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Sex Discrimination: Social Security Benefits

Neil B. Cohen
Brooklyn Law School, neil.cohen@brooklaw.edu

Catherine A. Broderick

Charles H. Klein

SEX DISCRIMINATION

CATHERINE A. BRODERICK
NEIL B. COHEN
CHARLES H. KLEIN

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SOCIAL SECURITY BENEFITS

Introduction.—Despite the rather large number of major sex discrimination cases decided under the equal protection clause[1] during the last four years,[2] a clear mode of conceptual analysis has yet to emerge.[3] The growing significance of the Supreme Court's decision in *Reed v. Reed*,[4]

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1. Although the equal protection clause of the fourteenth amendment of the United States Constitution is by its terms applicable only to the states, the Supreme Court has assumed that an equal protection guarantee underlies the fifth amendment's due process clause, which is applicable to federal action. See Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Equal protection claims under the fifth amendment are decided in the same manner as claims under the fourteenth amendment. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

2. E.g., Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Geduldig v. Aiello, 417 U.S. 484 (1974); Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). *Wiesenfeld, Schlesinger,* and *Frontiero* were actually decided under the due process clause of the fifth amendment, but employed equal protection analysis. See note 1 supra.

3. See generally Women's Rights, 1973/74 Ann. Survey Am. L. 459.

4. 404 U.S. 71 (1971). The plaintiff in *Reed* challenged a statute which mandated that if a male and a female of the same entitlement class applied for appointment as administrator of a decedent's estate, the male be given automatic preference. Id. at 73. Without contemplating the proposition that sex is a "suspect classification" or that a "fundamental interest" was involved (see note 6 infra), the Court held that the statute violated the equal protection clause by giving mandatory preference to males over females without regard to their individual qualifications as potential estate administrators. Id. at 74. The question the Court asked was whether the gender-based distinction was justified on the basis of criteria substantially related to the objective of the statute. It said that the admitted state objective of reducing the workload on probate courts by eliminating one class of controversy, while not without some legitimacy, was insufficient to justify an arbitrary classification based only on a difference in the sex of competing applicants. Id. at 77. Its ruling thus requires a determination in such situations of the relative capabilities of the competing applicants to perform the functions in question.

Prior to *Reed*, the classification created by the statute would have been judged according to a minimum rational relationship test and upheld "if any state of facts

however, is evident in one of its most recent opinions involving Social Security benefits. In *Weinberger v. Wiesenfeld*,[5] as in *Reed*, the Court found neither a "fundamental right" nor a "suspect classification."[6] Accordingly, the classification at issue was not subject to rigid scrutiny under the Court's two-tier equal protection analysis. Nevertheless, the gender-based distinction was invalidated on equal protection grounds.[7]

This section of the article analyzes *Wiesenfeld's* conceptual place in the constitutional law of sex discrimination and assesses its impact on Social Security benefit programs.

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reasonably may be conceived to justify [it]." McGowan v. Maryland, 366 U.S. 420, 426 (1961). Under that test, a statute was rarely invalidated, since virtually any legislative classification could be justified under some state of facts. *Reed's* significance lies in its departure from this pattern. It invalidated the challenged classification without applying strict scrutiny to it.

5. 420 U.S. 636 (1975).

6. In evaluating equal protection claims, the Court has traditionally chosen one of two standards of review. In cases involving "fundamental interests," e.g., the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); the right to travel interstate, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to appeal a criminal conviction, Griffin v. Illinois, 351 U.S. 12 (1956); or classifications deemed "inherently suspect," e.g., race, McLaughlin v. Florida, 379 U.S. 184 (1964); or alienage, Graham v. Richardson, 403 U.S. 365 (1971), a statute is looked upon with "strict scrutiny" and upheld only if justified by a countervailing, compelling state interest. Where neither a fundamental right nor a suspect class is involved, a legislative classification has been traditionally upheld if it is rationally related to a legitimate governmental interest.

Three years ago, it appeared that the Court was on the verge of declaring sex a "suspect classification." In Frontiero v. Richardson, 411 U.S. 677 (1973), four justices of the Court's eight-justice majority, in a plurality opinion by Justice Brennan (joined by Justices Douglas, White, and Marshall), went on record as favoring that view. Id. at 682. In cases since *Frontiero*, however, the plurality in favor of declaring sex a suspect classification has not emerged as a majority. See, e.g., Stanton v. Stanton, 421 U.S. 7 (1975), where the Court found it "unnecessary to decide in this case whether a classification based on sex is inherently suspect." Id. at 13.

7. See also Stanton v. Stanton, 421 U.S. 7 (1975). The plaintiff in *Stanton*, seeking continuance of child support payments under a divorce decree, challenged a Utah statute providing different ages of majority for males (21) and females (18). Id. at 9. The Court, in determining the statute to be unconstitutionally discriminatory in the context of child support, found *Reed* to be controlling. The test it applied was whether the different treatment accorded by the statute was based on criteria having a fair and substantial relation to the objective of the statute. Id. at 14. The purpose of the statute, acknowledged by the lower court to be the assurance to the child of parental support while receiving his education, was no longer sufficiently related to a difference in the sex of the dependents to justify the classification. In view of the expansion of women's activities in all walks of life, the Court said, "[i]f a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training so, too, it is for the girl." Id. at 15. It concluded that "under any test—compelling state interest, or rational basis, or something in between—[the Utah statute] in the context of child support, does not survive an equal protection attack." Id. at 17. Justice Rehnquist dissented, adhering to the Court's policy that "unnecessary constitutional adjudication" should be avoided. Id. at 20 (Rehnquist, J., dissenting).

Wiesenfeld and the Invigorated Rational Relationship Test.— Stephen Wiesenfeld, a technical consultant, married his wife, Paula, a school teacher, in November 1970. Less than two years later, Paula died in childbirth, leaving Stephen with the sole responsibility for the care of their newborn son.[8] By the time of her death, Paula had taught school for seven years and had contributed maximum Social Security payments each year from her salary.[9] Her income had exceeded Stephen's at all times during their marriage.[10]

After Paula's death, Stephen applied for Social Security benefits for himself and his infant son. He was granted child's insurance benefits for his son,[11] but was denied benefits for himself, since the relevant section of the Social Security Act, section 402(g), provided benefits to widows in his situation, but not to widowers.[12] Stephen thereupon filed suit seeking a declaration that section 402(g) was unconstitutional since men and women were treated differently, an injunction restraining the

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8. Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 984 (D.N.J. 1973) (three-judge court).

9. Id.

10. Stephen's total income in the years 1970, 1971, and 1972 was $7763; Paula's income for the same period was $27,330. Id.

11. Id. 42 U.S.C. § 402(d) (Supp. IV, 1974) provides child's insurance benefits to

(1) Every child . . . of an individual . . . who dies a fully or currently insured individual, if such child—

. . . .

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22,

. . . .

12. 367 F. Supp. at 984-85. 42 U.S.C. § 402(g) (1970, Supp. IV, 1974), provides in part:

(g) Mother's insurance benefits.

(1) The widow and every surviving divorced mother . . . of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—

(A) is not married,

(B) is not entitled to a widow's insurance benefit,

(C) is not entitled to old-age insurance benefits . . .

(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, and

(F) in the case of a surviving divorced mother—

(i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and

(ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,

shall . . . be entitled to a mother's insurance benefit . . . .

denial of benefits under section 402(g), and payment of past benefits due.[13]

The district court granted summary judgment in favor of Wiesenfeld.[14] It first applied the traditional rational relationship test, which requires that a legislative classification be upheld unless it bears no rational relationship to any legitimate governmental objective.[15] Under this test, the court found that the statute represented "a rational attempt by Congress to protect women and families who have lost the male head of the household."[16] Announcing, however, that it was persuaded by the plurality opinion in *Frontiero v. Richardson*[17] that sex is a suspect classification, the district court proceeded to apply the test of strict judicial scrutiny. Under this test, the court found the statute invalid not because it discriminated against male survivors but because it discriminated against female wage earners by denying their spouses and children the Social Security benefits accorded male wage earners who earned the same salary and made the same Social Security payments.[18]

The district court in *Wiesenfeld* explicitly rejected the proposition that *Reed* established a new, intermediate test for the constitutionality of legislative sex discrimination.[19] *Reed,* it pointed out, relied strongly on the half-century-old case of *F.S. Royster Guano Co. v. Virginia,*[20] which "can hardly be considered as a strong foundation for a 'new' equal protection standard."[21]

On appeal, the Supreme Court unanimously affirmed the lower court holding,[22] but on different analytical grounds.[23] The Court agreed

13. 367 F. Supp. at 983-84.

14. Id. at 981, 991.

15. Id. at 989-90.

16. Id. at 990. In so doing, the court rejected Wiesenfeld's argument that, inasmuch as the congressional purpose of § 402(g) was to provide for the *families* of deceased wage earners, the classification is arbitrary and unconstitutional on the basis of *Reed.* Id. at 989.

17. 411 U.S. 677 (1973).

18. 367 F. Supp. at 990-91. The court did say that affirmative legislation to undo the past discrimination against suspect groups may satisfy a compelling governmental interest, but because the statute in this case, although designed to protect women, also discriminates against them, it cannot survive the test. Id. at 991.

19. Id. at 988.

20. 253 U.S. 412, 415 (1920), where the Court said that a "classification 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, so that all persons similarly circumstanced shall be treated alike."

21. 367 F. Supp. at 988.

22. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Justice Douglas took no part in consideration or decision of the case.

23. Intervening cases involving alleged sex discrimination include Schlesinger v. Ballard, 419 U.S. 498 (1975) (see note 40 infra); Geduldig v. Aiello, 417 U.S. 484 (1974)

that section 402(g) discriminated against working women by depriving them of the same protection for their families as was afforded working men.[24] It determined that the classification created by section 402(g) was indistinguishable from the one invalidated in *Frontiero* and held that *Frontiero* dictated that it be found invalid.[25] Justice Brennan's majority opinion, however, made no mention of sex as a suspect class justifying rigid scrutiny. The equal protection analysis on which his opinion in *Frontiero* was based was noticeably absent in *Wiesenfeld,* sacrificed, no doubt, in the interest of obtaining a majority opinion. Nevertheless, the court relied heavily on the result in *Frontiero.*

In comparing the section 402(g) distinction with that at issue in *Frontiero,* the Court focused on the fact that both were premised on "overbroad generalizations that could not be tolerated under the Constitution."[26] The assumption challenged in *Frontiero* was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.[27] Similarly, in *Wiesenfeld,* the statutory classification was based on the assumption that the earnings of male workers are vital to the support of their families but those of female workers are not.[28] The fact that the distinction in *Wiesenfeld* was premised on an overbroad generalization was enough in itself to render it constitutionally impermissible. Since the differentiation in *Frontiero* was prohibited, the differentiation in *Wiesenfeld* was equally invalid.[29]

Following this rather conclusory ruling, the Court discussed and rejected the Government's opposing arguments. The Government's main argument in opposition to Wiesenfeld[30] was that the gender-based

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(California disability insurance system, which excludes disability payments for pregnancy, held not to be discrimination based on gender); Kahn v. Shevin, 416 U.S. 351 (1974) (Florida statute giving tax exemption to widows but not widowers held to be constitutional as a measure designed to ameliorate the effects of past discrimination against women); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (school board rule requiring pregnant teachers to take unpaid maternity leave several months before giving birth held to violate procedural due process by creating an "irrebuttable presumption" that such leaves are needed in every case).

24. 420 U.S. at 645.

25. Id. at 653.

26. Id. at 643, quoting the Court's own explication of *Frontiero* in Schlesinger v. Ballard, 419 U.S. 498, 507 (1975).

27. 420 U.S. at 643.

28. Id. The Court also noted that the gender-based classification in *Wiesenfeld* was even "more pernicious" than that in *Frontiero,* since under the *Frontiero* statute, the presumption of male nondependency was rebuttable, while the presumption of § 402(g) was not. Id. at 645.

29. Id. at 645.

30. An ancillary argument put forth by the Government and rather summarily rejected by the Court was that because Social Security benefits are not compensation

classification was reasonably designed to compensate women as a group to offset the adverse economic situation many of them still suffer[31] and was therefore defensible against an equal protection attack. Justice Brennan, writing for the Court and relying on *Kahn v. Shevin*[32] (decided after the district court's decision in *Wiesenfeld*), conceded that the appellant's argument, if true, would enable section 402(g) to survive such an attack.[33] Justice Brennan noted, however, 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."[34] Citing to a rather complete legislative history,[35] Justice Brennan concluded that the purpose of section 402(g), rather than being compensatory in nature, was instead "to provide children deprived of one parent with the opportunity for the personal attention of the other" by enabling the surviving parent to remain at home to care for the child.[36] Given that purpose, he held, the gender-based distinction in the section was entirely irrational,[37] insofar as it accomplished its goal only if the surviving parent was the mother. Since

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for work done, covered females need not be provided the same benefits as covered males. Id. at 646. For this proposition the appellant relied primarily on Flemming v. Nestor, 363 U.S. 603 (1960), in which the Court held that the interest of a covered employee in future Social Security benefits is "noncontractual," because "each worker's benefits, though flowing from the contributions he made to the national economy while actively employed, are not dependent on the degree to which he was called upon to support the system by taxation." Id. at 609-10.

The Court in *Wiesenfeld* stated that although Social Security benefits are not necessarily related directly to tax contributions, nonetheless,

> [s]ince OASDI [Social Security Old Age, Survivors, and Disability Insurance] benefits do depend significantly upon the participation in the work force of a covered employee, and since only covered employees and not others are required to pay taxes toward the system, benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex.

420 U.S. at 647.

31. 420 U.S. at 646.

32. 416 U.S. 351 (1974).

33. 420 U.S. at 648. The Court held in *Kahn* that a statute "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden" is valid under the equal protection clause. 416 U.S. at 355.

34. 420 U.S. at 648 (emphasis added), citing Jimenez v. Weinberger, 417 U.S. 628 (1974); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

35. Report of the Social Security Bd., H.R. Doc. No. 110, 76th Cong., 1st Sess. 7-8 (1939). See also Hearings on the Social Security Act Amendments of 1939 Before the House Comm. on Ways and Means, 76th Cong., 1st Sess. 61, 1217, 1269-70 (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. 36-37 (1939); Final Report of the Advisory Council on Social Security 31 (1938).

36. 420 U.S. at 648-49.

37. Id. at 651.

the classification could not be explained as an attempt to provide for the special disadvantages of women, it was indistinguishable from the classification invalidated in *Frontiero* and thus itself invalid.

Although explicit reference to *Reed* was notably absent throughout the Court's opinion,[38] its ruling is in effect an extension of the *Reed* analysis. The classification was invalid because it lacked a fair and substantial relation to the actual purpose of the legislation.

The decision in *Wiesenfeld* clearly reflects the Court's increasing propensity to invigorate the "rational relationship" test for use in sex discrimination cases.[39] While the test was, to say the least, lax prior to *Reed,* with that case the emphasis shifted from the mere rationality of the relationship between the challenged classification and a governmental objective to the sufficiency of that objective. *Reed, Kahn,* and the more recent case of *Schlesinger v. Ballard*[40] all turn on the sufficiency of the proffered objective of the statute in question.[41] With the decisions culminating in *Wiesenfeld,*[42] the Court has gone one step further. No longer is mere demonstration of a rational relationship between the classification and an indisputably legitimate governmental objective sufficient. The statute will nonetheless fall if there is convincing evidence that the proffered objective was not in fact that which the legislators had in mind at the time of enactment.

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38. Its only reference to *Reed* was in support of the general proposition that a statute which provides dissimilar treatment for men and women who are similarly situated violates the due process clause. Id. at 653.

39. Some observers have suggested that the Court has formulated a new intermediate test for the validity of sex-based classifications. See, e.g., Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

40. 419 U.S. 498 (1975). In *Ballard,* the Court was faced with a challenge to the Navy's "up or out" requirements for officers, codified at 10 U.S.C. §§ 6382, 6401 (1970). These requirements allow women line officers a longer period than men before mandatory discharge for want of promotion. On the basis of *Reed,* the Court upheld the requirements, explaining that Congress might reasonably have believed that, due to the restrictions on women officers' participation in combat and sea duty (women cannot be assigned to aircraft combat missions or to sea duty other than on hospital ships and transports, 10 U.S.C. § 6015 (1970)), women line officers have less opportunity for promotion than do their male counterparts, and that a longer period of tenure for women officers is, therefore, consistent with the goal of providing women officers with "fair and equitable career advancement programs." 419 U.S. at 508. Because the rationale asserted to justify the gender-based classification was, as such, adequate, the distinction was permissible. See id. at 510.

41. Amelioration of the effects of past discrimination (see, e.g., Kahn v. Shevin, 416 U.S. 351 (1974)) and assurance of a flow of promotions commensurate with opportunity for promotion (see, e.g., Schlesinger v. Ballard, 419 U.S. 498 (1975)) are sufficient objectives. Administrative convenience is not. Reed v. Reed, 404 U.S. 71 (1971).

42. See note 23 supra.

Decisions Since Wiesenfeld.—In the wake of *Wiesenfeld,* other gender-based distinctions contained in the Social Security Act have been challenged. Sections 402(e)[43] and 402(f)[44] grant benefits to a surviving spouse based on the covered earnings of a deceased spouse, if such benefits are greater than those to which the surviving spouse is entitled on the basis of his or her own earnings. While a widow who meets these qualifications is automatically eligible for the benefits, a widower must first show that he was receiving greater than one-half of his support from his wife at the time of her death. Similarly, sections 402(b)[45]

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43. 42 U.S.C. § 402(e) (1970, Supp. IV, 1974) provides in part:

(e) Widow's insurance benefits.

(1) The widow . . . and every surviving divorced wife . . . of an individual who died a fully insured individual, if such widow or such surviving divorced wife—

(A) is not married,

(B)(i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability . . .

(C)(i) has filed application for widow's insurance benefits, or was entitled to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died, and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title, or (ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained age 65, and

(D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of such deceased individual,

shall be entitled to a widow's insurance benefits . . . .

44. 42 U.S.C. § 402(f) (1970) contains comparable provisions with respect to a widower, with the additional requirement that he

(D)(i) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual at the time of her death, or if such individual had a period of disability which did not end prior to the month in which she died, at the time such period began or at the time of her death, and filed proof of such support . . . or (ii) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual at the time she became entitled to old-age or disability insurance benefits or, if such individual had a period of disability which did not end prior to the month in which she became so entitled, at the time such period began or at the time she became entitled to such benefits, and filed proof of such support . . . .

45. 42 U.S.C. § 402(b) (1970, Supp. IV, 1974) provides in part:

(b) Wife's insurance benefits.

(1) The wife . . . and every divorced wife . . . of an individual entitled to old-age or disability insurance benefits, if such wife or such divorced wife—

(A) has filed application for wife's insurance benefits,

(B) has attained age 62 or (in the case of a wife) has in her care (individually or jointly with such individual) at the time of filing such application a child entitled to a child's insurance benefit on the basis of the wages and self-employment income of such individual,

(C) in the case of a divorced wife, is not married, and

(D) is not entitled to old-age or disability insurance benefits, or is entitled to

and 402(c)[46] require men seeking old-age benefits through their wives' contributions to demonstrate greater than one-half dependence on their wives' earnings. Courts have invalidated both of these distinctions in recent months.

In *Goldfarb v. Secretary of HEW*,[47] the United States District Court for the Eastern District of New York invalidated the requirement in section 402(f)(1)(D) that widowers prove dependency to be eligible for survivor's benefits.[48] Finding the case to be controlled by *Wiesenfeld*, the court ruled that because there is no support for the proposition that working women are less concerned about their spouses' welfare in old age than are working men—a generalization upon which the court felt the statute was necessarily premised—its application deprived women of protection for their families which men received and was therefore unconstitutional.[49]

In addition, other district courts have invalidated the section 402(c)(1)(C) dependency requirement for men seeking old-age benefits through their wives' earnings,[50] applying what may fairly be called an invigorated version of the traditional rational relationship test.

In *Silbowitz v. Secretary of HEW*,[51] the United States District Court for the Southern District of Florida found the statute to be like those in *Frontiero* and *Wiesenfeld*.[52] Applying *Reed*, the court held

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old-age or disability insurance benefits based on a primary insurance amount which is less than one-half of the primary insurance amount of such individual, shall (subject to subsection (s) of this section) be entitled to a wife's insurance benefit . . . .

46. 42 U.S.C. § 402(c) (1970) contains comparable provisions with respect to a husband, with the additional restriction that he

(C) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual—

(i) if she had a period of disability which did not end prior to the month in which she became entitled to old-age or disability insurance benefits, at the beginning of such period or at the time she became entitled to such benefits, or

(ii) if she did not have such a period of disability, at the time she became entitled to such benefits . . . .

47. 396 F. Supp. 308 (E.D.N.Y. 1975) (three-judge court) (per curiam), prob. juris. noted sub nom. Matthews v. Goldfarb, 44 U.S.L.W. 3462 (U.S. Feb. 23, 1976) (No. 75-699).

48. Its broad-ranging decision also invalidated §§ 402(b), (c)(1)(C), and (e).

49. 396 F. Supp. at 309.

50. Silbowitz v. Secretary of HEW, 397 F. Supp. 862 (S.D. Fla. 1975), appeal filed sub nom. Matthews v. Silbowitz, 44 U.S.L.W. 3319 (U.S. Nov. 13, 1975) (No. 75-712); Jablon v. Secretary of HEW, 399 F. Supp. 118 (D. Md. 1975) (three-judge court), appeal filed by plaintiff, 44 U.S.L.W. 3319 (U.S. Nov. 18, 1975) (No. 75-727), appeal filed by defendant sub nom. Matthews v. Jablon, 44 U.S.L.W. 3319 (U.S. Nov. 19, 1975) (No. 75-739). But cf. Moss v. Secretary of HEW, Civil No. 74-721-Civ-T-H (M.D. Fla. Jan. 15, 1976); see notes 72-82, 105-15 infra and accompanying text.

51. 397 F. Supp. 862 (S.D. Fla. 1975).

52. Id. at 865-66.

that, because the purpose of the statutory scheme was the protection of family needs and because the dependency test resulted in the granting of benefits to nondependent women while withholding them from nondependent men, the classification was not rationally related to the state objective and was therefore invalid.[53] It rejected the defendant's assertion, based on the ruling in *Geduldig v. Aiello*,[54] that the distinction was consonant with the Social Security Act's intention to provide and allocate fiscal resources to those with the greatest need.[55] The court termed this reliance on *Aiello* "misplaced,"[56] pointing out that since economically independent wives receive benefits without regard to need, the statute is obviously not intended to fulfill such an objective, and that if preservation of fiscal resources were the concern, a more rational statute would require a showing of dependency for both males and females.[57]

The court also rejected[58] the defendant's assertion that the classification seeks to remedy the economic plight of women and therefore meets the rationality test set forth in *Kahn v. Shevin*.[59] It looked beyond the proffered intent of the classification to find that its actual purpose was administrative convenience and, citing *Frontiero*, held that such purpose was an insufficient justification for the distinction.[60]

The section 402(c)(1)(C) dependency requirement was also invalidated by the United States District Court for the District of Maryland in *Jablon v. Secretary of HEW*.[61] The Government there made several arguments in defense of the statute. First, it contended once again that Congress is not constitutionally required to provide similarly-situated males and females with the same Social Security benefits due to the "noncontractual" nature of these benefits.[62] This argument was dismissed with a reference to *Wiesenfeld's* discussion of *Flemming v. Nestor*.[63] A contention that the fact that women are more likely to need

53. Id. at 865-67.

54. 417 U.S. 484 (1974), where the Court held, *inter alia*, that the conservation and allocation of fiscal reserves of the state's disability insurance program is a legitimate state objective that may be achieved through the denial of pregnancy benefits, which are necessarily limited to women.

55. 397 F. Supp. at 867.

56. Id. The court viewed plaintiff's claim as inherently different from that asserted in *Aiello* because plaintiff, a covered worker, was denied a benefit a similarly-situated woman would receive.

57. Id.

58. Id. at 870-71.

59. 416 U.S. 351 (1974).

60. 397 F. Supp. at 867.

61. 399 F. Supp. 118 (D. Md. 1975).

62. Id. at 127.

63. Id. See note 30 supra.

such benefits justifies the distinction was similarly rejected on the basis of *Wiesenfeld.*[64] The Government then attempted to distinguish *Wiesenfeld* on the basis that the presumption of nondependency on the part of the male was irrebuttable in that case, whereas, under section 402 (c) (1)(C), a male applicant may receive benefits by demonstrating dependency.[65] The court rejected this defense and pointed out that, even if the gender-based distinction of section 402(c)(1)(C) was less "pernicious" than that invalidated in *Wiesenfeld,* it was nonetheless virtually identical with the scheme invalidated in *Frontiero.*[66]

The Government further argued that section 402(c)(1)(C) was enacted as remedial legislation aimed at compensating women for past discrimination and thus is supported by *Kahn.*[67] Citing the *Wiesenfeld* rule that the mere recitation of a benign, compensatory purpose is not an automatic shield against inquiry into actual purposes,[68] the court pointed out that it had "not been referred to any legislative history which suggests that that section had the broad remedial purpose the Government seeks to ascribe to it" and found that no such purpose was evident on the face of the statute.[69]

Even assuming such a remedial purpose, the court continued, the statute does not appear to be reasonably designed to further it, since the earnings of those women who do work are, solely on the basis of their sex, made less valuable to their families than the earnings of a similarly-situated male.[70] Applying *Wiesenfeld,* the court declared the classification unconstitutional.[71]

In *Moss v. Secretary of HEW,*[72] the United States District Court for the Middle District of Florida also held the gender-based distinction in qualifications for retirement benefits unconstitutional. Announcing that it was applying the *Reed* standard,[73] the court, relying on *Frontiero* and *Wiesenfeld,* found that "the only discernible justification for the gender-based distinction in this instance is one of administrative convenience . . . [which] is simply not enough to sustain it against an equal protection challenge."[74] In so holding, the court rather sketchily re-

64. 399 F. Supp. at 128.
65. Id. at 128-29.
66. Id. at 129.
67. Id. at 129-30.
68. 420 U.S. at 648.
69. 399 F. Supp. at 129-130.
70. Id. at 130.
71. Id. at 126.
72. Civil No. 74-721-Civ-T-H (M.D. Fla. Jan. 15, 1976).
73. Id. at 4.
74. Id. at 7.

jected a number of government arguments.[75] According to the district court, each of these arguments rested on one of two fallacious premises: that the challenged classification was overinclusive rather than underinclusive, and that the presumption of female dependency serves the valid governmental objective of rectifying past discrimination against women.[76] The fallacy in these arguments, reasoned the court, is that they concentrate only on the beneficiaries of derivative Social Security benefits, rather than also examining the gender-based distinctions from the perspective of wage earners. Examined this way, wrote the court, it is clear that the presumption of female dependency operates to the disadvantage of working wives in that their wages generate less protection for their families than do those of working husbands.[77] Given this effect, the court found that the statutory scheme was underinclusive with respect to female wage earners and, inasmuch as it discriminated against them, could not be said to be designed to rectify past discrimination against women.[78]

In addition to the gender-based distinctions in the Social Security Act which have already been invalidated, there are others which are also susceptible to an equal protection challenge under the fifth amendment due process clause. In particular, both sections 402(b) and 402(e), discussed above,[79] have provisions which allow divorced wives to receive benefits in certain circumstances, but sections 402(c) and 402(f) do not provide parallel benefits for divorced husbands.[80] Furthermore, the Railroad Retirement Act[81] has gender-based distinctions analogous to those in the Social Security Act.[82] It is likely that in the near future the constitutionality of these provisions will be litigated and, on the basis of *Wiesenfeld,* invalidated.

The Appropriate Parties.—Plaintiffs in several of these cases made an effort to broaden the effect of the rulings in their suits by moving to proceed as a class action. In *Wiesenfeld,* the plaintiff sought in the district court to represent a class of "all widowers who have in their care a child of an insured individual entitled to federal social security child benefits and who are excluded from benefits for themselves solely because they are men."[83] During oral argument, however, he admitted

75. The opinion does not indicate precisely what these arguments were.
76. Civil No. 74-721-Civ-T-H at 6.
77. Id. at 6-7.
78. Id.
79. See notes 43, 45 supra.
80. See notes 44, 46 supra.
81. 45 U.S.C. § 228a (1970).
82. E.g., 45 U.S.C. § 228e(b) (1970) provides annuities to widows of partially insured [as defined in § 228e(1)(8)] employees, but not to widowers of such employees.
83. 367 F. Supp. at 986.

that the purpose of this request was merely to safeguard the constitutional attack against mootness.[84] The court held this reason insufficient to maintain a class action and denied the motion.[85] The order was not appealed.[86] Similarly, in *Goldfarb* the plaintiff moved for certification as a class.[87] The application was denied summarily with a citation to *Wiesenfeld*.[88]

The plaintiffs in *Jablon* and *Moss* likewise attempted to proceed as class actions.[89] An intervening Supreme Court decision, however, caused them to withdraw their class requests.

That decision was *Weinberger v. Salfi*,[90] decided on June 26, 1975. The named plaintiffs, a widow and her child, were denied Social Security benefits after the death of the widow's husband of less than six months, on the basis of the duration-of-relationship requirements of the Social Security Act. These define "widow" and "child" so as to exclude surviving wives and children who had their respective relationships to a deceased wage earner for less than nine months prior to his death.[91] The plaintiffs sought to represent a class of all widows and stepchildren of deceased wage earners who are denied benefits because the wage earner died within nine months of the marriage.[92]

The Supreme Court, in ruling that the motion for a class determi-

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84. Id. The case could have become moot if, e.g., Wiesenfeld remarried before the final decision. See 42 U.S.C. § 402(g)(1)(A) (1970, Supp. IV, 1974), supra note 12.

85. 367 F. Supp. at 986-87. Determination of the propriety of a class action is ordinarily a matter for the trial court's discretion. See, e.g., Clark v. Watchie, 513 F.2d 994, 1000 (9th Cir.), cert. denied, 96 S. Ct. 72 (1975); Foster v. Sparks, 506 F.2d 805, 808 (5th Cir. 1975). The recent case of Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975) (per curiam), however, casts doubt on the continuing validity of the refusal to certify the class on the ground expressed by the district court in *Wiesenfeld*. *Jacobs* holds that certification as a class action may be necessary to avoid mootness and thus strongly implies that this is a legitimate purpose for such certification. Id. at 129. See also Sosna v. Iowa, 419 U.S. 393, 402-03 (1975). But see footnotes 90-96 infra and accompanying text.

86. 420 U.S. at 641 n.9.

87. 396 F. Supp. at 309. The opinion does not indicate how the plaintiff defined the purported class.

88. Id.

89. 399 F. Supp. at 123-24. The plaintiffs in *Jablon* proposed to represent

> "all past, present and future husbands of old age benefits recipients whose husbands are entitled to Social Security benefits" but for the dependency requirements of 42 U.S.C. § 402(c)(1)(C), and . . . "all past, present and future recipients of old age benefits under the Social Security Act whose husbands are entitled to benefits under 42 U.S.C. § 402(c)" but for the dependency requirements of section 402(c)(1)(C).

399 F. Supp. at 123-24. The opinion in *Moss* does not indicate how the plaintiffs defined the purported class.

90. 422 U.S. 749 (1975).

91. 42 U.S.C. §§ 416(c)(5), (2) (Supp. IV, 1974).

92. 422 U.S. at 755.

nation should have been dismissed,[93] raised a nearly insurmountable barrier to future class actions sought to be maintained on claims arising under the Social Security Act. It ruled that federal jurisdiction over such suits derives solely from section 405(g) of the Act[94] and not from 28 U.S.C. § 1331,[95] upon which the plaintiffs before it had proceeded. One of the prerequisites for judicial review under section 405(g) is a "final decision of the Secretary made after a hearing to which [the claimant] was a party." Inasmuch as the complaint did not allege that the class members had filed applications with the Secretary, much less received final decisions, the Court held that "the District Court was without jurisdiction over so much of the complaint as concerns the class."[96]

The likely effect of the *Salfi* decision, as *Jablon* and *Moss* illustrate, will be to reduce, if not entirely eliminate, the usefulness of class action suits regarding Social Security. As such, it denies the fruits of challenges to those who are in all probability least likely to receive them any other way. Since the rulings in the lower court decisions under discussion apply only to the individual litigants involved, it is unclear whether each person seeking relief from the discriminatory provisions of the Social Security Act will be required to initiate suit on his own behalf.[97]

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93. Id. at 764.

94. 42 U.S.C. § 405(g) (1970) provides in part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action . . . . Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business . . . . As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

95. The Court said that the third sentence of 42 U.S.C. § 405(h) (1970), providing that

> [n]o action against the United States, the Secretary, or any other officer or employee thereof shall be brought under section 41 [the previous codification of § 1331] of Title 28 to recover on any claim arising under this subchapter [Title II of the Social Security Act]

does not merely codify the doctrine of exhaustion of remedies but bars § 1331 jurisdiction altogether. 422 U.S. at 757-61.

96. 422 U.S. at 764.

97. These cases are currently being appealed to the Supreme Court. Should the Court hear these appeals, the Social Security Administration will clearly abide by the Court's decision. If the Court does not hear the appeals, however, letting the lower court decisions stand, it is possible that the Social Security Administration will only distribute benefits in response to specific court orders. Telephone conversation with Kathleen Peratis, staff attorney with the American Civil Liberties Union, Jan. 29, 1976.

The Appropriate Remedy.—In *Wiesenfeld,* the statute which was declared unconstitutional[98] provided benefits for certain women but not for similarly-situated men. Theoretically, it could have been remedied by either eliminating the benefit altogether or by extending it to men. The Court gave the relief requested by the plaintiff—extension of the benefits to men. Although neither the Supreme Court nor the district court gave any justification for this choice, it appears to be consonant with the legislative purpose of the statute as interpreted by the Supreme Court.[99]

In the cases involving dependency requirements,[100] a benefit was available to both men and women, but was available to a broader class of women than men. The courts, having declared these statutory schemes unconstitutional, once again had the same two remedies available—either expanding the class of eligible men to equal that of women, or narrowing the class of eligible women to match that of men.

Three of the courts chose to expand the class of men eligible for benefits, although the *Jablon* court was the only one to articulate its reason. Its decision was based primarily on the factor of cost.[101] Upon a showing that elimination of the support requirement for males would cost about $411 million per year,[102] while the cost of administering the dependency requirements for both sexes could be as high as one billion dollars,[103] it ordered the Social Security Act to be interpreted and enforced without reference to such dependency requirements.[104]

The court in *Moss,* on the other hand, indicated that the class of eligible women should be narrowed to match that of men.[105] Its analysis was based on the view that "the Court must choose the alternative that Congress would have selected had it confronted the question."[106] Thereupon, the court embarked on an analysis of the legislative history of derivative Social Security benefits.

Derivative benefits, the court noted, were added to the Social Security benefit structure in recognition of the fact that the adverse

98. 42 U.S.C. § 402(g) (1970).

99. See notes 35-37 supra and accompanying text.

100. *Goldfarb, Silbowitz, Jablon,* and *Moss.*

101. 399 F. Supp. at 131-33.

102. Id. at 132.

103. Id.

104. Id. at 132-33. The court noted also that this was the remedy given in the similar situation of *Frontiero.*

105. It is important to note, as did the court, that § 405(g) (see notes 94-96 supra and accompanying text) limits the jurisdiction of the court to "affirming, modifying, or reversing the decision of the Secretary." Civil No. 74-721-Civ-T-H at 7. Thus, the effectuation of the court's holding as to the constitutional remedy is limited to affirming the decision of the Secretary. Id. at 14-15.

106. Id. at 9.

effects of a worker's loss of earning capacity might not be limited to the worker.[107] Since, the court reasoned, "one person's loss of earning capacity would adversely affect the economic welfare of another only if the latter were dependent upon the former," it inferred a congressional intent to bestow derivative benefits only on dependents.[108] The court was not swayed from this conclusion by the fact that section 402(b) does not require wives to have been dependent in order to receive derivative benefits. Rather, the court pointed out, the statute originally required dependency of a sort.[109] That requirement was eliminated not to "divorce derivative benefits from . . . dependency,"[110] but, rather, to facilitate administration of the benefits by creating a presumption of wives' dependency upon their husbands.[111] On this basis, the court concluded that reimposition of the dependency requirement for wives would more likely match congressional intent.[112]

To bolster its choice of remedy, the court observed that the Social Security Act was passed pursuant to article I, section 8 of the Constitution,[113] empowering Congress to expend funds for the general welfare. Judicial enlargement of the coverage of the Act, necessitating an increase in government expenditures,[114] would, the court reasoned, "impinge" upon the doctrine of separation of powers.[115]

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107. Id. at 10.

108. Id. at 11.

109. Id. The original § 402(b) (Act of Aug. 10, 1939, ch. 666, § 202(b), 53 Stat. 1364) required a woman to be "living with" her husband to qualify for benefits. Section 409(n) (Act of Aug. 10, 1939, ch. 666, § 209(n), 53 Stat. 1378) stated that a woman was living with her husband if "they are both members of the same household, or she is receiving contributions from him toward her support, or he has been ordered by any court to contribute to her support." To buttress its interpretation, the *Moss* court cited similar interpretations by congressional committees. See Hearings on Social Security Before a Subcomm. of the House Comm. of Ways and Means, 83d Cong., 1st Sess. 69 (1953); S. Rep. No. 1669, 81st Cong., 2d Sess. 63 (1950).

110. Civil No. 74-721-Civ-T-H at 11.

111. Id. at 11-12. "Benefits are provided for a wife or widow without a test for support because it is reasonable to presume that a wife or widow loses support, or a potential source of support, when the husband's earnings are cut off." H.R. Doc. No. 80, 92d Cong., 1st Sess. 22 (1971).

112. Civil No. 74-721-Civ-T-H at 12-13.

113. Article I, § 8 provides in part that "[t]he Congress shall have Power To . . . provide for the common Defense and general Welfare of the United States."

114. The court distinguished potential expenditures necessary for administration of the dependency requirement from expenditures for benefits which would be mandated by elimination of the dependency requirement on the grounds that the former "would not entail the type of 'spending' contemplated by Article I, Section 8." Civil No. 74-721-Civ-T-H at 13-14.

115. Id. at 13. This reasoning, although perhaps appealing on its face, is not as persuasive in other contexts. For example, it is not at all clear that a court faced with a racially discriminatory benefit scheme would be forced to eliminate the benefit altogether rather than extend it to the group wrongfully excluded.

In sum, the plaintiffs in *Moss* won the battle but lost the war. The court found the difference in requirements for men and women unconstitutional, but concluded that the proper remedy was extension of the stricter men's requirements to women. Thus, the Secretary's order was affirmed, and the plaintiff, concededly unable to meet this test, lost the case.

The ultimate effect of the decisions in the lower court cases following *Wiesenfeld* will likely be found in amendments to the Social Security Act which they may spark. A study group of the Senate Special Committee on Aging, which is at present examining gender-based distinctions in Social Security benefits, has recommended following the cases and dropping the dependency requirements altogether.[116] In testimony before the committee, however, Social Security Commissioner James B. Caldwell differed with this view. He pointed out that elimination of the dependency requirement could cost $450 million and that many of the men benefitted would be government workers with earnings not covered by Social Security and a few independently wealthy men.[117] Thus, he concluded, elimination of the dependency requirement would constitute a "windfall that should, if at all possible, be avoided."[118] He indicated that the preferable course would be to eliminate the windfall which has always existed for women[119] and implied that dependency requirements should apply to both sexes.

Whether or not the case law gives rise to legislative amendments, its effect is significant. These decisions represent one more step in the gradual process of assuring equal treatment for men and women. As a result of this litigation, the earnings of men and women will provide the same protection for their families under the Social Security Act.

II

Pregnancy Disability Benefits

Introduction.—During the past year, three decisions by federal courts of appeals[120] have held that private employer disability compensation

116. N.Y. Times, Oct. 24, 1975, at 18, cols. 1-3.
117. Id.
118. Id.
119. Id.
120. Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975), aff'g 375 F. Supp. 367 (E.D. Va. 1974), cert. granted, 96 S. Ct. 36 (1975) (No. 74-1589); Communications Workers of America v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975), rev'g 379 F. Supp. 679 (S.D.N.Y. 1974), petition for cert. filed, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975), aff'g 372 F. Supp. 1146 (W.D. Pa. 1974), cert. granted, 421 U.S. 987 (1975) (No. 74-1245).

plans which deny benefits for pregnancy or pregnancy-related disabilities violate title VII of the Civil Rights Act of 1964[121] and the Equal Employment Opportunity Commission's EEOC guidelines promulgated thereunder.[122] Title VII and the EEOC guidelines represent a potent new avenue of attack against sex discrimination by private employers, necessitated by the Supreme Court's reluctance to hold that disparate treatment of pregnancy-related disabilities is sex discrimination in violation of the equal protection clause of the fourteenth amendment.

Geduldig v. Aiello,[123] decided in 1974, marked a retreat from the Court's stronger stand in earlier sex discrimination cases.[124] In an

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See also Holthaus v. Compton & Sons, 514 F.2d 651 (8th Cir. 1975) (reversing the judgment of the lower court and ruling that discharge of an employee because of pregnancy-related disability in disregard of the policy extended towards other temporary disabilities was discrimination in violation of title VII); but see Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973) (holding that Delta Air Lines' denial of disability pay and sick leave pay to pregnant women did not violate title VII, because pregnancy is a voluntary and normal condition that does not meet the definition of sickness or disability).

121. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1970), provides:

> It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to 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 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.

122. The guidelines issued by the Equal Employment Opportunity Commission, 29 C.F.R. § 1604.10(b) (1975), provide:

> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.
> (b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.
> (c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

123. 417 U.S. 484 (1974).

124. In 1973, four of the Supreme Court justices were persuaded that sex, like race and national origin, is an inherently suspect classification under the equal protection clause. See Frontiero v. Richardson, 411 U.S. 677 (1973). When Cleveland Bd.

opinion delivered by Justice Stewart, *Aiello* held that the provisions of California's public disability insurance program[125] which exclude from coverage disabilities arising from normal pregnancy and childbirth do not constitute invidious discrimination in violation of the equal protection clause.[126] The Court found that the state had a legitimate financial interest in maintaining the program on a self-supporting basis, in sustaining benefit payments at an adequate level, and in keeping the employee contribution rate low.[127] Characterizing the California program as a social welfare program to compensate disabled workers, the Court reasoned that the legislature could constitutionally seek to remedy the problem on a step-by-step basis; California had simply chosen to legislate on aspects other than pregnancy.[128] Justice Stewart noted that, "[p]articularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point."[129]

Justices Brennan, Douglas, and Marshall dissented, adhering to the position that gender is an inherently suspect classification and must therefore be subjected to strict judicial scrutiny.[130] They found that the state's interest in cost control was not sufficient to justify the discriminatory practice, especially when sexually neutral means were available to reduce costs.[131]

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of Educ. v. LaFleur, 414 U.S. 632 (1974), which held that a school teacher cannot be forced to stop teaching after five months of pregnancy, was decided solely on due process grounds, however, without mention of equal protection, it became clear that the majority of the Court was not prepared to hold that sex was a suspect class. See Turner v. Department of Employment Security, 96 S. Ct. 249 (1975), which followed LaFleur's due process reasoning to invalidate a provision of Utah law disqualifying pregnant women from unemployment compensation for a period extending from 12 weeks prior to the expected date of birth through six weeks after childbirth.

125. Cal. Unep. Ins. Code §§ 2601-3272 (West 1972). California's disability insurance system, in effect for almost thirty years, was designed to complement the state's workmen's compensation and unemployment insurance programs by providing payments to private employees who are temporarily unable to work because of disability not covered by workmen's compensation. See California Compensation Ins. Co. v. Industrial Accident Comm'n, 128 Cal. App. 797, 276 P.2d 148 (Dist. Ct. App. 1954). The program is funded entirely from contributions deducted from the wages of participating employees. Each employee contributes 1% of his salary up to an annual maximum of $90. Cal. Unep. Ins. Code § 985 (West Supp. 1975). Depending upon the amount earned during the base period, an employee is eligible to receive benefits varying from $25 to $119 per week, id. § 2655, for a maximum period of 26 weeks. Id. § 2653. Disabilities suffered in connection with a normal pregnancy are excluded from coverage. Id. §§ 2626, 2626.2. The program now provides benefits for abnormalities and complications arising from pregnancies. Id.

126. 417 U.S. at 494.

127. Id. at 496.

128. Id. at 495.

129. Id.

130. Id. at 503.

131. Id. at 503-04.

Although the challenge in *Aiello* was based on the equal protection clause of the fourteenth amendment rather than on title VII and the EEOC guidelines, *Aiello* has been put forth as an obstacle to upholding the EEOC guidelines and invalidating private employer disability plans which deny pregnancy benefits. This section of the article analyzes the three most recent appellate cases which upheld the EEOC guidelines.

Distinguishing Aiello.—In all three circuit court cases, the defendant-employers contended that *Aiello* broadly held that disparate treatment of pregnancy in disability compensation plans is not sex discrimination. Each court distinguished *Aiello* and found sex discrimination to be present.

In *Wetzel v. Liberty Mutual Insurance Co.*,[132] two female employees brought a class action on behalf of all female employees of Liberty Mutual Insurance Company, alleging, *inter alia*, that the company's "income protection plan"[133] violated title VII. In this case of first impression, the Third Circuit articulated the argument upon which other cases have principally relied in distinguishing *Aiello*. The court pointed out that *Aiello* involved constitutional analysis whereas the issue in *Wetzel* turned on the interpretation of title VII.[134] Implicit in this distinction is the recognition that the requirements of the equal protection clause for state legislation may be less restrictive than Congress's statutory requirements enacted pursuant to that clause for private employers.[135]

Although holding that, "[o]n this distinction alone we believe appellant's reliance on Aiello is misplaced,"[136] the Third Circuit also relied on the difference in coverage between California's and Liberty Mutual's disability programs.[137] The state disability plan involved in *Aiello* excluded only normal pregnancy from eligibility, while the program under review in *Wetzel* excluded all pregnancy-related disabilities,

132. 511 F.2d 199 (3d Cir.), cert. granted, 421 U.S. 987 (1975) (No. 74-1215).

133. Liberty Mutual's income protection plan was partially funded through employee contributions. After an eight-day absence due to illness, an employee received a percentage of his salary. 511 F.2d at 203.

134. Id. Compare Seaman v. Spring Lake Park Independent School Dist., 387 F. Supp. 1168 (D. Minn. 1974) (holding that denial of sick leave pay, pursuant to a provision in a collective bargaining agreement, to an employee on maternity leave did not violate equal protection) with Gilbert v. General Elec. Co., 375 F. Supp. 367, 382 (E.D. Va. 1974) ("[t]he rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert," quoting Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971)).

135. For another recent example of this type of analysis, see Evidence, 1974/75 Ann. Survey Am. L. 333, which discusses the holding of the Supreme Court that certain wiretapping which would be permitted by the fourth amendment was forbidden under title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970).

136. 511 F.2d at 203.

137. Id.

including conditions which would be regarded as disabilities in non-pregnant persons, but which were excluded simply because they occurred in connection with pregnancy.[138]

The differences in coverage of the disability plans considered in *Aiello* and *Wetzel* are significant and might have warranted the same result in *Wetzel* even if the defendants had succeeded in convincing the court that *Aiello* should control the interpretation of title VII. *Aiello* involved a plan which compensated pregnancy-related disabilities and omitted from coverage only normal pregnancy expenses. It is questionable whether that decision would have been the same had the plan excluded pregnancy-related disabilities which would have been compensated in the absence of pregnancy. Thus, *Wetzel's* second ground for distinguishing *Aiello* provides substantial support for the Third Circuit's holding.

The Second Circuit's consideration of *Aiello* in *Communications Workers of America v. American Telephone & Telegraph Co.*[139] achieved *Wetzel's* result but through a significantly different procedural route. *Aiello* was decided while the case was still in the discovery stage and prompted the district court to dismiss the complaint sua sponte and certify the question to the Second Circuit.[140]

The district court placed primary emphasis on footnote 20 to Justice Stewart's opinion in *Aiello,* which states:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.[141]

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138. Id.

139. 513 F.2d 1024 (2d Cir.), petition for cert. filed, 43 U.S.L.W. 3684 (U.S. June 19, 1975) (No. 74-1601).

140. 379 F. Supp. 679 (S.D.N.Y. 1974). The district court consolidated the *Communications Workers* case with Women in City Gov't United v. City of New York, which charged that a health and hospitalization plan giving fewer benefits for pregnancy-related conditions than for other medical problems violated both the equal protection clause and title VII. The *Women United* case was also dismissed by the district court and is presently on appeal.

141. 417 U.S. at 496 n.20. Justice Stewart pointed out that California's disability insurance program excluded not only disabilities attributable to normal pregnancies

According to the district court in *Communications Workers,* this language provides "the key to the Court's decision [in *Aiello*]. It flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender)."[142] Under this view, the denial of pregnancy benefits in a disability compensation program is not invalid under either the equal protection clause or title VII unless it is a mere pretext to effect an invidious discrimination against women.

The Second Circuit gave short shrift to the district court's analysis and framed the issue more narrowly. The question for decision was whether *Aiello* mandated dismissal of the complaint for failure to state a claim on which relief could be granted under title VII.[143] The court answered the question in the negative. To underscore its disagreement with the district court's reliance on footnote 20,[144] the court cited nearly a dozen cases in support of its admonition against reading too much into "marginalia" of Supreme Court opinions not directly applicable to the facts at bar. According to the appellate court, footnote 20, properly viewed, is restricted to the validity of legislative classifications under the equal protection clause.[145] It was intended to refute the argument of the dissent in *Aiello* that greater judicial scrutiny should be applied to California's plan.

Like the court in *Wetzel,* the Second Circuit emphasized that *Aiello* was constitutionally rather than statutorily based.[146] The court noted that the Supreme Court made no mention of title VII or the EEOC guidelines in *Aiello,* which strongly suggested to the circuit court that the decision in *Aiello* was not intended to affect them.[147] The court observed in a footnote that Justice Stewart must have had the guidelines in mind, since he had called attention to them only five months earlier in *Cleveland Board of Education v. LaFleur.*[148]

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but also any disability of less than 8 days unless the employee is hospitalized, Cal. Unep. Ins. Code §§ 2627(b), 2802; all disabilities after 26 weeks, id. § 2653; and disabilities resulting from civil commitment as a dipsomaniac, drug addict, or sexual psychopath, id. § 2678. 417 U.S. at 488.

142. 379 F. Supp. at 681.

143. 513 F.2d at 1027.

144. Id. at 1028.

145. Id. at 1030.

146. Id. at 1031.

147. Id. at 1030.

148. Id. n.11. In referring to the 1972 amendment to title VII extending its coverage to state agencies and educational institutions, Justice Stewart observed:

> [T]he Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII. . . . While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future.

414 U.S. at 639 n.8.

In *Gilbert v. General Electric Co.*,[149] a class action similar to *Wetzel*, the Fourth Circuit not only distinguished *Aiello* by citing *Wetzel* and *Communications Workers*,[150] but introduced an additional interpretation of its own. The *Gilbert* opinion emphasized that cases arising under the equal protection clause and those arising under title VII involve the application of two different standards in determining whether sex discrimination exists.[151] Under the equal protection clause, there need be only a rationally supportable basis to uphold a legislative classification.[152] Thus, the court observed, while the Supreme Court considered the disparate treatment involved in *Aiello* to be discriminatory, it was not invidiously discriminatory, since it had "a rational relationship to the objective of the legislature in establishing the social welfare program under review."[153] Title VII, on the other hand, does not authorize a rationality test for determining discrimination nor does it require that the discrimination be "invidious."[154] Rather, the statute prohibits any and all sex discrimination in conditions of employment.[155] The only exception to title VII's mandate concerns a bona fide occupational qualification that is reasonably necessary to the normal operation of the particular business,[156] a defense not raised by the employer in *Gilbert*.[157]

Judge Widener dissented in *Gilbert*, believing that *Aiello* was controlling.[158] He argued that even if title VII had a broader reach than the equal protection clause, it would not invalidate the pregnancy exclusion at issue, absent a showing of sex discrimination.[159] "Since the Supreme Court has held, for precisely the same exclusion, there is a 'lack of identity between the excluded disability and gender as such,' the exclusion should no more support a finding of discrimination under Title VII than under the equal protection clause," he asserted.[160] Judge Widener's argument on this point cannot be ignored. Unless there are two different standards for determining the *existence* of sex discrimination (as opposed to the applicable legal standard once discrimination is found), then a finding by the Supreme Court of no discrimination in a comparable plan seems to be decisive here.

149. 519 F.2d 661 (4th Cir. 1975).
150. Id. at 666.
151. Id.
152. 417 U.S. at 495.
153. 519 F.2d at 666-67.
154. Id. at 667.
155. Id.
156. 42 U.S.C. § 2000e-2(e)(1) (1970).
157. 519 F.2d at 667.
158. Id. at 668.
159. Id.
160. Id. at 668-69.

The majority attempted to refute the dissent's argument by maintaining that the Supreme Court did in fact find discrimination (but not invidious discrimination) in the California plan in *Aiello*.[161] Given the language of footnote 20 of the *Aiello* opinion, however, the Fourth Circuit's conclusion, though heroic, is not entirely persuasive.[162]

Judge Widener argued further that *Aiello* was not decided in a "vacuum" but looked forward to title VII cases that were certain to follow.[163] Since the statute was neither involved nor mentioned in *Aiello,* this assumption is questionable. The more reasonable assumption, proffered by the court in *Communications Workers,* is that Justice Stewart, aware of the EEOC guidelines from his opinion in *LaFleur,* would not have intended to affect them sub silentio.[164]

Judge Widener's dissenting opinion asserted that Fourth Circuit precedent requires title VII to be interpreted by the same standards applicable to the equal protection clause.[165] Thus, if the California plan considered in *Aiello* was valid under the equal protection clause, then General Electric's plan must be valid under title VII. Judge Widener based his contention on *United States v. Chesterfield County School District*.[166] A cursory reading of this case shows that his reliance was misplaced. *Chesterfield* was a suit under the equal protection clause by black teachers allegedly fired because of racial discrimination. The school district had instituted a policy of dismissing teachers who scored below a certain level on a national standardized test. The fired teachers, who had scored below that level,[167] alleged that the classification was discriminatory under the Supreme Court's holding in *Griggs v. Duke Power Co.*,[168] which prohibited "an employment practice which operates to exclude Negroes [if it] cannot be shown to be related to job performance."[169]

The holding of *Chesterfield* was merely that the test of validity developed under title VII is also the proper test under the equal protection clause.[170] Judge Widener's attempt to bootstrap this into a general holding that title VII is in all cases congruent with the equal protection clause is clearly overextrapolation. It would render title VII a meaningless reiteration of the Constitution. The Second Circuit's

161. See note 153 supra and accompanying text.
162. See note 141 supra and accompanying text.
163. 519 F.2d at 669.
164. See note 148 supra and accompanying text.
165. 519 F.2d at 669.
166. 484 F.2d 70 (4th Cir. 1973).
167. Id. at 71-73.
168. 401 U.S. 424 (1971).
169. Id. at 431.
170. 484 F.2d at 73.

admonition to the district court in *Communications Workers* concerning *Aiello's* footnote 20 applies with full force here.[171]

Judge Widener's opinion does reveal an overlooked, anomalous by-product of the title VII attack on sex discrimination. Judge Widener pointed out that, under *Aiello,* a state disability program for private employees would be free to deny benefits for pregnancy, but, under title VII, a state's program for its own employees would not.[172] He found this inconsistency unjustified and would interpret title VII to eliminate it.[173] While the anomaly is clear, to pervert congressional intention in order to preserve consistency in the law seems unjustified in this context. If California's legislature may, consistent with the equal protection clause, tackle only parts of a problem, Congress should be afforded the same luxury.

Validity of the EEOC Guidelines.—After deciding that *Aiello* is no bar to suits under title VII, the *Gilbert* and *Wetzel* cases considered whether the guidelines promulgated by the EEOC[174] properly interpret the statute.[175] Both courts agreed that statutory construction by the EEOC, although not having the force of law and not binding on a federal court, is entitled to great deference if the administrative guidelines and their application are faithful to the legislative purpose.[176]

The more extended discussion occurred in *Wetzel,* where the court was urged by Liberty Mutual to reject the EEOC guidelines as inconsistent with the policy of the act.[177] The defendant relied on *Espinoza v. Farah Manufacturing Co.,*[178] where EEOC guidelines relating to discrimination based on national origin had been invalidated as inconsistent with congressional intent.[179] In *Espinoza,* the Supreme Court decided that discrimination based on national origin did not encompass discrimination against noncitizens, as the EEOC guidelines had provided. The court in *Wetzel,* however, properly discerned no overstepping of congressional bounds by the EEOC guidelines concerning pregnancy disability. It found that such guidelines furthered the legislative pur-

171. See text accompanying notes 144-45 supra.

172. 519 F.2d at 669.

173. Id.

174. See note 122 supra.

175. 519 F.2d at 663; 511 F.2d at 204-05. Although the Second Circuit in *Communications Workers* did not decide whether the EEOC guidelines correctly interpreted title VII, it observed that the guidelines were "entitled to 'great deference' unless their application would be inconsistent with an obvious Congressional intent." 513 F.2d at 1030 (footnotes omitted).

176. 519 F.2d at 664 & n.12, citing Griggs v. Duke Power Co., 401 U.S. 424 (1971); 511 F.2d at 204.

177. 511 F.2d at 205.

178. 414 U.S. 86 (1973).

179. Id. at 94-95.

pose of the Civil Rights Act of 1964, which is to strike at a broad spectrum of discriminatory practices, and that the guidelines were consistent with the plain meaning of the statute.[180]

The employers in *Wetzel* further argued that the present guidelines concerning pregnancy disability, issued in 1972, are inconsistent with the EEOC's earlier position and, therefore, the denial of pregnancy benefits does not violate title VII.[181] The Third Circuit recognized the EEOC's ability to update its promulgations to adapt to society's changing attitudes and referred to the *Espinoza* Court's statement that the most recently issued guideline is the one entitled to greatest deference.[182] The court noted that "this evolutionary process is a necessary function of our legal system," which must remain flexible and adaptable to society's maturation.[183]

Gilbert considered the issue of whether discrimination in fringe benefits was outlawed by title VII.[184] General Electric contended that fringe benefits were not properly within title VII's proscription of discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment."[185]

In rejecting this argument, the court relied upon the broad remedial purpose of title VII, which is "plainly spelt out in the act."[186] Title VII is aimed at eliminating discriminatory treatment in employment decisions extending beyond discrimination in wage rates, the court observed. It pointed out that the EEOC guidelines, which "are merely expressive of what is the obvious meaning and purpose of the Act,"[187] explicitly include fringe benefits within the scope of title VII.[188] The court noted, in addition, that General Electric was in no position to claim this exclusion since it stated in its annual report that "compensa-

180. 511 F.2d at 205.

181. Id.

182. Id. See 414 U.S. at 94.

183. 511 F.2d at 205.

184. 519 F.2d at 663-64. The fringe benefit at issue was General Electric's employee disability plan.

185. See note 121 supra for text of 42 U.S.C. § 2000e-2(a)(1) (1970). See also Bernstein & Williams, Title VII and the Problems of Sex Classification in Pension Programs, 74 Colum. L. Rev. 1203, 1214 (1974).

186. 519 F.2d at 663.

187. Id.

188. 29 C.F.R. § 1604.9 (1975) provides in part:

(a) "Fringe Benefits," as used herein include medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment. (b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

tion at General Electric is interpreted broadly to include not only monetary returns but also the value of benefit programs."[189]

Employers' Policy Arguments.—In *Aiello*, Justice Stewart wrote that California's state disability plan, which excludes pregnancy from benefit eligibility, divides potential recipients not into women and men, but into two groups, pregnant women and nonpregnant persons.[190] Because the second group included members of both sexes, even though the first was exclusively female, Justice Stewart was apparently satisfied that the classification was not sex-based.[191] In contrast, the circuit court in *Gilbert*, taking its cue from the *Aiello* dissent, stressed that pregnancy is a condition peculiar to women, that it is inevitably sex-linked, and that to single out a physical condition unique to women for less favorable treatment in an inclusive disability insurance plan is discrimination on the basis of sex.[192]

The employers in *Gilbert* and *Wetzel* attempted to distinguish pregnancy from other disabilities by claiming that pregnancy is not a "sickness" because it is "voluntary."[193] Neither court was receptive to these arguments.

Wetzel found pregnancy to be a "sickness" because it has essentially the same effects as any temporary disability.[194] The court pointed out that pregnant employees suffer the same economic burdens and loss of income[195] as any temporarily disabled employee. It concluded that "pregnancy is no different than any other temporary disability under an income protection plan offered to help employees through the financially difficult times caused by illness."[196] Since Liberty Mutual's plan covered almost all temporary disabilities but pregnancy, the plan discriminated against women and was therefore invalid.[197]

Gilbert relied on prior authority to reach the same result. After finding that neither "sickness" nor "disability" was defined by the Gen-

189. 519 F.2d at 664.

190. 417 U.S. at 496-97 n.20.

191. Id.

192. 519 F.2d at 664. The court in *Wetzel* did not specifically attack the *Aiello* Court's finding that the classification was not sex-based. It found *Aiello* distinguishable because it concerned a question of constitutional rather than statutory interpretation. See notes 134-35 supra and accompanying text.

193. 519 F.2d at 664-65; 511 F.2d at 206.

194. 511 F.2d at 206.

195. Id. In *Gilbert*, one of the plaintiffs worked until five weeks before the birth of her child. Because she was ineligible for disability benefits and had no alternative sources of income, the gas and electricity were cut off in her home and she was unable to provide adequately for her newborn child. 375 F. Supp. at 381 n.12.

196. 511 F.2d at 206.

197. Id.

eral Electric plan, the court looked to case law.[198] Although several cases construing insurance contracts had excluded pregnancy from the definition of "sickness,"[199] the court chose to rely on *Wetzel* and a line of labor arbitrations[200] which equated pregnancy with other disabilities.[201]

The employers also contended that because pregnancy is "voluntary," whereas other disabilities are not, it may be excluded from employer disability plans.[202] This argument fared no better than the first. *Wetzel* found voluntariness no justification for disparate treatment. The court reasoned that disability resulting from many voluntary activities, such as drinking intoxicating beverages, smoking, skiing, and playing handball or tennis, is covered under Liberty Mutual's plan.[203] Thus, even if pregnancy is "voluntary," there is no excuse for excluding it, since other voluntary disabilities are covered.[204] In fact, the court added, for a variety of reasons, including religious convictions or failure of contraception methods, pregnancy may not always be voluntary.[205]

The General Electric plan at issue in *Gilbert* was also found to cover other "voluntary" disabilities. For example, the plan provides benefits for disabilities arising from cosmetic surgery and attempted suicides.[206] Thus, the court found, "[w]hatever facile plausibility there might be to the argument that its plan does not cover 'voluntary' disabilities accordingly disappears in the face of the manner in which the defendant itself has construed and applied its plan."[207]

Employers have additionally argued that maintaining the financial integrity of their disability plans justifies exclusion of pregnancy benefits. Substantially increased cost to its sickness and accident plan was the reason given for GE's original refusal to grant maternity benefits.[208] Liberty Mutual argued that its disability plan does not violate title VII, because of the company's legitimate interest in maintaining the financial

198. 519 F.2d at 665.

199. The court cited Mutual Benefit Health & Accident Ass'n v. United Cas. Co., 142 F.2d 390 (1st Cir.), cert. denied, 323 U.S. 729 (1944); Price v. State Capital Life Ins. Co., 261 N.C. 152, 134 S.E.2d 171 (1964). 519 F.2d at 665 n.13.

200. Middletown Bd. of Educ., 56 Lab. Arb. 830 (1971); Republic Steel Corp., 37 Lab. Arb. 367 (1961); National Lead Co., 18 Lab. Arb. 528 (1952).

201. 519 F.2d at 665 & n.14.

202. Id. at 665; 511 F.2d at 206.

203. 511 F.2d at 206.

204. Id.

205. Id.

206. 519 F.2d at 665; 375 F. Supp. at 381.

207. 519 F.2d at 665.

208. 375 F. Supp. at 378.

integrity of the plan.[209] Cost is no defense, however, to a charge of sex discrimination under title VII.[210] Sexually neutral means are available for reducing costs, such as setting a maximum amount for any single disability. As the district court opinion in *Gilbert* pointed out, the issue involves not the amount paid but rather the discriminatory distribution of available funds.[211]

The district court in *Gilbert* also rejected a defense of business necessity,[212] the only valid defense under the EEOC guidelines. General Electric attempted to justify its exclusion of pregnancy-related disabilities by showing that its practice was one of business necessity, in that the prohibitive cost of including pregnancy-related disabilities would destroy the company's entire disability program. The court in *Gilbert* found that the cost projection analysis submitted by the company was merely speculative as to actual future costs.[213] Similarly, the Third Circuit in *Wetzel* found that the increased cost for inclusion of pregnancy in Liberty Mutual's insurance plan would not be "devastating" to the fiscal integrity of the program.[214]

General Electric also argued that exclusion of pregnancy disability benefits is necessary in order to prevent the disproportionate allocation of funds between men and women employees.[215] The company submitted data in *Gilbert* showing that women utilize the sickness and accident plan more frequently than men and, General Electric argued, the in-

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209. 511 F.2d at 206.

210. 29 C.F.R. § 1604.9(e) (1975) provides: "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

211. 375 F. Supp. at 382.

212. Id.

213. Id. at 379. General Electric also argued that pregnant women would submit unduly large claims because they are incapable of working for long periods of time during pregnancy and childbirth. Id. at 378. The district court found, however, that, absent complications, there appeared to be no medical reason why pregnant women cannot work up to the time of childbirth; it observed that many women cannot afford prolonged absences from work after childbirth. Id. at 377. The company further contended that pregnancy should be excluded because it required long absences from work. The court dismissed this argument, noting that lung cancer, major surgery and broken limbs generally occasion long periods of convalescence, yet are not excluded on that account. Id. at 374.

General Electric's concern that the disability program would be abused by women who might continue to claim benefits after they had fully recovered from childbirth and were capable of resuming employment was similarly dismissed by the district court. Id. at 378. Since claimants are required to submit medical certification of the date of termination of the actual disability and pregnancy-related conditions are medically verifiable, the danger of fraud was found to be no greater here than for other included disabilities. Id.

214. 511 F.2d at 206.

215. 375 F. Supp. at 379.

clusion of pregnancy benefits would increase this imbalance.[216] The district court found this argument equally unconvincing.[217]

The so-called business considerations discussed above which were offered by General Electric and the other employers do not meet the criteria of business necessities nor do they constitute a bona fide occupational qualification under the EEOC guidelines. The EEOC guidelines[218] mandate that the bona fide occupational qualification exception be interpreted narrowly[219] and specifically reject as justifiable business exceptions the refusal to hire a woman on the "assumption that the turnover rate among women is higher than among men."[220] The guidelines require that a woman be evaluated on the basis of her individual capabilities and not on stereotyped generalizations attributed to her sex.[221] The only situation which the Commission considers to be a bona fide occupational qualification is "[w]here it is necessary for the purpose of authenticity or genuineness," as in the case of the hiring of an actor or actress to fill a certain part.[222]

What will hopefully be the definitive ruling on the issue is expected imminently from the Supreme Court, which has granted certiorari and heard arguments in *Wetzel* and *Gilbert*.[223]

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216. Id. at 377-79.

217. The court pointed out that no study had been made of the cost of compensating for disabilities having an exclusive or higher incidence in men, such as vasectomies or heart attacks. Id. at 383. Moreover, there was no showing that the cost of pregnancy coverage would be substantially greater than the cost to the program of other specific disabilities, such as heart attacks. The court even suggested that if payment of disability benefits for pregnancy did provide a greater economic advantage to women, this was simply an acknowledgment of women's "biologically more burdensome" role in procreation. Id.

The district court also rejected General Electric's claim that, since a large percentage of women do not return to work after childbirth, payment of disability benefits would be equivalent to giving women termination pay not available to nonpregnant employees. Id. at 379. The court observed that termination pay is received by all workers who fail to return to work following illness or accident. Id.

218. 29 C.F.R. § 1604.2 (1975).

219. Id. § 1604.2(a).

220. Id. § 1604.2(a)(1)(i).

221. Id. § 1604.2(a)(1)(ii).

222. Id. § 1604.2(2). In Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), there was no showing that sex was a bona-fide occupational qualification necessary for the position of "assembly trainee" to justify a hiring policy that discriminated against women with preschool age children.

223. The two cases were consolidated by the Supreme Court. See 44 U.S.L.W. 3421 (U.S. Jan. 27, 1975) for a summary of the arguments presented. The *General Electric* case affects more than 100,000 employees and could involve millions of dollars in benefits accruing since 1971. N.Y. Times, Sept. 16, 1975, at 36, col. 3.

III

TITLE IX

Introduction.—In the early 1970's, the women's movement sought to codify and expand courtroom victories in the area of sex discrimination in education. In response to this thrust, Congress enacted title IX of the Education Amendments of 1972,[224] which, with certain important exceptions, prohibits sex discrimination in "any education program or activity receiving federal funds."[225] This portion of the article explores the scope and application of title IX in the context of certain controversial areas which will be affected by its mandate.

Although cast in the form of a general prohibition, title IX includes numerous important exceptions to the basic rule. With respect to admissions to educational institutions, for example, its prohibition of sex discrimination is limited to vocational and professional programs, public institutions of undergraduate higher education other than those which traditionally and continually from their establishment have had a policy of admitting only students of one sex, and all institutions of graduate higher education.[226] Single sex institutions in the process of

224. Act of June 23, 1972, Pub. L. No. 92-318, §§ 901-05, 907, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-86 (Supp. IV, 1974)), § 906, 86 Stat. 375, amending 29 U.S.C. §§ 203(r)(1), (s)(4), 213(a) and 42 U.S.C. §§ 2000c(b), 2000c-6(a)(2), 2000c-9, 2000h-2 (Supp. IV, 1974).

225. 20 U.S.C. § 1681(a) (Supp. IV, 1974). Title IX also prohibits discrimination against the blind in educational institutions or programs receiving federal funds. Id. § 1684. Its enactment was the culmination of a two-year legislative process. First, in 1970, the House Special Subcommittee on Education held hearings on discrimination against women. Hearings on § 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor, 91st Cong., 2d Sess. (1970). The emphasis of these hearings was limited female employment opportunity, with a focus on employment in higher education. As an outgrowth of the hearings, a general prohibition against sex discrimination in higher education institutions receiving federal funds was included in the general higher education appropriations bill of 1971. H.R. 16098, 92d Cong., 1st Sess. (1971). The bill, however, died in committee. E. Green, Foreword to Discrimination Against Women at IX (C. Stimpson ed. 1973). In 1971, House hearings were held on an omnibus higher education bill which included a ban on sex discrimination. Hearings on H.R. 7248 Before the Subcomm. on Educ. of the House Comm. on Educ. and Labor, 92d Cong., 1st Sess. (1971). Again, little attention in the hearings was devoted to student-oriented problems in areas such as admissions, athletics, or financial aid. The bill, H.R. 7248, 92d Cong., 1st Sess. (1971), which was limited to higher education, was passed in the House on Nov. 5, 1971. 117 Cong. Rec. 39354 (1971). The Senate counterpart, S. 659, which had been passed on Aug. 6, 1971, id. 30500, extended the ban on sex discrimination to all institutions of vocational, professional, or higher education receiving federal funds. The Conference Committee adopted the Senate's broader approach. Senate Conf. Rep. No. 92-798, 92d Cong., 2d Sess. 221 (1972).

226. 20 U.S.C. §§ 1681(a)(1), (5) (Supp. IV, 1974).

changing to a coeducational system were given six years to comply.[227] Institutions exempted from the admissions provision include private and public preschool, elementary and secondary institutions, private undergraduate colleges, and public, traditionally single sex undergraduate colleges.[228] Institutions exempted from admissions provisions are, however, still subject to title IX prohibitions in other respects.[229]

Title IX completely exempts from all provisions institutions whose primary purpose is the training of members of the United States military services,[230] as well as institutions controlled by religious organizations where enforcement would be inconsistent with the religious beliefs of such organizations.[231] As amended in 1974,[232] title IX also provides complete exemption for social fraternities and sororities, and for the YMCA, YWCA, Girl Scouts, Boy Scouts and other tax-exempt youth groups which have traditionally been limited to persons of one sex.[233] In response to the concerns of more conservative members of the House of Representatives, title IX specifically states that the general prohibition does not require preferential treatment to redress existing sexual imbalances.[234] Moreover, the law specifically permits the maintenance of separate housing facilities for each sex.[235]

Title IX provides no guidance as to what forms of discrimination are prohibited, but only empowers each federal department and agency

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227. Id. § 1681(a)(2) provides in part:

> In regard to admissions to educational institutions, this section shall not apply (A) . . . for six years [after the date of enactment], in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is later.

228. Id. §§ 1681(a)(1), (5). A traditionally single sex institution is defined as one which traditionally and continuously since its establishment has had a policy of admitting members of only one sex.

229. The limitations of §§ 1681(a)(1), (2), and (5) apply only to admissions.

230. Id. § 1681(a)(4).

231. Id. § 1681(a)(3).

232. Act of Dec. 31, 1974, Pub. L. No. 93-568, § 3(a), 88 Stat. 1862.

233. 20 U.S.C. § 1681(a)(6) (Supp. IV, 1974).

234. Id. § 1681(b). Nine Republican Congressmen, in an "additional view" to the report of the Education and Labor Committee, had urged the addition of the language contained in § 1681(b). H.R. Rep. No. 554, 92d Cong., 1st Sess. 251-53 (1971). It should be noted, however, that § 1681(b) specifically does not preclude the use of statistical evidence showing sexual imbalance as to services, benefits, or activities in determining whether sex discrimination exists.

235. 20 U.S.C. § 1686 (Supp. IV, 1974).

which extends funds to educational programs to "effectuate the provisions" of title IX.[236]

These governmental entities are authorized to issue rules or regulations to be effective upon presidential approval[237] and to cut off federal funds for specific programs as to which there has been an express finding, after opportunity for a hearing, of noncompliance.[238] Fund termination, or refusal to grant or continue funds, is permitted, however, only where it has been determined that compliance cannot be secured by voluntary means.[239] Finally, title IX provides for judicial review of departmental actions, specifically authorizing review of fund termination and actions in which an agency has refused to grant funding due to noncompliance.[240]

Although title IX was enacted on June 23, 1972,[241] its actual implementation required the promulgation of agency regulations. The Department of Health, Education and Welfare (HEW), which has the greatest responsibility for the federal funding of educational programs,[242] did not publish proposed regulations until June 20, 1974,[243] almost two full years after the enactment of title IX.[244] The final regulations, implemented by the HEW Office for Civil Rights (OCR), became effective on July 21, 1975.[245]

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236. Id. § 1682.

237. Id.

238. Id.

239. Id. Before termination of funds, the agency must inform the congressional committees with jurisdiction over the educational program in question of the circumstances of and grounds for fund termination. The fund termination takes effect 30 days after the filing of such report. Id.

240. Id. § 1683.

241. Pub. L. No. 92-318, 86 Stat. 374 (1972).

242. HEW has funding authority for 16,000 public school systems and almost 2,700 postsecondary institutions. Press Release by Caspar W. Weinberger, Secretary of HEW, June 3, 1975, at 1.

243. 39 Fed. Reg. 22228 (1974).

244. Already concerned about the limitations placed by Congress on the law's basic mandate, feminist organizations and their congressional supporters viewed HEW's slow pace as a case of bureaucratic footdragging. Ann Scott, Vice President for Legislation, Higher Education Task Force of the National Organization for Women (NOW), viewed the agency's delay in issuing regulations "[a]s a further instance of unconcern." Hearings on S. 2518 Before the Subcomm. on Educ. of the Senate Comm. on Labor and Pub. Welfare, 93d Cong., 1st Sess. 73 (1973). Peter Holmes, Director of the Office for Civil Rights (OCR) of HEW, in a letter to Senator Walter Mondale, Chairman of the Senate Subcommittee, responding to criticism by the Senator of the delay, stated that "[t]o define in clear and specific terms the obligations conferred by Title IX in areas such as athletics and the whole spectrum of employment rights, in elementary and secondary as well as higher education, has not been a simple undertaking." Id. at 231. Holmes continued, "[t]o be sure, we are dealing with complex and sensitive issues." Id. at 235.

245. 45 C.F.R. § 86.1 (1975).

While title IX's general format gave HEW substantial flexibility, it also required the agency to establish policies frequently at odds with the social and economic interests of significant sectors of society. The nature and legitimacy of the most controversial of these policies are examined below.

Athletics.—The most controversial area affected by title IX and the HEW regulations is interscholastic athletic programs. Even before the passage of title IX, female athletes had begun successfully to challenge on equal protection grounds long-standing sex barriers to their full participation in interscholastic athletics.

In *Brenden v. Independent School District,*[246] one of the first cases to deal with this problem, two outstanding female high school athletes sought to enjoin enforcement of the Minnesota State High School League rule which prohibited girls from participating in the boys' interscholastic athletic program.[247] Desiring to participate in noncontact sports for which their schools provided only male teams, the plaintiffs asserted that the rule violated their rights under the equal protection clause.[248]

The Court of Appeals for the Eighth Circuit agreed. Applying the invigorated rational relationship test articulated in *Reed v. Reed,*[249] the court held that the failure of the rule to consider the plaintiffs' individual merits rendered it unconstitutional as applied to these plaintiffs.[250] In granting the injunction, however, the Eighth Circuit emphasized that the case did not require consideration of whether separate but equal facilities would violate the equal protection clause or whether exclusion of females is justified in contact sports.[251]

In a more recent case, *Fortin v. Darlington Little League, Inc.,*[252]

246. 477 F.2d 1292 (8th Cir. 1973), aff'g 342 F. Supp. 1224 (D. Minn. 1972).

247. 477 F.2d at 1294.

248. Id.

249. 404 U.S. 71 (1971). See discussion at note 4 supra.

250. 477 F.2d at 1302. See also Gilpin v. State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1973), another suit brought not under title IX but under the equal protection clause. In *Gilpin,* the plaintiff sought injunctive relief from enforcement of a state interscholastic rule, similar to that at issue in *Brenden,* prohibiting mixed athletic competition. Id. at 1236. The interscholastic athletic association argued that without a mixed competition bar girls would be required to compete against superior male athletes and would lose much of the benefit to be gained from individual competitive achievement. The association further contended that abolition of the rule would jeopardize the state's athletic programs for girls. Id. at 1242. In granting the injunction, the court held that, although the state's purported goal of advancing female athletics was laudable, the means employed (a total bar on mixed competition) was overbroad and a violation of equal protection. Id. at 1243. Although a mandatory sex separation rule might not be discriminatory where equivalent programs for each sex were provided, such requirement was discriminatory in the instant case where no female team was provided.

251. 477 F.2d at 1295.

252. 514 F.2d 344 (1st Cir. 1975).

a father and his ten-year-old daughter sought injunctive and declaratory relief against the denial of the daughter's right to participate in Little League baseball.[253] They asserted that denying her the same places of public accommodation and recreational activities that boys enjoyed violated equal protection.[254] The Court of Appeals for the First Circuit, citing *Schlesinger v. Ballard*,[255] asserted that the classification was a denial of equal protection unless it could be shown to rest "on a convincing factual rationale going beyond 'archaic and overbroad generalizations' about different roles of men and women."[256]

The Little League offered the testimony of a physician experienced in treating sports injuries but unfamiliar with female athletes who asserted that girls were more susceptible to injury than boys.[257] This evidence was rebutted by expert testimony introduced by the plaintiff.[258] Given the conflicting evidence, the court refused to accept the view that girls of the age group in question were more injury-prone than boys.[259] Furthermore, citing *Weinberger v. Wiesenfeld*,[260] the court stated that even if such a conclusion was " 'not entirely without empirical support,' it represents the sort of 'gender-based generalizations [which] cannot suffice to justify' the categorical exclusion of girls."[261]

The court held that the denial of participation to all girls constituted an unconstitutional denial of equal protection.[262] It qualified the sweep of its holding, however, in noting that "[n]othing we say is meant to preclude recognition of bona fide distinguishing factors between the sexes in some sports at some ages and in some circumstances."[263] Nonetheless, *Fortin* can be read to place a heavy burden on those seeking to exclude on the basis of sex. They will not be able to rely on what may seem to be common sense generalizations, nor will they have a chance of prevailing unless they can produce strong empirical evidence to support their positions.[264]

Efforts to enjoin enforcement of mixed competition rules have been

253. Id. at 345-46.
254. Id. at 346.
255. 419 U.S. 498 (1975). See discussion at note 40 supra.
256. 514 F.2d at 348, quoting 419 U.S. at 508.
257. 514 F.2d at 349.
258. Id.
259. Id. at 350-51.
260. 420 U.S. 636 (1975). See discussion at notes 23-39 supra and accompanying text.
261. 514 F.2d at 350 n.5, quoting 420 U.S. at 645. The court noted parenthetically that the Little League accepted boys of all physical conditions, even the handicapped. 514 F.2d at 350.
262. 514 F.2d at 351.
263. Id.
264. Other cases in which state rules barring mixed interscholastic competition in a noncontact sport were enjoined on equal protection grounds include Morris v. State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973); Reed v. School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972).

less successful where separate programs are provided for the sexes. In *Bucha v. High School Association*,[265] two female high school students brought a class action to enjoin the enforcement of a statewide interscholastic regulation barring girls from interscholastic swimming competition.[266] After the institution of the action, the state athletic association amended its bylaws to permit girls' teams in interscholastic swimming, but placed certain restrictions on the girls' teams that were inapplicable to their male counterparts.[267] Plaintiffs challenged, on equal protection grounds, the validity of the restrictions, the general bar on mixed competition, and what they considered to be the less competitive nature of the female team.[268]

The court granted defendants' motion for summary judgment, rejecting the equal protection claim. Applying the *Reed* rational relationship test,[269] it concluded that the physical and psychological differences between the sexes could justify separate programs and different rules.[270] It conceded, however, that had Congress or the state legislature enacted a law in education analogous to title VII in employment (such as title IX), it might have found the different levels of competition invalid and granted the injunction.[271]

In *Darrin v. Gould*,[272] the Supreme Court of Washington suggested that exclusion on the basis of sex from participation in contact sports may violate the equal protection clause of the fourteenth amendment. Two high school girls, denied the right to participate on the boys' football team due to a mixed competition bar,[273] instituted a class action in state court seeking an injunction against enforcement of the rule. The girls had passed the required physical tests and were found eligible to play by the school football coach.[274]

The lower court denied relief, finding the rules reasonable as applied to females as a class on the ground that females were more susceptible to injury[275] than males.[276] The Supreme Court of Washing-

265. 351 F. Supp. 69 (N.D. Ill. 1972).
266. Id. at 71.
267. Id.
268. Id.
269. See note 4 supra.
270. 351 F. Supp. at 74-75.
271. Id. at 75. Other cases in which rules barring mixed competition have been upheld include Ritacco v. School Dist., 361 F. Supp. 930 (W.D. Pa. 1973) (separate but equal programs for each sex where rational are valid).
272. 85 Wash. 2d 859, 540 P.2d 882 (1975).
273. Id. at 861, 540 P.2d at 884.
274. Id.
275. Civil No. 63556 (Wash. Super. Ct. Oct. 9, 1973) at 4-6. The court did not argue that the weaker "physical structure" of girls supported a total ban on female participation in football; rather, the court suggested that this factor supported the prohibition against mixed football competition. Id. at 6.
276. Id. at 8. The court implied that the decision might improperly deny the

ton reversed. Noting that both boys and girls risk physical injury in contact sports such as football,[277] the court concluded that members of both sexes are entitled to a determination of eligibility based on their individual qualifications.[278] In treating girls differently from boys, the court concluded that the rules prohibiting mixed competition violated the equal rights provision of the state constitution,[279] "if not the Equal Protection Clause of the Fourteenth Amendment."[280]

The HEW title IX regulations in the area of athletics[281] contain a general prohibition against sex discrimination in interscholastic, intercollegiate, club, and intramural athletics.[282] That general ban is qualified by a subsequent provision which permits the operation of separate teams on the basis of sex where "selection for such teams is based upon competitive skill or the activity involved is a contact sport."[283] In effect, the regulations allow separate teams in all contact sports[284] as well as in the overwhelming majority of noncontact sports on the in-

girls who brought the action proper access to the boys' football team. The court noted, however, that as a result of the nature of a class action, the court was "not being asked to carve out an exception in the law to benefit three particular girls in their circumstances." Id. The court therefore concluded that "the rights of the Darrin girls must be balanced against the collective rights of all high school girls." Id.

277. 85 Wash. 2d at 876, 540 P.2d at 892.

278. Id. at 867, 540 P.2d at 887. Citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), the court noted that under the due process clause of the fourteenth amendment participants are entitled to "an individualized determination of their qualifications, not a determination based on the qualifications of a majority of the broader class of which the individual is a member." 85 Wash. 2d at 867, 540 P.2d at 887. Despite its view that the rules barring mixed competition prevented such determinations for girls, the court did not find a due process violation.

279. Wash. Const. art. 31, § 1, states: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."

280. 85 Wash. 2d at 877, 540 P.2d at 893. In finding the bar on mixed competition a violation of the equal rights amendment to the state constitution, the court found support in an analogous Pennsylvania state court case. Id. at 872-74, 540 P.2d at 890-91. In Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839 (Pa. 1975), the court held that rules barring mixed competition enforced by the state interscholastic athletic association violated the equal rights amendment to the state constitution. Id. at 841. It did not consider whether the rules violated the fourteenth amendment of the United States Constitution. Although the court did not suggest that classification by sex could be made in contact sports, it did recognize that an individual girl's weak physical condition or susceptibility to injury might be a proper basis of exclusion. Id. at 843. In granting the injunction, the court upheld the right of qualified females to take part on the boys' team, even where a girl's team was provided.

281. 45 C.F.R. § 86.41 (1975).

282. Id. § 86.41(a).

283. Id. § 86.41(b).

284. "Contact sports" are defined to include "boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which includes bodily contact." Id. It is interesting to note, by comparison, that the New York State regulations which permit mixed competition in interscholastic noncontact sports include among a listing of contact sports baseball, soccer, team handball, and volleyball. 8 N.Y.C.R.R. § 135.4(c) (1974).

terscholastic, intercollegiate, and club levels, since team selection is generally based on "competitive" skill. Only on the intramural level, where individual skill plays a lesser role in selection of participants, might separate teams be held discriminatory in noncontact sports.

Where a team in a noncontact sport is operated only for one sex and no corresponding team is offered for the other sex, the regulations require that members of the excluded sex be given an opportunity to try out for the team.[285] In this respect the regulations codify the narrow holding of *Brenden*.[286] In addition, the regulations require the provision of equal athletic opportunity for members of both sexes by institutions which run or sponsor interscholastic, intercollegiate, club, or intramural athletics.[287] A list of factors relevant to a determination of whether equal opportunity exists is specifically provided in the regulations.[288] While they do not require equal aggregate expenditures for members of both sexes, they do provide that the failure to make adequate funding available to members or teams of one sex may be a factor in the Department's determination of equal opportunity.[289]

The HEW athletic regulations have created a storm of controversy. The uproar, not surprisingly, has centered on the economic implications of the equal opportunity provision, with the most intense opposition emanating from the National Collegiate Athletic Association (NCAA). Its efforts have been directed, to date unsuccessfully, towards the adoption of an exemption for "revenue-producing" sports from regulation under title IX.[290] Basic to the NCAA opposition is its fear of indiscrim-

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285. 45 C.F.R. § 86.41(b) (1975).

286. 477 F.2d at 1295, 1302. See discussion at notes 246-51 supra and accompanying text.

287. 45 C.F.R. § 86.41(c) (1975).

288. Id. They include but are not limited to the following:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice time;
(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.

289. Id.

290. Senator Tower introduced an amendment to the Education Amendments of 1974 that would have exempted all revenue-producing sports from title IX enforcement. 120 Cong. Rec. S8488 (daily ed. May 20, 1974). The Conference Committee, however, deleted the Tower Amendment. Conf. Rep. No. 93-1026, 3 U.S. Code Cong. & Ad. News 4271 (1974). Included instead was the Javits Amendment, mandating prompt HEW publication of proposed regulations which would "include with respect

inate use of the aggregate income factor.[291] HEW, through the regulations as well as various public statements, has stressed that parity of expenditures is not a requirement but rather only one of several factors to be considered in the determination of equal opportunity.[292] Nevertheless, it is conceivable that enforcement of the equal opportunity provision may, at least where resources are scarce, require monies to be diverted from men's athletic programs to those for women.[293]

Prior to the publication of proposed regulations, OCR initiated a complaint alleging a " 'large scale pattern of discrimination against female athletes' " at the University of Minnesota.[294] The complaint, which was filed jointly with the Twin Cities Student Assembly, alleged that women made up forty-two percent of the university's student body but received less than one percent of the intercollegiate sports budget.[295]

Two days after the publication of HEW's proposed title IX guidelines, the school increased the women's budget by more than 300%.[296] Furthermore, it was reported that an effort was begun to pressure the state legislature to provide $700,000 for the university's sports program,

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to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, § 844, 88 Stat. 484 (1974). In July 1975, the House Education and Labor Committee defeated an effort by Congressman James O'Hara, Post-Secondary Education Subcommittee Chairman, to amend title IX by exempting revenue-producing sports. N.Y. Times, July 10, 1975, at 32, col. 4. President Ford, however, informed the chairmen of the congressional committees dealing with title IX that he would welcome hearings on the issue of exempting revenue producing sports. The Senate Subcommittee on Education held hearings in September 1975 on the Tower Amendment. Senator Tower and Dr. John Fuzak, President of the NCAA, stressed that title IX regulation would result in reduced revenues from revenue-producing sports, leaving less money to spend on other sports activities, including women's sports. N.Y. Times, Oct. 2, 1975, at 51, col. 3.

291. Dr. William E. Davis, President of Idaho State University, noted at the 1975 NCAA convention that "about $300 million was spent on intercollegiate athletics by all NCAA members last year. Can you imagine them getting up a total of $300 million more?" N.Y. Times, Jan. 6, 1975, at 39, col. 3. One of the three goals of the NCAA convention was reported to be preventing title IX "from becoming a 'threat to entire athletic programs.' " Id. at 37, col. 1.

292. "The Regulations do not demand dollar-for-dollar matching expenditures for each sex." Press Release of Caspar W. Weinberger, Secretary of HEW, June 3, 1975, at 4. "Clearly, it is possible for equality of opportunity to be provided without exact equality of expenditure." 40 Fed. Reg. 24135 (1975).

293. See, for example, the comments of Charles Crawford, coach of the men's basketball team at Queens College, in an article urging men's coaches and athletic directors to cooperate with title IX: "Under current economic conditions, little or no new revenue will be available. With women getting a greater share of those unexpanding resources, men's programs will be asked to stand still while the women attempt the long-distance run to equality." Crawford, Title IX: No Reason for Fright, N.Y. Times, Aug. 10, 1975, § 5, at 2, col. 4.

294. Wehrein, University of Minnesota Reacts, 1 Women's L. Rep. 1.21 (Special Educ. Supp. Sept. 15, 1974).

295. Id.

296. Id.

to be divided equally between men and women.[297] The university's response was probably based on the tougher requirements in the proposed regulations[298] since deleted in the final rules—most notably the affirmative action provisions.[299] It is doubtful that the university would have responded as rapidly under the more complex and less aggressive final regulations.

Subsequent to the passage of title IX and adoption of the HEW regulations, and perhaps in response to them, the state of California enacted a statute requiring that athletic programs operated by the state's colleges, publicly financed community colleges, and universities "be provided on as equal a basis as is practicable to male and female students."[300] The law further provides that "[t]he costs of providing these equal opportunities may vary according to the type of sports contained within the respective men's and women's athletic programs."[301] Finally, it states that "[a]dditional sources of revenue should be determined to provide additional funds for these equal opportunity programs."[302] The statute is thus a conservative one: it permits the continuation of discriminatory practices if it would be impracticable to change them; it sets up a varying standard of equal opportunity; and it provides that the costs of redressing unequal opportunity should be absorbed only by new sources of revenue. Presumably, if the governing authority determines that no new funds are available for athletics, the failure of a college to provide a women's basketball team could not be redressed from the existing sports budget.

In contrast to the narrow scope of the California statute, New Jersey has recently enacted a general ban against sex discrimination in the public schools which has been broadly interpreted in relation to athletics.[303] Since that statute's adoption, the state interscholastic athletic

297. Id.

298. 39 Fed. Reg. 22236 (1974).

299. The proposed regulations required recipients to make affirmative efforts with regard to members of a sex for which athletic opportunities previously have been limited . . . to: (1) Inform members of such sex of the availability for them of athletic opportunities equal to those available for members of the other sex and of the nature of those opportunities, and (2) Provide support and training activities for members of such sex designed to improve and expand their capabilities and interests to participate in such opportunities.

39 Fed. Reg. 22236 (1974). Furthermore, the proposed regulations required recipients to "make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize such opportunities for members of both sexes." Id.

300. Cal. Educ. Code § 22504.7 (West Supp. 1975).

301. Id.

302. Id.

303. N.J. Stat. Ann. § 18A: 36-20 (Supp. 1975). "No pupil in a public school in this state shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of . . . sex."

association has amended its regulations to require, if sufficient female interest is demonstrated, the provision of a girls' team, even in contact sports, equivalent in equipment and coaching to the boys' team.[304] The new rules further provide that, if no separate team is available for girls due to lack of interest, they be allowed to try out for the boys' team.[305]

Textbooks.—While admitting that the problem of sex stereotyping in textbooks is a serious one,[306] HEW, in its final regulations, specifically exempted textbook and curricular materials from regulation under title IX.[307] It justified the exemption on the ground that proper statutory interpretation prohibits the extension of regulation into constitutionally sensitive areas, absent a specific mandate to the contrary.[308] Fearing that textbook regulation would turn the Department into a federal censor and would raise first amendment freedom of expression problems[309] and finding no legislative history concerning textbooks, HEW opted for nonregulation.[310]

Even if HEW were to elaborate on the nature of the first amendment problems raised by textbook regulation[311] and more rationally explain its posture, such a course would not surmount what appears to be the real roadblock to HEW action—the controversial political issues inherent in textbook regulation.

In announcing the final regulations, Caspar Weinberger, the HEW Secretary, commented that it would be "wholly inappropriate" for the federal government to regulate the content of textbooks and that the

304. Karen Cristiano, a New Jersey high school student, wanted to compete on the school fencing team in 1973. At the time, mixed interscholastic competition was permitted in noncontact sports. An amateur fencing group, however, convinced the state interscholastic athletic association that fencing was really a contact sport. As a result, Karen was dropped from the team. She subsequently led a lobbying fight for the passage of the nondiscrimination statute cited in note 303 supra. After its passage, Karen began a legal action to overturn the NJSIAA regulations. Reportedly, the Association decided to change its regulations to permit mixed competition in contact sports only after receiving legal advice that such a change was required by the new statute. N.Y. Times, Dec. 13, 1974, at 33, col. 1, 40, col. 3.

305. N.Y. Times, Dec. 13, 1974, at 40, col. 3.

306. 40 Fed. Reg. 24135 (1975).

307. 45 C.F.R. § 86.42 (1975). "Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials." For a discussion of the nature and effects of sex stereotyping in textbooks, see Note, Sex Discrimination: The Textbook Case, 62 Calif. L. Rev. 1312, 1314-24 (1974).

308. 40 Fed. Reg. 24135 (1975).

309. Id.

310. Id.

311. Regulation of the use of sexually biased textbooks in federally funded schools would not preclude the publication of such materials. Admittedly, marketplace economics would discourage the publication of a textbook that is likely to be banned from federally funded schools due to sexist content. Yet there is no authority to support a view that the right to publish profitably is protected by the first amendment. See Note, Sex Discrimination: The Textbook Case, supra note 307, at 1329.

issue was "more properly dealt with at the state and local level."[312] Implicit in that statement is the view, not without merit, that state and local governments are better equipped than the federal government to resolve highly charged, socially divisive issues and that a multiplicity of local standards is preferable to one federal rule.

As yet, only one state, California, has enacted specific legislation prohibiting school board adoption of textbooks containing "matter reflecting adversely" upon persons due to their sex.[313] The statute requires that educational materials adopted by school boards accurately portray "[t]he contributions of both men and women in all types of roles, including professional, vocational, and executive roles."[314]

The enforcement of these far-reaching provisions, however, has been less than vigorous.[315] In 1974, the California Curriculum Commission considered the report of the Legal and Factual Analysis Committee, established pursuant to the aforementioned legislation.[316] The Commission recommended, following some minor revision, the adoption of all the six or seven thousand books reviewed by the Committee. One commentator asserted that the Curriculum Commission, uninterested in requiring content revisions to eliminate sexism, focused almost entirely on the utility of the books in question (English texts) as reading tools.[317] The State Board of Education adopted the recommendations of the Commission, thereby authorizing the use of the texts involved for five years.[318] While it is too early to conclude that the California statute will be ineffectual, it is clear that strong legislation must be combined with administrative commitment in order to effectuate change.

Course Offerings and Programs.—Girls seeking to take vocational education courses in traditionally male-dominated trades have in the past faced Catch-22 arguments asserted to support their exclusion. Be-

312. HEW Press Release, Statement by Caspar W. Weinberger, Secretary of HEW, June 3, 1975, at 3. A New York Times editorial echoed Weinberger's view:

> The Department of Health, Education and Welfare has wisely resisted pressures to include the content of textbooks in its guidelines. Expert studies have provided ample illustrations that many of these teaching materials are indeed infected with male chauvinism, but Federal censorship is not the remedy. Local school boards and educators can better re-educate authors and publishers through care in selecting teaching materials.

N.Y. Times, June 5, 1975, at 36, col. 1.

313. Cal. Educ. Code § 9243 (West 1975). The California statute prohibits the use of instructional material which contain "any matter reflecting adversely upon persons because of their race, color, creed, national origin, ancestry, sex or occupation."

314. Id. § 9240(a).

315. See Note, Sex Discrimination: The Textbook Case, supra note 307, at 1330-31.

316. Id.

317. Id. at 1331.

318. Id.

lieving that even qualified women will be excluded because of their sex from union membership, school officials have argued that to offer training to a girl can only deprive a boy of an actual opportunity to get a job.[319] Some unions, however, have stated that they would be quite willing to admit women but cannot find trained applicants.[320]

The final regulations include a general prohibition against segregating courses or programs or requiring or refusing participation in any course or program on the basis of sex.[321] To counteract the fact that girls have, in the past, been rarely encouraged to take courses in such male-dominated areas as the industrial arts,[322] the regulations ban sex discrimination in counseling and guidance.[323] Specifically prohibited is the use of different testing and counseling materials for each sex. Only when such materials cover the same occupations and interest areas and are needed to eliminate sex bias is their use allowed.[324] Schools are further required to investigate whether disproportionate representation of one sex in a class or course of study is the result of the use of discriminatory counseling materials.[325]

Controversy surrounding the general ban on sexually segregated classes resulted in the promulgation of certain limitations on the scope of the regulation. As originally proposed, it would have required sex integration of all classes, with no exceptions, including health and physical education.[326] Opponents of the proposal asserted that integrated physical education classes would lead to greater permissiveness,[327] while

319. "Why should we admit women to vocational education courses on a whim, even if it is a strong whim, when it will deny admittance to an employable male? The unions won't admit women and they can't get jobs." Interview with Donald Fowler, Assistant to the California State Director of Vocational Education, Oct. 17, 1973, in Shelton & Berndt, Sex Discrimination in Vocational Education: Title IX and Other Remedies, 62 Calif. L. Rev. 1121 (1974).

320. "We would love to admit a woman to the union, but we can't find any qualified or trained in our field." Interview with a union official who wished to remain anonymous, June 17, 1974, in Shelton & Berndt, supra note 319, at 1121.

321. 45 C.F.R. § 86.34 (1975), which provides in part:

> A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

322. Martinez, Sexism in Public Education: Litigation Issues, 18 Inequality in Educ. 5, 7 (1974).

323. 45 C.F.R. § 86.36(a) (1975).

324. Id. § 86.36(b). The regulation also requires institutions to establish procedures to screen out sex bias.

325. Id. § 86.36(c).

326. 39 Fed. Reg. 22235 (1974).

327. More than 250 letters were received by HEW opposing integrated sex and physical education classes, with only one in favor. HEW Memorandum, Oct. 11, 1974, at 3.

supporters argued that they were necessary to allow girls to develop athletic skills on a par with boys.[328]

The final regulation was a compromise: separate classes for boys and girls may be provided on the primary and secondary levels in courses which "deal exclusively with human sexuality,"[329] while physical education classes must be operated on an integrated basis.[330] Although separation within physical education classes is permitted on the basis of skill differences[331] and separate groupings by sex are allowed in contact sports,[332] the rules do not specify whether students can be denied the right to participate in a given sport on the basis of lack of skill. Since exclusion from activity is broadly prohibited and each permissible separation is carefully delineated, such a denial would probably not be allowed, unless it could be shown that participation in that activity would be unreasonably dangerous.[333]

Admissions.—In prohibiting sex discrimination in admissions,[334] the regulations specifically ban separate sex ranking or quotas.[335] In addition, admissions rules concerning marital or parental status are not permitted unless both sexes are treated similarly.[336] Furthermore, admission preferences cannot be given to applicants on the basis of at-

328. N.Y. Times, July 17, 1975, at 30, col. 1.

329. 45 C.F.R. § 86.34(e) (1975).

330. Id. § 86.34.

331. Id. § 86.34(b).

332. Id. § 86.34(c).

333. Elementary schools are given one year to comply with the physical education regulations. Secondary and postsecondary institutions are given three years to comply. Id. § 86.34(a).

The release of the final regulations did not end the conflict over physical education. Congressman James O'Hara sought an amendment to title IX to permit the operation of physical education classes on a segregated basis. This move was squelched simultaneously with his amendment exempting revenue-producing sports. 121 Cong. Rec. D832 (daily ed. July 9, 1975). Only one week after the O'Hara Amendment was killed, the House, by a margin of only one vote, passed the Casey Amendment to the Education Appropriations Act of 1975, which would have prohibited HEW from spending any money to enforce the sex integration of physical education classes. 121 Cong. Rec. H6894-95 (daily ed. July 16, 1975). The Senate, however, deleted the Casey Amendment from the appropriations act by a 65-29 vote. Id. at S12896 (daily ed. July 17, 1975). Following the Senate action, the House reversed its previous vote, by a 215-178 margin, and killed the amendment. Id. at H7046 (daily ed. July 18, 1975).

334. The general prohibition is contained in 45 C.F.R. § 86.21(a) (1975). Admissions regulations apply only to "institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education." Id. § 86.15(d). The scope of the admissions regulations is limited to these institutions by title IX. 20 U.S.C. § 1681(a)(1) (Supp. IV, 1974).

335. 45 C.F.R. §§ 86.21(b)(1)(i), (ii) (1975).

336. Id. § 86.21(c)(1). For example, this rule would prohibit a college from giving admission preference to a married man over a married woman due to her potential maternal status.

tendance at a predominantly single sex institution, if such practice results in sex discrimination.[337]

The use of tests or criteria which have an adverse impact of a disproportionate nature on one sex are prohibited, absent a showing that such measures validly predict success and that no sexually-neutral alternative is available.[338] This regulation might be read to bar the use of credentials or experience that only one sex has had the opportunity to obtain.[339] Use of the following measures might thus be held to discriminate against women: military service or honors, athletic scholarships or awards, and membership or leadership in a professional or honorary society limited to men.[340]

Financial Aid.—The regulations ban sex discrimination in granting financial assistance.[341] They do not prohibit scholarships or fellowships funded through sex-restricted domestic or foreign wills, bequests or trusts, so long as the "overall effect" is nondiscriminatory.[342]

To assure nondiscrimination, the regulations require that students who receive awards be selected on the basis of nondiscriminatory criteria, such as financial need or academic achievement, without regard to the availability of sex-restricted funds.[343] No student may be denied an award solely because of the unavailability of sex-restricted funds to members of that student's sex.[344] In other words, a college cannot pass over number twenty on their list of potential award winners, a woman, due to lack of funds and then award number twenty-one, a man, a scholarship available only to men. If the college wants to provide the sex-restricted award to number twenty-one, it must first find funds from another source for number twenty.[345]

In addition, the regulations require that institutions awarding athletic scholarships "provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."[346]

337. Id. § 86.22. It is difficult to see how the granting of preference, for example, to graduates of an exclusively male prep school would not be discriminatory. The regulations do not offer guidance, however, as to the point at which such practice becomes discriminatory.

338. Id. § 86.21(b)(2).

339. See Dunkle & Sandler, Sex Discrimination Against Students: Implications of Title IX of the Education Amendments of 1972, 18 Inequality in Educ. 12, 18 (1974) [hereinafter cited as Dunkle & Sandler].

340. Id. at 18-19.

341. 45 C.F.R. § 86.37(a) (1975).

342. Id. § 86.37(b)(1).

343. Id. § 86.37(b)(2)(i).

344. Id. § 86.37(b)(2)(iii).

345. 40 Fed. Reg. 24133 (1975).

346. 45 C.F.R. § 86.37(c)(1) (1975).

There is no amplification of the phrase "provide reasonable opportunities." It is unclear whether it means, on the one hand, that female students be given the right to apply for a certain proportion of scholarships, or, on the other hand, that actual scholarship offers be made to a certain proportion of women.[347] Another unresolved issue is whether the sports scholarship provision is concerned only with the number of scholarships a school awards, or also with the actual amounts awarded.[348] It remains to be seen whether either the general aid regulation or the athletic scholarship provision will be used to prevent an institution from providing full tuition grants for the men's football team while granting the same number of nominal scholarship awards for the women's tennis team.

Behavior and Appearance.—Educational institutions are prohibited by the regulations from applying different rules of behavior, sanctions, or other treatment[349] and from discriminating in applying personal appearance rules[350] on the basis of sex. Both provisions could have a serious impact on social norms.

The behavior regulation's implicit prohibition of different visitation hours and curfews for male and female college students[351] departs from the law established in one relatively recent case which had upheld different curfew regulations. In *Robinson v. Board of Regents*,[352] a class

347. OCR has been unwilling to specify the precise nature of an institution's responsibility under this regulation.

> The thrust of the athletic scholarship section is the concept of reasonableness . . . . Institutions should assess whether male and female athletes are afforded approximately the same opportunities to obtain scholarships in sports at comparable levels of competition. Where the sports offered or the levels of competition differ for male and female students, the institution should assess its athletic scholarship program to determine whether overall opportunities to receive athletic scholarships are roughly proportionate to the number of students of each sex participating in intercollegiate athletics.

Letter from Gwendolyn H. Gregory, Office of Policy Communications, Office of Civil Rights, to Annual Survey of American Law, Nov. 11, 1975 [hereinafter cited as Letter from Gwendolyn H. Gregory, OCR].

348. Section 86.37(c)(1) reads in part: "To the extent that a recipient awards athletic scholarships or grants-in-aid." Some support can be found for the view that this phrase refers only to the number of scholarships awarded. Gilbert & Williamson in Hearings on S. 2518, supra note 244, at 304. It has been estimated that 50,000 men receive athletic scholarships annually as opposed to 50 women. Id.

349. 45 C.F.R. § 86.31(b)(4) (1975). The behavior regulation, for example, would seem to bar the use of a sanction for boys, such as corporal punishment, that is not applied to girls.

350. Id. § 86.31(b)(5).

351. Id. § 86.31(b)(4). HEW could have applied, in reference to dormitory rules, the following rule: "A recipient shall not on the basis of sex, apply different rules or regulations . . . related to housing." Id. § 86.32(a). Instead, the Department has chosen to apply the behavior rule subsection to complaints in this area. Letter from Gwendolyn H. Gregory, OCR, supra note 347.

352. 475 F.2d 707 (6th Cir. 1973).

action by a female college student challenging the validity of curfew regulations applicable to women, curfew regulations were imposed on female students but not on males at the college in question.[353] Second-, third-, and fourth-year women students were exempted from the restrictions if they maintained a C average, paid a $15 fee, and obtained (if they were under 21) the consent of their parents.[354]

During the period of litigation, the Regents issued new regulations which permitted all women, except for first semester freshmen, to regulate their own hours if they paid $10 and, if they were under 21, obtained parental consent.[355] Plaintiff noted that even the revised procedures, in requiring parental consent for underage females, applied a proviso not required of males.[356] Taking judicial notice that women are more susceptible to physical attack than are men, the court held that the procedures imposed on females, although different from those applied to men, were nonetheless reasonable.[357] The validity of the curfew regulations was upheld against equal protection challenge.[358]

The title IX regulations will change this result. In fact, prior to the publication of the proposed regulations, HEW resolved one complaint challenging discriminatory dormitory rules in favor of the complainant.[359]

The appearance rule does not require the same treatment for both sexes, as the behavior rule does, but rather only prohibits rules which are discriminatory.[360] What constitutes a "discriminatory" rule is as yet unresolved, however. For example, it is unclear whether it is discriminatory to permit only males to wear slacks or to establish one set of hair regulations for boys and another for girls.

It could be argued that rules, in order to be nondiscriminatory, must be identical for both sexes. A recent federal district court decision, however, took exception to that view. In *Trent v. Perritt*,[361] the plaintiff, a Mississippi high school senior, had been suspended from school for violating a county-wide regulation prohibiting only male students

353. Id. at 709.
354. Id. at 708-09.
355. Id. at 709.
356. Id.
357. Id. at 711.
358. Id.
359. In a letter from Peter Holmes, Director of OCR, to Senator Walter Mondale, Chairman of the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, it was noted that complaints involving dormitory regulations against Lousiana State University and the University of Missouri at Columbia had been resolved in favor of the complainants. Hearings on S. 2518, supra note 244, at 233.
360. 45 C.F.R. § 86.31(b)(5) (1975).
361. 391 F. Supp. 171 (S.D. Miss. 1975).

from attending school with hair below the ear lobe or over the collar.[362] Seeking an injunction against the enforcement of the regulation, plaintiff asserted that the imposition of the regulations only upon males denied him equal protection and violated title IX.[363]

The court dismissed the equal protection claim, asserting that it would have granted defendant's motion for summary judgment were it not for the title IX sex discrimination issue.[364] As to the latter issue, plaintiff asserted that title IX, as applied through the HEW proposed regulations on discriminatory appearance rules[365] (adopted verbatim in the final rules), prohibited enforcement of the grooming rule in question.[366] The court denied plaintiff's claim, narrowly construing the purpose of title IX to be the provision of federal *financial* assistance "to girls as much as to boys under any education program or activity."[367] The court asserted that, if the term "appearance" meant grooming so as to "erase all outside physical distinction between the sexes, it aims at a ridiculous result, one of stereotyping both sexes into one, with little relation to the purpose of federal funding."[368]

Although the court's federal funding relationship test was inappropriate,[369] its holding that the rules in question do not violate title IX or the appearance regulation is certainly defensible. Had the goal of the final appearance regulation been identical rules for both sexes, different rules for each sex would have been specifically prohibited, as they were in the behavior regulation.[370] Absent such prohibition, the appearance rule might reasonably be interpreted to allow different rules if they reasonably pursue the same objective and if compliance with that objective imposes an equal burden on both sexes.[371]

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362. Id. The only county regulation applicable to both male and female hair grooming prohibited students from attending school with rollers in their hair or with distracting hairstyles. Id. at 173.

363. Id. at 171-72.

364. Id. at 172.

365. 39 Fed. Reg. 22232-35 (1974).

366. 391 F. Supp. at 172-73.

367. Id. at 173.

368. Id.

369. A more accurate view of congressional intent in enacting title IX would focus on the desire to guarantee that any educational institution receiving federal funds not discriminate on the basis of sex in almost any manner.

370. 45 C.F.R. § 86.31(b)(4) (1975).

371. The following cases were decided prior to the adoption of the HEW regulations and dealt with the sex discrimination issue in constitutional terms. Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972) (equal protection challenge rejected under rational relationship test); Crews v. Clones, 432 F.2d 1259 (7th Cir. 1970) (freedom to wear hair as desired is fundamental right and school board failed to meet substantial burden of justification for rule); Woods v. Alamo Heights Independent School Dist., 433 F.2d 355 (5th Cir. 1970) (per curiam) (school regulation not arbitrary but is sufficiently related to proper objective).

Applying this test to the facts in *Trent*, the court could have concluded that the hair length rules for boys and the rule applicable to both sexes prohibiting hair rollers or distracting hair styles were designed to preserve school decorum and minimize student distraction. Whether the rules were equivalent responses to that goal is open to question. The school officials, by imposing additional rules concerning boys' hair length, implied that the general standard on distracting hair would not have prohibited hair slightly below the collar or ear lobe. The boys, therefore, were seemingly held to a higher standard than the girls, in violation of the regulations' nondiscrimination requirement.

Procedures.—The regulations require that by July 21, 1976 each institution or program receiving funds evaluate its own practices and policies,[372] modify all procedures violating the regulations, and take remedial action to remove the discriminatory effects of such procedures.[373] "Affirmative action" to overcome the effects of past discrimination is not required, however, in the absence of a finding of discrimination by HEW.[374]

The regulations also authorize the Director of OCR, upon a finding of discrimination, to take whatever steps he deems necessary to eliminate the effects of such practices.[375] Every applicant for federal funds is required under the regulations to submit a written assurance of compliance satisfactory to the Director of OCR.[376] The regulations mandate the designation of at least one employee responsible for the institution's compliance obligations.[377] Furthermore, institutions must establish internal grievance procedures to resolve complaints.[378]

In order to comply with the regulations, fund recipients must notify students and employees that they do not discriminate on the basis of sex.[379] Initial notification was required by October 19, 1975, through local and school newspapers as well as direct communications to each

372. 45 C.F.R. § 86.3(c)(i) (1975).

373. Id. §§ 86.3(c)(ii), (iii).

374. Id. § 86.3(b). The affirmative action section included in the proposed regulations was removed from the final version. 40 Fed. Reg. 24127, 24134 (1975).

375. 45 C.F.R. § 86.3(a) (1975).

376. Id. § 86.4.

377. Id. § 86.8(a).

378. Id. § 86.8(b). There has been some criticism of the internal grievance procedure requirement. In a telegram to President Ford, National Education Association President James A. Harris stated:

> By requiring both student and employee complainants to exhaust an internal grievance procedure prior to action by HEW without setting time limits or other specific standards for institutional procedures, the regulation may hamper the proper enforcement of Title IX.

1 Women's L. Rep. 1.182 (1975).

379. 45 C.F.R. § 86.9(a) (1975).

student and employee.[380] Recipients must also include statements of nondiscrimination in bulletins and catalogs.[381]

Although HEW had published proposed consolidated procedures for all provisions administered by OCR,[382] the interim procedures currently in use for title IX are those applicable to title VI of the Civil Rights Act of 1964.[383] The title VI procedures permit discrimination complaints to be brought by an individual in his or her own behalf or for a specific class.[384] The Director of OCR is also required promptly to investigate any "possible failure" of compliance indicated by a complaint, compliance review, or "other information."[385] In addition to responding to complaints, the Director is required to make periodic compliance reviews of fund recipients, although no specific guidelines are established for such reviews.[386]

The interim procedures require OCR to notify the recipient of findings of noncompliance and to negotiate voluntary compliance wherever possible.[387] If informal efforts fail, OCR can use any other means authorized by law,[388] or, subsequent to an opportunity for hearing and proper notification to Congress, can terminate or refuse to grant funding.[389] Title VI procedures also provide for judicial review of any departmental action which results in the refusal to grant funding or the termination of funding.[390]

HEW, stimulated by a recent court order in *Adams v. Weinberger*,[391] proposed consolidated procedures for all provisions administered by OCR.[392] The district court in *Adams* ordered HEW to investigate "all complaints or other information of racial discrimination in violation of Title VII."[393] HEW was further ordered to begin enforcement proceedings when voluntary compliance had failed.[394] The proposed regulations, recently withdrawn by the agency due to "over-

380. Id. § 86.9(a)(2).
381. Id. § 86.9(b)(1).
382. 40 Fed. Reg. at 24151-59.
383. 45 C.F.R. §§ 80.6-.11 (1975). The use of title VI procedures is specifically provided for in the final regulation. Id. § 86.71.
384. Id. § 80.7(b).
385. Id. § 80.7(c).
386. Id. § 80.7(a).
387. Id. § 80.8(d).
388. Id.
389. Id. § 80.8(c).
390. Id. § 80.11.
391. 391 F. Supp. 269 (D.D.C. 1975), enforcing 351 F. Supp. 636 (D.D.C. 1972), 356 F. Supp. 92 (D.D.C. 1973), aff'd with modification, 480 F.2d 1159 (D.C. Cir. 1973).
392. 40 Fed. Reg. at 24151-59.
393. 391 F. Supp. at 273.
394. Id.

whelmingly negative" public comment,[395] would have given HEW the discretion to investigate complaints on an elective basis.[396] In an effort essentially to establish the policy behind the discarded proposed regulations, HEW has sought a permanent modification of the *Adams* order which would require the investigation of only one-quarter of all complaints received.[397]

Conclusion.—Despite its limitations upon the general goal of eliminating sex-discrimination from educational programs and institutions, title IX, as enforced through the HEW regulations, is a significant piece of legislation whose impact cannot be measured solely by the scope of its coverage and enforcement. The statute has already engendered a ripple effect. It has ameliorated the climate for the passage of similar state legislation[398] and influenced the adjudication of questions outside the precise scope of the law.[399]

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395. N.Y. Times, Mar. 17, 1976, at 9, col. 1.

396. The essence of the proposal is to articulate the Department's role in civil rights enforcement in terms of a methodical approach geared toward identifying and eliminating systemic discrimination rather than in terms of a reactive or complaint-oriented approach geared toward securing individual relief for persons claiming discrimination.

40 Fed. Reg. at 24148. See id. at 24152-53.

397. N.Y. Times, Mar. 17, 1976, at 9, col. 1. The Agency has based its request for the modification on the inadequacy of the OCR staff level. Id. It should be noted, however, that no request for an increase in staff had been made by HEW until last year. Id.

398. E.g., Minn. Stat. Ann. § 363.03-5(1)(2) (Supp. 1975), which provides:

It is an unfair discriminatory practice: (1) To discriminate in any manner in the full utilization of or benefit from any educational institution . . . because of . . . sex. . . . (2) To exclude, expel or otherwise discriminate against a person seeking admission as a student, or a person enrolled as a student because of . . . sex.

399. E.g., in Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974), the court invalidated the use of higher admissions standards for girls than for boys seeking entrance to a special public college preparatory high school. Although basing its holding on the equal protection clause and noting the technical inapplicability of title IX since secondary school admissions are not covered by title IX, the court cited Congress's intent in enacting title IX to support its holding. Id. at 1269-70.