

COMMENT

CALIFANO v. BOLES: UNEQUAL PROTECTION FOR ILLEGITIMATE CHILDREN AND THEIR MOTHERS

I

INTRODUCTION

In recent years, the Supreme Court's stand on the constitutional status of illegitimates has been decidedly ambiguous.¹ In the Court's early consideration of equal protection claims alleging discrimination against illegitimates, notably *Weber v. Aetna Casualty & Surety Co.*,² *Levy v. Louisiana*,³ and *Glon v. American Guarantee & Liability Insurance Co.*,⁴ the Court ostensibly refused to apply to such claims the strict scrutiny afforded claims of discrimination against suspect classes such as race.⁵ The Court claimed to be measuring these claims against a mere minimum rationality standard, under which any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in [government] policy"⁶ would be upheld. In fact, however, the standard against which the Court measured these illegitimacy claims was significantly more strict than that of minimum rationality.⁷ Indeed, at least one commentator has argued that in these decisions the Court was actually applying a strict standard of scrutiny despite its reluctance to label illegitimacy as a suspect class.⁸ Later decisions, however, such as *Mathews v. Lucas*⁹ and *Lalli v. Lalli*,¹⁰ have retreated from this stance. The Court in these decisions has upheld the constitutionality of challenged statutes on the grounds that the illegitimacy-based classification bears a rational relationship to a legitimate governmental interest, regardless of whether alternative

1. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1057 (1978).

2. 406 U.S. 164 (1972).

3. 391 U.S. 68, *rehearing denied*, 393 U.S. 898 (1968).

4. 391 U.S. 73, *rehearing denied*, 393 U.S. 898 (1968).

5. Classifications based on race, alienage, and national origin are suspect and subject to strict scrutiny, while gender-based classifications are subject to an intermediate level of scrutiny. L. TRIBE, *supra* note 1, at 1060-66.

6. *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959).

7. A test of minimum rationality, demanding merely reasonableness of classifications, is the standard against which most socioeconomic legislation is measured. L. TRIBE, *supra* note 1, at 994.

8. *Id.* at 1057.

9. 247 U.S. 495 (1976).

10. 439 U.S. 259 (1978).

means exist which might serve that interest with a less discriminatory impact on illegitimates as a class.¹¹

The Court's recent decision in *Califano v. Boles*¹² adds considerably to the confusion regarding the proper level of scrutiny to be afforded the claims of illegitimates under the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment.¹³ In *Boles*, the appellees challenged section 202(g)(1) of the Social Security Act,¹⁴ which provided for payment of "mother's insurance benefits" to the widow of a deceased wage earner who had the wage earner's child in her care, while categorically denying such benefits to the otherwise similarly situated unwed mother of his child.¹⁵ The appellees, the illegitimate son of the deceased wage earner and the child's mother, claimed that while the legitimate child may receive his mother's care and attention during childhood because her receipt of "mother's insurance benefits" relieves her of the necessity of earning a living after her husband's death, the unwed mother receives no such benefits. The appellees claimed that the illegitimate child is thereby deprived of the mother's presence and, therefore, denied the equal protection of the law.¹⁶ The Court found it unnecessary to consider the equal protection claims of the class of illegitimate children adversely affected by the statute's classification; instead, the Court held that since the purpose of "mother's insurance benefits" was not specifically to benefit the children, the disproportionate impact on the class of illegitimate children was not sufficient to sustain an equal protection challenge.¹⁷ The Court then found the challenged provision to be constitutional when measured against a standard of minimum rationality.¹⁸ The Court thereby sidestepped the question of the appropriate degree of scrutiny to be applied to the equal protection claims of illegitimates.

This Comment will first discuss the context in which the *Boles* challenge arose. It will then examine the standards for evaluating the equal protection

11. See, e.g., *Labine v. Vincent*, 401 U.S. 532, 536 n.6, *rehearing denied*, 402 U.S. 990 (1971).

12. 443 U.S. 282 (1979).

13. "[This] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). The Court in *Bolling v. Sharpe*, 347 U.S. 497 (1954), held that while the fifth amendment does not contain an equal protection clause, and although "'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,'" *id.* at 499, so that the two phrases are not always interchangeable, "discrimination may be so unjustifiable as to be violative of due process." *Id.* The same duty of equal protection is therefore imposed upon the federal government via the due process clause of the fifth amendment as is imposed upon the states by the equal protection clause of the fourteenth amendment, and the same analytical scheme has been applied to challenges based on each of the amendments. See also *Buckley v. Valeo*, 424 U.S. 1 (1976).

14. Social Security Act, § 202(g)(1), 42 U.S.C. § 402(g)(1) (1976).

15. See *id.*

16. *Boles*, 443 U.S. 282, 287-88 (1979).

17. *Id.* at 296.

18. *Id.*

claims of illegitimates under both the two-tier "minimum rationality or strict scrutiny" format and the "balancing" format proposed by Justice Marshall,¹⁹ and conclude that under either analytical model, the Court's decision upholding the statute's constitutionality cannot be reconciled with its prior treatment of illegitimates. The Comment will argue further that the Court failed to recognize that a person's decision whether or not to marry is within the sphere encompassed by the constitutional right of privacy, and that the portion of the Social Security Act upheld in *Boles* must therefore be held constitutionally invalid on this basis, as well.

II THE CASE

A. "Mother's Insurance Benefits"

In 1939, in response to recommendations made by the Advisory Council on Social Security,²⁰ Congress amended Title II of the Social Security Act²¹ to provide for monthly cash benefits to the wives, children, widows, orphans, and surviving dependent parents of deceased wage earners.²² Payment of monthly benefits which would provide for the survivors of a wage earner was seen as more consistent with a social insurance plan, the primary purpose of which was to pay benefits in accordance with the probable needs of the beneficiaries.²³ Among the benefit categories created by the 1939 Amendments were "surviving child's benefits," payable to the dependent child of an insured wage earner upon the wage earner's death,²⁴ and "widow's current insurance benefits," later known as "mother's insurance benefits," payable to the widow of an insured wage earner with an entitled child of the deceased in her care.²⁵

Subsequent legislation and Supreme Court decisions have extended payment of "child's benefits" to the illegitimate child of a wage earner, if the child can satisfactorily prove the wage earner's paternity and can meet one of several tests for actual or deemed dependence on the wage earner at a statuto-

19. See text accompanying notes 177-209, *infra*.

20. ADVISORY COUNCIL ON SOCIAL SECURITY, FINAL REPORT, S. DOC. NO. 4, 76th Cong., 1st Sess. 1 (1938) [hereinafter cited as 1938 Report].

21. Social Security Act Amendments of 1939, Act of Aug. 10, 1939, ch. 666, tit. II, 53 Stat. 1362 (amending scattered sections of 42 U.S.C. (1939)) [hereinafter cited as 1939 Amendments].

22. The Act originally provided for a 3½% lump sum payable to the deceased wage earners' estates. See H.R. REP. NO. 728, 76th Cong., 1st Sess. 7 (1939).

23. *Id.* at 18.

24. 1939 Amendments, *supra* note 21 (codified at 42 U.S.C. § 416(e)(1) (1976 & Supp. 1980)).

25. 1939 Amendments, *supra* note 21 (codified at 42 U.S.C. § 402(g)(1) (1976 & Supp. 1980)). "Mother's insurance benefits," as they are now known, are also payable to fathers. See text accompanying note 28, *infra*.

rily defined moment.²⁶ However, while the Court in *Weinberger v. Wiesenfeld*²⁷ extended "mother's insurance benefits" to fathers regardless of the father's actual dependence on his deceased wife,²⁸ these benefits are not payable to the mother or father of an entitled illegitimate child even though the surviving parent may have been dependent on the deceased wage earner.²⁹ Although the surviving parent's dependence on the deceased wage earner provided the rationale for payment of "mother's" and "father's insurance benefits," factual dependence need not be proved, but instead is deemed to have existed as a result of the marital relationship.³⁰ Unmarried surviving parents, however, are denied both the deemed dependence provision and the opportunity to prove dependence.³¹

This categorical denial of benefits to unwed mothers was challenged by Margaret Gonzales and her son, Norman J. Boles, representing a nationwide class of all similarly situated children and their mothers. Gonzales and Boles filed an action in the Federal District Court for the Western District of Texas against Joseph A. Califano, Jr., Secretary of Health, Education and Welfare. They argued that section 202(g)(1) of the Social Security Act³² unconstitutionally discriminated against illegitimate children by denying them the benefit of a parent's choice to remain in the home, supported by Social Security survivors' benefits, while the child is young.³³ Since the challenged statute is a part of

26. An illegitimate child is deemed to be the child of the wage earner if he or she can inherit under applicable state intestacy law, § 416(h)(2)(A) (1976 & Supp. 1980), or if he or she is the child of an invalid ceremonial marriage, § 416(h)(2)(B) (1976 & Supp. 1980). If neither test is met, the illegitimate child of a deceased wage earner may nevertheless be deemed to be the child of the deceased wage earner if the wage earner had acknowledged the child in writing, or had been decreed by a court to be the child's parent, or had been ordered by a court to contribute to the child's support, 42 U.S.C. § 416(h)(3)(C)(i) (1976 & Supp. 1980). If the child cannot establish relationship to the decedent on any of these grounds he or she may still be entitled to benefits if the wage earner is shown by "evidence satisfactory to the Secretary to have been the [child's] father," and was living with or contributing to the support of the child when he died. 42 U.S.C. § 416(h)(3)(C)(ii) (1976 & Supp. 1980).

Once the child has met the relationship requirement, he or she must also satisfy a dependency requirement. A child is deemed dependent on the natural or adoptive parent. Actual dependency must be demonstrated, however, if the child (1) is neither living with nor being supported by the wage earner, and is neither the legitimate nor adopted child of the wage earner, or (2) was adopted by another individual. 42 U.S.C. § 402(d)(3) (1976 & Supp. 1980).

27. 420 U.S. 636 (1975).

28. *Id.* at 653.

29. Section 202(g)(1) of the Social Security Act, 42 U.S.C. § 402(g)(1) (1976 & Supp. 1980), provides for the payment of "mother's insurance benefits" to the widow and surviving divorced mother of a wage earner who died fully or currently insured. The widow or surviving divorced mother must satisfy a marriage requirement, 42 U.S.C. § 416(c), (d)(3) (1976 & Supp. 1980), and at the time of entitlement must be unmarried, have the deceased wage earner's child in her care, and meet certain other factors of entitlement. See note 24 and text accompanying notes 27-28, *supra*, for a discussion of the extension of "mother's insurance benefits" to the surviving male spouse with minor children in his care.

30. See Boles, 443 U.S. 282, 288-89 (1979).

31. See note 29, *supra*.

32. 42 U.S.C. § 402(g)(1) (1976).

33. See Boles v. Califano, 464 F. Supp. 408, 409-10 (W.D. Tex. 1978).

the federal Social Security Act, the equal protection claim was based on the fifth amendment's due process clause, which has been interpreted to provide the same equal protection guarantees against the federal government as the fourteenth amendment provides against the states.³⁴

B. The District Court's Decision

The district court, relying on *Weinberger v. Wiesenfeld*,³⁵ found that "mother's insurance benefits" were intended as a benefit for the child, giving the child the opportunity to receive the personal attention of the surviving parent.³⁶ The surviving parent's eligibility for monthly benefits obviates the financial need to work outside the home while the child is young, thereby allowing the parent to choose whether or not to seek employment. While parent and child each receive monthly cash benefits, the child also receives the intangible benefits derived from having a parent who is free to choose not to work.³⁷

Having reached that conclusion, the court then applied a level of scrutiny previously held applicable to the equal protection claims of illegitimates which, while less demanding than strict scrutiny, is "not a toothless one."³⁸ The court found that by denying to otherwise eligible illegitimate children a benefit conferred on their legitimate counterparts without regard to whether the deceased wage earner had ever lived with or supported the children, the statute had an unjustifiable, disparate impact on illegitimates and therefore violated the guarantees of the fifth amendment.³⁹ Accordingly, the district court granted the plaintiffs' motion for summary judgment, holding section 202(g)(1) unconstitutional and void insofar as it denied plaintiffs and the plaintiff class "mother's insurance benefits" solely because the plaintiff mothers were never married to the fathers of their children, and enjoining the Social Security Administration from continuing to deny benefits solely on the basis of the marriage requirement.⁴⁰

C. The Supreme Court Decision

Secretary Califano appealed, and the Supreme Court reversed the judgment of the district court in a 5-4 opinion written by Justice Rehnquist.⁴¹ The

34. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and note 13, *supra*.

35. 420 U.S. 636 (1975).

36. *Boles v. Califano*, 464 F. Supp. 408, 411-12 (1978) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648-49 (1975)).

37. *Boles v. Califano*, 464 F. Supp. 408, 411-12 (1978).

38. *Id.* at 416 (citing *Trimble v. Gordon*, 430 U.S. 762, 767 (1977) (citation omitted)).

39. *Boles v. Califano*, 464 F. Supp. 408, 413, 416-17 (1978).

40. *Id.* at 417-18.

41. *Boles*, 443 U.S. 282 (1979). Chief Justice Burger and Justices Stewart, Powell, and Stevens joined in the opinion of the Court. Justice Marshall filed a dissenting opinion in which Justices Brennan, White, and Blackmun joined.

Court concluded that because illegitimate children are only incidental and derivative beneficiaries of "mother's insurance benefits," and because any impact on them of the denial of such benefits is purely speculative, the denial of "mother's insurance benefits" to unwed mothers did not constitute discrimination against illegitimate children.⁴² Since the adversely affected class was that of unwed mothers and not illegitimate children, the Court found it unnecessary to analyze the constitutionality of the legislation by a strict standard, and therefore held that the challenged categorization need only bear a rational relationship to a legitimate legislative objective.⁴³ The Court held that the categorization challenged in *Boles* could be the result of Congress' reasonable conclusion "that a woman who has never been married to the wage earner is far less likely to be dependent upon the wage earner at the time of his death."⁴⁴ Since the wage earner was never legally obligated to support her, he was not likely to have been an important source of the woman's income, and the likelihood that she would suffer economic dislocation from his death is accordingly remote.⁴⁵

Justice Rehnquist was then faced with the Herculean task of reconciling his contention that mothers were the sole intended beneficiaries of "mother's insurance benefits," with his concurring opinion in *Wiesenfeld*, in which he joined the majority in finding that "mother's insurance benefits" were intended to enhance the child's welfare.⁴⁶ Acknowledging the "significant difference" in interpretations, Justice Rehnquist quoted precedents in which judges have "recede[d] from a prior opinion that has proved untenable and perhaps misled others."⁴⁷ Finding that it was the unwed mothers, and not the illegitimate children, who were adversely affected by the categorization, and that any impact on the children was both incidental and speculative, the Court declined to examine further the illegitimate children's equal protection claims.⁴⁸

III FINDING THE APPROPRIATE LEVEL OF SCRUTINY

As Justice Marshall observed in his dissent in *Boles*, "[t]he critical question in this dispute is whether [the challenged provision of the Social Security Act] discriminates against unmarried parents or against illegitimate children. The Court determines that the intended beneficiaries . . . are dependent

42. *Id.* at 294 (1979).

43. *Id.* at 293-95.

44. *Id.* at 289.

45. *Id.*

46. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648, 655 (1975).

47. *Boles*, 443 U.S. 282, 294 n.12 (1979) (citing *McGrath v. Kristensen*, 340 U.S. 162, 177-78 (1950) (Jackson, J. concurring)).

48. *Boles*, 443 U.S. 282, 294 (1979).

spouses, and that the statute therefore distinguishes between categories of parents.”⁴⁹ Since marital status was held to be a constitutionally permissible measure of dependency on the wage earner in *Califano v. Jobst*⁵⁰ and *Mathews v. De Castro*,⁵¹ the majority in *Boles* held that the challenged provision was not violative of the fifth amendment.⁵² If the Court had found instead that the primary purpose of the provision was to benefit children, the provision would have constituted a distinction based on legitimacy, and should have been tested under a more exacting standard.⁵³ Two questions must therefore be answered before proceeding to an equal protection analysis of the statute’s categorization: first, whether the intended beneficiaries are the dependent children or the dependent spouses of the deceased wage earners, and second, assuming *arguendo* that dependent spouses are the intended beneficiaries, whether that characterization should determine the level of scrutiny required when the classification has an adverse impact on illegitimate children.

A. *The Intent of Congress: Legislative History and Precedent*

Prior Supreme Court decisions and the legislative history on which the decisions rest make it clear that Congress intended that children be the ultimate beneficiaries of “mother’s insurance benefits.” Only five years ago, in *Weinberger v. Wiesenfeld*,⁵⁴ a gender-based discrimination case, the Court concluded that “mother’s insurance benefits” are intended to provide children deprived of one parent with the opportunity to have the surviving parent elect not to work outside the home and to devote himself or herself to the care of the children during the children’s youth.⁵⁵ *Wiesenfeld* involved a challenge to that provision of the Social Security Act⁵⁶ which paid “mother’s insurance-benefits” to the widow and minor children of a deceased male wage earner, but only to the minor children and not to the widower of a deceased female wage earner.⁵⁷ The Government attempted to justify the gender-based discrimination on two grounds: first, because Social Security benefits are “non-contractual,” Congress need not provide a female employee with the same benefits it provides to a male employee;⁵⁸ and second, since the challenged statute was “‘reasonably designed to offset the adverse economic situation of women by providing a widow with financial assistance to supplement or substi-

49. *Id.* at 297 (Marshall, J., dissenting).

50. 434 U.S. 47, 53-54 (1977).

51. 429 U.S. 181, 185 (1976).

52. *Boles*, 443 U.S. 282, 293 (1979).

53. *Id.* at 297 (Marshall, J., dissenting).

54. 420 U.S. 636 (1975).

55. *Id.* at 648-49.

56. 42 U.S.C. § 402(g) (1976).

57. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-38 (1975).

58. *Id.* at 646-47 (1975); see *Flemming v. Nestor*, 363 U.S. 603 (1960).

tute for her own efforts in the marketplace,' . . . [it] therefore does not contravene the equal protection guarantee."⁵⁹

The Court disposed of the first argument by holding that the noncontractual nature of Social Security benefits is insufficient justification for gender-based differential protection of covered employees.⁶⁰ In response to the Government's second proposed justification for differential treatment, the Court found that

it is apparent both from the statutory scheme itself and from the legislative history of [the challenged statute] that Congress' purpose in providing benefits to young widows with children was not to provide an income to women who were, because of economic discrimination, unable to provide for themselves. Rather, [the statutory provision for "mother's insurance benefits,"] *linked as it is directly to responsibility for minor children, was intended to permit women to elect not to work and to devote themselves to the care of the children.*⁶¹

The Court found support for this conclusion in the legislative history of "mother's insurance benefits": a proposal to extend benefits to all widows with or without young children was rejected, "apparently because [Congress] felt that young widows without children can be expected to work."⁶² The *Weisenfeld* Court found this distinction among women explicable only because in enacting the challenged statute "Congress was not concerned . . . with the employment problems of women generally but with the principle that children of covered employees are entitled to the personal attention of the surviving parent if that parent chooses not to work."⁶³

The *Weisenfeld* Court's decision was based not only on the legislative history of "mother's insurance benefits," but particularly on the Final Report of the Advisory Council on Social Security.⁶⁴ This Report was issued in late 1938 by the Advisory Council on Social Security, a panel appointed by a subcommittee of the Senate Finance Committee and by the Social Security Board to study the advisability of amending the Social Security Act, which had been in effect since 1937.⁶⁵ After a preliminary discussion of the expanded benefit categories being proposed, the Advisory Council's Report explicitly

59. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 646 (1975) (citation omitted).

60. While each person's benefits are not necessarily related directly to tax contributions, and are therefore "noncontractual," the statutory right to benefits is directly related to the number of years worked and the amount earned by the wage earner. Entitlement to benefits must therefore be determined according to classifications which do not differentiate among wage earners solely on the basis of sex, absent a compelling justification for that differentiation. *Id.* at 646-47.

61. *Id.* at 648 (emphasis supplied).

62. *Id.* at 649. See also 1938 Report, *supra* note 20, at 31.

63. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 651 (1975).

64. 1938 Report, *supra* note 20.

65. *Id.* at 1.

states that "mother's insurance benefits" are "intended as supplements to the orphans' benefits with the purpose of enabling the widow to remain at home and care for the children."⁶⁶

Further evidence that the children of a deceased wage earner are the intended beneficiaries of "mother's insurance benefits" is found in that portion of the Social Security Act which sets forth requirements for entitlement to spouse's and "mother's insurance benefits."⁶⁷ While the Act entitles a divorced wife who is the mother of a deceased wage earner's child to receive benefits regardless of the duration of the marriage and regardless of whether she or the child were actually dependent on the wage earner,⁶⁸ a divorced woman without an entitled child must meet a ten-year duration-of-marriage requirement.⁶⁹ This requirement reflects a presumption that if the surviving spouse was married to the deceased wage earner for ten years, he or she was likely to have been dependent on the wage earner during their marriage.⁷⁰ This presumption of dependency supports the conclusion that the presence of the child is the determinative factor in entitling a woman to "mother's insurance benefits" regardless of the duration of her marriage to the wage earner: the presence of an entitled child, without more, is a sufficient indicia of the likelihood of her dependence on the wage earner.

While the *Weisenfeld* decision, and the legislative history on which it rests, assumed that "benefits" included those intangibles which a child derives from his mother's freedom to choose to remain at home while the child is young,⁷¹ the *Boles* Court construed "benefit" in a strictly monetary sense, holding that "the focus of *these* benefits is on the economic dilemma of the surviving spouse or former spouse; the child's needs as such are addressed through the separate child's insurance benefits."⁷² The Court failed to recognize that a child's "needs" go far beyond the physical needs of food, clothing and shelter, which may be addressed through receipt of "child's insurance benefits." Cash benefits to the child cannot provide for the child's less tangible but equally important emotional needs which will only be met if the child's surviv-

66. *Id.* at 18.

67. See 42 U.S.C. § 402 (1976) and text accompanying notes 68-70, *infra*.

68. 42 U.S.C. § 402(g)(1)(F); 42 U.S.C. § 416(d)(3) (1976).

69. 42 U.S.C. § 416(d)(2) (1976 & Supp. 1980). Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1548 (codified at 42 U.S.C. § 416 (Supp. 1980)) reduced the duration of marriage requirement from 20 years to 10 years.

70. The Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1572 (current version at 42 U.S.C. §§ 402(b)(1) & (e)(1) (1976 & Supp. 1980)), eliminated the requirement that the wage earner continue to support the former spouse after their divorce, but retained the 20-year duration-of-marriage requirement. This distinction was based on the assumption that a person who had been married to the wage earner for an extended period of time was likely to have been out of the labor pool and therefore not insured for benefits on his or her own earnings record. H.R. REP. NO. 92-231, 92d Cong., 2d Sess. 1548, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4989, 5041.

71. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648-49 (1975).

72. *Boles*, 443 U.S. 282, 294 (1979).

ing parent is free to choose whether to be a full-time parent without the financial need to be employed outside the home.

It was these benefits to the child that the *Wiesenfeld* Court found Congress had intended to provide when it appropriated cash benefits to the mother.⁷³ The *Boles* Court, however, glibly dismissed this facet of a child's needs, stating that "the program was not designed to be . . . a general system for the dispensing of childcare subsidies."⁷⁴ Thus, the *Boles* Court was able to reach its conclusion as to the purpose of "mother's insurance benefits" by a disingenuous disregard for both the legislative history and the Court's own prior interpretation of that history.

*B. Does a Disproportionate Impact on Illegitimates
Trigger an Equal Protection Analysis?*

The Court in *Boles* declined to measure the constitutionality of the statute's effect on illegitimate children because it found that the children were merely "incidental" beneficiaries of the statute.⁷⁵ The Court implied that if children had been the intended beneficiaries, the purpose and effect of the statute would have been scrutinized according to a more stringent standard.⁷⁶ The Court found, however, that since the challenged categorization involved mothers and not children, its constitutionality was properly measured against a standard of minimum rationality.⁷⁷ Applying this test, the Court held that the constitutional requirement of equal protection was satisfied: the categorization bore a rational relationship to Congress' legitimate goal of efficient administration of that portion of the Social Security Act designed to ease "the economic privations brought on by the wage earner's death."⁷⁸ Even if one accepts the Court's analysis that the mother and not the child is the intended beneficiary of the statute, however, an equal protection inquiry requires an examination of the statute's adverse impact on the affected class of illegitimate children.

According to the Court's opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁷⁹ a statute's disproportionate impact on a discrete, identifiable class may be the starting point for an equal protection inquiry.⁸⁰ In initiating the inquiry, whether the statute was designed to have such an effect is of less significance than the effect itself.⁸¹ The constitutionality of a statute which is neutral on its face will be strictly scrutinized if it can

73. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648-49 (1975).

74. *Boles*, 443 U.S. 282, 289 (1979).

75. *Id.* at 294.

76. *See id.*

77. *Id.* at 296.

78. *Id.* at 293, 296.

79. 429 U.S. 252 (1977).

80. *Id.* at 266.

81. *See id.*

be shown that the effect of the statute is to create a grossly disproportionate impact on a discrete and insular minority or suspect class.⁸²

The dispute in *Arlington Heights* was whether the Village's refusal to modify its zoning laws to permit building of low-cost housing constituted racial discrimination in violation of the fourteenth amendment's equal protection clause and several federal Fair Housing statutes.⁸³ Although failing to find discriminatory intent, the Court stated that "[t]he impact of official action—whether it 'bears more heavily on one race than another'—may provide an important starting point"⁸⁴ for an analysis of the constitutionality of a challenged statute according to equal protection principles. Under this analysis, any governmental act which has a disproportionate impact on a "suspect classification" must withstand strict scrutiny in order to be constitutionally valid.⁸⁵ This standard of strict scrutiny tolerates disparate effects only if the challenged governmental act serves compelling interests; when the standard is applied to statutes which infringe upon fundamental rights or adversely affect suspect classes, the statutes are almost invariably held invalid.⁸⁶

Although illegitimacy has not been held to be a suspect class, it may be characterized as "quasi-suspect." While the level of scrutiny which has been applied to statutes that discriminate against illegitimates as a group is less exacting than that used in a racial context, it is more exacting than that demanded by the minimum rationality standard.⁸⁷ An equal protection claim which can establish that a statute has a disproportionately adverse impact on illegitimates, therefore, should be sufficient to trigger the middle level of scrutiny appropriate for claims of overt discrimination against illegitimates as a class.⁸⁸ Once disproportionate impact on a suspect or quasi-suspect class is shown, as it is in *Boles*, it is no longer appropriate to dismiss that class' claim for equal protection on the grounds that since it was not the intended beneficiary of the challenged statute, a test of mere minimum rationality will suffice to validate the statute.

IV

THE TWO-TIER TEST

A. *The Secret Middle Tier*

Since the Warren Court era, equal protection analysis has been couched in terms of a two-tier test for constitutionality, applying one of two theoretically distinct tests to equal protection claims under the fourteenth amendment's

82. *Id.*

83. *Id.* at 254.

84. *Id.* at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

85. *Korematsu v. United States*, 323 U.S. 214 (1944).

86. L. TRIBE, *supra* note 1, at 1000.

87. *Id.* at 1059.

88. See Note, *Equal Protection and the "Middle-Tier": The Impact on Women and Illegitimates*, 54 NOTRE DAME LAW. 303, 306 (1978).

equal protection clause or the fifth amendment's due process clause.⁸⁹ When the classification scheme of the challenged statute neither disproportionately affects a suspect class⁹⁰ nor impinges upon the exercise of a fundamental right,⁹¹ the classification is examined under a rational relationship test.⁹² When this test is invoked the statute almost invariably is held to be constitutional; the Court has been willing to uphold the constitutionality of any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy."⁹³ A traditional deference to legislative purpose has led the Court to uphold a statutory classification whether or not the conceivable "state of facts" did in fact exist, and has led the Court to conjecture about the legislature's purpose.⁹⁴ Further, aware of the legislative need to paint with a broad brush, the Court has tolerated classifications which are somewhat underinclusive or overinclusive.⁹⁵ Barring choices which are "clearly wrong, a display of arbitrary power,"⁹⁶ there is "no constitutional requirement that 'a statutory provision . . . filte[r] out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute.'"⁹⁷

Under the two-tier equal protection analysis, however, if the challenged classification infringes upon a "fundamental right"⁹⁸ or adversely affects a suspect class,⁹⁹ a minimally rational relationship between the statutory purpose and the means adopted by the legislature to implement that purpose is insufficient justification to uphold the statute's constitutionality. When the challenged statute deters, penalizes, or impinges directly on the exercise of a right independently protected against government interference,¹⁰⁰ or if the statute is tainted by "prejudice against discrete and insular minorities,"¹⁰¹ the classification is strictly scrutinized.¹⁰² Absent a compelling government justification,

89. See note 13, *supra*.

90. See note 5, *supra*.

91. A fundamental right has been defined as a right "explicitly or implicitly guaranteed by the Constitution," *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34, *rehearing denied*, 411 U.S. 959 (1973), such as the right to equal treatment in the voting process, *Dunn v. Blumstein*, 405 U.S. 330 (1972), the rights of procreation, *Skinner v. Okla.*, 316 U.S. 535 (1942), and abortion, *Roe v. Wade*, 410 U.S. 113 (1973), and the right of interstate travel, *United States v. Guest*, 383 U.S. 745 (1966).

92. See generally *L. TRIBE*, *supra* note 1, at 994-96.

93. *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959). See *Perry*, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 *COLUM. L. REV.* 1023, 1056 n.165 (1979).

94. *L. TRIBE*, *supra* note 1, at 996.

95. *Weinberger v. Salfi*, 422 U.S. 749, 776 (1975).

96. *Mathews v. De Castro*, 429 U.S. 181, 185 (1976) (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

97. *Boles*, 443 U.S. 282, 293 (1979) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975)).

98. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); see also note 91, *supra*.

99. *L. TRIBE*, *supra* note 1, at 1000-02.

100. *Id.*

101. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

102. *Id.*

the court will find that such a classification is unconstitutional.¹⁰³ While most statutes judged by the rational relationship standard are upheld, most of those which must withstand the strict scrutiny standard are found to be constitutionally invalid.¹⁰⁴

Despite the relatively clear analytical framework of the two-tier test, however, the Supreme Court's analysis of the equal protection claims of illegitimates has been inconsistent.¹⁰⁵ Nominally, the Court has held that illegitimacy is not a suspect classification.¹⁰⁶ The Court has noted, nevertheless, that illegitimacy as the basis for a classification scheme shares many characteristics with traditionally suspect classes.¹⁰⁷ Suspect classification schemes generally affect "discrete and insular minorities"¹⁰⁸ which are politically underrepresented.¹⁰⁹ The classification scheme is based on "an immutable characteristic determined solely by the accident of birth,"¹¹⁰ and may involve "those criteria which are so unlikely to prove relevant to any legitimate governmental purpose that their adverse use by government probably signals a bare desire to disadvantage a politically weak or unpopular group."¹¹¹ Measured against these considerations, illegitimacy is a highly suspect basis for any classification scheme. Illegitimate children constitute an easily identifiable minority. Singled out solely on the basis of their parents' marital status at the time of their birth, they have no effective political voice as a group due to their inferior legal status and to the moral opprobrium attached to their illegitimacy.¹¹² Despite these similarities, the Court's test for classifications which adversely affect illegitimates as a class is substantially more strict than the traditional minimum rationality standard, but falls short of the strict scrutiny standard applicable to classifications which adversely affect a suspect class.¹¹³

In *Levy v. Louisiana*¹¹⁴ and its companion case, *Glonn v. American*

103. See *Stanley v. Ill.*, 405 U.S. 645, 651 (1972) (quoted in *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975)).

104. L. TRIBE, *supra* note 1, at 1000-02.

105. Perry, *supra* note 93, at 1056 n.165.

106. See *Levy v. La.*, 391 U.S. 68 (1968); see, e.g., *Mathews v. Lucas*, 417 U.S. 495, 506 (1976) (discrimination between individuals on the basis of their legitimacy does not command the most exacting level of scrutiny). But see L. TRIBE, *supra* note 1, at 1057; Note, *Equal Protection and the "Middle-Tier": The Impact on Women and Illegitimates*, 54 NOTRE DAME LAW. 303 (1978).

107. See, e.g., *Levy v. La.*, 391 U.S. 68, 71-72 (1968).

108. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

109. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (Marshall, J., dissenting).

110. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

111. L. TRIBE, *supra* note 1, at 1053.

112. Further, one commentator has characterized a "suspect class" as one which is treated as morally inferior on the basis of characteristics which are morally irrelevant. The status of illegitimacy, as a purely legal creation, reflects a tradition of "attaching negative moral significance to this morally irrelevant fact." Perry, *supra* note 93, at 1030-31, 1058.

113. *Id.* at 1056-57.

114. 391 U.S. 68 (1968).

Guarantee & Liability Insurance Co.,¹¹⁵ the Court struck down a Louisiana statute which discriminated against illegitimates. *Levy* invalidated that portion of the statute which prohibited an illegitimate child from recovering damages in a wrongful death action for the death of his mother.¹¹⁶ Similarly, *Glon* voided those portions of the same wrongful death statute which permitted recovery by a parent of a legitimate child for the child's wrongful death but denied that recovery to a parent of an illegitimate child.¹¹⁷ Although purporting to apply a minimum rationality standard,¹¹⁸ the *Levy* Court first discussed the fundamental right to an "intimate, familial relationship between a child and his own mother"¹¹⁹ and then concluded that "it is invidious to discriminate against [illegitimates] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the [deceased parent]."¹²⁰ This pair of cases exemplifies the inconsistencies of the Court's approach towards illegitimacy as a suspect class. While the characteristics of illegitimacy enumerated in *Levy* echo those of a suspect class, the decisions in both *Levy* and *Glon* rest on the absence of any "possible rational basis"¹²¹ for assuming that the statute served the state's legitimate interest in "dealing with 'sin'."¹²² The standard for classification schemes which adversely affect illegitimates thus seems to require an intermediate level of scrutiny. This intermediate level of scrutiny requires that the discriminatory scheme be substantially related to the permissible government interest it was designed to serve,¹²³ but the scheme need not survive the most exacting level of scrutiny reserved for statutes adversely affecting traditional suspect classes.

Illegitimacy cases subsequent to *Levy* and *Glon* have continued to apply an intermediate standard of scrutiny. In *Labine v. Vincent*¹²⁴ the Court upheld a state law which prevented illegitimate children from sharing equally with legitimate children in the estate of an intestate father.¹²⁵ The Court emphasized that the father could have executed a will naming the illegitimate child as beneficiary, thus permitting the child to inherit regardless of his illegitimacy.¹²⁶ The state's interest in efficient administration of intestates' estates would virtually never be sufficient justification for discrimination against a traditional suspect class.¹²⁷ In *Labine*, however, this interest was found to

115. 391 U.S. 73 (1968).

116. *Levy*, 391 U.S. 68, 69 n.1, 72 (1968).

117. *Glon*, 391 U.S. 73, 74-76 (1968).

118. *Levy*, 391 U.S. 68, 68-71 (1968).

119. *Id.* at 71.

120. *Id.* at 72 (footnotes omitted).

121. *Glon*, 391 U.S. 73, 75 (1968).

122. *Id.*

123. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).

124. 401 U.S. 532 (1971).

125. *Id.* at 534.

126. *Id.* at 539.

127. See *Perry*, *supra* note 93, at 1035.

be sufficiently weighty to validate the statute where illegitimates were disadvantaged but not, as a group, absolutely barred from inheriting.¹²⁸ In *Trimble v. Gordon*,¹²⁹ by contrast, the Court struck down an Illinois statute which permitted illegitimate children to inherit by intestate succession only from their mothers, although legitimate children could do so from either parent.¹³⁰ The state's interest in deterring illegitimate relationships was insufficient to justify the statute's discriminatory effect on illegitimates; the Court noted, contrary to its holding in *Labine*, that if it "focus[ed] on the steps that intestate might have taken . . . [it would lose] sight of the essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law."¹³¹

Most recently, however, the Court in *Lalli v. Lalli*¹³² distinguished *Trimble v. Gordon* because New York's intestacy laws permitted intestate succession by an illegitimate child if a court order of paternity was entered prior to the intestate father's death.¹³³ The tenuous distinction made by the Court between *Trimble* and *Lalli* was that the statute invalidated in *Trimble* required the father to make a will or marry the child's mother in order for the child to inherit,¹³⁴ whereas the statute in *Lalli* merely required a court order of paternity to satisfy the state's evidentiary interests.¹³⁵ The *Trimble* statute was held to be insufficiently related to the state's valid interest in encouraging legitimate family relationships and an unnecessarily broad means for ensuring the accurate and efficient disposition of an intestate decedent's property.¹³⁶ In *Lalli*, by contrast, the Court held that the statute under consideration would satisfy the state's interest in conclusively establishing paternity without requiring that the child be legitimated.¹³⁷ Thus, another characteristic of the test to be applied to a statute which adversely affects illegitimates is that the statute must be "carefully tuned to alternative considerations."¹³⁸ The statute cannot absolutely disadvantage all illegitimates, but must provide some means *other than legitimation* which would give the illegitimate child the same rights as his legitimate counterpart.

The "fine tuning" aspect of the test applicable to illegitimates was first enunciated in *Mathews v. Lucas*.¹³⁹ *Lucas* upheld those provisions of the Social Security Act conditioning the eligibility of some illegitimate children for

128. Of course, the Court's analysis skirts the issue of the validity of the intestacy statute by failing to consider that if the decedent had left a will the intestacy statute would not apply.

129. 430 U.S. 762 (1977).

130. *Id.* at 764-65, 776.

131. *Id.* at 774.

132. 439 U.S. 259 (1978).

133. *Id.* at 271-74.

134. *Trimble v. Gordon*, 430 U.S. 762, 774 (1977).

135. *Lalli v. Lalli*, 439 U.S. 259, 273 (1978).

136. *Id.*; *Trimble v. Gordon*, 430 U.S. 762, 769-73 (1977).

137. *See, e.g., Lalli v. Lalli*, 439 U.S. 259, 273 (1978).

138. *Mathews v. Lucas*, 427 U.S. 495, 513 (1976).

139. 427 U.S. 495 (1976).

“surviving child’s insurance benefits” upon a showing that the deceased wage earner was either living with the children or contributing to their support, while deeming such dependency to exist for other classes of legitimate and illegitimate children.¹⁴⁰ This statute, the Court held, did not “broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations.”¹⁴¹ The statute, by deeming certain classes of children to be dependent on their fathers, served administrative convenience by avoiding a case-by-case inquiry, while permitting those children whose dependency was not deemed to demonstrate that they were in fact dependent.¹⁴² The appropriate standard of scrutiny was satisfied because illegitimacy does not call for the “‘extraordinary protection from the majoritarian political process’ . . . which our most exacting scrutiny would entail.”¹⁴³

The Court has thus established an intermediate level of scrutiny which applies to classifications with discriminatory impact on illegitimates. Such classifications will not be subject to the strict scrutiny applied to classifications which have a detrimental impact on a suspect class; but because illegitimacy does share many of the characteristics of suspect classes, the scrutiny will be “not a toothless one.”¹⁴⁴ The standard, therefore, requires a fairly substantial state interest and the means provided by the statute must directly serve that interest, particularly when other, less discriminatory, means could serve it as well or better. In addition, the barrier to the illegitimate child’s enjoyment of rights and privileges afforded the legitimate child may be a surmountable hurdle, but may not be an absolute bar.

B. Applying the Middle Tier

The middle tier of scrutiny thus warrants a substantial degree of congruence between the challenged statute and the significant state interest it serves, and prohibits any absolute bar to equal treatment on the basis of illegitimacy. When measured against this standard, a blanket denial of “mother’s insurance benefits” to the mothers of illegitimates is clearly constitutionally invalid. Illegitimates are denied any opportunity to prove their mothers’ dependence on the decedent, while the mothers of legitimate children are deemed to have been dependent. The mother of an illegitimate child is denied an opportunity to show that the deceased wage earner was living with her and their child, was supporting them, or was under court order to support them. The parents’ failure to marry, and thereby legitimize their relationship in accordance with the formalities required by the state, deprives their illegitimate child of the mother’s presence in the home, supported by “mother’s insurance benefits.”

140. *Id.*; see 42 U.S.C. § 416(h)(2)–(3) (1976 & Supp. 1980).

141. *Mathews v. Lucas*, 427 U.S. 495, 513 (1976).

142. *Id.* at 509, 512.

143. *Id.* at 506 (quoting *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

144. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

Only substantial congruence with a significant state interest would be sufficient to validate this absolute denial of benefits to the mothers of all illegitimate children.¹⁴⁵

Among the state interests which this scheme might arguably promote are encouraging legitimate family relationships, avoiding the danger of spurious claims without sacrificing administrative efficiency, and ensuring that the benefits payable to the legitimate family are, to the greatest extent possible, sufficient to support that family.¹⁴⁶

1. *Encouraging Legitimate Family Relationships*

The *Trimble* Court, considering the state's interest in encouraging legitimate family relationships, held that although such an interest is valid, it is an insufficient justification for the total statutory disinheritance of illegitimate children whose fathers died intestate.¹⁴⁷ The Supreme Court has repeatedly emphasized that a state may not attempt to influence the actions of men and women by imposing sanctions on their illegitimate children.¹⁴⁸ Thus the state's interest in encouraging legitimate family relationships cannot justify the adverse impact borne by illegitimate children whose mothers are denied "mother's insurance benefits."

2. *Preventing Spurious Claims Without Sacrificing Administrative Efficiency*

Another possible governmental interest which might justify the categorical denial of "mother's insurance benefits" to unwed mothers is the prevention of spurious claims. In *Jimenez v. Weinberger*,¹⁴⁹ however, which concerned the denial of "child's insurance benefits" to the illegitimate children of a beneficiary of Social Security disability insurance, the Supreme Court held that although avoiding such claims was a legitimate governmental interest, the conclusive exclusion of a subclass of afterborn illegitimates¹⁵⁰ was not sufficiently related to that interest.¹⁵¹ The Court held that the likelihood of spuri-

145. See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 769-73 (1977).

146. See, e.g., *id.* at 768-69 (promoting legitimate family relationships); *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974) (preventing spurious claims); *Boles*, 443 U.S. 282, 296 (1979) (ensuring benefits adequate to support decedent's family).

147. *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

148. See, e.g., *id.*; see also *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173, 175 (1972).

149. 417 U.S. 628 (1974).

150. 42 U.S.C. § 416(h) (1970) permitted illegitimate children to qualify for "child's insurance benefits" if they could inherit from the wage earner under state law, § 416(h)(2)(A), if their illegitimacy was the result of an invalid ceremonial marriage, § 416(h)(2)(B), or if they were legitimated under state law, § 416(h)(3)(B). Otherwise, they could qualify only if they had been living with or supported by the disabled wage earner prior to the onset of his disability, § 416(h)(3)(B). This effectively precluded entitlement of a subclass of illegitimates born after the onset of the wage earner's disability.

151. *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974).

ous claims was no greater for the subclass of illegitimates conclusively excluded than for the subclass deemed entitled to benefits without any showing of actual dependency.¹⁵² The Court noted that while "[t]he problems of government . . . may justify . . . rough accommodations,"¹⁵³ and the problem of spurious claims was a legitimate governmental interest, it did not follow that excluding the plaintiffs' subclass of illegitimates was sufficiently related to that state interest to validate the statute.¹⁵⁴ Other statutory means could be found which would satisfy the state's interest in avoiding spurious claims without arbitrarily discriminating against a subclass of illegitimates.¹⁵⁵ Thus, the danger of spurious claims is insufficient to justify this discriminatory scheme where other means exist to satisfy the government's legitimate interest, as long as such means would not require a substantial loss of administrative efficiency.

The Court has held that the government's interest in administrative efficiency constitutes a legitimate goal, sufficient to justify the statutory scheme in *Lucas* which required case-by-case proof of dependency only for certain classes of illegitimates.¹⁵⁶ While administrative efficiency is a legitimate goal,¹⁵⁷ the denial of "mother's insurance benefits" nevertheless endangers the child's fundamental personal rights even though the child is not the direct recipient of the cash benefits. Where illegitimate children, members of an immutable class defined by characteristics which are an accident of birth, are conclusively denied the fundamental personal right to their mothers' presence, a right granted the entire class of legitimate children, administrative efficiency is an insufficient justification for that denial.¹⁵⁸ When the purpose of a statutory exclusion of illegitimates is to ensure adequate proof of paternity, the Court has repeatedly emphasized the need for a substantial relationship between the state's interest in administrative efficiency and the categorization used to satisfy that interest.¹⁵⁹ Categorical refusal of benefits to members of a quasi-suspect class cannot be validated as an evidentiary measure when use of a more demanding standard of proof that would not necessitate a case-by-case examination of the facts would also satisfy the government's interest in administrative efficiency.¹⁶⁰ In *Trimble*, for example, the state's legitimate interest in an accurate and efficient method of disposing of an intestate's property did not save the intestacy statute from invalidity under the equal protection

152. *Id.*

153. *Id.* at 632-33 (citing *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69 (1913)).

154. *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974).

155. *Id.*

156. *Mathews v. Lucas*, 427 U.S. 495 (1976).

157. *Boles*, 443 U.S. 282, 284 (1979) (citing *Califano v. Jobst*, 434 U.S. 47, 53 (1977)).

158. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (classifications based on sex, an immutable characteristic which frequently bears no relation to ability to perform or contribute to society, are inherently suspect and must be subjected to strict scrutiny).

159. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977).

160. *Trimble v. Gordon*, 430 U.S. 762, 772 (1977).

clause, because the reach of the statute, which disinherited all illegitimate children, extended well beyond its asserted purpose.¹⁶¹

The stated purpose of "mother's insurance benefits" is to ease a woman's economic dislocation at the death of the family's male wage earner.¹⁶² The theory put forth by the Government, and accepted by the Supreme Court, to justify the denial of these benefits to unwed mothers is that the legal widow is more likely to have been dependent on the deceased wage earner and is therefore more likely to need a new source of income after his death. The statute thus seeks to assist those who were dependent on the deceased wage earner, identifying them by means of two irrebuttable presumptions: that a widow, by virtue of a marriage ceremony, was dependent on the wage earner, and the unmarried mother of the wage earner's children was not. Use of such presumptions is not the only way to avoid sacrificing administrative efficiency in evaluating a mother's dependency and entitlement. For example, to be entitled to "child's insurance benefits" a child must have been actually or deemed dependent on the deceased wage earner.¹⁶³ Certain subclasses of legitimate and illegitimate children and stepchildren are granted an irrebuttable presumption of dependence. Other subclasses, in particular those composed of children who were not the wage earner's natural legitimate children, are required to demonstrate their dependence on him by establishing that they were living with him or being supported by him before his death.¹⁶⁴ Therefore, since each entitled child was actually or deemed dependent on the wage earner, it is logically consistent to presume that the mother with whom that child lives was similarly dependent, thereby entitling those whom the statute was designed to protect without sacrificing administrative efficiency.

A second alternative for achieving the goal of administrative efficiency without compromising the standards for proof of relationship would permit the unwed mother to prove her dependence by the same tests applicable to a surviving illegitimate child. A court order of paternity or support, although pertaining directly to her child, would entitle the mother to benefits on the grounds of implied dependence. Absent such a court order, she could still establish dependency by demonstrating that the wage earner had been living with her or contributing to her support at the time of his death, the same remedy available to illegitimate children who were not the subject of a court order or written acknowledgement of paternity.¹⁶⁵ The woman whom the statute was intended to benefit would thus be protected without substantial loss of administrative efficiency.

161. *Id.* at 772-73.

162. *Boles*, 443 U.S. 282, 289 (1979).

163. *See* note 29, *supra*.

164. *See* note 29 and note 143, *supra*.

165. *See* note 29, *supra*.

3. Ensuring Sufficient Support for the Family

The *Boles* Court also justified the categorical denial of benefits to unwed mothers by reasoning that entitling such women to benefits would reduce the amount of benefits payable to each member of the legal widow's family and thereby cause them economic harm.¹⁶⁶ The Court feared that "the end result of extending benefits to [the unwed mother] may be to deprive [the legal widow] of a meaningful choice between full-time employment and staying home with her children, thereby undermining the express legislative purpose of mother's insurance benefits."¹⁶⁷ The statute provides that each surviving child, and the widow with a child in her care, is entitled to 75% of the wage earner's Primary Insurance Amount (PIA).¹⁶⁸ Once the total number of survivor beneficiaries exceeds two, however, the 75% is prorated so that each beneficiary receives a proportionate share of the maximum payable to the family, which is approximately twice the PIA.¹⁶⁹ When a legal widow has two entitled children in her care, each receives one-third of the family maximum. In such a situation, the additional child's entitlement reduces each person's benefit rate to one-quarter of the family maximum, and entitlement of the unwed mother would reduce each beneficiary's rate further, to one-fifth of the family maximum.

There are two flaws in the Court's analysis of this problem. First, the Court assumes the existence of both a legal widow and an unwed mother, each with entitled children, so that the family maximum has already been reached before entitlement of the unwed mother. While this was the situation in *Boles*,¹⁷⁰ it is not always the case.¹⁷¹ Second, although there is a family maximum which sets a statutory ceiling on the total benefits to be paid monthly based on any given wage earner's PIA, a statutory provision could be drafted to circumvent this ceiling.¹⁷²

Congress and the Social Security Administration have previously dealt with situations in which it could be to the financial detriment of the family to entitle a beneficiary who is clearly outside that primary family unit. When the deceased wage earner leaves both a surviving divorced wife and a legal widow

166. 42 U.S.C. § 403(a) (1976 & Supp. 1980) provides for a maximum benefit (the "family maximum") payable based on a wage earner's earnings record.

167. *Boles*, 443 U.S. 282, 296 (1979).

168. 42 U.S.C. § 402(d)(2), 42 U.S.C. § 402(g)(2) (1976 & Supp. 1980).

169. 42 U.S.C. § 403(a) (1976 & Supp. 1980).

170. The deceased wage earner left a widow and two legitimate children, in addition to his illegitimate child and that child's mother, the plaintiffs in *Boles*.

171. It is equally likely that the decedent left no legal widow, for example, or that his legal widow had no entitled child in her care and therefore would not be entitled to "mother's insurance benefits."

172. The Court should not have given any weight to this factor when evaluating the statute's constitutionality, since Congress could easily establish a less onerous alternative which would provide adequately for all beneficiaries. *See, e.g., San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 125 (1973) (Marshall, J., dissenting) ("less restrictive alternatives" analysis is firmly established in equal protection jurisprudence").

as the result of his subsequent remarriage, the surviving divorced wife's benefit does not affect the family maximum. As a result, the total benefits payable to all beneficiaries may substantially exceed the "maximum."¹⁷³ This solution is equally appropriate when one mother is a legal widow and one is not. For example, if the beneficiaries were to include a legal widow with two legitimate children and an unwed mother with one illegitimate child, each would receive one-quarter of the family maximum, so that the total benefits payable would equal one and one-quarter times the family maximum. Thus, the legal widow would not suffer any reduction in benefits as a result of the unwed mother's entitlement. Arguably, such a provision could prove costly, a consideration which moved the Court in *Dandridge v. Williams*¹⁷⁴ to uphold Maryland's Aid to Families with Dependent Children program. The Court found it preferable to have a program which "support[s] some families adequately and others less adequately,"¹⁷⁵ than one which gives insufficient support to all families. However, in *Boles*, as in *Jimenez*, "by contrast, there is no evidence supporting the contention that to allow [those] in the classification of [the affected illegitimate children] to receive benefits would significantly impair the federal Social Security trust fund"¹⁷⁶

The preceding discussion demonstrates that a statutory classification scheme having a disparate impact on the quasi-suspect class of illegitimates must be subjected to a middle-tier test. A substantial state interest must be addressed directly by the statute's provisions, particularly when less discriminatory means could serve that interest as effectively. When measured against this test, the Social Security Act's categorical denial of "mother's insurance benefits" to surviving unwed mothers has a disproportionate impact on illegitimate children, and is therefore unconstitutional.

V

MIDDLE TIER OR SLIDING SCALE?

In analyzing equal protection issues, the Supreme Court utilizes a two-tier test to determine the constitutionality of a challenged statute which sharply distinguishes those issues triggering a minimum rationality test from those requiring strict scrutiny.¹⁷⁷ When neither fundamental rights nor suspect classes are threatened, the Court invokes a minimum rationality standard and usually validates the statute. When, by contrast, such a right is jeopardized or such a class is unnecessarily discriminated against, the Court applies a strict scrutiny standard and almost invariably invalidates the statute.¹⁷⁸ The Court's deci-

173. 42 U.S.C. § 403(a)(3) (1976), 42 U.S.C. § 403(a)(3)(A) (Supp. 1980).

174. 397 U.S. 471 (1970).

175. *Id.* at 479.

176. *Jimenez v. Weinberger*, 417 U.S. 628, 633 (1974).

177. See text accompanying notes 90-92, *supra*.

178. See text accompanying notes 98-102, *supra*.

sions, however, particularly in light of the application of a middle tier of analysis to quasi-suspect classes such as illegitimates, support the conclusion that the Court in fact adjusts the standard of scrutiny on a case-by-case basis.¹⁷⁹ Rather than rigidly applying either a minimum rationality or strict scrutiny standard, the Court applies "a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause."¹⁸⁰ Justice Marshall has proposed that in scrutinizing challenged classifications, the Court actually weighs the constitutional and societal importance of the adversely affected interest and the invidiousness underlying the classification, then balances these factors against the state's purpose in creating the classification.¹⁸¹ When a statute adversely affects an economic interest which has no constitutional significance, the statute will generally be validated by any legitimate state purpose. When the statute discriminates against "particularly disadvantaged or powerless classes"¹⁸² or against "important individual interests with constitutional implications,"¹⁸³ however, it will be held constitutionally invalid. Applying Marshall's model of a sliding scale to the statute challenged in *Boles*, the statute is unconstitutional.

In applying Marshall's balancing formula, the adversely affected interest must first be identified. The appellees in *Boles* contended that the interest was, generally, the right of illegitimates to equal treatment and, specifically, an equal right to have the mother choose to remain in the home. Alternatively, accepting the Government's position and the Court's analysis, the interest can be viewed as that of an unwed mother to have the same opportunity as a legal widow to choose not to work while her children are young.¹⁸⁴

Marshall's analytical framework then requires an examination of the invidiousness of the classification. An invidiously discriminatory classification scheme rests on "an immutable characteristic determined solely by the accident of birth."¹⁸⁵ Further, the classification often "bears no relation to ability to perform or contribute to society,"¹⁸⁶ thereby relegating an entire class to inferior legal status without regard to the individual capabilities of the group's members. Also relevant to this inquiry is whether the affected group is a "discrete and insular minorit[y]" [which is] relatively powerless to protect [its] interests in the political process,"¹⁸⁷ and whether the group has historically been the victim of discriminatory treatment.¹⁸⁸

179. See, e.g., *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

180. *Id.* at 98-99.

181. *Id.* at 99.

182. *Id.* at 109.

183. *Id.*

184. See text accompanying notes 42-48, *supra*.

185. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

186. *Id.*

187. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting).

188. *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973).

Illegitimacy appears to be an especially invidious classification, as it burdens a class whose members are absolutely and unquestionably without responsibility for their membership in that group. The Court has repeatedly stressed that penalizing a child for society's condemnation of liaisons beyond the bonds of marriage "is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."¹⁸⁹

An unwed mother, by contrast, is generally considered responsible for her status; but to penalize her financially is also illogical and unjust. First, while in some instances she may be more responsible for her membership in the class of unwed mothers than her child is for its membership in the class of illegitimate children, the mother cannot reasonably be considered unilaterally responsible; conception requires a second responsible party. Second, the woman may have had little if any responsibility for the birth of her out-of-wedlock child; the child could as likely have been born as the result of force as of a consensual relationship. Further, no method of birth control, even when practiced faithfully, is absolutely effective; abortions, which were illegal in most parts of the country until *Roe v. Wade*,¹⁹⁰ remain unavailable to poor women as a result of the Hyde Amendment's¹⁹¹ curtailment of federal Medicaid funds for such procedures. Even when a woman can obtain a safe and inexpensive legal abortion she may have personal and religious reasons for choosing otherwise, and this choice should be respected as a constitutional right.¹⁹² Finally, the father may not be legally free to marry her, or may deny his paternity, or may simply disappear. To penalize the unwed mother for her status, therefore, is to make an unjustified assumption that she had complete control and freely chose that status. A classification scheme which is based on a woman's marital status, like one based on a child's legitimacy, thus may depend, "like race or national origin, [on] a characteristic determined by causes not within the control of the . . . individual,"¹⁹³ and may therefore be invidiously discriminatory.

A second feature of an invidious classification scheme is that it discriminates against a "discrete and insular minority"¹⁹⁴ which historically has been politically powerless.¹⁹⁵ The Court has stated in dictum that "discrimination against illegitimates has never approached the severity or pervasiveness of the

189. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972).

190. 410 U.S. 113 (1973).

191. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976); Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978).

192. See Part VI, *infra*.

193. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

194. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

195. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

historic legal and political discrimination against women and Negroes";¹⁹⁶ nevertheless, the statutes recently invalidated in *Levy*, *Glon*, and *Trimble* exemplify the history of powerlessness and discrimination that illegitimate children and unwed mothers have faced. The statute examined in *Levy* prohibited an illegitimate child from recovering damages for the wrongful death of his mother;¹⁹⁷ in *Glon*, the same statute precluded the parent of an illegitimate child from recovering damages for the child's wrongful death;¹⁹⁸ and in *Trimble*, § 12 of the Illinois Probate Act allowed illegitimate children to inherit by intestate succession only from their mothers, while legitimate children could inherit from either parent.¹⁹⁹ According to the Illinois Supreme Court, the statute invalidated in *Trimble* had been "enacted to ameliorate the harsh common-law rule under which an illegitimate child was filius nullius and incapable of inheriting from anyone."²⁰⁰ These statutes, and the common law tradition on which they rest, bear eloquent testimony to the political powerlessness and discrimination suffered by illegitimate children and, to a lesser extent, by their mothers.

Justice Marshall's test next requires balancing the nature of the interests adversely affected, and the invidiousness of the classification, against the state's interest served by the classificatory scheme, and the availability of less discriminatory alternatives to achieve the state's goals. In *Boles*, the governmental interest recognized by the Court is the efficient administration of a program designed to ease the economic dislocation of dependents when the wage earner dies.²⁰¹

The government's interest in administrative efficiency is substantial, and often is sufficient to validate a classification scheme which has little impact on important constitutional rights.²⁰² "General rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency,"²⁰³ and a statutory provision need not filter out only those who are in the factual position contemplated by the statute.²⁰⁴ Nevertheless, there must be a substantial relationship between the classification challenged in *Boles*, which denied "mother's insurance benefits" to all unwed mothers, and the government's interest in creating that classification to promote the efficient administration of the Social Security Act. This is especially true when the adversely affected interests are those of illegitimate children and their mothers, two discrete, insular, and traditionally powerless minorities; when the right infringed upon, that

196. *Mathews v. Lucas*, 427 U.S. 495, 506 (1976).

197. *Levy v. La.*, 391 U.S. 68 (1968).

198. *Glon v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

199. *Trimble v. Gordon*, 430 U.S. 762 (1977).

200. *Id.* at 768 (citing *In re Estate of Karas*, 61 Ill. 2d 40, 48, 329 N.E.2d 234, 238 (1975)).

201. *Boles*, 443 U.S. 282, 294 (1979).

202. *Trimble v. Gordon*, 430 U.S. 762, 771 (1977).

203. *Califano v. Jobst*, 434 U.S. 47, 53 (1977).

204. *Boles*, 443 U.S. 282, 293 (1979).

of bearing a child out of wedlock, falls within the constitutionally protected right of privacy;²⁰⁵ and when the governmental interest can be satisfied by less discriminatory means. *Boles* presents several alternatives which would satisfy the statute's goal of easing a family's economic dislocation upon the death of a breadwinner without sacrificing the classification scheme's goal of administering such a program efficiently. These alternatives, by permitting benefit payments to more of the women who actually suffered economic dislocation when the wage earner died, would also provide a closer relationship between the constitutional and governmental interests.²⁰⁶

The *Boles* plaintiffs, illegitimate children and their mothers, sought the right to equal treatment by securing for the unwed mothers the same opportunity given their widowed counterparts—the right to choose to remain at home and receive survivors' benefits while their children are young. According to the sliding scale standard, a classification which affects illegitimate children and their mothers adversely is likely to be invidious, since neither group has much control over its status²⁰⁷ and both groups suffer from a tradition of political powerlessness.²⁰⁸ While the government's interest in administrative efficiency is legitimate and is furthered by the challenged categorization, reasonable alternatives exist which would adequately serve that interest without an invidiously discriminatory effect.²⁰⁹ Therefore, the statute challenged in *Boles* is an unconstitutional violation of both the mother's and the child's rights arising from the fifth and fourteenth amendments.

VI

THE MOTHER'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRIVACY

The preceding discussion evaluated the Supreme Court's opinion in *Boles* under both a traditional equal protection analysis and Justice Marshall's sliding scale. By either standard, the Court's holding was inconsistent with the previous decisions in which it considered the equal protection claims of illegitimates. The briefs for both appellant and appellees considered only the child's equal protection claims,²¹⁰ and it was the only issue addressed by the Court, although the questions presented on appeal were not limited solely to the equal protection claims of illegitimates.²¹¹ Beyond the child's equal protection

205. See Part VI, *infra*.

206. See text accompanying notes 156-67, *supra*.

207. See note 149, *supra*.

208. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting).

209. See text accompanying notes 159-69, *supra*.

210. Brief for Appellant at 10, Brief for Appellees at 7, *Califano v. Boles*, 443 U.S. 282 (1979).

211. "1. Whether Section 202(g)(1) of the Social Security Act violates the Due Process Clause of the Fifth Amendment by restricting mother's insurance benefits to women who were once married to the deceased wage-earners." Brief for Appellant at 2, *Califano v. Boles*, 443 U.S. 282 (1979).

claims, however, exists an additional claim of constitutional dimensions: the mother's fundamental right to withhold personal information and to make certain decisions free from state intrusion.

Two notions underlie the Court's decisions concerning an individual's fundamental right to "privacy": an individual's interest in avoiding disclosure of personal matters, and an interest in making particular kinds of decisions.²¹² Once a governmental act intrudes on a right of this nature, it is necessary to weigh the significance of the right which is limited against the state's purpose in restricting that right.²¹³ The analysis of a statute's impact on a fundamental right such as privacy parallels the analysis of a statute's impact on a suspect class such as race, and calls for strict scrutiny "in order to preserve substantive values of equality and liberty."²¹⁴ As this Comment has argued, the portion of the Social Security Act at issue in *Boles* should not have survived an equal protection analysis of its impact on illegitimate children, even though the applicable level of scrutiny was less strict than that applied to a statute with an adverse impact on a suspect class. If the statute intruded upon not only the interests of a quasi-suspect class, but also on a fundamental right, then the highest level of scrutiny would have been appropriate with respect to that right. A statute having an adverse impact on a fundamental right is likely to be unconstitutional.

The Court's decisions in the areas of abortion,²¹⁵ marital choice,²¹⁶ procreation,²¹⁷ contraception,²¹⁸ and child rearing²¹⁹ support the proposition that there exists a class of fundamental rights which may be termed the right of "privacy" or "personhood."²²⁰ Such rights define limits on the state's power to shape the behavior of individuals and groups.²²¹ The sources of the rights have been found in the "penumbras" of the first, third, fourth, and fifth amendments, the privileges and immunities clauses of article IV and the fourteenth amendment, the due process clauses of the fifth and fourteenth amendments, the "blessings of liberty" guaranteed by the Preamble, and the eighth amendment's prohibitions against cruel and unusual punishment.²²²

Fundamental to the contraception and abortion cases is the notion that "[i]f the right of privacy means anything, it is the right of the *individual*,

212. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

213. L. TRIBE, *supra* note 1, at 891.

214. *Id.* at 1000.

215. *E.g.*, *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

216. *Loving v. Va.*, 388 U.S. 1 (1967).

217. *Skinner v. Okla.*, 316 U.S. 535 (1942).

218. *Carey v. Pop. Serv. Int'l*, 432 U.S. 678 (1977); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Conn.*, 381 U.S. 479 (1965).

219. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

220. L. TRIBE, *supra* note 1, at 886-93.

221. *Id.*

222. *Id.* at 893-96.

married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²²³ Since the seminal case of *Skinner v. Oklahoma*²²⁴ the right to reproduce has been held to be "one of the basic civil rights of man."²²⁵ Although *Griswold v. Connecticut*²²⁶ may have implied that "the zone of privacy [regarding contraception and child-bearing decisions] created by several fundamental constitutional guarantees"²²⁷ was limited to the intimate decisions of married life, later Supreme Court decisions such as *Eisenstadt v. Baird*²²⁸ made it clear that the right to privacy protects the individual's decisions regardless of marital status.²²⁹ Having held the privacy right to encompass both conception and contraception, the Court logically extended that right to a woman's decision whether or not to terminate her pregnancy.²³⁰ A subsequent decision held that neither the woman's husband²³¹ nor her parents²³² has an interest in the fetus sufficient to allow an absolute veto over her decision to abort. Taken together, these cases mean that the decision whether or not to bear a child is solely the decision of the woman involved, even when her right to choose conflicts with the special concerns of the inchoate being carried within her body.²³³ An unmarried woman's decision to bear a child therefore falls within the scope of the privacy right defined by the Supreme Court's compulsory sterilization, contraception, and abortion cases, and the state may not intrude on her decision absent a compelling interest.

The mother's associational rights are also jeopardized by a statute such as the one at issue in *Boles*, which penalizes her decision not to marry. Anti-miscegenation statutes have been invalidated on the grounds that marrying the person of one's choice is among the "vital personal rights."²³⁴ Statutes which threaten to withhold subsistence benefits in an attempt to reinforce the traditional family structure also have been invalidated.²³⁵ Penalizing a woman economically for her failure to marry the father of her child violates her right of association as clearly as does forbidding her to marry the person of her choice.

223. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

224. 316 U.S. 535 (1942).

225. *Id.* at 541.

226. 381 U.S. 479 (1965).

227. *Id.* at 485.

228. 405 U.S. 438 (1972).

229. *Id.* at 453.

230. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

231. *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-71 (1976).

232. *Id.* at 72-75.

233. L. TRIBE, *supra* note 1, at 923-27.

234. *Loving v. Va.*, 288 U.S. 1, 12 (1967).

235. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (per curiam); *cf. United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (holding that section 3(e) of the Food Stamp Act of 1964 (citation omitted), which required otherwise-eligible persons to live in households all of whose members are related to one another, could not survive even under minimal rational relationship test).

A woman's choice to bear a child out of wedlock is a decision which implicates the woman's rights of privacy, personhood, and association. State interference with this decision cannot be countenanced absent a compelling government interest not satisfied by any less restrictive alternative. The state may not intrude upon the decision not to bear a child, nor upon the decision to bear a child; it may not intrude upon the decision of whom to marry, nor upon the decision not to marry; it may not intrude upon the basic function of deciding who will comprise one's family unit, nor upon the decision not to form a family unit with a particular person.

Since the right to decide not to marry falls within the constitutionally protected right of privacy and personhood, government infringement requires a more compelling justification than is needed to justify a disproportionately adverse impact on a quasi-suspect class.²³⁶ Nevertheless, the statute in *Boles* infringes upon these privacy rights by placing a financial burden on the woman who did not marry the father of her child. No compelling state interest exists which justifies the statute's adverse impact on the quasi-suspect class of illegitimate children, under either the traditional two-tier analysis²³⁷ or under Justice Marshall's sliding scale.²³⁸ The government's interests in encouraging legitimate family relationships, preventing spurious claims without sacrificing administrative efficiency, and ensuring sufficient support for the family are even less adequate justifications for the statute's adverse impact on the mother's fundamental right to decide not to marry.

VII CONCLUSION

This Comment has examined the Supreme Court's recent decision in *Califano v. Boles*, which held constitutionally valid a categorization scheme of the Social Security Act which entitles women to "mother's insurance benefits" only if they had been married to the deceased wage earner whose child was in their care. Similarly situated but unmarried women are categorically denied such benefits, regardless of the economic dislocation they may have suffered upon the wage earner's death. In denying benefits to those unwed mothers the statute also denied the wage earner's illegitimate children of the right to treatment equal to that of his legitimate children.

The analysis in this Comment found the Court's reasoning to be incorrect on several grounds. First, although children are not the direct recipients of "mother's insurance benefits," the statutory classification has an adverse impact on illegitimate children which invokes a more demanding level of constitutional scrutiny than the minimum rationality standard. Second, the standard, which the Court has applied to statutes adversely affecting illegitimate

236. See notes 212-22 and accompanying text, *supra*.

237. See text accompanying notes 89-97, *supra*.

238. See text accompanying note 178, *supra*.

children lies somewhere between the minimum rationality standard, which the Court generally applies in the realm of economic regulation, and the strict scrutiny standard, which it applies to statutes with an adverse impact on a fundamental right or a suspect class. This intermediate level of review requires a substantial state interest which is directly served by the challenged classification, particularly when other less discriminatory means could serve that state interest equally well. Moreover, this intermediate level of review does not permit an absolute bar to the illegitimate child's enjoyment of rights and privileges afforded the legitimate child. When this is applied to the classification challenged in *Boles*, the statute's unconstitutionality is evident.

Third, this Comment applied Justice Marshall's sliding scale model for equal protection analysis to the *Boles* statute. Applying this standard to the classification challenged in *Boles*, the interest of the illegitimate children and their mothers in treatment equal to that afforded legitimate children and their mothers was found to be of substantial constitutional and societal consequence. The classificatory scheme, based on the marital status of the child's parents, was found to be particularly invidious when applied to the politically powerless child and to his unwed mother, who share many of the characteristics of a suspect class. Balanced against these constitutionally important interests was the government's legitimate interest in the efficient administration of a benefit program designed to ease the economic dislocation felt by dependents upon the wage earner's death. While the state's interest is substantial, it does not justify the challenged classification. Given the importance of the interests adversely affected by the classification, and the availability of other methods for achieving the classification's goals with less discriminatory impact, the relationship between the classification and the goal of administrative efficiency is not sufficient to make the classification constitutionally valid under Justice Marshall's formulation.

Finally, the Court failed to address the adverse impact which the challenged provision of the Social Security Act has on the mother's fundamental right to privacy and personhood, since the decision to bear a child and the decision not to marry are personal choices which fall within the protected sphere defined by the Court's decisions concerning abortion, contraception, and other similarly vital personal choices. Any statute which limits a person's exercise of such a right must withstand strict scrutiny to be held constitutionally valid. Since the challenged provision of the Social Security Act could not survive an equal protection analysis which applied an intermediate level of review to the statute's impact on illegitimate children and their mothers, the provision clearly could not survive the strict scrutiny which is applicable to a statute which limits the fundamental right of a woman to bear a child outside of marriage. Regardless of which mode of analysis is applied to section 202(g)(1) of the Social Security Act, its categorical denial of "mother's insurance benefits" to unmarried women is unconstitutional.

BARBARA LEVITAN

