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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1892

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare,

Appellant,

—v.—

STEPHEN CHARLES WIESENFELD, Individually and on behalf of all other persons similarly situated,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLEE

Opinion Below

The unanimous opinion of the United States District Court for the District of New Jersey, sitting as a three-judge court, is reported at 367 F. Supp. 981 (1973).

Jurisdiction

On January 28, 1974, the United States District Court for the District of New Jersey, sitting as a three-judge court, entered the judgment which is the subject of this appeal. Notice of Appeal to the Supreme Court of the

United States was filed on February 25, 1974. Time for docketing the appeal was extended by order of Mr. Justice Brennan to June 25, 1974. The Jurisdictional Statement was filed on June 18, 1974, and Appellee's Motion to Affirm was filed on June 25, 1974. Probable jurisdiction was noted on October 15, 1974. Jurisdiction to review this decision on appeal is conferred by 28 U.S.C. §§1252 and 1253.

Statute Involved

42 U.S.C. §402(g) provides:

> (1) The widow and every surviving divorced mother * * * of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,
>
> (E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, * * * shall * * * be entitled to a mother's insurance benefit * * *.

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

Question Presented

Whether 42 U.S.C. §402(g), which excludes a female wage earner's surviving spouse from a Social Security benefit designed to enable the deceased wage earner's child to be cared for personally by the surviving parent, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution.

Statement of the Case

This action was commenced on February 24, 1973 to declare unconstitutional and enjoin the enforcement of 42 U.S.C. §402(g) insofar as it discriminates on the basis of gender.

Appellee Stephen Charles Wiesenfeld and Paula Wiesenfeld were married from November 15, 1970 until June 5, 1972, when Paula Wiesenfeld died in childbirth, leaving appellee with sole responsibility for the care of their infant son, Jason Paul. Appellee has not since remarried.

During the seven years immediately preceding her death, Paula Wiesenfeld was employed as a school teacher. At the time of her death, she was a fully insured individual under Social Security; at all times during her employment, maximum contributions were deducted from her salary and paid to Social Security.

During their marriage, Paula Wiesenfeld's earnings exceeded those of her husband. In 1970, Paula earned $9808;

Stephen earned $3100. In 1971, Paula earned $10,686; Stephen $2188. In 1972, the year of her death, Paula earned $6836; Stephen $2475.

Stephen Wiesenfeld received his last and highest degree, a Master of Business Administration, in May 1969, eighteen months prior to his marriage. At no time during his marriage was Stephen Wiesenfeld "pursuing an education." See Deposition of Stephen Wiesenfeld, June 12, 1973, at 6 (Appendix at 18-19).[1]

In June 1972, after Paula Wiesenfeld's death, appellee went to the Social Security office in New Brunswick, New Jersey to apply for benefits. He obtained child insurance benefits for his infant son under 42 U.S.C. §402(d), but was informed he was ineligible for benefits under 42 U.S.C. §402(g) because that section, labelled "Mother's insurance benefits," specifically authorizes payments to women only. Because 42 U.S.C. §402(g) provides a benefit for a "mother" who "has in her care a child of [an insured] individual," but no benefit for a father who has in his care a child of an insured individual, Stephen and Jason Paul Wiesenfeld, survivors of a female wage earner, received half the amount that would have been paid to similarly situated survivors of a male wage earner.[2]

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[1] Brief for the Appellant at 4, attributing the disparity in earnings between appellee and his wife to appellee's "pursuit of an education," is wholly without support in the Record and flatly contrary to fact.

[2] For the period in which appellee devoted himself almost exclusively to the care of his infant and was not engaged in substantial gainful employment, he would have received an additional $275.25 per month absent the gender line in 42 U.S.C. §402(g). See 367 F. Supp. at 985 n. 9. This period included the eight months immediately following his wife's death, as well as the months following his short-term employment in 1973. See Affidavit of Stephen Wiesenfeld, September 28, 1973 (Appendix at 19-20).

Appellee did not seek further relief from the Social Security administrators for, as defendant has stipulated,[3] pursuit of any administrative remedy would have been futile: 42 U.S.C. §402(g) on its face grants benefits only to "mothers," thereby excluding men.

In a unanimous decision rendered December 11, 1973, judgment entered thereon January 28, 1974, the three-judge district court (1) declared 42 U.S.C. §402(g) unconstitutional insofar as it discriminates against "women . . . who have successfully gained employment as well as against men and children who have lost their wives and mothers," and (2) enjoined defendant from denying benefits under 42 U.S.C. §402(g) to the surviving spouse of a female insured individual solely on the basis of sex.

Summary of Argument

I.

The 42 U.S.C. §402(g) "child in care" Social Security benefit, furnished to the surviving spouse of a male insured individual, but not to the surviving spouse of a female insured individual, reflects the familiar stereotype that, throughout this Nation's history, has operated to devalue women's efforts in the economic sector. The female insured individual, who is treated equally for Social Security contribution purposes, is ranked as a secondary breadwinner for purposes of determining family benefits due under her account. Just as the female insured individual's status as a breadwinner is denigrated, so the parental status of her surviving spouse is discounted. For the sole

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[3] Transcript of Oral Argument, June 20, 1973, at 16-17; 367 F. Supp. at 985 nn. 5, 6.

reason that appellee is a father, not a mother, he is denied benefits that would permit him to attend personally to the care of his infant son, a child who has no other parent to provide that care.

The child, who supplies the *raison d'être* for the benefit in question, is the person ultimately disadvantaged by the 42 U.S.C. §402(g) gender line. A social insurance benefit, which is designed to facilitate close parent-child association, is not constitutionally allocated when it includes children with dead fathers, but excludes children with dead mothers.

II.

Exclusion of a deceased female worker's spouse from "child in care" benefits is not fairly and substantially related to the legislative purpose to provide for the families of deceased workers. Facilitating parental care for growing children, unquestionably an appropriate legislative purpose, may be advanced by a benefit tied to family need and the preference of the parent. However, gross gender classification may not be used as a proxy for a need or parental preference criterion. Legislative provision for a "mother's benefit," but no father's benefit, cannot do service for functional classification when the effect is invidious discrimination against the families of working women.

III.

In enacting a "child in care" benefit, Congress used as its model and, for convenience, treated as universal, the one-earner family composed of breadwinning husband and child tending wife. Increasing female participation in the paid labor force has made it apparent that this rigidly

stereotyped vision of man's work and woman's place lacks correspondence with reality for millions of American families.

IV.

Exclusion of the spouse of a working woman from social insurance benefits accorded the spouse of a working man does not operate to remedy the effects of past economic discrimination against women. On the contrary, the exclusion disadvantages working women, for their Social Security payments do not provide the same level of benefits for their families as do the payments of similarly positioned men. This tangible economic harm to working women and their families cannot be rationalized as part of a "benign" or "remedial" plan. Rather, the scheme "heaps on" an additional disadvantage, exacerbating, not alleviating, past discrimination encountered by women in the labor market.

V.

Fiscal economy may not be achieved by invidious exclusions of persons guaranteed by the Constitution the equal protection of the laws. It is invidious discrimination to provide less protection for the families of female wage earners than for the families of male wage earners, to deny to widowed fathers the same opportunity to attend to child rearing that is accorded widowed mothers, and to deny to a child whose mother has died the opportunity to be cared for personally by its sole surviving parent.

VI.

Benefits distributed by the federal government to gainfully-employed individuals and their families must be allocated with an even hand and without resort to classification based on gender per se. Decisions of this Court and lower federal courts establish that classification based on gender per se is impermissible in employment-related regulation. Nor may a federal social insurance scheme, which is designed to benefit children of deceased wage earners, incorporate a "blanket and conclusive exclusion" of a class of children without regard to their need or the life situation of their parents. While special deference may be due to state policies on issues of local concern, such as state taxation and zoning, latitude for underinclusive classification is less broad when a wholly federal and employment-related benefit program is in question.

Every branch of the federal government has identified as invidious discrimination against gainfully-employed women provision of benefits for the wives (or widows) and families of male employees when the same benefits are not made available for the husbands (or widowers) and families of female employees. As underscored by multiple federal efforts to counter practices that deny women equal rights and opportunities in the work force, including appellant's own published guidelines, the 42 U.S.C. §402(g) gender-based differential is at odds with the concept of nondiscrimination and contrary to any reasoned definition of affirmative action.

VII.

Upon determining that the gender line drawn by 42 U.S.C. §402(g) is unconstitutional, the Court, consistent with the dominant congressional purpose, should declare the benefit equally applicable to widowed mothers and fathers. Nothing in the text of the "child in care" benefit provision or its legislative history indicates that unequal treatment of men and women is a considered part of the congressional plan for protection of families of deceased insured individuals. Unquestionably, the dominant congressional purpose was to accord to the children of deceased workers the opportunity to receive the personal care of a parent. Withdrawing the benefit from mothers would conflict with this primary statutory objective. The legislative history of Social Security, the express remedial preference of Congress in all of its recent measures eliminating gender-based differentials, and well-established judicial precedent confirm that extension of "child in care" benefits to fathers is the remedy that must be accorded if the legislature's overriding purpose is to be preserved rather than destroyed.

ARGUMENT

I.

The gender-based criterion established by 42 U.S.C. §402(g) discriminates invidiously against gainfully-employed women insured under Social Security as well as against their surviving spouses and children; this discrimination constitutes a denial of the equal protection of the laws guaranteed by the due process clause of the fifth amendment.

A. *The statute discriminates against gainfully-employed women insured under Social Security.*

Paula Wiesenfeld, appellee's deceased wife, was a fully insured individual under Social Security. She contributed to Social Security on precisely the same basis as an insured male individual. Upon her death, however, her family received fewer benefits than those paid to similarly situated families of male breadwinners. The sole reason for the differential was Paula Wiesenfeld's sex. As a breadwinning woman, she was treated equally for Social Security contribution purposes, but unequally for the purpose of determining family benefits due under her account. Without regard to her family's need or life situation, 42 U.S.C. §402 (g) ranks her as a secondary breadwinner, an individual whose employment is less valuable to, and supportive of, the family than the employment of the family's man.

In short, 42 U.S.C. §402(g) reflects the familiar stereotype that has so long operated to deny women's efforts in the economic sector recognition and monetary benefits equal to those accorded men. Indeed, the statutory pattern en-

countered here is a prototype. A more recent, less extreme example of the genre was declared unconstitutional by this Court's 8-1 judgment in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973).[4] Significantly, on other days appellant, together with virtually every branch and department of the federal government, has identified the pattern in question as one that discriminates invidiously against gainfully-employed women. See pp. 38-44 *infra.* And compare Brief for the Appellant at 17 (asserting family Social Security benefits are not analogous to a housing allowance for the Frontieros, or medical and dental care for Joseph Frontiero), with Brief for the Appellees at 8, *Frontiero* v. *Richardson, supra* (Solicitor General's footnote explanation that the *Frontiero* differential was "similar" to Social Security family benefit differentials).

B. *The statute discriminates against surviving spouses of women workers insured under Social Security.*

Appellee Stephen Wiesenfeld is a father, not a mother. For that sole reason, 42 U.S.C. §402(g) denies him benefits that would permit him to attend personally to the care of his infant son—a child who has no other parent to provide that care. Identically situated parents, like identically situated breadwinners, are treated differently under 42 U.S.C. §402(g) solely on the basis of gender. No woman in appellee's situation can be denied the benefits in question, no man so situated can obtain them.

Just as Paula Wiesenfeld's status as a breadwinner is devalued, so Stephen Wiesenfeld's parental status is deni-

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[4] In *Frontiero,* a husband qualified for benefits if wife supplied more than half his support. In the case at bar, under no circumstances may benefits be accorded a male surviving parent.

grated, for 42 U.S.C. §402(g) recognizes the mother, to the exclusion of the father, as the nurturing parent. She may stay home with her child, he may not stay home with his. Implicit in this differential is the assumption that it is less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. In light of this Court's decisions in *Stanley* v. *Illinois,* 405 U.S. 645 (1972), and *Frontiero* v. *Richardson, supra,* the double-edged discrimination involved in the instant case cannot withstand constitutional review.

C. *The statute discriminates against children of deceased women workers insured under Social Security.*

Jason Paul Wiesenfeld, child of a deceased mother who qualified as a fully insured individual under Social Security, is the person ultimately disadvantaged by the statutory scheme. A child whose insured father dies may receive the personal care of its surviving parent, but the child whose insured mother dies must get along without the personal care of either parent.

Plainly, the child supplies the *raison d'être* for 42 U.S.C. §402(g). The benefit is inextricably bound to parental care for minor children. No benefit exists for the young widow absent a child of the insured individual in her care. As the court below observed, the statute "was primarily intended for the protection of the children of a deceased wage earner." 367 F. Supp. at 989. Focusing on this dominant purpose, the pivotal question becomes: Is a social insurance benefit, which is designed to facilitate close parent-child association, constitutionally allocated when it includes children with dead fathers, but excludes children with dead mothers?

Throughout his presentation, appellant sedulously avoids this critical issue. Understandably so, for the irrationality, inequality and injustice of the 42 U.S.C. §402(g) gender line, which operates to deny to Jason Paul Wiesenfeld the opportunity to receive the personal care of his sole surviving parent, should be manifest. Given the pattern of discrimination conspicuous in 42 U.S.C. §402(g), the differential founders on constitutional shoals clearly marked in this Court's precedent. Not only does it collide with *Stanley* v. *Illinois, supra,* and *Frontiero* v. *Richardson, supra,* but it conflicts as sharply with *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972),[5] *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973), and *Jimenez* v. *Weinberger,* 418 U.S. ——, 94 S. Ct. 2496 (1974), decisions striking legislative lines that impact adversely upon hapless children.

II.

The congressional purpose, to provide for the families of deceased workers, is not fairly and substantially served by the 42 U.S.C. §402(g) gender-based criterion.

To survive constitutional review, gender-based classifications, at a minimum, must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed,* 404 U.S. 71, 76 (1971), quoting from *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415

[5] Accord, *Davis* v. *Richardson,* 342 F. Supp. 588 (D. Conn.) (three-judge court), *aff'd mem.,* 409 U.S. 1069 (1972); *Griffin* v. *Richardson,* 346 F. Supp. 1226 (D. Md.) (three-judge court), *aff'd mem.,* 409 U.S. 1069 (1972).

(1920).[6] It is appellee's position that 42 U.S.C. §402(g) plainly fails to meet this standard. *A fortiori,* 42 U.S.C. §402(g) could not meet a heightened review standard, responding more precisely to the root cause of law-sanctioned gender lines that impact adversely upon women who seek to pursue economic or political activity on the same basis as men.[7]

A. *No legitimate governmental interest is fostered by denying to families of deceased female workers insured under Social Security benefits equal to those accorded families of deceased male workers.*

Exclusion of a deceased female worker's spouse from benefits under 42 U.S.C. §402(g), the "child in care" Social Security provision, is not fairly and substantially related

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[6] The due process clause of the fifth amendment, setting a standard to which federal legislation must conform, guarantees to every person security from arbitrary treatment and the equal protection of the laws. In this regard, the fifth amendment imposes the same obligation upon the federal government as the fourteenth amendment does upon the states. See *Johnson* v. *Robison,* 415 U.S. 361, 364-65 n. 4 (1974); *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528 (1973).

[7] See Brief for Appellant, *Reed* v. *Reed, supra;* Jurisdictional Statement, Brief of American Civil Liberties Union, Amicus Curiae and Joint Reply Brief of Appellants and American Civil Liberties Union, *Frontiero* v. *Richardson, supra;* Gunther, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 33-36 (1972); Note, 88 Harv. L. Rev. 129 (1974).

The *Reed* and *Frontiero* Briefs cited above discuss in detail the prime generator of gender-based classifications in the law: the notion that social roles are pre-ordained by sex, so that lump treatment of individuals has been regarded as permissible in this area long after such treatment was recognized as fundamentally unfair where race or national origin is the birth characteristic in question. For full elaboration of the "suspect" quality of classifications based on gender per se, see Joint Reply Brief, *supra,* and Davidson, Ginsburg & Kay, Sex-Based Discrimination 100-102 (1974).

to the dominant aim of Congress—to provide for the families of deceased workers. On the contrary, the 42 U.S.C. §402(g) gross gender line mandates differential treatment of identically situated families solely on the basis of a criterion that bears no necessary relationship to a child's need or a parent's nurturing function. The explanation for the differential is not obscure: Congress assumed that a widowed mother, but never a widowed father, would prefer child rearing to substantial economic endeavor. See 367 F. Supp. at 989. The fundamental unfairness of excluding motherless families from the "child in care" benefit was identified by the Railroad Retirement Commission in its analysis of 42 U.S.C. §402(g)'s counterpart in the Railroad Retirement Act (45 U.S.C. §228e(b)):

> Statistically speaking, there are, of course, significant differences by sex in the roles played in our society. For example, far more women than men are primarily involved in raising minor children. But if the society's aim is to further a socially-desirable purpose, e.g., better care for growing children, it should tailor any subsidy directly to the end desired, not indirectly and unequally by helping widows with dependent children and ignoring widowers in the same plight. In this example, it is the economic and functional capability of the surviving breadwinner to care for children which counts; the sex of the surviving parent is incidental.

Railroad Retirement Commission Report, H.R. Doc. No. 92-350, 92d Cong., 2d Sess. 378 (1972); cf. Pechman, Aaron & Taussig, Social Security 81-82 (1968) (disadvantageous treatment of families with working wives is inconsistent with the objectives of Social Security).

In short, the sharp line between the sexes drawn by 42 U.S.C. §402(g) plainly does not represent a fair, rational and functional approach to the allocation of family benefits. As in *Reed* v. *Reed, supra,* and *Frontiero* v. *Richardson, supra,* the legislation here at issue impermissibly distinguishes between men and women without regard to individual or family need, ability, preference or life situation. The gender label employed, however convenient, cannot do service for functional classification when the effect is invidious discrimination against the families of women workers.

B. *The gender line drawn by Congress rests on a gross, stereotypic view of the economic and parental roles of men and women.*

In the case at bar, as in *Reed* v. *Reed,* 404 U.S. 71 (1971), and *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), upholding the gender-based criterion would require approval of gross sex-role stereotyping as a permissible basis for legislative distinction. In providing a "mother's benefit," but no father's benefit, Congress assumed a division of parental responsibility along gender lines: breadwinner was synonymous with father, child tenderer with mother. Increasing female participation in the paid labor force has placed in clear focus the invidious quality of this rigid sex-role delineation.

As originally enacted in 1935,[8] the Social Security Act contained no provisions for monthly benefits to members of a deceased insured individual's family. By 1939, Congress concluded that family economic security required a more comprehensive program. Among the packet of amend-

[8] Act of August 14, 1935, ch. 531, Title II, §202, 49 Stat. 623.

ments added that year[9] was the "child in care mother's benefit." 42 U.S.C. §402(g), enacted as §202(e) of the Social Security Act.

As the court below pointed out, 42 U.S.C. §402(g), "although paying benefits directly to a widow, was primarily intended for the protection of the children of a deceased wage earner. The widowed mother received the benefits not because she was female, but because it was assumed that she would prefer to remain at home to care for the children." 367 F. Supp. at 989. "Such payments are intended as supplements to the orphans' benefits with the purpose of enabling the widow to remain at home and care for the children." Final Report of the Advisory Council on Social Security 31 (1938).[10]

Omission of widowers with children of a deceased wage earner in their care was not the product of deliberation. Rather, in 1939, legislators were accustomed to coupling widows and orphans, mothers and children; they did not conceive of men in a childcare role. A member of the House explained that the program was to provide "a family basis" of coverage, to make up for the loss of pay and wages that previously had been brought into the family by the insured individual. The Representative spoke of the loss only in terms of the father's or husband's income; he apparently did not contemplate the possibility that a mother or wife might have made important contributions to the family income, much less that she might be, as Paula Wiesenfeld

[9] Act of August 10, 1939, ch. 666, Title II, §201, 53 Stat. 1362; see H.R. Rep. No. 728, 76th Cong., 1st Sess. (1939); S. Rep. No. 734, 76th Cong., 1st Sess. (1939).

[10] No benefits were provided for young widows without children, nor are such benefits furnished today.

was, the family's principal breadwinner. 84 Cong. Rec. 6896 (1939) (remarks of Rep. Cooper).[11]

In short, the stereotype of woman at home, man at work was pervasive in the 1939 family benefit amendments. Congress used as its model and, for convenience, treated as universal the one-earner family composed of independent breadwinning husband and dependent, homemaking wife.[12]

In 1950, amendments were introduced to further enhance the security of survivors of insured individuals.[13] Contributions of the working wife to family income were accorded partial recognition.[14] Although the 1950 amendments represent a first significant step toward equalizing benefits for the families of insured men and women, Congress remained oblivious to the possibility that a deceased female breadwin-

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[11] Brief for the Appellant at 4 reveals the tenacity of one-eyed sex-role thinking well into the 1970's. To explain why appellee earned less than his wife, appellant assumes a non-existent fact—that appellee must have been "pursuing an education during that period." But the reality is that appellee, who married in 1970, completed his education in 1969. See p. 4 and n. 1, *supra*.

[12] Propositions such as "wives are typically dependent" (*Frontiero*), "men typically have more business experience than women" (*Reed*), "most unwed fathers do not want custody of their children" (*Stanley* v. *Illinois*) concededly may be reasonable as highly generalized conclusions. But the issue in all those cases, as in this one, is the reasonableness of treating the substantial population of individuals and families who do not match the gross generalization as if they did, and of using in the particular context a gender stereotype in lieu of functional description.

[13] Act of August 28, 1950, ch. 809, Title I, §202, 64 Stat. 483.

[14] Husbands' and widowers' benefits were introduced for elderly men, not themselves insured under Social Security, who received at least half their support from their wives, and receipt of orphans' benefits for the children of deceased female workers were facilitated. Act of August 28, 1950, ch. 809, Title I, §202(c), (d), (f), 64 Stat. 483-85.

ner's spouse might assume a child-rearing role. The coverage of 42 U.S.C. §402(g) was enlarged, but only to include the divorced wife of a deceased male insured individual. Further enlargement of the category mothers entitled to "child in care" benefits occurred in 1958 and again in 1972. See S. Rep. No. 2388, 85th Cong., 2d Sess. (1958); S. Rep. No. 92-1230, 92d Cong., 2d Sess. 33 (1972).

In contrast to the pattern assumed by Congress in 1939, and not reconsidered by the national legislature in the context of Social Security since that time,[15] women's dramatically increasing participation in the paid labor force is a prime fact of contemporary life. In 1940, women comprised less than 30% of gainfully-employed persons. By the start of the 1970's, they comprised nearly 43%. U.S. Bureau of Labor Statistics, Dep't of Labor, Employment and Earn-

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[15] No effort to provide a "child in care" benefit for fathers occurred until 1967. In that year, Representative Martha Griffiths sought extension of the 42 U.S.C. §402(g) "mothers" benefit to include similarly situated fathers. H.R. 9715, 90th Cong., 2d Sess. Since 1967, several similar bills have been introduced. See Brief for the Appellant at 13. However, to date, no bill eliminating the gender line from the "child in care" benefit has been reported out of the House Ways and Means Committee. Thus, contrary to appellant's references to "considered judgment" and "consistently rejected" (Brief for the Appellant at 13-14), the issue remains unexplored by Congress through committee report or floor debate.

Understandably absent from appellant's recitation is acknowledgment of the sponsorship of the bills he lists. Principal house proponents have been Representatives Martha Griffiths and Bella Abzug, leading advocates of equal opportunity for women.

It should be noted that a catalogue of bills to correct the discrimination challenged in *Frontiero* had been introduced before and during the pendency of that action. See Brief for the Appellees at 12 n. 8, *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (Solicitor General's reference to six bills introduced, but not passed, that would have eliminated the differentials challenged by Sharron and Joseph Frontiero). But rumblings in Congress were not considered an excuse for this Court's avoidance of the obligation to decide what the equal protection mandate requires.

ings 34-35 (May 1971). By 1974, close to 35 million women, including over 52% of all women between the ages of 18-64, were in the labor force. Close to 60% of gainfully-employed women were married and living with their husbands. Over 42% of women workers worked full-time the year round. U.S. Women's Bureau, Dep't of Labor, Why Women Work (rev. 1973) and Women Workers Today (rev. 1974). See also Hayghe, Labor Force Activity of Married Women, U.S. Dep't of Labor, Monthly Labor Review (April 1973). Moreover, despite the discrimination against women workers still characteristic of the labor market, many married women earn more than their husbands. The Census Bureau reports that in 1970, wives earned more than husbands in 3.2 million or 7.4% of American families. See New York Times, March 19, 1973, at 40, col. 1. The 1970 Census also reveals that women accounted for two-thirds of the increase in total employment in the 1960's and for half or more of the gain in certain jobs, ranging from bookkeeping to bartending. See Occupation by Industry, PC-7C (1970).

Candid recognition that the rigid sex-role allocation reflected in 42 U.S.C. §402(g) does not correspond with reality for millions of families in the United States appears in a recent Social Security Administration Research Report:

> The concept that a man is responsible for the support of his wife and children led to the creation of a broad structure of social security family protection. At the same time, the steady growth of labor-force participation by women, particularly married women, has been reflected in a phenomenal growth in the number of women entitled to benefits on the basis of their own earnings records. Complaints that the OASDHI system discriminates against women have proliferated as a result of this growth.

Hoskins & Bixby, Social Security Administration Research Report No. 42, Women and Social Security: Law and Policy in Five Countries 94-95 (1973).

In stark contrast to current awareness in most public forums of the invidiousness of regulation wedded to gross sex-role stereotypes, see pp. 38-44 *infra,* the Report of the 1971 Advisory Council on Social Security, H.R. Doc. No. 92-80, 92d Cong., 1st Sess., recommends that 42 U.S.C. §402(g) remain a benefit for mothers only. The Council supplied three reasons for its conclusion that men need not be offered the choice offered women between caring personally for children and substantial employment outside the home: (1) very few men adopt the "dual role of worker and homemaker"; (2) the "customary and predominant role of the father is that of family breadwinner"; (3) men generally continue to work after their wives' deaths or incapacity. Report, *supra,* at 23. But see Railroad Retirement Commission Report (1972), *supra,* p. 15. The 1971 Advisory Council Report, though myopic on the basic point that the motherless child is the one ultimately disadvantaged by the denial of father's benefits, pre-dates this Court's decisions in *Reed* v. *Reed,* 404 U.S. 71 (1971), *Stanley* v. *Illinois,* 405 U.S. 645 (1972), and *Frontiero* v. *Richardson,* 411 U.S. 677 (1973). See also *Moritz* v. *Commissioner of Internal Revenue,* 469 F.2d 466 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973). At the time the Report issued, no legislatively-drawn gender line, however sharp, failed to survive constitutional challenge. See generally Davidson, Ginsburg & Kay, Sex-Based Discrimination 1-35 (1974).

Equally myopic, but impossible to explain in light of his own contemporaneous pronouncements, see pp. 41-44 *infra,*

is appellant's reference in this Court, as in the court below, to appellee's advanced degrees and his ability to command a substantial salary. See Jurisdictional Statement at 9 n. 9; Brief for the Appellant at 4; p. 4 & n. 1, *supra.* If Jason Paul's surviving parent were a woman, any suggestion that her academic degrees and intellectual capacity indicated she should choose remunerative employment over personal attention to her newborn child undoubtedly would be dismissed with alacrity. Moreover, the uncontrovertible fact is that appellee Stephen Wiesenfeld did choose to devote himself to the care of his child,[16] a choice no longer regarded as anomalous. See, *e.g.,* U.S. Dep't of Health, Education and Welfare, Higher Education Guidelines 13 (1972), issued pursuant to Executive Order 11,246, as amended:

> [L]eave for purposes relating to childcare should . . . be available to men and women on an equal basis.

Cf. *Danielson* v. *Board of Higher Education,* 358 F. Supp. 22 (S.D.N.Y. 1972); *Ackerman* v. *Board of Education of the City of New York,* 372 F. Supp. 274 (S.D.N.Y. 1974); Kitch, AFT Negotiates Change for College Women (AFT Item No. 619, 1974) (collective bargaining agreements establishing parental leaves for men or women with childcare responsibilities).

In sum, 42 U.S.C. §402(g)'s exclusion of coverage for a father who has in his care a child of the deceased insured female worker, the 1971 Advisory Council Report, and appellant's position in this litigation rest on the "arrogant assumption that merely because [the male breadwinner/female child tenderer] stereotypes are accurate for some

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[16] See note 2, *supra.*

individuals the [government] has a right to apply them to all individuals—and, indeed, to shape its official policy toward the end that [the stereotypes] shall continue to be accurate." Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675, 725-26 (1971). Cf. Memorandum for the United States as Amicus Curiae at 8, *Cleveland Board of Education* v. *La Fleur* and *Cohen* v. *Chesterfield County School Board,* 414 U.S. 632 (1974), declaring in light of *Reed* v. *Reed, supra,* and *Frontiero* v. *Richardson, supra,* "It is now settled that the Equal Protection Clause of the Fourteenth Amendment (like the Due Process Clause of the Fifth) does not tolerate discrimination on the basis of sex."

C. *Exclusion of the spouse of a working woman from social insurance benefits accorded the spouse of a working man does not operate to remedy the effects of past economic discrimination against women.*

In *Kahn* v. *Shevin,* 416 U.S. 351 (1974), this Court upheld a gender line regarded as operating solely to remedy past economic discrimination encountered by women. Rectifying the effects of past discrimination against women (or historically disadvantaged minorities) is a laudable legislative objective. In assessing a gender classification for consistency with equal protection, however, a court must assure itself that the classification in fact works to alleviate past discrimination, and does not perpetuate practices responsible for that discrimination. The case at bar presents a classic example of the double-edged discrimination characteristic of laws that chivalrous gentlemen, sitting in all-male chambers, misconceive as a favor to the ladies. Significantly, when Congress genuinely determined to remedy overt discrimination against women in the economic sphere

by focusing on "firmly entrenched practices" inhospitable to their claims to equal opportunity and equal remuneration in the job market (cf. 416 U.S. at 353), it rejected the gender stereotype that underlies 42 U.S.C. §402(g). See, *e.g.*, 5 U.S.C. §7152 and kindred measures discussed at pp. 38-44 *infra*.

Perceiving the insidious impact on working women of the 42 U.S.C. §402(g) classification, the court below observed:

> [E]ven though Congress may have intended that this section rectify the effects of past and present discrimination against women, it operates to "heap on" additional economic disadvantages to women wage earners such as [the deceased wife]. [Citation omitted.] During her employment as a teacher, maximum social security payments were deducted from her salary. Yet, upon her tragic death, her surviving spouse and child receive less social security benefits than those of a male teacher who earned the same salary and made the same social security payments.

367 F. Supp. at 991; see *Frontiero* v. *Richardson*, 411 U.S. at 689 n. 22.

Nor can the discrimination operative here be willed away by reference to *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968), followed in *Kohr* v. *Weinberger*, 378 F. Supp. 1299 (E.D. Pa. 1974).[17] *Gruenwald* involved a differential specifically tied to past discrimination *female wage earners* experienced in the labor mar-

[17] See Brief for the Appellant at 15 n. 10.

ket: depressed wages and early retirement policies applied by employers to women but not to men. Without the more favorable calculation formula, a formula applied to amounts in fact earned by women, past wage and job placement discrimination would have been aggravated by projection into the working woman's retirement years. Thus the *Gruenwald* differential operated to alleviate past discrimination against wage-earning women without disadvantaging any member of that class.[18] By contrast, exclusion of a female wage earner's family from benefits available to a male wage earner's family is not tied to wages paid to gainfully-employed women and does nothing to rectify past wage discrimination against them. Instead, congressional attention to the wives of insured wage earners is expressed in a scheme that impacts adversely on wives who are insured wage earners themselves. Far from assisting women toward equal status in economic endeavor, the classification fortifies the assumption, harmful to women, that labor for pay and attendant benefits is primarily the prerogative of men. See Matthews, Women Should Have Equal Rights With Men, 12 A.B.A.J. 117 (1926).

In sum, interpretation of *Kahn* v. *Shevin* to permit relegation of a female wage earner to second class status for family social insurance pay-out purposes (although she must pay-in on a first class basis) would collide head-on with *Reed* and *Frontiero* and would turn back the clock to the day when sharp lines between the sexes drawn by the

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[18] See *Kohr* v. *Weinberger, supra,* 378 F. Supp. at 1302 n. 5. Congress evidently regarded the *Gruenwald* differential as a transition measure. In 1972, it extended to men retiring at 62 the more favorable calculation formerly reserved to women. Act of October 30, 1972, §104, P.L. 92-603, 86 Stat. 1340.

legislature were routinely approved by the judiciary. See *Goesaert* v. *Cleary,* 335 U.S. 464, 466 (1948); Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675 (1971). Congress itself and every federal agency concerned with genuine improvement of the position of women in the work force have identified as prime targets schemes of the kind challenged here. See pp. 38-44 *infra.* It would be bitterly ironic if a differential prohibited by federal command for the express purpose of eradicating sex discrimination in employment opportunity were permitted to stand in federal social insurance. See Note, Sex Classifications in the Social Security Benefit Structure, 49 Indiana L.J. 181, 193, 195 (1973). As the court below concluded affirmative legislation or executive action is permissible to undo past discrimination, but it would be perverse to characterize legislative action as "benign" or "affirmative" where, as here, "it discriminates against some of the group which it is designed to protect." 367 F. Supp. at 991.

Surely Paula Wiesenfeld would have found unfathomable the attempt to cast a compensatory cloak over the denial to her family of benefits available to the family of a male insured. Nor does appellant's rationale for discrimination begin to explain why the infant Jason Paul Wiesenfeld can have the personal care of a sole surviving parent only if that parent is female.

D. *Cost savings cannot justify an otherwise invidious discrimination.*

To the extent that appellant's prop for the challenged differential rests on cost savings, this Court's precedent rejects his position. *Shapiro* v. *Thompson,* 349 U.S. 618,

633 (1969); *Graham* v. *Richardson,* 403 U.S. 365 (1971); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973); *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528 (1973).

In *Shapiro* v. *Thompson, supra,* the Court confronted a determination by Congress and at least 40 states that public money should not be spent on welfare aid to new residents. Appellant's brief in that case cited the legislative history of the one-year residence requirement, and identified as the principal reason for the requirement the legislature's desire to limit welfare costs. Brief for Appellant at 8-10, *Shapiro* v. *Thompson, supra.* This Court's determination: the Constitution requires inclusion of the class deliberately excluded by the legislature. Accord, *Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974). Significantly, although the Court in *Shapiro* closely scrutinized the classification, it indicated that the one-year residence requirement was vulnerable even under the traditional, more lenient "rational basis" standard of equal protection review. 394 U.S. at 638.

In *Graham* v. *Richardson, supra,* legislative determinations excluding aliens from public assistance programs were overturned by the Court; public money had to be spent, despite the contrary command of the legislature, for persons entitled to equal protection. See also *Diaz* v. *Weinberger,* 361 F. Supp. 1 (S.D. Fla. 1973) (three-judge court), *prob. juris. noted,* 416 U.S. 980 (1974) (Social Security Act's exclusion from medicare eligibility of aliens with less than five years' residence held unconstitutional).

In *New Jersey Welfare Rights Organization* v. *Cahill, supra,* this Court struck down a limitation in New Jersey's

program for assistance to families of the working poor, thereby substantially enlarging the beneficiary class and the toll on the state fisc. That decision, summarily reversing 349 F. Supp. 491 (D.N.J. 1972) (three-judge court), bears a special relationship to the case at bar. Judge Fisher wrote the unanimous lower court opinions in both cases, and Judge Whipple served with him on both occasions. In both cases, the statutory exclusion ultimately disadvantaged a class of children. Mindful of this Court's firm instruction in *New Jersey Welfare Rights Organization,*[19] the court below in the instant case may have recalled Santayana's sage counsel. Moreover, the case at bar, unlike *New Jersey Welfare Rights Organization,* presented no question of federal deference due state policies on issues of local concern. Cf. *Davis* v. *Richardson,* 342 F. Supp. 588, 592 (D. Conn.) (three-judge court), *aff'd mem.,* 409 U.S. 1069 (1972). And plainly, leeway for Federal Social Security differentials (see Brief for the Appellant at 20) is no broader than leeway for state financed and operated public assistance programs. Finally, no "fundamental right" or "suspect" criterion was identified by this Court when it declared the exclusion impermissible in *New Jersey Welfare Rights Organization.* Accord, *United States Dep't of Agriculture* v. *Moreno,* 413 U.S. 528 (1973) (limiting food stamp program to households in which members are related to one another violates equal protection); *Vlandis* v.

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[19] See Transcript of June 20, 1973 hearing at 36, *Wiesenfeld* v. *Secretary of Health, Education and Welfare,* 367 F. Supp. 981 (D.N.J. 1973), following counsel for plaintiff's reference to this Court's decision in *New Jersey Welfare Rights Organization* v. *Cahill*:

> Judge Fisher: An unhappy memory, I wrote the opinion.
> Judge Whipple: Two unhappy memories, I was with him.

Kline, 412 U.S. 441 (1973) (in-state tuition); *Frontiero* v. *Richardson, supra; Demiragh* v. *DeVos,* 476 F.2d 403 (2d Cir. 1973) (welfare benefits); *Miller* v. *Laird,* 349 F. Supp. 1034 (D.D.C. 1972) (three-judge court) (medical care for service members' children born out of wedlock); *Chatman* v. *Barnes,* 357 F. Supp. 9 (N.D. Okla. 1973) (three-judge court) (state social insurance disability benefits); *Bowen* v. *Hackett,* 361 F. Supp. 854 (D.R.I. 1973) (state unemployment and disability insurance benefits); *Vaccarella* v. *Fusari,* 365 F. Supp. 1164 (D. Conn. 1973) (three-judge court) (augmented unemployment benefits for child in worker's care) (all decisions identifying unconstitutional exclusions from government benefits without labelling the right "fundamental" or the criterion "suspect").

In sum, fiscal economy is a commendable goal,[20] but it may not be achieved by invidious exclusions of persons guaranteed by the Constitution the equal protection of the laws.[21] It is invidious discrimination to provide less pro-

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[20] If the 1971 Advisory Council on Social Security was correct in its assumption that "very few" men would elect child care over full-time employment, see p. 21 *supra,* then the father's benefit cost will be minimal. Moreover, women's increasing preference for gainful employment outside the home suggests that the cost of according benefits to fathers would be offset by a reduction in women's claims for "child in care" benefits. Appellant's cost estimate for father's benefits (Appendix at 14) fails to note the potential offsetting impact of "child in care" benefit reductions attributable to 1) the steady growth in labor force participation by mothers, and 2) a declining birthrate.

[21] Appellant apparently agrees that the relative cost here at stake is not substantial, see Brief for the Appellant at 16-17 n. 11, but raises the specter of "closely analogous provisions." Brief for the Appellant at 22. That theme has been sounded before. See Brief for the Appellees at 20 n. 17, *Frontiero* v. *Richardson, supra;* Petition for Certiorari at 12, *Commissioner of Internal Revenue* v. *Moritz, supra;* cf. Brief for Appellant at 69-88, *Reed* v. *Reed, supra.* But discrimination that may exist in other statutes does not excuse discrimination against Paula, Stephen and Jason Paul

tection for the families of female wage earners than for the families of male wage earners, to deny to a widowed father the same opportunity to attend to the rearing of his child that is accorded the widowed mother, and to deny to a child whose mother has died the opportunity to be cared for personally by its father.

III.

Benefits distributed by government to gainfully-employed individuals and their families must be allocated with an even hand and without resort to classification based on gender per se.

A. *Decisions of this Court and lower federal courts establish that classification based on gender per se is impermissible in employment-related regulation.*

In *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), this Court held that gender-based discrimination in the alloca-

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Wiesenfeld, any more than it excused discrimination against Sharron and Joseph Frontiero, Charles Moritz or Sally Reed.

As to comparative cost, and the necessity of financing "child in care" benefits for families such as the Wiesenfelds through "a rise in taxes or a decrease in benefits" (Brief for the Appellant at 22), cf. Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds, Annual Report, H.R. Doc. 93-130, 93d Cong., 1st Sess. at 1, 7, 31-32 (1973): benefits paid from the old-age and survivors insurance trust fund in 1972 were $34,541,000,000; net contributions to the fund amounted to $35,711,000,000 in fiscal year 1972, an increase of 11.9% over the amount for the preceding fiscal year; the Social Security system's income for fiscal 1972 amounted to $43.2 billion, up by 11% over fiscal 1971, outgo totalled $40.2 billion, so that the funds increased by $3.1 billion in 1972 to a level of $43.8 billion on June 30, 1972. Significantly, the sole *actuarial* (not real) imbalance projected was attributed overwhelmingly to the disability insurance, not the survivors insurance, portion of the system. The Trustees recommended no change in contribution rates to adjust for the imbalance until "much more" is known about the change in disability rates.

tion of fringe benefits to members of the uniformed services violated the Constitution's guarantee of equal protection. A more extreme form of the same discriminatory pattern appears in the case at bar. Husbands qualified for benefits under the scheme struck down in *Frontiero* if they received more than half their support from their wives. The 42 U.S.C. §402(g) barrier, however, is insurmountable: under no circumstances are "child in care" benefits paid to the surviving spouse of a female insured individual. Cf. *Jimenez* v. *Weinberger,* 418 U.S. ——, 94 S. Ct. 2496 (1974) (declaring unconstitutional "blanket and conclusive exclusion" from Social Security benefits of subclass of children born out of wedlock). The invidiousness of the qualified exclusion in *Frontiero,* and the absolute exclusion here is evident: Paula Wiesenfeld's social insurance is worth less to her spouse and child than the insurance of an identically situated gainfully-employed male, just as Sharron Frontiero's efforts netted less for her family than the efforts of a male of similar rank and time in service. See Note, Sex Classifications in the Social Security Benefit Structure, 49 Indiana L.J. 181, 193, 195 (1973): "It would be highly anomalous for a court to decide that sex classifications of OASDHI meet either the rational relationship or the compelling state interest tests, when such classifications are not allowed in employment plans within the private sector."

Frontiero concerned, as this case does, woman's status and associated benefits when she participates in economic activity outside the home. As a worker, she has been assigned an inferior place, often with the aid of laws purportedly intended for her protection. As Justice Brennan commented in *Frontiero*:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage.

Frontiero v. *Richardson,* 411 U.S. at 684.

Spurred by a burgeoning feminist movement that has directed principal attention to employment-related inequities,[22] legislatures and courts are responding with increased sensitivity to generators of a separate and unequal place for women in the labor force. As a perceptive male jurist observed:

> One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.

Green v. *Waterford Board of Education,* 473 F.2d 629, 634 (2d Cir. 1973).[23] To assure meaningful equal protection of the laws to women, courts are beginning to undertake careful analysis of gender-based legislative classifications, and, particularly, gender lines drawn in an employment-related setting. See, *e.g., Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973) (equal protection requires that young women be permitted to serve as pages in South Carolina Senate under the same terms and conditions as young men); *Bowen*

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[22] See generally Janeway, Man's World, Woman's Place: A Study in Social Mythology (1971).

[23] Cf. *Henslee* v. *Union Planters Nat'l Bank & Trust Co.,* 335 U.S. 595, at 600 (1949) (Frankfurter, J. dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

v. *Hackett,* 361 F. Supp. 854 (D.R.I. 1973) (dependent child allowance must be furnished disabled and unemployed men and women on the same basis); *Smith* v. *City of East Cleveland,* 363 F. Supp. 1131 (N.D. Ohio 1973) (minimum height and weight requirements for municipal police officers discriminate invidiously on the basis of sex); *Andrews* v. *Drew Municipal Separate School District,* 371 F. Supp. 27 (N.D. Miss. 1973) (refusal to employ mothers of children born out of wedlock violates due process and discriminates on the basis of sex); *Stevenson* v. *Castles,* Civ. No. 7452 (D.C.Z. November 15, 1974) (free tuition for the children of male but not female employees of the Canal Zone Government and Panama Canal Company "discriminat[es] against women in violation of the equality guaranteed to them under the decisions of the Supreme Court [citing *Frontiero*] and [Title VII of] the Civil Rights Act [of 1964]").[24] As *Bowen* v. *Hackett, supra,* illustrates, it is hardly rational to condemn an employer's "compensation" scheme under the *Frontiero* principle, but declare that principle inoperative when the government distributes employment-related social insurance benefits.

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[24] For earlier indicators, see *Mengelkoch* v. *Industrial Welfare Comm'n,* 442 F.2d 1119 (9th Cir. 1971) (maximum hours laws applicable to women only presents substantial federal constitutional question); *Sail'er Inn, Inc.* v. *Kirby,* 5 Cal. 3d 1, 485 P.2d 529 (1971) (Federal and California Constitutions, as well as Title VII, bar exclusion of women from bartender occupation); *Paterson Tavern & Grill Owners Association* v. *Borough of Hawthorne,* 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from bartender occupation); *Application of Shpritzer* v. *Lang,* 17 A.D.2d 285, 290, 234 N.Y.S.2d 285, 290 (1st Dep't 1962), *aff'd,* 13 N.Y.2d 744, 241 N.Y.S.2d 869 (1963) (exclusion of policewomen from promotional examination for sergeant would impermissibly deny constitutional rights solely because of gender); *Wilson* v. *Hacker,* 101 N.Y.S.2d 461 (Sup. Ct. 1950) (union's discrimination against female bartenders "must be condemned as a violation of the fundamental principles of American democracy").

B. Kahn v. Shevin *does not reestablish an equal protection standard under which legislative lines based on gender routinely attract judicial approval.*

Treating this Court's turning point decisions in *Reed* v. *Reed, supra,* and *Frontiero* v. *Richardson, supra,* as inconsequential, and largely disregarding reasoned application of those decisions in the lower courts,[25] appellant has

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[25] See in addition to the cases cited in the immediately preceding text, *Brenden* v. *Independent School District,* 477 F.2d 1292 (8th Cir. 1973) (young women may not be denied educational opportunities available in public high school to young men); *Moritz* v. *Commissioner of Internal Revenue,* 469 F.2d 466 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973) (when placed under the scrutiny required by *Reed,* income tax deduction classification premised primarily on sex lacks justification); *Lamb* v. *Brown,* 465 F.2d 18 (10th Cir. 1972) (16 (boys)/18 (girls) sex-age differential for juvenile offender treatment held unconstitutional); *Berkelman* v. *San Francisco Unified School District,* 501 F.2d 1264 (9th Cir. 1974), and *Bray* v. *Lee,* 337 F. Supp. 934 (D. Mass. 1972) (higher admission standards for females in college-preparatory public high schools violate equal protection); *Samuel* v. *University of Pittsburgh,* 375 F. Supp. 1119 (W.D.Pa. 1974) (application of derivative domicile rule to deny married women in-state tuition held unconstitutional); *In re Patricia A.,* 31 N.Y.2d 83, 335 N.Y.S.2d 33 (1972) (16 (boys)/18 (girls) sex-age differential for classification of "persons in need of supervision" declared unconstitutional); *State* v. *Chambers,* 63 N.J. 287, 307 A.2d 78 (1973) (differential sentencing laws for men and women violate equal protection); Getman, The Emerging Constitutional Principle of Sexual Equality, 1972 Supreme Court Review 157.

As to the catalogue in Brief for the Appellant at 10 n. 3, *Miskunas* v. *Union Carbide Corp.,* 399 F.2d 847 (7th Cir. 1968), *cert. denied,* 393 U.S. 1066 (1969), is no longer the law even in the jurisdiction there in question. See *Troue* v. *Marker,* 253 Ind. 284, 252 N.E.2d 800 (1969). See also *Gates* v. *Foley,* 247 So. 2d 40 (Fla. 1971), and, most recently, *Rodriguez* v. *Bethlehem Steel Corp.,* 43 U.S. Law Week 2097 (Calif. Supreme Court, August 21, 1974). Nor is it surprising that no denial of equal protection to men was found in *Williams* v. *McNair,* 401 U.S. 951 (1971), *aff'g mem.* 316 F. Supp. 134 (D.S.C. 1970) (three-judge court). Men had access to the state university's prestige colleges, including an all-male military and engineering college, but were denied admission to a school established to educate "white girls" in, *i.a.,* sewing dressmaking, needlework, cooking and other industrial arts "suitable

sought summary reversal of the decision below on the ground that *Kahn* v. *Shevin,* 416 U.S. 351 (1974), "is dispositive of the issue presented here." Jurisdictional Statement at 7, 11.[26] Some jurists appear to share appellant's appraisal of *Kahn* as a sharp about-face and a return to old ways. See *Edwards* v. *Schlesinger,* 377 F. Supp. 1091 (D.D.C.), *rev'd sub nom. Waldie* v. *Schlesinger,* Nos. 74-1636 and 74-1637 (D.C. Cir. November 20, 1974); *Kohr* v. *Weinberger,* 378 F. Supp. 1299, 1303-1304 (E.D. Pa. 1974) (dictum). But cf. Note, 88 Harv. L. Rev. 129 (1974).[27]

In *Edwards* v. *Schlesinger,* the district court concluded that *Kahn* established as the proper test for sex-based equal protection claims, the least demanding form of judicial scrutiny. Reversing the district court, the court of appeals evaluated the intensity of scrutiny issue differently. It

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to their sex." Appellant himself has concluded that the rule in *Robinson* v. *Board of Regents of Eastern Kentucky Univ.,* 475 F.2d 707 (6th Cir. 1973), *cert. denied,* 416 U.S. 982 (1974), is an impermissible gender-based classification. See Proposed 45 C.F.R. §86.31(b), 39 Fed. Reg. 22235 (Dep't of Health, Education and Welfare, Education Programs and Activities Benefiting from Federal Financial Assistance, Nondiscrimination on the Basis of Sex).

[26] As developed under headings I. and II., *supra,* it is impossible to comprehend how a rational mind could characterize as "benign" or "remedial" a law that treats Paula Wiesenfeld as a second class breadwinner, Stephen Wiesenfeld as an absentee parent, and Jason Paul as a child not entitled to the personal care of any parent.

[27] *Geduldig* v. *Aiello,* 417 U.S. ——, 94 S. Ct. 2485 (1974), also relied upon by Appellant, provides no guidance here. The Court there found that the distinct status of pregnancy, in the context of a state disability program, was not "discrimination based on gender as such." See *id.* at 2492 n. 20. Significantly, Brief for the Appellant at 21 refers to n. 21 of the *Aiello* opinion, but disregards the accompanying text: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."

concluded that existing precedent, far from clarifying the appropriate review standard, reflected "widespread judicial uncertainty." And it characterized constitutional law in this area as "still evolving," "rapidly changing and variously interpreted." *Waldie* v. *Schlesinger,* Slip Opinion at 3-4, 5.

The uncertainty generated by *Kahn* with respect to judicial appraisal of gender-based classifications bears a marked resemblance to the uncertainty generated by *Labine* v. *Vincent,* 401 U.S. 532 (1971), with respect to birth status classifications. Indeed, commentators regarded *Labine* as a rapid retreat from, if not actually an overruling of, the turning point decision in *Levy* v. *Louisiana,* 391 U.S. 68 (1968). See Tenesco & Wallach, Book Review, 19 U.C.L.A. L. Rev. 845 (1972); Note, Inheritance by Illegitimates, 22 Case W. Res. L. Rev. 793 (1971). This Court's clarifying decisions, following soon after *Labine,* demonstrated the inaccuracy of forecasts that birth status classifications would not attract careful judicial analysis. See *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *Richardson* v. *Davis* and *Richardson* v. *Griffin,* 409 U.S. 1069 (1972), *aff'g mem.* 342 F. Supp. 588 (D. Conn.) (three-judge court) and 346 F. Supp. 1226 (D. Md.) (three-judge court); *Gomez* v. *Perez,* 409 U.S. 535 (1973); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973).

The *Kahn* decision is specifically and narrowly tied to the "large leeway" traditionally accorded states with respect to their systems of taxation, 416 U.S. at 355,[28] just as the *Labine* decision "reflected, in major part, the traditional deference to a State's prerogative to regulate the disposi-

[28] Cf. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974) (indicating similar deference to local concerns).

tion at death of property within its borders." *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. at 170. Latitude for underinclusive classification is less broad when wholly federal and employment-related benefit programs are in question. See *Jimenez* v. *Weinberger,* 418 U.S. ——, 94 S. Ct. 2496 (1974), and *Weinberger* v. *Beaty,* —— U.S. ——, 94 S. Ct. 3190 (1974), *aff'g mem.* 478 F.2d 300 (5th Cir. 1973); *Davis* v. *Richardson,* 342 F.Supp. 588, 592 (D. Conn.) (three-judge court), *aff'd mem.,* 409 U.S. 1069 (1972); *Frontiero* v. *Richardson, supra.*

The instant case presents the Court with an opportunity to provide the guidance essential to clear analysis by lower courts, federal and state, of gender-based differentials commanded by law. The Court should terminate current speculation, confusion and divergent interpretation, as it did with respect to birth status classifications in *Weber* and *New Jersey Welfare Rights Organization;* it should clarify the dimensions of *Kahn* and reaffirm the vibrant principle implicit in the *Frontiero* judgment.[29]

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[29] Overwhelming congressional approval of the equal rights amendment surely was not intended to deter dynamic judicial interpretation of the fifth and fourteenth amendments to bar law-sanctioned sex discrimination. During debate on the amendment, the principal proponent in the House, Representative Martha Griffiths, declared:

> There never was a time when decisions of the Supreme Court [under the fifth and fourteenth amendments] could not have done everything we ask today. 116 Cong. Rec. 28005 (1970).

Nonetheless, she urged her colleagues to provide a further constitutional guarantee of equality of rights and responsibilities between the sexes so that there would not be the slightest doubt that men and women stand as equals before the law. Cf. 2 J. Story, Commentaries on the Constitution of the United States §§1938, 1939 (5th ed. 1891). See also Citizens' Advisory Council on the Status of Women, A Memorandum on the Proposed Equal Rights Amendment to the United States Constitution 9-10 (1970), reprinted in Hearings on S.J. Res. 61 Before the Subcommittee on

C. *Federal laws governing private and public sector employment prohibit family fringe benefit differentials based on the sex of the gainfully-employed individual; these measures reflect the overriding concern of Congress to eliminate gender-based discrimination in the economic sphere.*

The discrimination ordered by 42 U.S.C. §402(g) is impossible to reconcile with the firm national commitment to eradicate per se differentials based on an individual's sex in all spheres of employment, private as well as public. Sex as a means to determine employment-related benefits has been declared unlawful by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e *et seq.;* the Equal Pay Act of 1963, as amended, 29 U.S.C. §206(d); Executive Order 11,246, as amended by Executive Order 11,375, 3 C.F.R. 169, 42 U.S.C. §2000e note; Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 *et seq.;* and statutes governing federal employment, *e.g.,* 5 U.S.C. §7152.

Sex Discrimination Guidelines issued by the Equal Employment Opportunity Commission pursuant to Title VII, 29 C.F.R. §§1604.1-1604.10,[30] provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; . . . 29 C.F.R. §1604.9(d).

Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. at 381-82 (1970); President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice 4 (April 1970); Equal Rights for Men and Women, S. Rep. 92-689, 92d Cong., 2d Sess. 10 (1972).

[30] See also (OFCC) Sex Discrimination Guidelines for Government Contractors, implementing Executive Order 11,375. 41 C.F.R. §60-20, particularly §60-20.3(c), (d).

The Guidelines, issued in 1972, are applicable to private as well as public employment; they explicitly proscribe differential treatment of men and women of the precise kind and quality here at issue. Moreover, they reflect consistent administrative and judicial interpretation prior to the time the Guidelines formally issued. For example, in 1969, the Equal Employment Opportunity Commission explained in a family fringe benefit ruling, Title VII "is intended to protect *individuals* from the penalizing effects of . . . presumptions based on the collective characteristics of a sexual group." EEOC Decisions, Case No. YNY9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969). For court confirmation of the underlying principle, see *Rosen* v. *Public Service Elec. & Gas Co.*, 477 F.2d 90 (3d Cir. 1973) (Title VII violated by pension arrangement allowing women to retire earlier on full pension); cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971).

Similar rulings have been made by the Wage and Hour Division of the Department of Labor, which administers the Equal Pay Act. For example, the Division has ruled that the Act is violated by insurance plans pursuant to which the employer pays family coverage insurance premiums for married male employees but pays such premiums for married female employees only if they qualify as heads of their families. W & H Opinion Letter No. 425, CCH Emp. Practices Guide ¶1208.52 (February 11, 1966).

With respect to federal employment, Congress enacted a catch-all in December 1971, to assure that national policy

governing the private sector applied with full vigor to the United States itself. 5 U.S.C. §7152 (P.L. 92-187, 85 Stat. 644) stipulates that all regulations granting benefits to government employees

> shall provide the same benefits for a married female employee and her spouse and children as are provided for a married male employee and his spouse and children . . . .

Further, 5 U.S.C. §7152 provides that

> any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

The section applies not only to other provisions of Title 5, but also to "any other provision of law granting benefits to employees." Only members of the uniformed services fall outside this encompassing benefit equalization provision.[31] Other measures similar in design deal with veterans' benefits and preferences (5 U.S.C. §2108, as amended in December 1971 by P.L. 92-187, 85 Stat. 644; 38 U.S.C. §102(b), as amended in October 1972, by P.L. 92-540, 86 Stat. 1074), cost of living allowances to spouses of federal employees (5 U.S.C. §5924, as amended in December 1971 by P.L. 92-187, 85 Stat. 644), and federal civil service survivors' annuities (5 U.S.C. §8341, as amended in January 1971 by

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[31] See also 5 U.S.C. §7151 (declaring it U.S. policy to insure equal employment opportunity without discrimination because of, *inter alia,* sex); 5 U.S.C. §7154 (prohibiting discrimination in federal employment because of, *inter alia,* sex); 5 U.S.C. §8902(f) (prohibiting exclusion from federal employee health benefit plans because of, *inter alia,* sex).

P.L. 91-658, 84 Stat. 1961). The latter amendment, according widowers the same automatic qualification as widows, was accompanied by a House Committee Report explaining:

> In the Committee's judgment, the present provision is discriminatory in that it runs counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standard of living. Accordingly, the bill removes the dependency requirements applicable to surviving widowers of female employees, thus according them the same treatment accorded widows of deceased male employees.

H.R. Rep. No. 91-1469, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News, Vol. III, 5931, 5934. See also 37 U.S.C. §401, as amended on July 9, 1973 (P.L. 93-64, 87 Stat. 148), equalizing fringe benefits for male and female members of the uniformed services in accordance with this Court's May 14, 1973 decision in *Frontiero* v. *Richardson, supra.*[32]

Finally, appellant himself has placed in sharp focus the utter irrationality of the congressional direction he is obliged to support in the case at bar. Carrying out a flatly contradictory congressional command of more recent vintage, Title IX of the Education Amendments of 1972, appellant has declared that recipients of federal funds may not withhold from the spouse of a female wage earner *any* benefit provided to the spouse of a male wage earner. In

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[32] Although the effective date of the statute is July 1, 1973, the Comptroller General has declared the *Frontiero* decision fully retroactive. 53 Comp. Gen. —— (B178979, August 31, 1973).

proposed rules implementing Title IX, issued June 20, 1974 (Proposed 45 C.F.R. §§86.46-86.48, 39 Fed. Reg. 22237), appellant has stipulated:

> §86.46
>
> . . . .
>
> (b) *Prohibitions.* A recipient shall not:
>
> (1) discriminate on the basis of sex with regard to making fringe benefits . . . available to spouses . . . of employees differently upon the basis of the employee's sex;
>
> . . . .
>
> (3) . . . participate in a pension or retirement plan which . . . discriminates in benefits on the basis of sex.
>
> §86.47
>
> (a) *General.* A recipient shall not apply any policy or take any employment action:
>
> . . . .
>
> (2) which is based on whether an employee . . . is the head of household or principal wage earner in such employee's . . . family unit.
>
> . . . .
>
> §86.48
>
> . . . .
>
> (b) *Benefits.* A recipient which provides any . . . benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same . . . benefit to members of the other sex.

See also U.S. Dep't of Health, Education and Welfare, Higher Education Guidelines pursuant to Executive Order 11,246, October 1, 1972, at 13: "It is also unlawful for an employer to make benefits available to the wives and families of male employees where the same benefits are not available to the husbands and families of female employees." The Guidelines instruct that the employer "must not presume that a married man is 'head of household' or 'principal wage earner'."

To illustrate appellant's position in this litigation:[33]

> W, a wage-earning married woman, dies in 1974. E, her employer, denies augmented family benefits to her spouse and child, but grants such benefits automatically to the spouse and child of a similarly situated male employee.

According to appellant, a practice of that kind, when engaged in by an employer, causes and continues relegation

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[33] Brief for the Appellant at 21-22 constructs a "theory" that surely is not appellee's. Women's receipt of "54% of Social Security payments" is hardly "evidence of discrimination against male workers." Quite the contrary. That figure is not far from women's representation in the nation's population. Moreover, women tend to outlive men, hence their receipts might be expected to exceed 54%. Cf. Hoskins & Bixby, Social Security Research Report No. 42, Women and Social Security: Law and Policy in Five Countries 82 (1973) (noting the preponderance of women among the special age-72 beneficiaries). Of course, a man who enjoys long life would receive benefits based on his individual situation and would not be denied benefits on the basis of a gross gender classification of the kind made in 42 U.S.C. §402(g). Also reflected in the percentages cited by appellant is the weighted benefit formula used to determine Social Security payments, *i.e.*, the highest percentage of benefits is paid for the first $110 of monthly earnings. 42 U.S.C. §415. This formula benefits *individuals* with low incomes, many of whom are women, but it does not discriminate against men. Again, the criterion is not gender as it is in 42 U.S.C. §402(g), but the insured individual's life situation, specifically, his or her earnings.

of women to an inferior position in the work force. But the very same differential, when utilized by defendant pursuant to 42 U.S.C. §402(g), is alleged to "ameliorate the inferior economic status of women." Brief for the Appellant at 14-18. The inconsistency and illogic are inescapable. If E's practice causes and continues a pattern that helps perpetuate women's inferior status in the work force, so does appellant's.

The sole candid explanation for appellant's inconsistent analyses is that the congressional orders he must follow point in opposite directions. That is unquestionably true. But the conflict in those orders is unavoidable. As underscored by every federal effort to counter practices that deny women equal rights and opportunities in the work force, including appellant's own published guidelines, the 42 U.S.C. §402(g) gender-based differential is at odds with the concept of nondiscrimination and contrary to any reasoned definition of affirmative action.

IV.

Upon determining that the gender line drawn by 42 U.S.C. §402(g) violates the fifth amendment, the Court, consistent with the dominant congressional purpose, should declare the benefit equally applicable to mothers and fathers.

When a federal statute denies equal protection by establishing an unconstitutional classification, the judiciary must determine "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional." *Welsh* v. *United States,* 398 U.S. 333, 355-56 (1970) (Harlan, J. concurring); *see Skinner* v. *Oklahoma ex rel. Williamson,* 316 U.S. 535, 542-43 (1942); *Iowa-Des Moines Nat'l Bank* v. *Bennett,* 284 U.S. 239, 247 (1931). The nature of the necessary inquiry was succinctly described by the Supreme Court of New Jersey:

> . . . [T]he judiciary cannot enlarge the reach of a statute, for that is solely a legislative function. The proposition is obvious enough, and it is equally true that a court may not restrict the scope of a statute. But neither proposition is involved when the question is whether a statute must fall because of a constitutional defect. Rather the question is whether the Legislature would want the statute to survive, and that inquiry cannot turn simply upon whether the statute, if adjusted to the constitutional demand, will cover more or less than its terms purport to cover. Although cases may be found which seem to speak in such mechanical terms, we think the sounder course is to consider what is involved and to decide from the sense of the situation

> whether the Legislature would want the statute to succumb.

Schmoll v. *Creecy,* 54 N.J. 194, 202, 254 A.2d 525, 529-30 (1969).

Similar reasoning is implicit in this Court's judgment in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973). The *Frontiero* judgment reflects a determination that extension of benefits to spouses of female members of the uniformed services would better serve the congressional purpose than would judicial destruction of the benefit scheme.

The same approach, preferring salvage to demolition, is indicated in diverse decisions of this Court involving state as well as federal laws. *E.g., Memorial Hospital* v. *Maricopa County,* 415 U.S. 250 (1974) (state health care); *United States Dep't of Agricuture* v. *Moreno,* 413 U.S. 528 (1973) (federal food stamps); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973) (state aid to families of the working poor); *Graham* v. *Richardson,* 403 U.S. 365 (1971) (state public assistance); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (state and District of Columbia public assistance). In all of these cases, the extensions necessary to bring the statutes in line with constitutional limitations required substantial expenditures of public funds. In two of them, *United States Dep't of Agriculture* v. *Moreno* and *New Jersey Welfare Rights Organization* v. *Cahill,* the remedy was not tied to any "fundamental right" or "suspect criterion" determination. Similarly, in *Shapiro* v. *Thompson,* although the Court closely scrutinized the classification, it indicated that the same result would follow even under the traditional, more lenient "ra-

tional basis" standard of equal protection review. 394 U.S. at 638.

The remedial issue was treated explicitly in *Moritz* v. *Commissioner of Internal Revenue,* 469 F.2d 466 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973), a decision of particular relevance to the instant case, for it involved a tax benefit available to never married women with incapacitated dependents, but not to similarly situated never married men. After determining that the gender line was inconsistent with the fifth amendment, the Tenth Circuit further declared:

> [Next], we must determine the effect of the invalidity of provisions denying the deduction to men who have never married. Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid or whether to extend the coverage of the statute. 469 F.2d at 470.

The Tenth Circuit concluded that extension of the tax benefit was "logical and proper," and accordingly declared the deduction in question available to never married men. Significantly, the remedial route in *Moritz* was noted by this Court when it pursued the same course in *Frontiero,* 411 U.S. at 691 n. 25.

Following this Court's guidance, lower courts have directed extensions kin to the one ordered by the court below in the instant case. See, *e.g., Demiragh* v. *DeVos,* 476 F.2d 403, 405 (2d Cir. 1973) (welfare benefits); *Bowen* v. *Hackett,* 361 F. Supp. 854 (D.R.I. 1973) (unemployment and disability insurance benefits); *Diaz* v. *Weinberger,* 361

F. Supp. 1 (S.D. Fla. 1973) (three-judge court), *prob. juris. noted,* 416 U.S. 980 (1964) (medicare benefits); *Chatman* v. *Barnes,* 357 F. Supp. 9 (N.D. Okla. 1973) (three-judge court) (disability benefits); *Miller* v. *Laird,* 349 F. Supp. 1034 (D.D.C. 1972) (three-judge court) (military medical benefits); *Vaccarella* v. *Fusari,* 365 F. Supp. 1164 (D. Conn. 1973) (three-judge court) (augmented unemployment benefits for child in worker's care). Cf. *Hays* v. *Potlatch Forests, Inc.,* 465 F.2d 1081 (8th Cir. 1972) (consistent with Title VII's employment discrimination prohibition, premium overtime law by its terms applicable to women only must be applied by employer to men as well as women); *In re Estate of Legatos,* 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (property exempt from tax when devised by wife to husband must also be exempt when devised by husband to wife).

Nor is the salvage approach a remedy of recent vintage. For decades, courts have recognized that, while the legislature ultimately may decide to revise or even abandon a statutory benefit, in the meantime, preservation rather than destruction of the legislation may be prescribed. See *Yale & Towne Mfg. Co.* v. *Travis,* 262 F. 576 (S.D.N.Y. 1919), *aff'd,* 252 U.S. 60 (1920) (tax exemptions granted by statute only to state citizens extended to citizens of other states); *Burrow* v. *Kapfhammer,* 284 Ky. 753, 145 S.W.2d 1067 (1940), noted in 54 Harv. L. Rev. 1078 (1941) (plaintiff added to exempt class to cure unconstitutional exclusion); *Quong Ham Wah Co.* v. *Industrial Accident Comm'n,* 183 Cal. 26, 192 P. 1021 (1920), *appeal dismissed,* 255 U.S. 445 (1921) (workmen's compensation benefits extended to nonresidents to cure constitutional infirmity); Note, 55 Harv. L. Rev. 1030, 1034-36 (1942).

The legislative history of 42 U.S.C. §402(g) supplies no cogent reason for the omission from insurance benefits of a male widowed parent caring for the child of a deceased wage earner. See pp. 16-23 *supra*. The scant history that exists supports the conclusion that the exclusion of fathers was the product of oversight, not deliberation. In any event, this much is clear: nothing in the text of 42 U.S.C. §402(g) or its legislative history indicates that unequal treatment of men and women is a considered part of the congressional plan for protection of families of deceased insured individuals. Unquestionably, the dominant congressional purpose was to provide for the families of deceased wage earners. Withdrawing the benefit from mothers would conflict with this primary statutory objective. Under the circumstances, extension is the only suitable remedy.

In sum, the legislative history of Social Security, the express remedial preference of Congress in all of its recent measures eliminating gender-based differentials, and well-established judicial precedent signal the direction for a court concerned with preservation rather than destruction of legislative policy.

CONCLUSION

For the reasons stated above, the decision of the district court declaring unconstitutional and enjoining the enforcement of 42 U.S.C. §402(g) insofar as it discriminates on the basis of gender should be affirmed.

Respectfully submitted,

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