CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Via Sapientiae: The Institutional Repository at DePaul University

DePaul University
University Libraries

DePaul Law Review

Volume 27
Issue 1 *Fall 1977*

Article 10

Recognizing the Father-Illegitimate Child Relationship for Intestate Succession - Trimble v. Gordon

Michael J. Zarski

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation

Michael J. Zarski, *Recognizing the Father-Illegitimate Child Relationship for Intestate Succession - Trimble v. Gordon*, 27 DePaul L. Rev. 175 (1977)
Available at: https://via.library.depaul.edu/law-review/vol27/iss1/10

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

RECOGNIZING THE FATHER-ILLEGITIMATE CHILD RELATIONSHIP FOR INTESTATE SUCCESSION— *TRIMBLE V. GORDON*

Discrimination against illegitimate children, as a class, has been a common and well-accepted element of the law in many areas.[1] Although the unreasonableness of this form of discrimination has received increasing recognition from both legislatures and courts,[2] some discriminatory statutes persist[3] and, in two instances within the last ten years, have received the express sanction of the United States Supreme Court.[4] Recently, however, the Supreme Court applied an equal protection analysis to eliminate a measure of the remaining discrimination found in intestate succession statutes.[5]

---

1. A cursory analysis of substantive law illustrates that legitimate children enjoy preferred status over illegitimate children in several areas of the law such as: citizenship, 8 U.S.C. § 1409(a), (b) (1970); pension benefits, ILL. REV. STAT. ch. 108½, § 8-120 (1975); inheritance and gift tax, N.J. STAT. ANN. § 54:34-2 (West Supp. 1977-1978); Bank of Montclair v. McCutcheon, 107 N.J. Eq. 564, 152 A. 379 (1931) (illegitimates excluded from low estate tax rate for "children"); adoption, N.Y. DOM. REL. LAW § 111(a) (McKinney Cum. Supp. 1976-1977); child's right to support, VA. CODE ANN. § 20-61.1 (1975). *See* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 21-42 (1971) [hereinafter cited as KRAUSE]. *See generally* Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962). *See* notes 2 & 24 *infra* for cases which struck down the legitimate-illegitimate distinction in other areas of law.

2. *See, e.g.*, Bales v. Elder, 118 Ill. 436, 11 N.E. 421 (1887), which stated:

> The common law, excluding a bastard from inheritance from any person, remained the law of this state until section 53, chapter 109, entitled "Wills," of the Revised Statutes of 1845, was enacted, which provided that a bastard might inherit the estate of a mother, when she died unmarried, leaving an estate.

Id. at 438-39, 11 N.E. at 421. *See also* Jimenez v. Weinberger, 417 U.S. 628 (1974) (social security benefits); Gomez v. Perez, 409 U.S. 535 (1973) (paternal support); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (workmen's compensation); Stanley v. Illinois, 405 U.S. 645 (1972) (custody); Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death); DeSylva v. Ballentine, 351 U.S. 570 (1956), *rehearing denied*, 352 U.S. 859 (1956) (copyright); Hutchinson Inv. Co. v. Caldwell, 152 U.S. 65 (1894) (public land).

3. *See* KRAUSE, *supra* note 1, at 25-26: "Residual statutory discrimination between legitimate and illegitimate offspring with respect to inheritance from the mother is very uncommon. In most states, however, the illegitimate child still cannot inherit from his father, other than by will." *Id.* at 25 (footnotes omitted).

4. Mathews v. Lucas, 427 U.S. 495 (1976), involved alleged discrimination in the Social Security Act against a sub-class of illegitimates who were required to show dependency before receiving surviving children's benefits. Legitimate children and certain illegitimates were not required to submit individualized proof of dependency. The Court upheld the statute because "the challenged classifications were justified as reasonable empirical judgments which were consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death." *Id.* at 510. Labine v. Vincent, 401 U.S. 532 (1971), upheld a Louisiana intestate succession statute that denied equal inheritance rights to illegitimates by holding that the statute furthered the state's interests in the protection and strengthening of family life and in the accurate disposition of property.

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

In *Trimble v. Gordon*, the Supreme Court was presented with an Illinois intestate succession statute excluding illegitimates from sharing in the estates of their fathers unless the natural parents intermarried and the father acknowledged the illegitimate child.[6] The appellant, Deta Mona Trimble, was an illegitimate child whose paternity had been adjudicated in a prior child support proceeding.[7] Because the father, Sherman Gordon, had neither married the mother nor formally acknowledged his daughter, she received no portion of Gordon's estate upon his death intestate.[8] Instead, the estate was divided among Gordon's parents and collateral relatives.[9] The validity of the statute, section 12 of the Illinois Probate Act, and the disposition of Deta Mona Trimble's father's estate were upheld by the Illinois Supreme Court.[10] The Illinois court relied on the United States Supreme Court's opinion in *Labine v. Vincent* which upheld a Louisiana intestate succession statute that discriminated against illegitimates.[11]

The United States Supreme Court, however, invalidated the Illinois statute, stating that the type of discriminatory treatment of illegitimate children embodied in the statute served no valid state interest and "cannot be squared with the command of the equal protection clause of the Fourteenth Amendment."[12] This Note will discuss the appellant's argument that discrimination within a class is unconstitutional, identify the equal protection review applied in

---

6. The relevant portion of the statute provides:

> 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.

ILL. REV. STAT. ch. 3, § 12 (1970). The statute was recodified without material change as ILL. REV. STAT. ch. 3, § 2-2 (Supp. 1976-1977). Since the lower court opinions, briefs, and Supreme Court opinion all referred to the statute as § 12, this Note will continue to do so.

7. 430 U.S. at 764.

8. *Id.*

9. *Id.*

10. *See In re* Estate of Karas, 61 Ill.2d 40, 52, 329 N.E.2d 234, 240 (1975). *Karas* upheld the exclusion of illegitimate children of intestate men by applying minimal scrutiny. The court held the classification rationally related to the state's interests in the promotion of legitimate family relationships and the accurate distribution of property. After *Karas* was decided, the Illinois Supreme Court heard oral arguments for *Trimble*. Since the Court apparently considered the issues adequately discussed in *Karas*, it issued no written opinion in *Trimble*. *See* 430 U.S. at 765.

11. *See* note 4 *supra*.

12. 430 U.S. at 776.

Trimble, and identify other legislative provisions which may still deprive some illegitimates of an interest in their father's estate.

INTRA-CLASS DISCRIMINATION

In *Trimble*, the appellant argued that the Illinois statute violated the equal protection clause of the Fourteenth Amendment in that some illegitimates were treated differently than others.[13] In the past, the Supreme Court has held that "intra-class" discrimination, or the treatment of some members of a class differently from other members of the same class, is unconstitutional.[14] In section 12, the sub-class of illegitimates whose fathers died intestate suffered the loss of succession rights. The discrimination was based on the sex of the decedent parent.[15]

Two United States Supreme Court cases support the argument that some disparity between illegitimates, predicated on the gender of the decedent parent, is unconstitutional. *Jimenez v. Weinberger*[16] held that discrimination against a sub-class of illegitimates was a violation of equal protection guaranteed by the due process clause of the Fifth

---

13. The appellant posed this question in her brief:

> Does Section 12 of the Illinois Probate Act, providing that an illegitimate child whose father dies intestate is not his heir, but that an illegitimate child whose mother dies intestate is her heir, violate the Equal Protection Clause of the Fourteenth Amendment by discriminating invidiously among illegitimate children based on the sex of the decedent?

Brief for Appellant at 3, Trimble v. Gordon, 430 U.S. 762 (1977).

14. This form of discrimination is the analytical equivalent of the due process irrebuttable presumption doctrine. *See* Jimenez v. Weinberger, 417 U.S. 628, 638-41 (1974) (Rehnquist, J., dissenting); Comment, *Jimenez v. Weinberger: Applying a New Equal Protection Test*, 10 NEW ENG. L. REV. 561 (1974). An irrebuttable presumption is a conclusive presumption of one fact, given proof of another fact. *See generally* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (holding irrebuttable presumption of disability applied to pregnant teachers unconstitutional); Vlandis v. Kline, 412 U.S. 441 (1973) (holding irrebuttable presumption of non-residency applied to students unconstitutional). Expressed as an irrebuttable presumption, section 12 takes the failure of an illegitimate's alleged father to marry the child's mother and acknowledge the child as conclusive proof that the man is not the child's father. Therefore, the child has no claim against the man's estate. The irrebuttable presumption doctrine in equal protection review has been widely criticized. *See, e.g.*, Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974).

15. *See* Green v. Woodard, 40 Ohio App.2d 101, 318 N.E.2d 397 (1974) (intestate succession statute which was construed to exclude illegitimates of intestate men held unconstitutional): "There is also discrimination within the class between various types of illegitimates, such as those illegitimates inheriting from and through the mother, and those inheriting from and through the father. It is this latter intra-class discrimination that is under attack in this case." *Id.* at 113, 318 N.E.2d at 406.

16. 417 U.S. 628 (1974).

Amendment.[17] *Weinberger v. Wiesenfeld*[18] suggested in dicta that discrimination against children based on the gender of the child's decedent parent was impermissible.[19]

The Supreme Court did not address this issue in its opinion in *Trimble*. However, the holding in *Trimble* fell short of requiring that all illegitimates be treated alike.[20] Thus, intra-class discrimination apparently was not held unconstitutional in this case. In addition, intra-class discrimination analysis has been criticized and the Court may be abandoning the approach.[21] Their action in *Trimble* was foreshadowed by a 1976 illegitimacy case which upheld a challenged statute that discriminated among illegitimates.[22] In *Trimble*, the Supreme Court found other grounds for invalidating the challenged statute.[23]

THE EQUAL PROTECTION ANALYSIS IN *Trimble*

Although this result was consistent with previous case law,[24] *Trimble* did not apply the analysis of the earliest illegitimacy decisions. Those decisions had intimated that the Court was treating illegitimacy

---

17. Chief Justice Burger, speaking for the majority, illustrates this principle, stating:

> Thus, for all this 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 guaranteed by the due process provision of the Fifth Amendment.

Id. at 637.

18. 420 U.S. 636 (1975).

19. In an opinion written by Justice Brennan, the Supreme Court struck down section 402 of the Social Security Act which provided for different treatment of the survivors of men and women wage-earners, stating: "Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender-based distinction of § 402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent." *Id.* at 651.

20. *Trimble* was critical of the difference embodied in section 12 between the rights of illegitimate children of intestate women and the rights of illegitimate children of intestate men. 430 U.S. at 768 n.13.

21. *See* note 14 *supra*.

22. *See* Mathews v. Lucas, 427 U.S. 495 (1976), and note 4 *supra*.

23. *See* text accompanying notes 24-60 *infra*.

24. Classifications of illegitimate children were struck down in ten of twelve cases. *See* Mathews v. Lucas, 427 U.S. 495 (1976) (upholding requirement of individual proof of dependency for unacknowledged illegitimates claiming surviving children's benefits); Jimenez v. Weinberger, 417 U.S. 628 (1974) (invalidating statute which discriminated between two classes of illegitimates in granting disability benefits); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (invalidating state aid program which limited benefits to married couples with minor children); Gomez v. Perez, 409 U.S. 535 (1973) (illegitimates granted same support right given legitimate children); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (prohibiting state from denying workmen's compensation benefits to dependent unacknowledged

as a suspect classification,[25] requiring the application of strict scrutiny, the higher of two equal protection standards of review.[26] To justify the use of a suspect classification in a statute, the state would have the burden of showing that the classification bore not merely a rational relation to a legitimate state interest, but further, that the classification was necessary to promote a compelling state interest.[27] Subsequent decisions, however, explicitly denied that illegitimacy had suspect classification status.[28] Therefore, under two-tier analysis, since neither a suspect classification nor a fundamental interest[29] was involved the classification was subject to minimal scrutiny, afforded a presumption of constitutionality, and evaluated by the rational basis test.[30] Under the rational basis test, the classification would be held

---

illegitimates); Labine v. Vincent, 401 U.S. 532 (1971) (upholding the state's right to exclude illegitimate children from an interest in father's intestate property); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (invalidating statute denying mother's cause of action for illegitimate child's wrongful death); Levy v. Louisiana, 391 U.S. 68 (1968) (invalidating statute denying illegitimate's cause of action for wrongful death of mother); Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973) (prohibiting exclusion of after-born illegitimates from parent's social security disability benefits); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.) (prohibiting disproportionate reduction in social security benefits applied to illegitimates), *aff'd*, 409 U.S. 1069 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.) (prohibiting discrimination against illegitimates in payment of benefits on death of wage-earning parent), *aff'd*, 409 U.S. 1096 (1972).

25. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), which defined a suspect classification as one: "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); McLaughlin v. Florida, 379 U.S. 184 (1964) (race); Korematsu v. United States, 323 U.S. 214 (1944) (nationality); *See* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120 (1969).

26. *See* KRAUSE, *supra* note 1, at 70; Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Ins. Co.*, 118 U. PA. L. REV. 1, 4-7 (1969).

27. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (no compelling state interest to justify predicating welfare benefits on citizenship or long-term residency); Loving v. Virginia, 388 U.S. 1 (1967) (no compelling state interest to justify ban on interracial marriage); Korematsu v. United States, 323 U.S. 214 (1944) (national security may constitute a compelling state interest).

28. *See* Trimble v. Gordon, 430 U.S. 762, 767 (1977); Mathews v. Lucas, 427 U.S. 495 (1976). "We therefore adhere to our earlier view, *see Labine v. Vincent*, 401 U.S. 532 (1971), that the Act's discrimination between individuals on the basis of their legitimacy does not 'command extraordinary protection from the majoritarian political process' which our most exacting scrutiny would entail." *Id.* at 506.

29. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal procedural rights); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); *see generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

30. *See, e.g.*, Williamson v. Lee Optical of Oklahoma, Inc. 348 U.S. 483 (1955) (act regulating opticians upheld); F.S. Royster Guano v. Virginia, 253 U.S. 412 (1920) (state revenue law upheld); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) (act protecting natural mineral springs upheld).

valid if any set of facts could be conceived to show the classification embodied in the statute rationally related to a legitimate state interest.[31] During the years that the two-tiered equal protection analysis was consistently applied, the level of scrutiny seemed to determine the outcome. That is, the application of strict scrutiny nearly always resulted in the invalidation of the statute on equal protection grounds, while the application of the minimal level of scrutiny invariably resulted in a holding of validity.[32]

The application of these tests would either allow courts to apply strict scrutiny and consequently protect the rights of illegitimates, or to apply minimal scrutiny and grant legislatures wide latitude in dealing with birth out of wedlock. As a result of its dissatisfaction with these limited alternatives, the United States Supreme Court has in effect adopted an intermediate level of scrutiny to apply to some classifications although it continues to articulate the two-tier approach to equal protection analysis.[33] Several theories of equal protection analysis include an intermediate level of scrutiny.[34]

---

31. *See, e.g.*, Jimenez v. Richardson, 353 F. Supp. 1356 (N.D. Ill. 1973), *vacated and remanded sub nom.* Jiminez v. Weinberger, 417 U.S. 628 (1974). The court articulated the test as follows:

> The traditional test consists of a two-part inquiry that first identifies the purpose or objectives of a legislative scheme and then asks whether the challenged discrimination bears a rational relationship to one of those purposes. Moreover, the purpose need not have been a main objective of the statute or even one that the legislators had in mind when they passed it.

Id. at 1360. *See also* McGowan v. Maryland, 366 U.S. 420 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

32. *See* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria*, 27 VAND. L. REV. 971, 995 (1974). Until the Court's approach changed, only one case found a classification invalid by applying minimal scrutiny. *See* Morey v. Doud, 354 U.S. 457 (1957) (act which exempted American Express Co. money orders from regulation and licensing held violative of equal protection).

33. *See* Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 385, 405 (1976); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479 (1974); Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155 (1973). The Court has also applied intermediate scrutiny to sex classifications. *See* Reed v. Reed, 404 U.S. 71 (1971). *See generally* Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617 (1974). *But see* Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality applied strict scrutiny in striking down statute requiring female members of the armed services to prove dependency of spouse).

34. One theory is Justice Marshall's sliding scale theory, articulated in his dissenting opinions in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70-133 (1973), and Dandridge v. Williams, 397 U.S. 471, 508-30 (1970). Marshall's analysis calls for balancing the rights threatened by the classification against the importance of the state interests. A right will be given more weight as it approaches a fundamental right, while a state interest will be given more weight as it approaches a compelling state interest. *See* note 27 *supra*. An over-inclusive classification affecting more individuals than necessary to further the objective of the law, or an under-inclusive classification failing to reach some individuals who should be reached in order to

The theory that most accurately describes the Supreme Court's approach in *Trimble* is Professor Gerald Gunther's means-oriented analysis.[35] Gunther's approach focuses on the relation between the classification and the state interest. The classification, which is the "means" for advancing the state interest, must bear an actual, rational relationship to articulated state interests in order to satisfy means-oriented intermediate scrutiny.[36] This test is similar in operation to minimal scrutiny but more difficult to satisfy because any interest unarticulated by the state will not be considered in the analysis.[37] Moreover, the court is required to discount any articulated interest if it appears that the articulated interest was only designed to obscure some other unconstitutional purpose which the classification really furthers.[38] In addition, similar to the test of strict scrutiny, the constitutionality of the statute will not be presumed.[39] The means-oriented approach results in more deference to the state than either strict scrutiny or other forms of intermediate scrutiny. It leaves the state free to employ any classification which furthers a legitimate state interest regardless of the availability of less restrictive alternative classifications that effectively further the same state interest.[40]

APPLICATION OF MEANS-ORIENTED ANALYSIS IN *Trimble*

Even though the means-oriented middle tier test is less restrictive than strict scrutiny or other intermediate tests, application of this analysis resulted in the invalidation of the statute challenged by *Trimble*. Before testing the rationality of the classification as a means of advancing the actual state interests, the Court examined the four state interests that allegedly were promoted by the statute.[41]

---

further the objective of the law, would not be tolerated. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). Nor would a state interest be considered if held to be a mere rationalization designed to conceal a genuine, invalid purpose. *Id.*

35. *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 (1972). According to Gunther: "The intensified means scrutiny would, in short, close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry." *Id.* at 24. The nature of intermediate scrutiny applied in other illegitimacy cases is discussed in: Note, *Illegitimacy and Equal Protection: Two Tiers or An Analytical Grab-Bag?*, 7 LOY. CHI. L.J. 754 (1976); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 497 (1974).

36. *See* Gunther, *supra* note 35, at 20-21.

37. *Id.* at 21.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See* 430 U.S. at 767-68, 774-76.

The Supreme Court determined that the state's dual purpose in enacting section 12 was to provide an intestate succession system which was more equitable to illegitimates than the previous system and to protect intestate decedents' property from fraudulent claims.[42] The Supreme Court rejected the appellee's argument that the exclusion of illegitimates in section 12 was an attempt to express the presumed intent of parents who die intestate.[43] Fathers of illegitimates are presumed to know that their illegitimate offspring would not inherit from them absent a will. The fathers presumably agree to this statutory exclusion by failing to execute a will, according to the appellee.[44] The Court ignored the merits of this argument and held that the Illinois legislature did not consider "presumed intent" as a purpose when it passed section 12.[45] The Supreme Court based this decision on the absence of the "presumed intent" rationale from the Illinois Supreme Court's articulation of purposes.[46] And since the Court held that furthering the presumed intent of illegitimates' fathers was not the purpose of the statute, even a substantial rational relation between exclusion of illegitimate children of intestate men and the intent of such men would not require the Court to uphold the statute using the means-oriented test.[47]

The Court also questioned the contention that the purpose of section 12 was to promote legitimate family relationships, even though the Illinois Supreme Court had held otherwise.[48] The United States Supreme Court stated that "[p]enalizing children as a means of influencing their parents seems inconsistent with the desire of the Illinois Legislature to make intestate succession law more just to il-

---

42. *Id.* at 776.

43. *Id.* at 774-76.

44. *Id.* at 774.

45. *Id.* at 774-75.

46. The Supreme Court reasoned that:

> The theory of presumed intent is not relied upon in the careful opinion of the Illinois Supreme Court examining both the history and the text of § 12. This omission is not without significance, as one would expect a state supreme court to identify the state interests served by a statute of its state legislature.

Id. at 775. Had "presumed intent" been found a purpose of section 12, the Supreme Court still may have ruled it an unacceptable justification for discrimination. *See* Mathews v. Lucas, 427 U.S. 495 (1976); Shelly v. Kraemer, 334 U.S. 1 (1948); Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975). In addition, the presumption itself may be invalid. The 1968 Omnibus Survey conducted in Illinois by the University of Illinois found that 64% of the respondents agreed that illegitimates should inherit from intestate fathers as if they were of legitimate birth. *See* KRAUSE, *supra* note 1, at 167.

47. *See* note 37 *supra*.

48. *See In re* Estate of Karas, 61 Ill.2d 40, 48, 329 N.E.2d 234, 238 (1975) (upholding section 12).

legitimate children."[49] This articulated legitimate state interest failed as a justification for excluding illegitimates because of a lack of a rational relationship between the two.[50] Also, the Supreme Court felt that making the intestate succession system more just to illegitimates and promoting legitimate family relationships were such incongruous goals that the Illinois legislature would not have attempted to achieve both goals in the same statute.

The Supreme Court did accept the state's interest in the accurate disposition of property by preventing fraudulent claims against intestate decedents' estates as one of the actual purposes for section 12.[51] However, the Court held that this state interest was insufficient to justify the exclusion of illegitimates of intestate men.[52] While focusing on the relation between the classification and the state purpose, the Supreme Court appeared to hold that section 12 was unconstitutional because some illegitimates deprived of inheritance rights posed no threat to the state's interest in accurate property distribution.[53] In other words, the classification was over-inclusive.[54] It encompassed more illegitimates than were needed to achieve the purpose of the statute. Over-inclusiveness is a factor in strict scrutiny,[55] but not significant in Gunther's means-oriented intermediate scrutiny.[56]

The presence of this apparently incongruous factor in the Supreme Court's analysis was due to the Court's determination of more than a single purpose for section 12.[57] The dual purpose of section 12 required the Court to test the rationality of the classification in relation to both of the partially conflicting purposes: (1) advancing the rights of illegitimates; and (2) protecting decedents' property from fraudulent claims. Had the Court determined that the only purpose of section 12 was to improve the succession rights of illegitimates, then the

---

49. 430 U.S. at 768 n.13.

50. "No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society. The flaw in the analysis lies elsewhere . . . . [T]he court below did not address the relation between § 12 and the promotion of legitimate family relationships, thus leaving the constitutional analysis incomplete." *Id.* at 769.

51. *See* note 42 and accompanying text *supra.*

52. 430 U.S. at 770-73.

53. *Id.* at 771.

54. *See* note 34 *supra* for a definition of over-inclusiveness.

55. *See* Gunther, *supra* note 35, at 24.

56. *See* text accompanying note 40 *supra.*

57. The position of the Court was:

> [W]e find in § 12 a primary purpose to provide a system of intestate succession more just to illegitimate children than the prior law, a purpose tempered by a secondary interest in protecting against spurious claims of paternity.

430 U.S. at 776.

rationality of the classification would have been tested only against that purpose. Consequently, no rational reason would exist for excluding any illegitimate. But the Court, in an effort to define the legislative purpose as accurately as possible, acknowledged that prevention of fraudulent claims against decedents' estates was a secondary purpose of section 12.[58] The finding of over-inclusiveness served merely to demonstrate how far a classification could go as a means of implementing a secondary state purpose before the classification unconstitutionally interfered with the conflicting primary purpose. The Supreme Court in *Trimble* found that the only illegitimates still permissibly excluded are those who threaten the state's secondary purpose in preventing fraudulent claims.[59] The Court did not specify which illegitimates threaten the state's interest, leaving that determination to the state legislatures.[60] Illegitimates such as Deta Mona Trimble, whose paternity was adjudicated before her father's death, clearly present no such threat of a fraudulent claim.

DRAWBACKS OF MEANS-ORIENTED ANALYSIS

The application in *Trimble* of the means-oriented approach to equal protection analysis illustrates two related problems with the approach. The first problem is identifying the purpose of the statute and determining which one of several purposes was of primary importance and which were secondary considerations.[61] Ranking the purposes of a statute requires judicial value judgments which Gunther's approach was designed to avoid.[62] While a clear legislative history may alleviate the need for such judgments, a court is still required to

---

58. *Id.*

59. *Id.* at 772.

60. *Id.* at 771.

61. *See generally* Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977). "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was a 'dominant' or 'primary' one." *Id.* at 265.

Justice Rehnquist recognized this problem in his dissent in *Trimble:*

> The appropriate "scrutiny" in the eyes of the Court, appears to involve some analysis of the relation of the "purpose" of the legislature to the "means" by which it chooses to carry out that purpose. . . . The question of what "motivated" the various individual legislators to vote for this particular section of the Probate Code, and the Governor of Illinois to sign it, is an extremely complex and difficult one to answer. . . .

430 U.S. at 781-83 (Rehnquist, J., dissenting).

62. According to Gunther: "An invigorated old equal protection scrutiny would not involve adjudication on the basis of fundamental interests with shaky constitutional roots. Nor would it require a critical evaluation of the relative weights of asserted state purposes." Gunther, *supra* note 35, at 21.

apply some review to such articulated purposes to insure that legitimate state interests are not being merely articulated in order to enact a statute for an otherwise invalid purpose. A second problem is testing the rationality of the classification in relation to a multi-purpose statute.[63] The classification may substantially advance some of the objectives, to the detriment of other objectives. In this situation, a court takes on a difficult task analogous to a legislature's attempts to draft bills which satisfy conflicting interest groups. A court is further hampered by a limitation of resources and input.

Even though the Court overcame these two problems in applying means-oriented middle tier scrutiny, in *Trimble*, the approach was too weak to permit the Court to compel adoption of the least restrictive alternative classification: the exclusion of only those illegitimates who have not established paternity. It is indisputable that the exclusion of other illegitimates, such as those who have not established paternity by the death of their putative father, would thwart some fraudulent claims and thereby further accurate property distribution.[64] The determination of whether this state interest was constitutionally significant enough to warrant the exclusion of such illegitimates was beyond the scope of the means-oriented analysis. Other approaches to equal protection would have allowed the Court to make that determination.[65] The use of means-oriented analysis limited the Court's prohibition to exclusions of illegitimates who clearly did not threaten the accurate distribution of property, leaving the state free to choose any other exclusion.[66]

---

63. Gunther recognized this problem, but offered no solution:

> The call for testing the rationality of means on the basis of state-articulated purposes raises other complications as well. A legislature may legitimately have a multiplicity of purposes, especially in carving exceptions from the scope of a general statute. Court inquiry should not be limited to a primary purpose; subsidiary purposes may also support the rationality of the means.

Gunther, *supra* note 35, at 47.

64. The problem of false paternity claims is not an illusory one:

> Paternity practice has suffered from the old saw to the effect that "maternity is a matter of fact whereas paternity is a matter of opinion." Indeed, this facile phrase is responsible for much of the remaining discrimination against the illegitimate child. It furnishes what seems to be a rational argument against the illegitimate's claim to his father. Unfortunately, applied to current paternity practice, the maxim retains validity.

KRAUSE, *supra* note 1, at 106.

65. Sliding scale analysis would have accomplished this by holding the importance of the illegitimate's rights outweighed the importance of the state interest in property distribution. Strict scrutiny would have accomplished the same thing by holding property distribution not a compelling state interest. *See* notes 25, 27, 34 and accompanying text *supra*.

66. Gunther's model has been criticized on this point. *See* Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

THE SCOPE OF PERTINENT EXCLUSIONS

One category of illegitimates which the state may exclude from an intestate succession scheme would be illegitimates whose paternity had not been adjudicated prior to the putative father's death.[67] The constitutionality of this statutory scheme has been tested and upheld in the state of Indiana.[68] Requiring paternity adjudication before the putative father's death would minimize the illegitimate's chance to secure inheritance rights where the father dies before or immediately after the birth of his child. Furthermore, in a situation where the parents of a child plan to marry after the child has been conceived, the death of the father before the marriage ceremony will result in the child's illegitimate birth and preclude the child from inheriting from his father, contrary to the father's intent.[69]

In addition to exclusions within the intestate succession statute, the states have some degree of freedom in creating requirements of proof of paternity.[70] Proving paternity, of course, remains the primary step for an illegitimate to secure any right against his father.[71] Consequently, even if an intestate succession statute excludes no illegitimates, the child's claim may be barred by operation of the state's paternity statute or case law. One reason why paternity statutes are often unfair to illegitimate children is that the statutes are designed to serve such interests as protecting accused fathers from false claims,

---

67. *See, e.g.*, Indiana's intestate succession statute which provides in relevant part:

> For the purpose of inheritance to, through, and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his father if but only if, (1) the paternity of such child has been established by law, during the father's lifetime; or (2) the putative father marries the mother of the child and acknowledges the child to be his own.

IND. CODE ANN. § 29-1-2-7(b) (Burns 1972).

68. *See* Burnett v. Camden, 253 Ind. 354, 254 N.E.2d 199 (1970) (requirement of paternity adjudication prior to father's death held rationally related to prevention of fraudulent claims), *appeal dismissed & cert. denied*, 399 U.S. 901 (1970). *See also In re* Estate of Pakarinen, 287 Minn. 330, 332, 178 N.W.2d 714, 715 (1970) (upholding statute requiring written declaration by father in addition to paternity adjudication), *appeal dismissed*, 402 U.S. 903 (1971). A similar requirement passed the Illinois House in 1975. *See* Amendment No.1 to H.B. 733, 79th Ill. Gen. Assembly (bill originally introduced March 12, 1975 and amended May 12, 1975).

69. *See generally* Krantz v. Harris, 40 Wis.2d 709, 162 N.W.2d 628 (1968), in which a child whose parents were engaged, but whose father died before either the child's birth or the marriage ceremony, was barred from recovering under the state's wrongful death act because paternity had not been established by written acknowledgement by the father, adjudication of paternity, or admission of paternity by the father in open court.

70. *See* 430 U.S. at 772 n.14.

71. KRAUSE, *supra* note 1. "The problem of ascertaining paternity will always remain the irreducible minimum relevance of birth out of wedlock, and it may be stipulated that 'equal protection' must be limited to those illegitimates whose paternity has been established. . . ." *Id.* at 82.

and aiding the mothers of illegitimates.[72] As was seen in the Illinois intestate succession statute, the illegitimate child's interests are sometimes shortchanged. In fact, the Illinois paternity statute limits the action to the mother in most cases.[73] An illegitimate has no standing to establish his own paternity but must depend on his mother to institute a successful paternity action to secure rights.

Before *Trimble,* the illegitimate depended on the father's will or acknowledgement and marriage to secure inheritance rights.[74] The effect of *Trimble,* then, merely shifts this dependency from the father to the mother.[75] The assumption is that the mother is more likely to look after the interests of her child. This assumption may only be valid as long as the interests of the child coincide with the mother's own interests. A mother's decision to establish paternity of her child may be determined by factors such as avoiding publicity or emotional upset, or the possibility of monetary gain from a settlement.[76] These factors easily could concern the mother more than the child's inheritance rights and may lead the mother to abandon or reject the opportunity to establish her child's paternity.

A further obstacle encountered in paternity statutes of Illinois and many other states is the limitation of paternity actions to a period of years following the birth of the illegitimate child.[77] In Illinois, the

72. *See* Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity,* 36 U. CHI. L. REV. 338, 349-50 (1969).

73. The Illinois statute provides:

> A proceeding to establish the paternity of a child born out of wedlock and to establish and enforce liability for its support, maintenance, education, and welfare shall be instituted in the Circuit Court. Such action may be instituted only on the filing of a complaint in writing (a) by the mother of the child born out of wedlock, (b) by a woman who is pregnant with child, which, if born alive, may be born out of wedlock, or (c) by the Illinois Department of Public Aid in behalf of a minor child who is receiving financial aid under "The Illinois Public Aid Code". . . . No such action may be brought after the expiration of two years from the birth of the child.

ILL. REV. STAT. ch. 106 3/4, § 54 (1975).

74. *See* note 6 *supra.*

75. Most paternity statutes allow the action to be brought by either the mother, guardian, or public officer charged with the care of the child. *See* Note, *Paternity,* J. FAM. L. 611 (1977).

76. KRAUSE, *supra* note 1, at 113.

77. Most states have time limits on paternity actions. *See, e.g.,* COLO. REV. STAT. ANN. § 19-6-101 (1974) (five years); HAW. REV. STAT. § 584-7 (Supp. 1975) (three years); IND. CODE ANN. § 31-4-1-26 (Burns 1973) (two years); KAN. STAT. ANN. § 38-1104 (1973) (one year); KY. REV. STAT. § 406.031 (1972) (three years); MISS. CODE ANN. § 93-9-9 (1972) (one year). *But see* DEL. CODE ANN. tit. 13 § 500 *et seq.* (1974) (no specified limit); OHIO REV. CODE ANN. § 2305.14 (Baldwin 1971) (no specified limit, 10-year statute of limitations applies). *See generally* 9 UNIFORM PARENTAGE ACT 365-66 (Supp. 1976), which provides a three year limitation on the action, with the exception that the illegitimate may bring the action within three years of reaching majority. *See also* Huss v. DeMott, 215 Kan. 450, 524 P.2d 743 (1974) (limitation in paternity statute applies to mother only, illegitimate has common-law right to establish paternity).

action must be brought within two years of the child's birth.[78] Thus, it is clear that even in a state granting illegitimates standing to establish their paternity, limiting the action to the early years of the child's life puts the illegitimate just as much in reliance on another person to secure his right to inherit as before *Trimble*.

Consideration of these limitations on paternity actions was beyond the scope of *Trimble* since Deta Mona Trimble's paternity had been adjudicated and therefore was not at issue. However, further litigation aimed at improving the status of illegitimates will likely center on the requirements of paternity statutes, due to the increased emphasis on proof of paternity as the only requirement for illegitimates to satisfy before securing their rights.

CONCLUSION

Further improvement in the status of some illegitimate children of intestate men will not occur until the right fact situation is before the Court. However, the result in *Trimble* substantially increased the rights of illegitimates whose paternity has been adjudicated in accordance with the relevant paternity statute.[79] In addition, illegitimates as a class will benefit since *Trimble* virtually overrules *Labine*.[80]

---

78. *See* note 73 *supra;* Cessna v. Montgomery, 63 Ill.2d 71, 344 N.E.2d 447 (1976). In *Cessna*, a mother's suit to establish the paternity of her illegitimate children, in which the Illinois Supreme Court upheld the two-year limitation on the institution of a paternity suit, although the father may be estopped from asserting the limitation. The Court also upheld the requirement that the action be brought by the mother. *See also* Colorado *ex rel.* L.B. v. L.V.B., 410 U.S. 976 (1972) (appeal dismissed) (five year limitation on paternity suits presents no federal question).

79. *Trimble* has the potential to benefit a large number of illegitimates. *See* Jurisdictional Statement at 8, Trimble v. Gordon, 430 U.S. 762 (1977): "The statutes of 21 states, in addition to Illinois, explicitly, by implication, or by judicial construction, deny illegitimate children the right to inherit from an intestate father, while providing for inheritance from an intestate mother."

80. The Supreme Court in *Trimble* gave a closer scrutiny to the Illinois statute than the Court did in *Labine*. In fact, it is clear that the equal protection analysis to be given classifications of illegitimate children is so much greater that *Labine* is virtually overruled: "it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine*, the more recent analysis controls." *Id.* at 1468 n.17. *Labine* has been widely criticized by commentators. *See* Turton, *Unequal Protection of the Illegitimate Child*, 13 S. TEX. L.J. 126 (1971); Pascal, *Louisiana Succession and Related Laws and the Illegitimate: Thoughts Prompted by Labine v. Vincent*, 46 TUL. L. REV. 167 (1971); Petrillo, *Labine v. Vincent: Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377 (1971). *Labine* has also generally been limited to the area of intestate succession. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170 (1972); Eskra v. Morton, 524 F.2d 9, 13 (1975); Lucas v. H.E.W., 390 F. Supp. 1310, 1317 n.6 (D.R.I. 1975); Davis v. Richardson, 342 F. Supp. 588, 592 (D. Conn. 1972); Norton v. Weinberger, 364 F. Supp. 1117 (D. Md. 1973), *aff'd on rehearing*, 390 F. Supp. 1084 (1975); Miller v. Laird, 349 F. Supp. 1034, 1041 (D.D.C. 1972).

Labine had not only validated a discriminatory intestate succession statute, but also advocated the weakest possible equal protection standard of review.[81] Now, no doubt should remain. The Supreme Court will apply more than mere minimal scrutiny to statutes which treat illegitimates differently from similarly situated legitimates. Legislatures would do well to refrain from employing statutory classifications except to the extent that the uncertainty of a child's paternity may be exploited dishonestly.

Michael J. Zarski

---

81. 401 U.S. 532, 536 n.6 (1970).