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THE EVOLVING CONSTITUTIONAL RIGHTS OF NONMARITAL CHILDREN: MIXED BLESSINGS

Michael J. Dale[†]

INTRODUCTION

In 1980, 1,820,000 children were living with unmarried parents in the United States.¹ In just five years the number doubled. By 1985, 3,756,000 children under the age of eighteen were living with a never-married parent.² Between 1984 and 1985 there was an eight percent increase in nonmarital births to women between the ages of fifteen and forty-four.³ For the period between 1975 and 1985 almost seventeen percent of all children born in the United States were the offspring of unwed mothers.⁴ In fact, by

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1. STAFF OF SENATE COMM. ON FINANCE, 100TH CONG., 1ST SESS., DATA MATERIALS RELATED TO WELFARE PROGRAMS FOR FAMILIES WITH CHILDREN (Comm. Print 1987).

2. *Id.*

3. NATIONAL CENTER FOR HEALTH STATISTICS ADVANCE REPORT OF FINAL NATALITY STATISTICS, 36 MONTHLY VITAL STATISTICS REPORTS, No. 4 (Supp. July 17, 1987). The specific increase was from 770,355 to 828,174. This increase is the largest since 1980.

4. For a description of the statistics during the mid-1970's, see *Caban v. Mohammed*, 441 U.S. 380, 402 n.2 (1979).

1984, twenty-one percent of all mothers giving birth to children in the United States were unwed.⁵ The social and legal ramifications of such a substantial population of children born out-of-wedlock are significant. These statistics explain why cases involving issues of illegitimacy have been decided by the United States Supreme Court ten times during the period between 1975 and 1985.⁶

Putative fathers,⁷ natural mothers, and nonmarital⁸ children have sought review in the Supreme Court raising issues of illegitimacy. The litigation, although disparate in factual context, may be divided into three categories. The case categories include constitutional challenges by putative fathers to dependency, adoption, and paternity proceedings, claims by nonmarital children

5. NATIONAL CENTER FOR HEALTH STATISTICS DATA, ADVANCE REPORTS OF FINAL NATALITY STATISTICS, 37 MONTHLY VITAL STATISTICS REPORTS, No. 3 (Supp. June 12, 1987). This number was up from 21 percent in 1984. See BUREAU OF CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1987).

6. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *United States v. Clark*, 445 U.S. 23 (1980); *Califano v. Boles*, 443 U.S. 282 (1979); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lalli v. Lalli*, 439 U.S. 259 (1978); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Mathews v. Lucas*, 427 U.S. 495 (1976).

An additional three cases were decided between 1968 and 1974. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Gomez v. Perez*, 409 U.S. 535 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972). The number of decisions during the entire period is even higher when one includes cases in which illegitimacy was of only factual significance or in which an illegitimacy issue was raised but not decided. These cases include *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (welfare benefits); *Weber v. Aetna Casualty and Sur. Co.*, 406 U.S. 164 (1972) (worker's compensation); *Labine v. Vincent*, 401 U.S. 532 (1971) (intestacy); *Glonn v. American Guar. and Liab. Ins. Co.*, 391 U.S. 73 (1968) (wrongful death); *Levy v. Louisiana*, 391 U.S. 68 (1968) (wrongful death); *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974); *Griffin v. Richardson*, 346 F. Supp. 1226 (Md.), *aff'd*, 409 U.S. 1069 (1972) (social security benefits); and *Davis v. Richardson*, 342 F. Supp. 588 (Conn.), *aff'd*, 409 U.S. 1069 (1972). For a detailed analysis of these cases and United States Supreme Court cases through 1980, see Kellett, *The Burger Decade: More Than Toothless Scrutiny for Laws Affecting Illegitimates*, 57 DET. J. OF URB. L. 791 (1980); Martin, *Legal Rights of the Unwed Father*, 102 MIL. L. REV. 67 (1983); Stenger, *Expanding Constitutional Rights of Illegitimate Children, 1968-1980*, 19 J. FAM. L. 407 (1981); and for an analysis of pre-1968 cases see Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967), and Martin, *Legal Rights of the Illegitimate Child*, 102 MIL. L. REV. 67 (1983).

7. The term "putative father" is synonymous with the term "unwed father" and is defined as "[t]he alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979).

8. The term "nonmarital children" is used in this Article because of the recently recognized pejorative connotation of the word "illegitimate." For a discussion of this issue, see Bodenheimer, *New Trends and Requirements in Adoption Laws and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 53 n.228 (1975) and Note, *The Unwed Father and the Right to Know of His Child's Existence*, 76 KY. L.J. 949, 949 n.2 (1987-88).

to the estates of their putative fathers, and support actions involving both public benefits and child support. All claims have been based upon alleged denials of due process and equal protection. The Court has responded by recognizing the application of procedural and substantive due process and equal protection principles to these claims.

In the due process context, the Court's opinions demonstrate that freedom of personal choice in matters of family life is a liberty interest protected by the procedural due process clause of the fourteenth amendment. This protection extends to families in which the parents are not married but have children. With respect to substantive due process, the Court has said that parents and children have a liberty interest in the family unit even if the parents are not married. The Court will balance the interest of the members of the family against the interests of the state when deciding whether state policy or law may be imposed upon members of the family and if so, to what extent. In addressing equal protection claims, the Court has held that discrimination on the basis of illegitimacy is impermissible if the governmental purpose is to punish the child for the parents' failure to conduct themselves in accordance with society's laws and moral rules. The state must have some other substantial reason if it wishes to treat nonmarital children differently than marital children.⁹

Challenges by nonmarital children have been relatively successful before the Supreme Court. This success is particularly evident in comparison to the outcome of cases in which children are in conflict with their parents or the government and the issue is something other than the child's legitimacy status.¹⁰ In such contexts as juvenile crime, mental health, abuse and neglect, and education, the Court has tended to favor the state. The Court has deferred to the judgment of state officials in cases involving conflicts between the child and the state or between the parent and the state.¹¹ When the dispute is between parent and child,

9. This Article supports the position that the Court's equal protection analyses have been fairly consistent. For a different view see Comment, *Adoption and the Putative Father's Rights*: *Shoecraft v. Catholic Social Services Bureau*, 13 OKLA. CITY U.L. REV. 231, 232 (1988).

10. Cf. Note, *Children's Rights Under The Burger Court: Concern For The Child But Deference To Authority*, 60 NOTRE DAME L. REV. 1214 (1985) [hereinafter *Children's Rights*].

11. Dale, *The Burger Court and Children's Rights—A Trend Toward Retribution?* 8 CHILDREN'S LEGAL RTS. J. 7 (1987); Stern, *The Burger Court and the Diminishing Constitutional Rights of Minors: A Brief Overview*, 1985 ARIZ. ST. L.J. 865 (1985); *Children's Rights*, *supra* note 10.

the Court usually has sided with the parent.¹² However, in nonmarital status cases, a more equal balance has been struck among children, parents, and the state.

This Article analyzes the Supreme Court opinions over the past twenty years in the area of nonmarital status with particular attention to the subjects of dependency, adoption, paternity, inheritance, and financial assistance and government benefits for nonmarital children. The Article describes the sometimes inconsistent Supreme Court application of procedural due process, substantive due process, and equal protection concepts, which nonetheless generally strikes a proper balance among the interests of nonmarital children, the state, and other parties to these proceedings. The Article demonstrates that the Court often obliterates any equal protection distinctions unrelated to substantial government interests. Although the Court applies both procedural and substantive due process protections when constitutionally and pragmatically appropriate, in the area of government benefits, a level of tension exists with respect to equal protection. This tension is based in part upon differences in the Justices' interpretations of legislative history and their divergent societal value judgments. Because statutory construction may be the battleground in the fight of nonmarital children for equal treatment, the outcome remains unpredictable.

Finally, the Article suggests an explanation for the somewhat better treatment of nonmarital children than children generally in their cases before the Supreme Court over the past twenty years. Nonmarital children have been more successful because their claims generally do not challenge directly either the family or the government. For example, in the field of education, children have challenged the authority of the school system;¹³ in the delinquency area, children have challenged the authority of the court;¹⁴ and in the mental health commitment area, children have

12. Cf. *Parham v. J.R.*, 442 U.S. 584 (1979); but see *Rivera v. Minnich*, 107 S. Ct. 3001 (1987).

13. See, e.g., *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988); *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

14. See, e.g., *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988); *Schall v. Martin*, 467 U.S. 253 (1984); *Fare v. Michael C.*, 442 U.S. 707 (1979); *Swisher v. Brady*, 438 U.S. 204 (1978); *Breed v. Jones*, 421 U.S. 519 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 520 (1971); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966); *High v. Kemp*, 819 F.2d 988 (1987), cert. granted sub nom. *High v. Zant*,

challenged the authority of their parents.¹⁵ Although the Court has been unwilling to favor the rights of children over these various types of authority, in the nonmarital status area no such threat to authority exists. To the contrary, the outcome in many of the cases may be viewed as beneficial to the state. For example, nonmarital children who gain an entitlement to a putative father's estate are less likely to be in need of government services in the form of public assistance. However, the challenges to government benefits have been more difficult cases for the nonmarital child to win, specifically because the suits have involved direct challenges to governmental authority and governmental purse strings.

I. DEPENDENCY, ADOPTION, AND PATERNITY

The family integrity cases concern putative fathers who either were denied the right to participate in or challenge proceedings involving the legal status of their nonmarital children or who sought to disclaim responsibility for the children. The more recent claims are based upon the 1972 decision in *Stanley v. Illinois*,¹⁶ in which the Supreme Court ruled that in a dependency proceeding, it is unconstitutional to presume that an unwed father is unfit.¹⁷

In a victory for both the father and the children, the Supreme Court decided that the father's interest in the "companionship, care, custody, and management" of his children is recognized as both a due process and equal protection right.¹⁸ The due process right was procedural in nature, arising from the failure of the Illinois Juvenile Court Act to provide any notice or hearing rights to the father.¹⁹ The equal protection claim arose from the Act's provisions, which defined "parents" as including mothers of nonmarital children but excluding fathers of nonmarital children.²⁰

108 S. Ct. 2896 (1988); *Wilkens v. Missouri*, 736 S.W.2d 409 (1987), *cert. granted*, 108 S. Ct. 2896 (1988).

15. *See, e.g., Parham v. J.R.*, 442 U.S. 584 (1979).

16. 405 U.S. 645 (1972).

17. *Stanley v. Illinois*, 405 U.S. at 649. When the unwed mother died, the state declared the children to be wards of the state and removed them from Stanley's custody without any hearing or determination that he was an unfit parent. Mr. Stanley lived with all three children over a period of 18 years and yet, was provided with no opportunity to challenge the state's action. *Id.* at 646.

18. *Id.* at 651.

19. *Id.* at 658.

20. *Id.* at 650. *See ILL. REV. STAT.* ch. 37 (1967).

The Court further held that the children could not be taken away from the father in the absence of a hearing and a determination that the father was unfit.²¹ It is not clear from Justice White's majority opinion whether the Court based its holding on due process or equal protection grounds or some combination of the two. One explanation for the Court's decision may be that Stanley appealed to the Supreme Court solely on equal protection grounds.²² Irrespective of the specific constitutional basis, *Stanley* is a very important case because for the first time the Supreme Court held that the concept of family integrity may be constitutionally protected beyond the traditional nuclear family.²³ However, the expected shock waves from this expansion of the concept of the family were not felt immediately.

Although *Stanley* dealt with both procedural due process and equal protection issues involving nonmarital children, the case arose as a dependency proceeding. The questions left unanswered by *Stanley* were whether procedural due process, substantive due process, and equal protection concepts may be applied to an unwed father in an adoption situation and, if so, to what extent. The Supreme Court first addressed these issues in *Quilloin v. Walcott*.²⁴ At issue in *Quilloin* was a putative father's challenge to Georgia's adoption law on both procedural due process and equal protection grounds. Quilloin sought to stop the adoption of his nonmarital child even though the child's mother had custody and control of the child for his entire life and Quilloin and the mother had never married nor established a home together.²⁵ Approximately two years after the child was born, the mother married another man. When the mother consented to the adoption of the child by her husband, Quilloin attempted to block the

21. *Stanley*, 405 U.S. at 658. The finding of unfitness refers to a dependency adjudication on parental qualifications, similar to that which occurs in situations in which the father and mother of the child had been married. *Id.*

22. *Id.* at 647. For a discussion of the lack of specificity in the opinion see Note, *The Impact of Stanley v. Illinois on Custody Proceedings for Illegitimate Children: Procedural Parity for the Putative Father?* 3 N.Y.U. REV. L. & SOC. CHANGE 31, 36 (1973); Comment, *A Dependency Hearing Which Would Deny an Unwed Father Custody of His Child on the Death of Its Mother Without Reference to the Father's Fitness as a Parent is Violative of Due Process and Equal Protection*, 4 LOY. U. CHI. L.J. 176, 181 (1973); and Comment, *Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290, 300-01 (1985).

23. The pre-*Stanley* cases dealt with traditional nuclear families. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

24. 434 U.S. 246 (1978).

25. *Quilloin v. Walcott*, 434 U.S. at 247.

adoption and secure visitation rights.²⁶ The Georgia statute provided that in order to be afforded the same right that divorced or separated parents have to object to a proposed adoption, the father of a child born out-of-wedlock was obligated to legitimate the child by either marrying the mother and acknowledging that the child was his or by obtaining a court order declaring the child legitimate and capable of inheriting from the father.²⁷ Quilloin had done neither of these things. In Georgia, until either action occurred, courts recognized only the mother as the child's parent.²⁸

Justice Marshall applied both due process and equal protection analyses in *Quilloin*.²⁹ He concluded that the father's substantive due process rights were not violated by the application of a "best interests of the child" standard in determining whether the father should be allowed to legitimate the child or whether the adoption should go forward.³⁰ Such a test was appropriate because Quilloin had never sought custody of his child.³¹ This holding seems to balance the unwed father's interests in his family against the state's interest in giving full protection to an already existing family unit.³² However, the Court was somewhat reticent in its holding. As the Court noted, "[w]hatever might be required in other situations, we cannot say that the State was required in

26. *Id.*

27. *Id.* at 249. One Georgia statute provided: "If the child be illegitimate, the consent of the mother alone shall suffice. Such consent, however, shall not be required if the mother has surrendered all of her rights to said child to a licensed child-placing agency, or to the State Department of Family and Children Services." *Id.* (quoting GA. CODE ANN. § 74-403(3) (1975)).

The other relevant statute provided:

A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known.

Id. (quoting GA. CODE ANN. § 74-103 (1975)).

28. *Quilloin*, 434 U.S. at 249.

29. *Id.* at 254–56. Although Quilloin did not raise the issue, the Court found that he had received adequate procedural due process when he was given an opportunity to be heard on his legitimation petition under Georgia law. *Id.* at 253–54.

30. *Id.* at 255.

31. *Id.* Quilloin did have a relationship with his son. He often visited with the child and gave him gifts "from time to time." *Id.* at 251.

32. *Id.* at 254–55.

this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.' ”³³

Quilloin is also important for what the Court did not decide. In his equal protection challenge, *Quilloin* only raised the issue of the distinction between the rights of married fathers and unmarried fathers. Thus, the Court did not rule on differences between mothers of nonmarital children and fathers of nonmarital children.³⁴ The Court distinguished *Quilloin*'s interests from those of the separated or divorced father, finding that *Quilloin* had not accepted the day-to-day parental responsibilities imposed upon the divorced or separated father and that this distinction allowed for a difference in the protection provided by the state's adoption law.³⁵

The *Quilloin* case demonstrates that to challenge an adoption, the putative father must make a specific and timely effort to legitimate the child by marrying the child's mother, obtaining a court order, or otherwise complying with state law. In other words, the father must have undertaken some affirmative act. Just what steps one must take to establish a protectible interest remained open to question. Two subsequent cases, *Caban v. Mohammed*³⁶ and *Lehr v. Robertson*,³⁷ also dealt with putative fathers' challenges to the adoption of their children. However, *Caban* was an equal protection challenge and thus did not deal with the standards a putative father must meet to challenge an adoption. On the other hand, *Lehr* was a particularly unsuccessful effort by the Court to address the issue of such standards.

Caban v. Mohammed is similar to *Quilloin* as it also involved a father's challenge to the adoption of his two children by their stepfather without *Caban*'s consent. However, unlike *Quilloin*, *Caban* involved a sex-based equal protection challenge. Justice Powell, ruling that the New York statute impermissibly distinguished between the rights of unmarried mothers and unmarried fathers, applied what often is referred to as the intermediate equal protection test. He found no substantially related important state interest to allow for the discrimination.³⁸

33. *Id.* at 255.

34. *Id.* at 253 n.13.

35. *Id.* at 256.

36. 441 U.S. 380 (1979).

37. 463 U.S. 248 (1983).

38. *Caban v. Mohammed*, 441 U.S. at 394. Abdiel Caban and Maria Mohammed lived together in New York City between 1968 and 1973 although they were never married.

The New York statute challenged in *Caban* allowed the mother to consent to the adoption without the consent of the father unless the father could show that the adoption was not in the children's best interest; however, the mother's consent was required if the father brought the adoption proceedings.³⁹ According to the Supreme Court, this gender-based distinction has to "serve some important governmental objectives" and must be "substantially related" to the achievement of such purpose or an equal protection violation would result.⁴⁰ The Court rejected the claim that this kind of gender distinction "is required by any universal difference between maternal and paternal relations at every phase of a child's development."⁴¹ The Court also did not hold that the distinction between unmarried mothers and unmarried fathers bore a substantial relation to a state interest in providing adoptive homes for nonmarital children. It found no difference in the degree to which unwed fathers would object to adoption as opposed to unwed mothers. Thus:

The effect of New York's classification was to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and

Id. at 382. In fact, until 1974, although separated, Caban was married to another woman. During the time Caban and Mohammed were living together, they had two children. Caban was identified as the father on each birth certificate, and he lived with and supported the children until late 1973. In December 1973, Mohammed left Caban, taking the two children, and in January 1974, married another man. After the marriage, Caban continued to see his children. *Id.* at 382. At one point, Caban took custody of the children, resulting in the commencement of a custody proceeding by Mohammed in which she was successful. Thereafter, she and Mr. Mohammed filed a petition seeking to allow her new husband to adopt the children. Caban cross-petitioned for adoption. The New York Surrogate Court granted the Mohammeds' petition for adoption and cut off all Mr. Caban's rights and obligations after it found that his consent to the adoption was not necessary. *Id.* at 383-84.

39. Section 111 of the N.Y. DOM. REL. LAW (McKinney 1977) provided that consent by a parent to an adoption is unnecessary in cases in which the parent abandoned the child, relinquished parental rights, or suffered termination of parental rights. Unless the mother fell into such a category, she could not only contest adoption but actually block it by withholding consent. *Id.* at 385-86.

40. *Id.* at 388. The Court's language is taken from *Craig v. Boren*, 429 U.S. 190, 197-99 (1976), which applied the intermediate standard of review for gender-based discrimination. For a criticism of the application of this standard in *Caban*, see Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries Are Defined*, 19 J. FAM. L. 445 (1980-81).

41. *Caban*, 441 U.S. at 389.

entitled than mothers to exercise a concerned judgment as to the fate of their children.⁴²

In essence, the Court could find no countervailing governmental interest of any kind in *Caban*. It did recognize that there might be situations in which the state could deny a father veto power over the adoption of his child when the father had never taken part in raising his child.⁴³ However, in *Caban* the Court found that the "undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, [did] not bear a substantial relationship to the State's asserted interests."⁴⁴ Thus, the New York statute violated the equal protection clause of the fourteenth amendment.⁴⁵

In contrast, Justice Stewart's dissent found the distinction between unmarried fathers and unmarried mothers under New York law insufficient to constitute an equal protection violation.⁴⁶ There is a certain pragmatic logic in Justice Stewart's dissent. Under New York law, fathers who have custody of children, even when the child is illegitimate, are given a veto power over adoptions.⁴⁷ Why should the unwed father who does not have custody of the child and who has not legitimated the child by marrying the mother have the right to veto the child's adoption? New York law provides that an unwed father has the right to challenge the adoption on the merits and show that the adoption is not in the child's best interests.⁴⁸ In Stewart's view, this right is an acceptable accommodation of the competing interests of the

42. *Id.* at 394. The dissent argued forcefully that the "best interests of the child" standard in this kind of a family situation is not unconstitutionally discriminatory because the standard represents a careful effort by the state to balance competing interests and to promote the welfare of children. *Id.* at 395 (Stewart, J., dissenting).

43. *Id.* at 392.

44. *Id.* at 394.

45. *Id.* As in *Quilloin*, the appellant made no procedural due process claim because Caban received notice and an opportunity to participate as a party in the underlying adoption proceeding. *Id.* at 385 n.3. However, citing *Stanley v. Illinois*, 405 U.S. 645 (1972), Caban did make a substantive due process claim, arguing that the termination of parental rights occurred without first finding the father unfit. *Id.* at 394 n.16. Because the Court ruled in his favor on the equal protection claim, it did not reach Caban's substantive due process claim. *Id.* Caban also made a second equal protection claim, asserting that New York impermissibly discriminated between married and unmarried fathers. The Court elected not to address this issue as well. *Id.*

46. *Id.* at 398-401 (Stewart, J., dissenting).

47. *Id.* at 395 (citing N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 1977)).

48. *Id.*

parents, state, and child and thus does not violate the equal protection clause of the fourteenth amendment.⁴⁹ Under the majority's interpretation, this system for challenging adoption is constitutionally inadequate.

A much more difficult question was presented to the Court in *Lehr v. Robertson*.⁵⁰ The issue in *Lehr* was whether an unmarried father who had never supported and had never seen his child since her birth two years earlier had an absolute right under the due process clause to notice and an opportunity to be heard before the child was adopted.⁵¹ In *Lehr* the child's unmarried mother subsequently married a man who sought to adopt the child. Under New York law, notice of adoption proceedings had to be given to certain classes of fathers of children born out of wedlock including

those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old.⁵²

Additionally, an unwed father could enter his name in New York's putative father registry.⁵³ *Lehr* neither registered nor complied with the statute. In order to block the adoption, he commenced a proceeding in a New York state court to challenge the statute.⁵⁴

49. *Id.* at 395–96.

50. 463 U.S. 248 (1983).

51. *Lehr v. Robertson*, 463 U.S. at 249–50. At first glance, *Lehr* appears similar to the situation referred to by Justice Powell in *Caban* in which a natural father is not eligible for application of the equal protection clause. *Caban*, 441 U.S. at 392. However, *Lehr* was not decided on equal protection grounds but on due process grounds. *Lehr* had originally made a gender-based equal protection claim, arguing that the New York law which denied fathers of nonmarital children the right to veto adoption while granting mothers such a right violated the equal protection clause. *Id.* at 255. But while *Lehr* was pending in the lower New York courts, *Caban* was decided. The dissenters in *Caban* specifically stated that the holding would not be retroactive because of the thousands of adoption cases which would be affected by such a result. *Caban*, 441 U.S. at 415–16. Instead *Lehr*'s position was governed by *In re Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486 (1975), the case which *Caban* overruled. Thus, the equal protection claim was not before the Supreme Court in *Lehr*.

52. *Lehr*, 463 U.S. at 251.

53. *Id.* at 250–51 n.4 (citing N.Y. SOC. SERV. LAW § 372-c (McKinney Supp. 1982–83)).

54. *Id.* at 253. A month after the adoption proceeding commenced in Ulster County, New York, *Lehr* brought a visitation and paternity proceeding in family court in Westch-

In the United States Supreme Court, Lehr mounted a two-part challenge to the New York statutory scheme. First, Lehr argued that his relationship with the child constituted a liberty interest which could not be destroyed without due process of law.⁵⁵ Second, he challenged the state's gender-based classification on the ground that he was denied equal protection because he received fewer procedural rights than the natural mother.⁵⁶ Relying upon *Stanley*, *Quilloin*, and *Caban*, the Court held that "the mere existence of a biological link does not merit equivalent constitutional protection."⁵⁷ The Court found that an unwed father should demonstrate a full commitment to the responsibilities of parenthood by participating in the rearing of the child and by showing a personal interest in the child. In so doing, he would gain protection under the fourteenth amendment due process clause.⁵⁸ The Court concluded that New York's statutory scheme provided the putative father with adequate methods of protecting himself against the adoption of his child.⁵⁹ In addressing the key issue of notice, the Court ruled that the Constitution did not require the judge or adverse litigant to give special notice to a nonparty who is "presumptively capable of asserting and protecting [his] own rights."⁶⁰

The Court also rejected Lehr's equal protection claim, finding no violation because Lehr had never established a relationship with his child. The Court allowed the mother and father in *Lehr*

ester County, New York. Lehr served the mother's lawyer and advised the court hearing the adoption of the paternity proceeding he had brought in the family court in Westchester County. *Id.* at 252. The court hearing the adoption stayed the out-of-county paternity proceeding until it could rule on a motion to change the venue of that proceeding to Ulster county. *Id.* at 252-53. A few days later, when Lehr's attorney called the judge hearing the adoption proceeding to advise the judge of his plan to seek a stay of the adoption, the judge informed the lawyer that he had signed the adoption order earlier that day. *Id.* at 253. Incredibly, the judge stated that he had known of the pending paternity petition but did not believe that he was required to give notice. Lehr lost in the New York courts despite the obvious unfairness of these events. *See In re Jessica XX*, 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981).

55. *Lehr*, 463 U.S. at 255.

56. *Id.*

57. *Id.* at 261.

58. *Id.* The distinction between unmarried fathers who have established a bond with their nonmarital children and those who have not has been described as the distinction between "developed" relationships as in *Stanley* and *Caban* and "potential" relationships as in *Quilloin*. Daskow, *The Constitution, Notice, and the Sins of the Fathers*, 8 J. JUV. L. 12, 14 (1984).

59. *Lehr*, 463 U.S. at 262-63 nn.18-19.

60. *Id.* at 265.

to be treated differently because there was a substantial relationship between the disparate treatment and the state's important purpose of promoting the best interests of the child.⁶¹ This purpose prevails when the father has not established a substantial relationship with the child and thus is not in a similar position to the mother.⁶²

The dissenting Justices White, Marshall, and Blackmun would have found that the putative father was nonetheless entitled to procedural due process protections in the form of notice and opportunity to be heard.⁶³ They believed that the nature of the interest at stake, the interest of a natural parent in his or her child, gives rise to due process protections. The dissenters rejected the majority's position that the parental relationship may or may not be a protected interest depending on the particular facts of the case.⁶⁴ Specifically, they rejected the majority view that the biological relationship alone does not give rise to an interest which is protected by procedural due process.⁶⁵ Rather, the dissenters viewed the biological relationship as an interest which gives rise to due process protections; "how well developed that relationship has become goes to its 'weight' not its 'nature.'"⁶⁶ Finally, because the dissenters found a violation of due process, they did not reach the equal protection argument.⁶⁷

Lehr demonstrates that a putative father's due process and equal protection challenges will not succeed when the father has made no effort to legitimate his child prior to the adoption. The states can and indeed have drafted statutes that set out objective understandable tests which the putative father must meet to have standing to contest an adoption.⁶⁸ The New York statute in

61. *Id.* at 266.

62. *Id.* at 267–68.

63. *Id.* at 268, 276 (White, J., dissenting).

64. *Id.* at 269–70.

65. *Id.* at 271–73. The Supreme Court's two-step due process analysis has been repeated in numerous contexts. The Court first decides whether due process applies by determining whether a liberty or property interest is implicated, and if so, what process is due. See *Perry v. Sinderman*, 408 U.S. 593, 601–02 (1973); *Board of Regents v. Roth*, 408 U.S. 564, 570–72 (1972).

66. *Lehr*, 463 U.S. at 272.

67. *Id.* at 276.

68. See *Shoecraft v. Catholic Social Serv. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986); see also Note, *Nebraska's Five-Day Statute of Limitations for Unwed Fathers*, 67 NEB. L. REV. 408 (1988) (suggesting that the Nebraska statute may not pass constitutional muster) [hereinafter *Five-Day Statute*]. For additional analyses, see Comment, *Domestic Relations—Parental Rights of the Putative Father: Equal Protection and Due Process Considerations*,

Lehr provides a good example of a standard against which the courts should have no difficulty evaluating the father's efforts.⁶⁹ The *Lehr* standard is also beneficial to the nonmarital child because it requires the father to have some substantial involvement with the child in order to contest the adoption. Legal authority as well as social morality suggest that such lack of contact is contrary to the child's best interests.⁷⁰ A comparison of the relationships between the fathers and children in *Caban* and *Lehr* supports this conclusion. In *Caban*, the father, mother, and two children lived together as a natural family for several years, and the father participated in the care and support of his children.⁷¹ This situation did not exist in *Lehr* because the putative father, whose paternity the mother denied at all times, had no

14 MEM. ST. U.L. REV. 259 (1984) [hereinafter *Domestic Relations*]; Riesenburger, *Paternity: Status of the Law in Florida*, 62 FLA. BAR J. 61 (Nov. 1988); and Comment, *The Unwed Father and Adoption in Utah: A Proposal for Statutory Reform*, 1989 Utah L. Rev. 115.

69. The New York statute considered in *Lehr* provided:

Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

Lehr, 463 U.S. at 251-52 (quoting N.Y. DOM. REL. LAW §§ 111-a(2), (3) (McKinney 1977 & Supp. 1982-83)).

70. See, e.g., *Lehr*, 463 U.S. 261-62 n.17; *Caban v. Mohammed*, 441 U.S. at 405 (Stevens, J., dissenting); M. LAMB, *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 437, 479 (1981). The father's involvement prior to the birth of the child may also be significant. See *Five-Day Statute*, *supra* note 68, at 420; *Domestic Relations*, *supra* note 68, at 266-67; Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313 (1984).

71. *Caban*, 441 U.S. at 389.

contact with the child from birth to the commencement of the adoption proceeding which the father sought to challenge.⁷²

However, under *Lehr*, a putative father who is prevented from establishing a relationship with his child and who, despite his best efforts, cannot comply with the notice requirements, will lack standing to challenge his child's adoption. This result may be viewed as harsh from the vantage point of the putative father, but as both pragmatic and beneficial from the standpoint of the child.

The court in *In re Baby Girl M.*⁷³ recently raised the question of whether such a harsh result is constitutional. Although the United States Supreme Court dismissed the appeal for lack of a properly presented federal question,⁷⁴ an analysis of the case is instructive. The mother and father of Baby Girl M. dated, and when the relationship ended, neither knew that the woman was pregnant.⁷⁵ When the child was born, the mother immediately sought to have her adopted. She never informed the father of the pregnancy and only informed him of the birth of the child two weeks after it occurred. At that time, the father attempted to contact the San Diego Department of Social Services to determine his rights.⁷⁶ However, after the mother relinquished her rights, the state commenced termination of parental rights proceedings despite the fact that the father had sought custody after the child was placed with prospective adoptive parents.⁷⁷

When the father sought custody of the child, the trial court held that such placement would not be in the best interests of the child.⁷⁸ On appeal, the California Supreme Court remanded, holding that detriment to the child had to be established before a best interest standard could be applied.⁷⁹ The trial court

72. *Lehr*, 463 U.S. at 250; *In re Jessica XX*, 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981). For an analysis of putative fathers' rights under state adoption statutes through 1985, see Note, *Removing the Bar Sinister: Adoption Rights of Putative Fathers*, 15 CUMB. L. REV. 499 (1985).

73. *In re Baby Girl M.*, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

74. *McNamara v. County of San Diego Dep't of Social Serv.*, 57 U.S.L.W. 4041 (1989) (No. 87-5840).

75. *In re Baby Girl M.*, 37 Cal. 3d at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.

76. *Id.*

77. *Id.* At the hearing the plaintiff, McNamara, was found to be the biological father. The subject of child custody involving nonmarital children is beyond the scope of this article. See Note, *Child Custody Law: Custody Presumptions Favoring One Parent May Impair the Child's Best Interests*, 38 U. FLA. L. REV. 187 (1986).

78. See *In re Baby Girl M.*, 236 Cal. Rptr. 660, 661 (1987).

79. *In re Baby Girl M.*, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

considered expert testimony and held that granting custody to the father would be psychologically damaging to the child because she had grown accustomed to her prospective adoptive parents who had cared for her since her placement shortly after birth.⁸⁰ The father appealed this decision to the California Court of Appeal, asserting that his fitness, rather than the child's detriment, was the issue, and his fitness was not disputed. The court of appeal acknowledged the father's interest, but held the interest of the child superior.⁸¹

The putative father in *In re Baby Girl M.* raised two issues before the Supreme Court, both based on equal protection grounds.⁸² First, he argued that termination of his parental rights solely on the basis of best interests of the child was a denial of equal protection when he had shown significant interest in the child. Second, the father contended that termination of parental rights without a showing of lack of parental ability was a denial of equal protection. He argued that the mother of the child was not treated similarly. It would appear that the Supreme Court dismissed the appeal because these issues were not raised by the father in the lower court. *In re Baby Girl M.* also raised the unresolved question in *Lehr*, whether the unwed father and child have any procedural rights to establish a relationship with each other when they have thus far been prevented from doing so.⁸³ Doubtless, this issue will come before the Court again.

The rights of a putative father and his child are again before the Court in a different context. In *Michael H. v. Gerald D.*,⁸⁴ the issue involves the constitutionality of a California statute which contains a conclusive presumption, subject to three limited exceptions, that a child of a married woman who is cohabitating with her husband is the child of the marriage.⁸⁵ The three exceptions are when the husband is impotent or sterile, or when the husband alone, or the wife together with the biological father, petition for a blood test to determine paternity within two years

80. See *In re Baby Girl M.*, 236 Cal. Rptr. at 662.

81. *Id.* at 665.

82. 57 U.S.L.W. 3030 (1989) (No. 87-5840).

83. For a further discussion of this issue see *Shoecraft v. Catholic Social Serv. Bureau*, 222 Neb. 574 (1986); Comment, *Adoption and the Putative Father's Rights: Shoecraft v. Catholic Social Services Bureau*, 13 OKLA. CITY U. L. REV. 231 (1988); and *Five-Day Statute*, *supra* note 68.

84. 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987), *cert. granted*, 108 S. Ct. 1072 (1988).

85. *Michael H. v. Gerald D.*, 191 Cal. App. 3d at 1007-08, 236 Cal. Rptr. at 818; CAL. EVID. CODE § 621 (West Supp. 1989).

of the birth of the child.⁸⁶ Thus, a biological father who is not married to the mother may be absolutely precluded from establishing paternity under the California law.

Michael H. involves questions of both equal protection and due process.⁸⁷ In this reverse paternity case, the unwed father's equal protection argument is based on a claim that the irrebuttable presumption treats the father of a child by a married woman cohabitating with another man at the time of conception and birth differently than other parents. Thus, the father in *Michael H.* argues that he has been denied the ability to prove that he is the biological father and so vindicate his parental rights to a relationship with the child. He claims that this irrebuttable presumption allows gender-based discrimination.⁸⁸ Such discrimination is prohibited by the Court's holding in *Caban*.⁸⁹

In addition, the unwed father claims that he has a right to a relationship with his child which may not be terminated by the state in the absence of due process.⁹⁰ The Court has been asked to decide whether there is a fundamental interest in the familial relationship between the unwed father and child, and if so, what procedures should be made available to protect that interest.⁹¹

86. See CAL. EVID. CODE § 621 (West Supp. 1989), which provides that unless blood tests show otherwise, "the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

87. Dale, *The Presumption that the Husband Is the Father of His Wife's Child: Should It be Conclusive?* 1988-1989 ABA Preview of the United States Supreme Court Cases 41. *Michael H.* is also important because it involves the underlying issue of the best interests of the child. At what point does the forced intervention of a biological but unknown father overcome the countervailing considerations of what upbringing is best for the child? Although the answer on a psychological level is imprecise, at some point the Supreme Court will have to decide this question on a due process or equal protection basis.

88. *Id.* at 42.

89. *Caban v. Mohammed*, 441 U.S. 380 (1979).

90. *Id.* at 1008-09, 236 Cal. Rptr. at 817.

91. The basic case relied upon in support of the appellant's position is *Stanley v. Illinois*, 405 U.S. 645 (1972).

Significantly, the child in *Michael H.* makes the same claim that the conclusive presumption denies due process rights. Cases used to support the child's argument are *Rivera v. Minnich*, 107 S. Ct. 3001, 3004 (1987) and *Bellotti v. Baird*, 443 U.S. 622, 633-34 (1979). The California Court of Appeal rejected the child's due process argument in *Michael H.*, finding that the state's interest outweighed those of the child. *Michael H.*, 191 Cal. App. 3d at 1010, 236 Cal. Rptr. at 818. Noting the state's interest in preserving and protecting the developed parent/child relationship, the court found that the welfare of the child would be harmed if she were permitted to rebut the conclusive presumption of legitimacy. *Id.*, 236 Cal. Rptr. at 819.

But what if the putative father does not wish to be recognized as the parent of an illegitimate child? What are the rights of parents, child, and state under these circumstances? This issue arose in a 1987 Supreme Court paternity case, *Rivera v. Minnich*,⁹² which demonstrated that the state is also interested in having the rights of putative fathers adjudicated for purposes of inheritance and other benefits.

In *Rivera*, the mother, an unmarried minor, gave birth to a baby and two weeks later filed a complaint in the Lancaster, Pennsylvania Common Pleas Court seeking support for her son.⁹³ Because the mother was receiving public assistance, the case was brought with the assistance of the Pennsylvania authorities, who based their efforts to obtain support on the Social Security Act provisions governing aid to families with dependent children.⁹⁴ At a subsequent paternity proceeding, the putative father, Rivera, was represented by counsel. At that proceeding, Rivera filed a motion challenging the burden of proof standard set out in the Pennsylvania statute.⁹⁵ He claimed that the standard should be proof by clear and convincing evidence rather than the state's standard of preponderance of the evidence.⁹⁶ Additionally, he argued that the Pennsylvania statute violated the due process clause of the fourteenth amendment of the United States Constitution and requested that the jury be charged pursuant to the clear and convincing evidence standard.⁹⁷

In an opinion written by Justice Stevens, the Court upheld the preponderance of the evidence standard against Rivera's due process challenge.⁹⁸ The significance of the case lies in the Court's balancing of the interests of the mother, child, and state. The Court in *Rivera*, relying on previous opinions including *Santosky v. Kramer*,⁹⁹ *Quilloin v. Walcott*,¹⁰⁰ and *Mathews v. Eldridge*,¹⁰¹ had little trouble determining that a fair balance was met by a

92. 107 S. Ct. 3001 (1987).

93. *Rivera v. Minnich*, 107 S. Ct. at 3002.

94. 42 U.S.C. § 654(4) (1982).

95. *Rivera*, 107 S. Ct. at 3002.

96. *Id.* at 3002-03.

97. *Id.* at 3003.

98. *Id.* In the majority of states, the standard to be met by the nonmarital child is preponderance of the evidence; other states such as New York require proof by clear and convincing evidence. *Id.*

99. 455 U.S. 745 (1982).

100. 434 U.S. 246 (1978).

101. 424 U.S. 319 (1976).

preponderance test.¹⁰² The majority concluded that to do otherwise would provide protections to the putative father more extensive than those available to the other parties and interested entities when there was no justification for such preferential treatment.¹⁰³

II. INHERITANCE

Since 1977 the Supreme Court has decided three cases involving the standards by which a nonmarital child may inherit from his father.¹⁰⁴ While holding that nonmarital children may not be precluded absolutely from seeking to inherit, the Court has upheld differences in the inheritance standards between marital and nonmarital children. These cases have turned on an application of equal protection standards.

The seminal case, *Trimble v. Gordon*,¹⁰⁵ involved a challenge to the constitutionality of the Illinois Probate Act, which provided that nonmarital children could inherit by intestate succession from their mothers but not from their putative fathers.¹⁰⁶ However, the Illinois law allowed marital children to inherit by intestate succession from both their mothers and fathers. The appellant in *Trimble* was the daughter of a man who had lived with the child's mother and then died intestate.¹⁰⁷ Before the man's death, the Circuit Court of Cook County had entered a paternity order determining that he was the child's father and ordering him to pay support. The father did support the child until his death and left an estate consisting only of a 1976 Plymouth automobile worth \$2500.¹⁰⁸ The child's mother brought a probate action to

102. *Rivera*, 107 S. Ct. at 3004–06.

103. *Id.* at 3006. Only Justice Brennan dissented from the majority. He concluded that the putative father's financial interests, the unwanted creation of a life-long cultural and moral role, and the social stigma involved all gave rise to a significant protected interest. *Id.* at 3006–07. Therefore, Justice Brennan concluded that the putative father's liability and property interests required a more demanding standard of proof. *Id.* at 3007.

104. *Reed v. Campbell*, 476 U.S. 852 (1986); *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977).

105. 430 U.S. 762 (1977).

106. *Trimble*, 430 U.S. at 764–65. Section 2-2 of the Illinois Probate Act states:

An illegitimate child is heir of his mother and of any maternal ancestor and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take by descent any estate which the parent would have taken, if living. A child who was illegitimate whose parent intermarry and who is acknowledged by the father as the father's child is legitimate.

ILL. ANN. STAT., ch. 110 1/2, § 2-2 (Smith-Hurd 1978).

107. *Trimble*, 430 U.S. at 764.

108. *Id.*

recover the automobile, but the Illinois courts upheld the probate statute and ruled that as an illegitimate child, the daughter had no right to share in her father's estate.

The United States Supreme Court reversed, finding the statute an unconstitutional violation of the equal protection clause.¹⁰⁹ The crux of the opinion was the finding that the standard for evaluating this state law was less than strict scrutiny but more than rational basis.¹¹⁰ The Court used this intermediate test to evaluate the discrimination against the professed purpose of the probate statute.¹¹¹

The state made two arguments in support of the statute — promotion of family relationships and orderly disposition of property.¹¹² The Court relied upon earlier cases and held that it was unjust to punish the child for the failure of either of her parents to conduct themselves in accordance with society at large and its moral rules.¹¹³ While finding that the state's need to provide for orderly disposition of property at death was legitimate, the Court ruled that the particular statute did not accomplish this purpose in constitutional fashion.¹¹⁴ The Court concluded that although the state had a legitimate interest in protecting against "spurious claims of paternity," this law impermissibly precluded the claims of nonmarital children.¹¹⁵

Within a year, *Lalli v. Lalli*¹¹⁶ raised the closer and more difficult question of to what degree the state could treat nonmarital children differently in terms of intestate succession. In *Lalli*, the nonmarital son of Mario Lalli brought an action for a compulsory

109. *Id.* at 765—66.

110. *Id.* at 766—67. The Court premised its application of the intermediate equal protection test on *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 172 (1972), which held that at a minimum, such a statutory classification must bear a rational relationship to a legitimate state interest and on *Mathews v. Lucas*, 427 U.S. 495 (1976), which held that such classifications are not suspect and therefore are not tested against a standard of strict scrutiny. *Id.* Justice Rehnquist dissented in *Trimble*, advocating the application of a rational basis test. *Id.* at 786.

111. *Id.* at 766—67.

112. *Id.* at 768—70.

113. *Id.* at 770. Despite the Court's failure to overrule explicitly *Labine v. Vincent*, 401 U.S. 532 (1971), it is hard to reconcile the more recent cases with this earlier decision. See *Trimble*, 430 U.S. at 776 n.17. See also W. WEYRAUCH AND S. KATZ, *AMERICAN FAMILY LAW IN TRANSITION* 598—602 (1983).

114. *Trimble*, 430 U.S. at 771—73.

115. *Id.* at 776.

116. 439 U.S. 259 (1978). For a discussion of this case see Comment, *Illegitimates and Equal Protection: Lalli v. Lalli—A Retreat From Trimble v. Gordon*, 57 DEN. U.L.J. 453 (1980).

accounting of the administration of his father's estate, claiming that he was entitled to inherit from his father who died intestate.¹¹⁷ Although the son had not obtained a filiation order during his putative father's lifetime as required by New York's probate law, he argued that there was substantial evidence of his relationship with his father.¹¹⁸ In support of his position, he submitted a notarized statement from his father, which consented to the son's marriage and referred to him as the father's son. The son also filed several other affidavits which stated that the father often had said that the appellant was his child.¹¹⁹

In a plurality opinion, the Court employed the same equal protection test outlined in *Trimble*.¹²⁰ The Court analyzed the requirement that the putative father be declared the father in a paternity proceeding prior to his death. The plurality found the statute constitutional because it was related to an important state interest—the orderly disposition of property at death.¹²¹ The dissenters, however, found the case indistinguishable from *Trimble*, arguing that the statute could be redrafted to allow a nonmarital child to prove the paternity of the father by other means.¹²²

The Court reaffirmed the *Trimble* test in the most recent inheritance case, *Reed v. Campbell*.¹²³ In *Reed*, a nonmarital daughter attempted to inherit from her putative father by intervening in an ongoing probate proceeding. The estate proceeding had been commenced prior to the *Trimble* decision, although the daughter's effort to intervene occurred after *Trimble*. The Supreme Court simply said that the two dates had no impact upon the fact that the state statute was constitutionally invalid.¹²⁴

117. *Lalli v. Lalli*, 439 U.S. at 261.

118. *Id.* at 261–62. The probate law stated that:

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.

Id. (quoting N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2) (McKinney 1967)).

119. *Id.* at 262–63.

120. *Id.* at 264–65.

121. *Id.* at 268, 275.

122. *Id.* at 278–79. The dissenters also concluded that the majority's argument that the New York statute protected the state from claims by unknown nonmarital children was tenuous at best.

123. 476 U.S. 852 (1986).

124. *Reed v. Campbell*, 476 U.S. at 856.

The inheritance cases demonstrate that when the government is a conduit for the resolution of disputes between private parties rather than a party to the dispute, the Court will not allow the government to discriminate between marital and nonmarital children absent a significant governmental interest. In inheritance cases, the government may prevail against a nonmarital child by demonstrating the need for a system of orderly disposition of property at death. However, the Court has approved statutory limitations on the rights of a nonmarital child in probate matters when the putative father has not been declared the child's father in a paternity proceeding prior to death. Contrary to the dissenters' argument in *Lalli* that such a requirement makes it virtually impossible for a child who has been fully supported by a putative father to inherit from him,¹²⁵ the Court seems willing to allow such a difference in treatment as a legitimate governmental prerogative. Thus, unless the state statute requires less, a filiation order may be a prerequisite to a nonmarital child's right to inherit from the putative father.

III. FINANCIAL ASSISTANCE

The third subject of Supreme Court rulings involves the rights of nonmarital children to various sources of child support, both public and private. As the following analysis demonstrates, the Court has been more protective of the interests of children when private child support is involved than when government benefits are at issue. A series of four cases decided between 1974 and 1980 illustrates the Court's reaction to nonmarital children seeking public money.¹²⁶

A. Government Benefits

In *Jimenez v. Weinberger*,¹²⁷ the Court addressed the right of a disabled worker's nonmarital children to Social Security insurance benefits. At issue in *Jimenez* was a section of the Social Security Act which provided that certain nonmarital children were not entitled to insurance benefits through their disabled fathers. These children were those whose fathers' paternity could

125. *Lalli*, 439 U.S. at 278.

126. *United States v. Clark*, 445 U.S. 23 (1980); *Califano v. Boles*, 443 U.S. 282 (1979); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974).

127. 417 U.S. 628 (1974).

not be proven through acknowledgement by the father or affirmed by evidence of domicile and support by the father prior to the onset of his disability.¹²⁸ In *Jimenez*, the Court rejected an absolute bar to such benefits for this particular group of nonmarital children because the Act covered other nonmarital children.¹²⁹ The Court held that there was no rational statutory basis upon which to deny these "after born" children the right to establish their fathers' paternity.¹³⁰ The Secretary of the Department of Health, Education, and Welfare attempted to justify the conclusive exclusion by arguing that the provision prevented spurious claims.¹³¹ The problem with the Secretary's position was its failure to recognize that the claims by nonmarital children covered by the Act could be equally spurious.¹³² The Court held the section invalid, finding two sub-classes of nonmarital children, one conclusively denied benefits and the other presumptively allowed benefits, and no justification for the distinction.¹³³

*Mathews v. Lucas*¹³⁴ involved a Social Security Act provision which related to the eligibility of certain nonmarital children for survivorship benefits. Despite the holding in *Jimenez*, the Court rejected the equal protection challenge of the nonmarital children in *Mathews*. A comparison of *Jimenez* and *Mathews* demonstrates the tension in this area and the imprecision in the Court's analyses.

The statute challenged in *Mathews* required certain nonmarital children to prove that the deceased wage earner was their father and, at the time of his death, was living with and contributing to their support.¹³⁵ There was a presumption of dependency for marital children and for those nonmarital children whose fathers had acknowledged the children as their offspring, had been judicially declared the fathers, or had been ordered to support the children.¹³⁶ The Court distinguished *Jimenez* in rejecting the

128. *Jimenez v. Weinberger*, 417 U.S. at 631 n.2.

129. *Id.* The Social Security Act provided that nonmarital children who could inherit under the intestacy laws of their father's domicile and children unable to inherit only because their parents' ceremonial marriage was invalid for nonobvious defects were entitled to benefits "without any further showing of parental support." *Id.* See also 42 U.S.C. § 416(h)(3) (1982).

130. *Jimenez*, 417 U.S. at 636.

131. *Id.* at 635.

132. *Id.* at 636.

133. *Id.* at 637.

134. 427 U.S. 495 (1976).

135. *Mathews v. Lucas*, 427 U.S. at 498 nn.1-2 (citing 42 U.S.C. § 402(d)(1), (3) (1970)).

136. *Id.* at 498-99.

equal protection challenge. The Court found that the nonmarital children in *Jimenez* had been "conclusively" denied benefits and justified the denial of benefits in *Mathews* because it was not conclusive.¹³⁷ The nonmarital children could qualify for the benefits by proving support and cohabitation at the time of the wage earner's death.¹³⁸ Furthermore, the Court found the difference in treatment was based upon the legitimate governmental purpose of requiring that the survivors have been dependent upon the deceased wage earner.¹³⁹

Justice Stevens' dissent found *Jimenez* indistinguishable.¹⁴⁰ He believed that the majority actually did not find the distinction justified, but rather based its decision on the opinion that a governmental agency's need for administrative convenience ought to be accepted as an adequate reason to treat two groups differently.¹⁴¹ Stevens concluded that administrative convenience is a pretext for the belief "that illegitimates are less deserving persons than legitimates."¹⁴²

The issue of Social Security benefits again came before the Supreme Court in *Califano v. Boles*,¹⁴³ a nationwide class action in which nonmarital children and their unmarried mothers challenged Section 202(g)(1) of the Social Security Act.¹⁴⁴ In a

137. *Id.* at 512.

138. *Id.*

139. *Id.* at 516.

140. *Id.* at 516-18.

141. *Id.* at 522.

142. *Id.* at 523.

143. 443 U.S. 282 (1979).

144. The statute provides:

(1) The widow and every surviving divorced mother (as defined in section 416(d) of this title) of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—

(A) is not married,

(B) is not entitled to a widow's insurance benefit,

(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,

(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child or such individual entitled to a child's insurance benefit, and

(F) in the case of a surviving divorced mother —

(i) the child referred to in subparagraph (E) is her son, daughter or legally adopted child, and

close decision, the Court ruled that the Act's restriction limiting mothers' insurance benefits to widows and divorced wives of wage earners was not a denial of equal protection.¹⁴⁵ The majority concluded that a rational basis existed for distinguishing between surviving parents who were married and those who were not married.¹⁴⁶ According to the Court, Congress reasonably could have decided that a woman who had never married the wage earner was less likely to be dependent on the wage earner at the time of his death than was the one who was married.¹⁴⁷ In addition, the Court found that the children's benefits from their parent's receipt of Social Security benefits were only "incidental,"¹⁴⁸ and the impact of the denial of benefits on the children was "speculative."¹⁴⁹

The dissenters viewed the case as an equal protection challenge involving nonmarital children rather than unmarried spouses. They would have found that Congress designed the mothers' insurance benefits program to aid the children; therefore, the denial of support to nonmarital children bore no substantial

(ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income, shall (subject to subsection (s) of this section) be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such widow or surviving divorced mother becomes entitled to an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widow's insurance benefit, she remarries, or she dies. Entitlement to such benefits shall also end, in the case of a surviving divorced mother, with the month immediately preceding the first month in which no son, daughter, or legally adopted child of such surviving divorced mother is entitled to a child's insurance benefit on the basis of the wages and self-employment income of such deceased individual.

42 U.S.C. § 402(g)(1) (1982).

145. *Califano v. Boles*, 443 U.S. at 295–96. The statute was upheld by a margin of five to four.

146. *Id.* at 294.

147. *Id.* at 289.

148. *Id.* at 295.

149. *Id.* at 296. Underlying the Justices' dispute over the identity of the intended beneficiaries is Justice Rehnquist's change of opinion from *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) to *Califano*. In *Weinberger*, Rehnquist specifically found that the purpose of section 202(g) was to provide benefits to children. *Weinberger*, 420 U.S. at 655 (Rehnquist, J., concurring). In *Califano*, Rehnquist explicitly recanted. *Califano*, 443 U.S. at 294–95 n.12.

relation to the Act's purpose.¹⁵⁰ Because the discrimination involved a nonmarital statute, the dissenters applied the intermediate equal protection test.¹⁵¹ The dissenters would have found that the children could recover under the Act.¹⁵² In addition, the dissenters suggested that the majority failed to heed its own admonition that it is impermissible for the state to penalize the nonmarital child for conduct and status that the child could not prevent.¹⁵³

The *Califano* dissent demonstrates that equal protection challenges by nonmarital children in government benefit cases are subject to inconsistent applications of equal protection standards and various interpretations of legislative history. What accounts for the difference between the majority and minority in the reading of the statute? Given the Court's willingness to reject distinctions between marital and nonmarital children in private finance contexts, the answer may relate to how comfortable a particular Justice feels in spending public money.

The Court's statutory interpretation was important in deciding a nonmarital child's entitlement to survivor's benefits under the Civil Service Retirement Act. In *United States v. Clark*,¹⁵⁴ the nonmarital children were denied benefits because, although they once had lived with a government employee in a family relationship, they were not living with him at the time of his death. The Civil Service Act required that a child "live with" a government employee in order to claim survivor's benefits. The Civil Service Commission interpreted this term to mean that the child must live with the employee at the time of the employee's death.¹⁵⁵ The children argued that the denial of benefits constituted impermissible discrimination against nonmarital children. The Court did not reach the equal protection argument because its interpretation of the statute allowed a decision in favor of the children.¹⁵⁶ The Court studied the language, intent, and history of the Civil Service Retirement Act and could find nothing to

150. *Califano*, 443 U.S. at 297-98 (Marshall, J., dissenting).

151. The dissent cited *Mathews v. Lucas*, 427 U.S. 495 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); and *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972) in support of its application of the intermediate standard. *Id.* at 302, 304 (Marshall, J., dissenting).

152. *Id.* at 300.

153. *Id.* at 303-04.

154. 445 U.S. 23 (1980).

155. *United States v. Clark*, 445 U.S. at 28.

156. *Id.* at 27-28.

limit the term "live with" to the time of the employee's death.¹⁵⁷

The concurring opinion, while reading the statutory language regarding "live with" differently than the majority, did not require the child to live with the employee at the employee's death. Rather, the concurring Justices believed that "live with" was Congress' way of requiring a showing of dependency.¹⁵⁸ Justices Rehnquist and Stewart restricted their dissent to the simple proposition that the case should have been remanded to the Court of Claims for an initial consideration of the statutory claim.¹⁵⁹

Clark teaches that the Court will side with nonmarital children when a governmental financial support statute contains no language or legislative history supportive of an interpretation which would treat nonmarital and marital children differently. Even at the risk of obligating the government to expend larger sums of money, the Court will not differentiate between children in this situation and will avoid reaching and deciding an equal protection challenge.¹⁶⁰

However, in other government benefits cases in which the statute clearly provides for discrimination between marital and nonmarital children, the Court will reach the equal protection question. The problem with the Court's interpretation of the equal protection standard in these cases has been that the various members of the Court use incomplete and divergent standards for determining whether the statute is a violation of equal protection either on its face or based upon its legislative history. The various Justices can find support for a particular position which either supports or opposes the interests of the nonmarital children. This ad hoc analysis of the cases is troublesome. First, the analysis makes predicting future determinations in the area extremely difficult. Second, the reasoning of the Court seems to be based in part upon the Justices' attitudes toward governmental expenditures.

157. *Id.* at 31. Even if the Court had found such a limitation, the majority recognized that it would then have to deal with an equal protection claim. Statutory construction, as the Court explicitly noted, is used to avoid constitutional violations by "adopting a saving statutory construction not at odds with fundamental legislative purposes." *Id.*

158. *Clark*, 445 U.S. at 35 (Powell, J., concurring in judgment).

159. *Id.* at 37 (Rehnquist, J., dissenting).

160. For equal protection claims in this context, the test is whether the classification bears a substantial relationship to the interest which the statute is to serve and whether a classification is substantially related to a permissible state interest. *Lalli v. Lalli*, 439 U.S. 259, 265, 268 (1978).

B. Child Support

The Supreme Court also has dealt with the nonmarital child's interests in financial matters in the context of child support. In a series of four cases, *Gomez v. Perez*,¹⁶¹ *Mills v. Habluetzel*,¹⁶² *Pickett v. Brown*,¹⁶³ and *Clark v. Jeter*,¹⁶⁴ the Court faced equal protection challenges based upon claimed discrimination resulting from the imposition of statutes of limitations against nonmarital children in child support cases.

In the first case, *Gomez*, the Court faced the basic question of whether Texas law allowed marital children a judicially enforceable right to support from their natural fathers while denying nonmarital children the same right.¹⁶⁵ In a per curiam opinion, the Court rejected the statutory distinction on equal protection grounds, finding that "a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."¹⁶⁶ The Court recognized that *Gomez* also raised "lurking problems" regarding the ability to prove paternity within the statute of limitations¹⁶⁷ but concluded that such problems could not create impenetrable barriers to the enforcement of support by nonmarital children.¹⁶⁸

The statute of limitations issue surfaced several years later in *Mills v. Habluetzel*.¹⁶⁹ *Mills* involved a challenge to a Texas statute of limitations which required that a suit by a nonmarital child seeking to identify his natural father be brought before the child was one year old.¹⁷⁰ The state argued that the statute of limitations protected against stale or fraudulent claims.¹⁷¹ The Court applied

161. 409 U.S. 535 (1973).

162. 456 U.S. 91 (1982).

163. 462 U.S. 1 (1983).

164. 108 S. Ct. 1910 (1988).

165. *Gomez v. Perez*, 409 U.S. at 535.

166. *Id.* at 538.

167. *Id.*

168. *Id.*

169. 456 U.S. 91 (1982). TEX. FAM. CODE ANN. § 13.01 (Vernon 1986) provided: "A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred." *Id.* See also O'Brien, *Illegitimacy: Suggestion For Reform Following Mills v. Habluetzel*, 15 ST. MARY'S L.J. 79 (1983).

170. *Mills v. Habluetzel*, 456 U.S. at 92. In *Mills*, the mother and the local welfare department to whom she had assigned the child's support rights brought a paternity proceeding against the alleged father of her child. *Id.* at 95-96. The mother lost at trial because the court imposed the one-year statute of limitations; the child was one year and seven months old at the commencement of the lawsuit. *Id.* at 96.

171. *Id.* at 92.

its well-established test that in nonmarital situations, a statutory restriction may survive equal protection scrutiny to the extent that it is substantially related to a legitimate state interest.¹⁷² The Court's analysis involved the two related requirements of providing the nonmarital child with a sufficient time period within which to present a claim and establishing an appropriate time limit which would allow the state to prevent loss of evidence or avoid fraudulent claims.¹⁷³ Applying this test, the Court held that there was a denial of equal protection because the time frame was unrealistically short given the finality of the result. Although marital children could seek support at any time until the age of eighteen, the twelve-month period available to nonmarital children would make many of these children unable to seek support. The Court recognized that avoiding fraudulent claims was a legitimate state interest but found that this interest was not substantial enough to overcome the child's equal protection claim.¹⁷⁴

A two-year statute of limitations for paternity and child support actions was at issue in *Pickett v. Brown*.¹⁷⁵ In *Pickett*, the Court applied *Mills* and concluded that the two-year period to bring the action for child support was also insufficient.¹⁷⁶ The Court again recognized that the possibility of fraudulent claims was a legitimate state interest but noted that scientific advances in blood testing had reduced further the likelihood of fraudulent claims.¹⁷⁷

Pickett and *Mills* did not define the period that would suffice as a statute of limitations in paternity or child support proceedings. The language in *Mills* was vague: "The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of

172. *Id.* at 99. By deciding the case on equal protection grounds, the Court did not reach *Mills*' due process claim. *Id.* at 96–97.

173. *Id.* at 99–100.

174. *Id.* at 100.

175. 462 U.S. 1 (1983). The Supreme Court had ruled nine years earlier that once a state sets up a cause of action for child support, it may not deny the same cause of action to nonmarital children. *Gomez v. Perez*, 409 U.S. 535 (1973). To do so violates the equal protection clause. *Id.* at 537–38.

176. *Pickett v. Brown*, 462 U.S. at 11–13. As in *Mills*, the Court did not reach the due process claim. *Id.* at 11 n.11.

177. *Id.* at 17–18. See also *Rivera v. Minnich*, 107 S. Ct. 3001, 3008 (1987) (Brennan, J., dissenting).

wedlock.”¹⁷⁸ However, Justice O'Connor's concurring opinion in *Mills* suggested that perhaps the statute of limitations should be similar to other situations in which statutes of limitations are tolled during minority.¹⁷⁹

However, subsequent to *Pickett*, Congress passed the Child Support Enforcement Amendments of 1984 and settled the question of what constitutes a sufficient period of time for nonmarital children to raise the issue of paternity.¹⁸⁰ Section 666(a)(5) of that law definitively states that each state must implement “[p]rocedures which permit the establishment of the paternity of *any* child at *any* time prior to such child's eighteenth birthday.”¹⁸¹

In *Clark v. Jeter*,¹⁸² the Supreme Court avoided the issue of whether the Child Support Enforcement Amendments were retroactive when codified by the Pennsylvania legislature. Cheryl Clark brought suit in 1983, ten years after the birth of her nonmarital daughter but prior to the enactment of the Child Support Enforcement Amendments. The putative father moved to dismiss, arguing that Pennsylvania's six-year statute of limitations barred the suit. The mother responded that the statute of limitations violated the due process and equal protection clauses of the fourteenth amendment.¹⁸³ The trial court upheld Jeter's argument, and Clark appealed to the superior court of Pennsylvania.

Before the superior court could rule on the case, the Pennsylvania legislature enacted an eighteen-year statute of limitations and brought its law into compliance with the Child Support Enforcement Amendments; such compliance is required if a state participates in the federal child support program.¹⁸⁴ Clark asked that the case be remanded to decide the question of the retroactivity of the new federal statute. On remand, the Pennsylvania trial court denied Clark's motion for reargument, holding that the statute was not retroactive absent express

178. *Mills*, 456 U.S. at 97.

179. *Id.* at 104–05 (O'Connor, J., concurring).

180. Child Support Enforcement Amendments of 1984, 98 Stat. 1305 (1984) (Pub. L. 98-378).

181. 42 U.S.C. § 666(a)(5) (1982 & Supp. III 1985) (emphasis added).

182. 108 S. Ct. 1910, 1913 (1988).

183. *Clark v. Jeter*, 108 S. Ct. at 1913–14.

184. *Id.* at 1913.

legislative intent.¹⁸⁵ The Pennsylvania Supreme Court subsequently denied Clark's petition for appeal.¹⁸⁶

The United States Supreme Court granted certiorari to consider whether Pennsylvania's legislative scheme was discriminatory because it allowed a nonmarital child only six years to establish paternity for purposes of obtaining support, while permitting a marital child to seek support from his parents at any time. Because Clark's argument in the lower court did not present adequately the issue of whether the new federal law preempted the six-year statute of limitations in the lower court, the Supreme Court avoided the issue of retroactivity and accepted the state's interpretation.¹⁸⁷

However, the Supreme Court proceeded to decide the case on the issue of whether the six-year statute of limitations violated the equal protection clause. The Court relied on its holdings in *Pickett* and *Mills*, in which the Court struck down one- and two-year statutes of limitations respectively and held that the period of time under Pennsylvania law was also too short given the emotional and financial problems faced by a mother when raising a nonmarital child.¹⁸⁸ Justice O'Connor, writing for a unanimous court in *Clark*, stated that even a six-year statute of limitations does not provide a reasonable time within which to assert a claim on behalf of a nonmarital child. In striking down the Pennsylvania statute as discriminatory, the Court held that "the period for obtaining support . . . must be sufficiently long [and] any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims."¹⁸⁹

As a result of *Gomez*, *Mills*, *Pickett*, and *Clark*, and most importantly, Section 666(a)(5) of the Child Support Enforcement Amendments, the Supreme Court has allowed paternity and support actions to be brought at any time during the child's first eighteen years, thus affording a nonmarital child an opportunity to assert a claim. The Supreme Court has been deferential to mothers who may not realize fully the financial expenses related to food, clothing, school, and medical expenses, which increase

185. *Clark v. Jeter*, 358 Pa. Super. 550, 518 A.2d 276 (1986).

186. *Clark v. Jeter*, 527 A.2d 533 (1987).

187. *Clark v. Jeter*, 108 S. Ct. 1910 (1988).

188. *Id.* at 1914-15; *Pickett v. Brown*, 462 U.S. 1, 18 (1983); *Mills v. Habluetzel*, 456 U.S. 91, 101 (1982).

189. *Clark*, 108 S. Ct. at 1914.

substantially as a child develops. This solicitousness seems to be at odds with the Court's more narrow response when a nonmarital child seeks to intervene in a probate proceeding or seeks government support. In those cases, the Court favors the state's administrative concerns that require filiation proceedings prior to the putative father's death and finds that federal child support legislation needs to include nonmarital children explicitly. The Court's attitude seems, at best, somewhat inconsistent.

CONCLUSION

Several general conclusions can be drawn from the series of Supreme Court cases involving paternity, adoption, inheritance, and public and private support benefits.¹⁹⁰ In the adoption cases, a putative father generally cannot prohibit a third party adoption by withholding consent unless the putative father has complied with one of the legitimation procedures available under the particular state statute; this result is subject to the outcome of a case now pending.¹⁹¹ It remains unclear whether the father can nonetheless block an adoption by demonstrating that, based upon a best interest of the child standard, the child should not be adopted. It is clear, however, that the absolute rights vested in a married father do not vest in the putative father unless he has legitimated the child under the relevant state law. It is unclear what role a putative father must play in the life of a child born while the mother was married to and living with another man.

In the context of inheritance by nonmarital children, the Court has applied the intermediate equal protection test. Under this test, the Court balances the state's interests against the nonmarital child's interests. Although the Court firmly rejects states' efforts to use probate codes to punish the nonmarital child, the Court will recognize some distinction between nonmarital and marital children when the interest of the state is in the efficiency of the probate process. Therefore, a nonmarital child must move

190. For issues involving children of unmarried parents other than the three subjects discussed in this article, see *Little v. Streiter*, 452 U.S. 1 (1981), involving the right to free blood tests for putative fathers in paternity cases; *Fiallo v. Bell*, 430 U.S. 787 (1977), involving nonmarital children and immigration status; *Parham v. Hughes*, 441 U.S. 347 (1979), *Glonn v. American Guar. and Liab. Ins. Co.*, 391 U.S. 73 (1968) and *Levy v. Louisiana*, 391 U.S. 68 (1968), all involving the interplay of children of unmarried parents and wrongful death action. See also W. WEYRAUCH & S. KATZ, *AMERICAN FAMILY LAW IN TRANSITION* 598-602 (1983).

191. *Michael H. v. Gerald D.*, 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (1987).

expeditiously in asserting a claim to the estate and, more importantly, in resolving a legitimation or paternity proceeding prior to the probate matter. How quickly the child must move is yet to be decided by the Court.

In the area of support benefits, and more particularly in that of federal funding, the Court has looked at legislative history and, depending upon the viewpoint of the majority, may or may not find a legitimate reason to distinguish between providing benefits to nonmarital and marital children. The distinctions are subtle, often emanating from the various Justices' philosophies of statutory construction and subjective judgments about legislative history. In fact, the Court may avoid a constitutional decision altogether by deciding the case solely on the basis of statutory interpretation. But when the Court has resolved the constitutional claim, its equal protection analysis has been simplistic and conclusory. Such treatment makes it extremely difficult to predict future results.

Finally, there is good news for nonmarital children in the area of private support claims. The combination of the passage of the Child Support Enforcement Amendments of 1984 and the Court's *Clark v. Jeter* ruling that the federal law may be applied retroactively, effectively gives nonmarital children the period until adulthood to seek support from their natural fathers, thereby giving them the same protections as marital children. Thus, in terms of support benefits the results are mixed. As long as private interests are involved, the nonmarital child will do well. If, on the other hand, the government is involved, the current Court is less likely to rule for the nonmarital child. The result may depend upon whose money the Court is spending.

