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ILLEGITIMACY: SUGGESTION FOR REFORM FOLLOWING *MILLS V. HABLUETZEL*

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I. INTRODUCTION: THE ISSUE

The dilemma of illegitimacy concerns the rights of a person amidst the competing interests of individuals, the state, and the federal social welfare system.[1] The problem is surrounded by the fact

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1. *See generally* Annot., 38 A.L.R. 3d 613, 615 (1971). The common law of England looked upon a child born out of wedlock as the son of nobody, *nullius filius,* and thus he could not be the heir to anyone, nor could he have heirs other than those of his own body. His parents had no right to his custody, nor could he assert any right, as against them, to be supported. He had no name, except by reputation, and at best he was only a child of the people, *filius populus*. Moreover, a child born out of wedlock could not be rendered legitimate by any subsequent act of the parents, such as marriage after birth. 1 W. BLACKSTONE, COMMENTARIES *459, 465-66. Consistent with the English legal precedent, the early American common law regarded the illegitimate child as having no family—mother or father. *See* Pfeifer v. Wright, 41 F.2d 464, 466 (10th Cir. 1930) (bastard has no inheritable blood), *cert. denied,* 282 U.S. 896 (1931); Houghton v. Dickinson, 82 N.E. 481, 481 (Mass. 1907) (a child not born in lawful wedlock lacks inheritable blood); Kotzke v. Kotzke's Estate, 171 N.W. 442, 443 (Mich. 1919) (bastards do not inherit); Martin v. Claxton, 274 S.W. 77, 78 (Mo. 1925) (illegitimate daughter treated as if no person existed); Turnmine v. Mayes, 114 S.W. 478, 479 (Tenn. 1908) (bastard may not inherit any estate, real or personal).

that illegitimate children are not directly included in most inheritance, compensation, or benefit statutes in the statutory defintions of "dependent," "child," "children," "issue," or "heirs."[2] The state, or the federal government, in the interest of preventing fraudulent claims, establishes a statutory requirement to prove paternity as a first step for illegitimate children to qualify for rights derived from the natural parent-child relationship.[3] Thus, the issue is paternity.

In the recent decision of *Mills v. Habluetzel,*[4] the Supreme Court implies that as technology advances and scientific tests make the determination of biological paternity more certain, the state or governmental interest in avoiding evidentiary problems of false claims, will cease to justify the use of any facile statutory denials of substantive rights claimed by illegitimates.[5] First, in the advent of scientific ability to prove the fact of paternity,[6] unrealistic legal prerequisites or statutory limitations extinguishing the rights of illegitimates will not prevail under a constitutional analysis.[7] Second, the use of science implies greater inquiry into all aspects of the rights of illegitimates.[8]

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2. *See* Note, *The Rights of Illegitimates Under Federal Statutes,* 76 HARV. L. REV. 337, 341 (1962). A tangentially related issue involving state court interpretation is determination of illegitimates' rights under federal law. *See id.* at 340-41. Some federal statutes require reference to state law definitions of "child" and like terms. *See id.* at 338; *see also* Watts v. Veneman, 476 F.2d 529, 531 (D.C. Cir. 1973) (D.C.'s intestate laws incorporated into social security laws for purpose of determining eligibility for payments to illegitimates of deceased wage earner).

3. *See, e.g.,* Veterans Benefit Act, 38 U.S.C. § 101 (4) (Supp. V 1981) (illegitimate child eligible for benefits on father's death if paternity established); LA. CIV. CODE ANN. art. 919 (West 1952) (illegitimate's right to inherit from father conditioned upon formal acknowledgement by father); TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1982-1983) (illegitimate's right to paternal support conditioned upon establishment of paternity).

4. 456 U.S. 91 (1982). The most recent decision by the United States Supreme Court is *Pickett v. Brown,* — U.S. —, 103 S. Ct. 2199, 76 L. Ed. 2d 372 (1983). This decision by a unanimous Court was a comprehensive endorsement of the principles enunciated in *Mills,* especially those of Justice O'Connor. As shall be described later, the Court decided that a Tennessee two-year limitations period denied certain illegitimate children the equal protection of the law guaranteed by the fourteenth amendment.

5. *See* Mills v. Habluetzel, 456 U.S. 91, 98 n.4 (1982) (states' interest in preventing fraudulent claims is protected by advances in blood testing).

6. *See* Little v. Streater, 452 U.S. 1, 6-8 (1981) (blood tests are highly probative in proving paternity); Terasaki, *Resolution By HLA Testing of 1,000 Paternity Cases Not Excluded By ABO Testing,* 16 J. FAM. L. 543, 543 (1978) (recent advances in blood testing predict paternity with high degree of certainty as well as proving "nonpaternity").

7. *See* Mills v. Habluetzel, 456 U.S. 91, 92-96 (1982) (Texas one-year statute of limitations unconstitutional).

8. *See id.* at 99 n.5 (entitlement to social security benefits and intestate distribution frequently involve proof of paternity).

This paper will thus: (a) discuss the evolution of the constitutional guidelines concerning the rights of illegitimate children prior to *Mills;* (b) describe the Texas experience from *Gomez* to *Mills* and the recent Texas inheritance cases; and (c) determine the implications for the future of Texas law and that of other jurisdictions.

II. HISTORY: THE PRE *MILLS* EVOLUTION OF CONSTITUTIONAL GUIDELINES CONCERNING THE RIGHTS OF ILLEGITIMATE CHILDREN

The Supreme Court has articulated guildelines with respect to the rights of illegitimate children in a series of decisions over the last fifteen years.[9] In 1968, in the landmark case of *Levy v. Louisiana,*[10] the United States Supreme Court overturned a Louisiana wrongful death statute denying illegitimate children the right to sue for the death of their mother.[11] Illegitimate children were identified by the

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9. *Cf.* Annot., 38 A.L.R. 3d 613, 616-17 (1971) (question of validity of discrimination against illegitimates not seriously considered until 1968).

10. 391 U.S. 68 (1968). Pursuant to a Louisiana wrongful death statute an action was brought on behalf of five illegitimate children for damages suffered by them for the loss of their mother. *See id.* at 69. The suit was dismissed by the Louisiana district court and affirmed by the court of appeals. *See* Levy v. State, 192 So. 2d 193, 195 (La. App. 1966). The court of appeals held that denial to illegitimates of the right to recover was "based on morals and general welfare because it discourages bringing children into the world out of wedlock." *Id.* at 195.

11. Levy v. Louisiana, 391 U.S. 68, 72 (1968). Louisiana's wrongful death statute provided:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. . . .
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> The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.
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> The right to recover all damages caused by an offense or quasi, if the injured person dies, shall survive for a period of one year from the death of deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right to action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs whether suit has been instituted thereon by the survivor or not.
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> As used in this article, the words "child", "brother", "sister", "father", and "mother", include a child, brother, sister, father, and mother by adoption, respectively.

LA. CIV. CODE ANN. art. 2315 (West Supp. 1983).

Court as "persons" clearly entitled to the equal protection of the law under the fourteenth amendment of the United States Constitution.[12]

Writing for a majority of six, Justice Douglas indicated that when basic civil rights are involved,[13] such as the right to sue for the death of a parent,[14] states cannot deny this right to all children out of wedlock.[15] The fact of illegitimacy had no relation to the nature of the wrong inflicted upon the mother which was the basis for bringing suit.[16] The Court held that to deny such right of action to dependent children solely because of the illegitimacy of one's birth was invidious discrimination especially when no action, conduct, or demeanor of the children were possibly relevant to the harm done to the mother.[17]

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12. *See* Levy v. Louisiana, 391 U.S. 68, 70 (1968). Several lower federal and state courts adopted this rationale of the Supreme Court and thus, held statutory classifications based solely on illegitimacy unconstitutional. *See, e.g.,* Ramon v. Califano, 493 F. Supp. 158, 160 (W.D. Tex. 1980) (Texas statue which provided that illegitimate could only inherit from intestate father if father legitimated child by marrying child's mother unconstitutional); Miller v. Laird, 349 F. Supp. 1034, 1046 (D.D.C. 1972) (exclusion of illegitimate children of military personnel from coverage under Dependents Medical Care Act unconstitutional); Rias v. Henderson, 342 So. 2d 737, 740 (Miss. 1977) (no constitutional reason for limiting illegitimate's right of support to age 16 while legitimate's right was not limited).

13. *See, e.g.,* Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry); Harper v. Virginia Bd. of Election, 383 U.S. 663, 667 (1966) (right to vote); Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (right to have offspring).

14. *See* Levy v. Louisiana, 391 U.S. 68, 71 (1968). A cause of action for the wrongful death of another did not exist at common law. Therefore, this right to recover damages for wrongful death is dependent upon statutory provisions. *See* Vassallo v. Nederl-Amerik Stoom v. Maats Holland, 337 S.W.2d 309, 311-12 (Tex. Civ. App.—Eastland 1960), *aff'd in part, rev'd and remanded in part,* 344 S.W.2d 421 (Tex. 1961); TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1952) (child has right of action for damages arising from wrongful death of parent).

15. *See* Levy v. Louisiana, 391 U.S. 68, 71 (1968). The Supreme Court indicated that it h[illegible] been "extremely sensitive" when reviewing violations of basic human rights such as those involving the "intimate, familial relationship" of parent and child. *See id.* at 71. Justice Douglas apparently reasoned that the right to wrongful death recovery was, also, a basic civil right. *See id.* at 71.

16. *See id.* at 72. The purpose of the wrongful death statute was "to save [children] harmless during their minority from the loss of the benefits . . . which they would have received had their [parents] lived up to the time of their respective majorities." Eichorn v. New Orleans & C. R., Light & Power Co., 38 So. 526, 530 (La. 1905). The status of illegitimacy bore no relation to the purpose of this statute. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968).

17. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968). The Supreme Court held that the Louisiana statute violated the equal protection clause without expressly stating the constitutional standard applied. *See* Gray & Rudovsky, *The Court Acknowledges The Illegitimate:*

In a companion case, *Glona v. American Guarantee & Liability Insurance Company,*[18] the Supreme Court held that to deny the mother of an illegitimate child the right to recover for the child's wrongful death was also violative of the equal protection clause.[19] The Court noted that there was "no rational basis" for the assumption that denying recovery to a natural mother for the wrongful death of her illegitimate child would serve the cause of illegitimacy.[20] It was "farfetched," the Supreme Court asserted, "to assume that women have illegitimate children so that they can be compensated in damages at their death."[21] Here again, denial of the right to sue under state law solely on the fact of illegitimacy was a denial of equal protection of the law.[22]

Levy v. Louisiana and Glona v. American Guarantee & Liab. Ins. Co., 118 U. PA. L. REV. 1, 7 (1969). In the majority opinion, however, Justice Douglas implied that the classification had no rational relation to the purpose of the wrongful death statute. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968). To determine the validity of a statute under the equal protection clause, various tests have been utilized. However, the Supreme Court requires, at a minimum, that a classification bear some rational relationship to a legitimate state purpose. *See* Morey v. Doud, 354 U.S. 457, 463-65 (1957) (statutory purpose must reasonably support the discrimination); Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955) (regulation constitutional because rationally related to state objective). Stricter scrutiny is exercised, however, when statutory classifications approach sensitive and fundamental rights. *See* Brown v. Bd. of Education, 347 U.S. 483, 493 (1954).

While the language of the Supreme Court was limited to factual situations involving a mother, the Louisiana Supreme Court on remand interpreted the *Levy* decision to mean that when a "parent" openly and publicly recognizes an illegitimate to be "his or her" child, such an illegitimate is a "child" as expressed in the Louisiana wrongful death statute. *See* Levy v. State, 216 So. 2d 818, 820 (La. 1968).

18. 391 U.S. 73 (1968).

19. *See id.* at 76. The *Glona* case presented a reverse fact pattern from *Levy*. In *Glona*, the mother of an illegitimate child sought to recover for the wrongful death of her illegitimate son who was involved in an automobile accident. *See id.* at 73. The original district court suit was dismissed because under Louisiana law, the mother had no right of action for the death of her illegitimate child. *See id.* at 74.

20. *See id.* at 75. A requirement of both due process and equal protection is that the laws serve a rational purpose. *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring). At a minimum, a classification must bear some relationship to the state interest. *See* Morey v. Doud, 354 U.S. 457, 463-65 (1957). The test used in *Glona,* however, did subject the Louisiana statute to stricter scrutiny than that called for by the "rational basis" tests applied after 1937. *Compare* Lochner v. New York, 198 U.S. 45, 53 (1905) (statute under attack needed a direct and immediate bearing on the stated legislative purpose) *with* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949) (Court stated it should not apply strict scrutiny test which would put Congress and state legislatures into straight jackets).

21. Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73, 75 (1968).

22. *See id.* at 76. The broad language of the Supreme Court in both *Levy* and *Glona*

Three years later, the Supreme Court again addressed the constitutionality of a state statute regarding illegitimacy.[23] In *Labine v. Vincent,*[24] Louisiana's intestate succession law was held constitutional. This law conditioned the illegitimate children's right to inherit property from their decedent father's estate upon a formal acknowledgement by the father during his life.[25] Under this statutory scheme, illegitimate children who were never acknowledged by their father had no right to inherit from his estate.[26] Also, Louisiana's statutory scheme required that the illegitimate child be legitimized.[27] This apparently limited the general rule of *Levy* that states

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was the beginning of a general change in the legal status of illegitimates. *See* Annot., 38 A.L.R.3d 613, 616-17 (1971).

23. *See* Labine v. Vincent, 401 U.S. 532, 533 (1971). The Louisana state court refused to permit an acknowledged illegitimate child to inherit from her father's estate under the Louisiana law of intestate succession. *See id.* at 534.

24. *Id.* at 539-40. Collateral relatives of the decedent (father) successfully asserted that they were entitled to the whole estate and that the illegitimate child was barred from sharing in her father's estate. *See id.* at 534. The relatives relied upon two articles of the Louisiana Civil Code of 1870. Article 206 provides: "Illegitimate children, though duly acknowledged, cannot claim the rights of legitimate children." LA. CIV. CODE ANN. art. 206 (West 1952). Article 919 provides: "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." LA. CIV. CODE ANN. art. 919 (West 1952).

25. Labine v. Vincent, 401 U.S. 532, 534 (1971) (citing LA. CIV. CODE ANN. art. 919 (West 1952)). Acknowledgement is made by a declaration before a notary public and two witnesses, or it can be made in the registry of birth or baptism. *See* LA. CIV. CODE ANN. art. 203 (West 1952). Not all illegitimate children were capable of being acknowledged. Only if the illegitimate child's parents were capable of marriage at the time of conception could the illegitimate child be raised from the status of illegitimacy to that of an acknowledged or natural child. *See id.* art. 204 (West 1952). Subsequent to the *Labine* decision, the Louisiana legislature repealed article 204. *See* LA. CIV. CODE ANN. art. 204 (West Supp. 1983) (repealed by 1979 La. Acts No. 607, § 4).

26. *See* Labine v. Vincent, 401 U.S. 532, 537 (1971). The provisions for inheritance in Louisiana at this time differed from other American jurisdictions (Louisiana is a civil law jurisdiction) in that it conferred no rights without acknowledgment by the parents. *Cf. id.* at 556 (Brennan, J., dissenting). In 1971, Louisiana was, also, the only state that denied illegitimate children the right to inherit equally from their mothers. *See id.* at 556-57 (Brennan, J., dissenting). Unacknowledged and incestuous adulterous children were excluded from any right of inheritance. *See* LA. CIV. CODE ANN. art. 920 (West 1952).

Also, acknowledged children are given only limited rights of inheritance. A "natural child" (illegitimate child who has been acknowledged) inherits from his mother only upon her not leaving lawful children or descendants. *See id.* art. 918.

A "natural child" only inherits from his father upon his not leaving any descendants, ascendants, collateral relations, or surviving wife. *See id.* art. 919.

27. *See* Labine v. Vincent, 401 U.S. 532, 546 (1971) (child denied inheritance because only acknowledged, not "legitimated" by her father). Louisiana's intestate laws provide that

could not invidiously discriminate against illegitimates as a particular class of people when such classification touched upon basic civil rights.[28] The Court explained that *Levy* did not mean that states can never treat illegitimate children "differently from legitimate offspring."[29] *Labine* emphasized the states' power to make rules in order to establish, protect, and strengthen family life as well as to regulate the disposition of property.[30] *Levy* was further distinguished by the *Labine* Court: in *Levy,* Louisiana's statute was an "insurmountable barrier" to the illegitimate child.[31] The Court applied the "rational basis" test in a footnote only, distinguishing the case from *Glona* because the facts in *Labine* involved a sufficient constitutional basis for the classification.[32]

The next year in *Weber v. Aetna Casualty & Surety Company,*[33] the Court returned to its general rule for the substantive rights of illegitimates: when sensitive and fundamental personal rights are involved, denial of such rights is unconstitutional under the equal protection clause of the fourteenth amendment.[34] The *Weber* Court

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"children are either legitimate, illegitimate, or legitimated." LA. CIV. CODE ANN. art. 178 (West 1952). An illegitimate child who can be legitimated becomes a "natural child" when he is acknowledged. *See id.* art. 198. Only those illegitimate children whose parents do not have legitimate descendants or ascendants and could lawfully have married each other at the time of the child's conception, or whose parents later marry, can be legitimated. *See id.* art. 200.

28. *See* Levy v. Louisiana, 391 U.S. 68, 71 (1968). The *Labine* Court distinguished *Levy* by explaining that under Louisiana's wrongful death statute, the state had created a statutory tort and permitted a large class of persons who were injured by the tort to recover damages. Under those circumstances, the *Labine* Court noted that a state could not totally exclude a decedent's illegitimate children from recovering. *See* Labine v. Vincent, 401 U.S. 532, 535-36 (1971). The Court found that under the *Labine* statute the father could have acted before his death to circumvent the denial of inheritance rights to the child by having married the mother. *See id.* at 539.

29. *See* Labine v. Vincent, 401 U.S. 532, 536 (1971).

30. *See id.* at 536. The Court has long afforded broad support for state powers to regulate the disposition of property at death. *See* Lyeth v. Hoey, 305 U.S. 188, 193 (1938).

31. *See* Labine v. Vincent, 401 U.S. 532, 539 (1971).

32. *See id.* at 536 n.6. The Court upheld the combination of state interests in orderly distribution of property and promotion of legitimate families as a "rational basis" justification. *Id.* at 536. In *Glona,* on the other hand, there was "no rational basis" for denying a mother the right to recover for the wrongful death of her illegitimate son. *See* Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73, 74-75 (1968). By implication this case has been substantially overruled. *See* Trimble v. Gordon, 430 U.S. 762, 776 (1977).

33. 406 U.S. 164 (1972).

34. *See id.* at 172 (precedent of *Levy v. Louisiana* applied). As noted earlier in this article, this general rule was established by the Supreme Court in 1968. *See* Levy v. Louisiana, 391 U.S. 68, 71 (1968).

struck down as unconstitutional the Louisiana workmen's compensation statute[35] that denied equal recovery rights to dependent unacknowledged illegitimates.[36] It was constitutionally impermissible discrimination to deny state workmen's compensation benefits in the state statutory compensation scheme to illegitimates where dependency on the deceased and acknowledgment were prerequisites to the right to recovery.[37] The majority opinion by Justice Powell distinguished the constitutionally permissible acknowledgement requirement of *Labine*.[38] The *Labine* intestacy laws, which barred an acknowledged illegitimate child from sharing equally with legitimate children in her father's estate, were justified by the substantial state interest in providing for the stability of land title and in prompt determination of valid ownership of property left by the decedents.[39] In *Weber,* the state interest in legitimate family relationships was not served by the statute. Also, the inferior classification of the dependent unacknowledged illegitimates bears *no significant relationship* to the recognized purposes of recovery which the workmen's compensation statutes serve.[40] The tests employed by the

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35. LA. REV. STAT. ANN. § 23:1232 (West 1964) (established schedule of payment of workmen's compensation benefits to classifications of dependents). Under section 8, illegitimate children are given the lesser status of "other dependents" and thus, can only recover if there are insufficient surviving dependents in the other classifications to exhaust the workmen's compensation benefits. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 169 (1972); LA. REV. STAT. ANN. § 23:1232 (8) (West 1964).

36. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 165 (1972). Historically, illegitimate children have been denied death benefits under workmen's compensation laws. *See generally* 81 AM. JUR. 2D *Workmen's Compensation* § 204 (1976) (general discussion of illegitimates' rights to death benefits).

37. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 169 (1972). "Children" as defined by Louisiana's workmen's compensation law included "only legitimate children, stepchildren, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of Civil Code articles 203, 204, and 205." LA. REV. STAT. ANN. § 23:1021(3) (West 1964).

38. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 170-71 (1972). In *Weber,* there was no substantial state interest in regulating the disposition of a decedent's property. *See id.* at 170. Also, the deceased in *Weber,* unlike the deceased in *Labine,* was statutorily barred from acknowledging his illegitimacy so that they might qualify for some death benefits. *See id.* at 171. Unlike article 204 of the Louisiana civil code, the decedent could not acknowledge his illegitimate children because he was incapable of contracting marriage with their mother at the time of conception. *See id.* at 171 n.9.

39. *See* Labine v. Vincent, 229 So. 2d 449, 452 (La. App. 1969), *aff'd*, 401 U.S. 532 (1971).

40. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972). The Court indicated that states frequently have drawn arbitrary lines in workmen's compensation and wrongful death statutes to facilitate potentially difficult problems of proof. *See id.* at 174.

Weber Court to determine the validity of state statutes under the equal protection clause require at a minimum that a statutory classification bear some *rational* relationship to a legitimate state purpose.[41] When such state statutory classifications approach sensitive and fundamental personal rights of illegitimates, the Court will exercise a stricter scrutiny.[42] The constitutional test of such classifications involved a dual inquiry: "What legitimate state interests does the classification promote?"[43] "What fundamental personal rights might the classification endanger?"[44]

The *Weber* Court questioned how the workmen's compensation statute would promote the state's interest in protecting the legitimate family unit.[45] The state's interest was not served by the compensation statute.[46] The Court applied the *Glona* rationale: it was farfetched to assume that persons will shun illicit relations because their offspring may not one day reap compensation benefits.[47]

The opinion noted that the historical status of illegitimacy reflected "society's condemnation of irresponsible liaisons" outside of marriage.[48] Legal burdens should be related to individual wrongdoing: punishing the illegitmate child who is not responsible for birth is illogical and unjust.[49] Thus, the discriminatory classification in *Weber* was not justified by a legitimate state interest and was there-

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However, the Court noted that its decision in *Weber* would not significantly alter the state's interest in minimizing proof problems. *See id.* at 174.

41. *See id.* at 172. In applying this "rational relationship" test, the *Weber* Court was following a long line of precedent. *See id.* at 172. The *Weber* Court specifically utilized the "rational relationship" test as set out in *Glona:* Is there a rational basis for the classification of illegitimacy? *See id.* at 173.

42. *See id.* at 172; *see also* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (classifications which encroach on fundamental rights must be "closely scrutinized and carefully confined").

43. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 173 (1972).

44. *Id.* at 173.

45. *See id.* at 173-74. The state interest in protecting "legitimate family relationships" may, indeed, be developing into a constitutionally venerable concern. *See id.* at 173.

46. *See id.* at 175.

47. *See id.* at 175; Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73, 75 (1968).

48. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972).

49. *See id.* at 175. Since no child is responsible for his birth, penalizing the child born out of wedlock is an ineffectual and unjust means of deterring the parents' conduct. *See* Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.,* 118 U. PA. L. REV. 1, 8 (1969).

fore constitutionally impermissible.[50]

In 1973, the Supreme Court had an opportunity in two per curiam opinions to clarify its seemingly inconsistent opinions of *Labine* and *Weber*.[51] In both decisions, the Court opted to follow the rationale of *Weber,* thereby favoring illegitimates.[52] The Court held that a state may not invidiously discriminate against illegitimate children by denying them the right of paternal support in the Texas case of *Gomez v. Perez*.[53] Buttressing its general rule that a state may not invidiously discriminate against illegitimate children by denying them substantial benefits,[54] the Court held that once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child because his parents were not married.[55] Although the Court recognized the problems of proof of paternity,[56] it decided that these problems can-

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50. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 176 (1972). Justice Blackmun's concurring opinion pointed out that under the facts of the *Weber* case, the state's statutory structure operated to deny the father of the illegitimate children the ability to even acknowledge his illegitimate children for qualification purposes. *See id.* at 176 (Blackmun, J., concurring).

51. *See* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (per curiam); Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam).

52. *See* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 620 (1973) (illegitimates can recover welfare aid); Gomez v. Perez, 409 U.S. 535, 538 (1973) (illegitimate can recover paternal support).

53. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973). Mrs. Gomez sued the father of her illegitimate child for child support. *See id.* at 535-36. Although the child required support, the trial court found that no legal obligation arose in the biological father because the child was illegitimate. *See id.* at 536.

54. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 176 (1972); Levy v. Louisiana, 391 U.S. 68, 71 (1968).

55. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973). Under the common law and Texas statutory law, the natural father had a "continuing and primary duty to support" his legitimate children. *See* Lane v. Phillips, 69 Tex. 240, 243, 6 S.W. 610, 611 (1887); TEX. FAM. CODE ANN. § 4.02 (Vernon Supp. 1982-1983) (each spouse has duty to support minor children). This duty of support extended beyond the dissolution of the marriage. TEX. REV. CIV. STAT. ANN. art. 4639c (Vernon 1976).

56. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973). The Supreme Court in *Pickett v. Brown* took particular notice of the problem of proof of paternity encountered in *Gomez* and *Mills. See* Pickett v. Brown, — U.S. —, —, 103 S. Ct. 2199, 2204, 76 L. Ed. 2d 372, 380 (1983). The Court noted: "Our decisions in *Gomez* and *Mills* are particularly relevant to a determination of the validity of the limitations period at issue in this case." *Id.* at —, 103 S. Ct. at 2204, 76 L. Ed. 2d at 380. Because *Mills* was a consideration of the Texas response to *Gomez,* certainly *Pickett,* even though a Tennessee case, is an indication of the Court's attitude to the Texas response following *Mills.* In other words, is the four year statute recently

not be made into "an impenetrable barrier that works to shield otherwise invidious discrimination."[57]

In the second opinion, *New Jersey Welfare Rights Organization v. Cahill,*[58] the Court held that a New Jersey "Assistance to Families of the Working Poor" program, which provided welfare to low income families with natural or adopted children, in practical effect denied illegitimate children equal protection of the law.[59] The Court noted that the benefits extended under such a welfare program are as "indispensable to the health and well-being of illegitimate children" as to others.[60] State exclusion of illegitimate children from sharing equally in such benefits, therefore, was held violative of the equal protection clause.[61]

Similarly in 1974, the Supreme Court examined the disability insurance benefit provisions of the federal Social Security Act[62] in *Jimenez v. Weinberger*.[63] Benefit entitlement was restricted under the Act to those who could inherit their parents' personal property under the domicile state's intestacy laws.[64] This classification limited qualification to illegitimates whose disabled wage-earner parent contributed to the child's support or lived with the child prior to the compensatory disability.[65] Thus, a subclass of illegitimate children, born after the onset of the parent wage-earner's disability, was completely barred from recovery.[66] The *Jimenez* Court found that the

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enacted in Texas a sufficient guarantee of equal protection under the guidelines of *Pickett*? For reasons that shall be discussed later in this paper, this author does not think the statute is a sufficient guarantee.

57. Gomez v. Perez, 409 U.S. 535, 538 (1973). "For a state to do so is illogical and unjust." *Id.* at 538.

58. 411 U.S. 619 (1973). The appellants argued that the state classification turned upon the status of the parents as well as upon the parent-child relationship. *See id.* at 619.

59. *See id.* at 621. The New Jersey statute provided public money to poor households only if the parents were married. N.J. STAT. ANN. § 44:13-1 et seq. (West Supp. 1983-1984) (repealed by 1977 N.J. Laws, c. 127, § 8, effective July 1, 1977).

60. *See* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973).

61. *See id.* at 621. Justice Rehnquist dissented stating that he did believe it was rational that special financial assistance be conditioned upon ceremonial marriage. *See id.* at 622-23 (Rehnquist, J., dissenting). "The Constitution does not require that special financial assistance designed by the legislature to help poor families be extended to 'communes' as well." *Id.* at 622 (Rehnquist, J., dissenting).

62. 42 U.S.C. § 416(h)(3)(B) (1976).

63. 417 U.S. 628 (1974).

64. *See id.* at 630.

65. *See id.* at 630.

66. *See id.* at 634.

statutory scheme's blanket and conclusive exclusion of benefits eligibility to a subclass of illegitimate children was not reasonably related to the legitimate governmental interest in the prevention of spurious claims.[67] Here the illegitimate children fathered before and after the onset of disability stood on "equal footing, and the potential for spurious claims was the same as to both."[68] Therefore, to conclusively deny to the second subclass disability support payments presumptively available to the first subclass, denies the equal protection provided in the due process clause of the fifth amendment.[69]

Subsequently, in 1976, the Supreme Court considered another provision of the Social Security Act.[70] In *Mathews v. Lucas,*[71] the Court examined the illegitimate child's right to survivor benefits under the Social Security Act and found its discriminatory classification and presumption of dependency scheme to be constitutionally permissible.[72] Under the Act, a child who is legitimate, or a child who is entitled to take personal property under state law, is presumed to have been dependent at the time of his parent's death.[73] This presumption of dependency applied to illegitimate children whenever their parents married, if they had been acknowledged by

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67. *See id.* at 636. A gender-based distinction was again criticized by the Court in 1975. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 (1975). Section 202(g) of the Social Security Act, as amended, 42 U.S.C. § 402(g) (1976), provided that survivor's benefits, based on a deceased husband's and father's earnings, accrued to the widow and minor children. However, benefits based on a deceased wife accrued only to the minor children unless the husband was dependent on her or was receiving one-half of his support from her. Social Security Act, ch. 531, tit. II, § 202, 49 Stat. 623 (1935) (codified as amended at 42 U.S.C. § 402(g) (1976). The Court held the generalization "archaic and overbroad" and unfair to the wage-earning female. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 643-44 (1975). Moreover, the Court discussed the effect on the children of the deceased saying that the gender-based distinction discriminated among the children "solely on the basis of the sex of the surviving parent", suggesting that this type of classification is an impermissible discrimination upon the child. *Id.* at 651.

68. *See* Jimenez v. Weinberger, 417 U.S. 628, 637 (1974).

69. *See id.* at 637.

70. *See* Mathews v. Lucas, 427 U.S. 495, 497 (1976) (discussing 42 U.S.C. § 402(d)(1) (1970)).

71. 427 U.S. 495 (1976).

72. *See id.* at 516. In his dissent, Justice Stevens failed to recognize a distinction between *Lucas* and *Jimenez*. *See id.* at 516-18 (Stevens, J., dissenting). Stevens noted that the requirement that unacknowledged illegtimates prove their dependency bore no substantial relationship to the fact of dependency. This was the same reasoning the Court utilized to invalidate the provision in *Jimenez*. *See id.* at 516-18 (Steven, J., dissenting).

73. *See id.* at 498 (discussing 42 U.S.C. § 402(d)(3) (Supp. IV 1976)).

the parents or by court decree, or if a support order had been issued by the court because of the parent-child relationship.[74]

Lucas followed the *Labine* view, reiterating the principle that statutory classifications are not "*per se* unconstitutional."[75] The degree of constitutionality "depends upon the character of the discrimination and its relation to legitimate legislative aims."[76] Thus, in *Lucas* the Court applied the *Weber* two pronged constitutionality test as to the type of governmental interest promoted by the classification and as to whether fundamental personal rights were endangered.[77] In applying this constitutional test, Justice Blackmun stated in the majority opinion that the standard of judicial review to be applied was less than "strictest scrutiny," but not a "toothless" scrutiny.[78]

Here the presumptions of the Social Security Act, classifying only certain recognized illegitimate children as dependents, aided administrative functions.[79] By employing such a classification scheme, the government was able to avoid the tremendous burden and expense of a case-by-case dependency determination in the abundance of cases where the fact of dependency was probable.[80] The statutory

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74. *See id.* at 499. The Secretary of Health, Education and Welfare had promulgated regulations defining the applicable intestacy laws to be the laws of the State where the wage earner was domiciled at the time of his death. *See* 20 C.F.R. § 404.1101(a) (1979). Section 404.1101(a) states in pertinent part: "The relationship is determined by 'applicable State law.' By this is meant the law the courts of the State of the domicile of such insured individual would apply in deciding who is . . . (a) child . . . of such individual's intestate personal property. The domicile of such insured individual, if deceased, is determined as of the date of his death . . . ." *Id.*; *see also* S. Rep. No. 404, 89th Cong., 1st Sess. 110 (1965). For cases applying this rule, see Allen v. Califano, 452 F. Supp. 205, 216 (D. Md. 1978); Massey v. Weinberger, 397 F. Supp. 817, 820 (D. Md. 1975).

75. *See* Mathews v. Lucas, 427 U.S. 495, 503-04 (1976). The Court adhered to its *Labine* view that the statutory discrimination between individuals on the basis of their illegitimacy did not "command extraordinary protection from the majoritarian political process." *Id.* at 506.

76. *Id.* at 504.

77. *See id.* at 504.

78. *See id.* at 510. Strict judicial scrutiny was not required because, in regulating entitlement to survivorship benefits, the statute does not discriminatorily interfere with a constitutionally fundamental interest. *Cf.* Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975) (statutory classifications in area of social welfare such as Social Security benefits do not require strict scrutiny). The statutory scheme of the Social Security Act considered in *Lucas* did not interfere with familial relationships. *See* Mathews v. Lucas, 427 U.S. 495, 504 n.8 (1976).

79. *See* Mathews v. Lucas, 427 U.S. 495, 509 (1976).

80. *See id.* at 509.

classification was not arbitrary and did not broadly discriminate between legitimate and illegitimate children.[81] On the contrary, the presumptions were "carefully tuned to alternative considerations."[82] The *Lucas* majority quoted a Maryland court's assessment of factors that give rise to the dependency presumption's substantial relationship to the likelihood of actual dependency:

> [I]t is clearly rational to presume the overwhelming number of legitimate children are actually dependent upon their parents for support. Likewise . . . the children of an invalid marriage . . . would typically live in the wage earner's home or be supported by him . . . . When an order of support is entered by a court, it is reasonable to assume compliance occurred. A paternity decree, while not necessarily ordering support, would almost as strongly suggest support was subsequently obtained. Conceding that a written acknowledgement lacks the imprimatur of a judicial proceeding, it too establishes the basis for a rational presumption. Men do not customarily affirm in writing their responsibility for an illegitimate child unless the child is theirs and a man who has acknowledged a child is more likely to provide it support than one who does not.[83]

As such, the *Lucas* Court followed the reasoning of the Maryland court and held that the Social Security statutory classifications were justified as reasonable empirical judgments consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parents' death."[84]

In 1977, the Supreme Court in *Trimble v. Gordon*[85] again reviewed the constitutionality of a state intestate succession law classifying legitimate children differently from illegitimate children. Here children born out of wedlock could only inherit from their mothers under the Illinois Probate Act while legitimate children could take property from both parents by the state intestate succession laws.[86]

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81. *See id.* at 513.

82. *Id.* at 513.

83. *Id.* at 513; *see* Norton v. Weinberger, 364 F. Supp. 1117, 1128 (D. Md. 1973), *vacated and remanded,* 418 U.S. 902 (1974).

84. *See* Mathews v. Lucas, 427 U.S. 495, 513 (1976).

85. 430 U.S. 762 (1977). An illegitimate daughter was excluded from inheriting from her intestate father under section 12 of the Illinois Probate Act. *See* Trimble v. Gordon, 430 U.S. 762, 764 (1977).

86. *See id.* at 764-65. Section 12 of the Illinois Probate Act provides in relevant part:

> An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an

The purpose of this classification disinheriting illegitimate children was to promote the state's interest in encouraging family relationships and in the efficient disposition of property at death.[87] The state's secondary interest underlying the classification differentiation was the prevention of spurious paternity claims.[88] In determining whether the Illinois Probate Act violated the equal protection clause, the Supreme Court required more than the minimum showing that the classification of illegitimacy must bear a rational relationship to the legitimate state objective.[89] The Illinois statutory qualification provision bore "only the most attenuated relationship" to the state's purported goal, the promotion of legitimate families.[90] In a case such as this involving basic rights of illegitimate children, "the Equal Protection Clause requires more than mere incantation of a proper State purpose."[91]

The constitutional analysis "depends upon the character of the discrimination and its relation to legitimate aims."[92] Illinois' attempt to promote the family unit by imposing sanctions upon illegitimate children is not only ineffectual, but unjust under our legal system.[93] Legal burdens must be in someway related to the individual wrongdoers.[94] "Illegitimate children can affect neither their parents' conduct nor their own status."[95] The Illinois statute imposed

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illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father's child is legitimate.

1939 Ill. Laws § 12 (current version at Illinois Probate Act of 1976, ILL. REV. STAT. ch. 3, § 2-2 (1975)). The constitutionality of section 12 of the Illinois Probate Act was first considered by the Illinois Supreme Court when similar cases challenging section 12 were brought before the Illinois court. *See In Re* Estate of Karas, 329 N.E.2d 234, 235 (Ill. 1975).

87. *See* Trimble v. Gordon, 430 U.S. 762, 767-68 & n.12 (1977).

88. *See id.* at 770. It is this interest which seems to be becoming less compelling as a justification for discrimination in the light of scientific advancement in paternal proof. *See id.* at 771 ("problems [of proof cannot be] an impenetrable barrier that works to shield otherwise invidious discrimination").

89. *See id.* at 767.

90. *See id.* at 768.

91. *Id.* at 769. The promotion of legitimate family relationships seems to be losing weight as a constitutionally justifiable reason for statutory discrimination against illegitimate children. *See id.* at 769.

92. *Id.* at 769 (quoting Mathews v. Lucas, 427 U.S. 495, 504 (1976)).

93. *See id.* at 770.

94. *See id.* at 769-70. The *Weber* Court employed a similar argument in holding Louisiana's workmen's compensation laws unconstitutional. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 176 (1972).

95. Trimble v. Gordon, 430 U.S. 762, 770 (1977). Thus, punishing illegitimate children

discriminatory classifications which denied blameless illegitimate children the rights of intestate inheritance as an unjust means of influencing the illicit procreational activities of the citizenry.[96]

Although lineal relationships were easier to prove with respect to maternal ancestry, the discriminatory classification of the Illinois statute favoring legitimate children's claims under their father's estate was not constitutionally justifiable.[97] The Supreme Court, limiting the precedent value of *Labine,* indicated that reliance on *Labine* was not enough.[98] The Illinois court should have further constitutionally analyzed the relationship of the statute's classification to the state goal of assuming efficient and orderly succession to intestate property at the decedent's death.[99]

> The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws.[100]

Here the Illinois statutory inheritance scheme was "constitutionally flawed" because there were some categories of illegitimates excluded unnecessarily from intestacy privileges under the statute, but who could take property from their fathers without upsetting the efficient disposition of property.[101] As such, the statute was constitutionally flawed in not carefully being "tuned to alternative considerations."[102] Its discriminatory classification greatly exceeded the

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did not further the statute's purported legislative aim of promoting legitimate family relationships. *See id.* at 768-69.

96. *See id.* at 770. Again the Court suggested that the *Labine* precedent had been limited by subsequent decisions asserting that states may not influence actions of adults by imposing sanctions on illegitimate children. *See id.* at 769.

97. *See id.* at 770-71. Here the Illinois statute completely extinguished the right of illegitimate children to inherit on an equal basis as legitimate children. *See id.* at 771-73. Again the Court suggested that state problems of proving paternity was of diminishing importance as a justification. *See id.* at 770-71.

98. *See id.* at 770-71.

99. *See id.* at 770.

100. *Id.* at 770-71. For a discussion of the intermediate level of scrutiny, see Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 24 (1972).

101. *See* Trimble v. Gordon, 430 U.S. 762, 771 (1977).

102. *See id.* at 771-72; Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria,* 27 VAND. L. REV. 971, 995 (1974).

needs of the purported state purpose.[103] Paternity suits prove that the difficulties involved in allowing illegitimates to inherit from their fathers' estate do not justify the total statutory disinheritance of illegitimate children whose fathers died intestate. "The reach of the statute extend[ed] well beyond the asserted purposes."[104]

The 1977 *Trimble* decision substantially overruled the *Labine* case which was based upon deference to the state's power to regulate property distributions after the death of a citizen.[105] The new emphasis of the Supreme Court, as evidenced in *Trimble,* accorded greater deference to the unconstitutional infringement of the property rights of illegitimate children than to the state's statutory scheme of inheritance.[106] The *Trimble* Court demonstrated a greater sensitivity to the irrationality and injustice of state imposition of legal burdens upon illegitimate children to pressure potential parents, men and women engaging in "irresponsible" sexual relationships, to conform their conduct to societal norms.[107]

In 1978, the year following *Trimble,* the Supreme Court in *Lalli v. Lalli*[108] judged the constitutionality of a New York intestate succession statute requiring illegitimate children to obtain a judicial order of affiliation declaring paternity from a court of competent jurisdiction during the father's lifetime, as a prerequisite for inheritance in their father's estate. Illegitimate children had to prove paternity in a court proceeding before they could qualify as heirs of the father; failure to secure such evidence during the father's lifetime disqualified them to share in the intestate estate of the father at his death.[109]

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103. *See* Trimble v. Gordon, 430 U.S. 762, 772-73 (1977).

104. *Id.* at 772-73.

105. *Cf. id.* at 767 n.12 (Court noted that "there is a point beyond which such deference cannot justify discrimination").

106. *See id.* at 771. The state must not only be concerned with disposition of its deceased citizen's property, but must also take care not to infringe on a constitutional right. *See id.* at 771. In scrutinizing a challenged statute, the Court will defer to a state's responsiblity to dispose of such property, but it will also balance the constitutional rights of persons affected by the statute. *See id.* at 771.

107. *See id.* at 768-70.

108. 439 U.S. 259 (1978).

109. *See id.* at 262. The New York statute provided in pertinent part:

> An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967). Subsequent to the *Lalli* deci-

This legal proceeding could be brought by the illegtimate child, the child's mother, or the father during his lifetime.[110] The narrow question here was whether the procedural demands placed upon illegitimate children under the New York statute bore an "evident and substantial relation to the particular state interests [which] the statute was designed to serve."[111] At the onset of its opinion, the *Lalli* Court distinguished the New York statutory scheme from the *Trimble* intestate inheritance classification scheme in Illinois.[112] The *Trimble* statutory requirement necessitated not only the father's acknowledgement of paternity but also legitimation of the parents through marriage as an absolute condition to inherit.[113] Even court proof of paternity, under the *Trimble* facts, was insufficient to allow inheritance. The precondition that parents marry before a child could inherit was an arbitrary and unreasonable means of promoting legitimate family relationships by penalizing the property rights of illegitimate children.[114]

Under the *Lalli* facts, in contrast, there was no absolute statutory bar to illegitimate children from paternal inheritance.[115] The parent's marital status was irrelevant. There was, however, one statutory obstacle, the legal declaration of paternity, which had to be met in order for an illegitimate child to qualify as an heir of his or her

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sion, this statute has been amended twice. *See* 1979 N.Y. Laws ch. 139, § 1; 1981 N.Y. Laws ch. 67, § 2; *id.* ch. 75, §§ 1, 2.

110. *See* Lalli v. Lalli, 439 U.S. 259, 261-62 n.2 (1978); N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967).

111. *See* Lalli v. Lalli, 439 U.S. 259, 268 (1978). The Supreme Court's 1978 decision in *Lalli* was not the first time that case had been considered by the Court. When *Lalli* was originally brought before the Court, *Trimble* had just been decided. As a result, the judgment of the court of appeals was vacated for reconsideration in light of *Trimble*. *See* Lalli v. Lalli, 431 U.S. 911 (1977).

112. *See* Lalli v. Lalli, 439 U.S. 259, 266-67 (1978). The New York Court of Appeals reconciled *Lalli* with *Trimble* by noting that *Lalli* did not violate *Trimble*'s requirement that the statutes could not punish illegitimates for the "sins" of their parents. *See In re* Lalli, 371 N.E.2d 481, 482, 400 N.Y.S. 2d 761, 763 (1977). "There is nothing . . . to suggest that the [New York] statute was intended as a moral, ethical or social disparagement of illegitimacy or was the product of proponents whose objective, even in small part, was to discourage illegitimacy, to hold human conduct or to set societal norms." *Id.* at 483, 400 N.Y.S. 2d at 764.

113. *See* Lalli v. Lalli, 439 U.S. 259, 266 (1978); 1939 ILL. LAWS § 12 (current version at Illinois Probate Act of 1975, ILL. REV. STAT. ch. 3, § 2-2 (1975)).

114. *See* Trimble v. Gordon, 430 U.S. 762, 771 (1977) (statute constitutionally unacceptable because effected total statutory disinheritance of illegitimate children who were not legitimated by subsequent marriage of parents).

115. *See* Lalli v. Lalli, 439 U.S. 259, 273 (1978).

father.[116] In deciding whether the New York statutory obstacle "squared with the Equal Protection Clause" of the Constitution, the *Lalli* Court examined the state's justification for the classification and its relationship to the primary state goal that the statute was designed to serve, the promotion of "the just and orderly disposition of property at death."[117]

Here, the state interest in the orderly disposition of property was of considerable magnitude.[118] This interest was directly implicated in paternal inheritance by illegitimate children because of peculiar problems of proof involved.[119] The Court recognized the frequent difficulties in the proof of paternity when the father takes no part in the formal family unit.

> The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know *who* is responsible for her pregnancy.[120]

Citing a report by the Temporary State Commission on the Modernization Revision and Simplification of the Law of Estates, the *Lalli* majority noted that the New York procedural scheme was necessary in order to mitigate the serious problems in the administration of estates. Some of the practical difficulties were cited:

> An illegitimate, if made an unconditional distributee in intestacy, must be served with process in the estate of his parent or if he is a distributee in the estate of the kindred of a parent . . . . And, in probating the will of his parent (though not named a beneficiary) or in probating the will of any person who makes a class disposition to 'issue' of such parent, the illegitimate must be served with process . . . . How does one cite and serve an illegitimate of whose existence neither

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116. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967). The *Lalli* Court noted, however, that this is not a "requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock." Lalli v. Lalli, 439 U.S. 259, 273 (1978).

117. *See* Lalli v. Lalli, 439 U.S. 259, 268 (1978). The primary state goal for the statute was the promotion of "just and orderly disposition of property at death." *See id.* at 268.

118. *See id.* at 268. Without offending the equal protection clause, a state could require an illegitimate to obtain a judicial determination of paternity during his father's lifetime before he was allowed inheritance from his father. *See id.* at 274-75 n.11.

119. *See id.* at 269.

120. *Id.* at 269 (quoting *In re* Ortiz, 303 N.Y.S.2d 806, 812 (1969)). It is submitted that with the advance of scientific technology, biological parenthood is becoming more of a certainty. Even those problems of the unknown father are in the future going to be resolved easily in the laboratory.

> family nor personal representative may be aware? And of greatest concern, how [to] achieve finality of decree in *any* estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries? Finality in decree is essential in the Surogates' Courts since title to real property passes under such decree. Our procedural statutes and the Due Process Clause mandate notice and opportunity to be heard to all necessary parties. Given the right to intestate succession, *all* illegitimates must be served with process. This would be no real problem with respect to those few estates where there are 'known' illegitimates. But it presents an almost insuperable burden as regards 'unknown' illegitimates. The point made in the [Bennett] commission discussions was that instead of affecting only a few estates, procedural problems would be created for many—some members suggested a majority—of estates.[121]

Spurious claims, also, are difficult to expose because of the particular problems of proof facing the estate where an individual claiming to be the illegitimate child of a deceased man identifies himself.[122]

Having determined that the state's interests were substantial, the Court then considered the statutory requirement's relationship to the important state interests it was intended to promote.[123] The Commission's report indicated that the law had been designed to insure accurate proceedings for the resolution of paternity claims.[124] The *Lalli* Court found that the New York statutory requirement of a judicial finding of paternity facilitated the administration of estates, minimized the possiblity of delay and uncertainty, and made fraudulent claims of paternity less likely to succeed.[125] Although the statute barred illegitimate children's inheritance where there was insufficient evidence of paternity during the father's lifetime, this did not disqualify an unnecessarily large number of children.[126] The *Lalli* statutory classification was unlike the unconstitutional statutory classification in *Trimble;* the *Lalli* scheme did not effect a total disinheritance of illegitimate children who were not legitimated by

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121. *Id.* at 270 (quoting *In re* Flemm, 381 N.Y.S.2d 573, 575-76 (Sur. Ct. 1975)).

122. *See id.* at 271.

123. *See id.* at 271.

124. *See id.* at 271.

125. *See id.* at 274.

126. *See id.* at 273. The Court did not specifically address the arbitrary two-year limitations date under the New York statute whereby a suit could be brought on the child's behalf after the father died.

their parents' subsequent marriage.[127] As such the *Lalli* Court found that the New York statutory requirement was not violative of the equal protection clause.[128] The statutory classification was substantially related to the important state interests it was intended to promote, granting "illegitimate children *in so far as practicable* rights of inheritance on a par with those enjoyed by legitimate children."[129] This phrase would return to haunt the Court in *Mills v. Habluetzel*.[130]

This phrase was also significant in *Pickett v. Brown.*[131] In *Pickett,* the Court condemned the Tennessee two-year statute of limitations despite the fact that Tennessee does grant to illegitimate children a right to paternal support[132] and provides a mechanism for enforcing that right.[133] But because the statute also restricts the right of certain illegitimate children[134] and this is not on a par with legitimate children, equality is denied. Tennessee attempted to support the inequality with a reference to its interest in "avoiding the litigation of stale or fraudulent claims."[135] Thus, Tennessee established an exception[136] to the statute of limitations for illegitimate children "who [are], or [are] liable to become a public charge."[137]

The Supreme Court also viewed this exception in the statute as demonstrating that the state is not affected by stale claims. If the

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127. *Compare* N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967) (statute involved in *Lalli* which granted a certain category of illegitimate children the right to an inheritance) *with* 1939 Ill. Laws § 12 (current version at Illinois Probate Act of 1975, ILL. REV. STAT. ch. 3, § 2-2 (1975)) (statute considered in *Trimble* which recognized only one category of illegitimates, who were totally barred from taking by intestate succession).

128. *See* Lalli v. Lalli, 439 U.S. 259, 275-76 (1978).

129. *See id.* at 274.

130. 456 U.S. 91 (1982).

131. — U.S. —, 103 S. Ct. 2199, 76 L. Ed. 2d 372 (1983).

132. *See id.* at —, 103 S. Ct. at 2206, 76 L. Ed. 2d at 382; TENN. CODE ANN. § 36-223 (1977) (father responsible for "the necessary support and education of the child").

133. TENN. CODE ANN. § 36-224(1) (1977) (mother or personal representative may file petition to establish paternity and to enforce paternal support).

134. *See id.* § 36-224(2) (two-year limitation period for filing petition).

135. *See* Pickett v. Brown, — U.S. —, —, 103 S. Ct. 2199, 2207, 76 L. Ed. 2d 372, 383 (1983).

136. *See* TENN. CODE ANN. § 36-224(2) (1977).

137. *See id.*; Pickett v. Brown, — U.S. —, —, 103 S. Ct. 2199, 2207, 76 L. Ed. 2d 372, 382 (1983). This group of illegitimate children can be represented by the state or by any person in a paternity or support action at any time prior to the child's eighteenth birthday. *See* TENN. CODE ANN. § 36-224(2) (1977). This distinction is not justified.

state can make a factual determination for a public charge up to age eighteen, then why not for all illegitimates?

> The exception in the statute, therefore, seriously undermines the state's argument that the different treatment accorded legitimate and illegitimate children is substantially related to the legitimate state interest in preventing the prosecution of stale or fraudulent claims and compels a conclusion that the two-year limitations period is not substantially related to a legitimate state interest.[138]

To further understand *Mills* and *Pickett* we must return to Texas and consider what happened to the Texas statutes in the aftermath of *Gomez*.

III. THE TEXAS EXPERIENCE

A. *From Gomez to Mills*

Prior to the *Gomez* decision[139] in 1973, the Texas statutory scheme nowhere provided for "any enforceable duty on the part of the biological father to support his illegitimate children."[140] This meant that the common law rule (that illegitimate children have no legal right to support from their father) was controlling in Texas.[141] In 1969 Gomez filed a petition in Texas district court asking for support for her minor child from Perez, the man she claimed was the child's father.[142] At the hearing, the trial judge established that Perez was the biological father of the child and that the child needed her father's support.[143] Nevertheless, the trial judge concluded that under the common law the father was not legally obligated to sup-

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138. Pickett v. Brown, — U.S. —, —, 103 S. Ct. 2199, 2207-08, 76 L. Ed. 2d 372, 384 (1983). The Court's recognized disparity in the Tennessee statute is just one indication that any state statutory scheme designed to limit suit on behalf of illegitimates to anything less than eighteen years—and potentially longer in certain instances—will fail judicial scrutiny. There is thus a precarious nature to Texas' present four year statute.

139. Gomez v. Perez, 409 U.S. 535 (1973) (per curiam).

140. *See id.* at 536; Comment, *The Rights of An Illegitimate Child: Post—Gomez v. Perez: A Legitimate Situation?,* 12 ST. MARY'S L.J. 199, 199 (1980) (historically, illegitimate child denied right of parental support in Texas).

141. *See* Home of the Holy Infancy v. Kaska, 397 S.W.2d 208, 210 (Tex. 1965); Lane v. Philips, 69 Tex. 240, 242, 6 S.W. 610, 611 (1887). Common law, also, precluded illegitimates from inheriting through intestate succession. *See* James v. James, 253 S.W. 1112, 1115 (Tex. Civ. App.—San Antonio 1923, writ ref'd); Fritz, *Judging the Status of the Illegitimate Child in Various Western Legal Systems,* 23 LOY. L. REV. 1, 25 (1977).

142. *See* Gomez v. Perez, 409 U.S. 535, 535-36 (1973).

143. *See id.* at 536.

port the illegitimate child.[144] This ruling was affirmed over an equal protection objection by the Texas court of appeals and the Texas Supreme Court refused application for a writ of error.[145]

Ruling that since Texas had created a "judicially enforceable right" for legitimate children, the Supreme Court held that no "constitutionally sufficient justification" existed for denying that same right to illegitimate children.[146] The Supreme Court's reversal of the holding by the State of Texas in *Gomez* was succinct, almost terse. After a brief review of the rules laid down in *Levy* and *Weber* the Court stated:

> Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust." [Citation omitted]. We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.[147]

This is, literally, all of the direction that was given to Texas in *Gomez*. If an enforceable right is given to a legitimate child it must also be given to the illegitimate child, the Court said. But how? That question was left to the state to answer.

The Texas response to *Gomez* was less than enthusiastic. The Texas legislature enacted section 13.01 of the Texas Family Code to provide the illegitimate child an opportunity to obtain paternal support by establishing paternity.[148] The procedure for establishing paternity is set forth in chapter 13 of the Family Code.[149] Most of these

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144. *See id.* at 536.

145. *See* G—— v. P——, 466 S.W.2d 41, 42 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.) (father had no legal obligations to support illegitimate child).

146. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973).

147. *Id.* at 538.

148. *See* TEX. FAM. CODE ANN. § 13.01 (Vernon 1975); Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 189, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ) (Chapter 13, "legislative 'response' to Gomez").

149. *See* TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1982-1983). Chapter 13 operates with other sections of the Family Code to establish the duty of fathers to support their

sections, however, only provided the father or mother a method for the voluntary legitimation of an illegitimate child.[150] Thus, section 13.01 was added, in response to *Gomez,* to provide the illegitimate child with a procedure for establishing paternity.[151]

Section 13.01 was a far cry from a liberal grant to the illegitimate child. The child (usually represented by the child's mother) was forced to bring an action to prove paternity within one year of the birth of the child.[152] This one year period was *not* tolled during minority.[153] If a petition was not filed within this time limit, the child was forever barred, under Texas common law, from seeking parental support from the father.[154] In other words, the Texas response to *Gomez* was soupcon.

After the enactment of section 13.01, several Texas courts held this section (one year statute of limitations) to be a constitutional response to *Gomez*.[155] The constitutionality of section 13.01, however, was subsequently questioned by the United States Supreme Court in *Mills*.[156] In 1977 Lois Mae Mills gave birth to an illegiti-

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illegitimate children. *See id.* § 12.04 (Vernon Supp. 1982-1983), § 14.05 (Vernon 1975). Section 12.04(3) provides that the duty of support includes food, medical care, shelter, and education. *Id.* § 12.04 (Vernon Supp. 1982-1983), § 14.05 (Vernon 1975). Under section 14.05, the court is empowered to order the father "to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age." TEX. FAM. CODE ANN. § 14.05(a) (Vernon 1975).

150. *See id.* § 13.21 (Vernon Supp. 1982-1983).

151. *See id.* § 13.01 (Vernon 1975).

152. *See id.* § 13.01.

153. *See id.*; Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 189, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ) (one-year statute not tolled during minority).

154. *See* Mills v. Habluetzel, 456 U.S. 91, 95 (1982). This one-year statute of limitations, however, was not retroactive. *See* Texas Dep't of Human Resources v. Delley, 581 S.W.2d 519, 521 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). Thus, paternity suits of illegitimate children born prior to the effective date of section 13.01, followed the general four-year statute of limitations. *See id.* at 521.

155. *See* Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 189, 192-93 (Tex. Civ. App.—Corpus Christi 1980, no writ) (constitutional procedural limit on right of support); Texas Dep't of Human Resources v. Delley, 581 S.W.2d 519, 521 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (section 13.01 constitutional but not retroactive); Texas Dep't of Human Resources v. Chapman, 570 S.W.2d 46, 50 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (time limit in section 13.01 constitutional).

156. *See* Mills v. Habluetzel, 456 U.S. 91, 92-95 (1982). Prior to the *Mills* decision, the one-year period of limitations was amended in 1981. This amendment substituted the "one-year time period" for four years. *See* TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1982-1983).

mate child in Texas.[157] Some nineteen months later, in October of 1978, Mills brought suit against Dan Habluetzel to establish that he was the natural father of the child.[158] The Texas courts, relying on two prior decisions rendered by the Texas courts of civil appeals,[159] held: (a) that the one year limitation of section 13.01 was not tolled during minority; (b) that the section did not violate the equal protection clause; and, (c) that a legitimate state interest in preventing the pursuit of stale or fraudulent claims "was rationally related to the one-year bar and therefore did not deny illegitimate children equal protection of the law."[160] Based on this reliance, the trial court as well as the Texas court of appeals dismissed the claim of Mills and her child.[161]

Partially as a result of the scantiness of the holding of *Gomez,* the Supreme Court heard *Mills* in early 1982.[162] The Court was not impressed with the minimal actions taken by Texas since *Gomez*.[163] Acknowledging that Texas did not have to "adopt procedures for illegitimates that are coterminous with those accorded legitimate children," the Court nevertheless held that the approach used by Texas was "so truncated that few could utilize it effectively."[164] The one-year period of section 13.01 was simply not long enough.

> If *Gomez* and the equal protection principles which underlie it are to have any meaning, it is clear that the support opportunity provided by the State to illegitimate children must be more than illusory. The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside

157. *See* Mills v. Habluetzel, 456 U.S. 91, 95 (1982).

158. *See id.* at 95-96. Mills was joined by the Texas Department of Human Resources which had been assigned the child's support rights. *See id.* at 95.

159. *See* Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 189, 192 (Tex. Civ. App.—Corpus Christi 1980, no writ) (one-year statute not tolled during minority, and does not violate equal protection clause); Texas Dep't of Human Resources v. Chapman, 570 S.W.2d 46, 49 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (state interest rationally related to one-year time limitation).

160. *See* Mills v. Habluetzel, 456 U.S. 91, 96 (1982); Texas Dep't of Human Resources v. Chapman, 570 S.W.2d 46, 49 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

161. *See* Mills v. Habluetzel, 456 U.S. 91, 96 (1982).

162. *See id.* at 97.

163. *See id.* at 97 ("impenetrable barrier" found in *Gomez* removed only to be replaced with another barrier, section 13.01 time limit).

164. *See id.* at 97.

of wedlock.[165]

In analyzing the constitutionality of section 13.01, the *Mills* Court reaffirmed its position that any future restrictions placed by the state "will survive equal protection scrutiny to the extent that they are substantially related to a legitimate state interest."[166] In effect, the Court was setting up a two-part test for any future laws regulating procedures for obtaining support for illegitimate children.[167] First, the law must give the child a time period which provides a reasonable opportunity for asserting his or her claim.[168] Second, any limitation by the state of the time allowed must be substantially related to the state's interest.[169] This interest is defined by the Court as the "State's interest in avoiding the litigation of stale or fraudulent claims."[170]

In her important concurring opinion,[171] Justice O'Connor points out the awkwardness of this test and implies a possible foundation for a new direction in constitutional interpretation of illegitimacy statutes.[172] Justice O'Connor demonstrates that the state possibly has conflicting interests in deciding whether or not to allow a suit for support of an illegitimate. "The State's interest stems not only from a desire to see that 'justice is done' [i.e., that no stale or fraudulent claims are brought], but also from a desire to reduce the number of

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165. *Id.* at 97.

166. *See id.* at 99; Lalli v. Lalli, 439 U.S. 259, 265 (1978).

167. *See* Mills v. Habluetzel, 456 U.S. 91, 99-100 (1982).

168. *See id.* at 99.

169. *See id.* at 99-100.

170. *Id.* at 99. This state interest will justify periods of limitation which "are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims." *Id.* at 99.

171. The importance of her concurring opinion is demonstrated in the recent opinion of *Pickett.* The Court reiterates the suggestions Justice O'Connor made in *Mills.* These suggestions are:

(1) "[L]onger limitations periods also might be unconstitutional."

(2) States should be more concerned over recent scientific developments in blood testing.

(3) If the states truly seek to reduce their welfare rolls, the short statute of limitations should be seen as a restriction on parental support.

(4) "[T]he emotional strain experienced by a mother and her desire to avoid family or community disapproval 'may continue years after the child is born'."

Pickett v. Brown, — U.S. —, —, 103 S. Ct. 2199, 2206, 76 L. Ed. 2d 372, 382-83 (1983). These and additional considerations form the gist of the Court's latest pronouncement on illegitimacy.

172. *See* Mills v. Habluetzel, 456 U.S. 91, 102 (1982) (O'Connor, J., concurring).

individuals forced to enter the welfare rolls."[173] This second interest, Justice O'Connor indicates, tends to push the equal protection analysis of statutory determinations of paternity out of a framework dominated by time considerations and into the objective arena of fact, regardless of the time elapsed since birth. Is the child the offspring of the father or not? "[T]he practical obstacles to filing suit within one year of birth could as easily exist several years after the birth of the illegitimate child" if, for example, the father had voluntarily supported the illegitimate child for the first few years of his or her life.[174]

As Justice O'Connor points out, modern technology[175] is making the objective determination of paternity much more exact.[176] Arbitrary statutory time limits, she implies in the final paragraph of her opinion, on the rights of illegitimates to file suit may soon be a thing of the past.[177] The Justice seems to be indicating that the issue of paternity in the final analysis is one of fact, not of law; and that the law should recognize this is in order to afford equal protection to the rights of the illegitimate.

B. *Recent Texas Inheritance Decisions*

As the constitutionality of the Texas statutory scheme for determining the support rights of illegitimates was being decided before

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173. *See id.* at 103 (O'Connor, J., concurring).

174. *See id.* at 105 (O'Connor, J., concurring).

175. Once again in the most recent Supreme Court pronouncement on the subject of illegitimacy, the fact of advanced technology and specifically, blood testing, was considered. *See* Pickett v. Brown, — U.S. —, —, 103 S. Ct. 2199, 2208-09, 76 L. Ed. 2d 372, 385-86 (1983). In *Pickett,* the Court went much further than the notice given by Justice O'Connor in *Mills.* The Court balanced the technological advancements against any state statute of limitations:

> This [blood testing] is an appropriate consideration in determining whether a period of limitations governing paternity actions brought on behalf of illegitimate children is substantially related to a legitimate state interest.

Id. at —, 103 S. Ct. at 2209, 76 L. Ed. 2d at 386. Was the Court asking if any statute of limitations is permissible when technology can provide near certainty long into the future? This author thinks so.

176. *See* Mills v. Habluetzel, 456 U.S. 91, 104 n.2 (1982) (O'Connor, J., concurring). According to a report by the American Bar Association and the American Medical Association, blood tests are over ninety percent accurate in negating a finding of paternity for falsely accused men. *See* Miale, Jennings, Rettberg, Sell & Krause, *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage,* 10 FAM. L.Q. 247, 258 (1976).

177. *See* Mills v. Habluetzel, 456 U.S. 91, 106 (1982) (O'Connor, J., concurring).

the U.S. Supreme Court, the Texas courts were struggling with the statutory procedure allowing illegitimates to inherit from their fathers. The development of this law in Texas provides an interesting parallel to the Supreme Court's *Gomez* and *Mills* decisions.

In 1976, five years after the death of James Thomas Hinkle, Rupert Bell brought suit in Brazoria County, Texas, against Hinkle's estate in *Bell v. Hinkle*.[178] Bell sought a partition of the decedent's real and personal property asserting "a right to one-half of the property of the estate as an heir at law of James Thomas Hinkle."[179] Rupert Bell, who was born in Brazoria County in 1921, claimed to be the illegitimate son of Hinkle.[180]

At trial the jury made a finding of fact that Bell was not the offspring of Hinkle.[181] Bell, the plaintiff, appealed to the Houston Court of Civil Appeals of Texas in October of 1980 claiming reversible error on the part of counsel for the decedent's estate.[182] The defendant, in a cross-point, asserted that Bell could not recover "because he [had] not proved his cause of action as a matter of law."[183] The appellate court agreed with this assertion.[184] The court of appeals argued that the state had established specific legal requirements for establishing paternity and that anyone asserting to be offspring for the purpose of inheriting under the laws of descent and distribution would have to adhere to those requirements.[185] "Since appellant [Bell] did not bring a paternity suit under the Family Code, or met any of the other conditions, he [could not] recover under the statute."[186] Thus, in *Bell,* the Texas Court of Civil Appeals held that the question of whether or not a person was the bio-

178. 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980), *cert. denied,* 454 U.S. 826 (1981).

179. *See id.* at 937.

180. *See id.* at 937.

181. *See id.* at 937.

182. *See id.* at 937. Bell alleged that the defense counsel made improper remarks during voir dire and closing argument which were racially prejudicial. *See id.* at 937.

183. *See id.* at 937.

184. *See id.* at 937. Even though the appellate court disapproved of the defense counsel's remarks, the court affirmed the trial court's decision based upon the defendant's cross-point. *See id.* at 937.

185. *See id.* at 937; TEX. PROB. CODE ANN. § 42 (Vernon 1980) (amendment to Probate Code allowing illegitimates to inherit from fathers if certain requirements met).

186. Bell v. Hinkle, 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980), *cert. denied,* 454 U.S. 826 (1982).

logical offspring of a male was a question of law.[187] It was to be decided by determining whether or not the person claiming to be the offspring had met the statutory requirements set up by the Texas legislature.[188]

Several months after the Houston court's decision in *Bell,* the Corpus Christi Court of Civil Appeals in *Johnson v. Mariscal*[189] tried a new tack in an effort to circumvent the strict interpretation of the law being applied by Texas appellate courts in paternity suits. The lower court in *Johnson* had submitted as a question of fact to the jury the issue of whether Cesar Javier Mariscal was the natural child of L.F. Nittler.[190] The jury found that he was.[191] Mariscal's mother argued that her son, as a pretermitted heir, was entitled under section 67(b) of the Texas Probate Code "to inherit from his father that portion of the estate to which he would be entitled if the decedent had died intestate."[192] The trial court, having established that the young Mariscal was the son of Nittler, agreed with the mother's contention and "declared the will [of Nittler] void because it did not provide for the child."[193]

Under the logic of *Bell* this trial court's decision would have been overturned. Mariscal, like Bell, had not met the statutory requirements for establishing paternity and thus, as a matter of law, had no standing to challenge the will.[194] But the appellate court in *Mariscal* wanted to find a way for the young boy to share in his father's estate.[195] After finding that the existing statutory scheme of paternal inheritance afforded equal protection to the illegitimate, the court looked to the definition of "child" in the Probate Code to find a

187. *See id.* at 937.

188. *See id.* at 937; TEX. PROB. CODE ANN. § 42 (Vernon 1980).

189. *See* Johnson v. Mariscal, 620 S.W.2d 905, 907-09 (Tex. Civ. App.—Corpus Christi 1981), *writ ref'd n.r.e. per curiam,* 626 S.W.2d 737 (Tex. 1982).

190. *See id.* at 906-07. At trial, evidence was introduced which described the relationship between Mrs. Mariscal and Mr. Nittler. *See id.* at 906. No blood tests were introduced nor were any voluntary/involuntary legitimation proceedings undertaken. *See id.* at 906-07. Also, Nittler never executed a statement of paternity. *See id.* at 906-07.

191. *See id.* at 907.

192. *See id.* at 906 (at the time of his death, Nittler was unmarried and had no children); TEX. PROB. CODE ANN. § 67(b) (Vernon 1980).

193. *See* Johnson v. Mariscal, 620 S.W.2d 905, 907 (Tex. Civ. App.—Corpus Christi 1981), *writ ref'd n.r.e. per curiam,* 626 S.W.2d 737 (Tex. 1982) (illegitimate child born after will executed).

194. *See id.* at 906-07.

195. *See id.* at 907-08.

loophole which would allow a factual, as opposed to legal, finding of paternity.[196] Noting that section 3(b) of the Code expressly excluded "an unrecognized, illegitimate child of the father," the appellate court concluded:

> [T]he statute impliedly provides that a 'recognized, illegitimate child of the father' is included in the definition of a child. Therefore, if a father does in fact 'recognize' his illegitimate child, then the child is entitled to inherit. By virtue of this statute, the recognized, illegitimate child of the father may inherit from that father without other statutory legitimization.[197]

The court further stated that "[r]ecognition by the biological father requires a factual determination."[198] Since the "trial court failed to submit *to the jury* . . . the question of recognition by the father," the judgment was reversed and remanded.[199] The door was now opened for a factual determination of paternity.

The following year, a third Texas court of appeals had an opportunity to address this issue in *Batchelor v. Batchelor*.[200] This ruling, however, came after the Supreme Court had rendered its decision in *Mills*. *Batchelor* points out the reluctance of the courts to move away from established statutory schemes and into the area of determining paternity as a question of fact.[201] It is evident that the courts, absent a clear ruling from the Supreme Court, are unwilling to ignore or circumvent existing statutory procedure.[202]

The facts in *Batchelor* are similar to those in *Bell* and *Mariscal*. After the death of James Carroll Batchelor in 1980, Charles E. Batchelor (James' brother) and Judith Batchelor (James' surviving wife) filed Applications to Declare Heirship.[203] James Steven Batch-

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196. *See id.* at 908. Section 3(b) of the Probate Code defines "child" as follows: " '[C]hild' includes an adopted child, whether adopted by any existing or former statutory procedure or by acts of estoppel, but, unless expressly so stated herein, does not include an unrecognized, illegitimate child of the father." TEX. PROB. CODE ANN. § 3(b) (Vernon 1980).

197. Johnson v. Mariscal, 620 S.W.2d 905, 908 (Tex. Civ. App.—Corpus Christi 1981), *writ ref'd n.r.e. per curiam,* 626 S.W.2d 737 (Tex. 1982).

198. *Id.* at 909; *see* Garza v. Cavazos, 148 Tex. 138, 144-45, 221 S.W.2d 549, 553 (1949).

199. *See* Johnson v. Mariscal, 620 S.W.2d 905, 909 (Tex. Civ. App.—Corpus Christi 1981) (emphasis added), *writ ref'd n.r.e. per curiam,* 626 S.W.2d 737 (Tex. 1982).

200. Batchelor v. Batchelor, 634 S.W.2d 71, 71 (Tex. Civ. App.—Fort Worth 1982, writ ref'd n.r.e.).

201. *See id.* at 72-73.

202. *See id.* at 73.

203. *See id.* at 71.

elor and Lonnie Dale Burrow then filed a Plea of Intervention in an effort to be declared the sons of the decedent.[204] James Carroll Batchelor, their purported father, died intestate.[205] The Probate Court of Tarrant County subsequently granted summary judgment for the executors of the estate ruling that, as a matter of law, neither of the intervenors were the legitimate children of the deceased.[206]

On appeal to the Fort Worth Court of Appeals, Batchelor and Burrow argued that they had been recognized by James Carroll Batchelor as his children.[207] Using a *Mariscal* type argument they claimed that "they were entitled to a fact issue to be submitted to a jury on the question of whether or not appellants were 'recognized' by Decedent as his children."[208] The *Batchelor* court rejected this argument.[209] Citing *Lalli,* the court held that the Supreme Court had "left to the states the task of providing an appropriate legal framework to further the interest of safeguarding the orderly disposition of property upon death so that the states could avoid a case by case determination of paternity."[210] The *Batchelor* court pointed out that the existing statutory scheme in Texas was more liberal than the New York statute in *Lalli*.[211] The court rejected the logic of *Mariscal* and asserted that the strict reading of the statutes in *Bell* was the correct approach.[212] Therefore, since Burrow and Batchelor had not followed any of the statutory procedures required to establish paternity, they were not entitled to inherit from the decedent.[213]

The *Batchelor* decision demonstrates the reluctance of the lower

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204. *See id.* at 71 (intervenors alleged they were the natural-born, illegitimate sons of decedent and thus, should be declared sons of the decedent).

205. *See id.* at 71.

206. *See id.* at 71.

207. *See id.* at 72. Batchelor and Burrow contended that there was ample evidence in the deposition testimony to show that they were the illegitimate children of James Carroll Batchelor and that he had recognized them as such. *See id.* at 72.

208. *Id.* at 72; *see* Johnson v. Mariscal, 620 S.W.2d 905, 909 (Tex. Civ. App.—Corpus Christi 1981), *writ ref'd n.r.e. per curiam*, 626 S.W.2d 737 (Tex. 1982).

209. *See* Batchelor v. Batchelor, 634 S.W.2d 71, 72 (Tex. Civ. App.—Fort Worth 1982, writ ref'd n.r.e.).

210. *Id.* at 72-73 (citing Lalli v. Lalli, 439 U.S. 259 (1978)).

211. *See id.* at 73. The illegitimate child is provided more methods of proof in establishing paternity under the Texas statutory scheme than under the New York statute. *See id.* at 73; N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967); TEX. PROB. CODE ANN. § 42(b) (Vernon 1980).

212. *See* Batchelor v. Batchelor, 634 S.W.2d 71, 73 (Tex. Civ. App.—Fort Worth 1982, writ ref'd n.r.e.).

213. *See id.* at 74.

courts to open new ground in the area of the rights of illegitimates. Clearly, this hesitancy stems from the failure of the Supreme Court to provide firm guidance in its rulings in this part of the law. In some instances the law will stand (*Lalli, Labine, Mathews*), in others it will not (*Trimble, Jimenez, Cahill, Gomez, Weber, Mills*, and *Pickett*). Given the reluctance of state courts to declare their own state's laws unconstitutional, the failure of the Supreme Court to set exacting standards helps guarantee that decisions like *Batchelor* will prevail.

IV. IMPLICATIONS FOR THE FUTURE

The future of illegitimates' rights will evolve in significant measure from four factors: the increasing number of illegitimate children being born each year, the advances that continue to be made in medical evidence, increasing concern over state welfare budgets, and a stricter level of scrutiny applied to state statutes limiting "the personal and fundamental rights" of these children.[214] The future of this last factor, judicial review, could result in more courts adopting a middle level of scrutiny; that is, an approach that would raise the standard of judicial review in illegitimacy cases to less than the "strictest scrutiny" applied to all "inherently suspect classifications," but more than the "toothless" scrutiny used in cases like *Lucas*.[215] As courts review cases in the future,[216] the character of the discrimination and its relation to legitimate state interests shall continue to

214. Through the Equal Protection Clause of the fourteenth amendment and the fifth amendment's Due Process Clause, the Supreme Court has required that certain governmental actions satisfy a "compelling state interest," thus immediately subjecting the law to a higher level of scrutiny. Those governmental actions receiving this "strict scrutiny" usually involve such characteristics as: immutably highly visible traits, historical disadvantage, or lack of political representation. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

215. *See* Mathews v. Lucas, 427 U.S. 495, 510 (1976).

216. There has been an evolution of judicial scrutiny on the part of the Supreme Court. Since 1968, the Court has been sensitive to many basic rights of illegitimates. *See* Mills v. Habluetzel, 456 U.S. 91, 92 (1982) (right to paternal support); Trimble v. Gordon, 430 U.S. 762, 765 (1977) (right of inheritance by intestacy); Mathews v. Lucas, 427 U.S. 495, 516 (1976) (right to survivor benefits under Social Security Act); Jimenez v. Weinberger, 417 U.S. 628, 634-35 (1974) (right to disability payments upon death of wage-earner father); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973) (right to welfare provided to low income familes); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 174-76 (1972) (right to recover workmen's compensation benefits); Levy v. Louisiana, 391 U.S. 68, 72 (1968) (right to sue for wrongful death of parent).

evoke scrutiny, but a higher level, a middle approach, would better articulate constitutional concerns. Nonetheless, the suggestion of a middle level approach to judicial scrutiny neither guarantees protection of illegitimates' constitutional rights, nor defines for the courts or legislature just what type of statute shall pass scrutiny.

As time and cases progress, clearer guidelines and parameters shall evolve.[217] For instance, today at least we can begin with the constitutional test of *Weber:* "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[218] We can ask if the statute broadly discriminates between legitimates and illegitimates. Is the statute "carefully tuned to alternative considerations?"[219] Does the statutory language exceed the needs of the purported state interest? These questions provide today's clearer insight into any definition of fundamental interests prompting a stricter level of scrutiny.

The cases vary in language and ingredients. For instance, in both *Levy* and *Glona* the Court applied a stricter standard of scrutiny than the standard of "rational basis" scrutiny in allowing recovery to the illegitimate for wrongful death.[220] However, in *Labine* the Court upheld the state's dual interest in protecting and strengthening family life and in providing for an orderly disposition of decedent's estate over an illegitimate child's right of inheritance.[221] The *Labine* Court implies that the stricter standard of judicial review is not always needed when there is no insurmountable barrier facing the illegitimate.[222] So too, in *Lalli* does the Court demonstrate its reluctance to impose a stricter and fundamental standard of review.[223] In upholding the New York statute, the Court reiterated its

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217. Justice Brennan, speaking for the Court in the unanimous decision of *Pickett v. Brown,* has the latest word on the parameters the Court shall use in scrutinizing in statutory classifications. Justice Brennan noted:

> In view of the history of treating illegitimate children less favorably than legitimate ones, we have subjected statutory classifications based on illegitimacy to a heightened level of scrutiny. Although we have held that classifications based on illegitimacy are not 'suspect' or subject to 'our most exacting scrutiny.'

Pickett v. Brown, — U.S. —, —, 103 S. Ct. 2199, 2204, 76 L. Ed. 2d 372, 379 (1983).

218. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 173 (1972).

219. *See* Mathews v. Lucas, 427 U.S. 495, 513 (1976).

220. *See* Levy v. Louisiana, 391 U.S. 68, 71 (1968); Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968).

221. *See* Labine v. Vincent, 401 U.S. 532, 537 (1971).

222. *See id.* at 537.

223. *See* Lalli v. Lalli, 439 U.S. 259, 266-71 (1978). The *Lalli* case suggests that the

conclusions in *Mathews* and *Trimble* that "strict scrutiny" is not always the standard of review.[224] When *Weber, Gomez*, and finally *Mills* eventually came before the Court, there was a return to a stricter scrutiny over rights that seem no more fundamental than those previously examined. Thus, there is no clear definition of fundamental rights which, when challenged by legitimate state interests, might consistently result in stricter scrutiny, at least a middle level scrutiny, by the courts.

The current statutory framework is also uncertain and demands future changes. Statutes broadly discriminate between legitimates and illegitimates without being "carefully tuned to alternative considerations."[225] These statutes exceed the purported state interest thereby reducing the fundamental rights of children. Furthermore, they prohibit the protection of natural children acknowledged by the father but now barred by the statute from benefits. While this listing of current statutory provisions is not conclusive, the statute discussed in *Krantz v. Harris*[226] is indicative.[227]

Furthermore, the statutes that seek to safeguard significant state interests often result in just the opposite.[228] For example, the state's interest in adopting the one-year period of limitation for the illegiti-

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combination of state interests in orderly disposition of property inheritance, and in the prevention of fraudulent claims would substantially justify a discriminating statutory classification scheme requiring that a filiation order be made as a prerequisite to illegitimate inheritance. *See id.* at 266-71.

224. *See* Lalli v. Lalli, 439 U.S. 259, 266-71 (1978); *see also* Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976).

225. *Cf.* Green v. Woodward, 318 N.E.2d 397, 408 (Ohio Ct. App. 1974) (example of intraclass discrimination against illegitimates).

226. 162 N.W.2d 628 (Wis. 1968).

227. *See id.* at 629 (illegitimate child barred from bringing wrongful death action when father, engaged to be married to the child's mother, died before his birth). States which grant absolute rights from the mother but condition inheritance rights from the father usually require some type of acknowledgment or adjudication prescribed by statute. *See* KAN. STAT. ANN. § 39-501 (1964) ("children" includes all illegitimates when applied to mother, and additionally to father if father notoriously or in writing recognized paternity or if paternity determined during father's lifetime in court action). While it is apparent that the statutes are not uniform, some states will attempt to construe the statutes as liberally as possible. *See* Jung v. St. Paul Fire Dep't Relief Ass'n, 27 N.W.2d 151, 153 (Minn. 1947) (statutes are "remedial" and should be given liberal construction); Martin v. Claxton, 274 S.W. 77, 78-79 (Mo. 1925) (statutes are an abrogation of the common law and should be liberally construed). When state statutes require a paternity adjudication prior to the putative father's death or within some specified time period related to the birth of the illegitimate child, children who would naturally benefit from the father are victimized.

228. *See* Mills v. Habluetzel, 456 U.S. 91, 103-04 (1982) (O'Connor, J., concurring).

mate to bring a paternity suit was a "desire to reduce the number of individuals forced to enter the welfare rolls."[229] In *Mills,* Justice O'Connor recognized that this period of limitation would in fact force illegitimates into a greater dependence on welfare.[230] Also, if courts rely upon intestate statutes as "a general legitimating statute,"[231] there is a detrimental effect upon such important rights as citizenship,[232] support rights,[233] and adoption proceedings.[234] Cases such as *Mathews v. Lucas*[235] and *Trimble v. Gordon,*[236] where the Court did not exercise a strict standard of judicial review, also demonstrate the fragile nature of illegitimate rights when they compete with state interests in the area between strict scrutiny and minimal rational basis scrutiny. Thus, state statutes and judicial scrutiny of them combine to thwart a paramount state interest: decrease of welfare recipients.

If the future is to hold promise for the illegitimate, an immediate option would be for the Supreme Court to decide that illegitimates are a suspect class and always entitled to strict scrutiny. Nonetheless, cases such as *Trimble* and *Mathews* suggest that state interests[237] and state statutes will continue to be examined under the fourteenth amendment in the middle ground between minimum rational basis and strict scrutiny. The *Pickett* decision, decided imme-

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229. *See id.* at 103 (O'Connor, J., concurring).

230. *See id.* at 104 (O'Connor, J., concurring).

231. *See* Allen v. Califano, 452 F. Supp. 205, 209 (D. Md. 1978).

232. *See* 8 U.S.C. § 1409 (1982).

233. *See* VA. CODE § 20-61.1 (1983).

234. *See* N.Y. DOM. REL. LAW § 111 (McKinney Supp. 1982-1983).

235. *See* Mathews v. Lucas, 427 U.S. 495 (1976). Mathews began a series of cases upholding state limitations on the rights of illegitimates. In *Mathews,* the child did not qualify for survivor benefits from the father. There was a state presumption that the child was not dependent upon the father unless the child could prove: (1) father lived with child; (2) father contributed to child's support at his death; (3) any of the statutory presumptions which recognize dependency. *See id.* at 507.

236. 430 U.S. 762 (1977). Although there was a paternity order declaring the decedent to be the father of an illegitimate daughter, the daughter was prevented from inheriting from the father because the Illinois statute required intermarriage of the parents in addition to acknowledgment of paternity. *See id.* at 770. The Court did in fact find the statute unconstitutional, but as in *Mathews,* it also found that the classifications of illegitimates did not warrant strict scrutiny. *See id.* at 768-74.

237. Perhaps the foremost state interest is providing for an orderly and just disposition of a decedent's estate. Since we are making recommendations for the future, we should be aware that as the American population grows older, this will not become less of a state interest.

diately prior to the publication of this article is evidence of how narrow this middle ground has become. Cases such as *Batchelor, Gomez, Jimenez,* and *Mills* suggest that the Court will narrow the space between those two extremes of judicial scrutiny and decide in favor of the illegitimate whenever the state statute seems arbitrary.

In addition to the Court's future responsiblity to protect fundamental rights of illegitimates, the state legislators have the present responsibility to draft statutes that will protect such rights. Statutes protecting an illegitimate's right to paternal support are already in existence in a number of states. Many of these statutes, however, limit a father's support obligation; time limitations have been established for liability prior to the paternity suit[238] and for bringing a paternity suit.[239] One onerous feature of these statutes is an arbitrary time restriction. In *Jimenez,* the Court stated that the time restriction must be reasonably related to the government interest.[240] As to the length of any statutory time, Justice O'Connor implies in *Mills* that the right to establish paternity should exist throughout the illegitimate child's minority for the safeguarding of the right to child support.[241]

The Uniform Probate Code[242] [hereinafter UPC] provides some guidance to state legislators in fulfilling their responsiblity to draft statutes pertaining to the rights of the illegitimate. Specifically, section 2-109 of the UPC seeks to discourage fraudulent claims under intestate succession laws by providing for the parent/child relation-

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238. *See, e.g.,* ME. REV. STAT. ANN. tit. 19, § 273 (Supp. 1981) (father's obligation for past education and support limited to six years prior to suit); MISS. CODE ANN. § 93-9-11 (1973) (father's obligation for past education and support limited to one year prior to suit); UTAH CODE ANN. § 78-45a-3 (1977) (father's obligation for past education and support limited to four years prior to suit.).

239. *See, e.g.,* State v. Maddox, 358 So. 2d 461, 463 (Ala. Civ. App. 1978) (two-year statute of limitations held constitutional); Jensen v. Voshell, 193 N.W.2d 86, 89-90 (Iowa 1971) (proceeding to establish paternity must be brought within two years after birth of illegitimate); Stringer v. Dudoich, 583 P.2d 462, 463 (N.M. 1978) (two-year statute of limitations constitutional).

240. *See* Jimenez v. Weinberger, 417 U.S. 628, 637 (1974).

241. *See* Mills v. Habluetzel, 456 U.S. 91, 105-06 (1982) (O'Connor, J., concurring).

242. *See* UNIF. PROBATE CODE § 2-109 (1977). The Uniform Probate Code has now been adopted in 14 states. They are:

ship.[243] Also, through the use of the Uniform Parentage Act[244] the illegitimate child becomes the intestate distributee if the father has received the child as his natural child or if the father openly de-

State	Effective Date
Alaska	1-1-73
Arizona	1-1-74
Colorado	7-1-74
Florida	7-1-75
Hawaii	7-1-76
Idaho	7-1-72
Maine	1-1-81
Michigan	7-1-79
Minnesota	8-1-75
Montana	7-1-75
Nebraska	1-1-77
New Mexico	7-1-76
North Dakota	7-1-75
Utah	7-1-77

Additionally, Kentucky has not adopted the Uniform Probate Code but has substantially adopted article VII, part 1, which is the trust organization section.

243. *See id.* The Uniform Probate Code [hereinafter UPC] promulgated by the National Conference of Commissioners on Uniform State Laws, was approved by the House of Delegates of the American Bar Association in 1969. Section 2-109 provides for the parent-child relationship for intestate inheritance purposes as follows:

Section 2-109 (Meaning of Child and Related Terms).

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,

(1) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and either natural parent.

(2) In cases not covered by Paragraph (1), a person is the child of its parents regardless of the marital status of its parents and the parent and child relationship may be established under the [Uniform Parentage Act].

Alternative subsection (2) for states that have not adopted the Uniform Parentage Act.

(2) In cases not covered by Paragraph (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or (ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, but the paternity established under this subparagraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

Id.

244. UNIF. PARENTAGE ACT § 4, 9A U.L.A. 590, 591 (1979). Section 4 of the Uniform Parentage Act provides for a presumption of paternity if:

(1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by

clared paternity in a document filed with the appropriate court or the Vital Statistics Bureau.[245] States not adopting the Uniform Parentage Act would establish proof under the UPC by an "adjudication"[246] prior to the death of the father or after the father's death at any time, by clear and convincing proof. Under these UPC options,

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death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court;

(2) before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with the law, although the attempted marriage is or could be declared invalid, and,

(i) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) if the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation;

(3) after the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) he has acknowledged his paternity of the child in writing filed with the [appropriate court or Vital Statistics Bureau].

(ii) with his consent, he is named as the child's father on the child's birth certificate, or

(iii) he is obligated to support the child under a written voluntary promise or by the court order;

(4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; or

(5) he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau]. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

(b) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

Id.

245. *Id.* The presumption found in subsection 4 of the Uniform Parentage Act allows for reasonable proof of paternity without an expensive and time consuming filiation proceeding of *Lalli.*

246. The UPC does not define adjudication. Conceivably, it could encompass mere support orders or support agreements instead of the formal order of filiation which the *Lalli* New York statutory inheritance scheme required. New York, although burdened with section 4-1.2 of the Estates, Powers & Trusts Law, has itself recognized this trend. *See In re* Anonymous, 302 N.Y.S.2d 688, 696 (Sur. Ct. 1969) (an inheritance by an illegitimate child was based on support agreement which contained specific declaration of paternity). New York followed this lead with *In re* Kennedy, 392 N.Y.S.2d 365, 367 (Sur. Ct. 1977), in which

there are no definite time restrictions terminating the right of the illegitimate child to prove paternal relationship.[247] Section 7 of the Uniform Parentage Act, however, does limit an action by or on behalf of a child whose paternity has not been determined, to three years after the child reaches majority.[248] This is an extended period of time, yet protective of state interests and rights enunciated in *Trimble, Jimenez, Cahill, Gomez, Weber,* and *Mills*.

The clear and convincing proof identified within the UPC should also prompt states to give greater statutory recognition to gains made by science in recent years. Paternity is and always has been, a genetic fact. Since there were no certain means by which the genetic fact of paternity could be determined in the past, statutes provided a solution. Today, because this statutory solution is so frought with inequality and because of the scientific advancements made in the area of proving paternity,[249] there is sufficient justification for the proposition that legislatures should utilize advanced technology in drafting state statutes.[250] At a minimum, and until such time as the chemist provides certainty, statutes should consistently be reviewed under at least a middle level scrutiny.

A broader level of inquiry invites another option for the future: the use of a referee to facilitate the processing of claims affecting substantial state interests and fundamental personal rights.[251] *Mills* suggests that in the advent of science and technological advancement, as well as greater judicial scrutiny, evidentiary problems of false paternity claims will cease to justify any facile statutory denial of substantive rights to illegitimates.[252] Nonetheless, as *Mills* sought

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a support order *not* specifically declaring paternity was held tantamount to a filiation order, and the illegitimate child was allowed the inheritance.

247. This seems consistent with Justice O'Connor's suggestion in her concurring opinion in the *Mill*'s case. In this matter the UPC avoided discriminating against the illegitimate children after the father's death and/or those who, due to one unfortunate circumstance or another, may not have brought the paternity suit during the father's life.

248. UNIF. PARENTAGE ACT § 7, 9A U.L.A. 596 (1979).

249. *See* Miale, Jennings, Rettberg, Sell & Krause, *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage,* 10 FAM. L.Q. 247, 258 (1976).

250. State legislators should be mindful of the fact that advanced technology can be costly and thus beyond the reach of the majority of those concerned with proof of paternity. A method to address this cost factor must be a part of any effective and fair statute.

251. The use of a referee in varied types of factual determinations is not new to the law; it is certainly no stranger to paternity and illegitimacy. *See* Howells v. McKibben, 281 N.W.2d 154, 155 (Minn. 1979); Bassi v. Zappaterra, 234 Cal. App. 2d 529 (1965).

252. *See* Mills v. Habluetzel, 456 U.S. 91, 97-98 n.4 (1982).

to improve upon *Gomez,* so will other cases, equally costly and representing an insignificant segment of the illegitimate population, continue to be heard. The burdened judicial system should be spared this. In its efforts to be "carefully tuned to alternative considerations," the state legislatures should seek the use of a referee to examine the factual basis for legitimation within the time suggested by the Uniform Probate Code, an effective and economical resource.

Needed change will be slow to come in the future. Historical impediments to the rights of illegitimates remain from the French civil law, the English common law, and the theory that courts were not empowered to grant inheritance rights.[253] Under this theory, only legislatures were empowered to grant inheritance rights and unfortunately, the legislatures have been slow to change.

Change will also be slow because state interests are continuously asserted successfully by the state to justify the classification of illegitimacy.[254] In the future, state concern over speed of administration, elimination of fraud, and certainty of distributees will only increase. Any legislative substitution in the future for the present illegitimate statutes will need to address these same issues with a view towards providing a better system, a system able to withstand any degree of equal protection scrutiny.[255]

Proponents of change should recognize the weaknesses of the present system. The fact that in Texas, cases such as *Bell* and *Mariscal* can have similar facts, yet different results,[256] points to the present uncertainty in the law. This uncertainty increases when courts such as the *Batchelor* court sustain a "case by case determination"

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253. *See* Moorman v. Moorman, 66 N.W.2d 248, 251 (Mich. 1954) (the judiciary has no control over legislature's judgment concerning descent and distribution laws).

254. Traditional state interests in regard to illegitimacy concern such issues as are recited in Green v. Woodward, 318 N.E.2d 397, 400 (Ohio Ct. App. 1974):

> In the past, illegitimate children were treated as 'nothing' and reasons given for such discrimination were to: (1) preserve feudal tenure; (2) discourage illegitimate relationships; (3) avoid artificial presumptions of intent; (4) encourage legitimate family relationships; (5) protect the rights of legitimate children.

Id. at 400.

255. *See* Krause, *Equal Protection for the Illegitimate,* 65 MICH. L. REV. 477, 504-05 (1967).

256. *Compare* Bell v. Hinkle, 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980) (issue of paternity question of law), *cert. denied*, 454 U.S. 826 (1981) *with* Johnson v. Mariscal, 620 S.W.2d 905, 909 (Tex. Civ. App.—Corpus Christi 1981) (factual determination of paternity), *writ ref'd n.r.e. per curiam,* 626 S.W.2d 737 (Tex. 1982).

of paternity issues.[257] A "case by case determination" also requires further defining of "fundamental rights." This is costly, often arbitrary, and invites Supreme Court interpretation of statutes and cases like *Batchelor*.[258]

The use of a referee is certainly less costly, more likely to result in the utilization of technology, and because of the local character of a referee, better suited to assist minority populations historically affected by discriminatory actions.[259] In a fact pattern like that of *Bell* and *Mariscal,* the use of a referee would be an alternative to the often arbitrary constraints of law[260] and the vagaries of a jury's determination[261] as to what constitutes recognition. The future will determine whether utilizing a referee would be a better approach than the Supreme Court reviewing decisions like *Batchelor;* this state of uncertainty points again to the lack of solidity of existing statutory procedure.[262]

There is a present likelihood of fraudulent paternity claims implicit in any system likely to sustain judicial scrutiny. Past statutory classifications, both valid and invalid under the fourteenth amendment, all invited fraudulent claims.[263] As long as the referee is

257. *See* Batchelor v. Batchelor, 634 S.W.2d 71, 73 (Tex. Civ. App.—Fort Worth 1982, writ ref'd n.r.e.).

258. A review of the *Mills* decision will demonstrate the concern of the Supreme Court with repeated intrusions into Texas statutory law. A more creative response to *Gomez* would have prevented *Mills*.

259. U.S. Dep't of Health, Education and Welfare, *Vital Statistics of the U.S.,* (1967).

260. *Cf.* Bell v. Hinkle, 607 S.W.2d 936, 937 (Tex. Civ. App.—Houston [14th Dist.] 1980) (question of whether or not person was biological offspring of a male is question of law), *cert. denied*, 454 U.S. 826 (1981).

261. *Cf.* Johnson v. Mariscal, 620 S.W.2d 905, 909 (Tex. Civ. App.—Corpus Christi 1981)(recognition by father requires factual determination), *writ ref'd n.r.e. per curiam,* 626 S.W.2d 737 (Tex. 1982).

262. Remember that in *Gomez* the Supreme Court ruled invalid in a per curiam opinion a Texas statute saying an illegitimate had no judicially enforceable right to financial support from the father. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam). The Court cited *Weber* as the standard for review and this standard was a stricter one that was particularly sensitive to race, lineage, and status of birth. *See id.* at 538. From among a statutory classification, a jury, and a referee, it is arguable that a referee better responds to these sensitive issues.

263. *See* Tenny v. United States, 441 F. Supp. 224, 225 (E.D. Mo. 1977). The Civil Service Retirement System Act contained a "lived with" requirement that was to bar payments to illegitimate children who did not live with the deceased annuitant. The court said the exclusion of illegitimates did not promote the purpose, nor did it discourage spurious claims of parentage. *See id.* at 228.

guided by the Uniform Parentage Act[264] or the clear and convincing proof of the Uniform Probate Code,[265] who is to say if the prior statutory solution prevented fraud any more effectively?

Through the *Mills* decision, Justice O'Connor and the four other justices who joined in most of her opinion, adopted a policy of realism in response to the increasing number of illegitimates.[266] The Court today, as evidenced by *Pickett v. Brown,*[267] is mindful of the advances in technology, the burden upon state welfare rolls, the avoidance of responsibility by putative fathers, and the changing mores within which Americans live and die today. The Court's unwillingness to apply a strict standard of judicial scrutiny is understandable. As the Justices move toward a middle approach, however, the states should respond. A renewed effort on the part of state legislatures to the challenge of illegitimacy is certainly the greatest implication for the future.

V. CONCLUSION

It is evident that state legislatures are the traditional guardians of interests affecting the people they govern. Among these interests are: protection of family life, stability of title and ownership of property, speed and efficiency in administering a decedent's estate, prevention of fraudulent claims, and all this, as cheaply as possible. Nonetheless, changes within the population itself demand that yesterday's solutions no longer correspond to today's desire for justice for a class of persons as illegitimates. The 1982 case of *Mills v. Habluetzel* is a benchmark in this process.

Life patterns among today's adults, many of them members of minority populations, cannot be cast into evidentiary classifications seeking to satisfy state interests. Also, the future of state legislation cannot be couched in a win-lose terminology; neither may thousands of children be stigmatized with standards of morality. Today, state legislatures must look to the facts and draft inquiries

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264. UNIF. PARENTAGE ACT § 7, 9A U.L.A. 596 (1979).

265. UNIF. PROBATE CODE § 2-109(2) (1979).

266. If this premise is correct, then a majority of the Court would now favor the *Mariscal* approach that requires a court to look to the facts, not a statutory approach as we saw in *Batchelor*.

267. — U.S. —, 103 S. Ct. 2199, 76 L. Ed. 2d 372 (1983).

that will allow sensitive, modern, and practical protection to the fundamental personal rights of illegitimates.

Substantial state interests are not an issue, only the means by which they are safeguarded. Suggestions of greater judicial scrutiny, utilization of statutory approaches such as the uniform acts, or equity devices such as a referee, all are meant to safeguard state interests. Nonetheless, after *Mills,* greater protection has come to mean more. Greater protection is now a right to which the illegitimate is entitled.