volving improperly motivated state action it is important to preserve the full force of remedial statutes like Title VII which implement the congressional commitment to eliminating discrimination.[65]

2. Discrimination Against Illegitimate Children. — Although the Supreme Court has hinted in recent years that illegitimacy may be a suspect classification for equal protection purposes,[1] a six-man majority[2] firmly rejected this proposition last Term in *Mathews v. Lucas*.[3] Employing "less than strictest scrutiny," [4] the Court went on to uphold provisions relating to survivors' benefits of the Social Security Act [5] that denied one group of illegitimate children the conclusive presumption of eligibility given to all other children.[6]

The Social Security Act provides that a child cannot obtain benefits unless he was dependent upon his insured parent at the time the parent died.[7] Most children, however, are not required to prove actual dependence, for the Act conclusively presumes the following to be dependent: (1) legitimate children; [8] (2) children able to inherit under the intestacy laws of the state in which the insured parent died; [9] (3) children whose parents had gone through a marriage ceremony which was technically in-

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[65] Even assuming that Title VII is aimed only at purposeful discrimination, there may be greater justification for erring on the side of overbreadth, *see* p. 119 *supra*, when a court is structuring evidentiary burdens on the basis of a congressional enactment aimed specifically at eliminating such discrimination than for adopting a similar approach to all state action under the constitutional guarantee of equal protection.

[1] *See* Gomez v. Perez, 409 U.S. 535, 538 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172–73 (1972); Levy v. Louisiana, 391 U.S. 68, 71 (1968).

[2] Justice Stevens, in a dissenting opinion joined by Justices Brennan and Marshall, did not reach the question of whether illegitimacy is a suspect classification, although some language in the dissent suggests that they thought it was. *See* 96 S. Ct. 2755, 2769 n.3, 2770 (1976) (Stevens, J., dissenting). Instead, the dissenters indicated that the statute challenged in *Lucas* could not even be described as rationally related to legitimate governmental goals. *See* note 25 *infra*.

[3] 96 S. Ct. 2755 (1976).

[4] *See id.* at 2764. While *Lucas* involved an alleged violation of the 5th amendment's due process clause, the constitutionality of federal discriminatory action is tested against the standards developed with respect to the equal protection clause of the 14th amendment. *See, e.g.*, United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

[5] 42 U.S.C. § 402(d)(1), (3); *id.* § 416(h)(2), (3) (1970 & Supp. IV 1974).

[6] 96 S. Ct. 2767.

[7] 42 U.S.C. § 402 (d)(1)(C)(ii) (1970 & Supp. IV 1974).

[8] All legitimate children are "deemed dependent," *id.*, and children who qualify under the categories described at text are "deemed legitimate," *id.* § 402(d)(3).

[9] *Id.* § 416(h)(2)(A). *See also* note 67 *infra*.

valid;[10] and (4) children whose insured father had acknowledged in writing his paternity,[11] had been declared by a court to be the child's father,[12] or had been ordered by a court to provide support.[13] An illegitimate child not covered by these presumptions cannot obtain survivors' benefits unless he can establish that the insured parent was living with him[14] or contributing to his support[15] when the parent died.

This scheme was challenged by Ruby and Darin Lucas, the illegitimate children of Belmira Lucas and James Cuffee. Cuffee, who was insured under the Act, and Lucas had begun living together in 1948, and Ruby and Darin were born in 1953 and 1960 respectively. The family remained together until 1966, when the parents separated, the children staying with their mother. When Cuffee died two years later, Ruby and Darin applied for survivors' benefits. The application was denied because they fell into none of the categories of children presumed dependent and had not been living with or receiving support from Cuffee at the time of his death.[16]

After exhausting administrative remedies, the Lucases appealed the adverse agency decision to the district court. That court held that the contested classification scheme was a denial of equal protection because it reflected the view that legitimate children were more entitled to support than were illegitimate children,[17] and was therefore unsupported by a permissible governmental interest.[18]

In an opinion written by Justice Blackmun, the Supreme Court

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[10] *Id.* § 402(d)(3); *id.* § 416(h)(2)(B).

[11] *Id.* § 402(d)(3); *id.* § 416(h)(3)(C)(i)(I).

[12] *Id.* § 402(d)(3); *id.* § 416(h)(3)(C)(i)(II).

[13] *Id.* § 402(d)(3); *id.* § 416(h)(3)(C)(i)(III).

[14] That a child is considered dependent on the insured parent if he lives with the parent might also be characterized as a presumption, since a child living with a parent is not necessarily dependent on the parent.

[15] *See* 42 U.S.C. § 402(d)(3) (1970); *id.* § 416(h)(3)(C)(ii). These provisions have been the subject of much litigation. Only the district court in *Lucas*, however, held that they were unconstitutional. *See* Watts v. Veneman, 476 F.2d 529 (D.C. Cir. 1973) (per curiam); Perry v. Richardson, 440 F.2d 677 (6th Cir. 1971); Norton v. Weinberger, 390 F. Supp. 1084 (D. Md. 1975), *aff'd sub nom.*, Norton v. Mathews, 96 S. Ct. 2771 (1976); Adams v. Weinberger, No. 73-C-633 (E.D.N.Y. 1974).

[16] *See* 96 S.Ct. at 2755–61. It was not contested that Cuffee was the father of the Lucas children, *see id.* at 2760, or that the children met the age and marital status requirements for children's benefits, *see* 42 U.S.C. § 402(d)(1), (3) (1970 & Supp. IV 1974).

[17] *See* Lucas v. Secretary of HEW, 390 F. Supp. 1310, 1320–21 (D.R.I. 1971).

[18] *Id.* The district court also concluded that illegitimacy is a suspect classification, *see id.* at 1319, but held that strict scrutiny was not necessary to strike down the contested classification, *see id.* at 1320.

reversed.[19] It first held that because illegitimacy is not a suspect classification, something "less than strictest scrutiny" was appropriate.[20] The Court accepted as permissible the Government's explanation of the purpose of the statutory scheme — to provide survivors' benefits only to children who had been dependent on an insured parent at the time of the parent's death [21] — and concluded that Congress could adopt statutory presumptions to further administrative convenience in implementing this purpose.[22] The provisions denying the Lucas children a presumption of dependency [23] were distinguished from legislation struck down in other cases concerning illegitimacy in that they did not operate to prevent any child who was dependent at the time his parent died from receiving benefits; [24] the statutory classifications determining which children would be conclusively presumed dependent at the parent's death were permissible because they were "reasonably related to the likelihood" of such dependency.[25]

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[19] 96 S. Ct. at 2767. Immediate appeal to the Supreme Court was taken under 28 U.S.C. § 1252. *See* 96 S.Ct. at 2760.

[20] 96 S.Ct. at 2764. The Court implied that the level of scrutiny employed in *Lucas* was the same as that employed in two sex discrimination cases, *see* Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (concurring opinions of Stewart, J. and Powell, J.); Reed v. Reed, 404 U.S. 71 (1971) (majority opinion), *cited at* 96 S. Ct. at 2764, which evidently applied middle level scrutiny, greater than that under the rational basis test but less than strict scrutiny, *see* 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, 32–35 (1972); *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 55, 116 (1973). But the Court may in fact use lower level scrutiny to review classifications based on legitimacy than it uses in sex discrimination cases, for in refusing to subject legislation discriminating against illegitimates to strict scrutiny, the Court relied in part on its view that this discrimination is less suspect than that against women, *see* p. 127 & note 34 *infra.* Moreover, the Court has struck down discrimination on the basis of sex which closely resembled the discrimination in *Lucas. See* Frontiero v. Richardson, 411 U.S. 677 (1973), *distinguished at* 96 S. Ct. at 2766.

[21] 96 S. Ct. at 2763.

[22] *Id.* at 2764.

[23] The Court recognized that *Lucas* involved discrimination on the basis of illegitimacy even though not all illegitimate children were burdened. *See id.* at 2762 & n.11. This discrimination is easy to describe: certain illegitimate children will be required to prove dependence and, further, may be denied benefits, while legitimate children in identical circumstances except for their legitimacy need not prove dependence and will receive benefits.

[24] *See id.* at 2765.

[25] *Id.* at 2764; *see id.* at 2766. The dissent argued that the distinction between *Lucas* and Jimenez v. Weinberger, 417 U.S. 628 (1974), *see* pp. 129–31 & notes 46 to 63 *infra,* was not constitutionally relevant, *see* 96 S. Ct. at 2767–68 (Stevens, J., dissenting) and that the governmental interest in using conclusive presumptions to further administrative convenience was not sufficient to outweigh the discrimination

In refusing to subject the legislation under consideration to its "strictest scrutiny," [26] the Court stated that it was "adher-[ing]" to the view it expressed in *Labine v. Vincent*,[27] the only decision prior to *Lucas* in which the Court found discrimination on the basis of legitimacy constitutional.[28] But the level of scrutiny employed in *Labine*, which concerned a discriminatory state intestacy law, may have been unique. In a curious opinion by Justice Black, the Court asserted that such state statutes are limited only by "specific constitutional guarantee[s]," [29] which it strongly suggested did not include "the vague generalities of the Equal Protection Clause." [30] Subsequent decisions concerning illegitimacy have required a showing of a more substantial connection between the challenged discrimination and the purpose it allegedly serves.[31] Moreover, nothing in these later opinions suggests that the Court had already decided that strict scrutiny

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against illegitimates in the classifications chosen, *see id.* at 2768–70 (Stevens, J., dissenting).

[26] 96 S. Ct. at 2764.

[27] 401 U.S. 532 (1971).

[28] Supreme Court decisions striking down classifications concerning illegitimacy are Jimenez v. Weinberger, 417 U.S. 628 (1974) (denial of Social Security benefits to certain illegitimate children of disabled persons); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (per curiam) (denial of state welfare assistance to most families with illegitimate children); Gomez v. Perez, 409 U.S. 535 (1973) (per curiam) (legitimate but not illegitimate children allowed to sue for parental support); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (illegitimate children did not share equally with legitimate children in workmen's compensation recovery for the death of parent); Glona v. American Guarantee Co., 391 U.S. 73 (1968) (parents of legitimate but not illegitimate children allowed to sue for wrongful death of child); Levy v. Louisiana, 391 U.S. 68 (1968) (legitimate but not illegitimate children allowed to sue for wrongful death of parent).

[29] 401 U.S. at 538–39.

[30] *Id.* at 539–40. The Court in *Labine* indicated that it was applying a level of scrutiny below that of the "rational basis" test. *See id.* at 536 n.6.

[31] *See* Jimenez v. Weinberger, 417 U.S. 628, 637 (1974) (no evidence that children presumed eligible are less likely to present spurious claims than those not eligible); Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam) (state interest in problem of proof of paternity may not be used "to shield otherwise invidious discrimination"); *see also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1974) (state interest is not "compelling"); *id.* at 175 (classification bears "no significant relationship" to legitimate objectives); *id.* at 172 ("at a minimum the statutory classification must bear a rational relationship to a legitimate state purpose").

Prior to *Labine*, the Court clearly used a rational basis test in one of its illegitimacy decisions, *see* Glona v. American Guarantee Co., 391 U.S. 73, 75–76 (1968). In its other pre-*Labine* decision, the level of scrutiny employed was not made clear, *compare* Levy v. Louisiana, 391 U.S. 68, 71 (1968) ("end result is whether the line drawn is a rational one"), *with id.* (while "we give great latitude to the legislature in making classifications . . . . We . . . have not hesitated to strike down an individious classification," *citing* Brown v. Board of Educ., 347 U.S. 483 (1952)).

might not be applicable to statutes which discriminate against illegitimates. Indeed, in one decision subsequent to *Labine*, the Court stated that it did not need to "reach" the argument that illegitimacy was a suspect classification.[32]

Despite its refusal to grant illegitimacy the status of a suspect classification, the majority did observe that "the law has long placed the illegitimate child in an inferior position relative to the legitimate . . . particularly in regard to obligations of support or other aspects of family law."[33] Ironically, *Lucas* confirmed the Court's observation by rejecting the propriety of strict scrutiny in the context of a statute operating to burden illegitimates in precisely that area of the law. Whether or not discrimination against illegitimates has ever "approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes," [34] the fact remains that illegitimates are relegated at birth to a disadvantaged status and lack the abiilty to protect their interests through a political process which historically has subjected them to severe deprivations during childhood.[35]

While *Lucas* clearly holds that legislation discriminating on the basis of legitimacy is subject to less scrutiny than is legislation which discriminates on the basis of race or national origin,[36] the opinion is ambiguous as to the precise level of scrutiny that was applied.[37] One critical issue, the Court implied, was whether the scheme rendered the Social Security Act underinclusive [38] — that is, whether it conclusively denied benefits to children who

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[32] *See* Jimenez v. Weinberger, 417 U.S. 628, 631–32 (1974).

[33] 96 S. Ct. at 2762.

[34] *Id.*

[35] *See generally* C. FOOTE, R. LEVY & F. SANDER, CASES & MATERIALS ON FAMILY LAW 16–169 (1966) & 1–18 (Supp. 1971).

[36] *See* p. 125 & note 20 *supra.*

[37] *See* 96 S. Ct. at 2767 (calculations of likelihood of dependency are not "unfounded, or so indiscriminate as to render the statute's classifications baseless"); *id.* at 2764 (classifications are permissible "because they are reasonably related to likelihood of dependency," where benefiting dependents is objective of statutory provisions); *id.* at 2766 ("[W]e cannot say that the factors giving rise to presumption of dependency lack any substantial relation to likelihood of actual dependency."). *See also* note 20 *supra.*

[38] The Court did not use the term "underinclusive" in its examination of the challenged scheme. However, the Court's description of the effect of the scheme is equivalent to the manner in which the Court distinguished between "underinclusiveness" and "overinclusiveness" in Jimenez v. Weinberger, 417 U.S. 628, 637 (1974). Moreover, the Court accepted the district court's characterization of the contested classification scheme as "overinclusive" but not "underinclusive," *see* 96 S. Ct. at 2760–61.

The district court's characterization, however, was with respect to a statutory objective which it considered impermissible. *See* 390 F. Supp. at 1319–20.

were within the purpose of the statute.[39] The Court reasoned that because the burdened children, those to whom none of the presumptions of dependency were applicable, could still obtain Social Security benefits upon a showing of actual dependency,[40] the contested classification scheme was not underinclusive.[41] This distinguished *Lucas* from previous cases holding discrimination against illegitimates unconstitutional, because in those cases at least some illegitimate children were conclusively denied equal entitlement to benefits.[42]

Of course, whether a classification scheme is underinclusive, or otherwise irrational, depends on the objective against which it is measured.[43] In characterizing the contested statutory scheme as intended to benefit only children dependent on the insured parent at the time the parent died, the *Lucas* Court ensured that the classifications were not underinclusive. Had the Court found instead that Congress intended to provide survivors' benefits to all children who had a right to support from an insured parent[44] or who might have become dependent on him, the scheme would have been underinclusive; some illegitimate children within this purpose could not have obtained benefits. Thus, inherent

[39] *See* 96 S. Ct. at 2764–65. The Court left open the possibility that the provisions in *Lucas* would have been upheld even if they were somewhat underinclusive. Underinclusiveness has not always been fatal. *See* Weinberger v. Salfi, 422 U.S. 749 (1975) (upholding classification resulting in denial of benefits to certain persons within purpose of Social Security Act).

[40] *See* pp. 123–24 *supra*. *See also* Norton v. Weinberger, 390 F. Supp. 1084, 1089 (D. Md. 1975) ("Even the hypothetical child who is conceived prior to his father's death but who is born afterwards, will recover if, at the time of his death, the father was living with the then-pregnant mother or was contributing to her support. *See* Wagner v. Finch, 413 F.2d 267 (5th Cir. 1967).").

[41] *See* 96 S. Ct. at 2765.

[42] *See* note 28 *supra*. Although phrased in terms of equal protection analysis, the inquiries in both *Lucas* and Jiminez v. Weinberger, 417 U.S. 628 (1974), bearing on over- and underinclusiveness, closely resemble irrebuttable presumption analysis under the due process clause, *see generally*, Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974). *See* Jiminez v. Weinberger, *supra*, at 639 (Rehnquist, J., dissenting). When an irrebuttable presumption imposes a burden, the major concern under this analysis is its overinclusiveness, because persons included within the presumption have no opportunity to escape the burden. *See* Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 645–46 (1974); United States Dep't of Agric. v. Murry, 413 U.S. 508, 512–15 (1973). When a classification scheme containing an irrebuttable presumption confers a benefit, its underinclusiveness would analogously be scrutinized, because persons excluded from the presumption have no opportunity to obtain the benefit.

[43] *See generally*, Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

[44] The Government had in fact argued before the district court that this was the purpose of the contested provisions, *see* 390 F. Supp. at 1320 (quoting Brief of Defendant in Response to Brief of Amicus Curiae at 2–3). The appellee Lucas children argued this purpose before the Supreme Court, *see* 96 S. Ct. at 2763.

in the Court's determination of the Act's purpose was a logical barrier to proof of the contention that the government had denied to certain illegitimate children entitlement "to needed support . . . simply because [each child's] natural father has not married its mother." [45]

The significance of the Court's characterization of the purpose of survivors' benefits for children is underscored by a comparison of *Lucas* with *Jimenez v. Weinberger*,[46] in which the Court held underinclusive and unconstitutional provisions in the Social Security Act relating to benefits for children of disabled persons insured under the Act.[47] The presumptions of eligibility in *Jimenez* for certain children of disabled persons were virtually identical to those in *Lucas* for certain surviving children.[48] Furthermore, in both cases, children not covered by a presumption had to prove they were dependent on the insured parent at the time the event triggering entitlement occurred: in *Jimenez*, at the time the parent became disabled,[49] in *Lucas*, at the time the parent died.[50] Had the Court in *Jimenez* characterized the purpose of the disability provisions as to benefit children dependent at the time the parent became disabled — the purpose that would have been analogous to that found in *Lucas* — the *Jimenez* classifications would not have been underinclusive. All children who had been dependent when the insured became disabled could have obtained benefits. Admittedly, some illegitimate children who had become dependent only later would have been denied benefits. But they would have had no cause for complaint; by hypothesis, they would not have been intended beneficiaries of the Social Security Act.

In *Jimenez*, however, the Court rejected the argument that Congress intended to provide benefits only to children who were dependent on the insured at the time he was disabled.[51] Rather, the Court concluded that all dependents of a disabled wage earner are within the purview of the Social Security Act,[52] including

[45] 96 S. Ct. at 2763 (quoting Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam)).

[46] 417 U.S. 628 (1974).

[47] *Id.* at 637. See 42 U.S.C. § 416(h)(3)(B) (1970).

[48] See 42 U.S.C. § 402(d)(1)(C), (3) (1970 & Supp. IV 1974) (all legitimate children presumed dependent whether parent is dead or disabled); *compare id.* § 416(h)(3)(C) (presumptions for certain illegitimate children of deceased insured) *with id.* § 416(h)(3)(B) (presumptions for certain illegitimate children of disabled insured).

[49] *See id.* § 416(h)(3)(B)(ii).

[50] *See id.* § 416(h)(3)(C)(ii).

[51] *See* 417 U.S. at 634–35. This purpose was not argued before the Court in *Jimenez*; rather, it was the only purpose of which the Court could conceive that was consistent with the classification scheme under challenge, *see id.* at 634.

[52] *See id.* at 633–34.

illegitimate children not dependent at the time of disability who later became dependent.[53]

The Court's acceptance in *Lucas* of a narrow legislative purpose analogous to that which it had rejected in *Jimenez* cannot be explained by differences in the language of the provisions contested in these cases; [54] the operative terms were entirely parallel.[55] Nor can it be explained by a difference in legislative history. Sources cited in *Lucas* as consistent with a narrow purpose were equally applicable to the sections of the Social Security Act challenged in *Jimenez*.[56]

Instead, the Court's opinions in *Jimenez* and *Lucas* indicate that it will usually defer to the Government's choice of purpose.[57] In *Lucas*, the Court accepted "at face value" the purpose that the Government had put forth and "authenticate[d] . . . by reference to the explicit language of the Act . . . and by reference to legislative history . . . ." [58] Similarly, in *Jimenez*, the Court adopted as the primary purpose of disability benefits a position that had been consistently argued by the Government.[59] Nevertheless, the Court's deference to the Government's articulation of purpose is not total. In *Jimenez*, the children won because the Court decided that the statute was inconsistent with the secondary purpose proffered by the Government, the prevention of spurious

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[53] *See id.* at 636.

[54] The Court may have been predisposed to find a broad purpose in *Jimenez* because of the peculiar situation of the *Jimenez* petitioners. The Jimenez children had been born after their father became disabled; therefore, they could never prove they had been dependent at the time of disability. However, when they applied for children's benefits, they were living with their father, as they had all their lives. The Court may have thought it particularly unfair to construe a narrow purpose which would exclude some currently dependent children merely because they were born after their father became disabled.

[55] *See* p. 129 & note 48 *supra.*

[56] The *Lucas* Court cited excerpts from two congressional reports in support of its choice of purpose. The first was House-Senate Conference Report on the 1965 Amendments to the Social Security Act, 111 CONG. REC. 18383, 18387 (1965), *cited at* 96 S. Ct. at 2763 n.14. In *Jimenez*, the Court had apparently relied on this passage for the broad purpose there adopted, *see* 417 U.S. at 634 n.3. But in *Lucas*, it characterized the same passage as only a "partial description of the actual effect" of the presumptions of dependency, *see* 96 S. Ct. at 2764 n.14.

The second, S. REP. No. 404, 89th Cong., 1st Sess. 110 (1965), *cited at* 96 S. Ct. at 2763, is equally applicable to the *Jimenez* situation, but was not cited in the *Jimenez* opinion. Expanding on the Court's reproduction of the passage, it reads: "[the program] is intended to provide benefits to replace the support lost by a child when his father *retires, dies, or becomes disabled.*" (emphasis added).

[57] Even the *Lucas* dissenters accepted the Government's interpretation of the purpose of survivors' benefits for children. *See* 96 S. Ct. at 2768 (Stevens, J., dissenting).

[58] *Id.* at 2763.

[59] *See* 417 U.S. at 633–34.

claims.[60] Moreover, the *Lucas* Court suggested that its deference to the Government's position could be overcome by a sufficiently strong showing based on statutory structure or legislative history.[61]

Because the Government can always offer a rationale for a statute that will render it not underinclusive, subsequent judicial means-ends scrutiny is potentially circular. The outcome of equal protection analysis thus may turn on whether the factors are present which persuade the Court to abandon its deference to the Government.

Of course, a choice of purpose which eliminates potential underinclusiveness in a statutory classification may render the statute overinclusive. For instance, under the statute challenged in *Lucas*, most children who are not in fact dependent when their parents die nonetheless receive benefits because they qualify under one of the statutory presumptions of entitlement.[62] The Court made it clear that such overinclusiveness did not, in itself, require that the scheme be found constitutionally defective.[63] Yet while the issue was nominally the degree to which each of the presumptions employed accurately identified dependent children,[64] the Court was in fact satisfied with being able to articulate a conclusory rationale for each presumption.[65]

The Court explained that its abbreviated inquiry was prompted by deference to Congress, which had "tailored [the] statutory classifications in accordance with its calculations of the likelihood of actual dependency." [66] Yet it is clear that at least the classification regarding ability to inherit under intestacy laws was never intended by Congress to be an indication of dependency. Read literally, the Social Security Act does not presume illegitimate intestate heirs dependent. Rather, the Court itself found it necessary to interpret the Act that way to avoid an anomaly that might have been created by other provisions relating to illegitimates.[67] Therefore, the classifications in *Lucas* were not

[60] *See id.* at 634.

[61] *See* 96 S. Ct. at 2763 n.14.

[62] *See* pp. 123–24 *supra.*

[63] *See* 96 S. Ct. at 2764.

[64] *See id.*

[65] *See id.* at 2766 (quoting Norton v. Weinberger, 364 F. Supp. 1117, 1128 (D. Md. 1973)).

[66] 96 S. Ct. at 2767.

[67] Under a literal reading of the statute, illegitimate intestate heirs are merely potentially eligible for benefits; they must prove dependence. 42 U.S.C. § 416(h)(2)(A) (1970) includes illegitimate intestate heirs within the definition of "child of an insured," the broadest class of potential recipients, but nowhere in the statute are these children automatically presumed legitimate or dependent. For many years, this was the only provision concerning illegitimate children. Thus, no illegit-

"tailored" in so precise a manner as the Court assumed; nor should it be expected that complicated and repeatedly amended social welfare legislation will be. Where the end result is discrimination against a group like illegitimates, the Court need not defer solely for fear of displacing conscious congressional policy choices.

Nevertheless, *Lucas* suggests that the Court will generally defer to the Government's choice of purpose and presumed empirical judgments by Congress in cases concerning illegitimacy, thereby disclaiming responsibility for protecting illegitimates from the vestiges of severe historical discrimination. It is perplexing that this position was reached in the context of differential treatment that can be rationalized only by resort to such tenuous and deferential analysis.

3. Economic Regulation. — In *Morey v. Doud*,[1] the Supreme Court invalidated an Illinois statute exempting the American Express Company by name from a general regulatory scheme. *Morey* was the only case by the Warren Court to overturn business regulations on equal protection grounds.[2] Last Term, in a per curiam decision, the Court eliminated this anamoly by expressly overruling *Morey* in *City of New Orleans v. Dukes*.[3]

In 1972, New Orleans barred all pushcart vendors from doing

imate children who were not intestate heirs could receive benefits, *see* Scalzi v. Folsom, 156 F. Supp. 838 (D.R.I. 1957), and only legitimate children were presumed dependent, *see id.* § 402(d)(3).

In 1960, § 416(h)(2)(B), *see* pp. 123–24 & note 10 *supra*, was added. Pub. L. No. 86–788, § 208(b), 74 Stat. 968 (1960). And in 1965, § 416(h)(3), see p. 124 & note 11 *supra*, was added. Pub. L. No. 89–97, § 339(a), 79 Stat. 409 (1965). These new provisions not only allowed many illegitimate children who were not intestate heirs to receive benefits but presumed them legitimate and thus not required to prove dependence. However, children included in § 416(h)(2)(A) were expressly excluded from the operation of these new provisions. An anomaly resulted: children who qualified under both § 416(h)(2)(A) and the new provisions had to prove dependence, while those children falling only within the new sections did not. In order to correct this anomaly, the Supreme Court construed the Social Security Act as presuming all intestate heirs legitimate and thus dependent, *see* 96 S. Ct. at 2766 n.17; Jimenez v. Weinberger, 417 U.S. 628, 631 n.2 (1974).

Since the provision on intestate heirs was intended only to define the word "child" as used in the Act, it is not surprising that, apart from the extent to which it subsumes factors included in other presumptions, it is not a good indicator of dependence. The only rationale which the Court offered for this presumption was quite tenuous: intestacy laws would embody the popular view within a jurisdiction as to how a parent would divide his wealth among his children, which in turn would reflect the popular conception of parental obligations, which in turn would affect actual parental support at least sometime during the child's life, *see id.* at 2766–77.

[1] 354 U.S. 457 (1957).

[2] G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 678 (9th ed. 1975).

[3] 96 S. Ct. 2513 (1976).