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ILLEGITIMATES AND EQUAL PROTECTION:
LALLI V. LALLI—A RETREAT FROM
TRIMBLE V. GORDON

INTRODUCTION

In the past decade the United States Supreme Court has reviewed state statutes which allegedly discriminated against illegitimate children in the fields of wrongful death,¹ workmen's compensation,² welfare and support,³ social security,⁴ and intestate succession.⁵ In dealing with the equal protection problems⁶ raised in those cases, the Court used an ad hoc approach rather than articulating a clear standard of review. Thus, except for the specific holdings of the decided cases, the law on the subject of equal protection for illegitimate children is still unsettled.⁷

Lalli v. Lalli,⁸ the Court's most recent decision on the rights of illegitimates, upheld the constitutionality of a New York statute requiring an order of filiation to establish paternity during the putative father's lifetime before a child born out of wedlock could inherit intestate from the father.⁹ To evaluate the emerging standard of equal protection review for illegitimates, the significance of *Lalli* lies in its rationale rather than its narrow holding.

The purpose of this comment is to ascertain the judicial standard of review currently applicable to equal protection issues concerning the rights of illegitimate children. To do so, the paper presents an analysis of the Supreme Court's prior decisions involving discrimination against illegitimates, examines the Court's analytical approaches to the equal protection issues raised in those cases, and discusses the rationale of *Lalli*, which signals a retreat from the equal protection standard articulated in *Trimble v. Gordon*¹⁰ less than one year earlier.

1. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

2. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

3. *Gomez v. Perez*, 409 U.S. 535 (1973); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973).

4. *Mathews v. Lucas*, 427 U.S. 495 (1976); *Jiminez v. Weinberger*, 417 U.S. 628 (1974); *Beatty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972).

5. *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Labine v. Vincent*, 401 U.S. 532 (1971).

6. The equal protection guarantee is found in the fourteenth amendment: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

7. For a thorough discussion of the Supreme Court's decisions on illegitimacy, see generally Note, *Illegitimacy and Equal Protection: Two Tiers or An Analytical Grab-Bag?*, 7 LOY. CHI. L.J. 754 (1976) [hereinafter cited as *Two Tiers*]; Note, *Illegitimacy And Equal Protection*, 49 N.Y.U. L. REV. 479 (1974); Note, *Const. Law: Equal Protection for Illegitimates*, 17 WASHBURN L.J. 392 (1978).

8. 439 U.S. 259 (1978).

9. *Id.* at 261-62, 275-76. For the text of the New York statute, see note 68 *infra*.

10. 430 U.S. 762 (1977).

I. ILLEGITIMACY AND EQUAL PROTECTION ANALYSIS

During the sixties the Supreme Court developed a "two-tier" approach to equal protection. The first tier approach, the rational basis test, is used in determining the validity of state statutes which deal with economic and social welfare legislation.¹¹ The Court generally holds such statutes valid on the theory that they do not violate federal constitutional guarantees so long as they bear any reasonable relationship to a permissible legislative purpose.¹² Chief Justice Warren best articulated this approach in *McGowan v. Maryland*¹³ when he said: "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."¹⁴ On the other hand, where a fundamental right¹⁵ is threatened or a suspect classification such as race,¹⁶ alienage,¹⁷ or ancestry¹⁸ is involved, the second tier test of strict scrutiny is applied. Under that test, the government is required affirmatively to show that it is pursuing a "compelling" or "overriding" goal. Under such circumstances the classification will not be sustained unless it is apparent that it is necessary to promote that compelling end, interest, or purpose.

Certain areas of discrimination including classifications based on illegitimacy defy such neatly packaged categorizations.¹⁹ Thus, the strict scrutiny test has not generally been applied to cases involving illegitimates because that test is reserved for suspect classifications. The first tier approach or rational basis test is also inappropriate because illegitimacy involves personal rights which deserve greater consideration than those involved with mere commercial factors. For these troublesome classifications, it has been suggested that the Supreme Court move to a middle-level scrutiny, such as Marshall's balancing approach²⁰ or Gunther's "means-focused" scrutiny.²¹

11. This test was set forth in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

12. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* (1978).

13. 366 U.S. 420 (1961).

14. *Id.* at 425-26.

15. Fundamental rights include the right to vote (*Harper v. Bd. of Elections*, 383 U.S. 663 (1966)); the right to procreate (*Skinner v. Oklahoma*, 316 U.S. 535 (1942)); criminal procedural rights (*Griffin v. Illinois*, 351 U.S. 12 (1956)); the right to travel (*Shapiro v. Thompson*, 394 U.S. 618 (1969)). See generally Note, 82 HARV. L. REV. 1065, 1127-31 (1969).

16. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

17. *Oyama v. California*, 322 U.S. 633 (1948).

18. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

19. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting). The difficulty with the two-tiered approach to equal protection is that it can deal adequately with the extremes which are clearly socio-economic or clearly fundamental but fails to work effectively in those cases that fall in between.

20. Justice Marshall discusses his balancing approach in his dissents to *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 70 (1973); *Richardson v. Belcher*, 404 U.S. 78, 90 (1971); and *Dandridge v. Williams*, 397 U.S. 471, 519-21 (1970). See generally Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. REV. 479 (1974); Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification and Some Criteria*, 27 VAND. L. REV. 971 (1974) [hereinafter cited as *The Less Restrictive Alternative*].

21. Gunther, *The Supreme Court 1971 Term-Forward: In Search of Evolving Doctrine on a Changing*

Gunther's relatively narrow ground of decision requires the showing of a substantial relationship between an asserted state interest and the means used to achieve it in order to sustain a statute's constitutionality. The test is more demanding than the traditional rational basis test because the Court assesses the means in terms of a *stated* legislative objective rather than mere conjecture.²² This strengthened rational basis test has the Court doing more to assure rationality of means without unduly infringing upon legislative prerogatives regarding ends.²³

In contrast, Justice Marshall has urged the adoption of his sliding scale model, under which the degree of care with which the Court will scrutinize particular classifications "depends upon the Constitutional significance of the interest affected and the invidiousness of the particular class."²⁴ Once the appropriate level of review is determined, it is applied to the examination of three factors: the legitimacy of the state interest, the reasonableness of the means used, and the availability of alternatives.²⁵ Until the *Lalli* decision, the trend in illegitimacy equal protection cases seemed to favor adoption of Marshall's balancing approach.

Prior to 1968 the Supreme Court did not apply the equal protection guarantee of the fourteenth amendment to statutory classifications based on illegitimacy.²⁶ In 1968, however, in *Levy v. Louisiana*²⁷ and its companion case *Glonn v. American Guarantee & Surety Co.*,²⁸ the Court held it to be a violation of the equal protection clause to deny illegitimate children the right to maintain an action for their mother's wrongful death or to deny a mother the right to recover for the wrongful death of her children born out of wedlock. Unfortunately, the theoretical basis for those two decisions was not made entirely clear by the Court. Certain language came close to characterizing illegitimacy as a suspect classification; nevertheless, other language apparently utilized the rational basis standard. In *Levy*, Justice Douglas described discrimination against illegitimates as "invidious . . . when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."²⁹ However, in *Glonn*, the Court held that the state had no *rational* basis to believe that denying recovery to the mother of illegitimates would tend to reduce illegitimate births.³⁰ The contrasting language used in *Levy* and *Glonn* illustrates the difficulty the Court had in applying the tradi-

Court: *A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972) [hereinafter cited as Gunther].

22. *See id.* at 20.

23. Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479, 490 (1974); *See Two Tiers*, *supra* note 7, at 758.

24. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

25. *The Less Restrictive Alternative*, *supra* note 20, at 1008.

26. *See Krause*, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 478-82 (1967). Professor Krause reported no cases in which the issue of discrimination against illegitimates had been discussed in equal protection terms. However, he found one case in which the equal protection challenge had been made and dismissed, *Brown v. Brown*, 183 Va. 353, 32 S.E.2d 79, 81 (1944).

27. 391 U.S. 68 (1968).

28. 391 U.S. 73 (1968).

29. 391 U.S. at 72.

30. 391 U.S. at 75.

tional "two-tiered" analysis to statutes which discriminated against illegitimates. It is not unnatural, therefore, that other courts, in subsequently applying those decisions, interpreted them in different ways.³¹

Despite the seemingly progressive views enunciated in *Levy* and *Glon*, three years thereafter the Court refused to adopt a similar rationale in *Labine v. Vincent*.³² That case involved a Louisiana statute which entitled an acknowledged illegitimate child to inherit from his father, but only to the exclusion of the state. The *Labine* Court applied a policy of total deference to the state legislation, emphasizing that the choice reflected by the intestate succession statutes was within the power of the state to make. The Court only alluded to a standard of review in a brief footnote, stating "even if we were to apply the 'rational basis' test . . . that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and directing disposition of property left within the State."³³ Thus the Court seemed to suggest that it would accord total deference to state legislation in areas of probate administration on the theory that such matters are traditionally within the regulatory power of the individual states.

Justice Brennan's dissent clearly showed the fallacy in the reasoning of the majority. He pointed out that although no one disputed Louisiana's right to pass laws dealing with inheritance, that fact did not make the equal protection clause of the constitution inapplicable.³⁴ In testing the validity of such laws he said: "It is precisely state action which is subjected by the Fourteenth Amendment to its restraints."³⁵

One year later, in *Weber v. Aetna Casualty & Surety Co.*,³⁶ the Court invalidated a Louisiana workmen's compensation law that granted full recovery to parents of legitimate and acknowledged children but limited the scope of such benefits in the case of unacknowledged illegitimates. In doing so the Court enunciated a standard of review for equal protection analysis of illegitimacy cases for the first time. Justice Powell, advocating Marshall's balancing approach in this area of discrimination, stated: "[W]hen state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny The essential inquiry [is], however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"³⁷ However, Powell's decision was not predicated on any such

31. For a discussion of various state court interpretations of *Levy* and *Glon*, see Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969).

32. 401 U.S. 532 (1971).

33. *Id.* at 536 n.6. In Justice Brennan's dissent, he applied his own fourteenth amendment analysis to the subject and concluded that even under the rational basis test the statute was not constitutional because unmarried parents would not conform to societal ways just to avoid possible discriminatory treatment their future offspring might receive. *Id.* at 548 (Brennan, J., dissenting).

34. *Id.* at 549. See Petrillo, *Labine v. Vincent: Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377 (1971).

35. 401 U.S. at 549.

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

37. *Id.* at 172-73. Justice Powell apparently accomplished Marshall's balancing test in one

balancing test.³⁸ Instead, he apparently relied upon a lower level scrutiny, similar to Gunther's "means-focused" test.³⁹ He stated that it "cannot be thought here that persons will shun illicit relations because their offspring may not one day reap the benefits of workmen's compensation."⁴⁰ Thus the statute was invalidated because inferior classification of dependent, unacknowledged illegitimates bears no significant relation to the legitimate state purpose of promoting family relations. In accordance with Gunther's "means-focused" approach, the Court required rationality in fact—the legislative means must substantially further the articulated legislative ends.⁴¹ Nevertheless, by stating one standard and applying another, the Court in *Weber* left unanswered the question of exactly where between the rational basis and strict scrutiny tests the correct analysis lies.

In subsequent cases, there was no clarification as to the proper standard of judicial scrutiny in cases involving discrimination against illegitimates.⁴² In one such case, *Gomez v. Perez*,⁴³ the issue was whether a Texas statute could constitutionally grant legitimate children a judicially enforceable right to support from their natural father and at the same time deny that right to illegitimate children. Relying on *Levy* and *Weber*, the Court made the following broad statement: "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."⁴⁴ Although the Court recognized that a legitimate state purpose existed in preventing fraudulent paternity suits and that such problems could not lightly be brushed aside, it nevertheless concluded that "neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."⁴⁵ This was the first time in considering such cases that the Court appeared to be utilizing the balancing approach.⁴⁶ Under either the traditional rational basis test or Gunther's "means-focused" approach, the Texas statute could have been upheld since the denial of support to illegitimate children could, in fact, further the state's objective to prevent the assertion of fraudulent claims. Instead of using either of these standards, the Court balanced the importance of the interest threatened (support to illegitimates) against the importance of the state goal sought to

step, wherein he balanced all the relevant factors. *The Less Restrictive Alternative*, *supra* note 20, at 1009.

38. See 52 TUL. L. REV. 406, 411 (1978).

39. See text accompanying note 21 *supra*.

40. 406 U.S. at 173.

41. See note 21 and accompanying text *supra*.

42. See, e.g., *Jimenez v. Weinberger*, 417 U.S. 628 (1974). In this case the Court invalidated a social security provision which barred recovery by illegitimate children born after the onset of the worker's disability. Without articulating a standard of review, the Court found no reasonable relationship between the classification and the governmental purpose of discouraging spurious claims. In *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973), the Court struck down a New Jersey program which provided welfare only to low income family units consisting of married couples with either natural or adopted children. The Court seemed to employ a rational basis test to determine whether the program was a means for achieving the stated objective.

43. 409 U.S. 535 (1973).

44. *Id.* at 538.

45. *Id.*

46. *Two Tiers*, *supra* note 7, at 762.

be achieved (preventing fraudulent paternity claims) and came to a decision that was "logical" and "just."⁴⁷

Levy's early intimation that illegitimacy might be a suspect class was finally firmly rejected by the Supreme Court in *Mathews v. Lucas*.⁴⁸ The challenged statute, which dealt with eligibility requirements for receiving social security benefits, granted a presumption of dependency to legitimate children and illegitimates who were entitled to inherit from the decedent under state law. Other illegitimates would receive benefits only if they could establish dependency by providing evidence of cohabitation or support by the wage earner at the time of death. In *Lucas*, the illegitimate children were unable to prove dependency at the time of their father's death because he died following an extended absence from home. The Court held the statutory classification permissible because the presumptions were reasonably related to the likelihood of dependency at death.⁴⁹

Writing for a majority of the Court, Justice Blackmun stated that the appropriate level of scrutiny was "less than [the] strictest . . . [but] not a toothless one."⁵⁰ Then, after acknowledging the substantial relationship between a statutory presumption of dependency and administrative convenience, he stated that the validity of such statutes depended upon whether "the statutory classifications . . . [are] reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of a parent's death."⁵¹ Following an extended review of the factors involved, he concluded that the statute was valid because it "does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations."⁵² Thus, Justice Blackmun utilized Marshall's balancing process⁵³ by checking the relationship between statutory objectives and means and by testing whether the statute was designed to ensure that the factors giving rise to a presumption of dependency substantially related to the likelihood of actual dependency.

Trimble v. Gordon,⁵⁴ decided less than a year before *Lalli*, provided further clarification of the Court's evolving equal protection framework in dealing with state statutes regarding illegitimates. Deta Mona Trimble, the illegitimate child of Sherman Gordon, was openly acknowledged and supported by her father in accordance with a paternity order. When Mr. Gordon died in 1974 without leaving a will, Deta Mona was unable to inherit from him because under Illinois intestacy law an illegitimate child's parents must intermarry and the child must have been formally acknowledged before she (or he) could inherit.

47. 409 U.S. at 538.

48. 427 U.S. 495 (1976).

49. *Id.* at 510-11.

50. *Id.* at 510. The *Lucas* Court noted that illegitimates do not suffer the political powerlessness characteristic of classes which traditionally receive strict scrutiny. *Id.* at 506 n.13 (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

51. 427 U.S. at 510.

52. *Id.* at 513.

53. See note 20 and accompanying text *supra*.

54. 430 U.S. 762 (1977).

An analysis of Justice Powell's decision holding the Illinois statute unconstitutional makes it evident that the Court was tending to favor an equal protection approach in the area of discrimination against illegitimates closely tailored to Marshall's balancing approach.⁵⁵ At the outset of his opinion Justice Powell in effect rejected the reasoning in *Labine*. He stated that while judicial deference is appropriate when the challenged statute involves a "substantial state interest" in providing for the prompt determination of those entitled to a distribution of a decedent's property, "there is a point beyond which . . . deference cannot justify discrimination."⁵⁶ In discussing the *Labine* case he said: "[I]t is difficult to place [that case] in the pattern of this Court's equal protection decisions and subsequent cases have limited its force as a precedent."⁵⁷ Instead, he cited *Weber* and *Lucas* as appropriate precedents, stating: "The Court demands more than rational basis, but less than compelling state interest when classifications approach sensitive and fundamental personal rights"⁵⁸

Justice Powell's treatment of the state's main argument in defense of the statute exemplifies the Court's shift from its previous ad hoc approach to a balancing approach. The state argued that its interest was to establish a method of property distribution unencumbered by difficulties in proof of paternity and dangers of fraudulent claims.⁵⁹ Answering that contention, Justice Powell explained that serious problems of proof of paternity might justify a more demanding standard for illegitimates claiming under their father's estate than that required for illegitimates claiming under their mother's estate, but that difficulty did not justify total statutory disinheritance for illegitimates whose fathers die intestate.⁶⁰ He held that the constitutional flaw in the Illinois statute was that it did not fit its intended purpose closely enough: "The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children . . . [whose paternity could clearly be established] inheritance rights can be recognized without jeopardizing . . . [estate] settlement[s]. . . ."⁶¹

In holding the Illinois statute invalid, Justice Powell reaffirmed the view expressed by the Court in *Lucas* that the statute must be "carefully tuned to

55. See note 20 *supra*. But see 43 MO. L. REV. 116, 119 (1978); 52 TUL. L. REV. 406, 411 (1978); 17 WASHBURN L.J. 392, 397 (1978).

56. 430 U.S. at 767 n.12.

57. *Id.*

58. *Id.* at 766-67.

59. The other state interests sought to be achieved were encouraging family relationships and discouraging casual liaisons. The Court could not find a rational relationship between denying illegitimate children the right to inherit from their fathers and discouraging casual liaisons or promoting family relations. 430 U.S. at 768-70. As the Court had previously declared in *Weber*, "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." 406 U.S. at 175. See generally 11 CREIGHTON L. REV. 609 (1977); 18 SANTA CLARA L. REV. 822 (1978).

60. 430 U.S. at 774.

61. *Id.* at 770.

alternative considerations."⁶² He held that the Illinois statute did not meet this standard because it "extend[ed] well beyond its asserted purposes."⁶³ Accurate and efficient disposition of the father's property would not have been compromised by allowing his illegitimate child's claim under the circumstances.

In a footnote, Justice Powell explained that states were free to prescribe different forms of proof of paternity; they need not accept inaccurate and inefficient methods. By way of illustration, he indicated that prior adjudication *or* formal acknowledgement of paternity were forms of proof that would not be constitutionally invalid.⁶⁴ Justice Powell was, however, careful to point out that a statute which promotes a legitimate state interest can exclude illegitimate children only when it is "carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity."⁶⁵

The *Trimble* court thus examined the substantiality of the state interest, the reasonableness of the means adopted, *and* the availability of alternatives, since a final determination of the statute's constitutionality depended upon a balancing of the importance of the interest threatened against the importance of the goals sought to be achieved *and the effectiveness* of the statute in achieving them.⁶⁶

The decisions from *Levy* to *Trimble* exemplify the diverse approaches the Supreme Court has taken in applying the equal protection clause in the case of illegitimates. If one could prognosticate after an analysis of the Court's meandering approach, it would seem that Marshall's balancing approach would be the preferred analysis in future cases. In *Trimble*, Justice Powell went a step further and not only required that the statute be designed to achieve its stated purposes, but also investigated the means imposed by the statutory scheme to accomplish its valid state objective.

II. *LALLI v. LALLI*

Only eight months after the Supreme Court in *Trimble* declared the Illinois statute unconstitutional, the Court in *Lalli v. Lalli*⁶⁷ upheld the constitutionality of a New York statute which required that an order of filiation be obtained during the lifetime of the putative father as a condition precedent for an illegitimate child to inherit intestate. How does the decision in *Lalli* fit into the Supreme Court's evolving equal protection framework? Is *Lalli* a logical extension of the holdings in *Trimble* or a retreat from the views expressed therein? A comparison of the Court's analysis of the two statutes involved shows some logic in the seemingly inconsistent results.

Both cases dealt with illegitimates claiming the right to inherit intestate from their respective fathers. Robert Lalli, like Deta Trimble, had been publicly acknowledged and supported by his putative father; but Lalli, un-

62. *Id.* at 772 (quoting *Mathews v. Lucas*, 427 U.S. 495, 513 (1976)).

63. 430 U.S. at 772.

64. *Id.* at 772 n.14.

65. *Id.*

66. See Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. REV. 479 (1974).

67. 439 U.S. 259 (1978) (5-4 decision).

like Deta Trimble, received that support without any judicial support order. When Mario Lalli was murdered in 1974, Robert Lalli petitioned the Surrogates Court for a compulsory accounting, claiming that he was entitled to inherit from Mario as his son. The petition was opposed on the ground that even if Robert were in fact Mario's child, he was not a lawful distributee under the New York statute of intestate succession, which provided that an illegitimate child could not inherit intestate from his father unless an order of filiation had been obtained during the putative father's lifetime.⁶⁸ Robert Lalli contended that the statute violated the fourteenth amendment. The evidence established conclusively that Mario Lalli had acknowledged openly and often that Robert was his son. Despite that uncontroverted fact, the New York courts upheld the constitutionality of the statute. Robert Lalli appealed that determination to the United States Supreme Court. The Court initially remanded the case for further consideration in light of its decision in *Trimble*. Upon remand, the New York Court of Appeals once more upheld the constitutionality of its statute. When the case again reached the United States Supreme Court, it declared that the New York statute did not violate the equal protection clause of the fourteenth amendment.

Justice Powell, writing for the *Lalli* majority, reaffirmed *Trimble* as setting the appropriate standard for review. However, a careful scrutiny of the rationale clearly shows that in reaching his conclusion that the New York statute was valid, Powell used Gunther's "means-focused" approach rather than the balancing approach employed in *Trimble*.⁶⁹ In the first part of the *Lalli* opinion, he stated that there was a substantial relationship between New York's legitimate state interest in providing "for the just and orderly disposition of property at death" and its statutory requirement for the obtaining of an order of filiation during the father's lifetime before an illegitimate child could inherit intestate.⁷⁰ He found a state interest to be directly involved because of the clear possibility, among other reasons, that spurious claims of paternity might be filed. In addition, he pointed out that problems in the administration of estates, such as cite and service of unknown illegitimate children, would be alleviated. Justice Powell then proceeded to consider whether the means adopted by New York State substantially furthered its interest. He came to the conclusion that the requirement for a paternity proceeding during the lifetime of the father was not constitutionally invidi-

68. Section 4-1.2 of N.Y. EST., POWERS & TRUSTS LAW (McKinney 1967) in its entirety provided:

(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) 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.

(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

69. See notes 20-21 and accompanying text *supra*.

70. 439 U.S. at 268.

ous because it would promote accuracy and reliability, and would permit the alleged father to defend himself and his reputation.

Up to this point in the *Lalli* decision, Justice Powell's reasoning was consistent with the rationale of *Trimble*. However, the departure from *Trimble* becomes apparent when the appellant's contention and Powell's answer thereto are considered. As a basis for his appeal, Robert Lalli argued that:

[Section] 4-1.2, like the statute at issue in *Trimble*, exclude[d] "significant categories of illegitimate children" who could be allowed to inherit "without jeopardizing the orderly settlement of their intestate fathers' estates." He urge[d] that . . . "known" illegitimate children who, despite the absence of an order of filiation . . . can present convincing proof of paternity—cannot rationally be denied inheritance as they pose none of the risks § 4-1.2 was intended to minimize.⁷¹

In response, Justice Powell stated: "Our inquiry under the Equal Protection Clause does not focus on the abstract '*fairness*' of a statute, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the *rationality contemplated* by the Fourteenth Amendment."⁷² He then added, "we have no basis to question . . . [the statute's] detail beyond the evident consistency and substantiality."⁷³

Thus the Court failed to employ the analysis utilized in *Trimble*, for the "rationality contemplated" in *Trimble* was a balancing process where the least restrictive alternative was an important consideration.⁷⁴ The balancing standard implicitly must consider the "fairness" of a statute by comparing the state's justification for the statutory scheme with the means employed to realize it. According to *Trimble*, if the means are "carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity," while still achieving the state objective, the two interests are balanced.⁷⁵

Consistent with Marshall's balancing approach, the Court in *Lucas* had upheld a statutory classification because it was "reasonably related to the likelihood of dependency at death."⁷⁶ Similarly, the Court in *Trimble* had struck down the Illinois statutory classification because it was "overly broad" and extended "well beyond the asserted purposes."⁷⁷ However, the Court in *Lalli* refused to extend its analysis that far. Without substantiation for his conclusion, Justice Powell stated: "This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock."⁷⁸

If the Court had inquired into the effectiveness of the means employed

71. *Id.* at 272.

72. *Id.* at 273 (emphasis added).

73. *Id.* at 274 (quoting from *Mathews v. Lucas*, 427 U.S. 495, 515-16 (1976)).

74. See text accompanying notes 56-59 *supra*.

75. Note, 11 CLEARINGHOUSE REV. 352, 353 (1977).

76. *Mathews v. Lucas*, 427 U.S. 495, 509 (1976). See notes 50-53 and accompanying text *supra*.

77. *Trimble v. Gordon*, 430 U.S. 762, 772-73 (1977). See notes 54-66 and accompanying text *supra*.

78. 439 U.S. at 273.

to determine whether significant categories of illegitimate children could be allowed to inherit intestate without compromising the state interest, it could well have found that the number disqualified under the New York condition precedent was indeed large.⁷⁹ As Justice Brennan observed in his dissent, "it is difficult to imagine an instance in which an illegitimate child, acknowledged and voluntarily supported by his father, would ever inherit intestate under the New York scheme."⁸⁰ Realistically viewed, the failure to obtain an order of filiation might have been due to the fact that the putative father was supporting the child and had acknowledged paternity; therefore, obtaining such an order would have served no real purpose. Justice Brennan pointed out that where children are being supported by the alleged father, institution of a paternity proceeding is unlikely to occur for two reasons: (1) most individuals are unaware of the necessity for initiating such a proceeding, and (2) the failure to institute such a judicial proceeding might result from the fear that the support might be withheld or that the relationship of the parties might thereby be disrupted.⁸¹ In addition, mothers may be unwilling to bring an action against the putative father for fear of public embarrassment. Thus, the practical effect of the New York statutory scheme was to forfeit an acknowledged and freely supported illegitimate child's future right of inheritance.⁸² If such a forfeiture resulted from a lack of proof, it would of course be justified; but certainly there are less drastic means of

79. See Note, 11 CLEARINGHOUSE REV. 352, 353 (1977), where it states that "fewer than 50 percent of illegitimate children are acknowledged or adjudicated."

80. 439 U.S. at 278 (Brennan, J., dissenting). In May of 1979, however, the New York legislature amended the former statute in an attempt to take into account the "willing" fathers who voluntarily support their illegitimate children. The statute presently provides that a father may voluntarily sign an acknowledgment of paternity within ten years after the birth of the child. The writing must be signed in the presence of a witness and acknowledged by such witness before a notary public. The new legislation also establishes a central registry in the Department of Social Services for filing such acknowledgment. The registry will serve to provide notice to personal representatives of the existence of the illegitimate. 1979 N.Y. Laws, ch. 139.

Nine months after the *Lalli* decision, the Surrogate's Court of New York decided *Estate of Herbert Rodriguez*, 420 N.Y.S.2d 349 (1979). In that case, the evidence conclusively established that the petitioner, Herbert's mother, and the decedent were the infant's parents. Although the original birth certificate did not list anyone as the father, two years later both decedent and petitioner executed a form provided by the Bureau of Vital Statistics naming the decedent as the father. Their signatures on the corrected birth certificate were sworn to before a commissioner of deeds. Since there was no judicial determination during the decedent's lifetime as to the child's paternity, however, the court was constrained under the holding of *Lalli* to conclude that the child was not a distributee under the decedent's estate.

Although the new provision of the New York statute liberalizes the rights of illegitimate children to inherit from the paternal side of the family, it would not have changed the outcome of *Rodriguez*, because the birth certificate was neither executed with the formalities required by the amended statute nor filed with the Department of Social Services. The result of *Lalli* is clear: only by compliance with the explicit terms of a state statute can an illegitimate child become a distributee of his father's intestate estate even where evidence conclusively establishes that the decedent was in fact the father of the child.

81. 439 U.S. at 278 (Brennan, J., dissenting).

82. The Court never addressed whether it was constitutional to require an order of filiation to be commenced within the first two years of the child's birth as stated in § 4-1.2 because the appellant had never commenced a paternity proceeding at any time. Thus, the Court chose to limit its ruling to the narrower issue of whether the requirement that a judicial order of filiation be issued during the lifetime of the father of an illegitimate was constitutional. See 439 U.S. at 267 n.5.

screening fraudulent claims of paternity and assuring accuracy in administering estates than the absolute bar laid down in the New York statute.⁸³ As Justice Brennan pointed out, to serve the state interest New York could have required elevated standards of proof; *e.g.*, public notice and a short statute of limitations.⁸⁴

CONCLUSION

The Court in *Lalli* failed to recognize or refused to consider the issue of "alternative considerations" and retreated from the *Trimble* balancing approach to a lower level scrutiny,⁸⁵ similar to Gunther's "modest interventionism . . . which permits the state to select *any* means that substantially further legislative purposes."⁸⁶ As the *Lalli* decision illustrates, there may be a valid state interest which a classification does in fact substantially further; but by employing Gunther's "means-focused" test, the Court will allow the burden imposed by a statutory classification to go beyond the quantum necessary to accomplish the desired goal.⁸⁷ Because of this potential overinclusiveness of the "means-focused" approach, many commentators suggest that Marshall's balancing approach as exemplified in *Trimble* is the preferred judicial standard in illegitimacy cases.⁸⁸ As a test for the constitutionality of any statute which distinguishes between legitimate and illegitimate children, the balancing approach is stricter than the "means-focused" rationale of *Lalli*: it would mandate that the means chosen to achieve a state objective be "carefully attuned to alternative considerations."

From *Levy* to *Lalli*, however, the Supreme Court has been reluctant to adopt any consistent mode of analysis in equal protection cases involving the rights of illegitimate children. In place of any definitive guidelines, the Court has preferred an ad hoc approach. With the "means-focused" ration-

83. Eleven states have adopted some version of the Uniform Probate Code provision which allows an illegitimate child to inherit from his father if his parents subsequently marry each other, or if paternity is adjudicated before his father's death or established afterward by clear and convincing proof. The states include Alaska, Ariz., Colo., Del., Fla., Idaho, Ind., Mont., N.D., S.D., and Utah. 32 ARK. L. REV. 120, 130 (1978).

A conflict exists in the Colorado statutes between the Colorado Probate Code, COLO. REV. STAT. § 15-11-109 (1973) and the Uniform Parentage Act, COLO. REV. STAT. §§ 19-6-103, 105 (1973). Under the Colorado Probate Code, for purposes of intestate succession a person born out of wedlock is the child of the father only if the parents marry before or after the child's birth or if paternity is established by adjudication before death of the father or after his death by a preponderance of the evidence. However, the Uniform Parentage Act totally eliminates the concept of illegitimacy and does not qualify inheritance on subsequent legitimization of the child.

In five states (Cal., Iowa, Kan., Md., and Vt.) open and notorious recognition of an illegitimate child by the father will establish inheritance rights. 32 ARK. L. REV. 120, 130 (1978).

84. 439 U.S. at 279 (Brennan, J., dissenting).

85. The retreat from *Trimble* may be attributable to differences in the impact of the Illinois statute, which the Court held unconstitutional in *Trimble*, and the New York statute upheld in *Lalli*. The language of the Illinois statute presented an absolute bar to any action to establish or acknowledge paternity other than marriage between the mother and father. The New York statute was not an insurmountable barrier, however, because paternity could at least be established in a judicial proceeding in lieu of marriage. *Id.* at 266-68.

86. *See* Gunther, *supra* note 21, at 21 (emphasis added).

87. *Id.* at 47-48.

88. *See* note 20 *supra*.

ale of *Lalli* following the balancing approach of *Trimble* by less than a year, there is no way to prognosticate the analytical approach courts will choose in reviewing this area of equal protection.

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