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Sex Discriminatory Admission Policies in Public Schools Subject to Stringent Judicial Review.

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CASE NOTES

CONSTITUTIONAL LAW—Equal Protection—Sex Discriminatory Admission Policies In Public Schools Subject To Stringent Judicial Review

Berkelman v. San Francisco Unified School District,
501 F.2d 1264 (9th Cir. 1974).

San Francisco Unified School District operated 11 high schools, four of which had special educational objectives and accepted qualified students from anywhere in the district. One of these special schools, Lowell High School, was the only school which offered an advanced college preparatory curriculum. Applicants for admission to Lowell were ranked numerically according to their junior high school grade point averages in four specified subjects and were admitted in numerical order until the class was filled. In 1970 Lowell instituted a balancing-of-the-sexes policy whereby an equal number of boys and girls would attend the school. This policy resulted in stricter admission standards for female than for male applicants.[1]

The plaintiffs, claiming to represent a class of students denied admission to Lowell High School, commenced an action in the United States District Court for the Northern District of California alleging that the admission policy deprived them of equal protection of the law. The district court upheld the validity of the admission policy, and the plaintiffs appealed to the Court of Appeals for the Ninth Circuit. Held—*Reversed.* The use of higher admission standards for female than for male applicants to Lowell High School violates the Equal Protection Clause of the 14th Amendment.[2] The test to be applied in reviewing the validity of sex-based admission policies is one of "strict rationality," a standard requiring the "classifier" to produce evidence that the challenged classification furthers its central purpose.[3]

1. In 1970 and 1971, male applicants were required to have a 3.0 (on a 4-point scale) average, while females had to have a 3.25. In 1972, the standard was raised, requiring males to have a 3.25 and females to have a 3.50. Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1268 (9th Cir. 1974).

2. *Id.* at 1270. U.S. Const. amend. XIV, § 1 provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

3. Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1269 (9th Cir. 1974).

Historically a dual-level approach has been utilized in determining the validity of statutory classifications under the Equal Protection Clause of the 14th Amendment. A strict standard of review is applied in equal protection cases when suspect classifications such as race,[4] alienage[5] and national origin[6] are concerned. The state must bear a heavy burden of justification in proving the classification is necessary to promote a compelling state interest.[7] There must be no reasonable alternate means to accomplish the state objective,[8] and both the purpose of the program and the classification used to further it must bear a heavy burden of justification.[9]

Where nonsuspect classifications are involved, the traditional standard of review is applied.[10] This approach requires the existence of a rational relationship between the classification and a permissible state objective.[11] The classification is presumed to be valid; the burden of proof being on the challenging party to show that it is unconstitutional.[12] The state does not have to prove the legitimacy of the purpose, and, where the purpose of the classification is in doubt, it will be sustained on any conceivably justifying state of facts.[13] In absence of evidence showing a legitimate state interest, the court will determine the purpose of the statute and ascribe that purpose to the classification.[14]

Recent United States Supreme Court decisions involving nonsuspect classifications have applied a more stringent standard of review.[15] In its analyses

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4. *E.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967).
5. *E.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).
6. *E.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944).
7. *E.g.*, Loving v. Virginia, 388 U.S. 1, 9 (1967).
8. *See* Shapiro v. Thompson, 394 U.S. 618, 637 (1969).
9. Loving v. Virginia, 388 U.S. 1, 9 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).
10. *E.g.*, Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Richardson v. Belcher, 404 U.S. 78, 81 (1971); McGowen v. Maryland, 366 U.S. 420, 425-26 (1961).
11. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); McGowen v. Maryland, 366 U.S. 420, 425-26 (1961); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
12. Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948); *see* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 420 (1920) (Brandeis, J., dissenting).
13. Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935); *see* Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 590-92 (1961). A good definition of the traditional standard was presented by Chief Justice Warren in McGowen v. Maryland, 366 U.S. 420 (1961):

> [The Equal Protection Clause] permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26.
14. A de Tocqueville, *Developments in the Law—Equal Protection, Democracy in America*, 82 HARV. L. REV. 1065, 1077 (1969); *see* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
15. *E.g.*, James v. Strange, 407 U.S. 128, 140-42 (1972); Jackson v. Indiana, 406 U.S. 715, 723-30 (1972); Jefferson v. Hackney, 406 U.S. 535, 546-51 (1972); Weber

the Court has continually stated that it was employing the traditional standard; in reality, however, the Court has determined the validity of the classifications in question in light of the evidence presented, rather than on the basis of any conceivable state of facts.[16] The evaluation has been focused on the means employed in determining whether the policy in question has actually and substantially furthered a proffered permissible objective,[17] and there has been no evaluation of the constitutionality of the legislative purposes.[18] Thus, unlike the traditional standard which allows the court to hypothesize facts and purposes, this means-scrutiny test requires the state to present a permisible objective. The means-scrutiny test does not require the showing either that there is compelling interest or that no alternate means are available in accomplishing the stated purpose; it does require, however, that the classification actually and substantially further the purported objective.[19]

Sex-based classifications have rarely been invalidated.[20] A combination

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v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-76 (1972); Reed v. Reed, 404 U.S. 71, 75-77 (1971). The Supreme Court of the United States has not explicitly articulated the existence of a new standard of review. Lower federal courts have interpreted the recent decisions of the Supreme Court as utilizing a new, more intense standard. *See* Boraas v. Village of Belle Terre, 476 F.2d 806, 819-22 (2d Cir. 1973), *rev'd*, — U.S. —, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974) (dissenting opinion); Green v. Waterford Bd. of Educ., 473 F.2d 629, 633-34 (2d Cir. 1973); Johnston v. Hodges, 372 F. Supp. 1015, 1017 (E.D. Ky. 1974); Bowen v. Hackett, 361 F. Supp. 854, 861 n.6 (D.R.I. 1973). *See also* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972).

16. *See* James v. Strange, 407 U.S. 128, 140-42 (1972); Jackson v. Indiana, 406 U.S. 715, 723-30 (1972); Jefferson v. Hackney, 406 U.S. 535, 546-51 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-76 (1972); Richardson v. Belcher, 404 U.S. 78, 81-84 (1971).

17. *See* James v. Strange, 407 U.S. 128 (1972) (In considering the validity of a Kansas recoupment statute the Court avoided any consideration of the constitutional validity of the statute and focused on the means as a furtherance of the objective presented by the state); Jackson v. Indiana, 406 U.S. 715 (1972) (Court, in invalidating a statute, accepted as legitimate without evaluation the objective presented by the state and focused its analysis on the rationality of the classifications). The Court in Eisenstadt v. Baird, 405 U.S. 438 (1972) and Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) seems to use a more intense standard than that used in *James* and *Jackson* because the evaluation extended to the legitimacy of the state objective.

18. *See* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Jefferson v. Hackney, 406 U.S. 535 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972).

19. Bowen v. Hackett, 361 F. Supp. 854, 861 (D.R.I. 1973). The Court in distinguishing the means-scrutiny, the traditional rational and the strict scrutiny standards states: "This 'new' rational basis test appears to demand a greater showing of legitimate state interest than the 'traditional' rational basis test, but not so great a showing as to be a compelling state interest." *Id.* at 861 n.6. For a detailed discussion of the means-scrutiny standard see Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1970).

20. *E.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908); *In re* Lockwood, 154 U.S. 116 (1894); Bradwell v. Illinois, 83 U.S. (16 Wall.)

of extreme judicial deference to the legislative branch and archaic notions of woman's role in society[21] usually provided the basis for the earlier decisions.[22] Later cases adhered to this deferential attitude, and sex-based classifications were held valid on the basis that the underlying legislative purposes of such classifications were the physical and moral protection of women.[23] Two recent decisions of the Supreme Court reveal, however, that more stringent standards of review than the traditional or "rational" standard are now being applied to classifications involving sex distinctions.[24]

Reed v. Reed[25] was the first decision in which a more stringent review standard was applied where a nonsuspect classification was involved. In invalidating an Idaho statute providing for mandatory preference to men over women when both apply for appointment to administer an estate, the Court purportedly applied the traditional "rational" standard.[26] Two reasons were advanced by the state for upholding the classification: (1) to reduce the workload of probate courts, and (2) that men were generally more conversant in business affairs than women.[27] The second defense was totally ignored in the evaluation, while the first was immediately rejected even though it was found to be "not without some legitimacy."[28]

The test applied in *Reed* is more stringent than that found in subsequent cases which apply the means-scrutiny test.[29] Even under the means-scrutiny test a rational relationship could have been found on the grounds that the proffered state objective of reducing the workload of the probate courts was furthered by the elimination of one class of contests. The evaluation clearly involved a balancing of interests: though the state interest had some

130 (1872); State v. Hunter, 30 P.2d 455 (Ore. 1956); Commonwealth v. Welosky, 177 N.E. 656 (Mass. 1931), *cert. denied*, 284 U.S. 684 (1932).

21. Frontiero v. Richardson, 411 U.S. 677 (1973). In the plurality opinion the Court underscored the effect of the "paternalistic attitude" of the courts toward women: "As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes . . . ." *Id.* at 685.

22. *In re* Lockwood, 154 U.S. 116 (1894); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872); *see* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1971).

23. Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (statute prohibiting women from tending bar unless they were the wife or daughter of the bar owner in order to protect the morals of women); Muller v. Oregon, 208 U.S. 412, 421-23 (1908) (statute providing maximum working hours for women on the basis that women require special treatment due to their physical weakness); *see* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. REV. 675 (1970).

24. Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

25. 404 U.S. 71 (1971).

26. *Id.* at 72-73, 76.

27. Brief for Appellee at 12, Reed v. Reed, 404 U.S. 71 (1971), *cited in* Frontiero v. Richardson, 411 U.S. 678, 683 n.10 (1973).

28. Reed v. Reed, 404 U.S. 71, 76 (1971).

29. *Compare* Reed v. Reed, 404 U.S. 71 (1971) *with* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Richardson v. Belcher, 404 U.S. 78 (1971).

legitimacy, the interests of the challenging party sufficiently outweighed the state's interest as to make the classification arbitrary and discriminatory. While the application of this strict standard reveals a sensitivity toward classifications involving sexual distinctions, the analysis obviously ignores an evaluation of sex as a basis of classification by limiting the scope of review to the means as a furtherance of the particular objective espoused by the state.[30] In so focusing on the means in a specific context, *Reed* avoids the evaluation of the constitutionality of sexual distinctions in any statutory scheme.[31]

The plurality decision in *Frontiero v. Richardson*[32] struck down a statute which had required that servicewomen prove the dependency of their spouses in order to qualify for increased service benefits.[33] All classifications based on sex were held to be inherently suspect and, therefore, subject to strict judicial scrutiny.[34] The concurring Justices, although refusing to hold all sex-based classifications suspect, felt that these particular statutes were invalid under the *Reed* standard because they resulted in an invidious discrimination against servicewomen.[35] The statutes involved in the *Reed* and *Frontiero* decisions were based on stereotyped distinctions between males and females: in *Reed* the state based its classification on the assumption that men were more conversant in business affairs than women, while in *Frontiero* the statute was based on the assumption that women are usually dependent on their husbands.[36] The plurality opinion of *Frontiero* based its holding on the fact that discrimination against women is due mainly to "gross stereotyped distinction between the sexes."[37]

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30. Reed v. Reed, 404 U.S. 71, 76-77 (1971); *see* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 34 (1970).

31. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-21, 30 (1972).

32. 411 U.S. 677 (1973).

33. *Id.* at 679. The spouses of servicemen were presumed to be dependent. *Id.* at 678.

34. *Id.* at 688.

35. *Id.* at 691-92. While *Reed* and *Frontiero* represent the extension of a more stringent standard of review to sex-based classifications, this extension has been limited in its application by some lower federal courts to those cases involving classifications based on stereotypes of the traditional social roles of men and women. Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1296 (8th Cir. 1973); Smith v. City of E. Cleveland, 363 F. Supp. 1131, 1138-39 (N.D. Ohio 1973); Heath v. Westerville Bd. of Educ., 345 F. Supp. 501, 505 n.1, 506 (S.D. Ohio 1972); *see* McGill v. Avon Worth Baseball Conference, 364 F. Supp. 1212, 1215 (W.D. Pa. 1973); Aiello v. Hansen, 359 F. Supp. 792, 796-99 (N.D. Cal. 1973), *rev'd*, — U.S. —, 94 S. Ct. 2485, — L. Ed. 2d — (1974) (for a good example of the rationale utilized by the lower courts); *cf.* Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 606 (S.D.N.Y. 1970).

36. Frontiero v. Richardson, 411 U.S. 677, 681 (1973); Note, 57 MINN. L. REV. 339, 347 (1972).

37. Frontiero v. Richardson, 411 U.S. 677, 685 (1973). The concurring opinion

Sex-based admission policies in public educational institutions are among the most damaging injustices suffered by women.[38] By discriminating against women in admission policies schools deny equal opportunities in both education and employment.[39] Although a few cases have dealt with discriminatory admission policies,[40] *Berkelman v. San Francisco Unified School District*[41] is the first case to consider the question of judicial review of sex-based admission policies in public schools. While explicitly rejecting the *Frontiero* plurality holding, *Berkelman* extends the *Reed* standard to sex-based classifications which are not based on stereotypes of the social roles of men and women.[42]

The *Berkelman* decision clarified the scope and intensity of review of the *Reed* standard.[43] While the appellants urged the court to apply a strict standard of review in evaluating the admission policy, the appellees sought the application of the traditional standard. In analyzing the admission policy of Lowell High School, the court in *Berkelman* applied an intermediate standard of "strict rationality."[44] This approach was the same as that utilized in *Reed*: the interests of the state and the challenging party are balanced in order to determine whether the classification is permissible. Thus, the court in *Berkelman* explicitly extended the *Reed* standard to cover sex-based classifications which are not formulated on the basis of social stereotypes. In so extending *Reed*, the Ninth Circuit has clarified the scope of application but has also limited the rigidity of review standards by rejecting the use of the strict scrutiny test promulgated by *Frontiero*.[45]

The effect of this decision could possibly be limited to cases where the discrimination involves education. In support of its application of this rigid

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of Justices Stewart and Powell reinforces this interpretation by limiting their holding to the particular classification and statute under review. Indeed, Justice Powell explicitly declines to extend the rationale of the Reed decision. *Id.* at 691-92.

38. A MATTER OF SIMPLE JUSTICE, THE REPORT ON THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES (April 1970).

39. *Id.*

40. Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972); Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970); Kirstein v. Rectors & Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970).

41. 501 F.2d 1264 (9th Cir. 1974).

42. The admission policy in *Berkelman* was based on past academic achievement of males and females in junior high school.

43. *Id.* at 1269.

44. The opinions of the Justices in Frontiero v. Richardson, 411 U.S. 677 (1973) could possibly be interpreted to limit the application of both *Reed* and *Frontiero* to cases involving similar types of stereotypic discrimination. *Id.* at 689-90; *see* Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1296-97 (8th Cir. 1973); Eslinger v. Thomas, 476 F.2d 225, 231 (4th Cir. 1973); Johnston v. Hodges, 372 F. Supp. 1015, 1018-19 (E.D. Ky. 1974); Andrews v. Drew Municipal Separate School Dist., 371 F. Supp. 27, 35-36 (N.D. Miss. 1973); Daugherty v. Daley, 370 F. Supp. 338, 340-41 (N.D. Ill. 1974); Chastang v. Flynn & Emrich Co., 365 F. Supp. 957, 965-67 (D. Md. 1973).

45. Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1268-69 (9th Cir. 1974).

standard, the court cited Title IX of the Education Amendments of 1972 which prohibits sex discrimination in admission policies of certain educational institutions. It does not, however, cover sex-based admission policies in public secondary schools.[46] Since education is an area in which sex discrimination must be rectified due to its effect on women in all aspects of their lives, it is natural that the judiciary should follow the legislative branch in advancing equal opportunity to women in education.[47] By so limiting the scope of application of *Reed* and *Frontiero* to cases involving discrimination in education the judicial branch would exercise deference to legislative perogatives and yet refrain from evaluating the broader issue of the constitutionality of sex as a basis of classification.

The rigidity of the stated standard of review in *Berkelman* is questionable. In the determination of applicable standards, the plurality holding in *Frontiero* was explicitly rejected in favor of the *Reed* standard.[48] Since a majority of the Supreme Court has refused to specify sex as a suspect classification, *Berkelman* interprets both *Reed* and *Frontiero* as demanding a standard of "strict rationality" rather than the strict scrutiny standard which is applied to suspect classifications.[49] This "strict rationality" standard, which *Berkelman* purports to follow, requires the state "to produce evidence that the challenged classification furthers the *central purpose of the classifier* . . . ."[50] In substantiating this interpretation of the *Reed* standard the court relied on an analysis of the application of the standard by Gerald Gunther.[51] Gunther interprets *Reed* as following an intense means-scrutiny model.[52] His analysis is that because the *Reed* classification could have been upheld even under the means-scrutiny test, the decision was the result of the sensitivity of the Justices toward sex-based classifications.[53] The standard which Gunther advocates demands an examination merely of the means in light of the proffered state ends.[54] The scrutiny does not extend to the validity of the purpose.[55] This interpretation is inconsistent with the more stringent review which would result from the application of the "strict

46. Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1281(a)(1).
47. *Id.* § 1681.
48. Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1268-69 (9th Cir. 1974).
49. *Id.* at 1269.
50. *Id.* at 1269 (emphasis added).
51. *Id.* at 1269; Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Gerald Gunther, William Nelson Cromwell Professor of Law, Stanford Law School, Visiting Professor of Law, Harvard Law School.
52. Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 29 (1972).
53. *Id.* at 34.
54. *Id.* at 21.
55. *Id.* at 21-22.

rationality" standard as defined in *Berkelman*.

The standard defined in *Berkelman* is even more intense than the balancing test actually utilized in *Reed*. *Reed* required the state to produce evidence showing the legitimacy of both the proffered purpose of the statute and the means used to implement that purpose.[56] A standard of strict rationality would seem to go further, requiring a showing that the "central" purpose of the classifier, as opposed to any other legitimate purpose presented by the state, outweighs the interests of the individuals adversely affected. This interpretation corresponds more closely with the strict scrutiny test applied in *Frontiero*. While there is no requirement that the stipulated means be the only means available to accomplish the ends, the requirement that the state prove the furtherance of the "central" purpose would involve evaluations of legislative perogatives and proof of an overriding state interest.

An evaluation of the acutal application of the "strict rationality" test clarifies the scope of the review. The school presented only one basis for its admission policy—that due to the maturation and achievement rates of males and females, females receive better grades in their early school years, while males catch up in high school.[57] The state had offered this fact as evidence in support of their objective, but there was no attempt by the court to evaluate its legitimacy.[58]

Conceding that females mature and achieve at a faster rate than males, an admission policy which compensates for differentials in grade point averages would be valid to provide male applicants an equal opportunity for admission. The school district, however, rather than compensating for individual variations due to the different maturation and achievement rates, required an inflexible 50/50 ratio as the basis for determining eligibility. Thus, due to its arbitrariness and lack of evaluation of individual capabilities the policy was invalid under the test propounded by the court in *Berkelman*. Since the rationale for the policy seems to be legitimate on the surface, it would be incumbent upon the court to consider its validity in greater detail.

Instead of accepting and evaluating the school district's rationale, the court offered its own hypothetical rationale to the effect that the school's "apparent" justification was that the policy of balancing the sexes was essential to good education.[59] This attempt to find a justifiable rationale is inconsistent with the requirement imposed by the means-scrutiny test that the state must produce the evidence. The problem resulting from the use of hypothetical justifications is that a court might offer a justification with sufficient basis

56. Reed v. Reed, 404 U.S. 71, 76-77 (1971).

57. Berkelmen v. San Francisco Unified School Dist., 501 F.2d 1264, 1269 n.8 (9th Cir. 1974).

58. The court stated that there was some evidence but did not inquire into the validity of the rationale. They merely found the evidence inconclusive. *Id.* at 1269.

59. *Id.* at 1269.