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Weinberger v. Wiesenfeld

Lewis F. Powell Jr.

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re Kahn v Shevin

Noted 10/7

3 J/Ct invalidated section of Social Security Act that afforded certain unemployment benefits to widows but not to widowers — sex held to be a suspect classification, as the Ct. recognized that statute had rational basis (widows less employable than widowers)

Vacate & Remand — This is clearly inconsistent with Kahn v. Shevin. I would grant the USDC a chance to rethink the issue in light of Kahn.

PRELIMINARY MEMO

Summer List 5, Sheet 1

No. 73-1892

WEINBERGER, Secy of HEW

v.

WEISENFELD

Appeal from USDC (N.J.)
(Fisher, Whipple, Hunter)
Federal/Civil

Timely

1. SUMMARY: Appellant appeals from the decision of a 3-Judge Court, which held 42 U.S.C. 402(g) unconstitutional as in violation of the 5th Amendment and enjoined the refusal of HEW to pay the same benefits to widowers thereunder as are paid to widows. */

---

*/ Although petr was not entitled to benefits at the time of filing, he was at the time of trial and the District Court held that this conferred jurisdiction under 28 U.S.C. 1331 and 42 U.S.C. 405(g). The briefs do not raise this question. Cf. Frontiero v. Richardson, 411 U.S. 677 (1973).

2. FACTS: Appellee, the widower of a fully qualified Social Security wage earner, applied for widow's insurance under 42 U.S.C. 402(g), and was refused although he did receive children's benefits for his son. If appellee had been a woman and his wife a man, he would have been entitled to 402(g) benefits. Appellee got a job between the time he tried to obtain benefits and the time he filed suit so that he was ineligible by reason of employment at the time that this suit was filed but by the time of decision he was once again unemployed and ineligible for benefits only by reason of ~~the sex of he and his deceased wife~~ his. 42 U.S.C. 402(g) in general entitled unmarried, otherwise uninsured widows and divorced mothers with children in their care of qualified individuals to receive 3/4 of the benefit that the deceased qualified individual would have been entitled to receive.

Wow! Where did O'Neil study English?

The three-judge panel held the statute unconstitutional and a deprivation of Fifth Amendment rights, reasoning in light of Frontiero v. Richardson, 411 U.S. 677 (1973), that sex is a suspect classification and that the statute unfairly burdens women wage earners by reducing the value of their social security insurance. The Court concluded that while the statutory classification did have a rational basis in seeking to aid women survivors who are discriminated against in the job market but that there was no compelling state interest to support the classification.

NO

3. CONTENTIONS: The Solicitor General argues that the decision should be summarily reversed in light of Kahn v. Shevin, No. 73-78, decided April 24, 1974. He argues that Kahn establishes that sex is not a suspect classification and that, in light of the USDC's finding of a rational basis in

the greater need of women with children in their care, the case falls directly in Kahn's holding of no violation where the classification serves a rational purpose in aiding a disadvantaged group. He argues this is particularly appropriate in the allocation of public benefits where the Court has held that Congress has the widest possible leeway. Cf. Richardson v. Belcher, 404 U.S. 78. He argues that the lower court was simply incorrect in focusing on the deceased wage earner's insurance rather than the surviving beneficiary's benefits.

Appellee claims that Frontiero still stands and that sex remains a suspect classification. He distinguishes Kahn on the grounds that it merely upheld a sex classification designed to benefit the disadvantaged class, women, and did not generally abolish sex as a suspect class at least where women as wage earners are burdened.

4. DISCUSSION: Only a very narrow reading of Kahn, accepting the petr's distinction, and an unnatural focus on the deceased wage earner rather than the actual beneficiary can save the appellee's case. */ The case should be reversed in light of Kahn, probably summarily.

O'Neill Op in Appellant's Statement of Juris.

7/19/74

JA

*/ It may be argued that Frontiero supports this focus but this is at at best doubtful since here in contrast to Frontiero the wage earner is deceased when the benefits accrue.

Argued ....., 19... *Assigned* ....., 19... No. 73-1892
Submitted ....., 19... *Announced* ....., 19...

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Appellant

vs.

STEPHEN CHARLES WIESENFELD, ETC.

6/18/74 Appeal filed.

Stewart
& White voted
to note because
of the invalidation
of Fed. S Inst.
would vote for
and some doubt as to
correctness of reasoning
in view of Kahn

Noted

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

MEMORANDUM

TO: Mr. Justice Powell DATE: January 17, 1975

FROM: ~~Lewis F. Powell, Jr.~~ Pgmj

No. 73-1892 Weinberger v. Wiesenfeld

It's hardly surprising that after Kahn v. Shevin the Government tenaciously characterizes this case as a distinction between widows and widowers, while the appellee just as tenaciously describes it as discrimination between male wage-earners and female wage-earners. Although I do not think the choice of labels is dispostive, I am not persuaded by the Government's argument that there is no discrimination against a female wage-earner because she has no interest in the Social Security benefits that will be paid to her family upon her death. This disregards the widespread practice of taking Social Security benefits into account in calculating life insurance needs. A woman who is the principal wage-earner for her family would have to purchase a greater amount of life insurance to give her husband the option of caring for their children rather than working full-time. Pretending that Social Security is not insurance or an annuity cannot eliminate this inherent discrimination against a female wage-earner.

But even apart from the premise that this is a case of discrimination against women rather than discrimination in their favor, I think the gender classification in this particular statutory scheme lacks a rational basis. If the

gender classification were eliminated, the statute would provide benefits for "surviving parents" of dependent children only under the following circumstances: (1) the deceased spouse qualified as a "fully insured individual" at the time of his or her death (the term is defined in 42 U.S.C. § 414; for Paula Wiesenfeld it would have required one quarter of covered employment for each year between the year she became 21 and the year of her death); (2) the surviving spouse remains unmarried; (3) the surviving spouse has custody of a child of the deceased spouse; and (4) the surviving spouse has earnings below a particular level (in this case, annual earnings under $ 8,360). Moreover, the level of benefits is dependent on the earnings of the deceased spouse. Thus, in the "typical" family where the wife either has not worked, has worked at low wages, or has worked only sporadically, while the husband has been the principal wage-earner, the benefits would be so low that the husband would not be tempted to take them in lieu of working.

I submit that these non-sex-based restrictions on receipt of "mother's benefits" already serve the purpose that the Government says the gender classification serves: they protect the widowed mother who has lost the principal means of support for herself and her children, while excluding men who will continue to work following their wives' death. Adding the gender classification serves a single purpose: it excludes men who have lost the principal support of

themselves and their children, or who would prefer to care personally for their children and would do so if given the benefits that are available to women for that purpose (a small class, no doubt). On that basis, unless it is rational for society to insist that men work rather than care for children, there is no rational basis for the gender classification in the existing statutory scheme. Moreover, the statute contains a built-in incentive for recipients to work. They may retain half of their earnings over $2,400 without having their total income reduced, and, of course, if they are capable of earning more than a stated sum, they will receive more money by working.

For these reasons, I recommend a vote to affirm.

P.C.

ss

73-1892 WEINBERGER v. WIESENFELD Court appeal from Argued 1/20/75
3 J/Ct is held unconstitutional 42 USC 402(g)

402(g) of Social Sec. Act provides benefits to widows with minor children but not to widowers with such children. (the "mother's insurance benefit")

Resp., who earned less than wife at time of her death & who later was unemployed, received "child insurance benefits" (3/4ths of primary insurance of deceased parent) but was denied "mothers benefits".

3 J/Ct found a rational basis for classification (women are "unable to earn incomes comparable to those of men") but held a compelling state interest must be shown. Found sex a suspect classification.

No

3 J/Ct also found, with reason, that statute renders a female wage earner's social security insurance of less value than a male's - since surviving spouse may receive less [In this respect bases to distinguish Kahn v Shevin and Geduldig v. Aiello (Cobb's death & insurance - pregnancy)]

SG (in addition to relying on Kahn & Geduldig) quotes from Flemming v Nestor, 363 U.S. 603, 609-10, for holding that benefits need not relate to payments made - as Social Security is a tax program for general welfare, not an annuity contract.

But a female certainly has an interest - equal to a man's - in the benefits paid her family. It is difficult for me to see a rational basis for the distinction drawn by Act.

Jones (SG)

Description of operation of Act is essential. Child benefits are same, whether father or mother survives.

Appellee's ~~first argument is that the~~ ~~[illegible]~~ unconstitutional segment of female wage earning is on analogy of purchase of private insurance. Two flaws:

1. Analogy to private insurance is unsound (Fleming v Nestor) - S/Security is social benefits.

2. ~~[illegible]~~ Nor is there discrimination as women really benefit more generally than men.

See pp 21, 22 Brief - female wage earners already has greater benefits under S/Security than men. This results in part from greater life expectancy, & also from fact that lower wage earners benefit greater proportionately.

Appellee's son already has received greater benefits than mother paid in. See Record.

Appellee's alternative argument is that Act discriminates vs males (widowers) - but Kahn v Shelvin answers this.

Child's benefits not involved here. Only issue relates to parent's benefit.

Jones (SG — Cont)

No problem of over-inclusiveness here that worried dissenters in Kahn.

Legislative purpose & basis of classification was to provide for widows who normally are economically disadvantaged by widowhood — whatever few men-cases.

Mrs. Ginsburg (for Reed)

Issue re validity of "gender line" in Act.

402(f)'s purpose is to protect family, supplementary child benefits.

There three types of discrimination are relied upon.

- Denies female worker social security coverage equal to that of male.
- Denial of parental care of father (a 3rd denial relied on which I missed)

Where breadwinner is male, family gets more than when breadwinner is female.

Double edge sword — based "solely and grossly" on gender.

The Chief Justice Reverse

Kahn v Shevin is close to being overhalling.

Rational basis: history & experience prove that there is economic justification for treating widows differently from widowers.

Douglas, J.

Dent

Brennan, J. Affirm

Doesn't agree with C/J that purpose of law to benefit widows.

Children widows get no benefits. Goal of statute is to provide for children

Cut-off point was $8,060.

Where surviving parent undertakes to care for child, then accords with statutory intent.

No rational basis - doesn't have to consider whether "suspect" classification

Brief spoke of deductions from benefits if baby sitter is employed ???

Stewart, J. Affirm

Agree with Brennan

Affirm

Affirm

Blackmun, J. Reverse (tentative)

Powell, J. Affirm
Close & difficult case for me,
but I agree with Brennan

Rehnquist, J. Reverse

Agree with C/J

Memo to Justice Powell from Penny

Re: No. 73-1892 Weinberger v. Wiesenfeld

I have gone over Justice Brennan's opinion carefully, and I think you can join it with little or no difficulty. The structure of the opinion draws heavily on the result (but none of the opinions) in Frontiero v. Richardson, premising that if the gender-based distinction in this statute rests on the same "archaic and overbroad generalizations" about the role of women that the Frontiero statute did, it would be invalid. The sentence at the top of p. 9, echoed in the last sentence before division III, states that conclusion in broad terms, and doesn't suggest that a rational basis (or legitimate state interest) might be dredged up to support such a sex-based distinction. Later in the opinion, however, it becomes clear that Justice Brennan is relying on the rational basis test to some extent. Since this first part is introductory, it may not lead to problems in misinterpreting the Court's approach.

I would have treated Flemming v. Nestor differently. It seems to be the analog to Dandridge v. Williams in the Social Security sector, declaring that classifications in benefit schemes are valid unless they lack a rational basis. I think I would have treated the "noncontractual" aspect of Flemming much as Justice Brennan did, but I would have noted explicitly that even if Flemming restricts all Social Security cases to a "rational basis" analysis, the classification used in this case would not even pass that test. Justice

Brennan's opinion winds up the discussion of Flemming, p. 11, with a statement that "benefits must be distributed according to classifications which do not without sufficient justification differentiate among covered employees solely on the basis of sex." I suspect the "sufficient justification" phrase is a compromise between "rational basis" analysis and "strict scrutiny," attempting to avoid defining what level of [redacted] public interest is required to justify a sex distinction. This statement does no damage to Flemming, and the Court will clearly be free to return to its restrictive language in other cases.

The opinion then rejects the Government's contention that the statute serves to compensate women for their economic inferiority. It surveys the features of the "mother's benefit" program and concludes that it is consistent only with the stated purpose of Congress: to aid the child rather than the parent, enabling the single parent to make a choice between working and staying home. On this basis, the opinion concludes that the sex classification is "entirely irrational" in relation to the Act's purpose. p. 15. This is the heart of the opinion, and I agree with it.

This is a carefully tempered opinion, obviously an attempt to garner a majority. I am inclined to think the [redacted] passage on p. 9 is not likely to produce misunderstanding, although if you're concerned about it, Justice Brennan might be willing to put in some "sufficient justification" language similar to that on p. 11. [redacted]

Penny

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 5, 1975

No. 73-1892 - Weinberger v. Wiesenfeld

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

PS

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 6, 1975

Re: No. 73-1892 -- Caspar W. Weinberger v.
Stephen Charles Wiesenfeld

Dear Bill:

Please join me.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 6, 1975

Re: No. 73-1892 - Weinberger v. Wiesenfeld

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 10, 1975

Re: No. 73-1892 - Weinberger v. Wiesenfeld

Dear Bill:

Please join me.

Sincerely,

Harry

Mr. Justice Brennan
cc: The Conference

3-12-75 LFP/gg

Cert in (A)

1st draft (no chambers draft) Clerk x224

No. 73-1892 WEINBERGER v. WIESENFELD

MR. JUSTICE POWELL, concurring.

I concur in the judgment and generally in the opinion of the Court. But I would identify the impermissible discrimination effected by § 402(g) somewhat more narrowly than the Court does. Social Security is designed, certainly in this context, for the protection of the family. Although it lacks the contractual attributes of insurance or an annuity, Flemming v. Nestor, 363 U.S. 603 (1950), it is a contributory system and millions of wage earners depend on it to provide basic protection for their families in the event of death or disability.

Many women are the principal wage earners for their families, and they participate in the social security system on exactly the same basis as men. When the mother is a principal wage earner, the family may suffer as great an economic deprivation upon her death as would occur upon the death of a father wage earner. It is immaterial whether the surviving parent

elects to assume primary child care responsibility rather than work, or whether other arrangements are made for child care. ~~is immaterial.~~ The statutory scheme provides benefits both to a surviving mother who remains at home and to one who works at low wages. A surviving father may have the same need for benefits as a surviving mother.* The statutory scheme therefore impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical. I find no legitimate governmental interest that supports this gender classification.

---

* I attach less significance to the view emphasized by the Court that a purpose of the statute is to enable the surviving parent to remain at home to care for a child. In light of the long experience to the contrary, one may doubt that fathers generally will forgo work and remain at home to care for children to the same extent that mothers may make this choice. ~~But~~ however, under the current statutory program, the payment of benefits is not conditioned on the surviving parent's decision to remain at home.

3/12/75 lfp/ss

No. 73-1892 WEINBERGER v. WIESENFELD

MR. JUSTICE POWELL, concurring.

I concur in the judgment and generally in the opinion of the Court. But I would identify the impermissible discrimination effected by § 402(g) somewhat more narrowly than does the Court. Social security is designed, certainly in this context, for the protection of the family. Although it lacks the contractual attributes of insurance or an annuity, Fleming v. Nestor, 363 U.S. 603 (1950), it is a contributory system and millions of wage earners depend on it to provide basic protection for their families in the event of death or disability.* Many women are the principal wage earners for their families, and they participate in the social security system on exactly the same basis as men.

*In terms of economic security in the event of death of a major contributor to family income, social security benefits may be taken into account in planning to meet, by life insurance or otherwise, family needs.

I agree with the Court that there is no legitimate justification for denying their families the same protection that is afforded the families of male wage earners.*

When the mother is a principal wage earner, the family may suffer as great an economic deprivation upon her death as would occur upon the death of a father wage earner. Whether the surviving parent elects to assume primary child care responsibility rather than work, or whether other arrangements are made for child care, is immaterial. The statutory scheme ~~is inherently discriminatory in that~~ ~~benefits are paid if the deceased wage earner is a father, but are withheld if the deceased wage earner is a mother.~~ I find no legitimate governmental interest that supports this gender classification.

*I attach less significance to the view emphasized by the Court that a purpose of the statute is to enable the surviving parent to remain at home to care for a child. In light of the long experience to the contrary, one may doubt that fathers generally will forgo work and remain at home to care for children to the same extent that mothers may make this choice.

Perry - Please add C.J.

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

Done. WE

CHAMBERS OF
THE CHIEF JUSTICE

March 13, 1975

Re: No. 73-1892 - Weinberger v. Wiesenfeld

Dear Lewis:

Please show me as joining your concurring opinion.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

March 13, 1975

No. 73-1892 Weinberger v. Wiesenfeld

Dear Bill:

I am circulating herewith a brief concurring opinion.

Although I am in general accord with your opinion, and join it, I personally would identify the impermissible discrimination somewhat more narrowly. I attach relatively little significance to the assumption that the surviving father may wish to remain at home to care for the child. In my view, this is immaterial.

Sincerely,

Mr. Justice Brennan

lfp/ss

cc: The Conference

MAR 13 1975

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SUPREME COURT OF THE UNITED STATES

No. 73-1892

Caspar W. Weinberger, Secretary of Health, Education, and Welfare, Appellant, *v.* Stephen Charles Wiesenfeld, Etc.	On Appeal from the United States District Court for the District of New Jersey.

[March —, 1975]

MR. JUSTICE POWELL, concurring.

I concur in the judgment and generally in the opinion of the Court. But I would identify the impermissible discrimination effected by § 402 (g) somewhat more narrowly than the Court does. Social Security is designed, certainly in this context, for the protection of the *family*. Although it lacks the contractual attributes of insurance or an annuity, *Flemming* v. *Nestor*, 363 U. S. 603 (1950), it is a contributory system and millions of wage earners depend on it to provide basic protection for their families in the event of death or disability.

Many women are the principal wage earners for their families, and they participate in the Social Security System on exactly the same basis as men. When the mother is a principal wage earner, the family may suffer as great an economic deprivation upon her death as would occur upon the death of a father wage earner It is immaterial whether the surviving parent elects to assume primary child care responsibility rather than work or whether other arrangements are made for child care. The statutory scheme provides benefits both to a surviving mother

who remains at home and to one who works at low wages. A surviving father may have the same need for benefits as a surviving mother.* The statutory scheme therefore impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical. I find no legitimate governmental interest that supports this gender classification.

*I attach less significance to the view emphasized by the Court that a purpose of the statute is to enable the surviving parent to remain at home to care for a child. In light of the long experience to the contrary, one may doubt that fathers generally will forgo work and remain at home to care for children to the same extent that mothers may make the choice. Under the current statutory program, however, the payment of benefits is not conditioned on the surviving parent's decision to remain at home.

SUPREME COURT OF THE UNITED STATES

No. 73–1892

Caspar W. Weinberger, Secretary of Health, Education, and Welfare, Appellant, v. Stephen Charles Wiesenfeld, Etc.

On Appeal from the United States District Court for the District of New Jersey.

[March 19, 1975]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE joins, concurring.

I concur in the judgment and generally in the opinion of the Court. But I would identify the impermissible discrimination effected by § 402 (g) somewhat more narrowly than the Court does. Social Security is designed, certainly in this context, for the protection of the *family*. Although it lacks the contractual attributes of insurance or an annuity, *Flemming* v. *Nestor*, 363 U. S. 603 (1960), it is a contributory system and millions of wage earners depend on it to provide basic protection for their families in the event of death or disability.

Many women are the principal wage earners for their families, and they participate in the Social Security system on exactly the same basis as men. When the mother is a principal wage earner, the family may suffer as great an economic deprivation upon her death as would occur upon the death of a father wage earner. It is immaterial whether the surviving parent elects to assume primary child care responsibility rather than work, or whether other arrangements are made for child care. The statu-

tory scheme provides benefits both to a surviving mother who remains at home and to one who works at low wages. A surviving father may have the same need for benefits as a surviving mother.[6] The statutory scheme therefore impermissibly discriminates against a female wage earner because it provides her family less protection than it provides that of a male wage earner, even though the family needs may be identical. I find no legitimate governmental interest that supports this gender classification.

[6]I attach less significance to the view emphasized by the Court that a purpose of the statute is to enable the surviving parent to remain at home to care for a child. In light of the long experience to the contrary, one may doubt that fathers generally will forgo work and remain at home to care for children to the same extent that mothers may make this choice. Under the current statutory program, however, the payment of benefits is not conditioned on the surviving parent's decision to remain at home.

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
		1/27/75						
Join LFP 3-14-75		2nd draft 3-5-75 3rd draft	Join WJB 3-5-75	Join WJB 3-6-75	Join WJB 3-6-75	Join WJB 3-10-75	Join WJB Concurring opinion 1st draft 3/13/75	Concur 3-7-75
		3-11-75						
					73-1892 Weinberger v.		Wiesenfeld	