscript{148} Both men and women are burdened by an hours limitations law that applies to both sexes by being denied the right to earn extra compensation through overtime work. But this is a shared burden. It is also offset by other social and legal institutions, such as minimum wage laws and effective union representation, both of which are designed to insure that workers earn an adequate living without having to rely on overtime work. By contrast, the woman-only overtime limitations laws, in addition to conferring special benefits on women, also burden them with \textit{special} disadvantages.

\textsuperscript{149} While overtime work properly might be regarded as a social evil to be discouraged by absolute statutory prohibitions or statutory requirements for extraordinary compensation, see \textit{Kanowitz, Women and the Law}, \textit{supra} note 10, at 124-25, allowing men to work overtime inevitably reduced pressures on unions and other institutions to secure wage rates
Before we examine the resolution of the problems created by the dual aspect of a purportedly benignly discriminatory law, it is again important to visualize the hours-limitations law for women only, though a single law in form, as two separate laws in effect. One is a genuinely protective, benefit-conferring law for women. It states, in effect: Women, but not men, have a right to refuse to work more than ten hours (or eight, or whatever the limit may be) a day. The other, burden-imposing law, for women, states: Employers must not hire women, though they may hire men, for any jobs requiring occasional, or any, work in excess of ten hours a day; and men, but not women, are permitted to earn, over their regular daily wages, any extra compensation they may derive from overtime work.

In approving the overtime restrictions for women employees in Muller, the Supreme Court focused entirely on the law's beneficial aspect and ignored its detrimental aspect, which severely damaged women in the workplace. The Court has dealt similarly with every law that it has approved as being benignly discriminatory toward women. In each instance, it has seen only the law's beneficial aspect and has ignored its detrimental aspect.

In Califano v. Webster, for example, the Court approved, as benign discrimination, the more favorable Social Security pension benefits accruing to women than to men who retire at the same age and with the same earnings records. Entirely ignored by the Court was the fact that this disparity tended to induce more women than men to retire early and that knowledge of this tendency could discourage an employer from hiring women.

Similarly, the approval by the Court in Schlesinger v. Ballard, on benign discrimination grounds, of a strict "up or out" system for

that would, of themselves, have been adequate. Because women worked in the same economic environment as men, they bore the brunt of a lower wage than they otherwise would have received had no overtime work been allowable to either sex, but were deprived of the right, available to men, to make up for lower wages by means of overtime work and the extra income it generated.

151. The existence of equal employment opportunity legislation, such as Title VII of the 1964 Civil Rights Act, as amended, and state counterparts, of course would prevent an employer from discriminating on grounds of sex. Under Title VII, pension schemes favoring women over men have been invalidated. See, e.g., Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90 (3d Cir. 1973). Cf. Equal Employment Opportunity Commission Sex Discrimination Guidelines, 29 C.F.R. 1604.9(f) (1979) ("[I]t shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex").
152. 419 U.S. 498 (1975).
male Naval officers and a guarantee for female officers of thirteen years before mandatory discharge for failure to be promoted, entirely overlooked one detrimental impact on women of such a differential, namely, that females were rendered ineligible for severance pay for a longer period than males, an issue raised by a female officer in a post-

Ballard federal court case, Two v. United States. 153 Nor did the Court in Ballard take into account another detrimental impact of the policy upon women: the easing of pressure on their superiors to promote them precisely because women officers could stay in the service two years longer than men without being promoted.

Even in Kahn, where the widows-only tax exemption was perceived as conferring a benefit on women—at least on that portion of the population of women who were widows—the law also disfavored women. For example, those women who died before their husbands and who, during their lifetimes, were concerned with how their surviving husbands might fare financially in their struggle for existence, received less favorable treatment as a result of this purportedly benign discrimination than did men who were concerned about how their widows might fare. 154

The dual aspect of a benignly discriminatory law, that is, its imposition of a burden as well as the conferral of a benefit on the group it seeks to assist, often affects the same women in both aspects. This is the case with laws that prescribe women-only maximum working hours, minimum wages, more favorable retirement benefits, and other protective laws in the employment sphere. In those instances, the laws' dual aspects stem principally, if not entirely, from their exclusive applicability to women. 155 At other times, as in the Kahn-type tax preference, however, the dual aspect of a law is present because the legislature or


154. See also Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). In both cases, the Court perceived the special Social Security benefits for widows, and their denial to widowers, as a discrimination against the covered female employee in that her contributions to the Social Security system produced less protection for her family in the event of her death than was acquired by a male covered employee for his family. Dissenting in Goldfarb, Justice Rehnquist disputed this analysis, saying that one could on that basis have argued in Kahn that "the real discrimination was between the deceased spouses of the respective widow and widower, who had doubtless by their contributions to the family or marital community helped make possible the acquisition of the property which was now being disparately taxed." 430 U.S. at 239 (Rehnquist, J., dissenting). Although Justice Rehnquist scoffs at the possible use of such an argument in the Kahn situation, his hostility towards it once again reflects an inadequate understanding of the dual aspect of all laws that purport to discriminate benignly in favor of one sex.

155. See notes 146-49 & accompanying text supra.
the court, or both, have focused their attention on only one part of the group, and not another.\textsuperscript{156}

In \textit{Duley v. Caterpillar Tractor Co.},\textsuperscript{157} for example, the Illinois Supreme Court upheld a more favorable survivor's benefit for widows than for widowers under the Illinois Workmen's Compensation Act,\textsuperscript{158} finding, in effect, a benignly discriminatory purpose in the gender differential to favor widows because of a "rational difference" between the sexes "based on the disparate earning power of men and women."\textsuperscript{159} Totally ignored by the court, however, were the adverse effects upon another group of women—covered women employees—caused by this sex-based disparity in a law purportedly designed to help women. In granting widows greater benefits than widowers, the Illinois Workmen's Compensation Act, like similar laws in other states,\textsuperscript{160} deprived women workers of the family protection accruing from their employment that it provided to covered male employees.

This detrimental aspect, for women, of a law granting widows greater benefits than widowers was recognized by a majority of the Supreme Court in \textit{Weinberger v. Wiesenfeld}\textsuperscript{161} and by a plurality of the Court in \textit{Califano v. Goldfarb}.\textsuperscript{162} At the same time, other parts of the opinions in those cases suggest that the Justices understood neither the dual aspects of a benignly discriminatory law nor the perverse results that can flow from focusing on only one of those aspects in isolation from the other.

In both cases, the Government argued unsuccessfully that Congress had had a benign purpose when it enacted the disputed provisions, namely, to compensate widows of covered employees for past

\textsuperscript{156} Here too it is useful, for purposes of devising appropriate remedies, to regard the law, because of its dual aspect, as effectively comprising two separate laws. In Kahn, the Florida legislature can be seen as having enacted one law that stated, in effect, that widows shall be given tax preference over widowers and another law that stated, in effect, that the tax law shall prefer husbands over wives in assuring the economic well-being of their surviving spouses.

\textsuperscript{157} 44 Ill. 2d 15, 253 N.E.2d 373 (1969).

\textsuperscript{158} In \textit{Duley}, the surviving husband of a covered woman employee who had been fatally injured in the course of her employment was limited by the state's Workmen's Compensation Act, ILL. REV. STAT. ch. 48, § 138.7(f) (1963), to receiving a $500 burial expense and was precluded from bringing a common law tort action against the employer for his wife's death. Had the survivor been the wife of a covered male employee killed under such circumstances, she would have been entitled to substantial death benefits under the Act.

\textsuperscript{159} 44 Ill. 2d at 19, 253 N.E.2d at 375.


\textsuperscript{161} 420 U.S. 636 (1975).

\textsuperscript{162} 430 U.S. 199 (1977).
discrimination against them and for the generally greater financial needs of widows as compared to widowers. The Government failed only because the majority in Wiesenfeld and the plurality in Goldfarb were not at all persuaded that this had been Congress' purpose. Presumably, these Justices—in both cases through an opinion by Justice Brennan—were prepared to validate such benign discrimination had they been convinced that Congress' purpose in fact had been benign. Indeed, in both cases Justice Brennan embarked upon an elaborate exploration to determine whether Congress' apparent preference for widows had a compensatory purpose or was merely an "archaic and overbroad generalization" about sex roles, or as stated in Justice Stevens' concurring opinion, was "the accidental by-product of a traditional way of thinking about females," the result of legislative "habit, rather than analysis."\(^{165}\)

Having characterized the fundamental discrimination in both cases as directed against covered women employees, Justice Brennan could hardly have maintained that it was also benign toward those same covered women employees. In seeking to determine whether Congress might have had a benign purpose to benefit needy widows, therefore, the Wiesenfeld majority and Goldfarb plurality were prepared to permit a large group of women (covered employees) to be deliberately, seriously, and discriminatorily injured by the federal government for the sake of assisting another group of women (surviving spouses of covered male employees).\(^{166}\)

More recently, in Orr v. Orr,\(^ {167}\) in which the Court invalidated a one-way alimony statute on equal protection grounds, Justice Brennan noted that had the statute in Orr been upheld it would have produced

---

163. Id. at 211.
164. Id. at 223 (Stevens, J., concurring).
165. Id. at 222.
166. But see Arp v. Workers' Comp. Appeals Bd., 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977), which rejected the claim of a benign purpose in a sex-discriminatory feature of the state's Workers' Compensation Act and noted, among other reasons for invalidating the statute on federal constitutional grounds, that it was "potentially disadvantage[ous] to] large numbers of the very sex it purports to aid." Id. at 407, 563 P.2d at 855, 138 Cal. Rptr. at 300. In light of such considerations, once the majority in Wiesenfeld and the four-member plurality in Goldfarb had determined that the discrimination in question was directed against covered women employees, they ought not to have examined the statute to see whether it was "benign" toward surviving wives of covered male employees. Precedent for not inquiring as to a sex-based classification's benign purpose, even where the Court assumes such a purpose might be revealed by the inquiry, has been established in Orr v. Orr, 440 U.S. 268 (1979).
"perverse results." Because only the financially secure wife whose husband is in need would be advantaged by the discrimination, the classification would generate "additional benefits only for those it has no reason to prefer." It is submitted, however, that the results are even more perverse where a classification inflicts damage upon those it intends to benefit. This would have been the result in *Wiesenfeld* and *Goldfarb* had Justice Brennan and his colleagues been persuaded that Congress' purpose had been to prefer widows over widowers. It has in fact been the result of every purportedly benign-discriminatory statute or rule that has been upheld by the Court. Such perverse results have been caused by the dual aspect of these discriminatory laws and the Court's failure adequately to recognize their dual nature or its significance for the benign discrimination cases it has decided.

Blindness to the dual aspect of benignly discriminatory laws has, of course, not been total. Limited recognition that a benignly discriminatory law can injure the group it seeks to aid does appear in Justice Brennan's *Orr* opinion. He notes there, for example, that "classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection." But the reinforcement of stereotypical notions about the sexes, while an important consideration, is in a relative sense the conferral of a vague, indirect, and remote burden. Far more serious, and thus far entirely ignored by

---

168. *Id.* at 282.
169. *Id.* at 283. Justice Stevens had made a similar observation in his *Goldfarb* concurrence two years earlier. "The [wives] who benefit from the disparate treatment are those who were . . . nondependent on their husbands." Califano v. Goldfarb, 430 U.S. at 221 (Stevens, J., concurring).
170. Justice Stevens' position, in his concurrence in *Goldfarb*, although raising other problems, does not suffer from this defect. Although he too failed to grasp the "dual aspect" character of the discrimination at issue in *Goldfarb*, he nevertheless would have held that the statute did not discriminate against covered women employees because of the non-contractual nature of the right to Social Security benefits. 430 U.S. at 217. He saw the issue, therefore, as going to whether widowers had been unconstitutionally discriminated against and concluded that they had been. In holding that the classification favoring widows did not reflect a benign purpose, Justice Stevens, unlike the four-member plurality who, for the reasons discussed at note 166 *supra*, should not even have tried to determine this question, did not place himself in their contradictory position.
171. 440 U.S. at 283.
172. See Kanowitz, *Women and the Law*, *supra* note 10, at 4: "Not only do legal norms tend to mirror the social norms that govern male-female relationships; they also exert a profound influence upon the development and change of those social norms. Rules of law that treat of the sexes *per se* inevitably produce far-reaching effects upon social, psychological and economic aspects of male-female relationships beyond the limited confines of legislative chambers and courtrooms."
the Court, are the direct, severe, and immediate burdens imposed on one sex by the laws that purport to grant that sex special benefits to compensate for past discrimination.

Finally, it should be noted that just as the legal and social phenomena of racial and sex discrimination were distinguished in an earlier part of this Article, insofar as the impact on the allegedly dominant group in each realm was concerned, so too is there a fundamental difference between the dual aspects of benignly discriminatory laws in both areas. Racial minorities can of course suffer adverse effects from a discriminatory law or official practice designed to compensate them for past discrimination. But such adverse effects would be limited to the reinforcement of stereotypical thinking about the "‘proper place’ of [minorities] and their need for special protection."173 Those adverse effects would not include the severe, immediate, and direct detriments that are meted out to the gender sought to be assisted by a particular benign rule or statute.174

As the first section of this Article demonstrated, the existence and implications of historical anti-male discrimination militate against the continuance of the benign discrimination doctrine in the gender area.175 The dual aspect of laws that allegedly discriminate for a benign purpose and the perverse results they produce are an additional reason for abrogating the doctrine in this area.

A further question that must be considered is whether abrogating the benign sex discrimination doctrine will not only relieve women of the burdens imposed by laws that were enacted to compensate them for past discrimination, but will also deprive them of the beneficial aspects

174. The adverse effects for women of a women-only minimum wage or overtime pay law are qualitatively different from the adverse effects upon minorities of general minimum wage laws that are alleged to arise by some economists of the Chicago School, primarily Professor Milton Friedman. For example, the adverse effects upon women of a women-only minimum wage law are caused by the law’s dual aspect. Employers need a work force. If they have a choice, other things being equal, they will hire males rather than females because of the women-only minimum wage requirement. By contrast, in the case of a sex-neutral minimum wage, the basic problem of employers is whether to hire people who, because of inadequate training or lack of skills, may not produce enough to justify payment of the minimum wage. Presumably, if employers could pay less, they would hire such people—or so the argument runs—who would be overwhelmingly black or members of other minorities. Employer reluctance to hire women because of a women-only minimum wage is not based on any notions that the prescribed wage is higher than their work should yield. Rather, it is based, however, on the assumption that the employer will receive as good or better work from male employees, but at a lower wage.
175. See notes 91-103 & accompanying text supra.
of those laws. As seen in the following section, in most instances, courts, not to speak of legislatures, can grant remedies that will both remove the burdens and preserve the benefits of benignly discriminatory laws, while respecting the principle of equal treatment without regard to sex.

Remedying Sex Discrimination

In addition to the common characteristics described in the previous sections, the three modern benign sex discrimination cases decided by the Supreme Court—Kahn, Ballard, and Webster—share other important features. In each, the plaintiff was a male. In none, did the male plaintiff seek to have the Court deprive women of the benefits accorded them by the respective laws in question: the tax exemption in Kahn; the thirteen-year discharge-free period in the Navy, despite the failure to be promoted in the interim in Ballard; and the exclusion of three low-earnings years in computing Social Security retirement benefits in Webster. Finally, in all of these cases, the male plaintiffs sought to have the benefits of these laws extended to them.

That the courts have the power to extend legislatively created benefits to a group or class not intended to have been benefited by the legislature is by now abundantly clear. In the sex discrimination cases themselves, the Supreme Court has done this on numerous occasions in recent years. Thus in Frontiero v. Richardson, upon finding an unconstitutional sex-based inequality in allowances for Army dependents, the Court extended the right to receive the benefits to women. Similar extension remedies were approved in Wiesenfeld and in Goldfarb—in the latter case notwithstanding the enormous additional financial burden this imposed on the federal government.

The judicial extension of benefits to a group that a legislature or court had deliberately excluded, based on a finding of unconstitutional underinclusiveness of a classification, is, moreover, not a recent innovation. In the 1968 case of Levy v. Louisiana, the Court found that the State's denial of a right to an illegitimate child to sue for its mother's

177. 411 U.S. at 690-91 & n.25.
180. Justice Stevens, concurring in the judgment, estimated that the decision would cost the government $750,000,000 per year. 430 U.S. at 219-20.
wrongful death while according that right to a legitimate child denied the former equal protection. The Court cured the inequality by extending the right to the illegitimate child rather than by taking the right away from the legitimate child. As early as 1872, the Court, in Railway Co. v. Whitton,\textsuperscript{181} found that the Judiciary Article of the Federal Constitution had been violated by a territorial legislature's law that, by limiting wrongful death suits to the territorial courts, denied plaintiffs the right to sue in the federal courts. In that case too, rather than invalidating the legislatively granted right to sue in the territorial courts, the Court extended it to the federal courts despite the legislature's intention not to permit suits in such tribunals.\textsuperscript{182}

Perhaps the most succinct statement of the principles that should govern a court's decision whether to abrogate or extend a statutory benefit on the ground that the class to which it applies is underinclusive appears in the opinion of the New Jersey Supreme Court in Schmoll v. Creecy:\textsuperscript{183}

\begin{quote}
[T]he question is whether the Legislature would want the statute to survive, and that inquiry cannot turn simply upon whether the statute, if adjusted to the constitutional demand, will cover more or less than its terms purport to cover. Although cases may be found which seem to speak in such mechanical terms, we think the sounder course is to consider what is involved and to decide from the sense of the situation whether the Legislature would want the statute to succumb.\textsuperscript{184}
\end{quote}

In most cases in which courts have been faced with the "extension-abrogation" choice, the guiding principle has thus been to implement a presumed legislative choice. Stated differently, the question has been, what would the legislature have preferred had it known that the classification it created would be held invalid because of its underinclusive-ness? Would it have preferred to achieve the required equality by taking the benefit away from the group to which it had granted the benefit or by extending the benefit to the group from which it had been withheld?

The Supreme Court has not always directly confronted the extension-abrogation question in sex discrimination cases. Nevertheless, its extension remedies in Levy, Whitton, Frontiero, Wiesenfeld, and Goldberg have all impliedly been based on presumed legislative intentions. This implication is especially clear in the latter three cases, in each of

\begin{footnotes}
\item[181] 80 U.S. (13 Wall.) 270 (1872).
\item[182] Id. at 286.
\item[184] Id. at 202, 254 A.2d at 530.
\end{footnotes}
which the Court extended the respective federal benefits despite the Government's protests that this would impose substantial burdens on the federal fisc.

The Court's implied assessment of presumed congressional intention on abrogation versus extension of the federal benefits in *Frontiero, Wiesenfeld,* and *Goldfarb* is also borne out by its differing behavior in *Orr v. Orr*185 and *Stanton v. Stanton.*186 In the latter cases, state law had conferred certain benefits that the Court held to be unconstitutional because the benefited class was underinclusive. In *Stanton,* it was the benefit187 of an earlier age of majority for females than for males. In *Orr,* it was the benefit of alimony rights for wives but not for husbands. In both cases, the Court did not decide the question of extension or abrogation. Rather, it remanded each case to the state courts so that those courts could make the decision.

The Court's different treatment of federal and state laws, with respect to determining the proper tribunal to decide the extension-abrogation issue, is merely a specific application of the familiar principle that the Supreme Court is the final arbiter of the meaning of federal laws while this role, with respect to state laws, is performed by the states' highest courts. Just as courts often decide what a legislature meant by language it used in a statute, so in resolving the extension-abrogation issue, courts decide what the legislature meant, that is, what it would have intended with respect to extension or invalidation, if its legislatively created classification were to be held unconstitutional because of its underinclusiveness.

How an underinclusive classification is to be remedied will thus be decided by the federal courts if the classification is created by federal statutes or by federal common law. By contrast, the same issue with respect to classifications created by state law will be decided by the state courts. In still a third category, special problems arise with respect to the extension-abrogation issue where state law has created the classification but the issue arises in a case within the exclusive jurisdiction of the federal courts. This problem most often arises when state "protective" labor laws are challenged in federal court as violating the command of Title VII of the 1964 Civil Rights Act188 that employers, *inter alia,* not discriminate against employees and prospective employees on

187. See text accompanying notes 140-41 *supra* for a discussion of the benefit-burden dual aspect of sex-discriminatory laws.
the grounds of sex. The exclusive jurisdiction of the federal courts over Title VII actions requires that the federal courts, when they find that the state law violates Title VII's equality principle, also decide in the first instance whether the state legislature would have preferred to extend the benefit of the state law to men or to take it away from women.¹⁸⁹

It is highly probable, therefore, that had the Supreme Court rejected the benign sex discrimination doctrine, it would have extended to the male plaintiff the benefit of the thirteen year protection against mandatory discharge previously enjoyed by female naval officers in Ballard rather than take that benefit away from female naval officers. Similarly, the Court would have extended to the male plaintiff in Webster the more favorable method of computing Social Security retirement benefits, which Congress itself did shortly after Webster arose.¹⁹⁰ In those cases, abrogation of the benign discrimination doctrine would have represented no loss for women who had previously profited from the beneficial aspects of those laws. They would have retained those benefits while men too would have enjoyed them. Because those laws also imposed a burden or detriment on women primarily as a result of their nonapplicability to men, the extension to men of these laws' beneficial aspects would also have removed their burdensome or detrimental aspects from women.

A different issue arises with respect to the disputed tax preference for women in Kahn. There the tax preference was state-created. The question of its extension or abrogation would, therefore, have had to have been decided by the Florida Supreme Court. Unlike the task thrust upon the Utah court in Stanton and the Alabama court in Orr, which involved assessing legislative intentions about restructuring rights and obligations between private parties and which appeared to require immediate resolution, the task in Kahn would have appeared to involve divining legislative intentions about restructuring governmental largesse toward private parties. Were Kahn's tax preference to be

¹⁸⁹. See also Craig v. Boren, 429 U.S. 190 (1976), invalidating as an equal protection violation Oklahoma's prohibition of sales of 3.2% beer to 18 to 20 year old males but not to females in that same age bracket. The case arose in the federal court in the first instance, and there was thus no state court to which it could be remanded. By reversing the federal district court which had upheld the prohibition of the sale to 18 to 20 year old males, the Supreme Court in effect granted the right to purchase 3.2% beer to males rather than take it away from females. Significantly, the Court stated that the "Oklahoma Legislature is free to redefine any cutoff age for the purchase and sale of 3.2% beer that it may choose, provided that the redefinition operates in a gender-neutral fashion." Id. at 210 n.24 (emphasis added).

extended to widowers it might have cost Florida an undetermined but substantial sum of money in lost tax revenues. If the Florida Supreme Court acted like other state courts have acted in comparable circumstances, there would be a strong possibility that it would invalidate the tax preference for widows rather than extend it to widowers. Had the Florida court chosen this course, its actions would have been contrary to those of the United States Supreme Court that, as we have seen, has extended benefits to the group from which they had been unconstitutionally withheld, despite a far greater financial cost to the federal government, absolutely as well as relatively, than the cost Florida would incur were the widow's tax preference to be extended to widowers.

State courts, and some lower federal courts in Title VII cases, have been much less willing than the Supreme Court to extend benefits to a class excluded by the legislature whose intentions they have been authorized to ascertain. These courts have often asserted that to extend the benefit to a group deliberately excluded by the legislature would constitute judicial usurpation of the legislative function. What these courts fail to recognize is that the decision to take the benefit away from the class the legislature intended to benefit—when that benefit can be preserved by extending it to the group the legislature had originally excluded—is analytically no more nor less a judicial usurpation of the legislative function than the extension itself.

Recognition of this principle is, moreover, implicit in the recent Supreme Court decision in *Califano v. Westcott*, in which the Court not only extended a benefit to an excluded class, but implied that under some circumstances a court might restructure a statute to have it conform to constitutional requirements, though finding those circumstances to be absent in *Westcott* itself.

The facts in *Westcott* were relatively simple. Federal law provided

---


192. See notes 223-26 & accompanying text infra for a discussion of why extension is appropriate, notwithstanding the economic burdens it might impose on employers.


196. Restructuring, as used in this Article, is primarily a shorthand expression for invalidation of the detrimental aspects of a sex discriminatory law, coupled with extension to the previously non-benefited sex of the law's beneficial aspects.
benefits to families whose dependent children were deprived of support because of their father’s unemployment but denied benefits in the case of the mother’s unemployment. The Court, on the basis of the Craig test, held that this gender-based classification violated the equal protection aspect of fifth amendment due process. But because no party had argued that nullification of the program was the proper remedial course, the Court majority, in an opinion by Justice Blackmun, stated that it would be inclined to consider that issue only if the power to order extension of the program were clearly beyond the constitutional competence of a federal district court. That no such remedial incapacity existed was strongly suggested, noted Justice Blackmun, by the Court’s previous decisions, which routinely had affirmed district court judgments ordering extension of federal welfare benefits.

Although no party in Westcott had opposed the extension principle, one, the Commissioner of the Massachusetts Department of Public Welfare, who administers the Act in that state, had sought to have the extension by the district court take a particular form. In his view, it was proper to permit either a mother’s or a father’s unemployment to qualify a needy family for benefits, but only if the parent in question could show that he or she was both unemployed and the family’s “principal wage-earner.”

The statute, of course, said nothing about the unemployed father having to be the family’s principal wage-earner to qualify the family for benefits when he becomes unemployed. Neither did the statute state anything about qualifying families if the mother becomes unemployed. Yet, the majority, as we have seen, had no difficulty in effectively rewriting the statute to make it conform to constitutional requirements by extending benefits to families in which the mother is unemployed. This result was reached partly because no party had raised that issue but also because of a discerned congressional intention that the unconstitutionality should be cured by extending the benefits, as evidenced by the strong severability clause in the Social Security Act

197. 443 U.S. at 79-80. Although the parties had not argued that nullification of the program was the proper remedial choice, Justice Powell, in a dissent joined by Chief Justice Burger and Justices Stewart and Rehnquist, decried “the extension of benefits [that] Congress wished to prevent.” Id. at 95 (Powell, J., dissenting). Justice Powell would have preferred an injunction prohibiting further payment under the program, which would “conserve the funds appropriated until Congress determines which group, if any, it does want to assist.” Id. at 96.
198. Id. at 90-91.
199. Id. at 89-90.
200. Id. at 91.
and the hardship that would be imposed on families Congress plainly meant to protect, were the program simply nullified.\textsuperscript{201}

Nevertheless, the majority in \textit{Westcott} referred to the particular form of extension urged by the Commissioner, in contrast to the simple extension that it approved, as a "restructuring" of the Act.\textsuperscript{202} Significantly, the majority rejected the proposed "restructuring" in \textit{Westcott}, not because it disapproved of the idea of restructuring in principle, but only because it found restructuring to be inappropriate under the circumstances of \textit{Westcott} itself.\textsuperscript{203} Were the Commissioner's "model" of providing benefits to only those families in which the unemployed parent of either sex was the principle wage-earner adopted, it would have meant cutting off benefits to some needy families already receiving benefits "merely because the unemployed father cannot prove 'breadwinner' status."\textsuperscript{204}

The Court also indicated that this type of restructuring, even more than when a court extends a benefits program to redress unconstitutional underinclusiveness, "risks infringing legislative prerogatives."\textsuperscript{205} In contrast to mere extension, which has "the virtue of simplicity," the "principal wage-earner" solution "would introduce a term novel in the [Aid for Dependent Children] scheme, and would pose definitional and policy questions best suited to legislative or administrative elaboration."\textsuperscript{206} Therefore, "any fine-tuning of . . . coverage along 'principal wage-earner' lines is properly left to the democratic branches of the Government. In sum, we believe the District Court . . . adopted the simplest and most equitable extension possible."\textsuperscript{207}

From the Court's language and its disposition of the restructuring issue in \textit{Westcott}, it can be concluded that extension of a benefit to an excluded class, even if it involves the restructuring of a statute, is more likely to be approved by the Court the simpler and more equitable that extension or restructuring appears. As will be demonstrated below, some forms of extension or restructuring of benefits which at first glance appear to be far from simple, turn out upon closer examination, and especially with the aid of the dual aspect analysis proposed in an earlier part of this Article, to be simple and equitable in fact.

\textsuperscript{201} \textit{Id.} at 92-93.
\textsuperscript{202} \textit{Id.} at 92.
\textsuperscript{203} \textit{Id.}
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.} at 93.
In a series of cases, federal courts have struck down, as violations of Title VII's equality principle, a variety of state protective labor laws that, as written, applied only to women workers. As indicated earlier, the prototype of such laws had been upheld as a benign discrimination by the 1908 Supreme Court decision in Muller v. Oregon. Among the types of laws that have been invalidated in recent years as a result of Title VII have been those that prohibit an employer from permitting only women workers from working more than a given number of hours in a day, those requiring daily overtime pay for women workers only, those imposing a maximum hour limitations for women workers only, those limiting the weights only women workers can be required to lift in the course of their employment, and those requiring seats at work and periodic rest and meal periods for women workers, but not for men.

In only one case, Potlatch Forests, Inc. v. Hays, did a federal district court, whose decision was affirmed by the Eighth Circuit Court of Appeals, uphold such a law even though it had been enacted by the Arkansas legislature to require that only women workers be paid time-and-one-half their hourly rate for hours worked in excess of eight in one day. The Hays court harmonized the women-only overtime pay law with Title VII's requirement of sex equality in employment by extending the benefit of the law to male employees, rather than by taking it away from female employees.

Implicit in Hays was the court's understanding that the Arkansas legislature would have preferred such a result had it known that its women-only overtime pay law would be invalidated because of its inconsistency with Title VII. Shortly after the Hays decision, however, the Arkansas Supreme Court, which as noted earlier is the final arbiter of the meaning of Arkansas law, including the presumed intention of

208. 208 U.S. 412 (1908).
209. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971). But see text accompanying notes 234-37 infra, which argues that only those aspects of the law that had deprived women of equal job opportunities with men were struck down by Rosenfeld.
213. Id.
216. See id. at 1083-84.
the Arkansas legislature on the abrogation-extension issue, held in State v. Fairfield Communities Land Co.,\textsuperscript{217} that the Arkansas legislature had not intended to benefit men. Totally ignored by the Arkansas court was the question impliedly resolved in Hays. That question was not what the Arkansas legislature's original intention had been with regard to covering men under the statute. The original intention was clear from the fact that the statute covered women employees only. Rather, the question to be resolved was what the Arkansas legislature had intended—or would have intended had it thought about the matter—as to whether the benefits under the statute should be extended to men or taken away from women, if the statute in its original form were held to be unconstitutional or violative of a federal law because of its benefited group's underinclusiveness.

Had the Arkansas court pursued that inquiry, it could reasonably have concluded that the Arkansas legislature would have preferred the extension of those benefits to male workers over their being taken away from female workers. Among other reasons, the court could have concluded that the 1915 Arkansas statute,\textsuperscript{218} like the post-1908 protective labor laws of many other states that applied to women workers only, had not been applied by the legislature to men primarily because the legislature had not believed that it could validly enact such a law to benefit both sexes. This had been the message of the Lochner-Muller sequence of United States Supreme Court decisions in 1905 and 1908.\textsuperscript{219} In \textit{Lochner}, the New York legislature's efforts to enact hours-limitation laws that would protect both men and women workers had been invalidated by the Court as a violation of the liberty of contract guarantee it found implicit in fourteenth amendment due process. But in \textit{Muller}, due process was held not to be violated by a law that limited the working hours of women workers only. Many women-only protective laws were later enacted by the states\textsuperscript{220} despite any wishes their legislatures, like the New York legislature in \textit{Lochner}, might have had to benefit both sexes. Although in 1917 the Court held in \textit{Bunting v. Oregon}\textsuperscript{221} that an hours limitation law for both sexes would be constitutional, by then inertia and habit had kept many women-only protective laws unchanged and permitted other women-only laws to be

\begin{footnotes}
\item[217] 260 Ark. 277, 538 S.W.2d 698, cert. denied, 429 U.S. 1004 (1976).
\item[218] See id. at 278, 538 S.W.2d at 699.
\item[219] See text accompanying notes 141-44 supra.
\item[221] 243 U.S. 426 (1917).
\end{footnotes}
subsequently enacted.222

The historical genesis of many women-only protective labor laws, the responsibility of courts to assess presumed legislative intention with respect to invalidation or extension if a law is declared invalid because of the underinclusiveness of the group it seeks to benefit, and the equal intrusion into the legislative domain whether a court decides to invalidate the law or to extend it to the excluded group, all suggest that the result in Hays was more sound than the one reached by the Arkansas Supreme Court in Fairfield Communities Land Co.223 These considerations also suggest that in the case of a daily overtime pay law or minimum wage law for women only, the proper remedy is to extend the benefit of the law to men rather than to take it away from women. In the language of Westcott, extension would be both simple and equitable,224 since it would not deprive any woman employee of benefits she had enjoyed under existing law. To the contrary, because of the dual aspects of such laws, their extension to men would not only give men the same benefits that had previously been enjoyed by women only, but would also relieve women of the detrimental effects of such laws that had previously burdened them.

Extension of such laws to men, it is submitted, would not be inequitable to employers, although extension might cost them more for both overtime work and higher wages for men who had been earning less than the state law's minimum wage for women. That such extension is reasonable is demonstrated by the government regulations that

222. By 1917 too many men had grown to depend on the availability of overtime work. In the absence of an understanding about their dual aspect, the extension of such laws to men would have burdened them with the inability to work overtime hours along with benefiting them by permitting them to refuse to work overtime. See text following note 225 infra.

223. The result in Potlatch Forests, Inc. v. Hays, 318 F. Supp. 1368 (E.D. Ark. 1970), aff'd, 465 F.2d 1081 (8th Cir. 1972), for the same reasons, also would appear to make more sense than the decision of the Ninth Circuit in Homemakers Inc. v. Division of Indus. Welfare, 509 F.2d 20 (9th Cir. 1974), cert. denied, 423 U.S. 1064 (1976), which refused to extend to men a state overtime wages and hours law applicable to women only, because it would "usurp the legislative power vested exclusively in the state." Significantly, that extension to men was subsequently effected by action of the California Legislature, CAL. LAB. CODE § 1173 (West Supp. 1980), and the California Industrial Welfare Commission Work Order No. 1-80, 8 CAL. ADMIN. CODE § 11180 (1979). The same timidity is reflected in the decision of the California Supreme Court in Arp v. Workers' Comp. Appeals Bd., 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977), which invalidated a workers' compensation provision giving surviving widows of covered male employees greater death benefits than was granted to surviving widowers of covered female employees who lost their lives in the course of employment. Rather than extend these benefits to the surviving spouses of female employees, however, the California court simply invalidated the provision, and left to the legislature the task of restructuring death benefits under the statute.

224. See text accompanying note 206 supra.
have for many years increased their cost of doing business. Also, the effect of the *Lochner-Muller* sequence upon the enactment of such laws suggests that employers had become the unintended beneficiaries of these laws, to the extent they were not required to pay male workers the same minimum wage or overtime pay as female workers. In addition, the alternative to extending overtime and minimum wage benefits to male workers is to take them away from women workers, that is, to invalidate the law.\(^2\)\(^2\)\(^5\) Were this to be done, it would create another windfall for employers who, until the law's invalidation for underinclusive ness, at least had been required to pay women workers the minimum wage or overtime pay prescribed by the statutes. Finally, even after the benefits of such laws were extended to men, employers could still seek further restructuring of the laws by their respective legislatures—although concededly the burden of disturbing the status quo would then be on the employers rather than upon those who desired to maintain the benefits for both sexes.\(^2\)\(^2\)\(^6\)

Extension to males of overtime pay or minimum wage laws that as written apply to women only, rather than invalidation of these laws, thus would appear to be the proper remedial course. There are two types of women-only protective labor laws, however, that would present special problems were they simply extended to male employees. They are laws prohibiting employers from permitting or requiring women employees to work more than a given number of hours in a day and laws prohibiting an employer from permitting or requiring women employees to lift objects weighing more than a given number of pounds, either repeatedly or on a single occasion, in the course and scope of their employment.

Were employers who had been prohibited from permitting women to work overtime now also to be prohibited from permitting men to work overtime, as a result of the law's extension, two results would ensue. Men, like women, would enjoy the benefits of such a law. If they wished, they could safely refuse their employer's request or demand that they work overtime. Like women, they would have more time for pursuits beyond the workplace. The problem, however, arises because many men have grown to depend upon the opportunity to work overtime as a means of making ends meet or of improving their living standard. Also, many employers at times require some overtime

\(^{225}\) If an hours-limitation law is simply invalidated because it applies to women only, women will lose the benefit of the law's truly protective aspects, *i.e.*, they can thereafter be forced to work overtime like men.

\(^{226}\) See text following note 228 infra.
work to be performed by their employees. Were the overtime prohibi-
tion simply extended to men, men would be deprived of the overtime-
pay opportunity, employers would be disabled from satisfying the
needs of their enterprise, and women who wished to work overtime to
maintain or improve their living standard would continue to be denied
that opportunity.

A similar problem results if a women-only weight-lifting restric-
tion is simply extended to men. If an absolute thirty-five pound limit
that applies to women is extended to men, for example, many objects
that have to be lifted in the course of employment will simply not be
lifted manually, although many individual men and women are capa-
ble of lifting such objects without harming themselves.

One obvious way to resolve the difficulties created by the statutory
or constitutional requirement of sex equality and the negative effects of
either invalidating or extending these laws is for the legislature that
enacted them to undertake the necessary restructuring to preserve the
benefits while simultaneously removing the burdens for both sexes.
This can be done in the area of hours-limitation laws by enacting the
principle of voluntary overtime. If employees of both sexes had the
right to work overtime, as well as the right to refuse to work overtime,
this goal could be met. In being permitted to work overtime, both men
and women could earn the income they need to maintain or improve
their living standard. In having the right to refuse to work overtime
without being punished by their employers, men and women workers
who wished to pursue family, personal, recreational, cultural, and edu-
cational interests, or simply rest, could do so. This solution has been
recognized in a proposed amendment to the federal Fair Labor Stan-
dards Act that is supported by the American Federation of Labor-Con-
gress of Industrial Organizations.227

A weight-lifting restriction can be dealt with in a comparable man-
ner. A legislature can restructure the law so that it protects both sexes,
but does not completely hobble an employer who needs certain objects
weighing more than a specified weight lifted by its employees. Such a
solution is found in the Georgia rule promulgated by the Georgia
Commissioner of Labor, protecting both sexes, that provides: "Weights
of loads which are lifted or carried manually shall be limited so as to
avoid strains or undue fatigue."228

1, col. 1.

228. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 233 (5th Cir. 1969) (quoting
Rule 69 promulgated pursuant to GA. CODE ANN. § 54-122(d) (1974)).
Although legislative power to effect such change is undoubted, invoking legislative, as opposed to judicial, aid presents a major difficulty because any person or group that seeks to have a legislature change the status quo bears a heavy burden. The question then becomes upon whom should that burden be cast. It is in the light of this problem that the possibility of judicial restructuring of the laws assumes major importance. It is true that regardless of how the courts resolve the question of invalidation or extension, the legislature retains the last word. Still, the problem of overcoming legislative inertia remains, making the allocation of this burden crucial.

Westcott's implication that judicial restructuring of a legislative scheme to cure its unconstitutionality (or invalidity under a statute) is permissible if it can be done simply and equitably thus assumes special importance. That a court can do this in remedying a state hours-limitations or weight-lifting law that by its terms applies to women only is illustrated by the 1971 decision of the Ninth Circuit Court of Appeals in *Rosenfeld v. Southern Pacific Co.*

In *Rosenfeld*, the defendant employer had refused to hire any women for a certain job because, among other reasons, the job required the lifting of weights in excess of what California law permitted for women, and occasional work days of more than ten hours, which another California law prohibited an employer from permitting or requiring women employees to work. Finding that such laws were inconsistent with Title VII's command of sex equality in employment, the court concluded that the employer's policy was "not excusable under the state statutes" and upheld the judgment for the woman plaintiff who had been discriminated against because of her sex. Significantly, however, the court added the following observation: "We leave undecided the questions of this kind which may arise concerning the varying employment policies of other employers under circumstances unlike those of the present case."

What, then, was the precise effect and scope of the *Rosenfeld* decision? Although the court did not discuss the dual aspect of the laws in question, its careful limitation of what it was deciding suggests that it took into consideration, or at least was aware of, that dual aspect. One effect of the hours- and weight-limitation laws in *Rosenfeld* was to deny

---

229. 444 F.2d 1219 (9th Cir. 1971).
232. 444 F.2d at 1227.
233. Id.
women equal employment opportunity with men. Another effect of the hours-limitation law was to deny women the same opportunity as men to earn overtime pay. These effects reflected the laws' burdensome or detrimental aspects. As suggested earlier, those detrimental aspects can be thought of as being embodied in separate and distinct statutes.\(^2\)

Accordingly, the only issue confronting the Rosenfeld court was the validity of those detrimental aspects or, in other words, the validity of the implied separate statutes embodying those detrimental aspects. The court's ruling that the employer could not rely on those statutes to deny the plaintiff the same job opportunity that it granted to men went only that far and no further. The court itself acknowledged this narrow scope when it limited its holding to the precise situation in the case.

After Rosenfeld was decided, had a California male employee sought to have the beneficial aspect of the hours- or weight-limitation laws, that is, the benefits of the implied separate statute applied to him, nothing determined in Rosenfeld would have precluded the same court from granting such relief. Having dealt only with the burdens of those laws, Rosenfeld decided nothing about the beneficial aspects of those laws or the implied laws embodying those separate aspects.

A court presented with a male employee seeking to have the benefit of the hours-limitation law extended to him could well have decided to grant the remedy for the reasons suggested in connection with the extension of minimum wage and overtime pay laws: the distortion of the original purpose of state legislatures to protect members of both sexes against working unwanted overtime hours by the Lochner-Muller sequence\(^2\) and the fact that invalidation of the protective law is as intrusive of legislative function as is the extension of its benefits to men.\(^2\)

A similar conclusion could be reached by a court if, following Rosenfeld, a male worker had sought to benefit from the weight-lifting restriction that had previously applied to women workers only. His claim of course would be that Rosenfeld had decided only that the weight-lifting law could not be relied on by the employer as an excuse for denying women equal job opportunities, that is, that Rosenfeld dealt only with the law's detrimental aspects or with the implied separate statute embodying those detrimental aspects. The case did not hold that women employees could not continue to benefit from the implied separate beneficial statute by being able to refuse with impunity

\(234\). See text following note 141 supra.

\(235\). See notes 142-49 & accompanying text supra.

\(236\). See text accompanying notes 193-95 supra.
to lift weights in excess of the maximum allowed by the statute, or that those beneficial aspects could not be extended to men. Because a simple extension of the weight-lifting restriction to men could produce unforeseen hardships on employers by disabling them from requesting any employee of either sex from lifting certain weights, extension of that restriction, while simple, might not prove to be as equitable to all concerned as would be a judicial restructuring of the weight-lifting statute. Were the court to restructure the statute so that it protected members of both sexes from lifting weights which caused undue strain or fatigue, as in the Georgia provision cited earlier, it would have removed the detriment in Rosenfeld and preserved the benefit in this subsequent case in a manner that can be seen to be both equitable and simple.

In California, the locus of the Rosenfeld decision and of other cases invalidating women-only protective labor laws for being inconsistent with Title VII, the problem of remedial choice has been largely mooted by subsequent state legislation and administrative agency action that, by and large, has extended prior women-only benefits to men. Thus, as a result of this legislative-administrative action, male employees in California are now equally entitled with women to the same minimum wage, to seats at work and periodic rest periods, and to protection against lifting excessive weights. Significantly, however, the California Industrial Welfare Commission has not promulgated any new work orders limiting the working hours of either men or women workers. The Rosenfeld decision would thus appear to have had the practical effect of depriving women workers of the hours-limitation protection as well as relieving them of its burden, although the case addressed only the burden aspect of those work orders. In large part, this result may be explained by failure of the California legislature and the state’s Industrial Welfare Commission to understand the narrow nature of the Rosenfeld holding.

Nevertheless, the analysis suggested above should give the California Industrial Welfare Commission and the California Legislature a basis for re-evaluating their post-Rosenfeld treatment of the hours-limitation question for both sexes. Furthermore, in those states that have not dealt with the apparent judicial invalidation of hours or weight lifting limitations, courts and legislatures can still restructure statutes or

237. See note 228 & accompanying text supra.

rules embodying such limitations so as to make their truly beneficial aspects apply to both sexes. Enactment at the state level of statutes embodying the principle of voluntary overtime, as proposed for the federal Fair Labor Standards Act, would be one way in which this can be done. And in numerous other areas, aside from state protective labor laws, the “restructuring” proposed herein is a technique that is readily available.

Unfortunately, the technique of judicial, or even legislative, extension of the beneficial aspects of laws and invalidation of their detrimental aspects—whether applied in separate proceedings or in a single proceeding, or treated as a simple extension or invalidation, or as an equally simple restructuring—is not available for every law that has a dual aspect. The obligation of compulsory military service, for example, is, as has been shown, also a dual aspect law. The benefits military service confers include job training at government expense, employment opportunity, and veterans’ benefits ranging from preference for government employment to educational and home-loan support under the G.I. Bill of Rights. Its detriments are equally obvious. Persons involuntarily inducted into the armed forces not only have their lives and careers disrupted by being removed from family, friends, and civilian jobs, but they face extraordinary risks of injury or death in the performance of their military duties. There is no way, moreover, to eliminate these detriments; they inhere in the nature of military service.

For too long, the burden of compulsory military service has been cast exclusively on the male members of our society. Thus far, the exclusion of women from this civic duty has not been justified by the courts as benign discrimination. Rather, the courts have upheld this exclusion based on the prevailing constitutional tests under which sex discrimination was assessed. All the cases upholding a male-only draft against constitutional challenge were decided, however, before the Craig intermediate test for gender discrimination had been promul-

239. See note 227 & accompanying text supra.
240. See note 196 supra.
241. For a variety of reasons it would be inappropriate for a court to extend the burden of a statute to a group upon which it had not been originally cast by the legislature. As a result, for the obligation of compulsory military service to survive constitutional challenge, it must be made sex-neutral not by a court, but by Congress itself. The unwillingness of the United States Supreme Court, in resolving equal protection challenges, to cast a burden upon a group that had not originally been burdened by a legislature, can be seen in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972).
gated by the Supreme Court. It is doubtful that the male-only obligation of compulsory military service can survive the Craig intermediate test. The danger is that exclusion of women from the draft, should a draft become necessary, will be sought to be justified as benign discrimination.

To uphold exclusion of women from compulsory military service on benign discrimination grounds would, for all the reasons examined in the earlier sections of this Article, be erroneous. It would ignore the effects of widespread societal and legal discrimination against males, and the detrimental aspects, for women, of being excluded from the draft. In this limited realm, however, there is no way to both preserve the benefits and remove the burdens of the draft for both sexes. When the draft becomes sex-neutral in its operation, the effect will necessarily be to confer on both sexes the burdens as well as the benefits of compulsory military service.

The development of a sex-neutral draft, as well as the abrogation of the benign discrimination doctrine itself, which has been the principal corrective proposed herein, can have positive effects on the development of constitutional principles affecting governmental sex discrimination. While its impact on equal rights amendment ratification is difficult to measure, it should influence Supreme Court decisions in sex discrimination cases brought under existing constitutional provisions. Abrogation of the benign discrimination doctrine should increase the likelihood that a Court majority could be persuaded to treat gender as a suspect classification. Even if this did not occur, it would be much more difficult for the Court to find that any governmental gender-based classification has passed the intermediate test of Craig. In effect, if not in theory, the Craig intermediate test is likely always to produce the same results as the overwhelming interest test that would be applied were sex classification held to be suspect.

In sum, in the overwhelming majority of cases, abrogation of the benign discrimination doctrine in the sex discrimination area would not cause women to lose the benefits they now derive from laws that are justified by that doctrine. Those benefits would simply be enjoyed by men as well as women. At the same time, abrogating the benign

243. In what appears to be the latest case challenging the draft on constitutional grounds before the Craig test was announced, the Court of Appeals for the Ninth Circuit upheld the male-only draft in a one-paragraph opinion by simply asserting a "rational basis" for the gender classification. United States v. Reiser, 532 F.2d 673 (9th Cir. 1976). Applying a suspect classification analysis, the district court had held the male-only draft unconstitutional. United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975).
discrimination doctrine would also remove from women the detrimen-
tal burdens imposed upon them by the laws that purport to discrimi-
nate in their favor. Above all, eliminating the benign discrimination
document would signal a recognition of a major fact too long ignored—
that, as a result of centuries of sex-role stereotyping, men as well as wo-
men have been victimized by legal and social institutions.

Conclusion

In the decade of the 1970's, the United States Supreme Court
made giant strides in response to claims of unconstitutional sex-based
discrimination. Although the Court has not yet agreed to treat gender
classifications as suspect—a development devoutly to be desired—it
has subjected such classifications to the heightened level of scrutiny re-
quired by the Craig test.244 The practical effect of applying that test,
under which a gender classification will satisfy the equal protection
guarantee only if it can be shown to be substantially related to an im-
portant governmental interest, will be to invalidate practically all gen-
der classifications that would have satisfied the Court's former "any
rational basis" test in this area—all, that is, except those classifications
the Court finds to have been created for a benign or compensatory pur-
pose.

The benign discrimination exception to the Craig test has under-
mained the Court's basic human rights achievement in the sex discrimi-
nation decisions of the 1970's.245 Except for some contrary intimations
of a willingness to apply the benign discrimination exception to men in

244. See notes 11-15 & accompanying text supra.
245. In urging the abrogation of the benign discrimination doctrine in the gender bias
area, I do not intend to cast any doubt on the validity of laws like the Equal Pay Act of 1963,
29 U.S.C. § 206(d)(1) (1976), and Title VII of the 1964 Civil Rights Act (as amended). 42
primarily to assist female victims of past discrimination in the employment sphere. At first
glance, therefore, they would appear to violate the principle negatively implied by Washing-
ton v. Davis, 426 U.S. 229 (1976), and Personnel Adm'r of Mass. v. Feenev, 442 U.S. 256
(1979), namely, that a law, although phrased in sex-neutral terms, is unconstitutionally dis-
criminatory if it was intended to benefit one sex more than another and in fact had that
effect. But the Equal Pay Act and Title VII, despite their apparent intention primarily to
benefit women victims of past discrimination, do in fact benefit both sexes. Indeed, in nu-
umerous cases male victims of employment discrimination have prevailed in their Equal Pay
Act or Title VII claims. See e.g., Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.
1971). Despite their primary intention, therefore, those Acts, by treating men and women
alike, avoid the dangers of a benign discriminatory law described earlier. They recognize
that men, as well as women, have been and continue to be victims of sex-based employment
discrimination. And they avoid burdening women with any detrimental aspects of those
laws that would be felt by them if those laws were not equally applicable to men.
the Marshall-Brennan dissent in *Feeney*, the exception has been applied only in cases in which the classification appears to favor women. As demonstrated in this Article, such classifications also inevitably disfavor women in important respects, because both sexes are not sought to be benefited by the law in question.

The most important shortcoming of the Supreme Court's benign discrimination doctrine in the area of gender bias has been the Court's failure to understand the scope and extent of past and present official discrimination against males. Not surprisingly, this shortcoming is shared by many members of the public who have come to think of the political and social movement for equal rights without regard to sex as essentially a movement for women's rights.

Although the injustices perpetrated upon women by the American social, political, economic and legal systems have been severe—indeed outrageous—men have been equally powerless victims of sex discriminatory laws, official practices, and social mores. The heightened level of scrutiny approved in *Craig*, to be applied where males allege their victimization by a sex-discriminatory law, is implicit recognition of this fact. The Court, however, has failed to face up to these implications of *Craig*.

The movement for equal rights without regard to sex is understood by most of its participants as a movement for human rights. In their efforts to achieve ratification of the proposed equal rights amendment and to convince the Court to raise still higher the level of scrutiny applicable to gender classification under existing constitutional provisions, equal rights advocates understand the fundamental goals of the movement to be the ending of law-imposed sex-role stratification, and not just of the stereotyping of women's roles. The right of all individuals, male or female, to realize their fullest potential as human beings, without governmental interference resting on gender-based assumptions about their attributes, is what the equal rights movement is all about.

The benign discrimination doctrine has been substantially narrowed since it was first formulated in *Kahn v. Shevin*.* Wiesenfeld*

---

246. See notes 116-22 & accompanying text supra.
247. See Kanowitz, Women and the Law, supra note 10.
and Goldfarb\textsuperscript{250} make it clear that the "benign" purpose must have been behind the statute at the outset; otherwise the doctrine will not be applied. Orr\textsuperscript{251} represents a further retrenchment: if the benign purpose can be achieved without a benign preference, \textit{i.e.}, by individualized hearings, the doctrine will not apply, and if the benign purpose is not designed to compensate for past discrimination "within the sphere" of the benignly discriminatory statute or rule, a further reason exists for not applying the doctrine.

Although the Court has narrowed the circumstances under which it will apply the benign discrimination doctrine, it has not repudiated it, and the doctrine undoubtedly still has a substantial field in which to operate. If the Court entirely abrogates the benign discrimination doctrine in the gender bias area, as proposed herein, most of the truly beneficial aspects of benignly discriminatory laws (which also have detrimental aspects) can be preserved for women by various judicial techniques. Even if the courts fail in individual cases to invoke such techniques, and instead invalidate benignly discriminatory laws in their entirety, legislatures can still restructure such laws in ways that will confer their beneficial aspects on both sexes. In most cases, judicial or legislative extension of benefits to the gender previously excluded from sharing in these benefits will in itself remove the law's detrimental aspects, or at least its most detrimental features.

Finally, it is to be hoped that, for the reasons advanced herein, the Court will soon come to understand that the benign discrimination doctrine in the gender bias area is an illusion, that it is inconsistent with, and undermines, the Court's positive achievements elsewhere in recent sex discrimination cases, that it reflects an inadequate understanding of the political and social striving for equality without regard to sex, and that the doctrine should be repudiated in its entirety.

