

Case Comments

Illegitimacy and Intestate Succession:

White v. Randolph

At early common law an illegitimate child was considered to be *filius nullius*—a child of no one and thus unable to inherit.¹ This early rule was first relaxed in 1824 in *Heath v. White*,² in which illegitimate children were granted full inheritance rights from their mother. Most states by statute now have placed illegitimate children on a par with legitimate children in inheritance from the mother.³ In many of these states, however, barriers still deny illegitimate children full inheritance rights from the father.⁴

The rationale advanced in American jurisdictions for discrimination against illegitimate children has changed little over the years.⁵ Many states

1. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND* 485 (1857).

2. 5 Conn. 228 (1824).

3. Forty-nine of the fifty states have such statutes. See ALA. CODE § 43-3-7 (1975); ALASKA STAT. § 13.11.045 (1972); ARIZ. REV. STAT. ANN. § 14-2109 (1956); ARK. STAT. ANN. § 61-141(d) (1947); CAL. PROB. CODE § 255 (West 1977); COLO. REV. STAT. § 15-11-109(b) (1973); CONN. GEN. STAT. ANN. § 45-274(b)(1) (West 1980); DEL. CODE ANN. tit. 12, § 508 (1974); FLA. STAT. ANN. § 732.108 (West 1980); GA. CODE ANN. § 113-904 (1975); HAWAII REV. STAT. § 532-6 (1976); IDAHO CODE § 15-2-109 (1949); ILL. ANN. STAT. ch. 3, § 12 (Smith-Hurd 1961); IND. CODE ANN. § 29-1-2-7 (Burns 1972); IOWA CODE ANN. § 633.221 (West 1964); KAN. STAT. ANN. § 59-501 (1976); KY. REV. STAT. § 391.090 (1970); ME. REV. STAT. ANN. tit. 18-A, § 2-109 (1979); MD. EST. & TRUSTS CODE ANN. § 1-208 (1974); MASS. ANN. LAWS ch. 190, § 5 (Michie/Law. Co-op 1969); MICH. COMP. LAWS ANN. § 702.81 (1980); MINN. STAT. ANN. § 525.172 (West 1975); MISS. CODE ANN. § 91-1-15 (1972); MO. ANN. STAT. § 474.060 (Vernon 1956); MONT. REV. CODES ANN. § 40-6-104 (1979); NEB. REV. STAT. § 30-2309 (1943); NEV. REV. STAT. § 134.170 (1966); N.H. REV. STAT. ANN. §§ 561.4, 561.5 (1974); N.M. STAT. ANN. § 45-2-109 (1978); N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967); N.C. GEN. STAT. § 29-19 (1976); N.D. CENT. CODE § 30.1-04-09 (1979); OHIO REV. CODE ANN. § 2105.17 (Page 1976); OKLA. STAT. ANN. tit. 84, § 215 (West 1979); OR. REV. STAT. § 112.105 (1979); 20 PA. CONS. STAT. ANN. § 2107 (Purdon 1980); R.I. GEN. LAWS § 33-1-8 (1956); S.C. CODE § 21-3-30 (1976); S.D. CODIFIED LAWS ANN. § 29-1-15 (1976); TENN. CODE ANN. § 31-114 (1977); TEX. PROB. CODE ANN. art. 42 (Vernon 1980); UTAH CODE ANN. § 75-2-109 (1978); VT. STAT. ANN. tit. 14, § 553 (1974); VA. CODE § 64.1-5.1 (1950); WASH. REV. CODE ANN. § 11.04.081 (1979); W. VA. CODE § 42-1-5 (1966); WIS. STAT. ANN. § 852.05 (West 1980); WYO. STAT. § 2-4-107 (1977). Louisiana has not placed illegitimate children completely on a par with legitimate children in inheritance from the mother. See LA. CIV. CODE ANN. art. 918 (West 1967).

4. Many state statutes simply do not include illegitimate children within the definition of children as used in inheritance statutes when the decedent is a man, except under certain circumstances. See ALASKA STAT. § 13.11.045 (1972); ARIZ. REV. STAT. ANN. § 14-2109 (1956); ARK. STAT. ANN. § 61-141(d) (1947); CAL. PROB. CODE § 255 (West 1977); COLO. REV. STAT. § 15-11-109(b) (1973); CONN. GEN. STAT. ANN. § 45-274(b)(1) (West 1980); DEL. CODE ANN. tit. 12, § 508 (1974); FLA. STAT. ANN. § 732.108 (West 1980); GA. CODE ANN. § 113-904 (1975); HAWAII REV. STAT. § 577-14 (1976); ILL. ANN. STAT. ch. 3, § 12 (Smith-Hurd 1961); IND. CODE ANN. § 29-1-2-7 (Burns 1972); IOWA CODE ANN. § 633.222 (West 1964); KAN. STAT. ANN. § 59-501 (1976); KY. REV. STAT. § 391.090 (1970); LA. CIV. CODE ANN. art. 919 (West 1967); ME. REV. STAT. ANN. tit. 18-A, § 2-109 (1979); MD. EST. & TRUSTS CODE ANN. § 1-208 (1974); MASS. ANN. LAWS ch. 190, § 7 (Michie/Law. Co-op 1969); MICH. COMP. LAWS ANN. § 702.83 (1980); MINN. STAT. ANN. § 525.172 (West 1975); MISS. CODE ANN. § 91-1-15 (1972); MO. ANN. STAT. § 474.070 (Vernon 1956); NEV. REV. STAT. § 134.170 (1966); OR. REV. STAT. § 112.105 (1979); S.C. CODE § 21-3-20, 21-3-30 (1976); S.D. CODIFIED LAWS ANN. § 29-1-15 (1976); TENN. CODE ANN. § 31-114 (1977); TEX. PROB. CODE ANN. art. 42 (Vernon 1980); VT. STAT. ANN. tit. 14, § 553 (1974); WYO. STAT. § 2-4-107 (1977).

5. Maintenance of the family institution is the rationale most often advanced for discrimination against illegitimates. See Note, *From Levy to Robins: Equal Protection for Adulterous Illegitimates*, 3 So. U.L. REV. 287, 292 (1977).

and the federal government freely enacted legislation that denied illegitimate children the right to support, inheritance, and other benefits afforded to legitimate children.⁶ Because illegitimate children had few vocal proponents of their rights, there was a lack of remedial legislation.⁷ Prior to 1968, the United States Supreme Court had not tested the equal protection validity of statutory classifications based on legitimacy. Since 1968, however, state courts, lower federal courts, and the United States Supreme Court have heard many cases challenging the constitutionality of legitimacy classifications.⁸

Ohio's statutes have not been immune from equal protection attack. This Comment concerns the most recent attack on Ohio's intestate succession statutes, which classify potential heirs on the basis of legitimacy. *White v. Randolph*⁹ is the first instance in which the Ohio Supreme Court considered the validity of the intestate succession statute since the United States Supreme Court first applied equal protection analysis to legitimacy classifications. This Comment concerns the illegitimate child's right to inherit from his intestate father. Its purpose is to explore the constitutionality of Ohio's intestate succession statute in its treatment of illegitimate children, and to comment on the Ohio Supreme Court's opinion in *White v. Randolph*.

I. STANDARDS OF EQUAL PROTECTION

The Warren Court developed two analytical frameworks that could be applied when determining the validity of a statutory classification under the equal protection clause of the Constitution.¹⁰ The lower tier of this two-tier system consists of the rational basis test, under which a challenged classification denies equal protection only if the classification is irrelevant to the legislative goals.¹¹ The determination of validity requires three steps.

6. See Social Security Act, § 202(d)(3), 42 U.S.C. § 402(d)(3) (1970); LA. REV. STAT. ANN. § 23:1232 (West 1964) (workmen's compensation benefits).

7. Stenger, *The Supreme Court and Illegitimacy: 1968-1977*, 11 FAM. L. Q. 365, 400 (1977).

8. See, e.g., Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975); Watts v. Veneman, 476 F.2d 529 (D.C. Cir. 1973); Severance v. Weinberger, 362 F. Supp. 1348 (D.D.C. 1973); Strahan v. Strahan, 304 F. Supp. 40 (W.D.La. 1969), *aff'd*, 444 F.2d 528 (5th Cir.), *cert. denied*, 404 U.S. 949 (1971); *In re Estate of Ginocchio*, 43 Cal. App. 3d 412, 117 Cal. Rptr. 565 (1974); *In re Estate of Caldwell*, 247 So. 2d 1 (Fla. 1971); Pettiford v. Frazier, 226 Ga. 438, 175 S.E.2d 549 (1970); *In re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975); Burnett v. Camden, 253 Ind. 354, 254 N.E.2d 199, *rehearing denied*, 255 N.E.2d 650, *cert. denied*, 399 U.S. 901 (1970); Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1975), *vacated*, 431 U.S. 911 (1977); *In re Estate of Breole*, 287 Minn. 556, 178 N.W.2d 896, *appeal dismissed sub-nom.* Kostamo v. Northern City Nat'l Bank, 402 U.S. 902 (1970), *rehearing denied*, 402 U.S. 1013 (1971); *In re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970), *appeal dismissed sub-nom.* Hietala v. Pakarinen, 402 U.S. 903 (1971); *In re Estate of Thompson*, 136 N.J. Super. 412, 346 A.2d 442 (Passiac County Ct. 1975); *In re Will of Flemm*, 85 Misc. 2d 855, 381 N.Y.S.2d 573 (Sur. Ct. 1975); *In Re Estate of Jensen*, 162 N.W.2d 861 (N.D. 1968); Young v. Willis, 436 S.W.2d 445 (Tenn. App. 1968); Wells v. Hames, 464 S.W.2d 393 (Tex. Civ. App. 1971).

9. 59 Ohio St. 2d 6, 391 N.E.2d 333 (1979).

10. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

11. McGowan v. Maryland, 366 U.S. 420, 425 (1961).

First, the Court must identify the trait that forms the basis of the classification. Second, it must determine the purpose behind the classification. Finally, the court must scrutinize the relationship between the trait and the purpose.¹² Application of the rational basis test ensures, in the majority of cases, that the statute will be upheld since some legitimate purpose can be rationalized for almost any classification.¹³ In fact, from 1937 to 1970 the challenged classifications were upheld in all but one case¹⁴ in which the Supreme Court applied the traditional rational basis test.

The second tier of the original two-tier system of equal protection analysis consists of the strict scrutiny test, which is reserved for cases dealing with suspect classifications—such as race, alienage, and national origin¹⁵—or fundamental rights—such as the right to privacy.¹⁶ When this test is applied, the court does not defer to the legislature's judgment concerning the statute's goals and the challenged classification's relationship to those goals. Instead it independently determines the degree of relationship that the classification bears to a constitutionally compelling goal.¹⁷ For the classification to survive, the court must find it necessary to promote a compelling governmental interest.¹⁸ Review under this test is so strict that it is difficult for the classification to survive. Prior to the Burger Court, the challenged classification was upheld in only one case¹⁹ out of several in which the strict scrutiny test was applied.

One of the fundamental differences in the application of the traditional rational basis test and the strict scrutiny test is the assignment of the burden of proof.²⁰ When a court applies the traditional rational basis test, the challenged classification is presumed to be valid. The challenger must show that the classification bears no reasonable relation to a legitimate purpose. No presumption of validity, however, is afforded the classification when a court applies the strict scrutiny test. The supporter of the challenged classification must show a compelling state interest that justifies the discrimination.²¹

12. Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 *FORDHAM L. REV.* 605, 606-07 (1973).

13. Lorio, *Succession Rights of Illegitimates in Louisiana*, 24 *LOYOLA L. REV.* 1, 10 (1978).

14. *Morey v. Doud*, 354 U.S. 457 (1957), *overruled*, *New Orleans v. Dukes*, 427 U.S. 297 (1976).

15. Suspect classifications include race, *see Loving v. Virginia*, 388 U.S. 1 (1967), alienage, *see Graham v. Richardson*, 403 U.S. 365 (1971), and national origin, *see Oyama v. California*, 332 U.S. 633 (1948).

16. Fundamental personal rights include the right to procreate, *see Skinner v. Oklahoma*, 316 U.S. 535 (1942), free exercise of religion, *see Sherbert v. Verner*, 374 U.S. 398 (1963), privacy in marital decision, *see Griswold v. Connecticut*, 381 U.S. 479 (1965), freedom of political association, *see William v. Rhodes*, 393 U.S. 23 (1968), freedom of interstate travel, *see Shapiro v. Thompson*, 394 U.S. 618 (1969), and the right to terminate pregnancy, *see Roe v. Wade*, 410 U.S. 113 (1973).

17. J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 524 (1978).

18. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

19. *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

20. *See Goesaert v. Cleary*, 335 U.S. 464 (1948); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 420 (1920) (Brandeis, J., dissenting).

21. *Loving v. Virginia*, 388 U.S. 1, 9 (1967). *See also Note, Paternal Inheritance Rights of Illegitimate Children and the Problem of Proving Paternity*, 24 *WAYNE L. REV.* 1389, 1394 (1978).

Both tests in the two-tier equal protection analysis deal with the determination of the government's purpose in making the challenged classification. This determination is made differently for the two tests. Under the traditional rational basis test, a court hypothesizes all possible purposes behind the classification. Each possible purpose and related interest is then tested according to the appropriate level of relationship, and the finding of one purpose satisfying the appropriate relationship is sufficient to uphold the constitutionality of the classification.²² Under strict scrutiny analysis, a court searches for the one motivating purpose of the classification accepting not necessarily the legislature's stated purpose as the motivating purpose of the statute.²³

Since the development of the two-tier equal protection analysis, some have questioned whether the Court actually continues to follow the dichotomy. The Burger Court appears to have changed the focus in equal protection cases. It has struck down some statutes to which application of the rational basis test would have resulted in a finding of validity, although the Court evidently was not applying strict scrutiny.²⁴ Thus, it appears that the Court applied neither of the two traditional tests and that a middle level test had developed within the Court's equal protection analysis.²⁵

The Court's analysis in sex discrimination cases is one example of the application of a middle level of scrutiny. In *Reed v. Reed*,²⁶ the Court found that a sex "classification 'must be reasonable, not arbitrary, and must rest upon some difference having a fair and substantial relation to the object of the legislation.'"²⁷ Sex was not found to be a suspect classification like race and therefore the classification did not have to satisfy the strict scrutiny test. The test applied in *Reed*, however, was not the traditional rational basis test. The Court required more than a mere rational relationship between the challenged classification and the classification's purpose; the relationship had to be "substantial" to satisfy the Court. Unlike application of the traditional rational basis test, the Court imposed an affirmative duty on the party defending the classification to demonstrate the required relationship between the classification and the purported purpose.

22. See *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), in which the Court stated: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." See also *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-81 (1969).

23. See *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Court rejected the state's contention that the statute prohibiting interracial marriage was based on scientific evidence on the advisability of such marriages.

24. *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Powell, J. concurring); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Craig v. Boren*, 429 U.S. 190 (1976).

25. Lorio, *supra* note 13, at 11.

26. 404 U.S. 71 (1971).

27. *Id.* at 76.

Justice Marshall, in dissenting opinions in a number of cases,²⁸ has developed his own theory of how the Court actually analyzes equal protection cases. He contends that the court "has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause."²⁹ According to Justice Marshall, the intensity of the Court's scrutiny depends upon the importance of the interest threatened by the classification, balanced against the effectiveness of the classification in achieving its purpose and the importance of those purposes. Marshall suggests that the use of this sliding scale approach has been particularly evident in the Court's decisions concerning illegitimate children.³⁰

II. STANDARDS OF REVIEW APPLIED TO LEGITIMACY CLASSIFICATIONS

A. *Strict Scrutiny*

The Supreme Court has never explicitly denoted illegitimacy as a suspect classification subject to strict scrutiny. Some commentators interpreted the Court's opinion in *Levy v. Louisiana*,³¹ the first of the recent line of cases concerning illegitimacy, as indicating that illegitimacy was a suspect classification.³² The Court at one point in *Levy* appears to equate illegitimacy with race, a suspect classification, in stating that, in the past, it has "not hesitated to strike down an invidious classification even though it had history and tradition on its side."³³ In the past, racial classifications have been struck down although the challenged classification had history and tradition on its side.³⁴

The issue in *Levy* was whether an illegitimate child could bring a wrongful death action for the death of his mother. The Court analyzed the case as one concerning interference with the family relationship, and those interpreting *Levy* as indicating that illegitimacy was a suspect classification found support in the statement by the Court that, in the past, the Court has "been extremely sensitive when it comes to basic civil

28. See *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 98-109 (1973) (Marshall, J. dissenting); *Richardson v. Belcher*, 404 U.S. 78, 90-91 (1971) (Marshall, J. dissenting); *Dandridge v. Williams*, 397 U.S. 471, 519-21 (1970) (Marshall, J. dissenting).

29. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J. dissenting).

30. *Id.* at 108-09 (Marshall, J., dissenting).

31. 391 U.S. 68 (1968).

32. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1127 n.281 (1969); Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 4-7 (1969); Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969); 35 BROOKLYN L. REV. 135, 138 (1968); 34 MO. L. REV. 271, 272 (1969); 47 TEX. L. REV. 326, 329 (1969).

33. 391 U.S. 68, 71 (1968).

34. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

rights. . . . The rights asserted here involve the intimate familial relationship between a child and his own mother."³⁵ Thus, the Court came close to designating a family relationship a fundamental right, which would be protected by the application of the strict scrutiny test.

The Court's failure to provide any real constitutional analysis in *Levy* provided room for speculation on the application of strict scrutiny. It must be noted, however, that other language in the *Levy* opinion points to the application of the rational basis test, and in retrospect, it appears the Court did apply a less stringent test.³⁶

Following *Levy*, a plea for application of the strict scrutiny test was made in most illegitimacy cases presented to the Court. The Court, however, soon put an end to any speculation on the application of the test. In *Mathews v. Lucas*³⁷ and *Trimble v. Gordon*,³⁸ the Court explicitly refused to hold illegitimacy a suspect classification. The Court in *Lucas* stated that although illegitimacy, like race, is a trait not within the control of the child, discrimination against illegitimate children has not been as severe as that against blacks.³⁹ The *Trimble* court reaffirmed the position taken in *Lucas*.⁴⁰

B. *The Other Extreme: Deferral to the Legislature*

The lowest standard of review applied by the Supreme Court to a legitimacy classification appeared in *Labine v. Vincent*.⁴¹ In *Labine*, an illegitimate child attacked the constitutionality of a state intestate succession law that barred an illegitimate child from sharing equally with legitimate children in the estate of the father. In upholding the constitutionality of the statute, the Court applied a level of review less restrictive than even the traditional rational basis test.⁴² The Court simply deferred to the state prerogative to regulate the disposition of property at death, and the state power to establish, protect, and strengthen family life.⁴³ There was no

35. 391 U.S. 68, 71 (1968).

36. The *Levy* court stated: "Though the test has been variously stated, the end result is whether the line drawn is a rational one." *Id.*

37. 427 U.S. 495 (1976).

38. 430 U.S. 762 (1977).

39. The court stated that:

[W]hile the law has long placed the illegitimate child in an inferior position relative to the legitimate in certain circumstances, particularly in regard to obligations of support or other aspects of family law, perhaps in part because the roots of the discrimination rest in the conduct of the parents rather than the child, and perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.

427 U.S. 495, 505-06 (1976) (citation omitted).

40. 430 U.S. 762, 767 (1977).

41. 401 U.S. 532 (1971).

42. See Note, *Mathews v. Lucas: A Setback in the Illegitimate's Quest for Equality Under the Law*, 16 J. FAM. L. 37, 43 (1978); 52 TUL. L. REV. 406, 408 (1978); 23 VILL. L. REV. 405, 409 (1978).

43. [T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State.

inquiry into the relationship between the state's purpose and the legitimacy classification. The Court did state that if the rational basis test was applied to the case, the statute would be found valid.⁴⁴ Cases other than *Labine* also contain deference language.⁴⁵ These cases, however, take the additional step of inquiring into the relationship between the state's purpose and the classification.⁴⁶

C. *Development of the Rational Basis Test: Levy to Trimble*

The history of equal protection review of legitimacy classifications from *Levy* to *Trimble* demonstrates that there has been a blurring of the traditional two-tier equal protection analysis. In *Levy*, the Court concluded that illegitimacy had no relation to the purpose of the statute, but did not articulate a standard by which the classification could be measured in the future.⁴⁷ Instead, the Court held that the statute was invalid merely because it was "invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant" to the purpose of the statute.⁴⁸

In *Levy's* companion case, *Glonn v. American Guarantee & Liability Insurance Company*,⁴⁹ the Louisiana wrongful death statute was challenged, but for a reason slightly different than that advanced in *Levy*. The statute did not permit the mother of an illegitimate child to recover for the wrongful death of the child. As in *Levy*, the challenged classification was found to be invalid because there existed no possible rational relationship between the classification and the purpose of the statute. Like *Levy*, *Glonn* contained limited constitutional analysis on which to base future application. Both *Levy* and *Glonn* resulted in inconsistent lower court cases.⁵⁰

Four years after *Levy*, in 1972, as a result of in-depth constitutional

Absent a specific constitutional guarantee, it is for the legislature, not the life-tenured judges of this Court, to select from among possible laws.

Labine v. Vincent, 401 U.S. 532, 538-39 (1971).

44. *Id.* at 536 n.6.

45. In *Matthews v. Lucas* the court stated:

Our role is simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions that individualized factual inquiry in order to isolate each nondependent child in a given class of cases is unwarranted as an administrative exercise. In the end, the precise accuracy of Congress' calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality.

427 U.S. 495, 516 (1976). In *Trimble v. Gordon* the court stated: "Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance." 430 U.S. 762, 771 (1977).

46. See text accompanying notes 59-60 and 66-67 *supra*.

47. See text accompanying notes 31-36 *supra*.

48. 391 U.S. 68, 72 (1968).

49. 391 U.S. 73 (1968).

50. See *Munn v. Munn*, 168 Colo. 176, 450 P.2d 68 (1969); *In re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970); *R. v. R.*, 431 S.W.2d 152 (Mo. 1968); *In re Estate of Jensen*, 162 N.W.2d 861 (N.D. 1968); *Storm v. None*, 57 Misc. 2d 342, 291 N.Y.S.2d 515 (Fam. Ct. 1968).

analysis, *Weber v. Aetna Casualty & Surety Company*,⁵¹ produced a test of validity that could easily be applied to future cases. In this case the Louisiana workmen's compensation statute was attacked. Under the Louisiana law,⁵² illegitimate children were not considered within the class of "children" for whom benefits could be forthcoming, but were relegated to a lesser status. According to *Weber*, a court should ask: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"⁵³ The degree of importance of the state interest should be balanced against the personal rights involved. If the state interest is important and the personal rights involved are not fundamental, the challenged classification should be upheld.

Because it considers factors other than the state's interest, such as endangered fundamental rights, this balancing test is more than a mere application of the traditional rational basis test. Although it includes a consideration of fundamental rights, the balancing test falls short of the strict scrutiny test because the balancing factor could theoretically weigh in favor of the state even without a compelling state interest. The *Weber* Court also found that there was "no significant relationship to those recognized purposes" of the statute.⁵⁴ The *Weber* test, stated this way, appears very similar to the middle level scrutiny applied in *Reed*. The term "significant" used in *Weber* could mean the same as the phrase "fair and substantial," as used in *Reed*.⁵⁵

In *Mathews v. Lucas*, decided in 1974, the Court indicated that it was applying the *Weber* balancing test.⁵⁶ The challenged classification in *Lucas* arose from provisions of the Social Security Act. These provisions⁵⁷ placed conditions on the eligibility of certain illegitimate children for a surviving child's insurance benefits that were not placed on legitimate children. The Court reviewed in detail the relationship between the statutory classification and its asserted purpose, thus indicating that the Court was using a heightened level of review. The challenged classification, however, was found to be permissible, indicating that the test applied provided the illegitimate child with virtually no more protection than that provided by the traditional rational basis test. The Court, in fact, may have applied the traditional rational basis test; it stated that "the statutory classifications are permissible . . . because they are reasonably related to the likelihood of dependency at death."⁵⁸ The Court, showing more deference than had

51. 406 U.S. 164 (1972).

52. LA. REV. STAT. ANN. § 23:1232 (West 1964).

53. 406 U.S. 164, 173 (1976).

54. *Id.* at 175 (emphasis added).

55. Comment, *Paternity Statutes Thwarting Equal Protection for Illegimates*, 32 U. MIAMI L. REV. 339, 345-49 (1977).

56. 427 U.S. 495, 504 (1976).

57. Social Security Act, § 202(d)(3), 42 U.S.C. § 402 (d)(3) (1970).

58. 427 U.S. 495, 509 (1976).

been afforded in previous cases, accepted without inquiry the government's characterization of the statutory purpose.⁵⁹ In addition, the government was required to show only that the result of the classification approximated, rather than precisely mirrored, the results that a case-by-case determination would reach.⁶⁰

Whatever confusion existed after *Weber* and *Lucas*, it appeared clear after the Court's 1977 decision in *Trimble v. Gordon* that the Court no longer exclusively applied the two-tier equal protection analysis, and that classifications based on legitimacy were to be examined more closely than under the traditional rational basis test. *Trimble* concerned the Illinois intestate inheritance statute, which precluded illegitimate children from inheriting from their father. The test employed in *Trimble* contained three steps: identification of the objectives of the statute; determination of the correlation between the objectives and the means; and scrutiny of the legitimacy of the stated objectives.⁶¹

When identifying the objectives of the statute, the *Trimble* Court clearly indicated that it was not going to hypothesize about the motivating purposes behind the challenged classification.⁶² A mere incantation of a proper state purpose by one of the parties to the case was found insufficient by the Court.⁶³ The only state objectives considered by the Court in *Trimble* were those objectives identified by the Illinois Supreme Court as the actual purposes of the statute. In fact, the Court explicitly refused to consider a purpose espoused by a party because the Illinois court did not find that purpose to be one behind the statute.⁶⁴ Thus, the first step in the *Trimble* test neither resembled the traditional rational basis test, in which the Court considers all possible purposes supporting the classification, nor fully resembled the traditional strict scrutiny test, in which the Court makes an independent determination of the purpose behind the classification.⁶⁵

In the second step of the *Trimble* test—the determination whether there is a correlation between the objectives and the means—the Court explored alternative means to achieve the purposes of the classification in order to evaluate whether the legislature had available other feasible alternatives. According to the Court, if feasible alternatives are available, and the means under review are imperfect—either over- or under-inclusive—the Court must then decide what degree of imperfection is permissible, the degree of permissible imperfection depends upon the

59. *Id.* at 507.

60. *Id.* at 509.

61. 18 SANTA CLARA L. REV. 823, 825 (1978).

62. 430 U.S. 762, 776 (1977).

63. *Id.* at 769.

64. *Id.* at 775-76.

65. See text accompanying note 22-23 *supra*.

degree of infringement upon an important right.⁶⁶ This second step in the *Trimble* test differs from the traditional rational basis test in that it calls for consideration of alternatives available to the legislature. The *Trimble* test also differs from traditional strict scrutiny, since it does not require the selection of the *best* possible means, only that the means be within the range appropriate to the importance of the rights involved. The Court in *Trimble* concluded by restating the holding of *Lucas*: that the statute must be "carefully tuned to alternative considerations."⁶⁷

Thus, it appears that *Trimble* and the line of illegitimacy cases leading to it are a part of the growing number of middle ground equal protection cases,⁶⁸ reflecting the Burger Court's dissatisfaction with the Warren Court's rigid two-tier approach.⁶⁹

D. Purpose of Legitimacy Classifications

One of the major purposes behind legitimacy classifications is encouragement of legitimate family relationships through marriage. Those concerned with this purpose claim that if the state provided the illegitimate child with all the rights of a legitimate child there would be no other encouragement for the parties to marry.⁷⁰ The rights of legitimate family relationships include the rights to support,⁷¹ to bring a wrongful death action,⁷² to workmen's compensation,⁷³ to social security benefits,⁷⁴ and to intestate succession from the father.⁷⁵ As far as intestate succession is concerned, the rationale of promoting legitimate family relationships ignores the fact that often the relevant inheritance statute permits the father to include the illegitimate child in his will, and fails to explain why, in most states, the illegitimate child is permitted to inherit from the intestate mother.⁷⁶

In *Labine*,⁷⁷ *Weber*,⁷⁸ and *Trimble*⁷⁹ the Court recognized the state's

66. See text accompanying notes 70-88 *supra* for a discussion on imperfection of means.

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

68. See Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 *VAND. L. REV.* 971, 1006 (1974).

69. See Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1 (1972).

70. Krause, *Equal Protection for the Illegitimate*, 65 *MICH. L. REV.* 477, 493 (1967).

71. *Gomez v. Perez*, 409 U.S. 535 (1973).

72. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

73. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

74. *Jimenez v. Weinberger*, 417 U.S. 628 (1974).

75. *Trimble v. Gordon*, 430 U.S. 762 (1977).

76. Krause, *supra* note 70, at 494.

77. In *Labine*, the court stated that "the power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution of the United States and the people of Louisiana to the legislature of the State." 401 U.S. 532, 538 (1971).

78. In *Weber*, the court stated:

The Louisiana Supreme Court emphasized strongly the State's interest in protecting "legitimate family relationships," and the regulation and protection of the family unit have indeed

interest in promoting legal family relationships as a legitimate statutory purpose. In *Labine*, in which the state intestate succession law prevented illegitimate children from sharing equally with legitimate children in the estate of the father, the Court concluded that the statutory classification was rationally related to the state's interest in encouraging family life and was therefore constitutional.⁸⁰ In *Weber*, however, when the state workmen's compensation statute relegated illegitimate children to a lesser position than legitimate children in recovery of benefits, the Court found that although promoting family life was a legitimate purpose, the legitimacy classification did not sufficiently serve that purpose.⁸¹ The challenged classification in *Trimble*, like *Labine*, concerned an intestate succession statute that did not permit an illegitimate child to inherit from his intestate father on the same basis as a legitimate child. Unlike *Labine*, however, the *Trimble* Court agreed with *Weber* and found that the classification did not sufficiently afford realization of the purpose.⁸²

Intimately connected with the interest of promoting legitimate family relationships is the state's interest in discouraging promiscuity. Although this interest might be a valid exercise of the state's power to regulate the moral behavior of its citizens, the Court in *Weber* denounced the relationship between the classification and this state interest. The potential parents would not be dissuaded from engaging in illicit sexual activity by fear that any resulting illegitimate children would not be given the same rights as a legitimate child.⁸³ This criticism applies equally to the state interest in promoting legitimate family relationships.

Another rationale underlying most intestate succession laws is the presumed intent doctrine of inheritance; in the absence of a will expressing the desires of the decedent, the state must create a plan of distribution that follows as closely as possible the presumed desires of decedents in general.⁸⁴ In *Labine* and *Trimble*, the challenged classifications placed illegitimate children in disadvantageous positions as compared to legitimate children

been a venerable state concern. We do not question the importance of that interest; what we do question is how the challenged statute will promote it.

406 U.S. 164, 173 (1972).

79. In *Trimble*, the court stated: "No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society. The flaw in the analysis lies elsewhere." 430 U.S. 762, 769 (1977).

80. 401 U.S. 532, 537-38 (1971).

81. 406 U.S. 164, 173 (1972).

82. 430 U.S. 762, 769 (1977).

83. The court in *Weber* stated:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. . . . Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

406 U.S. 164, 175 (1972).

84. See generally, Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Ins. Co.*, 118 U. PA. L. REV. 1 (1969); 23 AM. JUR. 2d *Descent and Distribution* § 10 (1965).

in intestate succession from the child's father. It was argued in *Trimble* that the purpose behind the classification was to reflect the presumed desires of the decedent.⁸⁵ This argument may have some merit. When it appears that the father has little or no relationship with the illegitimate child beyond the obligation of support, it seems reasonable to presume that the father would not want his illegitimate children to take a share of his estate, especially when this share would lessen the shares of his spouse and legitimate children. When, however, the father lives with the illegitimate child in a family relationship, as was the case in *Trimble*, the presumed intent rationale is not persuasive. This argument, however, was not passed on by the *Trimble* Court because, although presented to the Court, presumed intent was not considered as one of the purposes behind the classification.⁸⁶ If the Court had addressed the argument, the relationship between the presumed intent theory and the classification would probably not have been sufficient to uphold the statute since the statute did not take into consideration situations in which the classification made was obviously not the decedent's intent.⁸⁷

The Court has recognized administrative convenience as a legitimate state purpose justifying legitimacy classifications. In *Lucas*, a Social Security provision was challenged as a violation of equal protection, as embodied in the fifth amendment due process clause. Under the challenged Social Security provision, a child was entitled to surviving child's benefits if the child was dependent on the father at the time of the father's death. Legitimate children and certain illegitimate children were relieved of the burden of proving dependency. The statute was upheld because it promoted the government's interest in administrative convenience.

Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny.⁸⁸

Other possible means of avoiding a case-by-case determination of dependency were not considered by the Court.

85. 430 U.S. 762, 774 (1977).

86. *Id.* at 775.

87. The Court states that: "At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of 'presumed intent.'" *Id.* at 775 n.16.

88. 427 U.S. 495, 509 (1976). The Court continued:

Under the standard of review appropriate here, however, the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be "scientifically substantiated." Nor, in any case, do we believe that Congress is required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately "spent," ignoring the relative amounts devoted to administrative rather than welfare uses.

Id. at 510.

E. *Intestate Succession: Purpose of Legitimacy Classifications*

Although presumed intent has been suggested as the purpose behind illegitimacy classifications in intestate succession statutes,⁸⁹ the main purpose behind these classifications is probably the administrative convenience doctrine of *Lucas*. The state has an interest in establishing an efficient method of property disposition at death. When illegitimate children attempt to inherit from the intestate father, there is the significant problem of proving paternity, and as a result there is the possibility of a large number of spurious claims.⁹⁰ A case-by-case determination of paternity after the death of the father would delay the settlement of estates. Thus, for the sake of administrative convenience, the states have established classifications in which some children automatically inherit from the deceased, and some do not. This problem of proving paternity appears to be the only remaining barrier to absolute equality for the illegitimate child in father-child intestate succession legislation.⁹¹

Statutory methods of proving paternity were considered in *Labine*, *Gomez*, and *Trimble*. The constitutionality of Louisiana's intestate inheritance law was challenged in *Labine v. Vincent*. Louisiana law barred an illegitimate child from sharing equally with legitimate children in the intestate property of their father. Although a public acknowledgement of the child by the father was sufficient to give the child a claim for support from the father and the capacity to be a limited beneficiary under a will left by the father, it provided the child with only the limited right to inherit from an intestate father to the exclusion of the state.⁹² An acknowledgement of the child coupled with a statement by the father that he wishes to legitimate the child was sufficient under Louisiana law to provide an illegitimate child with the full benefit of intestate inheritance.⁹³ But in the case before the Court, the father had not made such a statement. This intestate succession scheme was upheld by the Court. The Court did not discuss what other methods of proving paternity the state can require besides those found valid in Louisiana's law.

Following *Labine*, the Court next dealt with the problems of proving paternity in the 1973 decision of *Gomez v. Perez*.⁹⁴ The case, however, did not concern an intestate succession statute. The challenged statute granted legitimate children a judicially enforceable right to support from the natural father, but denied this right to illegitimate children. The law precluded an illegitimate child from the opportunity to prove that he was

89. See text accompanying notes 84-87 *supra*.

90. See generally H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 105-60 (1971); Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 489 (1967).

91. 52 TUL. L. REV. 406, 413 (1978).

92. 401 U.S. 532, 533 (1971).

93. *Id.* at 539.

94. 409 U.S. 535 (1973).

the biological child of the father, as the child in *Gomez* attempted to do.⁹⁵ The statute was found to be unconstitutional because it denied the child equal protection. Recognizing the problems of proving paternity, the Court stated that such "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."⁹⁶

The Court, in 1977, once again handled paternity proof problems in connection with intestate succession statutes, in *Trimble v. Gordon*, in which the Illinois Probate Act⁹⁷ was the subject of attack. The Illinois law permitted illegitimate children to inherit by intestate succession from the mother, but not from the father. Legitimate children could inherit by intestate succession from both the mother and father. The appellant in *Trimble* was the illegitimate child of a man who had died intestate. Appellant had received support payments from the decedent in accordance with a court paternity order, which found the decedent to be appellant's father. The Supreme Court ruled that the challenged statute could not "be squared with the command of the Equal Protection Clause of the Fourteenth Amendment."⁹⁸

The *Trimble* Court again recognized the difficulties of proving paternity, but concluded that "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."⁹⁹ In this case the Court found the classification over-inclusive. It encompassed all illegitimate children, including those whose paternity could be ascertained without burdening or delaying the succession procedure. The Court found that the Illinois statute failed to consider the possibility of a middle ground between complete exclusion and case-by-case determination of paternity.¹⁰⁰ Although a blanket exclusion could not be justified by problems of proof, the Court held that certain classes of illegitimate children could permissibly be denied the opportunity of proving paternity:

The States, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgement of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity.¹⁰¹

Guidelines for developing a constitutional intestate statute are not

95. *Id.* at 536.

96. *Id.* at 538.

97. ILL. ANN. STAT. ch. 3, § 12 (Smith-Hurd 1961).

98. 430 U.S. 762, 776 (1977).

99. *Id.* at 772.

100. *Id.* at 770-71.

101. *Id.* at 772 n.14.

provided by the Court in *Trimble*. Although the Court appears to require acceptance of a formal acknowledgement or prior adjudication as proof of paternity, it does not say what other methods, if any, would be acceptable.

F. *Effect of Lalli v. Lalli*

In *Lalli v. Lalli*,¹⁰² decided late in 1978, the constitutionality of the New York intestate succession law¹⁰³ was attacked. The New York statute permitted an illegitimate child to inherit intestate from his father only if a court of competent jurisdiction had issued an order of filiation declaring paternity in a proceeding during the lifetime of the father and during the mother's pregnancy or within two years of the child's birth. The appellant in *Lalli* had not obtained a filiation order during the father's lifetime, but did tender evidence of acknowledgement by the father.¹⁰⁴ The Supreme Court upheld the constitutionality of the New York law.

Justice Powell, joined by two other Justices, wrote the plurality opinion in *Lalli*. The level of scrutiny applied by Justice Powell appears to differ from that applied in *Trimble*. Although Powell did make the statement that the question was whether the statute bore "an evident and *substantial* relation to the particular state interests this statute is designed to serve,"¹⁰⁵ he also stated that the proper inquiry was "whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment."¹⁰⁶ Another indication that different tests were applied in *Trimble* and *Lalli* is that in *Lalli* the Court did not inquire into the feasible alternatives available to the legislature. Justice Powell stated that "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative' to the statutory scheme. . . ."¹⁰⁷ Such an inquiry was proper according to the Court in *Trimble*.¹⁰⁸

Whether or not *Lalli* represents a retreat from the *Trimble* middle scrutiny test, *Lalli* does represent a change in the type of paternity proof for which the state must provide in its intestate succession statute. According to the Court in *Trimble*, recognizing both a prior adjudication of paternity and a formal acknowledgement of the child by the father as sufficient proof of paternity does not compromise the state's interests in the efficient distribution of property. An intestate succession statute was unconstitutional, according to *Trimble*, insofar as it did not provide for inheritance by an illegitimate child who could prove paternity by either of these two methods.¹⁰⁹ The appellant in *Lalli* was denied the opportunity to introduce

102. 439 U.S. 259 (1978).

103. 1965 N.Y. LAWS, ch. 955, § 1.

104. 439 U.S. 259, 262-63 (1978).

105. *Id.* at 268.

106. *Id.* at 273.

107. *Id.* at 274.

108. See text accompanying notes 66-67 *supra*.

109. 430 U.S. 762, 772 n.14 (1977).

evidence of the decedent's acknowledgement of the appellant as his child, and the Court upheld this denial. Justice Powell attempts to retreat from the position taken in *Trimble* without overruling that decision. According to Justice Powell, to read *Trimble* as requiring intestate succession statutes to provide for both prior adjudication and acknowledgement ignores the broad rationale of the Court's opinion and the context in which the statement was made.¹¹⁰ The New York statute in *Lalli* was constitutional even though it did not recognize a formal acknowledgement of paternity as sufficient for intestate inheritance purposes, because, according to Powell, "[a]ccuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father."¹¹¹ The states appear to be given much leeway in developing acceptable methods of proving paternity for intestate inheritance purposes.

In affirming the judgment below, we do not, of course, restrict a State's freedom to require proof of paternity by means other than a judicial decree. Thus, a State may prescribe any *formal* method of proof, whether it be similar to that provided by [the New York statute] or some other regularized procedure that would assure the authenticity of the acknowledgement. As we noted in *Trimble*, such a procedure would be sufficient to satisfy the state's interests.¹¹²

Justices Rehnquist and Blackmun joined the judgment in *Lalli*, but for reasons other than those set out in Justice Powell's opinion. Justice Rehnquist relied upon his dissent in *Trimble*, calling for a highly deferential review by the Court.¹¹³ Justice Blackmun would have overruled *Trimble*, and saw the Court reverting to the deferential principles of *Labine*.¹¹⁴

III. ILLEGITIMATES IN OHIO

A. Ohio Statutes

In Ohio, one can dispose of his property at death by making a will,¹¹⁵ and there is nothing to prohibit one from including an illegitimate child in the will. If a person does not make a will, section 2105.06 of the Ohio Revised Code provides for the distribution of the decedent's property by setting forth, in order of priority, those persons who are to take the property. The "children" of the decedent are given the highest priority following the decedent's spouse.¹¹⁶ Illegitimate children are not included in the term "children" as used in section 2105.06 except as provided in other

110. 439 U.S. 259, 274 n.11 (1978).

111. *Id.* at 271.

112. *Id.* at 272 n.8.

113. *Id.* at 276.

114. *Id.* at 276-77 (Blackmun, J., concurring).

115. See OHIO REV. CODE ANN. §§ 2107.01-.77 (Page 1976).

116. OHIO REV. CODE ANN. § 2105.06 (Page 1976).

statutory sections.¹¹⁷ Section 2105.17 of the Ohio Revised Code provides that an illegitimate child can inherit from his mother as if he were a legitimate child.¹¹⁸ Thus the word "children" in section 2105.06 includes illegitimate children when the decedent is the child's mother. The definition of "children," however, has not been similarly modified to include illegitimate children when the decedent is the child's father. An illegitimate child can inherit from the intestate father under section 2105.06 only if: (1) the father adopts the child;¹¹⁹ (2) the father legitimizes the child by marrying the child's mother;¹²⁰ or (3) the father formally acknowledges, in probate court with the consent of the mother, that the child is his.¹²¹

Ohio's bastardy statute¹²² provides a procedure by which the unmarried mother of an illegitimate child can obtain support for the child from the father. If the accused is found to be the father of the child, the court will order him to pay for the support and maintenance of the child.¹²³ No provision of the intestate succession statute, however, recognizes such a finding as granting the illegitimate child the right to inherit from an intestate father.

In sum, Ohio's statutory inheritance scheme provides for limited inheritance by an illegitimate child from his father. Only when the father has taken some affirmative steps during his lifetime to ensure such inheritance can an illegitimate child take from the father's estate. The Ohio statutory scheme does not provide any method by which the child can take action before the father's death to guarantee inheritance, nor does an illegitimate child have the opportunity to introduce evidence of paternity in order to inherit from an intestate father after his death.

B. *Green v. Woodward*

The constitutionality of Ohio's intestate succession statute was challenged in *Green v. Woodward*,¹²⁴ a court of appeals case decided in 1974. The plaintiff in the case claimed that she was the illegitimate child of the decedent and that she was entitled to a share of her father's property as if she were a legitimate child. She had, however, been neither legitimated nor formally acknowledged by the decedent. The Court of Appeals for Cuyahoga County found that the equal protection clause required all illegiti-

117. Ohio courts have held that unless there is some language in the statute itself that shows a contrary intent on the part of the legislature, the word "child" or "children" means legitimate children. See *Miller v. Industrial Comm.*, 165 Ohio St. 584, 138 N.E.2d 672 (1956); *Staker v. Industrial Comm.*, 127 Ohio St. 13, 186 N.E. 733 (1933); *Creisar v. State*, 97 Ohio St. 16, 119 N.E. 128 (1917); *Bonewit v. Weber*, 95 Ohio App. 428, 120 N.E.2d 738 (1952).

118. OHIO REV. CODE ANN. § 2105.17 (Page 1976).

119. OHIO REV. CODE ANN. § 3107.17 (Page 1976).

120. OHIO REV. CODE ANN. § 2105.18 (Page 1976).

121. *Id.*

122. OHIO REV. CODE ANN. §§ 3111.01-.24 (Page 1976).

123. OHIO REV. CODE ANN. § 3111.17 (Page 1976).

124. 40 Ohio App. 2d 101, 318 N.E.2d 397 (1974).

mate children be able to inherit intestate under section 2105.06, as if they were legitimate, whether they inherited from the mother or the father.¹²⁵

The issue in *Green*, as stated by the appeals court, was one of intra-class discrimination. When section 2105.17 was enacted granting illegitimate children the right to inherit from their intestate mother, the state included some illegitimate children within the definition of "children" while excluding others. The Court stated: "We must determine whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that once Ohio recognized some illegitimate children as 'children' under R.C. §2105.06 the definition of 'children' under that statute includes all illegitimate children."¹²⁶

Levy, *Glon*, and *Weber* were not applicable, according to the appeals court, because those cases were not challenges to intestate succession statutes.¹²⁷ *Levy* and *Glon* concerned the right of an illegitimate child to bring a wrongful death action,¹²⁸ while *Weber* dealt with the right of an illegitimate child to recover death benefits under a workmen's compensation statute.¹²⁹ *Labine* did concern an intestate succession statute, and at first glance would appear to be the applicable precedent.¹³⁰ Nevertheless, the appeals court found *Labine* to be inapplicable because it did not deal with intraclass discrimination.¹³¹ The Louisiana intestate succession statute challenged in *Labine* barred illegitimate children from sharing equally with legitimate children in *both* the father's *and* mother's estate and thus discriminated between all legitimate children and all illegitimate children. The Ohio statute, however, barred illegitimate children from sharing equally with legitimate children only in the father's estate and not the mother's.

The Ohio appeals court found the discrimination involved in *Green v. Woodward* unconstitutional because it found "no reasonable or rational relationship between the purpose of the statute and a classification that permits illegitimate children taking *only* from and through the mother."¹³² The court rejected the idea that the statute should be upheld because illegitimate children were not completely discriminated against since they could be recognized and provided for by will, or could be legitimated by adoption or acknowledgement. The court also rejected the rationale that

125. *Id.* at 117, 318 N.E.2d at 408.

126. *Id.* at 106, 318 N.E.2d at 402.

127. *Id.* at 111, 318 N.E.2d at 404.

128. See text accompanying notes 31-36 and 49-50 *supra*.

129. See text accompanying notes 51-55 *supra*.

130. *Trimble* and *Lalli*, which also were challenges to intestate succession statutes, were not considered because they had not been decided at the time of the *Green* decision.

131. 40 Ohio App. 2d 101, 113, 318 N.E. 2d 397, 406 (1974).

132. *Id.* at 117, 318 N.E. 2d at 408.

the problems of proving paternity supported the statute. In discussing this problem, the court stated:

This argument can be overcome by requiring proof of paternity in such cases by a high degree of proof such as clear and convincing evidence. Further, among the things that can be considered by a court is whether there was a determination of paternity by a court of competent jurisdiction within a reasonable period of time after the birth of the child and prior to the death of the father.¹³³

Thus it appears that the appeals court investigated possible alternatives available to the legislature. By so doing, the appeals court was looking for more than a rational relationship as it claimed. The appeals court not only rejected the conclusion of *Labine*, but also rejected the level of scrutiny applied in *Labine*.

Levy, *Glon*, and *Weber* may not have been as inapplicable as the court originally implies—*Levy* and *Glon* because they too rejected the challenged classifications, and *Weber* because the Court in that case also investigated legislative alternatives.

C. Moore v. Dague

In the 1975 case of *Moore v. Dague*,¹³⁴ the Court of Appeals for Franklin County reached a conclusion opposite that reached in *Green v. Woodward*. The plaintiff in *Moore* claimed that he was the illegitimate son of the decedent. The decedent, however, had neither legitimated the plaintiff nor acknowledged him as his son. As in *Green v. Woodward*, the plaintiff attacked the constitutionality of the Ohio intestate succession statute, claiming that illegitimate children were denied equal protection under the statute.

The appeals court upheld the statute's validity, citing the Supreme Court's decision in *Labine* as support. The intraclass versus interclass discrimination distinction made by the appeals court in *Green* was found to be unconvincing by the court in *Moore*. According to the court, the Ohio statute did not create two classes of illegitimate children—rather, the court based its holding on its views that all illegitimate children are treated the same under the statute and that they can *all* inherit from the intestate mother, and from their father if the father takes certain action.¹³⁵

Levy, *Gomez*, and *Weber* were distinguished from *Labine* and from the case before the court. Those cases were concerned with the rights of illegitimate children arising from dependency upon their natural parents. The cases before the court in *Moore* and *Labine* dealt with the right of

133. *Id.* at 116, 318 N.E.2d at 407.

134. 46 Ohio App. 2d 75, 345 N.E.2d 449 (1975).

135. *Id.* at 80, 345 N.E.2d at 452.

illegitimate children to inherit intestate—actual dependency was not an issue.¹³⁶ The court concluded:

Thus, the court has expressly held that the state may not discriminate between rights granted dependent children upon the basis of whether they are legitimate or illegitimate. On the other hand, the Supreme Court has expressly held that a state may grant rights of inheritance to legitimate children and deny similar rights to illegitimate children and may create classes of illegitimate children, with respect to the right to inherit from their natural parents.¹³⁷

As in *Green*, the court did not have the benefit of the Supreme Court's analyses in *Trimble* and *Lalli* since they were respectively decided two and three years later. *Trimble* did find an intestate succession statute unconstitutional.

The *Moore* court appeared to accept and apply the almost nonexistent level of review applied in *Labine*, and rejected the middle level test of *Weber*. The statute was afforded a presumption of validity,¹³⁸ requiring the challenger to prove its unconstitutionality. The state's interest in eliminating spurious claims to the estate of a claimed natural father and in minimizing the problems of proving paternity were discussed with apparent approval by the appeals court.¹³⁹ The appeals court also placed importance on the state's interest in the promotion of the family through the marriage relationship.¹⁴⁰ This interest was accepted in *Labine* as sufficient to support the challenged statute, but rejected by the Supreme Court in *Weber*. The third interest considered by the appeals court in upholding the validity of the challenged statute was the state's interest in reflecting the presumed intention of the decedent. The appeals court's statements concerning this interest demonstrates the low level of scrutiny employed, and the extent to which the court deferred to the legislative judgment:

It is not the function of this court to describe whether the better rule would be that illegitimate children have the right to inherit from their natural father or that this would constitute the probable intent of a natural father not making a will or otherwise providing for children. Rather, provisions for inheritance by illegitimate children from their natural fathers is a matter that the court must leave to the legislature and the natural fathers themselves.¹⁴¹

The court concluded that it could "find no invidious discrimination rising to constitutional stature in such classifications, since they express long-time societal attitudes and the presumed intent of the natural father who is free to provide otherwise."¹⁴²

136. *Id.* at 82, 345 N.E.2d at 453.

137. *Id.*

138. *Id.* at 85, 345 N.E.2d at 455.

139. *Id.* at 82-83, 345 N.E.2d at 453-54.

140. *Id.* at 84, 345 N.E.2d at 455.

141. *Id.*, 345 N.E.2d at 454.

142. *Id.*

In sum, it appears that, like the court in *Green v. Woodward*, *Moore* rejected *Weber* and the test employed there, but that, unlike *Green*, the appeals court applied the low level of scrutiny applied in *Labine* and reached the same conclusion as *Labine*.

D. *White v. Randolph*¹⁴³

Clarence Jackson died leaving a will devising all his property to his wife, but he failed to provide for disposition if his wife died before him, which she did. The administrator of the estate brought an action to determine the decedent's heirs-at-law. Alice Marie Jackson, who claimed to be the decedent's illegitimate child, was joined as a defendant.¹⁴⁴ The common pleas court held that Alice Marie was not entitled to inherit from the decedent's estate because she was unable to introduce evidence to demonstrate that the decedent legitimated Alice Marie, formerly acknowledged her in probate court, adopted her, or designated her as his heir-at-law.¹⁴⁵ Alice Marie appealed to the Court of Appeals for Franklin County claiming that the equal protection clause requires that she be permitted to inherit from her intestate father if she can establish that the decedent was in fact her father. The appeals court upheld the common pleas court decision. The Ohio Supreme Court accepted the appeal to resolve the conflict between the decision of the Court of Appeals for Franklin County and the judgment of the Court of Appeals for Cuyahoga County in *Green v. Woodward*.¹⁴⁶ The Supreme Court affirmed the decision of the *White* appeals court, adopting most of the language of the appeals court opinion and making some additions.

The appeals court that heard *White v. Randolph* was the same court that decided *Moore v. Dague*. Since the time of the *Moore* decision, the United States Supreme Court decided *Trimble*, and the appeals court wished to review its prior decision in light of *Trimble*.¹⁴⁷ Thus, the appeals court based its decision in *White* on *Trimble* and the cases leading to *Trimble*. The appeals court decision in *White*, however, was reached before the United States Supreme Court decided *Lalli* late in 1978. The Ohio Supreme Court's decision, however, came after the *Lalli* decision, and does consider its significance.

The prior controversy concerning intraclass versus interclass discrimination did not concern the appeals court in *White*. The Illinois intestate succession statute challenged in *Trimble* was open to the same intraclass discrimination attack that concerned the appeals court in *Green*. The

143. 59 Ohio St. 2d 6, 391 N.E.2d 333 (1979).

144. *Id.* at 7, 391 N.E.2d at 333.

145. *Id.*, 391 N.E.2d at 334. See OHIO REV. CODE ANN. § 3107.13 (Page 1976); OHIO REV. CODE ANN. § 2105.18 (Page 1976).

146. 59 Ohio St. 2d 6, 6, 391 N.E.2d 333, 333 (1979).

147. *Id.* at 7, 391 N.E.2d at 333.

United States Supreme Court, however, appeared not to be concerned with the difference between the two types of discrimination. This lack of concern in *Trimble* might have led the appeals court in *White* also to ignore the difference and this lack of concern appears to be justified.

The appeals court in *White* assumes, without explaining how it reached the assumption, that the statutory classification was designed to further the state's interest in providing an efficient method of property disposition at death. The appeals court was especially concerned with the problem of proving paternity. *Labine*, *Weber*, and *Trimble* were relied on to establish the state's interest in minimizing the problem of proving paternity as a substantial state interest. In light of this state interest the court found that, unlike the statutory scheme in *Trimble*, the Ohio law was not overinclusive, and thus not unconstitutional.¹⁴⁸ The distinguishing feature between the Ohio statutory scheme and the Illinois scheme challenged in *Trimble* was that the Illinois law excluded all illegitimate children from inheriting intestate from their father. The Ohio law recognized at least one way for an illegitimate child to inherit intestate from his father. The court concluded: "In conformity with the dictates of *Trimble* . . . the Ohio statutory provisions present a reasonable middle ground for the recognition of certain categories of illegitimate children of intestate men."¹⁴⁹

It is not clear what level of scrutiny the court of appeals applied in this case. Twice it stated the test in terms of the traditional rational basis test.¹⁵⁰ The appeals court focused, however, upon language in *Trimble* in which the United States Supreme Court held the Illinois statute invalid because the statute did not consider a middle ground between complete exclusion and a case-by-case determination of paternity.¹⁵¹ Thus, the appeals court, by investigating alternatives available to the legislature, was probably employing a higher level of scrutiny than the traditional rational basis test. In its addition to the appeals court opinion, the Ohio Supreme Court, when discussing the *Lalli* decision, stated the applicable test in terms of a heightened level of scrutiny: "[W]e conclude that the Ohio statutes in question in the cause at bar are *substantially related* to the important state interests discussed by the court in *Lalli*."¹⁵²

While, according to *Trimble*, the appeals court may have applied the correct level of scrutiny, the conclusion reached is contrary to the *Trimble* decision. *Trimble* recognized that when there was a prior adjudication or

148. *Id.* at 10, 391 N.E.2d at 335.

149. *Id.*

150. "In the cases considering the general issue before us, it has been rather uniformly pointed out that the rationality of the classification must be examined in light of the legitimate state purposes to which it is related." *Id.* at 8, 391 N.E.2d at 334. "Clearly, the Ohio classification scheme is rationally related to the legitimate state purpose of assuring efficient disposition of property at death while avoiding spurious claims." *Id.* at 10, 391 N.E.2d at 335.

151. *Id.* at 9-10, 391 N.E.2d at 335.

152. *Id.* at 11, 391 N.E.2d at 336.

formal acknowledgement of paternity, the state's interest in the efficient disposition of property at death was not compromised.¹⁵³ Although Ohio law provides for the possibility of a prior adjudication of paternity,¹⁵⁴ a prior adjudication does not necessarily grant the illegitimate child the right to inherit intestate from the father. Ohio law, contrary to what the court says in *White*, thus does not conform to the dictates of *Trimble* when an illegitimate child has obtained a prior adjudication of paternity.

It should be noted, however, that the appellant had not obtained a prior adjudication of paternity. Appellant was asking for the opportunity to establish paternity with other evidence.¹⁵⁵ If the case had involved a child who had obtained a prior adjudication of paternity, the court might have reached a different conclusion. "While we may envision situations in which persons placed within certain statutory classes may be victims of invidious discrimination, we do not believe that appellant has presented such a situation under the Ohio statutes in the case at bar."¹⁵⁶

Because the United States Supreme Court's decision in *Lalli* came between the appeals court's decision in *White* and the Ohio Supreme Court's decision, it would have been advisable for the Ohio Supreme Court to write its own opinion, focusing more on the significance of *Lalli*. *Lalli* does appear to support the validity of the Ohio statute. In *Lalli*, the United States Supreme Court stated that a "state may prescribe any formal method of proof, whether it be similar to that provided by [the New York statute] or some other regularized procedure that would assure the authenticity of the acknowledgement."¹⁵⁷ While *Lalli* could be read as lowering the standard of review, the Ohio Supreme Court attempted to apply a higher standard and still reached the conclusion of validity.

The dissenting opinion of Justice Palmer in *White* emphasized the fact that the Ohio statute provided no procedure by which an illegitimate child could initiate a proceeding to secure parity in inheritance with legitimate children.¹⁵⁸ The only distinguishing feature found by Palmer between the Ohio statute and the Illinois statute in *Trimble* was that Ohio added one more method by which the father could recognize his illegitimate child for purposes of intestate succession.¹⁵⁹ Relying upon *Trimble*, Justice Palmer would require the state to provide a middle ground between complete exclusion and a case-by-case determination of paternity. A

153. 430 U.S. 762, 772 n.14 (1977).

154. OHIO REV. CODE ANN. §§ 3111.01-.24 (Page 1976).

155. 59 Ohio St. 2d 6, 8, 391 N.E.2d 333, 334 (1979).

156. *Id.* at 10, 391 N.E.2d at 335. The court concluded "that the provisions of R.C. Chapter 2105, as applied to the appellant, do not constitute invidious discrimination under the equal protection clause of the Fourteenth Amendment." *Id.* at 11, 391 N.E.2d at 335 (emphasis added).

157. 439 U.S. 259, 272 n.8 (1978).

158. 59 Ohio St. 2d 6, 12, 391 N.E.2d 333, 336 (Palmer, J., dissenting).

159. *Id.* The one additional method provided by Ohio law is a formal proceeding in probate court, initiated by the father, to designate such child as his heir at law. OHIO REV. CODE ANN. § 2105.15 (Page 1976).

middle ground approach, according to Palmer, appears only to be one that permits the illegitimate child to initiate action to gain intestate inheritance rights. By upholding a statute that permitted the child to gain inheritance rights through a prior adjudication of paternity initiated by the child, *Lalli* was seen by Palmer as simply recognizing the possible middle ground required by *Trimble*.¹⁶⁰

IV. CONCLUSION

Although the Ohio Supreme Court had difficulty correctly applying the individual holdings of the United States Supreme Court, the conclusion of constitutionality reached by the Ohio court is at least defensible in light of the *Lalli* decision. This conclusion is dependent on interpreting the *Lalli* decision as lowering the level of review employed in illegitimacy cases, and, as a result, granting states greater leeway in the kinds of paternity proof they will accept as valid. Application of the middle level test found in *Trimble*, and the accompanying requirements concerning the methods of paternity proof for which the state must provide, would appear to invalidate the Ohio statute. Likewise, interpreting *Lalli* in a manner similar to the interpretation of Justice Palmer in his *White v. Randolph* dissent would result in the invalidation of the Ohio law. Indeed, the question may hinge on whether the state must provide some method by which the illegitimate child could initiate action before the father's death to gain intestate inheritance rights.

It is clear that the state cannot completely prohibit intestate inheritance by an illegitimate child. It is equally clear that the state is not required to recognize all forms of competent evidence of paternity introduced after the death of the father to gain a part of his estate. The state can place some restrictions on the intestate inheritance of illegitimate children. The question, however, remains as to exactly what restrictions are permissible.

Christopher D. Trail

160. 59 Ohio St. 2d 6, 13-14, 391 N.E.2d 333, 337. (1979).