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PENDLETON V. PENDLETON: AN EQUAL RIGHT OF INHERITANCE FOR THE ILLEGITIMATE?

Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?

Shakespeare, King Lear, Act I, Scene ii.

I. INTRODUCTION

The illegitimate child has been the butt of social and legal discrimination since long before Shakespeare's time. Although such discrimination is not new, only recently has the illegitimate been given legal rights equal with those of legitimates under the equal protection clause of the fourteenth amendment. Since 1968 the United States Supreme Court has handed down a series of decisions giving illegitimates equal rights in the areas of wrongful death actions, workmen's compensation, and social security. Nevertheless, the historical discrimination

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1 At common law the illegitimate child was considered a filius nullius (son of no one) and was completely barred from inheriting property. The law has, however, made some progress in recognizing the illegitimate's rights. In Levy v. Louisiana, 391 U.S. 68, 70 (1968), the Supreme Court stated: "[I]llegitimate children are not 'non-persons.' They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." For a general discussion of the illegitimate's rights at common law and in the United States, see Note, A Return to Filius Nullius, 48 N.D.L. REV. 59, 60-65 (1971).

2 See, e.g., Levy v. Louisiana, 391 U.S. 68 (1968) and Glona v. American Guarantee Co., 391 U.S. 73 (1968) (giving illegitimates and parents of illegitimates the right to recover in statutory wrongful death actions); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (allowing unacknowledged illegitimate children equal rights to workmen's compensation benefits previously limited to legitimates and acknowledged illegitimates); Gomez v. Perez, 409 U.S. 535 (1973) (holding that a statute giving legitimate children the right to support by the father violates equal protection by barring illegitimates from the same right); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (invalidating a statute restricting state welfare benefits to families in which the parents were formerly married and had at least one legitimate child); Jimenez v. Weinberger, 417 U.S. 628 (1974) (holding that illegitimate children born after their father's disability were entitled to prove their dependency in order to receive social security benefits). But cf. Mathews v. Lucas, 427 U.S. 495 (1976), which upheld a statute requiring illegitimate children to prove dependency and paternity.
against illegitimates is still evident in the area of intestate succession.\(^3\)

The case in point is *Pendleton v. Pendleton*\(^4\) and the Kentucky statute in question\(^5\) allows the illegitimate child to inherit property from the mother but not from the father. The appellant in *Pendleton* was the acknowledged illegitimate child of the intestate, who died unmarried and without other issue. An equal protection challenge was raised on the basis that the statute invidiously discriminated against the illegitimate child. The Supreme Court of Kentucky, while clearly dissatisfied with their decision, felt compelled to uphold the statute's constitutionality on the basis of the United States Supreme Court's decision in *Labine v. Vincent*.\(^6\) In *Labine* the Court split five to four to uphold Louisiana's intestate succession scheme as constitutional, despite its discrimination against illegitimates. The particular statute challenged allowed the illegitimate child, who had been formally acknowledged by the intestate as his natural issue, to inherit the property of the father, but only if there were no ascendants, descendants, collateral kindred, or wife surviving.\(^7\)

*Pendleton*, currently on appeal before the United States Supreme Court,\(^8\) is an appropriate case for review.\(^9\) The facts

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\(^3\) Only a few states allow the illegitimate child to inherit equally with legitimates. See, e.g., N.D. CENT. CODE § 56-01-05 (1969) and ORE. REV. STAT. § 109.060 (1975).

\(^4\) 531 S.W.2d 507 (Ky. 1976).

\(^5\) Ky. REV. STAT. § 391.090 (1972) [hereinafter cited as KRS]: "(2) a bastard shall inherit only from his mother and his mother's kindred." Similar statutes include: ALA. CODE tit. 16 § 7 (1959); GA. CODE ANN. § 113-904 (1975); ILL. ANN. STAT. ch. 3, § 12 (Smith-Hurd 1961); MASS. ANN. LAWS ch. 190 § 5 (1969); MICH. COMP. LAWS § 702.91(151) (MICH. STAT. ANN. § 27.3178 (1968)); and N.J. STAT. ANN. § 3A:4-7 (1953).

\(^6\) 401 U.S. 532 (1971).

\(^7\) LA. CIV. CODE ANN. art. 919 (West 1870).

\(^8\) Appeal docketed, 45 U.S.L.W. 3077 (U.S. May 11, 1976) (No. 75-1610). *Pendleton* is being held in abeyance, pending the United States Supreme Court's decision on *Trimble v. Gordon*, 45 U.S.L.W. 3077, cert. granted, 45 U.S.L.W. 3531,
and issues are sufficiently similar to those in Labine, and yet the relevant statutes are clearly distinguishable, so that the Court has wide berth to choose whether to reaffirm, distinguish, or overrule Labine.

II. A REALISTIC LOOK AT POLICY IN RELATION TO KENTUCKY'S INTESTACY SCHEME

There are several themes running through the courts' justifications for discriminating against illegitimates in the area of intestate succession. These policy reasons should be closely examined in relation to a statute barring the illegitimate child's inheritance from the intestate father but allowing inheritance from the intestate mother.10

A. Proof of Paternity Problems

One reason advanced for discrimination against illegitimates is that proof of the paternity of a child born out of wedlock is less certain than that of a legitimate child.11 Underlying this rationale as it applies to the Kentucky statute of descent and distribution12 is the idea that, whereas the identity of a child's mother is always ascertainable,13 men would often be unjustly accused of fathering illegitimate children who would thereafter inherit their intestate property.

Actually, there is no surety even within wedlock that a


Besides being very similar to Pendleton as to the facts and the Illinois statute challenged, Ill. Ann. Stat. ch. 3, § 12 (Smith-Hurd 1961), Trimble v. Gordon covers a broader scope. The Court will decide not only the question of discrimination against and within the class of illegitimates but also the issue of sex discrimination within the statute.


10 For statutes similar to KRS § 391.090(2), see supra note 5.


12 KRS § 391.090(2) (1972).

13 Louisiana is the only state that requires the mother to acknowledge the illegitimate as her natural child before the child can inherit from the mother. La. Civ. Code Ann. arts. 918, 924 (West 1870).
woman's husband is in fact the father of her child, despite the law's strong presumption of his paternity. Where there is a dispute, blood tests can provide more substantial evidence of paternity than merely eliminating as possible fathers those with certain blood types. At any rate, proof problems do not exist in the many cases where the father freely acknowledges his paternity.

In *Pendleton* the deceased had been determined to be the child's natural father by a bastardy proceeding obligating the father to support his illegitimate child. Thereafter until his death, unmarried and intestate, the deceased consistently referred to and acknowledged the child as his son. There was obviously no uncertainty as to the child's paternity, yet Kentucky does not allow even a formally acknowledged illegitimate child to inherit from the father.

Although problems concerning paternity can and do arise, they are not sufficient justification to deprive the illegitimate child of his rights. In *Gomez v. Perez* the United States Supreme Court held that illegitimate children must be given a right to the father's support equal with that of legitimates. The Court realized that the problems as to proof of paternity are “not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise

15. KRS § 406.011 (1972): “A child born within lawful wedlock, or within ten (10) months thereafter, is presumed to be the child of the husband and wife.”
17. Note however, that in Kentucky blood tests are merely admissible evidence as to the alleged father's paternity. KRS § 406.11 (1972). See Tackett v. Tackett, 508 S.W.2d 790 (Ky. 1974), in which the trial court was held in error for its resolution of paternity based solely on blood tests without other substantial evidence.
18. In *Labine* the parents had acknowledged the appellant as their natural child according to Louisiana law two months after her birth. Nevertheless, according to Louisiana’s intestacy scheme, the child could inherit the natural father's property only if there were no surviving legitimate relatives or spouse, and to the exclusion of only the state. See La. Civ. Code Ann. art.919 (West 1870).
20. See Helm v. Goin, 14 S.W.2d 183 (Ky. 1929), which held that mere acknowledgment of an illegitimate child, without the parents’ subsequent marriage, is insufficient to qualify the child as an heir at law.
invidious discrimination."\(^{21}\)

Even the Pendleton Court cited Gomez with approval, noting that Kentucky had always enforced the father's obligation to support his illegitimate child despite proof of paternity problems. The Court went on to imply that denying the illegitimate child the right to intestate succession equal with legiti- mates was inconsistent with giving them an equal right to sup- port.\(^{22}\)

B. Discouraging Promiscuity

Legislation to discourage promiscuity is a valid exercise of the state's power to regulate its citizens' moral behavior.\(^{23}\) However, there is no rational connection between this stated purpose and a law allowing the illegitimate to inherit from the mother but not from the father. Potential parents will not be dissuaded from engaging in illicit sexual conduct by the fear that their illegitimate child will not be allowed to inherit from the father, nor will they be encouraged by the knowledge that the child will be allowed to inherit from the mother.\(^{24}\)

The state would more effectively discourage promiscuity by acting directly—by enforcing its sanctions on fornication and adultery and providing incentives such as special tax benefits for legitimate relationships.\(^{25}\) Punishing the illegitimate child for the parents' actions in this manner is not only irrational but also grossly unfair. Justice Powell denounced the injustice of such legislation in Weber v. Aetna Casualty & Surety Co.:\(^{26}\)

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the

\(^{21}\) Id. at 538.

\(^{22}\) 531 S.W.2d at 510-11. See also dicta in Green v. Woodard, 318 N.E.2d 397, 407 (Ohio 1974), where the Court of Appeals of Ohio reasoned that if the alleged parent of an illegitimate must be given the right to prove his paternity in a custody hearing, Stanley v. Illinois, 405 U.S. 645 (1972), then the illegitimate child should have a similar right to prove the father's paternity so as to receive his inheritance rights.

\(^{23}\) H. Krause, supra note 16, at 75.

\(^{24}\) The Supreme Court in Glona v. American Guar. Co., 391 U.S. 73 (1968), found a similar lack of rational connection between the state's purpose of discouraging illegitimacy and the statute prohibiting a mother from suing for the wrongful death of her illegitimate child.

\(^{25}\) H. Krause, supra note 16 at 76.

\(^{26}\) 406 U.S. 164 (1972).
bonds of marriage. But visiting this condemnation on the head of the infant 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. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.\footnote{\textit{Id.} at 175.}

C. \textit{Encouraging Legal Family Relationships}

Closely related to the policy of discouraging promiscuity, and equally unconvincing, is the policy of encouraging legitimate family relationships through marriage. Again, the state's purpose is proper but unrelated to the statute.\footnote{The four members of the dissent in \textit{Labine} pointed out the fallacy of the Louisiana court's state purpose for discriminating against the illegitimate in Louisiana's intestate succession scheme. There is no relationship between the policy of encouraging marriage and a statute disinheriting an illegitimate child. 401 U.S. at 559.} The argument is that if the state provided the illegitimate with all the rights of the legitimate, including the right of intestate succession from the father, there would be no other encouragement for the parents to marry.\footnote{Krause, \textit{Equal Protection for the Illegitimate}, 65 Mich. L. Rev. 477, 492-93 (1967).} This rationale ignores the fact that the father can always include his illegitimate child in a will, and again fails to explain why the illegitimate is allowed to inherit from the mother but not from the father. It also focuses upon the innocent child as the scapegoat for the state's disapproval of the parents' actions.\footnote{The purpose of encouraging marriage is also inapplicable in the situation where one of the natural parents cannot marry. In \textit{Pendleton} the mother was already married at the time the illegitimate child was conceived and born. Brief for Appellees at 16, Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1976).

Note that in Kentucky an illegitimate child can become the legitimate issue of the natural parents only if they subsequently marry and acknowledge the child as their own. KRS § 391.090(3) (1972). There is nothing that the illegitimate child himself can do to change his status.}

A more practical approach toward protecting family stability would be to consider the effect on the existing family unit caused by the illegitimate child's inheritance of the father's intestate property.\footnote{Krause, \textit{Equal Protection for the Illegitimate}, 65 Mich. L. Rev. 477, 494 (1967).} If the illegitimate were allowed to inherit
equally with the decedent’s legitimate issue, his inheritance would admittedly decrease the shares of the legitimate family. However, the illegitimate child would merely be taking equally with the legitimate issue. In many cases the illegitimate child is more in need of support than the family of the deceased.\footnote{In Kentucky the illegitimate’s right to support by the father ends at the father’s death. KRS § 406.041 (1972).} Furthermore, the illegitimate is allowed to inherit from the mother’s estate, regardless of that effect upon the existing family unit. And when, as in \textit{Pendleton}, there is no family unit to be affected, the case is even stronger for allowing the deceased’s only issue, rather than his collateral relatives,\footnote{In \textit{Pendleton}, the deceased’s brother, sister, and nephew inherited the estate. Brief for Appellees at 2, Pendleton v. Pendleton, 531 S.W.2d 507 (1976).} to inherit the intestate’s property.

\textbf{D. Presumption of Father’s Intent in Distribution of Property}

There may be more support for presuming that most fathers would prefer their legitimate rather than illegitimate issue to inherit their property.\footnote{Krause, \textit{Equal Protection for the Illegitimate}, 65 Mich. L. Rev. 477, 501-02 (1967).} However, the Kentucky statute in question\footnote{KRS § 391.090(2) (1972).} deals \textit{within} the class of illegitimates, permitting them to inherit from the mother but not from the father.\footnote{There is implied discrimination between legitimates and illegitimates in KRS § 391.090(2) in that the illegitimate child can never inherit intestate property from the father while the legitimate child is not barred.} The relevant question is whether the statute reasonably presumes that the majority of mothers desire their illegitimate children to inherit equally with their legitimate issue but that most fathers intend to completely bar their illegitimate children from inheritance.\footnote{Although this issue is not mentioned by the court in \textit{Pendleton}, there may be a due process question as to whether it is constitutional under the fourteenth amendment to presume that illegitimates are outside the class of intestate takers intended by the father, solely on the basis of their status. For more on the theory of irrebuttable presumptions, see Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973). For irrebuttable presumptions in cases related to illegitimacy, see Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974), especially Justice Rehnquist’s dissent; Stanley v. Illinois, 405 U.S. 645 (1972). \textit{See also} 10 N. Eng. L. Rev. 561, 566-69 (1975).}
E. The Reality of Prejudice

The real reason for discrimination against illegitimates is prejudice, stemming historically from society's disapproval of illicit sex. The "central reality" is that legislators misguidedely punish illegitimates for their parents' actions. Statutes like that of Kentucky seem to recognize the close bond between mother and child as the justification for the concession of allowing the illegitimate child to inherit from the mother, instead of completely barring any inheritance at all.

The ancient tradition of prejudice against illegitimates is breaking down, as is evidenced by recent Supreme Court decisions giving illegitimates equal rights with legitimates. There is no convincing public policy that can be furthered by statutes limiting the illegitimates' rights of intestate succession; there is no rationale that can withstand the force of equal protection principles if applied.

III. Intra-Class Discrimination: A Chance to Distinguish Labine

The query after Labine v. Vincent is whether the area of intestate succession will remain untouched by principles of equal protection—whether it is so traditionally an area governed by the various states that the Supreme Court will not move to correct the discrimination in these statutes.

A. The Supreme Court's Stance in Labine

The majority's position in Labine can be summed up by their statement:

[T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of intestate property . . . is committed by the people of Louisiana to the legislature, not the life-tenured judges of this Court to select from among possible laws.

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39 Labine v. Vincent, 401 U.S. at 558 (dissenting opinion).
40 KRS § 391.090(2) (1972).
41 See note 2 supra.
42 401 U.S. at 539-40.
Thus the Court blankly refused to examine the rationality of Louisiana's intestate succession statute, even in the face of an equal protection challenge by the illegitimate child. The majority deferred to the legislature's traditional power to regulate the devolution of intestate property without the barest inquiry as to whether there was any rational relationship between the discriminatory statute and the legislature's goal of protecting family life.

Justice Brennan, the author of the dissenting opinion, considered the majority's opinion unprincipled, stating that no statute can be immune from the equal protection clause merely because it is within an area traditionally governed by the states. Although the state may have broad powers to classify, there must be a substantial reason for drawing the line; otherwise, it is invidious discrimination prohibited by the fourteenth amendment. Despite the strong dissent, Labine has not been attacked by a majority of the Court. In fact the Court, by their subsequent distinction of Labine in Weber v. Aetna Casualty & Surety Co., seemed to imply that Labine would stand.

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43 LA. CIV. CODE ANN. art. 919 (West 1870).
44 The Labine majority seemed to apply the old equal protection test used by the Warren Court to uphold economic and social regulations against equal protection challenges. Under this test if any reason could be conceived for the state's classification, then the statute was presumed to be constitutional. See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).
45 The majority in a brief aside commented that even if they were to apply a rational relationship test, the statute would be found to have a rational basis in the state's interests in promoting family life and in directing the devolution of intestate property. But the Court does not explain how they would reach that conclusion. See 401 U.S. at 536 n.6.
46 Id. at 550. The dissent also mentioned United States v. Oregon, 366 U.S. 643 (1961), in which the states' power to regulate intestate succession was not immune under the tenth amendment from federal laws "necessary and proper" to the exercise of a delegated power. Id. at 548, n.16.
47 406 U.S. at 170-71. The Court first distinguished Weber by noting that the decision in Labine was greatly influenced by the Court's respect for the state's power to regulate intestate succession, a deference not present in the workmen's compensation area involved in Weber. The second distinction involved the fact that the intestate in Labine could have provided for his child in a will or could have legitimized the child upon marrying the mother. In contrast, the petitioner in Weber could do nothing to make his children eligible to receive the statutory benefits. Louisiana law prohibited parents' acknowledgment of the children if they were incapable of marrying at the time of conception or thereafter. Id. The Court's second distinction does not, however recognize the fact that the illegitimate child himself can take no action to modify his status.
B. *Intra-Class Discrimination in Pendleton*

There are two levels of analysis of equal protection under the law. The first level examines the statute in question to determine whether it applies equally to the class involved, i.e., whether the statute includes all illegitimates within its scope. The second level looks deeper to examine whether the status of illegitimacy is a permissible basis for the discriminatory classification. This determination depends on whether there is a rational relationship between the statute and a proper state purpose. This second level is the "rational relationship" test which the *Labine* majority found unnecessary to apply, due to their presumption of the statute's constitutionality.

The first level describes the intra-class discrimination that is found in Kentucky's intestate succession scheme. *Green v. Woodard,* a 1974 Ohio decision, used this rationale to strike down a statute similar to the Kentucky statute as violative of the equal protection clause of the fourteenth amendment. Since Ohio's and Kentucky's intestate succession schemes are very similar, the *Green* rationale is applicable to the facts and issues in *Pendleton.*

In *Green,* the Ohio descent and distribution statute listed...
“children” as among the takers of intestate property. The term 
“children” in the statute had been interpreted to refer only to 
legitimate children as intestate takers. However, a second 
Ohio statute allowed the illegitimate child to inherit from and 
through the mother as if the child were legitimate. This sec-
ond statute in effect modified the meaning of “children” in the 
descent and distribution statute to include as intestate takers 
those illegitimate children inheriting from the mother, as well 
as all legitimate children. The Ohio court reasoned that this 
was intra-class discrimination in the treatment of illegitimate 
children in the descent and distribution statute, because the 
word “children” was extended to include only those illegiti-
mates inheriting from the mother and not the remaining mem-
bers of the class. The Ohio court went on to reject as invalid 
the policies offered to justify the discrimination in the statute. 
Since there was no convincing reason for the intra-class dis-
crimination, the court found the discrimination to be invidious, 
holding that equal protection demanded the modification of 
“children” in the descent and distribution statute be extended 
to include all illegitimate children.

The decision in Labine can be distinguished from Green, 
and therefore from Pendleton, in several ways. First, Louisi-
ana’s intestacy scheme is substantially different from Ken-

his kindred, male and female, in the following order . . .: 
(1) To his children and their descendants . . . .

58 318 N.E.2d at 401.


60 “Children born out of wedlock shall be capable of inheriting or transmitting inheritance from and to their mother . . . .” Ohio Rev. Code Ann. § 2105.17 (Page 1968). KRS § 391.090(2) states: “A bastard shall inherit only from his mother and his mother’s kindred” (emphasis added). Whereas Kentucky implies exclusion of the ille-
gitimate child from the father’s inheritance, Ohio Rev. Code Ann. § 2105.17 is silent as to inheritance from the father. This slight difference does not affect the applicability of the equal protection rationale used by the Ohio court.

61 318 N.E.2d at 401-02.

62 The justifications found invalid by the Ohio court included the following: (1) Distribution of intestate property to be exclusively within the state’s power, relied upon in Labine v. Vincent, 401 U.S. at 539; (2) absence of total discrimination against illegitimate children because they could receive property under a will or could be legitimized so as to be able to inherit property, asserted in Labine v. Vincent, id. at 540; (3) problems of proving paternity, rejected in Gomez v. Perez, 409 U.S. at 538; (4) fear of spurious claims, overcome in Jimenez v. Weinberger, 417 U.S. at 628, 634-35. See Green v. Woodard, 318 N.W.2d at 406.

63 318 N.W.2d at 408.
Louisiana can be said to group children into three classes according to their intestate succession rights: legiti mates, acknowledged illegitimates (termed "natural chil dren"), and unacknowledged illegitimates.6 Unacknowledged illegitimates are not permitted to inherit intestate property from the father or the mother;6 therefore there is obviously no discrimination within this class, nor within the class of legiti mates.

Within the class of acknowledged illegitimates (which includes the appellant in \textit{Labine}), the order of intestate succession is different, depending on whether the child is to inherit from the father or the mother.6 But ostensibly the acknowledged illegitimate has a chance to inherit from either parent;6 there is none of the clear intra-class discrimination which was struck down in \textit{Green}. Thus in Louisiana whether the child inherits from the father or mother, neither the acknowledged illegitimate nor the unacknowledged child is ever allowed rights equal with those of a legitimate child; the discrimination is totally between classes, not within one group.6 \textit{Labine} then can be interpreted as holding that discrimination between the two classes of legitimates and illegitimates is constitutional under the fourteenth amendment, whereas \textit{Green} focuses upon impermissible intra-class discrimination within the class of il-

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62 For a clear explanation of the illegitimate's position in Louisiana's unique scheme of descent and distribution, see 10 \textit{LOYOLA L. REV.} 188 (1971-72).

63 See \textit{LA. CIV. CODE ANN.} art. 202 (West 1870).

64 The Kentucky and Ohio statutes do not mention any difference in treatment between acknowledged and unacknowledged illegitimates for the purpose of intestate succession.

65 \textit{LA. CIV. CODE ANN.} art. 920 (West 1870).

66 Although this difference within the order of intestate succession may possibly be considered intra-class discrimination, the acknowledged illegitimate is not completely barred from inheriting from the father, as is the case in Kentucky and Ohio.

67 The natural child inherits from the mother if there are no legitimate descendants, to the exclusion of all her surviving legitimate ascendants, collaterals and husband. If there are legitimate descendants, the natural child receives only a modest alimony. \textit{LA. CIV. CODE ANN.} art. 918 (West 1870).

The natural child takes from the father only if there are no legitimate ascendants, descendants, collaterals, or wife surviving, and to the exclusion of only the state. \textit{See LA. CIV. CODE ANN.} arts. 919, 924 (West 1870).

68 The author does not condone the total discrimination between legitimates and illegitimates but merely points out that the superficial \textit{form} of the discrimination may be permissible, whether or not the substantive basis of the classification is justified.
legitimates.\textsuperscript{69}

An alternative interpretation of \textit{Labine} and a possible distinction may exist in that Louisiana does allow the acknowledged illegitimate to inherit, albeit only after the father's other kindred. One might consider \textit{Labine} to merely hold that the Court could not constitutionally rearrange the statutory order of intestate succession. In Kentucky the illegitimate child is not only disadvantaged in the order of intestate succession, but is completely barred from inheriting from the father.\textsuperscript{70}

**IV. Conclusion**

Because of the Supreme Court's blank deference to the traditional power of the states to regulate intestate succession, \textit{Labine} appears to close the door in the face of all equal protection challenges.\textsuperscript{71} Nevertheless, \textit{Labine} is a constitutional holding and open to re-examination.\textsuperscript{72} If the Supreme Court decides to use \textit{Pendleton} as a vehicle to re-examine their decision in \textit{Labine}, there are several theories the Court could use to reaffirm or to overrule \textit{Labine}.

The most obvious possibility is that the Court will decide that illegitimacy is a suspect classification requiring a compelling state interest to justify the discrimination.\textsuperscript{73} The Court thus far has either refused or considered it unnecessary to take this step.\textsuperscript{74} Still, such a holding is a distinct possibility in view

\textsuperscript{69} See also Jimenez v. Weinberger, 417 U.S. 628 (1974), in which intra-class discrimination within the class of illegitimates for the purpose of determining the availability of social security benefits was declared unconstitutional as violative of equal protection.

\textsuperscript{70} Brief for Appellant at 12-13, Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1976).

\textsuperscript{71} The Court in \textit{Pendleton}, albeit reluctantly, considered \textit{Labine} controlling:

We are equipped with neither a crystal ball nor the type of scales on which it is evident that a right must be weighed in order to determine whether it is heavy enough to register under the 14th Amendment. Nor are we willing to undertake the sophistry of distinguishing \textit{Labine} v. \textit{Vincent} . . . . Suffice it to say that it has not been overruled by the court that has the exclusive power to overrule it, and we think that as long as it remains the law it governs this case.

531 S.W.2d at 511.


\textsuperscript{73} See Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972) for a discussion of the Court's scrutiny of suspect classifications.

\textsuperscript{74} In \textit{Labine} the dissent stated that they did not reach the question of whether
of the similarity of development of suspect classifications in the areas of race and alienage. The Court noted certain criteria as indicating suspectness in *San Antonio Independent School District v.Rodriguez*.

Illegitimates seem to meet all the criteria: They are certainly burdened with social and legal disabilities; they have historically been singled out as a target of discrimination; and they have so little political force as to need special protection by the legislatures.

A more likely approach is a "means-oriented" equal protection test in which the Court looks for a substantial relationship between the challenged statute (the "means" used by the state to achieve its goals) and the articulated state purpose. In applying this test the Court would accept as permissible the state's declared goal of avoiding proof of paternity problems and concentrate upon whether a statute discriminating against the illegitimate as to inheritance rights actually and substan-

illegitimacy was a suspect classification because the "rational basis" standard was sufficient to prove the discrimination unconstitutional. 401 U.S. at 551 n.19.

The appellants in *Jimenez v. Weinberger* urged that illegitimacy is suspect because it is a characteristic determined entirely by birth; it is a status that the illegitimate is powerless to change; and it subjects the illegitimate to the stigma of inferiority and disgrace. The majority held the discrimination invidious for lack of a rational basis, not reaching the issue of suspectness. 417 U.S. at 631-32.

But in *Mathews v. Lucas* the Court stated that illegitimacy was not a suspect classification because the discrimination had never been as extensive or severe as that aimed against blacks and women, nor was illegitimacy an obvious badge like race and sex. 427 U.S. 495.


In the evolving area of equal protection as to gender, see *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

See *Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933-34 n.85 (1973). Ely urges special suspicion toward classifications in which the decision-makers, who are members of the majority class, are likely to rely on historical stereotypes which portray certain minorities, e.g., blacks and women, as inferior and therefore as likely objects of discrimination.

This theory was dubbed "minimum scrutiny with bite" by Professor Gerald Gunther and was described as bridging the gap between the "old equal protection" test with its presumption of the statute's constitutionality and the "new equal protection" test with its very strict scrutiny of statutes involving suspect classifications and fundamental rights. For an explication of this theory, see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).
tially furthers that goal. This was the rationale used by the dissent in *Labine* to find that the statute's discrimination against an acknowledged illegitimate had no rational basis.79

Another recent theory is based upon the Court's rationale in *Jimenez v. Weinberger*.80 In that case the Supreme Court used a combination of the "means-oriented" equal protection and the due process irrebuttable presumption tests to hold the discriminating statute unconstitutional. Not only did the Court find that the statute in question was not a rational means to achieve the state's goal, but they also determined that the statute deprived the appellants of their right to claim social security benefits without giving them the chance to prove their eligibility as dependents.81

At odds with the "means-oriented" theory is Justice Marshall's "sliding scale" approach. The intensity of the Court's scrutiny would depend upon balancing the importance of the interest threatened by the classification against the effectiveness of the state's statutory scheme in achieving certain goals and the importance of those stated goals.82 This same approach was used in *Weber*.83 The Court there asked: (1) What legitimate state interest does the classification further? and (2) What fundamental personal rights84 might be threatened by the classification? Under this approach the Court

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79 401 U.S. at 553.
81 See note 37 supra for cases dealing with irrebuttable presumptions.
83 See also Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. Rev. 479 (1974), for a convincing application of Justice Marshall's approach to explain the Supreme Court's extension of equal protection to illegitimates in several areas and their refusal to do the same in the area of intestate succession.

It is interesting to speculate whether the right of intestate succession could be considered so important as to be a fundamental right protected by the fourteenth amendment. If so, then the state could regulate the disposition of such property only so long as the illegitimate were not completely barred from inheriting.
would balance the importance of the illegitimate’s inheritance rights against the importance of the state’s goals and the effectiveness of the intestate succession scheme in achieving those goals.

Although it is possible under any of the four rationales above that the Supreme Court will reaffirm or overrule Labine upon re-examination, it is more probable that they would choose to distinguish Pendleton on the grounds that it involves intra-class discrimination. The dissent in Labine was strong and unified, and since that decision the Court’s personnel has changed. In light of the subsequent decisions in favor of the illegitimate’s rights at law and the dissatisfaction shown by the courts in Green and Pendleton, the Supreme Court may decide it is time to re-examine the illegitimate’s rights in the area of intestate succession. If so, Pendleton offers the Court a clear opportunity to recognize the illegitimate’s right to inherit property equally with legitimates under the fourteenth amendment.*

Donna Chu

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* It is significant to note that after Labine, two of the five justices in the majority, Justices Black and Harlan, were replaced by Justices Powell and Rehnquist. Thereafter the Court handed down several decisions favorable to illegitimates. See note 2 supra. On the other hand, one of the dissenters in Labine, Justice Douglas, has since resigned. Thus a current count of the Labine Court (assuming all of the original voters are of the same mind) would be three to three leaving three votes uncertain.

** See note 2 supra.

7 If a state cannot constitutionally force a father to support his children without including illegitimate children, we can find no justification in logic for its authority to deny illegitimate children the same right of inheritance conferred upon other children. Though . . . the father may of course discriminate against any child, legitimate or illegitimate, it seems incongruous that the state should be allowed to do it for him. But after all, this is mere logic, which seems to have a declining importance in the world of constitutional jurisprudence.

Pendleton v. Pendleton, 531 S.W.2d at 511.

* Editor’s Note: Since this Comment was written, there have been several significant developments. In April, the United States Supreme Court handed down its decision, the Court struck down an Illinois statute which prohibited an illegitimate from inheriting from his father’s intestate estate. Since the law was held unconstitutional on equal protection grounds, the Court did not reach the sex discrimination issue also raised by the appellant.

Writing for the plurality, Mr. Justice Powell cited Mathews v. Lucas, 427 U.S. 495 (1976), and Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), in reaffirming that,
although illegitimacy is not a suspect classification requiring strict scrutiny, nevertheless such classification requires a rational relationship to a legitimate state purpose. The state goals of preserving stability of titles and orderly disposition of intestate property are not hindered in a substantial number of cases where the illegitimate's paternity is not in dispute. The plurality opinion, while rejecting the Court's previous deference to state intestacy laws in Labine v. Vincent, 401 U.S. 572 (1971), did not overrule that decision. The Court instead chose to distinguish Labine on the basis of the difference in Louisiana's classification of illegitimates for the purpose of intestate succession. See text accompanying nn. 62-68 supra.

On the other hand, the four dissenting justices briefly stated that they found the instant case "constitutionally indistinguishable" from Labine and would have accordingly upheld the Illinois statute. No. 75-5952, slip op. at 15 (U.S. Apr. 26, 1977). Mr. Justice Rehnquist filed a separate dissent in which he deplored the Court's use of the equal protection clause to "instruct [state legislatures] in a better understanding of how to accomplish their ordinary legislative tasks." No. 75-5952, dissenting opinion at 8 (U.S. Apr. 26, 1977).

On May 17, United Press International reported that the United States Supreme Court had issued a directive to both Kentucky and New York State courts to "review earlier rulings against illegitimates inheriting from their fathers." Lexington Herald, May 17, 1977, § C-7, col. 2.

On May 20, the Court of Appeals of Kentucky decided Rudolph v. Rudolph, No. Ca-373-MR (C.A. Ky. May 20, 1977) and held KRS § 391.090 unconstitutional. The Court of Appeals found the statute unconstitutional under Section 2 of the Kentucky Constitution "insofar as that statute would bar the appellant from inheriting from his father." Id. at 3.