Jones v. Schweiker: Illegitimate Children and Social Security Benefits

I. Introduction

"We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[1] This statement by Justice Douglas, speaking for the United States Supreme Court in 1968, indicates that the rights of illegitimate children have progressed substantially since earlier times. At common law an illegitimate child was considered a *filius nullius*, the child of no one.[2] The harshness with which the law treated the illegitimate child is demonstrated by the common law inheritance rules. There it was said that the illegitimate child "had neither father, mother, nor sister. He could neither take from, nor transmit to, those standing in such relations to him, any estate by inheritance."[3] Although the severity of such rules has slowly been tempered,[4] in part by Supreme Court decisions, illegitimate children still face hurdles in many areas in which legitimate children do not, including the area of participation in government benefit programs.

Since 1968, the United States Supreme Court has decided several

---

[1]Levy v. Louisiana, 391 U.S. 68, 70 (1968) (citations omitted). The number and percentage of children born out of wedlock has risen dramatically in the last few decades. Of the 3,333,279 children born in the United States in 1978, 543,991 (16.3%) were illegitimate. U.S. Dep't of Health and Human Services, Vital Statistics of the United States, 1978, Vol. 1.1 (1982) (tables 1-1 and 1-31). In 1960 only 5.3% of the children born were illegitimate. *Id.* These figures represent over a 300% increase in the percentage of illegitimate children in just eighteen years. The percentage of non-white children born out of wedlock far exceeds the national average. In 1978, 53.2% of the non-white children born were illegitimate. *Id.* These figures demonstrate that laws which discriminate against illegitimate children do so against a large and growing percentage of all children. The figures also show that the impact of those discriminatory laws burden non-white children in a substantially disproportionate manner as compared to white children.

[2]*See, e.g.*, Truelove v. Truelove, 172 Ind. 441, 86 N.E. 1018 (1909); Jackson v. Hocke, 171 Ind. 371, 84 N.E. 830 (1908).

[3]McCool v. Smith, 66 U.S. (1 Black) 459, 470 (1861).

[4]*See, e.g.*, Ind. Code § 29-1-2-7 (1982). That section provides in part:

> (a) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother . . . .
>
> (b) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his father, if but only if, (1) the paternity of such child has been established by law, during the father's lifetime; or (2) if the putative father marries the mother of the child and acknowledges the child to be his own.

cases concerning the rights of illegitimate children.[5] The challenges made by illegitimate children to state and federal laws have generally been based on equal protection grounds. The Supreme Court has never held illegitimacy to be a suspect classification, and, therefore, has never applied strict scrutiny in these cases.[6] However, an analysis of the cases in this area demonstrates that the Supreme Court examines statutory classifications based on illegitimacy with a higher degree of scrutiny than the standard low level requirement that the means be rationally related to legitimate governmental interests. This is indicated both in the outcome of some of the cases,[7] and in the Court's statements that the level of scrutiny appropriate in testing classifications based on legitimacy "is not a toothless one"[8] and that such classifications will violate the equal protection clause "if they are not substantially related to permissible state interests."[9] With a few signifi-

---

[5]The major cases since 1968 are: (1) Levy v. Louisiana, 391 U.S. 68 (1968) (Louisiana wrongful death statute that denied recovery to illegitimate children held unconstitutional); (2) Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (Louisiana statute that barred recovery to parents of illegitimate children but allowed it for parents of legitimate children held unconstitutional); (3) Labine v. Vincent, 401 U.S. 532 (1971) (Louisiana statute that prevented illegitimate children from sharing equally in father's estate with legitimate children held constitutional); (4) Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972) (Louisiana statute that prevented illegitimate children from recovering under worker's compensation law held unconstitutional); (5) Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972) (provisions of the Social Security Act that reduced benefits to otherwise eligible illegitimate children held unconstitutional); (6) Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972) (same as (5)); (7) Gomez v. Perez, 409 U.S. 535 (1973) (Texas law denying illegitimate children right to paternal support while giving that right to legitimate children held unconstitutional); (8) New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (statute limiting right of illegitimate children to state provided assistance to poor working families held unconstitutional); (9) Jimenez v. Weinberger, 417 U.S. 628 (1974) (Social Security Act provisions limiting illegitimate child's claim for disability benefits to certain situations held unconstitutional); (10) Mathews v. Lucas, 427 U.S. 495 (1976) (Social Security Act provisions that create presumption of dependency for legitimate and some illegitimate children held constitutional); (11) Trimble v. Gordon, 430 U.S. 762 (1977) (Illinois statute limiting right of illegitimate children to inherit from their fathers through intestate succession held unconstitutional); (12) Lalli v. Lalli, 439 U.S. 259 (1978) (New York intestate succession statute following illegitimate child to inherit only if paternity decree is entered during father's lifetime held constitutional); (13) United States v. Clark, 445 U.S. 23 (1980) (illegitimate child entitled to survivor's benefits under Civil Service Retirement Act, statutory construction avoided constitutional issue); (14) Mills v. Habluetzel, 456 U.S. 91 (1982) (Texas statute requiring paternity suit to be brought within one year of illegitimate child's birth held unconstitutional).

[6]*See* Mathews v. Lucas, 427 U.S. at 505-06.

[7]*See infra* text accompanying note 61.

[8]427 U.S. at 510.

[9]Lalli v. Lalli, 439 U.S. at 265. For a more thorough discussion of the Court's equal protection analysis in cases dealing with illegitimacy, see Kellett, *The Burger Decade: More Than Toothless Scrutiny For Laws Affecting Illegitimates*, 57 U. DET. J. URB. L. 791 (1980); Maltz, *Illegitimacy and Equal Protection*, 1980 ARIZ. ST. L.J. 831;

cant exceptions, the Court has ruled in favor of the illegitimate child.[10] The Supreme Court has addressed the rights of illegitimate children in four cases under the Social Security Act.[11]

The Social Security Act provides that children who meet certain criteria are eligible for benefits after the death of an insured parent.[12]

Isaacson, *Equal Protection for Illegitimate Children: A Consistent Rule Emerges*, 1980 B.Y.U. L. Rev. 142: Comment, *Illegitimates and Equal Protection:* Lalli v. Lalli—*A Retreat from* Trimble v. Gordon, 57 DEN. L.J. 453 (1980).

[10]*See* cases cited *supra* note 5. A look at how the individual Justices voted in the above decisions provides some enlightening information. The chart below indicates the cases by the numbers assigned in footnote 5 above. A vote for the illegitimate party is shown by a "*" and a vote against is indicated by a "—."

Case Number

Justice	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Warren	*	*												
Fortas	*	*												
Black	—	—	—											
Harlan	—	—	—											
Douglas	*	*	*	*	*	*	*	*	*					
Stewart	—	—	—	*	—	—	—	*	*	—	—	—	—	
Brennan	*	*	*	*	*	*	*	*	*	*	*	*	*	*
White	*	*	*	*	*	*	*	*	*	—	*	*	*	*
Marshall	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Burger			—	*	—	—	*	*	*	—	—	—	*	*
Blackmun			—	*	*	*	*	*	*	—	—	—	*	*
Powell				*	*	*	*	*	*	—	*	—	*	*
Rehnquist				—	—	—	—	—	—	—	—	—	—	*
Stevens										*	*	*	*	*
O'Connor														*

Justice O'Connor's strong concurring opinion in *Mills* (14) suggests that there will consistently be at least five votes in favor of the illegitimate party (Brennan, White, Marshall, Stevens, and O'Connor). When these five votes are combined with the fact that Rehnquist, in his first vote for an illegitimate party, wrote in *Mills* for a Court with no dissent, it appears that illegitimate children may fare even better when their case is before the Court in the future, than they have in the past.

[11]Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972).

[12]42 U.S.C.A. § 402(d)(1) (West 1983) provides in part:

> Every child (as defined in section 416(e) of this title) 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 elementary or secondary school student and had not attained the age of 19 . . . 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 . . . .

For the statutory definitions of "fully insured" and "currently insured" see 42 U.S.C.

One eligibility requirement is that the children be dependent on the insured parent at the time of the insured's death.[13] To aid in the determination of which children qualify for benefits, the Act establishes certain presumptions of dependency, including the presumption that all legitimate and adopted children are dependent on the insured parent.[14] The Act also provides several presumptions of dependency for illegitimate children, one arising when an illegitimate child inherits personal property from the estate of the deceased parent under state intestate succession law.[15] Several recent cases have dealt with the question of how this presumption of dependency should operate when a state's intestate succession law is found unconstitutional.[16] The Supreme Court faced this issue when it heard the case of *Jones v. Schweiker*.[17] The Court, however, did not resolve the issue and has

---

§ 414(a) (1976) and 42 U.S.C. § 414(b) (1976), respectively. The same criteria apply to determine the eligibility of children for benefits under the Act's old-age and disability insurance provisions.

[13]42 U.S.C.A. § 402(d)(1)(C) (West 1983).

[14]42 U.S.C. § 402(d)(3) (1976) provides:

> A child shall be deemed dependent upon his father or adopting father . . . 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.

[15]42 U.S.C. § 416(h)(2)(A) (1976) provides in part:

> In determining whether an applicant is the child . . . of a fully or currently insured individual . . . the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property . . . 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 . . . shall be deemed such.

Illegitimate children may also qualify as dependent if other statutory conditions are met. A child whose parents went through a marriage ceremony which was rendered invalid by a legal impediment is deemed a legitimate child and is therefore eligible for benefits. *See* 42 U.S.C. § 416(h)(2)(B) (1976) and 42 U.S.C. § 402(d)(3) (1976). When the deceased father, before death, acknowledges in writing that the child is his son or daughter, or was decreed to be the child's father by a court, or was ordered by a court to provide support for the child because of paternity, or if the father lived with or contributed to the support of the child at the time of his death, the child is deemed legitimate. *See* 42 U.S.C. § 416(h)(3)(C) (1976 & Supp. V 1981) and 42 U.S.C. § 402(d)(3) (1976).

[16]*See* cases cited *infra* note 74.

[17]668 F.2d 755 (4th Cir. 1981), *vacated sub nom.* Jones v. Heckler, 103 S. Ct. 1763 (1983).

remanded the case to the Court of Appeals for the Fourth Circuit for reconsideration.[18] The original circuit court opinion in *Jones* held that finding a state's intestacy law unconstitutional does not qualify otherwise ineligible illegitmate children for benefits under the Act.[19] This Note will demonstrate that legal analysis supports the opposite conclusion, and that illegitimate children confronted with such a situation do qualify for benefits under the Act.

This Note will first examine the Supreme Court cases that have addressed the Social Security Act presumptions of dependency, and the Court's decisions dealing with the constitutionality of state intestate succession laws. Next, the circuit court's opinion in *Jones* will be evaluated by examining the congressional intent underlying the relevant Social Security Act provisions and by exploring federal constitutional considerations not dealt with by the Fourth Circuit. Finally, an analysis of how *Jones* will be decided on remand will be presented.

II. Historical Perspective

A. The Validity of the Statutory Presumptions

The statutory presumptions of dependency created by the Social Security Act were challenged in *Mathews v. Lucas*.[20] In that case, the mother of two illegitimate children, Ruby and Darin Lucas, applied for surviving children's benefits for Ruby and Darin after their father, the insured, died.[21] Although the Social Security Administration found that the insured was the children's father, it ruled that the children's actual dependence upon the insured had not been demonstrated, and that none of the statutory presumptions of dependency applied.[22] Ruby and Darin were, therefore, not entitled to survivor's benefits.

On appeal to the District Court of Rhode Island, the children's mother contended that the Act violated the equal protection component of the due process clause of the fifth amendment because some children, including all legitimate children, are statutorily entitled to survivorship benefits regardless of actual dependency while others are not.[23] The district court held that the statutory presumptions were

---

[18]Jones v. Heckler, 103 S. Ct. 1763 (1983).

[19]668 F.2d at 759.

[20]427 U.S. 495 (1976).

[21]*Id.* at 497. The application was filed under 42 U.S.C. § 402(d)(1) (1970) & Supp. IV 1974) (current version at 42 U.S.C.A. § 402(d)(1) (West 1983)).

[22]The Social Security Administration ruled that the children had failed to show their dependency by proof that their father either lived with them or was contributing to their support at the time of his death. 427 U.S. at 500-01. For a discussion of the statutory presumptions, see *supra* notes 14-15 and accompanying text.

[23]Lucas v. Secretary, 390 F. Supp. 1310, 1314-15 (D.R.I. 1975).

unconstitutional and found the children eligible for benefits.[24] Although the district court found that the closest judicial scrutiny was not necessary to find the classifications unconstitutional, the court concluded, in dicta, that statutory classifications based on illegitimacy should be examined with strict scrutiny.[25] The Supreme Court disagreed.

The Supreme Court began its analysis by rejecting the applicability of strict scrutiny to classifications based on illegitimacy. Although the Court stated that the appropriate level of scrutiny was "not a toothless one,"[26] it found that strict scrutiny was not called for because discrimination against illegitimates "has never approached the severity or pervasiveness of . . . discrimination against . . . Negroes."[27] The appellees were, therefore, required "to demonstrate the insubstantiality"[28] of the relationship between the statutory classifications and the government interests which the classifications were designed to promote.

The Court next identified two government interests which the presumptions were intended to further: conditioning entitlement to benefits on dependence and administrative convenience. The government claimed that the provisions were designed by Congress to provide benefits to those children who were actually dependent on the insured at the time of his death.[29] The government argued that the provisions were not impermissibly discriminatory because a child's classification as legitimate or illegitimate is only relevant to a determination of dependency. The Court accepted this characterization of Congressional intent, and found that conditioning entitlement to benefits on dependency was a legitimate government interest.[30] The statute's classifications, the Court concluded, were permissible "because they are *reasonably related* to the likelihood of dependency at death."[31] The Court also determined that Congress adopted the statutory presumptions to avoid the administrative inconvenience of

---

[24]The district court found the dependency classifications to be over inclusive because some children were eligible for benefits regardless of actual dependency. *Id.* at 1319-20. The court concluded that although the Act showed Congress' view as to which children are entitled to support, reflecting society's favoritism of legitimate children, such a basis for the Act's dependency provision did not constitute a legitimate governmental interest and therefore failed to meet the equal protection challenge. *Id.* at 1320.

[25]*Id.* at 1318-19.

[26]427 U.S. at 510.

[27]*Id.* at 506.

[28]*Id.* at 510.

[29]*Id.* at 507. The government appealed directly to the Supreme Court under 28 U.S.C. § 1252 (1976).

[30]427 U.S. at 507.

[31]*Id.* at 509 (emphasis added).

making case-by-case determinations of dependency. Finding that administrative convenience can be a legitimate government interest, the Court stated that Congress had made "reasonable empirical judgments . . . consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death."[32] The Court concluded that it could not say that the presumptions "lack any substantial relation to the likelihood of actual dependency,"[33] and held that the challenged classifications were permissible means to the government's goals.[34]

Mathews v. Lucas established the constitutionality of the Social Security Act presumptions of dependency. One of the presumptions approved in *Lucas*, section 416(h)(2)(A), finds an applicant to be the child of the insured, and therefore eligible for benefits, if the applicant would take personal property as a child under the intestate succession laws of the state in which the insured was domiciled at his death.[35] In a footnote in *Lucas*, the Supreme Court commented that "[a]ppellees do not suggest, and we are unwilling to assume, that discrimination against children in appellees' class in state intestacy laws is constitutionally prohibited . . . in which case appellees would be made eligible for benefits" under section 416(h)(2)(A).[36] *Jones v. Schweiker*[37] presents the situation where a claim for benefits under section 416(h)(2)(A) is based upon an equal protection challenge to state intestacy laws.[38] Before exploring the merits of this claim, it is necessary to examine the Supreme Court decisions dealing with state intestacy laws that discriminate against illegitimates.

B. The Illegitimate's Right to Intestate Inheritance

Those urging the creation and protection of equal rights for illegitimate children, as related to legitimate children, suffered a substantial setback in 1971 with the Supreme Court's decision in *Labine v. Vincent*.[39] *Labine* involved an illegitimate, Rita Vincent, whose father had publicly acknowledged her according to procedures

---

[32]*Id.* at 510.

[33]*Id.* at 513.

[34]Justice Stevens, writing for a dissent of three, found that the majority opinion shed little light on what was the proper level of scrutiny. *Id.* at 519. He concluded that the governmental interest of administrative convenience was not sufficient to justify the classifications, which he believed were "more probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates." *Id.* at 523.

[35]42 U.S.C. § 416(h)(2)(A) (1976); *see supra* note 15.

[36]427 U.S. at 515 n.18.

[37]668 F.2d 775 (4th Cir. 1981), *vacated sub nom.* Jones v. Heckler, 103 S. Ct. 1763 (1983).

[38]*See supra* note 15.

[39]401 U.S. 532 (1971) (5-4 decision).

authorized by Louisiana law. This acknowledgement, nevertheless, did not entitle Rita to share equally in her father's intestate estate. Rather, the state intestate statute provided for her to inherit only if there were no other surviving descendants, ascendants, wife, or collaterals.[40] When Rita's father died intestate, her guardian sought to have her declared the sole heir as her father's only child. The Louisiana Court of Appeals ruled that because Rita's father had surviving collateral relations, Rita was excluded from any inheritance.[41]

On appeal to the Supreme Court,[42] Rita's guardian relied heavily on a Supreme Court decision, *Levy v. Louisiana*,[43] which held a Louisiana statute allowing legitimate children to recover damages for the wrongful death of their parents, while denying the same right to illegitimate children, to be invidious discrimination in violation of the equal protection clause of the fourteenth amendment.[44] The Court in *Labine*, however, said that *Levy* could not be construed to bar the states from ever treating legitimate and illegitimate children differently.[45] In upholding the Louisiana statute the Court reasoned that the factual situation in *Levy*, where the state had created an "insurmountable barrier" to a wrongful death recovery by illegitimate children,[46] was distinguishable from that in *Labine*, where the father could have left Rita property by executing a will or by legitimating her.[47]

The Court also found two state interests, promoting family life and regulating property disposition, that justified the Louisiana statute.[48] The Court observed that the power to regulate these areas was constitutionally given to the states.[49] "Absent a specific constitutional guarantee, it is for that legislature [Louisiana's], not the life-tenured judges of this Court, to select from among possible laws."[50]

---

[40]LA. CIV. CODE ANN. art. 919 (West 1952) (repealed 1981). "Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State."

[41]229 So. 2d 449 (La. Ct. App. 1969), *cert. denied*, 255 La. 480, 231 So. 2d 395 (1970), *aff'd*, 401 U.S. 532 (1971).

[42]401 U.S. 532 (1971).

[43]391 U.S. 68 (1968).

[44]*Id.* at 72.

[45]401 U.S. at 536.

[46]*Id.* at 539.

[47]*Id.*

[48]*Id.* at 538.

[49]*Id.*

[50]*Id.* at 538-39. The Court observed that while some other choices might be "more closely connected to our conceptions of social justice," it was for the state to choose from the rational options. *Id.* at 538. It is interesting to note that in 1891, the Court made a similar observation in upholding a Utah statute *allowing* illegitimates to in-

This statement indicates the extremely deferential approach used by the Court in reviewing the statute. Thus, Louisiana's statute, which severely limited the right of illegitimate children to inherit from their fathers, was allowed to stand.

For the next six years it appeared that illegitimates would have to rely on the benevolence of the states if they were to be given intestate inheritance rights. Then, in 1977, the Court in *Trimble v. Gordon*[51] struck down an Illinois statutory provision limiting an illegitimate's right to inherit by intestate succession.[52] *Trimble* involved an illegitimate child, Deta Mona, who lived with both of her unmarried parents until her father, Mr. Gordon, was killed in 1974. In 1973, an Illinois state court had entered a paternity order finding Gordon to be Deta Mona's father and ordering him to make payments for her support. Under the Illinois Probate Act, Deta Mona could inherit from and through her mother but was not entitled to share in the estate of her father because he had not married her mother or acknowledged Deta Mona as his daughter.[53] By comparison, a legitimate child in Deta Mona's position as only child would have inherited her father's entire estate.[54]

The Court began by discussing the test it must use to examine state statutory classifications that discriminate against illegitimates. Although finding that illegitimacy has never been held a suspect classification requiring strict scrutiny, the Court restated that the level of scrutiny is not a toothless one.[55] " '[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.' "[56] With these conceptual standards

---

herit from their fathers. Cope v. Cope, 137 U.S. 682 (1891). The Court there said that "[t]he distribution of and the right of succession to the estates of deceased persons are matters exclusively of State cognizance . . . ." *Id.* at 684. The Court went on to say that the law, based on Utah's Mormon heritage, was not void because of "its failure to conform to our own standard of social and moral obligations." *Id.* at 685.

[51]430 U.S. 762 (1977).

[52]*Id.* at 776.

[53]ILL. REV. STAT. ch. 3, § 12 (1973) (current version at ILL. REV. STAT. ch. 110 1/2, § 2-2 (1979)). The contested version read in part, "[a] child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate." *Id.* The amended version is more liberal in providing for illegitimates to inherit from their fathers. The new statute provides in part, "[i]f a decedent has acknowledged paternity of an illegitimate person or if during his lifetime or after his death a decedent has been adjudged to be the father of an illegitimate person, that person is heir of his father and of any paternal ancestor . . . ." ILL. REV. STAT. ch. 110 1/2, § 2-2 (1979).

[54]430 U.S. at 765. Sherman Gordon's entire estate consisted of a 1974 automobile valued at approximately $2,500. *Id.* at 764.

[55]*Id.* at 767 (citation omitted) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

[56]430 U.S. at 766 (citation omitted) (quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 172 (1972)).

in mind, the Court examined the justifications put forward by Illinois for the statute.

The Court first rejected the state's claim that the statute promoted legitimate family relationships. The Court found that the statute bore "only the most attenuated relationship to the asserted goal,"[57] reasoning that it was illogical and unjust to attempt to compel adults to live up to accepted standards of conduct by punishing the innocent children of unmarried couples.

Next, the Court looked at the state's interest in orderly property disposition and the concern that the difficulty of proving paternity might lead to spurious claims. Although finding that decisions about intestate inheritance schemes are usually left to the states, the Court believed that there was a middle ground between proving paternity case-by-case and the total exclusion of illegitimates. The Court reasoned that some categories of illegitimate children could be allowed to inherit without disrupting the orderly settlement of estates.[58] As an example of a situation falling in the middle ground, the Court pointed to Deta Mona, who could prove that Mr. Gordon was her father with the state court's paternity decree. The statute, which would exclude Deta Mona from inheriting from her father's intestate estate, could not be justified as promoting accurate or efficient property disposition, and it extended "well beyond the asserted purposes."[59]

The third justification presented by the state was that the statute created no insurmountable barrier to inheritance by illegitimates because fathers could insure that their illegitimate children would inherit from their estates by executing a will or by legitimating the children. Although the first two justifications were considered to be legitimate state interests which simply were not adequately furthered by the statute, the Court gave the third justification much less credence, calling it "an analytical anomaly."[60] The Court reasoned:

> Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances.[61]

---

[57]430 U.S. at 768. The Court noted that the Illinois Supreme Court had not analyzed the relationship between the statute and the goal, a claim which the Court admitted could also be made about its decision in *Labine*. *Id.* at 769.

[58]*Id.* at 771.

[59]*Id.* at 772-73.

[60]*Id.* at 773.

[61]*Id.* at 773-74. The hypothetical circumstances referred to the state's contention that Mr. Gordon could have left Deta Mona property by executing a will or legitimating her. *Id.* at 773.

Because the insurmountable barrier concept is unrelated to the constitutional ends-means analysis, the Court ruled that it had no constitutional significance in this case.[62]

Thus, the same state interests which six years earlier had justified the Louisiana intestate statute involved in *Labine* were found inadequate to uphold the Illinois statute involved in *Trimble*. The different result occurred because in *Trimble*, the Court scrutinized the relationship between the government interests advanced and the means used to achieve these interests more carefully than it did in *Labine*. The Court acknowledged that it had failed in *Labine* to adequately consider the relation part of the equal protection test, making its "constitutional analysis incomplete."[63] In *Trimble*, the Court recognized the legitimacy of the state interests in promoting family life and establishing an efficient method of property disposition. However, the Court took the next step, the one it refused to take in *Labine*, and held that the means employed by the state were not adequately related to those legitimate ends. Although the Court in *Trimble* remained unwilling to accept illegitimate children as a suspect class,[64] and did not clearly articulate the proper level of scrutiny for classifications based on illegitimacy, the result in the case clearly shows that it applied a higher level of scrutiny than the almost total deference used in *Labine*.

The third important Supreme Court decision examining the treatment of illegitimates under a state intestate succession statute came in 1978, one year after the *Trimble* decision. In *Lalli v. Lalli*,[65] the Court upheld New York's intestate succession law which conditioned the right of illegitimate children to inherit from their fathers upon a court decree of paternity prior to the father's death.[66] The Court distinguished the New York statute from statutes like that in *Trimble*, which required both acknowledgment by the father and marriage between the parents as preconditions to inheritance. The New York statute had no marriage requirement. Nor did the state contend that the purpose of the law was to promote legitimate family relationships. Rather, the goal of the statute was to promote orderly property

---

[62]*Id.* at 774. The Court also examined the state's claim that the statute represented the presumed intent of the Illinois citizens regarding property disposition at their death. *Id.* at 774-76. This was rejected not only because the Illinois Supreme Court had not relied upon it when deciding the case, but also because the Court was convinced that the statutory provision was enacted for other purposes. *Id.* at 775.

[63]*Id.* at 769.

[64]430 U.S. at 767.

[65]439 U.S. 259 (1978) (5-4 decision). Justice Powell, who wrote for the Court in both *Trimble* and *Lalli*, joined with the four dissenting Justices in *Trimble* to form the majority in *Lalli*. Both Justice Blackmun and Justice Rehnquist wrote separate opinions concurring in the result.

[66]439 U.S. at 275-76.

disposition.[67] The Court found this state interest to be "substantial"[68] and found that the New York legislature had carefully balanced the rights of illegitimate children with the important state interest. Concluding that the requirements of the New York statute were "substantially related to the important state interests the statute is intended to promote,"[69] the Court held that the statute did not violate the equal protection clause of the fourteenth amendment.

Lalli demonstrated that some difference in the treatment of legitimate and illegitimate children will be allowed if the challenged classifications meet the appropriate equal protection test. The Court in *Lalli* also provided clarification as to what level of scrutiny will be applied to statutes basing classifications on illegitimacy. The Court stated that such classifications "are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests."[70] The requirement of a substantial relationship is more demanding than the rational relationship associated with low level scrutiny and indicates that a mid-level test will be applied to classifications based on illegitimacy.

The Supreme Court decisions in *Labine*, *Trimble*, and *Lalli* demonstrate the development of the Court's equal protection analysis as it relates to laws that discriminate against illegitimate children. The Court has moved away from the extreme deference of *Labine* to the mid-level scrutiny of *Lalli*. The progression of these decisions indicates that state intestacy laws that discriminate against illegitimates will be held violative of equal protection if they are not carefully tailored to achieve important state interests. This Note will now address how and why a finding that a state's intestacy laws are unconstitutional should result in making some otherwise ineligible illegitimate children eligible for survivor's benefits under the Social Security Act presumptions of dependency.

III. PRESENTATION OF *Jones v. Schweiker*

A. Introduction

The statutory presumptions of dependency in the Social Security Act were validated by the Supreme Court in *Mathews v. Lucas*.[71] The *Lucas* footnote also suggested that one of these presumptions, section 416(h)(2)(A), may provide previously ineligible illegitimates with

---

[67]*Id.* at 267-68.
[68]*Id.* at 271.
[69]*Id.* at 275-76.
[70]*Id.* at 265.
[71]427 U.S. 495 (1976).

a claim for benefits if their states' intestacy laws are found to be unconstitutional.[72] During the next term, in *Trimble v. Gordon*, the Court held that the Illinois intestacy law unconstitutionally discriminated against illegitimate children.[73] The combination of the *Lucas* footnote and the holding in *Trimble* raises the question of how section 416(h)(2)(A) should operate when a state intestacy law is found unconstitutional.

Four decisions have held that the unconstitutionality of the state intestate succession law in effect at the death of an illegitimate child's insured father makes the child eligible for benefits under section 416(h)(2)(A) of the Act.[74] These cases reason that, since *Trimble*, some types of discrimination against illegitimate children in state intestacy laws violate the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment when the laws are incorporated into a federal statute.[75] In one of these cases, *Allen v. Califano*,[76] the court explained that where state intestate succession laws are found to discriminte against illegitimate children in violation of equal protection,

> were the estates of the deceased fathers before the [state] courts, those courts would be required to permit the plaintiff children to inherit by reason of the equal protection clause. So viewing the question, these children are entitled to benefits under the Act because they would take intestate under the law as it would be applied by the state court.[77]

Only one case has held that the unconstitutionality of a state's intestate succession law would not qualify an illegitimate child whose father died while the law was unconstitutional for benefits under section 416(h)(2)(A) of the Act. Last term the Supreme Court agreed to hear that case: *Jones v. Schweiker*.[78]

---

[72]*See supra* note 36 and accompanying text.

[73]430 U.S. 762, 776 (1977).

[74]Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981); White v. Harris, 504 F. Supp. 153 (C.D. Ill. 1980); Ramon v. Califano, 493 F. Supp. 158 (W.D. Tex. 1980); Allen v. Califano, 456 F. Supp. 168 (D. Md. 1978).

[75]*See, e.g., Allen*, 456 F. Supp. at 172-74.

[76]456 F. Supp. 168 (D. Md. 1978).

[77]*Id.* at 174.

[78]668 F.2d 755 (4th Cir. 1981), *vacated sub nom.* Jones v. Heckler, 103 S. Ct. 1763 (1983). Another decision not awarding benefits was Cox v. Harris, 486 F. Supp. 219 (M.D. Ga. 1980). The *Cox* holding was based on the district court's finding that the state intestacy law was constitutional. The court stated that "the Georgia intestacy law has been upheld as constitutionally sound, therefore, the posture of the case falls squarely within the holding of *Lucas*. This court is not now faced with the question outlined in footnote 18, *Lucas*." *Id.* at 222 n.2.

B. The Fourth Circuit's Opinion

Jones involves the consolidation of two actions from different states appealing the denial of surviving children's benefits under the Social Security Act.[79] One suit was filed by Marcia Simms, an illegitimate child conceived six to eight weeks prior to the death of her father. The other action was brought by three illegitimate children, Albert, Bridget, and Barbara Jones. In each action, the children sought to establish their dependence on their insured fathers, and their entitlement to benefits, under two statutory provisions.[80] The children were denied benefits in both actions, and they raised two contentions on appeal. The children's first contention was that the Secretary of Health and Human Services' decision that the children's fathers, at their deaths, were not contributing to the children's support was erroneous.[81] The Fourth Circuit concluded that in both cases substantial evidence supported the Secretary's determination and, therefore, affirmed that ruling.[82]

The second contention raised on appeal based a claim for benefits on section 416(h)(2)(A), which outlines one of the methods the Social Security Administration is to use in determining whether an applicant is a dependant child of an insured individual and thereby entitled to benefits. Under that section, the intestate succession law of the state in which the deceased parent was domiciled at his death is applied. If, under that law, the applicant would take personal property intestate as a child of the deceased, then, for the purposes of the Act, the applicant is considered to be a dependent of the deceased.[83]

The children in *Jones* argued that their states' intestate succession statutes were similar to the statute found unconstitutional in *Trimble* and, therefore, were unconstitutional as violative of the equal protection clause as they applied to illegitimate children. Because the state courts would, therefore, be required to allow the illegitimate children to inherit by intestate succession,[84] the children claimed that they must also qualify for social security benefits under section 416(h)(2)(A) of the Act.[85]

The court of appeals also rejected this contention, reasoning that in enacting section 416(h)(2)(A), Congress intended to extend benefits to those children whom the state legislatures deemed likely to have been dependent on the insured, as reflected in the state intestate succes-

---

[79]The states involved were Mississippi and West Virginia.

[80]668 F.2d at 757.

[81]*Id.*

[82]*Id.* at 758.

[83]*See supra* note 15 and accompanying text.

[84]*See supra* notes 71-74 and accompanying text; *see also Jones*, 668 F.2d at 764 (dissenting opinion).

[85]668 F.2d at 757.

sion statutes.[86] In reaching this conclusion the court of appeals relied on the Supreme Court's decision in *Lucas* and quoted part of the *Lucas* opinion in which the Supreme Court found section 416(h)(2)(A) to be reasonably related to the likelihood of dependency:

> Similarly, we think, where state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death. For in its embodiment of the popular view within the jurisdiction of how a parent would have his property devolve among his children in the event of death, without specific directions, such legislation 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.[87]

The Fourth Circuit reasoned that because the state laws in question precluded these children from inheriting through their fathers by intestate succession, the state legislatures had not deemed the children, or others in similar positions, dependent.[88] Because the states had not deemed the children to be dependent, the court found the critical question to be "whether 'such law as would be applied' in § 416(h)(2)(A) means (a) all law, including that emanating from federal, constitutional, non-state sources, or (b) only law derived from state legislative enactments (or conceivably from the state's common law). It is obvious that only the latter was intended by Congress."[89] The court concluded that Congress intended the federal social security legislation to incorporate state intestacy law without any "involuntary modifications" that might be "compelled by the federal constitution."[90]

The Fourth Circuit went on to say that even if the intestate succession statutes were unconstitutional, and the children involved were able to join in taking from the estates of their fathers, this would not qualify them for benefits under the Social Security Act. The court reasoned that such a ruling would contravene the intent of Congress in adopting section 416(h)(2)(A) by granting benefits to illegitimates whom the state legislatures had not deemed dependent.[91] The court, therefore, never reached the issue of the constitutionality of the state intestacy laws.

---

[86] *Id.* at 760.
[87] *Id.* (quoting Mathews v. Lucas, 427 U.S. 495, 514-15 (1976)).
[88] 668 F.2d at 760.
[89] *Id.* at 761.
[90] *Id.*
[91] *Id.*

C. Evaluation and Criticism of the Court of Appeals Decision

1. Congressional Intent.—The court of appeals erred in construing the intent of Congress in adopting section 416(h)(2)(A) to be the extension of benefits only to those children deemed dependent by the state legislatures, regardless of the constitutionality of those determinations. The history of the Act and federal constitutional considerations, not dealt with by the Fourth Circuit, lead to the conclusion that the reasoning of the court in *Jones* was seriously flawed. First, the *Jones* majority's interpretation of congressional intent is refuted by the history of the Social Security Act provisions that create the presumptions of dependency. The Fourth Circuit's interpretation restricts the number of illegitimate children eligible for benefits under section 416(h)(2)(A) to those children deemed likely to be dependent by state legislatures.[92] Congress, however, has consistently acted to increase the number of illegitimate children eligible for benefits, and it is unlikely that Congress intended such a restrictive reading of the section. Prior to 1960, section 416(h)(2) was comprised only of the presumption of dependency based on the intestate succession laws of the states. In that year, Congress added the section, now codified as section 416(h)(2)(B), which declares an applicant the child of the insured if the mother and father went through a marriage ceremony that would have been valid except for a legal impediment.[93] This amendment made it possible for some illegitimate children who would not qualify under section 416(h)(2)(A) to become elegible for benefits. Then, in 1965, Congress again amended this part of the Social Security Act by adding section 416(h)(3)(C),[94] which creates a presumption of dependency when the deceased insured individual had acknowledged the applicant to be his child, or when a court had declared the decedent to be the applicant's father, or when a court had ordered the decedent to help support the applicant because the applicant was his child.[95] Section 416(h)(3)(C) also provides for a child's eligibility when the applicant can prove paternity and demonstrate that the deceased insured either lived with or contributed to the support of the applicant at the time of the insured's death.[96] Thus, it can be seen that

---

[92]*Id.*

[93]Social Security Amendments of 1960, Pub. L. No. 86-778, § 208(b), 74 Stat. 924, 951-52. The Social Security Act defines a legal impediment as: "only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage." 42 U.S.C. § 416(h)(1)(B) (1976).

[94]Social Security Amendments of 1965, Pub. L. No. 89-97, § 339(a), 79 Stat. 286, 409-10.

[95]42 U.S.C. § 416(h)(3)(C)(i) (1976 & Supp. V 1981); *see supra* note 15.

[96]42 U.S.C. § 416(h)(3)(C)(ii) (1976 & Supp. V 1981).

Congress has acted consistently to expand the number of illegitimate children eligible for benefits under the Social Security Act. These amendments do not support the congressional intent attached to section 416(h)(2)(A) by the court of appeals in *Jones*, which severely limits the number of illegitimate children eligible for benefits. Given the trend of Congress in the enactment of the amendments described above, it is much more likely that Congress would prefer a broad reading of section 416(h)(2)(A) which would increase the number of eligible illegitimate children.[97]

The United States Constitution provides a second basis for questioning the *Jones* majority's interpretation of congressional intent. It is less obvious than indicated by the *Jones* court that Congress intended to incorporate only state law in section 416(h)(2)(A). Section 416(h)(2)(A) states that the Social Security Administration shall "apply such law as would be applied in determining the devolution of intestate personal property . . . by the courts of the State in which [the insured] was domiciled at the time of his death" in determining whether the presumption of dependency has been fulfilled.[98] It is unlikely that the Fourth Circuit would have concluded that Congress intended to adopt a state intestate succession law allowing illegitimate white children to inherit from their fathers, but preventing illegitimate black children from doing so because it reflects the popular view within the jurisdiction[99] as to which children are likely to be dependent. To attribute such an intention to Congress seems ludicrous, yet it is not significantly different from the *Jones* court's interpretation of congressional intent. Regardless of whether a state intestacy law violates the equal protection clause because it is found to discriminate against blacks, under strict scrutiny, or illegitimates, under an intermediate level of scrutiny, the United States Constitution refutes a conclusion that Congress intended to incorporate an unconstitutional statute as a basis for determining eligibility for federal benefits.

The supremacy clause of the United States Constitution states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding."[100] Under the supremacy clause the state courts are bound to consider federal constitutional requirements when interpreting and applying their state laws.[101] Thus, if the courts of the states involved in *Jones* were called upon to determine the constitu-

---

[97]*See* Jones v. Schweiker, 668 F.2d at 766 (Bryan, J., dissenting).

[98]42 U.S.C. § 416(h)(2)(A) (1976); *see supra* note 15.

[99]668 F.2d at 761.

[100]U.S. CONST. art. VI, cl. 2.

[101]Smith v. O'Grady, 312 U.S. 329 (1941).

tionality of their state intestacy laws, those courts would be obligated to evaluate those laws in light of the equal protection standards enunciated by the Supreme Court in *Trimble v. Gordon*[102] and *Lalli v. Lalli*.[103] If those laws were found to discriminate unconstitutionally against the illegitimate children involved in *Jones*, the Supreme Court's dicta in the *Lucas* footnote indicates that those children would be eligible for benefits under section 416(h)(2)(A).[104] That dicta and its compelling logic have been followed by at least four courts.[105] In *Allen v. Califano*,[106] the court stated:

> Section 416(h)(2)(A) looks to the law that would be applied by the state of the wage earner's domicile at death. In these cases the state laws referred to are invalid. Thus, were the estates of the deceased fathers before the [state] courts, those courts would be required to permit the plaintiff children to inherit by reason of the equal protection clause. So viewing the question, these children are entitled to benefits under the Act because they would take intestate under the law as it would be applied by the state court. Accordingly, they meet the statutory qualification criteria found in 42 U.S.C. § 416(h)(2)(A).[107]

It is clear from both the wording of section 416(h)(2)(A) and the interpretation given that wording by the courts, that the majority in *Jones* erred in holding that Congress intended to adopt state law unaffected by federal constitutional considerations. Because the validity of state law is conditioned upon meeting federal constitutional requirements, the duty under section 416(h)(2)(A) of the Secretary to "apply such law as would be applied . . . by the courts of the State"[108] compels the conclusion that Congress intended the Secretary to apply state intestacy laws as modified by federal constitutional law.

2. Congressional Adoption of Unconstitutional State Laws.—In *Jones*, the Fourth Circuit concluded that Congress intended to adopt the state intestate succession laws, regardless of their constitutionality, as one method of determining dependency. There are grave doubts whether the adoption of an unconstitutional law would itself be constitutional. While the fifth amendment, unlike the fourteenth amend-

---

[102]430 U.S. 762 (1977); *see supra* notes 51-64 and accompanying text.

[103]439 U.S. 259 (1978); *see supra* notes 65-70 and accompanying text.

[104]*See supra* text accompanying note 36.

[105]Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981); White v. Harris, 504 F. Supp. 153 (C.D. Ill. 1980); Ramon v. Califano, 493 F. Supp. 158 (W.D. Tex. 1980); Allen v. Califano, 456 F. Supp. 168 (D. Md. 1978); *see also* Jones v. Schweiker, 668 F.2d 755, 764 (4th Cir. 1981) (Bryan J., dissenting).

[106]456 F. Supp. 168 (D. Md. 1978).

[107]*Id.* at 173-74.

[108]42 U.S.C. § 416(h)(2)(A) (1976).

ment, does not contain an equal protection clause, the Supreme Court has concluded that:

> the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[109]

If the Supreme Court were faced with the adoption of an unconstitutional state law by a federal statute, it is likely that the federal statute would be found unconstitutional as violative of the due process clause of the fifth amendment. *Eskra v. Morton*[110] provides useful insight in an analogous situation.

Eskra involved the incorporation of state intestate succession laws into federal statutes. In *Eskra*, Constance, a Chippewa Indian and an illegitimate child, sought review of a decision of the Bureau of Indian Affairs that she was not eligible to inherit part of the estate of her great aunt Blue Sky.[111] According to the federal statutes involved in the case,[112] Blue Sky's interest in Indian trust land in Wisconsin would pass to her heirs under the laws of Wisconsin.[113] Thus, the share Constance would take from her great aunt's estate under Wisconsin intestacy law, determined the share she would take from her aunt's interest in the Indian trust land. Under the Wisconsin law then in effect, an illegitimate child could inherit from but not through her mother.[114] In a decision by Mr. Justice Stevens (then Circuit Judge), the Court of Appeals for the Seventh Circuit found no legitimate state interest to justify the state intestacy law's discrimination against illegitimates in Constance's position.[115] The court stated that all persons within the jurisdiction of every state and of the United States must be given equal protection of the laws.[116] The Seventh Circuit concluded that the due process clause of the fifth amendment prevented the federal government from discriminating against Constance on the basis of the unjustifiably discriminatory state law. The

---

[109]Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (footnote omitted).

[110]524 F.2d 9 (7th Cir. 1975).

[111]*Id.* at 10-11.

[112]25 U.S.C. § 348 (1976 & Supp. V 1981) and 25 U.S.C. § 464 (1970) (current version at 25 U.S.C. § 464 (1976 & Supp. V 1981)).

[113]524 F.2d at 11.

[114]*Id.*

[115]*Id.* at 14-15.

[116]*Id.* at 13.

court held that she was, therefore, entitled to share in her great aunt's estate equally with her legitimate sisters.[117]

Eskra provides the basics for a convincing argument that Congress is prohibited by the fifth amendment from incorporating unconstitutional state intestacy laws into section 416(h)(2)(A). Classifications in state intestacy laws that discriminate against illegitimates will be found to violate the equal protection clause of the fourteenth amendment when the statutes are not "substantially related to the important state interests the statute is intended to promote."[118] Similarly, the due process clause of the fifth amendment prohibits Congress from discriminating against illegitimates unless it is able to justify its actions under the mid-level test applicable to classifications based on illegitimacy. In *Eskra*, the court found the classification in the state intestacy law unconstitutional, and held that the due process clause prevented the federal government from discriminating against the illegitimate child by incorporating the state law.[119] It follows that the federal government is prohibited from discriminating against illegitimate children by incorporating unconstitutional state intestacy laws into section 416(h)(2)(A). Upon concluding that the classifications in the state intestate succession law could not be justified, the court in *Eskra* held that the illegitimate child was entitled to the same treatment accorded her legitimate sisters.[120] The logical conclusion is that if the intestacy laws involved in *Jones* were found to discriminate unconstitutionally against illegitimate children, the children involved in *Jones* would have to be treated as legitimate children for purposes of intestate succession. Therefore, those children would be eligible to inherit from their fathers' estates under the state intestacy law, and would be eligible for benefits under section 416(h)(2)(A).

The court in *Jones* attempted to distinguish *Eskra* by looking at the congressional purpose underlying the federal statutes in each case.[121] The *Jones* majority reasoned that the congressional purpose underlying the federal statute involved in *Eskra* was to distribute Indian trust land in the same manner that the land of non-Indians was distributed under state intestacy laws. "Congress obviously desired and expected exactly the same result under two interrelated intestate succession schemes."[122] Thus, if a state intestacy law were declared unconstitutional and an illegitimate child was, therefore, allowed to inherit from a non-Indian, the child should also be allowed to inherit from an Indian who owned property in the state. The *Jones* majority

---

[117]*Id.* at 15.

[118]Lalli v. Lalli, 439 U.S. at 275-76; *see supra* notes 65-70 and accompanying text.

[119]524 F.2d at 15.

[120]*Id.*

[121]668 F.2d at 761 n.17.

[122]*Id.*

reasoned that *Eskra* provided for a result "*not intended* by the Wisconsin legislature . . . in order to maintain parity" between two intestate succession schemes as Congress intended.[123] In contrast, a determination that a state intestacy statute is unconstitutional would not affect who qualifies under section 416(h)(2)(A) because it is only the state legislature's opinion of which children are dependent that Congress adopted. The majority's analysis is unpersuasive for two reasons. First, it is based on its misunderstanding of Congress' intent in enacting section 416(h)(2)(A), as discussed in the previous section. Second, it fails to recognize that Congress is prohibited by the fifth amendment from incorporating an unconstitutional statute, even if that was its intention.

IV. On Remand to the Fourth Circuit

The Supreme Court vacated and remanded *Jones* to the Fourth Circuit.[124] In remanding the case, the Supreme Court suggested further consideration in light of changes in the Mississippi intestate succession statute and a West Virginia state court decision.[125]

Of relevance to the Jones children, Mississippi has amended its intestate succession statute to allow illegitimate children to inherit from their fathers if there has been an adjudication of paternity.[126] That adjudication may take place after the death of the intestate, and the statute is given retroactive effect by allowing claims existing prior to the amendment to be brought within three years of its effective date.[127] Because the insured was found by the Secretary of Health and Human Services to be the father of the three Jones children,[128] it is probable that a proceeding under the amended Mississippi statute would result in the same finding. If the children brought an action, as authorized by the statute, seeking and obtaining an adjudication of paternity, they would be able to inherit under the state intestacy law. Even under the Fourth Circuit's reasoning, if the children can inherit under the state intestacy law they are eligible for benefits under section 416(h)(2)(A) of the Social Security Act because the state legislature has made the value judgment that these children should

---

[123]*Id.*

[124]Jones v. Heckler, 103 S. Ct. 1763 (1983). The case name was changed to indicate the new Secretary of Health and Human Services, Margaret H. Heckler. The case was reheard by the Fourth Circuit in July, 1983, but no decision had been issued as of 1983.

[125]103 S. Ct. at 1763.

[126]Miss. Code Ann. § 91-1-15(2) (Supp. 1982).

[127]*Id.* The statute allows claims existing prior to its effective date, July 1, 1981, to be brought within three years. Thus, the Jones children would have until July 1, 1984 to bring an action to take their intestate share from their purported father.

[128]Jones v. Schweiker, 668 F.2d at 758.

be considered dependent.[129] It is likely, therefore, that the Fourth Circuit will declare the Jones children eligible to receive benefits under section 416(h)(2)(A).

The situation of Marcia Simms, as affected by a West Virginia state court decision, may not provide the Fourth Circuit with the same guidance for reversing its earlier holding. On remand, the Supreme Court called on the Fourth Circuit to reconsider the case in light of *Adkins v. McEldowney*.[130] In that case, the highest West Virginia court found the state intestacy law unconstitutional as applied to illegitimate children. The West Virginia intestacy law allowed illegitimates to inherit from their mothers but not from their fathers,[131] while legitimate children could inherit from both parents.[132] The court found the statute violative of the equal protection clause of the fourteenth amendment using intermediate scrutiny.[133] It also held that under the equal protection clause of the West Virginia state constitution, illegitimacy is a suspect classification and subject to strict scrutiny.[134] Thus, the state intestate succession statute was found to violate both the state and federal equal protection clauses.

The West Virginia court then discussed the effect of the finding of unconstitutionality upon illegitimate children's inheritance rights. The court stated that the trial courts[135] erred in concluding that the statute's unconstitutionality required them to resort to the common law and deny any intestate inheritance rights to illegitimate children.[136] The court concluded that because the legislature had demonstrated an intent to benefit some illegitimate children, by allowing them to inherit from their mothers, the doctrine of neutral extension was appropriate.[137] Under that doctrine, the court held that illegitimate children must be allowed to inherit from both their mothers and their fathers.

Under the *Adkins* decision, Marcia Simms would be eligible to inherit from her father. That case and its result do not, however, necessarily qualify her for social security benefits under the Fourth Circuit's reasoning in *Jones*. The *Adkins* court found the intent of the state legislature to allow illegitimate children to inherit controlling,

---

[129]*See supra* notes 83-88 and accompanying text.

[130]280 S.E.2d 231 (W. Va. 1981).

[131]W. VA. CODE § 42-1-5 (1982).

[132]*Id.* § 42-1-1.

[133]280 S.E.2d at 232-33.

[134]*Id.* at 233. The court had also found gender-based classifications to be suspect and entitled to strict scrutiny under the state constitution. Peters v. Narick, 270 S.E.2d 760 (W. Va. 1980).

[135]*Adkins* involved three cases consolidated on appeal.

[136]280 S.E.2d at 233.

[137]*Id.*

although the law was unconstitutional as written.[138] Under the Fourth Circuit's reasoning, however, the West Virginia legislature's intent to make some illegitimate children eligible to inherit does not mean that the state legislature made the value judgment that Marcia should be deemed dependent. The Fourth Circuit could find that, regardless of the state legislature's intent, the *Adkins* decision makes Marcia eligible to inherit from her father's intestate estate and that she is, therefore, eligible for benefits under section 416(h)(2)(A). It is equally reasonable to read the Fourth Circuit's opinion in *Jones* as leading to the conclusion that the West Virginia legislature has not deemed Marcia to be dependent and that she is not, therefore, eligible for benefits under section 416(h)(2)(A).[139] Such a conclusion requires the court not only to find that Congress intended to adopt a state law which violates both federal and state constitutional requirements as a basis for determining eligibility for federal benefits, but also to approve such an intention even though it violates the due process clause of the fifth amendment. Such a holding would, for the reasons discussed in the preceeding section, be one degree less correct than the Fourth Circuit's original opinion in *Jones*.

V. Conclusion

The Social Security Act has created several presumptions of dependency which, if met, will entitle a child to survivor's benefits. One of those presumptions arises if a child inherits personal property from the deceased insured parent's estate according to the applicable state intestate succession law. Several state intestate succession laws have been found unconstitutionally discriminatory against illegitimate children. To prevent illegitimate children from receiving social security benefits on the basis of these unconstitutional state laws contravenes the intent of Congress to broaden the group of children eligible for such benefits. Furthermore, the incorporation into a federal statute of an unconstitutional state law as a basis for determining eligiblity for federal benefits is itself prohibited by the fifth amendment. The majority in *Jones* erred in holding that the denial of benefits to the children involved in *Jones* did not deny them equal protection of the law. On remand the Fourth Circuit should follow the reasoning of *Eskra*, and hold that if the state statutes involved are unconstitutional, the children are automatically eligible for benefits under section 416(h)(2)(A). If the court is unwilling to reach such a holding, it should find the Jones children eligible under their state's amended intestacy law, which allows them to inherit from the insured's intestate estate. The

---

[138] *Id.*

[139] *See supra* notes 83-88 and accompanying text; *see also Jones*, 668 F.2d at 760-61.

court should also find Marcia Simms eligible for benefits under her state's case law. The *Adkins* decision makes Marcia eligible to inherit from her father's intestate estate and she, therefore, falls within the plain wording of section 416(h)(2)(A).

TIMOTHY L. STEWART