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SEXUAL EQUALITY: NOT FOR WOMEN ONLY

Until recent years, women were confined to the home and the family. Paternalistic courts and legislatures perpetuated traditional sexual stereotypes and thereby carefully circumscribed women's role in society. Although the state legislatures, in enacting these laws, may have intended to protect women, such paternalistic legislation had the practical effect of precluding women from competing with men, particularly in the area of employment.

As women became more integrated into the labor market, however, they began to challenge paternalistic statutes in order to receive equal treatment with men. Initially, the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment were the primary vehicles used to attack discriminatory statutes. Success under these constitutional provisions was slow as the Supreme Court struggled for a standard of analysis in sex discrimination cases. Later, with the enactment of Title VII of the Civil Rights Act of 1964, women were able to contest

1. In the early 1900's, employers charged with violating protective state statutes regulating the number of hours that women were permitted to work brought unsuccessful constitutional challenges. See Radice v. New York, 264 U.S. 292 (1924) (women prohibited from working in city restaurants between the hours of 10 p.m. and 6 a.m.); Bosley v. McLaughlin, 236 U.S. 385 (1915) (maximum hour law for female hospital employees upheld); Miller v. Wilson, 236 U.S. 373 (1915) (women working in a hotel limited to an eight-hour day, 48 hour week); Riley v. Massachusetts, 232 U.S. 671 (1914) (women factory workers cannot work more than 56 hours per week); Muller v. Oregon, 208 U.S. 412 (1908) (women prohibited from working more than 10 hours a day in a laundry).

2. Courts have held that special recognition and favored treatment can constitutionally be afforded women. See, e.g., Hoyt v. Florida, 368 U.S. 57 (1961); Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), cert. denied, 393 U.S. 982 (1968).


4. U.S. CONST. amends. XIV & V. Although the fifth amendment does not have an equal protection clause as does the fourteenth amendment, the fifth amendment's due process clause does prohibit the federal government from engaging in discrimination that is "so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954).


6. 42 U.S.C. § 2000e-2(a) (1976). Congress's objective in enacting Title VII was to
discriminatory employment practices without resorting to the unpredictability of the Court's equal protection analysis.\(^7\) Largely unrecognized in the women's movement toward sexual equality, however, were the many benefits men had derived from challenges to gender classification.

Indeed, the same sexual stereotypes that have deprived women of equal rights in employment, education, social insurance, and fringe benefits have denied men equal treatment, particularly in the areas of family law, social security, and retirement benefits.\(^8\) This comment will analyze how constitutional and statutory challenges to sex-based discrimination, specifically in suits brought under the fourteenth amendment and Title VII, have benefitted men and have helped redefine the role of men and women in our society.\(^9\) Additionally, it will examine the Supreme Court's development of an equal protection standard of analysis for sex discrimination cases with the goal of discovering whether the Court's analysis has adequately accommodated changing sex-role perceptions in America.

I. MEN, WOMEN, AND THE EQUAL PROTECTION CLAUSE — A SUPREME COURT IN SEARCH OF A STANDARD OF ANALYSIS

Prior to 1971, it was well settled judicial policy to uphold gender-based


7. See note 154 and accompanying text infra.

8. See Califano v. Webster, 430 U.S. 313 (1977) (per curiam) (social security benefit formula providing more favorable benefit payments to retired women does not violate due process clause of the fifth amendment where it directly addresses discrimination against women and tries to remedy it); Califano v. Goldfarb, 430 U.S. 199 (1977) (provision of Social Security Act providing survivors' benefits to widows but not to widowers unless widowers received at least one-half of their support from their deceased wives, violated the due process clause of the fifth amendment); Craig v. Boren, 429 U.S. 190 (1976) (different drinking ages for men and women violates the equal protection clause of the fourteenth amendment); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (statute precluding men from survivors' benefits under Social Security Act but providing women with survivors' benefits violates the due process clause of the fifth amendment); Kahn v. Shevin, 416 U.S. 351 (1974) (property tax exemption provided for widows, but not widowers, not violative of equal protection since the exemption compensated women for past economic discrimination).

Of the seven sex discrimination cases considered by the Supreme Court between 1972 and 1975, all the challenges to practices discriminating against women were successful, see Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971), while all the challenges to practices discriminating against men were unsuccessful. See Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). But see Taylor v. Louisiana, 419 U.S. 522 (1975).

9. Not all commentators agree that the alteration of traditional sex-role models is a desirable social development. See, e.g., Ryman, A Commentary on Family Property Rights and the Proposed 27th Amendment, 22 Drake L. Rev. 505, 514 (1973).
classifications under the equal protection clause of the fourteenth amendment. Finding support for its position in traditional notions of the role of men and women in society, the Supreme Court developed a “minimum rationality” standard of analysis for sex discrimination cases brought under the fourteenth amendment, giving great deference to the work of the legislatures. Under this standard, only sex classifications resting on grounds wholly irrelevant to the achievement of the state’s objective were unconstitutional. Although the minimum rationality test produced consistent results, it did so at great expense, for no gender classification failed to survive constitutional attack; similarly situated people were treated dissimilarly with the sanction of the judiciary.

Myra Bradwell brought the first challenge to a gender classification in Bradwell v. State, alleging her right to practice law in the State of Illinois. The Supreme Court determined that a state had the power to prescribe qualifications for admission to the bar of its own courts, and this power was not affected by the fourteenth amendment. In his concurring opinion, Justice Bradley stated that the Court’s holding was supported by the fact that both civil law and nature had always recognized a difference in the respective sphere and destinies of men and women.

10. See, e.g., Hoyt v. Florida, 368 U.S. 57 (1961) (Florida statute providing that no woman shall be selected for jury service unless she volunteers not unconstitutional on its face); Goesaert v. Cleary, 335 U.S. 464 (1948) (Michigan statute forbidding any female to act as a bartender unless she is the wife or daughter of the owner not violative of the fourteenth amendment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (state constitutional provision confining the right to vote to male citizens of the U.S. not violative of the Federal Constitution). See also Ginsburg, supra note 5, at 13; Note, The Emerging Bifurcated Standard for Classifications Based on Sex, 1975 Duke L.J. 163, 166.


12. See notes 13-22 and accompanying text infra.


14. Bradwell was denied admission to the bar because: 1) she was married; 2) she was a woman; and 3) clients would have difficulty enforcing their contracts with her. See Corker, Bradwell v. State: Some Reflections Prompted by Myra Bradwell’s Hard Case that Made “Bad Law”, 53 Wash. L. Rev. 215 (1978).

15. This oft-quoted passage from Justice Bradley’s concurrence exemplifies the concept of “romantic paternalism”: Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say the identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a
Seventy-six years after the *Bradwell* decision in *Goesaert v. Cleary*, the Supreme Court upheld the constitutionality of a Michigan statute requiring all bartenders to be licensed, but prohibiting a woman from being licensed unless she was "the wife or daughter of the male owner" of a licensed liquor establishment. Since the state had a legitimate interest in devising preventive measures for the moral and social problems that might arise if women were bartenders, the Court deferred to the Michigan legislature's reasonable belief that the "oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight."21

Again, in *Hoyt v. Florida*, the Court embarked upon a minimum rationality analysis. A woman convicted of second degree murder before an all-male jury challenged a Florida statute providing that only women who volunteered could be selected for jury service. Despite the "enlightened emancipation of women," the Court found that women were still regarded as "the center of home and family life" and therefore the state's classification was reasonable.22

From the consistency with which the Court tolerated gender-based classifications, it was apparent that classifications based upon sex were not to receive the strict scrutiny accorded to laws discriminating on the basis of

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woman adopting a distinct and independent career from that of her husband. . . .

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the Law of the Creator.

83 U.S. at 141 (Bradley, J., concurring).


18. The Court relied on the proposition that the state could prohibit all women from working as bartenders. 335 U.S. at 465.

19. *Id.* at 466-67. The Court went on to say "that it could not cross examine either actually or argumentatively the mind of Michigan legislators nor question their motives." *Id.*


22. 368 U.S. at 61-62.

23. Courts apply the "strict scrutiny" test to statutory distinctions made on the basis of immutable characteristics, such as race or national origin, which have the effect of invidiously discriminating against a class of persons. Statutes embodying such distinctions may only be sustained if justified by a "compelling state interest." Fundamental interests such as the right to vote also require application of the strict scrutiny test. *See generally* Gunther, *supra* note 11.
race,\footnote{See Loving v. Virginia, 388 U.S. 1, 11 (1967) (Virginia statute prohibiting interracial marriages violates equal protection and due process clauses of the fourteenth amendment); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (Florida criminal statute prohibiting an unmarried interracial couple from occupying the same room at night violates the equal protection clause of the fourteenth amendment).} alienage,\footnote{See Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (state statutes restricting welfare benefits on the basis of alienage found unconstitutional under the equal protection clause of the fourteenth amendment); Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886) (discriminatory application of city ordinance against Chinese aliens is violative of the equal protection clause of the fourteenth amendment).} or national origin.\footnote{While legal restrictions placed upon a class of persons solely on the basis of their national origin are immediately suspect, there are circumstances where “public necessity may justify the existence of such restrictions.” Korematsu v. United States, 323 U.S. 214, 216 (1944) (the exclusion of American citizens of Japanese descent from certain west coast areas during WWII found to be a valid exercise of the war power); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (curfew imposed upon all persons of Japanese ancestry within a designated military area found to be a valid exercise of the war power).} In 1971, however, in Reed v. Reed,\footnote{404 U.S. 71 (1971). This was the first time the Supreme Court had responded affirmatively to a woman’s complaint of unconstitutional sex discrimination.} the Supreme Court departed from its historical practice of upholding gender classifications by declaring governmentally imposed sex discrimination unconstitutional for the first time, signalling a new era in judicial scrutiny of sex-based discrimination.

\textbf{A. From Reed to Stanton — A Quagmire of Judicial Decisions}

The Supreme Court in Reed shifted from the traditional minimum rationality test that it had introduced in Bradwell toward a stronger standard of analysis for sex classifications. In this case, both parents filed competing petitions for the administration of their son’s estate. When the father received preference under the Idaho Code, the mother brought suit challenging the state’s mandatory preference for males over females. The majority instructed that sex-based classifications must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. The Court reasoned that under this approach persons similarly situated would be treated alike.\footnote{Id. at 76.} Applying this standard to the case, the Court found that Idaho’s mandatory preference for males over females in the administration of intestate estates did not bear a “rational relationship” to the state objective.\footnote{The state objective was to reduce the workload of probate courts by eliminating one class of contests. The Court found, however, that this objective was not advanced in a manner consistent with the fourteenth amendment since the exclusion of the class of women, rather than men, was nothing more than an arbitrary legislative choice. \textit{Id.}} The majority rejected the argument that the male preference was a justifiable adminis-
trative convenience and determined that such an arbitrary legislative choice resulted in dissimilar treatment for men and women who were similarly situated. Therefore, the unanimous Court held that the statute violated the equal protection clause of the fourteenth amendment. However, this new “rational relationship” test, a clear departure from the “minimum rationality” of the Bradwell line of cases, was not applied by the Supreme Court in the next sex discrimination case it considered.

Instead, the plurality in Frontiero v. Richardson evaluated the challenged statute under a “strict scrutiny” analysis. In the past, the strict scrutiny analysis had been reserved for those cases where the challenged classification was based upon an immutable characteristic such as race or national origin. Unlike a classification subject to the rational basis test, a classification can only withstand strict scrutiny when it is justified by a compelling state interest. In Frontiero, a woman challenged a federal fringe benefit scheme providing that a serviceman could claim his wife as a dependent, regardless of whether she was in fact dependent upon him for any of her support. The statute prohibited a servicewoman, however, from claiming her husband unless she demonstrated that he was in fact dependent upon her for over one-half of his support. Despite the Government's

30. Id. at 77.
31. The Supreme Court has rendered only one other unanimous sex discrimination decision. See Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), discussed at notes 66-75 and accompanying text infra.
33. One explanation offered for this departure is that Frontiero was essentially an equal pay case. It was brought under the fifth amendment since Title VII and the Equal Pay Act do not apply to the military. See Ginsburg, supra note 5, at 13. The Court's decision was four to four and to date no fifth vote has been found to make sex a suspect classification. See also note 23 and accompanying text supra.

Between Reed and Frontiero, the Court considered Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972). There, the Court struck down a Louisiana workmen's compensation statutory scheme distinguishing between legitimate and dependent illegitimate children with regard to compensation for the death of the natural father. Since legitimacy was related to status of birth, and therefore beyond the control of the infant, the Court examined whether the statutory classification promoted a legitimate state interest. Finding that the classification served no such interest, compelling or otherwise, the Court held that the denial of equal recovery rights to dependent unacknowledged illegitimates violated the equal protection clause of the fourteenth amendment. It is unclear from the Court's opinion whether its strict scrutiny approach to discrimination against illegitimates rested upon fundamental rights or the presence of a suspect class. Tribe, supra note 11, at 1057. One commentator has criticized Justice Powell's majority opinion as an attempt "to blur the distinctions between strict and minimal scrutiny precedents by formulating an overarching inquiry applicable to 'all' equal protection cases." Gunther, supra note 11, at 17.
34. See note 23 and accompanying text supra.
argument that the statutory purpose was administrative convenience, the challenged statute could not withstand the Court's stricter scrutiny since its ultimate effect was to relegate women to an inferior status by burdening them with an additional economic disadvantage.

Although the plurality in *Frontiero* examined the discriminatory effect of the statute upon women, they did not address the statute's impact upon men. The opinion can easily be read, however, as making either gender *per se* or female gender alone a suspect classification. Nevertheless, by striking down the discriminatory statute, the Court repudiated the notion of the independent male and dependent female and accorded men with wives in the military the same benefits as women with husbands in the military.

The promise of a strict scrutiny approach in sex discrimination cases, as articulated in *Frontiero*, was compromised in *Kahn v. Shevin*, the first challenge to a gender classification brought by a male. Appellant Kahn, a widower living in Florida, applied for the five-hundred-dollar property tax exemption available to widows under a Florida statute. The state denied his application because the statute did not provide an analogous benefit for widowers. Applying Reed's rational relationship test, the Supreme Court concluded that the challenged statute did not violate the fourteenth amendment since there was a "fair and substantial" relationship between Florida's differing treatment of widows and widowers and the state policy of diminishing the financial impact of spousal loss for the sex suffering the

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36. 411 U.S. at 688-89. The Government conceded that the challenged statute served no purpose other than that of mere "administrative convenience."

37. Id. at 689 n.22. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment but disagreed with the majority's approach. He asserted that the same conclusion could have been reached by following Reed's rational relationship test. Furthermore, he criticized the Court for preempting the states' vote on the Equal Rights Amendment (ERA). Id. at 692 (Powell, J., concurring). Ironically, the refusal of five of the Justices to apply the strict scrutiny test in sex discrimination cases is a major reason why the ERA is necessary. By refusing to find sex a suspect class, the Court has in effect decided to tolerate a considerable amount of sex discrimination. The ERA would provide an alternate method of eradicating sex discrimination since passage of this constitutional amendment would prohibit all discrimination on the basis of sex.


41. FLA. STAT. § 196.202 (Supp. 1974-75).

42. 416 U.S. at 355.
greatest hardship. Since the job market had been inhospitable to women seeking any but the lowest paid jobs, the Court justified the gender distinction as compensatory discrimination designed to recompense women for economic discrimination in the marketplace.

The Kahn decision retarded the progress made by Reed and Frontiero by purporting to help women, when in reality the majority's reliance upon the concept of compensatory discrimination reinforced traditional perceptions of men and women. The ironic result of this judicial regression was to reverse the usual pattern of discrimination by making men equal victims with women. Nevertheless, one year later the Supreme Court applied a compensatory rationale to support a discriminatory statute in Schlesinger v. Ballard.

In Ballard, a male lieutenant in the United States Navy asserted that the
statutory discharge provisions allowing a longer term of service for female naval officers than for their male counterparts deprived him of equal protection guaranteed under the due process clause of the fifth amendment. Unlike Reed and Frontiero, when the majority in Ballard applied the rational relationship test, they found that the different treatment of male and female officers was not based upon "overbroad generalizations" but upon the demonstrable fact that male and female officers were not similarly situated. Congress had specifically provided that "women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships or transports." This restriction precluded women from compiling naval service records comparable to their male counterparts. The governmental interest in compensating women for their more limited promotion opportunities provided the Court with ample justification for the disparate treatment.

Finding nothing in the statutory scheme or legislative history to support the majority's contention that Congress enacted the legislation to remedy the disadvantages to women in the Navy, the dissent concluded that the challenged statute served no compelling government interest. Justice Brennan criticized the Court for "conjuring up a legislative purpose which may have underlain the gender based distinction here attacked." Using

51. The pertinent discharge law provided for a strict "up or out" system for male officers who failed to be promoted, 10 U.S.C. § 6382(a) (1962), but guaranteed female officers 13 years before mandatory discharge for lack of promotion. Id § 6401(a). After nine years of active service as a commissioned officer, appellant failed for a second time to be selected for promotion to lieutenant commander and was therefore subject to mandatory discharge. 419 U.S. at 499.

52. See note 4 and accompanying text supra.

53. 419 U.S. at 507-08. The statutes in both Reed and Frontiero were based on overbroad generalizations. In Reed, the Idaho statute assumed that men would be better estate administrators, while in Frontiero it was assumed that women, not men, were dependents. See notes 29-30, 36-37 supra.

54. 419 U.S. at 508 (quoting 10 U.S.C. § 6015 (1970)).

55. 419 U.S. at 508. But see Johnston, supra note 46, at 240-41.

56. 419 U.S. at 517 (Brennan, J., dissenting).

57. Id. at 511 (emphasis in original). Under the early "minimum rationality" standard used by the Supreme Court, hypothesizing legitimate legislative purposes was permitted. See United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), in which the Court stated:

[The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. In a footnote, Justice Stone recognized that there may be a "narrower scope for the opera-
the strict scrutiny analysis enunciated in *Frontiero*, the dissent found that the legislative classification did not serve compelling interests that could not be otherwise achieved.\(^{58}\)

As in *Reed* and *Kahn*, the Supreme Court in *Ballard* failed to recognize that the sole justification for the challenged statute was a sex-role stereotype.\(^{59}\) However, the *Ballard* Court went even further than *Kahn* in seeking out a sex-neutral justification, relying upon an analysis of the statute's legislative history to find the existence of a questionable statutory purpose. In this respect, the *Ballard* decision created even greater confusion concerning the proper mode of analysis in gender-based cases, particularly with regard to the use of the compensatory discrimination rationale.\(^{60}\)

Unfortunately, during the remainder of the 1974 term, the Supreme Court had no further opportunity to invoke, and hence clarify, the compensatory discrimination rationale in its consideration of gender-based classifications. In *Taylor v. Louisiana*,\(^{61}\) a male plaintiff convicted of aggravated kidnapping by an all-male jury, appealed his case on the grounds that Louisiana's constitutional and statutory requirements\(^{62}\) excluding women from jury service violated his sixth and fourteenth amendment rights.\(^{63}\) Rejecting the argument that jury service would substantially in-
terfere with a woman’s distinctive role in society, the Court reversed Taylor’s conviction solely on the ground that the all-male venire violated his sixth amendment right to an impartial jury.64 By narrowing its holding to the sixth amendment the Court avoided addressing the troublesome equal protection issue raised by the plaintiff.65

Accordingly, the Taylor decision provided little, if any, guidance regarding the proper standard of review in sex discrimination cases. This judicial reluctance to address the equal protection issue indicated the difficulty the Court was experiencing in directly confronting the problems of gender-based discrimination. Despite this judicial reticence, Taylor did serve the dual purpose of altering society’s perception of women by allowing women to sit on juries while at the same time ensuring both men and women that juries would more accurately reflect a cross section of their communities. Yet, during its 1974 term, the Supreme Court perpetuated the analytical confusion bred by Taylor and its progenitor cases by its decision in Weinberger v. Wiesenfeld.66

In Wiesenfeld, a widower challenged denial of survivors’ benefits under the Social Security Act after the death of his wife whose salary had provided the principal source of income for their family.67 Although Social Security taxes had been deducted from his wife’s salary, the statute allocated benefits from her earnings only to her minor children whereas benefits from a deceased husband’s earnings would pass to both his widow and minor children.68 In allowing the widower’s claim for benefits, the Court did not rely upon the compensatory discrimination rationales of Kahn and Ballard. However, the Court determined that the gender-based distinction

64. 419 U.S. at 526, 535-37.
65. See text accompanying notes 20-22 supra. While the majority in Taylor did overcome the presumption raised as a defense in Hoyt that the “woman is still the center of home and family life,” they did not expressly overrule Hoyt, thereby raising questions as to the applicability of the decision outside of the criminal context.
67. 42 U.S.C. § 402(g) (1976). On October 30, 1979 the Supreme Court granted certiorari in Wengler v. Druggists Mutual Co., 583 S.W.2d 162 (Mo. 1979), cert. granted, 48 U.S.L.W. 3283 (Oct. 30, 1979) to consider whether Missouri’s policy of denying widowers the same workmen’s compensation death benefits that it pays to widows, discriminates against men on the basis of sex.
68. 420 U.S. at 637-38. At present, husbands and aged widowers of covered workers may receive benefits if they were dependent upon their wives for more than one-half of their support. 42 U.S.C. § 402(c), (f) (1976).
made by the statute was indistinguishable from that invalidated in *Frontiero*.69 In the Court's first unanimous sex discrimination decision since *Reed*, Justice Brennan found that the statutes in both *Frontiero* and *Wiesenfeld* were based upon the overbroad social generalization that women have a dependent social role. Therefore, the applicable statute in *Wiesenfeld*, like the classification in *Frontiero*, could not withstand scrutiny under the fifth amendment.70

As in *Frontiero*, the female, rather than her dependents, was treated as the principal victim of the discrimination.71 Despite the factual similarity with *Frontiero*, however, the Court refused to apply a strict scrutiny test and instead relied upon *Reed*'s rational relationship test. The majority concluded that the statute provided dissimilar treatment to men and women who were similarly situated,72 and it ultimately discriminated against the surviving children solely on the basis of the sex of the surviving parent.73 *Wiesenfeld* confronted the Court with a situation virtually indistinguishable from *Frontiero*,74 yet the Court refused to engage in a strict scrutiny analysis, perhaps eliminating once and for all the possibility of using this analysis in gender classification cases. Furthermore, the Court did not attach any significance to the compensatory discrimination argument articulated in *Kahn* and *Ballard*, determining that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."75

*Wiesenfeld* undercut traditional attitudes regarding sex roles by accepting the reality of the working woman and by providing her family with the same employment protection accorded to the families of working men.76 Moreover, the decision was a victory for men since it chipped away

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69. 420 U.S. at 642, 653.
70. Id. at 643-53. In some ways the classification in *Wiesenfeld* was more pernicious because, unlike in *Frontiero*, Mr. Wiesenfeld had no opportunity to demonstrate that he was dependent on his wife. Furthermore, Ms. Wiesenfeld paid social security taxes into a fund from which she could not derive the same benefits as men. Id. at 645.
72. 420 U.S. at 653.
73. The legislative purpose of the Act was to provide children deprived of one parent the opportunity to enjoy the personal attention of the other parent. Therefore, there was no rational relationship between the classification and the purpose of the statute. Id. at 651, 653.
74. Both the *Frontiero* and *Wiesenfeld* statutes presumed the dependency of wives on their husbands. Id. at 643. For a discussion of *Frontiero*, see notes 32-39 and accompanying text supra.
75. 420 U.S. at 648.
76. In 1977, women who worked full-time year-round earned an average of about 60
at the singular perception of the male as breadwinner and provided them with the choice of working or remaining at home to care for their children.\(^{77}\) Although the Court did depart from its compensatory discrimination rationale, it nevertheless maintained its recalcitrance by failing to articulate conclusively a standard for equal protection review. Absent a clear standard of review, the gains for men and women by decisions such as *Wiesenfeld* hang in a precarious balance.

The final gender classification case the Court considered during its 1974 term was *Stanton v. Stanton*.\(^{78}\) Before the Court was a Utah statute specifying an older age of majority for males than for females. Since the law required parental support payments only until the children reached the age of majority, the effect of the statute was to deny daughters the same parental financial protection guaranteed to sons.\(^{79}\)

Rather than evading the equal protection issue, the majority expressly applied the *Reed* rational relationship test.\(^{80}\) By analyzing the state's stereotyped justifications that "it is the man's responsibility to provide a home" and that "girls tend to mature physically, emotionally and mentally before boys,"\(^{81}\) the Court determined that there was nothing rational in the distinction drawn by the statute since it imposed "criteria wholly unrelated to the objective of the statute."\(^{82}\) Specific acknowledgments by the Court of the changing role of the woman in society\(^{83}\) and of the need for equal
cents for every dollar earned by their male counterparts. Women's median earnings were $8,600 compared to a median salary of $14,600 for men. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, REP. 547, NO. 3, EMPLOYMENT IN PERSPECTIVE: WORKING WOMEN (October 1978). See generally Comment, *Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles*, 24 HASTINGS L.J. 1191 (1973).

\(^{77}\) See notes 8, 9 and accompanying text supra.

\(^{78}\) 421 U.S. 7 (1975).

\(^{79}\) *Id.* at 15. Mr. and Mrs. Stanton were divorced in 1973. Mr. Stanton agreed to provide support for his son and daughter until they reached the age of majority. The Utah Code provided that the age of majority for men was 21 while for women it was 18. UTAH CODE ANN. § 15-2-1 (1953). As a result, sons would receive greater financial assistance than daughters. 421 U.S. at 8-10.

\(^{80}\) 421 U.S. at 13. See text accompanying notes 28-29 supra.

\(^{81}\) 421 U.S. at 10.

\(^{82}\) *Id.* at 14.

\(^{83}\) The Court stated:

Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. . . . To distinguish between the two on educational grounds is to be self serving: if the female is not to be supported as long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.
opportunities for men and women were important steps toward the Court's recognizing the need for a clear standard of review in sex discrimination cases. *Stanton* marked the end of the Supreme Court's constant equivocation in such cases. The majority held that governmentally imposed gender classifications violate equal protection guarantees when the classification can only be justified with traditional sex-role stereotypes. The Court stated that under any test — compelling state interest, rational basis, or something in between — the Utah statute could not survive constitutional attack because of its irrational distinction between the sexes. This forecasted the emergence of the "something in between" test articulated during the 1976 term in *Craig v. Boren*.85

B. Supreme Court — 1976 Term: The Emergence of a New Standard of Review

*Craig* concerned an Oklahoma statute86 prohibiting the sale of "non-intoxicating" 3.2% beer to males under the age of twenty-one and to females under the age of eighteen. The law was challenged as a denial of equal protection to males between the ages of eighteen and twenty. Instead of applying *Reed*'s rational relationship test, however, the majority embarked upon a heightened scrutiny of the classification derived from previous sex discrimination cases. Justice Brennan stated that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."87 While the Court did not expressly endorse a "middle tier" of scrutiny, the concurring and dissenting opinions determined this to be the obvious implication of the Court's decision.88

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84. 421 U.S. at 17.
85. 429 U.S. 190 (1976). *Craig* was the first successful challenge by a male in a sex discrimination suit. See note 8 and accompanying text *supra.*
87. 429 U.S. at 197 (emphasis added).
88. Justice Powell, in concurrence, stated:
As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification.

Id. at 210 n.* (Powell, J., concurring). In dissent, Justice Rehnquist criticized the Court for enunciating the standard that "classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives," without citation to any source. Id. at 217 (Rehnquist, J., dissenting) (emphasis in original). See Karst, *Foreword to The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 178 (1977).
Statistical surveys were introduced to provide support for the classification, showing that more males than females were arrested for drunk driving. Nevertheless, the majority determined that the relationship between gender and traffic safety was too tenuous to satisfy Reed's requirement that gender-based difference be substantially related to the achievement of the statutory objective. Consequently, the Court struck down the statute as invidiously discriminating against males.

In dissent, Justice Rehnquist criticized the Court for favoring men by invoking a stricter standard of judicial review where the statute resulted in less favorable treatment of men than women. However, Justice Rehnquist's criticisms were premature. It remained to be seen whether this heightened level of scrutiny would be applied exclusively to sex discrimination cases initiated by males challenging gender-based classifications. Although Justice Rehnquist viewed the decision as providing a benefit to men, in reality the decision benefitted both men and women by advocating equal treatment without regard to sex.

The test developed in Craig was reaffirmed in Califano v. Goldfarb when the Court struck down a provision of the Social Security Act providing survivors' benefits to widows but not to widowers unless they had received at least one-half of their support from their deceased wives. Writ-

89. 429 U.S. at 200.
90. Id. at 204.
91. Id. at 217 (Rehnquist, J., dissenting).
92. There has been some discussion by commentators whether the same test should be applied by the Court in scrutinizing classifications based upon sex regardless of which sex is discriminated against. See notes 38, 46 and accompanying text supra. The middle-tier analysis developed in Craig has been regularly applied by the Court to male challenges to discriminatory state statutes. See Caban v. Mohammed, 99 S. Ct. 1760 (1979); Orr v. Orr, 99 S. Ct. 1102 (1979); Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977). See also notes 93-145 and accompanying text infra. However, during its 1978 term, the Court applied the middle-tier Craig test where the challenge was brought by a woman in Personnel Adm'v. v. Feeney, 99 S. Ct. 2282 (1979). Here, the Court held that a Massachusetts veterans' preference law did not discriminate against women in violation of the fourteenth amendment's equal protection clause but instead made a distinction between veterans and nonveterans, the latter category including men and women alike. This application of the Craig test to a female challenge is an indication that this heightened level of scrutiny is not reserved exclusively for male challenges to gender-based statutes but is a uniform test to be applied to discrimination against either sex. See also notes 146-52 and accompanying text infra. The Feeney Court's distinction between veterans and nonveterans is reminiscent of a similar distinction made by the Court in Geduldig v. Aiello, 417 U.S. 484, 496-97 n.10 (1974), where it found that an employment disability insurance plan not providing funds for pregnancy did not discriminate against women because the distinction made by the plan was between pregnant women and nonpregnant persons, the latter category including both men and women.
ing for a plurality of four, Justice Brennan found the gender-based classification indistinguishable from *Wiesenfeld* and *Frontiero*. By providing the working female with less protection for her family than that of the male wage earner even if their family needs are identical, the statute discriminated against the female wage earner in violation of the due process clause of the fifth amendment.\(^9\) In reaching this conclusion, the Court rejected arguments for administrative convenience and compensatory discrimination as justification for the discrimination.\(^9\) To determine the "actual purposes" of the discrimination, the majority examined the legislative history of the statute and concluded that Congress did not create the disparity between nondependent widows and widowers with a compensatory purpose.\(^9\) Rather, it had intended to grant benefits on the basis of dependency and not need.\(^9\) Therefore, the argument for compensatory discrimination had no logical foundation, and the analytical problems created by *Kahn* and *Ballard* were easily avoided by the Court.\(^9\)

The *Goldfarb* plurality found that the statute, by presuming the dependency of wives, reflected "archaic and overbroad" generalizations\(^9\) and therefore provided insufficient justification for gender-based discrimination in the distribution of employment-related benefits.\(^9\) In both *Goldfarb* and *Wiesenfeld*, the Court refused to focus its equal protection analysis upon the surviving widower, regarding the covered female wage earner as the primary victim of the discrimination since she was in effect penalized for working.\(^9\) Nevertheless, by providing widowers with the same benefits surviving widows received, regardless of their status, the Court gave positive support for the equal treatment of men and women in the labor market.\(^9\)

After *Goldfarb*, it appeared that the Court was developing a new stan-

\(^\text{95.}^\) See note 4 *supra*.
\(^\text{96.}^\) 430 U.S. at 212-17.
\(^\text{97.}^\) *Id.* at 216.
\(^\text{98.}^\) *Id.* at 213.
\(^\text{100.}^\) But see Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (the different treatment of male and female naval officers under 10 U.S.C. §§ 6382, 6401 (1970) reflected not "archaic and overbroad generalizations, but instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service").
\(^\text{101.}^\) 430 U.S. at 217.
\(^\text{102.}^\) *Id.* at 207-09. But see *id.* at 218 (Stevens, J., concurring) ("relevant discrimination in this case is against surviving male spouses, rather than against deceased female wage earners"). See note 71 and accompanying text *supra*.
\(^\text{103.}^\) One commentator regards *Wiesenfeld* as the first step and *Goldfarb* as the second step in a litigation campaign to advance the *Frontiero* judgment and contain the *Kahn* decision. See Ginsburg, *supra* note 46, at 819.
standard of analysis, moving further away from compensatory discrimination and traditional sex-role assumptions and closer to a heightened standard of review. But rather than continuing development along this vein, the Court seemingly retreated from its progression in *Califano v. Webster*.

In this case, the Court upheld a formula for social security retirement benefits, effective from 1956 to 1972, providing more favorable benefit payments to retired women than to retired men with the same past earnings. What appeared to be a retreat to *Kahn* and *Ballard*, however, was in essence the judicial response to the question of affirmative action in the context of gender. Applying the *Craig* test and *Goldfarb* analysis in a *per curiam* opinion, the Court determined that the challenged statutory scheme was more analogous to those upheld in *Kahn* and *Ballard* than those struck down in *Wiesenfeld* and *Goldfarb*. In contrast to *Goldfarb* and *Wiesenfeld*, the challenged statutory provision was not based on a "romantically paternalistic" view of women but served as a specific response to the discrimination and attempted to remedy it. Therefore, the Court concluded that when legislation directly addresses discrimination and tries to remedy it, disparate treatment of the sexes for a determined amount of time is constitutional.

With this decision, the Court created a rather fine distinction between compensatory discrimination adopted by the legislature for remedial reasons and compensatory discrimination based upon traditional stereotypes, tolerating the former but not the latter. Despite this fine distinction, the use of the compensatory rationale in any form ultimately reinforces traditional male-female role models by creating

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104. 430 U.S. 313 (1977) (per curiam).
106. See Ginsburg, supra note 46, at 822. See also note 46 and accompanying text supra.
107. See Karst, supra note 88, at 178-80.
110. 430 U.S. at 318-20. In 1972, Congress phased out this differential by extending to men the three low earning years' exclusion once reserved for women. This action was taken soon after the Equal Pay Act and Title VII were enacted. Ginsburg, *Women, Equality & the Bakke Case*, 4 CIV. LIB. REV. 8, 13 (1977).
112. See notes 45, 48 and accompanying text supra.
the impression that women cannot get ahead without paternalistic legislation, and by reinforcing systems in which men do not receive the same benefits as their female counterparts.

The continued viability of the distinction created by the Court between the two different types of compensatory discrimination is presently uncertain. It is clear, however, that the use of a middle-level analysis is only marginally effective as long as the Court may resort to compensatory discrimination as a justification for gender classifications. By using different standards of review, depending upon whether the discrimination is for or against women or men, the Court misses the point that all discrimination, whether compensatory or not, has a deleterious effect upon men and women. Unless the Court further defines the factors used in the middle-tier analysis and describes how these factors are to be weighed, "the intermediate level of scrutiny will remain a mask for an unexplained process of adjudication."

C. The Supreme Court — 1978 Term: Altering Perceptions of the Male’s Role in Society

During the 1978 term, the Supreme Court continued to use the middle-tier approach as it scrutinized gender-based statutes regarding alimony, the rights of the putative father, and parental eligibility for AFDC benefits and as a result made significant inroads for men and women in the area of family law. In *Orr v. Orr*, a divorced man challenged the constitutionality of Alabama’s alimony statutes authorizing the courts to require husbands but not wives to pay alimony. Using the middle-tier...

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113. See Johnston, supra note 48, at 670.
114. At the close of the 1976 term the “middle-level” analysis had only been applied to male challenges to gender classifications, see Califano v. Webster, 430 U.S. 313 (1977) (per curiam); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976), whereas prior female challenges had been scrutinized under *Reed’s* rational basis test. See *Stanton v. Stanton*, 421 U.S. 7 (1975); *Reed v. Reed*, 404 U.S. 71 (1971).
115. See Erickson, supra note 45, at 53.
116. See *Erickson*, supra note 88, at 53.
119. Califano v. Westcott, 99 S. Ct. 2655 (1979). The Aid to Families with Dependent Children Program (AFDC) provides financial assistance to families with needy dependent children. Participating states administer the program in conformity with federal standards, financed by the federal government and the states on a matching-funds basis. See note 147 infra.
120. 99 S. Ct. 1102 (1979).
122. 99 S. Ct. at 1107. The Orrs were divorced in February, 1974, and Mr. Orr was directed to pay $1240 per month in alimony. In July, 1976, Mrs. Orr initiated a contempt...
analysis articulated in Craig, the Court held that the Alabama statutory scheme violated the equal protection clause of the fourteenth amendment.

Justice Brennan, writing for the majority, examined three possible governmental objectives which could arguably be served by Alabama’s statutory scheme. Rejecting the valid state interest and administrative convenience arguments, the Court found that the statute failed to serve an important governmental objective. Also, the Court noted that the gender classification drawn by the statute produced perverse results by giving an advantage only to the financially secure wife whose husband is in need. The compensatory discrimination rationale also failed to provide support for the gender classification since women had not been significantly discriminated against, with respect to opportunities, in the sphere to which the statute applied the sex-based classification. Not only did the Court reject the application of a compensatory discrimination rationale to the facts of this particular case, but it specifically recognized that gender-based legislative classifications “carry the inherent risk of reinforcing stereotypes about the proper place of women and their need for special protection.” Given this negative effect, the Court recommended the careful tailoring of statutes purportedly designed to compensate for and ameliorate the effects of past discrimination.

proceeding against Mr. Orr, alleging that his alimony payments were in arrears. At the hearing on Mrs. Orr’s petition, Mr. Orr submitted a defense motion questioning the constitutionality of the statute.

123. See text accompanying notes 86-88 supra.

124. The Court expressly recognized that classifications discriminating against men are also subject to scrutiny. 99 S. Ct. at 1111.

125. The Court found that Alabama’s desire to reinforce a family role model which characterizes the wife as a dependent family member was not a valid state interest. Id. at 1111.

126. The Court determined that there was no reason to use sex as a proxy for need since needy males as well as needy females could be helped along with “little if any additional burden on the State.” Id. at 1112-13.

127. Id. at 1113. See also Califano v. Goldfarb, 430 U.S. 199, 221 (1977) (Stevens, J., concurring) (where survivors’ benefits were paid to the wife regardless of her dependency, but paid to the husband only if he received one half of his support from his wife, such disparate treatment only benefitted those wives who were not dependent on their husbands).


129. 99 S. Ct. at 1113.

130. The Court noted that where “the state’s compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender-classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.” Id.
By advocating the allocation of alimony obligations on the basis of need, the decision provided men with the opportunity to receive alimony. This signified a substantial departure from traditional sex roles by freeing women from stereotypical dependence and providing dependent men with the same benefits accorded women upon the termination of the marital relationship. Moreover, the Court's qualified denouncement of the compensatory rationale reinforces its conclusion in *Webster* that only statutes specifically designed to compensate women for past discrimination are constitutionally permissible.

One month later, the Court decided *Caban v. Mohammed*, holding unconstitutional a New York statute requiring the consent of the unmarried mother but not the unmarried father in an adoption proceeding. Caban and Mohammed lived together for four years and, though never legally married, had two children. Caban identified himself as the father on each child's birth certificate, lived with the children, and provided support for them. One year after Caban and Mohammed separated, Mohammed married another man; however, Caban continued to see and communicate with his children. When Mohammed and her husband sought to legally adopt the children, Caban cross-petitioned for the adoption of his children. The Court granted Mohammed's petition for adoption, despite Caban's withholding of consent, thereby cutting off all of Caban's parental rights and obligations.

The majority found the distinction between the rights of unmarried mothers and the rights of unmarried fathers not substantially related to an important state interest. Mohammed's refusal to consent to Caban's adoption of his children took away all of Caban's parental rights to his children whereas the natural father's consent to adoption by Mohammed was not a legal necessity.

In *Caban*, the Court once again applied the *Craig* test to a male challenge. Justice Powell, writing for the majority, examined whether a sub-

131. In more than half (24.8 million) of all two-parent families, wives had earnings in 1977, and their average median contribution to family income was $5100. This rose to $8600, or 38% of family income, when wives were employed full-time all year. *See U.S. Bureau of Labor Statistics, Dep't of Labor, Rep. 551, No. 4, Employment in Perspective: Working Women* (January 1978). In 1976, 74.6% of the divorced women were in the labor force. *See U.S. Bureau of Labor Statistics, Dep't of Labor, U.S. Working Women: A Databook* 27 (1977).

132. *See* text accompanying notes 110-11 *supra*.


134. 99 S. Ct. at 1763-64.

135. Caban also contended that the Court's holding in *Quilloin v. Walcott*, 434 U.S. 246 (1978), recognized the due process right of natural fathers to maintain a parental relationship with their children, absent a finding that they are unfit as parents. 99 S. Ct. at 1764.

136. *See* notes 85-90 and accompanying text *supra*.
substantial relationship existed between the purported state interest of promoting the adoption of illegitimate children and the sexual classification of the New York statute. 137 Not only did the Court require a showing of a substantial relationship, but the distinction made had to be structured in such a way as to reasonably further those ends. 138 The Court distinguished between cases in which the father had never come forward to participate in the rearing of his child 139 and cases in which the father had established a substantial relationship with the children and admitted his paternity, 140 finding that in the latter case, the unwed father’s consent was warranted. 141

In concluding that the New York statute was an example of “overbroad generalizations” in gender-based classifications, the majority did not even address the two principal justifications of compensatory discrimination and administrative convenience relied upon in previous cases 142 to sustain statutes. In dissent, Justice Stewart found that when unwed mothers and unwed fathers are not similarly situated, the equal protection clause is not violated. 143 In this case, however, the unwed father had established a paternal relationship with his children and was similarly situated to the unwed mother. Despite this fact, Justice Stewart, applying the “best-interests-of-the-child” standard to the case, concluded that the legislative

137. 99 S. Ct. at 1767.
138. Id. In 1977, the New York Court of Appeals considered In re Adoption of Malpica-Orsini, 36 N.Y.2d 568, 331 N.E. 2d 486 (1975), app. dismissed for want of a substantial federal question sub nom. Orsini v. Blasi, 423 U.S. 1042 (1976), in which the court reasoned that people wishing to adopt a child born out of wedlock would be discouraged if the natural father could prevent the adoption by withholding his consent since in many instances the unavailability of the father could cause interminable delays. See generally Note, Constitutional Law — Fourteenth Amendment Equal Protection — Rights of the Unwed Father — Consent to Adoption, 61 CORNELL L. REV. 312 (1976); Recent Development, 4 HOFSTRA L. REV. 473 (1976).
139. See note 141 infra.
140. 99 S. Ct. at 1768-69.
141. See Tabler, Parental Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father, 11 J. FAM. L. 231 (1971). See also Comment, The Emerging Constitutional Protection of the Putative Father’s Parental Rights, 70 MICH. L. REV. 1581, 1590 (1972). But see Parham v. Hughes, 99 S. Ct. 1742 (1979). In Parham a father challenged a Georgia statute which precluded him from bringing a wrongful death action for the death of his child if he had not legitimated the child. The Court held that the statutory classification was a rational means for dealing with the problem of proving paternity and did not reflect any overbroad generalizations about men as a class. See also Quillino v. Walcott, 434 U.S. 246 (1978) (Georgia code provision that only the mother’s consent is required for the adoption of an illegitimate child if the natural father has not legitimated the child does not deny the father equal protection).
142. See notes 125-30 and accompanying text supra.
143. 99 S. Ct. at 1771.
goal of the statute — to facilitate adoptions that are in the best interests of the illegitimate children — is fairly served by the gender-based classification since requiring the consent of both parents might result in illegitimate children remaining illegitimate.

As in Orr, the Caban decision invalidated a state statute based on a gender classification discriminating against men. Here, as in previous male challenges, the Court continued to develop a middle-tier analysis requiring a heightened level of scrutiny. In Califano v. Westcott, however, the Court applied this heightened level of scrutiny in considering a female challenge to section 407 of the Social Security Act.

In Westcott, the challenged statutory scheme provided benefits to families whose dependent children had been deprived of parental support because of the unemployment of the father but did not provide comparable benefits when the mother became unemployed. Applying the Craig test, the Court found that the legislative distinction was based solely on the sex of the parent and therefore discriminated against families in which the female spouse was the wage earner. As in Wiesenfeld, the deprivation imposed by the statute had a more pernicious effect since it was not merely a procedural barrier like the proof-of-dependency requirement in

144. Id. at 1773. The best interest of the child theory was articulated by Justice Cardozo in Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925):

The chancellor in exercising his jurisdiction . . . does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against anyone. He acts as parens patriae to do what is best for the interest of the child . . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child" or as between one parent and another . . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.


145. During the 1978 term, the Supreme Court also considered Duren v. Missouri, 99 S. Ct. 664 (1979), a male challenge to a Missouri state statute. Relying upon their decision in Taylor v. Louisiana, 419 U.S. 522 (1975), the Court held that a Missouri law allowing women to be exempted from jury service upon their request, resulting in an average of less than 15% of women on jury venires in the forum county, violated the "fair cross-section" requirement of the sixth amendment. The Duren Court, like the Taylor Court, did not address the equal protection issue.

146. 99 S. Ct. 2655 (1979). See also note 92 and accompanying text supra.


148. 99 S. Ct. at 2657-58. Appellees were two couples who satisfied all the requirements for AFDC-UF benefits except for the requirement that the unemployed parent be the father. In both cases, the woman had been the family breadwinner before losing her job and would have qualified the family for benefits had she been male. Id. at 2658-59.

After examining the legislative history of the statute, the Court concluded that the statutory classification was not substantially related to the statutory goal of reducing the father's incentive to desert. Rather, the distinction was based upon sexual stereotypes presuming the father as breadwinner and the mother as homemaker. The use of the middle-tier test in Westcott perhaps signals the consistent application of the test to all sex discrimination cases.

Both Caban and Orr provided men with increased rights in the area of family law and altered some of the traditional assumptions attached to male and female family responsibilities. Similarly, Westcott recognized that women have a function apart from raising a family, for in many cases they bear the primary responsibility for the support of their families. The effect of judicial recognition that men may be more financially in need than women or that men have a right to withhold their consent in the adoption of their illegitimate children has helped to redefine the male function within the family unit while also providing more flexibility for perceptions of the woman's role.

At the close of the 1978 term, the Court had adopted the middle-tier analysis for all gender-discrimination cases. The strict scrutiny analysis used by the Court in Frontiero appears to have been a mere aberration in the Court's consideration of gender classifications. This judicial reluctance to regard sex as a suspect class along the lines of race and national origin has produced a line of cases often difficult to reconcile. While the middle tier offers some standard of analysis, specific factors used by the Court in its determination are unclear. On the other hand, Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment

150. 99 S. Ct. at 2661. See also note 70 and accompanying text supra.
151. Id. at 2663.
152. See note 131 and accompanying text supra.
153. See notes 23, 32-39 and accompanying text supra.
155. See text accompanying note 116 supra.
156. Title VII is the "equal employment opportunity" section of the Civil Rights Act of 1964 and provides in relevant part:
   (a) It shall be an unlawful employment practice for an employer —
      (1) to fail or refuse to hire or to discharge any individual . . . with respect to
on the basis of sex, provides victims of discrimination with a more certain alternative avenue for relief.

II. TITLE VII — AN ALTERNATIVE METHOD FOR ACHIEVING SEXUAL EQUALITY

With the enactment of Title VII of the Civil Rights Act of 1964, individuals dissatisfied with the Court's "minimum rationality" approach to gender cases, were provided with an additional right of action in employment cases. Title VII, in conjunction with the Equal Pay Act of 1963, statutorily supplemented the protection afforded by the fifth and fourteenth amendments by mandating equal treatment in every phase of the employment relationship. Since Title VII's prohibition of discrimination in employment reaches both state and private action, as opposed to the fifth and fourteenth amendments, which reach only governmental action, the Act may be enforced either by the federal government or by an individual suing on his or her own behalf.

The Act does not specifically prohibit discrimination against women but instead extends its protection to all persons. It provides women with an effective means of attacking "protective" labor legislation and also offers men a means of challenging gender-based discrimination in the areas

his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


157. See note 160 and accompanying text infra.


159. Title IX of the Education Amendments to the Civil Rights Act of 1964 similarly prohibits sex discrimination in any educational program or activity receiving federal financial assistance. 20 U.S.C. §§ 1681-1686 (1976). Recently, the United States District Court for Rhode Island held that Title IX prohibits the exclusion of a male from an all-female high school volleyball team where there is no male volleyball team. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I. 1979). See also Cox, Intercollegiate Athletics and Title IX, 46 GEO. WASH. L. REV. 34 (1977); Comment, The Regulation of Title IX: Sex Discrimination in Student Affairs, 13 HOUS. L. REV. 734 (1976); Note, Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX, 88 YALE L.J. 1254 (1979).

160. For a comprehensive examination of the procedures for filing a Title VII lawsuit, see Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1195 (1971).

161. The limited House debate on the sex amendment to Title VII concentrated upon its effect on protective state employment legislation. See 110 CONG. REC. 2579-80 (1964).
of employment and retirement benefits.\textsuperscript{162} Unlike the equal protection standards of review, Title VII requires only that the plaintiff prove that the challenged employment practice has a disproportionate effect upon a protected class.\textsuperscript{163} Once this discriminatory effect is proven, the employer must either revise the employment practice to conform with the mandate of Title VII or successfully raise the bona fide occupational qualification defense.\textsuperscript{164}

A bona fide occupational qualification\textsuperscript{165} is a characteristic "reasonably

\begin{itemize}
\item \textsuperscript{162} See Preferential Economic Treatment, supra note 46, at 843.
\item \textsuperscript{163} In Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), the Supreme Court held that a discriminatory purpose is not a necessary precondition to liability under Title VII. Once the plaintiff has established that the challenged employment practice has an “effect” upon members of a protected class, it is up to the employer to prove that the requirement has a manifest relationship to the employment in question. Known as the “effects test,” this standard was incorporated into the 1972 amendments to Title VII by the Conference Report of the Equal Opportunity Act of 1972. See Comment, Sex Discrimination — Distinctions Between Title VII and Equal Protection — General Electric Co. v. Gilbert, 31 Rutgers L. Rev. 91, 96-97 (1978). The Court has specifically recognized that the constitutional standard for adjudicating claims of invidious racial discrimination is not the same as the standard applicable under Title VII. Under Title VII, the complainant need only show that the employment practice in question has a disproportionate impact upon a particular class of persons whereas a constitutional challenge requires a showing of discriminatory purpose. Washington v. Davis, 426 U.S. 229 (1976). Since neutral laws do not violate the equal protection clause solely because they result in a racially disproportionate impact, Title VII, by placing a lighter burden of proof upon the complainant, offers the more attractive alternative for relief.
\item \textsuperscript{164} See note 197 infra. An employer has the choice of either providing men with the same benefits as women or taking those benefits away from women to ensure that both sexes receive the same employment benefits. But see Comment, Employment Rights of Women in the Toxic Workplace, 65 Calif. L. Rev. 1113 (1977) (outright exclusion of women based on the assumption that exposure to toxic substances in the workplace threatens the reproductive health of women more than men cannot be supported under either statutory or judicial exceptions to Title VII).
\item \textsuperscript{165} 42 U.S.C. § 2000e-2(e) (1976) provides in relevant part:

\begin{quote}
[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .
\end{quote}

The Equal Employment Opportunity Commission (EEOC), responsible for the administration of Title VII, has construed the bona fide occupational qualification exception quite narrowly. See 29 C.F.R. § 1604.2(a)(1)(ii) (1978) (the principle of nondiscrimination requires that individuals be considered on the basis of individual capabilities and not on the basis of any characteristics generally attributed to the group). Furthermore, in Dothard v. Rawlinson, 433 U.S. 321 (1977) the Supreme Court in its first ruling on the bona fide occupational qualification defense, approved a portion of the EEOC guidelines stating “that the bfoq [bona fide occupational qualification] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.” 433 U.S. at 334.
\end{itemize}
necessary to the normal operation of [the] particular business or enterprise.\textsuperscript{166} When no member of one sex can qualify for a job because the person lacks unique sex characteristics, the bona fide occupational qualification may be used to discriminate on the basis of sex.\textsuperscript{167} However, this provision may only be employed when an individual determination of capacity would not serve any purpose. For example, the position of wet nurse or a theatrical part calling for a male or female actress would not violate Title VII despite its preclusion of members of the opposite sex since only members of one sex can perform the job.\textsuperscript{168} In determining whether a valid bona fide occupational defense has been raised, courts use the “business necessity” test providing that “discrimination on the basis of sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.”\textsuperscript{169} By employing the bona fide occupational qualification as a defense, an employer admits sex discrimination but attempts to justify it.\textsuperscript{170} Traditionally, the courts have been reluctant to hold the bona fide occupational qualification as a


\textsuperscript{167} See Sirotta, \textit{Sex Discrimination: Title VII and the Bona Fide Occupational Qualification}, 55 Tex. L. Rev. 1025, 1026 (1977). Since race is omitted from the coverage of the bona fide occupational qualification, employers may never raise the defense when charged with racial discrimination but may rely upon it where discrimination is on the basis of religion, national origin, or sex. See also Note, \textit{Equal Rights for Women: The Role of Affirmative Action}, 9 Sw. U.L. Rev. 177, 197 (1977).

\textsuperscript{168} The EEOC allows hiring of only male or female actresses despite the fact that one applicant may have the “physical appearance” of a member of the opposite sex. 29 C.F.R. § 1604.2(a)(2) (1978).


\textsuperscript{170} Once a sexually discriminatory practice is proven, the defendant has the burden of proving his defense. This defense will only be sustained by the court if it can withstand judicial scrutiny under one of three possible tests advanced in different circuit courts:

1. “all or substantially all” test: an employer has the burden of proving that he had reasonable cause to believe, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved. Weeks v. Southern Bell Tel. and Tel Co., 408 F.2d 228 (5th Cir. 1969). See also Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971);

2. “essence test” or “business necessity test”: discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971);

3. “sexual characteristics test”: where sexual characteristics, rather than mere attributes culturally common to one sex, constitute the basis of the occupational qualification, there is no need to find a total business disruption. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971).

valid defense; accordingly, Title VII has become a powerful means to battle sex discrimination in employment.\textsuperscript{171}

The passage of Title VII generated much litigation by women as they sought equal treatment in, and access to, employment opportunities.\textsuperscript{172} Women challenged male-oriented labor practices which reinforced the traditional notions of women as the weaker sex;\textsuperscript{173} however, men also brought suits under the Act.\textsuperscript{174}

\textbf{A. Men Seek Access to Traditionally Female-Dominated Areas}

Title VII provided men with the opportunity to gain access to areas of employment traditionally closed to them.\textsuperscript{175} In \textit{Diaz v. Pan American World Airways},\textsuperscript{176} for example, a male plaintiff brought a class action under Title VII challenging employment practices precluding him from obtaining a job as a flight cabin attendant. Since the defendant admitted that the plaintiff had been discriminated against on the basis of sex,\textsuperscript{177} the Fifth Circuit examined whether a sexual characteristic constituted a bona fide occupational qualification for the job of flight attendant.\textsuperscript{178} Pan Am contended that its policy of hiring exclusively females constituted a business necessity because women could perform the nonmechanical functions of the job in a more effective manner than men.\textsuperscript{179} The court disagreed with Pan Am, concluding that its business operation would not be undermined by hiring members of both sexes, and holding that the airline was therefore in violation of the Act.\textsuperscript{180}

Similarly, in \textit{Hailes v. United Airlines},\textsuperscript{181} a male filed a Title VII lawsuit alleging sex discrimination on the part of United Airlines. United placed a newspaper advertisement for stewardesses under the "Help-Wanted-Females" column without a corresponding ad in the "Help-Wanted-Males" column.\textsuperscript{182} Finding this job listing indicated a preference for females, the

\textsuperscript{171} See Sirota, \textit{supra} note 167, at 1042.
\textsuperscript{172} See Kendrigan, \textit{Equal Rights for Men}, 12 \textit{Trial} 52 (1976).
\textsuperscript{173} See note 192 and accompanying text infra.
\textsuperscript{174} See Kendrigan, \textit{supra} note 172, at 52.
\textsuperscript{175} See generally Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir.), \textit{cert. denied}, 404 U.S. 991 (1971).
\textsuperscript{176} 442 F.2d 385 (5th Cir.), \textit{cert. denied}, 404 U.S. 950 (1971).
\textsuperscript{177} \textit{Id.} at 386.
\textsuperscript{178} \textit{Id.} at 387. See notes 165-71 and accompanying text \textit{supra}.
\textsuperscript{179} 442 F.2d at 388.
\textsuperscript{180} \textit{Id.} \textit{See} Diaz v. Pan Am. World Airways, Inc., 346 F. Supp. 1301 (S.D. Fla. 1972) (on remand the court allowed the plaintiff back pay damages).
\textsuperscript{181} 464 F.2d 1006 (5th Cir. 1972).
\textsuperscript{182} It is well-settled in the Fifth Circuit that female gender is not a bona fide occupational qualification for the position of airline cabin attendant. \textit{Id.} at 1008 n.2. See notes
Fifth Circuit remanded the case to the district court to determine if Hailes was reasonably inhibited from seeking employment with United.183

Like the job of flight attendant, the nursing profession has been opened to men through Title VII litigation. In *Wilson v. Sibley Memorial Hospital*,184 a male registered nurse brought a civil rights action against the hospital. On two separate occasions, Sibley had refused to permit the plaintiff to attend to female patients before any patients had an opportunity to accept or reject his services.185 The United States District Court for the District of Columbia held that these actions were a deliberate circumvention of the safeguards against discrimination established by Title VII and granted summary judgment for the plaintiff.186

A contrary result, however, was reached in *Fesel v. Masonic Home of Delaware, Inc.*187 in which a male nurse had been denied employment at a nursing home on the basis of the residents’ preference for women. The court, in its analysis of the bona fide occupational qualification defense, focused upon case law dealing with those situations in which an employer refuses to hire members of one sex due to the privacy interests of his clients or customers, rather than an employee’s ability to perform a particular

176-80 and accompanying text supra; accord, EEOC v. Delta Air Lines, Inc., 441 F. Supp. 626 (S.D. Tex. 1977) (policy compelling unpaid maternity leave for pregnant flight attendants constitutes a bona fide occupational qualification; weight restrictions are not based on immutable characteristics and therefore cannot be challenged under the BFOQ defense). See also Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1977) and Jarrell v. Eastern Airlines, Inc., 430 F. Supp. 884 (E.D. Va. 1977), aff'd, 577 F.2d 869 (4th Cir. 1978). 183. 464 F.2d at 1009. See 29 C.F.R. § 1604.5 (1978). In its sex discrimination guidelines, the EEOC has taken the position that it is a violation of Title VII for a help wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless it is a bona fide occupational qualification for the particular job involved. The EEOC further states that placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed “male” or “female,” would be considered an expression of preference or limitation, specification or discrimination based upon sex.


185. The Professional Nurses Registry assigned nurses to job opportunities as they were phoned in by the hospital or individuals, and assignments were made nondiscriminatorily. If the assigned nurse was rejected by the patient, the nurse would nevertheless be remunerated for the services that were to be rendered that day. Sibley’s rejection of the male nurse deprived him of the opportunity to be remunerated for his services. 340 F. Supp. at 688.

186. On appeal, the United States Court of Appeals for the District of Columbia agreed that the facts alleged in the complaint required a ruling that an action was maintainable under Title VII. Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973). It did not agree, however, that the record justified the district court’s *sua sponte* grant of a summary judgment since the liability of the hospital under the Act would depend upon the resolution, at trial, of material issues of fact. *Id.* at 1339. Accordingly, the court reversed and remanded the case for further proceedings.

job. When such a defense is raised, the court determined that the employer's burden is twofold. The employer first must prove that he had a factual basis for believing that not hiring members of one sex exclusively would directly undermine the essence of his business. Secondly, he must show that it would not be possible to assign job responsibilities selectively so as to minimize clashes between the privacy interests of customers and the principles of Title VII. Upon consideration of the employer's evidence, the court held that the home had met its burden of establishing a bona fide occupational qualification defense based upon the privacy interests of its guests.

As illustrated by the airline and nursing cases, Title VII protects both men and women from employment discrimination. But, while access to employment in traditionally female-dominated professions has helped to dispel some stereotyped assumptions concerning the "proper" professions for men and women, mere access has not ensured equality for men or women, since many employers have insisted upon providing different benefits to their employees on the basis of sex.

B. Employment Benefits

Many employers have attempted to compensate women for both their "inferior physical abilities" and a history of employment discrimination by instituting retirement plans according different treatment to employees on the basis of sex. In Rosen v. Public Service Electric and Gas Co., male employees attacked a retirement plan permitting female employees to retire on full pension at the age of sixty, but requiring men to wait until the

188. Id. at 1350.
189. Id. at 1351.
190. Id. at 1351-54.
191. The Ninth Circuit has held that transsexuals as a class are not within the scope of Title VII. Giving the statute its plain meaning, Congress had only intended to include the traditional notions of sex. Holloway v. Arthur Anderson and Co., 566 F.2d 659, 662-63 (9th Cir. 1977). See Friedman, Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation, 64 IOWA L. REV. 527 (1979) (examination of the constitutional and statutory questions raised by public and private employment policies that discriminate on the basis of sexual preference).
192. Women have partially overcome this traditional notion by challenging employment practices that precluded them from jobs on the basis of their physical constitution. See, e.g., Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) (violation of Title VII to assume that women as a group cannot work as long hours as men); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (Title VII prohibits the application of the assumption that women as a class are weaker than men).
193. See notes 194-201 and accompanying text infra.
194. 477 F.2d 90 (3d Cir. 1973), aff'd without opinion, 527 F.2d 645 (3d Cir. 1976).
age of sixty-five or to retire at sixty at reduced pensions.\textsuperscript{195} The Third Circuit found the sexually discriminatory retirement benefits to be violative of Title VII.\textsuperscript{196} Therefore, the men who had retired on reduced pensions were entitled to receive an increase in their benefits to bring their pensions to the same level as those of similarly situated women.\textsuperscript{197}

The Fourth Circuit reached a similar result in \textit{Chastang v. Flynn and Emrich Co.},\textsuperscript{198} when retired male employees brought suit for damages on the basis of a sexually discriminating retirement plan providing males who retire early with a smaller share of the retirement fund than similarly situated female employees.\textsuperscript{199} The defendant company offered a compensatory discrimination justification for the disparate treatment, arguing that women, because of a lack of physical strength, had been unable to qualify for the higher paying company jobs involving manual labor. However, the Fourth Circuit rejected this argument since the compensatory plan did not extend benefits to female foundry workers who were the lowest paid of the female employees. Consequently, the court held that there was no business necessity to justify the disparate treatment. In contrast to some of the equal protection cases decided by the Supreme Court,\textsuperscript{200} the retirement cases demonstrate that the compensatory discrimination rationale has no applicability to a Title VII analysis. Since the prohibition against discrimination on the basis of sex is absolute under Title VII,\textsuperscript{201} compensatory

\textsuperscript{195} The company initiated the original employment plan in 1911. Although the plan was revised in May, 1977, it remained discriminatory to the extent that it favored women hired prior to May 1, 1967. \textit{477 F.2d} at 92-93.

\textsuperscript{196} \textit{Id.} at 93. Under Title VII, retirement benefits are within the "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a) (1976). \textit{See also} City of \textit{Los Angeles v. Manhart}, 435 U.S. 702 (1978) (Title VII prohibits unequal contributions by men and women to employment pension funds); \textit{see generally} Bernstein & Williams, \textit{Title VII and the Problem of Sex Classifications in Pension Programs}, 74 COLUM. L. REV. 1203 (1974). \textit{See note 202 infra.}

\textsuperscript{197} \textit{477 F.2d} at 96. The court stated that the company was not precluded from raising men's benefits to the level of women's benefits in order to achieve equality. Such adjustments have been recognized as a proper means to achieve that end. \textit{See Hays v. Potlatch Forests, Inc.}, 465 F.2d 1081 (8th Cir. 1972).

\textsuperscript{198} \textit{541 F.2d} 1040 (4th Cir. 1976).

\textsuperscript{199} \textit{Id.} at 1041.

\textsuperscript{200} \textit{See} notes 40-49, 50-60, 104-16 and accompanying text \textit{supra}. Paternalistic state statutes are similar to some of the retirement benefit provisions since they discriminate against men by providing special treatment for women. In \textit{Burns v. Rohr Corp.}, 346 F. Supp. 994 (S.D. Cal. 1972), a California law providing 10-minute rest breaks exclusively for female employees was preempted by Title VII under the supremacy clause. The court found that such protective legislation, as well as discriminating against men, made women less desirable for hiring due to the special accommodations the employer must provide for them. Therefore, such statutes had a discriminatory effect on women as well. \textit{Id.} at 997.

\textsuperscript{201} \textit{See} Kendrigan, \textit{Reverse Sex Discrimination — The Horns of the Dilemma}, 13 TRIAL
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discrimination favoring one sex cannot be tolerated.202

Although dissimilar employment opportunities and benefits for men and women are clearly prohibited by Title VII, in most cases an employer still retains the right to establish different grooming regulations for male and female employees under the Act.

C. The "Grooming Cases"

For the most part, challenges to grooming codes as a discriminatory employment practice have been initiated by male claimants.203 Although such challenges may appear somewhat frivolous, they attack the essence of traditional sexual stereotypes — physical appearance. In Roberts v. General Mills, Inc.,204 an employer in the food processing business required male employees who came into contact with food to wear hats and their female coworkers to wear hairnets. A male employee discharged for wearing a hairnet sued under Title VII.205 The district court held that the classification was unreasonable since it was based on a sex stereotype and not

28 (1977) (Title VII is a flat and absolute prohibition against all sex discrimination in conditions of employment). See also Peters v. Missouri Pac. R.R. Co., 483 F.2d 490 (5th Cir.), cert. denied, 414 U.S. 1002 (1973) (retirement plans establishing different ages of retirement for male and female employees violate Title VII); Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974), aff'd, 519 F.2d 559 (2d Cir. 1975); aff'd, 427 U.S. 445 (1976) (Connecticut State Employees' Retirement Act providing women with retirement benefits five years earlier than similarly situated men violates Title VII).

202. But see United Steelworkers v. Weber, 99 S. Ct. 2721 (1979), in which the Court held that a racial affirmative action plan did not violate Title VII. By examining the legislative history of the Act, the Court determined that Congress' intent to eliminate racial discrimination could not be interpreted as prohibiting the private sector from taking affirmative steps to accomplish that goal. While § 703(j) of the Act does not require an employer to grant preferential treatment to any group because of race, there is nothing in the Act which precludes employers from taking such action. Id. at 4854. The Weber decision, by relaxing Title VII's prohibition of discrimination in employment, raises serious questions as to the continued effectiveness of the Act in the area of sex discrimination. Whether the decision will alter the Court's treatment of the compensatory rationale in the context of sex under Title VII remains to be seen. Recently, in City of Los Angeles v. Manhart, 435 U.S. 702 (1978), the Supreme Court determined that an employment pension fund requiring larger monthly contributions from female employees than from their male counterparts violated Title VII. Rejecting the generalization that "women, as a class, do outlive men," id. at 707, the Court examined the purpose of Title VII and concluded that the basic policy of the Act requires a focus upon fairness to individuals rather than classes. Id. at 709. Since the longevity distinction was based solely on sex, the employment pension plan unlawfully discriminated against women. Id. at 709-10.


205. Id. at 1057.
the grooming habits of the individual employee.\textsuperscript{206}

However, a contrary result was reached by the United States Court of Appeals for the District of Columbia in \textit{Fagan v. National Cash Register Co.}\textsuperscript{207} where the court considered whether an employer's grooming regulations for the hair length of male technical service employees unlawfully discriminated against the claimant on the basis of his sex.\textsuperscript{208} The court, holding that no substantial federal question existed, examined the purpose of the statute\textsuperscript{209} and concluded that good grooming regulations were reasonable requirements in furtherance of the company's policy. Thus, the regulation did not amount to discrimination on the basis of an immutable characteristic.\textsuperscript{210}

Similarly, in \textit{Willingham v. Macon Telegraph Publishing Co.},\textsuperscript{211} the Fifth Circuit reaffirmed the principle that distinctions in employment practices between men and women on the basis of something other than immutable characteristics does not inhibit employment opportunity in violation of Title VII.\textsuperscript{212} In \textit{Willingham} the claimant alleged that the sole basis for the company's refusal to hire him as a copy layout artist was its objection to the length of his hair.\textsuperscript{213} The court examined whether the actions of Macon Telegraph constituted "sex plus" discrimination\textsuperscript{214} and found that the employment practice in question was more closely related to how an employer runs his business than to equality of employment opportunity. Since Title VII was intended to provide equal access to the job market, the court concluded that an employer's preferences for the grooming of his

\textsuperscript{206} \textit{Id.}
\textsuperscript{207} 481 F.2d 1115 (D.C. Cir. 1971).
\textsuperscript{208} \textit{Id.} at 1119.
\textsuperscript{209} \textit{Id.} at 1125-26. There is nothing in the Act or its legislative history to suggest that an employer's discharge of an employee because of contravention of grooming regulations would violate Title VII.
\textsuperscript{210} \textit{Id.} Hair is not an immutable characteristic since it may be changed at will. See notes 23-26 and accompanying text supra.
\textsuperscript{211} 507 F.2d 1084 (5th Cir. 1975) (en banc).
\textsuperscript{212} \textit{Id.} at 1092.
\textsuperscript{213} \textit{Id.} at 1086. In 1972, the district court had granted a summary judgment in favor of Macon Telegraph. 352 F. Supp. 1018 (M.D. Ga. 1972). On appeal, however, the circuit court reversed, finding a prima facie case of sexual discrimination. 482 F.2d 535 (5th Cir. 1973). Accordingly, it remanded the case for an evidentiary hearing.
\textsuperscript{214} Sex-plus discrimination involves the classification of employees on the basis of sex plus one other ostensibly neutral characteristic. By including this type of discrimination in the interpretation of § 704, "similarly situated individuals of either sex cannot be discriminated against vis a vis members of their own sex unless some distinction is made with respect to those of the opposite sex." 507 F.2d at 1089. See Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (lacking business necessity, an employer may not refuse to hire women with pre-school age children if it hires similarly situated men).
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employees did not inhibit employment opportunity.215

A majority of the circuits216 have adopted the position that differing grooming requirements for men and women do not contravene Title VII's prohibition of sex discrimination. Accordingly, male challenges to employer grooming standards have for the most part been unsuccessful.217 But, in the significant areas of retirement benefits, protective labor practices, and "female" professions, men have met with a great deal of success. Title VII has demanded that men and women be considered on an individual basis without regard to generic stereotypes. Clearly, the Act has provided men, as well as women, with increased benefits and opportunities.218

III. Conclusion

Although the movement for sexual equality has generally been associated with women, it unmistakably embraces men as well. Each successful challenge to a discriminatory statute or employment practice perpetuating traditional stereotypic myths provides both sexes with greater freedom to pursue their chosen professions and lifestyles. A major obstacle to overcoming pervasive sex discrimination in society, however, has been the Supreme Court's reluctance to treat sex as a suspect class deserving the same strict scrutiny accorded race, alienage, and national origin.

The Court's recalcitrance has left a legacy of opinions difficult to recon-

215. 507 F.2d at 1091-92.
217. Golden, supra note 203, at 351. For a discussion of whether sexual harassment should provide aggrieved men and women with a cause of action under Title VII, see Note, Sexual Harrassment and Title VII: The Foundations for the Elimination of Sexual Cooperation as an Employment Condition, 76 Mich. L. Rev. 1007 (1978). See also Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (where female employees' superior was bisexual, his insistence upon sexual favors from female does not constitute gender discrimination because it would apply to male and female employees alike).
218. The operation of Title VII foreshadows how, in the area of employment, the Equal Rights Amendment would function. If passed, the amendment would provide the initiative for legislatures to develop similar provisions in other areas. Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 936 (1971). The ERA would do away with a dual system of equal rights and the existing pattern of piecemeal change by providing an absolute prohibition of discrimination on the basis of sex in every facet of our lives. See also Emerson, In Support of the Equal Rights Amendment, 6 Harv. C.R.-C.L. L. Rev. 225 (1971); Mendelson, ERA, The Supreme Court, and Allegations of Gender Bias, 44 Mo. L. Rev. 1 (1979).
cile. The "middle-tier" equal protection analysis, now apparently the norm in sex discrimination cases, fosters uncertaincy in the law and allows considerable latitude in the disparate treatment of the sexes. Although Congress has tried to bridge some of the gaps created by the Supreme Court's uncertain approach to gender classifications, Title VII's guarantee of equal treatment of the sexes in the area of employment cannot ensure equality of treatment under the law in all areas. It is time for the Court to come to terms with the problem of sex discrimination and recognize that anything less than a strict scrutiny approach will have the inevitable effect of perpetuating certain types of gender classifications thereby reinforcing the stereotyped perceptions that stand as a barrier to the realization of equal rights for men and women alike.

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