Why Bastard, Wherefore Base

William J. Rube Jr.

criminator to be a member of one of the classes in the Act, the discriminator's intent should be controlling. If the discriminator refused to serve a man he believed to be black, the intent of the discriminator to refuse service on the basis of race should be sufficient to invoke the Civil Rights Act of 1964, whether the man was actually black or not. Brogan believed the plaintiffs were antichristian and atheistic, even though they were not. In that circumstance, can it be denied that Brogan refused service to the plaintiffs on the basis of religion? The statutory language can easily accept such an interpretation. It is within the broad policy scope of the Act to include discriminations based on the characteristics of the person being discriminated against. Situations in which the intent of the discriminator is to refuse service because he believes, even though erroneously, the person has characteristics of one of the classes provided in the Act should be included within the Act as well.

Mark C. Clements

Why Bastard, Wherefore Base?[1]

Ezra Vincent died intestate, survived by his illegitimate daughter, Rita, and several collateral relations. Rita's claim as sole heir to her father's estate was supported by conclusive proof that she was the child of Ezra Vincent.[2] The trial court applied Louisiana intestate succession statutes[3] and concluded that Ezra Vincent's collateral relations were his only lawful heirs. The Louisiana Court of Appeals affirmed,[4] and the Supreme Court of Louisiana denied certiorari.[5] On appeal to the United States Supreme Court, Rita contended that Louisiana's statutory scheme for intestate succession constituted an invidious discrimination against illegitimate children which was violative of the due process and equal protection clauses of the fourteenth amendment.[6] *Held, affirmed*: The Louisiana intestate succession provisions which preclude illegitimate children, even though duly acknowledged, from claiming the succession rights of legitimate children, were choices within the power of the state to

[1] The complete Shakespearean quotation is: "Why bastard, wherefore base? When my dimensions are as well compact, my mind as generous, and my shape as true, as honest madam's issue? Why brand they us with base? with baseness? bastardy? base, base?" W. SHAKESPEARE, KING LEAR act I, scene 2, lines 6-10.

[2] Rita's birth certificate established that she was the child of Ezra Vincent and Lou Bertha Patterson (now Labine). Decedent and Lou Bertha Patterson appeared before a notary public and executed an acknowledgement of paternity as to Rita, elevating her to the status of a "natural child." *See* LA. CIV. CODE ANN. art. 202 (West 1952). Rita's birth certificate was changed to give her decedent's name one month after the acknowledgement. However, this appears to be directed only when the child has been legitimated by subsequent marriage of its parents. *See* LA. REV. STAT. § 40:308 (1965). The brothers and sisters came from as far away as Washington, D.C. They were unable to prove that their parents had ever been married, and they could prove their relationship to the decedent only by reputation.

[3] "Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendents nor ascendents, nor collateral relations, nor surviving wife, and to the exclusion only of the state." LA. CIV. CODE ANN. art. 909 (West 1952).

[4] Succession of Vincent, 229 So. 2d 449 (La. Ct. App. 1969).

[5] 255 La. 480, 231 So. 2d 395 (1970).

[6] U.S. CONST. amend. XIV, § 1.

make, and are not in contravention of the due process or equal protection clauses. *Labine v. Vincent*, 401 U.S. 532 (1971).

I. INTESTATE SUCCESSION AND THE ILLEGITIMATE

It is within the power of each state to provide for the devolution of property of its citizens on intestacy.[7] Statutory schemes for intestate succession vary widely, but generally legitimate children and their descendants are preferred over illegitimate children.[8] This preference has its origin in the common law which considered the illegitimate as *nullius filius*, a kin to nobody, unable to inherit from his parents or other ancestors.[9] Any deviation from the common-law provisions for descent and distribution must be by statute. Therefore, illegitimate children have no succession rights in the absence of contrary legislation.[10] Jurisdictions following civil-law principles allow illegitimates to inherit only from their mothers.[11]

Louisiana's legal traditions are derived from the French, Spanish, and Roman civil law, and the Louisiana Constitution reflects the extensive legal ordering of familial affairs characteristic of the civil law.[12] Louisiana has classified those who may inherit in terms of their legal rather than their biological relation to the deceased.[13] Mothers may inherit from their illegitimate children whom they have acknowledged, and vice versa.[14] However, Louisiana law takes a stricter course as regards the relationship between father and illegitimate child. The illegitimate child that goes unacknowledged is termed a "bastard"[15] and inherits nothing from his father. An acknowledgment entitles him to be termed a "natural child,"[16] and he may inherit from his father, but only to the exclusion of the state.[17] The only way an illegitimate can attain equality with his legitimate siblings is to be "legitimated";[18] then he may take by intestate succession or by will as any other child.

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[7] Harris v. Zion's Sav. Bank & Trust Co., 317 U.S. 447, 450 (1943); Mager v. Grima, 49 U.S. (8 How.) 490, 493 (1850).

[8] For a compilation of statutory schemes of intestate succession, see Note, *Constitutional Law—Equal Protection of Illegitimate Children*, 17 LOYOLA L. REV. 170, 172 n.8 (1970-71).

[9] *See* 1 W. BLACKSTONE, COMMENTARIES *446.

[10] *See* Annot., 24 A.L.R. 570, 571-92 (1923); Annot., 83 A.L.R. 1330, 1331-38 (1933).

[11] Oppenheim, *One Hundred Fifty Years of Succession Law*, 33 TUL. L. REV. 43, 46 (1958).

[12] *See* Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 264 (1970).

[13] Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 79 (1968) (Harlan, J., dissenting). Apart from inheritance, the Louisiana legislators have been reluctant to classify on the basis of a citizen's legitimacy. Louisiana makes no distinction between legitimate and illegitimate children for the crime of incest. LA. REV. STAT. § 14:78 (1952). A mother has the right to sue for the loss of property destroyed during the life of her illegitimate son if he dies thereafter. LA. CIV. CODE ANN. arts. 2315 (West 1952), 922 (West Supp. 1967). Furthermore, a mother is eligible for recovery under Louisiana's Workmen's Compensation Act if she is the dependent of her illegitimate son killed in an industrial accident at his place of employment. Thompson v. Vestal Lumber & Mfg. Co., 208 La. 83, 119, 22 So. 2d 842, 854 (1945); LA. REV. STAT. §§ 23:1231, :1252, :1253 (1964).

[14] LA. CIV. CODE ANN. arts. 918, 922 (West 1952).

[15] *Id.* art. 202.

[16] *Id.*

[17] *See* note 3 *supra*.

[18] LA. CIV. CODE ANN. art. 1486 (West 1952). Legitimation is effected by the subsequent marriage of the biological parents of the illegitimate.

The Louisiana courts have stated that the classification of children as legitimate or illegitimate for purposes of intestate succession serves a valid legislative purpose. The classification seeks to encourage the institution of marriage, discourage the birth of illegitimate children, and promote security of title to property.[19] The rationale behind the classification is "not to punish the offspring of those contravening these rules of morality, but to raise a warning barrier before the transgressor, prior to the act, of the consequences of his conduct . . . ."[20]

II. JUDICIAL REVIEW OF LEGISLATIVE CLASSIFICATIONS

The United States Supreme Court decided in 1850 that every state has the power to regulate "the manner and term upon which property . . . may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it."[21] This power is not altogether exclusive,[22] and even though a state is not obligated to extend a right to anyone, once it has done so, it must not limit the extended right by making unreasonable distinctions.[23]

The fourteenth amendment of the United States Constitution demands that a state afford its citizens equal protection of the laws.[24] Great latitude is given to state legislatures in making classifications incident to social and economic legislation.[25] It has been stated by the Supreme Court that the scope of particular legislation need not provide "abstract symmetry."[26] The legislatures may mark and set aside the classes and types of problems according to the needs of the state and as dictated or suggested by experience.[27] Nevertheless, a state may not invidiously discriminate between particular classes of persons.[28] Historical notions of equality have not limited the interpretation of what is invidious discrimination,[29] for equal protection of the laws defies exact interpretation.[30] The traditional standard in applying the equal protection clause calls for an

[19] Strahan v. Strahan, 304 F. Supp. 40, 42-44 (W.D. La. 1969).

[20] Minor v. Young, 149 La. 583, 589, 89 So. 757, 759 (1921).

[21] Mager v. Grima, 49 U.S. (8 How.) 490, 493 (1850). *See also* Irving Trust Co. v. Day, 314 U.S. 556, 562 (1941).

[22] "Although it is true that this [devolution of property] is an area normally left to the states, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power." United States v. Oregon, 366 U.S. 643, 649 (1961).

[23] *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956).

[24] "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[25] *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[26] Patsone v. Pennsylvania, 232 U.S. 138, 144 (1914).

[27] New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928). *See also* Tigner v. Texas, 310 U.S. 141, 147 (1940) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."); Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931) ("[T]he machinery of government would not work if it were not allowed a little play in its joints."); and Truax v. Raich, 239 U.S. 33, 43 (1915) (the legislature is not prevented from recognizing "degrees of evil").

[28] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541-42 (1942).

[29] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954), in which the Court reversed the holding of Plessy v. Ferguson, 163 U.S. 537 (1896), that state maintenance of separate public facilities for white and Negro citizens was constitutional.

[30] Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928).

examination of the relationship between the discrimination and the purpose of the legislature's activity.[31] The ultimate inquiry for the Court is whether the legislative action treats all persons similarly situated without arbitrary or unreasonable distinctions.[32] A law is reasonable under the equal protection clause only if the consideration of difference which separates those persons or things excluded from those included in the class has a fair and substantial relationship to the purpose of the legislation.[33]

The traditional standard for application of the equal protection clause was one of limited judicial scrutiny. A stricter standard, known as the "compelling interest" doctrine, was articulated in 1966.[34] This "compelling interest" exception requires that classifications based on "suspect" criteria or affecting a "fundamental right" be supported by a compelling interest.[35] Classifications involving one or both of these factors are subject to the "most rigid scrutiny."[36] Among those interests identified by the Court as "fundamental" are: voting,[37] procreation,[38] association for political purposes,[39] and interstate travel.[40] Race is the only criterion that is definitely suspect,[41] although others may be nationality[42] and alienage.[43] The Supreme Court has not said whether classification on the basis of legitimacy is similarly suspect.[44] However, it has been suggested that the common factor in all these suspect classifications is that they discriminate against an individual on the basis of factors over which he has no control.[45]

A higher degree of relevance to legislative purpose is required of classifications involving a fundamental right or suspect criteria. Because discrimination based upon a fundamental right or suspect criteria can survive constitutional attack only with the demonstration of a compelling interest, such classifications

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[31] McLaughlin v. Florida, 379 U.S. 184, 191 (1964); Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[32] *See* Douglas v. California, 372 U.S. 353, 356-57 (1963); Central R.R. v. Pennsylvania, 370 U.S. 607, 617-18 (1962); Morey v. Doud, 354 U.S. 457, 465-66 (1957); Griffin v. Illinois, 351 U.S. 12, 17-19 (1956); Hernandez v. Texas, 347 U.S. 475, 478 (1954); Kotch v. Pilot Comm'rs, 330 U.S. 552, 556-57 (1947); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541-43 (1941); Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459, 461-63 (1937); Louisville Gas & Elec. Co. v. Coleman, 227 U.S. 32, 37-39 (1928); Air-Way Elec. & Appliance Corp. v. Day, 266 U.S. 71, 85 (1924); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Southern Ry. v. Greene, 216 U.S. 400, 417 (1910); American Sugar Ref. Co. v. Louisiana, 179 U.S. 89, 92 (1900); Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150, 155 (1897).

[33] Asbury Hosp. v. Cass County, 326 U.S. 207, 214 (1945); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 543 (1942); Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 197 (1936); State Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[34] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[35] Shapiro v. Thompson, 394 U.S. 618 (1969).

[36] Korematsu v. United States, 323 U.S. 214, 216 (1944).

[37] *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

[38] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (*semble*).

[39] Williams v. Rhodes, 393 U.S. 23 (1968).

[40] Shapiro v. Thompson, 394 U.S. 618 (1969).

[41] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

[42] *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

[43] *See, e.g.*, Oyama v. California, 332 U.S. 633, 646 (1948).

[44] *But see* Levy v. Louisiana, 391 U.S. 68 (1968).

[45] Labine v. Vincent, 401 U.S. 532, 551 n.19 (1971) (Brennan, J., dissenting).

are not usually upheld.[46] This result occurs because the ordinary presumption of validity is reversed when a suspect criterion or fundamental right classification is discovered.[47] In such cases the burden shifts, and the state then has the burden of justifying the legislation.[48]

III. LABINE V. VINCENT

In *Labine v. Vincent*[49] the United States Supreme Court declined to examine the Louisiana intestate succession laws as they pertain to illegitimates in light of the equal protection clause. Instead, the Court merely reaffirmed the exclusive power of every state to regulate the devolution of property.[50] The opinion in *Labine* concluded with an observation that Louisiana had not created an insurmountable barrier to the decedent's illegitimate daughter.[51] No such barrier existed because Ezra Vincent could have made a will, legitimated Rita by marrying her mother, or made a statement of his intent to legitimate Rita.[52]

The Court has not declined in prior cases to apply the equal protection clause to a subject merely because it is regulable by the States.[53] The Court's action is especially surprising in light of the 1968 companion decisions of *Levy v. Louisiana*[54] and *Glona v. American Guaranty & Liability Insurance Co.*,[55] in which Mr. Justice Douglas used language that several writers[56] believed would place illegitimacy on the growing list of suspect criteria: "[I]t is invidious to discriminate against them [illegitimates] when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother."[57] However, it is clear now that *Levy* and *Glona* are not based on a finding of "suspect" classification. Instead, *Levy* and *Glona* called for an application of the traditional "rational basis" test.[58] On first impression it appears that neither test was applied in *Labine*. However, the majority opinion in *Labine* suggests by way of a footnote that the Louisiana intestate succession statute is subject to the less

[46] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).

[47] *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Madden v. Kentucky, 309 U.S. 83, 88 (1940).

[48] Loving v. Virginia, 388 U.S. 1, 9 (1967).

[49] 401 U.S. 532 (1971).

[50] Justice Black, writing for the majority, alluded to the Court's previous holdings in Mager v. Grima, 49 U.S. (8 How.) 490, 493 (1850), and Lyeth v. Hoey, 305 U.S. 188, 193 (1938). *But see* his opinion in United States v. Oregon, 366 U.S. 643, 649 (1961), in which he asserted that the states are not immune from review of laws pertaining to the devolution of property.

[51] The Court attempted to distinguish Levy v. Louisiana, 391 U.S. 68 (1968), on the ground that in *Levy* Louisiana had created an insurmountable barrier by their wrongful death statute which barred an illegitimate child from recovering for the wrongful death of its mother.

[52] 401 U.S. at 533.

[53] *See* note 50 *supra.*

[54] 391 U.S. 68 (1968) (an illegitimate child may bring an action for the wrongful death of his mother, despite a state statute to the contrary).

[55] 391 U.S. 73 (1968) (a mother may bring an action for the wrongful death of her illegitimate child, despite a state statute to the contrary).

[56] *See, e.g., In re* Estate of Jensen, 162 N.W.2d 861, 878 (N.D. 1968); Note, *Constitutional Law—Equal Protection of Illegitimate Children*, 17 LOYOLA L. REV. 170 (1971); Note, *Successions—Illegitimacy—Equal Protection and the Applicability of Levy v. Louisiana to Succession Law*, 44 TUL. L. REV. 640 (1970); 21 CASE W. RES. L. REV. 292 (1970).

[57] Levy v. Louisiana, 391 U.S. 68, 72 (1968).

[58] If this were not the case, then certainly the Court would have reached a different result in *Labine*.

stringent rational basis test.[59] One must assume that the rational basis for the Louisiana law was too apparent to the Court to warrant discussion.[60]

Analysis of Louisiana's intestate succession statute in light of the equal protection clause raises two questions. First, does the basis for Louisiana's classification of those who take upon intestacy have a fair and substantial relation to a valid legislative objective? And second, if the first inquiry results in a finding of reasonableness, then is the distinction one which is suspect or one which involves a fundamental right?[61]

Louisiana has chosen to distinguish those classes of persons who shall take upon intestacy in terms of their legal rather than their biological relation to the deceased. Acknowledged illegitimates take only to the exclusion of the state, while "bastards" take nothing. In view of the usual objective of intestacy statutes to distribute the intestate's property as he most likely would have done had he drawn a will,[62] the distinction of legal relationship becomes slightly unrealistic. The distinction is wholly unrealistic when applied to the acknowledged illegitimate who has a strong relationship with his parents. A more justifiable distinction would favor those children who could prove a biological relationship, the parent's financial support, and the parent's love and affection, rather than those who could prove merely a biological relationship.[63]

It has been stated in support of the Louisiana intestate statute that a classification on the basis of legitimacy is reasonable because its effect bears a substantial relation to a legitimate legislative purpose. The law is said to encourage marriage, discourage promiscuity, and stabilize land titles. While the first two purposes may be morally desirable, the legislative disabilities imposed upon the illegitimate child have not had a prophylactic effect upon the illicit conduct of the parents.[64] Very little "reasonableness" lies in penalizing the child for the sins of the parents.

Protecting heirs or purchasers of the intestate's property from individuals who might fraudulently pose as illegitimate offspring is also desirable. Requiring the demonstration of a legal relationship between the child and the deceased parent appears reasonable to provide such protection. However, the

[59] 401 U.S. 533 n.6 (1971): "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."

[60] Justice Harlan's concurrence concluded that it is "[e]ntirely reasonable for Louisiana to provide that a man who has entered into a marital relationship thereby undertakes obligations to any resulting offspring beyond those which he owes to the product of a casual liaison." 401 U.S. 532, 540 (1971).

[61] Since the finding of a suspect classification or the infringement of a fundamental right has the effect of reversing the usual presumption of validity, the second inquiry is usually the first one to be considered.

[62] Comment, *Status of Illegitimates in Louisiana*, 16 LOYOLA L. REV. 87, 109 (1969).

[63] This distinction would be contrary to Louisiana's forced heirship right of legitimate children. LA. CIV. CODE ANN. arts. 1493-95 (West 1952). But all of Louisiana's distinctions in ordering of familial relations must be considered when determining a justifiable classification.

[64] *See, e.g.*, Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 347 (1969). In 1940, 89,500 illegitimate children were born as compared with 318,100 illegitimate births in 1967. In 1940 the rate of illegitimacy per 1,000 unmarried women was 7.1 as compared with a rate of 24.0 in 1967. In 1940 the ratio of illegitimates born per 1,000 live births was 37.9 as compared with a ratio of 90.3 in 1967. U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, VITAL STATISTICS OF THE U.S. 1967, table 25, § 1 (1969).

statute which discriminates against the "natural child," the acknowledged but unlegitimated offspring, is not justifiable on these grounds. Louisiana land titles are not jeopardized if an illegitimate child must be acknowledged in writing before a notary in order to take on intestacy. These requirements would provide more security to land titles than would the fact of legitimate birth.[65] Hence, it seems completely unreasonable to discriminate between the acknowledged illegitimate and the legitimate child for the purpose of securing land titles. In Rita Vincent's case the state's discrimination between legitimate and natural children to support title security seems completely arbitrary.

By giving every presumption of validity to the state's classification, the question of reasonableness could, however, be answered affirmatively. Even assuming that the stabilization of land titles is in no way promoted by distinguishing between legitimate children and acknowledged illegitimates for purposes of intestate succession, the Louisiana law probably meets the reasonableness standard. In view of the Court's unwillingness to strike down legislation so long as *any* measure of reasonableness can be shown, one must assume that if the Louisiana succession laws deter one illegitimate birth, or encourage one couple to marry, the law is rationally related to some legitimate legislative purpose.

The next step is to inquire into the possibility of the status involving a suspect classification or fundamental right. The question of the existence of a fundamental right to inherit on intestacy may be easily dismissed. The Court has not found the "right" to be a fundamental one. An inspection into the suspect nature of a classification based on legitimacy is not so easily resolved. Classifications which have been declared suspect appear to have been based on congenital or unalterable traits over which an individual has no control and for which he should not be held responsible. Though important, these considerations do not completely explain the character of suspect criteria. Classifications based on race or lineage will usually be perceived as a stigma of inferiority and a badge of ignominy.[66] It therefore appears that the attachment of ignominy to a particular classification is the key to the determination of what future congenital and unalterable traits will be viewed as suspect.[67] Illegitimacy of birth,

[65] The following standards have been suggested to meet the test of reasonableness for proving requisite family relationships. In order to prove maternity, possession, and presentation of a valid birth certificate bearing the names of the mother and child must be produced; testimony must be given to the effect that the child was dependent upon, supported by, and lived with the mother and was reputed to be the child of the alleged mother; or testimony must be given to the effect that the mother lived with and was dependent upon the child, and was reputed to be the mother of the alleged child. In order to prove paternity, it has been suggested that the requirements established by the Social Security Act, 42 U.S.C. § 416(h)(3)(A)(i)-(ii) (Supp. I, 1965), serve as a format. This being the case, the child should: (1) be acknowledged in writing by the father; (2) be decreed or ordered the father's child by the court; or (3) produce other evidence satisfying the court that this is the father of the child and that he has been living with or contributing to the child's support. 43 TUL. L. REV. 383, 388 nn.16, 17 (1969).

As a further safeguard to the stability of land titles, a statute of limitations could be established limiting the time within which the illegitimate might bring his claim; *i.e.*, the illegitimate could be required to establish paternity within the father's lifetime or a reasonable time thereafter.

[66] *Cf.* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960) (the social meaning of segregation is inequality, the stamping of one race with the mark of inferiority).

[67] For example, congenital blindness is an unalterable trait, but is not viewed as suspect because the stigma is not despicable.

under this formulation is a prime candidate for being a suspect trait.[68] Once a characterizing trait is found to be suspect, the state must overcome the presumptive invalidity of the classification and show a compelling justification. Louisiana's stated purposes were barely sufficent to support a finding of reasonableness and would surely fall under the rigid scrutiny of the compelling interest test. Nevertheless, the Court has yet to place illegitimacy on the list of suspect criteria.

IV. CONCLUSION

The failure of the majority to more thoroughly analyze Louisiana's classification is untenable when considered in light of preceding cases. By evading the issue of discrimination, the decision is a definite backward step in developing the application of the equal protection clause. Concededly, the illegitimate may never achieve social equality with the legitimate, and perhaps such equality is not called for. However, the illegitimate has the right under the United States Constitution to equal protection of the *laws*. An ancillary right is to have any alleged discriminatory classification reviewed by the courts under standards consistent with their previous holdings. A more principled decision, as suggested by Justice Brennan in his dissent,[69] would have been an analysis of whether a rational basis existed and if such a basis was found, then an inspection of illegitimacy as a possibly suspect trait. Until the questions posed by an application of the equal protection guarantee to classifications based on legitimacy are thoughtfully considered, one can do no more than Shakespeare's Edward and wonder: "Why brand they us with base?"[70]

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[68] *See In re* Estate of Jensen, 162 N.W.2d 861, 878 (N.D. 1968): "This statute [classifying illegitimates as nontakers in inheritance], which punishes innocent children for their parents' transgressions has no place in our system of government which has as one of its basic tenets equal protection for all."

[69] 401 U.S. 532, 548-49 (1971).

[70] *See* note 1 *supra*, at line 10.