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ASTRUE V. CAPATO: FORCING A SHOE THAT DOESN'T FIT

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Courts are increasingly encountering dilemmas caused when they must interpret and apply older laws to matters that have been significantly impacted by technological advances unimaginable to the lawmakers who wrote the controlling statutes.[1] In *Astrue v. Capato ex. rel. B.N.C., et al,*.[2] the Supreme Court considered whether a posthumously conceived child qualifies as a "child" for the purpose of receiving survivors' benefits under the Social Security Act.[3] The Act was originally passed in 1935, primarily as a retirement program.[4] In 1939, it was amended significantly to provide the spouse and dependents of a worker with payments after the worker retired, and with survivors' benefits after the worker died.[5] Posthumously conceived children were not a possibility contemplated by the legislators who enacted the law in its original and amended forms.[6] In *Capato*, the

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1. Distinguished Seventh Circuit Court of Appeals Judge Richard Posner has been fairly outspoken on "how judges deal with the intersection of science and the law, an increasingly busy and complex juncture." Ameet Sachdev, *Federal Judge Richard Posner Takes on Science and the Law*, CHI. TRIB. (May 11, 2012), http://articles.chicagotribune.com/2012-05-11/business/ct-biz-0511-chicago-law-20120511_1_judges-law-clerks-7th-circuit-bar-association. At a bar association dinner, Judge Posner remarked that, "[w]hat we're confronted with in modern technology is altogether more esoteric and difficult than what we grew up with," and noted that to deal with this problem, judges "duck, bluff, weave and change the subject." *Id.* (internal quotation marks omitted). *See* Gillett-Netting v. Barnhart, 371 F.3d 593, 595 (3rd Cir. 2004) ("Developing reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by posthumous conception.").

2. 132 S. Ct. 2021 (2012).

3. *Id.* at 2025–26.

4. *Historical Background and Development of Social Security*, SOC. SEC. ADMIN., http://www.ssa.gov/history/briefhistory3.html (last updated Jan. 10, 2013).

5. *Id.*

6. The first child who was conceived through in vitro fertilization was born in 1978, more than forty years after the Act's passage. *See* Machelle M. Seibel, *A New Era in Reproductive Technology*, 318 NEW ENG. J. MED. 828, 828 (1988). Artificial insemination was relatively widely used in the U.S. as early as the 1950s. Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 REAL PROP. TR. & EST. L.J. 393, 395 (2008). However, the technique that allows the use of a parent's gamete or a couple's embryo long after the death of one parent, cryopreservation, was only discovered in 1949, and did not become mainstream until many years later. *See* Benjamin Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law*,

Court unanimously held that the intestacy law of the state in which the insured parent was domiciled at the time of his or her death controlled the answer to the question which was before the Court.[7] If the child could not inherit from the decedent under the state's intestacy law, then the child does not qualify as a "child" for the purposes of survivors' benefits.[8]

Although substantial support exists for the Court's holding in *Capato*—in the statutory language itself, the legislative intent underlying that language, and the Court's consistency with the Social Security Administrator's interpretation of the Act—the Court was only able to reach its conclusion by glossing over a significant Equal Protection problem posed by its reading of the survivors' benefits provisions.[9] Because the provisions discriminate on the basis of legitimacy, the Court should have evaluated their validity using intermediate scrutiny, rather than rational basis review.[10] If the Court had properly applied this heightened level of scrutiny, it likely would have found that survivors' benefits provisions are unconstitutional because the law's distinction between nonmarital and marital children is not substantially related to any important government interest.[11] While the Court's disregard for the Act's discrimination against illegitimate children is the most significant shortcoming of the decision in *Capato*, the decision is also inadequate because it promotes continued unpredictability in the legal treatment of posthumously conceived children.[12] To correct these problems, federal and state legislators both need to take action.[13] Congress should replace the Act's deference to state intestacy law with a federal standard for qualifying recipients of survivors' benefits more closely related to dependency, and state lawmakers should clearly and explicitly address posthumous children in their intestacy statutes, possibly using one of the model laws, such as the 2008 Uniform Probate Code, for guidance.[14]

I. THE CASE

Shortly after Karen and Robert Capato were married in New Jersey on May 15, 1999, Robert was diagnosed with esophageal carcinoma.[15] The couple decided to freeze Robert's sperm to maintain the possibility of having biological children if

Why Attempts to Address the Issue Have Fallen Short, and How to Fix It, 21 CORNELL J.L. & PUB. POL'Y 347, 355–56 (2011).

7. 132 S. Ct. at 2028.

8. Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2028 (2012).

9. *See infra* notes 178–83 and accompanying text .

10. *See infra* Part IV.A.1.

11. *See infra* Part IV.A.2.

12. *See infra* Part IV.B.

13. *See infra* Part IV.C.

14. *See infra* Part IV.C.

15. Capato *ex rel.* B.N.C. v. Astrue, No. 08–5405 (DMC), 2010 WL 1076522, at *2 (Dist. N.J. Mar. 23, 2010).

the chemotherapy rendered Robert infertile.[16] Although the couple naturally conceived a child, who was born in 2001, they continued to pursue preservation of Robert's sperm because they wanted their child to have a sibling.[17] Robert passed away in March of 2002, and approximately eighteen months later Karen gave birth to twins, conceived through artificial insemination treatments using Robert's sperm.[18] On October 31, 2003, Karen Capato applied to the Social Security Administration for child's insurance benefits from her deceased husband, Robert Capato, on behalf of their twin children.[19] When her application was denied, Capato filed a request for reconsideration, which was also denied.[20] Capato then requested a hearing by an Administrative Law Judge, who ultimately rejected her claims upon a *de novo* review.[21] After the Appeals Council denied Capato's request for an administrative review, she sued in the United States District Court for the District of New Jersey.[22]

Affirming the prior denial, the District Court concluded that the Administrative Law Judge had "properly evaluated the applicable law," and that his "decisions were supported by substantial evidence."[23] The District Court determined that the Capato twins did not meet the definition of children under Florida intestacy laws,[24] that the Administrative Law Judge was not biased in his decision, and that denying benefits to the twins did not violate the Equal Protection Clause of the U.S. Constitution.[25] The Court of Appeals for the Third Circuit then reversed, finding that "the undisputed biological children of a deceased wage earner and his widow" qualify for survivors' benefits, regardless of what the state intestacy law says.[26] The court reasoned that because Section 416(e) of the Act broadly defines "child" as including "the child or legally adopted child of an individual," there was no need to look to state intestacy law.[27] According to the Court of Appeals, state law on inheritance rights only becomes relevant when there is a dispute as to the biological relationship of the applicant and the deceased insured.[28] The Supreme Court granted certiorari to address the conflict emerging

16. *Id.* at *1.
17. *Id.* at *1–*2.
18. *Id.* at *3.
19. *Id.* at *1.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at *4.
24. *Id.* at *6–*7. Although Karen Capato filed this action in the U.S. District for the District of New Jersey, she and her husband, the deceased insured, resided in Pompano Beach, Florida at the time of the decedent's death. *Id.* at *3.
25. *Id.* at *7–*8.
26. Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 631 (2011).
27. *Id.* at 629, 631.
28. *Id.* at 631.

among the Circuits over which law applies when determining a posthumously conceived child's eligibility for Social Security survivors' benefits.[29]

II. LEGAL BACKGROUND

A. Introduction

A basic understanding of the pertinent Social Security Act provisions is essential to an informed analysis of the issue in *Capato*. Section 402(d), "Child's insurance benefits," states that every "child" of an insured deceased individual is eligible to receive benefits if the child (1) files an application for benefits, (2) is under a certain age at the time of application or is under a disability, and (3) was dependent upon the insured individual at the time of their death.[30] While not listed as a separate requirement for eligibility, qualifying as a child for the purposes of the Act's benefits provisions is essentially a fourth condition, albeit prerequisite to the other three.[31] "Child" is further defined in Section 416(e) as "the child or legally adopted child of an individual."[32]

Although Section 416(h), "Determination of family status," is not explicitly referenced in Section 402(d),[33] many courts have also found direction in that provision as to who qualifies as a child when reviewing administrative denials of survivors' benefits to posthumously conceived children.[34] Section 416(h)(2)(A) provides that the Commissioner of Social Security (hereinafter the "Commissioner") should apply the intestacy law of the state where the insured parent lived when he or she died to determine if an applicant meets the definition of a child.[35] One who does not qualify under the state law will nonetheless be deemed a child of the insured parent if the applicant is the son or daughter of that person and if the deceased insured parent and the applicant's other parent attempted to be married, but their marriage was invalidated by some "legal impediment."[36] An applicant who does not fit into either of these two categories may still be deemed a child of the insured if the insured had acknowledged the child as their son or daughter, had been declared as the child's parent by a court, had been ordered by a court to support the child as their parent, or is determined by the Commissioner to

29. Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2027 (2012). *See infra* Part II.B. (describing the contrasting interpretations of the provisions accepted by the Circuit Courts).

30. 42 U.S.C. § 402(d) (2011).

31. *Id.*

32. § 416(e).

33. § 402(d)(1) ("Every child (as defined in section 416(e) of this title) . . . .").

34. § 416(h). *See infra* Part II.B (explaining the contrasting approaches that Circuit Courts have taken as to when § 416(h) applies to the determination of whether a posthumously conceived applicant qualifies as a "child" under § 402(d)).

35. § 416(h)(2)(A).

36. § 416(h)(2)(B).

be the child's mother or father *and* to have been living with or contributing support to the child at the time of the insured's death.[37]

When the Supreme Court reviewed the Third Circuit's decision, the Circuits were divided between two general views on the issue.[38] Like the Third Circuit, the Ninth Circuit had reversed a denial of benefits to posthumously conceived children.[39] Finding support in both the Social Security Act and state law, the Ninth Circuit held that a child who is conceived posthumously, but who is the biological child of the deceased and his widow, qualifies for survivors' benefits because he is a legitimate child and, as such, is "deemed dependent on [the insured] for child's insurance benefits."[40] In contrast, the Fourth and Eighth Circuits had held that one who is conceived posthumously only qualifies as a child for the purposes of survivors' benefits when that person could inherit intestate from the insured under the law of the state where was living at the time of death.[41] These courts would apply such a rule without regard to the marital relationship between the deceased insured and the child's other biological parent.[42]

Likewise, state courts have addressed the status of posthumously conceived children in the interplay of the Social Security Act and intestacy laws using a wide variety of conflicting approaches.[43] It logically follows from the fact that the substance of state intestacy laws differ greatly that the application of such statutes would lead to disparities in the resulting judicial decisions. However, state courts have interpreted virtually identical language in various state probate laws to have completely different effects.[44] As a result, the adjudication of posthumously conceived children's rights is quite unpredictable and often seems to be based more on the political and ethical views of the presiding judges than on sound statutory interpretation.[45]

37. § 416(h)(3).

38. *See infra* Part II.B.

39. Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 632 (2011); Gillett-Netting v. Barnhart, 371 F.3d 593, 594 (9th Cir. 2004).

40. *Gillett-Netting*, 371 F.3d at 594. A potential issue with this interpretation of the law is that it would allow for the differential legal treatment of children based on whether or not their parents were married, thereby violating the Equal Protection Clause. *See infra* Part II.D. (discussing how legitimacy classifications, such as that included in the Social Security Act, may violate the Equal Protection Clause).

41. Beeler v. Astrue, 651 F.3d 954, 956 (8th Cir. 2011); Schafer v. Astrue, 641 F.3d 49, 50–51 (4th Cir. 2011).

42. *See Beeler*, 651 F.3d at 956; *Schafer*, 641 F.3d at 50–51.

43. *See infra* Part II.C.2.

44. *See* Carpenter, *supra* note 6, at 394 (pointing out that the Superior Court of New Jersey in *In re Kolacy*, and the Supreme Court of Arkansas in *Finley v. Astrue*, interpreted basically the same language in the pertinent state laws to have completely different practical effects, based on diverging reasoning); s*ee also infra* note 106.

45. *See* Carpenter, *supra* note 6, at 392–93 (criticizing the District Court's opinion in *Gillett-Netting* as particularly "troubling" because, unlike previous courts, which had created their own rule to address posthumously conceived children when faced with an ambiguous statute, the District Court

B. Circuit Courts Embrace Opposing Views

1. The Posthumous Biological Child of a Married Couple Always Qualifies for Survivors' Benefits

In *Gillett-Netting v. Barnhart*, the Ninth Circuit Court of Appeals held that twins conceived after their father's death through in vitro fertilization were "children" for the purposes of the Social Security Act, and thus entitled to the deceased's child's insurance benefits.[46] The court first acknowledged that "[n]either the [Act] nor the Arizona family law . . . makes clear the rights of children conceived posthumously."[47] Interpreting this ambiguity, the court determined that the twins were entitled to benefits because they were the deceased's biological, legitimate children, and thus "considered to have been dependent under the Act." [48] As such, the court rejected the Commissioner's argument that every applicant must meet the requirements of Sections 416(h)(2) or (3)(C) in order to receive survivors' benefits through a deceased insured parent.[49] Instead, the Ninth Circuit found that Section 416(h) simply provides additional ways for a person to qualify as a child when "their parents were not married or their parentage was in dispute."[50] However, when an applicant is the legitimate child of a deceased insured, the person need not meet the criteria set out in Section 416(h) because their legitimacy serves to satisfy both the child and dependency requirements.[51] Essentially, the court found that the Act's "[d]etermination of family status" provision is irrelevant when there is no family status to determine.[52] And because all legitimate children are "deemed dependent" on the insured by Section 402(d)(3), they are eligible to receive benefits, as long as they satisfy the other requirements for eligibility provided in Section 402(d).[53] Under Arizona family law, the Netting children were the legitimate children of the insured and his widow.[54] The Third Circuit, in reaching an identical conclusion in *Capato*, relied on the reasoning used in *Gillett-Netting*.[55]

"strictly construed one section of the statute, ignored one section altogether, and then misstated another," in order to justify its conclusion, which seemed to have actually been based on "unexpressed moral, public policy, or other grounds").

46. 371 F.3d 593, 594–95 (9th Cir. 2004).

47. *Id.* at 595–96.

48. *Id.*

49. *Id.* at 596. *See supra* notes 35–37 and accompanying text (summarizing the requirements listed in §§ 416(h)(2) and (3)(C)).

50. *Gillett-Netting*, 371 F.3d at 596.

51. *Id.*

52. *Id.*

53. *Id.* at 598. It was uncontested that the Gillett-Netting children had applied for benefits and that the deceased parent was fully insured at the time of his death. *Id.* at 596. *See supra* notes 30–31 and accompanying text (describing the four requirements for eligibility to receive child's insurance benefits).

54. *Gillett-Netting*, 371 F.3d at 598.

55. Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 629–32 (2011).

2. *A Posthumous Child Qualifies for Survivors' Benefits Only When the Child Could Inherit Under the State Intestacy Laws*

In *Schafer v. Astrue*, the Fourth Circuit rejected the surviving parent's argument that the state intestacy rights of legitimate biological children are irrelevant to their eligibility for survivors' benefits because such children clearly fall within Section 416(e)'s simple definition of a "child."[56] Instead the Court accepted the Social Security Administration's interpretation of the Act, reasoning that *Chevron, Inc. v. National Resources Defense Council, Inc.*[57] compelled judicial deference to the agency charged with the challenged statute's implementation in this case.[58] The Administration has always read Section 416(h) as elaborating on the elements necessary to meet the definition of a child briefly described in Section 416(e), which applies to both legitimate and illegitimate applicants alike, and has administered the Act's provision of survivors' benefits accordingly.[59] Because the Court found the agency's reading to be reasonable, it was obligated to give effect to that interpretation.[60] However, the Fourth Circuit recognized some merit in the *Schafer* alternate understanding of the Act, noting that the ordinary meaning of "child," as used in the statute, could appear to include all biological children, regardless of when conceived or born, and that a statute's plain language is the best evidence of the underlying legislative intent.[61] Ultimately though, the Court decided that the plain language is just one of many factors to consider, and that a more comprehensive application of all of the rules of statutory interpretation leads to the conclusion that administrative deference is necessary.[62]

In *Beeler v. Astrue*, the Court of Appeals for the Eighth Circuit also found the Administration's view to be reasonable and entitled to deference.[63] The Court relied heavily on *Schafer* to reject arguments that all biological offspring of married parents qualify as children and to find that Section "416(h) is thus irrelevant" to the determination of their eligibility for survivors' benefits.[64] The Eighth Circuit concluded that Section 416(h) was not intended just to supplement the qualification methods in Section 416(e), because the former clearly directs the Administrator to refer to state intestacy law to decide whether an applicant qualifies as a child "for

56. 641 F.3d 49, 51 (2011).

57. *Chevron* established that when Congress has charged an administrative agency with implementing a statute, the agency's interpretation of that statute is entitled to deference as long as it is reasonable, even if it is not *the most* reasonable interpretation. 467 U.S. 837, 844–45 (1984).

58. *Schafer*, 641 F.3d at 51 ("The agency's view best reflects the statute's text, structure, and aim of providing benefits primarily to those who unexpectedly lose a wage earner's support.").

59. *Id.* at 52–53.

60. *Id.* at 51.

61. *Id.* at 54.

62. *Id.*

63. 651 F.3d 954, 956 (2011).

64. *Id.* at 962–64.

the purposes of [that] subchapter," which includes Section 416(e).[65] Therefore, every applicant must satisfy one of Section 416(h)'s criteria in order to qualify as a "child" for the purposes of survivors' benefits.[66] Among those criteria is the ability to inherit intestate from the deceased parent under state law.[67]

C. State Courts Addressing the Rights of Posthumous Children Have Struggled to Fit the Children into State Intestacy Laws Not Designed for That Purpose

Several state courts have interpreted their states' laws so that they may be applied in the administration of the Social Security Act, which has had a significant impact on the inheritance rights of posthumous children. A survey of state intestacy laws is also helpful for understanding the varied nature of state laws and the import of the *Capato* Court's deference to those laws.

1. A Survey of State Statutes

While forty-seven states and the District of Columbia have statutes that expressly address the rights of a child who was *conceived before* a parent's death, but born thereafter, there is no such consistency in the statutory treatment of a child who was *conceived after* a parent's death.[68] Twenty of the states with probate statutes granting intestate inheritance rights to children born posthumously make no mention of children who are conceived posthumously.[69] Three states—Ohio, Pennsylvania, and Indiana— incorporate into their statutes the 1946 Model Probate Code's[70] "afterborn-heirs provision" which said that "[d]escendants . . . of the

65. *Id.* at 962–63.

66. *Id.* at 963.

67. *Id.* at 958.

68. *See generally* Carpenter, *supra* note 6, at 362–83 (describing the statutes of each of the forty-eight jurisdictions which address the inheritance rights of children who are born posthumously, and categorizing them based on their similarities and origins). As for the other three states, Carpenter notes that "the Mississippi and Nevada statutes do not address in any manner posthumous heirs—whether conceived before or after the death of a parent." *Id.* at 377 (citing MISS. CODE ANN. §§ 91-1-1 to 31 (West 2011); NEV. REV. STAT. ANN. §§ 133–34 (2010)). New Hampshire's code also contains no mention of posthumous heirs, but simply states that the "surviving issue" of an intestate deceased can inherit from the deceased's estate. *Id.* at 397 (citing N.H. REV. STAT. ANN. § 561:1 (2007)).

69. Carpenter, *supra* note 6, at 362–66, 377, 390–91, 395; *see* ALASKA STAT. ANN. § 13.12.108 (LexisNexis 2012); ARIZ. REV. STAT. ANN. § 14-2108 (West 2012); ARK. CODE ANN. § 28-9-210(a) (LexisNexis 2012); HAW. REV. STAT. § 560:2-108 (LexisNexis 2012); IND. CODE ANN. § 29-1-2-6 (LexisNexis 2012); KY. REV. STAT. ANN. § 391.070 (West 2011); ME. REV. STAT. ANN. tit. 18-A § 2-108 (West 2012); MASS. GEN. LAWS ch. 190B, § 8 (1994); MICH. COMP. LAWS ANN. § 700.2108 (West 2012); MONT. CODE ANN. § 72-2-118 (2011); NEB. REV. STAT. § 30-2308 (West 2012); N.J. STAT. ANN. § 3B:5-8 (West 2012); N.C. GEN. STAT. ANN. § 29-9 (LexisNexis 2012); OHIO REV. CODE ANN. § 2105.14 (LexisNexis 2012); OR. REV. STAT. ANN. § 112.075 (2011); 20 PA. CONS. STAT. ANN. § 2104(4) (West 2012); TENN. CODE ANN. § 31-2-108 (LexisNexis 2012); VT. STAT. ANN. tit. 14, § 303 (LexisNexis 2012); W. VA. CODE ANN., §§ 42-1-3f, 42-1-8 (LexisNexis 2012); WISC. STAT. §§ 852.03, 854.21 (West 2012).

70. *See infra* Part II.E for a more detailed description of the Model Probate Code and other uniform laws.

intestate, begotten before his death but born thereafter, shall inherit as if they had been born in [his] lifetime."[71] The statutes of three states—Maine, Nebraska, and Tennessee—provide that, "[r]elatives of the decedent conceived before his death but born thereafter inherit as if they had been born in [his] lifetime," reflecting an early version of the Uniform Probate Code.[72] Nine other states—Alaska, Arizona, Hawaii, Michigan, Montana, New Jersey, Vermont, West Virginia, and Wisconsin—also use these, or very similar, words in their probate codes, but replace "conceived" with "in gestation."[73] With only slight variations in each, the statutes of Kentucky, North Carolina, Oregon, Arkansas, and Massachusetts are also worded similarly.[74] Regardless of the specific words used, all twenty of these states' statutes are at least somewhat ambiguous as to their practical effect on posthumously conceived children. The confusion resulting from this ambiguity is evidenced by the contradictory interpretations of the same language in the state courts' decisions.[75]

The other twenty-seven states and D.C. explicitly address the rights of not only posthumously born children, but also posthumously conceived children in their statutes.[76] Seven of those states—Virginia, Georgia, Idaho, Minnesota, South

71. Carpenter, *supra* note 6, at 362–64; *see* MODEL PROBATE CODE § 25 (1946); IND. CODE ANN. § 29-1-2-6 (LexisNexis 2012); OHIO REV. CODE ANN. § 2105.14 (LexisNexis 2012); 20 PA. CONS. STAT. ANN. § 2104(4) (West 2012).

72. Carpenter, *supra* note 6, at 364–65; *see* ME. REV. STAT. ANN. tit. 18-A § 2-108 (West 2012); NEB. REV. STAT. § 30-2308 (West 2012); TENN. CODE ANN. § 31-2-108 (LexisNexis 2012).

73. Carpenter, *supra* note 6, at 365–66; *see* ALASKA STAT. ANN. § 13.12.108 (LexisNexis 2012); ARIZ. REV. STAT. ANN. § 14-2108 (West 2012); HAW. REV. STAT. § 560:2-108 (LexisNexis 2012); MICH. COMP. LAWS ANN. § 700.2108 (West 2012); MONT. CODE ANN. § 72-2-118 (2011); N.J. STAT. ANN. § 3B:5-8 (West 2012); VT. STAT. ANN. tit. 14, § 303 (LexisNexis 2012); W. VA. CODE ANN., §§ 42-1-3f, 42-1-8 (LexisNexis 2012); WISC. STAT. §§ 852.03, 854.21 (West 2012).

74. Carpenter, *supra* note 6, at 377, 390–91, 395; *see* ARK. CODE ANN. § 28-9-210(a) (LexisNexis 2012); KY. REV. STAT. ANN. § 391.070 (West 2012); MASS. GEN. LAWS ch. 190B, § 8 (2012)); N.C. GEN. STAT. ANN. § 29-9 (LexisNexis 2012); OR. REV. STAT. ANN. § 112.075 (2011).

75. *See infra* Part II.C.2.

76. Carpenter, *supra* note 6, at 367–83; *see* ALA. CODE § 26-17-707 (LexisNexis 2012); ALA. CODE §43-8-47 (LexisNexis 2012); CAL. PROB. CODE §§ 249.5-249.8 (West 2013); COLO. REV. STAT. ANN. § 15-11-120 (West 2012); CONN. GEN. STAT. §§ 45A-771 TO -779 (West 2012); DEL. CODE ANN. tit. 12, §§ 310, 505 (LexisNexis 2012); DEL. CODE ANN. tit. 13, § 8-707 (LexisNexis 2012); D.C. CODE § 19-314 (West 2012); FLA. STAT. ANN. § 742.17(4) (West 2013); GA. CODE ANN. § 53-2-1(b)(1) (LexisNexis 2012); IDAHO CODE ANN. § 15-2-108 (LexisNexis 2012); 755 ILL. COMP. STAT. ANN. 5/2-3 (West, 2012); IOWA CODE ANN. § 633.220A (West 2012); KAN. STAT. ANN. § 59-501 (2005); LA. REV. STAT. ANN. § 9:391.1(A) (West 2013); MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis 2012); MINN. STAT. ANN. § 524.2-120(10) (West 2013); MO. ANN. STAT. § 474.050 (West 2013); N.M. STAT. ANN. §§ 40-11A-707 (West 2012); N.M. STAT. ANN. § 45-2-108 (West 2012); N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(a)-(b) (West 2012); N.D. CENT. CODE ANN. § 30.1-04-19 (LexisNexis 2011); OKLA. STAT. ANN. tit. 84, § 228 (West 2013); R.I. GEN. LAWS ANN. § 33-1-4 (LexisNexis 2012); S.C. CODE ANN. § 62-2-108 (West 2012); S.D. CODIFIED LAWS § 29A-2-108 (West 2012); TEX. FAM. CODE ANN. § 160.707 (West 2012); TEX. PROB. CODE ANN. § 41(a) (West 2012); UTAH CODE ANN. § 75-2-104(1)(b) (LexisNexis 2012); UTAH CODE ANN. §§ 78B-15-707 (LexisNexis 2012); VA. CODE ANN. §§ 20-158.B, 20-164, (LexisNexis 2012); WASH. REV. CODE ANN. § 26.26.730 (West 2013); WYO. STAT. ANN. § 2-4-103 (LexisNexis 2011); WYO. STAT. ANN. §§ 14-2-907 (LexisNexis 2011).

Carolina, South Dakota, and New York—expressly deny posthumously conceived children the ability to inherit by intestate succession.[77] Another seven states—Delaware, New Mexico, Texas, Alabama, Utah, Washington, and Wyoming—declare that a child conceived after an individual's death using their genetic material will be deemed the child of that individual if he or she consented to be the child's parent, guided by the Uniform Parentage Act.[78] However, this grant of legal status appears in the states' parentage laws, while their probate codes fail to address posthumously conceived children, making their applicability to issues of intestate succession unclear.[79] Seven states expressly grant the legal status as a child of the deceased individual to children conceived after the death of a parent, subject to certain limitations.[80] Florida's statute, the law interpreted to deny benefits to the children in *Capato*, states that "posthumously conceived children are eligible for a 'claim against the decedent's estate,'" only when such children are included in the deceased's will.[81] Mirroring the 2008 UPC, Colorado and North Dakota allow a child conceived after a parent's death to inherit if the deceased intended to be treated as the parent of the child, and the child is in utero within three years of their death.[82] Maryland, Louisiana, California, and Iowa have each enacted unique statutes, which allow posthumously conceived children to inherit, subject to different time, consent, and intent limitations.[83] Lastly, the statutes of Connecticut, Illinois, Kansas, Missouri, Oklahoma, Rhode Island, and D.C. have language that seems to grant inheritance rights to children conceived posthumously, without

77. Carpenter, *supra* note 6, at 367–68, 378–79; *see* GA. CODE ANN. § 53-2-1(b)(1) (LexisNexis 2012); IDAHO CODE ANN. § 15-2-108 (LexisNexis 2012); MINN. STAT. ANN. § 524.2-120(10) (West 2013); S.C. CODE ANN. § 62-2-108 (West 2012); S.D. CODIFIED LAWS § 29A-2-108 (West 2012); N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(a)-(b) (West 2012); VA. CODE ANN. §§ 20-158.B, 20-164, (LexisNexis 2012).

78. Carpenter, *supra* note 6, at 368–72; *see* ALA. CODE § 26-17-707 (LexisNexis 2012); DEL. CODE ANN. tit. 13, § 8-707 (LexisNexis 2012); N.M. STAT. ANN. §§ 40-11A-707 (West 2012); TEX. FAM. CODE ANN. § 160.707 (West 2012); UTAH CODE ANN. §§ 78B-15-707 (LexisNexis 2012); WASH. REV. CODE ANN. § 26.26.730 (West 2013); WYO. STAT. ANN. §§ 14-2-907 (LexisNexis 2011).

79. Carpenter, *supra* note 6, at 369–70; *see* ALA. CODE §43-8-47 (LexisNexis 2012); DEL. CODE ANN. tit. 12, §§ 310, 505 (LexisNexis 2012); N.M. STAT. ANN. § 45-2-108 (West 2012); TEX. PROB. CODE ANN. § 41(a) (West 2012); UTAH CODE ANN. § 75-2-104(1)(b) (LexisNexis 2012); WYO. STAT. ANN. § 2-4-103 (LexisNexis 2011).

80. Carpenter, *supra* note 6, at 372–74; 379–83; *see* CAL. PROB. CODE §§ 249.5-249.8 (West 2013); COLO. REV. STAT. ANN. § 15-11-120 (West 2012); FLA. STAT. ANN. § 742.17(4) (West 2013); IOWA CODE ANN. § 633.220A (West 2012); LA. REV. STAT. ANN. § 9:391.1(A) (West 2013); MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis 2012); N.D. CENT. CODE ANN. § 30.1-04-19 (LexisNexis 2011).

81. Carpenter, *supra* note 6, at 379–80; *see* FLA. STAT. ANN. § 742.17(4) (West 2013).

82. *See* Carpenter, *supra* note 6, at 372–74; *see also* COLO. REV. STAT. ANN. § 15-11-120 (West 2012); N.D. CENT. CODE ANN. § 30.1-04-19 (LexisNexis 2011).

83. Carpenter, *supra* note 6, at 380–83; *see* CAL. PROB. CODE §§ 249.5-249.8 (West 2013); IOWA CODE ANN. § 633.220A (West 2012); LA. REV. STAT. ANN. § 9:391.1(A) (West 2013); MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis 2012).

limitation.[84] However, when all of these laws were enacted, cryopreservation—the technology responsible for the emergence of posthumously conceived children—was not as widely used.[85]

2. State Court Decisions

In 2000, the New Jersey Superior Court addressed whether posthumously conceived children could inherit from the estate of their deceased biological parent under the state intestacy law in *In re Estate of Kolacy*,[86] becoming the first court to publish an opinion on the issue.[87] The case arose when a mother sought a judicial declaration from the state court that her twins, conceived using the sperm of her husband a year after he died of cancer, were the legal heirs of the deceased.[88] The Plaintiff's application for Social Security benefits on behalf of her children had been denied, and she reasoned that such a declaration would increase her chances of a successful federal administrative or judicial appeal.[89] Both sides focused on the New Jersey after-born heirs law, which stated that, "[r]elatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."[90]

The court rejected these arguments in favor of developing a new test, specific to posthumously conceived children, reasoning that, "[s]imple justice" required the court to contemplate the rights of such children when announcing law affecting those rights.[91] The case presented an immediate real world problem in need of a solution that was too urgent to wait for the legislature to respond.[92] Accordingly, the court looked for direction in the state's intestacy statutes, and identified "a basic legislative intent to enable children to take property from their parents and through their parents."[93] Guided by this intent, the court held that once a child is proven to

84. Carpenter, *supra* note 6, at 376–77; *see* CONN. GEN. STAT. §§ 45A-771 TO -779 (West 2012); D.C. CODE § 19-314 (West 2012); 755 ILL. COMP. STAT. ANN. 5/2-3 (West, 2012); KAN. STAT. ANN. § 59-501 (2005); MO. ANN. STAT. § 474.050 (West 2011); OKLA. STAT. ANN. tit. 84, § 228 (West 2013); R.I. GEN. LAWS ANN. § 33-1-4 (LexisNexis 2012). While the language of each state's statute is slightly different, the thrust of all of these statutes is that a posthumous child shall inherit as if born during the deceased intestate's lifetime. However, the laws do not distinguish between posthumously conceived children and posthumously born children, which could indicate that the legislators only granted such broad rights because they did not contemplate posthumously conceived children.

85. Carpenter, *supra* note 6, at 376.

86. 753 A.2d 1257, 1260 (2000).

87. Carpenter, *supra* note 6, at 386.

88. *Kolacy*, 753 A.2d at 1259.

89. *Id.*

90. *Id.* at 1260 (quoting N.J.S.A. 3B: 5–8) (2004) (internal quotation marks omitted).

91. *Id.* at 1261–62.

92. *Id.* at 1261.

93. *Id.* at 1262.

be a decedent's biological offspring, he or she is entitled to the legal status of an heir.[94]

Like in New Jersey, the Massachusetts Supreme Judicial Court also opted to develop its own new rule for determining the ability of posthumously conceived children to inherit under state intestacy law in *Woodward v. Commissioner*.[95] Upon receiving an appeal from the Commissioner's denial of survivors' benefits to Woodward, the U.S. District Court for Massachusetts certified to the state court the question[96] of whether two children, conceived using their father's sperm after his death, could inherit as his natural children under Massachusetts law.[97] The state court answered that posthumously conceived children could inherit if their genetic relationship to the decedent was established and the decedent had consented to posthumous reproduction and to supporting any children resulting therefrom.[98]

In contrast, the Arkansas Supreme Court denied the status of a legal heir to a posthumously conceived child in *Finley v. Astrue*.[99] As in *Woodward*, the issue was presented as a certified question from the federal court adjudicating a mother's appeal of the denial of survivors' benefits to her child.[100] The child, unlike in earlier cases, "was created as an embryo through in vitro fertilization during his parents' marriage, but implanted into his mother's womb after the death of his father."[101] The Court sought to effectuate the legislative intent behind the applicable statute, which stated that "[p]osthumous descendants of the intestate *conceived before his or her death* but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate."[102] While recognizing that the case turned on the definition of conception, the court found it unnecessary to ascertain the word's meaning because "[the court could] definitively say that the General Assembly . . . did not intend for the statute to permit a child, created through in vitro fertilization and implanted after the father's death," to inherit intestate.[103] The Court reasoned that the legislature obviously did not intend to extend inheritance rights to posthumously conceived children because the statute, enacted in 1969, did not

94. *Id.*

95. 760 N.E.2d 257, 259 (2002).

96. As the state court explained, "[t]he United States District Court judge certified the above question to this court because [t]he parties agree that a determination of these children's rights under the law of Massachusetts is dispositive of the case and . . . no directly applicable Massachusetts precedent exists." *Id.* at 261 (internal quotation marks omitted).

97. *Id.* at 259–61.

98. *Id.* at 259.

99. 270 S.W.3d 849, 850 (2008).

100. *Id.*

101. *Id. Kolacy* and *Woodward* both involved circumstances in which the father's sperm was frozen prior to his death and used to fertilize the mother's eggs, forming embryos, after the father's death. In re Estate of Kolacy, 753 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 2000); Woodward v. Commissioner, 760 N.E.2d 257, 260 (2002).

102. *Finley*, 270 S.W.3d at 853 (quoting ARK. CODE ANN. § 28-9-210(a) (2004)).

103. *Id.*

explicitly address such children.[104] Thus, the Arkansas Supreme Court interpreted a statute, virtually identical to the law at issue in *Kolacy*, to have the exact opposite effect as that found by the New Jersey Superior Court.[105] However, the Arkansas court's reasoning that policy decisions are solely for the legislature to make was consistent with the rationale on which the Supreme Court of New Hampshire relied a year earlier to deny a posthumously conceived child intestate inheritance rights in *Khabbaz ex rel. Eng v. Commissioner*.[106]

D. Equal Protection and Nonmarital Children

The Fourteenth Amendment's Equal Protection Clause provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[107] In *Tigner v. Texas*, the Supreme Court interpreted this language to mean that states *may* classify people into groups to which disparate legal treatment applies when the classification correlates to an actual difference between the groups.[108] Laws that discriminate against certain groups of people are, therefore, not *per se* unconstitutional, but the discriminatory classification must be "rationally related to a legitimate state interest."[109] Although the Fourteenth Amendment only applies to states, in *Bolling v. Sharpe* the Court held that the federal government is also subject to these limitations by the Fifth Amendment's Due Process Clause's implicit Equal Protection component.[110]

The Supreme Court has since identified certain classifications for which the Constitution requires a more significant reason to justify unequal treatment because these classifications are inherently more suspect than others.[111] The Court found illegitimacy classifications to merit the use of heightened scrutiny in judicial review in *Clark v. Jeter*.[112] Declaring a Pennsylvania law that required nonmarital children to establish paternity within six years of birth in order to receive support from their

104. *Id.*

105. *See supra* notes 90 and 102 and accompanying text.

106. 930 A.2d 1180, 1182, 1186 (2007). *Khabbaz* involved the application of statutory language that was much more ambiguous that that considered in *Finley*. *Id.* at 1183. As such, the decision is not as problematic as that of the New Jersey court because it does not seem to make the same unreasoned leaps in logic to reach its conclusion.

107. U.S. CONST. amend. XIV, § 1.

108. 310 U.S. 141, 146–47 (1940).

109. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). This standard is known as "rational basis review," and is the least stringent level of review that the Court uses to evaluate laws challenged on Equal Protection grounds. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 694 (4th ed. 2011).

110. 347 U.S. 497, 498–99 (1954).

111. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (race); Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (gender); Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage).

112. 486 U.S. 456, 461 (1988). The use of intermediate scrutiny in reviewing discriminatory classifications of nonmarital children is appropriate because, while such children possess many of the same characteristics as other groups which receive heightened scrutiny, the discrimination against nonmarital children has not been as severe as that experienced by racial or ethnic minorities, for whom strict scrutiny is applied. CHEMERINSKY, *supra* note 109, at 797–98.

fathers unconstitutional, the Court made clear that intermediate scrutiny applies to legal distinctions based on legitimacy.[113] Accordingly, a law that treats marital and nonmarital children differently is only constitutional if it "serve[s] important governmental objectives and . . . [is] substantially related to those objectives."[114]

From the plethora of cases in which the Supreme Court has reviewed discriminatory classifications of illegitimate children, three trends have emerged. First, laws that grant benefits to all legitimate children, but conclusively deny them to illegitimate children, are always unconstitutional.[115] Second, laws that grant benefits only to some illegitimate children are reviewed individually using intermediate scrutiny.[116] Lastly, statutes limiting the length of time for establishing paternity are only constitutional when they provide sufficient time for relevant parties to make their claims and are substantially related to the state's interest in thwarting fraudulent claims.[117] While the Social Security Act and relevant state intestacy laws fall into the second category, many principles guiding the Supreme Court's jurisprudence on legitimacy classifications were developed in the cases on the first category of laws.[118] In *Levy v. Louisiana*, the Court invalidated a wrongful death statute precluding nonmarital children from suing for their mother's death, reasoning that "it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done."[119] While acknowledging the state's interest in preventing fraudulent claims to benefits in *Trimble v. Gordon*, the Court held such an interest was insufficient to justify a total denial of benefits to all nonmarital children.[120]

Two of the most influential cases evaluating laws in the second category involved challenges to the very statutory scheme at issue in *Capato*. In *Jiminez v. Weinberger*, the Court invalidated the law's limitation of an illegitimate child's eligibility for disability benefits based on the criteria in Section 416(h) because marital children were automatically deemed dependent, while nonmarital children who could not inherit intestate were deprived of even the opportunity to establish dependency.[121] The Court concluded that the Act's qualification mechanisms were not sufficiently related to the government's interest in providing benefits solely to

113. *Jeter*, 486 U.S. at 461.

114. Craig v. Boren, 429 U.S. 190, 197 (1976). As the Supreme Court explained in *United States v. Virginia*, "the burden of justification is demanding and . . . rests entirely on the state," under intermediate scrutiny. 518 U.S. 515, 533 (1996).

115. CHEMERINSKY, *supra* note 109, at 798.

116. *Id.*

117. *Id.*

118. *See id.* at 798–99 (describing the doctrines that were established in the earliest Supreme Court cases applying intermediate scrutiny to laws that disadvantaged nonmarital children).

119. 391 U.S. 68, 72 (1968).

120. 430 U.S. 762, 770–71 (1977).

121. 417 U.S. 628, 635–36 (1974).

those in need after a parent became disabled.[122] Just two years later, though, the Court upheld the same statutory scheme, as it applied to Social Security survivors' benefits, in *Mathews v. Lucas*.[123] The Court noted, just as it had when applying the Act to disability benefits in *Jiminez*, that the Act automatically deemed marital children, and nonmarital children who could inherit intestate, dependent; however, in the context of survivors' benefits, all other nonmarital children had the opportunity (or the burden) to prove that the insured was living with or contributing to their support at the time of their death.[124] The Court rejected the argument that "the statute's matrix of classifications [bore] no adequate relationship to actual dependency at death," finding instead that the classification was "reasonably related to the likelihood of dependency at death," and the administrative convenience it provided was sufficient to justify any possible discriminatory effect.[125]

E. Model Laws Serve as Recommended Statutory Schemes for the Appropriate Legal Treatment of Posthumous Children

As noted above, many states have incorporated provisions from model codes and uniform acts on posthumous children into their statutes.[126] The most significant model laws include the Uniform Probate Code (based in large part on its predecessor, the Model Probate Code), the Uniform Parentage Act, and the American Bar Association Model Act Governing Assisted Reproductive Technology.[127]

1. The Uniform Probate Code

The Uniform Probate Code (UPC) is maintained by the National Conference of Commissioners on Uniform State Laws (NCCUSL), and approved by the American Bar Association (ABA).[128] Approximately one in four states today employ the approaches embodied in the 1969 and 1990 versions of the UPC for the legal treatment of posthumous children.[129] The 1969 UPC stated that "[r]elatives of

122. *Id.*

123. 427 U.S. 495, 508–09 (1976).

124. *Id.* at 497–99.

125. *Id.* at 508–09.

126. *See supra* text accompanying note 70–71.

127. *See* Carpenter, *supra* note 6, at 362–75 (describing the model codes and uniform acts that have been adopted by various states or are noteworthy for other reasons).

128. *See Legislative Fact Sheet – Probate Code (2013)*, NAT'L CONF. COMMISSIONERS ON UNIFORM ST. LAWS, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Probate%20Code (last visited June 14, 2013).

129. *See* Carpenter, *supra* note 6, at 364–66 (noting that Maine, Nebraska, and Tennessee retain the language of the 1969 UPC in their statutes, while Alaska, Arizona, Hawaii, Michigan, Montana, New Jersey, Vermont, West Virginia, and Wisconsin statutes continue to incorporate the words of the 1990 UPC).

the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."[130] The 1990 UPC replaced this language with "[a]n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth."[131] The Commissioners did not comment on the purpose of the change, but it is certainly possible that they were aware of the possibility of posthumous conception that had emerged by that time due to technological developments.[132] For the first time, the UPC expressly addressed children conceived after a parent's death in its 2008 amendments, specifically providing for intestate succession to a posthumously conceived child when the decedent intended to be treated as the parent, and the child is in utero within thirty-six months of the parent's death. [133] Although it has only been adopted by two states,[134] the 2008 UPC could be an ideal solution to the disparate legal treatment of posthumously conceived children, in part because in its entirety, it serves as a comprehensive statutory system for a field of law, avoiding the possibility of conflicting provisions that can arise when laws are enacted in a piecemeal fashion.[135]

2. The Uniform Parentage Act and the ABA Model Act Governing Assisted Reproductive Technology

The NCCUSL first recognized the rights of posthumously conceived children in the Uniform Parentage Act (UPA) in 2000, and amended the Act two years later.[136] The UPA states that if an individual has consented to being a parent through assisted reproductive technology, but "dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child."[137]

130. UNIF. PROBATE CODE § 2-108 (1969).

131. UNIF. PROBATE CODE § 2-108 (1990); *see* Carpenter, *supra* note 6, at 365 (describing the historical evolution of the Uniform Probate Code).

132. Carpenter, *supra* note 6, at 365.

133. UNIF. PROBATE CODE §§ 2-116 and 2-120 (2008). *See* Carpenter, *supra* note 6, at 372–73.

134. *See* Carpenter, *supra* note 6, at 374.

135. UNIF. PROBATE CODE (2008). The UPC is self-described as "[a]n Act . . . making uniform the law with respect to decedents and certain others; and repealing inconsistent legislation." The "underlying purposes and policies," of the code include "simplify[ing] and clarify[ing] the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons." UNIF. PROBATE CODE § 1-102(b). While the most recent version of the UPC was published in 2010, there were no major revisions made at that time, and the current version is commonly referred to as the 2008 Uniform Probate Code.

136. *See* UNIF. PARENTAGE ACT § 707 (2002).

137. *Id.*; Although Section 707 might appear to affect children of married parents and children of non-married parents differently by reference to the "deceased *spouse*," the prefatory note makes clear that the authors of the 2002 UPA actually intended to erase any potential inequality that could have been interpreted in its earlier form. *See* UNIF. PARENTAGE ACT prefatory note at 1–2 (2002). In 2000, the section stated that "[i]f a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse

While significant for its early recognition of a relationship between posthumously conceived children and their deceased parents, the UPA never explicitly addresses the effect that this relationship should have on the children's rights to inherit,[138] but states that it "applies for all purposes."[139] Without such an express directive, a court interpreting the UPA could reasonably decide the issue in various ways—that the Act applies to the probate context and the existence of a parent-child relationship confers to the posthumous child inheritance rights, that the Act applies, but the parent-child relationship does not necessarily implicate such rights, or that the Act only applies to parentage, which only involves the rights and responsibilities of the parent and child while the parent is alive.[140] The ABA Model Act, adopted six years after the UPA Amendments, incorporated, *verbatim*, 2002 UPA § 707.[141]

III. THE COURT'S REASONING

In *Astrue v. Capato*, the Supreme Court unanimously embraced the Social Security Administration's argument that a posthumously conceived child is entitled to receive survivors' benefits only when the child qualifies to inherit from the deceased parent under the intestacy laws of the state in which the decedent was "domiciled" at death, or "satisf[ies] one of the statutory alternatives[142] to that requirement."[143] The Court's analysis was based almost entirely on the principles of statutory interpretation.[144] When interpreting a statute, federal courts look first to the plain language of the statute, the meaning of the language within the context of surrounding provisions and the purpose of the statutory scheme as a whole, and then to relevant legislative history, to ascertain and effectuate the intent of the legislature.[145] The Court found that the text of the Act supports the determination that rights to survivors' benefits for posthumously conceived children is contingent

is not a parent of the resulting child unless the deceased spouse consented . . . that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child." UNIF. PARENTAGE ACT § 707 (2000). The substitution of "individual" for all but one use of "spouse" reflects the UPA drafters' intent to give the same rights to all posthumously conceived children, whether or not their parents are married. UNIF. PARENTAGE ACT prefatory note at 2 (2002).

138. Carpenter, *supra* note 6, at 369.

139. *See* Mary F. Radford, *Postmortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows*, 2 EST. PLAN. & CMTY. PROP. L.J. 33, 39 (2009) (quoting § 203 of the Uniform Parentage Act).

140. Carpenter, *supra* note 6, at 369–70.

141. *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607 (2008).

142. The "statutory alternatives" to which the Court refers are the additional methods, listed in 42 U.S.C. § 416(h)(2)(b) and (h)(3), for qualifying as a "child" in order to be eligible to receive survivors' benefits. *See supra* text accompanying notes 36–37.

143. 132 S. Ct. 2021, 2026 (2012).

144. *See id.* at 2025–26.

145. *See, e.g.*, United States v. Davidson, 246 F.3d 1240, 1246 (9th Cir. 2001); *see also* United States v. Choice, 201 F.3d 837, 840 (6th Cir. 2000) ("The language of the statute is the starting point for interpretation . . . . we may look to the legislative history of a statute if the statutory language is unclear.") (citations omitted). *Cf.* United States v. Cullen, 499 F.3d 157, 163 (2nd Cir. 2007).

on their qualification for inheritance under applicable state law.[146] The provision at issue, Section 416(e)(1), does not unambiguously define the word "child," but Section 416(h), which, by its own terms, applies to Section 416(e), states that the Commissioner should determine whether an applicant meets the definition of a "child" by using the appropriate state's law on intestacy.[147]

The Court also discredited Karen Capato's argument, which the Third Circuit had embraced in its holding, reasoning that it contained several "conspicuous flaws."[148] Capato contended that an applicant for survivors' benefits who is the "biological child of a married couple," clearly qualifies as a child under Section 416(e), which defines the term as the "child of an [insured] individual."[149] Such an applicant is, therefore, not subject to Section 416(h) criteria.[150] The Court gave many reasons for rejecting Capato's interpretation. First noting that "[n]othing in § 416(e)'s tautological definition . . . suggests that Congress understood the word 'child' to refer only to the children of married parents," the Court reasoned that such a confined reading would conflict with the common understanding of the word, as reflected in multiple dictionaries.[151] Second, Congress did limit the definition of "child" to refer only to a legitimate child in another Social Security Act provision[152] and other "contemporaneous statutes"—evidence that Congress purposefully chose the particular definition employed in the survivors' benefits provisions.[153] Third, Congress could have not have specifically "intended 'biological' parentage to be a prerequisite to 'child' status" under Section 416(e), because it was not possible to prove a biological connection between a parent and child when the provision was passed in 1939.[154] Fourth, the current legal reality is that one's biological parent is not necessarily one's parent, under the law.[155] Lastly, the Court pointed out "that marriage does not ever and always make the parentage of a child certain, nor does the absence of marriage necessarily mean that a child's

146. *Capato*, 132 S. Ct. at 2027–28.

147. *Id.* at 2030–31. As the Court noted, § 416(h)(2)(A) of the Act states that "[i]n determining whether an applicant is the child or parent of [an] insured individual *for the purposes of this subchapter*, the Commissioner of Social Security shall apply state intestacy law." *Id.* (internal quotation marks omitted). The subchapter referenced—Chapter 7, Subchapter II—encompasses both § 402(d), which provides survivors' benefits to children, and § 416(e), which initially defines "child." *Id.* at 2031.

148. *Id.* at 2029–30.

149. *Id.* at 2029.

150. *Id.*

151. *Id.*

152. *Id.* at 2029–30. The other Social Security Act provision to which the Court referred to was § 402(d)(3), which prescribes the criteria for the dependency under the Act, and thus, also pertains to the determination of an applicant's eligibility for benefits.

153. *Id.* at 2030 (citing the Servicemen's Dependents Allowance Act of 1942, ch. 443, § 120 as an example).

154. *Id.* at 2030.

155. *Id.* at 2030.

parentage is uncertain."[156] The latter is particularly true for posthumously conceived children because, depending on the applicable state law, marriage may end with the death of a spouse.[157]

After addressing Capato's argument, the Supreme Court went on to explain how the Social Security Administration's interpretation of the Act serves the central purpose that Congress sought to achieve by providing survivors' benefits, while still precluding the burdens associated with administering those benefits from becoming manageable.[158] The Court elaborated that Congress created survivors' benefits primarily to replace the financial support lost by the *dependent* family members when an insured individual dies.[159] Relying on the reasoning in *Mathews*, the Court explained that when state law would allow a child to inherit from their parent, it is reasonable to find that the child was more likely to have been dependent on that parent at the time of death and as a result, "[r]eliance on state intestacy law to determine who is a 'child' thus serves the Act's driving objective."[160] While recognizing that deferral to state law allows some people to receive benefits who were not actually dependent, the Court concluded that Congress may legislate "for the generality of cases," which it did "here by employing eligibility to inherit under state intestacy law as a workable substitute for burdensome case-by-case determinations whether the child was, in fact, dependent on her father's earnings."[161]

Finally, the Court rejected Capato's argument that the interpretation it ultimately adopted denies equal protection to posthumously conceived children.[162] Capato had argued that under this interpretation, "posthumously conceived children are treated as an inferior subset of natural children who are ineligible for government benefits simply because of their date of birth and method of conception."[163] The Court dismissed the notion that this violated the Equal Protection Clause because it reasoned that "[n]o showing has been made that posthumously conceived children share the characteristics that prompted our skepticism of classifications disadvantaging children of unwed parents."[164]

156. *Id.* (explaining that an adopted child does not typically have a legal relationship with their genetic parents, nor do children conceived through assisted reproductive technology using donated genetic material).

157. *Id.* The Court stated that "it [was] far from obvious," that the Capato twins would be considered the biological children of married parents because Florida law holds that marriage ends when either spouse dies. *Id.* (citing Price v. Price, 153 So. 904, 905 (1934)).

158. *Id.* at 2032.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 2032–33.

163. *Id.* at 2033.

164. *Id.*

Therefore, the Court concluded that rational-basis review was appropriate and, as a result, "the regime Congress adopted easily passes inspection."[165]

IV. ANALYSIS

The plain language of the Social Security Act's survivors' benefits provisions, evidence of the legislative intent underlying those provisions, and the purpose of the Social Security Act as a whole, generally lend credence to the Supreme Court's conclusion in *Capato*.[166] Taken together, these considerations do provide significant support for the Court's holding. But they are not substantial enough to overcome the Act's Equal Protection violation, a problem to which the Court gave inadequate consideration, in order to reach its ultimate conclusion.[167]

A. Capato Poses Serious Problems for Equal Protection

The Court's holding that Section "416(h) governs the meaning of 'child'," and is, therefore, "a gateway though which *all* applicants for insurance benefits . . . must pass," is somewhat misleading because the interpretation implies that the survivors' benefits qualifying provisions impose no additional burdens on illegitimate children.[168] But even if Section 416(h) applies equally to all children, its implementation may still result in unconstitutional legal treatment of illegitimate children because Section 416(h) requires the reference to and application of state laws, which themselves frequently contain provisions that discriminate based on legitimacy.[169]

1. The Court Incorrectly Employed Rational Basis Review Instead of Intermediate Scrutiny

When government action is challenged on Equal Protection grounds, the proper level of scrutiny to be applied in the review thereof depends on the type of discrimination embodied in the law and the type of rights affected by the law.[170] Rational-basis review is the "default" standard,[171] appropriate for evaluating all

165. *Id.*

166. *See supra* text accompanying notes 146–61.

167. *See infra* text accompanying notes 179–83; *see also infra* Part IV.A.2.

168. *See Capato*, 132 S. Ct. at 2029 (suggesting that the provisions could not impermissibly discriminate because all natural children must meet the same requirements under § 416(h)).

169. *See, e.g.*, COLO. REV. STAT. ANN. § 15-11-120 (West 2012); N.D. CENT. CODE ANN. § 30.1-04-19 (LexisNexis 2011) (where state probate statute allows inheritance by posthumously conceived children if (1) the deceased parent intended to be treated as a parent and (2) the child is in utero within three years, children whose parents were married at the time of the deceased parent's death are presumed to meet the first requirement, while children of non-married parents must produce clear and convincing evidence of that intent).

170. CHEMERINSKY *supra* note 109, at 687.

171. *Id.* at 688.

laws that do not impinge on fundamental rights[172] or employ a suspect classification as the basis for distinguishing among people.[173] Under this minimally exacting level of review, a discriminatory classification is constitutional as long as it is "rationally related to a legitimate state interest."[174] On the other end of the spectrum, laws that discriminate based on race or national origin are subject to strict scrutiny, and will only be upheld if "suitably tailored to serve a compelling state interest."[175] Falling somewhere between rational-basis review and strict scrutiny, intermediate scrutiny requires that a law "serve[s] important governmental objectives and . . . [is] substantially related to achievement of those objectives," in order to comply with Equal Protection.[176] In *Clark v. Jeter* the Supreme Court left no doubt that intermediate scrutiny should be used to review laws that distinguish among people on the basis of legitimacy.[177]

In *Capato*, the Court avoided giving meaningful consideration to the Equal Protection problem presented by the Social Security Act's survivors' benefits provisions because it found that posthumously conceived children do not possess the characteristics that warranted the application of heightened scrutiny to illegitimate children.[178] This conclusion conflicts with the Court's evaluation of the exact same statutory scheme using heightened scrutiny in *Mathews v. Lucas*, where the Court's opinion focused heavily on whether the law's disparate impact on certain illegitimate children was permissible.[179] This rationale also contradicts the *Capato* Court's own statement that, depending on the applicable state law, posthumously conceived children are inherently illegitimate children because marriage ends with the death of a spouse.[180] Because many state intestacy statutes contain provisions that disadvantage illegitimate children,[181] the recognition that state law may conclusively deem posthumously conceived children as illegitimate should have prompted the Court to acknowledge the possibility that the Social

172. The Supreme Court has held that certain rights are "fundamental," and when the government infringes on those rights, strict scrutiny should be applied to evaluate the constitutionality of the government action. *Id.* at 691. *See* Boddie v. Connecticut, 401 U.S. 371, 378–79 (1971) (holding that access to effective use of judicial process is a fundamental right); Reynolds v. Sims, 377 U.S. 533, 554–55 (1964) (holding that voting is a fundamental right); Shapiro v. Thompson, 394 U.S. 618, 629–30 (1969) (holding that the right to interstate travel is fundamental).

173. *See supra* note 111 and accompanying text.

174. *See supra* note 109 and accompanying text.

175. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

176. Craig v. Boren, 429 U.S. 190, 197 (1976).

177. 486 U.S. 456, 461 (1988).

178. 132 S. Ct. 2021, 2033 (2012).

179. *See* Mathews v. Lucas, 427 U.S. 495, 510 (1976) (applying heightened scrutiny and concluding that the statutory classifications were permissible, even though they had a discriminatory impact on certain illegitimate children, because they were "consistent with a design to qualify entitlement to benefits upon a child's dependency").

180. *See supra* note 157 and accompanying text.

181. *See supra* note 169.

Security Act impermissibly discriminates against posthumously conceived children through its reliance on discriminatory state intestacy laws.[182]

Apparently disregarding its own inconsistent reasoning, the Court applied rational-basis review, concluding that the statutory scheme easily met this standard because it is "reasonably related to the government's twin interests in [reserving] benefits [for] those children who have lost a parent's support, and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis."[183] While the Court was justified in finding that the Act's provision of survivors' benefits meets rational-basis review, such a deferential standard was not appropriate for evaluating a law that allows for differential treatment of children based on the marital status of their parents.[184] Instead, the Court should have followed its own well-established precedent, and applied intermediate scrutiny.[185] Doing so would have allowed the Court to correct its misapplication of that precedent in *Mathews v. Lucas*, when it upheld the statutory scheme because of the administrative convenience it provided, despite acknowledging its discriminatory impact on illegitimate children and over-inclusiveness.[186]

2. Under Proper Application of Intermediate Scrutiny, the Social Security Act's Survivors' Benefits Provisions Are Unconstitutional

As discussed above, "[t]o withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."[187] Applied to this case, the distinction between nonmarital children is only constitutional if the Act involves an important government interest, and the distinction is substantially related to serving that interest.[188] Neither of the government interests asserted—"[reserving] benefits [for] those children who have

182. An acknowledgement of such a possibility, and consequently the application of intermediate scrutiny, would only have been consistent with the Supreme Court case law evaluating the constitutionality of state laws that discriminate on the basis of legitimacy. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968); *Trimble v. Gordon*, 430 U.S. 762, 770–71 (1977).

183. *Capato*, 132 S. Ct. at 2033 (quoting Vernoff v. Astrue, 568 F.3d 1102, 1112 (9th Cir. 2009)) (internal quotation marks omitted).

184. *See supra* notes 107–14 and accompanying text.

185. *See supra* notes 112–22 and accompanying text.

186. 427 U.S. 495, 508–09 (1976). As Justice Stevens aptly stated in his dissent, joined by Justices Brennan and Marshall, "[t]he Court's reason for approving discrimination against this class—'administrative convenience'—is opaque and insufficient: opaque because the difference between this justification and the argument rejected in *Jimenez v. Weinberger* is so difficult to discern; insufficient because it unfairly evaluates the competing interests at stake." *Id.* at 516–17 (Stevens, J., dissenting) (citing Jimenez v. Weinberger, 417 U.S. 628 (1974)).

187. *Jeter*, 486 U.S. at 461.

188. CHEMERINSKY, *supra* note 109, at 799.

lost a parent's support" or administrative convenience[189]—meets both the "important" and "substantially related" prongs of the intermediate scrutiny test. This Article will discuss the shortcoming of each interest asserted separately.

While it is safe to assume that providing benefits only to actual dependents is an important government objective,[190] the criteria that serve to create a presumption of dependency in the Act's survivors' benefits previsions are not substantially related to that objective.[191] Although there is no precise formula for determining whether the mechanisms used in a law are sufficiently related to achieving the law's goal, the Supreme Court has concentrated its evaluation of the relationship on the extent to which the law's application is over-inclusive or under-inclusive.[192] The benefits provisions are both over-inclusive, allowing children who are not actually dependent to receive benefits because they were born to married parents and thus, "deemed dependent,"[193] and under-inclusive, denying benefits to children who were dependent in reality, like those at issue in *Mathews*.[194] In that case, the provisions had the practical effect of denying benefits to applicants whose father had consistently acknowledged them as his children throughout his life, and even lived with them for many years, but who did not fit the criteria for dependency listed in the Act.[195]

Conversely, it is easy to find that a substantial relationship exists between the Act's dependency presumptions and the government's interest in administrative convenience.[196] But reducing administrative procedural burdens is not so important

189. Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2033 (2012).

190. This assumption is consistent with Supreme Court case law applying intermediate scrutiny to evaluate laws challenged as violating Equal Protection. *See, e.g.*, Jiminez v. Weinberger, 417 U.S. 628, 636 (1974) ("We recognize that the prevention of spurious claims is a legitimate governmental interest and that dependency of illegitimate [like appellants] . . . has not been legally established even though, as here, paternity has been acknowledged."); Califano v. Westcott, 443 U.S. 76, 78, 85–86 (1979) (accepting that supplying "aid for children deprived of basic sustenance because of a parent's unemployment" was an important government objective, the Court nonetheless declared a Social Security Act provision granting benefits to children only when their father was unemployed, but did not do so when their mother was unemployed, reasoning that the gender distinction in the provision was not substantially related to serving that objective).

191. As the dissent in *Mathews* emphasized, the Act's criteria for deeming a child dependent are based on questionable inferences, such as that legitimate children are much more likely to be dependent on their parents than are illegitimate children, and "nebulous inference upon inference is treated as more acceptable evidence of actual dependency than proof of actual support for many years." 427 U.S. at 521–22 (Stevens, J., dissenting).

192. CHEMERINSKY, *supra* note 109, at 689.

193. Even the Court in *Capato* conceded that "the intestacy criterion yields benefits to some children outside the Act's central concern," and that, under the Social Security Act's provisions, a child "may be eligible for benefits even though she never actually received her father's support." 132 S. Ct. at 2032.

194. Mathews v. Lucas, 427 U.S. 495, 521–22 (1976) (Stevens, J., dissenting).

195. *Id.*

196. *Capato*, 132 S. Ct. at 2032 (explaining that the Act's dependency presumptions increase administrative convenience by providing "workable substitute[s] for burdensome case-by-case determinations whether the child was, in fact, dependent on her father's earnings").

an interest as to sustain the discrimination attached to it.[197] The traditional skepticism with which the Court has viewed laws discriminating against nonmarital children "demands a conclusion that the classification is invalid unless it is justified by a weightier governmental interest than merely 'administrative convenience.'"[198]

The Social Security Act's survivors' benefits qualification scheme, through the state statutes it implicates, is littered with provisions that advantage children born to married parents.[199] By giving effect to these provisions, *Capato* continues to put the Supreme Court's stamp of approval on the Equal Protection violation first endorsed in *Mathews*.[200]

B. Capato Also Fails to Provide Any Uniformity in Legal Treatment of Posthumous Children

The Supreme Court's decision in *Capato* is inadequate, not solely because it conflicts with the Court's own Equal Protection precedent, but also because it promotes continued unpredictability in the legal treatment of posthumously conceived children.[201] Although posthumous conception has existed for decades and the number of children born as a result is substantial,[202] most states have not explicitly addressed posthumously conceived children in their intestacy statutes.[203] Instead, many states rely on statutes that grant, deny, or limit the ability to inherit intestate to children who were "conceived" or "begotten" before the deceased parent's death, or they assume that, because posthumously conceived children were not contemplated by the legislators who wrote the applicable statute, such children

197. In striking down a Social Security Act survivors' benefits provision, which required proof of dependency for male widows, but presumed dependency for all female widowers, the Supreme Court recognized that Congress's enactment of "provisions that draw lines in classifying those who are to receive benefits . . . are entitled to deference as those of the institution charged under our scheme of government with . . . making such judgments in light of competing policies and interests." Califano v. Goldfarb, 430 U.S. 199, 210 (1977). However, such classifications "must serve important governmental objectives and must be substantially related to the achievement of those objectives" to be deemed constitutional. *Id.* at 210–11 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976) (internal quotation marks omitted)). Finding that "[t]he only conceivable justification for . . . the presumption of wives' dependency . . . [was] based simply on archaic and overbroad generalizations that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes," it held that "such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits." *Id.* at 217 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (internal quotation marks omitted)).

198. *Mathews*, 427 U.S. at 519 (Stevens, J., dissenting).

199. *See supra* note 169 and accompanying text.

200. *See Capato*, 132 S. Ct. at 2033 (holding that the Social Security Act's dependency presumptions are constitutional, despite previously acknowledging their potentially discriminatory effect on illegitimate children, in light of the administrative convenience that the presumptions allow).

201. *See id.* at 2031–32 (reviewing the wide variety of requirements that posthumously conceived children must meet in order to inherit intestate, and in effect, qualify to receive Social Security Act survivors' benefits, depending on the applicable state law).

202. *See supra* note 6.

203. *See supra* Part II.C.1.

are never eligible inherit under them.[204] Furthermore, the practical effect that these laws have when applied is subject to the whim of the interpreting courts because of statutory ambiguity.[205] Because these statutes were not written to account for posthumously conceived children, their application can lead to unreasonable and unpredictable legal treatment.[206] A child conceived posthumously could inherit intestate, and in turn qualify for survivors' benefits, in one state, while a child conceived and born under the exact circumstances in a neighboring state would be denied both.[207]

There are a wide variety of technologies that can now be used alone or combined in a seemingly endless number of ways in order to create a child. According to Section 102 of the ABA Model Act Governing Assisted Reproductive Technology, "assisted reproduction means a method of causing pregnancy through means other than by sexual intercourse," which includes "[i]ntrauterine insemination," "[d]onation of eggs," "[d]onation of embryos," "[i]n-vitro fertilization and transfer of embryos," and "intracytoplasmic sperm injection."[208] The simple fact is that Congress and most state legislatures have not addressed posthumous children, no matter which method was used for their conception, in the legislation bearing on the rights of these children, and the older laws do not fit current realities; attempting to make them fit leads to unpredictability and injustice.[209] While the Social Security Act survivors' benefits qualifying provisions may reflect Congress' valuation of administrative convenience over uniformity, the Court cannot affirm such a legislative choice when it discriminates against illegitimate children, and thus, violates the Equal Protection Clause.

204. *See supra* Part II.C.1.

205. *See supra* Part II.C.2.

206. A hypothetical example is illustrative. In Ohio, a child may inherit intestate if she was "begotten" before the death of her parent. OHIO REV. CODE ANN. § 2105.14 (LexisNexis 2012). According to this law, when a mother and father preserve an embryo created with their genetic material for later use, and that embryo is implanted into the mother's uterus after the father's death, their child was "begotten" before the father's death. But if the couple preserved their genetic material separately and the mother used it to create an embryo only after the father's death, their child would have been "begotten" after the father's death. The result is an arbitrary determination of who qualifies to inherit based on the method of assisted reproduction chosen by the parents. *See* Carpenter, *supra* note 6, at 364 (arguing that "[i]t is extremely unlikely that the drafters intended to draw such an arbitrary line when they approved the language . . . [m]ore likely, they simply had not considered the possibility of posthumous conception, which remained a scientific impossibility at that time").

207. *See supra* Part II.C.

208. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(1) (2008) (internal quotation marks omitted).

209. *See supra* Part II.C.1.

C. A Possible Two-Part Solution: A Federal Standard for Determining Qualification for Survivors' Benefits and State Statutes Explicitly Addressing Posthumous Children

In order to achieve adequate and fair legal treatment of posthumous children, both federal and state legislators need to take action. Congress should amend the Social Security Act to create a federal standard for determining who qualifies to receive survivors' benefits that is more closely related to actual dependency, rather than referring to state law to make the determination. Social Security benefits are federal benefits, granted to people across the entire nation, and accordingly, their needs to be uniformity in their administration.[210] The federal standard should also be created with potential Equal Protection implications in mind, so that any potential for differential treatment of illegitimate children plaguing the current Act is eliminated.

While the federal government should assume control over the administration of Social Security benefits, states should retain control over intestacy laws, as this is a domain typically governed by the states. However, states should revise their intestacy statutes to account for the realities presented by recent scientific advancements, eliminating the need for judicial guesswork in the application of older laws. The 2008 UPC provides an excellent example for these new state laws. Not only does it represent a comprehensive system for probate law, but it would also enable states to give effect to decedents' wishes that their children to inherit from them, while still safeguarding against fraudulent claims and overly burdensome estate administrations.[211]

V. CONCLUSION

In *Capato*, the Supreme Court attempted to force the application of the outdated Social Security Act to fit the complex modern realities created by major scientific advancements.[212] The Court held that state intestacy laws should control the determination of whether a posthumously conceived child qualifies for

210. As stated by the Supreme Court in *Flemming v. Nestor*, "[t]he Social Security system may be accurately described as a form of social insurance enacted pursuant to Congress' power to spend money in aid of the general welfare, whereby persons gainfully employed, and those who employ them, are taxed to permit the payment of benefits to the retired and disabled, and their dependents." 363 U.S. 603, 609 (1960) (quoting Helvering v. Davis, 301 U.S. 627, 640 (1937) (internal quotation marks omitted)). Because the program is sustained through taxes, uniformly assessed by the federal government on all those who contribute to the American economy, the distribution of the program's benefits should not be contingent on state law.

211. *See* Carpenter, *supra* note 6, at 372–74. However, the 2008 UPC is not perfect. It does contain presumptions in favor of a finding a parent-child relationship for the purposes of intestate succession that advantage legitimate children. UNIF. PROBATE CODE §§ 2-116 and 2-120 (2008). Such presumptions should be eliminated prior to being adopted by the state legislatures in order to avoid violating the Equal Protection Clause.

212. *See supra* notes 1–3, 6 and accompanying text.

survivors' benefits,[213] ignoring the problems that their decision poses for Equal Protection and for the disparate legal treatment of posthumously conceived children.[214] The Court overlooked internal inconsistencies in its reasoning and conflicting precedent in order to reach its conclusion.[215] This undesirable method of judicial interpretation should be a sign to federal and state legislators that judges are being forced to make law by applying inapplicable statutes, and that the time has come to for elected representatives to take responsibility for adequately legislating on modern issues with such an important effect on a growing number of posthumously conceived children.

213. Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2026 (2012).

214. *See supra* notes 168–69 and accompanying text.

215. *See supra* text accompanying notes 178–82.