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Constitutional Law - Fourteenth Amendment - Statute Denying Illegitimates the Right to Inherit by Intestate Succession from Their Fathers Held to be Invidious Discrimination in Violation of the Equal Protection Clause of the Fourteenth Amendment

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actions, cautious courts may be justified in limiting *Occidental Life* to its own facts and relying on it only in Title VII suits.[85] The interpretive dilemma facing courts after the decision in *Occidental Life* could probably have been avoided if the Supreme Court had chosen to reexamine the borrowing rule and to formulate a new standard which would take national policies into account in determining if a state limitations period should be applied.

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CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — STATUTE DENYING ILLEGITIMATES THE RIGHT TO INHERIT BY INTESTATE SUCCESSION FROM THEIR FATHERS HELD TO BE INVIDIOUS DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Trimble v. Gordon (U.S. 1977)

Shortly after Sherman Gordon died intestate, appellant Deta Mona Trimble, the illegitimate[1] daughter of appellant Jessie Trimble and Sherman Gordon, was excluded from an order determining heirship entered by the Probate Division of the Circuit Court of Cook County, Illinois.[2] Prior to Gordon's death in 1974, the Illinois circuit court had found him to be the father of Deta Mona.[3] In reaching the decision to exclude Deta Mona from

85. The only Supreme Court decision in which a federal statute was ruled not subject to a state statute of limitations involved a suit in equity to enforce a liability created by the Federal Farm Loan Act, 12 U.S.C. § 812 (1970). Holmberg v. Armbrecht, 327 U.S. 392 (1946). The *Holmberg* Court declined to apply the state statute of limitations on the ground that historic principles of equity mandated that the suit be limited only by laches. *Id.* at 395. The Court probably would have subjected an action at law brought under the same statute to the state statute of limitations, under the theory of congressional acquiescence to the application of state limitations periods. *Id.* at 395. For a discussion of this theory as a justification for the borrowing rule, *see* text accompanying notes 28 & 29 *supra.*

1. According to one commentator:

> The definition of illegitimacy is tied to the parents' marital status at the time of their child's birth. It usually involves the fact that the child was "born out of wedlock and not legitimated," sometimes includes a reference to the time of conception to cover the child who was conceived before marriage or born after its termination, and excludes from legitimacy children born to a married mother in circumstances in which the husband could not have been the father.

H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 10-11 (1972) (footnotes omitted).

2. Trimble v. Gordon, 430 U.S. 762, 763-64 (1977). The order identified as Gordon's only heirs his father, mother, brother, two sisters, and half-brother, all of whom were appellees in the instant case. *Id.* at 764.

3. *Id.* After the adjudication of paternity, Gordon supported Deta Mona as ordered by the court and "openly acknowledged her as his child." *Id.*

the order, the circuit court relied upon section 12 of the Illinois Probate Act[4] (section 12), which allows illegitimate children to inherit by intestate succession only from their mothers.[5] Illinois law does, however, permit legitimate children to inherit by intestate succession from both their mothers and their fathers.[6]

The decision of the circuit court was appealed directly to the Illinois Supreme Court.[7] Appellants argued that section 12 violated the equal protection clause of the fourteenth amendment[8] by invidiously discriminating on the basis of illegitimacy, sex, and race.[9] Appellants' contentions that section 12 was unconstitutional on these grounds were made in an *amicus* brief filed in two pending consolidated appeals presenting similar issues.[10] In *In re Estate of Karas,*[11] the Illinois Supreme Court upheld the constitutionality of section 12 against all challenges, "including those presented in appellants' *amicus* brief."[12] On the authority of *Karas,* the Illinois Supreme Court affirmed the circuit court's decision in *Trimble.*[13] The United States Supreme Court reversed, *holding* that a statutory provision which allows illegitimate children to inherit only from their mothers invidiously discriminates on the basis of illegitimacy in violation of the equal protection clause of the fourteenth amendment. *Trimble v. Gordon,* 430 U.S. 762 (1977).

In the first decades after the enactment of the fourteenth amendment, the equal protection clause was so rarely invoked by the Supreme Court that Justice Holmes, in 1927, described it as "the usual last resort of constitutional arguments."[14] The level of review employed by the Court when it did utilize the equal protection clause was labeled the rational basis

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4. ILL. REV. STAT. ch. 3, § 12 (1961). The Probate Act, including § 12, was repealed and replaced on January 1, 1976, by the Probate Act of 1975. ILL. REV. STAT. ch. 3, §§ 1-1 to 663 (Supp. 1976-77). The part of § 12 relevant in *Trimble* was recodified without significant change in § 2-2 of the Probate Act of 1975. *Id.* § 2-2.

5. ILL. REV. STAT. ch. 3, § 12 (1961). Section 12 provided in pertinent part:

> An illegitimate child is heir of its mother and of any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. An illegitimate child whose parents inter-marry and who is acknowledged by the father as the father's child shall be considered legitimate.

Id.

6. ILL. REV. STAT. ch. 3, § 2-1 (Supp. 1976-77). If Deta Mona had been a legitimate child, she would have inherited her father's entire estate. *Id.* § 2-1(b).

7. 430 U.S. at 765.

8. The fourteenth amendment provides, in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. amend. XIV, § 1.

9. *In re* Estate of Karas, 61 Ill. 2d 40, 46-47, 50, 329 N.E.2d 234, 237, 239 (1975). *See* text accompanying notes 10-12 *infra.*

10. 61 Ill.2d at 44, 329 N.E.2d at 236.

11. 61 Ill. 2d 40, 329 N.E.2d 234 (1975).

12. *Id.* at 46-56, 329 N.E.2d at 237-42.

13. 430 U.S. at 765. The opinion of the Illinois Supreme Court was delivered orally by Chief Justice Underwood. *Id.*

14. Buck v. Bell, 274 U.S. 200, 208 (1927). *See* Note, *Illegitimacy and Equal Protection: Two Tiers or An Analytical Grab-Bag?,* 7 LOY. CHI. L.J. 754, 756 (1976).

standard.[15] Judicial review under this test was very limited, however, since the Court showed great deference to legislative classifications.[16] A stricter standard of review[17] did evolve, although its application was limited to cases involving racial[18] or other "suspect" legislative classifications.[19] By the late 1960's, the Warren Court had fashioned these standards into a "rigid two-tier" approach to equal protection.[20] In certain contexts, the traditional

15. There have been numerous formulations of the rational basis test. *See, e.g.,* Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Flemming v. Nestor, 363 U.S. 603, 611 (1960) (classifications must not be "patently arbitrary" or "utterly lacking in rational justification"); Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (classifications must "be reasonable, not arbitrary," and they must be based upon distinctions which have a "fair and substantial relation" to the purposes of the legislation); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (a classification does not violate the equal protection clause simply because it is not mathematically precise or because it in fact produces "some inequality", as long as it has some rational basis); Gulf, C. & S.F. Ry v. Ellis, 165 U.S. 150, 155 (1897). In *McGowan,* the Court articulated the test as follows:

> 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.

366 U.S. at 425-26 (citations omitted).

16. *See* Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause,* 2 HASTINGS CONST. L.Q. 153, 164 (1975); Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria,* 27 VAND. L. REV. 971, 996 (1974). For a further discussion of the traditional equal protection approach, *see generally Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Developments in the Law*].

17. "Suspect" classifications, such as race, are subjected to what is known as strict or rigid equal protection scrutiny, under which they bear a much heavier burden of justification than that required under the traditional scrutiny. *See Developments in the Law, supra* note 16, at 1088. Specifically, strict scrutiny differs from the rational basis standard in a number of significant respects: 1) the usual presumption of constitutionality is reversed when strict scrutiny is applied; 2) the state, rather than the challenging party, must bear the burden of proof; 3) a *possible* rational basis for the classification will be insufficient to satisfy the test of strict scrutiny; 4) sometimes the classification must be deemed "necessary" to the accomplishment of a permissible state purpose; and 5) the state's purpose must be considered to be "compelling." *See id.* at 1101; Note, *supra* note 16, at 997. *See also* note 15 *supra.*

18. *See, e.g.,* McLaughlin v. Florida, 379 U.S. 184 (1964) (Florida criminal statute prohibiting unmarried interracial couples from habitually occupying the same room at night held to violate the equal protection clause); Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools held a violation of the equal protection guarantee inherent in the due process clause of the fifth amendment).

19. Other classifications have been designated as "suspect" by the Court and therefore subject to strict scrutiny. *See, e.g., In re* Griffiths, 413 U.S. 717 (1973) (alienage); Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Oyama v. California, 332 U.S. 633 (1948) (national origin). A plurality of the Court has designated classifications based on sex as suspect. *See* Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality opinion).

20. *See* Gunther, *The Supreme Court, 1971 Term — Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

rational basis test was applied,[21] while suspect classifications and classifications adversely affecting "fundamental interests"[22] triggered strict scrutiny.[23] The Burger Court, without rejecting it entirely, has indicated its dissatisfaction with this rigid, bifurcated approach.[24] As a result, a blurring of the two tiers[25] has become apparent in the Court's decisions involving equal protection for illegitimate children.[26]

Prior to 1968, the equal protection clause had never been invoked for the purpose of protecting the rights of illegitimates.[27] In that year, the Supreme Court decided the companion cases of *Levy v. Louisiana*[28] and *Glona v.*

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21. *Id.* Specifically, it was in fiscal and regulatory matters that the Court continued to apply the deferential rational basis test. *See Developments in the Law, supra* note 16, at 1087. *See also* Railway Express Agency v. New York, 366 U.S. 106 (1949).

22. For examples of interests determined to be fundamental by the Warren Court, *see, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (right of interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal appeals once provided for by the state). *See* Gunther, *supra* note 20, at 8-9.

23. Gunther, *supra* note 20, at 8.

24. *See, e.g.,* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-73 (1972). In *Mosley,* there was a notable absence of two-tier rhetoric. Instead, the Court observed that the question in *all* equal protection cases is "whether there is an appropriate governmental interest suitably furthered by the differential treatment." 408 U.S. at 95 (citations omitted). In *Weber,* the Court paid lip-service to the two-tier approach, but then formulated a two-pronged test to be applied in *all* equal protection cases. 406 U.S. at 172-73. *See* note 40 *infra. See also* Gunther, *supra* note 20, at 10-20.

25. One commentator has suggested that the Court has blurred the sharp line between traditional and strict scrutiny by giving "bite" to the rational basis test. *See* Gunther, *supra* note 20, at 18-19. *See also* note 26 and accompanying text *infra.* Whereas application of that test once meant virtual abdication of judicial review, under the more recent formulations of the standard, "[j]udicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished." Gunther, *supra* note 20, at 20. *See* text accompanying notes 15 & 16 *supra.*

26. *See, e.g.,* Jimenez v. Weinberger, 417 U.S. 628 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). *See also* notes 39, 40 & 42-46 and accompanying text *infra.* The blurring of the two tiers was not as apparent in the earliest cases involving equal protection for illegitimates, decided by the Warren Court. *See* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (Louisiana wrongful death statute construed to bar recovery to parent of illegitimate child while allowing recovery to parents of legitimate child violated the equal protection clause because there was no rational basis for the distinction); Levy v. Louisiana, 391 U.S. 68 (1968) (distinction between legitimate and illegitimate children suing for wrongful death of mother constituted denial of equal protection since legitimacy of birth has no relation to wrong allegedly inflicted on mother). *See also* note 32 and accompanying text *infra.*

27. *See* Krause, *Equal Protection for the Illegitimate,* 65 MICH. L. REV. 477, 483 (1967); Note, *supra* note 14, at 755. Although English common law treated the illegitimate very harshly, this harshness has been mitigated to a great extent in the United States over the past century. *See* 47 NOTRE DAME LAW. 392, 394-96 (1971). Nevertheless, illegitimates have faced discrimination in this country under statutes regulating rights to support, inheritance, benefit distributions, and public housing, as well as under laws dealing with custody, visitation, and use of names. *See* Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.,* 118 U. PA. L. REV. 1, 19-38 (1969).

28. 391 U.S. 68 (1968).

American Guarantee & Liability Insurance Co.[29] In *Levy*, the Court held that a Louisiana statute that denied illegitimate children the right to bring a wrongful death action for the death of their mother, while granting that right to legitimate children, invidiously discriminated against illegitimates in violation of the equal protection clause.[30] In *Glona*, the Court invalidated that part of the Louisiana wrongful death statute which provided that a mother had no cause of action for the death of her illegitimate child.[31] In both cases, the Court stated that the appropriate standard for testing classifications based on illegitimacy was the rational basis test.[32]

Three years later, the Supreme Court decided *Labine v. Vincent.*[33] In *Labine*, the Court upheld a Louisiana law barring illegitimate children from sharing equally with legitimate children in the estates of their fathers who died intestate.[34] In reaching its decision, the Court suggested that it was *not* applying the rational basis test.[35] Although the standard actually employed was not articulated in the *Labine* opinion itself, the Court explained the *Labine* holding, in *Weber v. Aetna Casualty & Surety Co.*,[36] as resting on two grounds: "the traditional deference to a State's perogative to regulate the disposition at death of property within its borders;"[37] and the absence of any insurmountable barriers to inheritance by illegitimates from their fathers.[38]

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29. 391 U.S. 73 (1968). For discussions of the implications of *Levy* and *Glona, see, e.g.*, Gray & Rudovsky, *supra* note 27; Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana — First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969); Krause, *The Bastard Finds His Father*, 3 FAM. L.Q. 100 (1969).

30. 391 U.S. at 71-72.

31. 391 U.S. at 76.

32. Specifically, the *Levy* Court noted: "[t]hough the test has been variously stated, the end result is whether the line drawn is a rational one." 391 U.S. at 71 (citation omitted). *See* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968). However, after setting forth this test, the Court in *Levy* declined to consider whether the line drawn *was* rational, but instead appeared to decide the case on the ground that the rights asserted involved the "intimate familial relationship" between a mother and her dependent children whose illegitimate status was in no way relevant to the wrong done to the mother. 391 U.S. at 71-72. In *Glona*, however, the Court actually did apply the test and concluded that there was no possible rational relation between the classification and the permissible state purpose of discouraging illegitimacy. 391 U.S. at 75. The Court determined that it was unreasonable to assume that if natural mothers could recover for the wrongful death of their illegitimate children, they would be encouraged to have children out of wedlock. *Id.*

In his dissenting opinion, Justice Harlan, joined by Justices Black and Stewart, called these decisions "constitutional curiosities." *Id.* at 76, (Harlan, J., dissenting). Justice Harlan asserted that the legislative distinction between legitimate and illegitimate children was rationally related to the legitimate state interest in formalized family relationships, and thus would have allowed the Louisiana statute to stand. *Id.* at 80-82. (Harlan, J., dissenting).

33. 401 U.S. 532 (1971).

34. *Id.* at 535, 539-40.

35. This suggestion was indicated by the Court's statement: "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State." *Id.* at 536 n.6.

36. 406 U.S. 164 (1972).

37. *Id.* at 170, *citing* Labine v. Vincent, 401 U.S. 532, 538 (1971).

38. 406 U.S. at 170-71. In *Labine*, the Court had emphasized that in Louisiana an illegitimate child could inherit from his father on the same terms as a legitimate child

In *Weber,* the Court held unconstitutional a provision of the Louisiana workmen's compensation law that prevented dependent, unacknowledged illegitimate children from recovering on an equal basis with legitimate children for the death of their natural fathers.[39] The *Weber* Court closely examined the question of whether the illegitimacy classification promoted the state's interests.[40] However, in two of the three cases following *Weber* in which the Court invalidated legislative classifications based on illegitimacy, the Court declined to engage in the same kind of in-depth analysis.[41] The exception among these cases was *Jiminez v. Weinberger.*[42] In *Jimenez,* certain provisions of the Social Security Act were held to be unconstitutional violations of the equal protection clause.[43] The challenged legislation provided that legitimate children were entitled to a parent's disability benefits without any showing of dependency,[44] while certain classes of illegitimate children who were not dependent on the parent at the onset of the disability were conclusively denied the benefits regardless of their dependency at the time the application for benefits was made.[45] In its

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if his father had executed a will, legitimated the child by marrying his mother, or stated his desire to legitimate the child through an acknowledgement of paternity. 401 U.S. at 539.

In Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975), the Seventh Circuit in discussing the insurmountable barrier rationale in illegitimacy cases observed: "We have some difficulty in evaluating the importance of the options open to the parents, since from the point of view of the child it really makes no difference whether options were nonexistent or simply not exercised." *Id.* at 15.

39. 406 U.S. at 165.

40. *Id.* at 173-75. The Court suggested that the applicable test in this type of case was a dual one involving a determination of the legitimate state interest promoted by the classification, and an examination of the fundamental personal rights possibly endangered by the classification. *Id.* at 173. The basis for the Court's holding, however, appeared to be that the classification bore "no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve." *Id.* at 175.

41. *See* New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973) (per curiam). *But see* Jimenez v. Weinberger, 417 U.S. 628 (1974). In *Gomez,* a Texas law which granted legitimate children a judicially enforceable right to support from their natural fathers while denying that right to illegitimate children was held unconstitutional. 409 U.S. at 538. The *Gomez* Court did not specify what equal protection standard it applied, although the Court did cite *Levy* and *Weber* as support for its holding. *Id.* at 537-38 (citations omitted). The Court noted that the state had a legitimate concern with problems of proof of paternity, but instead of determining whether this interest was rationally related to the classification, the Court simply concluded that such problems cannot "be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Id.* at 538 (citations omitted).

In *New Jersey Welfare Rights Organization,* a New Jersey welfare assistance program, which in effect denied benefits to most illegitimate children, was found to violate the equal protection clause. 411 U.S. at 621. The Court reasoned that the decisions in *Levy, Weber,* and *Gomez* compelled this conclusion since illegitimate children had as great a need for the benefits of the program as legitimate children. *Id.* at 620-21. Again, the Court did not consider whether the classification furthered the asserted purposes of the statute.

42. 417 U.S. 628 (1974).

43. *Id.* at 637.

44. 42 U.S.C. § 402(d)(3) (1970).

45. *Id.* § 416(h)(3).

analysis, the *Jimenez* Court was particularly stringent in scrutinizing the relationship between the classification and its asserted objectives.[46]

Subsequently, the Court in *Mathews v. Lucas*[47] upheld the constitutionality of certain other provisions of the Social Security Act[48] that were challenged as denying equal protection to illegitimates.[49] These provisions "conditioned the eligibility of certain illegitimate children for a surviving child's insurance benefits upon a showing that the deceased wage earner was the claimant child's parent and, at the time of his death, was living with the child or contributing to his support."[50] In contrast, legitimate children and certain other classes of illegitimate children enjoyed a statutory presumption of dependency.[51] The Court found that the statute did "not broadly discriminate between legitimates and illegitimates without more," but was rather "carefully tuned to alternative considerations."[52] The Court's detailed review of the relationship between the statutory classification and its asserted purposes suggests that the traditional version of the rational basis standard was not being applied.[53] The opinion was, however, marked by a deferential tone.[54] In addition, the *Mathews* Court made it clear that illegitimacy would not be considered a suspect classification requiring strict scrutiny.[55]

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46. 417 U.S. at 633-37. The Court apparently considered it necessary to be extremely precise in identifying the statutory objective. *Id.* at 633-34. After a careful examination of the social security provision in question, *id.* at 634-35, the Court rejected the statutory interpretation proposed by the government because it conflicted with what the Court determined to be the underlying purpose of that scheme: "to provide support for dependents of a disabled wage earner," regardless of whether that support was "enjoyed prior to the onset of disability." *Id.* at 634. In analyzing whether the statutory scheme furthered this purpose, the Court was careful to note that the statute not only distinguished between legitimate and illegitimate children, but also between two *sub*classes of illegitimate children. *Id.* at 635. It was this subclassification that was found to be irrational. *Id.* at 637. The Court, refusing to hypothesize facts that might justify the subclassification, noted:

> [F]or all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws . . . .

Id. The Court did not consider this to be strict scrutiny, however, and, indeed, did not even reach the argument that illegitimacy is a suspect classification and thus one which would consistently be subject to strict scrutiny. *Id.* at 631.

47. 427 U.S. 495 (1976).

48. *Id.* at 516 (construing 42 U.S.C. §§ 402(d)(1), (3), 416(e), 416(h)(1)(B), 416(h)(2)(A), (B), 416(h)(3) (1970 & Supp. IV 1974)).

49. 427 U.S. at 502.

50. *Id.* at 497.

51. 42 U.S.C. § 402(d)(3) (1970). *See* 427 U.S. at 498-99.

52. 427 U.S. at 513.

53. *Id.* at 510-16.

54. *Id.* at 516. This was evidenced by the Court's statement: "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." *Id.* at 516.

55. *Id.* at 504. The Court recognized that illegitimacy is akin to other suspect classifications such as race or national origin in that it is "a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation

The *Trimble* Court majority opinion began with a brief review of the range of equal protection standards that might be applied to classifications based on illegitimacy.[56] The principal standards were identified as the minimum rationality standard,[57] "stricter" scrutiny,[58] and "strictest" or "most exacting" scrutiny.[59] The Court concluded that " 'less than strictest scrutiny' " was the applicable test in the instant case and noted that this standard was " 'not a toothless one.' "[60]

Applying this test, the Court first examined the relationship between the statutory classification and the purported state interests.[61] The Court determined that section 12 failed to promote the state's interest in encouraging legitimate family relationships since " 'penalizing the illegitimate child is an ineffectual — as well as unjust — way of deterring the parent.' "[62] The majority criticized the Illinois Supreme Court's decision in *Karas* for failing to make more than a cursory examination of the relationship between the statute and this state purpose.[63] The Court also made the same criticism of its own opinion in *Labine,* on which the Illinois Supreme Court had relied.[64]

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to the individual's ability to participate in and contribute to society." *Id.* at 505. However, the majority expressed the view that its refusal to give illegitimacy suspect status was warranted. *Id.* at 505-06. The court explained:

> [P]erhaps 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, . . . discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.

Id. at 506 (footnote omitted).

56. 430 U.S. at 766-67. The argument made in appellants' *amicus* brief in *Karas* that § 12 discriminates on the basis of race was not advanced in *Trimble* and therefore was not considered by the Court. *Id.* at 765 n.10.

57. *Id.* at 766-67. The Court explained that under this standard the minimum requirement is " 'that a statutory classification bear some rational relationship to a legitimate state purpose.' " *Id.,quoting* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972).

58. 430 U.S. at 767. This level of scrutiny was said to be appropriate where " 'statutory classifications approach sensitive and fundamental personal rights . . .' " *Id., quoting* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972).

59. 430 U.S. at 767. The Court was referring to the "strict" scrutiny applied to suspect classifications. *Id.* (citation omitted). *See* note 17 *supra.*

60. 430 U.S. at 767, *quoting* Mathews v. Lucas, 427 U.S. at 510. The view expressed in *Lucas* that illegitimacy classifications are not suspect was reaffirmed in *Trimble.* 430 U.S. at 767 (citations omitted).

61. 430 U.S. at 767-73. The purported state interests were in promoting legitimate family relationships, and in establishing an efficient method for the distribution of property at death. *Id.*

62. *Id.* at 769-70, *quoting* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

63. 430 U.S. at 768-69.

64. *Id.* The Louisiana intestate succession statute upheld in *Labine* was almost identical to the Illinois statute contested in *Trimble. See* text accompanying notes 4-6 & 34 *supra.* The *Labine* Court indicated that the Louisiana statute would promote the state's interest in encouraging legitimate family relationships. 401 U.S. at 538. *See* note 35 *supra.* The *Trimble* Court attempted to explain the inconsistency between its conclusions in *Labine* and *Trimble* as to the relationships between the statutes and this state interest. 430 U.S. at 768-69. The majority initially distinguished the Louisiana law from § 12, but ultimately concluded that the Louisiana law may have been "misguided" in its "attempt to deter illegitimate relationships." *Id.* at 768-69

The state's interest in an accurate method of property disposition was also found not to justify section 12.[65] Although the *Karas* court had relied on *Labine* for this justification as well,[66] the majority viewed the state court's analysis of the relation between section 12 and the state's second major objective as inadequate.[67] The Court acknowledged the state's need "to draw 'arbitrary lines . . . to facilitate potentially difficult problems of proof.' "[68] The majority used a type of balancing test,[69] however, and determined that the state's legitimate concern with problems of proof could not be allowed " 'to shield otherwise invidious discrimination.' "[70] Analyzing section 12 to see whether it was " 'carefully tuned to alternative considerations',"[71] and not merely discriminatory without more,[72] the Court concluded that section 12 did not satisfy this standard since "[t]he reach of the statute extends well beyond the asserted purposes."[73]

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n.13. In the text of the opinion, the *Trimble* Court reiterated this view, noting that in the decisions which followed *Labine* it was determined that states could not "attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships." *Id.* at 769. *See, e.g.,* Mathews v. Lucas, 427 U.S. 495 (1976); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

65. 430 U.S. at 770-73.

66. 61 Ill. 2d at 48, 329 N.E.2d at 238 (citation omitted). The Illinois Supreme Court, concerned with the difficulty of establishing paternity and the related risk of spurious claims, held that the different treatment accorded intestate succession by illegitimates from their mothers was justified on the theory that proof of maternity is more easily obtained. *Id.* at 52-53, 329 N.E.2d at 240-41. According to one expert on illegitimacy, this assumption is not an invalid one. H. KRAUSE, *supra* note 1, at 82.

The *Trimble* Court noted that *Labine* had been limited in its precedential force by subsequent cases that had recognized that "judicial deference is appropriate" when a statute challenged under the equal protection clause deals with the " 'determination of the valid ownership of property left by decedents . . . .' " 430 U.S. at 767 n.12, *quoting* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170 (1972). The Court reaffirmed that position, but contended that "there is a point beyond which such deference cannot justify discrimination." 430 U.S. at 767 n.12.

67. 430 U.S. at 770-71. According to the majority, this inadequacy was evidenced by the fact that the statute unnecessarily included certain categories of illegitimate children of intestate men whose inheritance rights could be recognized without encountering any of the difficulties that the state purportedly hoped to avoid by making the classification. *Id.*

68. *Id.* at 771 (citations omitted).

69. *Id.* at 771. This balancing was illustrated by the Court's statement: "The judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area." *Id.*

70. *Id., quoting* Gomez v. Perez, 409 U.S. 535, 538 (1973).

71. 430 U.S. at 772, *quoting* Mathews v. Lucas, 427 U.S. 495, 513 (1976). *See* text accompanying note 52 *supra.*

72. 430 U.S. at 772.

73. *Id.* at 772-73. The Court focused on the facts of the instant case in supporting this conclusion. *Id.* at 772. Gordon had been found, in a 1973 state court paternity suit, to be Deta Mona's father. *Id. See* text accompanying note 3 *supra.* Proof of paternity was therefore not an issue in her case and the fact that it might be a highly problematic issue in other cases was not considered sufficient justification for the blanket disinheritance of illegitimate children whose fathers die intestate. 430 U.S. at 772. The Court did recognize, however, that proof of paternity might be "unduly burdensome" under certain circumstances and indicated that "[o]ur holding today goes only to those forms of proof which do not compromise the States' interests." *Id.* at 772 n.14.

The Court next analyzed the Illinois court's reliance on the proposition, established in *Labine*,[74] that the absence of an insurmountable barrier preventing an illegitimate child from inheriting part of her father's estate is "constitutionally significant."[75] In rejecting this proposition, the majority stated that a law which cannot pass constitutional muster under traditional equal protection analysis is not rendered constitutionally acceptable by virtue of the absence of insurmountable barriers under hypothetical circumstances.[76] The Court did note that it had scrutinized section 12 "more critically than the Court examined the Louisiana statute in *Labine*."[77] Furthermore, the majority stated: "[T]o the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls."[78]

Finally, the Court dealt with the argument that section 12 should be sustained because it mirrors the presumed intentions of Illinois citizens.[79] Finding that the desire to mirror citizens' intentions was not one of the Illinois legislature's objectives in enacting the statute,[80] the Court declined to resolve the question of whether presumed intent could ever justify a classification such as that made in section 12.[81] The Court did, however, express strong doubts as to whether a state could, "by invoking the theory of 'presumed intent,' "[82] constitutionally place "the burden of inertia in writing a will"[83] on a disadvantaged group such as illegitimates.[84]

Justice Rehnquist, in a dissenting opinion,[85] criticized the majority's mode of equal protection review, arguing that it was not clear what level of scrutiny had been applied.[86] The dissent was particularly critical of the Court's analysis of the relationship between the state's purposes and the

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74. *See* note 38 and accompanying text *supra*.

75. 430 U.S. at 773. The Illinois court had noted that the decedents in *Karas* could have left parts of their estates to their illegitimate children by drafting wills. 61 Ill. 2d at 52, 329 N.E.2d at 240.

76. 430 U.S. at 774. The Court explained the significance placed on the presence or absence of insurmountable barriers in *Labine* and in *Weber* as "somewhat of an analytical anomaly." *Id.* at 773. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170-71 (1972); Labine v. Vincent, 401 U.S. 532, 539 (1972). *See* note 38 and accompanying text *supra*.

77. 439 U.S. at 776 n.17.

78. *Id.*

79. 430 U.S. at 774-76.

80. *Id.* at 775-76. In making this determination, the Court relied on its own examination of the purposes of § 12 and on the analysis of the Illinois Supreme Court, which did not identify "presumed intent" as one of the interests served by the statute. *Id.*

81. *Id.* at 774-75. The Court noted that characterizing the intestate succession law as a "statutory will" based on the "presumed intent" of the state's citizens does not camouflage the fact that it is state, not individual, action and thus subject to the strictures of the fourteenth amendment. *Id.* at 775 n.16.

82. *Id.* at 775 n.16.

83. *Id.*

84. *Id.* (citation omitted).

85. Chief Justice Burger, and Justices Stewart and Blackmun, also dissented. They found the instant case to be "constitutionally indistinguishable from *Labine*," and therefore would have affirmed the judgment of the state court. *Id.* at 776-77 (citation omitted).

86. 430 U.S. at 777 (Rehnquist, J., dissenting).

classification chosen to accomplish them, noting that this is a legislative task which the judiciary is not well-equipped to undertake.[87] Considering the proper standard of review to be the traditional formulation of the rational basis test — that "a statutory discrimination will not be set aside if any state of facts reasonable may be conceived to justify it"[88] — Justice Rehnquist concluded that section 12 should have been sustained since the distinction made therein was "not mindless and patently irrational."[89]

The majority opinion is subject to criticism for its ambiguous treatment of *Labine*. It is submitted that the source of this ambiguity lies in the Court's apparent reluctance to clearly identify the *real* factor which explains the difference in the decisions in *Labine* and in the instant case — that since *Labine*, the Court has given substantially more "bite" to the rational basis test.[90]

The majority's analysis may also be criticized, as suggested by Justice Rehnquist, for the confusion surrounding the equal protection standard employed.[91] The majority labelled the appropriate test for illegitimacy classifications "less than strictest scrutiny."[92] Unfortunately, this label does not indicate precisely where, in the wide realm between minimum and strictest scrutiny, this standard is anchored.[93] Furthermore, the Court accomplished little in the way of eliminating the confusion by describing the standard as one which was "not toothless."[94]

In actuality, it appears that the test applied by the *Trimble* Court is remarkably close to strictest scrutiny,[95] 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.[96] As a result, it is submitted that the once distinct tiers of equal protection analysis have been blurred to such an extent that it is no longer helpful to think in terms of *distinct* levels of scrutiny.

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87. *Id.* at 783-84 (Rehnquist, J., dissenting). The grave defect in such an analysis, according to Justice Rehnquist, is that it "requires a conscious second-guessing of legislative judgment in an area where th[e] Court has no special expertise whatever." *Id. See* notes 61-73 and accompanying text *supra.*

88. *Id.* at 785 (Rehnquist, J., dissenting), *quoting* McGowan v. Maryland, 366 U.S. 420, 426 (1961) (Maryland statute prohibiting sale on Sundays of all merchandise, with certain exceptions, held not to violate equal protection clause as it could not be said that the statutory classifications were without rational relation to purposes of the legislation).

89. 430 U.S. at 786 (Rehnquist, J., dissenting).

90. *See* Gunther, *supra* note 20, at 18-20. A comparison of *Levy*, the first case in which the Supreme Court invalidated an illegitimacy classification on equal protection grounds, with *Jimenez*, decided six years later, reveals a striking difference in the depth of the equal protection analysis employed in the two cases. *See* notes 32 & 42-44 and accompanying text *supra. See also* text accompanying notes 77 & 78 *supra.*

91. 430 U.S. at 781 (Rehnquist, J., dissenting). *See* text accompanying note 86 *supra.*

92. 430 U.S. at 767, *quoting* Mathews v. Lucas, 427 U.S. 495, 510 (1976). *See* note 60 and accompanying text *supra.*

93. *See* note 17 *supra.*

94. 430 U.S. at 767.

95. *See* note 17 *supra.*

96. *See* notes 61-73 and accompanying text *supra.*

It is conceivable that this development might prompt the Court to alter its approach to equal protection analysis. In 1947, Justice Black noted that "the constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task."[97] Despite this observation, it is believed that a "reasoned articulation" of the new trends in equal protection analysis *is* possible.[98]

Scholars and members of the Court have suggested several different approaches that the Court might take to determine whether illegitimacy classifications violate the equal protection clause. It has been proposed, for instance, that illegitimacy be made a suspect classification like race and ancestry.[99] It is submitted, however, that this approach would not be appropriate since the Court would remain locked into the two-tiered framework that has become a source of confusion.[100] Balancing tests have been suggested as an alternative.[101]

The most viable approach in this area may be the "multifactor, sliding scale analysis"[102] suggested by Justice Marshall.[103] Justice Marshall has contended that the Court "has applied a *spectrum* of standards in reviewing discrimination allegedly violative of the Equal Protection Clause."[104] The degree of scrutiny has varied with "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[105] In Justice Marshall's view, once the appropriate degree of scrutiny has been

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97. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947).

98. *See* Gunther, *supra* note 20, at 20. *See also* Note, *supra* note 14, at 780-81.

99. *See* Gray & Rudovsky, *supra* note 27, at 15; Note, *supra* note 14, at 773-75; Note, *Constitutional Law — Due Process and Equal Protection — Classifications Based on Illegitimacy,* 1973 WIS. L. REV. 908, 913-14. It is usually argued that illegitimacy is so akin to other suspect classifications that there is no reason not to give it suspect status. *See* Gray & Rudovsky, *supra* note 27, at 5-7; *Note, supra* note 14, at 774-75; *Note, supra* at 913. The Supreme Court has recognized this argument but is apparently reluctant to expand the number of classifications deemed suspect. *See* notes 55 & 60 and accompanying text *supra.*

100. *See* text accompanying notes 86 & 91-94 *supra.*

101. *See* Shaman, *supra* note 16, at 174; Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945, 989-98 (1975); Note, *supra* note 16, at 1022-23.

Under the balancing approach, the Court would first balance the individual interests involved in the classification against the asserted state purpose. Shaman, *supra* note 16, at 174. If the Court determined that the valid state purpose outweighed the individual rights, it would then consider whether that purpose and the classification were reasonably related. *Id.*

102. This term was coined by Professor Gunther. Gunther, *supra* note 20, at 17-18.

.103. *See* San Antonio Independent 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).

104. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (emphasis added).

105. *Id.* at 99 (Marshall, J., dissenting).

determined by reference to the character of the particular classification, the Court has concentrated upon "the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[106] Furthermore, Justice Marshall has suggested that use of this approach has been particularly evident in the Court's decisions involving equal protection for illegitimate children.[107] It is submitted that if this is the approach which the Court is actually taking, the Court must, if it is to be rational and consistent in its decisionmaking, acknowledge this fact rather than attempt to adhere to the unworkable two-tiered analysis framework.[108]

Since the Court indicated that the *Trimble* holding "goes only to those forms of proof which do not compromise the State's interests,"[109] it appears that a state intestate succession statute could be framed which, without violating the equal protection clause, would deny some illegitimate children

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106. *Id. Quoting* Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). The problem with the two-tier approach to equal protection is that it can deal adequately with the extremes but seems to falter in those cases that fall in between. *See* Note, *supra* note 14, at 758. Thus, application of the deferential rational basis test to business regulations or the application of the strict scrutiny standard to clearly invidious racial classifications, does not give rise to any difficulties. *Compare* Railway Express Agency v. New York, 336 U.S. 106, 109-10 (1949) (city traffic regulation prohibiting operation of vehicles bearing advertisements, except vehicles which advertised business or products of the owner and which were not used primarily for advertising, held not to violate the equal protection clause as there was no basis for finding that the ordinance was not related to the city's interest in eliminating traffic distractions) *with* McLaughlin v. Florida, 379 U.S. 184, 191-93 (1964) (Florida criminal statute prohibiting unmarried interracial couples from habitually occupying the same room at night held to violate the equal protection clause as there was no overriding statutory purpose justifying proscription of the specified conduct only when engaged in by interracial couples). One commentator has noted that

> [s]imple deference tot he legislative will under the traditional rational basis test can appear to offend common notions of justice where, for example, the right threatened is a personal right which, while not protected by the Bill of Rights, is vital to a decent standard of living; or where the classification, while not suspect under judicial precedent, seems to possess the general attributes of a suspect classification.

Note, *supra* note 14, at 758.

107. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 108-09 (1973) (Marshall, J., dissenting). In *Rodriguez*, Justice Marshall commented that "the Court's sensitivity to the invidiousness of the basis for discrimination is perhaps most apparent in its decisions protecting the interests of children born out of wedlock from discriminatory state action." *Id.* at 108 (Marshall, J., dissenting) (citations omitted). Justice Marshall asserted that these decisions supported his conclusion that "th[e] Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification." *Id.* at 109 (Marshall, J., dissenting).

108. *See* 411 U.S. at 109-10 (Marshall, J., dissenting).

109. 430 U.S. at 772 n.14. *See* note 73 *supra*.

the right to inherit from their fathers.[110] It is submitted that alternative subsection (2) of section 2-109 of the Uniform Probate Code[111] accomplishes this result,[112] as the provision appears "carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity."[113]

While the impact of this decision on illegitimate children themselves certainly should not be ignored,[114] it is submitted that the greatest significance of *Trimble* lies in the implications for equal protection analysis that this case contains.

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110. *See* 430 U.S. at 772 n.14. The Court indicated that a state statute that was "carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity" would be constitutionally acceptable. *Id.*

111. UNIFORM PROBATE CODE § 2-109(2) (alternative subsection) (1975 version). That section provides in pertinent part: "a person born out of wedlock is a child of the mother. That person is also a child of the father if: . . . (ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof." *Id.*

112. *See* Note, 69 MICH. L. REV. 112, 117-18 (1970); Note, *supra* note 14, at 777 n.135. It has been suggested that this provision would be valid under either the minimum rationality standard or the test of strict scrutiny. *See* Note, *supra,* at 117.

113. 430 U.S. at 772 n.14. *See* note 110 *supra.* One commentator has taken the position that this provision of the Uniform Probate Code gives all children "the right to inherit equally from their natural parents," and "merely establishes a burden of proof of paternity in the child-father relationship which the illegitimate must meet before he can inherit from his natural father." Note, *supra* note 112, at 117 (footnote omitted). Furthermore, the "clear and convincing" standard set out in alternative subsection (2) of § 2-109 has been noted as being "consistent with other burdens of proof relating to legal relationships involving deceased persons," and thus probably constitutional. *Id.* at 118 (footnote omitted).

114. Professor Krause has noted that allowing the illegitimate to inherit from his father gives him access to an important "private resource" — his parent — "that ought to be available to give him an even start in life." Krause, *Bringing the Bastard Into the Great Society — A Proposed Uniform Act on Legitimacy,* 44 TEXAS L. REV. 829, 829-30 (1966).