Gender-Based Legislative Classifications: *Califano v. Goldfarb*, 430 U.S. 199 (1977)

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Gender-Based Legislative Classifications


I. INTRODUCTION

At what point does a gender-based legislative classification attain a "fair and substantial relationship" to a permissible state objective and thereby withstand constitutional challenge? Since it was posed by the Supreme Court in *Reed v. Reed*, this question has yielded neither easy answers, nor answers of any great consistency. In *Califano v. Goldfarb*, the Supreme Court concluded that the gender-based distinction of a Social Security Act provision requiring widowers, but not widows, to prove actual dependency in order to qualify for survivors' benefits violated the equal protection clause of the fifth amendment's due process clause. The different treatment of men and women was held to be invidious discrimination against female wage earners, affording them less protection for their surviving spouses than that provided male employees. Although the Court's opinion represented only the views of a four-man plurality, *Califano v. Goldfarb* does shed light on the possible approaches to the question posed by *Reed*.

This note will briefly outline recent history of equal protection and gender-based legislative classifications as well as relate the pertinent facts behind the *Goldfarb* decision.

Basically, if the social security provisions in question were enacted with the congressional intent to rectify past and present discriminatory practices, they very likely will withstand equal protection scrutiny. If, however, gender differences are merely the product of groundless stereotyping, such legislative classifications are rarely declared valid. For this reason, an in-depth review of congressional intent in enacting the Social Security Act and its subsequent amendments will be made. This note will also examine the validity of the dissenting proposals that administrative conveni-

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3. U.S. Const. amend. V.
ence alone should validate gender-based classification, and that social security, being a non-contract benefit, requires less scrutiny than do other divisions of the law.

II. DEVELOPMENT OF MODERN EQUAL PROTECTION THEORY

The Constitution prohibits any state from denying a person equal protection of the laws. This provision is universal in its application "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." The ninety years since Mr. Justice Matthews wrote these words have seen the constitutional scope of equal protection expand, albeit haltingly, unevenly, and unpredictably, to cover a variety of judicial concepts. "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination . . . ."

Central to equal protection are the concepts of classification and legislative purpose. The Court has traditionally adopted a two-tiered system of review in analyzing the relationship between these two concepts. The lower or minimum tier presumes constitutionality of any classification established by the legislature. The Court views the statutory classification to determine only if such classification "bears a rational relationship to a [permissible] state objective." The basic test, therefore, has been not whether some in-

4. U.S. Const. amend. XIV, § 1. Although the equal protection clause applies only to states, its concepts have been extended to the federal government by the fifth amendment due process clause. "[A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (footnote omitted). See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).
equality results from the classification, but whether there exists any reasonable basis to justify the classification.  

In the second or upper tier of traditional equal protection review, the Court has scrutinized more carefully classifications which affect fundamental constitutional rights and those which are based on race, alienage, or national origin. The test in the upper tier review has been whether such classifications advance a "compelling state interest." The burden of showing the constitutionality of these classifications rests with the government, which must demonstrate that a compelling state interest is served, the state's purpose cannot be achieved in a less burdensome manner, and the public good accomplished outweighs the fundamental rights impinged. This strict scrutiny or suspect classification has developed into the Court's primary weapon in insuring equality of opportunity by challenging the traditional preeminence of wealthy, white, Anglo-American males. Implied has been the notion that opportunities should be available on the basis of personal merit, and not class identification. Classifications based on sex and illegitimacy have yet to achieve standing as suspect categories, but appear to require some undetermined level of elevated review in excess of traditional rational relationship scrutiny.


The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.


16. At least one state court has seen fit to recognize gender as a suspect classification:

An analysis of classifications which the Supreme Court has
In 1971, the Court in Reed v. Reed, for the first time, declared a statute employing a gender-based classification unconstitutional. The Court determined that the statute provided different treatment solely on the basis of sex, and thus established a classification subject to equal protection scrutiny. "A classification "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." While the Court said scrutiny was required, it did not proceed on a strict scrutiny analysis, but confined its analysis to a "first tier" rational relationship inquiry. The decision, however, was a distinct break from prior decisions under the rational relationship test, in which the constitutional validity of similar preferential statutes was upheld. Fair and substantial had become part of the definition of rational relationship.

Previously designated as suspect reveals why sex is properly placed among them. Such characteristics include race, lineage or national origin, alienage, and poverty, especially in conjunction with criminal procedures. Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities.

Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18-19, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971) (footnote omitted).

17. 404 U.S. 71 (1971). An Idaho statute preferred men to women in appointment of estate administrators from the same entitlement class. The Court reversed the Idaho Supreme Court, holding the statute violated the equal protection clause of the fourteenth amendment.

18. Id. at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

19. It should be noted, however, that the Reed Court explicitly limited its decision to father/mother estate administrator applicant disputes, excluding similar disputes between brother and sister. The Court made no attempt to address the broad issue of a state's right to classify solely by gender.

20. In an earlier case, for example, the Court stated: While Michigan may deny to all women opportunities for
In a 1973 decision a plurality of the Court moved beyond the first tier rational relationship test and concluded "that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." However, application of the strict scrutiny test to gender-based statutory classifications, did not gain majority approval; the Court subsequently reverted to its fair and substantial rational relationship test, stating that Reed was the actual basis of decisions invalidating "statutes employing gender as an inaccurate proxy for other, more germane bases of classification." Reed, interpreted in light of the later cases, seems to mandate that classifications based upon sex are less than suspect and not deserving of strict scrutiny, yet are more than minimal and therefore deserving of only rational relationship analysis. What emerges is an intermediate approach between rational basis and compelling interest.

The uncertainty of this intermediate approach invites differing

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21. Frontiero v. Richardson, 411 U.S. 677, 688 (1973). Only three justices joined Justice Brennan's opinion. Three more, while concurring in the outcome, specifically stated the Reed rational relationship test was broad enough.


23. 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, 18-19 (1972). Justice Stevens maintains there is but one equal protection test inasmuch as there is but one equal protection clause which "does not direct the courts to apply one standard of review in some cases and a different standard in other cases." The two-tier test of equal protection is to be seen as nothing more than a device to explain decisions that actually apply a single standard in a reasonably consistent fashion. Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring).
opinions, conflicting conclusions, and inconsistent judgments. When does a classification bear a fair and substantial relationship as opposed to a mere rational relationship? At what point do gender-based assignments approach "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause"? 24

III. THE BACKGROUND OF GOLDFARB

Mrs. Hannah Goldfarb worked in the New York City public school system for nearly twenty-five years prior to her death in 1968. During the entire time of her employment she had paid all social security taxes required by the Federal Insurance Contribution Act. 25 Following his wife's death, Leon Goldfarb applied for social security survivor's benefits, but his claim was denied: "You do not qualify for a widower's benefit because you do not meet one of the requirements for such entitlement. This requirement is that you must have been receiving at least one half support from your wife when she died." 26 Under the Old-Age, Survivors, and Disability Insurance Benefits program, 27 benefits for widows were based on the earnings of their husbands, regardless of dependency. 28 But benefits to similarly situated widowers were payable only if it were shown the widowers had received at least one-half of their support from their wives. 29

28. Id. § 402(e), in pertinent part provides:
   (1) The widow . . . of an individual who died a fully insured individual, if such widow . . .
   (A) is not married,
   (B) (i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability . . .
   (C) (i) has filed application for widow's insurance benefits, or was entitled to wife's insurance benefits . . . and
   (D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of such deceased individual, shall be entitled to a widow's insurance benefit for each month . . .
29. Id. § 402(f) provides:
   (1) The widower . . . of an individual who died a fully insured individual, if such widower—
   (A) has not remarried,
   (B) (i) has attained age 60, or (ii) has attained age 50 but has not attained 60 and is under a disability . . .
A three-judge district court held the different treatment mandated by the statute constituted invidious discrimination against female wage earners and that Mrs. Goldfarb was entitled to protection for her surviving spouse equal to that afforded male employees. She had paid taxes at the same rate as men and was as concerned about her spouse's welfare in old age as were men. The government

(C) has filed application for widower's insurance benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual . . .

(D) (i) was receiving at least one-half of his support as determined in accordance with regulations prescribed by the Secretary, from such individual at the time of her death, or if such individual had a period of disability which did not end prior to the month in which she died, at the time such period began or at the time of her death, and filed proof of such support within two years after the date of such death, or, if she had such a period of disability, within two years after the month in which she filed application with respect to such period of disability or two years after the date of such death, as the case may be, or (ii) was receiving at least one-half of his support, as determined in accordance with regulations prescribed by the Secretary, from such individual at the time she became entitled to old-age or disability insurance benefits or, if such individual had a period of disability which did not end prior to the month in which she became so entitled, at the time such period began or at the time she became entitled to such benefits, and filed proof of such support within two years after the month in which she became entitled to such benefits or, if she had such a period of disability, within two years after the month in which she filed application with respect to such period of disability or two years after the month in which she became entitled to such benefits, as the case may be, and

(E) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife, shall be entitled to a widower's insurance benefit for each month . . .

The definition of what constitutes "at least one-half support" is set out in 20 C.F.R. § 404.350 (b) (i) (1977):

[A] person is receiving at least one-half of his support from the insured individual at a specified time if such individual, for a reasonable period . . ., before the specified time, made regular contributions, in cash or kind, to such person's support and the amount of such contributions equaled or exceeded one-half of such person's support during such period.

(c) "Support" defined. The term "support" includes food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for maintenance of the person supported.

(d) "Contributions" defined. "Contributions," as used in this section, means contributions actually provided by the contributor from his own property, or the use thereof, or by the use of his own credit.
was incapable, in the court's opinion, of justifying the gender-based distinction.\textsuperscript{30}

The Supreme Court affirmed in a five to four decision:

The gender-based distinction drawn by § 402 (f) (1) (D)—burdening a widower but not a widow with the task of proving dependency upon the deceased spouse—presents an equal protection question indistinguishable from that decided in \textit{Weinberger v. Wisenfeld} . . . . That decision and the decision in \textit{Frontiero v. Richardson} . . . plainly require affirmance of the judgment of the District Court.\textsuperscript{31}

\textit{Frontiero v. Richardson}\textsuperscript{32} had ruled unconstitutional a statute that provided benefits to married male members of the armed services regardless of their wives' dependency, while allowing similar benefits to married female members only if they could prove they provided over one-half of their husbands' support. The government justified the statute by "administrative convenience." It claimed Congress could reasonably have concluded it would be less expensive and easier to presume wives of male servicemen were financially dependent upon their husbands, while requiring female members to establish their husbands' dependency in fact.\textsuperscript{33} The Court specifically rejected such a gender-based statutory scheme created solely for the purpose of achieving administrative convenience, and concluded "that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate[d] the Due Process Clause of the Fifth Amendment."\textsuperscript{34}

\textit{Weinberger v. Wiesenfeld},\textsuperscript{35} like \textit{Goldfarb}, was concerned with Old-Age, Survivors and Disability Insurance programs. Section 402 (g) of the Social Security Act\textsuperscript{36} granted survivors' benefits based on the earnings of a deceased husband/father covered by the Act to both his widow and surviving minor children in her care. But benefits based on the earnings of a deceased wife/mother were granted only to the minor children and not the widower. The Court struck down the statute as violative of equal protection:

\begin{quote}
Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support . . . . But such a gender-based generalization cannot suffice to justify the denigration of the ef-
\end{quote}

\begin{footnotes}
33. Id. at 689.
34. Id. at 690-91.
\end{footnotes}
forts of women who do work and whose earnings contribute significantly to their families' support.

Section 402(g) clearly operates, as did the statutes invalidated by our judgment in *Frontiero*, to deprive women of protection for their families which men receive as a result of their employment. . . . [S]ocial security taxes were deducted from [the wife's] salary during the years in which she worked. Thus, she not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others. Since the Constitution forbids the gender-based differentiation premised upon assumptions as to dependency made in the statutes before us in *Frontiero*, the Constitution also forbids the gender-based differentiation that results in the efforts of female workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men. 37

The Court in *Goldfarb*, based on these two prior decisions, maintained that section 402(f) (1) (D) 38 could not withstand constitutional attack since it operated to deprive working women of protection for their families that was afforded similarly circumstanced working men.

IV. ANALYSIS

A. Legislative Purpose

In ascertaining whether the Reed equal protection test was correctly applied in *Goldfarb*, the essential inquiries are these: (1) what governmental interest was the legislature promoting; (2) was such legislative purpose legitimate; and, (3) if so, does the classification established bear a fair and substantial relationship to furthering this legitimate purpose?

If the intention of Congress was to prefer widows over widowers to alleviate the effects of past discrimination against women, and such intention was the criterion for the development of the current dependency presumptions, the Court's previous opinions were strong evidence that such legislation would pass the Reed test. In *Kahn v. Shevin*, 39 the Court upheld a Florida decision validating a state constitutional provision of a property tax exemption for widows. 40 The Court took note of the fact that a lone woman faces financial difficulties exceeding those faced by a lone man: "Whether from overt discrimination or from the socialization process of a

37. 420 U.S. at 645.
40. Article IX, § 9 of the 1885 Florida Constitution provided an exemption
male-dominated culture, the job market is inhospitable to the woman . . . .41 While a widower could usually continue his vocation and livelihood following his wife's death, a widow found herself forced into an unfamiliar market for which her former dependency left her unprepared. The Court found "[t]here [could] be no doubt . . . that Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.'"42 The state law was found to be reasonably designed to further a legitimate state policy of easing the financial impact of loss of a spouse upon those on whom the loss imposed a disproportionately heavy burden.43

If the legislative intent in the Social Security Act provision involved in Goldfarb reflected a considered judgment by Congress that the need for financial assistance is greater for a widow than a widower, "the denial of benefits [could arguably have] reflected the congressional judgment that aged widowers as a class were sufficiently likely not to be dependent upon their wives that it was appropriate to deny them benefits unless they were in fact dependent."44 Thus, the differing treatment of the sexes rested upon some ground of difference having a fair and substantial relationship to a legitimate legislative objective similar to Kahn.

On the other hand, if the focus of congressional intent was on the insured spouse rather than the surviving spouse, the Social Security Act's requirement that widowers provide proof of actual dependency would violate equal protection under Wiesenfeld and Frontiero, because wage earning females were deprived of the pro-

from taxable property of $200 to every widow supporting a family and to all disabled persons. Currently, FLA. STAT. ANN. § 196.202 (West Supp. 1977) provides: "Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation."

41. 416 U.S. at 353.
42. Id. at 355 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).
43. See also Schlesinger v. Ballard, 419 U.S. 498 (1975). In Ballard the Court upheld a Navy policy with differing mandatory discharge statutes for male and female naval officers. The due process clause was not violated since the difference in treatment flowed from the fact that female line officers, because of combat and sea duty restrictions, did not have equal opportunities for advancement. "In enacting and retaining § 6401, Congress may thus quite rationally have believed . . . that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with 'fair and equitable career advancement programs.'" Id. at 508.
44. 430 U.S. at 207 (quoting Brief for Appellant at 12).
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tection for their families that males received. The Goldfarb Court was divided, with the plurality focusing on the insured spouse, the dissenters on the plight of the widow.

Since its inception, social security has been a program of social insurance distributing benefits according to family relationships. Wage earners procure coverage through their role as the family provider while spouses, children, and parents receive benefits as dependents.\textsuperscript{45} Since the program's benefit structure is rooted in traditional assumptions regarding the roles of family members, dependents' benefits have been largely defined in terms of sex. Still, the underlying premise is that of the covered wage earner and of the covered wage earner's dependents.\textsuperscript{46}

The statute specifically required beneficiaries to be dependent on the covered wage earner. For example, a widow of a fully insured individual is treated as a dependent beneficiary unless her own primary insurance equals or exceeds her deceased husband's primary insurance amount\textsuperscript{47} or if she remarries.\textsuperscript{48} That is, the statutes presume dependency of married women on their husbands until it is specifically shown they are dependent on another (remarry) or are self-dependent (a fully covered wage earner in their own right).\textsuperscript{49} This is in accord with the general purpose of social secu-

\textsuperscript{46} Social Security's concept of the "family" has not remained static. The original Act of 1935 provided a system of old-age insurance as a long-run safeguard against the occurrence of old-age dependency only for the actual worker in industry and commerce. In 1939 the Act was considerably broadened, extending old-age insurance protection to the wife and children of the retired worker as well as to his surviving widow and children. Social Security Act of 1935, ch. 531, tit. II, § 202, 49 Stat. 623; Amendment of 1939, ch. 666, tit. II, § 201, 53 Stat. 1362, 1363-64 (current revision at 42 U.S.C. § 402(b), (e), (g) (1970 & Supp. I-V 1971-1975)). Still the basic assumption husbands were the family providers remained. If such an assumption proved to be the only criterion Congress considered in treating men differently from women the statute must be invalidated.

"[While] the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support, . . . such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."

430 U.S. at 205-06 (quoting Weinberger v. Weisenfeld, 420 U.S. at 645 (1975)).
\textsuperscript{48} Id. § 402(e)(1)(A).
\textsuperscript{49} Riches, Women Workers and Their Dependents Under the 1950 Amendments, Soc. Sec. Bull., Aug., 1951, at 9, 11. If the purpose of extending coverage to widows was merely to mitigate past discriminatory treatment against woman as the Goldfarb dissent contends, such ex-
rity as ascertained by the Court in previous opinions, that is, to provide support for dependents of wage earners who have lost their primary earning power due to retirement, disability or death, and to provide replacements for those lost earnings.50

Benefits are extended on a sole criterion of dependency rather than on a basis of pure economic assistance as are welfare programs. No one is entitled to social security benefits unless he or she is a covered wage earner or a dependent of a covered wage earner. “This accords with the system's general purpose; one who was not dependent to some degree on the covered wage earner suffers no economic loss when the wage earner leaves the work force.”51 The plurality in Goldfarb maintained that congressional intent was one of benefitting dependents for lost financial support, and that Congress had erroneously presumed wives were always dependent and, therefore, required no proof of dependency.52 There was no exceptions for non-dependency would be unjustifiably inconsistent with this legislative purpose.

51. 430 U.S. at 213-14.
52. This view was in accord with that of the special advisory council appointed by the Secretary of Health, Education and Welfare in 1969 to submit its findings and recommendations for the social security programs as required by section 706 of the Social Security Act.

The purpose of the social security program is to provide a continuing income for a worker and his family when the worker's earnings are cut off by his retirement in old age, his disability, or his death. To accomplish this purpose, the program provides benefits not only for the worker himself but also for those of his relatives whom the worker normally supports or has a legal obligation to support. Benefits are provided for these relatives because they lose support, or a potential source of support, when the worker's earnings are cut off. Benefits are provided for a wife or widow without a test of support because it is reasonable to presume that a wife or widow loses support, or a potential source of support, when the husband's earnings are cut off, except in situations where she, herself, has covered earnings and is eligible for a benefit on her own account that is larger than her wife's or widow's benefit. (As discussed later, the wife's or widow's benefit is not payable in such situations.) On the other hand, men are generally not dependent upon their wives for support, and a presumption of dependency that is reasonable for a wife or widow does not seem to be reasonable for a husband or widower. Therefore, present law requires that for a man to get a benefit as a husband or widower, he must establish that he was actually supported by his wife.

It has been suggested that one could apply the same rules to a husband or widower as to widows and wives and assume that he was dependent upon his wife unless his own benefit was higher than his benefit as a husband or widower. If this were done, the men who would get dependents' benefits and who cannot get them under present law would be chiefly those who had worked in noncovered employment, such as
intention of alleviating the financial problems a nondependent widow might encounter as opposed to a nondependent widower. The basic criterion for benefits was dependency on a covered wage earner. The covered wage earner was the source of all benefits eventually falling to his family. Since only covered wage earners were required to pay taxes toward the system, benefits must be distributed according to classifications which do not differentiate among covered employees solely on the basis of sex.\textsuperscript{53}

In 1950 coverage was expanded to dependent widowers of covered females but only if they were receiving at least one-half of their support from the deceased wife.\textsuperscript{54} Again analysis of the legislative history points out that neither the 1950 nor the previous 1939 amendments demonstrate a congressional intent to create a difference between nondependent widows and nondependent widowers. The recommendation to extend benefits to dependent widowers was solely to "equalize the protection given to the dependents of women and men."\textsuperscript{55} There was no legislative documentation or presumable

Federal employment and certain State and local employment, who are not really dependent on their wives, and with respect to whom a presumption of dependency would be invalid. Such men make up a very substantial proportion of the total number of husbands who would be affected by such a proposal. In view of these considerations, the Council believes that the dependency requirements that the present law applies to spouses should not be changed.

\textit{Reports of the 1971 Advisory Council on Social Security}, H.R. Doc. No. 92.80, 92d Cong., 1st Sess. 22-23 (1971) (footnote omitted). An assumption that the family breadwinner is a man is certainly not unfounded, especially when one considers the era (1935-1950) in which these statutes were enacted. Even today more women receive social security benefits as dependent wives, widows, and mothers than as workers. In 1972, over 8 million men were receiving monthly benefits of which 99.9 percent were receiving them as retired workers. At the same time, some 13 million women were receiving monthly benefits, but only 47 percent of these were receiving them as retired workers. \textit{Quarterly Statistics, Soc. Sec. Bull.}, Dec., 1972, at 74-78 (tables Q-5 to Q-10).

\textsuperscript{53} Expanded benefits were added to the Social Security Act to "afford more adequate protection to the family as a unit." H.R. Rep. No. 728, 76th Cong., 1st Sess. 7 (1939). See also 430 U.S. at 213.


\textsuperscript{55} \textit{Advisory Council on Social Security, Recommendations for Social Security Legislation}, S. Doc. No. 208, 80th Cong., 2d Sess. 38 (1949). These additional benefits were viewed as creating parity between dependents of working men and women, yet the differing support requirements were retained. A program analyst for Social Security stated:

The earlier legislation made no provision for benefits to a hus-
intention for disparate treatment of dependent widows and dependent widowers as a conscious effort to redress the "legacy of economic discrimination."66 against females.67

The dissenting justices in Goldfarb were able to find a concerted congressional intent to treat nondependent widows and widowers differently. Justice Rehnquist claimed that the 1939 amendments reflect a legislative judgment that widows of social security recipients were a needy group, and that such enactments for widows' benefits were in response to congressional recognition of poverty among this group.68 However, if this had been the congressional intent, it is unclear why the legislation's scope was limited to only part of society's widows—that those who were also dependents of wage earners covered by social security. Social security is an insurance program, that is, insurance in the sense of relating benefits to a loss of income normally received. It is not a civil rights act, as the dissent implies, intended to right historical wrongs inflicted upon women.69 “Because social insurance is effective in the limited

57. Mr. Justice Stevens concluded it was clear that Congress never focused its attention on the question whether to divide nondependent surviving spouses into two classes on the basis of sex. . . . It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms "widow" and "dependent surviving spouse." . . .

This discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females. . . . [A] rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve [the] interest" put forward by the government as its justification.

430 U.S. at 222-23 (Stevens, J., concurring) (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976)).
58. Id. at 231-33 (Rehnquist, J., dissenting).
59. Justice Stevens explained congressional motivation more accurately when commenting in Goldfarb on the earlier Kahn decision:

For that case involved a discrimination between surviving spouses which originated in 1885; a discrimination of that vintage cannot reasonably be supposed to have been motivated by a decision to repudiate the 19th century presumption that females are inferior to males. It seems clear, therefore, that the Court upheld the Florida statute on the basis
function for which it is intended does not justify placing burdens upon it which distort its purpose and endanger its acceptance."60

Certainly no one can dispute the general disparity in financial difficulties confronting lone women, but that is not justification to impute to Congress motives that most assuredly did not exist at the time the legislation was enacted.61

The dissent in Goldfarb further advocated sustention of the legislative classification because "[t]he effect of the statutory scheme is to make it easier for widows."62 The Reed test, however, deals with the purpose of the statutory scheme. Since the purpose of social security was to provide a covered wage earner and his dependents a source of support when deprived of the original support source, the fact that a secondary effect was not, in itself, constitutionally violative should not be enough to save the originally established arbitrary classification which was in violation of constitutional mandates.63

Social security is no more than a social insurance program, a system of poverty prevention passed in 1935 to prevent a reoccurrence of the poverty brought on by the depression of that decade and to protect the people of this nation against the hazards of old age, ill health, and unemployment.64 The concept of such a federal

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of a hypothetical justification for the discrimination which had nothing to do with the legislature's actual motivation. 430 U.S. at 223-24 (Stevens, J., concurring) (footnotes omitted). The Goldfarb dissent, in its apparent unwillingness to dismiss any gender-based classification as discriminatory, extends to Congress a legislative purpose that is wholly improbable.


61. Justice Rehnquist agreed with the plurality that there was no legislative history indicating Congress had considered the specific case of nondependent widows or decided such individuals needed benefits despite their lack of dependency, yet concluded "neither is there any reason to doubt that it singled out the group of aged widows for especially favorable treatment . . . because it saw prevalent throughout that group a characteristically high level of need." 430 U.S. at 233 (Rehnquist, J., dissenting) (emphasis added).

62. 430 U.S. at 225 (Rehnquist, J., dissenting) (emphasis added).

63. To determine legality on a numerical tally basis (three good effects minus 2 bad effects equal constitutionality) alters the Supreme Court's role from interpreting the law with respect to the Constitution to that of scorekeeper. See text accompanying notes 51-57 supra.

64. J. Brown, supra note 60, at 55. For an excellent discussion concerning the validity and purposes of the Social Security Act of 1935, see Helvering v. Davis, 301 U.S. 619 (1937). Justice Cardozo, speaking for the Court, states: "The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." Id. at 641.
social insurance program, the establishment of the mechanism needed to implement it, and its subsequent passage by Congress in 1935 were performed with great haste at the urging of President Roosevelt, who wished to ensure passage while the memories of the devastating depression were still vivid. Such social legislation had never before been attempted by the federal government and some areas, such as unemployment insurance, were completely foreign to any level of government within the nation. It is not surprising that such radical legislation should lack the effectiveness intended in some areas as well as overlooking other areas completely.

For the foregoing reasons the Social Security Act underwent extensive revision in 1939. Among the major alterations was one extending coverage from the wage earner to include his wife and widow. It was during this drastic overhaul of the entire social insurance program that Justice Rehnquist envisions Congress attempting to correct the historically unfair treatment accorded the women of this nation. The 1939 Act amended the 1935 Act, and the 1935 Act was an attempt at social insurance—not a civil rights endeavor. As social security benefits were expanded to various dependents of wage earners, the initial congressional intent remained—to define an insurable risk followed by a social security insurance mechanism “to lift persons out of reliance on the residual relief system by providing protection as a matter of right.”

Consideration of all available evidence reveals little to support the dissent's hypothesis that Congress intended to compensate nondependent widows for prior discriminatory treatment via social security legislation.

B. Administrative Convenience

The dissent's second hypothetical justification for allowing discriminatory classifications was “administrative convenience.” Legislative and general history contradicted the dissent's first argument but no such facts either refute or support an assumed purpose of convenience. It would certainly be within the realm of reasonable possibility to assume that Congress foresaw an administrative efficiency in making widowers actually prove dependency. The following, therefore, become basic issues: (1) if Congress did foresee an administrative convenience, is such a purpose valid regarding

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65. J. Brown, supra note 60, at 62.
66. 430 U.S. at 225 (Rehnquist, J., dissenting).
67. This argument, however, is speculative at best. The historical background suggests Congress proceeded on an accepted presumption of female dependency without focusing on the cost of proving individual dependency.
gender-based classifications; and (2) if such classifications are generally valid, is there a point at which convenience becomes arbitrary and "too tenuous to satisfy Reed's requirement that the gender-based difference be substantially related to achievement of the statutory objective."68

The Court plurality, following a long line of cases since Reed, distinctly rejected administrative convenience as sufficient justification for gender-based classifications.69 Apparently, convenience and ease can never justify gender-based distinctions. However, there are two extrinsic considerations: (1) the previous cases had not dealt with social security provisions,70 and (2) the Court's recent decision in Mathews v. Lucas.71

69. 430 U.S. at 217. The Reed Court deemed the objectives of reducing probate court work loads and avoiding intra-family controversies of insufficient importance to sustain use of overt gender criteria for appointing estate administrators. 404 U.S. at 76-77. Every decision since Reed has similarly rejected administrative ease and convenience as sufficiently important to justify gender-based classifications. In a case involving statutory denial to unwed fathers of the custody of their illegitimate children, the Court held:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy governmental officials no less, and perhaps more, than mediocre ones.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly distains present realities in deference to past formalities, it needlessly runs roughshod over...important interests...

Stanley v. Illinois, 405 U.S. 645, 656-57 (1972) (footnotes omitted). See also Frontiero v. Richardson, 411 U.S. 677, 690 (1973) ("'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Kahn and Schlesinger v. Ballard, 419 U.S. 498 (1975), both upholding gender-based classifications, were based not on administrative convenience, but rather, on the Court's perception of the justifiable purpose of those laws as remedying disadvantageous conditions suffered by women.

70. Weinberger v. Wiesenfeld, 411 U.S. 677 (1975), dealt with social security classifications, and although the Court specifically found the gender-based distinction involved indistinguishable from that invalidated in Frontiero, the government did not advance a convenience justification argument. The Court, therefore, did not address the issue.

Arguably, principles requiring heightened levels of judicial scrutiny under equal protection do not carry over into fields of social insurance legislation. Social security is a statutory scheme developed piecemeal, expanding and altering over a forty year period, and distributing payments among millions of people. A precise correlation between need and payments is unattainable given the administrative realities involved. The dissent in Goldfarb contended that "had Congress attempted to distribute program funds in precise accordance with a purpose to alleviate need, it could very well have created a procedural leviathan consuming substantial amounts of those funds in case-by-case determinations of eligibility." The dissent, however, failed to carry its observations to the essential issue of equal protection versus sex-based generalities. Congress indeed recognized the impossibility of distributing funds precisely on need and, therefore, made a series of connecting assumptions. When the normal flow of income into a household was interrupted due to incapacity, death, or old-age of the wage-earner there was an assumption that household members would require funds to alleviate need, an assumption that household members had previously depended on the wage-earner, and finally, an assumption that the wage earner was the husband. It is this final assumption which violates equal protection guarantees.

The acceptable assumption that household members are dependent on the covered wage earner goes hand-in-hand with the legislative purpose of replacing the household's covered income flow once it is cut off. It is possible to argue, with justification, that all beneficiaries of the social security program are not dependent on the wage earner due to independent wealth or outside revenue sources. Social security, however, is concerned only with the income derived from employment within the social security system. Certainly no funds are forwarded to retired or disabled individuals or their dependents if such individuals were not within the program's coverage, regardless of their desperate need for such funds.

An allowable administrative convenience limits concern only to covered funds, disregarding how monies and funds not within the confines of the program's limits are distributed throughout society. An allowable administrative convenience makes distributions based on the covered wage earner's salary and contributions and not on the outside income of his dependents. A disallowable administrative convenience arises when distributions are based on the sex of the covered wage earner. Just as no consideration is given to out-

72. 430 U.S. at 231.
side wealth of the wife or widow, none should be given to the outside wealth of the husband or widower. This would appear to be a logical and equitable conclusion inasmuch as the social security statutes set forth special provisions where both husband and wife are covered wage earners, that is, the program takes note of spousal income only if it is also within the system. If social security were a welfare program it would be expected that all assets and incomes be considered, but since social security is a self-contained insurance program it should be administered regardless of outside circumstances unless such outside circumstances are applied to all.

The assumption that the husband is the sole wage earner is arbitrary, based on past sex role stereotyping and outdated misconceptions concerning the role of the female as housewife.73 The issue remains whether any legislative classification based on traditional social presumptions and administrative convenience should be allowed to pass equal protection scrutiny?74

In June of 1976, the Court, in Mathews v. Lucas75 upheld a social security statute conclusively presuming dependency for all children save a specified group of illegitimate children. The presumption was specifically declared to pass equal protection scrutiny on grounds of administrative convenience. Like Goldfarb, Lucas presented an issue of constitutionality under the due process clause of the fifth amendment relating to provisions of the Social Security Act. In an opinion authored by Justice Blackmun, the Court concluded "that, in failing to extend any presumption of dependency to appellees and others like them, the Act does not impermissibly discriminate against them as compared with legitimate children or those illegitimate children who are statutorily deemed depend-

73. The importance of women in the work field and as family providers is too great to allow such broad generalizations. In 1974 nearly 12½ million women were heads of families, an increase nearly 250 percent greater than the percentage increase in the total number of all families since 1960. In only 31 percent of all families was the husband the sole earner, and where the wife did work, she contributed over 30 percent of the family income in over 40 percent of such families. BEUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, BULL. NO. 1880, U.S. WORKING WOMEN, charts 31, 39-41 (1975).

74. Goldfarb was a five to four decision. However, Stevens' concurrence acknowledged approval of an administrative convenience argument under the appropriate conditions. Therefore, in reality a majority of the Court would allow gender-based distinctions solely for administrative ease and convenience.

75. 427 U.S. 495 (1976). Robert Cuffee had lived with Belmira Lucas and had fathered two children by her. Cuffee died in 1968 without acknowledging in writing or undergoing a judicial proceeding declaring
The Court then attempted to establish criteria for a legitimate administrative convenience. "In cases of strictest scrutiny, such approximations must be supported at least by a showing that the Government's dollar 'lost' to overincluded benefit recipients is returned by a dollar 'saved' in administrative expense avoided." Under the lesser rational relationship test, the likelihood of dependency would not require scientific substantiation nor an inquiry solely in terms of dollars.

Although Lucas dealt with a social insurance program, the implications are bewildering. Has the Court lowered its requirement of a compelling state interest for suspect classifications to a mere equal dollar value? Can discriminations based on race or national origin be upheld because the state saves money? Will Plessy v. Ferguson be resurrected because the cost of bussing increases the...
tax levy? Certainly one would doubt the Court intended such interpretations, but just as certainly the implications are there.

Other questions are raised when viewing *Lucas* in the context of other legislative classifications. Is the Court in complete contradiction of itself in *Lucas* and *Goldfarb*? Is the distinction drawn between illegitimate—legitimate children and widows-widowers warranted? Was the administrative convenience found in *Lucas* greater than that found in *Goldfarb*? Was the rational relationship more rational in *Lucas*? Does sex demand a greater degree of scrutiny? Is child dependency easier to prove than spousal dependency? The statutory scheme essentially does not extend a presumption of dependency to illegitimate children not living with or being supported by the wage earning parent. There can be no doubt that there are legitimate children as well as illegitimate children exempt from proving dependency who are not in fact dependent on the natural father through whom they claim. To limit equal protection to situations in which it is convenient subjects such protection to the arbitrary views of legislatures and courts to decide when it shall be convenient. The law creates a judicially enforceable right of support on behalf of children from the natural parents. When a parent is a covered wage earner the government assumes this right to support upon the death of the parent. If the parent has illegally disavowed his responsibility, the responsibility of the government should not necessarily tumble as well. The child suffers a double punishment, once during the parent's lifetime and again after the parent's death.

79. Whether the classification is expressed in terms of eligible classes or in terms of presumptions of dependency, the fact remains that legitimacy, written acknowledgments, or state law makes eligible many children who are no more likely to be "dependent" than are the children in appellee's situation. Yet in the name of "administrative convenience" the Court allows these survivors' benefits to be allocated on grounds which have only the most tenuous connection to the supposedly controlling factor—the child's dependency on his father.


Justice Blackmun stated: "[I]t adds nothing to say that the illegitimate child is also saddled with the procedural burden of proving entitlement on the basis of facts the legitimate child need not prove. The legitimate child is required, like the illegitimate, to prove the facts upon which his statutory entitlement rests." 427 U.S. at 503-04 n.7. However, the legitimate child is extended a presumption of dependency so that evidently the only fact he needs to prove is that his parent actually died.
A second apparent distinction is the degree of rational relationship needed for gender classifications and those based on legitimacy. Lucas limited illegitimacy to a traditional rational test; "because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity [of] discrimination against women and Negroes."\textsuperscript{80} Yet it would seem, like race and sex, illegitimacy is wholly determined by birth, uncontrolled by the individual subject, and entirely unrelated to that individual's ability to contribute to society. Historically, this society has made distinctions between male and female, alien and citizen, legitimate and illegitimate, black and white. Such stereotyping should be abolished—and can be through the provisions of the equal protection clause. To allow continuation of separate treatment by such classifications prolongs a cancer which society and the courts have a duty to remove. There would seem to be no constitutional excuse for sidestepping these issues by referring to secondary distinctions, such as dependency or non-dependency, and then upholding such classifications because they are administratively convenient.\textsuperscript{81} The distinctions and arguments applied by the Court do not point out the correctness of Goldfarb as much as they do the incorrectness of Lucas.

If in fact administrative convenience is a justifiable basis for gender distinctions as the dissent contends, can the widow-assumption-of-dependency statute be upheld? Are there few enough aged widows not dependent on a husband at the time of his death that the cost of administering inquiries of actual proof would exceed any future benefits they might receive? Justices Rehnquist and Stevens contend ninety percent of all widows would be eligible for benefits under a dependency test similar to that administered widowers. In Rehnquist's opinion, "[t]his nine-tenths correlation appears sufficiently high to justify extension of benefits to the other one-tenth for reasons of administrative convenience."\textsuperscript{82} Stevens concluded that administrative convenience would cost the government approximately one billion dollars, which would be excessive.\textsuperscript{83}

The acceptance of an administrative convenience rationale will only obscure an already clouded area by basing sex discrimination on imprecise dollar values—on judicial instincts and intuitions as to when the magic amount has been overstepped.

It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statis-

\textsuperscript{80} 427 U.S. at 506.
\textsuperscript{81} Id. at 516 (Stevens, J., dissenting).
\textsuperscript{82} 430 U.S. at 239 n.7 (Rehnquist, J., dissenting).
\textsuperscript{83} Id. at 220 n.5.
tical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.

C. Contract Theory

A final argument made in support of administrative convenience is that social security is a noncontract benefit and therefore less scrutiny is required than in other divisions of the law. The Court has maintained a person's right to social security benefits is not considered an "accrued property right." Although the program is participatory in nature, in the sense that benefits are not extended to persons without a close relationship to an individual contributing to the program, Congress did not enact social security with contractual obligations in mind. Flemming v. Nestor, the most notable holding in the area, characterized the social security program as a form of social insurance whereby wage earners and their employers are taxed to permit benefits to the retired and disabled, and their dependents. Eligibility and the amount of such benefits depend on the wage earner's earning record, not on his or her contributions. Therefore it is apparent that the interest of the employee covered by the Act cannot be contractual. The Court went on to state:

86. See § IV-A of text supra.
88. Id. at 610. Justice Black, in dissent, argued the Court was holding that, in spite of the contributions by the covered workers, the Social Security payments were merely gifts terminable at will by the government which was contrary to the purpose and intent of the system. Id. at 621.

Interestingly, the non-contractual concept involving social security developed from a questionable factual situation. Ephram Nestor had immigrated from Bulgaria in 1913, remaining in this country 43 years, for 19 of which he was covered by the Social Security Act. He became eligible for benefits in November, 1955. However, in July, 1956, he was deported for having been a member of the Communist Party from 1933 until 1939. He was denied benefits under Section 202 (n) of the Social Security Act, which terminated old-age benefits payable to any alien after September 1, 1954, who was deported as having been a member of the Communist Party. The Court held it was not a punishment, but merely denial of a non-contractual benefit. The dissenting opinions contended the statute was ex post facto and a bill of attainder since in 1939 neither was it illegal to be a Communist nor was it statutory grounds for deportation. Id. at 622.

Considering the political climate of the time, the Communist witch-
Particularly when we deal with a withholding of a non-contractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.89

How should the foregoing statement affect the Reed test applied by Goldfarb? When dealing with gender-based classifications in conjunction with social welfare programs, should they be judged by Reed's fair and substantial test or Nestor's patently arbitrary test? Undoubtedly classifications requiring strict scrutiny will be unaffected by Nestor, as well as those subjected to minimum tier scrutiny, inasmuch as congressional social and economic policies traditionally pass a rational relationship inspection.90 Therefore, the only classification arguably affected would be the middle-tier gender-based distinctions set forth in Reed. No matter how much or little due process requirements are relaxed by Nestor, equal protection guarantees should allow no adjustments where only classifications based on gender are involved.91 "We do not see how the fact that social security benefits are 'noncontractual' can sanction differential protection for covered employees which is solely gender based."92

Classifications for noncontractual benefits must still serve a governmental objective and be related to the results of such objectives.

89. "We do not see how the fact that social security benefits are 'noncontractual' can sanction differential protection for covered employees which is solely gender based."

91. In Geduldig v. Aiello, 417 U.S. 484 (1974), the Court dealt with a California disability insurance program exempting female workers undergoing normal pregnancy. Although holding there was no requirement that a state "subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program," the case was decided on a lack of discrimination within the individual risks covered, rather than a lack of discrimination against women. Id. at 496.

92. Weinberger v. Wiesenfeld, 420 U.S. at 646.
To rule otherwise results in open invitation to breathe new life into the time worn generalizations, archaic traditions, invidious stereotypes, and sexual discriminations the Court should be attempting to eradicate rather than resurrect. To allow a lessening of equal protection scrutiny for noncontractual benefits validates the dissent's attempt at an end run—an end run which merely postpones, evades, and ignores a problem the Court should no longer avoid, the problem of equal protection for women. Despite the contractuality of a governmental benefit and despite the gender of an employee, each employee deserves equal treatment for his or herself and his or her dependents.93

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93. There has developed through the years a feeling both in and out of Congress that the contributory social insurance principle fits our times—that it serves a vital need that cannot be as well served otherwise. It comports better than any substitute we have discovered with the American concept that free men want to earn—their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity...

Social security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual. As an earned right, the individual is eligible to receive his benefit in dignity and self respect.

102 Cong. Rec. 15110 (1956) (statement made by Senator George, Chairman of the Finance Committee when the Social Security Amendments of 1956 were enacted).