1979

Equal Protection and the Inheritance Rights of the Illegitimate Child: Lalli v. Lalli

Sharon Nelson Freytag

NOTES

Equal Protection and the Inheritance Rights of the Illegitimate Child: Lalli v. Lalli

Robert Lalli, the alleged illegitimate son of an intestate decedent, brought suit against the decedent's administratrix in Surrogate's Court, seeking a compulsory accounting of the decedent's estate. The claimant urged that he and his sister, as the acknowledged illegitimate children of the decedent,[1] were entitled to inherit from the decedent's estate. The administratrix, widow of the decedent,[2] argued that even if paternity was conceded, the children nevertheless were not lawful distributees of the estate because they had failed to comply with a New York statute[3] that prevents an illegitimate child from inheriting from its intestate father unless a court of competent jurisdiction has entered, during the lifetime of the father, an order of filiation declaring paternity.[4] Robert Lalli contended that this restriction discriminated against him on the basis of his illegitimate birth, thereby denying him equal protection under the fourteenth amendment.[5] The Surrogate's Court upheld the constitutionality of the statute and ruled that the alleged son was properly excluded as a distributee of the estate and therefore lacked status to petition for a compulsory accounting. The New York Court of Appeals ultimately upheld the statute,[6] adhering

1. The decedent had provided financial support for the children and openly accepted them as his own.

2. The widow, Rosamond Lalli, had been married to decedent, Mario Lalli, since 1939. Robert and Maureen Lalli, the children, were born in 1948 and 1950, respectively. Their natural mother died in 1968, five years before the death of Mario Lalli. *See In re* Lalli, 38 N.Y.2d 77, 78, 340 N.E.2d 721, 722, 387 N.Y.S.2d 351, 352-53 (1975).

3. N.Y. EST., POWERS & TRUSTS LAW § 4—1.2(a)(2) (McKinney 1967).

4. Robert Lalli possessed a notarized certificate of parental consent to the marriage of a minor child, signed by Mario Lalli at the time of Robert's marriage, that referred to Robert as Mario's "son." Robert also had several affidavits that stated Mario had openly acknowledged Robert as his son.

5. A general principle of the equal protection clause is that persons similarly situated should be treated similarly. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 993 (1978). Robert Lalli argued that legitimate and illegitimate children are similarly situated with regard to their relationship to their natural father and that illegitimate children should not be required to produce judicial proof of paternity.

6. *In re* Lalli, 43 N.Y.2d 65, 371 N.E.2d 481, 400 N.Y.S.2d 761 (1977). The New York Court of Appeals originally upheld the statute as it found a rational relationship between the requirement of a judicial decree and the state's interest in proving paternity to insure the orderly settlement of estates. 38 N.Y.2d 77, 340 N.E.2d 721, 372 N.Y.S.2d 351 (1975). Later, while pending before the United States Supreme Court, the case was vacated and remanded for reconsideration in light of the Supreme Court's decision in Trimble v. Gordon, 430 U.S. 762 (1977). In *Trimble* the Court invalidated an Illinois statute that required the acknowledgement of an illegitimate child by the father and the marriage of the child's parents before that child could inherit by intestate succession. On remand, the New York Court of Appeals decided that § 4—1.2(a)(2) met the stricter scrutiny required by *Trimble*. *See* notes 45-50 *infra* and accompanying text.

to the rationale that the statute's requirement for specific judicial proof of paternity was constitutional. Robert Lalli appealed to the United States Supreme Court. *Held, affirmed*: the requirement of a judicial declaration of the paternity of the father imposed by the State of New York on illegitimate children who would inherit from their fathers is substantially related to the important state interest the statute is intended to promote and therefore does not violate the equal protection clause. *Lalli v. Lalli*, 99 S. Ct. 518, 58 L. Ed. 2d 503 (1978).

I. HISTORICAL TREATMENT OF THE INHERITANCE RIGHTS OF ILLEGITIMATE CHILDREN

At common law, the illegitimate child was the child of no one. Blackstone described that child's plight: "The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore kin to nobody, and has no ancestor from whom any inheritable blood can be derived."[7] Most states have relaxed the inflexibility of the common law rule against inheritance by illegitimate children through adoption of statutes that allow the illegitimate child to occupy the same position as the legitimate child with respect to his mother.[8] Inheritance by an illegitimate child from an intestate father, however, is allowed usually only after the father's marriage to the mother,[9] after formal recognition or acknowledgement of the child by the father,[10] or, in some instances, after an adjudication of paternity.[11] In contrast, legitimate children can inherit from their fathers without the necessity of formal acknowledgement, based on the existence of their biological relationship. At present, only three states treat both the illegitimate and the legitimate child as essentially equal for purposes of inheritance.[12]

A constitutional challenge to the validity of state intestate succession laws with separate classifications for legitimate and illegitimate children

7. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 485 (1857), *quoted in* Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 353-54 (1969). *See generally* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971) for a discussion of the history and development of the rights of the illegitimate child.

8. *See, e.g.*, ARK. STAT. ANN. § 61-141(d) (1971); MO. ANN. STAT. § 474.060 (Vernon 1956); TENN. CODE ANN. § 31-206(2) (1978); TEX. PROB. CODE ANN. § 42(a) (Vernon Supp. 1978-1979).

9. *See, e.g.*, MO. STAT. ANN. § 474.070 (Vernon 1956); TENN. CODE ANN. § 31-206(2)(a) (1978); TEX. PROB. CODE ANN. § 42(b) (Vernon Supp. 1978-1979).

10. *See, e.g.*, CAL. PROB. CODE § 255 (West 1956); FLA. STAT. ANN. § 732.108(2)(c) (West Supp. 1978); TEX. PROB. CODE ANN. § 42(c) (Vernon Supp. 1978-1979).

11. *See, e.g.*, FLA. STAT. ANN. § 732.108(2)(b) (West 1976); TENN. CODE ANN. § 31-206(2)(b) (1978). For background on illegitimate children's statutory inheritance rights, see Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 854-56 (1966).

12. ARIZ. REV. STAT. § 14-2611 (1975); N.D. CENT. CODE §§ 30.1-04-09 (2-109) 2, 14-17-02 to -04(4)(d) (1977); OR. REV. STAT. §§ 112.105, 109.060 (1977). Even in these states, an illegitimate child bears the burden of proving paternity, a requirement not imposed on a legitimate child.

raises the difficult question of which standard of review applies. The Warren Court employed a two-tiered approach to the analysis of equal protection claims.[13] The first tier is a rational basis test: a statutory classification is constitutional if it is rational and furthers a legitimate governmental purpose.[14] Describing this rational basis test in *McGowan v. Maryland*,[15] Chief Justice Warren emphasized that the equal protection clause permits the states broad discretion in enacting laws that affect some groups of citizens differently from others. He wrote: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[16] Since most statutes easily can meet the minimal scrutiny of this test, the rational basis approach has been characterized as "judicial abdication."[17] The second tier involves a strict scrutiny test that applies when a challenged statutory classification is based on suspect criteria[18] or concerns some fundamental right.[19] This approach requires the Court to analyze rigorously the necessity of the classification as a means of accomplishing a compelling state interest.[20] Application of the strict scrutiny test generally results in invalidation of the challenged statute.[21] Thus, the Court's determination of the appropriate standard of review usually determines the fate of the statute under attack.

The Supreme Court did not analyze discrimination against the illegitimate child in terms of equal protection under the laws until 1968 in *Levy v. Louisiana*.[22] In *Levy* the Court struck down a Louisiana statute that denied illegitimate children the right to recover for their mother's wrongful death.[23] Although the opinion of the Court used the language of the rational basis test,[24] it also suggested the possibility of a fundamental right or a suspect classification: "The rights asserted here involve the intimate, familial relationship between a child and his own mother. . . . [I]t is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the

13. For a discussion of the two-tiered approach and evolving equal protection standards, see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of an Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

14. *See* L. TRIBE, *supra* note 5, at 995. Under this approach, the party challenging the statute has the burden of proving its irrationality.

15. 366 U.S. 420 (1961). *See* New Orleans v. Duke, 427 U.S. 297 (1976), for a recent decision based on the rational basis test.

16. 366 U.S. at 425-26.

17. *See* Gunther, *supra* note 13, at 19.

18. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (race). In Graham v. Richardson, 403 U.S. 365 (1971), the Court treated alienage as a suspect classification. *But see* Foley v. Connelie, 435 U.S. 291 (1978).

19. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).

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

21. *See* Gunther, *supra* note 13, at 8, for the statement that strict scrutiny is "strict" in theory and "fatal" in fact.

22. 391 U.S. 68 (1968).

23. LA. CIV. CODE ANN. art. 2315 (West 1967).

24. 391 U.S. at 71.

mother."[25] In a companion case, *Glona v. American Guarantee & Liability Insurance Co.*,[26] the Court invalidated that part of the same Louisiana statute that denied a mother's right to recover for the death of her illegitimate son. Repeating *Levy*'s emphasis on the intimate familial relationship between the mother and child, the majority nevertheless unambiguously stated that the standard used was the rational basis test;[27] yet the statute did not survive the Court's scrutiny, a result usually associated with more rigorous analysis. During a decade of decisions[28] following *Levy* and *Glona*, the proper equal protection standard for classifications based on illegitimacy was not clearly defined, but the "all or nothing approach"[29] of the two-tiered model gradually broadened to include a middle tier.

Three years after *Levy* and *Glona*, the Court in *Labine v. Vincent*[30] upheld a Louisiana statute[31] that prohibited an acknowledged illegitimate child[32] from inheriting from an intestate father when the father was survived by collateral heirs. The Court determined that the statute created no insurmountable barrier to inheritance by the illegitimate daughter since the father could have provided for her by will, married her mother, or stated in his acknowledgement of paternity his desire to legitimate his daughter.[33] Justice Black, writing for the majority, emphasized that a state may establish its own rules for the protection of family life and for the disposition of property.[34] Because of the Court's deference to the state legislature, the equal protection analysis in *Labine* was perfunctory and

---

25. *Id.* at 71-72 (footnotes omitted). One commentator maintains that strict scrutiny has been applied to statutory classifications based on illegitimacy since *Levy*. *See* L. TRIBE, *supra* note 5, at 1057.

26. 391 U.S. 73 (1968); *see* Krause, *supra* note 7, for a discussion of the effects of *Levy* and *Glona*. *See also* Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liab. Ins. Co.*, 118 U. PA. L. REV. 1 (1969).

27. 391 U.S. at 75.

28. Before *Lalli*, the Court reviewed the constitutionality of alleged discrimination on the basis of legitimacy thirteen times: Fiallo v. Bell, 430 U.S. 787 (1977); Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Jiminez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *summarily aff'd*, 418 U.S. 901 (1974); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *summarily aff'd*, 409 U.S. 1069 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972). For a review of these decisions, see Stenger, *The Supreme Court and Illegitimacy: 1968-1977*, 11 FAM. L.Q. 365 (1978).

29. Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 1017 (1975).

30. 401 U.S. 532 (1971).

31. LA. CIV. CODE ANN. art. 919 (West 1967).

32. The child had lived with the mother and father, was acknowledged by the father, and was the only child of the father.

33. 401 U.S. at 539.

34. Justice Black stressed:

> [T]he choices reflected by the [Louisiana] intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules.

Id. at 537.

did not require the succession statute to meet any standard at all.[35] In a footnote, however, the Court concluded that the Louisiana statute would satisfy the rational basis test if it were applied.[36]

Considering the decisions in *Levy* and *Glona*,[37] one writer commented that the decision in *Labine* was only a temporary setback in the expansion of rights for illegitimate children.[38] That interpretation appeared well-founded in light of the Court's decision a year later in *Weber v. Aetna Casualty & Surety Co.*[39] Invalidating a statute that denied worker's compensation benefits to unacknowledged illegitimate children, the Court suggested a balancing process in equal protection analysis: "The essential inquiry . . . is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[40] With this new method of inquiry, the Court exhibited a move away from the minimal scrutiny of the rational basis test toward an intermediate standard of review.[41] In *Mathews v. Lucas*[42] the Court described the evolving intermediate level of analysis as "less than strictest scrutiny" but more than "toothless" scrutiny.[43] Furthermore, the Court explicitly stated that illegitimate children are not a suspect class because "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."[44]

In *Trimble v. Gordon*[45] the Supreme Court relied on the intermediate

35. *But see* Comment, *Illegitimacy and Equal Protection: Two Tiers Or An Analytical Grab-Bag?*, 7 LOY. CHI. L.J. 754 (1976), for the proposition that *Labine* could be read as implying the emergence of a new test more deferential than the rational basis test.

36. 401 U.S. at 536 n.6: "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State."

37. Justice Black, writing for the majority in *Labine*, did distinguish *Levy*, noting that it involved the state legislature's creation of a statutory tort while *Labine* involved property rights incident to family life. *Id.* at 535-36.

38. *See* Petrillo, *Labine v. Vincent: Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377, 379 (1971).

39. 406 U.S. 164 (1972).

40. *Id.* at 173.

41. *Id.* at 172 (citations omitted): "[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose . . . . [W]hen classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." *See* Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 177-88 (1977), for a discussion of this intermediate standard of scrutiny in other equal protection cases. *See also* L. TRIBE, *supra* note 5, at 1077.

42. 427 U.S. 495 (1976). In *Lucas* the Court upheld a statute that conditioned entitlement to Social Security disability benefits on proof of an unacknowledged illegitimate child's dependency at the time of the wage earner's death.

43. *Id.* at 510.

44. *Id.* at 506. Sex, however, still has not been considered a suspect class by a majority of the Court. *See* note 56 *infra*.

45. 430 U.S. 762 (1977). For discussion of this decision, see Note, *"Legitimate" Discrimination Against Illegitimates: A Look at Trimble v. Gordon and Fiallo v. Bell*, 16 J. FAM. L. 57 (1977); Note, *Constitutional Law—Equal Protection and the Inheritance Rights of Illegitimates Under Intestate Succession Laws*, 43 MO. L. REV. 116 (1978); Note, *Constitutional Law—*

mode of analysis in *Lucas* when the Court reviewed an Illinois statute that permitted an illegitimate child to inherit from his intestate father only if the father had acknowledged the child and the child had been legitimated by the marriage of the parents.[46] The Illinois Supreme Court had relied on the statement in *Labine* that the state had a legitimate interest in the orderly distribution of property at death and therefore upheld the constitutionality of the statute. The United States Supreme Court, however, determined that the statute was not related closely enough to this asserted state interest to withstand judicial scrutiny:

> The [Illinois] court failed to consider the possibility of a middle ground between the extremes of complete exclusion [of the illegitimate from inheritance] and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws.[47]

In reaching this conclusion, the Court neither clearly distinguished nor expressly overruled *Labine*,[48] which involved a similar fact situation. Justice Powell, writing for the majority in *Trimble*, recognized that the Illinois statute in *Trimble* had been examined more critically than the Louisiana statute in *Labine* and directed that the more recent method of analysis controlled.[49] Yet he failed to articulate specifically the appropriate level of scrutiny to be applied.[50]

Equal Protection—Equal Protection Clause Limits Discrimination Against Illegitimates Claiming Under Their Intestate Fathers' Estates, Trimble v. Gordon, 97 S. Ct. 1459 (1977), 9 TEX. TECH L. REV. 113 (1977); Note, *Constitutional Law—Equal Protection—State's Denial of Right to Inherit Intestate Succession Based on Illegitimate Status Invalidated*, 52 TUL. L. REV. 406 (1978); Note, *Illegitimate Succession—Illinois Statute Denying the Rights of Illegitimate Children to Inherit from Father's Estate Is Unconstitutional, Trimble v. Gordon, 97 S. Ct. 1459 (1977)*, 13 TULSA L.J. 178 (1977).

46. ILL. REV. STAT. ch. 3, § 12 (1973).

47. 430 U.S. at 770-71.

48. *See* notes 30-36 *supra* and accompanying text. The Court did explain that the Louisiana statute in *Labine* did not discriminate against all illegitimate children but only those not legitimated. The Illinois statute, on the other hand, resulted in complete discrimination since there was no provision for legitimation. Yet in a footnote to the majority opinion, the Court recognized that "*Labine v. Vincent* . . . is difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as a precedent." 430 U.S. at 767 n.12.

49. 430 U.S. at 776 n.17. One writer suggested that after the decision in *Trimble, Labine* was no longer good law. L. TRIBE, *supra* note 5, at 1058. *See* note 88 *infra* for a comment on *Lalli*'s effect on that writer's conclusion.

50. *See* Justice Rehnquist's dissent, 430 U.S. at 781-82, for the opinion that the Court's analysis causes confusion because it does not set out the precise level of scrutiny to be used for classifications based on illegitimacy. *See also* Comment, *Constitutional Law—Illegitimacy—Intestate Succession—Trimble v. Gordon*, 23 N.Y.L. SCH. L. REV. 329, 338 (1977). *But see* Note, *Constitutional Law: Equal Protection for Illegitimates*, 17 WASHBURN L.J. 392, 397 (1978), in which the writer defines the equal protection scrutiny in *Trimble* as "intensified means scrutiny." *See also* Note, *Constitutional Law—Equal Protection—Illegitimacy Classifications Require Reasonably Strict Scrutiny—Trimble v. Gordon, 97 S. Ct. 1459 (1977)*, 11 CREIGHTON L. REV. 609, 614 (1977), in which the writer calls the intermediate level of analysis in *Trimble* "reasonably strict scrutiny."

II. LALLI v. LALLI

In *Lalli v. Lalli* the Supreme Court reviewed the constitutionality of a New York statute that required judicial proof of paternity before an illegitimate could inherit from an intestate father.[51] Justice Powell, writing for the plurality,[52] supported the equal protection approach enunciated in *Trimble* to the extent that classifications based on illegitimacy are not subject to strict scrutiny,[53] but added that these classifications are invalid under the fourteenth amendment if they are not "substantially related to permissible state interests."[54] The plurality,[55] therefore, clearly articulated the intermediate test for classifications based on illegitimacy: a "substantial relationship" test[56] falling between the extremes of minimal scrutiny and strict scrutiny.[57] To withstand this test, a statute must further the state interest with minimal impact on the rights of illegitimate children.[58] In

51. N.Y. EST., POWERS & TRUSTS LAW § 4—1.2(a)(2) (McKinney 1967) provides:
> An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

52. Justice Powell was joined in his opinion by Chief Justice Burger and Justice Stewart and joined in the judgment by Justices Blackmun and Rehnquist.

53. *Id.* at 523, 58 L. Ed. 2d at 509.

54. *Id.* The plurality stated in *Lalli* that the "substantial relationship" test had actually been applied in *Trimble. Id.* The *Trimble* Court had cited Reed v. Reed, 400 U.S. 71 (1971), as the appropriate analytical approach to statutes involving the disposition of property at death. 430 U.S. at 767 n.12. *Reed*, a case involving gender discrimination, required that a statute bear a fair and substantial relation to the object of legislation. Justice Rehnquist, dissenting in *Trimble*, expressed the fear that the majority was returning to the substantial relationship test used in the 1920's. *Id.* at 784. *See* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

55. Justice Powell again emphasized this test in the final paragraph of the opinion. 99 S. Ct. at 528, 58 L. Ed. 2d at 516. Justice Brennan, dissenting, also employed the substantial relationship test. 99 S. Ct. at 530, 58 L. Ed. 2d at 518.

56. The Court articulated the same standard for gender-based classifications in Craig v. Boren, 429 U.S. 190 (1976), stating: "[C]lassifications by gender must serve *important* government objectives and must be substantially related to the achievement of those objectives." *Id.* at 197 (emphasis added). Although Justice Powell also spoke of "important" state interests, 99 S. Ct. at 528, 58 L. Ed. 2d at 516, he used the adjective interchangeably with the word "permissible," 99 S. Ct. at 523, 58 L. Ed. 2d at 509. Commentators on *Craig* emphasized the Court's choice of the word "important" as one indicator of the Court's heightened scrutiny of the statute's purpose. *See, e.g.*, L. TRIBE, *supra* note 5, at 1082; Karst, *supra* note 41, at 54.

57. *See* Karst, *supra* note 41, at 186-88, in which the author asserted that the Court had been using a balancing technique in middle-tier analysis of illegitimacy and sex classifications so that, instead of measuring these classifications against an absolute standard of substantiality, the Court has engaged in a process of comparing the challenged statute with alternative considerations that avoid an illegitimacy or sex classification and then balancing the results against the invidiousness of the particular classification. In that writer's opinion, the balancing process is ad hoc in nature, having no clearly defined factors: "If 'substantiality' is in fact being ascertained by a balancing process, the Court should explain more clearly the factors that enter into its determination and the process by which these factors are weighed. Otherwise, the intermediate level of scrutiny will remain a mask for an unexplained process of adjudication." *Id.* at 188.

58. Professor Tribe characterizes five techniques encompassed by intermediate review: (1) assessing importance, (2) demanding close fit, (3) requiring current articulation, (4) limit-

Lalli the plurality succeeded in finding a substantial relationship between the statute and a legitimate state interest.

The plurality began its analysis of the New York statute with a review of its decision in *Trimble v. Gordon*.[59] Justice Powell distinguished the New York statute from the Illinois statute in *Trimble* on two grounds. First, he noted that the Illinois statute required both the father's acknowledgement of paternity and the legitimation of the child through the marriage of the parents before allowing inheritance by the child. Thus, even though the parent-child relationship in *Trimble* had been judicially established in a paternity hearing, the illegitimate child was denied inheritance under the statute because the parents had not married. In contrast, the New York statute required only a judicial declaration of paternity before the father's death. Secondly, the plurality differentiated the state interests the two statutes purported to serve. Whereas the Illinois law stated the dual purpose of encouraging family relationships[60] and insuring the orderly distribution of property of estates, the New York statute was directed at the latter goal only.[61] Therefore, the Court examined the procedural demands of the statute[62] only in terms of its "substantial relation" to the primary state interest of providing for the just and orderly disposition of property at death.

Focusing on the unique and difficult problems of proof of paternity involved when an illegitimate child seeks to inherit from his father, Justice Powell stated that accuracy would be enhanced by resolving paternity disputes in a judicial forum prior to the father's death.[63] He reasoned that the reliability of such a judicial order would prevent fraudulent claims during the administration of an estate.[64] Justice Powell emphasized that the intes-

---

ing afterthought, and (5) permitting rebuttal. For a discussion of these techniques, *see* L. TRIBE, *supra* note 5, at 1082-89.

59. 430 U.S. 762 (1977).

60. In *Weber* the Court rejected the argument that statutes penalizing illegitimate children are defensible as incentives for parents to enter legitimate family relationships. The Court stated:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasions beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

406 U.S. at 175. *But see* Parham v. Hughes, 99 S. Ct. 1742, 1746-47, 60 L. Ed. 2d 269, 275-76 (1979), in which the Court justified penalizing the putative father.

61. Perhaps in reaction to *Weber*, the court of appeals denied that the purpose of the New York statute was to discourage illegitimacy, mold human conduct, or set societal norms. 43 N.Y.2d 65, 70, 371 N.E.2d 481, 483, 400 N.Y.S.2d 761, 764 (1977).

62. The plurality limited its decision to the constitutionality of that part of the New York statute requiring that a judicial order of filiation be issued during the lifetime of the father of an illegitimate child. It reserved judgment on the constitutionality of that part of the statute requiring that the order be made within two years of the child's birth since that issue was not before the Court. 99 S. Ct. at 524 n.5, 58 L. Ed. 2d at 510 n.5.

63. *Id.* at 526, 58 L. Ed. 2d at 513.

64. This state interest in preventing fraudulent claims was also discussed in Parham v.

tate statute under review was drafted by the Bennett Commission, a group created by the New York Legislature to conduct a comprehensive study of certain areas of state law, including the descent and distribution of property. According to the Commission's report,[65] the proposed statute served to alleviate the plight of the illegitimate child while mitigating serious difficulties in the administration of estates. Therefore, the statute in question resulted from the legislature's careful consideration of the proper balance between the rights of the illegitimate child and the state's interest in proving paternity to prevent fraudulent claims.

Although states are free to require proof of paternity other than by judicial decree,[66] the plurality stated that the proof should be a "regularly prescribed, legally recognized"[67] method of acknowledging paternity. Justice Powell indicated that the state's interest in safeguarding the accurate and orderly disposition of property at death could be frustrated easily if there were a constitutional requirement that any notarized yet unsworn statement[68] identifying an individual as the decedent's "child" had to be accepted as adequate proof of paternity regardless of the context in which the statement was made.[69]

Justice Brennan, writing for the dissent,[70] disagreed as to the type of proof constitutionally required.[71] The dissent contended that New York's judicial order requirement would make it virtually impossible for acknowledged and freely supported illegitimate children to inherit from intestate fathers for several practical reasons:[72] (1) social welfare agencies concerned with errant fathers are not likely to bring paternity proceedings against fathers who support their children;[73] (2) acknowledged children

---

Hughes, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979), in which the Court upheld a statute denying the putative father an action for the wrongful death of his illegitimate child even though the father could prove paternity.

65. FOURTH REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, Legis. Doc. 1965, No. 19 (1965).

66. 99 S. Ct. at 526 n.8, 58 L. Ed. 2d at 513 n.8.

67. *Id.* at 528 n.11, 58 L. Ed. 2d at 515 n.11. The plurality stressed that such a regularly prescribed, legally recognized method of acknowledging paternity was the kind of "formal acknowledgement" contemplated in *Trimble v. Gordon*, 430 U.S. at 772 n.14. Although not specifying what alternative types of proof would suffice, the plurality rejected the notarized marriage "Certificate of Consent" possessed by Robert Lalli as a valid acknowledgement of paternity even though it contained Mario Lalli's signature and a clear reference to "my son Robert." In the plurality's opinion, since the certificate was not intended to prove biological paternity, the use of "my son" was ambiguous.

68. The lower court opinion differed from the Supreme Court opinion in stating that the writing was sworn to. *In re* Lalli, 38 N.Y.2d 77, 78, 340 N.E.2d 721, 722, 378 N.Y.S.2d 351, 352 (1975).

69. 99 S. Ct. at 528 n.11, 58 L. Ed. 2d at 515 n.11. *But cf.* Caban v. Mohammed, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979), also a New York case, involving adoption rights of a putative father, in which the Court accepted the father's name on the birth certificate and his support of the illegitimate child as valid proof of paternity.

70. Justices White, Marshall, and Stevens joined in the dissent.

71. 99 S. Ct. at 528 n.11, 58 L. Ed. 2d at 515 n.11.

72. *Id.* at 529, 58 L. Ed. 2d at 517.

73. *But see* MINN. STAT. ANN. § 257.33 (1971), which provides:

> It shall be the duty of the commissioner of public welfare when notified of a

are unlikely to bring paternity proceedings against their fathers because of a lack of need and a fear of provoking disharmony; (3) mothers are unlikely to bring proceedings against a father for these same reasons; and (4) fathers who fail to make even a rudimentary will are not likely to bring formal filiation proceedings. Justice Brennan suggested that in addition to a formal acknowledgement of paternity other than a judicial order, a state could require an elevated standard of proof[74] to prevent fraudulent claims. The requirement of an order of filiation declaring paternity would bar unnecessarily the claim of an acknowledged illegitimate child such as Robert Lalli, who had no reason to bring a paternity action during his father's lifetime and was barred from satisfying the statutory requirement after his father's death. Therefore, the dissent argued that the requirement of the New York statute was overbroad, unconstitutionally discriminating against illegitimate children by excluding forms of proof that do not compromise the state's interests.[75]

The plurality conceded that the New York statute might operate unfairly against a small number of illegitimate children[76] who otherwise might be able to prove their relationship to their fathers without compliance with the judicial order requirement and without serious disruption of the administration of estates.[77] Nevertheless, the plurality reasoned that the "inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law,[78] but on whether the statute's relation to the

---

> woman who is delivered of an illegitimate child, or pregnant with child likely to be illegitimate when born, to take care that the interests of the child are safeguarded, that appropriate steps are taken to establish his paternity . . . .

74. Justice Brennan suggested that the illegitimate child might bear the burden of proving paternity by "clear and convincing evidence, or even beyond a reasonable doubt." 99 S. Ct. at 530, 58 L. Ed. 2d at 518.

75. *Id.* (quoting Trimble v. Gordon, 430 U.S. 762, 772 n.14 (1977)).

76. The plurality rejected appellant's contention that the statute, in conjunction with N.Y. DOM. REL. LAW § 24 (McKinney 1967), unconstitutionally discriminated between classes of illegitimate children. Section 24 provides that a child conceived out of wedlock is legitimate if, before or after birth, his parents marry, even if the marriage is void, illegal, or judicially annulled. Appellant argued that children legitimated in that manner escaped the rigor of the requirement of a judicial order of paternity before intestate inheritance is permitted. The plurality, however, saw no unconstitutional discrimination between the two classes of illegitimate children, reasoning that the child legitimated under § 24 would have to prove not only paternity but also maternity and the marriage of his parents. Therefore, less exacting proof of paternity would be acceptable because of the additional evidentiary requirements. Earlier in its decision, however, the Court emphasized the ease with which the maternity of a child can be proved. "Establishing maternity is seldom difficult . . . '[T]he birth of the child is a recorded or registered event usually taking place in the presence of others.' " 99 S. Ct. at 525, 58 L. Ed. 2d at 511 (quoting *In re* Orwitz, 60 Misc. 2d 756, 761, 303 N.Y.S.2d 806, 812 (Sup. Ct. 1969)). Likewise, a marriage between parents of an illegitimate child would be a recorded event and easily proved.

77. 99 S. Ct. at 527, 58 L. Ed. 2d at 514.

78. The Court focused on the liberal interpretation the statute has been given by New York courts in refusing to exclude illegitimate children from inheritance because of technical failures in complying with the statute. *Id.* In all of the cases cited, however, some previous judicial determination of paternity was present. *See In re* Kennedy, 89 Misc. 2d 551, 392 N.Y.S.2d 365 (1977); *In re* Niles, 53 A.D.2d 983, 385 N.Y.S.2d 876 (1976), *appeal denied*, 40 N.Y.2d 809, 360 N.E.2d 1109, 392 N.Y.S.2d 1027 (1977). In addition, the plurality, in permitting the required judicial order, cannot be certain that all courts would be so liberal in the application of such a statute.

state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment."[79] Justice Powell's opinion echoed the state deference principle enunciated in *Labine*[80] and emphasized that the function of the Court was not to "hypothesize . . . on the desirability or feasibility of any possible alternative[s]"[81] to the statutory scheme formulated by New York. Rather, those "matters of practical judgment and empirical calculation"[82] were state responsibilities. The plurality did, however, attempt to reconcile *Labine* with *Trimble* by reaffirming that no deference would be given to state statutes like the Illinois statute in *Trimble*, where despite the legitimate state interest in orderly disposition of property at death, the statute broadly disqualified significant categories of illegitimate children of intestate men whose inheritance rights could be determined without jeopardizing the orderly settlement of estates.[83]

Justice Blackmun, in an opinion concurring in the judgment, remained unconvinced that the holdings in *Labine* and *Trimble* could be reconciled. He interpreted the decision in *Lalli* as providing solid support for the principles previously set forth in *Labine* and thus would overrule *Trimble*, a "derelict" that he believed provided little precedent for constitutional analysis of state intestate succession laws.[84] Justice Stewart, in a concurring opinion, agreed with the plurality's explanation of the differences between the Illinois statute in *Trimble* and the New York statute in *Lalli* and disagreed with Justice Blackmun that *Trimble* was a derelict.[85] Justice Rehnquist concurred with the judgment based on his dissent in *Trimble* in which he opposed a broad reading of the equal protection clause that would permit judicial intervention to change legislative judgment.[86] He, like Justice Blackmun, would adopt the principles set forth in *Labine*.

The plurality opinion in *Lalli*, coupled with the decisions in *Labine* and *Trimble*, provides lower courts with inconclusive guidelines as to the level of scrutiny the Court will apply to state intestacy statutes involving illegitimacy classifications.[87] In *Labine* the Court exhibited marked deference toward the legislature. In *Trimble*, however, the Court engaged in a rigor-

79. 99 S. Ct. at 527, 58 L. Ed. 2d at 514. In making this statement, the plurality combined the language of the rational basis test with its substantial relationship test.

80. *See* note 34 *supra* and accompanying text. Justice Warren approved that deference in *McGowan*. *See* notes 15-16 *supra* and accompanying text.

81. 99 S. Ct. at 528, 58 L. Ed. 2d at 515 (quoting Mathews v. Lucas, 427 U.S. 495, 515 (1976)).

82. 99 S. Ct. at 528, 58 L. Ed. 2d at 515.

83. *Id.* at 523, 58 L. Ed. 2d at 510 (quoting Trimble v. Gordon, 430 U.S. 762, 771 (1977)). The plurality stated that the New York statute's requirement did not "inevitably disqualif[y] an unnecessarily large number of children born out of wedlock." 99 S. Ct. at 527, 58 L. Ed. 2d at 514.

84. 99 S. Ct. at 529, 58 L. Ed. 2d at 517.

85. *Id.*

86. 430 U.S. 762, 777 (1977).

87. For a discussion of the binding effect upon state courts of an opinion of the United States Supreme Court supported by less than a majority of all its members, see Annot. 65 A.L.R.3d 504 (1975).

ous scrutiny of the statute. In *Lalli*[88] the Court purportedly used the same intermediate, heightened level of scrutiny as in *Trimble*, but exhibited the deferential attitude of the *Labine* court. With this ambiguous precedent,[89] the type of "regularly prescribed, legally recognized"[90] proof[91] permitted when illegitimate children seek to inherit from intestate fathers will have to be determined on a case-by-case basis since states cannot be certain what middle ground of circumstances[92] referred to in *Trimble* will insure that a statute satisfies the Court's substantial relationship test.

The Court did suggest that requiring a judicial order of paternity to be made within two years of the birth of the child could be constitutionally challenged.[93] Such a requirement puts the illegitimate infant in a situation over which he has no control,[94] reminiscent of classifications based on race and national origin. One author has suggested that the Supreme Court recognize illegitimacy as a suspect classification, thus requiring the strictest scrutiny of state intestate statutes.[95] "No excuse remains to continue the disabilities and prejudices of another day at the expense of today's chil-

88. The Court in *Lalli* refers to *Labine*, making clear that the two cases coexist with *Trimble* in providing guidelines for equal protection analysis. 99 S. Ct. at 525, 58 L. Ed. 2d at 511.

89. The alignment of the Court in any constitutional challenge is obviously critical. Justice Powell, who wrote the majority opinion in *Trimble*, aligned himself with Justices Brennan, White, Marshall, and Stevens; in *Lalli*, Justice Powell wrote the plurality opinion, joined by Chief Justice Burger and Justice Rehnquist and joined in the judgment by Justices Blackmun and Stewart. The Justices agreeing with Justice Powell in the majority opinion in *Trimble* formed the dissent in *Lalli*.

90. 99 S. Ct. at 528 n.11, 58 L. Ed. 2d at 515 n.11.

91. Improved methods of blood testing make paternity more easily ascertainable. For recent decisions in the field of serology, see Larson, *Blood Test Exclusion Proceedings in Paternity Litigation: The Uniform Acts and Beyond*, 13 J. FAM. L. 713 (1973-1974). *See also* S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS (1975).

92. *See* text accompanying note 47 *supra*. *See* White v. Randolph, 59 Ohio St. 2d 6, 391 N.E.2d 333 (1979), in which the Ohio Supreme Court upheld a state statute permitting inheritance by an illegitimate child from the natural father only after the father married the mother, acknowledged the child, designated the child as heir at law, adopted the child, or provided for the child in a will. Citing *Lalli*, the court determined that the requirements of the statute were substantially related to the important state interest of providing for the just and orderly distribution of property at death. 391 N.E.2d at 337. The court decided that the statute's five alternatives provided the reasonable middle ground that *Trimble* dictated. In a vigorous dissent, Justice Palmer argued that the Ohio statute placed the ability to inherit beyond the control of the illegitimate child and in the control of the putative father and thus provided no middle ground at all. *Id.* at 336-37.

93. The New York Court of Appeals declined to consider the appellant's challenge to that part of the statute containing the two-year limitation because the appellant did not have a judicial order to fulfill the other requirement of the statute. 38 N.Y.2d 77, 80, 340 N.E.2d 721, 724, 378 N.Y.S.2d 351, 354 (1975). The appellate court suggested that had the appellant possessed a judicial order, the time limit would have become relevant. The Supreme Court, using the same reasoning, also reviewed only one segment of the statute rather than the statute as a whole. *See* note 62 *supra*. If the Court had considered the two-year limitation, however, the appellant's case would have been substantially strengthened and that provision of the statute almost certainly would have been invalidated.

94. The illegitimate child should be allowed to bring a paternity action in his own right whether such an action has been previously brought or whether a statute of limitations would bar such an action if it were brought by the persons authorized to bring the paternity action under current statutes. *See* H. KRAUSE, *supra* note 7, at 151.

95. *See* Comment, *Illegitimates and Equal Protection*, 10 U. MICH. J.L. REF. 543, 553-54 (1977).