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In the

Supreme Court of the United States

F. David Mathews, Secretary of Health, Education, and Welfare,

Appellant,

v.

Ruby M. Lucas, et al.,

Appellees.

No. 75-88

Washington, D. C.
January 13, 1976

Pages 1 thru 38

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RUBY M. LUCAS, et al.,

Appellees.

Washington, D. C.,

Tuesday, January 13, 1976.

The above-entitled matter came on for argument at 1:55 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

KEITH A. JONES, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Appellant.

C. CHRISTOPHER BROWN, ESQ., Legal Aid Bureau, Inc., 341 N. Calvert Street, Baltimore, Maryland 21202; on behalf of the Appellees.

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for the Appellant 36

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll now hear No. 75-88, Mathews against Lucas.

Mr. Jones.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE APPELLANT

MR. JONES: Mr. Chief Justice, and may it please the Court:

This case, like the one just argued, arises from the Secretary's denial of insurance, child's insurance benefits, to the illegitimate children of a deceased wage-earner, on the ground that the wage-earner had not been supporting or living with the children at the time of his death.

In this case, however, the claimants brought suit for review only of the Secretary's specific denial of benefits to them. They did not request either injunctive or class relief.

The district court sustained the Secretary's findings as supported by substantial evidence, but, nevertheless, reversed, without issuing an injunction, the denial of benefits on the ground that the statutory eligibility requirement of support or co-residence denied illegitimate children due process under the Fifth Amendment.

Since, in so holding, the district court held the statute -- held an Act of Congress unconstitutional, this Court

plainly has jurisdiction under Section 1252 of the Judicial Code.

Proper analysis of this case requires a full understanding of the statutory scheme for the distribution of child's insurance benefits. The formal linchpin of that scheme is dependency. Under Section 202(d)(1)(C) of the Social Security Act, payment of child's insurance benefits are made only on behalf of the dependent children of disabled, retired or deceased wage-earners.

However, the Act presumes dependency as a matter of law for most children. As to legitimate children, the Act presumes dependency if the child has not been adopted by another wage-earner.

Dependency is also presumed with regard to four categories of illegitimate children. First, children whose parents went through a marriage ceremony that was rendered invalid by a non-obvious legal impediment; second, children whose father acknowledged paternity in writing; third, children whose father's paternity was decreed by court; and, fourth, children whose father was ordered by a court to contribute to their support.

Dependency is not presumed with regard to other illegitimate children or to legitimate children who are -- legitimate adopted children who are seeking benefits on behalf of their natural parents' social security account.

In order to be entitled to child's insurance benefits, these latter categories of children must prove that the wage-earner was in fact their father and also that their father was living with or contributing to their support at the time of death.

Now, it's the constitutional validity of this statutory classification that is at issue in this case. The Appellees here, the Lucas children, are children who must prove dependency as a condition of eligibility for child's insurance benefits under the Act. And they challenge that requirement as a denial of due process under the Fifth Amendment.

At the outset of this case, it is necessary to address the question of the appropriate standard of review, and with the Court's indulgence, I propose to approach this question in a largely philosophical manner.

The briefs in both this and the preceding case, the Norton case, proceed upon the premise that the two-tiered equal protection analysis that evolved in the late 1960's still governs the adjudication of equal protection cases. And upon reflection I have concluded that this premise is probably erroneous.

This Court appears in large part to have abandoned the two-tiered equal protection analysis and, I think, for good reasons.

The development of a two-tiered equal protection analysis appears to have been an interim judicial response to the perceived failure of the traditional rational basis test sufficiently to protect certain disadvantaged groups, and to vindicate certain important interests, when this Court determined that statutes adversely affecting such groups or impinging upon such interests would be subjected to very close judicial scrutiny and would be sustained only if they satisfied or serve a compelling governmental interest.

QUESTION: Do you happen to know where that phrase first was used?

MR. JONES: Compelling governmental interest? No, but I think it --

QUESTION: I think it was in the Cramer case, which was in 1969 -- would that be right?

MR. JONES: I'm not sure of the date.

QUESTION: The voting rights case in New York, the voting disqualification case in New York. However, go ahead; I think I'm correct in that. That was just used as a phrase, wasn't it, --

MR. JONES: That's correct.

QUESTION: -- not as a doctrine.

MR. JONES: But it became one, I think.

QUESTION: That's right. That's what happens to phrases.

MR. JONES: But other classifications continued to be reviewed under the traditional rational basis test, which required only a minimal showing of rationality.

And this two-tiered approach had a lot of obvious difficulties to it. One of these was in knowing to which tier a particular case belonged. Outside the area of race, there appeared to be no availability constitutional standards for defining suspectness. That is, for selecting the groups with respect to whom statutory classifications would be considered inherently suspect.

Similarly, there are few, if any, constitutional guideposts for determining what interests are so important as to be fundamental.

Another difficulty with the two-tiered analysis is that it has never been easy to articulate an adequate constitutional justification for the dramatic gap that existed between the two levels of equal protection review.

QUESTION: You don't take the Caroline Products footnote as an article of faith, then?

MR. JONES: In what sense an article of faith, Mr. Justice Rehnquist?

QUESTION: Well, you don't believe that it has the statue of being bodily incorporated into the Constitution?

MR. JONES: The footnote in the Caroline Products case?

QUESTION: It wasn't an equal protection footnote; it was a First Amendment footnote.

QUESTION: Before, it wasn't either.

[Laughter.]

MR. JONES: It would be of assistance to counsel --

QUESTION: And your opinion.

[Laughter.]

MR. JONES: -- if these cryptic comments could be made more explicit.

QUESTION: I withdraw my question.

[Laughter.]

MR. JONES: At any rate, with considerations such as those I have just indicated in mind, perhaps in mind, the Court has, it seems to me, preceptibly and gradually altered its approach to equal protection cases.

First, in the recent past it has resisted attempts by litigants to add new classifications to the suspect list of the higher tier.

But second, and perhaps more importantly, in many punitively lower-tier cases, the Court has departed from the traditional rational basic test by requiring a more persuasive showing than in the past that the means chosen by the legislature serve an actual and permissible legislative objective.

In particular, this stronger showing has been required where the challenged statutory classification defined

the class in such a manner as to create the suspicion that the legislature may have been discriminating against it, against the class without just cause.

In this latter development of a stricter rational basis standard of review, in large part, has rendered the two-tiered analysis obsolete.

Accordingly, I think it is unrealistic for the Appellees here to insist upon a compelling governmental interest standard of review. But, by the same token, since this case concededly involves a class of individuals that historically has been subjected to social obliquity and to invidious treatment by State Legislatures.

QUESTION: And that has no political power in it.

MR. JONES: That's correct.

I think it's equally unrealistic for the government to insist upon the minimal scrutiny of the traditional rational basis test in this case. And I would anticipate that in a case such as this, the Court would carefully review the challenged statutory classification.

QUESTION: Where do you put McGowan v. Maryland in this now? Your terminology has got me a little bit confused.

MR. JONES: McGowan v. Maryland did not, as I recall, involve discrimination or --

QUESTION: Yes, but which test I am speaking of, minimal?

Is McGowan v. Maryland what you think of as the minimal scrutiny, and minimal rational --

MR. JONES: That's correct. And I am not suggesting that the minimal scrutiny test has lost all force, but, rather, I am suggesting that in practice the Court has departed from that test in cases involving classes of individuals as to whom there may be some founded suspicion that they would be subject to invidious treatment by the Legislature.

A statutory classification that did not classify people according to any characteristics that would normally define a class that would be subject to social mistreatment, who would, I think, be subject to the traditional rational basis standard of review.

QUESTION: How about mortgage holders out in Minnesota in 1935, that Blazius vs. Minnesota Savings and Loan?

MR. JONES: I think that kind of economic legislation which does not impinge upon a group that is definable in invidious terms would be subject to minimal --

QUESTION: What do you mean by definable in invidious terms?

MR. JONES: Well, frankly, Mr. Justice Rehnquist, I think that the class that we're concerned with here, the class of illegitimate children, is one that has been subject to invidious treatment by --

QUESTION: What do you mean by "invidious"?

MR. JONES: Enactments that express moral disapproval of the status of illegitimate children.

QUESTION: Don't you think that mortgage holders out in Minnesota in '35 were subjected to that same kind of treatment?

MR. JONES: I would not have thought so.

QUESTION: Well, there were farmers with pitchforks on the courthouse doors, preventing the laws from being enforced. As recited in the court's opinion.

QUESTION: Perhaps what you're saying is that they were not historically, for such a long period of time, subjected to a continuous pattern, as illegitimate children who couldn't inherit and who couldn't do a lot of other things.

MR. JONES: Well, really, what I'm trying to do is simply to state what I think has become the law. I would have said that discrimination of that kind is not discrimination against historically disadvantaged class; at the same time, it's quite clear that the Court has started applying a different rule than the minimal scrutiny test in some cases, and what I'm trying to do is just to describe what I think is a practical matter as the rule in this case.

And that rule, I would think, would be that --

QUESTION: Are you suggesting, Mr. Jones, that you're reading into some of the decisions, particularly the recent ones, a spectrum of strict scrutiny at one end and pure

minimal at the other, and a sliding scale in between?

MR. JONES: Well, about a year ago I argued a case called Weinberger v. Wiesenfeld --

QUESTION: I recall that you did.

MR. JONES: -- and, I won't make any comments as to the outcome, but it seemed to me to reflect --

QUESTION: It was unanimous.

[Laughter].

MR. JONES: The result was.

It seemed to reflect the application of a standard of review that was stricter than that which I had argued for at the time. That is, stricter than the minimal scrutiny that had traditionally been applied to social --

QUESTION: And yet not the so-called compelling interest.

MR. JONES: That's right. The Court did not, by terms, require the showing of a compelling governmental interest; and I would hope that in such cases the Court would not, and that if a sufficiently strong showing that Congress had an actual and legitimate objective in mind can be made, then the Court would sustain it.

QUESTION: Well, one of your objections, though, to the two-tiered test, you say, is the difficulty of deciding which tier something goes into. Now you're, in effect, proposing three tiers. Wouldn't that just compound the difficulty of

deciding what tier something goes into?

MR. JONES: It certainly complicates matters for both litigants and legislatures. I think that the two-tier test also complicated it. I'm not really proposing anything, but if I can predict something, I would predict that the Court might be tending toward formulation of a rule that might embrace a large number of cases and give more guidance to the Court.

I think right now we're in a position, frankly, where litigants and legislatures really don't know just what they can do. And maybe that will always be the case, as long as you have an intervention as approach to the equal protection clause.

What I am recognizing now is that we do have such an approach in these cases.

At any rate, I would anticipate that the Court would apply a test similar to that that was applied in Wiesenfeld.

QUESTION: Mr. Jones, could you help me? I understand you to be saying it should be a somewhat -- with the discrimination between legitimates and illegitimates, the test should be more strict than a rational basis test. Would you tell me what the test is that you propose?

MR. JONES: Well, I'm not saying, Mr. Justice Stevens, that it should be.

QUESTION: That you think it is --

MR. JONES: What I'm saying is that --

QUESTION: You think that's the way the law has

developed.

MR. JONES: And how this Court is going to -- what I am positive is the standard that I think is likely this Court will use in evaluating the constitutionality of the statute.

QUESTION: That's what I wanted. Would you phrase for me what your understanding is of what the law is with respect to the appropriate standard for this kind of case?

MR. JONES: Yes. I would assume that constitutionality of the requirement that these illegitimate children prove dependency would be sustained if, and only if, it is shown that that requirement further is an actual and permissible legislative objective.

And the question in this case is whether the denial of benefits to this sub-class does in fact serve an actual and permissible legislative objective.

I would make an important preliminary point at the outset. This standard of review rules out one mode of analysis, and I think that should be made clear.

It is not acceptable to ascribe a broad purpose to the statutory scheme that is in fact inconsistent with the challenged provisions, and then to hold the provision is unconstitutional because they do not further that purpose.

An example of what I have in mind is contained in the Appellant's brief in Norton, where it is argued that because the Social Security Act is intended to operate in a humanitarian

manner, it should strain a court's credibility to lay at Congress's door an intent to deny benefits to Appellant's class.

Now, with all due respect to opposing counsel, that line of argument is simply nonsense. It overlooks the fact that Congress has in fact expressly denied benefits to this class, and therefore cannot strain any court's credibility to lay that intent, the intent expressly stated in the statute, at Congress's door.

A complexity of the legislative process requires a more subtle and comprehensive analysis of the statute.

The question to be asked in a case like this is not whether the denial of benefits to this class furthers the broad social welfare purpose of the statute, but, rather, the question that I would anticipate would be asked is: Why did Congress choose to deny benefits to this class?

Now, Congress had -- if Congress reasonably believed that de-ying benefits to this class would serve an actual and a permissible legislative objective, then I would think the statute should be sustained.

Now, I can conceive of --

QUESTION: Well, does this suggest, though, that Congress has to point out what its objective was?

MR. JONES: Well, again, in Wiesenfeld, I was surprised to learn that that was the requirement, that Congress was required to spell out in the legislative history what its

purposes were, and then the provisions of the statute had to satisfy those purposes. That had not been the rule under the traditional rational basis test. But that was the approach that the Court took in Wiesenfeld, as I understood.

Now, I can conceive of three possible rationals for the statute.

QUESTION: Let me ask you one question, Mr. Jones. You say that the purpose must have been an actual one on the part of Congress, and that this particular legislation must have furthered it. So that we sit, in effect, and say, Do we agree with the legislative judgment having had this purpose in mind, that this particular section furthered that purpose?

Well, can you -- I can't imagine a more complete method of simply second-guessing the legislature.

MR. JONES: Well, if --

QUESTION: If they had that in mind, this general purpose, and enacted this statute which, in their view, furthered it, we would then be sitting here and say: Given that purpose, we think what you chose to further it didn't further it.

MR. JONES: Well, I think that a lot of leeway has to be given to judging whether a classification in fact furthers the purpose. But if it can be shown that the classification is plainly irrational in terms of any perceivable legislative purpose, then it has been the recent attitude of this Court

that even if maybe some other conceivable purpose could have been imagined, nevertheless, the statute will not be upheld. But there are inevitable -- pardon?

QUESTION: What, beside Wiesenfeld, would you suggest indicated that?

MR. JONES: Well, I think that the Murray and Moreno Food Stamp cases of three years ago are similar examples. Where, under the minimal scrutiny of the traditional rational basis test I would have thought that those statutory classifications could be sustained.

But the Court --

QUESTION: Do you get that out of the opinion or do you -- is that what you surmize?

MR. JONES: A lot of it is surmize. I've forgotten now, it's been some time since I read the Moreno opinion.

QUESTION: You might go a step further and suggest that the Court return to what was pretty well settled constitutional law for a hundred years or so, the equal protection clause was the last refuge of a desperate constitutional lawyer.

MR. JONES: That would be fine with me, Mr. Justice Stewart. But I would like to make the arguments that I think actually sustain the statute under the approach that I anticipate would be followed here.

I would say that one possible legislative objective,

I think, would be eliminated completely at the outset, and that is that Congress did not devise this statutory scheme simply to invidiously discriminate against illegitimates. There's nothing in the legislative history that suggests that the statutory classification was motivated by congressional hostility to illegitimates.

Moreover, the extension of the presumption of dependency in this case to four categories of illegitimates, and the withhwlding of it from the category of legitimate children, would refute, I would think, any suggestion that the statutory pattern itself reveals a purpose of invidious discrimination.

Therefore, this is not a case, arguably, like Levy or Glona, where the legislative objective was the impermissible one of expressing moral disapproval of the status of illegitimacy.

Now, two other legislative objectives that I think should be considered: One clearly supports the constitutionality of the statute; and the other appears not to do so.

And I will take up these in reverse order, quickly, if I can.

It seems to me that the private claimant's best argument here begins with the contention that the legislative objective was to restrict the payment of benefits to children, whether or not actually dependent, who had a legal right to be

supported by the wage-earner. And that would, of course, be a permissible legislative objective. And although the evidence is conflicting, there is some arguable basis for that view in the legislative history. But their argument proceeds, as I understand it, that the statutory scheme may have been constitutional at the time of enactment, but that the premise on which it was based was undone by this Court's decision in Gomez v. Perez, where it was held that the State must grant an illegitimate child the same right to support from his father as is possessed by a legitimate child.

And under this line of reasoning, since the members of the complainant class now have the same right to parental support as all other children, the denial to them of child's insurance benefits does not further the original purpose of the Act, and therefore should not be sustained.

Now, that I think is a plausible approach to the problem at hand. But there is an equally plausible approach that would sustain its statute, and in these circumstances, this Court should, of course, out of deference to Congress, choose the course that sustains the validity of the statute.

Now, as we point out at pages 32 through 36 of our brief in the Norton case, there is substantial evidence, both in the legislative history and directly inferable from the statutory scheme, that the purpose of the child's insurance benefits program is to provide support only for the dependent

children of disabled, retired, or deceased wage-earners, and that the purpose of requiring members of the complainant class to prove co-residence or support is to restrict the payment of benefits -- to restrict the payment of benefits to those children who may reasonably be presumed to have been dependent.

If that is the correct view of the statutory purposes, and we submit that it is, then the statutory scheme must be sustained.

It clearly was permissible for Congress to seek to restrict the payment of dependency benefits to children who reasonably could be presumed to be dependent, and the requirement that the members of the complainant class prove dependency, prove support or co-residence, furthers that permissible legislative objective.

The opposition expressed to this line of reasoning by the district court in this case was that under that view of the statutory purposes, the statute is allegedly over-inclusive and that it grants benefits to some children who are not actually dependent upon the parental wage-earner. And I would offer two answers to the argument of over-inclusiveness.

The first is that the statute is not in fact over-inclusive. And the second is that, in any event, mere over-inclusiveness is not a sufficient basis for invalidating the statute.

The statute is not over-inclusive in the terms that

I have describe; that is, to pay benefits to children who could reasonably be presumed to have been dependent upon the parental wage-earner.

As we point out at pages 38 and 39 of our brief in Norton, and as the district court correctly observed in that case, it was not unreasonable for Congress to have extended the presumption of dependency to most legitimate children and to the four specifically defined categories of illegitimate children.

At the same time, the members of the complainant class could not reasonably have been presumed to be dependent upon their fathers, since the statutory purpose is a modest one of separating those classes as to which the presumption of dependency is reasonable from those as to which is it not reasonable. The statute is not, in fact, over-inclusive in those terms.

But, finally, even if the statute were deemed over-inclusive, because it fails to weed out some non-dependent children from the list of beneficiaries, that would not justify as judicial enlargement of the class of beneficiaries to include all other non-dependent children as well.

A statute that is over-inclusive but not under-inclusive. That is, a statute that grants benefits to some persons who are outside the statutory rationale, but does not deny benefits to any persons who are within the statutory rationale, should not, except perhaps in the most extraordinary

circumstances, be struck down.

The realities of the legislative process, and the complexities of administration ordinarily prevent a perfect matching of legislative purpose and effect.

A permissible legislative purpose, such as the purpose here of restricting benefits, the children who could reasonably be presumed to be dependent upon their wage-earner father should not be abandoned wholesale by the courts merely because that purpose has not been carried out by the legislature with precision.

Accordingly, the statute here, the denial of benefits to these children, furthers a legitimate and an actual legislative objective which should be sustained.

I would like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Brown.

ORAL ARGUMENT OF C. CHRISTOPHER BROWN, ESQ.,

ON BEHALF OF THE APPELLEES

MR. BROWN: Mr. Chief Justice, and may it please the Court:

I'd first like to address myself to the proper equal protection standards that should be applied in this case.

We contend that this class of illegitimate children meets all the traditional criteria which have been applied to put this class within the strict scrutiny standard test.

On the other hand, it seems quite clear that this, the Dandridge vs. Williams test, does not apply here and for the same reasons it did not apply in the Jimenez case. The government has made no finite resources argument in this case.

Now, it's not totally important to us as to what label we put on this case: is this a strict scrutiny test or is this a traditional test?

At the very least, we think, that it has to be dealt with with very high scrutiny, and it's not so imporant as to what we call it, but it's more important as to what this Court does.

QUESTION: Well, what's the difference between "high scrutiny" and "strict scrutiny"?

MR. BROWN: Under strict scrutiny, and I would contend under scrutiny, if there is indeed a gradient, the illegitimate children are somewhere at the top end of that gradient.

And the difference would be this -- and people would be placed along the gradient, I presume -- one criteria to place them upon that would be, are they a class that has no control over the status that they are being discriminated against? That's the case here in illegitimate kids situation.

But, at the very least -- and it's not necessary to get into argument -- are they in the strict scrutiny class and all the way at the top, or are they somewhere approaching that class?

QUESTION: Well, how about discrimination against

Catholics? Now, they can become Protestants tomorrow, presumably, and change their status. Would you say that is not, therefore, strict scrutiny?

MR. BROWN: Unless there are First Amendment overtones, yes, sir, you're correct, Your Honor.

What this Court has traditionally done, when it has dealt with either strict scrutiny cases or heightened scrutiny cases or whatever we may call it -- and perhaps sex falls into this same category -- generally speaking, the burden has been on the government to establish why or what the legitimate purposes of the Act are.

And that's a very significant fact, because if the government has to come forth and say something, that means a lot to the outcome of the case.

Secondly, and I think perhaps Mr. Jones has conceded this point, there have to be actual legislative objectives. Now, in this situation, that would be that Congress has to actually have articulated in some fashion or another what, indeed, it did intend.

It's very easy for lawyers, after the fact, --

QUESTION: Well, can't we get that right out of the words they use, such as the word "dependent"?

MR. BROWN: Indeed you can; indeed you can.

And if that's what they intended, and if they say we're on words, that's the best place to get it, without a

doubt.

QUESTION: That's a pretty good source, isn't it, the language of the statute?

MR. BROWN: Indeed it is. I have no problem with that. That's the best source, I would guess.

Well, let me -- okay, let me lead in, because that obviously leads in to what they did intend.

The Congress has set up the structure, which is basically as follows: All legitimate -- first of all, everyone has to prove that an individual was indeed a wage-earner covered by the Act, employed in so many months and so forth -- so many quarters.

Also they have to apply, also they have to be under either 18 or 22, and they have to be unmarried.

Those are the non-controversial pre-conditions that have to be met.

There are two major pre-conditions, however; one is that paternity has to be shown, and the second is that dependency has to be established.

Now, what the Act does is, it sets up a dependency requirement, and then it wipes it away for everyone except for two classes: one class is the class in this case, a certain class of illegitimate children; the second class consists of adopted children and step-children.

Now, there is a special reason for adopted children

and step-children to have to establish actual dependency. Indeed, the fact that they were dependent or supported by the deceased wage-earner. And that is because they have two potential wage-earners upon which to claim benefits. The adopted child has his natural father that he can claim benefits upon, or his new adoptive father. The same goes for step-children.

Now, unfortunately, this class of illegitimate children has been lumped in with this latter category. Unforunately, illegitimate children, much less than having two parents to look to for support after that parent dies -- before he dies, generally often have no parents at all.

There, therefore, seems to be good reason to require of adopted children and step-children to prove this, but, I contend, that there is no reason to require this class of illegitimate children to prove this.

Now, what the court below and what the Secretary has argued the purpose is is as follows:

That really the Congress, in structuring the Social Security Act, intended to only replace support that was actually lost. That is, they only intended to give benefits to the children of fathers who actually did support them prior to the father's death.

We cite in our briefs the rather explicit legislative history, which seems to counter this notion. There are two

documents that say that the Act intends to give benefits to those who did receive support prior to their father's death and those who were owed the obligation to receive support prior to their father's death.

We contend that that more clearly articulates Congress's reasoning, not just to give benefits to those who actually got it, but also to give benefits to those who were in a position that they should have actually gotten it, but, for some reason, their father failed to live up to that obligation.

What the district court below did, in order to add on to that reason, is that the district court below assumed that Congress set up a category that those people will not have to prove actual support before the father died, if it's more likely that they indeed were supported. This is very similar to Frontiero vs. either Laird or Richardson, that this Court has encountered before.

In other words, legitimate children are presumed generally to have been supported, therefore, to save administrative convenience, that category will not have to establish that they were in fact supported.

Now, our briefs establish that, assuming that indeed Congress had such a notion -- which we don't think they did, because the congressional history doesn't seem to indicate that. If they indeed did have that notion, the Act has very inarticulately attempted to pursue that purpose.

There is no guarantee -- there are only two studies that seem to reflect upon this, and both result in ambiguous conclusions as to whether or not who is more likely than someone else to have actually been supported prior to death.

Accordingly, it seems highly likely that even if we assume that Congress did indeed intend to only give benefits to those people who were actually supported prior to their death, that they didn't really accomplish that in any meaningful way.

And I --

QUESTION: To get back to your example of adopted children and step-children, did I understand you to say that it was likely they were supported before?

MR. BROWN: Well, if you're --

QUESTION: Aren't the parents --

MR. BROWN: If you're an adopted child.

QUESTION: Aren't there a lot of adopted children who are orphans and a lot of step-children who have lost a parent?

MR. BROWN: Okay. The Social Security Administration, if you're going to adopt a child, and you're not an illegitimate child in this class, presumes that you were in fact dependent upon your natural father, and you can automatically -- assuming you prove he's your father -- get Social Security benefits under the Act.

Now, you may also want to attempt to get benefits under your adoptive father's wage-earner status. And, in effect, you can get the highest of whichever the two may be.

QUESTION: But you can't get both?

MR. BROWN: Can't get both. You get the best of both worlds, whichever that may be, and we're not complaining about that.

The problem is they have -- the Act has lumped our category in with this category that has two potential wage-earner sources.

QUESTION: But you haven't answered my observation that a lot of these don't have two potentials.

MR. BROWN: That is true -- that's possibly true, but --

QUESTION: Possibly; it is often true, is it not?

I certainly have conducted many an adoption of an orphan child, and many an adoption of a step-child without a male or female parent.

MR. BROWN: Okay. I concede that that is true.

QUESTION: Well, given that most States conceal the identity of illegitimate children, identity of the father in adoption proceedings, your generalization really doesn't wash as to illegitimate children. It's very difficult for an illegitimate child to find out the identity of the father in most circumstances.

MR. BROWN: Find out the identity of his own father?

QUESTION: Yes.

MR. BROWN: Well, it is in some circumstances. I don't really think it is in most circumstances, Your Honor.

The Act sets out very explicit routes by which you can establish the paternity of your natural father, even though he was not married to your mother; and indeed there are difficulties in pursuing proof of paternity at times. But the Act doesn't seem to be really dealing with that difficulty.

It may be argued, the logical purpose of this discrimination against illegitimate children could be to bolster proof of paternity, and therefore avoid fraud.

The district court didn't find that purpose. As our brief indicates, the Secretary who, himself, is the one to whom you have to prove to his satisfaction paternity, his own internal claims manual, which is his instructions to people as to how to interpret the Act, it doesn't seem to use it as that purpose. Prevention of fraud could theoretically be a purpose in this situation, but Congress hasn't said it, the Secretary hasn't said it, the district court didn't say it, and the Solicitor General has alluded to it in the last two pages of his brief, mildly.

If this is a case that requires some sort of heightened scrutiny, it wouldn't seem that that sort of a very evasive and intangible purpose, never articulated by

Congress, could indeed be the legitimate purpose upon which this case could be -- this statutory classification could be found constitutional.

QUESTION: Well, how about the presumption or the notion, as you call it, that the class you're interested in is normally not supported?

MR. BROWN: There's a presumption -- there's a presumption that the class that Gregory Norton is in is not supported; was not previously supported by the deceased father.

QUESTION: And there is a congressional presumption.

MR. BROWN: Well, that's -- that's one way the Act could be read, yes.

QUESTION: Yes. Well, let's assume that's so. And you say that there's conflicting evidence around --

MR. BROWN: Okay. Here's an example --

QUESTION: -- studies; but there's no question about what Congress concluded the evidence showed.

MR. BROWN: If you ascribe that intent to Congress, and if Congress indicated that finding by the way it structured the Act.

QUESTION: Well, assume it did. Assume it did.

MR. BROWN: Okay. Assume Congress assumed, then, that these other categories were more likely --

QUESTION: Then you're suggesting to us we should disagree with Congress because we think we have a better notion

of what the facts are, or what?

MR. BROWN: Well, my contention is this: The only notion that I can see anyone having would be based upon a few very limited sources of statistical information.

QUESTION: Well, what about Congress, though? They've -- Congress has come down and made its own judgment in the statute.

MR. BROWN: Well, assuming that Congress has made that judgment -- which I, of course, do not concede -- I think this Court still has a role. If Congress said -- if Congress made an assumption, which is factually incorrect, --

QUESTION: Well, would our test be that we just disagree with them, or should we ask: Is there some basis, any basis, in fact for the congressional conclusion?

MR. BROWN: Well, the Secretary has had a chance to show you whatever basis Congress might have had. You have an -- he's had the chance -- you don't have to ask him that, he has had the opportunity to do it.

QUESTION: Well, I know, but you're telling us now there's quite a bit of basis for the congressional conclusion; namely, the facts are disputed. There's a lot of evidence on both sides.

MR. BROWN: No. There is evidence to indicate that there can -- it is really not clear who is more likely to be supported than not. There is evidence to indicate that there is

no ground for any assumption.

QUESTION: Is there evidence to indicate that there is?

MR. BROWN: Well, here's one study which was done, and it's not conclusive, which says that 89 percent of absent illegitimate fathers -- we'll call them that -- do not support their children; whereas 81 or 82 percent of absent legitimate fathers don't support their children.

Okay, so there's an eight percent difference between these two classes, in this one study which was conducted in California and is referred to in the brief.

My contention is that that eight percent doesn't mean much. And that it is really -- it is nothing upon which you can base a conclusion, a presumption such as this, and it's especially not enough when you're talking about illegitimate children.

It may be enough when you're talking about Minnesota farmers, but it's not enough when you're talking about illegitimate children. Eight percent is not enough to base a presumption upon.

QUESTION: Mr. Brown, would the presumption have been rebutted in this case if the father had simply written a letter to the mother, inquiring how their son was?

MR. BROWN: That's correct, Your Honor.

QUESTION: A simple letter would have done it?

MR. BROWN: That would have done it.

The problem is that people who are fathers of illegitimate children don't take to the habit of writing letters and going through the formalities that a lot of middle class people traditionally do. So, as a practical matter, I wish that happened more often, but it doesn't happen; and that makes it more difficult for these people to establish their right to benefits.

I see no great difference between this case and the Frontiero case. That was a case which had the same kind of presumption with respect to service people, and that men had to establish -- a male serviceman, it was presumed that his spouse, his wife, was dependent upon him if he got benefits; and the opposite was the case for women. If a woman was a service person, she had to establish specifically that her spouse was dependent upon her in order to get fringe benefits from the service.

It seems to be the very same case in that respect, and I would request the very same result, which was a reversal and a finding of unconstitutionality of this statutory scheme.

QUESTION: Mr. Brown, you seem to disparage somewhat the idea that the element of fraud was not present in these cases, but for a number of centuries -- not years; centuries -- the explanation for not allowing illegitimate children to inherit from a father was the fraud element, was it not? Isn't that part of the history of the common law?

MR. BROWN: That's probably correct, and I think ther eare --

QUESTION: Probably? Is there any doubt about it?

MR. BROWN: I don't think that's the only reason. There's another reason which is that historically it was felt that illegitimate fathers don't want to give benefits to bastards. I think that was probably another historical reason.

There was a presumption, intestate laws presume that illegitimate fathers don't want their illegitimate children necessarily to get their money.

QUESTION: Most of the States have had statutes permitting the recognition of the illegitimate child, and giving certain rights, and are not the statutes we're concerned with patterned on those statutes?

That is, the acknowledgement in writing, for example.

MR. BROWN: Well, there are three ways -- basically, there are various ways an illegitimate child can become eligible here: one is to satisfy his own State's intestacy statute -- In maryland, for instance, if Gregory Norton --

QUESTION: That may be -- that may be, by having a written acknowledgment from the father.

MR. BROWN: Indeed. And in Maryland, for instance, all you have to do is openly, have openly acknowledged that someone is your father. Gregory Norton, Sr., today, if he had died after 1970, I think could have established -- satisfied

that test.

There are many different tests. But it's not impossible to prove paternity. It's difficult to prove paternity, but not impossible.

The Secretary, in his own, you know, in the instructions that he gives to his workers, specifically says: first, determine paternity -- I guess the facts are utilized when determining that -- and then, secondly, if they happen to fall under this class, determine whether or not they were supported by or lived with.

There is the Secretary, who is the one charged with this duty of establishing paternity, hasn't indicated, in no way at all, that indeed the support or residence requirement is used as another way to bolster proof of paternity. That may be a legitimate basis, another setting; but it doesn't seem to be so here.

I have no further comments.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Jones?

REBUTTAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE APPELLANT

MR. JONES: Yes, I would like to make three quick points, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: You have just three minutes to do it.

MR. JONES: Well, I can do it in one minute each.

First, opposing counsel is incorrect in stating that it is sufficient that the illegitimate child meets the State intestacy statute. The correct statutory analysis is set forth in the Appendix, pages 79 through 83, of the decision of the district court in the Norton case.

And also that is the long-standing administrative construction, as we point out in footnote 14 of our Norton brief, at pages 38 and 39.

Secondly, the purpose of the statutory exclusion was plainly that of limiting payment of benefits to children who were dependent. As we point out on page 34 of our brief, the Act itself limits benefits to children who were dependent upon the wage-earner. The Senate Report on the amendments enacting this provision state -- correctly describe the Act as a national program that is intended to pay benefits to replace the support lost by a child when his father dies.

And this Court recognized this statutory purpose in its opinion in Jimenez v. Weinberger, where it pointed out that the primary purpose of the program is to provide support for dependents of a wage-earner.

And, third, the validity of the presumptions of dependency for the categories of children who do not have to prove dependency are, we think, broadly rational, for the reasons set forth in pages 38 and 39 of our brief.

But I would further point out that if the evidence is conflicting, if, in some instances, those presumptions may not be broadly rational, nevertheless, that boils down simply to a claim that the statute is over-inclusive in its provision of benefits, not under-inclusive. And for the reasons I set forth in my argument, mere over-inclusiveness would not result in the invalidity of the statute.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:41 o'clock, p.m., the case in the above-entitled matter was submitted.]

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