Illegitimates and Equal Protection

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ILLEGITIMATES AND EQUAL PROTECTION

Illegitimates often have been discriminated against by legislatures in the enactment of statutes, as well as by courts which have sanctioned such legislation. This article will examine the judicial response to legislative treatment of the illegitimate in social insurance, loss compensation, and intestacy statutes. Emphasizing the Supreme Court's analysis of the legal status of illegitimates in terms of the equal protection clause, it will also discuss how the principle of equal protection may be applied in order to reduce the number of illegitimates denied the benefit and protection of the law.

I. THE LEGAL STATUS OF ILLEGITIMATES

A. Social Insurance Legislation

Several federal statutes, including the Social Security Act, contain provisions which discriminate against illegitimates seeking the benefits available under these social insurance programs. Although such provisions rarely make benefits explicitly unattainable, benefits may nevertheless be denied by imposing a greater burden of proof on illegitimate claimants than upon legitimate claimants. For example, under the Social Security Act, children's benefits may be payable when a parent qualifies for a retirement or disability pension, or when the insured parent dies. To be considered eligible for Social Security benefits based upon the contributions of an insured parent, the illegitimate must first be deemed a "child" within the Act's provisions. The Act, however, declares the illegitimate to be prima facie ineligible and grants "child" status only if, in addition to establishing paternity, the illegitimate can

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6 See e.g., 42 U.S.C. § 416(h)(3)(A)(ii) (1970) ("[S]uch insured individual is shown by evidence satisfactory to the secretary to be the father of the applicant. . . .").
meet one of several other qualifying conditions. The illegitimate may be deemed a "child" if the applicable state intestacy statute makes the person an heir or if the parents' marriage ceremony was invalidated on technical grounds. Additionally, the illegitimate may qualify if he obtains a written acknowledgement of paternity, a judicial decree of paternity, or a judicial support order. The illegitimate may also be deemed a "child" if the Secretary of Health, Education, and Welfare is satisfied with respect to paternity and proof of dependency exists at the time of the event insured against.

As a result, illegitimate claimants are required to present proof of paternity as well as proof of some other factor indicative of a "family" relationship. The latter burden weighs most heavily on those illegitimates who must prove actual dependency at the time of the event insured against. In contrast, proof of dependency is not required of legitimate children since there is a statutory presumption in their favor. In effect, the statute favors legitimate children regardless of their actual dependency. While proof of dependency is not required of illegitimates qualifying under the

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   (3) An applicant who is the son or daughter of a fully or currently insured individual, but who is not (and is not deemed to be) the child of such insured individual under paragraph (2) of this subsection [i.e., the intestacy and invalid marriage qualifications], shall nevertheless be deemed to be the child of such insured individual if:
      (A) in the case of an insured individual entitled to old-age insurance benefits
      (i) such insured individual—
         (I) has acknowledged in writing that the applicant is his son or daughter,
         (II) has been decreed by a court to be the father of the applicant, or
         (III) has been ordered by a court to contribute to the support of the applicant because the applicant is his son or daughter,
      and such acknowledgement, court decree, or court order was made not less than one year before such insured individual became entitled to old-age insurance benefits or attained age 65, whichever is earlier .
   (ii) such insured individual is shown by evidence satisfactory to the Secretary to be the father of the applicant and was living with or contributing to the support of the applicant at the time such insured individual became entitled to benefits .
Section 416(h)(3)(B) repeats this language but with respect to individuals entitled to disability insurance benefits; § 416(h)(3)(C) does the same for those entitled to death benefits.
11 42 U.S.C. § 402(d)(3) (1970) reads in part as follows:
   (3) A child shall be deemed dependent . . . unless . . . such individual [i.e., an (adopting) father or (adopting) mother] was not living with or contributing to the support of such child and—
      (A) such child is neither the legitimate nor adopted child of such individual, or
      (B) such child has been adopted by some other individual.
For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

Despite the omission of a reference to section 416(h)(2)(A) in this section, the Court has determined that children qualifying via that provision are deemed dependent as well. Mathews v. Lucas, 427 U.S. 495 (1976).
intestacy, invalid marriage, or proof by document provisions of the Act, the illegitimate child unable to offer evidence of a parental relationship is required to prove dependency in fact to receive benefits under the Social Security Act.

In two recent decisions concerning illegitimacy, the Supreme Court has reached different conclusions with respect to the presumption of dependency. In *Jimenez v. Weinberger*, the claimants were the illegitimate, dependent children of a disabled worker. The dependency presumption was unavailable to them by virtue of their illegitimacy and the inapplicability of the statute’s special qualifying provisions. Moreover, because they were born after the onset of the disability, the children were unable to prove their dependency “at the time” that their father’s disability was sustained, as the Act required. The Court, however, used an equal protection analysis to reverse the denial of their benefits by probing the rationality of the relation between the legislative means and ends and the extent to which the statutory result reflected the statutory purpose. The Court determined that the exclusion of these illegitimates was not “reasonably related to the prevention of spurious claims,” and that “it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency.”

*Mathews v. Lucas* involved illegitimate children whose father died following an absence of several years from the home. As a result, they were unable to prove dependency “at the time” of his death. Despite the demonstrable fact that the insured had lived with the family for the eighteen years prior to his departure, the Court upheld the denial of benefits finding no violation of equal protection. The statutory classification which excluded these children was justified, in part, on the grounds of administrative convenience. The Court also found the classification permissible because it was “reasonably related to the likelihood of dependency at death.”

The Act’s unfavorable treatment of illegitimates has not been confined to the provisions challenged in *Jimenez* and *Lucas*. Until recently, illegitimates of a particular class were the first members of a “family” to have their benefits reduced if the total benefits received by the household exceeded the statutory maximum.

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13 See notes 7-10 and accompanying text supra.
14 417 U.S. at 636.
16 Id. at 516.
17 Id. at 509.
This policy was justified on the ground that such a scheme reasonably reflected the greater probability that certain groups of children were more likely to be dependent than others,\(^{19}\) even though these children were statutorily entitled to the same presumption of dependency as legitimates, or had, in fact, earned that status by proving their dependency. Later challenges, however, successfully attacked the provision as impermissibly discriminatory insofar as it lacked any rational justification.\(^{20}\)

In addition to the Social Security Act, numerous other federal statutes provide similar payments of benefits for federal employees and their dependents.\(^{21}\) The illegitimate’s receipt of benefits is often conditioned on qualifying as a “child” as defined in each statute,\(^{22}\) with some statutes imposing a dependency requirement as well.\(^{23}\) Benefits have also been conditioned upon a finding that a “recognized natural child” lives in a “regular parent-child relationship” with the person covered by the particular statute.\(^{24}\) These limitations may be discriminatory, not only with respect to illegitimates, but also with respect to any nontraditional family relationship, such as single-parent families, communal households, homosexual parenthood, and older-sibling parenthood. Strict interpretation of such restrictions would result in the denial of benefits to claimants in these situations. In the event that the limitation will be litigated, the courts may construe the standard in accordance with the liberal interpretation generally given to benefit statutes.\(^{25}\)


Entitlement to benefits, however, should rest on a firmer foundation than the personal sympathies of the judge. In this respect, the "regular parent-child relationship" concept may be vulnerable to a challenge based upon vagueness and possible overbreadth. While such a flaw might be remedied using language more explicitly describing the aspect of the insured-claimant relationship on which Congress desires to condition the receipt of benefits, any attempt to draw these new lines too narrowly would raise equal protection issues.26

B. Loss Compensation Statutes

The difficulties faced by illegitimates claiming support benefits are also present in statutes providing compensation for the losses suffered by the claimant upon the wrongful or work-related death of the parent.27 In general, illegitimates have received more favorable treatment where federal courts possess exclusive jurisdiction to interpret a federal compensation statute,28 than where jurisdiction is shared with state courts.29 Federal courts have tended to avoid reliance on analogous state law, even where the structure and language of the federal act appear to warrant such reliance. For example, although the Federal Employees Group Life Insurance Act30 establishes a hierarchy of claimants to the death benefits by using language characteristic of many state intestate succession laws,31 the federal courts, in accord with the Act's beneficial,

26 See, e.g., notes 75-79 & 141-49 and accompanying texts infra.
31 5 U.S.C. § 8705 (1970) reads in part:
(a) The amount of group life insurance . . . shall be paid . . . in the following order of precedence:
First, to the beneficiary . . .
Second, if there is no designated beneficiary, to the widow or widower of the employee.
remedial nature, have generally chosen to interpret it in terms of support or loss compensation rather than in terms of property distribution on intestacy. 32 This interpretation has the advantage of avoiding the incorporation of inconsistent state legislation and its often unfavorable application to the claims of illegitimates. 33 In cases involving federal statutes which operate independently of state law, the federal courts have found a similar congressional intent to compensate the recipient for loss of society and care 34 or, simply, to bestow a benefit. 35 The reliance of federal courts on federal common law in interpreting loss compensation statutes should continue to benefit illegitimates in the future. The occasional intrusion of state law, 36 however, is a reminder of the precarious status which illegitimates now enjoy.

At the state level, illegitimates have gained increased access to compensation benefits as a result of several recent decisions. In Levy v. Louisiana 37 and Gliona v. American Guarantee & Liability Insurance Co., 38 the Supreme Court sharply curtailed the ability of states to discriminate against illegitimates in wrongful death statute cases that involved Louisiana's wrongful death statute 39 which denied a cause of action to illegitimates for the death of their mother and to a mother for the death of her illegitimate son.

In Levy, five illegitimate children sued for damages for the wrongful death of their mother. Concluding that distinctions drawn on the basis of the claimant's birth status bore "no relation to the nature of the wrong allegedly inflicted on the mother," the Court held that these distinctions constituted invidious discrimination against illegitimates in violation of the equal protection clause of the fourteenth amendment. 40 Similarly, in Gliona the Court found "no possible rational basis" for assuming that the policy of dis-

33 See, e.g., the statutes cited in notes 50-54 infra.
36 See note 29 supra.
38 Id. at 73.
40 391 U.S. at 72.
courting illegitimacy would be undermined by permitting a natural mother to be compensated under the statute for the wrongful death of her illegitimate child.\textsuperscript{41} The Court followed a similar approach in \textit{Weber v. Aetna Casualty & Surety Co.},\textsuperscript{42} where two illegitimate children of the decedent sought to be included as "children" under the Louisiana workmen's compensation statute.\textsuperscript{43} The statute classified illegitimate children as "other dependents," who were entitled to recover only if the statutorily limited award had not been exhausted by prior takers, which included the decedent's legitimate children. The \textit{Weber} Court was unable to perceive a "significant relationship" between the discriminatory means employed by the statute and the statutory purpose of providing support for the dependents of the decedent.\textsuperscript{44} Consequently, the provision was held to violate the equal protection clause.\textsuperscript{45} As in \textit{Glona}, the Court concluded that the state's interest in discouraging illicit sexual activity between adults was not effectively furthered by the discriminatory classification of illegitimate children.\textsuperscript{46}

\textbf{C. Intestate Succession Statutes}

Intestate succession has long been considered a matter of state concern.\textsuperscript{47} Uniform treatment of illegitimates under intestacy statutes became impossible as states pursued different courses in mitigating the harsh common law attitude towards illegitimates. Although the doctrine of \textit{nullius filius} (the child of no one) is no longer the letter of the law in any state, its spirit is still felt.\textsuperscript{48} With

\begin{footnotesize}
\textsuperscript{41} Id. at 75.
\textsuperscript{42} 406 U.S. 164 (1972).
\textsuperscript{43} LA. REV. STAT. ANN. § 23.1232 (West 1967).
\textsuperscript{44} 406 U.S. at 175.
\textsuperscript{45} Id. at 176.
\textsuperscript{48} In its earliest forms, the common law doctrine deemed the illegitimate to have no inheritable blood nor any rights of inheritance from either parent. W. HOOPER, \textit{The Law of Illegitimacy} 25-27 (1911). Although the burden has been eased generally, specific inclusion of illegitimates in various statutes is often required to overcome the common law bias against them.
\end{footnotesize}
the exception of Louisiana, all states permit an illegitimate child to inherit automatically from the natural mother, and some states allow inheritance from the mother’s kindred as well. Most states allow illegitimates to succeed to their father’s intestate estate, however, only on proof of paternity and his acknowledgment or recognition of the child as his own. In some states inheritance

49 According to the Louisiana scheme, there are two kinds of illegitimate children: those born to parents who are capable of marrying each other, and those born to parents whose marriage is prevented by some legal impediment. LA. CIV. CODE ANN. art. 181 (West 1952). Only those born to parents free to marry each other are capable of being acknowledged by either parent, thereby earning the designation “natural child;” those illegitimates not so fortunate are termed “bastards,” either adulterous, id. art. 182, or incestuous, id. art. 183, depending upon the nature of the impediment to their parents’ marriage.

Illegitimates are not entitled to inherit until acknowledged; if not acknowledged, the law grants them nothing more than a “mere alimony” interest. Id. art. 920. An acknowledged natural child can inherit from the mother to the exclusion of her kindred, but not to the exclusion of lawful children and descendants. Id. art. 918. An acknowledged natural child can inherit from its father only to the exclusion of the state. Id. art. 919.


52 FLA. STAT. ANN. § 731.29 (1964); IND. CODE ANN. § 29-1-2-7 (Burns 1972); IOWA CODE § 633.222 (1975); KAN. STAT. § 59-501 (1964); ME. REV. STAT. tit. 18, § 1003 (1965); MD. EST. & TRUSTS CODE ANN. § 1-208 (1974); MICH. COMP. LAWS ANN. § 702.83 (Supp. 1976); MINN. STAT. ANN. § 525.172 (West 1975); NEV. REV. STAT. § 134.170 (1973); N.Y.
from paternal kindred is also permitted. The Uniform Probate Code, adopted in ten jurisdictions, has done much to equalize the status of all children by focusing on the biological relationship between parent and child as the primary qualification for intestate succession.

Although the Supreme Court has not required uniformity of state intestate succession schemes, the equal protection doctrine has been used to establish minimum standards of fairness for illegitimates. In *Labine v. Vincent*, the Court indicated that the states were entitled to exercise their individual judgments with respect to intestate succession. *Labine* involved an equal protection challenge to a Louisiana statute which permitted the acknowledged, illegitimate children of a deceased father to share in the estate only to the exclusion of the state. The Court, with only a minor reference to the equal protection issue, deferred to Louisiana’s prerogatives in the area, upholding the state’s interest in controlling the intestate distribution of property within its borders.

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53 IND. CODE ANN. § 29-1-2-7 (Burns 1972); ME. REV. STAT. tit. 18, § 1003 (1965); N.C. GEN. STAT. § 29-18; (1976); ORE. REV. STAT. § 112.105 (1975); VT. STAT. ANN. tit. 14, § 553 (1974); WASH. REV. CODE ANN. § 11.04.081 (1967); WIS. STAT. ANN. § 852.05 (West 1971).


55 The National Conference of Commissioners on Uniform State Laws has published two versions of § 2-109, the provision defining “child” for the Uniform Probate Code. The earlier version is the one adopted by state legislatures to date, and reads in relevant part:

(2) ... 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.

56 401 U.S. 532 (1971).

57 LA. CIV. CODE ANN. art. 919 (West 1952).

58 401 U.S. at 536 n.6. Four dissenting members found a violation of equal protection, *id.* at 541, using the rational basis test. *Id.* at 548.
Despite this traditional judicial deference, the prerogatives of state governments have recently been restricted by the requirements of the equal protection doctrine. In the recent case of *Trimble v. Gordon*, the Court, after acknowledging a state's "primary responsibility" in establishing an intestate succession scheme, reaffirmed the applicability of the equal protection clause as a means of "vindicating constitutional rights" and held that the Illinois intestacy statute, which permitted illegitimates to inherit only from their mothers, was unconstitutional.

Speaking for the majority, Justice Powell indicated that *Labine* was distinguishable since the Louisiana statute reflected different legislative purposes than the Illinois statute considered in *Trimble*. The opinion in *Trimble* clearly stated, however, that its "more recent analysis" will control future treatment of the issue.

The Court's treatment of the equal protection question in *Labine* could perhaps have been attributed to the tradition of federal deference to the states in matters of intestacy, and to the strength of the states' interest in property distribution. The demonstrated vulnerability of Louisiana's legislative treatment of illegitimates should have prompted a more extensive equal protection analysis. In particular, the state interest in protecting the orderly distribution of intestate property from the disruptive intrusion of "lost" or "hidden" heirs is arguably neither furthered by, nor rationally related to, a legislative classification which places acknowledged, illegitimate children of the deceased after all other related takers of the estate. The *Labine* Court bypassed this approach in light of the traditional deference to state intestacy policy. The Court's most recent discussion of this issue, however, established *Labine* as an anomaly and indicated that the Court was returning to a more "traditional equal protection analysis" based on the relationship between statutory discrimination and the promotion of state objectives.

II. EQUAL PROTECTION

Modern analysis of the equal protection clause requires that discrimination be examined on a level of judicial scrutiny deter...

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61 *Id.* at 4397.
62 *Id.*
63 *Id.* at 4399.
64 *Id.* at 4399 n.17.
66 See notes 37-46 and accompanying text supra.
68 *Id.* at 4398.
69 U.S. Const. amend. XIV. § 1. The actions of the federal government are similarly constrained by the equal protection concept of the fifth amendment. See, e.g., *Shapiro v.*
mined by the subject matter of the legislation, the nature of the groups being affected, and the importance of the competing interests. Legislative classifications will be invalidated if they fail to meet the tests appropriate to the level of scrutiny employed.\footnote{See, e.g., Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).}

Some equal protection challenges have concerned legislative classifications which discriminate against illegitimate children and in favor of legitimate children, such as state intestacy statutes. In other cases, however, the challenged classification has distinguished between groups of illegitimates. The Louisiana illegitimacy scheme\footnote{See note 49 supra.} and the Social Security Act's dependency presumptions\footnote{See notes 12-20 and accompanying text supra.} were both challenged on such grounds. In evaluating these classifications in terms of the equal protection clause, it should be noted that, while a particular provision may not have discriminated against all illegitimates, the persons discriminated against were in all cases illegitimate. As a result, the overriding question has been the permissibility of using birth status as a basis for legislative classification.

A. Strict Scrutiny

During the 1960's the Supreme Court developed a two-tier method of equal protection analysis,\footnote{Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972).} supplementing the traditional minimal level of scrutiny with a new stricter examination. The more exacting level of scrutiny is employed when the legislation involves either a "suspect classification" or a "fundamental interest."\footnote{Id. at 8-10. Classifications based on race, see, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964), national origin, see, e.g., Oyama v. California, 332 U.S. 633 (1948), and alienage, see, e.g., Graham v. Richardson, 403 U.S. 365 (1971), have all been deemed worthy of strict scrutiny. Similarly, legislation has been found to deny equal protection where it impinged on "fundamental interests" of the individual: voting, see, e.g., Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), travel, see e.g., Shapiro v. Thompson, 394 U.S. 618 (1969), procreation, see, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942), and criminal appeals, see, e.g., Griffin v. Illinois, 351 U.S. 12 (1956). Although, theoretically, a state can constitutionally classify on these grounds if the interest it seeks to further is deemed "compelling," Shapiro v. Thompson, 394 U.S 618, 638 (1969), in practice, few interests have satisfied the compelling state interest test. But see Korematsu v. U.S., 323 U.S. 214 (1944).}

Classifications based on illegitimacy should be subject to strict judicial scrutiny insofar as they discriminate against individuals on
the basis of their birth status.\(^7^5\) Like the suspect classifications of race, alienage, and national origin, illegitimacy is not only a characteristic of birth beyond the individual’s control,\(^7^6\) but it also is one which has traditionally attracted extensive social opprobrium.\(^7^7\) In terms of the “‘traditional indicia of suspectness,’” illegitimates have clearly been subjected to a “‘history of purposeful unequal treatment, and have been saddled with . . . disabilities,’”\(^7^8\) not because of any inadequacy or defect inherent in the class or its members, but as a result of a cultural bias against perceived immorality which inaccurately, and unfairly, stigmatizes the blameless.\(^7^9\)

Until recently, the Supreme Court has been favorably disposed towards the use of the strict level of scrutiny in its treatment of the equal protection problems posed by illegitimates.\(^8^0\) In *Levy v. Louisiana*,\(^8^1\) the Court emphasized its sensitivity to “‘basic civil rights,’” and its willingness to strike down instances of historical and traditional invidious discrimination.\(^8^2\) With reference to the Louisiana wrongful death statute, the Court stated that “it is invidious to discriminate against [illegitimates] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.”\(^8^3\) Writing for the Court, Justic Douglas was possibly referring to fundamental rights when describing “‘[t]he

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\(^7^6\) See *Note, Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1126-27 (1969). A similar argument on behalf of sex as a suspect classification has met with the approval of a plurality of the Court. See *Frontiero v. Richardson*, 411 U.S. 677 (1973). See also *Reed v. Reed*, 404 U.S. 71 (1971). In *Frontiero*, the plurality opinion identified sex as an immutable birth characteristic bearing little relation to the individual’s ability to contribute to society, 411 U.S. at 686-87, and supported the proposition that the burden imposed should bear some relationship to individual responsibility. *Id.* at 686, citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). The opinion went on to dismiss administrative convenience as a sufficient justification for a scheme which required a male spouse to prove dependency on his military wife but presumed a wife’s dependency on her military husband. 411 U.S. at 688-89.

\(^7^7\) Gray & Rudovsky, *supra* note 46, at 6.

\(^7^8\) *See* supra note 37-40 and accompanying text.


\(^8^3\) See, e.g., *San Antonio Independent School District v. Rodriguez*, 411 U.S. at 109 (Marshall, J., dissenting): “Status of birth, like the color of one’s skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations. Yet, illegitimacy has long been stigmatized by our society. Hence, discrimination on the basis of birth—particularly when it affects—innocent children—warrants special judicial consideration.” Justice Stewart, concurring in the majority decision, commented: “But there are other classifications [besides race] that, at least in some settings, are also ‘suspect’—for example, those based upon national origin, alienage, indigency, or illegitimacy.” *Id.* at 61 (footnotes omitted).

\(^8^4\) 391 U.S. 68 (1968). See notes 37-40 and accompanying text *supra*.

\(^8^5\) 391 U.S. at 71.

\(^8^6\) *Id.* at 72.
rights asserted here [as involving] the intimate, familial relationship between a child and its own mother. 84 Both the thrust of the Court’s analysis and the decision to strike down the discrimination may be viewed as reflecting the scrutiny appropriate to a suspect classification. 85

Nevertheless, the court has refused to declare illegitimacy a suspect classification. 86 In fact, in Glona v. American Guaratee & Liability Co., 87 the Court used language often associated with the more lenient, minimal level of scrutiny. 88 The contrasting language of Levy and Glona, and the implicit decision not to designate illegitimacy a suspect classification may, however, be reconciled by considering the nature of the discrimination before the Court. The Court faced a particularly blatant form of discrimination in both cases and may have desired to avoid a sweeping holding where a narrower one would accomplish its objective. Consequently, there was no need to find a suspect classification, since the legislative schemes under scrutiny did not even satisfy the “rational basis” test.

In Mathews v. Lucas, 89 the Court’s refusal to find illegitimacy to be a suspect classification 90 was based, in part, upon a view of Levy and Weber as cases involving less-than-strict scrutiny. The Court noted that illegitimacy, unlike race or sex, does not carry “an obvious badge.” 91 Consequently, having never faced discrimination as severe or pervasive as that experienced by women and blacks, 92 illegitimates were deemed not to require the greater degree of judicial protection afforded to those groups. The Court’s observation is not persuasive in view of the fact that national origin and alienage, despite their invisibility, have been considered “suspect” classifications. 93 Although the decision in Lucas may be

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84 Id. at 71. Although he did not elaborate, Justice Douglas may have been alluding to a fundamental interest in privacy (see, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)), perhaps in an attempt to analogize equal protection of the illegitimate to the basic civil rights previously reviewed in the opinion.

85 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), also contains language characteristic of strict scrutiny analysis. In that case, the Court found no state interest, “compelling or otherwise,” id. at 176, sufficient to justify the discrimination and struck down the offending provision of the Louisiana workmen’s compensation statute.

86 See Mathews v. Lucas, 427 U.S. 495 (1976); notes 15-17 and accompanying text supra.


88 See notes 155-58 and accompanying text infra. It can be argued, too, that Weber’s connection with the two-tier system is more semantic than substantial. See notes 95-115 and accompanying text infra. See also Yackle, Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court, 9 U. RICH. L. REV. 181, 207-10 (1975).


90 Id. at 503-06.

91 Id. at 506.

92 Id.

93 See Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Oyama v. California, 332 U.S. 633 (1948) (national origin). The Court’s reliance here on the visibility of a trait as a
read by some as dispositive of the issue, it is possible to interpret the decision much more restrictively.94

**B. A Newer Equal Protection**

Some commentators have suggested that the Court's recent decisions reflect a growing reluctance to apply the "either-or" two-tier analysis and that the Court is developing a new level of scrutiny somewhere between minimal and strict.95 This "newer" equal protection approach has been described as a "means-focused, relatively narrow, preferred ground of decision" standard based on the principle that "legislative means must substantially further legislative ends."96 This means-oriented analysis rejects the unquestioning deference to legislatures often associated with a minimal level of scrutiny in favor of a more exacting level of scrutiny based less on judicial hypothesis than on expressed legislative purpose and other evidence presented to the Court.97 The continued expansion of strict scrutiny, with its implicit normative assessments of legislative purpose, is checked by the new standard, which reflects a "more modest interventionism" on the part of the Court.98

Under this level of scrutiny, classifications involving illegitimacy have been susceptible to successful equal protection challenges.99 Determining whether the means chosen "substantially further" the legislative ends requires the Court to identify and balance the interests of the illegitimate claimant against those of the state.100 In general, the illegitimate's interest is in the unrestricted receipt of benefits to which he would have been entitled except for his birth criterion for determining the permissibility of the classification is open to question as well. See Mathews v. Lucas, 427 U.S. at 523 (Stevens, J., dissenting) ("The fact that illegitimacy is not as apparent to the observer as sex or race does not make this governmental classification any less odious.").

94 See notes 132-49 and accompanying text infra.
95 Gunther, supra note 73, at 17-20; Yackle, supra note 88, at 191-94.

This article's division of the equal protection analysis into three segments is not meant to imply that no other alternatives exist. In particular, Justice Marshall has outlined a flexible "sliding scale" whose levels of scrutiny are determined according to the importance of the interests at stake and the reasonableness of the legislated means of promoting the state interest. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting). See also Gunther, supra note 73, at 17-18.

96 Gunther, supra note 73, at 20.
97 Id. at 21.
98 Id. Nonetheless, an argument can be made for the continuing viability of suspect classifications and fundamental interests as deserving of special attention. Id. at 24.
100 The Weber Court formulated a new equal protection test in terms of a "dual inquiry." First, what legitimate state interest does the classification promote? Second, what fundamental rights might the classification endanger? 406 U.S. at 173.
status.\textsuperscript{101} The state's competing interest in denying or limiting those benefits has usually been expressed in terms of general social policy or the specific purposes of a particular statute. In the case of illegitimates, states have cited their interest in the protection of legitimate family relationships\textsuperscript{102} and the strengthening of the family unit\textsuperscript{103} to discourage illicit sexual activity.\textsuperscript{104} In addition, the specific purposes of individual statutes, such as providing general financial support,\textsuperscript{105} the replacement of lost support,\textsuperscript{106} or the orderly distribution of property,\textsuperscript{107} may reflect a general state interest in protecting the welfare of its citizens. Finally, courts have recognized legitimate state interests in the efficient administration of social insurance programs: the prevention of fraud,\textsuperscript{108} administrative convenience,\textsuperscript{109} and the circumvention of difficult problems of proof.\textsuperscript{110}

The "substantial relation" between legislative ends and means required by the intermediate level of scrutiny has proven difficult to establish, especially in cases where illegitimates were excluded from a statutory scheme with the primary purpose of providing support\textsuperscript{111} or loss compensation.\textsuperscript{112} Attempts to justify the exclusion on family protection or administrative grounds have been unsuccessful where the interest of the illegitimate in receiving benefits coincides with the express statutory purpose of providing

\textsuperscript{107} Labine v. Vincent, 401 U.S. 532 (1971).
\textsuperscript{110} Perry v. Richardson, 440 F.2d 677 (6th Cir. 1971). \textit{But see} Beatty v. Weinberger, 478 F.2d at 307: "[W]hat is significant about these cases \textit{[Levy and Glona]} is the Court's implicit, if not explicit, disavowal of the notion that difficulties of proof are a sufficient, or indeed rational, basis for discriminating against illegitimates." \textit{See also} Gomez v. Perez, 409 U.S. 535, 538 (1973). (Problems of proof are not to be made into an "impenetrable barrier" which shields "otherwise invidious discrimination.".).
those benefits.\footnote{113} When other factors, such as the Court’s traditional deference to state prerogatives\footnote{114} or a reluctance to expand the scope of a support statute,\footnote{115} have been determinative, the interests of the illegitimate have not prevailed.

\textit{Weber v. Aetna Casualty & Surety Co.}\footnote{116} and \textit{Jimenez v. Weinberger}\footnote{117} illustrate the Court’s willingness to strike down discrimination against illegitimates by employing the new middle-level scrutiny. In both cases, interests of illegitimates were held to be paramount when weighed against the state’s interest in providing support and protecting the family.\footnote{118} In \textit{Weber}, which involved the rights of illegitimates under Louisiana’s workmen’s compensation statute, the Court considered whether there was a “significant relationship” between legislative means and ends, rather than relying upon either the “rational basis” or the “compelling interest” test of the two-tier approach to reach its decision.\footnote{119}

Similarly, the \textit{Jimenez} Court, citing \textit{Weber} with approval,\footnote{120} struck down a challenged Social Security provision, not on the basis of a suspect classification or rational basis analysis, but rather by means of an extended examination of the degree to which the legislative classification successfully promoted the statutory purpose.\footnote{121}

In \textit{Mathews v. Lucas},\footnote{122} the Court elaborated on its view of equal protection with respect to illegitimates. While rejecting suspect status for illegitimacy,\footnote{123} the Court described the appropriate level of scrutiny as being “less than strictest scrutiny” but “not a toothless one;”\footnote{124} more importantly, the Court attempted to clarify its role in such cases. The Court expressed its unwillingness to substitute its judgment for that of Congress in “matters of practical
Rather the Court viewed its role as "simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions." In view of that limitation, the Court refused to scrutinize more strictly the precision or accuracy of the legislative classification. The classification will be upheld if it satisfies the threshold determination of consistency and substantiality. The Lucas Court rejected the illegitimates' assertion of unconstitutionality because it found a "reasonable relation" between the classification and the likelihood of the children's dependency on their absent father at the time of his death. The Court perceived the congressional purpose behind the classification to be "obviously" administrative convenience, since the classification avoided the increased burden and expense of case-by-case adjudication. The Court's assessment of the importance of the state interests was reinforced by its unwillingness to find that the other factors involved in the classification "lack any substantial relation to the likelihood of actual dependency." Finding that these assumptions were not "so inconsistent or insubstantial" as to warrant rejection, the Court upheld the classification.

The difficulty with the Court's analysis in Lucas is its failure either to follow Jimenez or to repudiate it despite both claims arising out of similar statutory requirements and presenting a similar array of competing interests. Both cases challenged the statutory requirement of proof of dependency at the time of the event insured against. In Jimenez, the Court decided against a strict

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125 427 U.S. at 515.
126 Id. at 516.
127 Id. See Gunther, supra note 73, at 20-24. The sharp dissent by Justice Stevens may indicate that the transition is not yet complete. "[A]n admittedly illogical and unjust result should not be accepted without both a better explanation and something more than a 'possibly rational' basis .... [T]he Court should be especially vigilant in examining any classification which involves illegitimacy." 427 U.S. at 519-20.
128 427 U.S. at 510-16.
129 Id. at 509.
131 427 U.S. at 513. After considering the Court's attempt to indicate the substantiality of the relation between the likelihood of dependency and the illegitimate's inclusion in an intestate succession scheme, Justice Stevens described the effort as involving "nebulous inference upon inference." Id. at 522. See also Norton v. Weinberger, 390 F. Supp. 1084 (D. Md. 1975), aff'd sub nom., Norton v. Mathews, 427 U.S. 524 (1976). The district court in Norton, while upholding the statutory classifications, based its decision in part on the failure of § 402(d)(3) (the presumption of dependency) to include a reference to children qualifying through § 416(h)(2)(A) (inclusion within an intestacy scheme). But see note 11 supra. The omission was crucial, in the court's opinion, because if a child was deemed dependent "due to the unrelated circumstance" of his treatment under local intestacy laws, "a significant question would be raised about the rational basis for the statutory scheme." 390 F. Supp. at 1090 n.7.
application of that provision to the after-born, presently dependent children of the insured. The *Lucas* children, on the other hand, could not prove their dependency since their father was not living with them at the time of his death. The Court distinguished the cases on the ground that, while the statute was an absolute bar to the illegitimates in *Jimenez* without regard to their actual dependency, nothing in the statute similarly prevented the *Lucas* children from proving cohabitation or contribution.\(^{133}\) The distinction, however, is actually not as clear as the opinion would indicate.\(^{134}\)

The Court could view the Social Security Act either as providing support to all eligible recipients\(^ {135}\) or as specifically replacing the support lost by the recipient upon the withdrawal of the insured parent from the work force.\(^ {136}\) If the Court is inclined to view actual dependency (*i.e.*, the receipt of support from the insured) as a prerequisite to the receipt of benefits, it is also likely to be persuaded by a justification of the legislative classification as based upon the likelihood of dependency. Conversely, if the Court views the statute in terms of a right to support, then actual dependency, although relevant, will not be a conclusive factor in determining eligibility. Consequently, arguments based upon the likelihood of dependency are less persuasive than those which attempt to establish the claimant’s right to support.

The Court in *Jimenez* adopted the broader of the two views despite the government’s assertion that illegitimates, as a class, are not as likely to have been dependent on the wage earner as other children. Concluding that this view would bar children born after the event insured against, as well as those who had never received actual support prior to that event, the Court refused to read the statute as supporting such an interpretation.\(^ {137}\) Although the opinion reflected the particular circumstances of the parties before it, the Court was generally sympathetic to the plight of those illegiti-

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\(^{134}\) *Id.* at 516 (Stevens, J., dissenting) (“The difference between this justification [of administrative convenience] and the argument rejected in *Jimenez*” is “opaque and insufficient.”).

\(^{135}\) See note 98 supra.

\(^{136}\) See note 99 supra.

\(^{137}\) *Jimenez* v. Weinberger, 417 U.S. 628, 634 (1974). In addition, the operation of the presumption itself was found to be unfair on the grounds of both over- and under-inclusiveness (*i.e.*, it inevitably presumes the dependency of some children who are in fact not dependent, while simultaneously barring the claims of those who are not “entitled” to the presumption but who are actually dependent.). *Id.* at 637.
mates falling outside the presumptively dependent categories.\footnote{Id. at 636. "[I]t would not serve the purpose of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits."} Consequently, the Court found the "likelihood" arguments, even when coupled with the governmental interest in the prevention of fraud,\footnote{Id. at 507. The Court’s reliance on the dependency arguments throughout the opinion and the degree to which they were found persuasive are additional evidence that the Court was employing that interpretation. Id. at 507-16. See, e.g., id. at 508-09, where the Court referred to the "obvious fact" that the presumption is "incrementally over-inclusive" but permissible, in any case, because of its reasonable relation to the likelihood of the illegitimate’s dependency.} insufficient to justify the discrimination against the illegitimate claimants.

The Court in \textit{Lucas} implicitly adopted the narrower interpretation of the statute’s purpose. Restating the government’s contention that the "actual support" theory reflected congressional intent, the Court accepted "this explanation at face value."\footnote{Id. at 427 U.S. at 507-16. See, e.g., id. at 508-09, where the Court referred to the "obvious fact" that the presumption is "incrementally over-inclusive" but permissible, in any case, because of its reasonable relation to the likelihood of the illegitimate’s dependency.} Such a fundamental shift has consequences which significantly limit the scope of the statute and which place \textit{Lucas} squarely at odds with the result and rationale of \textit{Jimenez}.\footnote{42 U.S.C. § 402(d)(3) (1970). The presumption of dependency is, in effect, the statutory formulation of the conclusions drawn by the government as to the likelihood of the illegitimate’s dependency.}

The Court may have accepted the "actual support" theory too uncritically. As the following discussion suggests, that theory unfairly discriminates against illegitimates, a result that can be avoided by interpreting the statute in terms of a child’s right to support. Due to the operation of the presumption of dependency,\footnote{42 U.S.C. § 402(d)(3) (1970). The presumption of dependency is, in effect, the statutory formulation of the conclusions drawn by the government as to the likelihood of the illegitimate’s dependency.} the majority of child recipients are granted benefits without reference to their dependency. The presumption is extended to all legitimate children\footnote{Id. at 507-16. See, e.g., id. at 508-09, where the Court referred to the "obvious fact" that the presumption is "incrementally over-inclusive" but permissible, in any case, because of its reasonable relation to the likelihood of the illegitimate’s dependency.} and to those illegitimates who meet a series of qualifying conditions.\footnote{42 U.S.C. § 416(h)(2)(A)-(h)(3)(A)(i), (h)(3)(B)(i), (h)(3)(C)(i) (1970). See notes 7-11 and accompanying text supra.} From these groups no proof of dependency is required, and undisputed evidence to the contrary will not disqualify them.\footnote{Mathews v. Lucas. 427 U.S. 495, 516 (1976) (Stevens, J., dissenting).} In fact, the "actual support" theory is applied only with respect to those illegitimates who are statutorily required to prove both paternity and dependency.\footnote{These illegitimates qualify through 42 U.S.C. §§ 416(h)(3)(A)(ii), (B)(ii), (C)(ii) (1970).} The fact of legitimacy and the qualifying provisions of the statute may be viewed as evidence, not of actual support, but of the claimant’s right to support,\footnote{The adoption of the "right to support" theory presents the threshold task of defining the nature of the right. As used in this discussion, the term refers to a right to support which is legally enforceable against a delinquent parent. The advantage of the definition is its compatibility with the present statutory scheme, one of whose qualifying provisions for illegitimates currently grants "child" status upon production of a judicial support order or} which entitles the claimant to re-
ceive benefits. Viewed from this perspective, the children who currently benefit from the operation of the dependency presumption are those legally entitled to support and those ‘entitled’ because of their status under selected state laws. Since the presumption operates without reference to the support actually received by the claimant, entitlement to support may be viewed as a question of paternity rather than dependency. If so, the imposition of the additional burden of proving dependency on illegitimates able to prove paternity is unnecessary, unfairly exclusive, and inconsistent with the policy of the statute. A broader interpretation of statutory purpose, focused on the question of the child’s right to support, would not only provide a theoretical foundation consistent with the practical effect of the statute, but would also avoid the inevitable imprecision of classifications based upon the presumed likelihood of actual dependency.

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148 Special status is conferred by those statutes governing intestate succession, id. § 416(h)(2)(A), and the validity of the parents’ marriage ceremony, id. § 416(h)(2)(B). Although the value of these provisions as evidence of dependency has been questioned, see note 131 supra, they may nevertheless be indicative of a child’s right to support. It can be argued that the child’s inclusion within an intestacy scheme or the parents’ participation in a marriage ceremony are indirect evidence of membership in a ‘sanctioned’ family structure which, once established, ‘entitles’ the child to support.

This social concept of ‘entitlement’ can be perceived in the intestate succession, compensation, and support statutes which exclude illegitimates from their operation. One view of these statutes interprets the inclusion or exclusion of illegitimates as the result of an assumption that an unconventional or ‘nonfamily’ relationship does not ‘entitle’ the child to support, compensation, or a share in the estate. This assumption can be obscured by statutory emphasis on ‘tests,’ such as dependency, which determine the suitability of the family relationship involved. To the extent that a statutory classification is based on this kind of assumption, and excludes illegitimates, it can be argued that it does so on grounds that are impermissibly subjective and which bear no justifiable relation to the disadvantaged individual—the child who is clearly not responsible for the family context into which he or she is born. Indeed, the argument seems to suggest that the appropriateness of any examination of the family context is highly questionable.

149 In the event that the Court continues to find the ‘likelihood’ arguments persuasive, the statute can still be challenged on the grounds that the presumption of dependency is in fact an invalid irrebuttable presumption. In other contexts, the Court has found a denial of due process when the presumption implied by the original facts is not ‘necessarily or universally true in fact.’ Vlandis v. Kline, 412 U.S. 441, 452 (1973). See also Weinberger v. Salfi, 422 U.S. 749 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep’t of Agriculture v. Murray, 413 U.S. 508 (1973). Although the conclusion is expressed in terms of due process, the examination of the accuracy of the classification in light of statutory purpose closely resembles the equal protection means-ends analysis and, thus, is not wholly inappropriate in this context. But see Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974) (criticizing the doctrine...
C. Minimal Scrutiny

Classifications involving illegitimates are subject, as are any legislative classifications, to at least minimal judicial scrutiny under the equal protection doctrine. Even on this basis, illegitimates have occasionally succeeded in challenging legislative classifications.\(^{150}\) Minimal scrutiny has traditionally been applied to social and economic legislation\(^ {151}\) where judicial examination of legislative judgment is generally so deferential as to ensure a finding of constitutionality.\(^ {152}\) In order to be upheld, the legislative classification must only bear a "rational relation" to the statutory purpose.\(^ {153}\) The Court has been willing to uphold a classification if it could determine that a conceivable set of facts might exist which would bear a suitably rational relation to statutory purpose.\(^ {154}\)

Although *Glona v. American Guarantee & Liability Co.*\(^ {155}\) and *Labine v. Vincent*\(^ {156}\) contain language reflecting the "rational relation" requirement,\(^ {157}\) both have peculiarities which make this an

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inappropriate categorization. The Court in *Glona* most clearly indicated that it was exercising minimal scrutiny. The Court noted that it saw "no rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy would be served." 158 Significantly, the Court struck down the classification in issue, a result more often associated with a stricter standard of review. 159

*Labine*, on the other hand, involved a classification which was upheld following the perfunctory application of a "rational basis" test. "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis . . . ." 160 Nonetheless, this result could as easily be attributed to traditional judicial acquiescence in state judgments with respect to local intestacy matters. 161

### III. Conclusion

Illegitimates suffer significant legal disabilities under social insurance, loss compensation, and intestate succession statutes as a result of a social prejudice which brings the full force of its moral judgment to bear on blameless children. Legislative discrimination on the basis of illegitimacy is vulnerable, however, to judicial invalidation at all levels of scrutiny under the equal protection doctrine. The unequal imposition of additional burdens of proof or persuasion violates the most basic concepts of fairness implicit in that doctrine.

A strong argument can be presented that classifications based on illegitimacy—an unalterable trait of birth over which the stigmatized extramarital child has no control—are analogous to the suspect classifications of race, national origin, and alienage, and thus should be subject to the same strict level of judicial scrutiny under the equal protection clause. Alternatively, the interests of illegitimates may be found to outweigh those of the state under a

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158 391 U.S. at 75 (emphasis added), Justice Harlan's dissent supports this conclusion, *id.* at 79, although his description of *Levy* and *Glona* as "constitutional curiosities" underscores a deeper dissatisfaction with the results reached. "The Court has reached . . . [an] answer . . . by a process that can only be described as brute force." *Id.* at 76.

159 An argument can be raised that *Levy* also belongs in this category despite the tendency of its references to lean towards a stricter scrutiny approach; the opinion is perhaps ambiguous enough to permit placement in either level.

160 401 U.S. at 536 n.6 (1971) (emphasis added).

newly emerging middle-level scrutiny, involving an examination of the statute's purpose and the means chosen to effectuate it. Finally, illegitimates can successfully challenge discriminatory classifications on the ground that the scheme lacks a rational relation to its own goals, thus failing to weather even the minimal level of equal protection scrutiny. The past vulnerability of legislative discrimination to these challenges justifies the hope that continued pressure will ultimately result in the elimination of legally sanctioned prejudice against illegitimate children.

—David Hallissey