MATHEWS V. LUCAS: THE COURT SUSTAINS ILLEGITIMACY DISCRIMINATIONS IN THE SOCIAL SECURITY ACT

In *Mathews v. Lucas*,[1] the United States Supreme Court upheld provisions of the Social Security Act which distinguish children on the basis of the legitimacy of their births.[2] In a series of cases prior to *Lucas*,[3] the Court had, with only one exception,[4] consistently invalidated state and federal legislative classifications based on illegiti-

1. 427 U.S. 495 (1976).

2. *See* notes 6-9 and accompanying text *infra*.

At common law the illegitimate was *filius nullius*—no one's son. Originally, the primary legal disability the illegitimate child encountered was an inability to inherit, but in later years other distinctions between the legal rights of legitimates and illegitimates developed. In the United States, progressive legislation has alleviated many of the burdens, and a few states have in effect abolished the status of illegitimacy. Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 75 (1959). In most states, illegitimates now stand on a par with legitimates with respect to their mothers. However, with respect to their fathers, distinctions which vary widely between and within states remain. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY, 1-8 (1971).

The Supreme Court decisions herein discussed have had significant impact in certain areas. Nevertheless, as Krause argues persuasively, comprehensive uniform legitimacy legislation is required if all vestiges of discrimination are to be eliminated. *Id.*; Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966).

Discriminatory provisions based on legitimacy do not affect only a small minority. Krause reports that in the United States in 1967 one in twelve births was illegitimate, and the rate of illegitimate births has been increasing rapidly. In some urban areas, as many as 40 to 50 per cent of all births are illegitimate. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY, 8 (1971).

See generally Gray & Rudovsky, *The Court Acknowledges the Illegitimate*: Levy v. Louisiana & Glona v. American Guarantee & Liability Ins. Co., 118 U. PA. L. REV. 1 (1969); Krause, *Equal Protection of the Illegitimate*, 65 MICH. L. REV. 477 (1966); Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962); Note, *Illegitimacy & Equal Protection*, 49 N.Y.U. L. REV. 479 (1974).

3. Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Richardson v. Griffin, 409 U.S. 1069 (1972), *aff'g mem.* 346 F. Supp. 1226 (D. Md. 1972); Richardson v. Davis, 409 U.S. 1069 (1972), *aff'g mem.* 342 F. Supp. 588 (D. Conn. 1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968).

4. Labine v. Vincent, 401 U.S. 532 (1971). *See* notes 31-33 and accompanying text *infra*.

macy as violative of the fourteenth amendment equal protection clause or of the equal protection component of fifth amendment due process.[5] However, in sustaining the scheme at issue in *Lucas*, the Court determined that under certain circumstances legislative distinctions between legitimate and illegitimate children are constitutionally permissible.

The provisions of the Social Security Act examined in *Lucas* provide monthly benefits to surviving children of deceased insured wage earners who are dependent on their parent at the time of death.[6] Under the Act, a legitimate child is presumed dependent.[7] Further, a child is deemed to be legitimate and thereby presumed dependent if at least one of the following requirements is met:[8] (1) He is entitled to inherit personal property from the parent under state intestacy law;[9] (2) His

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5. The equal protection clause found in the fourteenth amendment applies only to the states and not to the federal government. The due process clause of the fifth amendment does apply to the federal government. The Court has recognized that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [W]e do not imply that the two are always interchangeable phrases. But . . . discrimination may be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The Court has thus applied equal protection analysis to federal as well as state legislative discriminations. See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Richardson v. Belcher, 404 U.S. 78 (1971).

6. Every child . . . of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child—
(A) has filed application for child's insurance benefits,
(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, . . . and
(C) was dependent upon such individual—
. . .
(ii) if such individual has died, at the time of such death,
. . .
shall be entitled to a child's insurance benefit. . . .
42 U.S.C. § 402(d)(1) (1970).

7. A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—
(A) such child is neither the legitimate nor adopted child of such individual, or
(B) such child has been adopted by some other individual. For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.
42 U.S.C. § 402(d)(3) (1970).

8. *Id.*

9. In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this sub-chapter, the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property

mother and father went through a marriage ceremony resulting in a marriage which was invalid only because of some minor legal defect;[10] (3) The insured parent had prior to his death (a) acknowledged the child in writing, (b) been decreed by a court to be the parent of the child, or (c) been ordered by a court to contribute to the child's support.[11] If the

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. . ., if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death. . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

42 U.S.C. § 416(h)(2)(A) (1970).

The Secretary of H.E.W. disagreed with the Supreme Court's position, first stated in Jimenez v. Weinberger, 417 U.S. 628, 631 (1974), that children who can inherit by state intestacy law are presumptively dependent under the statute. The Secretary argued that § 402(d)(3), *see* note 7 *supra*, which deems certain children to be legitimate and therefore dependent, applies only to children who meet the requirements of § 416(h)(2)(B) or § 416(h)(3). Thus, under the Secretary's interpretation, children who meet only the provisions of § 416(h)(2)(A) (eligible to inherit under state intestacy law) must also prove dependency by showing that they were living with or supported by the deceased parent at the time of death. Brief for Appellee at 38 n.14, Norton v. Mathews, 427 U.S. 524 (1976), *citing* Social Security Claims Manual §§ 2408, 2418, 2421 (March 1975); Social Security Ruling 61-48, 1960-1961 Cum. Bull. 31.

The Court, in *Lucas*, defended its interpretation of the statute. 427 U.S. at 514 n.17. While the issue has no direct bearing on the decision in this case, as appellees were not in that disputed class of illegitimates, it does affect the reasonableness of the statutory scheme as a whole. *See* note 57 *infra*.

For discussions of the two alternative interpretations of this statutory provision, see Norton v. Weinberger, 390 F. Supp. 1084, 1090-92 (majority opinion), 1093 n.1 (Winter, J., dissenting) (D. Md. 1975).

10. If an applicant is a son or daughter of a fully or currently insured individual but is not (and is not deemed to be) the child of such insured individual under subparagraph (A), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, of such applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of paragraph (1)(b), would have been a valid marriage.

42 U.S.C. § 416(h)(2)(B) (1970).

11. An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection, shall nevertheless be deemed to be the child of such insured individual if:

(C) In the case of a deceased individual—
(i) such insured individual—
(I) had acknowledged in writing that the applicant is his son or daughter,
(II) had been decreed by a court to be the father of the applicant, or
(III) had been ordered by a court to contribute to the support of the applicant because the applicant was his son or daughter.

and such acknowledgement, court decree, or court order was made before the death of such insured individual, or

(ii) such insured individual is shown by evidence satisfactory to the Secretary to have been the father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died.

42 U.S.C. § 416(h)(3) (1970).

child is unable to meet any of these statutory presumptions of dependency, he bears the burden of proving that the deceased was his parent, and was living with him or contributing to his support at the time of his death.[12]

The appellees in *Lucas*, illegitimate children of a deceased insured wage earner, were unable to meet any of the statutory presumptions or to prove dependency.[13] They appealed the administrative decision denying them benefits, arguing that when paternity is not at issue, it is a denial of equal protection to require proof of dependency only of children who do not meet any of the statutory presumptions. The heart of the argument was the reasonableness of the presumptions. The district court accepted the equal protection argument and ordered payment of benefits,[14] whereupon the Secretary of Health, Education and Welfare appealed.[15] The Supreme Court held that the classification scheme does not violate the equal protection component of fifth amendment due process because the classifications are reasonably related to the likelihood of dependency on the insured parent at the time of death.[16]

Over the years the Supreme Court has developed a two-tiered approach in analyzing equal protection challenges to legislative classifications.[17] If the legislative classification involves a "suspect class,"[18]

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12. 42 U.S.C. § 416(h)(3)(C)(ii) (1970). *See* note 11 *supra*.

Note that under § 402(d)(3)(B), a legitimate child who has been legally adopted by another individual is not presumed to be dependent upon his natural parent. *See* note 7 *supra*. Here, too, the child must prove dependency if claiming benefits from the account of that parent. Similarly, 402(d)(4) provides that step-children must prove their dependency on the step-parent. Thus the requirement for proving dependency does not apply exclusively to illegitimate children, nor does it apply to all illegitimate children. The overwhelming number of children affected by the provision, however, are illegitimate.

13. The Lucas children's parents lived together unmarried from 1948 to 1966. The children were born to them in 1953 and 1960, respectively. In 1966 the parents separated, and in 1968 the father died. Mathews v. Lucas, 427 U.S. 495, 497 (1976). Thus although the children had lived with and had been supported by their father for most of their lives, they failed to meet the requirements of the Act because they could not prove dependency at death.

14. Lucas v. Secretary, Dep't of H.E.W., 390 F. Supp. 1310 (D.R.I. 1975).

15. 28 U.S.C. § 1252 (1970) authorizes direct appeal to the Supreme Court from a decision of any court of the United States which holds an act of Congress unconstitutional or when the United States, any of its agencies, or any officer or employee thereof, in his official capacity, is a party to the action.

16. Mathews v. Lucas, 427 U.S. 495, 509 (1976).

17. For a thorough introduction to equal protection, see G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 657-897 (9th ed. 1975).

18. The Court has described various indicia of suspectness: "[a]n immutable characteristic determined solely by the accident of birth . . . [which] bears no relation to ability

or intrudes upon a "fundamental interest,"[19] it is subject to strict judicial scrutiny and will be invalidated unless narrowly tailored to achieve a "compelling" governmental interest.[20] Other legislation is subject to a much less demanding "rational basis" test, requiring only that the legislative scheme bear some rational relationship to legitimate government purposes.[21] The Court's equal protection decisions, however, do not all fit easily into one category or the other, and many lower courts and commentators have suggested that in fact the Court frequently has employed an unarticulated middle standard of review.[22]

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to perform or contribute to society." Frontiero v. Richardson, 411 U.S. 677, 686 (1973); a class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

The Court has found race, national origin, and alienage to be suspect classes. *See* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Bolling v. Sharpe, 347 U.S. 497 (1954) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin); Korematsu v. U.S., 323 U.S. 214 (1944) (race); Hirabayashi v. U.S., 320 U.S. 81 (1943) (national origin).

Although the plurality opinion in Frontiero v. Richardson, 411 U.S. 677, 688 (1971), found that sex met the criteria of suspectness, sex has not yet been held suspect by a majority of the Court, and recent cases dealing with sex discriminations do not rely on suspectness. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

19. Fundamental interests include: voting and full access to the ballot, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); equal access to the judicial process in criminal cases, Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); right of free interstate movement, Shapiro v. Thompson, 394 U.S. 618 (1969); marriage and procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942); free speech, Police Dep't v. Mosley, 408 U.S. 92 (1972); and perhaps privacy, Roe v. Wade, 410 U.S. 113 (1973).

20. Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969).

21. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972). *See also* Reed v. Reed, 404 U.S. 71, 76 (1971), *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). "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.'" (emphasis added).

22. *See, e.g.*, Tanner v. Weinberger, 525 F.2d 51, 54 n.2 (6th Cir. 1975); Lucas v. Secretary, 390 F. Supp. 1310, 1316 n.5 (D.R.I. 1975); Norton v. Weinberger, 364 F. Supp. 1117, 1122 (D. Md. 1973), *vacated and remanded*, 418 U.S. 902 (1974).

Certain members of the Supreme Court have acknowledged the Court's departure from a rigid two-tier standard, notably Mr. Justice Marshall. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting). Justice White indicated his agreement with Justice Marshall's "spectrum of standards" notion, in a concurring opinion in Vlandis v. Kline, 412 U.S. 441, 458 (1973).

For a comprehensive analysis of developments in the Court's approach to equal protection problems, see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

The judicial standard of review appropriate when illegitimacy classifications are at issue has never been clearly defined. Although the Supreme Court has not declared illegitimacy to be a suspect class, in all but one of the illegitimacy cases prior to *Lucas*,[23] the Court employed a standard of review stricter than minimum rationality.

Levy v. Louisiana[24] and *Glona v. American Guarantee & Liability Insurance Company*,[25] both involving the Louisiana wrongful death statute,[26] are the earliest Supreme Court decisions in which legislative classifications based on illegitimacy were invalidated. Although in both cases the Court articulated a rationality standard,[27] the *Levy* opinion implied that fundamental interests and stricter scrutiny might have been involved.[28] Because it appeared that the legislative schemes in *Levy* and *Glona*[29] would have survived the characteristically deferential rational basis test, several commentators suggested that the cases indicated a more stringent standard of review, and predicted the demise of virtually all legislative classifications based on illegitimacy.[30]

Three years later this optimism was diminished when, in *Labine v. Vincent*,[31] the Court upheld classifications which discriminated against illegitimates in state intestacy laws. The Court emphasized the broad powers of the state to regulate property dispositions and to protect

23. Labine v. Vincent, 401 U.S. 532 (1971).

24. 391 U.S. 68 (1968).

25. 391 U.S. 73 (1968).

26. *See* note 29 *infra*.

27. "[T]he test . . . is . . . whether the line drawn is a rational one." Levy v. Louisiana, 391 U.S. 68, 71 (1968); "rational basis," Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 75 (1968).

28. "[W]e have been extremely sensitive when it comes to basic civil rights . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. . . . The rights asserted here involve the intimate, familial relationship between a child and his own mother." 391 U.S. at 71.

29. In *Levy*, the Court held that the Louisiana wrongful death statute, construed by the Supreme Court of that state as granting a right of recovery for the death of a parent only to legitimate children, constituted an invidious discrimination impermissible under the fourteenth amendment. *Glona* was a companion case to *Levy*, in which the Court invalidated the state's construction of the same statute to bar recovery to a parent for the wrongful death of an illegitimate child.

30. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY, 84 (1971); Gray & Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana and Glona v. American Guarantee & Liability Ins. Co., 118 U. PA. L. REV. 1, 2 (1969).

31. 401 U.S. 532 (1971). The provisions under review in *Labine* provided that unlegitimated illegitimate children could inherit by intestacy from their father only if he left surviving him no other descendants, ascendants, collateral relations, or wife. *Id.* at 534.

family life,[32] and seemed to imply that not even a rational basis was required to sustain state legislation in areas traditionally reserved to the states.[33]

The fears *Labine* aroused as to the future success of equal protection challenges to illegitimacy discriminations were mitigated a year later by the Court's decision in *Weber v. Aetna Casualty and Surety Company*.[34] The Court in *Weber* did not overrule *Labine*,[35] yet it

32. *Id.* at 538.

33. "*Even if we were to apply the 'rational basis' test* . . . the statute clearly has a rational basis. . . ." *Id.* at 536 n.6. (emphasis added).

The Court distinguished *Levy* and *Glona* on grounds that in *Labine* the state had created no "insurmountable barrier" to the illegitimate child, because the father could have allowed the child to inherit by leaving a will or legitimating the child. *Id.* at 539.

The dissent in *Labine* specifically noted that there was no need to address the issue of a suspect class, as the statute did not meet even the minimal requirements of the rational basis test. *Id.* at 551 n.18 (Brennan, Douglas, White & Marshall, JJ., dissenting).

In light of the cases which followed *Labine*, some lower courts suggested that *Labine* was an aberration and questioned its continued vitality even on its particular facts. *See, e.g.*, Lucas v. Secretary, Dep't of H.E.W., 390 F. Supp. 1310, 1317 n.6 (D.R.I. 1975); Norton v. Weinberger, 364 F. Supp. 1117, 1124 (D. Md. 1973), *vacated and remanded*, 418 U.S. 902 (1974).

In fact, in Trimble v. Gordon, 430 U.S. 762 (1977), a decision subsequent to *Lucas*, the Supreme Court all but overruled *Labine*. The Illinois Supreme Court had relied on *Labine* in upholding a state statute which prevented illegitimate children from inheriting by intestacy from their fathers. The U.S. Supreme Court reversed, and in doing so clearly rejected the rationale of *Labine*. In *Trimble*, the Court acknowledged that while deference is due to states in certain areas "there is a point beyond which such deference cannot justify discrimination." *Id.* at 767 n.12. The Court also repudiated the "insurmountable barrier" theory by which *Labine* had previously been distinguished, as an "analytical anomaly." *Id.* at 773. Thus, while the Court did not explicitly overrule *Labine*, it is clear that *Trimble* has left it with little, if any, value as precedent.

But see Fiallo v. Bell, 430 U.S. 787 (1977), handed down with Trimble v. Gordon. In *Fiallo*, the Court upheld provisions in the immigration laws which differentiate between legitimate and illegitimate children and their fathers. The opinion is reminiscent of *Labine* in its rationale that because immigration is a political matter wholly in the control of Congress, extreme judicial deference to Congressional decisions is appropriate.

34. 406 U.S. 164 (1972). In *Weber*, the Court found unconstitutional a provision of Louisiana's Workmen's Compensation law which, while allowing unacknowledged illegitimate children to receive benefits, relegated them to a less favored class whereby they could receive only if the maximum allowable benefits were not exhausted by more favorably classified dependents, including legitimate children.

35. *Labine* was distinguished on the grounds of the traditional broad state authority in regulating property dispositions, and by the fact that there was an "insurmountable barrier" to the child in *Weber* which was absent in *Labine*. The "insurmountable barrier" was a Louisiana statute which prevented the parents in *Weber* from acknowledging the child because the parents had not been legally free to marry each other at the time of the child's conception. *Id.* at 171.

clearly suggested that illegitimacy classifications were subject to a standard of review stricter than mere rationality.[36] The Court formulated a dual test: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[37] This, the Rehnquist dissent argued,[38] was a "hybrid" between the two standards traditionally employed in equal protection cases.

Finally, in *Jimenez v. Weinberger*,[39] the Supreme Court specifically

36. The language of the Court implied that both fundamental interests and a suspect class were involved.

> This Court requires that a statutory classification bear some rational relationship to a legitimate state purpose. . . . [B]ut when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises stricter scrutiny.

Id. at 172.

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Id. at 175.

37. *Id.* at 173. In applying this standard, the Court conceded the importance of the state's interest in promoting legitimate family relationships, but found that the challenged provisions did not promote that interest. "[It cannot] be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation." *Id.* The Court thus concluded that the classification at issue was "justified by no legitimate state interest, compelling or otherwise." *Id.* at 176. This conclusion would seem to suggest that, despite the Court's language indicating that a "stricter scrutiny" was applicable to illegitimacy cases, such stricter scrutiny was not in fact required to invalidate the *Weber* discrimination.

38. *Id.* at 181 (Rehnquist, J., dissenting).

39. 417 U.S. 628 (1974). *See* notes 55-56 *infra*.

In the time between the *Weber* and *Jimenez* decisions, the Court decided four illegitimacy cases, invalidating the challenged provisions in each. The Court's opinions in Gomez v. Perez, 409 U.S. 535 (1973) and in New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) are brief and conclusory, with minimal analysis in equal protection terms. But the results in the cases implied that the Court employed a standard stricter than traditional rationality. In *Gomez*, the Court held that "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.'" 409 U.S. at 538. In *Cahill*, a state welfare program limiting benefits to households in which the parents were married and had at least one minor child in common was held to constitute a denial of equal protection to illegitimate children. The Court stated that the *Gomez* rationale applied equally to support provided by the government as to support provided by fathers.

Davis v. Richardson, 342 F. Supp. 588 (D. Conn. 1972), and Griffin v. Richardson, 346 F. Supp. 1226 (D. Md. 1972), were affirmed together by the Court without opinion, 409

stated that it did not reach the issue of whether illegitimacy is suspect and thereby subject to strict scrutiny. However, the Court rejected the argument that, in areas of social welfare, the deferent rational basis test[40] was necessarily controlling.[41]

In summary, the illegitimacy decisions prior to *Lucas* appeared to apply a standard of review somewhere between traditional rationality and strict scrutiny. In addition, because of the *Labine* decision, the cases were difficult to reconcile. Thus, lower courts have had difficulty in ascertaining the appropriate standard of review[42] to be used in

U.S. 1069 (1972). *Davis* and *Griffin* invalidated the same Social Security provision, 42 U.S.C. § 403(a) (1970), which provided that if the maximum award available on a single account was not sufficient to meet the claims of all entitled (the insured worker and/or all his eligible dependents), the benefits of certain illegitimate children would be reduced first and even eliminated before the benefits of any other eligible individuals would be reduced. The *Davis* court based its decision on the rationale basis test. 342 F. Supp. at 591. In *Griffin*, the district court concluded that a review of prior Supreme Court cases did not clarify the applicable standard of review, but that the provision was invalid "whether the standard is that the scheme must be 'rationally based and free from invidious discrimination,' or that it is a 'patently arbitrary classification utterly lacking in rational justification,' or that there is no 'compelling state interest' to justify the classification." 346 F. Supp. at 1233.

40. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426.

Dandridge v. Williams, 397 U.S. 471, 485 (1970).

Applying these standards, the Court in *Dandridge* upheld Maryland's AFDC program which limited the monthly grant per family to a maximum of $250, regardless of the family's size or estimated needs.

41. Jimenez v. Weinberger, 417 U.S. 628, 633-34 (1974). The Court distinguished *Dandridge* on grounds that the deference of that decision was due to the finite resources available to the state, whereas there was no such problem in *Jimenez*.

42. *See, e.g.*, Lucas v. Secretary, Dep't of H.E.W., 390 F. Supp. 1310 (D.R.I. 1975), *rev'd sub nom.* Mathews v. Lucas, 427 U.S. 495 (1976); Eskra v. Morton, 380 F. Supp. 205 (W.D. Wis. 1974), *rev'd*, 524 F.2d 9 (7th Cir. 1975); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md. 1972), *aff'd mem.*, 409 U.S. 1069 (1972).

See also Tanner v. Weinberger, 525 F.2d 51, 54 n.2 (6th Cir. 1975) ("more than a rational basis and less than a compelling governmental interest"); Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *aff'd mem.*, 418 U.S. 901 (1974) (rational basis); Norton v. Weinberger, 364 F. Supp. 1117, 1122 (D. Md. 1973), *vacated and remanded*, 418 U.S. 902 (1974) (means "must bear a direct and primary correlation to an actual statutory goal or purpose"); Miller v. Laird, 349 F. Supp. 1034, 1046 (D.D.C. 1972) ("stricter scrutiny"); Watts v. Veneman, 334 F. Supp. 482, 485 (D.D.C. 1971), *rev'd in part, aff'd in part*, 476

determining whether specific legislative provisions constitute a denial of equal protection to illegitimates.

Mathews v. Lucas did not wholly resolve these difficulties. The opinion did, however, make explicit that illegitimacy is not entitled to suspect status.[43] The Court found that while illegitimacy does bear some of the indicia of suspectness, "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."[44] The Court held that illegitimacy classifications are, therefore, not subject to "our most exacting scrutiny."[45] As the dissent made clear, however, the majority still failed to define the appropriate level of scrutiny.[46] The Court referred to "this realm of less than strictest scrutiny,"[47] and a scrutiny that is "not a toothless one,"[48] but ultimate-

F.2d 529 (D.C. Cir. 1973) (classification sustained unless "patently arbitrary [and] utterly lacking in rational justification").

The Kentucky Supreme Court was particularly cynical about the ambiguity of the Court's standards in this area.

> It is readily apparent that the meaning of the equal protection clause cannot be ascertained from what it says, nor even from what the Supreme Court has said about it. As in *Regina v. Ojibway** [Reprinted by permission in Stevens v. City of Louisville, 511 S.W.2d 228, 230-31 (Ky. App. 1974)] a pony was found to be a small bird, so under the 14th Amendment an illegitimate child may be either a speckled bird or a jackass, depending on its current aspect as (and when) viewed by the keeper of the royal secrets of the Constitution. Indeed it appears that here is a corner of the world Alice in Wonderland would not find unfamiliar.

Pendleton v. Pendleton, 531 S.W.2d 507, 510 (Ky. 1975).

43. As noted in Brief for Appellant at 40, Norton v. Mathews, 427 U.S. 524 (1976), some of the justices had previously indicated a willingness to find illegitimacy classifications subject to strict scrutiny. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 61 (Stewart, J., concurring), 108-09 (Douglas & Marshall, JJ., dissenting) (1973).

In addition, some lower courts had expressed their beliefs that illegitimacy classifications should be subject to strict scrutiny. Lucas v. Secretary, Dep't of H.E.W., 390 F. Supp. 1310, 1317 (D.R.I. 1975); Eskra v. Morton, 380 F. Supp. 205, 215 (W.D. Wis. 1974), *rev'd*, 524 F.2d 9 (7th Cir. 1975).

44. Mathews v. Lucas, 427 U.S. 495, 506 (1976). It is curious that in this statement the Court included women with Negroes, as race has clearly been found to be suspect, but sex has not. *See* note 18 *supra*. Perhaps the Court, or at least Justice Blackmun, believes sex bears the indicia of suspectness, but is reluctant to make such a determination as long as ratification of the E.R.A. remains before the state legislatures. *See* Frontiero v. Richardson, 411 U.S. 677, 692 (1971) (Powell & Blackmun, JJ., concurring).

45. Mathews v. Lucas, 427 U.S. 495, 506 (1976).

It is important to note that while the dissent vigorously objected to the decision in this case, it did not reply on a finding of suspectness or fundamental rights to support its position. The dissent seemed to suggest a middle standard. "[T]he Court should be especially vigilant in examining any classification which involves illegitimacy." *Id.* at 520. (Stevens, Brennan & Marshall, JJ., dissenting).

46. *Id.* at 519.

47. *Id.* at 510.

48. *Id.*

ly appeared to rely on the traditional rationality standard.[49]

The degree of scrutiny in fact applied in *Lucas* can be discerned in the Court's analysis of the particular statutory scheme. The Court reasoned that the statutory classifications were "obviously" created to serve the legitimate government interest in administrative convenience by minimizing the need for individual determinations of eligibility.[50] Prior illegitimacy cases were distinguished in two ways. First, under the provisions at issue in most of the earlier cases,[51] "not only was the legitimate child automatically entitled to benefits, but an illegitimate child was denied benefits solely and finally on the basis of illegitimacy, and regardless of any demonstration of dependency or any other legitimate factor."[52] Here, "by contrast, the statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations."[53] Thus, in contrast to plaintiffs in these earlier cases, the Lucas children were denied benefits not because of their illegitimacy *per se*, but because they did not meet the constitutionally permissible requirement of dependency. Second, *Jimenez*[54] was distinguished in that the children there had been conclusively denied benefits,[55] whereas the children in *Lucas* had an

49. "We conclude that the statutory classifications are permissible, however, because they are reasonably related to the likelihood of dependency at death." *Id.* at 509. "Our role is simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions. . . ." *Id.* at 516.

50. *Id.* at 509.

The administrative convenience rationale necessarily assumes that the cost of paying benefits to children who are not in fact dependent but who meet the statutory presumptions of dependency is less than the cost of making individual determinations of dependency for all children. Given the large number of children who qualify for benefits under the statutory presumptions without in fact meeting the dependency requirement, the validity of this rationale is questionable. *Cf.* Califano v. Goldfarb, 430 U.S. 199, 219-20 (1977) (Stevens, J., concurring). (similar argument made in refutation of administrative convenience rationale in the context of social security widow's benefits).

51. 427 U.S. at 511. The Court here distinguished New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Richardson v. Griffin, 409 U.S. 1069 (1972); Richardson v. Davis, 409 U.S. 1069 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

52. Mathews v. Lucas, 427 U.S. at 511.

53. *Id.* at 513.

54. Jimenez v. Weinberger, 417 U.S. 628 (1974).

55. *Jimenez* was a challenge to 42 U.S.C. § 416(h)(3)(B)(ii) (1970), virtually identical to § 416(h)(3)(C)(ii) involved in *Lucas* (*see* note 11 *supra*), but relating to dependents of disabled insured wage earners rather than dependents of deceased insured wage earners. Under 42 U.S.C. § 416(h)(3)(A)(ii) (1970) there are virtually identical provisions applicable to children of insured wage earners entitled to retirement benefits. All of these

opportunity to prove dependency and thus establish their eligibility. Finally, the Court concluded that the statutory presumptions of dependency were reasonably related to the controlling factor—dependency on the insured parent at the time of his death,[56] and were, therefore, constitutional.

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provisions require children who are unable to meet the statutory presumptions of dependency to prove that they were dependent on the insured parent at the onset of his entitling event (retirement, disability, or death).

There is, however, a practical distinction in the provisions as they apply to children of deceased insured, and to children of disabled or retired insureds. The *Jimenez* children were born after the onset of their father's disability. They could not, therefore, possibly have been living with or supported by their father at the onset of his disability and thus could not possibly meet the proof requirement. A similar problem could apply to afterborn children of retired insureds. *See, e.g.*, Rhodes v. Weinberger, 388 F. Supp. 437 (E.D. Pa. 1975); Severance v. Weinberger, 362 F. Supp. 1348 (D.D.C. 1973). The problem does not arise with survivor's benefits. There are no such afterborn children simply because the insured worker cannot continue to produce children after the onset of the entitling event—death. (Where the child has been conceived before the father's death, but is born thereafter, and at the time of his death the father was living with or supporting the child's mother, it has been held that the child was sufficiently "in being" to meet the living with or supported by requirements and was entitled to benefits. Wagner v. Finch, 413 F.2d 267, 268 (5th Cir. 1969).).

The Supreme Court in *Jimenez* relied heavily on the fact that afterborn illegitimate children are conclusively denied benefits, with no opportunity to prove their actual dependency on the wage earner. The Secretary argued, however, that the Act was intended only to replace actual support enjoyed prior to the onset of the disability (or death or retirement), that no children born after the onset of the disability were intended to receive benefits under the Act, and that such a distinction was necessary to prevent spurious and collusive claims. 417 U.S. at 633-35.

The Court rejected the Secretary's view of the purpose of the Act and noted that afterborn children who meet the statutory presumptions are eligible for benefits even though they could not possibly have been dependent on the wage earner at the onset of his disability. Therefore, the Court held that the purpose of the Act was not exclusively to replace support previously received but lost because of the parent's disability. *Id.* at 634-37. The Court thus concluded that since "the potential for spurious claims is the same as to both . . . to conclusively deny one subclass [of illegitimates] benefits presumptively available to the other denies the former the equal protection of the laws." *Id.* at 637.

56. In agreeing that dependency at the time of the insured parent's death is the controlling factor, the Court in *Lucas* assumed the Secretary's position that the Act was intended to replace only that support actually lost because of the parent's death. However, parallel statutory schemes were at issue in Jimenez v. Weinberger, 417 U.S. 628 (1974), and the Court there appeared to reject this view of the purpose of the Act. *See* note 55 *supra*.

In reliance on *Jimenez*, two lower federal courts had held the provisions at issue in *Lucas* unconstitutional. These courts interpreted *Jimenez* as finding that the purpose of the Act was not merely to replace support lost because of the parent's death, but rather to provide benefits to all children of deceased insured wage earners. Further, these courts noted that Gomez v. Perez, 409 U.S. 535 (1973), held that if an enforceable right

The readiness with which the Court found certain of these presumptions reasonable is troubling. For example, the Court was able to conclude that state intestacy law is reasonably related to the likelihood that at the time of his death, a parent was supporting his illegitimate child.[57] Several of the other presumptions seem scarcely less tenuous,[58] and there is some limited statistical evidence to suggest that they in fact bear little relationship to the likelihood of dependency.[59] It is

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of support is created for the legitimate child, it must also apply to the illegitimate child. *See* note 39 *supra*. Thus, the courts reasoned that the provisions requiring only certain illegitimate children to prove actual dependency were unconstitutional because they operated to treat differently children who were similarly situated with respect to the purpose of the Act. Tanner v. Weinberger, 525 F.2d 51 (6th Cir. 1975); Lucas v. Secretary, Dep't of H.E.W., 390 F. Supp. 1310 (D.R.I. 1975).

Another lower federal court, however, found *Jimenez* distinguishable and reached the same decision as the Supreme Court in *Lucas*. In Norton v. Weinberger, 390 F. Supp. 1084 (D. Md. 1975), the court found the statements in *Jimenez* concerning the Act's purpose narrowly limited to the case of conclusively excluded afterborn children, and thus inapplicable where the insured worker is deceased. *See* note 55 *supra*.

The Court in *Lucas* did not take any definite stand on the purpose of the Act, saying only that appellees failed to sustain the burden of showing the Secretary's interpretation to be wrong. 427 U.S. at 508 n.14. The Court did not appear to recognize any discrepancy in its interpretation of the statutory provisions in *Jimenez* and in *Lucas*.

57. Mathews v. Lucas, 427 U.S. 495, 514-15 (1976). "[S]uch legislation [state intestacy laws] also reflects to some degree the popular conception within the jurisdiction of the felt parental obligation to such an 'illegitimate' child in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life." *Id.* at 515.

The Secretary and the Court did not agree as to whether this provision, 42 U.S.C. § 416(h)(2)(A) (1970), is accompanied by a presumption of dependency. *See* note 9 *supra*. The court in Norton v. Weinberger, 390 F. Supp. 1084 (D. Md. 1975), upheld the classification scheme as rationally based, but nevertheless felt compelled to disagree with the Court's dicta in *Jimenez* regarding this provision, stating: "This is significant to the ultimate result in *Norton* because, if an individual were deemed dependent due to the unrelated circumstance that he is favorably treated under his state's intestacy laws, a significant question would be raised about the rational basis for the statutory scheme." *Id.* at 1090 n.7.

58. 42 U.S.C. §§ 416(h)(2)(B) and 416(h)(3) (1970). *See* notes 10 and 11 *supra* for text of provisions.

59. In Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *aff'd mem.*, 418 U.S. 901 (1974), which involved the same statutory challenge as *Jimenez* (*see* note 55 *supra*), the court noted:

> In support of his argument the Secretary has introduced statistics from a study of absent father families by the Department of Health, Education and Welfare which demonstrate that where the father was or had been married to the mother 18.3% of the families received contributions from the father whereas in families where the father had never been married to the mother only 10.2% received such contributions. It can, with equal accuracy, be said that of the former group fully 82% of such families did *not* receive support contributions from the father, yet the children would nonetheless be eligible for insurance benefits under [42 U.S.C.] § 402(d). It also appears, by reversing the figures in this manner, that only a slightly greater percentage of families in the latter group did not receive contributions from the father, there being a difference of just slightly more than 8%.

obvious that under the statutory presumptions, many children must be eligible for benefits without in fact being any more dependent than the Lucas children. Indeed, even if it is undisputed that they are not in fact dependent, the children nevertheless qualify.[60] Where paternity is not at issue, these unsupported legitimate and illegitimate children stand in the same position with respect to the purpose of the Act,[61] yet are treated differently.[62] Solely because of their illegitimacy, certain children bear a burden of proof, not imposed on others, which effectively excludes them from benefits other unsupported children receive by presumption.

Any classification necessarily implies less than absolute precision. The critical issue is how closely the assumption must conform to reality in order to be "reasonable." The Court in *Lucas* stated that the justification for such classifications need not be "scientifically substantiated"[63] and that the burden is upon the challenger to demonstrate the insubstantiality of the assumption created by the classification.[64]

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478 F.2d at 306 n.9.

Appellant's brief in *Norton v. Mathews*, a companion case to *Lucas*, cites a Baltimore study indicating that "[i]n 1971 . . . less than 25 per cent of the parents . . . who were under a court support order in Baltimore City were actually making support payments." Brief for Appellant at 52, Norton v. Mathews, 427 U.S. 524 (1976), *citing, City Seeking Aid to Enforce Support Payment Collection*, The Sun (Baltimore), Jan. 11, 1971, at col. 5.

In Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. REV. 479, 528 (1974), the authors effectively argue that such data

> compels the conclusion that a much more accurate categorization would be to grant the presumption to all children whose fathers are living with them and to require all children of absent fathers to establish dependence. Such a presumption would preserve the requirement of dependency, but would be consistent with Congress' evident desire not to bear the cost of requiring all children to prove dependence. Significantly, it would also eliminate any hint of discriminatory treatment toward illegitimate children.

Such a scheme would come considerably closer than the scheme upheld in *Lucas* to meeting the Court's articulated standard—"carefully tuned to alternative considerations." Mathews v. Lucas, 427 U.S. 495, 513 (1976). However, the Court in *Lucas* declined to speculate about potentially "better" alternative classifications. *Id.* at 515.

60. 427 U.S. at 521 (Stevens, J., dissenting).

61. This assumes, as the Court did, that the purpose of the Act is only to replace support actually lost by the parent's death. *See* note 56 *supra*.

62. *Cf.* Reed v. Reed, 404 U.S. 71, 77 (1971). (In the context of a sex discriminatory provision, the Court said: "Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to [the] objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the equal protection clause.").

63. Mathews v. Lucas, 427 U.S. 495, 510 (1976).

64. *Id.* Query how much and what kind of evidence would be necessary to sustain the burden. The statistics cited, *see* note 59 *supra*, as well as others, were available to the Court in deciding *Lucas*, since *Norton* was a companion case.

The result in *Lucas* suggests that if any conceivable relationship exists, the classification is permissible. Only if the presumptions are "unfounded, or so indiscriminate as to render the statutory classification baseless,"[65] will the scheme be invalidated. This language, and the readiness with which the Court was willing to speculate as to the reasonableness of the statutory presumptions, seem indistinguishable from the deference accorded legislative classifications under the rational relation test.[66] Under any stricter standard, it would, as the dissent suggested, seem difficult to sustain such tenuous relationships justified by no "weightier government interest than merely 'administrative convenience.' "[67]

How can the Court's apparent shift from a middle or higher standard of review in prior illegitimacy cases to the deferential review in *Lucas* be explained? The critical distinction the Court perceived between *Lucas* and prior cases invalidating illegitimacy discriminations is that in the provisions at issue in *Lucas*, status of birth is not itself the basis of eligibility or ineligibility. Rather, the statute is "carefully tuned to alternative considerations."[68] Illegitimacy is considered merely as indicating the likelihood of the supposedly determining factor—dependency. In addition, if the illegitimate fails to qualify under the statutory presumptions, he nevertheless has the opportunity to establish eligibility by proving actual dependency.[69]

Early in the opinion the Court cited with approval the *Weber* test,[70] which requires balancing the conflicting governmental and individual interests involved. Applying this approach, the Court seems to hold that when the denial is not *per se* based on illegitimacy, and when the

65. 427 U.S. at 516.

66. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Flemming v. Nestor, 363 U.S. 603, 611 (1960); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See* note 40 *supra*.

67. Mathews v. Lucas, 427 U.S. 495, 519 (1976) (Stevens, Brennan & Marshall, JJ., dissenting).

Administrative convenience has not generally been found to be a particularly strong government interest, particularly when "stricter scrutiny" has been applied. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 688 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972). Occasionally administrative convenience arguments have been disregarded even when the rationality test was employed. *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

68. Mathews v. Lucas, 427 U.S. 495, 513 (1976).

69. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) where the plurality opinion held that a similar scheme which used sex as the indicator of dependency and was justified only by administrative convenience, could not withstand strict judicial scrutiny.

70. Mathews v. Lucas, 427 U.S. at 504. *See* note 37 and accompanying text *supra*.

illegitimate has an opportunity to overcome the disability by a show of proof, the infringement of the individual's interest is not sufficiently onerous to outweigh a legitimate government interest.

Perhaps, then, *Lucas* and the prior illegitimacy decisions can best be explained in terms of a sliding scale of standards.[71] When the burden on the individual interest is perceived by the Court as relatively slight, the means and ends of the governmental scheme will be less critically scrutinized. This type of test is inherently subjective and is likely to lead to continued confusion as lower courts attempt to resolve equal protection challenges to particular illegitimacy classifications.

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71. *See* Note, *Illegitimacy & Equal Protection*, 49 N.Y.U. L. REV. 479, 491 (1974). *See also* Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting).