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Family Law - Illegitimate Children - Denial of Equal Recovery Rights to Dependent Unacknowledged Illegitimates under State Workmen's Compensation Statute Violates Equal Protection

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FAMILY LAW — ILLEGITIMATE CHILDREN — DENIAL OF EQUAL RECOVERY RIGHTS TO DEPENDENT UNACKNOWLEDGED ILLEGITIMATES UNDER STATE WORKMEN'S COMPENSATION STATUTE VIOLATES EQUAL PROTECTION.

Weber v. Aetna Casualty & Surety Co. (U.S. 1972)

On June 22, 1967, Henry Clyde Stokes died of injuries sustained during the course of his employment in Louisiana. Residing with him at the time of his death were four dependent legitimate children¹ and one dependent unacknowledged² illegitimate child. A second illegitimate child was born posthumously.³

Pursuant to the Louisiana workmen's compensation law,⁴ the four legitimate children filed a claim for compensation for their father's death, and the defendant employer impleaded the mother of the illegitimate children who appeared claiming compensation on their behalf. The four legitimate children brought a second suit against a third party tort-feasor to recover losses sustained due to their father's death. The latter suit resulted in a settlement, limited to the four legitimate children, which exceeded the benefits allowable under the workmen's compensation statute.⁵ In the initial action the four legitimate children were awarded the maximum statutory compensation which the trial judge declared satisfied by virtue of the tort suit settlement.⁶ The two unacknowledged illegitimate children were

1. These children were born of the deceased's marriage to Adelaid Jones Stokes who was at the time of her husband's death committed to a mental hospital. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972).

2. An illegitimate child may be acknowledged by his father and mother or either of them by means of a declaration to that effect before a notary public and two witnesses. LA. CIV. CODE ANN. art. 203 (West 1952). Such an acknowledgment cannot be made, however, in favor of children whose parents were incapable of contracting marriage at the time of conception, unless the parents should later marry. *Id.* art. 204. This acknowledgment is distinguished from legitimation which may be accomplished in two ways — by the subsequent marriage of the child's parents or by a notarial act by either parent before two witnesses, acknowledging the child and expressing the intent to legitimate such child. *Id.* arts. 198, 200.

3. 406 U.S. at 165.

4. LA. REV. STAT. § 23:1231 (1950) provides in pertinent part:

For injury causing death within two years after the accident there shall be paid to the legal dependent of the employee, actually and wholly dependent upon his earnings for support at the time of the accident and death, a weekly sum as hereinafter provided for a period of 400 weeks

5. 406 U.S. at 167.

6. *Id.* LA. REV. STAT. § 23:1232 (1950) sets forth the payment schedule of workmen's compensation benefits to dependents. It provides for benefits distributed in the following sequence:

Payment to dependents shall be computed and divided among them on the following basis:

(6) If three or more children, sixty-five per centum of wages.

(8) If there are neither widow, widower, nor child, nor dependent parent entitled to compensation, then to one brother or sister, thirty-two and one-half per centum of wages with eleven per centum additional for each brother or sister in excess of one. If *other dependents* than those enumerated, thirty-two and one-

awarded judgment only to the extent that maximum compensation benefits were not exhausted by the four legitimate children.⁷ As the tort suit settlement had exceeded and thereby exhausted those benefits, the two illegitimate children received nothing.

Both the Louisiana Court of Appeals⁸ and a divided Louisiana Supreme Court⁹ sustained the relevant statute, which relegated unacknowledged illegitimates to the inferior classification of "other dependents,"¹⁰ notwithstanding the constitutional objections based upon the equal protection clause of the fourteenth amendment.¹¹ On writ of certiorari, the United States Supreme Court reversed, *holding* that Louisiana's denial of equal recovery rights to dependent unacknowledged illegitimates was based upon an arbitrary classification and was thereby violative of the equal protection clause since there existed no rational basis upon which the classification, between that group and legitimate or acknowledged illegitimate children, could be justified. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

Notwithstanding the well-established common law and statutory tradition of extensive discrimination against illegitimates,¹² the Supreme Court

half per centum of wages for one, and eleven per centum additional for each such dependent in excess of one, subject to a maximum of sixty-five per centum of wages for all, regardless of the number of dependents.

Id. (emphasis added).

7. Under Louisiana law unacknowledged illegitimates are relegated to the inferior classification of "other dependents" under LA. REV. STAT. § 23:1232(8) (1950). See note 6 *supra*. See also *Thompson v. Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So. 2d 842 (1944).

8. It should be noted that this court did not actually consider the equal protection argument on its merits, but rather held only that *Levy v. Louisiana*, 391 U.S. 68 (1968), (see notes 14-20 and accompanying text *infra*), could not be given retrospective application. *Stokes v. Aetna Cas. & Sur. Co.*, 232 So. 2d 328 (La. App. 1969).

9. *Stokes v. Aetna Cas. & Sur. Co.*, 257 La. 424, 242 So. 2d 567 (1971).

10. See notes 6 & 7 *supra*.

11. U.S. CONST. amend. XIV, § 1.

12. Under the common law a child born out of wedlock was considered to be *nullius filius*. This child of "no one" could not inherit nor could he have heirs other than those of his body. Robbins, *The Familial Property Rights of Illegitimate Children: A Comparative Study*, 30 COLUM. L. REV. 308, 316 (1930). See Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45 (1959); Annot., 24 A.L.R. 570 (1935). His parents had neither a right of custody of the child nor a duty to support him. Robbins, *supra*, at 316. Furthermore, any subsequent act by the child's parents, including marriage, would not suffice to remove the stigma of illegitimacy. *Id.* at 318.

The rationale underlying this harsh treatment stemmed primarily from a moral tradition which stressed the sanctity of marriage and condemned illicit relationships. Early monogamous societies treated the illegitimate more harshly than did polygamous societies due to a stronger, more strictly enforced marital tie in the monogamous society. *Id.* at 309-10. See Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 498-99 (1969). Moreover, the majority of American courts initially adhered to the common law treatment of illegitimates. See Note, *supra*, at 47. States have, however, mitigated this hardship through statutory enactments which narrowed the definition of illegitimacy, provided means of subsequent legitimation, or established a legal presumption of the legitimacy of any child born in wedlock, even though conception may have resulted from an adulterous relationship. See Krause, *Bringing the Bastard into the Great Society — A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 843-44 (1966).

Nevertheless, extensive discrimination continues to exist in various areas. In the area of the child's right to an inheritance, for example, statutes in nearly all states place the illegitimate on an equal footing with the legitimate child regarding its ability to inherit from its mother, but the illegitimate generally cannot inherit from his

did not consider the constitutionality of such discrimination in light of the equal protection clause until 1968, when it rendered two decisions holding Louisiana's wrongful death statute violative of the equal protection clause.¹³ In the first decision, *Levy v. Louisiana*,¹⁴ five illegitimate children brought suit pursuant to Louisiana's wrongful death act and sought recovery as "surviving children" for damages resulting from the loss of their mother and for damages based on the survival of the cause of action which had vested in the mother at the time of her death for pain and suffering.¹⁵ Recovery had been denied by the Louisiana Court of Appeals on the basis that "surviving children" under the statute did not include illegitimate children.¹⁶ The state court indicated that the denial of recovery was justified in order to discourage bearing of children out of wedlock.¹⁷ On appeal, the United States Supreme Court evaluated the constitutionality of the exclusion in terms of the equal protection clause.¹⁸

father. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 478 (1969). See Petrillo, *Labine v. Vincent: Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377, 377-78 (1971); Note, *supra*, at 74-84. In the area of custody, the father of an illegitimate generally fares worse in his right to custody of his illegitimate child than the father of a legitimate child. Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 34-38 (1969). Lastly, the illegitimate frequently fares worse under state and federal welfare laws. For an analysis of statutory treatments of illegitimates, see *id.* at 27-29. See also Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 480-82 (1969); Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

13. *Glon v. American Guar. Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968). In *Glon*, a mother sought damages for the death of her illegitimate son pursuant to the Louisiana wrongful death act. LA. CIV. CODE ANN. art. 2315 (West 1971). She had been denied recovery under Louisiana law which excluded mothers of illegitimate children from the classification of "surviving mothers," thereby precluding her from recovering for the wrongful death of her illegitimate child. See *Lynch v. Knoop*, 118 La. 611, 43 So. 252 (1907). Applying the rational basis test (see note 18 *infra*) to the statutory classification, the Court found no justification for distinguishing mothers of legitimate children from mothers of illegitimate children. 391 U.S. at 76.

14. 391 U.S. 68 (1968).

15. *Id.* at 69-70.

16. *Levy v. Louisiana*, 192 So. 2d 193 (La. App. 1966), *cert. denied*, 250 La. 25, 193 So. 2d 530 (1967).

17. *Id.* at 195.

18. Where a statutory classification is challenged because it violates the equal protection clause, the Court will effectively apply a twofold inquiry:

What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972).

If there is no fundamental right involved, the Court will apply the traditional rational basis test, which it has formulated as follows:

[A state classification] must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrary and without such basis.

Gulf, C.&S.F. Ry. v. Ellis, 165 U.S. 150, 155 (1896).

If, however, the statutory classification is found to interfere with sensitive and fundamental personal rights, the Court will exercise a stricter or closer scrutiny. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). The effect of this exercise of closer scrutiny is to negate the traditional presumption of constitutionality attending the classification, *Kramer v. Union Free School Dist.*, 395 U.S. 621, 627 (1969), and it becomes incumbent upon the state to show that the classification meets the standard of the rational basis test and, *additionally*, that the classification is necessary to promote some *compelling* state interest. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

The Supreme Court in *Levy* did not find fault with the validity of the state's interest in providing a right of recovery for losses sustained due to the wrongful death of a parent, but rather questioned the existence of any rational relationship between this legitimate purpose and the different treatment with respect to legitimate and illegitimate children. In making this determination, it would seem that the Court closely scrutinized the classification in *Levy*, as it indicated the fundamental right involved there to be the child's right to the intimate familial relationship with his mother.¹⁹ The Court concluded:

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.²⁰

The import of *Levy* was somewhat emasculated, however, when in a five-to-four decision, the Supreme Court, in *Labine v. Vincent*,²¹ upheld Louisiana's statutory scheme of intestate succession, favoring legitimate children over acknowledged illegitimate children who could inherit only when the only other claimant under the intestacy provisions was the state.²² The Court distinguished the *Levy* decision,²³ characterizing it as merely standing for the proposition that:

[T]he State could not *totally exclude* from the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort that took their mother's life. *Levy* did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring.²⁴

Moreover, the Court indicated further distinctions. First, *Levy* involved a tort, whereas *Labine* did not. Secondly, whereas both the legitimate children in *Levy* were wronged in the same manner by the wrongful death

Therefore, fulfilling the traditional rational basis test alone does not suffice when a fundamental right is involved; yet, failure to meet that test is sufficient to invalidate the classification.

It should be noted that the above analysis outlines the traditional formulation. However, the Court itself frequently speaks broadly in terms of general equal protection principles rather than mechanically applying any test. See *Green v. Waterford Bd. of Educ.*, Civil No. 72-1676 (2d Cir., Jan. 29, 1973) (suggesting a narrowing of the gap between the two constitutional standards, and citing *Weber*). Furthermore, although the Court has alluded to fundamental rights, it has never precisely defined a fundamental right. *Weber v. Aetna Cas. & Sur. Co.*, *supra*, at 179 (Rehnquist, J., dissenting). For cases referring to fundamental rights, see *Levy v. Louisiana*, 381 U.S. 68 (1968); *Harper v. Virginia Bd. of Elections*, *supra*; *Brown v. Board of Educ.*, 347 U.S. 535 (1942). See also *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

19. 391 U.S. at 71. See notes 18 *supra* & 26 *infra*.

20. 391 U.S. at 72.

21. 401 U.S. 532 (1971).

22. LA. CIV. CODE ANN. art. 919 (West 1952).

23. See notes 14-20 and accompanying text *supra*.

24. 401 U.S. at 535-36 (emphasis added).

of their parent, the intestacy succession statute in *Labine* did not deal with an individual being wronged, but was simply an attempt by the state to regulate the disposition of the intestate's property.²⁵

This distinction would seem to be relevant for purposes of determining the constitutionality of the classification under the equal protection clause. The wrong in *Levy* involved a fundamental right which led the Court to scrutinize closely the classification. The alleged absence of such a fundamental right²⁶ in *Labine* would seemingly lead the Court to apply the less stringent rational basis test under the equal protection clause. Yet, the *Labine* Court chose rather to deemphasize the rational basis test by merely referring to it in a footnote, indicating that the result would be the same even if the rational basis test had been applied.²⁷ Apparently, the regulatory aspect of the intestacy succession statute led the Court to defer to the state's power to control the disposition of property within its borders upon an intestate's death. It is difficult to understand, however, why the Court did not directly apply the rational basis test to the challenged classification, especially in light of its opinion that the result would have been the same.²⁸

25. *Id.* at 535, 537.

26. See note 18 *supra*. The absence of a fundamental right must be inferred from the absence of any reference thereto in the decision. One possible justification for the differing results of *Levy* and *Labine* depends upon the vague characterization of the fundamental right in *Levy*. See note 19 and accompanying text *supra*. It is arguable that interference with the child's fundamental right to an intimate familial relationship with its mother arises in *Levy* as a result of the commission of the tort and that the statute's express purpose is to remedy the violation of that right. Justice Douglas intimated the existence of such interference in *Levy*:

When a child's claim of damage for loss of his mother is in issue, why, in terms of "equal protection," should the tortfeasors go free merely because the child is illegitimate?

391 U.S. at 71. As this is arguably the interference with which the statutory classification dealt, closer scrutiny was applied to insure that all those children suffering such an interference are afforded equal recovery rights. However, in *Labine*, it can be argued there was no interference with the parent-child relationship as the intestacy statute only took effect after the termination of the relationship and was in no way concerned with the creation or protection of rights arising as a result of the interference with that intimate familial relationship. Thus, it can be argued that there was no interference with this fundamental right, and the statute need meet only the traditional rational basis test.

Yet, it is also possible that the statutory discrimination itself in *Levy* constituted the interference with the child's fundamental right in that it denied equal recovery rights to those children who were similarly situated having an intimate familial relationship. It could be argued, therefore, that a similar statutory interference existed in *Labine* since the state had effectively denied equal inheritance rights to those children who were similarly situated in an intimate familial relationship with a parent.

27. 401 U.S. at 536 n.6, wherein the Court stated:

Even if we were to apply the "rational basis" test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State.

28. This failure to apply the rational basis test was a focal point for the dissent in *Labine*:

But no one questions Louisiana's power to pass inheritance laws. Surely the Court cannot be saying that the Fourteenth Amendment's Equal Protection Clause is inapplicable to subjects regulable [*sic*] by the States — that extraordinary proposition would reverse a century of constitutional adjudication under the Equal

The *Labine* Court found another distinction from *Levy*, namely, the absence of any state-created insurmountable barrier to that child's capacity to inherit. Under the wrongful death statute in *Levy*, the State had supposedly created an insurmountable barrier to the illegitimate's ability to recover compensation.²⁹ However, in *Labine* the Court found no insurmountable barrier to the child's ability to inherit for, under the Louisiana statutory scheme regulating inheritance, a father may devise one-third of his estate to his acknowledged illegitimate child.³⁰ It is submitted, however, that this distinction is tenuous at best. The supposed statutory barrier to recovery that was present in *Levy* could actually be considered surmountable; the mother could have legitimated her children,³¹ thereby vesting them with rights equivalent to those children who were born legitimate.³²

In the wake of *Labine*, the continued viability of *Levy* was uncertain. For example, several federal courts,³³ recognizing that *Labine* circumscribed *Levy*, chose to follow the *Labine* rationale in upholding discriminatory provisions of the Social Security Act.³⁴

It was in this climate of uncertainty that the Louisiana court in *Weber*, when confronted with the question of the validity of the inferior classification of dependent unacknowledged illegitimates under the workmen's compensation law, upheld the discrimination, distinguishing the case from *Levy*.³⁵ The primary basis for the lower court's distinction was that *Levy*

Protection and Due Process Clause. It is precisely state action which is subjected by the Fourteenth Amendment to its restraints.
Id. at 548-49. (Brennan, J., dissenting).

29. *Id.* at 539.

30. LA. CIV. CODE ANN. art. 1486 (West 1952).

31. Although mere acknowledgment of children alone is not sufficient to permit recovery in Louisiana, legitimation of children qualifies them under Louisiana's wrongful death act. See *Youchican v. Texas & P. Ry.*, 147 La. 1080, 86 So. 551 (1920) ("children" refers only to children born in wedlock or duly legitimated); *Levy v. Louisiana*, 192 So. 2d 193 (La. App. 1966) (mere acknowledgment not sufficient to allow recovery). See also note 2 *supra*.

32. Furthermore, for equal protection purposes, the thrust of *Labine* would seem to be, not whether there was an absence of any insurmountable barrier to the child's ability to inherit, but whether there was any rational basis for subordinating the claim of acknowledged illegitimates under the intestacy succession statute. The Court has, in other instances, struck down discrimination merely disadvantaging a class. See *Hunter v. Erickson*, 393 U.S. 385 (1969); *Douglas v. California*, 372 U.S. 353 (1963).

33. In *Parker v. HEW*, 453 F.2d 850 (5th Cir. 1972), the court sustained the challenged classification as not violative of the due process clause of the fifth amendment. See note 34 *infra*. Referring to the impact of *Labine*, the court stated that "[a]ny doubt in regard to the legislature's power to distribute rights on the basis of status stemming from legitimate or illegitimate birth was resolved by the Supreme Court in [*Labine*]." *Id.* at 852. Thus, the court concluded:

[T]he statute in question may be justified on the basis of Congress giving precedence or priority to the legitimate children in the interest of strengthening and preserving family ties

Id. at 851. See *Watts v. Veneman*, 334 F. Supp. 482 (D.D.C. 1971); *Garner v. Richardson*, 333 F. Supp. 1191 (N.D. Cal. 1971). But see notes 71-75 and accompanying text *infra*.

34. 42 U.S.C. §§ 402(a), 416(h)(3)(C) (1970). These sections provide for the reduction of benefits to qualified illegitimate children before any reduction in benefits to others when the total monthly claims by qualified survivors of the deceased insured exceed the maximum monthly family grant allowable.

35. *Stokes v. Aetna Cas. & Sur. Co.*, 257 La. 424, 242 So. 2d 567 (1971).

involved a wrongful death statute which absolutely excluded all illegitimates from recovery, whereas the workmen's compensation statute at issue in *Weber* placed acknowledged illegitimates on a parity with legitimate children.³⁶ Moreover, the latter statute did not deny recovery to unacknowledged illegitimates but rather merely placed them in the inferior recovery classification of "other dependents."³⁷ Such a distinction appeared justifiable given the *Labine* Court's interpretation of *Levy* as prohibiting only *total exclusion* of illegitimates and its apparent deemphasis of the rational basis test.³⁸

The Supreme Court, however, rejected these arguments in the instant case and invalidated the classification as violative of the equal protection requirement. In so doing, it relied on three rationales: (1) the state interest in promoting legitimate family relationships is not served by intra-familial discrimination since it cannot seriously be contended that a mere statutory disability will significantly discourage illicit sexual relationships;³⁹ (2) the state interest in promoting legitimate family relationships has no significant relation to, but rather is in direct conflict with, the *recognized* primary purposes of workmen's compensation statutes and, therefore, such a statute is not the proper vehicle through which to pursue this collateral governmental objective;⁴⁰ and (3) the basic concept of our system of justice that legal burdens should bear some relationship to the individual's responsibility or wrongdoing makes it unjust to penalize a child for the circumstances of his birth, over which he had no control.⁴¹

Applying the rational basis test, the *Weber* Court concluded that the discriminatory classification of dependent unacknowledged illegitimates bore no rational relationship to the state's purpose of providing recovery for losses sustained by dependent children resulting from the death of their father.⁴² The Court indicated that the state could not justify the classification on the basis of its collateral legitimate interest in protecting the family unit and promoting legitimate family relationships.⁴³ It cannot "be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."⁴⁴ Further, it emphasized:

We do not question the importance of that interest [promotion of legitimate family relationships]; what we do question is how the challenged statute will promote it.

. . . .

36. *Id.* at 431, 242 So. 2d at 570.

37. *Id.* See notes 6 & 7 *supra*.

38. See notes 21-28 and accompanying text *supra*.

39. 406 U.S. at 173.

40. *Id.* at 173-75. It should be noted that this rationale is implied, rather than specifically stated, throughout the opinion.

41. *Id.* at 175.

42. *Id.*

43. *Id.*

44. *Id.* at 173. One statistical study has indicated that the rate of illegitimacy has steadily increased in spite of the state's attempted deterrence of illicit relations. See H. CLARK, *LAW OF DOMESTIC RELATIONS* 156 (1968).

The state interest in legitimate family relationships is not served by the statute. . . . Obviously, no child is responsible for his birth and penalizing the illegitimate is an ineffectual . . . way of deterring the parent.⁴⁵

Consequently, lacking a legitimate state interest, compelling or otherwise,⁴⁶ the Court concluded that there was no justification for such unequal treatment.

The second rationale of the Court is implied throughout the opinion. The Court, reasoning that *Levy* was controlling, stated:

An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born in wedlock or an illegitimate later acknowledged.⁴⁷

The Court recognized the fact that the primary purpose of the workmen's compensation statute was to compensate those children dependent on the deceased who suffer as a result of his death, regardless of the status of their birth. Since such need and suffering do not distinguish between legitimates and illegitimates, there was no rational relationship between the primary purpose of the statute and the discriminatory classification.⁴⁸

However, the Court had indicated in *Labine* that the collateral interest of promoting the family relationship could be rationally served by the inferior position of the acknowledged illegitimate in the state's intestate succession statute despite its totally unrelated primary purpose.⁴⁹ The obvious problem then is to ascertain the significant difference that justifies the conclusion that this collateral interest is properly pursued by means of discriminatory treatment of illegitimates under intestate succession laws, and yet improperly pursued by means of discriminatory compensation schemes in workmen's compensation and wrongful death acts. One arguable difference may be the relationship of the collateral state interest with the primary underlying purposes of the respective statutes. Since both wrongful death and workmen's compensation statutes are designed to create a recovery right for close relatives and dependents of the deceased, the collateral purpose of promoting legitimate family relationships is directly antagonistic to this primary objective.⁵⁰ In other words, the state cannot seek to create a right of recovery for *any* child who has suffered loss due to the death of a parent and concurrently pursue a policy of promoting legitimate family relationships by denying equal recovery rights to a few children who are similarly situated, except for the status of their birth — a factor totally irrelevant to the gravity of their loss. In *Labine*, however, there was, at least arguably, no conflict between the primary statutory purpose — to regulate the intestate disposition of property within

45. 406 U.S. at 173-75.

46. *Id.* at 176.

47. *Id.* at 169.

48. *Id.* at 175.

49. See note 27 *supra*.

50. See Gray & Rudovsky, *supra* note 12, at 8.

the state's borders and thereby to provide for stability of land titles and prompt determination of the valid ownership of the property⁵¹ — and the state's interest in promoting legitimate family relationships. Since the primary purpose is essentially regulatory in nature and does not seek to protect or benefit dependent children generally, no direct conflict is created by also employing the statute as a vehicle to pursue the aforementioned collateral interest.

The third equal protection rationale utilized by the Court arose from the basic juridical concept that "legal burden should bear some relationship to individual responsibility or wrongdoing."⁵² It was, in the Court's opinion, highly unjust to visit "condemnation on the head of an infant"⁵³ for conduct over which he had no control — for a wrong in which he had no part.⁵⁴ Such harsh treatment of the innocent can only be justified in the face of a compelling governmental interest.⁵⁵ Thus, even if the discriminatory classification could comply with the two aforementioned equal protection rationales by demonstrating some rational basis, it would nevertheless fail this third, absent a showing of a sufficiently crucial or compelling state objective to justify or excuse the significant interference with the child's fundamental personal rights.⁵⁶

The interrelationship of the three equal protection rationales of *Weber* is exemplified by the Court's invalidation of the discrimination between acknowledged and unacknowledged illegitimates.⁵⁷ As previously mentioned, the *Weber* Court's decision was based in part on the simple observation that discrimination against illegitimate offspring will never discourage individuals from engaging in illicit relationships. Thus, even if such a goal is a proper governmental objective, utilizing this method of discrimination for achieving this goal is unjustifiable.⁵⁸ However, this reasoning is not as persuasive if applied to discrimination against unacknowledged illegitimates where the governmental goal is to encourage parental acknowl-

51. 406 U.S. at 170.

52. *Id.* at 175. It was precisely this rationale to which the dissent in *Labine* (see note 28 *supra*) alluded when it stated:

The Court nowhere mentions the central reality of this case: Louisiana punishes illegitimate children for the misdeeds of their parents.

401 U.S. at 557 (Brennan, J., dissenting).

53. 406 U.S. at 175.

54. *Id.* at 176.

55. *Id.* at 175-76. While the Court does not explicitly come to this conclusion, it is nevertheless reasonably inferable from the thrust and tone of the decision.

56. Justice Rehnquist, in dissent, specifically addressed himself to this argument: A fair minded man might regard it [the classification] as both [illogical and unjust], but the Equal Protection Clause of the Fourteenth Amendment requires neither It requires only that there be some conceivable set of facts which may justify the classification involved.

Id. at 183. Thus, he rejected the *Levy* rationale and indicated his preference for a single constitutional test to examine all statutory classifications. He rejected the Court's dual approach as a "judicial superstructure," allowing the Court to expand traditional equal protection principles in order to make policy judgments on legislative enactments. *Id.* at 183-85.

57. This discrimination should be contrasted to the broader discrimination between legitimate and illegitimate children invalidated in *Levy*. See notes 14-20 and accompanying text *supra*.

58. See notes 47-51 and accompanying text *supra*.

edgment of their offspring. It is not unreasonable to maintain that *acknowledgment* can be effectively encouraged by means of statutory incentives and discriminations. It would not be a futile attempt to prevent illicit sexual conduct, but rather an attempt to achieve formal parental acceptance of the child in conformity with certain statutorily prescribed procedures.

This proffered justification, however, was evidently not argued, and the Court did not address itself to it *sua sponte*. However, even this justification fails to satisfy the third rationale employed by the Court to strike down the classification. That rationale,⁵⁹ a basic legal maxim, condemns discrimination between the acknowledged and the unacknowledged illegitimate with as much force as it condemns discrimination between the legitimate and the illegitimate.⁶⁰

Furthermore, even if the Court had concluded that the workmen's compensation scheme was a proper vehicle to advance the state interest in the acknowledgment of illegitimate children, the facts in *Weber* would require the same result, since the claimants were unacknowledgeable illegitimates due to the marital incapacity of their parents at the time of conception.⁶¹ The Court could have chosen to indicate that the impossibility of acknowledgment was the fatal flaw in the Louisiana scheme; that is, the state could advance its interest in the acknowledgment of children, but in doing so it could not preclude a parent from acknowledging this child if such preclusion would result in a denial of recovery under the workmen's compensation act. This argument, in fact, is the focal point of Justice Blackmun's concurring opinion, wherein he indicated that he would so limit *Weber*.⁶² By refusing to adopt such a limited holding, the Court has further indicated that a state cannot encourage parental acknowledgment to the point of precluding recovery by a dependent child who suffered loss, anymore than it can preclude such recovery in order to discourage illicit relationships.⁶³

This analysis may satisfactorily explain the import, if any, of the Court's reference to the existence of a state-created insurmountable barrier to acknowledgment of children in a *Weber* situation.⁶⁴ The Court referred to this barrier in its attempt to distinguish *Weber* from *Labine* wherein the Court had considered the absence of a state-created insurmountable

59. See text accompanying note 52 *supra*.

60. Additionally, it could be argued that such a justification fails in light of the second rationale. Although there is a legitimate state objective, it may be argued that this statute is simply not a proper vehicle for its pursuit in light of the obvious conflict between this collateral objective and the primary objective of creating a right of recovery.

61. See note 1 & 2 and accompanying text *supra*.

62. 406 U.S. at 176-77. Justice Blackmun read the majority opinion as granting dependent unacknowledged illegitimates full equality with dependent legitimate children. Having concluded the bar to acknowledgment was the fatal flaw under the statute, he indicated he would let the resolution of this broader issue await presentation in a more appropriate factual context. *Id.* at 177.

63. See notes 57-60 and accompanying text *supra*.

64. 406 U.S. at 170-71.

barrier a relevant factor in deciding the case.⁶⁵ Thus, it could be argued, as Justice Blackmun suggested,⁶⁶ that had there been no insurmountable barrier, the discrimination would have been tolerated in that this broad interpretation of *Labine* would control. Granted that there is a valid factual distinction, nevertheless, it is not important to the application of equal protection principles in *Weber*, for the thrust of the decision is that a child should not be penalized for something over which he had no control — legitimacy and acknowledgment. From this basic premise, it follows that the mere fact that a parent could or could not have legitimized or acknowledged the child cannot operate to deny the child his remedial right.⁶⁷

The fact that the *Weber* Court failed to confront adequately the *Labine* decision presents difficulties with respect to *Labine*'s future application. *Weber* has apparently restricted *Labine* since the Court merely has stated that *Labine* represented its traditional deference to the state's authority to regulate the disposition of a decedent's property within its borders.⁶⁸ Yet, this is an unsatisfactory resolution of the apparent conflict between the decisions. It fails to explain adequately, in terms of the equal protection clause, the constitutional justification for the inferior classification of acknowledged illegitimates in intestate succession. It is elementary that such deference cannot justify the avoidance of a constitutional mandate.⁶⁹ Nevertheless, it seems clear that *Labine* will be limited to similar statutes involving the regulation of property, and that its rationale cannot be extended to statutes designed to provide compensation to children when the primary purpose of such statutes is to protect or benefit dependent offspring.⁷⁰

A further difficulty with the *Weber* decision concerns the extent to which a state may employ acknowledgment and legitimation requirements in any statute to promote legitimate family relationships and to encourage the parental recognition of their illegitimate children. It is apparent from the Court's reluctance to overrule *Labine* that states may still promote these interests by discriminating against illegitimates — acknowledged and unacknowledged — in their intestate succession statutes. But, it would appear that states may, in the future, be required to abandon acknowledgment and legitimacy requirements in other areas to advance their interest in promoting socially acceptable family relationships, and to adopt more direct methods, such as providing economic inducements, to encourage parents to acknowledge and legitimate their illegitimate offspring, methods which would involve no discriminatory interference with basic rights.

65. See notes 29-32 and accompanying text *supra*.

66. See note 62 *supra*.

67. Accordingly, it would seem that this distinction does not afford the Court a basis for justifying the different results of *Weber* and *Labine*. Perhaps in recognition of this, the Court mentioned it only secondarily to the major distinction between the differing underlying purposes of the statutes. 406 U.S. at 170-71.

68. *Id.* at 170.

69. But see notes 21-28 and accompanying text *supra*.

70. Compare note 33 *supra* (pre-*Weber* cases) with notes 71-75 and accompanying text *infra* (post-*Weber* cases).

In conclusion, the *Weber* decision has made several significant contributions to the meager body of constitutional precedent protecting the illegitimate: (1) it has reaffirmed *Levy's* application of the rational basis test and the need for stricter scrutiny in this area, a judicial advance which had been endangered by *Labine*; (2) it has rejected a restrictive interpretation of the *Levy* holding — only *total exclusion* of illegitimates from the statutory recovery scheme is prohibited — and has declared that equal protection encompasses all children of the same natural parents, regardless of the legitimacy of their births — that is, inferior inclusion will not suffice; (3) it has suggested three different equal protection rationales to weigh discrimination among such children; and (4) it has condemned discrimination between unacknowledged and acknowledged illegitimates with constitutional force equal to its condemnation of discrimination against all illegitimates.

However, the *Weber* Court's reluctance to overrule *Labine* leaves unresolved the question with respect to the precise application of each decision to statutes concerning the illegitimate child. The early results of *Weber* indicate that uncertainty does, in fact, persist. For example, in *Morris v. Richardson*,⁷¹ *Weber* was followed by a three-judge federal court in striking down discriminatory provisions of the Social Security Act.⁷² The *Weber* rationale seems clearly applicable, and earlier federal decisions relying on *Labine* in upholding these same discriminatory provisions are now of questionable viability. However, in *New Jersey Welfare Rights Organization v. Cahill*,⁷³ a three-judge court held that the state's interest in preserving and strengthening traditional family life justified public assistance eligibility standards, requiring that both parents live at home, be ceremonially married to each other, and be the natural or adoptive parents of children living at home. The court recognized *Weber* as controlling since the eligibility requirements operated as a hardship on illegitimate children, and applying the *Weber* rationales, the court subjected the eligibility classification to close scrutiny.⁷⁴ It concluded, however, that it was a sufficiently proper and compelling interest for the state to refuse to subsidize a family unit which violated its laws against fornication and adultery, and that there existed a rational relationship between this legitimate purpose and the statutory scheme for eligibility.⁷⁵

While it is still uncertain how pervasive *Weber* will be in removing discrimination against the illegitimate child, its sweeping philosophical condemnation indicates that the trend should be toward its eventual eradication.

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71. 346 F. Supp. 494 (N.D. Ga. 1972), *judgment vacated*, 409 U.S. (1973).

72. 42 U.S.C. §§ 402(a), 416(h) (3) (C). See note 34 *supra*.

73. F. Supp. (D.N.J. 1972).

74. *Id.*

75. *Id.*