CASENOTES

Has the Equal Protection Standard for Illegitimates Been Revised?: *Lalli v. Lalli*[1]—New York's Estates, Powers and Trusts Law section 4-1.2(a)(2)[2] provides that an illegitimate child's right to inherit intestate from his father is contingent on whether the child obtains a court order of filiation prior to the father's death.[3] In 1973, Robert Lalli (Robert), the illegitimate son of Mario Lalli, sought a court order compelling an accounting by the administratrix of his father's estate.[4] Robert acknowledged that he lacked the requisite order of filiation required by the statute, but offered other evidence of his relation to Mario Lalli.[5] The Surrogate's Court excluded this evidence, reasoning

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[1] 439 U.S. 259 (1978).

[2] N.Y. EST., POWERS & TRUST LAW § 4-1.2 (McKinney), enacted by 1965 N.Y. Laws, c. 958, § 1.

[3] *Id.* Article 4 of the N.Y. Estate, Powers & Trusts Law governs the descent and distribution of an intestate estate. Section 4-1.1 sets forth, in part, the distributive shares of the surviving *child*, *children* and/or *descendants*. For the purposes of § 4-1.1 these words refer to the legitimate or lawful children and/or descendants. An illegitimate child's rights of inheritance are set forth in § 4-1.2. Prior to its 1979 revision, this section provided:

> § 4-1.2 Inheritance by or from illegitimate persons
> (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).
> (4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.
> (b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

This section was substantially amended by the enactment of 1979 N.Y. Laws, c. 139, § 1, effective May 29, 1979. The amendment extended the statutory period for obtaining the court order of filiation from two to ten years and provided an alternative procedure for establishing paternity so as to qualify an illegitimate child to inherit from his father. This alternative procedure requires the father to file a formal acknowledgement of paternity with the State Department of Social Services. N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (1979) (McKinney).

[4] 439 U.S. at 261. Robert Lalli claimed that both he and his sister, Maureen, were entitled to inherit from their father, Mario Lalli, as his children. *Id.*

[5] *Id.* at 262-63. During his lifetime, Mario Lalli had provided financial support for both Robert and Maureen. In addition, Robert produced several affidavits

that the method of proof specified in section 4-1.2—"an order of filiation declaring paternity"—was the sole permissible means by which an illegitimate child could establish his right to inherit from his father's estate.[6] The court therefore denied Robert's request for an accounting of the estate and granted the administratrix's motion to dismiss Robert's claim. In so doing, the Surrogate's Court rejected Robert's contention that the statute's exclusion of alternate evidence of paternity denied him equal protection of the law by denying him the opportunity to inherit as would a legitimate child.[7]

The New York Court of Appeals upheld the Surrogate's decision,[8] and Robert Lalli appealed to the United States Supreme Court.[9] In a five-to-four plurality decision, the Supreme Court held: New York can constitutionally condition an illegitimate child's right to inherit from his intestate father on a single specific method of proof of paternity.[10] The Court found that New York had a legitimate and important interest in assuring the orderly and just disposition of an intestate's property upon his death. Provided a state does not predicate the right of inheritance on the marital status of the illegitimate child's parents, the Court ruled, the state may give effect to its legitimate interest by legislatively prescribing any method of proof that bears a substantial relationship to the purpose underlying its intestacy statute.[11]

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from persons who stated that Mario had acknowledged openly and frequently that Robert and Maureen were his children. Furthermore, after Robert's mother died in 1968, Mario provided the requisite parental consent when Robert married in 1969. Incident to this consent, Mario acknowledged that Robert was his son in a writing sworn to before a notary public. *Id.*

[6] *Id.* at 263.

[7] U.S. CONST. AMEND. XIV. At this time, the Surrogate's Court was bound by a United States Supreme Court decision permitting states to condition the inheritance rights of illegitimate children in order to further a rational state goal. See text at note 25 *infra*.

Robert also argued that § 4-1.2(a)(2) was unconstitutional in requiring the paternity proceeding to take place during the pregnancy of the mother or within two years of the birth of the child. Since he failed to get the order of filiation, however, a requirement that the Supreme Court held was constitutionally sound, the Court concluded that Robert lacked standing to argue this secondary challenge. 439 U.S. at 267 n.5. For consideration of this latter challenge, *see* Estate of Harris, 98 Misc.2d 766, 414 N.Y.S.2d 612 (1979) (invalidating the two year limitation), and cases cited therein.

[8] 38 N.Y.2d 77, 340 N.E.2d 721 (1975).

[9] This was actually the second time the Court agreed to hear Robert's case. While the case was pending before the Court the first time, it decided a similar case, Trimble v. Gordon, 430 U.S. 762 (1977). The Court therefore vacated and remanded Robert's case to permit further consideration in light of *Trimble*. Lalli v. Lalli, 431 U.S. 911 (1977). On remand, the New York Court of Appeals affirmed its earlier decision. In Re Lalli, 43 N.Y.2d 65, 371 N.E.2d 481 (1977). It is from this second appellate decision that Robert sought the Supreme Court's review discussed in this casenote.

[10] 439 U.S. at 275-76. Justice Powell announced the judgment of the Court in an opinion joined by Chief Justice Burger and Justice Stewart. *Id.* at 261. In addition, Justice Stewart wrote a short opinion responding to a particular point made in the concurring opinion of Justice Blackmun. *Id.* at 276. Justice Rehnquist was the fifth to concur in the judgment of the plurality, for the reasons he set forth in his dissenting opinion in *Trimble*. *Id.* A dissenting opinion was filed by Justice Brennan, who was joined by Justices White, Marshall and Stevens. *Id.* at 277.

[11] *Id.* at 275-76.

This casenote will examine the *Lalli* decision to determine its ramifications for future intestacy law challenges brought by illegitimate children. After a brief discussion of the prior case law in the area, the opinions in *Lalli* will be presented. The casenote then will analyze the Court's reasoning in *Lalli* with a view toward ascertaining the ultimate significance of the decision for challenges to intestate succession provisions similar to the New York provision at issue in *Lalli*. It will be submitted that the Court's decision in *Lalli* signifies a retreat from the "middle-tier" level of scrutiny[12] employed in earlier decisions

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[12] "Middle-tier" scrutiny is a phrase which describes the intensity of judicial review into the constitutionality of a statute challenged on equal protection grounds. Although the degree of intensity in middle-tier scrutiny has never been succinctly articulated, it lies between minimal scrutiny and strict scrutiny, both of which are discussed below.

The Court employs minimal scrutiny in cases where the challenged state action concerns economic and social welfare. Realizing that legislatures must draft laws based on generalizations about people's situations, the Court has only required that the classifications drawn be rationally related to the purpose underlying the state's action. Application of such scrutiny generally leads to upholding the challenged action. Minimal scrutiny is the traditional standard applied in reviewing equal protection challenges. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); McGowen v. Maryland, 366 U.S. 420 (1961); Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61 (1913). *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

The standard of strict scrutiny is used when a statute concerns *suspect* classifications or interferes with fundamental constitutional rights. Under this standard, the statute is not entitled to the usual presumption of validity. Instead, the state, rather than the plaintiff, must bear the heavy burden of demonstrating that its classification was premised upon a compelling state interest and was structured with such precision so as to be the least restrictive means for effectuating the state goal. If these two prongs of the test cannot be demonstrated, the statute under review will be declared constitutionally infirm. *See, e.g.*, San Antonio School District v. Rodriguez, 411 U.S. 1, 16-17 (1973); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). The traditional indicia of a suspect classification are that the class is

> saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio School District v. Rodriguez, 411 U.S. at 28. Fundamental rights, for equal protection purposes, have been limited to those rights and liberties that are expressly or impliedly protected by the Constitution. *Id.* at 29-36. *See also* Roe v. Wade, 410 U.S. 113 (1973) (personal privacy); Dunn v. Blumstein, 405 U.S. 330 (1972) (equal voting opportunity); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel).

The Court has also used what many commentators have labeled "middle-tier" scrutiny, although the Court itself has not enunciated it as such. Justice Powell described this standard as follows:

> As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the "two-tier" approach that has been prominent in the Court's decisions in the past decade. . . . As has been true of *Reed* and its progeny, our decision today will be viewed by some as a "middle-tier" approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential "rational

involving the constitutional rights of illegitimate children.[13] Whereas the Court previously had required that a statute classifying illegitimate children differently than legitimate children be substantially related to its purpose, the effect of the Court's inquiry in *Lalli* was to focus on whether the burden imposed by the statute was merely rationally related to its purpose. Nonetheless, it also will be submitted that because the Court expressly stated it was not overruling recent precedent in the area, a reconciliation of *Lalli* with the prior case law may limit *Lalli*'s precedential significance to its facts. *Lalli* should be construed as standing for the proposition that statutes requiring a judicial record of the paternal relationship to be established prior to the father's death before permitting paternal inheritance by an illegitimate child are constitutionally sound.

I. Prior Case Law: From *Labine v. Vincent* to *Trimble v. Gordon*, the Rights of Illegitimate Children Expand

At common law, a child born out of wedlock had no parents and therefore was excluded from all rights of inheritance granted legitimate children, save the right to inherit from the heirs of his own body.[14] This harsh rule has been ameliorated by statutory schemes. For example, all states now allow a mother's property to be transferred upon her death to her children, be they

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basis" standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases.

Craig v. Boren, 429 U.S. 190, 210 n * (1976) (Powell, J., concurring). This middle level of scrutiny requires that the classification serve important government objectives and be *substantially related* to the achievement of those objectives. In considering the relationship between the classification and the state's objectives, the Court looks at the alternatives reasonably available to the state to accomplish the statutory purpose and the reasons why the state chose the challenged classification over the available alternatives to become the law. Trimble v. Gordon, 430 U.S. 762, 784 (1977) (Rehnquist, J., dissenting). In the Court's application of this test, the level of scrutiny used, while less than strict scrutiny, is significantly more than the traditional standard. *See generally* Gunther, *The Supreme Court 1971—Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) [hereinafter cited as *Gunther*]. For the application of this intermediate level of scrutiny in cases where the challenged classifications were based on illegitimacy, see note 34, *infra* and accompanying text.

[13] Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Beaty v. Weinberger, 478 F.2d 300 (CA 1973), *summarily aff'd*, 418 U.S. 901 (1974); Jiminez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Griffen v. Richardson, 346 F. Supp. 1226 (D. Md. 1972), *summarily aff'd*, 409 U.S. 1069 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn. 1972), *summarily aff'd*, 409 U.S. 1069 (1972); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

[14] I. Blackstone, Commentaries 458 (1765). *See generally* H. Krause, Illegitimacy: Law and Social Policy (1971).

legitimate or illegitimate.[15] Since an illegitimate child obviously is of his mother's blood, any denial by an intestate succession scheme of inheritance from and through the mother, while granted to legitimate children, is considered unjustified.[16] The same is not true, however, of the illegitimate child's right to inherit from his intestate father.

In 1971, the Supreme Court considered *Labine v. Vincent*,[17] a constitutional challenge to an intestacy statute brought by the illegitimate daughter of an intestate man.[18] Although the child's mother and father never married, they jointly executed a Louisiana Board of Health certificate two months after the child's birth which acknowledged that the father was in fact the child's natural father.[19] Under Louisiana law, this acknowledgment gave the plaintiff a right to demand support from her natural father or his heirs.[20] Two articles of the Louisiana Code, however, prevented her from inheriting a portion of her father's estate. One article provided that "[i]llegitimate children, though duly acknowledged, cannot claim the rights of legitimate children."[21] The second article further provided that "[n]atural children are called to the inheritance of their natural father, who had duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State."[22] Since the decedent in *Labine* was survived by collateral relations, the plaintiff was prohibited from sharing in his estate at all.[23] The plaintiff challenged these provisions, contending that they denied her equal protection of the law on the basis of her illegitimacy.[24]

In rejecting the plaintiff's contention that these provisions were unconstitutional, the Supreme Court deferred to the Louisiana legislature and held that the state's power to structure rules for intestate succession included the power to make incidental classifications based on illegitimacy.[25] Provided the classification drawn was rationally related to the statute's purpose, the Court stated that the statute would not violate the equal protection clause of the Constitution.[26] Applying this principal to the Louisiana intestacy statute, the Court identified the statute as being designed both to direct the disposition of property left within the state's borders and to promote legitimate relation-

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[15] H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 25 (1971).

[16] *See* Glona v. American Guarantee & Surety Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Vallin v. Bondesson, 346 Mass. 748, 196 N.E.2d 191 (1964).

[17] 401 U.S. 532 (1971). This was the third case in which the Court reviewed statutes classifying according to illegitimacy. *See* Glona v. American Guarantee & Surety Co., 391 U.S. 73 (1968) (wrongful death statute); Levy v. Louisiana, 391 U.S. 68 (1968) (same).

[18] 401 U.S. at 533.

[19] *Id.*

[20] LA. CIV. CODE ANN., arts. 239-42 (West).

[21] LA. CIV. CODE ANN., art. 206 (West).

[22] LA. CIV. CODE ANN., art. 919 (West).

[23] 401 U.S. at 534.

[24] *Id.* at 535.

[25] *Id.* at 537-39.

[26] *Id.* at 537-40.

ships. The *Labine* Court found that a rational relationship existed between these purposes[27] and the means used to achieve them. Consequently, the Court ruled that the statute was constitutional.[28]

In 1972, the Court again considered a classification based on illegitimacy in *Weber v. Aetna Casualty & Surety Co.*[29] *Weber* involved a workmen's compensation statute whose purpose was to provide support for dependents of deceased employees. The statute, however, effectively denied benefits to dependent, but unacknowledged, illegitimate children.[30] The plaintiff, an unacknowledged dependent of her deceased father, contended that the statute denied her equal protection of the laws by denying her benefits accorded other dependents.[31]

Addressing the plaintiff's contention, the *Weber* Court observed that the basic problem in distinguishing between unacknowledged illegitimate children and acknowledged illegitimate children was proving the existence of a paternal relationship.[32] From an administrative viewpoint, limiting the application of the workmen's compensation statute to acknowledged illegitimate children obviated the necessity of determining paternity on a case-by-case basis. While such a distinction was convenient, the Court stated that it was not substantially related to the statute's goal of affording support to dependent children of deceased workers; the absence of an acknowledgment by the natural father did not negate the dependency of his illegitimate children. The Court further observed that penalizing illegitimate children for the wrongdoings of their parents was contrary to a basic concept of our legal system—that burdens should be related to the individual responsible for the wrongdoing.[33] The Court therefore departed from the low level of scrutiny employed in *Labine*, and held that a state must demonstrate the existence of a substantial relationship between a statutory classification based on illegitimacy and the interest to be promoted by that statute.[34] Applying this standard to the *Weber* statute, the Court found such a relationship wanting, and held the statute unconstitutionally overbroad.

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[27] *Id.* at 536 n.6. The Court identified the statute as being designed both to direct the disposition of property left within the state's borders *and* to promote legitimate family relationships. *Id.*

[28] *Id.* at 539-40. The Court also found the Louisiana law unobjectionable because it did not create an insurmountable barrier to illegitimate children's ability to inherit. There are other means by which a natural father could provide for his illegitimate children upon his death. For example, the Court noted, a father could provide for a child in his will or he could legitimate the child for inheritance purposes by marrying the child's mother. *Id.* at 539.

For a good background examination of discrimnation against illegitimate children, *see* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971).

[29] 406 U.S. 164 (1972).

[30] *Id.* at 168.

[31] *Id.*

[32] *Id.* at 174.

[33] *Id.* at 175.

[34] *Id.* at 170, 172-73. Although the Court did not specify the intensity of its review in *Weber* it stated,

> [t]hough the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fun-

In reaching this conclusion, the *Weber* Court distinguished *Labine* by asserting that the latter decision was a reflection of the particular importance of the states' interest in regulating the descent of a decedent's property.[35] This distinction between workmen's compensation and intestacy statutes turned out to be short lived. Six years after *Labine*, the Court's decision in *Trimble v. Gordon*[36] brought the analysis applicable to intestate succession challenges in line with post-*Labine* developments in other areas. The plaintiff in *Trimble* had been acknowledged by her father in a paternity action decided prior to his death; her natural parents, however, never married.[37] The applicable intestacy statute[38] precluded illegitimate children from inheriting from their fathers' estate unless their natural parents married each other subsequent to the child's birth *and* the father acknowledged the illegitimate child as his own. Addressing the plaintiff's constitutional argument, the Court observed that the statute was not carefully tuned to reflect consideration of alternative methods of proving paternity—methods that would advance the state's interest in preventing fraudulent claims against intestate estates without impos-

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damental personal rights, this Court exercises a stricter scrutiny. The essential inquiry is . . . a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

Id. (citations omitted). The *Weber* standard was not an exercise of strict scrutiny, but rather of a *stricter* scrutiny than the Court had used in *Labine v. Vincent*. *See* Mathews v. Lucas, 427 U.S. 495 (1976); Jiminez v. Weinberger, 417 U.S. 628 (1974). The description of this standard as a substantial relationship test was not enunciated until later cases. *See* Trimble v. Gordon, 430 U.S. 762 (1977). Compare this scrutiny with the scrutiny employed in relation to gender classifications. Craig v. Boren, 429 U.S. 190, 197-98 and 210 n.23 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 647 (1974); Vlandis v. Kline, 412 U.S. 441, 458-59 (1973) (White, J., concurring); Frontiero v. Richardson, 411 U.S. 677 (1973).

[35] 406 U.S. at 170. The Court asserted that

> [*Labine*] reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. The Court has long afforded broad scope to state discretion in this area. Yet the substantial state interest in providing for "the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents" is absent in [*Weber*].

Id. quoting Labine v. Vincent, 229 So.2d 449, 452 (La. App. 1969).

[36] 430 U.S. 762 (1977).

[37] *Id.* at 764.

[38] ILL. REV. STAT. ch. 3, § 12 (1973) (recodified without material change as ILL. REV. STAT. ch. 3, § 2-2 (h) (1976). At the time *Trimble* was decided the relevant part of the statute provided:

> 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 parents inter-marry and who is acknowledged by the father as the father's child is legitimate.

Id. But see note 139 and accompanying text for subsequent revision at ILL. REV. STAT. ch. 2-2(h) (1976).

Under ILL. REV. STAT. ch. 3 § 2-1 (b) (1976), legitimate children are entitled to inherit from both their mother and their father.

ing so heavy a burden on the inheritance rights of illegitimate children.[39] By way of illustration, the Court noted that the adjudication of paternity present in *Trimble* provided sufficiently compelling evidence of paternity to assure against the possibility of fraud.[40] In unnecessarily excluding illegitimate children with competent proof of paternity along with those children presenting potentially fraudulent claims, the Court held that the statute was unconstitutionally overbroad.[41]

Although the *Trimble* Court reiterated the view expressed in earlier cases[42] that illegitimacy is not a suspect classification,[43] its analysis, unlike the analysis in *Labine*, was far from "toothless."[44] The Court acknowledged that states have a strong interest in assuring the prompt and definitive distribution of an intestate's estate.[45] The court averred, however, that the existence of such an interest does not automatically trigger judicial deference to statutory classifications.[46] Indeed, the Court stated that even when an intestacy statute is designed for the sole purpose of facilitating the resolution of potentially difficult problems of proving paternity, the provision should be drawn carefully to reflect the variety of methods of evidencing paternity.[47] While a state is free to select the method of proof least likely to present significant problems of inaccuracy and inefficiency, the Court determined that it must choose a method substantially related to the statute's purpose and carefully tailored to avoid overbroad classifications based on illegitimacy.[48]

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[39] 430 U.S. at 779.

[40] *Id.*

[41] *Id.* at 772-73.

[42] *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 504-06 (1976); Jiminez v. Weinberger, 417 U.S. 628, 631-34 (1974).

[43] 430 U.S. at 767.

[44] *Id.* Although the *Trimble* Court did not specifically overrule *Labine*, it noted that subsequent cases had limited *Labine's* precedential value. 430 U.S. at 776 n.17.

[45] *Id.* at 767 n.12. *See also* Labine v. Vincent, 401 U.S. at 537-39.

[46] 430 U.S. at 767 n.12. *Cf.* Labine v. Vincent, 401 U.S. 532 (Intestate succession law that bars an illegitimate child from sharing equally with legitimate children in father's estate is within State's power.). In addition, the Court stated that one of the purposes of the statute involved in *Trimble*—the promotion of family relationships—could not be used as a justification for any and all statutory classifications based on illegitimacy. *Id.* at 768-70.

Furthermore, the Court found that a statutory classification may deny illegitimate children equal protection even if they are not absolutely or broadly barred from obtaining a benefit. See note 28 *supra*. The issue of whether the challenged statute created an insurmountable barrier to illegitimate children was an important concept in the Court's decision in *Weber*, *see* 406 U.S. at 170-71. By the time the Court decided *Trimble*, however, it had eliminated this concept from its inquiry. While the court indicated that the availability of *statutory* alternatives to achieve a particular goal were relevant to the constitutionality of a challenged statute (see text accompanying note 54 *infra*), it stated that *factual* alternatives—means that had been available to the decedent to remove the disfavored position of his illegitimate child (e.g. adoption, legitimation by marrying the child's mother, or a will)—were not. 430 U.S. at 774.

[47] *Id.* at 772 n.14.

[48] *Id.* at 772.

In summary, in the cases following *Labine*,[49] the Court formulated a more demanding standard for scrutinizing classificatons based on illegitimacy, including those classifications drawn by state intestacy statutes.[50] Although the Court has declined to designate illegitimacy a suspect classification, it nonetheless has demonstrated its sympathy for the proposition that illegitimate children should not be punished for the wrongdoings of their parents.[51] A state's interest in promoting family life therefore does not justify discrimination against the offspring of extra-marital relationships.[52] Moreover, while the Court has recognized the states' interest in diminishing the administrative problems inherent in establishing paternity on an individual basis, it has developed the principle of requiring states to resolve the problem of potentially fraudulent claims with due regard for the rights of illegitimate children.[53] In implementing this principle, the Court has insisted that states demonstrate a substantial relationship between the statutory goal of preventing fraud and the classification employed to achieve that end. Specifi-

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[49] See note 13 *supra*. *See also* 430 U.S. at 766 n.11. For an overview of the cases decided in this interim period *see* Stenger, *The Supreme Court and Illegitimacy: 1968-1977*, 11 FAMILY L.Q. 365 (1978).

[50] Prior to the Court's decision in *Trimble*, lower courts had felt constrained to follow *Labine* in reviewing constitutional challenges to intestacy statutes, although many felt that the arguments accepted by the Court in subsequent non-intestacy cases applied to intestate succession laws with equal force. *See, e.g.*, Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1975), *rev'd*, 560 S.W.2d 539 (Ky. 1978).

[51] See text accompanying note 33 *supra*.

[52] Trimble v. Gordon, 430 U.S. 762 (1977). *See also* Griffen v. Richardson, 346 F. Supp. 1226 (D. Maryland 1972), *aff'd*, 409 U.S. 1069 (1972); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

[53] For example, the Court in Gomez v. Perez, 409 U.S. 535 (1973), struck down a Texas law denying illegitimate children the right to paternal support. Although it recognized that the state is confronted with lurking problems with respect to proof of paternity, the *Gomez* Court concluded that the state could not create an impenetrable barrier to illegitimate children in attempting to deal with these problems. *Id.* at 538. The Court maintained this position in Jiminez v. Weinberger, 417 U.S. 628 (1974). The statute in *Jiminez* did not altogether bar illegitimate children from receiving the disability benefits allotted to legitimate children. However, it granted benefits only to those illegitimate children, "(a) who can inherit under state intestacy laws, (b) who are legitimated under state law, or (c) who are illegitimate only because of some formal defect in their parents' ceremonial marriage." *Id.* at 635-36. If an illegitimate child did not fall within the quoted provisions, the statute granted him benefits only if he could prove that his father had contributed to his support or lived with him *prior to* the onset of the father's disability. *Id.* at 634-35. Thus, the statute discriminated against the subclass of illegitimate children born after their fathers became disabled, denying them any chance to prove dependency. The state justified the statute as a way to prevent spurious claims of paternity. *Id.* at 636. The *Jiminez* Court, however, did not find such a justification sufficient. Rather, the Court stated that the state could not conclusively and presumptively exclude illegitimate children solely to avert spurious claims. *Id. See also* Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974), where the court, after analyzing *Levy*, *Weber*, *Gomez* and other Supreme Court cases, concluded that the prevention of fraud was not a sufficient justification for an otherwise invidious classification. *Id.* at 307-08. Based on its analysis, the *Beaty* court concluded that there is a strong principle of requiring a state to assess the genuineness of the claims of illegitimate children. *Id.*

cally, the Court has required that any legislative classification be tailored carefully to avoid the overbroad exclusion of illegitimate children.[54] Although this requirement is not as rigorous as the "least restrictive means" analysis employed where suspect classifications are at issue, the Court has struck down those classifications based on illegitimacy where they were either grossly underinclusive or overinclusive.[55]

II. The Development of a New Standard: *Lalli v. Lalli*

In *Lalli v. Lalli*,[56] the Court examined the constitutionality of an intestate succession provision that permitted only those illegitimate children possessing a court order of filiation issued prior to their father's death to inherit from his estate. Considering the plaintiff's challenge to the statute as denying him rights afforded legitimate children in violation of the equal protection clause of the Constitution, the Supreme Court denied relief and held that the state of New York could require an exclusive means of proof of the paternal relationship before allowing an illegitimate child to inherit from his father.[57] Justice Powell announced the judgment of the Court in an opinion joined by Justices Burger and Stewart.[58]

Justice Powell began his analysis of *Lalli* with a discussion of the Court's decision in *Trimble v. Gordon*.[59] *Trimble*, Justice Powell explained, held that although the state's goal of promoting legitimate family relationships could not justify a classification based on illegitimacy,[60] the state's goal of assuring the just and orderly settlement of estates *could* justify such a classification.[61] While this classification could be constitutionally permissible, the *Trimble* Court cautioned that any classification based on illegitimacy must be substantially related to this valid state goal and carefully tailored to avoid overbreadth.[62] Justice Powell then noted that the statute under consideration in *Trimble* served two purposes. The challenged statute was designed in part to foster legitimate family relationships, and in part to assure the just and orderly distribution of estates. Although the *Trimble* Court found that the primary pur-

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[54] See text accompanying note 33 *supra*.

[55] The Court takes into consideration both the possible availability of statutory alternatives that would minimize the statute's discriminatory effect and the degree to which the state's interests would be compromised by the adoption of such alternatives. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495, 509-13 (1976); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 174-75 (1972). For an interesting discussion on the Court's consideration of statutory alternatives, *see* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification and Some Criteria*, 27 VAND. L. REV. 971 (1974).

[56] 439 U.S. 259 (1978).

[57] 439 U.S. at 275-76.

[58] *Id.* at 261.

[59] *Id.* at 264. For a discussion of *Trimble* see text at notes 36-48 *supra*.

[60] 439 U.S. at 265.

[61] *Id.*

[62] *Id.* at 266. See text at notes 49-55 *supra*.

pose was the permissible goal of aiding in the orderly distribution of estates, the statute was found to be neither substantially related to this underlying purpose nor carefully tailored to avoid overbreadth. Because the statute conditioned the inheritance rights of illegitimate children on their parents' marital status, the statute excluded a significant number of illegitimate children who could establish their paternity without compromising the statute's purpose.[63] The *Trimble* Court, Justice Powell noted, therefore ruled that the statute violated the equal protection clause of the fourteenth amendment.[64]

Turning to the case at bar, Justice Powell noted that *Lalli* warranted the same level of scrutiny as was employed in *Trimble*.[65] But, since he was able to distinguish the statute at issue in *Lalli* from the provision overturned in *Trimble*, he concluded that *Trimble* did not mandate the invalidation of the New York intestacy statute. The provisions differed, according to Justice Powell, in both the character of the burdens imposed on illegitimate children and the state interest furthered by those provisions.[66] In Justice Powell's view, the New York provision's requirement of an order of filiation was solely an evidentiary requirement, going directly to the heart of the paternity question.[67] The intermarriage requirement of the *Trimble* statute, by contrast, was wholly unrelated to the paternity issue. This difference, he observed, reflected the different aims of the two provisions. In Justice Powell's opinion, the sole purpose of the challenged New York provision was to provide for the just and orderly disposition of property at death;[68] unlike the *Trimble* provision, the New York statute in no way attempted to influence family relationships.[69]

Having explained the differences between the two provisions, Justice Powell addressed his attention to the relationship between the burden imposed by the New York statute and the purpose it was designed to further. He stated that the provision was intended to mitigate serious difficulties in the administration of estates. To assure the finality of probate proceedings, all parties having an interest in a given estate had to be served with process and given an opportunity to be heard. Thus, if illegitimate children were granted the same intestate inheritance rights as legitimate children, all illegitimate

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[63] 439 U.S. at 265.

[64] *Id.* at 266.

[65] *Id.* at 268.

[66] *Id.* at 266-68.

[67] Analytically distinguishing § 4-1.2(a)(2) as an evidentiary requirement, in contrast to the status requirement of the *Trimble* provision, causes conceptual difficulties. The evidence that the illegitimate child in New York must present is not evidence of the paternal relationship, the real issue for intestate succession purposes, but is evidence of whether the statutory requirement of a court order has been satisfied. In essence, the requirement is one of a prior judicial finding and not one of evidence of paternity. Regardless of whether the child can prove the filial relationship at the administration hearing, his right to inherit from his intestate father depends on the existence of a prior judicial finding of paternity. Thus, whether or not the illegitimate child had a prior judicial finding of paternity is ultimately, as it was in *Trimble*, a question of status.

[68] 439 U.S. at 267-68.

[69] *Id.* The illegitimate child in New York need not have been legitimated by his father in order to inherit from him. *Id.* at 267.

children, whether acknowledged or not, would have to be served with process. Justice Powell explained that, under such circumstances, serious difficulties could arise due to the absence of records evidencing the existence of illegitimate children of intestate men.[70]

In his analysis of the relationship of the statute to its purpose, Justice Powell considered whether the statute was unconstitutionally overbroad. The plaintiff contended that the New York statute, like the statute in *Trimble*, unconstitutionally denied inheritance rights to illegitimate children with a demonstrable relationship to the intestate—that is, those illegitimate children who could convincingly evidence their paternity, despite their lack of a court order of filiation.[71] He argued that New York need not exclude such illegitimate children to accomplish its dual goal of ensuring the finality of probate proceedings and guarding against spurious claims.[72]

Justice Powell, however, did not agree, and found that the challenged statute was a carefully considered balance between the achievement of the state's interests and the uniform treatment of illegitimate and legitimate children.[73] Furthermore, Justice Powell found that section 4-1.2 was substantially related to the purpose underlying the statute. First, he concluded that the requirement of a judicial record of filiation—and, hence, of an illegitimate child's right to notice of probate proceedings—greatly facilitated the administration of an intestate's estate.[74] Second, by requiring that the question of paternity be litigated during the father's lifetime, the statute ensured the genuineness of claims against the father's estate.[75] Thus, the plurality found the New York statute, unlike the statute reviewed in *Trimble*, was constitutionally sound.

Justice Blackmun concurred with the Court's judgment and with most of Justice Powell's opinion.[76] He did not join in the plurality decision since he believed the Court should have overruled, rather than distinguished, *Trimble*.

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[70] *Id.* at 269-71. In accepting this as § 4-1.2's purpose, Justice Powell relied heavily on an opinion of a New York Surrogate who had participated in some of the deliberations of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates which drafted and proposed enactment of § 4-1.2. *Id. See also* N.Y. SURR. CT. PROC. ACT, § 1403 (McKinney 58A). But see text at notes 128-32 *infra*.

The New York legislature created this temporary commission in 1961 to study the law and recommend needed changes. Commissions in New York function as messengers to the legislature, presenting a complete and objective analysis of a problem and explaining the pros and cons of the proposed changes. *See*, Fourth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Legis. Doc. 1965, No. 19 [hereinafter cited as Commission Report]. *See generally*, Dana, *Background Materials for Statutory Interpretation in New York*, 14 RECORD OF N.Y.C.B.A. 80 (1959); MacDonald, *Forward: The New York State Law Revision Commission—The Impact of Twenty Years*, 40 CORN. L. Q. 641, 642-44 (1955).

[71] 439 U.S. at 272.

[72] *Id. See* Commission Report, *supra* note 70, at 266-67.

[73] 439 U.S. at 274.

[74] *Id.* at 271.

[75] *Id.* at 271-72.

[76] *Id.* at 276.

He described the *Trimble* decision as a judicial reaction to a sad and appealing fact situation.[77] He also noted that there had been a strong dissent in *Trimble*, with four Justices preferring to keep *Labine* as the controlling law for intestacy law challenges by illegitimate children.[78] The *Trimble* dissenters had maintained that the Court's prior justification for retaining the *Labine* analysis when reviewing intestate succession statutes was still a valid expression of the Court's proper role.[79] The *Labine* analysis viewed regulation of the descent of property and the manner of creating estates as being entirely within the state's control thereby leading the Court to afford broad scope to state discretion in this particular area.[80] Furthermore, because Justice Blackmun believed the effect of the Court's decision in *Lalli* would be a return to the *Labine*-type of deference to state legislatures, he said that the principles of *Labine* should have been underscored and *Trimble* explicitly reversed.

Justice Stewart responded to Justice Blackmun's stand that *Trimble* is now "a derelict" in a brief concurring opinion.[81] Fully accepting Justice Powell's opinion, he reiterated that the *Trimble* and *Lalli* provisions were sufficiently different to sustain opposite conclusions using the same method of inquiry. Justice Stewart disagreed with the proposition that the *Lalli* Court had failed to give authoritative guidance to the lower courts and state legislatures.[82] By emphasizing that Justice Powell's opinion had followed *Trimble*, Justice Stewart implied that the *Labine* standard had *not* been employed by the Court.[83]

Referring the reader to his dissent in *Trimble*, Justice Rehnquist's concurrence in *Lalli* consisted of a lengthy discourse on the Court's improper use of the equal protection clause of the Constitution to invalidate legislation based on classifications not considered suspect.[84] According to Justice Rehnquist, if these classifications are not mindless or patently irrational the Court exceeds its proper role when setting such classifications aside.[85] Justice Rehnquist considered the New York statute to be rational, and he voted with the plurality to affirm the statute's constitutionality.

The dissent in *Lalli* was more unified than the plurality, with four Justices joining in one opinion. These Justices were unable to agree with Justice Powell that *Trimble* was distinguishable. Declaring section 4-1.2 to be inconsistent with the standard established in *Trimble*, Justice Brennan wrote that the

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[77] *Id.*

[78] *Id.* at 276-77.

[79] 430 U.S. at 776-77. Justice Rehnquist, while agreeing that the challenged statute was of the kind the Court should not overturn unless it was patently irrational, wrote a separate dissenting opinion. *Id.* at 777.

[80] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170 (1972). *See also* In Re Estate of Karas, 61 Ill.2d 40, 329 N.E.2d 234 (1975), *rev'd sub nom.* Trimble v. Gordon, 430 U.S. 762 (1976).

[81] 439 U.S. at 277.

[82] *Id.* at 276.

[83] *Id.*

[84] *Id. See* 430 U.S. at 777 (Rehnquist, J., dissenting).

[85] *Id. See also* Matter of Estate of Lalli, 43 N.Y.2d 65, 70, 71, 371 N.E.2d 481, 483, 484 (1977) (Cooke, J., dissenting) (section 4-1.2 is not mindless or totally irrational), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978).

state's interest could be adequately served by requiring paternity be proved by a formal acknowledgement of paternity made by the father.[86] Justice Brennan sketched some examples of the injustice *Lalli* was likely to produce. For instance, Justice Brennan noted, a voluntarily supported illegitimate child rarely will inherit from the father since mothers and social welfare agents see no need to bring paternity proceedings against supporting fathers.[87] In addition, those who do think of instituting a paternity proceeding may prefer to refrain, not wanting to disrupt the harmony of the filial relationship.[88] Thus, a number of acknowledged and freely supported illegitimate children were being excluded from inheritance rights by the statute.[89]

Justice Brennan then reviewed the state's arguments accepted by Justice Powell for upholding the validity of section 4-1.2. The state claimed that reliance on mere formal public acknowledgments would unduly hinder the state's effort to minimize fraudulent claims of paternity. In response, Justice Brennan suggested that New York might require illegitimates to comply with a given *standard* of proof.[90] In addition, the dissent considered the state's position that a judicial record is necessary for due process purposes to be a weak claim. Justice Brennan thought that notice by publication would adequately serve the state's interest in serving process on "unknown" illegitimates who have valid claims to intestate succession from their natural fathers.[91] Reiterating that the *Trimble* conclusion should have controlled in the present case, since section 4-1.2 excluded forms of proof which do not compromise the state's interests, the dissent would have invalidated the statute.[92]

The disagreement between the plurality opinion and the dissent about whether *Lalli* was distinguishable from *Trimble* is founded in their differing interpretations of the *Trimble* decision. In *Lalli*, Justice Powell applied the

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[86] 439 U.S. at 278.

[87] *Id.*

[88] *Id.*

[89] *Id.* In addition, the dissenting judge in the appellate court decision noted that the failure to obtain a judicial determination of paternity may be due to carelessness or ignorance of the person instituting a support proceeding. Matter of Estate of Lalli, 43 N.Y.2d 65, 71, 371 N.E.2d 481, 484 (1977) (Cooke J., dissenting) *rev'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978). For example, a court order of support, binding on the father, need not make a judicial finding of paternity. After a support order is obtained, would mothers or welfare agents realize they are acting to the child's detriment by failing to have a conclusive finding of paternity? *See* N.Y. EST., POWERS AND TRUSTS LAW, § 4-1.2(3) (McKinney); N.Y. FAM. CT. ACT § 425 (agreement to support), § 516 (agreement or compromise), § 517 (time for instituting proceedings), § 542 (order of filiation) (McKinney 29A); Commission Report, *supra* note 67, at 267. *But see* In Re Flemm, 85 Misc.2d 855, 863-64, 381 N.Y.S.2d 573, 578-79 (Sur. Ct. 1975).

[90] 439 U.S. at 279. *See* In Re Estate of Burris, 361 So.2d 152 (Fla. 1978). *Cf.* UNIFORM PROBATE CODE (U.L.A. § 2-109(2) (ii)) (requiring the illegitimate child to show clear and convincing evidence of the filial relationship if the father has died before a paternity determination is made).

[91] 439 U.S. at 279. *Cf.* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 318 (1950) (overruled constitutional objections to published notice on behalf of beneficiaries whose interest or addresses are unknown to the trustee).

[92] 439 U.S. at 279.

Trimble standard in a less exacting manner than that which Justice Brennan claimed was required. The resultant confusion will become apparent in subsequent cases. *Lalli* does not clarify the appropriate standard of review to be used—particularly because Justice Powell's interpretation of *Trimble* was joined by only two other Justices. Justices Blackmun and Rehnquist concurred in the judgment based on the results of the traditional minimum standard of review. The split in the Court's opinions invites litigation to determine the direction in which the Court is moving and to test the strength of that direction.

III. Analysis of *Lalli*

In *Lalli*, Justice Powell couched his reasoning in terms of a comparison with the *Trimble* decision. He claimed to use the standard of review enunciated in *Trimble*, reaching a different conclusion by distinguishing *Lalli* on the basis of both the character of the burden imposed by the statute and the state interest the statute was designed to further.[93] The following section will analyze Justice Powell's opinion. The first part will examine how Justice Powell employed the *Trimble* standard of review. It will be submitted that the standard employed was in fact a less stringent standard of review than that articulated in *Trimble*, and as such obscures the proper standard to be used. The second part of the analysis will examine whether *Trimble* was properly distinguished on the basis of the purposes the statutes were to further. This examination will demonstrate that the sole purpose the Court should have considered in examining the relationship of the statute's burden to its purpose is the prevention of fraudulent claims by illegitimate children—the same purpose the Court considered in *Trimble*. It will be submitted therefore that section 4-1.2 should have been judged, like the statute in *Trimble*, an unconstitutionally overbroad attempt by the state to deal with the problem of proving the paternity of illegitimate children.

A. *The Standard of Review Employed in* Lalli

The principal difference between the standard of review employed in *Labine* and that used in *Trimble* is the manner in which the means-ends test[94] was applied. Functionally, *Labine* was an ends test: once the Court concluded that the end sought by the state was within the sphere of legitimate state interests, the constitutional inquiry was limited to a cursory examination of the means employed to achieve that end. The Court required only the barest relationship between the state's goal and the legislative classification in-

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[93] 430 U.S. at 776 n.17.

[94] This shorthand phrase describing the Court's mode of analysis as an inquiry into a "means-ends" relationship was first articulated by Professor Gunther in his 1972 article. Gunther, *supra* note 12 at 20. *See also Forum: Equal Protection and the Burger Court*, 2 Hastings Con. L. Q. 645 (1975).

volved.[95] In cases decided after *Labine*, however, the Court reviewed provisions discriminating against illegitimate children with a detailed examination of both the ends *and* the means.[96] This examination involves an assessment of the precision with which the statute was drawn. The statute must reflect a consideration that alternative solutions to the problem presented by fraudulent claims of paternity which may be less restrictive upon illegitimate children would hinder achievement of the state's goals.[97] This requirement makes the substantial relationship scrutiny found in *Trimble* much stricter than the traditional equal protection scrutiny used in *Labine*.

The *Lalli* plurality retreated from fully employing the *Trimble* test. Although Justice Powell purported to use the analysis the Court had employed in *Trimble*, and used "substantial relationship" language, he did not in fact apply the heightened standard of review mandated by *Trimble*. Instead, by refusing to assess the precision with which section 4-1.2's classification was drawn, he essentially reviewed the statute according to the more lenient traditional standard of review.[98]

In *Trimble*, Justice Powell stated, the majority had reasoned that for the state to assure accuracy and efficiency in the disposition of an intestate's property, the danger of spurious claims might justify statutory discrimination against the illegitimate children of intestate men. The flaw in the *Trimble* provision, however, was that it totally excluded from inheritance illegitimate children not legitimated by the subsequent marriage of their parents. That provision, Justice Powell explained, served to disqualify an unnecessarily large number of illegitimate children. Justice Powell perfunctorily concluded that section 4-1.2 did not share such a defect.[99]

To reach his conclusion that the New York statute was not constitutionally infirm, Justice Powell effectively ignored the question the *Trimble* Court would have framed. Had he incorporated the substantial relationship test with its requirement of careful tailoring into his analysis of *Lalli*, the question that he should have posed would have been: although section 4-1.2 rationally furthers the state's broad aim of a just and orderly disposition of an estate,[100]

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[95] Such a standard of review in the equal protection area almost always signifies that the statute will be upheld. See note 12 *supra*.

[96] See text at notes 29-48 *supra*.

[97] See note 55 *supra*.

[98] See note 12 *supra*.

[99] 439 U.S. at 273. Justice Powell explained that

> [i]nheritance is barred only where there has been a failure to secure evidence of paternity during the father's lifetime in the manner prescribed by the State. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.

Id. Then, in response to the dissent's comment that this requirement rarely will be satisfied if the father had willingly recognized and supported the illegitimate child, *id.* at 278, Justice Powell explained that a father, willing to acknowledge paternity, can waive his defenses in a paternity proceeding, can institute such a proceeding himself or can totally avoid this entire problem by providing for his illegitimate child by will. *Id.* at 273, 273 n.10. For an explanation of the inadequacy of Justice Powell's remarks see text at notes 104-13 *infra*. See also note 46 *supra*.

[100] The provision furthers this goal by eliminating the need to determine paternity after an alleged father has died intestate. Avoiding post-death litigation on

does the fact that discrimination results from the use of a single and absolute criterion of paternity[101] infringe on the rights of illegitimate children more than is necessary to further the aim of the state? It was, in fact, the dissenters who responded to the *Trimble* question, taking the position that the New York provision *could* have been written more equitably without compromising the state's interest.[102] This conclusion, the dissent noted, required reversal of the lower court's decision and invalidation of the statute.[103]

Although he originally articulated that the correct level of scrutiny for *Lalli* was that level used in *Trimble*, Justice Powell expressly rejected the dissenters' position, noting that the precision of a statute is not a matter of specialized judicial competence.[104] Justice Powell's reluctance to examine the statute in such a manner, however, is contrary to common judicial practice. There are times when the Court does examine a statute's precision; this is an important element in cases concerning suspect classifications, calling for strict scrutiny of a statute.[105] In addition, although illegitimacy has never been declared suspect, the Court does have a basis in *Trimble* for questioning whether a classification is being grossly over or underinclusive in accomplishing a valid state goal. In both *Trimble* and in *Lalli*, Justice Powell agreed that the relationship must be substantial and finely tuned—not merely rational.[106] Such a test permits the Court to make a value judgment as to the precision with which a classification based on illegitimacy will further the asserted statutory purpose. Nonetheless, Justice Powell did not scrutinize the New York provision in the manner which *Trimble* mandated, failing to consider fully the requirement of careful tailoring. Such scrutiny should have exposed the statute's overbreadth in accomplishing the state's goal.

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this issue protects "innocent adults and those rightfully interested in their estates from fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimate heirs." Commission Report, *supra* note 67, at 265.

[101] The criterion is absolute only when the parents have not married subsequent to the illegitimate child's birth. However, as *Trimble* expressly denies the state the opportunity to precondition an illegitimate child's inheritance rights on his parent's marital status, it is the burden that the state imposes in those cases where the parents have *not* married each other subsequent to the child's birth with which we are solely concerned.

[102] 439 U.S. at 278-79 (Brennan, J., dissenting). Justice Brennan asserted,

> But even if my confidence in the accuracy of formal public acknowledgments of paternity were unfounded, New York has available less drastic means of screening out fraudulent claims of paternity. In addition to requiring formal acknowledgments of paternity, New York might require illegitimates to prove paternity by an elevated standard of proof, *e.g.*, clear and convincing evidence, or even beyond a reasonable doubt.

Id. In addition, Justice Brennan stated, "Publication notice and a short limitations period in which claims against the estate could be filed could serve [the state purpose of protecting estates from belated claims by unknown illegitimates] as well as, if not better than, the present scheme." *Id.* at 279.

[103] *Id.* at 279.

[104] *Id.* at 274. *See also* Mathews v. Lucas, 427 U.S. 495, 516 (1976).

[105] See note 12 *supra*.

[106] *Trimble*, 430 U.S. at 772; *Lalli*, 439 U.S. at 268. See also note 12 *supra*.

The statute's deficiency becomes evident upon a consideration of two realities for an illegitimate child whose father lives in New York. First, the illegitimate child rarely will inherit under the provision if his father has willingly supported him, whereas he would more likely inherit if his father did not want to support him. As Justice Brennan pointed out in his dissent, those fathers who have recognized and are willing to support their illegitimate children are not brought to court by either mothers or welfare agents.[107] Although Justice Powell remarked that a willing father always can institute a paternity proceding himself,[108] it is unlikely that many fathers are aware their failure to do so will have such a detrimental effect on the illegitimate child's rights should the father die intestate.[109]

The second practical difficulty with the tailoring of the statute concerns the existence of another statute in New York that encourages putative fathers to settle paternity claims without resorting to the intricacies of an adjudicatory process.[110] The putative father can enter into a binding agreement with the mother for the support of the illegitimate child which bars all other remedies the mother and child might have had. Such an agreement does not include a court order of filiation. Section 4-1.2 specifically states that "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."[111] The New York legislature's intention to use this binding agreement as an incentive for the parents to avoid onerous paternity proceedings[112] conflicts with its requirement of a court order of filiation as a precondition to inheritance from an intestate father by an illegitimate child.[113]

In sum, although Justice Powell stated that he was using the *Trimble* principles,[114] he failed to comply with *Trimble's* heightened standard of review. In light of his recognition of the willing-unwilling father problem inherent in the New York statute, his opinion never adequately explained why the statute did not disqualify an unnecessarily large number of illegitimate children from paternal intestate succession. Nor did Justice Powell ever respond to the dissent's comment that publication notice would be less restrictive upon illegitimate children without hindering the state's aim. His plurality opinion did not explore the relationship of the statute's burden to its purpose to the same

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[107] 439 U.S. at 278. *See* In Re Flemm, 85 Misc.2d 855, 864, 381 N.Y.S.2d 573, 578 (Sur. Ct. 1975).

[108] *Id.* at 273.

[109] Justice Powell also noted that "a father is always free to provide for his illegitimate child by will." *Id.* at 273 n.10. Such an observation, however, should be of no significance within the context of the appropriate equal protection analysis. See note 46, *supra*.

[110] N.Y. FAM. CT. ACT § 516 (McKinney).

[111] N.Y. EST., POWERS and TRUSTS LAW § 4-1.2(a) (3) (McKinney). *See* Commission Report, *supra* note 67 at 267.

[112] Bacon v. Bacon, 46 N.Y.2d 477, 480, 386 N.E.2d 1327, 1328 (1979).

[113] For a comparison of § 4-1.2 and other New York statutes with proof of paternity requirements, *see* 5 HOFSTRA L. REV. 697, 709-12 (1977).

[114] 439 U.S. at 268.

extent as in *Trimble*, nor did he require a demonstration of the feasibility of less restrictive means of accomplishing the stated aim. Thus, because a reduced level of inquiry was employed by the plurality—although articulated as being the same as that used in *Trimble*—*Lalli* obscures the extent of the proper examination due challenges brought by illegitimate children to intestacy laws.

B. *The Improper Determination of Section 4-1.2's Purpose*

Justice Powell's failure to apply the proper standard of review is not the only flaw in the *Lalli* opinion. The failure to rely on the correct sources to determine the purpose of the New York statute—and thus the failure to examine the statute's burden in light of its actual purpose—marks the second flaw of *Lalli*. Had the correct method been followed, it is doubtful Justice Powell would have declared that a substantial relationship existed between the burden imposed by section 4-1.2 and the purpose it was designed to further. Initially it must be stated that the Court requires a statute challenged on equal protection grounds to be scrutinized for its relationship to the *actual* purpose the legislature designed it to further.[115] In *Trimble*, it was noted that particularly with classifications for which the Court will not automatically defer to the legislature, more than mere incantation of a proper state purpose is required to justify an otherwise invidious classification.[116] By requiring that the actual purpose be considered in its analysis, the Court rejected the traditional approach of accepting as the legislative purpose any conceivable state of facts, proffered by the state or by the members of the Court itself, which can justify challenged statutory discrimination.[117]

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[115] Schlesinger v. Ballard, 419 U.S. 498, 520 (1975), (Brennan, J., dissenting). The reason statutory purpose is sought in equal protection cases is different than in any other statutory interpretation context. The challenging party does not say, as is the common starting point for many inquiries into statutory purpose, "[T]he statute should not be read to include me in a particular class." Rather the party argues, "[P]lacing me in the class affected/unaffected by the statute is unconstitutional." *See* Note, *Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1077-78 (1969).

[116] 430 U.S. at 769.

[117] The traditional approach was that used in McGowen v. Maryland, 366 U.S. 420, 425-26 (1961). There the Court said:

> Although no precise formula has developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. See, e.g., Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 563 (1947) (reaching its conclusion that a challenged Louisiana pilotage law did not deny equal protection, the Court, rather than looking to the actual purpose behind the law, conjured up possible purposes of the Louisiana legislature); Goesaert v. Cleary, 335 U.S. 464 (1948) (possible purposes for restricting female employment as a bartender to

When, as is true of section 4-1.2, the statute's language does not reveal its purpose, the Court must look to extrinsic aids to ascertain the statute's actual purpose.[118] The most important extrinsic aid to the Court is the legislative history of the statute.[119] Various materials make up legislative history,[120] with no single material considered by the Court to be the definitive statement of the statute's purpose.[121] The legislative history of section 4-1.2 reveals

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wives and daughters of bar owners); Note, *Developments in the Law - Equal Protection*, 82 HARV. L. REV. 1065, 1077-1080 (1969).

This traditional approach has been rejected by the Court. As Justice Brennan stated in Schlesinger v. Ballard, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting), "while we have in the past exercised our imaginations to conceive of possible rational justifications for statutory classifications . . . we have recently declined to manufacture justifications in order to save an apparently invalid statutory classification." *Id. See, e.g.*, Johnson v. Robison, 415 U.S. 361 (1974), where the Court looked at the classification to see its relation to "at least one of the *stated* purposes justifying the different treatment . . . *Id.* at 376 (emphasis added). The Johnson Court found error in the district court's excessively broad statement of the congressional objective and narrowed its focus to the *specific* purpose the statute, when read in conjunction with its legislative history, was to further. *Id.* at 377.

[118] Extrinsic aids are information pertaining to a statute but not included in the statute's text. These extrinsic aids generally are comprised of the statute's legislative history and historical context. By comparison, intrinsic aids relate solely to the text itself and include items such as the definitions and popular usages of the textual language. *See generally* HART AND SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1201, 1243-64, 1266-69 (tentative ed. 1958) [hereinafter cited as HART AND SACKS].

[119] *Cf.* Note, *A Decade of Legislative History in the Supreme Court: 1950-1959*, 46 VA. L. REV. 1408 (1960) (although reliance on legislative history to interpret a statute has been criticized in the past, the Court seems quite willing to refer to legislative history when a question of meaning or statutory purpose arises).

[120] Employing legislative history as an aid in statutory construction is more difficult with state legislation than with federal legislation. State legislatures do not publish the amount of material Congress does. Committee reports usually are available, but transcripts of state legislative hearings and debates rarely are published. Legislative journals, skeletal records of the statutory history, are maintained but have little substantive value regarding the comments of the legislators. As to the viability of using legislative history when construing state statutes, although some states have expressly provided by statute that legislative history may be fully considered, *see, e.g.*, 1 PA. CONS. STAT. ANN. § 1921 (c) (Purdon), the state courts have generally evolved their own rules of reliability. *See (generally)* FOLSOM, LEGISLATIVE HISTORY (1972); Cashman, *Availability of Records of Legislative Debates*, 24 RECORD of N.Y.C.B.A. 153 (1969); Dana, *Background Materials for Statutory Interpretation in New York*, 14 RECORD of N.Y.C.B.A. 80 (1959) (hereinafter cited as Dana).

[121] Even so, these materials are given different weight depending on their purpose within the legislative process. While committee reports are considered very good indicia of the purpose of statutes, less formal material—such as floor debates, hearings and statements by sponsors of bills—are also admissible for determining statutory purpose, although they are generally afforded less weight. The less formal the material is, the less appropriate it is for judicial consideration. There must be some showing that the legislature considered the material in its decision-making process. In this light, isolated statements by individual legislators, not primarily responsible for a bill's enactment, have very little persuasive value for use in ascertaining the purpose a statute is designed to further. *See, e.g.*, Tennessee Valley Authority v. Hill, 437 U.S. 153, 209 (1978) (Powell, J., dissenting) (testimony or statements made by legislators

that the statute was a product of a special Commission, created by the New York legislature to make a comprehensive study of New York's law of estates and to prepare statutory revisions where necessary.[122] The Commission issued a formal report to the legislature, as an appendix to its proposed bill, explaining the defects of the then present law by which illegitimate children inherited from their intestate parents.[123] The report also explained the purpose of the recommended revisions.[124] The New York legislature enacted the bill, as section 4-1.2, exactly as proposed by the Commission.[125]

The Commission Report broadly explained the purpose of section 4-1.2: "to alleviate the plight of the illegitimate child."[126] Section 4-1.2(a)(2), however, was explained more specifically. That subsection was designed explicitly to prevent fraudulent claims of paternity and to mitigate the difficulties in the administration of estates presented by "harassing litigation instituted by those seeking to establish themselves as illegitimate heirs."[127]

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after a statute has been enacted have no probative value and considered inadmissible to show statutory purpose); Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 563-65 (1976) (sponsors' statements are an important part of legislative history to be used in statutory construction); Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1975) ("post passage remarks, however explicit, cannot serve to change the legislative intent of Congress before the Act's passage"); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 381-82 (D.C. Cir. 1973) (statements by legislators who were among the most active in securing passage of statute entitled to some weight); International T. & T. Corp. v. General T. & E. Corp., 518 F.2d 913, 921 (9th Cir. 1975) (committee reports made after a careful study of a problem entitled to greater weight than are floor debates and hearings); Banco Nacional de Cuba v. Farr, 383 F.2d 166, 175 (2nd Cir. 1967) (individual and isolated statements during floor debates not entitled to same respect as carefully prepared committee reports, while statements of sponsors who are the most active legislators in getting a bill enacted of some significance), American Airlines v. C.A.B., 365 F.2d 939, 949 D.C. Cir. 1966) (generally accepted maxim of statutory construction that the report of the committee formulating the proposed statute for legislative approval take precedence over statements made in legislative debates); Friedman v. United States, 364 F. Supp. 484, 488 (S.D. Ga. 1973) (affidavits of legislators who drafted the statute inadmissible aid to statutory construction); Southern Railway Company v. A. O. Smith Corp., 134 Ga. App. 219, 221, 213 S.E.2d 903, 906 (1975) (even if draftsman of statute had been a legislator rather than a lawyer, his affidavit as to how the statute was intended to be applied as an expression of the general legislative intention would be inadmissible). *See generally* HART AND SACKS *supra* note 118, at 1283-86. *Cf.* In re John Children, 61 Misc. 2d 347, 358-61, 306 N.Y.S.2d 797, 809-11 (1969), where *in light of the fact that no other formal legislative materials were available,* the court relied on the contents of an assemblyman's letter on the basis of unequivocal assurance that although the letter, which concerned statutory intention, was not physically a part of the legislators' consideration before voting on the statute, the contents of the letter were before the legislature in verbal form.

[122] See note 70 *supra*.

[123] Commission Report, *supra* note 70 at 235.

[124] *Id.* at 265-68. *See also id.* at 234.

[125] *See id.* at 233. See also note 3 *supra*.

[126] Commission Report, *supra* note 70 at 37. *See also* 439 U.S. at 269.

[127] Commission Report, *supra* note 70 at 265. The Report added,

> The utmost caution should be exercised to protect innocent men from unjust accusations in paternity claims. To avoid this hazard, no informal

After recognizing the Commission's Report as explaining section 4-1.2's purpose, Justice Powell turned to a statement made by a New York Surrogate which purported to explain the Report's explanation.[128] Justice Powell quoted the Surrogate at length, although he was well aware that the Surrogate had been only a participant in some of the Commission's deliberations and was not a Commission member.[129] According to the Surrogate, the "real concern to the experienced members of the commission"[130] involved the procedural problem of being unable to serve process on the illegitimate child, if he were made an unconditional distributee in intestacy.[131] Justice Powell seized upon this explanation as indicating the true purpose for which the New York legislature enacted section 4-1.2.[132]

The impact of Justice Powell's reliance on this post-enactment statement is demonstrated by a comparison of the way the two purposes affect the outcome of the appropriate judical scrutiny. Applying the *minimum rationality* test to the classification created by section 4-1.2, the statute would be found constitutional if the purpose of the statute were, as the Commission stated, to prevent fraudulent claims.[133] Similarly, the statute would be found constitutional if the purpose were that presented by the Surrogate—to enable process to be served on the illegitimate children of a decedent.[134]

When a more stringent test is employed, however, as Justice Powell used in *Trimble* and professed to use in *Lalli*, the result depends on the purpose discerned. To reiterate a point made earlier,[135] in looking for a substantial relationship between the goal of preventing fraudulent claims of paternity

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> method of acknowledgment has been provided for in the recommendations. While a formal acknowledgment alone would be a considerable advance over the statutes of most states allowing inheritance from an acknowledging father, it is felt that the recommendation here made gives even more protection against such hazard. The procedure in other states provides merely that any informal witnessed writing establishing the relationship of father and child between the deceased and the claimant is sufficient to establish paternity, allows paternity to be established after the death of the father, thus affording considerable opportunity for falsification of evidence and inviting harassing litigation. These problems are eliminated by requiring a court order establishing paternity during the lifetime of the father."

Id. at 266-67.

Although neither the New York legislature nor the New York state courts have specifically enunciated principles for using the available legislative history for statutory construction, see note 120, *supra*, the state courts tend to consider committee reports a highly persuasive background source for statutory purpose. *See* Dana, *supra* note 120. A committee report logically should be given additional persuasive value if, as occurred with section 4-1.2, the legislature enacts a proposed bill without any changes. See text and note at note 125 *supra*.

[128] 439 U.S. at 270.

[129] *Id.*

[130] In Re Flemm, 85 Misc.2d 855, 859, 381 N.Y.S.2d 573, 575 (Sur. Ct., 1975).

[131] *Id.*

[132] 439 U.S. at 271.

[133] Matter of Estate of Lalli, 43 N.Y.2d 65, 70-71, 371 N.E.2d 481, 483-84 (1977) (Cooke, J., dissenting), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978).

[134] 439 U.S. at 276 (Blackmun, J., concurring).

[135] See text at notes 53-54 *supra*.

and the classifications designed to further this goal, the Court has required that a legislature carefully tailor these classifications to reflect less restrictive alternatives. Excluding illegitimate children who do not have a court order of filiation from intestate inheritance *is not* substantially related to the prevention of fraudulent claims, when a significant number of these children have other competent evidence of the paternal relation. This would follow from the *Trimble* decision, where the statute's purpose had been the prevention of fraudulent claims but the statute was infirm because it was unnecessarily overbroad in its exclusion of illegitimate children from inheritance rights. Thus, if Justice Powell had relied on the purpose presented by the Commission Report, section 4-1.2 would have been invalidated as unconstitutional.

It is easier to reach the conclusion Justice Powell reached in his opinion when section 4-1.2's burden is reviewed with the purpose presented by the Surrogate. Conditioning an illegitimate child's inheritance from his intestate father on a court order of filiation is substantially related to the goal of making the existence of the illegitimate child known to an administrator. Knowing that the illegitimate child has a rightful interest in the estate, the administrator can serve him with process and give him an opportunity to be heard. If reliance on this purpose, as presented by the Surrogate, were proper, Justice Powell's finding would be defensible.

Such reliance was improper, though, given the appropriate hierarchy of usable legislative material to discern statutory purpose. In this light, Justice Powell's opinion was flawed by his failure to examine the New York statute against the same purpose the statute in *Trimble* had been designed to further. Justice Powell did recognize, at least initially, that the New York statute was designed to eliminate unfounded claims of heirship. Yet his examination into the relationship between the character of the statute's burden—being the exclusive means of proving the paternal relationship—and the purpose of the burden emphasized that purpose to be the need for a judicial record of an illegitimate child's existence, a purpose distinctly different from the statutory purpose discussed in the *Trimble* decision. Thus, Justice Powell avoided having to square his examination with statements made by the Court in earlier cases to the effect that a state cannot presumptively exclude illegitimate children from rights granted legitimate children solely to avert fraudulent claims.[136] If he had examined New York's manner of resolving this problem of fraudulent claims, the *Trimble* decision would have required him to strike down the statute as unconstitutional because of its unnecessary exclusivity in acceptable proof of paternity. Instead, Justice Powell incorrectly placed greater emphasis on a post-enactment statement of someone who played only a minor role in the statute's enactment than on the text of the Commission's Report, and thus was able to affirm the constitutionality of the New York statute.

In sum, an analysis of *Lalli* reveals that although the Court was given an opportunity to clarify the appropriate standard of review for intestacy law challenges by illegitimate children, the Court failed to do so. While the Court articulated the standard it employed in *Lalli* as heightened scrutiny of the relationship between section 4-1.2's burden and purpose, reiterating the language employed in *Trimble*, the actual scrutiny of the relationship effectively retreated from the "middle-tier" level of review. The most crucial element of

[136] See note 53 *supra*.

the review in *Trimble*—questioning the precision with which a burden is drawn—was expressly omitted from the review in *Lalli*. Nonetheless, the desired impact of this retreat was not made clear. The Court chose not to overrule *Trimble*, claiming instead that it was distinguishable. Distinguishing *Trimble* on the basis of statutory purpose, however, was erroneous. Had the Court's reasoning not been flawed on this point, a review of the New York statute for its relationship to the same purpose found furthered by the statute in *Trimble* would have enabled the Court to invalidate the statute and thereby illustrate more clearly the appropriate scrutiny of intestate succession schemes challenged by illegitimate children.

IV. The Significance of a *Trimble-Lalli* Reconciliation for States Having Intestate Succession Provisions Similar to the New York Estates, Powers and Trust Law section 4-1.2

To ascertain the significance of distinguishing *Trimble* in the *Lalli* decision, an examination of the various types of statutes providing for paternal intestate succession of illegitimate children is helpful. In broad terms, they can be categorized according to three main types of requirements. One is the requirement considered in *Trimble*: an illegitimate child inherits from his intestate father only after he has been legitimated by the subsequent intermarriage of his parents combined with his father's acknowledgment of paternity.[137] The Court in *Trimble* held this requirement to be unconstitutional. A second type of requirement is that which was challenged in *Lalli*: an illegitimate child not legitimated by the subsequent intermarriage of his parents, inherits from his intestate father only when a "specific method" of proof has been satisfied.[138] The *Lalli* Court established that this type of requirement is constitutionally permissible. The third type of requirement is modeled after section 2-109 of the Uniform Probate Code: unless an illegitimate child has been legitimated or paternity has been judicially established prior to the father's death, an illegitimate child inherits intestate from his father only when he satisfies a given "standard" of proof of the paternal relationship.[139] The constitutionality of this requirement has never been decided by the Court.[140]

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[137] Ky. Rev. Stat. § 391.090; Mass. Gen. Laws Ann. ch. 190, § 7 (West) (struck down in Lowell v. Kowalski, 1980 Mass. Adv. Sh. 1243, 405 N.E.2d 135 pursuant to the Equal Rights Amendment to the Massachusetts Constitution); Miss. Code Ann. § 91-1-15; Mo. Ann. Stat. § 474.070 (Vernon); N. H. Rev. Stat. Ann. § 457.42; R.I. Gen. Laws § 33-1-8; S.C. Code § 20-1-60; W. Va. Code § 42-1-6; Wyo. Stat. § 2-3-109.

[138] See notes 143 and 144 *infra*.

[139] Alaska Stat. § 13.11.045; Ariz. Rev. Stat. Ann. § 14-2109; Colo. Rev. Stat. § 15-11-109; Del. Code Ann tit. 12, § 508; Idaho Code § 15-2-109; Ill. Ann. Stat. ch. 110 1/2, § 2-2 (Smith-Hurd); Iowa Code Ann. § 633.222 (West); Md. Est. & Trusts Code Ann. § 1-208; Mich. Stat. Ann. § 27.5111 (no standard of proof specified); Mont. Rev. Codes Ann. § 91A-2-109; Neb. Rev. Stat. § 30-2309; N.J. Stat. Ann. § 3A:2A-41 (West); N.M. Stat. Ann. § 45-2-109; 20 Pa. Cons. Stat. Ann. § 2107 (Purdon); S.D. Probate Code § 2-109; Tenn. Code Ann § 31-206; Utah Code Ann. § 75-2-109; Vt. Stat. Ann. tit. 14, § 553; Va. Code § 64.1-5.1. *See also* Wash. Rev. Code Ann. § 11.04.081 (same).

[140] At least four Justices, however, believe that a statute requiring an illegitimate child to satisfy a particular standard of proof recognizes the possibility of the

The statutes within these three categories all separate illegitimate from legitimate children for purposes of granting paternal inheritance rights—but by different mechanisms. The *Trimble* judgment held that one type of classification was not constitutionally permissible while the *Lalli* judgment held that a different type was. According to Justice Powell's opinion in *Lalli*, however, the *Trimble* and *Lalli* judgments differed not only because the burdens imposed by the two classifications differed, but also because the statutory purposes with which the classifications were reviewed by the Court also differed. In *Trimble*, the statutory purpose was the prevention of fraudulent claims of paternity. In *Lalli*, while this was a secondary purpose of section 4-1.2, the primary purpose emphasized by the plurality was the need for a judicial record of a father's relation to his illegitimate child. Regardless of the validity of this emphasis,[141] Justice Powell's *Lalli* reasoning rests on the difference in statutory purpose between the two statutes.

Although Justice Powell stated that the judgment in *Lalli* controlled all challenges to statutes requiring an illegitimate child to satisfy a "specific method" of proof of paternity to be eligible to inherit intestate from his father,[142] a necessary reconciliation between the *Trimble* and *Lalli* decisions may mean that *Lalli*'s precedential strength will be limited to only those statutes requiring a method of proof that becomes part of a judicial record. A closer look at the statutes requiring a "specific method" of proof reveals that the methods required vary among the states. Some states require a judicial record of paternity be created.[143] Some, though, simply require a formal, witnessed documentation of the paternal relationship.[144] While Justice Powell noted that the *Lalli* decision applies to all such statutes, regardless of the method of proof required, this may not be true. Equal protection challenges to those statutes which can be justified by a statutory purpose identical to the

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variety of forms of evidence which an illegitimate child may possess while still achieving the state's goal of preventing fraudulent claims. 439 U.S. at 279 (Brennan, J., dissenting).

[141] See text at notes 115-36 *supra*.

[142] 439 U.S. at 272 n.8.

[143] ALA. CODE § 26-11-2; D.C. CODE ENCYCL. § 19-316 (West); GA. CODE ANN. § 74-103; HAWAII REV. STAT. § 560:2-109; IND. CODE ANN. § 29-1-2-7 (Burns); N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney); N.C. GEN. STAT. § 49-10; N.D. CENT. CODE § 14-17-04, 05; OHIO REV. CODE ANN. § 2105.18 (Baldwin); TEX. PROB. CODE ANN. tit. 17A, § 42.

[144] ARK. STAT. ANN. § 61-141; CAL. CIV. CODE § 7004 (West); CONN. GEN. STAT. ANN. § 45-274 (West); FLA. STAT. ANN. § 732.108 (West); KANSAS STAT. ANN. § 59-501; ME. REV. STAT. ANN. tit. 18, § 1003; MINN. STAT. ANN. § 525.172 (West); NEV. REV. STAT. § 134.170; OKLA. STAT. ANN. tit. 84, § 215; OR. REV. STAT. § 112.105; WIS. STAT. ANN. § 852.05 (West).

The methods required in these statutes are exclusive. If the particular documentation or a statutorily permitted alternative cannot be produced, no other evidence will suffice. *See* In re Estate of Pakarinen, 287 Minn. 330, 178 N.W.2d 714 (1970), *dismissed* 402 U.S. 903 (1971). In this case, an adjudication of paternity was held not to confer any right of inheritance since it was not the equivalent of the required statutory proof. Although an appeal of the case was dismissed by the Supreme Court, without explanation, the case arose prior to the present case law discussed in this casenote.

purpose with which section 4-1.2 was reviewed clearly will be controlled by *Lalli*. *Lalli*'s judgment, however, cannot automatically affirm the constitutionality of statutes requiring a specific method of proof that does not become part of a judicial record when it is highly unlikely these statutes further any purpose other than the facilitation of problems of proof so as to create a just and orderly disposition of an intestate's property. This is especially true given the Court's position that the state cannot conclusively and presumptively exclude illegitimate children from inheriting intestate as a way of facilitating potentially difficult problems of proof of paternity.[145] Rather, the constitutionality of these statutes will have to be examined by the Court in a subsequent case. If the *Trimble* decision is to remain good law, in this re-examination of the constitutional issue, a showing that the statute excludes alternative methods of proof that may be less restrictive upon a significant number of illegitimate children without compromising the statutory purpose of preventing fraudulent claims should compel a finding that these statutes are unconstitutional. Therefore, to continue to uphold *Trimble*, the effect of *Lalli* will be limited only to statutes requiring a specific method of proof which furthers the due process rights of illegitimate children with valid claims of heirship to notice and an opportunity to be heard.

CONCLUSION

In *Trimble v. Gordon* the Court directed lower courts to use heightened equal protection scrutiny when reviewing challenges by illegitimate children to state intestate succession laws. *Trimble*, however, controlled only those intestate succession statutes which conditioned inheritance by illegitimate children from their fathers on the marital status of the natural parents. In *Lalli v. Lalli* the Court had the opportunity to clarify the desired effect of its *Trimble* decision. Despite this opportunity, *Lalli* only obscured the appropriate standard of review for lower courts to use. Regardless of the plurality opinion's use of "substantial relationship" language, the plurality did not fully apply *Trimble*'s heightened scrutiny in analyzing the constitutionality of the statute. Instead,

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[145] See note 53 *supra*. *But see* Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979) which considered the constitutionality of a statute that gives an illegitimate child intestate succession rights from and through his father, provided that the child's parents had intermarried after his birth, or a judicial decree of paternity was entered during the father's lifetime, or the father's written admission of paternity was recorded with the court during the father's lifetime. The statute was sustained upon the authority of *Lalli*. The court did not, however, rely on the purpose asserted in *Lalli*, although both specific methods of proof provided for by the challenged statute require a judicial record of paternity be created. Rather, the court summarized Justice Powell's opinion as describing the New York statute's purpose to be the alleviation of the peculiar problems of proof presented by illegitimate children in order to obtain just and orderly dispositions of property at death. *Id*. at 767. The court noted the statutory purpose of the challenged statute to be this very purpose and concluded that, in accordance with Justice Powell's decision in *Lalli*, the challenged statute is substantially related to the lawful interest it is intended to promote. *Id*. at 768. *Cf*. Everage v. Gibson, 372 So.2d 829 (Ala. 1979) (statutory purpose expressed in *Lalli* used to distinguish *Trimble* from *Lalli* and sustain intestacy statute requiring a judicial record be established).

the Court's decision in *Lalli* increased the acceptable level of tolerance for classifications in intestate succession schemes based on the legitimacy of a child's birth. Thus, *Lalli* represents a retreat from the course plotted by *Trimble*.

This retreat, however, may be of limited significance. Because the *Lalli* Court expressly chose not to overrule *Trimble*, the two decisions must be reconciled. *Lalli* does state that it will control all challenges to laws providing that intestate succession from the father by an illegitimate child depends on the satisfaction of a particular method of proof of paternity. A *Trimble-Lalli* reconciliation, however, may require that *Lalli* control those statutes justified by the need to have the father's relation to his illegitimate child on judicial record, while *Trimble* controls those statutes justified by the need to prevent fraudulent claims of paternity. Indeed, although Justice Powell noted the contrary in *Lalli*, *Trimble* may well control the constitutionality of statutes requiring specific methods of proof that do not create a judicial record or in any other way serve the due process interests of illegitimate children.

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