In the

Supreme Court of the United States

F. David Mathews, Secretary Of Health Education, And Welfare,

Petitioner,

v.

Leon Goldfarb,

Respondent

No. 75-699

Washington, D. C.
October 5, 1976

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F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, Petitioner,	:	No. 75-699
v.	:	
LEON GOLDFARB, Respondent	:	

Washington, D. C.

Tuesday, October 5, 1976

The above-entitled matter came on for argument at 1:01 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

KEITH A. JONES, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

RUTH BADER GINSBURG, ESQ., American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York, 10016, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-699, Mathews against Goldfarb.

Mr. Jones, you may proceed whenever you are ready.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.

ON BEHALF OF THE PETITIONER

MR. JONES: Mr. Chief Justice, and may it please the Court:

This case is here on appeal from the United States District Court of the Eastern District of New York.

The issue concerns the imposition of a support test on widowers but not widows as a condition on eligibility for Social Security survivors benefits.

The appellee is a retired Federal employee and a widower. Following the death of his wife, he applied for Social Security widower's benefits under his deceased wife's earning account, that is, he sought to tack Social Security retirement benefits, Social Security survivor's benefits, onto his existing Civil Service pension.

If appellee had been a private employee, rather than a civil servant, he would not have been able to tack benefits in this way even without regard to the support test he challenges here.

The reason for this is that both widows and widowers, to be eligible for survivor's benefits, must pass what may

for convenience be called the PIA test. PIA refers to the primary insurance amount, which is the maximum monthly old-age benefit to which a wage earner is entitled under his or her own earnings account.

Only a survivor whose PIA is less than that of the deceased spouse is entitled to survivors benefits. And it is undisputed that if appellee's lifetime had been covered by Social Security he could not have passed this test.

The PIA test bars a widower from tacking a smaller survivor's benefit onto an existing Social Security old-age benefit. The theory behind this rule is that Social Security benefits are not vested rights but are payable on the basis of probable need.

If a widower is already receiving old-age benefits in excess of the survivor's benefits to which he would otherwise be entitled, he probably is not needy. But the PIA test, standing alone, is insufficient, inadequate, to weed out non-needy Federal pensioners such as appellee. It is inadequate to weed out this category of non-needy widowers.

To achieve this end of weeding out such widowers, Congress has imposed a second test, the support test that is at issue in this case. Under this test, a widower must prove that he was receiving more than one-half his support from his wife at the time of her death, disability or retirement.

The practical effect of the support test is suggested in

Appendix to our brief. In short, if the support test were eliminated, approximately $447 million annually would be required to be distributed to non-needy widowers. And of this, from $350 million would be required to be distributed to non-needy pensioners such as appellee.

QUESTION: Mr. Jones, it has been a while since I read these briefs in this case. Am I right in understanding that the basic PIA test is applicable alike to males and females?

MR. JONES: That is correct, Mr. Justice Stewart.

QUESTION: And it is only this additional test that differentiates between men and women.

MR. JONES: That's correct.

The problem in this case is that the support test does not apply to women. A widow, age 60 or older, who passes the PIA test is entitled to survivor's benefits without regard to support. Thus, a woman similarly situated to appellee, that is, a retired female civil servant whose husband's lifetime employment had been covered by Social Security would be entitled to survivor's benefits.

This loophole in the Social Security law does not appear ever to have received explicit Congressional attention. And it is upon the existence of this loophole that creates different treatment for this small, narrow class of men and women upon which appellee's case largely depends.

QUESTION: Mr. Jones, I am also a little rusty in the case. This $440 million figure which applies to this small, narrow class, is that based on anything in the record or is that something you developed subsequently and just in the briefs here?

MR. JONES: It is not in the record, Mr. Justice Stevens. The methodology underlying the estimate is spelled out in the Appendix to our brief on the merits. The amount involved was not put in issue in the District Court, as far as I understand it.

The appellee could not pass the support test. He had not, in fact, been dependent upon his wife, and for that reason he was denied widower's benefits. He then brought this suit in District Court and the District Court declared the support test as to widowers unconstitutional, relying in large part upon this Court's opinions in Weinberger v. Wiesenfeld and Frontiero v. Richardson.

Before turning to a discussion of those two cases which underpin the appellee's arguments here, I would like to make some general observations about the appellee's arguments on the merits.

Although appellee is a man and it is the denial of benefits to himself he complains of, he has sought to portray this statutory classification as discriminating principally against women. He contends that the real discrimination here

is against the deceased working wives whose widowers must now prove support, that is, largely against the deceased working wives of civil servants.

Of course, as an analytical matter, the discrimination, if any, bears equally upon these widowers and their deceased working wives. These two categories, one male and one female, necessarily are present here on a one to one ratio.

That suggests that this case does not involve sex discrimination at all but rather discrimination, if any, against certain kinds of families, that is, appellee's kind of family.

But putting that aside, at a minimum, all other things being equal, the choice of which sex to characterize as the disadvantaged class here would appear to be a matter of purely rhetorical significance. Yet all other things are not equal.

There is not a legislative motive here to discriminate against women. Congress plainly designed the support test simply to deny benefits to non-needy widowers, such as appellee. The difference in treatment is aimed at men not at women.

Since this is so, it may seem all the more puzzling why the appellee has worked so hard to characterize the support test as discriminating principally against women. But there are, I suspect, three good reasons for this approach.

First, appellee is attempting to obscure the fact

that what he seeks here is a double benefit, that is, it is a windfall in the nature of Social Security survivors benefits on top of the Civil Service pension.

QUESTION: If the genders were reversed, he would -- she would get this windfall, wouldn't she?

MR. JONES: That is correct, Mr. Justice Stewart, that is the loophole.

QUESTION: Well, any time somebody doesn't like a provision of the law he calls it a loophole. This is a provision of the law.

MR. JONES: Sometimes they call it unconstitutional.

(laughter)

MR. JONES: But it does seem to me that the appellee understandably seeks to divert the court's attention away from the obvious rationality of Congress' decision to deny him this double benefit. And that purpose I would like to frustrate.

It is plain here that what he seeks is a windfall. It is true it is a windfall that's available to women of a special, narrow class, but that does not mean it is a constitutional matter, it should also be made available to him.

QUESTION: Well, that's the question in this case, isn't it?

MR. JONES: That's correct, Mr. Justice Stewart.

I think the second reason that the appellee seeks to characterize this as a women's rights case is that the cause of women's rights is now a fashionable one and the appellee seeks to ride on its skirt-tails. But it is the responsibility of this Court to act on the basis of what reflects a proper accommodation of the respective roles of Congress and the courts, and not to act on the basis of what may be favored by the shifting tides of extra-judicial legal fashion.

But the third reason why appellee may be characterizing this as a women's rights case is the one that disturbs me the most. Appellee may be implicitly suggesting that the rights of women are constitutionally entitled to higher protection than the rights of men.

As a lawyer and as a member of the class that would thereby be disadvantaged, I would urge this Court to reject any such subtle suggestion. Women constitute a majority of the voting age population in this country. Unlike racial minorities, for example, women have the political power, if they choose to use it, to remedy any statutory inequality of which they perceive themselves to be the victims. In short, women are not a discreet, insular minority that requires special judicial protection against an indifferent or a hostile legislature.

This is not to say that women have not been subject

to legal and social discrimination in the past. That history of discrimination justifies remedial legislation that extends to women certain benefits or opportunities that may not be made available on the same basis to men. This Court so held in Kahn v. Shevin. But further than that, the courts may not go. Men and women are entitled to the same statute under the Constitution. The same constitutional analysis must apply whether the discrimination of which appellee complains is directed against men or against women.

With these preiminary thoughts in mind, I would now turn to discussion of this Court's opinions in Frontiero and Wiesenfeld.

The statutory classification at issue in Frontiero was concededly superficially quite similar to the one involved here. But superficial similarities of that kind are largely irrelevant to equal protection analysis.

At the heart of any equal protection inquiry, is whether the challenge classification is rationally related to a permissible and a substantial legislative objective.

In Frontiero the differential treatment accorded men and women furthered no objective other than mere administrative convenience. The Government so conceded and this Court so held.

And that objective, the Court held, was insufficiently substantial to justify the difference in treatment. That

rationale is not applicable here. The statutory classification challenged here is not rooted in mere administrative convenience. Instead, as I will show momentarily, the classification reflects Congress' legitimate efforts rationally to allocate so scarce Social Security's monies on the basis of the probable needs of competing classes of potential beneficiaries.

Yes, Mr. Justice Stevens.

QUESTION: Would it not be correct that the decision not to require a support test in the converse situation is justified by administrative convenience?

MR. JONES: It is justified by several factors and administrative convenience is one of them.

QUESTION: What are the others? --

MR. JONES: But it is not rooted in administrative convenience.

The rational basis, or the social welfare considerations on which the Government relies here, are spelled out at length at pages 15 to 36 of our main brief. But I can summarize them here.

The Social Security provisions for widows and widowers have separate and different histories. In 1939, Congress determined to pay monthly benefits to those groups of survivors whose probable need was the greatest. And it identified those groups as elderly widows, dependent children and aged dependent parents.

And, although a major purpose of this support test -- excuse me -- of the survivors' benefits was to replace the support lost by a dependent upon the death of the wage earner.

Congress did not restrict widows' benefits to those women who were, in fact, dependent upon their husbands. And the reasons for this, Mr. Justice Stevens, were two-fold.

First, in 1939, and for many years thereafter, very few aged women were, in fact, not economically dependent upon their husbands. And to have imposed the support test would have placed a substantial burden upon all of those widows and upon the administrative agency as well. And that burden would have been incurred to weed out a very small percentage of non-dependent women.

Indeed, the appellee here concedes that the imposition of the support test upon widows would entail -- and I quote from pages 65 and 68 of his brief -- "an exhorbitant administrative burden of potentially monstrous proportion." That's the appellee's language, that's not our language.

So that, to some extent, Mr. Justice Stevens, you are correct that the extension of benefits to women does have some basis in administrative convenience. But, at the same time, the non-dependent women who would have been weeded out by a support test are very likely to have been needy in any event.

The women who would pass the support test, that is,

the women who receive less than half their support from their husbands, were very likely to have been either deserted or to have been living in other circumstances of substantial need. Very few aged widows were truly self-sufficient. And it was both reasonable and humane for Congress to extend widows benefits to these women without regard to dependency.

QUESTION: Doesn't your argument suggest that there is not necessarily a correlation between the ability to pass the support test and probable need at the time that the applicant applies for benefit?

MR. JONES: That's certainly true as to widows and it was truer, perhaps, in 1939 than it is today. At that time -- and I must confess that the statistics are very rough -- but at that time, it is a fair inference that considerably fewer than 10% of all women would have passed the support test at any given point in time --

QUESTION: Would have fought the support test.

MR. JONES: Would have fought the support test, that's correct, would have been non-dependent. That's correct.

-- at any given point in time, at any point in their employment history. And, as to women age 55 and older, there was a decrease in their participation in the job market. So that, it would be considerably less than 10% for these aged women. But not only that, these are women who probably did not work over the full course of their working lives, who may

have worked sporadically, but who probably did not build up substantial Social earnings, entitlements or other retirement benefits.

So, as to this class of working women, it is a fair assumption, I think, that even those women who were non-dependent at the critical point, still existed in circumstances of need.

Now, the same is not true, I submit, generally, as to widowers. The program of widowers' benefits was established later, in 1950. At that time, Congress reasonably identified as presumptively needy only those widowers who had been dependent on their wives for support. With few exceptions, non-dependent men either had substantial Social Security entitlements or they had been gainfully employed in positions outside the Social Security systems, like the appellee, and they, therefore, fell outside the category of probable need.

And the support test served to weed out approximately 97% of all widowers, whereas, it would have only weeded out less than 10% of widows. And if the support test had not been imposed, from 75% to 90% of the additional monies that would have been required to be paid out would have been paid to non-needy pensioners such as the appellee.

Congress rationally chose not to spend its scarce Social Security monies in that manner.

QUESTION: But I suppose there are some widowers who

are needy but who can't pass the support test.

MR. JONES: It depends upon what you mean by needy, Mr. Justice White.

QUESTION: Well, what's the purpose of the support test in the first place?

MR. JONES: To weed out the non-needy, basically.

QUESTION: To weed out the non-needy, which implies there are some that are not needy, or you wouldn't have to weed anybody out.

MR. JONES: Well, I think, as a practical matter, -- excuse me, I may have misunderstood you -- it implies that some widowers are non-needy?

QUESTION: My initial question was: aren't there some widowers who are needy even though they cannot pass the support test?

MR. JONES: Again, Mr. Justice White, I say that may well depend on the standard of neediness that you use in a welfare system. It is certainly hypothetically possible that there are some men who were self-supporting who, nevertheless, were needy.

Now, there are, of course, supplementary programs which are designed to alleviate the need of those people whose need has not been entirely met by the Social Security.

QUESTION: Has the man involved in this case ever indicated he was needy?

MR. JONES: He has not.

QUESTION: Would this case here be any different if he had?

MR. JONES: Well, it would certainly be more attractive on the facts for the other side.

As a statistical matter, Mr. Justice White, 85%, roughly, of the benefits we are talking about go to Civil Service pensioners. They are plainly not needy. And of the other percentages, we cannot say with certainty that no needy person would thereby be given benefits, but,as a practical matter, it is a rare member of the so-called disadvantaged class here who, in fact, is needy.

QUESTION: Maybe I misunderstood, but, as I understood my brother White's question it was directed -- or at least, my question is directed to this proposition: Why is the fact that a widow or widower may have received more than one-half of his support during the lifetime of his spouse from his spouse relevant to his present neediness?

MR. JONES: Well, the time in which it is measured is not during the lifetime, but at the time of the death, retirement or disability of the spouse.

QUESTION: All right, at the time of the spouse's death. Why is that fact relevant to his present state of need?

MR. JONES: Well, if he was dependent upon his wife at that point and if he is a retired widower, then it is

unlikely that he has extrinsic sources of support and the survivor's benefit serves to replace the support he has, in fact, lost. We may say that he is presumed needy by virtue of that.

QUESTION: It is, apparently, rough equivalence, isn't it? Or could be non-equivalence --

MR. JONES: Well, I don't think it could be said to be non-equivalence except in those rare instances of -- well, perhaps, not so rare -- but in those instances where the woman has substantial independent wealth which the man will inherit upon her death.

Other than in those situations, if he was, in fact, dependent upon her at the time of her death, it is very probable that he has lost support. Support which Congress has deemed he needs to have replaced.

QUESTION: Well, now, what about the converse? He was not dependent upon her at the time of her death.

MR. JONES: Then, he is ineligible for benefits.

QUESTION: Well, I know, but what's that got to do with need now?

MR. JONES: If he were not dependent upon her at the time of her death, then he has lost little in the way of support and can be presumed to be continuing on whatever sources of support that he had in the past.

Now, it is true that this is not a means test. It

does not definitively distinguish between those persons acutely in need and those who are not.

QUESTION: And to that extent, it's an administrative convenience argument?

MR. JONES: Well, I think that any support test, any dependency test, is only roughly equivalent to need. For example, in Mathews v. Lucas, last term, this Court upheld a statute which imposed upon illegitimate children a dependency test or support test, even though a similar test was not imposed upon legitimate children.

The criterion was considered substantially rationally related to a need to distinguish between those who would need additional support and those who did not. And this statute serves exactly the same purpose.

Now, it is true that we have here, as we did in Lucas, a problem of over-inclusiveness. The statute provides benefits to certain women, Federal -- retired civil servants and certain other women and the benefits are not made available to similarly situated men. But mere over-inclusiveness, without more, does not render a statute unconstitutional.

Now, let me backtrack for a moment to make a few comments about the Wiesenfeld opinion upon which appellee and the court below largely rely.

The Wiesenfeld opinion, it must be conceded, contains language that, if taken at face value, would require the

widower's support test to be struck down. The Court stated -- and I quote: "The Constitution forbids gender based differentiation, the results and the efforts of female workers producing less protection for their families than is produced by the efforts of men."

But that statement cannot be lifted bodily and applied out of context. In the first place, the statement was made with regard to a statute that the Court found had no rational basis.

The Court's rational in Wiesenfeld was that the statutory bar against father's benefits was inconsistent with the legislative purpose providing children deprived of one parent with the opportunity for the personal attention of the other.

But neither that rationale nor any similar rationale is available here. The support test for widowers is fully consistent, I submit, with the underlying legislative purpose of restricting benefits to those groups that may largely be presumed to be needy.

But secondly, if the statement in Wiesenfeld were detached from its factual context, it would amount to a per se constitutional rule. Indeed, that's what appellee suggests that it is.

But the due process clause affords no basis for such a rule. Such a flat declaration of what Congress may not do in

the Social Security Act would, I submit, constitute a radical and an unwise departure from historical principles of equal protection.

It would allow no weight to be given to governmental interests that might be served by a particular gender-based classification. This Court has always given weight to such interests in equal protection cases in the past and it should do so here.

Mr. Chief Justice, I would like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well.

Mrs. Ginsburg.

ORAL ARGUMENT OF RUTH BADER GINSBURG, ESQ.

FOR THE RESPONDENT

MRS. GINSBURG: Mr. Chief Justice, and may it please the Court:

Leon Goldfarb's case concerns a differential in the quality of social insurance accorded men and women.

Pursuant to the Federal Insurance Contributions Act, payments into Social Security's Old Age and Survivor's Insurance Program are exacted from gainfully employed men and women without regard to the sex of the contributor. Whether the wage earner is a man or a woman, equal earnings require equal contributions.

In contrast to the gender neutral contribution system,

the program draws a sharp line between the sexes on the payout side. Benefits to a spouse available under a male wage earner's account are not equally available under a female wage earner's account.

The Court below ruled that this separate and unequal payout system discriminates invidiously against the wage earning woman and her spouse. That decision and all other, five other, Federal court judgments on the same point solidly anchor to this Court's 1973 judgment in Frontiero v. Richardson, and the 1975 decision in Weinberger v. Wiesenfeld.

Thus, the issue on which this appeal turns is cleanly posed. Do Frontiero and Wiesenfeld impart a principled basis for deciding gender discrimination cases formed from the same mold, or are the Frontiero and Wiesenfeld precedents shallow and evanescent, as the Secretary would have it today?

In Wiesenfeld, the Court declared unconstitutional the Social Security Act provision of a mother's benefit, but no father's benefit. When Wiesenfeld was presented to this Court, the Solicitor General described the gender differential there at issue as very closely analogous to the one at bar. And in Frontiero, the Court held unconstitutional a military fringe benefit arrangement displaying a gender line virtually identical to the one at bar.

In defending the Frontiero classification, the Solicitor General noted similar distinctions are found in other

Federal laws. He supplied as his sole example 42 U.S.C. 402, the very Social Security provision now before the Court.

Like Steven Wiesenfeld and Sharon and Joseph Frontiero, Leon Goldfarb challenged an employment-related benefit scheme that attributes to the male wage earner status, dignity and importance not attributed to the female wage earner.

As the Secretary recites, the Old Age and Survivor's Insurance at issue took shape in two stages. First, in 1939, Congress ordered that the male workers Social Security account should attract benefits for his spouse without regard to husband's and wife's respective contributions to family income.

QUESTION: Mrs. Bader, may I interrupt here for a moment?

MRS. GINSBURG: Ginsburg.

QUESTION: You heard what our friend, Mr. Jones, had to say preliminarily about whether or not this is anti-female discrimination or anti-male discrimination. And I suppose you would agree that it could be cast either way. You cast it as anti-female discrimination, anti-female wage earner discrimination. It could be equally cast as anti-male beneficiary discrimination.

But in any event, do you think there is any constitutional difference? Let's say the statute were -- wherever it says widow it said widower and vice versa. Let's

just turn the coin around and say the statute was the other way. Would it make any constitutional difference? Would you have just as strong and no more strong a constitutional argument?

MRS. GINSBURG: The line drawn here, like virtually every gender discrimination, is a two-edge sword. It works both ways.

QUESTION: Because some of the opinions of this Court, and other courts, have, when they have seen anti-female discrimination, have relied for their constitutional decision upon the history of anti-female discrimination. There has been no such history of anti-male discrimination, I guess, as a matter of historic fact.

MRS. GINSBURG: Because most anti-female discrimination was dressed up as discrimination favoring the woman.

QUESTION: I know that. I know that, but the courts, through the help of advocates such as you, have been able to see through that, haven't they?

(laughter)

MRS. GINSBURG: The point is that the discriminatory line almost inevitably hurts women --

QUESTION: Well, my question is if this were purely an anti-male discrimination, and let's assume it were, would you have as strong a constitutional argument, in your view?

MRS. GINSBURG: My argument would be the same because

I don't know of any purely anti-male discrimination. In the end, the women are the ones who end up hurting.

QUESTION: Suffering.

MRS. GINSBURG: Yes.

I should point out that in 1950, when Congress authorized these benefits under the female workers' account, the dependency test that was attached was a very stringent dependency test. It was not a question of whether the woman --

QUESTION: Could I interrupt just to be sure I understand your position in response to Justice Stewart? Is it your view that there is no discrimination against males?

MRS. GINSBURG: I think there is discrimination against males --

QUESTION: If there is such discrimination, is it to be tested by the same or by a different standard from discrimination against females?

MRS. GINSBURG: My response to that, Mr. Justice Stevens, is that almost every discrimination that operates against males operates against females, as well.

QUESTION: Is that a yes or a no answer?

I just don't understand you and -- Are you trying to avoid the question or --

MRS. GINSBURG: No, I am not trying to avoid the question. I am trying to clarify the position that I don't know of any line that doesn't work as a two-edge sword, doesn't

hurt both sexes.

QUESTION: We heard a case this morning, just to be concrete, involving a law that would not permit males to make certain purchases that females could make, and it was attacked as discrimination against males.

MRS. GINSBURG: Yes.

QUESTION: My question is whether we should examine that law under the same or a different standard than if it were discrimination against the other sex.

MRS. GINSBURG: My answer to that question is no, in part, because such a law has an insidious impact against females. It stamps them docile, compliant, safe to be trusted --

QUESTION: But your answer always depends on their finding some discrimination against females. You seem to put that in every answer to this question.

MRS. GINSBURG: My answer was that I have not yet come across a statute that doesn't have that effect.

QUESTION: But, if there were one, you would say it should be tested under a different standard, I take it.

MRS. GINSBURG: If there were such a statute, I would reserve judgment on what the standard should be. In any case, I have not come across such a statute in my --

QUESTION: So, your case depends, then, on our analyzing this case as a discrimination against females.

MRS. GINSBURG: No. My case depends on your recognition that using gender as a classification, resorting to that classification is highly questionable and should be closely reviewed.

QUESTION: And is always, in fact, a discrimination against females.

MRS. GINSBURG: Yes, as far as I have seen.

QUESTION: That's your position.

MRS. GINSBURG: That that is the ultimate effect of such line-drawing.

QUESTION: How do you put Mr. Justice Douglas' opinion in Shevin v. Kahn into this colloquy you are having with my brothers?

MRS. GINSBURG: In Kahn v. Shevin, the Court analyzed that classification as helpful to some women, harmful to none. If you accept that analysis, well, then, you might rationalize that as a compensatory classification that could survive constitutional review. In addition, it was a very small matter involved in Kahn --

QUESTION: Well, it did survive constitutional scrutiny here.

MRS. GINSBURG: Yes, but what we have in this case is a classification that is harmful to women.

QUESTION: Mrs. Ginsburg, speaking of the test which is to be applied, it is my understanding there has not been a

decision of the majority of the full Court that says in so many words that sex is a suspect classification. Would you say that the existing precedents from this Court require sex to be scrutinized more or less carefully than a classification based on illegitimacy, such as the one in Mathews v. Lucas, last term?

MRS. GINSBURG: Yes, I think that was the clear indication of the Mathews v. Lucas decision.

QUESTION: Well, the question is: which is the strictest scrutiny, sex or illegitimacy, in your construction of our cases?

MRS. GINSBURG: Sex. Let me say that has been a very recent development, because, as we know, at the time these lines came into Social Security in 1939 and in 1950, virtually anything goes was then the state of equal protection law with respect to gender classification. But anything goes is certainly not the law as to gender classification today.

The equal protection principle is part of a Constitution intended to govern American society as it evolved over time and inevitably keeping pace with the nation's progress toward maturity. Notions of what constitutes the equal protection of the laws do change and as to sex discrimination, they have changed. Thus, the gender line in question here is no more secure because it solidified in 1950 than it would be if the program had taken shape in 1970.

The Court has not yet acknowledged sex as a suspect criterion, but it has plainly identified the vice of legislative resort to gender pigeon-holeing.

Last term, in Mathews v. Lucas, Mr. Justice Blackmun, writing for the Court, referred to the severity and pervasiveness of the historic legal and political discrimination against women, discrimination made ever so easy because sex, like race --

QUESTION: Yet, that case upheld the classification largely on a justification of administrative convenience, didn't it?

MRS. GINSBURG: Mathews v. Lucas did not involve a sex classification --

QUESTION: No, a classification of illegitimacy.

MRS. GINSBURG: And in the process of so doing, distinbuished sex classifications and race classifications, both of which present, as Mr. Justice Blackmun said, "An obvious bad."

Yes, women's history has been a history of purposeful unequal treatment. Women have been subjected to unique disabilities based on sterotyped characteristics, not truly indicative of their abilities.

And, further, in Mathews v. Lucas, the Court pointed to the generalization harmful to women underlying this one-way three to one support test. The woman spouse does not qualify

unless the woman supplied all of her own support, plus half of his. It is a 75% support test at issue here. It is not enough that she earn 51% of the family's income.

But the Court pointed out in Mathews v. Lucas that such a gender specific classification reflects the familiar overboard stereotypical assumption that earnings of men are vital to the family and earnings of women are not.

But the Secretary has told you that this discrimination in Old Age and Survivor's Insurance is discrimination helpful to women, discrimination rationally responsive to the low economic status of many wives and widows.

Yes, Congress did attend to the man's wife in 1939 in the same paternalistic spirit it attended to his children. But the vaunted congressional attention to wives and widows is expressed in a scheme that heaps further disadvantage on the gainfully employed woman.

A law that benefits a woman as wife or widow, but does not denigrate woman as wage earner might be rationalized as benign and the gender criterion ranked as an appropriate means to a legitimate end, but the Section 402 differential cannot be rationalized as favorable to some women, harmful to none. The wage earning woman is disfavored, her work is devalued when the earnings dollar she contributes to Social Security is worth less in protection for her family than the earnings dollar of an identically situated male worker.

In sum, the line Congress drew in Section 402 does not ameliorate gender discrimination. It does not alter conditions that relegate women to an inferior place in political and economic endeavor. Rather, the gender line drawn in the Old Age and Survivor's Insurance Program reflects and reinforces constraining stereotypes.

The differential favors and rewards men's employment more than women's. It casts the law's weight on the side of arrangement in which man's work comes first, woman's second. Together with other incentives, it helps steer the married couple in one direction and discourages independent choice by the pair.

QUESTION: Mrs. Ginsburg, let me come back to Kahn and Shevin again.

I really wasn't too clear on whether you thought we had decided that case wrongly or what your view is. That's not too important, but in that case did we not hold that the State had enacted there this special benefit for women that was -- for widows not given to widowers, because -- and this is the language of the opinion: "It was reasonably designed to further a State policy of cushioning the financial impact of spousal loss on the sex for which that loss imposes a disproportionately heavy burden."

Now, isn't there something of that same undertone in this case?

The critical difference is that in Kahn that small tax break was unlikely to reinforce significantly --

QUESTION: Well, does it make much difference whether it is small or large on a constitutional basis?

MRS. GINSBURG: The question -- the critical issue is whether the distinction reinforces stereotype characterizations of the way women or men are or whether such a line influences men and women's --

QUESTION: I should think a small benefit might be more invidious as a sex stereotype than a large benefit, wouldn't it?

MRS. GINSBURG: It is unlikely to affect the decisions of men and women concerning the work that they do. A $15 annual tax benefit is not likely to have such an impact, but a Social Security differential, if it is a question of which one will be the dominant breadwinner and if it is a question of thousands of dollars, that can sway decisions one way or another. A $15 tax break is not likely to have that effect.

QUESTION: So, what you are saying is that Congress cannot legislate on the basis of the assumption that in the great majority of cases the man is the primary, is the dominant breadwinner in our society?

MRS. GINSBURG: Congress can use a gender neutral standard, but it can't simply assume that the men are the

breadwinners and the women are the dependents.

QUESTION: What is the fact, statistically?

MRS. GINSBURG: The fact statistically, as to this three to one dependency test, I think it is quite clear that millions of American women could not meet such a test. It is not a small group of women involved here. The Secretary has noted that the median average contribution of the wife to family income is 27%. Where she works full-time it is 38%, but even 27% is too high to qualify her under this three to one dependency test. So most women do not meet that test.

The Secretary's ultimate --

QUESTION: Mrs. Ginsburg, could I ask: would you find objectionable on equal protection or due process grounds an application of the support test across the board to both men and women?

MRS. GINSBURG: If that's the line Congress chose to draw, there would be no problem with such a line. A question whether the legislature should do it --

QUESTION: That's a different question, but you couldn't, if Congress said our overall aim is to provide for need and we are going to have a simple rule to serve that in, namely a support test, and we are going to apply it to both men and women. You wouldn't find that objectionable?

MRS. GINSBURG: There would not be a constitutional infirmity with that line.

MRS. GINSBURG: The Secretary's position here is that -- although this is not clearly stated as justification for discrimination, it is cheaper to adhere to this gender criterion but that is not necessarily true nor is it material to this Court's function.

It should be underscored that the remedial issue in this case calls for tentative adjudication, not final resolution, by this Court. Authority and responsibility for definitive disposition remain with Congress.

Striking the gender criterion leaves to the legislature the full range of gender neutral options. Congress may extend benefits, it may retract them. It may apply across-the-board the half support test or a less blunt limitation.

This Court's interim disposition should be guided by the preference Congress has consistently indicated when a gender line infects a benefit program.

The reshaping has taken the same form on each occasion. Removal of the gender based differential by dropping the dependency test, that is the course unexceptionally recommended in every official report recently made regarding gender lines in Social Security, including the report so extensively quoted in the Secretary's brief.

QUESTION: What judgment would you -- suppose you win the case -- what judgment, what kind of a judgment should the Court enter? Just a declaration --

MRS. GINSBURG: The Court should affirm the judgment below.

QUESTION: Which is just a declaration that the distinction is unconstitutional on equal protection grounds?

MRS. GINSBURG: It should affirm the decision below which held the one-way dependency test unconstitutional. The consequence of that was that Leon Goldfarb qualified for benefits and is presently receiving them.

An application of across-the-board dependency test, though open to Congress, is unlikely in view of the very drastic program change that approach would effect. It would remove from the beneficiary category not a small percentage of wives and widows, as the Secretary asserted, but based on that 27% figure, clearly millions of wives and widows would fail that three to one dependency test.

Nor has the Secretary supplied a shred of evidence in this case as to dollars saved by presuming the wives dependent. There was a reference to a lower court hearing in Maryland in the Jablon case in which the Goverrment counsel did tender a guess that the administrative expense could run as high as a billion dollars, but in a subsequent hearing Government counsel stated that there was no factual basis, whatever, for that figure or any other figure. In short, there is no factual basis in this record, nor in the record of any other case, for a comparison of administrative dollars saved

as against benefit dollars paid out to wives and widows who would be ineligible under the three to one dependency test.

Congress never attempted to determine whether any saving would be effected by assuming men independent and women dependent. It appears that what Congress did have in mind in 1939 and 1950 was not so much administrative convenience as the notion that husband, whatever his actual earnings, ought to be ranked the family's dominant breadwinner.

Further, as even the Secretary's brief reveals, albeit sotto voce, most of the husbands and widowers who would qualify were this three to one support test eliminated, are not their family's principal breadwinners; rather, on the basis of the Secretary's projection, the majority of these men earned less than their wives. The life's partner of these men are women whose earnings range from over 50% to just under 75% of family income.

Finally, as to that cost computation, the computation introduced for the first time in the Secretary's brief to this Court. It is a one-eyed, illusive estimate that both exaggerates and obscures. It does not offset against new secondary beneficiaries the ever-increasing extent to which wives and widows are removed from that category because they qualify as primary beneficiaries entitled to maximum benefit under their own accounts. It does not take account of the probability of continued movement toward the announced congressional-goal of universal Social Security coverage for all gainfully employed

persons.

It does not place the estimate in context. The total sum the Secretary conjectures amounts to just about two-thirds of 1% of annual Social Security receipts. In 1975, those receipts exceeded $66.7 billion.

And, significantly, it appears to hypothesize a condition that does not correspond to reality. The projections suppose that every newly eligible man would retire forthwith as early as age 60 or 62 and take full advantage of his eligibility.

Left out of the calculation is the Social Security Act's vitally important retirement test. Most individuals do not retire at ages 60 to 64. Many potential Social Security recipients work well past age 65.

Leon Goldfarb, for example, retired when he was approaching 67.

All potential Social Security beneficiaries under age 72 are subject to the Act's retirement test; otherwise eligible individuals under 72, if they have earnings in excess of the income ceiling, will receive no benefits.

Under the retirement test, a high percentage of the husbands and widowers counted by the Secretary as eligible likely would receive no benefits at all, or would have their benefits cut down substantially because they earn in excess of $2,760, the current income ceiling for full benefits.

QUESTION: Do you have any reliable figures on that, Mrs. Ginsburg?

MRS. GINSBURG: I have no access to figures concerning the extent of people who could not get full benefits or whose benefits would be reduced.

QUESTION: Wouldn't that be likely a fluctuating group?

MRS. GINSBURG: We know that the computation appears to count every person who is eligible in that estimate, and we know that it does not appear to take account of anybody not retiring at first available opportunity.

QUESTION: Is it possible that that's why they revised their figures downward from a billion dollars to $400 and some million?

MRS. GINSBURG: They have never revised the figures downward. The billion dollars was suggested once as the cost of applying the dependency test to wives, requiring wives to prove that they supplied less than a quarter of the total family income. But that billion dollars had nothing to do with this estimate. This estimate has escalated. In the Wiesenfeld case, it was suggested that it was $300 million, now it is up to $447 million.

But it appears that no account was taken of the retirement test and that is a significant omission and it is underscored by the emphasis that the Social Security

Administration has placed on the enormous expense of eliminating or scaling down the retirement test through legislative revision.

In any event, it is impossible to rationalize a gender criterion allocating benefits on the ground that it is cheaper to proceed that way. If all that is required to uphold the statutory classification is the conclusion that it effects economies, then any statutory scheme can be established and no arbitrarily excluded group can complain.

Decades ago, now Senior Federal District Court Judge Bernita Shelton Mathews in her days at the bar as counsel to the National Women's Party, explained like why a gender line such as the one at bar helps to keep women not on a pedestal but in a cage. Such classification, she said: "Fortifies the assumption harmful to women that labor for pay with attendant benefits for one's family, is primarily the prerogative of men."

Appellee Goldfarb respectfully requests that the judgment below be affirmed, thereby establishing that under the equal protection principle the women worker's national social insurance is of no less value than is the social insurance of the working man.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Ginsburg.

Mr. Jones, do you have anything further?

REBUTTAL ARGUMENT OF KEITH A. JONES, ESQ.

ON BEHALF OF THE PETITIONER

MR. JONES: Yes, thank you, Mr. Chief Justice.

I would like to point out that the beneficiaries with which we are largely concerned here are retired civil servants who receive Government pensions, and that this Court should not lightly require the largely irrational distribution of benefits that the appellee seeks.

The appellee's arguments here largely depend on changing employment statistics. His reliance is upon the fact that today, very much unlike 1939 and 1950, there is a substantial proportion of non-dependent women in the job market, perhaps as high as 20% at this point, or roughly in that area.

QUESTION: Mr. Jones, do you think the constitutionality of this statute turns on the statistics as they existed in 1939, 1950 or today?

MR. JONES: Mr. Justice Stevens, if you believe that this statute was constitutional when first enacted and that recent social history has largely eroded the factual basis on which the classification originally depended, I would think that the appropriate remedy would not be to determine, in the first instance, that this statute is unconstitutional.

I do not think that this Court should sit as a committee of revision on the Social Security Act, in the first

instance.

It seems to me that if you believe that recent social history has undercut the foundation of the Act in this respect, you should advise Congress of the fact that changing events have cast serious doubt upon the continued viability of this distinction, that you should give to Congress the opportunity to sort out this very complicated matter which, no matter how this Court would dispose of it, would result in an irrational and unfair allocation of Social Security monies.

QUESTION: Let me change the question a little bit. Supposing we were convinced that the statute was constitutional in 1950 and that conditions have totally changed whenever we get to the case, would we be bound to say it is still constitutional?

MR. JONES: I think that to give due deference to Congress which has the primary responsibility of sorting out the difficult questions of the proper allocation of Social Security monies, it would be appropriate for this Court to hold at this point that the statute remains constitutional, but advise Congress that if current social trends continue, the factual basis for that finding of constitutionality will have been completely eroded, but give to Congress some opportunity to sort out --

QUESTION: How would we advise Congress, send them a letter?

MR. JONES: Well, I think that an opinion to the effect would sufficiently apprise Congress of your --

QUESTION: Are you sure they would read it?

QUESTION: This is an odd role that you are recommending for this Court.

MR. JONES: Well, it is not unlike the role you played in the Federal Election Commission case.

QUESTION: A half a dozen cases can be cited.

QUESTION: Sorry to hear that.

(laughter)

QUESTION: A half a dozen cases can be cited where the Court has done almost precisely what you have suggested in making recommendations without legislation.

MR. JONES: Well, I think that in a matter such as this where to affirm the decision below would require new allocation of benefits, that it just makes plain good sense to give Congress the primary opportunity to take care of what seemed to be an unfair allocation.

QUESTION: You say that the statute is constitutional or unconstitutional?

MR. JONES: Constitutional.

QUESTION: We would say that it is constitutional despite the fact that we think it is unconstitutional?

(laughter)

MR. JONES: Well, I submit that the fact that more

women are now in the job market than in 1939 does not at this point, standing alone, necessitate a finding of unconstitutionality. I do not think we have yet reached that point. My submission is that --

QUESTION: I didn't think your primary -- one of your points anyway, early in your argument, was that the fact that you are paying widows something you weren't paying widowers didn't prove unconstitutionality. You said Congress' aim is to take care of needy people.

MR. JONES: The appellee's argument, as I understand it, is that what was once over-inclusiveness as to 5 to 10% of the women, is now over-inclusiveness as to, perhaps, 20 to 25% of women. It may well be that -- and I would submit the contrary -- but it may well be that if the Court concludes that that kind of broad over-inclusiveness is of doubtful constitutionality, it might apprise Congress of that fact.

My submission would be that mere over-inclusiveness without more, does not render the statute unconstitutional, that the statute need not be mathematically precise as to --

QUESTION: What if it was 30%, instead of 2%, would you say that degree of over-inclusiveness is another matter?

MR. JONES: Well, it is a matter of degree. If it were 100%, then, obviously, it would be very difficult to sustain. Where 30% stands in relation to that, other than being about 30% toward 100%, I am not sure I am prepared to say

at this moment.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jones.

Thank you, Mrs. Ginsburg.

The case is submitted.

(Whereupon, at 2:01 o'clock, p.m., the case in the above-entitled matter was submitted.)