EQUAL PROTECTION OF THE SEXES IN KENTUCKY: THE EFFECT OF THE *HUMMELDORF* DECISION ON A WOMAN'S RIGHT TO CHOOSE HER SURNAME

INTRODUCTION

In Kentucky, a married woman does not have complete freedom to use the surname she chooses. Section 403.230(2) of the Kentucky Revised Statutes states that, when a married woman with children is granted a divorce, the judge may determine what name she shall have.[1] In addition, a married woman in Kentucky was, until January of 1982, required by administrative action[2] and legislative inaction[3] to use her husband's surname on her driver's license regardless of her own preference.[4] Although the administrative order was withdrawn,[5] the United States District Court for the Eastern District of Kentucky upheld the validity of the requirement in the case of *Whitlow v. Hodges*.[6] This precedent would allow either a *sub silentio* or affirmative reinstatement of the order at any time.

The purpose of this comment is to determine the application of the decision *Hummeldorf v. Hummeldorf*[7] to the issue of a woman's right to use the surname she desires. In *Hummeldorf*, the newly devised intermediate standard of equal protection review was adopted in Kentucky for the first time.[8] To review this decision, appropriate background to the two other levels of equal protection review—rational basis and strict scrutiny—is necessary. Also, a synopsis of the history of women's rights is needed to understand the previous legal atmosphere. Next, the development and application of the intermediate level of review to gender-based discrimination is presented. Finally, the context in which *Hummeldorf* was decided and its relationship to a woman's legal right to establish her own identifying name are analyzed.

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1. "Upon request by a wife whose marriage is dissolved or declared invalid, the court *may*, and if there are no children of the parties shall, order her maiden name or a former name restored." KY. REV. STAT. § 403.230(2) (1972) (emphasis added).

2. *See* note 147 *infra* and accompanying text.

3. *See* note 175 *infra* and accompanying text.

4. Comment, *The Constitutionality of Requiring Use of Husband's Name in Driver's License: Whitlow v. Hodges*, 38 OHIO ST. L.J. 157, 161 (1977) [hereinafter cited as *Driver's License*].

5. Ky. Dep't of Transportation General Counsel Opinion (Oct. 30, 1981).

6. Whitlow v. Hodges, 539 F.2d 582 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

7. 616 S.W.2d 794 (Ky. App. 1981).

8. *Id. See* Craig v. Boren, 429 U.S. 190 (1976).

I. EQUAL PROTECTION REVIEW—THE TWO—TIER APPROACH

The fourteenth amendment guarantees all persons "the equal protection of the laws."[9] Originally, the claim of a denial of equal protection was interjected only as "the last resort of constitutional arguments."[10] Except in suits based on racial discrimination, the Supreme Court applied a standard of review that was highly permissive and required minimal scrutiny.[11] This standard of review—the rational or reasonable basis standard—was succintly outlined in *Lindsey v. Natural Carbonic Gas Co.*[12] First, a court will interfere with a state's power to legislate only when the purpose of the law is "without any reasonable basis" and is "purely arbitrary."[13] Second, a classification with any reasonable basis is sufficient and does not require exactness in its application.[14] Third, the reasonable basis or purpose does not have to be the actual basis, but may be any state of facts reasonably conceived or assumed.[15] Finally, the challenger of the classification has the burden of proving the classification is essentially arbitrary.[16] This still viable model is best explained by the late Chief Justice Earl Warren:

> The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them.[17]

This test presumes the purpose of the classification to be valid and results in the Court's upholding almost every scheme that is not

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9. U.S. CONST. *amend.* XIV, § 1. *See* 16 AM. JUR. *Constitutional Law* § 737 (1979).
> Equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, ... Equal protection in its guaranty of like treatment to all similarly situated permits classification which is reasonable and not arbitrary . . . in relation . . . to the public purpose sought to be achieved by the legislation involved.

Id. at 738.

10. Buck v. Bell, 274 U.S. 200, 208 (1927).

11. *See* Note, *Equal Protection and the "Middle Tier": The Impact on Women and Illegitimates*, 54 NOTRE DAME LAW. 303, 305 (1978).

12. 220 U.S. 61 (1911).

13. *Id.* at 78.

14. *Id.*

15. *Id. See also* McGowan v. Md., 366 U.S. 420, 426 (1961).

16. 220 U.S. at 79.

17. McDonald v. Board of Election, 394 U.S. 802, 809 (1969).

entirely arbitrary or irrational.[18]

A second level of review applies to classifications which threaten either a fundamental right[19] or involve a suspect class.[20] This level of review requires a "more searching judicial inquiry,"[21] and the ordinary presumption in favor of a statute's constitutionality is not invoked.[22] Rather, the state must demonstrate that the classification meets a compelling purpose or a compelling state interest.[23] Also, the classification is not deemed necessary if its purpose may be achieved by less drastic means.[24] Classifications reviewed under this "strict scrutiny" test rarely survive, since the standard "demands nothing less than perfection."[25] Constitutional scholar Gerald Gunther describes the result of strict scrutiny review as " 'strict' in theory but fatal in fact."[26]

A related approach to the Court's review of purpose is the doctrine of irrebuttable presumptions.[27] When employing this doc-

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18. Comment, *The Burger Court's "Newest" Equal Protection: Irrebuttable Presumption Doctrine Rejected—Two Tier Review Reinstated,* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), WASH. U. L. Q. 140, 142 n.11 (1977) [hereinafter cited as *"Newest" Equal Protection].*

19. Examples of fundamental rights include:
a) Voting—Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966);
b) Procreation—Griswold v. Conn., 381 U.S. 479 (1965);
c) Travel—Shapiro v. Thompson, 394 U.S. 618 (1969);
d) Rights in criminal procedures—Douglas v. Cal., 372 U.S. 353 (1963).

20. Suspect classes include:
a) Race—Loving v. Va., 388 U.S. 1 (1967);
b) Nationality—Korematsu v. United States, 323 U.S. 214 (1944);
c)Alienage—Sugarman v. Dougall, 413 U.S. 634 (1973).

21. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

22. *See, e.g.,* McGowan v. Md., 366 U.S. 420 (1961).

23. *See* notes 19 and 20 *supra.*

24. Shapiro v. Thompson, 394 U.S. 618 (1969).

25. *See* Dunn v. Blumstein, 405 U.S. 330 (1972). "To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." *Id.* at 363-64 (Burger, C.J., dissenting). *But see* Korematsu v. United States, 323 U.S. 214 (1944) (race classifications upheld for national security during World War II).

26. Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine of Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

27. "A statute which provides that if Fact A is present, Fact B is presumed to be present, contains an irrebuttable presumption." *"Newest" Equal Protection, supra* note 18 at n.36. *See also* Note, *The Conclusive Presumption Doctrine: Equal Protection or Due Protection?* 72 MICH. L. REV. 800 (1974).

> [t]he essence of the doctrine is as follows: When a statutory provision imposes a burden upon a class of individuals for a particular purpose and certain individuals within the burdened class are so situated that burdening them does not further that pur-

trine, the Court must first decide if a state interest is sufficiently compelling to warrant an irrebuttable presumption of the disputed action's constitutionality; if not, the Court will allow individual hearings to rebut the presumption.[28] When considering either the purpose or presumption, the Court must determine if the classification or presumption applies "equally" to all persons similarly situated. If the presumption or classification applies only to a part of a larger group, it is "under-inclusive."[29] But if persons not characteristically a part of the group are included, then the statute is "over-inclusive."[30] Neither an over- or under-inclusive classification or presumption meets the requirements of equal protection review.[31]

In sum, under equal protection review, the legislative scheme must meet both a purpose test (whether rational or compelling) and an inclusion test (not over- or under-inclusive). Often, the choice of review determines the result. Generally, if strict scrutiny is invoked, the legislation is negated; if the rational basis standard is used, the legislation is sustained.[32]

II. EQUAL PROTECTION FOR WOMEN: 1800-1970—"GLUED TO THE PEDESTAL"[33]

A survey of congressional and judicial protection afforded women prior to the application of equal protection intermediate review displays a pattern of constitutional discrimination against women. During colonial times, women had a legal status similar to children and slaves.[34] Gender-based laws were historically designed

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pose, then the rigid statutory classification must be replaced to the extent administratively feasible, by an individual factual determination that more accurately selects the individuals who are to bear the statutory burden. The legislature in such cases is said to have 'conclusively presumed' that all members of the burdened class possess those characteristics . . . and due process is found to require an individual opportunity to rebut this presumption.

Id. at 800.

28. *"Newest" Equal Protection, supra* note 18, at 147.

29. H. KRAUSE, FAMILY LAW: CASES AND COMMENTS 17 (1976).

30. *Id.*

31. *Id.*

32. Note, *The Conclusive Presumption Doctrine: Equal Protection or Due Protection?* 72 MICH. L. REV. 800, 810-11 (1974).

33. S. NICHOLAS, A. PRICE & R. RUBIN, RIGHTS AND WRONGS: WOMEN'S STRUGGLE FOR LEGAL EQUALITY 12 (1979) [hereinafter cited as S. NICHOLAS]. *See also* Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

34. S. NICHOLAS, *supra* note 33, at 3.

to protect women by virtue of the cultural fixation on the identity of women as "housekeepers, childrearers, and husband custodians."[35] Ironically, the first women's rights convention grew out of the sexist treatment of women who participated in the anti-slavery movement.[36] In 1840, Lucretia Mott and Elizabeth Cady Stanton were told they had to sit in a special gallery, for women only, while attending the World Anti-Slavery Convention in London. Upon their return to the United States, they organized the first women's rights convention in Seneca Falls, New York, in 1848. But twenty years later, the fourteenth amendment used the word "male" for the first time in any portion of the Constitution.[37] Even though the first section of the fourteenth amendment contained language implying equal protection for all, the threefold use of the word "male" in its second section signified, at best, a qualified application to women.[38] The fifteenth amendment also failed to include voting privileges for women by specifying only race and national origin as classifications for which states may not deny persons the right to vote.[39] Although the women's suffrage movement sought to unite with advocates of Negro suffrage, the response from leaders of the Anti-Slavery Society was "not [to] mix the movements. [Such an alliance] would lose for the Negro far more than we would gain for the woman."[40] Some fifty years later, in 1920, women finally were granted the constitutional right to vote.[41]

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35. W. BROWNLEE & M. BROWNLEE, WOMEN IN THE AMERICAN ECONOMY: A DOCUMENTARY HISTORY, 1675 to 1929, 2 (1976).

36. S. NICHOLAS, *supra* note 33, at 4.

37. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the *male* inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of *male* citizens shall bear to the whole number of *male* citizens twenty-one years of age in such state.

U.S. CONST. *amend* XIV, § 2 (emphasis added).

38. S. NICHOLAS, *supra* note 33, at 5.

39. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. *amend* XV.

40. A. LUTZ, CREATED EQUAL: A BIOGRAPHY OF ELIZABETH CADY STANTON 12 (1973) (letter from Wendall Phillips to Elizabeth Cady Stanton, May 10, 1865).

41. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. *amend* XIX.

The Supreme Court has followed congressional patterns of discrimination by keeping women in their "natural role" as wives and mothers. Subsequent to the passage of the fifteenth amendment, a woman in Illinois was denied application to be a licensed attorney in that state solely because she was a woman. Myra Colby Bradwell had studied law for years with her husband—attorney, published a leading legal publication, the *Chicago Legal News*, and passed the Illinois bar examination in 1869. However, the Illinois Supreme Court denied her application to practice law. Subsequently, the United States Supreme Court found nothing in the fourteenth amendment to protect against this form of exclusion.[42] In a concurring opinion, Justice Bradley wrote that there is no sex based right to work in any profession. Rather, civil and natural law, as well as female limitations, natural delicacy, and destiny require women to "fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[43]

For nearly another hundred years, the Supreme Court and the states continued to "protect" women in other employment-related situations stressing women's child-bearing capacity, regardless of whether the woman in question had children or was past child-bearing years. In *Muller v. Oregon*,[44] in 1908, the Court upheld an Oregon statute limiting women to ten hour work days because of the perceived need to protect them. In the Court's words: "the supposed differences in body structures, functions and capacities for labor justified the legislative distinctions."[45]

Forty years later, the Court continued to uphold statutes permitting different treatment of men and women in employment.[46] During World War II, women had successfully held many jobs usually restricted to men, including bartending. In 1945, the male-controlled bartenders' union in Michigan won enactment of a state statute that allowed only women who were the wives or daughters of male owners of liquor establishments to serve as bartenders. The Court upheld the statute under the guise of "protecting" women, although no evidence was offered of the need or desire for such "protection."[47] The Court based its result on the rationale

42. Bradwell v. Ill., 83 U.S. (16 Wall.) 130 (1873).
43. *Id.* at 141-42 (Bradley, J., concurring).
44. 208 U.S. 412 (1908).
45. *Id.* at 422.
46. Goesaert v. Cleary, 335 U.S. 464 (1948).
47. S. NICHOLAS, *supra* note 33, at 50 (footnote omitted).

that "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight."[48]

This attitude continued into the 1960's. In *Hoyt v. Florida*,[49] a Florida statute was upheld which required women to serve on juries only when they voluntarily and affirmatively registered themselves for jury duty. Men who met jury requirements were automatically registered. The Court determined that the Florida statute was based on "some reasonable classification"[50] because, "[d]espite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of the community life formerly reserved to men, a woman is still regarded as the center of home and family life."[51] In 1966, the Court dismissed an appeal of a case[52] in which the Mississippi Supreme Court upheld the total elimination of women from juries. The Mississippi Supreme Court allowed the total exclusion so women could "continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial."[53]

As these cases indicate, the protection historically afforded women served to restrict their equal participation in important societal institutions such as the marketplace and the courtroom. All women were, in effect, kept in their "place" as wives and mothers.[54]

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48. 335 U.S. at 466.

49. 368 U.S. 57 (1961).

50. *Id.* at 61-62.

51. *Id.*

52. State v. Hall, 187 So.2d 861 (Miss. 1966), *appeal dismissed*, 385 U.S. 98 (1966).

53. *Id.* at 863.

54. Contrary to the presumption of the Court and states, all women were not mothers or wives. In 1890, 30.6 percent of American women were either single, widowed, or divorced; in 1950, 34 percent. In 1979, 36.5 percent were not married. U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, 15 (1961).U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, *Marital Status of the Population by Sex and Age;* 1979 43 (101st ed. 1980).

In 1940, 36.6 percent of women ever married between the ages of twenty to twenty-four were childless, and 27.7 percent of the women twenty-five to twenty-nine were childless. In 1975, 42.8 percent of the women twenty to twenty-four years of age were childless, with 21.1 percent of the women between twenty-five to twenty-nine also childless. U.S. DEPT. OF COMMERCE, PERSPECTIVES ON AMERICAN FERTILITY, 10 (1978).

Finally, since the 1890's women have consistently constituted at least 17 percent of the labor force. K. DAVIDSON, R. GINSBURG, & H. KAY, TEXT, CASES, AND MATERIALS ON SEX-

III. Development and Application of Intermediate Equal Protection Review to Gender-Based Discrimination, 1970-1980

In the 1970's, the United States Supreme Court implemented a new standard of equal protection review based on modified concepts of the identity of women. In *Reed v. Reed*,[55] in 1971, the Court for the first time implicitly required more than its traditional rationality of a legislative classification of women.[56] In *Reed*, the Court unanimously invalidated an Idaho statute that preferred a man's appointment as estate administrator when the choice was between two equally entitled persons, one male and one female.[57] Although the decision was ostensibly based on the rational basis test, the Court did state that "[t]o give a mandatory preference to members of either sex . . . [was] to make the very kind of arbitrary legislative choice forbidden by [equal] protection."[58] Tribe and Gunther suggest that "only by importing some special suspicion of sex-related means . . . can the result [in *Reed*] be made entirely persuasive."[59] Thus, the Court implied that gender-based classifications require a level of review applicable to a "quasi"-suspect class.[60]

Just a year and half later, in *Frontiero v. Richardson*,[61] four of the justices did assume that a special sensitivity was applicable to gender when used as a classifying factor. There, a plurality of the Court declared a federal statute unconstitutional because of the distinction made between spouses of male and female members of the armed services in conferring military benefits. The Court described the effect of the scheme as "romantic paternalism" operating to "put women not on a pedestral but in a cage."[62] In addition, the Court stated that any "statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving admin-

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Based Discrimination 423 (1974). In 1979, women represented 41.7 percent of the labor force. U.S. Dept. of Commerce, Statistical Abstract of the United States, *Employment, by Sex, by States:* 1976 and 1979, 404 (101st ed. 1980).

55. 404 U.S. 71 (1971).

56. L. Tribe, American Constitutional Law 1063 (1978).

57. 404 U.S. at 73.

58. *Id.* at 76.

59. L. Tribe, *supra* note 56, at 1063 (*quoting* Gunther, *supra* note 26, at 34).

60. Note, *Equal Protection and Due Process: Contrasting Methods of Review under Fourteenth Amendment Doctrine*, 14 Harv. C.R.-C.L. L. Rev. 529, 541 (1979) [hereinafter cited as *Equal Protection and Due Process*].

61. 411 U.S. 677 (1977).

62. *Id.* at 684.

istrative convenience, necessarily commands dissimilar treatment for men and women who are similarly situated and, therefore, involves the very kind of arbitrary legislative choice forbidden by the Constitution."[63]

In 1975, two more equal protection cases were determined on the basis of the changed status of women. Prior to *Weinberger v. Wiesenfeld*,[64] a woman decedent's social security survivor's benefits were not awarded to her husband despite his responsibility but a man's benefits would accrue to his widow and dependent children. The Court invalidated this provision of the Social Security Act and asserted that "the Constitution . . . forbids the gender-based differentiation that results in the efforts of female workers required to pay Social Security taxes producing less protection for their families than is produced by the efforts of men."[65] And, in *Stanton v. Stanton*,[66] a Utah statute which required parental support of a son until twenty-one and a daughter only until eighteen was held unconstitutional. The Court invalidated that statute on the ground that "a child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family."[67] To deny the daughter equivalent length of support reduced her opportunity for further education and training and "coincide[d] with the role-typing society has long imposed."[68]

In Tribe's analysis of the foregoing cases, each case either "prevented, or economically discouraged departures from 'traditional' sex roles, freezing biology into social destiny."[69] In each instance, the government's assumptions based on traditional female roles were recognized as merely a self-fulfilling prophecy.[70] The changed status of women and new social standards no longer permitted these assumptions to operate.

In 1976, a majority of the Court held that assumptions based on gender classifications were subject to a new intermediate level of

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63. *Id.* at 690 (*quoting* Reed v. Reed, 404 U.S. 71, 76-77 (1971)).

64. 420 U.S. 636 (1975).

65. *Id.* at 645. The Court held the gender-based classification to be "entirely irrational" and objected to the presumption that the surviving parent was a dependant mother. The Court noted that "[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female." *Id.* at 651-52.

66. 421 U.S. 7 (1975).

67. *Id.* at 14.

68. *Id.* at 15.

69. L. TRIBE, *supra* note 56, at 1065.

70. *Id.*

equal protection. In *Craig v. Boren*,[71] the Court required that gender-based classifications must serve important governmental objectives and be substantially related to the achievement of those objectives.[72] The quarrel in *Craig v. Boren* was with an Oklahoma statute which forbade the sale of 3.2 percent beer to males under twenty-one and to females under eighteen. The state contended that the statute served the governmental objective of enhancing traffic safety and attempted to use statistics of alcohol-related driving offenses to prove the substantial relation of the statute to its objectives. The Court found the evidence to be "an unduly tenuous 'fit' " and noted that "[t]he very social stereotypes that find reflection in age differential laws . . . are likely substantially to distort the accuracy of these comparative statistics. Hence 'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."[73]

The intermediate level of equal protection review adopted in *Craig v. Boren* has four analytical elements.[74] First, the governmental objective to be served must be "important,"[75] a standard lying between the "reasonable" and "compelling" requirements. Second, the means of achieving the important objective must be a close fit or "substantially related to the achievement of . . . objectives."[76] Third, there must be a "current articulation"[77] of the rationale to support the legislative classification. Furthermore, the legislature must clarify the governmental objective at the time the statute was enacted; the Court will not supply a purpose and the purpose cannot be supplied by hindsight. Finally, the legal scheme under challenge, if not struck down altogether, permits rebuttal of the classification in individual cases.[78] In summary, equal protection intermediate review requires a "tightly focused legislative choice of means to ensure that the aim of the challenged classification is not simply to impose a burden on the group defined by the classification, but is rather an efficient means of dealing with some

71. 429 U.S. 190 (1976).
72. *Id.* at 197.
73. *Id.* at 202, n.14.
74. Fox, *Equal Protection Analysis: Laurence Tribe, the Middle Tier, and the Role of the Court*, 14 U. SAN FRAN. L. REV. 525 (1980).
75. 429 U.S. 190, 197 (1976).
76. *Id.*
77. *See* Fox, *supra* note 74, at 530.
78. *Id.* at 531 (footnotes omitted).

important legislative end."[79]

Although the *Hummeldorf* decision, with which this comment is primarily concerned, relied on *Craig v. Boren,* subsequent United States Supreme Court cases are also good precedent for use of the intermediate standard of equal protection review in testing the constitutionality of gender-based practices.

In *Califano v. Goldfarb,*[80] a closely divided Court held unconstitutional another Social Security Act provision similar to the previous provision in *Weinberger.*[81] In *Goldfard,* a widow received survivor's benefits without any restrictions, while a widower was required to have received at least half his support from his deceased wife. The Court rejected this paternalistic distinction between men and women. The Court commented that a gender-based differentiation "is forbidden by the Constitution, at least when supported by no more substantial justification than archaic and overboard generalizations or old notions, such as assumptions as to dependency that are more consistent with the role typing society has long imposed than with contemporary reality."[82]

In 1979, in *Orr v. Orr,*[83] the Court invalidated an Alabama statute which required the husband to provide alimony, but not the wife. Again the Court applied the *Craig v. Boren*[84] requirements of important governmental objectives and a substantial relation to achievement of those objectives. The appellant asserted that the state's purposes were to impose the "provider" (and, therefore, protector) role on the husband, to provide financial help for needy wives from a broken marriage, and to compensate women for past discrimination in marriage.[85] In summarizing this case, the Court commented that gender based distributions of burdens or benefits risk "reinforcing stereotypes about the proper place of women and their need for special protection," and "must be carefully tailored."[86] In addition, when a gender neutral classification equally

79. *Equal Protection and Due Process, supra* note 60, at 532.

80. 430 U.S. 199 (1977).

81. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

82. 430 U.S. at 207 (*quoting* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 645, 653 (1975); Stanton v. Stanton, 421 U.S. 7, 15 (1975)). The statutory purpose to aid dependent spouses was "coupled with a presumption that wives are usually dependent." Weinberger v. Wiesenfeld, 420 U.S. 636, 647 (1975).

83. 440 U.S. 268 (1979).

84. 429 U.S. 190 (1976).

85. Orr v. Orr, 440 U.S. at 280.

86. *Id.* at 283 (*quoting* United Jewish Org. v. Carey, 430 U. S. 144, 173-74 (1977)).

serves the state's purposes, "the State cannot be permitted to classify on basis of sex."[87]

That same term, in *Personnel Administrator of Massachusetts v. Feeney*,[88] all nine members of the Court accepted and adopted the intermediate standard of judicial review for gender-based discrimination cases. In *Feeney*, the Court held that a Massachusetts statute granting veterans preference in civil service jobs did not violate the equal protection clause of the fourteenth amendment. The important consideration was the purpose behind the law, not the disparate impact or result.[89] However, in dicta, the Court stated that a statute, gender-neutral on its face, if proved to be overtly or covertly designed to discriminate on the basis of sex, would require an "exceedingly persuasive" justification to withstand a constitutional challenge under the equal protection clause.[90] Since, in *Feeney*, the Court determined that the veterans preference statute was neither covertly or overtly designed to discriminate against women, the Court did not have to determine if the purpose of the statute was exceedingly persuasive.[91] The Court found that the intent of the statute was to benefit veterans, rather than to discriminate against women.[92]

In the last ten years, the Court has taken significant steps to end the legal protectiveness long attached to classifications affecting women. As a minimum, states no longer may enact gender-based legislation that does not meet important governmental objectives and which is not substantially related to such achievement. It is also possible that gender-based statutes with an overt or covert purpose to discriminate may require exceedingly persuasive justification, a seemingly stricter requirement than "important." In any event, discrimination against women now may not be justified by assumptions based on stereotypes or classifications that are merely "rational."

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87. *Id.* at 283.

88. 442 U.S. 256 (1979).

89. *Commentary on Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), 7 HASTINGS CONST. L. Q. 429, 442 (1980).

90. 442 U.S. at 273.

91. *Id.* at 276-78.

92. 442 U.S. at 276, 280.

IV. *Hummeldorf v. Hummeldorf* AND THE ADOPTION OF INTERMEDIATE REVIEW IN KENTUCKY

Hummeldorf v. Hummeldorf[93] is the first case in which the intermediate level of equal protection review has been applied to a gender-based distinction in Kentucky.[94] The impetus for *Hummeldorf* was a husband's filing for divorce in Boone County, Kentucky, where he had moved after separation from his wife. His wife and children continued to reside in Kenton County. The trial court dismissed the husband's petition due to improper venue pursuant to section 452.460 of the Kentucky Revised Statutes, which places divorce venue in the county of the wife.[95] The husband then appealed the dismissal as a denial of equal protection under the fourteenth amendment, as well as Section Two of the Kentucky Constitution.[96] The Court of Appeals reversed the circuit court and directed the trial court either to proceed on the husband's original petition or reject jurisdiction based on other guidelines outlined in the opinion. The result was the Court of Appeals' decision that the Kentucky divorce venue statute was unconstitutional, based on its failure to withstand the intermediate level of equal protection review.

Kentucky's divorce venue statute, originally adopted in 1852, was directed toward the convenience of women.[97] According to the Kentucky court: "The real object, we have no doubt, was to regulate the jurisdiction as to subserve the convenience and possibly the interest of the wife by making the jurisdiction local to that county in which she should, at the time of the commencement of the suit have an actual residence."[98] This attitude of protectiveness toward women was based on the status of a woman in the mid-nineteenth century. At that time, a wife or mother was simply an extension of her husband and dependent on him.[99] Without any economic independence, women were restrained and possessed lim-

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93. 616 S.W.2d 794 (Ky. App. 1981).

94. Craig v. Boren, 429 U.S. 190 (1976).

95. "An action for alimony or divorce must be brought in the county where the wife usually resides, if she have an actual residence in this state; if not, in the county of the husband's residence." KY. REV. STAT. § 452.470 (1975).

96. Brief for Appellant, Hummeldorf v. Hummeldorf, 616 S.W.2d 794 (Ky. App. 1981).

97. Simms, *The Kentucky Divorce Venue Statute: A Call for Reform*, 66 KY. L.J. 724, 725 (1978).

98. Johnson v. Johnson, 75 KY. (12 Bush) 485, 488 (1877). *See also* Williamson v. Williamson, 209 S.W. 503, 504 (Ky. 1919).

99. Simms, *supra* note 97, at 725.

ited mobility.[100] Legal actions for alimony[101] and abandonment[102] were available to women in Kentucky. At that time, an underlying assumption of the Kentucky venue statute was that "if the wife filed only for alimony, the husband was at fault for abandoning her."[103]

In *Hummeldorf*, the Kentucky Court of Appeals used the new intermediate level of equal protection review to closely examine the traditional protective attitude of the courts toward women. The court of appeals determined that the classification served no important governmental objectives, was not substantially related to the achievement of any important governmental objectives, and was, therefore, unconstitutional.[104]

In reaching this decision, the court considered three governmental interests raised by the appellee. The first objective the court considered was the historical basis of the statutory classification.[105] The court recognized that "[h]owever laudable and necessary protection [of women] was in the past, we do not think it comports with the changing status of women in our society today."[106] If the court upheld the statute, it would provide unnecessary protection to a woman in the situation in which a woman leaves her husband and forces him to litigate in her new forum.[107]

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100. *Id.* (footnotes omitted).

101. *Id.* at 726 nn.13 & 14. The notes quote from M. PAULSEN, W. WADLINGTON, & J. GOEBEL, DOMESTIC RELATIONS—CASES AND MATERIALS (1970): "Divorce *a mensa et thoro* was a partial divorce which did not extinguish any right or responsibilities attached to the marriage bond. . . . Alimony was basically a remedy provided by the English courts in a divorce *a mensa et thoro*, based on the husband's common law duty to support his wife. *Id.* at 416-19. Reference is also made to R. PETRILLI, KENTUCKY FAMILY LAW (1969): "by statute of 1812 . . . wives could sue and recover alimony without divorce . . . . There are several reasons a wife might choose to file for alimony but not divorce. The main reason is that a wife who divorced had to give up her dower interest in the husband's property. 28 C.J.S. *Dower* 53 (1941)." *Id.* § 25.27.

102. Abandonment [included but] was not limited to desertion. The husband could legally abandon the wife by treating her in such a manner as to force her to leave him—in effect constructive abandonment. . . . For example, in Williamson v. Williamson, the wife left her husband when he mistreated her children from a previous marriage. . . . In her subsequent suit for alimony, the court stated: [A] suit for alimony may be maintained independent of and without regard to a divorce, where the husband treats the wife with cruelty and compels her to leave him.

Simms, *supra* note 97, at 727-28 (footnotes omitted).

103. *Id.* at 727.

104. 616 S.W.2d at 797.

105. *Id.* at 796.

106. *Id.*

107. *Id.* This is the same rationale the Court used in Orr v. Orr, 440 U. S. 268 (1979), pertaining to the Alabama alimony statutes. *See* note 83 *supra*. The Court said that the

The second interest considered was the intention of the classification to "minimize conflicts by limiting the court's inquiry on venue . . . to the county of the wife's residence."[108] the appellee argued that to " 'equalize' the statute would foster a race to the courthouse."[109] The court rejected the interest of judicial and administrative conveniences, however, since the original statute already created a race to the courthouse.[110] The court stated that to " 'equalize' the statute did not create a race, but merely changed the character of the existing race."[111] In addition, the court offered certain guidelines to the circuit courts to avoid confusion over who would win the race. The courts were directed to follow "jurisdictional restraints on the court's ability to handle the related matters of child custody, child support, maintenance and property settlement."[112] The court also stated that the factors outlined in *Shumaker v. Paxton*[113] were relevant to divorce venue questions: "(1) the county of the parties' marital residence prior to separation; (2) the usual residence of the children, if any; (3) accessibility of witnesses and the economy of offering proof."[114] The *Hummeldorf* court also noted that the use of *forum non conveniens* was within the discretion of circuit courts who chose to decline jurisdiction when appropriate.[115]

Finally, the court rejected the objectives of limiting "forum shopping" and jurisdiction. Although these might be important governmental objectives, the statute was not substantially related to the objectives.[116] Rather, "a more narrowly drawn version providing for venue in the county of the parties' last residence prior to separation would serve that purpose without resort to the unre-

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"present Alabama statutes give an advantage only to the financially secure wife whose husband is in need." 440 U.S. at 282.

108. 616 S.W.2d at 797.

109. *Id.*

110. Under the statute, venue was determined based on the wife's actual residence. Therefore, with the requisite intent, the wife could change her residence immediately. 616 S.W.2d at 797. For instance, in Whitaker v. Bradley, 349 S.W.2d 831 (Ky. 1961), the wife lived four days in her new county. In Burke v. Tartar, 350 S.W.2d 146 (Ky. 1961), the husband won the race by filing for divorce in the morning while the wife was en route to a new residence.

111. 616 S.W.2d at 797.

112. *Id.* at 797-98.

113. 613 S.W.2d 130 (Ky. 1981). This case involved a dispute over the "proper forum for modification of an existing child custody decree." 616 S.W.2d at 798.

114. 616 S.W.2d at 798.

115. *Id.*

116. *Id.* at 797.

lated factor of gender."[117] The court, in essence, found an "unduly tenuous 'fit' " between the valid governmental objective and means used to achieve it.[118]

As a result of *Hummeldorf,* Kentucky courts are now required to determine venue in divorce suits on gender-neutral factors. The immediate effect has been to end Kentucky's reign as the only jurisdiction which rejected the usual criteria for divorce venue—the county of the plaintiff, the county of the defendant, or the county where either party lives.[119] However, the more important result of the case is the implication for other gender-based laws in Kentucky. The final section of this comment will analyze the application of *Hummeldorf* and intermediate equal protection review to the current gender-based discriminatory practice in Kentucky of placing restrictions on a woman's right to use her own legal surname.

V. HUMMELDORF AND A WOMAN'S SURNAME

In 1974, the Kentucky General Assembly made comprehensive revisions of state laws attempting to eliminate gender-based language and practices.[120] However, a symbolically important remnant of the historical attitude toward women continues through controls place on a married woman's surname. *Hummeldorf's* application of the intermediate standard of equal protection review calls into question the legality of these controls.

A. History and Significance of Surnames

At English common law, a married woman was not required to take her husband's surname upon marriage.[121] But the feudal doctrine of coverture (marriage) created the "old common law fiction that the husband and wife are one . . . [and] the one is the hus-

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117. *Id.*

118. *Id. See also* Craig v. Boren, 429 U.S. 190, 202 (1976).

119. Simms, *supra* note 97, at 731 nn.40-44.

120. Act of April 2, 1974, Ch. 386, 1974 Ky. Acts 762. *See* Simms, *supra* note 97, at 734 n.62, for a proposal to conduct a study, and nn.66-69 for examples of changes made to eliminate sex discrimination.

121. Comment, *Women's Name Rights* 59 MARQ L. REV. 876, 882 (1976). *See also* Comment, *Married Women and the Name Game* 11 U. RICH. L. REV. 121 (1976) [hereinafter cited as *Name Game*]. "When a woman married she generally adopted the name of the husband by usage but she was not required to do so. . . . There were significant instances in which the wife and the husband held different surnames. It was even more common for the husband to adopt the wife's surname." *Id.* at 128 (footnotes omitted).

band."[122] Since married women did not have the legal right to contract, to sue or be sued, or handle property, the married woman adopted her husband's surname out of practical necessity.[123] The change of name, however, existed in fact, not in law.[124]

Surnames function as a powerful symbol of identity. In America, names often serve to establish or alter identity with certain ethnic groups. For example, immigrants frequently have anglicized their names in order to assimilate themselves into American culture.[125] Surnames are said to perform at least three functions:[126] (1) provide continuity with identity; (2) maintain relationships with biological or psychological parents and a nuclear family; and (3) serve as a vehicle for transferring the goodwill associated with the name in a community. Thus, *requiring* a wife to adopt her husband's surname is an explicit symbolic statement of the merger of the wife's indemnity with her husband's.[127] Her symbolic relationship with her parents is terminated and she loses whatever goodwill was assciated with her prior name. The strong reaction from both proponents and opponents of the woman's right to use her maiden name, in itself, indicates the importance of a person's surname.[128]

B. Surname of Divorced Women with Children

The current statutory control Kentucky laws place on a woman's surname occurs in divorce. Prior to 1972, Kentucky law allowed a woman the absolute right to restore her maiden name after a divorce.[129] Today, under comprehensive revisions of Kentucky divorce law, the judge determines whether a divorced woman with children may return to the use of her maiden or former name.[130] In

122. United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).

123. Comment, *Women's Name Rights*, 59 MARQ. L. REV. 876, 883 (1976).

124. 19 HALSBURY, LAWS OF ENGLAND 829 (3d ed. 1957).

125. Thornton, *The Controversy over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests* UTAH L. REV. 303, 304 (1979).

126. *Id.* at 304. Though the article states that children's surnames perform these three functions, these functions also are applicable to surnames of adults.

127. B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAWS 102 (1977). This comment does not seek to negate the choice of a woman to assume her husband's surname. "Rather, the issue is whether society has such a significant interest in a particular name-symbol of marriage that a married woman must bear a name which she feels does not reflect her true identity." *Name Game, supra* note 121, at 125.

128. *Name Game, supra* note 121, at 124.

129. "If the wife obtaining a divorce so desires, the Court shall restore to her the name she bore before marriage." KY. REV. STAT. § 403.060 (1972) (repealed 1972).

130. *See* note 1 *supra*.

establishing this restriction, the determinative factor is whether there are "children of the parties."[131] The following analysis is offered to illustrate that the objectives of the provision relate to the interests of the children or the state, and not the woman. It will focus on the intermediate level of equal protection review adopted in *Hummeldorf*:[132] any gender-based law in Kentucky must fulfill important governmental objectives and employ means substantially related to the achievement of those objectives.

The objectives related to protecting the children's interest involve the previously discussed purposes of surnames:[133] (1) continuity of identity; (2) relationships with parents and family; and (3) transferring goodwill of the name. To implement these three objectives, the state requires that the mother (former wife) retain the paternal (former husband's) surname to prevent the children from having parents with different surnames. In determining whether children should adopt the surname of a mother who remarries, the courts in other states have considered the embarrassment, confusion, and inconvenience a child may experience due to different parental surnames.[134] Most courts find these factors insufficient and "minimize the severity of the problem by pointing out that the situation has been relatively common in a society where divorce and subsequent remarriage are so prevalent."[135]

The means to accomplish the objectives identified above also are inadequate under Kentucky common law, since a woman who remarries is not required to keep her former husband's surname.[136] Though the woman who remarries may have children by the former marriage with the former husband's surname, the woman is not required to retain it but may adopt a new surname. To require divorced mothers to retain paternal surnames, while married mothers are not required to, creates an over-inclusive classification.[137] Finally, the objective of transferring the goodwill of a name is not an issue when the mother changes her name, since the child retains the paternal name and the "goodwill" of the name

131. The conflict only arises when a divorced woman chooses and requests to have her maiden or former name restored.

132. 616 S.W.2d 794.

133. *See* note 125 *supra*.

134. Thornton, *supra* note 125, at 325 n.100. These cases involved a parental request to change the child's name rather than a parental request to change his or her own name.

135. *Id.* at 326 (footnotes omitted).

136. *See* note 147 *infra*.

137. *See* note 30 *supra*.

continues.[138]

The other possible interest of the provision is administrative convenience for the state. Requiring women to adopt paternal surnames purportedly facilitates ascertaining legal relationships.[139] However, the Court has not upheld administrative convenience as a valid objective in gender-based distinctions.[140] In addition, the means of achieving this objective are not substantially related to it. For instance, a less restrictive alternative would have "state officials in charge of vital records cross-index births under the surnames of both parents."[141] Also, one commentator states that there is no adequate explanation "why the administrative burden of a change [the court] condone (the adoption by a wife of her husband's surname) is less than that of the change they oppose (the resumption of the pre-marriage name by a married woman)."[142] Finally, since at common law any person could informally change a name by public declaration,[143] a divorced woman may informally change her name even if the court does not do so. To facilitate administrative convenience and prevent dual names, the court should grant the informally used name to divorced women upon request.

The statutory restrictions on a divorced woman's surname fail to meet the equal protection standard of intermediate review. Therefore, the statute should either be revised to reflect previous law[144] or the courts should be limited to preventing fraudulent use of names. For instance, the Indiana Supreme Court concluded that in an Indiana statutory provision where a judge "*may* change the names of natural persons on application by petition,"[145] . . . "the only duty of the trial court upon the finding of such petition is to determine that there is no fraudulent intent involved."[146]

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138. But the goodwill of a name could "pass as easily through a maternal as paternal line, and the automatic choice of one over the other without an analysis on the merits does not seem to meet even a deferential standard of equal protection." Thornton, *supra* note 125, at 310 (footnotes omitted).

139. *Id.* at 306.

140. Reed v. Reed, 404 U.S. 71, 76 (1971). *See* notes 55-56 *supra* and accompanying text. *See also* Craig v. Boren, 429 U.S. 190, 197-98.

141. Thornton, *supra* note 125, at 308 (footnotes omitted).

142. *Name Game, supra* note 121, at 154 n.218.

143. Burke v. Hammonds, 586 S.W.2d 307, 308 (Ky. App. 1979).

144. *See* note 129 *supra*

145. IND. CODE ANN. § 34-4-6-1 (1973) (emphasis added).

146. *In Re* Hauptly, 312 N.E.2d 857, 860 (Ind. 1974). *See also Name Game, supra* note 121, which says, "Courts in jurisdictions which have not abrogated the common law right to

C. *A Married Woman and Her Driver's License*

An oral instruction issued by the Director of the Division of Driver Licensing, Kentucky Department of Transportation, required that "all operator's licenses issued to married women must be in the surname of their husbands unless a court order granting a name change is presented to the circuit clerk at the time of the application for, or renewal of, the license."[147] Thus, a local circuit clerk could refuse a married woman a driver's license unless she complied by using her husband's name.

The constitutionality of this administrative requirement was tested in *Whitlow v. Hodges.*[148] The plaintiff used her maiden name as her legal name after her marriage, but was denied a driver's license unless she used her husband's surname. A class action suit was filed based on a violation of civil rights under the due process and equal protection clauses of the fourteenth amendment. The United States District Court for the Eastern District of Kentucky dismissed the complaint.[149] But, upon remand from the United States Court of Appeals of the Sixth Circuit,[150] the District Court ascertained that "under the common law of Kentucky, a woman upon marriage abandons her maiden name and assumes her husband's surname."[151] The court said that, under the common law, "the wife's legal existence was, in virtue of marriage, suspended or extinguished . . . or entirely merged or incorporated into that of the husband."[152] Upon subsequent appeal, the Court of Appeals of the Sixth Circuit decided that "upon further reflection . . . we need not determine with finality that the challenged

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change a legal name by usage without legal proceedings will generally wish to minimize a judge's discretion." *Id.* at 153 (footnotes omitted).

147. 77 OP. KY. ATT'Y GEN. 72 (1977).

148. 539 F.2d 582 (6th Cir. 1976), *cert denied,* 429 U.S. 1029 (1976).

149. By brief order, the late District Judge Mac Swinford dismissed the complaint relying wholly upon Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), a three-judge district court ruling, *affirmed* without opinion by the Supreme Court at 405 U.S. 970, 92 S. Ct. 1197, 31 L.Ed.2d 246 (1972). The court in Forbush denied the same claim now being urged by plaintiff in the instant case.
539 F.2d at 583.

150. The case was remanded primarily to permit an inquiry into whether Kentucky law allows a married woman to retain her maiden name as her legal name, indicating that if the district court should find that Kentucky law, like that of Alabama, requires a woman to take her husband's surname upon marriage, then . . . the result would be clearly compelled by the affirmance of *Forbush.*
539 F.2d at 583.

151. *Id.*

152. Whitlow v. Hodges, No. 74-7 at 2 (E.D. Ky. Feb. 14, 1978).

regulation is consistent with the common law of Kentucky. . . . Instead [the] primary thrust [is] directed to the question of whether the challenged regulation has a rational connection with a legitimate state interest."[153] Using the rational basis test, the court of appeals held that the rationale of orderly and convenient administration of license issuance and the preservation of the integrity of licenses, which the United States Supreme Court affirmed in *Forbush v. Wallace*,[154] were also reasonable state interests in this case.[155] The court further noted that Kentucky afforded a simple and inexpensive means for changing a person's name.[156]

Although the Sixth Circuit followed the rationale and result of *Forbush*, the court of appeals avoided deciding whether Kentucky common law does, in fact, require married women to assume their husbands' surnames.[157] Under Section 233 of the Kentucky Constitution, the English common law is said to rule, unless specifically abrogated by the Kentucky courts or legislature.[158] The district court, however, incorrectly equated the feudal *customs* of marriage with the common laws regarding surnames,[159] and held that the English, and therefore Kentucky, common law merged the wife's identity into her husband's.[160] As observed in *Kruzel v. Podell*,[161] surprisingly, the English common law theory of coverture did not require the wife to assume the husband's surname: "However, when the wife did assume the husband's name, it was a matter of

153. 539 F.2d at 583.

154. 341 F. Supp. 217 (M.D. Ala. 1971), *affirmed* 405 U.S. 970 (1972).

155. "The rationale of *Forbush* can be applied equally here and without variation." 539 F.2d at 583.

156. Any person at least eighteen (18) years of age, may have his name changed by the county court of the county in which he resides. If he resides on a United States army post, military reservation or fort his name may be changed by the county court of any county adjacent thereto.

KY. REV. STAT. § 401.010 (Supp 1980). Prior to 1974, the provision did not apply to married women. Act of March 12, Ch. 66, § 1, 1974 Ky. Acts 63, deleted the prior exclusion of married women.

157. As Justice McCree indicated, "We cannot determine whether this case is governed by *Forbush* . . . unless we first determine whether the common law of Kentucky, like that of Alabama, requires a married woman to adopt her husband's surname." 539 F.2d at 584 (McCree, J., dissenting).

158. KY. CONST. § 233. *See also* Whitlow v. Hodges, No. 74-7, at 2 (E.D. Ky. Feb. 14, 1975), 539 F.2d 582 (6th Cir. 1976), *cert denied*, 429 U.S. 1029 (1976).

159. Brief for Appellant at 4, Whitlow v. Hodges, 539 F.2d 582 (6th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976).

160. Whitlow v. Hodges, No. 74-7, at 2 (E.D. Ky. Feb. 15, 1978).

161. 67 Wis.2d 138, 226 N.W.2d 458 (1975).

custom or practice and not of law."[162] Thus, the district court's rendition of the Kentucky common law[163] was incorrect and the court of appeals should have reversed on that issue alone.

In addition, case law has since rejected historical practices as rationales for gender based classifications.[164] Even if there had been a tradition of women accepting their husband's surnames, to require the perpetuation of such a practice does not comport with the "changed status of women."[165] In the words of one commentator, the courts in *Whitlow* ignored significant doctrinal changes that had occurred after *Forbush* was decided. Had the court in *Whitlow* applied the appropriate standard of review, it would have found a violation of Whitlow's right of equal protection under law."[166] Although the decision in *Whitlow* employed the rational basis test, as a result of *Hummeldorf*, now an *important* governmental objective must be shown and the means used must have a substantial relation to that important governmental objective.[167]

The governmental interests advanced by the state were administrative order and convenience, and preserving the integrity of the driver's license.[168] Administrative convenience, however, has been held an insufficient governmental objective in gender-based distinction.[169] In addition, the state's interest in preserving the integrity of the driver's license, even if arguably an important governmental interest, is not implemented by a means substantially related to the achievement of that objective. Since, under Kentucky common law, a married woman legally may retain her maiden name,[170] there is no substantial relation between using the driver's license as a means of identifying a woman, when she must use a name other than her legal name.[171] Rather than being rational, the result created an irrational scenario in which the law

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162. *Id.* at 463. *See* notes 121-124 *supra.*

163. 77 OP. KY. ATT'Y GEN. 72 (1977).

164. Hummeldorf v. Hummeldorf, 616 S.W.2d at 796. *See* notes 105-06 *supra* and accompanying text.

165. 616 S.W.2d at 796.

166. *Driver's License, supra* note 4, at 163.

167. Hummeldorf v. Hummeldorf, 616 S.W.2d 794 (Ky. Ct. App. 1981). *See also* Craig v. Boren, 429 U.S. 190 (1976).

168. 539 F.2d at 583.

169. *See* Reed v. Reed, 404 U.S. 71 (1971), and notes 55-58 *supra* and accompanying text. *See also* Frontiero v. Richardson, 411 U.S. 677 (1973) and notes 61-63 *supra* and accompanying text.

170. *See* note 163 *supra* and accompanying text.

171. *Driver's License, supra* note 4, at 161.

demanded that a woman "change" her name to what it already is.[172]

The requirement that a married woman use her husband's surname on her driver's license clearly fails to meet the standards of intermediate review. To rectify this inequity, the discriminatory practice was recently repealed by administrative order.[173] The Kentucky courts, however, should use the intermediate level of equal protection review adopted in *Hummeldorf* to overrule the gender-based references to the supposed common law merger of a woman with her husband. Finally, the Kentucky legislature could amend the laws[174] pertaining to surnames on vehicle operator licenses. In two previous sessions, bills have been presented to correct the driver's license problem, but they have failed to receive approval.[175] Legislatures should reconsider the implications of practices requiring women to use their husband's names that perpetuate archaic notions that a woman has no separate identity from that of her husband.

CONCLUSION

The recent decision in *Hummeldorf* provides the clearest statement of reasons to eliminate the discriminatory restrictions on a woman's choice of surname. The intermediate level of equal protection requires such restrictions to serve important governmental objectives and utilize means substantially related to their achievement. But neither the surname restriction on a driver's license or in a divorce may be justified by administrative convenience. Also,

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172. *Id.* at 162.

173. *See* note 5 *supra.*

174. KY. REV. STAT. § 186.412 and § 403.230(2) (1980).

175. Senate Bill 199 proposed to amend KY. REV. STAT. § 186.412 by adding: "If a married person has elected to retain a maiden or former name, then such person may be issued an operator's license in such maiden or former name so long as the name is not used for fraudulent purposes." The amendment was deleted by the committee on Highways and Traffic Safety. *Bill Summaries,* LEGISLATIVE RECORD, April 3, 1978, at 29.

House Bill 592 proposed to amend KY. REV. STAT. § 186.412 by adding: "If a married or previously married person has elected to use or retain a birth, former, or hyphenated name, then such person may be issued an operator's license in such birth, former, or hyphenated name, so long as the name is not used for fraudulent purposes." The amendment after a defeat on March 25, 1980, was reconsidered on March 27, 1980, and passed the House by a vote of 54-37 and was forwarded to the Senate Committee on Highways and Traffic Safety. This session ended on April 3, 1980, without the bill ever leaving the committee. *Bills in Committee,* LEGISLATIVE RECORD, April 16, 1980, at 2. Although the bill had been prompted by the request of the Kentucky Commission on Women, the 1980 House bill became dubbed the "Phyllis George" bill. Louisville Courier-Journal, Mar. 30, 1980, at 34, col. 1.

historical or traditional practices are no longer permitted, due to the changed status of women. Furthermore, the purposes—perserving the integrity of driver licenses and providing children with identity or relationships to parents—do not serve any important objectives. A woman, whether married or not, should have the constitutional right to maintain an independent social and legal identity by being allowed to use the name she chooses. As one commentator has expressed it, the symbolic function of a woman choosing her own legal name "is to show that she is an individual, in her own right" and that "[n]o matter how important the relationship [of marriage] may be, she does not feel that it should define her identity."[176] Because of current Kentucky limitations placed on a woman's choice of surname fail to pass the intermediate level of equal protection review, these restrictions should be eliminated.

DENISE HOUGH

176. Comment, *A Woman's Right to Her Name*, 21 U.C.L.A. L. REV. 665, 685 (1973) (footnotes omitted).