10-1976

Mathews v. Goldfarb

Lewis F. Powell Jr.

3 J/Ct invalidated Social Security Act provisions which "discriminate" against husbands & widowers w/respect to benefits earned by wives.

Note or Affirm on Weinberger v. Wiesenfeld

Preliminary Memo

February 20, 1976 Conference
List 1, Sheet 1

DISCUSS

No. 75-699		
MATHEWS	Appeal from 3-Judge DC for the E.D. N.Y. (Weinstein & Judd; p.c.; Moore, concurring) Federal/Civil	Timely (Jurisdiction conceded by SG)
v.		
GOLDFARB		
No. 75-712		
MATHEWS	Appeal from USDC for the S.D. of Florida (Fulton) Federal/Civil	Timely Although a Fed statute is invalidated, I may follow usual policy & Note.
v.		
SILBOWITZ		
No. 75-727		
JABLON	Appeal from 3-Judge DC for the D. of Md. (Winter, Kaufman and Blair) Federal/Civil	Timely
v.		
MATHEWS		
No. 75-739		
MATHEWS	Appeal from 3-Judge DC for the D. of Md. (Winter, Kaufman and Blair) Federal/Civil	Timely No class action was certified but Appellees want a mandatory injunction vs. the Secretary that would assure a "class result"
v.		
JABLON		
No. 75-765		
COFFIN	Appeal from 3-Judge DC for the D. D.C. (MacKinnon, Gash and Smith; per curiam) Federal/Civil	Timely
v.		
MATHEWS		
No. 75-791		
MATHEWS	Appeal from 3-Judge DC for the D. D.C. (MacKinnon, Gash and Smith; per curiam) Federal/Civil	Timely
v.		
COFFIN		

Inclined to Note one of these, though it seems that they could be summarily affirmed (except for the Coffin case, which the SG will "withdraw." Carl

1. SUMMARY: Four District Courts -- three 3-Judge Courts and one 1-Judge Court -- have declared unconstitutional those parts of the Social Security Act which condition husband and widower's benefits on a showing of "dependency," in light of the fact that no such showing is required for wives and widows. The SG has filed four appeals -- under 28 U.S.C. § 1252 -- from these decisions seeking to reverse them on the merits. He concedes that in all but one of the cases the appellee had achieved a sufficiently final rejection of his claim from the Secretary of Health, Education & Welfare that the District Courts properly had jurisdiction over the cases. The husband and widower in two of the cases has filed a cross-appeal attacking the refusal of the court below to issue what they refer to as an "injunction."

2. FACTS: Payment of social security benefits to a husband, on account of the wages earned by his retired wife, is conditioned, inter alia, on a demonstration that the husband was receiving at least one-half of his support from his wife at the time of retirement. 42 U.S.C. § 402(c). Payment of social security benefits to a widower, on account of the wages earned by his wife, is conditioned, inter alia, on a demonstration that the widower was receiving at least one-half of his support from his wife at the time of her death. Payment of such benefits to wives of retired husbands and to widows is not so conditioned. Dependency is conclusively presumed.

Appellees Goldfarb and Coffin were denied widower's benefits under the dependency requirement; and appellees Silbowitz, Jablon and Coffin were denied husband's benefits under the same requirement. All but Coffin concededly had their claims for benefits finally denied by the Secretary of HEW. The SG claims Coffin did not. However, the SG does not wish the issue to be decided. If one of the other cases is reversed, the SG says the Coffin case can be reversed without reaching the jurisdictional issue. If the other appeals are affirmed, the SG will withdraw the appeal in Coffin.

The courts below all declared 42 U.S.C. § 402(c) and (f) unconstitutional on the authority of Fronterio v. Richardson, 411 U.S. 677, and Weinberger v. Weisenfeld, 420 U.S. 636, reversing the Secretary's refusal to pay benefits to the appellees. The courts in Coffin and Jablon refused to grant "injunctions" against the Secretary's application of the statute.

3. CONTENTIONS: The SG says that the decisions below will cost the Social Security trust fund $400 million a year in benefits which Congress never intended to pay. Dependency is the principle upon which widows, widowers, husbands and wives' benefits are to be paid under the Act. Seven out of eight wives are dependent on their husbands within the Act's definition of dependency, and only one out of eight husbands is dependent on his wife. It is thus reasonable for the Congress to conclude that it is cheaper to pay all wives than to go through the administrative expense of separating out the one out of eight which Congress did not really want to pay.

This conclusion is powerfully fortified by the fact that another condition of receipt of widows or wives' benefits is that the widow or wife must not be receiving social security benefits of her own in an amount larger than those received by her husband on account of his own wages. In almost every case of a non-dependent wife or widow, she will be unable to meet this other criterion. The SG acknowledges, of course, that the same principle weeds out most non-dependent husbands and widowers. However, there is still a considerable number of men who earn more than their wives, but who do so in jobs which do not contribute to social security and who therefore do not receive larger social security payments than their wives. It is this class of people who will receive the $400 million of which the SG complains.

The SG seems to recognize that this case is at first blush squarely governed by Fronterio v. Richardson, supra. He argues, however, that the determinative factor in Fronterio was that the dependency presumption there had the effect of giving men greater compensation for equal work. Here compensation is not the purpose of the payments. Insurance for dependent persons whose provider has ceased to provide is. The SG points to no language in Fronterio which supports his interpretation of it and I have found none. The SG's argument really seems to be that after Weinberger v. Salfi, 422 U.S. 749, in which this Court applied a rational basis test to a social security act classification, Fronterio is to be limited to its facts.

Appellees disagree.

In their cross-appeal, the husbands -- or more accurately their lawyers who are the same in each case -- complain that no "injunction" was issued. That is not, however, what they really mean. They are aware that the orders below require the Secretary to pay money to their clients and that he will do so even if not subject to contempt for failure to do so. What they want is an injunction ordering the Secretary to pay people other than their clients but who are similarly situated. (Class actions were not certified.)

4. DISCUSSION: I thought that the reason for the Fronterio decision was that the classification was on the basis of sex. However, this is the express reasoning of only four members of the Court. The brief remarks of a fifth member of the Court make it difficult to determine whether the fact that the classification was sex-based entered into his decision. If the fact that the classification in Fronterio was gender-based was important to the decision, Salfi would not be particularly relevant. Otherwise, it might be. Perhaps, then, one of the appeals should be noted to resolve the uncertainty.

The cross-appeals seem frivolous to me. Courts do not order defendants to pay money, or fashion other relief running to, people who are not parties to a law suit. The class action device was invented to avoid the multiplicity of suits which might result from this proposition. No classes were certified below. However, Anyway, the Secretary will be morally bound by any

decision of this Court in these cases, summary or otherwise.

There are two cross-appeals and four motions to affirm.

1/21/76 Nields Opinions attached to Jurisdictional Statements

ME

Preliminary Memo

February 20, 1976 Conference
List 1, Sheet 1

No. 75-712

MATHEWS

v.

SILBOWITZ

Timely

Appeal from USDC for the S.D. of Florida (Fulton)
Federal/Civil

Please see preliminary memo in No. 75-699, Mathews v. Goldfarb, February 20, 1976 Conference (List 1, Sheet 1).

There are two cross-appeals and four motions to affirm.

1/21/76 Nields

Opinions attached to Jurisdictional Statements

ME

Preliminary Memo

February 20, 1976 Conference
List 1, Sheet 1

No. 75-727

JABLON	Appeal from 3-Judge DC for the D. of Md. (Winter, Kaufman and Blair)	Timely
-v-		
MATHEWS	Federal/Civil	

Please see preliminary memo in No. 75-699, Mathews v. Goldfarb, February 20, 1976 Conference (List 1, Sheet 1).

There are two cross-appeals and four motions to affirm.

1/21/76	Nields	Opinions attached to Jurisdictional Statements

ME

Preliminary Memo

February 20, 1976 Conference
List 1, Sheet 1

No. 75-739

MATHEWS	Appeal from 3-Judge DC for the D. of Md. (Winter, Kaufman and Blair)	Timely
v.		
JABLON	Federal/Civil	

Please see preliminary memo in No. 75-699, Mathews v. Goldfarb, February 20, 1976 Conference (List 1, Sheet 1).

There are two cross-appeals and four motions to affirm.

1/21/76	Nields	Opinions attached to Jurisdictional Statements

ME

Preliminary Memo

February 20, 1976 Conference
List 1, Sheet 1

No. 75-765

COFFIN	Appeal from 3-Judge DC for the D. D.C.	Timely
-v-	(MacKinnon, Gash and Smith; per curiam)	
MATHEWS	Federal/Civil	

Please see preliminary memo in No. 75-699, Mathews v. Goldfarb, February 20, 1976 Conference (List 1, Sheet 1).

There are two cross-appeals and four motions to affirm.

1/21/76	Nields	Opinions attached to Jurisdictional Statements

ME

Preliminary Memo

February 20, 1976 Conference
List 1, Sheet 1

No. 75-791

MATHEWS	Appeal from 3-Judge DC for the D. D.C.	Timely
-v-	(MacKinnon, Gash and Smith; per curiam)	
COFFIN	Federal/Civil	

Please see preliminary memo in No. 75-699, Mathews v. Goldfarb, February 20, 1976 Conference (List 1, Sheet 1).

There are two cross-appeals and four motions to affirm.

1/21/76	Nields	Opinions attached to Jurisdictional Statements

ME

Conference 2-20-76

Court USDC, E.D. N.Y.
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 75-699
(Vide 75-712, 75-727)

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Appellant)

vs.

LEON GOLDFARB

11/12/75 Appeal filed.

I voted to note in view of Fed. Statute being involved — also I think decision probably will be affirmed.

Noted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Stevens, J.				✓			✓							
Rehnquist, J.				✓										
Powell, J.				✓										
Blackmun, J.														
Marshall, J.							✓							
White, J.				✓										
Stewart, J.				✓										
Brennan, J.							✓							
~~Douglas, J.~~														
Burger, Ch. J.														

LFP/vsl
8/2/76

No. 75-699, Mathews v. Goldfarb

This memorandum, dictated after a preliminary look at the briefs, is intended only as an "aid to memory" that will refresh my recollection when I return to a more careful study of the case prior to argument and decision. When an opinion is expressed or intimated, it is wholly tentative.

* * * *

This is one of several appeals from decisions invalidating the provisions of Section 402 of the Social Security Act that impose a condition that a widower is entitled to benefits from his deceased wife's Social Security only if he shows that he was receiving at least one half of his support from the wife when she died. No such showing is required by a widow.

Appellee's brief states, correctly I believe, that five appeals by the Solicitor General challenge this holding. (For a list of the cases, see appellee's brief, p. 3.) This case, Goldfarb,

was the first case docketed. It is here from a three-judge court in New York, where in a conclusory and brief per curiam opinion, the court said:

> It is conceded that had the gender of these spouses been reversed, the plaintiff would have been granted Social Security benefits. A female need not show "at least one-half support from" the deceased spouse. . . . Thus, the statute and its application to [Goldfarb], "deprive women of protection for their families that men receive as a result of their employment."

The three-judge court stated that the "case is controlled by Wiesenfeld."

Circuit Judge Moore, concurred because he considered Frontiero (411 U.S. 677) and Wiesenfeld (420 U.S. 636) to be controlling. Judge Moore indicated his disagreement with these decisions:

> The Congress presumably, after giving the problem due consideration and weighing the pertinent facts, enacted the legislation in question. If there are to be presumptions it would be but fair to the legislative branch to presume that their enactments were designed to be rationally related to the goal which they desired to achieve. By this decision it seems to me that the court is creating a new class of beneficiaries which Congress did not create.

The SG's Position

Congress first enacted a program of survivors' benefits in 1939, including only aged widows. Not until 1950 did it bring

aged widowers under the Act. Different standards of eligibility were prescribed for the two classes of beneficiaries. The SG argues that:

> Those differences arose from the fact that a very substantial proportion of aged widows found themselves in dire need upon the death of their spouse, while aged widowers were better situated because they had generally been self-supporting over most of their working lives. It was therefore rational for Congress in 1939 to provide aged widows with benefits without their having to prove that their husbands had supported them. Such a requirement would have been an unnecessary burden on the vast majority of such widows, who would qualify in any event; and it would have gratuitously increased the administrative complexity of the widows' benefit program.
>
> In contrast, since the vast majority of widowers were not dependent on their spouses, it was rational for Congress to conclude in 1950 that the probable needs of this class warranted extension of survivors' benefits to widowers only when they had been dependent on their wives for a substantial part of their support.

The SG's brief is replete with statistics said to support the rationality of classifying widowers differently from widows. See SG's brief, pp. 26, 27, 34.

As would be expected, the SG relies primarily on cases in which the Court has pepeatedly applied the rational basis test (some would say the minimum rational basis test) to economic and social legislation. These cases include the familiar ones of Richardson v. Belcher, 404 U.S. 78, 81; Dandridge v. Williams,

397 U.S. at 487; and Geduldig v. Aiello, 417 U.S. 484, 495. In response to appellee's position that this gender-based classification is invalid under Frontiero and Wiesenfeld, the SG relies on Kuhn v. Shevin, 416 U.S. 351, and Schlesinger v. Ballard, 419 U.S. 498.

Position of Appellee

In an elaborate and sophisticated brief for appellee (Ginsberg, Wolff and Peratis for the ACLU), the emphasis -- as expected -- is on the alleged sex discrimination. Female wage-earners are denied Social Security benefits (for their spouse) accorded the spouse of male wage-earners. Viewed in this light, Wiesenfeld does seem to be controlling.

Comments

As is evident, I am undertaking only the briefest identification of the issue and positions of the parties. Nor am I undertaking at this time any analysis of the competing authorities. I have the issue well in mind, and think it must be resolved by a careful application of the cases mentioned above.

At the time we noted this case, I thought it rather clear that this gender-based classification was invalid under Wiesenfeld and Frontiero. Having now scanned the briefs, and reflected further on the issue, I am no longer confident that my initial view is correct.

There is a good deal to Judge Moore's view. Neither party relies specifically on any designated portion of the legislative history, and yet is clear that Congress deliberately classified widowers differently from widows. It is also clear, as indicated by the statistics in the SG's brief, that this difference in classification was not a frivolous one. Whatever may be the situation in the future, in 1950 -- and even now -- the economic facts support the Congressional judgment that the need of widows is of a different character and magnitude from the need of widowers. Thus, if the classification is viewed in terms of the purpose of the Social Security Act (to provide for the needy aged), the classification is rational. If, however, it is viewed from that of a working wife who pays the same Social Security taxes as the husband, the classification is certainly gender-based, and -- under our cases -- has a degree of "suspectness" not present in other equal protection analysis.

I would like for my clerk to present both sides of this issue as strongly as possible in light of our prior decisions.

MEMORANDUM

TO: Justice Powell DATE: August 12, 1976

FROM: Tyler Baker

No. 75-699 Matthews v. Goldfarb

This case[1] arose from the denial by the Social Security Administration of appellee's application for monthly social security survivors' benefits (widower's insurance) on the earnings record of his deceased wife, Hannah Goldfarb. Mrs. Goldfarb had contributed to social security pursuant to the Federal Insurance Contributions Act for a period of 25 years and was a fully insured person under the system. The Social Security Administration denied appellee's application for the following reason:

> You do not qualify for a widower's benefit because you do not meet one of the [statutory] requirements for such entitlement. This requirement is that you must have been receiving at least one half support from your wife when she died.

The dependency requirement relied on by the Social Security Administration is mandated by 42 U.S.C. § 402(f)(1)(D). There is no such dependency requirement for the payment of the survivor's benefits (widow's insurance) to the spouse of a male insured individual. 42 U.S.C. § 402(e).

Had appellee not been required to show dependency, as defined above, he would have been entitled to benefits. There are several other requirements, including age and absence of remarriage. One of these additional requirements needs to

be emphasized for purposes of the discussion that follows. The appellee was required to show that he was not personally entitled to old-age insurance benefits equal to or in excess of his deceased wife's primary insurance amount.[2] 42 U.S.C. 402(f)(1)(E). This requirement must also be met by widows applying for benefits under their deceased husbands' account. Appellee was able to meet this requirement, not because he was entitled to lower primary benefits than his wife, but rather because he was entitled to no benefits at all. Appellee had been employed as a federal employee and, therefore, had not been under the social security system at all.

Appellee Goldfarb was not under Social Security

In a very short opinion, the three-judge DC held that the unconstitutionality of the challenged statute was established by this Court's decision in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). The DC noted that Mrs. Goldfarb had paid taxes at the same rate as men and that "there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men." J.S. at 3a. Working from those propositions, the DC found the following language from Wiesenfeld to be conclusive:

> [S]he not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in Frontiero, the Constitution also forbids the gender-based

> differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men. 420 U.S., at 645.

It is impossible to determine from the DC's opinion whether the Government made any attempt to introduce any empirical evidence in support of the statutory differentiation. Certainly, there are no findings of fact of the type made in Craig v. Boren. The explanation may be that the DC assumed that no such empirical demonstration would affect the legal conclusion.

There are two "pivotal" decisions to be made in the instant case. The first is the determination of the Congressional purpose in enacting the challenged statute. The analysis here could provide an opportunity to give Prof. Gunther's intermediate equal protection theory a mild boost. Assuming that my view of the congressional purpose is correct, the question then becomes whether administrative convenience and savings can ever be a sufficient ground for a gender-based discrimination, for that is the only justification for the differentiation here. I certainly would not want to make administrative convenience an automatic justification in these cases, but I do think that the term may sometimes mask a much harder problem: giving up a good program, or extending it to areas where there is not a perceived need, or wasting large amounts of scarce resources in inefficient paper shuffling. Both of the above questions are posed in an interesting context. If my reading of congressional purpose is correct, the claim for equal treatment here is for treatment that is fundamentally inconsistent with the underlying theory of the statute.

Congressional Purpose:

An interesting shift in argument occurs between the SG's Jurisdictional Statement and his Brief. Of the two, the following argument from the Jurisdictional Statement is by far the more straightforward and, in my view, candid. The argument states that the purpose of the survivor's benefits, as with other social security provisions, is to replace the support formerly provided by the insured person and lost as a result of his/her death. The proof of that support is dependency as defined by the statute. In the Jurisdictional Statement, the SG argues simply that, "This legislative classification reasonably implements the objective of Congress to confer Social Security benefits upon spouses who were dependent upon the primary wage earner." JS at 7. The argument continues that it is a demonstrable fact that many more women are dependent on men than vice versa. The SG then cites Salfi[3] as support for the proposition that administrative convenience justifies using a presumption of dependency for widows but not for widowers. The SG recognized that the challenged statute "may result in the payment of benefits to some women whose earnings were not covered by the Social Security Act and who were in fact self-supporting." J.S. at 11 n. 10. Despite that acknowledgment, the SG argues that when tested by the standards established in Salfi, the statute is constitutional.

In the Brief, the SG seems to have lost his nerve; he certainly has lost his clarity. The argument sketched above is

not entirely abandoned, but it is now embellished with another, quite different argument. Unfortunately, the strands of the arguments become tangled. The new argument is an attempt to justify the statute under the Court's existing sex discrimination doctrine, with primary reliance being placed on the Court's decision in Kahn v. Shevin, 416 U.S. 351 (1974). Rather than relying on labor statistics to support the "presumption of dependency," as in the Jurisdictional Statement, the SG now relies on those statistics to emphasize the desperate economic plight of widows.[4] Because of the need of widows as a group, the SG now argues that Congress intended to give them benefits under this statute even when they would not otherwise qualify under the standards applied to widowers. Under this theory, the payment to widows who would not have been eligible had they been men is not regretted over-inclusiveness resulting from administrative necessity, but the intentional act of a Congress recognizing the problems of widows as a class. If the SG's analysis were accepted, the case would be similar to Kahn in which the Court upheld a state law giving a property tax exemption to all widows regardless of need. The instant case is, however, distinguishable because of the asserted discrimination against women workers who have paid social security contributions. Kahn did not involve this problem of equal payments, but unequal benefits, because the property tax break was financed, in effect, by all property taxpayers. Also Kahn involved the area of state taxation, an area in which the Court has consistently given the states wide berth.

Distinguishable from Kahn

Apart from the fact that the SG discovered the congressional purpose to help widows after submitting his Jurisdictional Statement, I don't find it very convincing. The decision to include a group such as widows or children of insured workers was undoubtedly made on the basis of the perceived need of the group. Perceived need was certainly one of the motivating factors leading to the adoption of the social security system. The question remains, however, why Congress did not include a dependency showing for widows as well as widowers. The fact that the group of widows was included does not necessarily indicate a congressional intent that every member of the group recover benefits. Indeed, the requirement applicable to both widows and widowers, that the claimant have primary benefits of their own less than those of the other person belies any congressional intention to benefit all widows in a way comparable to the property tax exemption in Kahn. Since that requirement was imposed on widows, the SG must argue that Congress concluded that the impoverished state of widows justified exemption from one requirement - dependency - but not exemption from another - level of primary benefits. In fact, as appellee's case indicates, it seems more likely that the two requirements were really paired so that one requirement would catch anyone who for some reason slipped by the other. Although the dependency requirement is omitted for widows, I think that it is most likely that Congress simply assumed that the vast majority of widows were dependent on

their deceased husbands and decided to omit the requirement of an individualized showing. In Wiesenfeld, the Court speaking of the 1939 Act generally, concluded that its framers "legislated on the 'then generally accepted presumption that a man is responsible for the support of his wife and children.'" 420 U.S. at 644 (citation omitted). The following statement from the SG's Jurisdictional Statement rings true to me:

> Actual or presumed dependency is a central feature of all dependents' benefits under the Act where the purpose is to compensate for the loss of the wage-earner's support. Thus, in addition to the benefits afforded husbands, wives, widows, and widowers of retirement age, dependency is also an underlying requirement for parents' benefits (42 U.S.C. 402(h), children's benefits (42 U.S.C. 402(d), and divorced wife's benefits (42 U.S.C. 402(b)). J.S. at 9 n. 8.

Further evidence for this position can be derived from the structure of the 1939 Act which extended secondary benefits to widows for the first time. Under the Act, the group entitled to benefits without a showing of dependency was defined to include all widows living in the same household as their husband. Widows who had been living apart from their husbands - to whom the presumption of dependency is obviously weakened - could recover, but only by showing that the deceased husband had contributed to their support. SG Brief at 21. The requirement that a separated wife make such a showing was eliminated in 1957. Although the SG draws a different conclusion from the elimination, it seems consistent to me with a congressional determination that it was not worth the trouble and the expense. Finally, the SG's analysis would require the conclusion that

Congress had converted the social security system into a partial general welfare system.

Administrative Convenience/Expense

It may be too late in the day to uphold a gender-based discrimination on the basis of administrative convenience/expense. In Reed v. Reed, 404 U.S. 71 (1971), one of the articulated objectives of the rule preferring male administrators was the elimination of an additional contested hearing. The Court recognized the legitimacy of that objective, but found that it was not sufficient to justify the unequal treatment. Similarly, in Frontiero, the only justification advanced by the government was administrative convenience. The plurality noted that the government had not demonstrated that it was cost efficient to presume dependency of wives of male officers, but went on to say that administrative convenience is simply not sufficient to justify a suspect classification. The concurrence written by you was based on Reed, but without elaboration. It would be reasonable for a reader to conclude that administrative convenience was also rejected as a justification in Frontiero.

Wiesenfeld is a case with two rationales. The first rationale extends the decision in Frontiero from the context of a contract of employment to the context of social security payments. Finding that the gender-based differentiation at issue there amounted to "the denigration of the efforts of women who do work and whose earnings contribute significantly

to their families support, the Court held that Wiesenfeld was controlled by Frontiero, 420 U.S. at 645. The Court also considered the government's argument that the differentiation was intended to benefit women because of the difficulties that they face in the labor market. The Court found that the asserted purpose was not the purpose at all. This finding led to what is, in fact, a second rationale:

> Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402(g) is entirely irrational. 420 U.S., at 651.

The second rationale was the sole ground of decision relied upon by Justice Rehnquist.

You based your concurrence on an analysis quite similar to the Court's first rationale:

> A surviving father may have the same need for benefits as a surviving mother. The statutory scheme therefore impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical. I find no legitimate governmental interest that supports this gender classification. 420 U.S., at 654-655.

At first glance Wiesenfeld controls - But there are distinctions

The first rationale in Wiesenfeld, at first glance, does appear to govern the instant case. Distinctions can, however, be made. Administrative convenience cannot be asserted as easily in that case as here because of the absolute nature of that statute. Benefits were given to all widows with children and to no widowers with children. Indeed, the Court stated that the situation in Wiesenfeld was, if anything, more pernicious than in Frontiero because the male did not even

have a chance to prove his dependency, as he did in Frontiero, and as he does here.

I think that a more fundamental distinction based on the apparent Congressional purpose in providing the survivorship benefits can be drawn. As stated above, I think that payments to nondependent widows are tolerated, rather than intended, on the theory that enough widows are in fact dependent that separating out those who are not is not worth the expense. Although the equal benefits for equal contributions argument can be made here, it does not really make any sense. The payment to nondependent widows is not made because of perceived need, but because it is more efficient to do that than to separate them by an individualized test. The efficiency rationale does not apply for widowers because of the relatively small incidence of dependency in that group.

The claim for equality here is a claim for equality in the distribution of benefits that are inconsistent with the underlying theory of the system. The payments being sought here are secondary payments sought by one person on the basis of another person's social security account. The purpose of the payments is to relieve the hardship of the loss of the support of the person who has died. If the claimant was not dependent upon insured person for one half of his support, Congress has made a decision that the hardship is not sufficient to justify payment. There is an additional obstacle to one seeking payment. The claimant must not have a social security account in his or her own name which is equal to or greater than the account of

the person under whose account he or she claims. If the account of the claimant is as large, Congress has made a decision that the claimant can simply rely on his primary benefits. Payment to a person who did not satisfy either of the above need-related conditions would be inconsistent with congressional purpose.

Assuming that the dependency requirement were stricken, two groups of males would benefit. They would benefit in exactly the same way as similarly situated females, but the point is that to allow payments to either males or females in those groups is inconsistent with congressional purpose. For persons covered by social security in their own employment, elimination of the dependency requirement would allow them to recover if they make more than 25% of the family income and less than 50%. Beyond 50%, the claimant would fall afoul of the requirement that the primary account not be equal to or more than the primary account of the person upon whose account the claim is made. If the claimant does not work in a job covered by social security, as is the case with appellee, the perversion of the congressional purpose is complete, because not even the 50% of family income would be a bar, because such persons do not have a primary account with social security of <u>any amount</u>.

I do not think that the decided cases require this result. In <u>Frontiero</u> the stated purpose of the benefit program was to enhance the recruitment effort of the Air Force in enticing people away from private industry. The purpose of those benefits was <u>not</u> to satisfy any perceived need on the part of the

beneficiaries. Congress chose, as it was certainly free to do, to condition the extra benefits on dependency, rather than the mere fact of marriage. It does seem apparent that there was no necessary link between the showing of dependency and the achievement of the purpose - enhanced recruitment. Extending the benefits to Lt. Frontiero's spouse without a showing of dependency was not inconsistent with the congressional purpose.

In Wiesenfeld there were, I think, two purposes. One found by the Court was to allow a parent to stay home with a child. (1) The first purpose This goal was sex-neutral. Extending the benefits to widowers with children actually advanced the purpose, and certainly was not inconsistent with it. (2) The second purpose was more generally to provide support for the parent left with the responsibility of supporting a child alone. Although there may have been a presumption of dependency underlying the statutory gender differentiation, there was no specific showing of dependency required. Furthermore, to the extent that there was a presumption of additional need on the part of women, the statute had an "equalizing" element. If the surviving spouse elected to work (in which case males might have an advantage), benefits were reduced by $ 1 for each $ 2 earned. Therefore, there was no real possibility for a male to make any use of his labor market advantage. This provision tended to eliminate payments beyond the level of perceived need.

In the instant case, there is a direct link between the requirement that dependency be shown (or presumed) and the reason for the program. As stated earlier, the underlying

basis of the social security system is ultimately need. It seems that there was a decision that dependency is a fairly close predictor of need. To the extent that dependency is eliminated the system is cast free from its moorings.

Stereotyping

Appellee's arguments are littered with references to stereotyping, self-fulfilling prophecies, denigrating the contributions of women and the like. I do think that some kinds of streotyping in legislation are matters of genuine concern. I discussed the loose kinds of distinctions that I would draw in Craig v. Boren and will not repeat them here. I really do not feel that whatever stereotyping there might be here is of the objectionable variety. This law simply does not "denigrate" the contributions of working women. I do not see that the statute, as I have interpreted its purpose, puts any different value on the work of men or women. It would be hard to argue that the effect of this differentiation is going to force or preclude any particular type of life-style. Stanton v. Stanton, 421 U.S. 7 (1975), is distinguishable on this ground. To the extent that a woman takes the differentiation, as I have interpreted it, as a comment on the value of her contribution to her family by her work, she simply misunderstands. If a showing of significant administrative savings can be made, the Court's upholding the statute would indicate no more than that so many fewer women have dependent spouses that there

is a significant savings of scarce resources by using the assumption of dependency for widows.

Conclusion

I think that this case presents a real quandry. I am very reluctant to order a massive additional payment of benefits that are inconsistent with the statutory purpose. On the other hand, there seems to be nothing more here than an assertion[5] of administrative convenience and expense. Reed and Fronterio would preclude upholding a law on this basis alone, and I think that sex discrimination is different enough that a more convincing showing must be made. Unless the savings were quite significant (a matter of degree and judgment), I would not allow an administrative savings justification. From the statistics presented here, it is impossible to guess as to whether such a showing could be made. The median contribution to family income by wives who work is 27%, so a large numer of widows would not be able to meet the tests applied to widowers. There is nothing in the papers concerning the expense of conducting the individualized showing.

On this point appellee and the ACLU are rather inconsistent. They argue that there is no proof that presuming widows to be dependent saves money, pointing out that millions of women earn enough money to cover at least one half of their own living expenses, and thus to fall foul of the dependency requirements. When addressing the question of the proper remedy in the event

the Court accepts their argument, they argue against the extension of the dependency test, urging instead that these benefits be extended to all. The reason given is that extension of the dependency requirements would impose administrative burden of "potentially monstrous proportion." They argue that social security is an earned benefit and not a need-related welfare, ignoring the explicit requirements that Congress set up to try to keep some degree of need-relation present.

If the Court were disposed to hold that demonstrated savings of significant amounts can be enough of a justification in a case of this type, it might consider remanding to the DC for findings on this question. If large scale savings cannot be shown, I would, if possible, leave it to the Social Security Administration or to Congress to choose whether to extend benefits to all without a showing of dependency or to require individualized showings by everyone.

T.B.

ss

FOOTNOTES

1. This is one of five appeals docketed by appellant, Secretary of HEW, involving substantially the same question: whether the stringent support test restricting old-age survivors' benefits to a spouse on a female insured individual's earnings record, when no support test conditions benefits to a spouse on a male insured individual's earnings record, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution. The instant appeal was the first docketed. The remaining appeals, in order of docketing are: Mathews v. Silbowitz, No. 75-712, opinion below, 397 F. Supp. 862 (S.D. Fla. 1975); Mathews v. Jablon, No. 75-739, opinion below, 399 F. Supp. 118 (D. Md. 1975); Mathews v. Coffin, No. 75-791, opinion below, 400 F. Supp. 953 (D.D.C. 1975); Mathews v. Abbott, No. 75-1643, opinion below, ___ F. Supp. ___ (N.D. Ohio, February 12, 1976). Each of the five district courts held the gender-explicit support test unconstitutional. Old-age (husband's insurance) benefits are at issue in Silbowitz, Jablon and Abbott; survivors' (widower's insurance) benefits are at issue in the instant case; both old-age and survivors' (husband's and widower's insurance) benefits are at issue in Coffin. The Secretary has indicated that if this Court affirms the decision below, he may withdraw the remaining appeals.

2. "Primary insurance amount" is the maximum monthly benefit payable to a retired worker covered by social security on the basis of his or her own earnings record. Beneficiaries other than the wage earner receive "secondary" or "derivative" benefits.

3. In Salfi this Court upheld a nine-month presumption of ulterior motive as a method of screening out persons who, in contemplation of death, marry in the hope of receiving or bestowing social security benefits. The admitted over-and-under-inclusiveness of that presumption was not a fatal flaw.

4. It is worth noting that this argument does not seem to work in the case of wives seeking secondary benefits when their husbands are alive, but retired. That is the situation in several of the other cases with which this case was grouped. See note 1, supra.

5. See also, Kahn v. Shevin, supra, at 355.

Jones (SG) 10/5

Not sex discrimination. If there is discrimination, it is against men.

No purpose to discriminate vs women. The dependency req. is directed at men.

Congress' purpose is to avoid a double payment to men — a "windfall".

~~Appellee says that woman~~

? Argues that appellee really want a preference over men.

Frontiero: the differential there furthered no leg. govt. purpose.

Weinberger v Wiesenfeld: there is dictum that would constitute a per se Const. rule as to S/Security legislation. Our cases have never so held

Jones (cont) 10/5-

Hirt of lag. as imp.

If dependency test were required of women, the burden – adm. burden – would be "enormous" (conceded by appellee's' brief).

The support test would weed out 85% of widowers but only 10% of widows (I think these were ~~figures~~ % Jones used)

I don't understand this. { "85% of benefits we are talking about go to civil service pensioners"

Relies on Mathews v Lucas & Salfi

There is a problem here (as in Lucas) of over-inclusiveness, but mere over-inclusiveness is not conclusive.

Ms Ginsburg (appellee)

Equal earnings require equal deductions & eq. benefits.

Wiesenfeld + Frontiero control.

Every gender based discrimination is invalid – whether vs men or women. The Court. doctrine is two-edged sword – cuts both ways. [But Ms. Ginsburg says almost every gender discrimination is against women]. [But after Stevens questioned her she backed off & "reserved judgment" as to whether a different standard applies to desc. vs. men. She simply ducked this]

Responding to Rehnquist, she said "sex" requires "stricter" scrutiny than "illegitimacy".

Mr. Guilbert (cont.)

If support test were applied to both sexes, no Const. infirmity. But this would disqualify millions of widows.

*Jones (Rebuttal)

75-699 MATHEWS v. GOLDFARB Appeal from 3J/Ct Argued 10/5/76

3J/Ct invalidated S/Security provision requiring a widower to prove dependency (1/2 of her support) before receiving survivor's insurance.

Pers was held to be an impermissible gender based discrimination because widows are not required to prove dependency.

To: Justice Powell

From: TAB

10/6/76

Re: Follow-up on Mathews v. Goldfarb

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1. The civil service employees' loophole. The windfall gain that the Gov't attorney referred to results from the fact that Goldfarb, as a former civil service employee, was not covered by social security at all. In order to recover benefits, widowers must show both that they were dependent on their deceased spouse and that their primary insurance amounts (their social security entitlements which are related to the level of their incomes) are less than those of the deceased spouses. In the case of a widower who was covered by social security in his employment, the elimination of the dependency requirement would benefit him only if his income had been less than that of his spouse, because of the operation of the primary insurance amount requirement. This result would allow more widowers to recover than if the dependency requirement were enforced, but it would still bar recovery to those widowers who made more than their spouses. In the case of a widower who was a civil service employee, the primary insurance amount requirement is no requirement at all; such a widower has no primary insurance amount because he was never in the social security system at all. Such a widower (civil service employee) would, in the absence of a dependency requirement, be able to receive benefits although he earned more than his wife and is entitled to a fat civil service pension. Such a result is completely inconsistent with the need-dependency rationale of the system, but equally anomalous results would occur if the genders were reversed.

2. Effect of Mathews v. Lucas, 44 U.S.L.W. 5139 (1976). This is an important case that should be significant in the resolution of the instant case. Lucas involved social security survivorship benefits

for children of deceased persons who were insured under the system. The case thus involved the same basic question as the instant case, differing only in that a different class of beneficiaries was involved. In Lucas the key to recovery for children was a showing of dependency. The statute contains a number of presumptions of dependency keyed to particular facts that are closely associated with dependency in fact. The children in Lucas were illegitimates who did not fall under any of the presumptions, some of which did include illegitimates. They therefore had to prove actual dependency. The Court upheld the law.

The case is significant first in that the Court decided the case on the basis that dependency was the statutory requirement. The children had argued that the statute was designed to favor legitimates. The case adds to my conviction that Congress excluded widows from the dependency requirement because Congress felt that it was a reasonably accurate assumption that they were dependent. I still am unconvinced by the Gov't's argument that Congress was trying to extend a helping hand to widows.

The Court held that discrimination on the basis of illegitimacy does not "command extraordinary protection from the majoritarian political process." 44 U.S.L.W., at 5143. In the process of so holding, the Court noted that illegitimacy does not carry an obvious badge, as race and sex do, and stated that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes." Id.

Against that background the Court held that administrative convenience could supply the justification for the statute. The following quotation is the Court's discussion of administrative convenience as a justification:

Congress' purpose in adopting the statutory presumptions of dependency was obviously to serve administrative convenience. While Congress was unwilling to assume that every child of a deceased insured was dependent at the time of death, by presuming dependency on the basis of relatively readily documented facts, such as legitimate birth, or existence of a support order or paternity decree, which could be relied upon to indicate the likelihood of continued actual dependency, Congress was able to avoid the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable. Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny. See *Weinberger* v. *Salfi*, 422 U. S., at 772.[15]

In cases of strictest scrutiny, such approximations must be supported at least by a showing that the Government's dollar "lost" to overincluded benefit recipients is returned by a dollar "saved" in administrative expense avoided. *Frontiero* v. *Richardson*, 411 U. S., at 689 (plurality opinion). Under the standard of review appropriate here, however, the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be "scientifically substantiated." *James* v. *Strange*, 407 U. S. 128, 133 (1972), quoting *Roth* v. *United States*, 354 U. S. 476, 501 (1957) (separate opinion of Harlan, J.). Nor, in any case, do we believe that Congress is required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately "spent," ignoring the relative amounts devoted to administrative rather than welfare uses. Cf. *Weinberger* v. *Salfi*, 422 U. S., at 784. Finally, while the scrutiny by which their showing is to be judged is not a toothless one, *e. g.*, *Jimenez*, *supra*; *Frontiero* v. *Richardson*, 411 U. S., at 691 (concurring opinions of MR. JUSTICE STEWART and MR. JUSTICE POWELL); *Reed* v. *Reed*, 404 U. S. 71 (1971), the burden remains upon the appellees to demonstrate the insubstantiality of that relation. See *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79 (1911); cf. *United States* v. *Gainey*, 380 U. S. 63, 67 (1965).

44 U.S.L.W., at 5143.

The Court also discussed Frontiero and, since this discussion in in the context of a social security case involving discrimination justified on the basis of administrative convenience, it is obviously important for the instant case. The Court contrasted the sta tute

before it in Lucas to that in Frontiero as follows:

> It is, of course, not enough simply that any child of a deceased insured is eligible for benefits upon *some* showing of dependency. In *Frontiero* v. *Richardson*, *supra*, we found it impermissible to qualify the entitlement to dependent's benefits of a married woman in the uniformed services upon an individualized showing of her husband's actual dependence upon her for more than half his income, when no such showing of actual dependency was required of a married man in the uniformed services to obtain dependent's benefits on account of his wife. The invalidity of that gender-based discrimination rested upon the "overbroad" assumption, *Schlesinger* v. *Ballard*, 419 U. S. 498, 508 (1975), underlying the discrimination "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Weinberger* v. *Wiesenfeld*, 420 U. S., at 643; see *Frontiero*, 411 U. S., at 689 n. 23. Here, by contrast, the statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations. The presumption of dependency is withheld only in the absence of any significant indication of the likelihood of actual dependency. Moreover, we cannot say that the factors that give rise to a presumption of dependency lack any substantial relation to the likelihood of actual dependency.

Frontiero

over-broad assumption

44 U.S.L.W., at 5144.

Given the above language in Lucas, I think that it would be impossible in the instant case to simply assume an administrative convenience rationale. I think that Lucas might allow the Gov't to use a gender based discrimination if it could show administrative savings. Lucas may be the explanation for the mid-stream shift in theories by the Gov't. Given that the Gov't did not build a trial record of administrative savings and given that it did not rely on that theory before this Court, I am inclined to say that it loses.

75-699 Mathews v Goldfarb (10/7)

Under 402 (e) + (f) of S/S act, a widower is not entitled to survivor's benefits from his wife S/S unless he proves that he was receiving 1/2 of his support from wife when she died

(He also must prove that he was not entitled under his own S/S to benefits ~~=~~ of as much as ~~he~~ he would receive under his wife S/S. Not relevant here as Goldfarb was not covered by S/S)

SG's Argument

Congressional purpose has no general social objective. Purpose is to replace the economic support lost by a dependent spouse ~~or~~ when wife or husband dies

Congress, as matter of convenience & economy, presumed ~~=~~ most widows ~~were~~ would have been dependent. But widowers were required to prove it.

Wiesenfeld - 420/656 (Distinguishable - this is generally supportive of invalidity of gender based classifications.)

Gov't purpose: enable surviving parent to remain at home & care for children. No such social purpose here.

Frontiero - 411/677

Compensation of officers was involved. Female officer allowed no additional compensation* for her "dependents" (husband) unless she could prove dependency. Husband did not have to prove dependency.

Gov. purpose - only justification advanced was adm. convenience. No claim that it would cost more than Gov't would save, to require women to prove dependence.

Lucas - 44 USLW 5139 (1976) - S/S survivor benefits† for children who were dependent on deceased parent. Act presumed dependency except for illegitimates. Congress thought it was reasonable to assume dependency in one case & not in another. As Court said: Saved money by not requiring all children

* For housing etc.

No. 75-699 Mathews v. Goldfarb Conf. 10/8/76

5 - Affirm
4 - Pass
3 - Reverse

The Chief Justice Pass (first vote)
Pass (second vote)

There is tension bet. Weisenfeld & Kahn v Shevin. In doubt.

Douglas, J. Stevens Affirm *

Court has gone too far and not content with present state of law. Yet feels bound by cases already decided - Weisenfeld & Frontiero can't be distinguished fairly.

Lucas does give some support to those who would Reverse

* Changed to Reverse - See letter of 10/21

Brennan, J. Affirm

Can't reverse w/out over-ruling Weisenfeld and Frontiero.

Stewart, J. Pass *

Concerned with course we have followed in S/Security cases - where the statutes are replete with distinctions & classifications. These judgments as to use of public funds should have been left to leg. branch.

But agree with Brennan that in gender based classifications one can point other way.

* Later advised he is leaning towards Affirm.

Affirm. Prior cases required.

We should make clear that a man should not necessarily get this windfall

Affirm

Blackmun, J. Reverse

Balance in between Sherrer and Weinberger & Frontiero. This case is ~~of~~ not fully controlled by any prior case.

We have intruded on legislative function.

Powell, J. Affirm (Very tentative)

Agree with Potter that we should have left this area to legislature.

But in the gender based cases we have gone rather far.

If state were clear I would certainly leave to Congress.

Altho I think Weinberger & Frontiero can be narrowly distinguished, they certainly strongly support the decision below.

Rehnquist, J. Reverse

Agree with Harry.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

October 18, 1976

Re: No. 75-699, Matthews v. Goldfarb

Dear Chief,

As presently advised, I vote to affirm the judgment under the authority of our prior decisions. I am not particularly happy with this result, however, and shall read with hospitable interest what is written on the other side.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 20, 1976

MEMORANDUM TO THE CONFERENCE

RE: 75-699 - Matthews v. Goldfarb

I have Potter's memo of October 18 still as a "tentative" vote to affirm, changing from "reverse" - at least on my record. Lewis is also "tentative affirm."

If both Potter and Lewis remain in the "affirm" column (I having now voted to reverse), I, therefore, ask Bill Brennan to assign.

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 21, 1976

RE: No. 75-699 Mathews v. Goldfarb

Dear Chief:

I have assigned the above case to myself.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 21, 1976

Re: 75-699 - Mathews v. Goldfarb

Dear Bill:

As you know, I have already expressed doubt about my original vote to affirm. Subject to reading your opinion, I am now persuaded that I will vote to reverse. My reason, in brief, is that the discrimination is in the distribution of benefits, rather than in the collection of the tax; that the discrimination is therefore against males rather than females; and that, although prima facie invalid, its justification is sufficient under Kahn v. Shevin. I don't believe this will cause you to lose your majority, but want you to understand my present thinking while your opinion is in process.

Respectfully,

Mr. Justice Brennan

Copies to the Conference

[1976 OCT. ?]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Re: 75-699 - Mathews v. Goldfarb

Dear Bill:

As you will note from the attached opinion, I have finally decided to vote to affirm. As I am sure you realize, I have had a great deal of difficulty with this case and I apologize to everyone for taking so long in making up my mind.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference

Note from Bill White on Bench

Goldfarb File

Supreme Court of the United States

Memorandum

Oct, 19 76

Lewis—

after talking to you on the telephone yesterday P.M. I went back & read not only your concurrence in Wiesenfeld, but mine, too. I now see that I will have some eating of words to do - not in this case, but when we ultimately go public on the Murgia issue

wm

G Goltz

November 24, 1976 Conference
List 5, Sheet 2

No. 75-699

MATHEWS

Motion of Appellee for Leave to File Supplemental Brief, after argument

Grant
FAB

GOLDFARB

This is appellee's motion for leave to file a supplemental brief (7 pages) after argument in which appellee discusses the opinion of CA 6 in Kalina v. Railroad Retirement Board, decided September 13, 1976. Appellee notes that Kalina, decided after appellee's brief on the merits was filed and reported in Law Week after oral argument in this case, presents the identical constitutional issue raised in the instant case.

There is no response.

11/19/76 Goltz Slip op. in brief

PJN

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 75-699

Submitted ....., 19... *Announced* ....., 19...

MATHEWS

vs.

GOLDFARB

Motion of appellee for leave to file supplemental brief, after argument.

G

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
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Stevens, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

To: Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 12/2/76

Recirculated:

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-699

F. David Mathews, Secretary of Health, Education, and Welfare, Appellant, v. Leon Goldfarb. | On Appeal from the United States District Court for the Eastern District of New York.

[November —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under the Federal Old-Age, Survivors, and Disability Insurance Benefits program (OASDI) 42 U. S. C. §§ 401–431, survivors' benefits based on the earnings of a deceased husband covered by the Act are payable to his widow. Such benefits on the basis of the earnings of a deceased wife covered by the Act are payable to the widower, however, only if he "was receiving at least one-half of his support" from his deceased wife.[1] The question in this case is whether

[1] 42 U. S. C. § 402 (f)(1), in pertinent part, provides:

"The widower . . . of an individual who died a fully insured individual, if such widower—

"(A) has not remarried,

. . . . . .

"(B)(i) has attained age 60, or (ii) has attained age 50 . . . and is under a disability . . . ,

"(C) has filed application for widower's insurance benefits . . . ,

"(D)(i) was receiving at least one-half of his support . . . 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 within two years after the date of such death . . . , or (ii) was receiving at least one-half of his support . . . from such individual at the time she became entitled to old-age . . . insurance bene-

Renewed 12/5/76
Good Opinion - inclined to join at some time? circulate my Concurrence in Bowen

this gender-based distinction violates the Due Process Clause of the Fifth Amendment.

A three-judge District Court for the Eastern District of New York held that the different treatment of men and women mandated by § 402 (f)(1)(D) constituted invidious discrimination against female wage earners by affording them less protection for their surviving spouses than is provided to male employees, 396 F. Supp. 308 (1975).[2] We noted probable jurisdiction. 424 U. S. 906 (1976). We affirm.

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fits . . . , and filed proof of such support within two years after the month in which she became entitled to such benefits . . . and,

"(E) 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 his deceased wife,

"shall be entitled to a widower's insurance benefit . . . ."

Compare 42 U. S. C. § 402 (e)(1), which provides, in pertinent part:

"The widow . . . of an individual who dies a fully insured individual, if such widow . . .

"(A) is not married,

"(B)(i) has attained age 60, or (ii) has attained age 50 . . . and is under a disability . . . ,

"(C)(i) has filed application for widow's insurance benefits . . . 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 benefit . . . ."

[2] The decision also applied to § 402 (c)(1)(C), which imposes a dependency requirement on husbands of covered female wage earners applying for old-age benefits; wives applying for such benefits are not required to prove dependency, § 402 (b). These gender-based classifications have been uniformly held to be unconstitutional. See *Abbott* v. *Weinberger*, — F. Supp. —, Civil No. C 74-194 (ND Ohio Feb. 12, 1976), appeal docketed *sub nom. Mathews* v. *Abbott*, No. 75-1643 (husband's old-age benefits); *Coffin* v. *Secretary of Health, Education and Welfare*, 400 F. Supp. 953 (DC 1975) (three-judge court), appeal docketed *sub nom. Mathews* v. *Coffin*, No. 75-791 (both husband's and widower's benefits); *Jablon* v. *Secretary of Health, Education and Welfare*, 399 F. Supp. 118 (Md. 1975) (three-judge court), appeal docketed *sub nom. Mathews* v. *Jablon*, No. 75-739 (husband's benefits); *Silbowitz* v. *Secretary of Health, Edu-*

I

Mrs. Hannah Goldfarb worked as a secretary in the New York City public school system for almost 25 years until her death in 1968. During that entire time she paid in full all social security taxes required by the Federal Insurance Contributions Act, 26 U. S. C. §§ 3101–3126. She was survived by her husband, Leon Goldfarb, now age 72, a retired federal employee. Leon duly applied for widower's benefits. The application was denied with the explanation that

> "You do not qualify for a widower's benefit because you do not meet one of the requirements for such entitlement. This requirement is that you must have been receiving at least one-half support from your wife when she died." [2]

The District Court declared § 402 (f)(1)(D) unconstitu-

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cation and Welfare, 397 F. Supp. 862 (SD Fla. 1975) (three-judge court), appeal docketed *sub nom. Mathews* v. *Silbouitz*, No. 75-712 (husband's benefits). See also *Kalina* v. *Railroad Retirement Board*, — F. 2d —, No. 75-2256 (CA6 Sept. 13, 1976) (spouse's annuity under the Railroad Retirement Act, 45 U. S. C. § 231a (c)(3)(ii)).

[2] Although Mr. Goldfarb did not pursue an administrative appeal of the denial of his application, appellant concedes that because the denial was based on his failure to meet a clear statutory requirement, further administrative review would have been futile and the initial denial was therefore "final" for purposes of the District Court's jurisdiction to review it under 42 U. S. C. § 405 (g). See *Weinberger* v. *Salfi*, 422 U. S. 749, 764–767 (1975).

In order for Mr. Goldfarb to have satisfied § 402 (f)(1)(D), his wife would have to have been earning three times what he earned. According to Appellant's Brief, p. 25, "As a practical matter, only husbands whose wives contribute 75 percent of the family income meet [the dependency] test." That is because in order to meet the test, the wife must have provided for all of her own half of the family budget, plus half of her husband's share. For more elaborate descriptions of the dependency calculation, see 20 CFR § 404.350; Social Security Claims Manual, §§ 2625, 2628. See also Appellant's Brief, at 25–26, and n. 14; Appellee's Brief, at 5 n. 7.

tional primarily on the authority of *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), stating

> "[§ 402 (f)(1)(D)] and its application to this plaintiff, 'deprive women of protection for their families which men receive as a result of their employment.' *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 645 (1975). See also *Frontiero* v. *Richardson*, 411 U. S. 677 (1973).
>
> "Whatever may have been the ratio of contribution to family expenses of the Goldfarbs while they both worked, Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to their joint welfare when the couple or one of them retired and her husband's welfare should she predecease him. She paid taxes at the same rate as men and there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men." 397 F. Supp. *supra*, at 308–309.

II

The gender-based distinction drawn by § 402 (f)(1)(D)—burdening a widower but not a widow with the task of proving dependency upon the deceased spouse—presents an equal protection question indistinguishable from that decided in *Weinberger* v. *Weisenfeld*, *supra*. That decision and the decision in *Frontiero* v. *Richardson*, *supra*, plainly require affirmance of the judgment of the District Court.

The statutes held unconstitutional in *Frontiero* provided increased quarters allowance and medical and dental benefits to a married male member of the uniformed armed services whether or not his wife in fact depended on him, while a married female service member could only receive the increased benefits if she in fact provided over one-half of her husband's support. To justify the classification, the Government argued that "as an empirical matter,

wives in our society frequently are dependent on their husbands, while husbands are rarely dependent on their wives. Thus, . . . Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent on their husbands, while burdening female members with the task of establishing dependency in fact." 411 U. S., at 688–689. But *Frontiero* concluded that, by according such differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statute violated the Fifth Amendment. See *Reed* v. *Reed,* 404 U. S. 71, 76 (1971); *Stanley* v. *Illinois,* 405 U. S. 645, 656–657 (1972); cf. *Schlesinger* v. *Ballard,* 419 U. S. 498, 506–507 (1975).

Weinberger v. *Wiesenfeld,* like the instant case, presented the question in the context of the OASDI program. There the Court held unconstitutional a provision that denied father's insurance benefits to surviving widowers with children in their care, while authorizing similar mother's benefits to similarly situated widows. Paula Wiesenfeld, the principal source of her family's support, and covered by the Act, died in childbirth, survived by the baby and her husband Stephen. Stephen applied for survivors' benefits for himself and his infant son. Benefits were allowed the baby under 42 U. S. C. § 402 (d), but denied the father on the ground that "mother's benefits" under § 402 (g) were available only to women. The Court reversed, holding that the gender-based distinction made by § 402 (g) was "indistinguishable from that invalidated in *Frontiero,*" 420 U. S., at 642, and therefore, while,

> ". . . the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support, . . . such a gender-based generalization cannot suffice to justify

> the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.
>
> "Section 402 (g) clearly operates, as did the statutes invalidated by our judgment in *Frontiero*, to deprive women of protection for their families which men receive as a result of their employment. Indeed, the classification here is in some ways more pernicious . . . [I]n this case social security taxes were deducted from Paula's salary during the years in which she worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others." *Id.*, at 645.

Precisely the same reasoning condemns the gender-based distinction made by § 402 (f)(1)(D) in this case. For that distinction too operates "to deprive women of protection for their families which men receive as a result of their employment": social security taxes were deducted from Hannah Goldfarb's salary during the quarter-century she worked as a secretary, yet, in consequence of § 402 (f)(1)(D), she also "not only failed to receive for her [spouse] the same protection which a similarly situated male worker would have received [for his spouse] but she also was deprived of a portion of her earnings in order to contribute to the fund out of which benefits would be paid to others." *Wiesenfeld* thus inescapably compels the conclusion reached by the District Court that the gender-based differentiation created by § 402 (f)(1)(D)—that results in the efforts of female workers required to pay social security taxes producing less protection for their spouses than is produced by the efforts of men—is forbidden by the Constitution, at least when supported by no more substantial justification than "archaic

and overbroad" generalizations, *Schlesinger* v. *Ballard, supra,* 419 U. S., at 508, or "old notions," *Stanton* v. *Stanton,* 421 U. S. 7, 14 (1975), such as "assumptions as to dependency," *Weinberger* v. *Wiesenfeld, supra,* at 645, that are more consistent with "the role-typing society has long imposed," *Stanton* v. *Stanton, supra,* at 15, than with contemporary reality. Thus § 402 (f)(1)(D) "[b]y providing dissimilar treatment for men and women who are . . . similarly situated . . . violates the [Fifth Amendment]. *Reed* v. *Reed,* 404 U. S. 71, 77. . . ." *Weinberger* v. *Wiesenfeld, supra,* at 653.

III

Appellant, however, would focus equal protection analysis not upon the discrimination against the covered wage earning female, but rather upon whether her surviving widower was unconstitutionally discriminated against by burdening him but not a surviving widow with proof of dependency. The gist of the argument is that, analyzed from the perspective of the widower, ". . . the denial of benefits reflected the congressional judgment that aged widowers as a class were sufficiently likely not to be dependent upon their wives, that it was appropriate to deny them benefits unless they were in fact dependent." Appellant's Brief, p. 12.

But *Weinberger* v. *Wiesenfeld* rejected the virtually identical argument when appellant's predecessor argued that the statutory classification there attacked should be regarded from the perspective of the prospective beneficiary and not from that of the covered wage earner. The Secretary's Brief in that case, p. 14, argued that ". . . the pattern of legislation reflects the considered judgment of Congress that the 'probable need' for financial assistance is greater in the case of a widow, with young children to maintain, than in the case of similarly situated males." The Court, however, analyzed the classification from the perspective of the wage earner and concluded that the classification was unconsti-

Appellant (Gov't) would focus on upon surviving husband - rather than the wife who paid the S/Security

tutional because "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. Thus, contrary to appellant's insistence, Appellant's Brief, p. 12, *Wiesenfeld* is "dispositive here."

From its inception, the social security system has been a program of social insurance. Covered employees and their employers pay taxes into a fund administered distinct from the general federal revenues to purchase protection against the economic consequences of old age, disability and death. But under § 402 (f)(1)(D) female insureds received less protection for their spouses solely because of their sex. Mrs. Goldfarb worked and paid social security taxes for 25 years at the same rate as her male colleagues, but because of § 402 (f)(1)(D) the insurance protection received by the males was broader than hers. Plainly then § 402 (f)(1)(D) disadvantages women contributors to the social security system as compared to similarly situated men.[4] The section then "impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical." 420 U. S., at 654–655 (POWELL, J., concurring). In a sense of course both the female wage earner and her surviving spouse are disadvantaged by operation of the statute, but this is because "Social Security is designed . . .

[4] The disadvantage to the woman wage earner is even more pronounced in the case of old-age benefits, to which a similarly unequal dependency requirement applies. 42 U. S. C. §§ 402 (b), (c)(1)(C). See n. 2, *supra*. In that situation, where the insured herself is still living, she is denied not only "the dignity of knowing [during her working career] that her social security tax would contribute to their joint welfare when the couple or one of them retired and her husband's welfare should she predecease him," *Goldfarb* v. *Secretary of Health, Education and Welfare*, 396 F. Supp. 308, 309 (EDNY 1975), but also the more tangible benefit of an increase in the income of the family unit of which she remains a part.

for the protection of the *family*," 420 U. S., at 654. (JUSTICE POWELL concurring),[5] and the section discriminates against one particular category of family—that in which the female spouse is a wage earner covered by social security.[6] Therefore decision of the equal protection challenge in this case cannot focus solely on the distinction drawn between widowers and widows but, as *Wiesenfeld* held, upon the gender-based discrimination against covered female wage earners as well.[7]

IV

Appellant's emphasis upon the sex based distinction between widow and widower as recipients of benefits rather

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[5] See, *e. g.*, H. R. Rep. No. 728, 76th Cong., 1st Sess., at 7 (1939), accompanying the bill that extended social security benefits for the first time beyond the covered wage earner himself. The Report emphasizes that the purpose of the amendments was "to afford more adequate protection to the *family* as a unit." (Emphasis supplied.)

[6] This is accepted by appellant and appellees. See, *e. g.*, Appellant's Brief, at 13 n. 2; Appellee's Brief, at 23; Tr. of Oral Arg., at 7.

[7] In any event, gender-based discriminations against men have been invalidated when they do not "serve important governmental objectives and [are not] substantially related to the achievement of those objectives." *Craig* v. *Boren*, — U. S. —, — (1976). Neither *Kahn* v. *Shevin*, 416 U. S. 351 (1974), nor *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975), relied on by appellant, supports a contrary conclusion. The gender-based distinctions in the statutes involved in *Kahn* and *Ballard* were justified because the only discernible purpose of each was the permissible one of redressing our society's longstanding disparate treatment of women. *Craig* v. *Boren*, *supra*, at — n. 6 (1976).

But "the mere recitation of a benign, compensatory purpose is not an automatic shield that protects against any inquiry into the actual purposes underlying a legislative scheme." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975). That inquiry in this case demonstrates that § 402 (f) (1)(D) has no such remedial purpose. See Part IV–B, *infra*. Moreover, the classifications challenged in *Wiesenfeld* and in this case rather than advantage women to compensate for past wrongs compounds those wrongs by penalizing women "who do work and whose earnings contribute significantly to their families' support." *Wiesenfeld*, *supra*, 420 U. S., at 645.

than that between covered female and covered male employees also emerges in his other arguments. These arguments have no merit.

A

We accept as settled the proposition argued by appellant that Congress has wide latitude to create classifications that allocate noncontractual benefits under a social welfare program. *Weinberger* v. *Salfi*, 422 U. S. 749, 776–777 (1975); *Flemming* v. *Nestor*, 363 U. S. 603, 609–610 (1960). It is generally the case, as said in *Flemming* v. *Nestor*, 363 U. S., at 611, that

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

See also *Weinberger* v. *Salfi*, *supra*, 422 U. S., at 768–770; *Richardson* v. *Belcher*, 404 U. S. 78, 81, 84 (1971); *Dandridge* v. *Williams*, 397 U. S. 471, 485–486 (1970).

But this "does not, of course, immunize [social welfare legislation] from scrutiny under the Fifth Amendment." *Richardson* v. *Belcher*, *supra*, 404 U. S., at 81. The Social Security Act is permeated with provisions that draw lines in classifying those who are to receive benefits. Congressional decisions in this regard are entitled to deference as those of the institution charged under our scheme of government with the primary responsibility for making such judgments in light of competing policies and interests. But "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig* v. *Boren*, — U. S. —, — (1976).[8] Such

[8] Thus, justifications that suffice for non-gender-based classifications in

classifications, however, have frequently been revealed on analysis to rest only upon "old notions" and "archaic and overboard" generalizations, *Stanton* v. *Stanton, supra,* 421 U. S., at 14; *Schlesinger* v. *Ballard, supra,* 419 U. S., at 508; cf. *Mathews* v. *Lucas,* 44 U. S. L. W. 5139, 5144 (1976), and so have been found to offend the prohibitions against denial of equal protection of the law. *Reed* v. *Reed, supra; Frontiero* v. *Richardson, supra; Weinberger* v. *Wiesenfeld, supra; Stanton* v. *Stanton, supra; Craig* v. *Boren, supra.* See also *Stanley* v. *Illinois, supra; Taylor* v. *Louisiana,* 419 U. S. 522 (1975).

Therefore, *Wiesenfeld,* 420 U. S., at 646–647, expressly rejected the argument of appellant's predecessor, relying on *Flemming* v. *Nestor,* that the "non-contractual" interest of a covered employee in future social security benefits precluded any claim of denial of equal protection. Rather, *Wiesenfeld* held that the fact that the interest is "non-contractual" does not mean that "a covered employee has no right whatever to be treated equally with other employees as regards the benefits which flow from his or her employment," nor does it "sanction differential protection for covered employees which is solely gender-based." 420 U. S.,

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the social welfare area do not necessarily justify gender discriminations. For example, *Weinberger* v. *Salfi,* 422 U. S. 749 (1975), sustained a discrimination designed to weed out collusive marriages without making case-by-case determinations between marriages of less than nine months' duration and longer ones on the ground that

"While such a limitation doubtless proves in particular cases to be 'under-inclusive' or 'over-inclusive' in light of its presumed purpose, it is nonetheless a widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its terms." *Id.,* at 776.

Yet administrative convenience and certainty of result have been found inadequate justifications for gender-based classifications. *Reed* v. *Reed,* 404 U. S. 71, 76 (1971); *Frontiero* v. *Richardson,* 411 U. S. 677, 690 (1973); *Stanley* v. *Illinois,* 405 U. S. 645, 656–657 (1972). Cf. *Mathews* v. *Lucas,* 44 U. S. L. W. 5139, 5143 (1976).

at 646. On the contrary, benefits "directly related to years worked and amount earned by a covered employee, and not to the needs of the beneficiaries directly," like the employment-related benefits in *Frontiero*, "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.

B

Appellant next argues that *Frontiero* and *Wiesenfeld* should be distinguished as involving statutes with different objectives than § 402 (f)(1)(D). Rather than merely enacting presumptions designed to save the expense and trouble of determining which spouses are really dependent, providing benefits to all widows, but only to such widowers as prove dependency, § 402 (f)(1)(D), it is argued, rationally defines different standards of eligibility because of the differing social welfare needs of widowers and widows. That is, the argument runs, Congress may reasonably have presumed that nondependent widows, who receive benefits, are needier than nondependent widowers, who do not, because of job discrimination against women (particularly older women), see *Kahn* v. *Shevin*, 416 U. S. 351, 353–354 (1974), and because they are more likely to have been more dependent on their spouses. See *Wiesenfeld*, *supra*, 420 U. S., at 645; *Kahn* v. *Shevin*, *supra*, 416 U. S., at 354 n. 7.[9]

But "inquiry into the actual purposes" of the discrimination, *Wiesenfeld*, *supra*, 420 U. S., at 648, proves the contrary. First, § 405 (f)(1)(D) itself is phrased in terms of *dependency*, not *need*. Congress chose to award benefits not to widowers who could prove that they are needy, but to those who could prove that they had been dependent on their

[9] This argument is made for the first time in Appellant's Brief. The Jurisdictional Statement argued only the rationality of "extending to women . . . the presumption of dependency." J. St., at 11.

wives for more than one-half of their support. On the face of the statute, dependency, not need, is the criterion for inclusion.

Moreover, the general scheme of OASDI shows that dependence on the covered wage earner is the critical factor in determining beneficiary categories.[10] OASDI is intended to insure covered wage earners and their families against the economic and social impact on the family normally entailed by loss of the wage earner's income due to retirement, disability, or death, by providing benefits to replace the lost wages. Cf. *Jiminez* v. *Weinberger*, 417 U. S. 628, 633–634 (1974). Thus, benefits are not paid, as under other welfare programs, simply to categories of the population at large who need economic assistance, but only to members of the family of the insured wage earner.[11] Moreover, every family member other than a wife or widow is eligible for benefits only if a dependent of the covered wage earner.[12] This accords with the system's general purpose; one who was not dependent to some degree on the covered wage earner suffers

[10] Although presumed need has been a factor in determining the amounts of social security benefits, in addition to the extent of contributions made to the system, the primary determinants of the benefits received are the years worked and amount earned by the covered worker. 42 U. S. C. §§ 414, 415. See *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 647, and nn. 14, 15 (1975). In any event, need is not a requirement for inclusion in any beneficiary category, 42 U. S. C. § 402, and from the beginning was intended to be irrelevant to the right to receive benefits. See H. R. Rep. No. 615, 74th Cong., 1st Sess., at 1 (1935).

[11] Old-age and survivors' benefits may be paid to the insured wage earner himself, 42 U. S. C. § 402 (2); his spouse, while he is still alive, § 402 (b), (c), or after his death, § 402 (e), (f), (g); his children, § 402 (d); and his parents, § 402 (h).

[12] Dependency is a prerequisite to qualification for parents' benefits, § 402 (h)(1)(B), children's benefits, § 402 (d)(1)(C), husbands' benefits, § 402 (c)(1)(C), and widowers' benefits, § 402 (f)(1)(D). (Certain children are "deemed" dependent, § 402 (d)(3). This presumption was upheld as sufficiently accurate to pass scrutiny on grounds of "administrative convenience," *Mathews* v. *Lucas*, 44 U. S. L. W. 5139 (1976).)

no economic loss when the wage earner leaves the work force. Thus the overall statutory scheme makes actual dependency the general basis of eligibility for OASDI benefits, and the statute, in omitting that requirement for wives and widows, reflects only a presumption that they are ordinarily dependent. At all events, nothing whatever suggests a reasoned congressional judgment that nondependent widows should receive benefits because they are more likely to be needy than nondependent widowers.

Finally, the legislative history of § 402 (f)(1)(D) refutes appellant's contention. The old age provisions of the original Social Security Act, 49 Stat. 622 (1935), provided pension benefits only to the wage earner himself, with a lump-sum payment to his estate under certain circumstances.[13] Wives' and widows' benefits were first provided when coverage was extended to other family members in 1939. Social Security Act Amendments of 1939, 53 Stat. 1360, 1364–1366. The general purpose of the amendments was "to afford more adequate protection for the *family* as a unit." H. R. Rep. No. 728, 76th Cong., 1st Sess., at 7 (1939). (Emphasis supplied.) The House Ways and Means Committee criticized the old lump-sum payment because it "make[s] payments to the estate of a deceased person regardless of whether or not he leaves dependents." *Ibid.* The Social Security Board, which had initiated the amendments in a report transmitted by the President to Congress, recommended the adoption of survivors' benefits because "The payment of monthly benefits to widows and orphans, who are the two chief classes of dependent survivors, would furnish more significant protection than does the payment of lump-sum benefits." H. R. Doc. No. 110, 76th Cong., 1st Sess., 7 (1939).[14] In

[13] This payment essentially amounted to 3½% of the wage earner's earnings while covered, less the amount received as an old-age pension, Social Security Act § 203, 49 Stat. 623 (1935).

[14] See also remarks of Senator Harrison, 84 Cong. Rec. 8827 (1939). To the extent that this statement indicates that Congress found widows

addition to recommending survivors' benefits, the Board suggested the extension of old-age pension benefits "for the aged dependent wife of the retired worker."[15] *Id.*, at 6. On the Senate floor, Senator Harrison, the principal proponent of the amendments, criticized the then existing system of benefits because under it "no regard is had as to whether [the covered wage earner] has a dependent wife, or whether he dies leaving a child, widow, or parents." 84 Cong. Rec. 8827 (1939). There is no indication whatever in any of the legislative history that Congress gave any attention to the specific case of nondependent widows, and found that they were in need of benefits despite their lack of dependency, in order to compensate them for disadvantages caused by sex discrimination. There is every indication that, as *Wiesenfeld, supra*, recognized, 420 U. S., at 644, "the framers of the Act legislated on the 'then generally accepted presumption that a man is responsible for the support of his wife and children.' D. Hoskins & L. Bixby, Women and Social Security: Law and Policy in Five Countries, Social Security Administration Research Report No. 42, p. 77 (1973)."[16]

Survivors' and old age benefits were not extended to husbands and widowers until 1950. 64 Stat. 483–485. The legislative history of this provision also demonstrates that Congress did not create the disparity between nondependent widows and widowers with a compensatory purpose. The

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and orphans needier *than other dependents*, it may support a discrimination between dependent widows and dependent widowers, but it certainly demonstrates a congressional assumption that widows are dependent, rather than an intention to aid nondependent widows because of a finding that they are needier than nondependent widowers.

[15] See also Final Report of the Advisory Council on Social Security, at 24 (1938): "The inadequacy of the benefits payable during the early years of the old-age insurance program is more marked where the benefits must support not only the annuitant himself, but also his wife."

[16] See also the further excerpts from and discussion of the legislative history in *Wiesenfeld*, 420 U. S., at 644 n. 13.

impetus for change came from the Advisory Council on Social Security, which recommended benefits for "the aged, dependent husband . . . [and] widower." The purpose of this recommendation was "[*t*]*o equalize the protection given to the dependents of women and men*" because "[*u*]*nder the present program, insured women lack some of the rights which insured men can acquire.*" Advisory Council on Social Security, Recommendations for Social Security Legislation, S. Doc. No. 208, 80th Cong., 2d Sess., at 38 (1949). (Emphasis supplied.) It is clear from the Report that the Advisory Council assumed that the provision of benefits to dependent husbands and widowers was the equivalent of the provision of benefits to wives and widows under the previous statute, and not a lesser protection deliberately made because of lesser need. Although the original House Bill H. R. 6000 that became the Social Security Act Amendments of 1950 did not contain a provision for husbands' and widowers' benefits, the Senate Finance Committee added it, because "the committee believes that protection given to dependents of women and men should be made more comparable." S. Rep. No. 1669, 81st Cong., 2d Sess., at 28 (1950). In 1950, as in 1939, there was simply no indication of an intention to create a differential treatment for the benefit of nondependent wives.

We conclude, therefore, that the differential treatment of nondependent widows and widowers results not, as appellant asserts, from a deliberate congressional intention to remedy the arguably greater needs of the former, but rather from an intention to aid the dependent spouses of deceased wage earners, coupled with a presumption that wives are usually dependent. This presents precisely the situation faced in *Frontiero* and *Wiesenfeld*. The only conceivable justification for writing the presumption of wives' dependency into the statute is the assumption, not verified by the Government in *Frontiero*, 411 U. S., at 689, or here, but based simply on "archaic and overbroad" generalizations, *Schlesinger* v.

Ballard, supra, 419 U. S., at 508, that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes.[17] We held in *Frontiero*, and again in *Wiesenfeld*, and therefore hold again here, that such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits.[18]

Affirmed.

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[17] In fact, the legislative history suggests that Congress proceeded casually on a "then generally accepted" stereotype and did not focus on the possible expense of determining dependence in every case.

[18] Even if appellant's theory of the purpose of the discrimination were accurate, it would not necessarily follow that the classification is "fairly and substantially related" to that purpose. *Reed* v. *Reed*, 404 U. S. 71, 76 (1971). If Congress intended to provide greater benefits to widows because they were perceived as generally needier than widowers, it chose a strikingly imprecise instrument. On the one hand, all widows of wage earners covered by social security are presumed needy, regardless of whether they are actually needy or of whether they were dependent on their deceased husbands. Though widows as a class may well constitute a disadvantaged group, the precise sub-class of widows benefited by the discrimination at issue here are those least likely to be needy: those whose husbands were covered wage earners and who themselves earned enough not to be dependent on their husbands' earnings. Widows dependent on husbands who had no social security protection, likely to be the neediest of the needy class, are not reached at all by the benefits provided here, and dependent widows of covered wage earners receive no greater benefit than widowers in the same situation. The discriminatory scheme is not carefully tailored to meet the needs of even those nondependent widows who benefit from it, because any subsidy given through the OASDI system is not related to need, but to the years worked and amount earned by the covered wage earner.

On the other hand, widowers of covered individuals are presumed less needy unless their wives out-earned them by 3 to 1. Just as many working wives would fail this test if it were applied to them, so there are many widowers whose accustomed standard of living depended in considerable measure on their wives' earnings, even if they could not demonstrate dependency under this formula. The actual poverty of the widower is not taken into account, only whether he can pass the stringent dependency test.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 2, 1976

Re: No. 75-699 - Mathews v. Goldfarb

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 2, 1976

Re: No. 75-699 - Mathews v. Goldfarb

Dear Bill:

In due course, I will circulate a dissent in this case.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

December 6, 1976

No. 75-699 Mathews v. Goldfarb

Dear Bill:

Please join me in your opinion for the Court.

I do have some reservation as to note 18 (p. 17). It seems to be unnecessary dicta, and mayhhave implications that are not foreseeable.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 7, 1976

Re: No. 75-699 - Mathews v. Goldfarb

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Brennan

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 13, 1976

Re: No. 75-699 - Mathews v. Goldfarb

Dear Bill:

I am, of course, awaiting the dissent.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 14, 1976

75-699 - Mathews v. Goldfarb

Dear Bill,

As I have indicated to you orally, I think your proposed opinion for the Court is a remarkably fine job, and that, given Weinberger v. Wiesenfeld, the result it reaches is close to unanswerable. As I have also orally indicated, however, I have had some second thoughts about the Wiesenfeld decision, and for that reason shall await the dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 3, 1977

MEMORANDUM TO THE CONFERENCE

RE: No. 75-699 Mathews v. Goldfarb

Upon reading Bill Rehnquist's dissent, I propose to make no changes beyond insertion of the following footnote at the end of the first paragraph of Part II on page 4:

> The dissent maintains that this sentence "overstates [the] relevance" of Wiesenfeld and Frontiero. It is sufficient to answer that the principal propositions argued by appellant and in the dissent, -- namely, the focus on discrimination between surviving, rather than insured, spouses; the reliance on Kahn v. Shevin, 416 U.S. 351 (1974), the argument that the presumption of female dependence is empirically supportable, and the emphasis on the special deference due to classifications in the Social Security Act -- were all asserted and rejected in one or both of those cases as justifications for statutes substantially similar in effect to Sec. 402(f)(1)(D).

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 3, 1977

Re: 75-699 - Mathews v. Goldfarb

Dear Bill:

Although I expect to join your dissent, I want to try my hand at a few additional paragraphs to point up the difference between this case and cases like Mathews v. Lucas and Craig v. Boren.

Respectfully,

Jack

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 4, 1977

No. 75-699, Mathews v. Goldfarb

Dear Bill,

After considerable backing and filling, I have concluded that yours is the preferable conclusion in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 4, 1977

Re: 75-699 Mathews v. Goldfarb

Dear Bill:

I join your dissent. It should convince even the most ardent "equal protector"!

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

Lewis,

How can you not agree with WHR!?

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 6, 1977

MEMORANDUM TO THE CONFERENCE

RE: No. 75-699 Mathews v. Goldfarb

My circulation in this case explains why this case is controlled by Frontiero and Wiesenfeld, and this memo is circulated simply to suggest why Bill Rehnquist's dissent does not, in my view, succeed in distinguishing those cases.

Bill's first major thread is that the Social Security Act is somehow sui generis and therefore invulnerable to equal protection attacks. This is precisely the argument, however, that was used to attempt to distinguish Wiesenfeld from Frontiero, and we squarely rejected it. 420 U.S., at 646-647. Indeed, Wiesenfeld held that the fact that the case arose in the context of the contributory social security system made the discrimination there "more pernicious" than that in Frontiero. 420 U.S., at 645. Bill argues, however, that Mathews v. Lucas, 44 USLW 5139 (1976), and Weinberger v. Salfi, 422 U.S. 749 (1975), embraced the argument rejected in Wiesenfeld and established a new principle that constitutional doctrines developed in other fields of law do not have the same force in the context of the Social Security Act, and that this new principle undercuts Wiesenfeld.

But nothing in Salfi or Lucas purports to establish any new principle, or to cast any doubt on Wiesenfeld. Salfi was decided only three months after Wiesenfeld. It relies on such cases as Flemming v. Nestor, 363 U.S. 603 (1960), Dandridge v. Williams, 397 U.S. 471 (1970), and Richardson v. Belcher, 404 U.S. 78 (1971). See 422 U.S., at 768-770. All of these cases pre-dated Wiesenfeld, and Wiesenfeld and my opinion in Goldfarb, like Salfi, recognize the principle they establish, namely that congressional judgments in the field of social welfare are to be accorded considerable deference. Salfi did not involve sex discrimination, or indeed any equal protection issue at all, dealing instead with the quite

different doctrine of conclusive presumptions. The concern it expresses that overuse of that doctrine could invalidate the myriad examples of line-drawing in the Social Security Act, such as the requirement that claims be filed within 60 days rather than, say, 75, given as the reason for limiting the doctrine in the social security context, 422 U.S., at 772-773, hardly seems applicable to the limited use of the equal protection clause to prevent gender discrimination. Cases this Term such as Mathews v. deCastro and Knebel v. Hein demonstrate that restraint against erasure of lines drawn on bases other than gender presents no problem. Thus, Salfi simply does not represent any new departure inconsistent with Wiesenfeld.

Nor does Lucas teach that a distinction impermissible in another area is permissible in the context of the Social Security Act. Lucas relies both on cases arising under the Social Security Act, e.g., Jiminez v. Weinberger, 417 U.S. 628 (1974), and on cases in other areas, e.g., Labine v. Vincent, 401 U.S. 532 (1971); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), in support of the standard applied to the classification at issue in that case. 44 USLW at 5141-5142. And of particular significance, Lucas most carefully distinguished Frontiero and Wiesenfeld, noting that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes." Id., at 5142. In Frontiero and Wiesenfeld,

> The invalidity of [the] gender-based discrimination rested upon the "overbroad" assumption, Schlesinger v. Ballard, 419 U.S. 498, 508 (1975), underlying the discrimination "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." Weinberger v. Wiesenfeld, 420 U.S., at 643; see Frontiero, 411 U.S., at 689 n. 23. Here, by contrast, the statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations.

44 USLW at 5144. This same overbroad presumption, which we condemned in Frontiero and Wiesenfeld, is at the heart of "the severe [and] pervasive . . . historic legal and political discrimination against women," and is the basis of the statute under review. Nothing in Salfi or Lucas remotely suggests that legislation based on this damaging presumption about women is any more permissible in the Social Security Act than in other legislation, or more permissible now than it was less than two years ago.

Bill's second thread is his reliance on Kahn v. Shevin, 416 U.S. 351 (1974). This argument was also made in Wiesenfeld, 420 U.S., at 648, and rejected there. It was rejected precisely because the Court decided that a classification cannot be regarded as remedial, and thus exempt from heightened scrutiny, when it penalizes working women by giving them less insurance protection for their families on the basis of an invidious and overbroad presumption that has historically been used to discriminate against them. Bill challenges Wiesenfeld's deliberately chosen focus of the equal protection analysis from the viewpoint of the wage-earning wife; he says that focus was "questionable", dissent at 15. However questionable, it was the basis of both Court and concurring opinions in Wiesenfeld, which seven of us joined. Moreover, it cannot be questioned that a discrimination against the survivors of a deceased insured on the basis of the sex of the insured is at least in some part a discrimination against the insured. Social security benefits, after all, unlike the subsidy in Kahn, are available only to those who stand in a defined relationship to the insured; they are not awarded to recipients solely on the basis of their own characteristics. The benefits are earned by the insured, and in a real sense accrue to him or her as much as to the nominal recipient. (The benefit accrues to the insured in a more tangible sense in the case of the living retired insured covered by the spouses' insurance provisions at issue in the companion cases.) A discrimination that affects working women in this way, as Wiesenfeld squarely held, cannot be regarded as remedial.

In short, I can find nothing in Bill's dissent that provides any principled basis for distinguishing Wiesenfeld and Frontiero, or indeed raises any arguments that were not raised in Wiesenfeld and rejected. I simply cannot accept Bill's proposal that a decision joined by all but one Justice only two Terms ago should now be so thoroughly repudiated. This "ardent 'equal protector'", at least remains unpersuaded.

W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 22, 1977

Re: No. 75-699 - Mathews v. Goldfarb

Dear Bill:

Please join me in your dissent.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
	10/21/76							
join WHR 1/4/76	~~1st~~ 3rd draft 12/2/76	await dissent 12/14/76	join BRW 12/7/76	join WJB 12/2/76	await dissent 12/13/76	join WJB 12/6/76	will dissent 12/2/76	1st Draft Concurring in the judgment 2/17/77 ~~2nd~~ 2nd draft 2/24/77
		join WHR 1/4/76			join WHR 2/22/77		1st draft 12/30/76	
					75-699 Matthews v. Goldfarb			