Constitutional Law - Taxation - Equal Protection - Sex as a Criterion for Tax Exemption

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would abandon the escrow system in view of the current "liquidity crisis" many lenders are undergoing. Moreover, the payment of interest on escrow accounts may be a phantom victory for the potential mortgagor entering the housing market, since the increased costs of "administration" of the system may well be passed on to him.

Michael T. Reilly

**Constitutional Law—Taxation—Equal Protection—Sex as a Criterion for Tax Exemption**—The United States Supreme Court has held that a Florida statute which grants a tax exemption to widows does not deny equal protection of the law to widowers who have no such exemption and who qualify in all other respects.


Florida’s long extant legislative policy of granting a property tax exemption to widows is expressed in a current statute which gives all resident widows a $500.00 exemption from the *ad valorem* tax. Appellant Mel Kahn, a widower, applied to the Dade County Tax Assessor’s Office for this tax exemption. Because the statute does not offer an analogous benefit to widowers, his application was denied. In a declaratory judgment, the county court found that it was unable to expand the meaning of “widow” to include both men and women and held that, since the statutory classification was based on gender, it was discriminatory and arbitrary and violated the

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(c)(12) (1970), defines deposit as including “trust funds whether retained or deposited in . . . such bank or . . . another bank.”

One case has suggested, though, that if these funds are held under a constructive trust they are not a “trust” within the meaning of the statute. *In re Farmer’s State Bank*, 675 S.D. 51, 289 N.W. 75 (1939).

95. *Business Week*, July 6, 1974, at 84.

1. *Fla. Const.* art. IX, § 9 (1885) provided such an exemption. Appellant sought declaratory relief under what is currently *Fla. Stat.* § 196.202 (1973) which provides:

Property of widows, blind persons, and persons totally disabled—property to the value of five hundred dollars ($500.00) of every widow, blind person or totally and permanently disabled person who is a bona fide resident of this State shall be exempt from taxation.
equal protection clause of the United States Constitution. On appeal, the Supreme Court of Florida reversed, stating that all sex classifications are not necessarily unconstitutional if the classification is based upon some difference which has a fair and substantial relation to the purpose of the legislation. They held that the gender classification under litigation was one which met the "fair and substantial" test. The United States Supreme Court noted probable jurisdiction and affirmed, five justices joining the majority opinion and three justices dissenting. The Court concluded that the legislation falls well within constitutional limits by furthering a valid state interest to which the sex-based classification bears a fair and substantial relation.

The importance of Kahn lies less in its approval of a Florida taxation statute than in its revelation of the Court's approach in dealing with equal protection challenges to legislation containing gender classifications. As an indicator of the future of equal protection analysis of gender classifications, Kahn represents a significant link between two seemingly divergent views present on the Court.

The first approach is a traditional one in which the Supreme Court analyzes equal protection challenges to legislation based on its characterization of the interests involved. Statutes dealing with "fundamental rights" or containing "suspect classifications" have

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3. Id. at 73, quoting Reed v. Reed, 404 U.S. 71, 76 (1971).
6. Mr. Justice Douglas delivered the opinion of the Court, in which Chief Justice Burger, and Justices Stewart, Blackmun, Powell and Rehnquist joined. Justices Brennan and Marshall joined in a dissenting opinion, while Justice White filed a separate dissent.
7. See generally Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1067 (1969) [hereinafter cited as Developments], which analyzes the equal protection reasoning of the Warren Court and categorizes it as either restrained review or active review. The Burger Court's evolution from this model is extensively discussed in Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972) [hereinafter cited as Gunther].
9. To date the Court has found only race, national origin, and ancestry to be suspect classifications. See, e.g., In re Griffiths, 413 U.S. 717 (1973) (alienage); Graham v. Richard-
been subjected to strict judicial scrutiny. Strict scrutiny is an active review which places the burden on the state to demonstrate a compelling interest in using the classification as well as to show the unavailability of a less drastic means to accomplish this objective. Because of the double burden, this form of review has been called strict in theory and fatal in fact. A more restrained review is used in cases which do not revolve around a suspect criterion or a fundamental interest. This review involves a far less stringent burden of proof, relieving the state of the need to demonstrate a compelling interest or the unavailability of a less drastic means to accomplish its objectives. The statute will be upheld if the Court can reasonably conceive of any valid purpose supporting the constitutionality of the classification. Review of this kind has been described as minimal in theory and virtually none in fact.

This two-tiered approach developed throughout the Warren era and carried over into the early Burger Court. With Reed v. Reed, and several other equal protection cases of the 1971 term, the emergence of a second equal protection test was postulated. In the area of sex discrimination, the vacillation between these divergent approaches to equal protection challenges is apparent.

Reed v. Reed, decided in the 1971 term, involved an equal protection challenge to an Idaho probate statute requiring the choice of a male administrator over a female administrator if the applicants were of equal entitlement class. When, under this law, com-
peting petitions were presented to the court by the father and mother of the deceased, the probate court chose the father without inquiring into the relative capabilities of the applicants. The mother’s appeals brought the case before the Supreme Court which, in a unanimous decision, declared the statute unconstitutional. Reviewing the classification, the Court used a standard enunciated by *Royster Guano v. Virginia*\(^9\) which stated that, to be valid within the equal protection clause, a classification “must be reasonable . . . and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .”\(^{20}\) The Court found that the statute did not meet this test. Declining to use strict judicial scrutiny, the Reed Court nevertheless invalidated the gender-based classification. The “substantial relation” test had the unanimous approval of the Court and seemed to be the dominant trend.

It was in this context that *Frontiero v. Richardson*\(^{21}\) came before the Court in the 1973 term. The case was decided by a divided Court and focused on the choice of the test to be applied to the statute involved. The plurality opinion, joined by Justices Brennan, Douglas, White and Marshall, enunciated the proposition that sex-based classifications are inherently suspect and, therefore, must be subjected to strict judicial scrutiny.\(^2\) The plurality reasoned that, although administrative convenience is a valid governmental interest, it cannot be the *sole* basis for the use of a sex-based classification; when subjected to strict judicial scrutiny, that classification will be held invalid.\(^2\) Chief Justice Burger and Justices Powell and Blackmun joined in a concurring opinion which refused to go as far as the

\(\text{grandparents in another and so on. As a result, more than one potential administrator could be in any given entitlement class.}\)

20. *Id.* at 415.
21. 411 U.S. 677 (1973). Lieutenant Sharron Frontiero, a female member of the U.S. Air Force, sought increased quarters allowance and medical benefits by claiming her husband as a dependent. Her application was denied because the applicable statutes, 10 U.S.C. § 1072(2)(c) (1970) and 37 U.S.C. § 401 (1970), required a female member to show her spouse’s dependency for one-half of his support. Not meeting this requirement, she and her husband challenged the constitutionality of the statutes. The aspect of this case which has received the greatest attention is the plurality opinion which declared sex to be a suspect criterion, thereby placing classifications based on sex within the purview of strict judicial scrutiny. For an extensive discussion of this case and its implications see *The Supreme Court, 1973 Term*, 87 Harv. L. Rev. 116 (1973); 12 Duq. L. Rev. 982 (1974).
22. 411 U.S. at 688.
23. *Id.* at 690.
plurality. They did not include sex in the "narrowly limited group of classifications which are inherently suspect";\(^4\) they would have reversed on the narrower ground that the same result could be reached through the reasoning in Reed.\(^5\) They would have deferred categorizing sex as a suspect criterion pending the passage of the equal rights amendment.\(^6\)

The clash of the two equal protection approaches in Frontiero left the state of the law in limbo as to an important issue. In dealing with equal protection attacks on gender classifications contained in legislation, would the Court: a) use the two-tiered approach, classifying sex as a suspect criterion and subjecting all such legislation to strict judicial scrutiny; or b) use the Reed approach with its fair and substantial relation test. Kahn suggests the answer to this issue.

The coalition formed in Frontiero, which would have subjected all sex classifications to strict judicial scrutiny, has apparently been reduced by one. Mr. Justice Douglas seems to have retreated from his previous position, leaving Justices Brennan, White and Marshall as the stalwarts of this view. Kahn signals that the Court is solidly in the position of refusing to list gender as a suspect classification which elicits strict judicial scrutiny.\(^7\) Instead, the Kahn Court asked: Does the differing treatment received by widows and widowers "rest upon some ground of difference having a fair and substantial relation to the object of the legislation?"\(^8\) This test, which was

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24. Id. at 691-92.
25. Id. at 692. These Justices considered it unnecessary to classify sex as a suspect criterion and thereby create far-reaching implications for all such classifications. They felt that the same result could be reached quite adequately through the reasoning of Reed v. Reed, 404 U.S. 71 (1971).
26. The equal rights amendment, passed by Congress on March 22, 1972, and submitted to the states for ratification provides: "Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. No. 208, 92d Cong., 1st Sess. (1971). The Justices reasoned that, if adopted, the amendment would resolve the sex classification issue. Classifying sex as a suspect criterion at a time when the states are making a major political decision to accept or reject the amendment would preempt the duly prescribed legislative process. Such wide-sweeping social choices should not be made by the courts at a time when the constitutional processes are at work to put these very choices to the decision of the people. 411 U.S. at 692.
28. 94 S. Ct. at 1737, quoting Reed v. Reed, 404 U.S. 71, 76 (1971), quoting Royster Guano
adopted in *Reed*, is the focal point of the Court’s reasoning in *Kahn*.

The majority in *Kahn* applies the test in an almost cursory manner. Mr. Justice Douglas seems to divide the test into three sections: a) does the differing treatment of men and women rest on some ground of difference; b) is there a valid purpose served by the statute; and c) does the ground of difference have a fair and substantial relation to that object.

The Court finds a valid economic difference between widows and widowers. Women are, in general, employed in lower paying jobs than men, and the widow’s previous economic dependency and unfamiliarity with the job market she is suddenly forced to enter magnify the economic disparity. Turning discussion to the object of the legislation, the Court distinguished *Kahn* and *Frontiero*. Unlike *Frontiero*, in which administrative convenience was the only justification offered for the classification, *Kahn* finds a valid state policy to ease the financial impact of spousal loss upon the widow. It is upon her and not upon the widower that this loss imposes a disproportionately heavy burden. Having found a ground of difference and a valid state object, the Court simply concludes that “there can be no doubt” that the differing treatment of the sexes created by this statute rests upon a ground of difference which bears a “fair and substantial relation” to the object of the legislation.

The application of the *Reed* test to *Kahn* was abbreviated, somewhat abstruse, and left the problem of the interrelationships between the elements of the test unanswered. One reason for this summary treatment may be that the statute in question involves the state’s power to tax. Taxation statutes, and their classifications, have been subjected to a distinctive type of scrutiny. The Court cites several cases which have found that states have wide discretion in creating reasonable systems of taxation, and that classifications created within such systems are valid if founded upon a “reasonable distinction or difference in state policy.”

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Co. v. Virginia, 253 U.S. 412, 415 (1920). It should be noted that this is the same test which the Chief Justice and Justices Blackmun, Powell and Stewart would have applied in the *Frontiero* case. See note 25 supra.

29. 94 S. Ct. at 1736-37. These conclusions are reached after an extensive statistical analysis contained in notes 4, 5 and 6 of the opinion.

30. Id. at 1737.

31. Id.

formity or scientific precision within these classifications would subject taxation legislation to an intolerable degree of judicial supervision.  

A more immediate reason why the Kahn Court did not go into extensive analysis of their use of the Reed test may be that Kahn was not chosen as the vehicle to define or clarify the rationale of Reed. Instead, Kahn was used to indicate that, in relation to equal protection challenges to gender classifications, the "fair and substantial" test, and not strict scrutiny, would be applied. Unlike the dissenters who would use Frontiero's suspect criterion reasoning, the majority seems firmly committed to the use of the Reed test in this area. The precedent existed to adopt either the strict scrutiny test of Frontiero or the substantial relation test of Reed. The choice of the Reed test in this instance seems to preclude the adoption of sex into the category of classifications which are inherently suspect.

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