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I. INTRODUCTION

In *Trimble v. Gordon*,[1] the Supreme Court struck down a section of the Illinois Probate Act[2] that allowed illegitimate children to inherit by intestate succession from only their mothers. Many observers felt the *Trimble* opinion resolved the confusion over the standard of equal protection analysis applicable to cases involving classifications based on legitimacy.[3] The general consensus among observers was that "the test applied by the *Trimble* Court is remarkably close to strictest scrutiny, for it would be difficult to imagine a more exacting analysis of the relationship between statutory purposes and legislative means than the one engaged in by the majority."[4] One commentator proposed that "the *Trimble* decision clearly justifies a general condemnation of classifications based on legitimacy."[5] Another predicted that "the momentum amassed since 1968 for equal treatment should work to erase all distinctions based upon legitimacy."[6]

These predictions proved to be inaccurate. Just one year after deciding *Trimble*, the Supreme Court upheld two states' statutes that discriminated on the basis of illegitimacy. In *Lalli*

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1. 430 U.S. 762 (1977).

2. Probate Act of 1975 § 2-2, ILL. REV. STAT. ANN. ch. 3, § 2-2 (Smith-Hurd Supp. 1978) (original version at Probate Act of 1939 § 12, 1939 Ill. Laws 8).

3. "[T]he general spirit of *Trimble* . . . [indicates that] any statute which denies rights to illegitimates who are able to prove paternity should be stricken." Note, *Paternal Inheritance Rights of Illegitimate Children and the Problem of Proving Paternity*, 24 WAYNE L. REV. 1389, 1405 (1978). "While the [*Trimble*] opinion falls short of calling illegitimacy a suspect category . . . , it implies that the scrutiny which will be applied to illegitimacy is almost indistinguishable from strict scrutiny." Comment, *Paternity Statutes: Thwarting Equal Protection for Illegitimates*, 32 U. MIAMI L. REV. 339, 365-66 (1977) [hereinafter cited as *Paternity Statutes*]. "In *Trimble*, the Court implemented the reasonably strict scrutiny test." 11 CREIGHTON L. REV. 609, 628 (1977). "Therefore, in the Court's rejection of the statutory scheme, its analysis approximated strict scrutiny . . . ." 52 TUL. L. REV. 406, 412 (1978).

4. 43 VILL. L. REV. 405, 415 (1978).

5. Comment, *Constitutional Law: Equal Protection for Illegitimates*, 17 WASHBURN L.J. 392, 399 (1978).

6. Note, *Paternal Inheritance Rights of Illegitimate Children and the Problem of Proving Paternity*, 24 WAYNE L. REV. 1389, 1408 (1978).

v. Lalli,[7] the Court sustained a New York law[8] prohibiting an illegitimate child from inheriting from his intestate father unless the father during his lifetime declared paternity. Similarly, the Georgia law[9] upheld in *Parham v. Hughes*[10] denied the father of an illegitimate child the right to sue for the wrongful death of the child unless the father legitimated the child prior to the child's death.[11]

The statute declared unconstitutional in *Trimble* was substantively similar to the statute upheld in *Lalli*.[12] By contrast, the standards of equal protection analysis that were applied were markedly different. In *Trimble* the Court maintained that even " '[t]hough the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . .' "[13] The *Trimble* Court also required that the statute be " 'carefully tuned to alternative considerations.' "[14]

Compare the *Trimble* approach with the test used in *Lalli*: "[I]t is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to

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7. 439 U.S. 259 (1978).

8. N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967).

9. GA. CODE ANN. § 105-1307 (1975).

10. 441 U.S. 347 (1979).

11. The Georgia Code provides that a natural father can legitimate his child merely by petitioning the superior court in his county to declare paternity. The court then issues an order declaring the child to be legitimate and capable of inheriting from the father equally with any children born in lawful wedlock. GA. CODE ANN. § 74-103 (1975).

12. The New York law reads in pertinent part:

> (1) An illegitimate child . . . and his issue inherit from his mother . . . .
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> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967).

The relevant part of the Illinois law declares: "An illegitimate child is heir of his mother . . . . A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father's child is legitimate." Probate Act of 1975 § 2-2, ILL. REV. STAT. ANN. ch. 3, § 2-2 (Smith-Hurd Supp. 1978) (original version at Probate Act of 1939 § 12, 1939 Ill. Laws 8).

Although specific requirements differ, both statutes require that in order for illegitimate children to inherit they must be formally legitimated by acts of the parents prior to the death of the father. *See* note 88 *infra*.

13. 430 U.S. at 767 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972)).

14. *Id.* at 772 (quoting Mathews v. Lucas, 427 U.S. 495, 513 (1976)).

the statutory scheme . . . ."[15] Instead of the "stricter scrutiny" applied in *Trimble*, the *Lalli* opinion declared that state statutes regarding illegitimacy must be only "substantially related to the important state interests the statute is intended to promote."[16]

This apparent inconsistency is the latest chapter in the Supreme Court's struggle to determine the appropriate constitutional test for statutes dealing with illegitimacy. The lack of a consistent test is not only philosophically distressing, but on a practical level, it offers states little guidance in determining whether their laws are valid. Although Justice Blackmun concurred in the *Lalli* result, he strongly criticized the plurality opinion for not providing clear guidance to the states: "[T]he corresponding statutes of other States will be of questionable validity until this Court passes on them, one by one, as being on the *Trimble* side of the line or the *Labine-Lalli* side."[17]

The Supreme Court opinions dealing with illegitimacy can be justly criticized for inconsistency; however, the purpose of this Comment is to propose a rule that accurately explains the holdings of the illegitimacy cases. Briefly stated, this rule is that the degree of judicial scrutiny in illegitimacy cases depends on the legislative purpose for the discrimination. If the statute's primary purpose is to express society's condemnation of promiscuity, then the statute will be strictly scrutinized and will probably be held unconstitutional. On the other hand, if the discrimination serves a purely administrative purpose, unrelated to moral condemnation of illegitimacy, the statutory scheme has a much greater chance of being held constitutional.

II. Equal Protection Analysis: The Two-Tiered Approach

The fourteenth amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[18] The drafters of the fourteenth amendment chose to express the constitutional guarantee of equal protection in broad terms. The language of the amendment itself does not, for example readily indicate whether illegitimate children can be treated differently than legitimate children. In fact, the language of the fourteenth amendment alone does not resolve any of the myriad

15. 439 U.S. at 274 (quoting Mathews v. Lucas, 427 U.S. 495, 515 (1976)).
16. *Id.* at 275-76.
17. *Id.* at 277 (Blackmun, J., concurring).
18. U.S. Const. amend. XIV, § 1.

issues that have been raised pursuant to the promise of equality before the law. In order to give real meaning to the amendment's promises the courts have had to develop formulas and tests that define "equal protection" in a way that can be applied to specific factual situations. By the late 1960's a fairly rigid standard had evolved.[19]

This standard involves a "two-tiered" analysis of the challenged law. The first tier, or the general rule, is that a state statute that discriminates between people or groups of people will be upheld if there is some rational basis to support the discrimination.[20] The impact of this test is to give the states great deference in fashioning laws—even if such laws treat people unequally—so long as a minimal connection exists between the purpose of the law and the discrimination.

The second tier consists of two exceptions to the rational basis test. The rational basis test applies unless the law discriminates on the basis of a "suspect category,"[21] or unless the law infringes some "fundamental right."[22] Under either exception

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19. For a detailed review of equal protection analysis and especially the two-tiered system, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1100 (1978). Developments in this area are reported in 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 (1972).

20. The rational basis test has been stated many times by the Supreme Court. One widely quoted elucidation of this test is from McGowan v. Maryland, 366 U.S. 420 (1961):

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26.

21. The Supreme Court has to date declared three categories suspect. *See* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin or ancestry). Although many of the racial discrimination cases also involve discrimination based on national origin or ancestry, national origin has been declared a suspect classification even in the absence of racial overtones. *See* Oyama v. California, 332 U.S. 633 (1948). *See also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943). The classification of alienage as a suspect category has been weakened by recent cases. *See* Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979).

In Frontiero v. Richardson, 411 U.S. 677 (1973), the Supreme Court in a plurality opinion declared sex to be a suspect category. *Frontiero* has not been followed, however, and the more recent decisions have firmly rejected, for the time being, classifying sex as a suspect category. *See* Kahn v. Shevin, 416 U.S. 351 (1974).

22. The Supreme Court has deemed various rights fundamental for equal protection purposes. *See* Roe v. Wade, 410 U.S. 113 (1973) (the right to an abortion in the first

the states are denied the deference afforded them under the rational basis test and strict judicial scrutiny is imposed. This means that a state has to show more than a reasonable connection between the statute's purpose and the challenged discrimination; the state has the burden of proving that the statute "promote[s] a *compelling* governmental interest."[23]

This two-tiered approach has the advantages of being both understandable and relatively easy to apply. It can, however, be criticized for being too rigid.[24] Under the two-tiered approach it is clear that whether an individual case is won or lost usually depends on which tier is used. The facts of the case and the strengths of the parties' interests are important only to the extent that they determine which tier applies. In recent years the Supreme Court has not adhered to the two-tiered mode of analysis as dogmatically as had been the custom.[25] Several observers have noted the Court's changing approach and have termed the new standard a balancing test or a sliding scale approach.[26] The two-tiered analysis was basically an "either-or" approach: either the statute was strictly scrutinized or it was barely scrutinized. The balancing test or sliding scale approach, however, facilitates varying degrees of judicial scrutiny, and therefore allows varying

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trimester of pregnancy); Shapiro v. Thompson, 394 U.S. 618 (1969) (the right of interstate travel); Loving v. Virginia, 388 U.S. 1 (1967) (the right to marry); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (the right to vote); Griswold v. Connecticut, 381 U.S. 479 (1965) (the right of privacy in marital matters); Sherbet v. Verner, 374 U.S. 398 (1963) (the free exercise of religion); Douglas v. California, 372 U.S. 353 (1963) (the right to appeal criminal convictions); Skinner v. Oklahoma, 316 U.S. 535 (1942) (the right to procreate).

23. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis in original).

24. Between 1937 and 1970 (roughly from the beginning of the two-tiered approach until when the approach began to change) the Supreme Court applied the "rational basis" standard to invalidate only one legislative classification. *Paternity Statutes, supra* note 3, at 344; *see* Morey v. Doud, 354 U.S. 457 (1957). *Doud* was overruled in New Orleans v. Dukes, 427 U.S. 297, 306 (1976).

Only once has the Supreme Court upheld the legislative classification in a case involving strict scrutiny of a suspect category. *See* Korematsu v. United States, 323 U.S. 214 (1944).

25. *See* Gunther, *supra* note 20, at 10-20.

26. The most prominent advocate of the "sliding scale" or balancing test approach is Justice Marshall. He argues not only that the two-tiered approach should be abandoned in favor of a more flexible approach, Dandridge v. Williams, 397 U.S. 508, 519-21 (1970) (Marshall, J., dissenting), but also contends that the Supreme Court has not in fact applied a two-tiered analysis in recent years. Justice Marshall persuasively argues that the Court has applied varying degrees of judicial scrutiny in equal protection cases. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317-22 (1976) (Marshall, J., dissenting); San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

deference to legislative decisions. The Supreme Court's move from the rigid two-tiered analysis to a more flexible approach is amply documented by a review of the illegitimacy cases.

III. The Supreme Court Illegitimacy Cases Through the 1977 Term

A. An Uncertain Beginning

In *Levy v. Louisiana*[27] and its companion case, *Glona v. American Guarantee & Liability Insurance Co.*,[28] the Supreme Court for the first time considered discrimination based on illegitimacy as a possible denial of equal protection of the laws. In *Levy* five illegitimate children tried to recover for the death of their mother under the Louisiana wrongful death statute.[29] The Louisiana courts had construed the word "children" as used in the statute to exclude illegitimates.[30] In striking down this law the Supreme Court did not clearly define what test it applied. Justice Douglas' majority opinion paid homage to the rational basis rule,[31] but also cited cases clearly involving the strict scrutiny approach[32] and declared: "We have been extremely sensitive when it comes to basic civil rights . . . ."[33] The companion case, *Glona,* involved a mother's right under the Louisiana wrongful death statute[34] to recover for an illegitimate child's death. As in *Levy,* Justice Douglas mentioned the rational basis standard, but the challenged law was summarily declared unconstitutional,[35] thus creating the impression that the statute was not afforded traditional rational basis deference.[36] Consequently, the Court's analysis in *Levy* and *Glona* raised doubts as to the

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27. 391 U.S. 68 (1968).

28. 391 U.S. 73 (1968).

29. La. Civ. Code Ann. art. 2315 (West 1979).

30. Levy v. State, 192 So. 2d 193, 195 (La. Ct. App. 1966), *cert. denied,* 250 La. 25, 193 So. 2d 530 (1967), *rev'd,* 391 U.S. 68 (1968). *See also* Glona v. American Guarantee & Life Ins. Co., 391 U.S. at 74 n.3; Youchian v. Texas & P. Ry. Co., 147 La. 1080, 86 So. 551 (1920); Buie v. Hester, 147 So. 2d 733 (La. Ct. App. 1962).

31. *See* 391 U.S. at 71.

32. *Id.* The cases cited by the Court were Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669-70 (1966), Brown v. Board of Educ., 347 U.S. 483 (1954), and Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

33. 391 U.S. at 71.

34. La. Civ. Code Ann. art. 2315 (West 1979).

35. 391 U.S. at 75.

36. *See generally* Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act,* 23 U. Kan. L. Rev. 23, 43-44 (1974).

proper equal protection standard to be applied in illegitimacy cases.

In a dissenting opinion applicable to both *Levy* and *Glona*, Justice Harlan characterized the majority opinions as "constitutional curiosities,"[37] and contended that the majority reached its conclusion "by a process that can only be described as brute force."[38] Justice Harlan observed that wrongful death is a legislatively created cause of action in which the legislature generally limits those who can recover on "highly arbitrary" grounds.[39] These grounds are usually technical legal distinctions. For example, a man may recover for the death of a wife he did not love and whom he did not support, but the same man may not recover for the death of his paramour. The legal relationship is considered a valid distinction here. Justice Harlan argued that basing recovery on whether a child is legally recognized is just as "rational" as basing recovery on the biological relationship, which appears to be what the majority required.[40]

Three years after *Levy* and *Glona* the dissenters in those cases found themselves in the majority in a new illegitimacy case. The Court in *Labine v. Vincent*[41] upheld a Louisiana law that denied unacknowledged illegitimate children the right to inherit under the intestate succession act and limited the right to recover of even acknowledged illegitimate children.[42] In upholding the statute by applying traditional rational basis analysis, the Court stated:

> [I]t is for [the Louisiana] legislature, not the life-tenured judges of this Court, to select from among possible laws. We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children.[43]

Justice Black, writing for the majority, tried to distinguish *Labine* from *Levy* by limiting the holdings of *Levy* to tort actions.[44]

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37. 391 U.S. at 76 (Harlan, J., dissenting).
38. *Id.*
39. *Id.* at 77.
40. *Id.* at 79-80.
41. 401 U.S. 532 (1971). Justice Black wrote the majority opinion, joined by Chief Justice Burger and Justices Harlan, Stewart, and Blackmun. Justice Brennan, joined by Justices Douglas, White, and Marshall, dissented.
42. LA. CIV. CODE ANN. arts. 919, 202, 206 (West 1952).
43. 401 U.S. at 538-39.
44. *Id.* at 535-36.

Justice Brennan's dissent in *Labine* countered that the majority opinion's "reasoning flies in the face not only of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, but also of the very notion of a rule of law."[45] The lengthy dissent compared illegitimacy with national origin, a suspect category. Justice Brennan contended that illegitimacy and ancestry are things over which people have no control and therefore illegitimacy statutes should be strictly scrutinized in the same manner as statutes involving national origin.[46] Therefore, he concluded, "[i]t is certainly unusual in this country for a person to be legally disadvantaged on the basis of factors over which he never had any control."[47] Despite the strength of Justice Brennan's argument, it is nevertheless true that the government can and does legally discriminate against people on the basis of facts over which they have no control. Age, for example, is an unalterable trait that is not classified as a suspect category even though it is often employed as a basis for discrimination.[48] Sex is another unalterable trait that the Supreme Court has refused to denominate a suspect category.[49]

B. Weber v. Aetna Casualty & Surety Co.: *Moving Toward Strict Scrutiny*

When the next illegitimacy case reached the Supreme Court, it was uncertain whether the Court would follow the *Levy* and *Glona* approach of closely examining the state statute, or adhere to the *Labine* approach of granting broad deference to the state. In *Weber v. Aetna Casualty & Surety Co.*,[50] the Supreme Court chose to follow *Levy*[51] and distinguish *Labine*,[52] but the appropriate equal protection standard for illegitimacy remained uncertain. The Court in *Weber* invalidated the Louisiana workmen's compensation statute[53] that discriminated

45. *Id.* at 550 (Brennan, J., dissenting).
46. *Id.* at 557-58.
47. *Id.*
48. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).
49. *See* Kahn v. Shevin, 416 U.S. 351 (1974).
50. 406 U.S. 164 (1972).
51. *Id.* at 168-69, 172.
52. *Id.* at 170-71.
53. LA. REV. STAT. ANN. § 23:1021(3) (West 1964). This section defined "children" to include "only legitimate children, stepchildren, posthumous children, adopted children," and acknowledged illegitimate children. Thus, unacknowledged illegitimate children could only recover under workmen's compensation as "other dependents." Those quali-

against illegitimate children who were seeking equal benefits along with the legitimate children of their deceased father.

In distinguishing *Weber* from *Labine,* Justice Powell noted that *Labine* "reflected . . . the traditional deference to a state's prerogative to regulate the disposition at death of property within its borders."[54] Justice Powell reasoned that "the substantial state interest in providing for 'the stability . . . of land titles' "[55] justified the greater deference afforded the state in *Labine.*

Justice Powell further distinguished *Labine* on the ground that the deceased in *Labine* could have easily made a will providing an inheritance for the illegitimate child, whereas the deceased in *Weber* could not have legitimated the plaintiffs because of the requirement in Louisiana law that in order to acknowledge an illegitimate child the father must have been capable of contracting marriage with the mother when the child was conceived.[56] In other words, it would have been relatively easy for the illegitimate child in *Labine* to receive an inheritance, but in *Weber* it was legally impossible for the children to receive any benefits of the compensation scheme. According to Justice Powell's argument, stricter scrutiny should be applied to statutes that place "insurmountable barriers" in the paths of illegitimate children seeking to receive equal treatment. Justice Powell in a later opinion, however, seemed to reverse himself on the insurmountable barrier doctrine and recognized that "[b]y focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the essential question: the constitutionality of discrimination against illegitimates . . . ."[57]

Notwithstanding the difficulty in harmonizing the *Labine* precedent, the Court in *Weber* did attempt a thorough doctrinal analysis of the equal protection standard for illegitimacy. Justice

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fying as "other dependents" received only the excess beyond the "children's" and surviving spouse's portions. LA. REV. STAT. ANN. § 23:1232(8) (West 1964). In *Weber* the illegitimate children recovered nothing since the benefits awarded to the legitimate children and widow exhausted the funds allotted. 406 U.S. at 167.

54. 406 U.S. at 170.

55. *Id.* (quoting Labine v. Vincent, 229 So. 2d 449, 452 (La. Ct. App. 1969)).

56. LA. CIV. CODE ANN. art. 204 (West 1952). When the illegitimate children in *Weber* were born their father was legally married to a woman other than the children's mother. Thus their parents were incapable of marriage when they were conceived. 406 U.S. at 170-71.

57. Trimble v. Gordon, 430 U.S. at 774.

Powell cited the leading cases that developed both the rational basis test and the fundamental rights exception, and then declared: "The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[58]

Justice Powell's analysis in *Weber* simply incorporates both tiers of the old two-tiered approach. An examination of state interests or objectives is the starting point of the two-tiered analysis. The second question in the *Weber* "two-fold" approach appears to represent the fundamental rights exception that the courts have used for many years in other contexts.[59] This emphasis on fundamental rights in the illegitimacy context is confusing since arguably no fundamental rights are infringed upon by illegitimacy statutes. The Supreme Court has not recognized a fundamental right to inherit in intestate succession, to sue under wrongful death statutes, or to receive workmen's compensation or social security benefits. Nonetheless, these areas comprise the majority of alleged illegitimacy discrimination. These are all areas where the "right" to receive the benefit of the statute—if it can be called a right—is created by legislation, and such rights are commonly refused to those who do not qualify. Hence, the *Weber* "two-fold approach" did not significantly clarify the appropriate equal protection standard to be applied in illegitimacy cases.

Following *Weber*, the Court struck down several statutory schemes discriminating against illegitimates without explicitly following *Weber's* two-fold inquiry. In *Gomez v. Perez*,[60] the Supreme Court overruled a Texas Court of Appeals decision[61] that granted legitimate children "a judicially enforceable right to support from their natural fathers,"[62] but denied that same right to illegitimate children. The per curiam opinion cited cases holding statutes unconstitutional for discrimination against illegitimates but ignored *Labine*, the one case upholding such a stat-

58. 406 U.S. at 173. The *Weber* approach is discussed in several commentaries. Wallach & Tenoso, *supra* note 36; Note, *Equal Protection and the "Middle-Tier": The Impact on Women and Illegitimates*, 54 NOTRE DAME LAW. 303 (1978); *Paternity Statutes*, *supra* note 3, at 348; 42 Mo. L. REV. 444 (1977).

59. *See* note 22 *supra*.

60. 409 U.S. 535 (1973).

61. Gomez v. Perez, 466 S.W.2d 41 (Tex. Ct. App. 1971).

62. 409 U.S. at 535.

ute. A New Jersey financial assistance program[63] encountered the same fate in the 1973 case of *New Jersey v. Cahill.*[64] The following year a portion of the Social Security Act[65] requiring illegitimate children to prove dependency in order to recover on behalf of their disabled parent was declared unconstitutional. In that case, *Jimenez v. Weinberger,*[66] the Court reasoned that the law discriminated between classes of illegitimate children. For illegitimate children in general the statute required proof of actual dependency prior to the father's disabling injury. Illegitimate children born after the injury obviously could not prove that they had depended on their fathers prior to the injury. After-born illegitimate children could only qualify for benefits if they were entitled to inherit under state intestacy law, were legitimated under state law, or were precluded from legitimate status because of some formal defect in their parents' marriage.[67] These requirements have nothing to do with dependency and yet the aim of the statute was to aid dependent children, therefore the law discriminated on criteria unrelated to its goal. In other words, the Supreme Court invalidated the law because some after-born illegitimates could receive benefits and some could not, and the distinction had nothing to do with whether they actually depended on the injured parent.[68]

Following these cases *Labine* remained the only exception to the trend that statutes discriminating against illegitimate children would not withstand an equal protection challenge. The end result was that even though the Supreme Court had never expressly admitted it, illegitimacy was apparently being treated as a suspect category.

C. Mathews v. Lucas: *Is Illegitimacy a Suspect Category?*

Subsequently, in *Mathews v. Lucas,*[69] the Supreme Court refused to in fact make illegitimacy a suspect category, even though the lower court had done so.[70] The plaintiffs in *Lucas*

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63. N.J. STAT. ANN. § 44:13 (West 1940) (replaced in 1977 by N.J. STAT. ANN. § 44:10 (West Supp. 1979-1980)).

64. 411 U.S. 619 (1973).

65. 42 U.S.C. § 416(h)(3)(B) (1976).

66. 417 U.S. 628 (1974).

67. *Id.* at 635-36.

68. *Id.*

69. 427 U.S. 495 (1976).

70. *Id.* at 504-06.

challenged portions of the Social Security Act that required illegitimate children to prove actual dependency on a deceased parent in order to recover after-death support.[71] The plaintiffs were illegitimate children of the deceased and could not prove dependency. The Court refused to condemn the established procedure since it thought that "the statutory classifications challenged here are justified as reasonable empirical judgements that are consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death."[72] The degree of scrutiny implied by this holding is certainly less than strict scrutiny and more akin to rational basis deference.[73] *Weber's* two-fold approach was not expressly followed. In refusing to declare illegitimacy a suspect category the Court did contend that its scrutiny of illegitimacy statutes would not be "a toothless one."[74]

Justice Stevens' dissent noted that *Mathews v. Lucas* presented essentially the same issue treated in *Jimenez v. Weinberger,* where the Court reached an opposite result.[75] As noted, the problem of illegitimate children born after the parent becomes disabled was crucial in *Jimenez.* Obviously, where the parent has died—as in *Lucas*—this problem does not exist. On this ground the two cases are distinguishable. The end result, however, is not satisfying. Certain illegitimate children of deceased parents cannot recover Social Security benefits, but similarly situated illegitimate children of disabled parents can. The Court offered no clear justification for this distinction.

D. Trimble v. Gordon

Just one year after deciding *Lucas,* the Supreme Court decided *Trimble v. Gordon.* The Court made a detailed examination of the preceding illegitimacy cases in *Trimble,* and set forth what many observers felt would finally become a consistent standard for illegitimacy cases:

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71. 42 U.S.C. §§ 402(d)(1), (3), 416(2)(B), (3) (1976). *See also* 427 U.S. at 498-500, nn.1-3.

72. 427 U.S. at 510.

73. One observer writes: "In *Mathews v. Lucas,* the reasonable level of scrutiny utilized through the *Weber* balancing test provided the illegitimate with virtually no more protection that [sic] a mere rational basis test would have provided." 42 Mo. L. Rev. 444, 451 (1977).

74. 427 U.S. at 510.

75. *Id.* at 516-18 (Stevens, J., dissenting).

> "[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." In this context, the standard just stated is a minimum; the Court sometimes requires more. "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . ."
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> Appellants urge us to hold that classifications based on illegitimacy are "suspect," so that any justifications must survive "strict scrutiny." We considered and rejected a similar argument last Term in *Mathews v. Lucas.* As we recognized in *Lucas,* illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations. We nevertheless concluded that the analogy was not sufficient to require "our most exacting scrutiny." Despite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny," *Lucas* also establishes that the scrutiny "is not a toothless one," a proposition clearly demonstrated by our previous decisions in this area.[76]

In other words the Court followed this basic approach: although illegitimacy is not a suspect category, any law that discriminates against illegitimate children will receive a close judicial examination, something slightly less than strictest scrutiny, but still "stricter scrutiny" than is given state laws dealing with most other matters. Having thus defined the applicable standard of review, the Court held unconstitutional an Illinois law[77] requiring that the parents of an illegitimate child marry before the child could recover under the intestate succession act.

IV. The Illegitimacy Issue in the 1978 Term

A. Lalli v. Lalli

Although all the interested parties agreed that Robert Lalli was the son of Mario Lalli,[78] the Supreme Court ruled that Robert could not inherit from his father in intestate succession.

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76. 430 U.S. at 766-67 (citations omitted) (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972); Mathews v. Lucas, 427 U.S. 495, 505, 506, 510 (1976)).

77. Probate Act of 1975 § 2-2, Ill. Rev. Stat. Ann. ch. 3, § 2-2 (Smith-Hurd Supp. 1978) (original version at Probate Act of 1939 § 12, 1939 Ill. Laws 8).

78. Lalli v. Lalli, 439 U.S. at 277 (Brennan, J., dissenting).

Mario Lalli had not had his paternity declared by petitioning the proper New York court for an order officially recognizing that he was Robert's father.[79] Robert claimed that this New York state requirement discriminated against him as an illegitimate child in violation of the equal protection clause.[80] Robert's argument appeared likely to prevail, considering the trend of the Supreme Court from *Levy v. Louisiana* through *Trimble v. Gordon.* Robert's argument, however, convinced only four of the five justices who had joined in striking down the Illinois law in *Trimble.*[81] The fifth justice of the *Trimble* majority, Justice Powell, joined the *Trimble* dissenters[82] and upheld the New York statute. The Court reasoned that "a number of problems arise that counsel against treating illegitimate children identically to all other heirs of an intestate father."[83] These same "problems" existed in *Trimble,* and arguably in other illegitimacy cases in which the challenged laws were struck down, but in the previous cases the Court did not think that these "problems" justified treating illegitimate children differently.

The Supreme Court's analysis in *Lalli* essentially followed the traditional rational basis approach: "Our inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law, but on 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."[84] The Court concluded, using this "rationality" test, that the New York proof of paternity requirement is "substantially related to the important state interests the statute is intended to promote."[85] This conclusion is difficult to reconcile with *Trimble.* The statute in *Trimble* was "substantially related" to "important state interests." The flaw in *Trimble* was that the statute did not consider less discriminatory approaches in dealing with illegitimacy problems.[86]

Justice Powell wrote both the *Trimble* and *Lalli* opinions,

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79. *Id.* at 262. *See also* note 12 *supra.*

80. 439 U.S. at 262.

81. Justices Brennan, White, Marshall, Powell, and Stevens formed the majority in *Trimble.* Justices Brennan, White, Marshall, and Stevens dissented in *Lalli.*

82. Chief Justice Burger, and Justices Stewart, Blackmun, and Rehnquist were the dissenters in *Trimble,* and along with Justice Powell formed the majority in *Lalli.*

83. 439 U.S. at 269.

84. *Id.* at 273.

85. *Id.* at 275-76.

86. 430 U.S. at 772.

and he tried to distinguish *Lalli* on the ground that *Trimble* "effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents."[87] In *Lalli,* by contrast, the requirements for legitimating children did not necessitate the marriage of the parents but only a court decree of paternity.[88] As Justice Brennan's dissent persuasively pointed out, however, neither the marriage of the parents nor a court order of paternity represents a requirement that many illegitimate children will be able to meet.[89] In any event, Justice Powell convinced only a plurality of the Court that *Trimble* was distinguishable. Justice Blackmun's concurring opinion gave the fifth vote in favor of the judgment, but Justice Blackmun disagreed with Justice Powell's reasoning and contended that the Court could not hold as it did without overruling *Trimble.*[90] The four dissenters felt *Trimble* was indistinguishable.

B. Parham v. Hughes *and* Califano v. Boles

Other opinions in the 1978 Term give support to the observation that the standard in illegitimacy analysis is moving away from the "stricter scrutiny" of *Trimble* toward greater deference to the legislature. In *Parham v. Hughes,*[91] the Court upheld a Georgia statute[92] that required a father to declare paternity before the death of his illegitimate child in order to take advantage of Georgia's wrongful death statute. The dissent by Justice White pointed out that the fact situation in *Parham* was fundamentally the same as that found in *Glona,* where the Louisiana law was struck down.[93] In upholding the Georgia statute, the majority opinion correctly observed that the law did not discriminate directly against illegitimate children vis-a-vis legiti-

87. 439 U.S. at 273.

88. N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney 1967). The New York law requires that the proceeding requesting the court order of filiation must commence during the pregnancy of the mother or within two years from the birth of the child. The Supreme Court did not rule specifically on the constitutionality of this two-year limitation because the lower court had not reached the issue. 439 U.S. at 267 n.5. Consequently, all that *Lalli* specifically held was that requiring court decrees of paternity for illegitimate children in intestate succession is not unconstitutional.

89. 439 U.S. at 278-79 (Brennan, J., dissenting).

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

91. 441 U.S. 347 (1979).

92. Ga. Code Ann. § 105-1307 (1975).

93. 441 U.S. at 363 (White, J., dissenting).

mate children, but actually discriminated between parents of illegitimate children and parents of legitimate children.[94] This same distinction was present in *Glona,* but Justice Douglas was not deterred there from declaring the Louisiana statute unconstitutional. Justice Douglas found "no possible rational basis"[95] to support the law: "Where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock."[96] *Glona* and *Parham* can be distinguished by the fact that it was the illegitimate child's mother trying to recover in *Glona,* whereas the father brought the suit in *Parham.* The Court, however, does not mention this distinction, and the *Parham* opinion merely rests on the ground that the Court did find that the statute was rationally related to a permissible state objective.[97]

In *Califano v. Boles,*[98] the Supreme Court sustained the portion of the Social Security Act that restricts mothers' insurance benefits to widows and divorced wives of wage earners.[99] The mother of an illegitimate child brought suit contending that because she could not receive mothers' benefits, part of which she would use for support of the child, the child was being discriminated against because of its illegitimacy. The Court responded that the child received direct benefits as a minor child of the deceased,[100] and declared incidental any effect on the child from mothers' benefits.[101] Justice Marshall's dissent persuasively argued that the absence of mothers' benefits had much more than an incidental effect on children.[102] Justice Marshall also stressed that the majority opinion violated principles of *Weber* and *Jimenez—Weber* because the Court had concluded there that "marital status of parents is not a sufficiently accurate index of the economic needs of their children to warrant conclusively denying assistance to illegitimates,"[103] and *Jimenez* because "[t]he constitutional infirmities identified in *Jimenez*

94. 441 U.S. at 353.
95. 391 U.S. at 75.
96. *Id.* at 76.
97. 441 U.S. at 357-58.
98. 443 U.S. 282 (1979).
99. 42 U.S.C. §§ 402 (g)(1), 416 (d)(3) (1976). *See also* 443 U.S. at 286 n.5.
100. 443 U.S. at 294.
101. *Id.* at 295.
102. *Id.* at 298-301 (Marshall, J., dissenting).
103. *Id.* at 305.

are equally evident in this case . . . ."[104] These infirmities were that the law aided legitimate children who were not in fact dependent on their deceased parent, and took away aid from illegitimate children who in fact had depended on their deceased parent.[105]

V. Equal Protection for Illegitimates: Is There a Consistent Rule?

The history of the illegitimacy cases presents a chain of close decisions accompanied by frequent, vigorous dissents. On the present Court, Chief Justice Burger and Justices Stewart and Rehnquist generally favor an analysis granting considerable deference to illegitimacy statutes.[106] Justices Brennan, White, and Marshall lean toward a stricter scrutiny of illegitimacy statutes.[107] Justices Blackmun, Powell, and Stevens have changed their positions during the course of the illegitimacy cases; the more recent opinions indicate that Justice Stevens is leaning toward rational basis deference and Justice Blackmun toward stricter scrutiny.[108] This even division in the present Court makes it difficult to predict what may occur in the future. Nonetheless, some basic conclusions can be drawn concerning the Supreme Court's approach to the question of equal protection for illegitimates.

It does not appear likely that illegitimacy will join race, national origin, and alienage as classifications receiving the Court's strictest scrutiny.[109] On the other hand, illegitimacy statutes are not approved according to a mere rational basis standard; established precedent requires a stricter examination of illegitimacy issues. Thus illegitimacy does not fit neatly or consistently into either of the two tiers of the traditional approach. Sometimes an illegitimacy statute is given deference as is done under the rational basis test, and sometimes it is more strictly scrutinized.

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104. *Id.*

105. *Id.* at 305-06.

106. *See* Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. at 776-86 (Rehnquist, J., dissenting). Especially note Justice Rehnquist's majority opinion in Califano v. Boles, 443 U.S. 282 (1979).

107. *See* Califano v. Boles, 443 U.S. at 297-306 (Marshall, J., dissenting); Parham v. Hughes, 441 U.S. at 361-68 (White, J., dissenting); Lalli v. Lalli, 439 U.S. at 277-79 (Brennan, J., dissenting).

108. Justice Stevens voted with the majority in *Califano v. Boles* and *Parham v. Hughes*. Justice Blackmun dissented in these same cases.

109. *See* note 21 *supra*.

What are the factors that determine which illegitimacy statutes are strictly scrutinized and which are not?

A. Insurmountable Barriers

One factor present in several cases is the "insurmountable barrier" doctrine. This doctrine inquires whether illegitimate children are permanently barred from equal treatment or whether only minor barriers must be overcome before achieving equality with legitimate children. Justice Powell expressly disparaged insurmountable barriers as an analytical tool in *Trimble v. Gordon,*[110] and since the presence or absence of insurmountable barriers does not explain all the cases,[111] insurmountable barriers can only be part of the reconciliation of the illegitimacy issue. However, in the recent case of *Lalli v. Lalli,* Justice Powell seemed to again rely on the insurmountable barrier doctrine to distinguish *Lalli* from *Trimble*:

> The Illinois statute in *Trimble* was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes. . . . [The New York law] does not share this defect. . . . This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.[112]

Thus "insurmountable barriers," or the burden the illegitimate child must overcome to secure equal treatment, is but one of the factors that determines how strict the scrutiny applied to an illegitimacy statute will be. Another factor goes much further in explaining and reconciling the illegitimacy cases: the presence or absence of a moral purpose in the legislation.

B. Legislative Purpose: The Determinative Factor?

The starting point of analysis in the illegitimacy cases under

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110. "Despite its appearance in two of our opinions, the focus on the presence or absence of an insurmountable barrier is somewhat of an analytical anomaly." 430 U.S. at 773. *See also* notes 56-57 and accompanying text *supra.*

111. For example, the insurmountable barrier doctrine cannot explain the differences between *Labine v. Vincent* and *Trimble v. Gordon:* the barrier for the illegitimate child was exactly the same in each case. Both cases involved intestate succession, and the barrier to illegitimate children in the intestate succession laws would have been avoided in each case by the making of a will, yet the holdings are opposite.

112. 439 U.S. at 273.

the equal protection clause has generally been an examination of the objective the statute purports to further: whether it seeks to regulate the behavior of the parents by punishing the illegitimate child, or whether it seeks to facilitate an orderly distribution of a decedent's property or a just allocation of benefits under family support programs. A review of the illegitimacy cases with these possible objectives in mind reveals a definite consistent pattern. In every case where the state objective in a statute that discriminates against illegitimate children is primarily the promotion of moral behavior or the condemnation of sexual activity outside of marriage, the statute has been declared unconstitutional. On the other hand, if the state objective is merely to provide for the equitable distribution of property or to overcome problems of proof, the statute has been upheld. The accuracy of this conclusion can be documented by analyzing the nature of the governmental interest in illegitimacy statutes.

A review of the cases invalidating illegitimacy laws shows a definite pattern. In *Levy v. Louisiana*, the state statute had been declared by the state courts to be " 'based on morals and general welfare because it discourages bringing children into the world out of wedlock.' "[113] In *Glona v. American Guarantee & Liability Insurance Co.*, the Supreme Court noted that " 'sin' . . . is, we are told, the historic reason for the creation of the disability."[114] The Court mentioned in *Weber v. Aetna Casualty & Surety Co.* that "[t]he Louisiana Supreme Court emphasized strongly the state's interest in protecting 'legitimate family relationships' . . . ."[115] In *New Jersey v. Cahill*, the state's objective was " 'to preserve and strengthen family life.' "[116] In *Trimble v. Gordon*, one of the state's purported interests furthered by the statute was " 'the promotion of [legitimate] family relationships.' "[117] Hence, this almost unanimous pattern suggests that

113. 391 U.S. at 70 (quoting Levy v. State, 192 So. 2d 193, 195 (La. Ct. App. 1966)).

114. 391 U.S. at 75.

115. 406 U.S. at 173 (quoting Stokes v. Aetna Cas. & Sur. Co., 257 La. 424, 433, 242 So. 2d 567, 570 (1970)).

116. 411 U.S. at 620 (quoting New Jersey v. Cahill, 349 F. Supp. 491, 496 (D.N.J. 1972)).

117. 430 U.S. at 768 (quoting In re Estate of Karas, 61 Ill. 2d 40, 48, 329 N.E.2d 234, 238 (1975)). The other purpose for the statues was the state's interest in governing the intestate succession of property. *Id.* at 770. The Supreme Court concluded that the statute did not meet this goal because it was too broad; the statute excluded some illegitimate children unnecessarily. *Id.* at 770-72. Thus, encouraging morality was not the sole purpose for the statute in *Trimble*. However, Justice Powell emphasized the presence of the "moral" purpose in *Trimble* when he distinguished *Lalli* from *Trimble*. 439 U.S. at

if the statute's primary objective in discriminating against illegitimates is merely to encourage morality or discourage promiscuity, the statute will be declared unconstitutional.

The pattern in cases upholding illegitimacy legislation is just as clear. Although strengthening family life was briefly mentioned as a possible state objective for the statute in *Labine v. Vincent*, the Court's holding actually rests on the state's power "to make laws for distribution of property left within the State."[118] In *Mathews v. Lucas*, the Court upheld a statute that discriminated against illegitimate children, but the Court determined that the governmental objective was "to provide for all children of deceased insureds who can demonstrate their 'need' in terms of dependency at the times of the insureds' deaths."[119] Any mention of punishing sin or encouraging legitimate family relationships was conspicuously absent in *Lucas*. Similarly, the Supreme Court declared in *Lalli v. Lalli*: "[T]he primary state goal underlying the challenged aspects of § 4-1.2 is to provide for the just and orderly disposition of property at death."[120] The lack of any state purpose designed to encourage moral behavior is one of the facts the Court accented in distinguishing *Lalli* from *Trimble*:

> The Illinois law [in *Trimble*] was defended, in part as a means of encouraging family relationships. No such justification has been offered in support of § 4-1.2. The Court of Appeals disclaimed that the purpose of the statute, "even in small part, was to discourage illegitimacy, to mold human conduct or to set societal norms."[121]

In no case upholding a statute permitting discrimination against illegitimate children has the state's principal aim been a moral condemnation of the parents' illicit conduct.[122] In these cases the

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267-68.

Many statutes do have multiple aims. The point here, however, is that if one of the state's objectives is to minimize promiscuity by treating illegitimates differently, then the statute will probably be strictly scrutinized.

118. 401 U.S. at 539.

119. 427 U.S. at 507.

120. 439 U.S. at 268.

121. *Id.* at 267-68 (quoting In re Lalli, 43 N.Y.2d. 65, 70, 371 N.E.2d 481, 483, 400 N.Y.S.2d 761, 764 (1977)).

122. The Court in *Parham v. Hughes* upheld a statute whose objective was to encourage legitimate family relations, 441 U.S. at 350, but that case does not weaken the stated conclusion. The statute in *Parham* did not punish illegitimate children for the infidelity of their parents; rather it only denied fathers of illegitimate children the right to sue for the wrongul death of their child. The Court declared: "It is thus neither illogi-

Court usually emphasizes the nonmoral, property, or administrative purposes of the statute.

What does this conclusion mean for the illegitimacy problem in particular, and also for the broader issue of equal protection analysis? First, Justice Blackmun's assertion in his concurring opinion in *Lalli* that the courts had not given guidance to the states, and that each law will have to be judicially determined to be on either the *Lalli* or the *Trimble* side of the line[123] was not entirely accurate. Justice Blackmun was correct in stating that the courts have not given the states explicit guidance, but the pattern of history tells drafters of state or federal statutes that illegitimates can only be treated differently vis-a-vis legitimate children for purposes unrelated to the moral objective of discouraging illicit sexual behavior. Possible proper motives have been previously suggested.

This is not to suggest that a statute whose real purpose is to discriminate against illegitimate children for moral reasons will be upheld under the guise of a stated "proper" purpose. The courts will undoubtedly see through such a sham and deal with the real purpose. The government will have the burden of demonstrating a legitimate objective unrelated to the morality of the parents. If the government is successful in carrying its burden, the statute will be afforded some deference, rather than being subjected to strict scrutiny.

In addition to giving some guidance for future cases, the observation that the nature of the state objective is determinative in illegitimacy cases also lends insight into the present Supreme Court approach to equal protection. It was noted earlier that some observers contend that the Court is applying a type of balancing test in equal protection cases. It is beyond the scope of this Comment to study in depth the merits and functions of such a balancing test; however, some general observations based on the limited scope of the illegitimacy cases can be offered.

Too often the issue of what constitutional standard is used is resolved merely by stating that a balancing test or a sliding scale is used. These labels are of limited value. To tell a legislative drafting committee or a client that the Court applies a sliding scale approach will not significantly aid the committee in de-

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cal nor unjust for society to express its 'condemnation of irresponsible liaisons beyond the bonds of marriage' by not conferring upon a biological father the statutory right to sue for the wrongful death of this illegitimate child." *Id.* at 353.

123. *See* 439 U.S. at 277 (Blackmun, J., concurring).

ciding how to draft a statute or the client in deciding whether to incur the expense of contesting an alleged discriminatory practice. Interested parties need to know the controlling principles likely to influence the Court's decision in order to assess their reasonable chances of success. This information depends on what factors the Court weighs in its balancing test or what slides the scale in the sliding scale approach.

In the illegitimacy area the nature of the legislative objective appears to be the determining factor in the Court's balancing test. Despite the cogency of this conclusion, it remains tentative since it was formulated from a case-by-case comparison of the Court's holdings, and cannot presently be grounded in the express declarations of the Supreme Court. Thus, if the Supreme Court intends to continue using a balancing test in illegitimacy cases or in other areas, and desires to clarify the current state of the law, the Court must specify what particular factors will predominate in the balancing process.

VI. Conclusion

The Supreme Court has vacillated in its approach to the problem of equal protection for illegitimate children. In some cases, laws discriminating against illegitimate children have been strictly scrutinized. In other cases, somewhat similar laws have been treated with greater deference. The present Court's even division on this issue makes the future of the illegitimacy issue uncertain. The analytical approach of the Court is characterized by the lack of a strict rule: the Court weighs the competing interests and applies differing degrees of judicial scrutiny in different cases. The factor that apparently triggers stricter scrutiny is whether the challenged statute attempts to condemn the practice of having illegitimate children by discriminating against the child. The Supreme Court has declared: "[I]t is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it."[124] On the other hand, if a statute's primary purpose in discriminating against illegitimate children is unrelated to moral condemnation of illegitimacy, the statute will likely

124. Parham v. Hughes, 441 U.S. at 352.

survive an equal protection challenge.

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