

TOWARD EQUALITY: NONMARITAL CHILDREN AND THE UNIFORM PROBATE CODE[†]

Paula A. Monopoli*

This Article traces the evolution of the Uniform Probate Code's (UPC) broad equality framework for inheritance by nonmarital children in the context of the wider movement for legal equality for such children in society. It concludes that the UPC is to be lauded for its efforts to provide equal treatment to all nonmarital children. The UPC's commitment to such equality serves an expressive function for state legislatures and courts to follow its lead. The UPC has fulfilled its promise that all children regardless of marital status shall be equal for purposes of inheritance from or through parents, with one exception: its adoption of an agency approach to the inclusion of such children in class gifts from nonparent transferors. The Article analyzes this one exception and evaluates the systemic costs and constitutional concerns surrounding the use of an agency theory in this context. The Article concludes that a previous default rule under the UPC was the more equitable approach and suggests a return to that rule as it existed from 1975 to 1990. This approach was recently embraced by the Massachusetts legislature in its new probate code.

INTRODUCTION

The 1960s witnessed an equality revolution that we usually associate with race and gender. But there was another, less visible, equality movement that had its roots in that era—the idea that children born out of wedlock, or “nonmarital” children, should be treated in the same way as children born to a married couple. Legal scholars began to lay the groundwork for a theory of equal treatment of nonmarital children, and the original 1969 Uniform Probate Code (UPC) reflected that scholarly embrace of equality and civil rights. The UPC has remained faithful to that original equality framework. This Article analyzes how the UPC's equality framework has evolved since 1969 to provide for the equal treatment of virtually all nonmarital children. With one small exception—class gifts from nonparent transferors—the UPC has

[†] Paula A. Monopoli, © Copyright 2012. All rights reserved.

* Professor of Law, University of Maryland School of Law; B.A., Yale College, 1980; J.D., University of Virginia School of Law, 1983. The author would like to thank Susan G. McCarty, Christopher Gray, and Michael Kellerman for their research assistance and Christopher Hirst for his editorial assistance with this Article.

provided nonmarital children the opportunity to inherit from and through their parents in the same manner as children born in wedlock.

Part I discusses the evolution of the law concerning nonmarital children and the development of the UPC's broad protective framework for nonmarital children. Part II examines how using an agency approach in section 2-705(e) of the UPC to determine whether nonmarital children should be included in a class gift from a nonparent transferor deviates from the UPC's overall equality framework. Part III illustrates the costs of such an agency approach, while Part IV outlines a possible constitutional argument against the approach. Part V argues for a return to the default rule found in the version of section 2-611 of the UPC as it existed between 1975 and 1990 and recently embraced by the Massachusetts legislature in its new probate code.

I. THE EVOLUTION OF THE CASE LAW, THE UPC, AND THE UPA

As noted above, in the midst of the 1960s-era equality revolution in gender and race, scholars were also developing an intellectual framework for legislative and judicial law reform with regard to society's unequal treatment of nonmarital children. For example, in his 1966 article, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*,¹ Professor Harry Krause noted the “inadequacy” of the treatment of nonmarital children under the common law² and proposed a model statute that would provide a framework for equality.³ In 1967, Krause wrote a second article, entitled *Equal Protection for the Illegitimate*,⁴ in which he argued that the Equal Protection Clause of the Fourteenth Amendment should apply to statutes that treat nonmarital children differently from marital children.⁵

1. Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966).

2. *Id.* at 831.

3. *Id.*

4. Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

5. *See id.* at 484.

Krause argued that these statutes reflected a significant bias against such children⁶ and were arguably unconstitutional.⁷

A. Case Law

Krause's articles provided the theoretical groundwork for the U.S. Supreme Court's landmark 1968 decision in *Levy v. Louisiana*,⁸ in which five nonmarital children sought damages for the wrongful death of their mother.⁹ Under the relevant Louisiana statute, a child could recover damages for a parent's wrongful death,¹⁰ the Louisiana Court of Appeal, however, held that "child," as used in the statute, only referred to "legitimate child" and therefore excluded nonmarital children.¹¹ The Court reversed the Louisiana Court of Appeal, holding that nonmarital children were "'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."¹² The Court said that a state could not "draw a line which constitutes an invidious discrimination against a particular class."¹³ The Court also held that a state could not discriminate against nonmarital children "when no action,

6. *See id.* at 500. According to Krause, there are five primary justifications for discriminatory legislation against nonmarital children. Krause argues against each of these justifications, asserting that the real motivation behind this legislation is the "long history of discrimination against the illegitimate." *Id.* The first justification is that there is more uncertainty regarding paternity for nonmarital children. This is not a sufficient justification because every birth is unique; paternity may be certain for many nonmarital children, and may be uncertain for many children born in wedlock. The second justification is that legislation against nonmarital children discourages promiscuity. This justification fails because such legislation unfairly punishes illegitimate children for the mistakes of their parents, and it does not effectively prevent unmarried couples from having sex. The third justification is to protect the family unit. As with the second justification, this justification fails because a state that truly wants to prohibit casual unions can do so directly rather than by unfairly punishing the children produced by casual relationships. The fourth justification is that nonmarital children do not have close relationships with their fathers. This justification, however, does not accurately portray reality in that an illegitimate child may already have a close relationship with his father, while a legitimate child may never have met his father. The final justification is that it should be the father's choice whether to recognize a nonmarital child. This is unpersuasive, because it may result in a child being stigmatized through the term bastard and, more significantly, in the loss of property rights and social status afforded most children. *See id.* at 489–96.

7. *See id.* at 500.

8. 391 U.S. 68 (1968).

9. *Id.* at 69. The lawsuit was filed against their mother's doctor and insurance company. *Id.* at 70.

10. *Id.* at 70 n.1.

11. *Id.* at 70.

12. *Id.*

13. *Id.* at 71.

conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.”¹⁴

The Court arguably retreated a bit from its ruling in *Levy* when, in 1971, it upheld a statutory distinction between marital and nonmarital children in *Labine v. Vincent*.¹⁵ *Labine* involved a nonmarital child whose father died intestate.¹⁶ Louisiana law provided that an acknowledged nonmarital child could only inherit when her father “has left no descendants nor ascendants, nor collateral relations, nor surviving wife.”¹⁷ Thus, the lower court found that the father’s brothers and sisters, and not the nonmarital child, should inherit the entire estate.¹⁸

In affirming the lower court’s decision, the Court declined to extend its reasoning in *Levy*, noting that “*Levy* did not say and cannot be fairly read to say that a State can never treat an illegitimate child differently from legitimate offspring.”¹⁹ The Court emphasized that, unlike the statute in *Levy* “where the State . . . created an insurmountable barrier” for nonmarital children,²⁰ the statute in *Labine* permitted nonmarital children to inherit from the estates of their fathers under certain circumstances; for example, a nonmarital child could inherit from her father if her father had executed a will naming her as one of his beneficiaries, legitimated her by marrying her mother, or followed a procedure provided for under Louisiana law in conjunction with his acknowledgement of paternity.²¹ The Court, therefore, held that the law violated neither the Equal Protection Clause nor the Due Process Clause, and affirmed the lower court’s decision.²²

The *Labine* Court was sharply divided, with five justices in the majority and four justices joining Justice Brennan’s dissent.²³ In his dissent, Justice Brennan’s analysis²⁴ foreshadows the later 5–4 decision in *Trimble v. Gordon*,²⁵ discussed below, in which the Court

14. *Id.* at 72.

15. 401 U.S. 532 (1971).

16. *Id.* at 533.

17. *Id.* at 534.

18. *Id.*

19. *Id.* at 536.

20. *Id.* at 539.

21. *Id.*

22. *Id.* at 539–40.

23. *Id.* at 541 (Brennan, J., dissenting).

24. Justice Brennan notes that all the authorities cited to the Court, including the UPC, suggest the conclusion that a father who has publicly acknowledged his child would not want to disinherit her. This mention of the UPC by Justice Brennan indicates that even a mere two years after it was promulgated, the UPC was having an impact at the highest jurisprudential levels. *See id.* at 556 (Brennan, J., dissenting).

25. 430 U.S. 762 (1977).

found that an intestacy statute that treated nonmarital children differently from marital children violated the Equal Protection Clause.

From 1971 to 1978, the Court continued to develop its jurisprudential approach regarding nonmarital children and intestacy statutes. In 1977 and 1978, respectively, the Court decided the landmark inheritance cases *Trimble v. Gordon* and *Lalli v. Lalli*,²⁶ both of which are discussed in more detail in Part IV below.²⁷ *Trimble* and *Lalli*, taken together, established the current constitutional parameters for state inheritance statutes as they apply to nonmarital children; these parameters include an intermediate standard of scrutiny for such statutes, affording nonmarital children a higher level of constitutional protection than that afforded under the rational basis standard used in *Labine*.²⁸

B. The UPC

The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the UPC in 1969.²⁹ Technical amendments were incorporated in 1975 in response to the enactment of the Uniform Parentage Act (UPA) in 1973. NCCUSL further revised Article II in 1990 and 2008. The following sections trace the evolution of the statutes that define the parent-child relationship for purposes of intestacy and class gifts.

1. Intestacy

Section 2-109 of the original UPC allowed a nonmarital child to inherit from his mother when she died intestate.³⁰ In order for a nonmarital child to inherit from his father in intestacy, however, the child had to establish such eligibility³¹ in one of three ways: (1) the natural parents participated in a marriage ceremony after the child's birth; (2) paternity was established by adjudication prior

26. 439 U.S. 259 (1978).

27. See *infra* notes 163–172 and accompanying text.

28. See analysis of *Trimble* *infra* note 170 and accompanying text.

29. UNIF. PROBATE CODE historical notes (2011), 8 U.L.A. pt. I, at 1 (1998). NCCUSL is now known as the Uniform Law Commission (ULC), but this Article will refer to it as NCCUSL.

30. See UNIF. PROBATE CODE § 2-109(1) (1969) (amended 2008).

31. See *id.*

to the father's death; or (3) paternity was established after the father's death by clear and convincing proof.³²

In 1975, NCCUSL amended the UPC³³ to conform it to the recently promulgated UPA.³⁴ The UPC provided that if a state had enacted the UPA, the UPA's mechanism for establishing paternity would apply;³⁵ if a state had not enacted the UPA, an alternative subsection of section 2-109 prescribing the mechanism by which a child could demonstrate that he was a child of the father would apply.³⁶

In 1990, Article II of the UPC was significantly revised.³⁷ Section 2-109 essentially became section 2-114.³⁸ Section 2-114 defined the parent-child relationship as follows: "an individual is the child of his [or her] natural parents, regardless of their marital status."³⁹ The relationship between parent and child could be established under the mechanism provided under the UPA or, if a state had not enacted the UPA, under applicable state law.⁴⁰

Finally, in 2008, Article II of the UPC was amended again.⁴¹ Section 2-114 effectively became sections 2-115, 2-116, and 2-117. When read together these provisions provide a definition of

32. *Id.* § 2-109(1)(i)–(ii).

33. UNIF. PROBATE CODE 1975 technical amendments (1975), 8 U.L.A. pt. I, at 1 (1998).

34. *See id.*, 8 U.L.A., pt. I, at 2 (1998).

35. UNIF. PROBATE CODE § 2-109 (1975) (amended 2008), 8 U.L.A. 284 (1998).

36. *See id.* If a state had not adopted the UPA, it could adopt the alternative subsection, which read as follows:

[(2) In cases not covered by Paragraph (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

- (i) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
- (ii) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, but the paternity established under this subparagraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.]

Id. This bracketed portion of section 2-109 kept the prior language of the UPC merely in the event that a state had not adopted the UPA.

37. *See* UNIF. PROBATE CODE art. 2, prefatory note (2011), 8 U.L.A. pt. I, at 75 (1998).

38. *See* Patricia G. Roberts, *Adopted and Nonmarital Children—Exploring the 1990 Uniform Probate Code's Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539, 540 (1998).

39. UNIF. PROBATE CODE § 2-114(a) (1990) (amended 2008), 8 U.L.A. pt. I, at 91 (1998) (the bracketed phrase "or her" is included in the UPC provision's text).

40. *See id.* § 2-114(a) & cmt. (amended 2008), 8 U.L.A. pt. I, at 91 (1998).

41. UNIF. PROBATE CODE art. 2, prefatory note (2011), 8 U.L.A. pt. I, at 33 (Supp. 2011).

genetic fathers and mothers,⁴² explain the effect of establishing a parent-child relationship,⁴³ and establish that a parent-child relationship exists between parents and children regardless of the parents' marital status.⁴⁴

2. Rules of Construction and Class Gifts

Bequests in a will or trust that reference the beneficiary's relationship to a particular person, for example a bequest to "my daughter's children," are known as class gifts. In 1969, the original section 2-611 of the UPC provided that an out-of-wedlock child would be included in a class gift to the child's natural parent's children if he met the definition of "child" under the intestacy rules of section 2-109.⁴⁵ However, an out-of-wedlock child would only be considered a child of his father for construing class gifts if he had been openly and notoriously treated as such by the father.⁴⁶ In the same 1975 technical amendments that conformed the UPC to the UPA, this open and notorious provision was dropped such that, under section 2-611, if a nonmarital child were included for purposes of intestacy under section 2-109, the nonmarital child would be included in a class gift from either of his parents or from nonparents.⁴⁷

In 1990, section 2-611 became section 2-705,⁴⁸ which provided that nonmarital children were included in class gifts from parents.⁴⁹ However, this new section made a significant policy shift with regard to nonparent transferors. Unlike the 1975–1990 version of section 2-611 of the UPC, section 2-705 added an

42. See *id.* § 2-115, 8 U.L.A. pt. I, at 50–51 (Supp. 2011).

43. See *id.* § 2-115 8 U.L.A. pt. I, at 52 (Supp. 2011).

44. See *id.* § 2-117, 8 U.L.A. pt. I, at 53 (Supp. 2011). Exceptions to this rule are noted in §§ 2-114, 2-119, 2-120, and 2-121. See *id.*; see also UNIF. PROBATE CODE § 2-117 cmt. (2011), 8 U.L.A. pt. I, at 53 (Supp. 2011).

45. See UNIF. PROBATE CODE § 2-611 (1969) (amended 1990); see also NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS, 1975 PROCEEDINGS IN COMMITTEE OF THE WHOLE, UNIFORM PROBATE CODE AMENDMENTS 13 [hereinafter NATIONAL CONFERENCE PROCEEDINGS].

46. See UNIF. PROBATE CODE § 2-611 (1969) (amended 1990) (noting that "a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father"); see also NATIONAL CONFERENCE PROCEEDINGS 13.

47. See UNIF. PROBATE CODE § 2-611 (1975) (amended 1990), 8 U.L.A. pt. I, at 434 (1998); see also NATIONAL CONFERENCE PROCEEDINGS, *supra* note 45, at 13–14. (identifying the switch from a system placing a "burden" on the child to a system conforming to the UPA).

48. See UNIF. PROBATE CODE § 2-705 (1990) (amended 2010), 8 U.L.A. pt. I, at 187 (1998).

49. See *id.* § 2-705(a) 8 U.L.A. pt. I, at 187 (1998).

additional hurdle to those nonmarital children seeking inclusion in a class gift from nonparents. Section 2-705(b) of the UPC stated the following:

(b) [I]n construing a dispositive provision of a transferor who is not the natural parent, an individual born to the natural parent is not considered the child of that parent unless the individual lived while a minor as a regular member of the household of that natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse.⁵⁰

In 2008, section 2-705 was amended again.⁵¹ Section 2-705(e) now provides that the parent or another specified relative must have functioned as a parent in order for a nonmarital child to be included in a class gift from a nonparent.⁵² The concept "functioned as a parent of the child" is defined in the new section 2-115 and, as the Comment notes, is adapted from the *Restatement (Third) of Property: Wills and Other Donative Transfers*.⁵³

C. The UPA

The UPA was first promulgated in 1973 by NCCUSL,⁵⁴ and its provisions regarding parentage are incorporated by reference into

50. *Id.* at 187–88. According to the Amendments section following the comment associated with § 2-705, the 1991 amendment in subsection (b) substituted "dispositive provision of" for "donative disposition by." *Id.* at 189.

51. *See id.* § 2-705 (2011), 8 U.L.A. pt. I, at 141–42 (Supp. 2011). Note that section 2-705(b) was amended again in 2010 to clarify that an expression of contrary intent as to inclusion or exclusion of a child born to parents who were not married to each other was not to be applied to children born as the result of assisted reproduction. EXEC. COMM. OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE CONFORMING AND TECHNICAL AMENDMENTS 16 (2010).

52. *See id.* § 2-705(e) (2011), 8 U.L.A. pt. I, at 141 (Supp. 2011).

53. *Id.* § 2-115 cmt. (2011), 8 U.L.A. pt. I, at 51 (Supp. 2011) (citing RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 14.5 reporter's note 4 as providing a description of the behaviors that constitute "functioned as a parent of the child"). Section 2-115 provides that functioning as a parent means:

[B]ehaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household.

Id. § 2-115(4) (2011), 8 U.L.A. pt. I, at 50 (Supp. 2011).

54. UNIF. PARENTAGE ACT, historical notes (2002), 9B U.L.A. 377 (2001).

the UPC.⁵⁵ In the UPA's Prefatory Note, the authors write that the UPA was specifically promulgated to address the inequality of nonmarital children.⁵⁶ Given the U.S. Supreme Court's decisions from 1968 through 1972, states needed legislative guidance—many state statutes governing the rights of nonmarital children (or lack thereof) were “either unconstitutional or subject to grave constitutional doubt,”⁵⁷ and compliance with the Court's new case law was required.⁵⁸

Section 2 of the original UPA read, “The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.”⁵⁹ Section 3 provided that a mother-child relationship was established by proof of giving birth to the child.⁶⁰ Section 4 provided that a father-child relationship was presumed if, among other things, the man was married to the mother at the time of the child's birth, had attempted to marry her before the child's birth (although the attempted marriage could be declared invalid), married the mother at a later time and acknowledged paternity in writing, was named with his consent on the child's birth certificate, or was obligated to support the child by voluntary promise or by court order.⁶¹ A presumption of paternity also existed under section 4 if the man received the child into his home while the child was a minor, and openly held the child out as his natural child or acknowledged his paternity in writing.⁶²

55. See UNIF. PROBATE CODE § 2-115 Legislative Note (2011), 8 U.L.A. pt. I, at 51 (Supp. 2011) (“States that have enacted the Uniform Parentage Act (2000, as amended) should replace ‘applicable state law’ in paragraph (5) with ‘Section 201(b)(1),(2), or (3) of the Uniform Parentage Act (2000, as amended).’ Two of the principal features of Articles 1 through 6 of the Uniform Parentage Act (2000, as amended) are (i) the presumption of paternity and the procedure under which that presumption can be disproved by adjudication and (ii) the acknowledgement of paternity and the procedure under which that acknowledgement can be rescinded or challenged.”).

56. See UNIF. PARENTAGE ACT, prefatory note (2002), 9B U.L.A. 378 (2001). Professor Krause is mentioned multiple times for his contributions to the movement to put nonmarital children on equal footing with marital children. The UPA itself, according to the note, is based on Krause's *A Proposed Uniform Act on Legitimacy*, *supra* note 1, and “Professor Krause agreed to serve as reporter to the committee.” UNIF. PARENTAGE ACT, prefatory note (2002), 9B U.L.A. 378 (2001).

57. UNIF. PARENTAGE ACT, prefatory note (2002), 9B U.L.A. 378 (2001).

58. See *id.* The prefatory note goes on to cite two cases that were important in this change: *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164, 175 (1972), and *Gomez v. Perez*, 409 U.S. 535, 538 (1973). See UNIF. PARENTAGE ACT, prefatory note (2002), 9B U.L.A. 379 (2001).

59. UNIF. PARENTAGE ACT § 2 (1973) (amended 2000), 9B U.L.A. 390 (2001).

60. See § 3, 9B U.L.A. 391 (2001).

61. See § 4(a) (1)–(3), 9B U.L.A. 393–94 (2001).

62. See § 4(a) (4)–(5), 9B U.L.A. 394 (2001).

The UPA underwent significant revisions in 2000.⁶³ Under section 201 of the revised UPA, a mother-child relationship can be established by:

- (1) the woman's having given birth to the child, except as otherwise provided in Article 8;
- (2) an adjudication of the woman's maternity;
- (3) adoption of the child by the woman; or
- (4) an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under Article 8 or is enforceable under other law.⁶⁴

A father-child relationship can be established by:

- (1) an un rebutted presumption of the man's paternity of the child under Section 204;
- (2) an effective acknowledgement of paternity by the man under Article 3, unless the acknowledgment has been rescinded or successfully challenged;
- (3) adjudication of the man's paternity;
- (4) adoption of the child by the man;
- (5) the man's having consented to assisted reproduction by his wife under Article 7 that resulted in the birth of the child; or
- (6) an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under Article 8 or is enforceable under other law.⁶⁵

The Comment to this section notes that section 4 of the UPA (1973) was expanded here "to include all possible bases of the parent-child relationship."⁶⁶

As noted above, section 202 of the UPA (2000) provides that a nonmarital child has the same rights as a child born to married parents.⁶⁷ The Comment notes that that "this is one of the most significant substantive provisions of the [UPA (2000)],"⁶⁸ reaffirming the principle that first appeared in the original UPA.⁶⁹

63. See UNIF. PARENTAGE ACT, historical notes (2002), 9B U.L.A. 295 (2001).

64. *Id.* § 201(a), 9B U.L.A. 309 (2001).

65. *Id.* § 201(b), 9B U.L.A. 309 (2001).

66. *Id.* § 201 cmt., 9B U.L.A. 309 (2001).

67. See *id.* § 202 (2000), 9B U.L.A. 309 (2001).

68. *Id.* § 202 cmt. (2000), 9B U.L.A. 310 (2001).

69. See *id.*

However, the Comment also notes that this “broad” statement regarding the rights of nonmarital children does not eliminate all distinctions between nonmarital children and marital children.⁷⁰ As an example of such a distinction, the Comment references section 2-705(b) of the pre-2008 UPC:

In short, the UPC (1993) provides that an individual is presumed not to be included in a class gift from someone other than the child’s parent unless that individual lived as a member of the parent’s family during childhood. This presumed intent of the donor is rebuttable. Although this provision probably has a disproportionate effect on nonmarital children, the disparity is not based on the circumstances of birth, but rather on post-birth living conditions.⁷¹

Section 204 reiterated the traditional marital presumption that the husband of a woman who gives birth is the legal father of that child.⁷² The UPA was amended in 2002 as a result of “objections” to the 2000 version raised by the American Bar Association Section of Individual Rights and Responsibilities and the American Bar Association Committee on the Unmet Legal Needs of Children.⁷³ After much controversy, section 204 was amended to include a presumption of paternity for a nonmarital child whose father had lived in the household for two years after the child’s birth and “openly held the child out as his own.”⁷⁴

II. THE OUTLIER: UPC SECTION 2-705(e)

Taken together, the case law, the UPA, and the UPC have evolved to produce a large measure of equality for nonmarital children. NCCUSL is to be commended for giving voice to a powerful expressive dimension of American equality jurisprudence in crafting these uniform laws. Since its inception in 1969, the UPC has made great strides toward providing a comprehensive equality

70. *Id.*

71. *Id.*

72. *See id.* § 204, 9B U.L.A. 310 (2001).

73. UNIF. PARENTAGE ACT prefatory note (2002), 9B U.L.A. 6 (Supp. 2011).

74. UNIF. PARENTAGE ACT § 204(a)(5) (2002), 9B U.L.A. 23 (Supp. 2011); *see also* Paula Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 SANTA CLARA L. REV. 857, 882–83 (2008) (citing John J. Sampson, *Preface to the Amendments to the Uniform Parentage Act (2002)*, 37 FAM. L.Q. 1 (2003)) (discussing the history of the revised UPA).

framework for nonmarital children in the context of inheritance law. The overarching theme has been to eliminate barriers for such children in inheriting from their fathers and to minimize the stigma attached to being a nonmarital child in our society. The only piece of the framework that arguably still impedes full equality is the agency approach taken in the area of class gifts from nonparent transferors, as embodied in section 2-705(e) of the UPC.

In her recent article, *Illegitimate Harm: Law, Stigma and Discrimination Against Nonmarital Children*,⁷⁵ Professor Solangel Maldonado notes that the pre-2008 UPC section 2-705(b), which required a child to have lived with his father or father's relatives, seemingly singled out nonmarital children for differential treatment.⁷⁶ This is an important issue because of the increasing number of nonmarital children who may be affected by such an approach.⁷⁷ While the 2008 amendments to Article II replaced living with the father with having the father function as a parent in section 2-705, Maldonado correctly notes that the post-2008 section 2-705(e) "has a similarly disparate impact on nonmarital children."⁷⁸ Section 2-705(e) provides:

[A] child of a genetic parent is not considered the child of the genetic parent unless the genetic parent, a relative of the genetic parent, or the spouse or surviving spouse of the genetic parent or of a relative of the genetic parent functioned as a parent of the child before the child reached [18] years of age.⁷⁹

Maldonado provides the following illustration of section 2-705(e):

75. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011).

76. See *id.* at 359.

77. The number of children born out of wedlock in this country has risen significantly. There were 89,500 out-of-wedlock births in 1940 compared with more than 1.7 million such births in 2009. STEPHANIE J. VENTURA, NAT'L CTR. FOR HEALTH STATISTICS, CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES 2 (2009), available at <http://www.cdc.gov/nchs/data/databriefs/db18.pdf> (reporting nonmarital births as a percentage of all births rising from 18.4% in 1980 to 39.7% in 2007); see also BRADY E. HAMILTON ET AL., NAT'L CTR. FOR HEALTH STATISTICS, BIRTHS: PRELIMINARY DATA FOR 2009 4 (2010), available at http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_03.pdf (reporting that nonmarital births climbed to 41.0% of all births in 2009).

78. Maldonado, *supra* note 75, at 359.

79. UNIF. PROBATE CODE § 2-705 (2011), 8 U.L.A. pt. I, at 141-42 (Supp. 2011) (alteration in original).

[A] nonmarital child whose father (let's call him David) had little contact with her (even though paternity is undisputed), and thus never functioned as a parent, would not be considered David's genetic child for purposes of a third party's bequest to "David's descendants."⁸⁰

Essentially, under section 2-705, if the child is not in the family circle, the father is not considered the child's parent. The child would, therefore, not receive any part of a nonparent's class gift to the father's descendants.

A. *History of Section 2-705(e)*

As noted above, section 2-611 of the original UPC provided that nonmarital children would be included in class gifts from their mothers or through their mothers. However, in order for such children to be included in class gifts from or through their fathers, the father would have had to have openly and notoriously held such a child out as his own.⁸¹ In 1975, the UPC drafters altered that rule by deleting the clause that required a different standard for inheriting from fathers. Thus, the 1975 version of section 2-611 provided that all nonmarital children would be included in class gifts (presumably from parents or nonparents) if they were eligible to inherit under the intestacy provisions of section 2-109.⁸² In making this change, the drafters explained:

2-611 is a change, again, to conform the Uniform Probate Code to the Uniform Parentage Act. Here we are dealing with the meaning to be given to words used by a testator called "class gift" terms, which include "child", "issue" or other terminology, for somebody to figure out when is a child a child, and, specifically, is an illegitimate child a child?

The former language of the Code, as now enacted, in lines 10 through 12 on page 20 of this package, put a burden of special proof here—not a child of the father, unless the person is openly or notoriously so treated. We support now, or suggest now, a total deletion of the special burden of proof to show parentage by a father of a child born out of wedlock, and that's what lines 8, 9 and 10 are about.

80. Maldonado, *supra* note 75, at 359–60.

81. See *supra* notes 45–46 and accompanying text.

82. See *supra* note 47 and accompanying text.

We delete this. We leave in, as bracketed, the old language, again for the same reason as formerly described, that this has been enacted and picked up by at least one or two of the states that have picked up the Code, and we don't want, by amending it, to put them in a category of noncompliance here.⁸³

In 1990, as discussed above, section 2-611 became section 2-705,⁸⁴ and an agency theory was adopted to support a shift in policy. A nonmarital child who would have automatically been included in a class gift from a nonparent if he qualified as a child for purposes of intestacy from 1975–1990 would now have to overcome a hurdle not required of marital children. He would have to establish that he lived in the household of a family member in order to inherit. The Comment to section 2-705 of the UPC described the agency theory upon which the shift was grounded: a transferor would only want a child to be included in a class gift if the child lived with the parent (or parent's relative) before turning eighteen.⁸⁵ This language was based on the California Probate Code.⁸⁶

83. National Conference Proceedings, *supra* note 45, at 13–14 (noting why there was a switch from a system placing a “burden” on the child to a system conforming to the UPA).

84. See UNIF. PROBATE CODE § 2-705 (1993). It should be noted that the pre-2008 UPC was arguably neutral in that it made both marital and nonmarital children subject to the test imposed: “By its terms, the section is not limited to cases involving non-marital children, but the most obvious case contemplated would involve a gift from *O* to ‘*A*’s children’ where *A* has a non-marital child.” Patricia G. Roberts, *Adopted and Nonmarital Children—Exploring the 1990 Uniform Probate Code’s Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539, 545–46 (1998) (discussing UPC § 2-705). The pre-2008 section 2-705(a) “provides that adopted and non-marital children are included in class gifts if they, at a minimum, qualify to take under the rules for intestate succession If the transferor is not the natural or adopting parent, sections (b) and (c) impose requirements in addition to the section 2-114 intestacy requirements.” *Id.* at 545. Section (b) provides:

In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the natural parent, an individual born to the natural parent is not considered the child of that parent unless the individual lived while a minor as a regular member of the household of that natural parent or of that parent's parent, brother, sister, spouse or surviving spouse.

UNIF. PROBATE CODE § 2-705(b) (1990) (amended 2010), 8 U.L.A. pt. I, at 188 (1998).

However, the post-2008 section 2-705(b) specifically applies subsection (e) to a child born to parents “who are not married.” *Id.* § 2-705(b) (2008) (amended 2010), 8 U.L.A. 141 (Supp. 2011). Thus, I would argue it is not status-neutral.

85. See UNIF. PROBATE CODE, § 2-705 cmt. (amended 2010), 8 U.L.A. pt. I, at 188 (1998).

86. *Id.* California's probate code reads:

In 2008, section 2-705 was revised again. The drafters noted that the revisions were based on the most recent version of the *Restatement (Third) of Property: Wills and Other Donative Transfers* regarding class gifts.⁸⁷ The first Restatement had embodied the common law rule in 1940, which excluded nonmarital children from class gifts by both parents and nonparents unless a contrary intent was indicated.⁸⁸ However, in 1988 the drafters of the Restatement (Second) reversed that rule and presumptively included nonmarital children in class gifts to one's children or the children of another under section 25.2.⁸⁹

The Restatement (Third) of Property⁹⁰ echoes the UPC section 2-705 shift in the form of a new section 14.7 that replaced the prior section 25.2.⁹¹ It too provides that while a nonmarital child will be included in a class gift from a parent, he will only be included in a gift from a nonparent if the parent or the parent's relative functioned as a parent to the nonmarital child.⁹²

§ 21115. Halfbloods, adoptees, persons born out of wedlock, stepchildren and foster children; inclusion[.]

...

(b) In construing a transfer by a transferor who is not the natural parent, a person born to the natural parent shall not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse.

CAL. PROB. CODE § 21115 (West 2011).

87. See UNIF. PROBATE CODE, § 2-705 cmt. (amended 2010), 8 U.L.A. 142 (Supp. 2011).

88. See RESTATEMENT OF PROP. § 286(1) (1940) ("Children"—Exclusion of Illegitimate Descendants).

89. The prior section 25.2 provides:

When the donor of property describes the beneficiaries thereof as the "children" of a designated person, the primary meaning of such class gift term includes a descendent in the first generation of such person who is born out of wedlock. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 25.2 (1988). The comment to this section states that "[t]he time has come to shift from a rule that requires a finding of an intent of the donor to include a child born out of wedlock to a rule that requires a finding of an intent to exclude the child. The rule of this section makes that shift." *Id.* § 25.2 cmt. a.

90. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS (2011).

91. See *id.* § 14.7 reporter's note.

92. See *id.* § 14.7; see also Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property*, 33 OHIO N. U. L. REV. 993, 1000 (2007) ("In construing a class gift created by someone other than the child's genetic parent, a nonmarital child is also treated as a child of the child's genetic parent, but only if: (i) the generic parent [sic], the genetic parent's

Thus, section 2-705(e) represents what some would argue is a more nuanced view of the nonparent transferor's intent—only intending to include a nonmarital child in a class gift if the child was part of the family circle. But from 1975 to 1990, the UPC had allowed all nonmarital children to be included in class gifts from both parents and nonparent transferors. In the following sections, I argue for a return to that approach under the former section 2-611, and a move away from the agency approach embodied in section 2-705(e). My argument is grounded in both policy and concerns about inequality under an equal protection analysis. First, however, I will review the foundational principle that divining the testator's intent is an essential goal of inheritance law, and how rules of construction, such as section 2-705, facilitate that goal.

1. Divining the Testator's Intent Under UPC Section 2-705

Section 2-705 of the UPC is a rule of construction. Such rules are used in the law to construe statutes and instruments.⁹³ In the example above, where a grandmother leaves a bequest in her will to her son's "children," a court would use section 2-705 to divine the testator's intent as to whether she meant to include both marital and nonmarital children when her intention is not specified in her will. Many authors have characterized divining testator's intent as the polestar of inheritance jurisprudence.⁹⁴ A

grandparent or a descendant of the genetic parent's grandparent, or the spouse, surviving spouse, domestic partner, or surviving domestic partner of any of the foregoing functioned as a parent of the child before the child reached the age of majority") (footnote omitted). See also Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property* 10–11 (Univ. Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 266, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006627.

93. See BLACK'S LAW DICTIONARY 234 (9th. ed. 2009)

94. Freedom of testation and testator's intent are frequently identified as paramount jurisprudential touchstones in the area of trusts and estates. See Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. MICH. J.L. REFORM 1, 2 (2003). For example, in writing about this area of the law, scholars note, "The organizing principle of Anglo-American law is freedom of disposition: the donor's intention is given effect except to the extent that it contravenes public policy." *Id.* at 2; see also Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 634 (1992) ("The rhetoric of wills law portrays wills as exercises of autonomy and self-determination."); Pamela R. Champine, *My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 NEB. L. REV. 387, 394 (2001) ("[T]he communication of dispositive wishes is the ultimate purpose of the will."); Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 209 (2001) ("Donative freedom is a principal value in the American system of inheritance."); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1114 (1996) ("As judges never tire of reiterating, the object of [will interpretation] is to glean the intent of the testator.") (footnote omitted). These scholars have then gone on to explore the accuracy and the

formalist might characterize the purpose of rules of construction that aid the court in divining intent as a means for finding the individual's actual or subjective intent.⁹⁵ This would differentiate the purpose of rules of construction from the purpose of intestacy statutes, which formalists would argue are in fact expressions of the state legislature's intent as to how property should be reallocated at death.⁹⁶ However, some scholars have noted that rules can actually yield only an imputed intent, not the actual subjective intent of a testator.⁹⁷ Other scholars have noted the fallacy inherent in the effort to assign a real or absolute meaning to the testator's words.⁹⁸

wisdom of those doctrinal touchstones. See Baron, *supra*, at 634–78; Champine, *supra*, at 396–464; Foster, *supra*, at 209–15; Hirsh, *supra*, at 114–15; Waggoner, *supra*, at 2–4.

95. For a broader discussion of formalism and legal realism in the context of statutory construction, see John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREEN BAG 2d 283 (2002):

In the twelve quick pages of *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, Karl Llewellyn largely persuaded two generations of academics that the canons of construction were not to be taken seriously. His point was simple: The canons are indeterminate, and judges use them to justify reasoning by other means. With less impact, earlier realists had made similar claims. But Llewellyn made a chart. At the end of his essay, he aligned 28 “Thrusts” against 28 “Parries.” Finding that each canon had an equal and opposite counterpart, Llewellyn urged courts to “give up that foolish pretense [that] there must be a set of mutually contradictory *correct* rules on How to Construe Statutes.” In place of these technicalities, Llewellyn proposed a more functional approach to interpretation—one that sometimes sought legislative “intent,” but more commonly tried “to make sense” of a statute in light of its “[b]road purposes.”

Id. at 283 (alteration in original) (footnotes omitted) (quoting Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950)).

96. See *id.* at 284.

97. Although many cases identify the importance of freedom of testation and of effectuating testators' intent, one scholar correctly noted:

Our property law system reinforces the classical liberal conception of rights as instruments for promoting individual autonomy. The cloak of private law, along with the traditional view that a donative transfer represents the property owner's unilateral act, causes many to fall into the trap of believing that the law implements, and only should implement, an individual's subjective intent. The state, however, has no direct access to the property owner's subjective will. It only can determine the manifestation of the property owner's will through words and actions. The state's dependence on the property owner's manifestation of intent moves its inquiry from identifying subjective intent to imputing intent.

Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 611–12 (1988) (footnotes omitted).

98. See Scott T. Jarboe, Note, *Interpreting a Testator's Intent from the Language of Her Will: A Descriptive Linguistics Approach*, 80 WASH. U. L.Q. 1365 (2002). Jarboe writes,

Rules of construction in inheritance law are used to divine the donor's intent in the absence of a finding of contrary intent.⁹⁹ As rules that supply a definition of "child" that causes a substantive difference in the distribution of a class gift, they seem very similar to intestacy statutes¹⁰⁰ when viewed through the lens of legal realism.¹⁰¹ The outcomes are the same: property is reallocated at death in a manner chosen by the state.¹⁰² Judges only resort to these rules when meaning cannot be ascertained by language or circumstances; in those instances, they apply these default rules and ascribe an imputed intent to the donor.¹⁰³

The importance of this observation is that it raises the spectre of state action.¹⁰⁴ Courts have held intestacy statutes unconstitutional if they unduly burden the inheritance rights of nonmarital children¹⁰⁵ and at least one state court has extended that analysis to rules of construction, reasoning that the outcomes—the state deciding who will receive a share of the testator's or trustor's property—are the same.¹⁰⁶ Before considering the constitutional implications of rules of construction and whether they are substantively different from intestacy statutes, I will explore the systemic costs, in terms of efficiency, transaction costs, and administrative convenience, raised by the current version of section 2-705 of the UPC.

The ordinary standard [for will interpretation], or "plain meaning," is simply the meaning of the people who did not write the document.

The fallacy consists in assuming that there is or ever can be *some one real* or absolute meaning. In truth, there can only be *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document

Id. at 1365 (alteration and ellipsis in original) (quoting Andrea W. Cornelison, *Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule*, 35 REAL PROP. PROB. & TR. J. 811, 811 (2001)).

99. See UNIF. PROBATE CODE § 2-701 (2011), 8 U.L.A. 181 (1998).

100. See *supra* text accompanying note 92.

101. See BLACK'S LAW DICTIONARY, *supra* note 93, at 979.

102. See *supra* text accompanying note 92.

103. A number of court cases discuss how rules of statutory construction relate to the issue of divining donor or testator intent. See, e.g., *Langille v. Norton*, 628 A.2d 669, 670–71 (Me. 1993); *Tetrault v. Mahoney*, Hawkes & Goldings, 681 N.E.2d 1189, 1194–95 (Mass. 1997); *In re Ruth Easton Fund*, 680 N.W.2d 541, 549–52 (Minn. Ct. App. 2004); *In re Estate of Tateo*, 768 A.2d 243, 246–48 (N.J. Super. Ct. App. Div. 2001); *All Saints' Parish v. Protestant Episcopal Church in the Diocese of S.C.*, 595 S.E.2d 253, 261–64 (S.C. Ct. App. 2004).

104. See *infra* Part IV.A.

105. See *infra* Part IV.B.

106. See *infra* Part IV.C.

III. POLICY CONCERNS IMPLICATED BY THE AGENCY APPROACH
OF UPC SECTION 2-705(e)

What should the ultimate principle be in reallocating property at death? The American system is predominantly still a status-based system of inheritance¹⁰⁷ and, with some exceptions,¹⁰⁸ does not generally use behavior as a criterion for inheritance.¹⁰⁹ Behavior-based models of inheritance raise efficiency and administrative costs, even though they tend to maximize fairness.¹¹⁰ These are important systemic costs to consider. Adding a behavior-based criterion like “functioning as a parent” to the process by which nonmarital children can become eligible to be included in class gifts from nonparents increases these systemic costs. This is, in large part, due to the fact that there are more than a million American children now born out of wedlock each year.¹¹¹

While genetic connection may not fulfill all of society’s goals for an inheritance paradigm, it does have the benefit of efficiency. The American system of inheritance allows citizens to opt out of the default rules of intestacy by drafting wills and trusts.¹¹² Rules of construction are only invoked when the testator or transferor fails to make her wishes clear.¹¹³ Thus, a grandmother may exclude an out-of-wedlock grandchild—she simply must take some affirmative and clear action to do so.¹¹⁴

I would suggest that in terms of class gifts from nonparents, the 1975 through 1990 version of section 2-611 of the UPC contained

107. See Paula A. Monopoli, “Deadbeat Dads”: Should Support and Inheritance Be Linked?, 49 U. MIAMI L. REV. 257, 259 (1994).

108. Slayer statutes are one such exception. See, e.g., CAL. PROB. CODE § 250 (West 2011); FLA. STAT. ANN. § 732.802 (West 2010); 20 PA. CONS. STAT. ANN. § 8802 (West 2005); VA. CODE ANN. § 55-402 (West Supp. 2011); and UNIF. PROBATE CODE § 2-803 (2011), 8 U.L.A. pt. I, at 172-74 (Supp. 2011). Currently, only a handful of states do not have a slayer statute. See Gregory C. Blackwell, Comment, *Property: Creating a Slayer Statute Oklahomans Can Live With*, 57 OKLA. L. REV. 143, 143 n.4 (2004).

109. See Monopoli, *supra* note 107, at 259; see also Foster, *supra* note 94, at 230-31 (citing Monopoli, *supra* note 107, at 297, which characterized our system as a status-based system as opposed to a behavior-based model of reallocating property at death); Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1203 (citing Monopoli, *supra* note 107, at 257); Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 80 n.7 (1998) (citing Monopoli, *supra* note 107, at 259-60).

110. See Monopoli, *supra* note 107, at 273-91 (analyzing a behavior-based system of inheritance).

111. See Hamilton, *supra* note 77, at 4 (citing recent statistics that nonmarital births constitute 41 percent of all births in the United States).

112. See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 27-28 (1994).

113. See *supra* Part I.

114. See UNIF. PROBATE CODE § 2-705 (2011), 8 U.L.A. pt. I, at 141 (Supp. 2011).

the rule best suited to achieve equality for nonmarital children. Moving from the clear language of the prior section 2-611, which applied the presumption that all nonmarital children are included in a class gift if the donor's intent is not clear,¹¹⁵ to a rule where only nonmarital children whose parent "functioned as a parent"¹¹⁶ are included in a class gift from a nonparent transferor, creates the need for the admission of extrinsic evidence. In applying the rule of construction in a judicial proceeding, the court is forced to look outside the instrument to determine whether the parent met one of the complex factors listed in section 2-115 regarding whether someone functioned as a parent.¹¹⁷ Are these the kinds of inquiries that really belong in a probate court proceeding determining the members of a class? While these inquiries may be appropriate in a custody proceeding to determine parentage, they are cumbersome at best and speculative at worst. Their utility in divining a testator's intent is questionable; the connection between a parent's engagement in these behaviors and a nonparent's intent is tenuous at best.

In terms of fairness to the nonparent transferor, the adoption of an agency theory may seem beneficial, but those benefits may be significantly outweighed by the systemic costs in terms of efficiency and administrative convenience. In addition, with regard to the goal of replicating what most decedents would want, or "majoritarian intent," the presumptions that underlie the rule in section 2-705(e) may be gendered. For instance, if one were to do an empirical survey, one might find that more grandmothers than grandfathers would want to include a nonmarital child they had been unaware of, if only to compensate for not having been part of the child's life. This may be a controversial proposition, but it merits consideration.

While courts do allow extrinsic evidence for the purpose of divining a testator's intent, they are reluctant to do so because of the policy and fraud concerns that undergird the requirement that a testator's intent be reduced to a witnessed writing.¹¹⁸ The factors

115. See UNIF. PROBATE CODE § 2-611 (1975) (amended 1990), 8 U.L.A. pt. I, at 434 (1998). For the text of Restatement section 25.2, see *supra* note 89.

116. UNIF. PROBATE CODE § 2-705(e) (2011), 8 U.L.A. pt. I, at 141 (Supp. 2011).

117. See UNIF. PROBATE CODE § 2-115 cmt. (2011), 8 U.L.A. pt. I, at 51-52 (Supp. 2011).

118. See Jarboe, *supra* note 98, at 1369 (citing 1 ISAAC F. REDFIELD, LAW OF WILLS § 33.12 (4th ed. 1876)); SIR JAMES WIGRAM, THE LAW OF WILLS 535-607 (3rd ed. 1869); Fellows, *supra* note 97; Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741 (1961)). Jarboe also notes:

James L. Robertson, a former justice of the Supreme Court of Mississippi, recognizes (based on many years of difficulty with the cases on his own docket) that courts have

courts would use to determine whether someone functioned as a parent are rather fluid, to say the least.¹¹⁹ This second-level analysis would only be applied in the absence of contrary evidence of a testator's intent.¹²⁰ At that point, the court invokes the rule of construction.¹²¹ By definition, if a court is applying section 2-705, there is no contrary intent to be found in the language of the document.¹²² But if the court has found no contrary language, the utility of applying the rule of construction should be to decide the issue in a final and efficient way. In its current form, section 2-705(e) requires the admission of extrinsic evidence to resolve the subsidiary issue of whether the "parent . . . functioned as a parent."¹²³ This may arguably be justified by asserting that application of the standard and the testimony it requires will result in an imputed intent on the part of the nonparent grantor that replicates what most people would want. However it does not yield the actual subjective intent of the testator. The better choice is to supply an imputed intent without using a standard that requires time-consuming and resource intensive testimony and that efficiently resolves the question of whether the child is a member of the class, and that errs on the side of including a class of children that had historically borne the brunt of societal discrimination.¹²⁴

a hard time determining testamentary intent in any case, regardless of the clarity of the will's language, the existence of extrinsic evidence, or the theoretical approach underlying the court's analysis.

Jarboe, *supra* note 98, at 1369 n.21 (citing James L. Robertson, *Myth and Reality—or, Is It "Perception and Taste?"—in the Reading of Donative Documents*, 61 *FORDHAM L. REV.* 1045 (1993)). Jarboe concludes, "Following Robertson's writing, courts should at least recognize that their determinations of the meaning of a will's language are driven by forces other than merely the established rules of interpretation and construction." Jarboe, *supra* note 98, at 1369 n.22.

119. See UNIF. PROBATE CODE § 2-115 cmt. (2011), 8 U.L.A. pt. I, at 51-52 (Supp. 2011).

120. See *supra* Part I.

121. See *id.*

122. See UNIF. PROBATE CODE § 2-705(e) (2011), 8 U.L.A. pt. I, at 141 (Supp. 2011).

123. *Id.*

124. Jarboe offers this analysis:

Robertson recognizes that, in attempting to interpret testamentary intent in situations where the court decides that the language of the will is not sufficiently ambiguous to require extrinsic evidence of intent, courts "commingl[e] a subjective, internal approach to meaning with a host of quasi-objective, external standards." The negative element of this sort of interpretation, in Robertson's opinion, is the courts' "failure to see how deeply interpretive our enterprise is." Essentially, by couching its interpretation in quasiobjective standards, a court convinces itself that it has somehow objectively divined the testator's true intent.

IV. CONSTITUTIONAL CONCERNS REGARDING UPC SECTION 2-705(e)

Section 2-705(e) of the UPC is based on an agency theory of class membership that has at its root an imputed intent element. A nonmarital child may be excluded as a taker under a class gift from a nonparent if his parent, a relative, or a spouse of his parent or relative failed to function as a parent, even though he may be genetically related to the parent.¹²⁵ This is based on the premise that a nonparent, such as a grandmother, would not want such a child to take as a member of a class gift to her son's "children" if neither her son nor any other relative had known the child well enough to function as a parent. In other words, section 2-705(e) uses the parent "function[ing] as a parent"¹²⁶ as a surrogate for whether the nonparent knew and would have wanted to include the child in the class gift. There are federal and state cases that may constrain a state's ability to adopt such an agency theory unless its entire inheritance scheme is status-neutral. Even then, as noted above, the agency theory embodied in section 2-705(e) has a disparate impact on nonmarital children, who are less likely to have a relative who functioned as a parent.

Note that a nonparent such as a grandmother is free to draft a will that leaves a bequest to her son's "children born in wedlock"; there would be no constitutional concerns with her doing so, since she is not a state actor.¹²⁷ In the following section, I will explore the view that a court's application of a rule of construction to a class gift, such as a grandmother's bequest to her son's "children" without further description, might arguably constitute state action and trigger equal protection concerns when applied to nonmarital children.

Robertson suggests that courts, in an attempt at intellectual honesty in their interpretation of wills, should no longer attempt to determine the intent of the testator. Instead, courts should apply rigid rules of construction to all wills; when a will uses certain words, a court will interpret the language in a particular way. As Robertson notes, this approach better conforms to courts' actual practices.

Jarboe, *supra* note 98, at 1369 n.22 (alteration in original) (citations omitted) (citing Robertson, *supra* note 119, at 1053-54).

125. See UNIF. PROBATE CODE § 2-705(e) (2011), 8 U.L.A. pt. I, at 141 (Supp. 2011).

126. *Id.*

127. See *infra* Part III.A.

A. What Constitutes State Action?

As noted above, the question of what constitutes state action turns on whether one views a court's application of a rule of construction as state action.¹²⁸ The state action doctrine is based on the Fourteenth Amendment,¹²⁹ which provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹³⁰

This provision, if read literally, may be construed to limit the Fourteenth Amendment's application to those laws or actions directly passed, taken, or enforced by the state.¹³¹ Private action would arguably be outside the purview of the Fourteenth Amendment.¹³²

The early civil rights cases yielded the first restrictive interpretation of the Amendment.¹³³ In 1883, several cases known as the *Civil Rights Cases* were joined in order to determine the constitutionality of the Civil Rights Act of 1875,¹³⁴ which prohibited racial discrimination in public accommodations, inns, and public places of amusement.¹³⁵ The issue was the validity of the petitioners' convictions under the act.¹³⁶

The majority opinion, reflecting a narrow reading of the Fourteenth Amendment,¹³⁷ concluded that the Fourteenth Amendment was limited to remedying state laws that, in effect, abridged citizens' rights, privileges, and immunities, or deprived them of life, liberty, or property.¹³⁸ The Court's restrictive view led

128. See *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) ("State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.").

129. See *id.* at 14–15.

130. U.S. CONST. amend. XIV, § 1.

131. See *Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment.").

132. See *id.*

133. See, e.g., *id.* at 21 (noting that state action of a particular character rather than invasion of individual rights is the focus of the amendment).

134. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

135. See *id.*

136. See *Civil Rights Cases*, 109 U.S. at 9.

137. See *id.* at 21–22.

138. See *id.* at 21.

to the conclusion that the act was unconstitutional because it targeted private action rather than state action.¹³⁹ The Court stated,

[T]he legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing¹⁴⁰

Thus, the public versus private distinction in the state action doctrine was born.¹⁴¹

However, later decisions of the Court offer a much more expansive view of state action.¹⁴² In the seminal case *Shelley v. Kraemer*,¹⁴³ the Court expanded the notion of state action to include not only the enactment of legislation by the state but also judicial enforcement of private covenants.¹⁴⁴ Mark Rosen describes the importance of *Shelley* and the Court's analysis of the state action doctrine: "To analyze whether court orders constitute state action, one must begin with the case of *Shelley v. Kraemer*."¹⁴⁵

Shelley involved a group of property owners in Missouri who wanted to restrict the sale of property in the area to Caucasians only.¹⁴⁶ The property owners entered into a private agreement that, in effect, provided that "any person not of the Caucasian race" was prohibited from occupying the properties at issue.¹⁴⁷ In violation of this restrictive covenant, one of the property owners sold property

139. See *id.* at 23.

140. *Id.* at 13–14.

141. See G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility* (pt. 1), 34 HOUS. L. REV. 333, 343–44 (1997) (discussing the public versus private distinction in the *Civil Rights Cases*).

142. See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 508–09 (1946) (holding that a person could not be prosecuted for passing out religious pamphlets in a company-owned town since it served the same function as a public town); see also Buchanan, *supra* note 141, at 344–54 (discussing exceptions to the state action doctrine).

143. 334 U.S. 1 (1948).

144. See *id.* at 18. See, e.g., Francis A. Allen, *Remembering Shelley v. Kraemer: Of Public and Private Worlds*, 67 WASH. U. L.Q. 709 (1989) (commemorating *Shelley's* fortieth anniversary); A. Leon Higginbotham, Jr., *Race, Sex, Education and Missouri Jurisprudence: Shelley v. Kraemer in a Historical Perspective*, 67 WASH. U. L.Q. 673 (1989) (commemorating *Shelley's* fortieth anniversary); Shelley Ross Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: "A Time for Keeping; a Time for Throwing Away?"*, 47 U. KAN. L. REV. 61 (1998) (arguing that eliminating private discrimination no longer requires *Shelley's* protective state action distinction); Mark Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383 (1988) (discussing the relationship between *Shelley's* equality and state action theories).

145. Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 188 (2004).

146. See *Shelley*, 334 U.S. at 4–5.

147. Rosen, *supra* note 145, at 188 (quoting *Shelley*, 334 U.S. at 4–5).

to the Shelleys, who were African-American.¹⁴⁸ Kraemer, an owner of one of the other properties, wanted to enforce the private agreement that prevented African Americans from occupying the property.¹⁴⁹ He sued to enforce the agreement and effectively divest the Shelleys of title to the property.¹⁵⁰

Kraemer prevailed in the Supreme Court of Missouri, which ordered enforcement.¹⁵¹ However, the U.S. Supreme Court overturned the state supreme court.¹⁵² The Court held that the state supreme court's enforcement of the restrictive covenant would violate the Equal Protection Clause of the Fourteenth Amendment.¹⁵³ However, as Rosen notes, arriving at such a normatively attractive outcome was not doctrinally simple: "The chief obstacle was the understanding that 'the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.'"¹⁵⁴

This private/public distinction focused on, in effect, whether the action sought would be constitutional if "imposed by state statute or local ordinance."¹⁵⁵ The Court found that the restrictive covenants themselves did not run afoul of the Fourteenth Amendment;¹⁵⁶ rather, it was the lower court's proposed enforcement of the restrictive covenants that was unconstitutional.¹⁵⁷ Rosen further explains this distinction:

Though the restrictive covenant itself could not be said to be "action by the State" triggering the Fourteenth Amendment, the Court ruled that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." After all, the "full coercive power of government" was being used . . . "to deny to petitioners, on the grounds of race or color, the enjoyment of property rights." Furthermore, because enforcement orders came from

148. See *Shelley*, 334 U.S. at 5.

149. See *id.* at 6; Rosen, *supra* note 145, at 189.

150. See *Shelley*, 334 U.S. at 6.

151. See *Kraemer v. Shelley*, 198 S.W.2d 679, 683 (Mo. 1946), *rev'd*, *Shelley v. Kraemer*, 334 U.S. 1 (1948).

152. See *Shelley*, 334 U.S. at 23.

153. See *id.* at 20.

154. Rosen, *supra* note 145, at 189 (quoting *Shelley*, 334 U.S. at 13).

155. *Id.* (quoting *Shelley*, 334 U.S. at 11).

156. See *Shelley*, 334 U.S. at 13.

157. See *id.* at 20.

courts, the “judicial action in each case bears the clear and unmistakable imprimatur of the State.”¹⁵⁸

In addition to finding that judicial enforcement of a private contract would constitute state action, the Court considered:

what aspects of the enforcement order were attributable to the state. Without explanation, the Court determined that the substantive provisions of the contract themselves were appropriately deemed to be action of the state. Under the *Shelley* Court’s approach, the question became whether a state could have enacted into general law the contract’s substantive provision. Because it could not have, it readily followed that enforcing the restrictive covenant also violated the guarantee of equal protection Under *Shelley*, the approach is to determine whether the substantive provision of the contract the court is asked to enforce could have been enacted into general law by the state.¹⁵⁹

Thus, under the *Shelley* Court’s expansive view of state action, a court’s application of a rule of construction to interpret a private instrument might arguably constitute state action, especially where judicial application of that rule yields an outcome in which a historically disadvantaged societal group (nonmarital children) are treated differently than a similarly situated group (marital children).¹⁶⁰ Although state action based on race is subject to strict

158. Rosen, *supra* note 145, at 189 (footnotes omitted) (quoting *Shelley*, 334 U.S. at 13–14, 19–20).

159. *Id.* at 190 (footnotes omitted).

160. Numerous authors discuss the *Shelley* case and the factors relating to the state action doctrine. See, e.g., G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility* (pt. II), 34 HOUS. L. REV. 665, 697–723 (1997); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2327 (2002); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 316–24 (1995); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 629–31 (1997); Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 490–513 (1998).

There are also many cases that have grappled with the *Shelley* doctrine. See, e.g., *In re Adoption of K.L.P.*, 763 N.E.2d 741, 751 (Ill. 2002) (discussing whether adoption decree is state action when filed by private parties; ultimately decided on other grounds); *First Nat’l Bank of Kan. City v. Danforth*, 523 S.W.2d 808, 819–21 (Mo. 1975) (determining that enforcement of trust by state was not state action); *Stephanus v. Anderson*, 613 P.2d 533, 540–42 (Wash. Ct. App. 1980) (determining that court-enforced lease termination was not a state action).

scrutiny by courts,¹⁶¹ differential treatment based on birth status has been subject to an intermediate standard of judicial scrutiny as described below.¹⁶²

*B. What Level of Constitutional Scrutiny Applies to
Statutes Affecting Nonmarital Children?*

The U.S. Supreme Court and the lower federal courts have applied the Fourteenth Amendment's equal protection analysis to cases involving discrimination on the basis of illegitimacy in a number of areas, including inheritance law.¹⁶³ In the first of these cases, *Levy v. Louisiana*,¹⁶⁴ the Court found a violation of equal protection in a statute permitting only legitimate children to bring wrongful death suits.¹⁶⁵ In subsequent cases, the Court went on to develop the doctrine that statutes which discriminate against nonmarital children are within the ambit of the Equal Protection Clause.¹⁶⁶ One commentator notes that "the Supreme Court has recognized for several decades that classifications treating illegitimate children more harshly than legitimate children violate [the] [E]qual [P]rotection" Clause of the Fourteenth Amendment.¹⁶⁷

In *Trimble v. Gordon*, the Supreme Court held as unconstitutional an Illinois statute that prevented a nonmarital child from inheriting from the child's father unless the child's mother and father had married.¹⁶⁸ Justice Powell, writing for the majority, rejected the state's purported rationales of promoting two-parent families and enhancing the orderly disposition of estates.¹⁶⁹ Powell stated that the standard of scrutiny used by the Court (which was arguably an intermediate standard of scrutiny) was "not a toothless

161. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

162. See *Clark v. Jeter*, 486 U.S. 456, 461-62 (1988) (applying intermediate scrutiny for nonmarital children).

163. See Nikki Ahrenholz, Comment, *Miller v. Albright: Continuing to Discriminate on the Basis of Gender and Illegitimacy*, 76 DENV. U. L. REV. 281, 284-87 (1998); see also Monopoli, *supra* note 74, at 860-68.

164. *Levy v. Louisiana*, 391 U.S. 68 (1968).

165. See Ahrenholz, *supra* note 163, at 285 (discussing *Levy*, 391 U.S. at 71-72).

166. See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 388-94 (1979); *Lalli v. Lalli*, 439 U.S. 259, 268 (1978); *Fiallo v. Bell*, 430 U.S. 787, 807 (1977); *Trimble v. Gordon*, 430 U.S. 762 (1977). See generally Ahrenholz, *supra* note 163, at 285-86 (discussing these cases).

167. Ahrenholz, *supra* note 163, at 303 (citing *Caban*, 441 U.S. at 388-89).

168. See *Trimble*, 430 U.S. at 776.

169. See *id.* at 769-73.

one”¹⁷⁰ and that the state statute at issue had no more than an “attenuated relationship to the asserted goal” of encouraging family relationships.¹⁷¹

One year later, in *Lalli v. Lalli*, Powell again wrote for the Court in a five-to-four decision that upheld a New York statute that allowed a nonmarital child to inherit if paternity was established by adjudication while the putative father was alive.¹⁷² However, the statute did not allow a nonmarital child to establish paternity after the father had died.¹⁷³ This was arguably a broader statute than the Illinois statute struck down in *Trimble*, because marriage was not the sole manner by which a nonmarital child could inherit.¹⁷⁴ The state argued that its interests in the orderly disposition of estates and limiting the adjudication of paternity to the father’s lifetime to prevent fraudulent claims were enough to justify the disparate treatment of nonmarital children.¹⁷⁵ This time, the Court agreed with the state and upheld the statute.¹⁷⁶

Trimble and *Lalli* involved intestacy statutes—the rules we use to reallocate property at death when citizens do not create their own instruments of property disposition.¹⁷⁷ Since our system allows for freedom of testation and has little in the way of forced heirship (unlike civil law countries), an individual can draft a will or trust to alter the default intestacy rules.¹⁷⁸ As noted above, testators often create class gifts, such as in our example of the grandmother who leaves a bequest to her son’s “children.”¹⁷⁹ Courts must then apply rules of construction to decide whether to include both marital and nonmarital grandchildren in the class gift.¹⁸⁰ Only a handful of state supreme courts have grappled directly with the issue of whether such judicial activity constitutes state action that triggers

170. *Id.* at 767 (quoting the Court’s description of the less-than-strict scrutiny applied to classifications based on illegitimacy in *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

171. *Id.* at 768. While the Court in *Trimble* used language that could be interpreted as an intermediate standard of review, the Court did not explicitly adopt that standard with regard to nonmarital children until *Clark v. Jeter*, 486 U.S. 456 (1988); see also Ahrenholz, *supra* note 163, at 287 (citing *Clark*, 486 U.S. at 461).

172. See *Lalli*, 439 U.S. at 261, 275–76.

173. See *id.* at 261–62.

174. Compare N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967), with 110 1/2 ILL. COMP. STAT. ANN. § 2-2 (West 1978).

175. See *Lalli*, 439 U.S. at 268–71.

176. See *id.* at 275–76.

177. See Estate of Dulles, 431 A.2d 208, 213 (Pa. 1981).

178. See *id.* (quoting lower court decision, 29 Fiduc. Rep. 141, 148 (Pa. Ct. Com. Pl. 1979)).

179. See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 361 (3d ed. 1984).

180. See *Dulles*, 431 A.2d at 213–14.

the Equal Protection Clause of the Fourteenth Amendment.¹⁸¹ While a legislature's enactment of a state intestacy statute clearly constitutes state action, it is far less clear whether the application of a rule of construction by a court meets our jurisprudential understanding of what constitutes state action.¹⁸²

C. Does Application of a State Rule of Construction Involving Class Gifts and Nonmarital Children Constitute State Action?

The Pennsylvania Supreme Court in *Estate of Dulles* was faced with a situation in which a grandmother, Ida Dulles, drafted a trust that created a classic class gift.¹⁸³ The terms of the trust provided that income was to be paid to those of her grandchildren who reached the age of twenty-one.¹⁸⁴ Ida had a nonmarital grandchild, Gloria Dulles,¹⁸⁵ who was the child of Ida's son, Harrison.¹⁸⁶ The dispute focused on whether Gloria should be included in the class gift.¹⁸⁷ The Supreme Court of Pennsylvania's analysis in *Dulles* is instructive in considering whether section 2-705(e)¹⁸⁸ raises constitutional concerns.

The court in *Dulles* was considering a state statute—section 14(7) of the Pennsylvania Wills Act of 1947¹⁸⁹—that was a rule of construction.¹⁹⁰ The statute provided that “in construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, a person born out of wedlock shall be considered the child of his mother and not of his father.”¹⁹¹

The court noted:

On April 26, 1977, before Gloria Dulles' exceptions were decided, the Supreme Court of the United States decided *Trimble v. Gordon*. *Trimble* held unconstitutional as violative of equal protection a state intestacy statute which excluded a child born out of wedlock from participation in the estate of

181. See, e.g., *infra* Part III.C.

182. See *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948).

183. See *Dulles*, 431 A.2d at 209.

184. See *id.* at 210.

185. See *id.*

186. See *id.*

187. See *id.* at 211.

188. See UNIF. PROBATE CODE § 2-705(e) (2011), 8 U.L.A. pt. I, at 141 (Supp. 2011).

189. See *Dulles*, 431 A.2d at 210.

190. See *id.*

191. See *id.* (quoting 20 PA. CONS. STAT. § 14(7) (1947)).

the child's father, even though the father had acknowledged paternity.¹⁹²

As a result, “[o]n September 12, 1977, in light of *Trimble*, the orphans’ court . . . dismissed Gloria Dulles’ exceptions without prejudice and referred the matter to [an] auditing judge for further consideration.”¹⁹³ The court recognized that even though the statute at issue was a rule of construction rather than an intestacy statute, both it and the *Trimble* statute involved state action and raised similar constitutional concerns.¹⁹⁴ In both statutes, no means were provided for a nonmarital child to establish eligibility to benefit from the father’s estate or that of an ancestor claimed through the father.¹⁹⁵

The *Dulles* court’s analysis is persuasive:

There can be little doubt that, under *Trimble v. Gordon*, the canon of construction which would operate to exclude Gloria Dulles is constitutionally flawed. A State may not “attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.” And, because it is undisputed that Harrison Dulles is Gloria Dulles’ father, “the State’s interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing [the] claim”¹⁹⁶

The court went on to note the similarity between a state intestacy statute and a rule of construction in terms of the role the state plays in both—an important conceptual link with regard to constitutional analysis, because state action is required in order to make an equal protection claim under the Fourteenth Amendment¹⁹⁷:

192. *Id.* at 211–12 (citation omitted).

193. *Id.* at 212.

194. *See id.* at 213–14.

195. The court noted that both Section 14(7) of the Pennsylvania Wills Act of 1947 and the statute at issue in *Trimble* were distinguishable from *Lalli*, where the Supreme Court “upheld a New York statute allowing a child born out of wedlock to inherit from his father who died intestate only if a court of competent jurisdiction has, during the father’s lifetime, entered an order of filiation declaring paternity in a proceeding commenced during the mother’s pregnancy or within two years of the child’s birth.” *Dulles*, 431 A.2d at 213 n.5.

196. *Id.* at 213 (alteration in original) (citation omitted) (quoting *Trimble*, 430 U.S. at 769, 772).

197. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948).

Although *Trimble* involved a state intestacy statute, while here there is involved a “canon of construction,” in both cases the judgment of the sovereign is interposed to effectuate distribution of the decedent’s estate. As Judge Klein observed,

“[a] person has the right to write a will disposing of his property at death. If he fails to do so, the state steps in and writes a will for him by means of an intestate act and directs the manner in which his estate shall be distributed, designating the persons who shall receive the property and the proportions they are to receive. If a person writes a will but fails to express his intent clearly, or fails to make a complete distribution of his property, or otherwise runs counter to some rule of law, the state also steps into . . . the gap through a statutorily enacted rule of construction which mandates the manner of distribution. In both cases the state and not the decedent dictates the method of distribution.”¹⁹⁸

The Pennsylvania Supreme Court held that, given the Supreme Court’s opinion in *Trimble*, the lower court was correct to hold the rule of construction unconstitutional.¹⁹⁹ The court went on to note that the presumed intent argument—that the testator would want to exclude out-of-wedlock children—had been discredited by the *Trimble* Court:

There, where an intestacy statute excluding a child born out of wedlock from taking through a father was challenged, it was argued that the intestacy statute “mirrors the presumed intentions of the citizens of the State regarding the disposition of their property at death,” and that the father’s failure to make a will “shows his approval of that disposition.” Although the contention had not been relied upon by the state courts, and therefore was not a matter for the Court to decide, Justice Powell, speaking for the majority, dismissed the contention²⁰⁰

The *Dulles* court went on to quote Justice Powell’s words, which give pause when reading section 2-705(e) of the UPC:

198. *Dulles*, 431 A.2d at 213 (alteration in original) (quoting lower court decision, 29 Fiduc. Rep. 141, 148 (Ct. Ct. Com. Pl. 1979)).

199. *See id.*

200. *Id.* at 214 (citation omitted) (quoting *Trimble*, 430 U.S. at 774).

Even if one assumed that a majority of the citizens of the State preferred to discriminate against their illegitimate children, the sentiment hardly would be unanimous. With regard to any individual, the argument of knowledge and approval of the State law is sheer fiction. The issue therefore becomes where the burden of inertia in writing a will is to fall. At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of “presumed intent.”²⁰¹

The *Dulles* court concluded:

As in *Trimble*, it cannot be said that testators whose wills fail to contain specific provisions are unanimous in the sentiment to discriminate against children born out of wedlock. Because settlor has failed to write a specific provision governing Gloria Dulles’ right to share in trust income, we are left with the decision made by the sovereign, in the form of a canon of construction, to place upon Gloria Dulles the “burden of inertia” and thereby exclude her. That canon is constitutionally infirm, and Gloria Dulles must prevail on this issue.²⁰²

Unlike the Pennsylvania Supreme Court,²⁰³ the Supreme Judicial Court of Massachusetts rejected the idea that the application of a rule of construction constituted state action.²⁰⁴ In *Powers v. Wilkinson*, the trustee of an inter vivos trust sought a declaratory judgment that a child born out of wedlock to the donor’s granddaughter was “issue” of the donor’s children for purposes of the trust.²⁰⁵ The trust instrument “provided for payment . . . [to the donor’s] surviving children in equal shares for the duration of their lives, and then to the children’s ‘issue’ by right of representation.”²⁰⁶ In the instrument itself, the donor did not elaborate on whether she meant to include all issue, marital and nonmarital;²⁰⁷ she simply used the word “issue.”²⁰⁸

201. *Dulles*, 431 A.2d at 214 (quoting *Trimble*, 430 U.S. at 775 n.16).

202. *Id.* at 214.

203. *See id.* at 213 (accepting the lower court’s finding that the application of the rule of construction did constitute state action).

204. *Powers v. Wilkinson*, 506 N.E. 2d 842, 845 (Mass. 1987).

205. *Id.* at 842.

206. *Id.* at 843.

207. *See id.*

208. *Id.*

The trustee believed that the term “issue” should include nonmarital children, absent a showing of contrary intent.²⁰⁹ The trustee first argued that absent extrinsic evidence establishing that the donor ascribed a special meaning to the term “issue,” her intent must have been to use it in its usual and customary meaning (as defined in Webster’s Dictionary): biological issue, progeny, or offspring, regardless of a parent’s marital status.²¹⁰ The court rejected this argument and referred to its previous decision in *Fiduciary Trust Co. v. Mishou*,²¹¹ in which it stated:

It cannot be doubted that by the common law of a few generations ago such words as issue, children, descendants, and so forth as descriptive of a class in a grant, devise, or legacy, in the absence of anything indicating a contrary intent, meant only persons of the class who were born in lawful wedlock.²¹²

The *Powers* court concluded:

Because nothing indicate[d] an intent by the donor to include nonmarital issue, [*Mishou*] require[d] [the court] to presume that the donor intended, in accordance with the law extant at the time the instrument was executed, to exclude nonmarital descendants from the class denoted by her use of the word “issue.”²¹³

Next, “the trustee argue[d] that application of the rule of construction stated in *Mishou* would violate the rights of the nonmarital child to the equal protection of the laws as guaranteed by the Fourteenth Amendment.”²¹⁴ Citing *Shelley v. Kraemer*, the trustee argued that the rule of construction set forth in *Mishou* is subject to scrutiny under the Fourteenth Amendment because, according to the U.S. Supreme Court, “[s]tate action . . . refers to exertions of state power in all forms.”²¹⁵ The court rejected the trustee’s equal protection argument.²¹⁶ First, the court noted that

209. *See id.* at 844.

210. *See id.*

211. *Id.* at 848 (citing *Fiduciary Trust Co. v. Mishou*, 75 N.E.2d 3 (Mass. 1947), *overruled by Powers*, 506 N.E.2d at 848–49).

212. *Fiduciary Trust Co.*, 75 N.E.2d at 14.

213. *Powers*, 506 N.E.2d at 844.

214. *Id.*

215. *Id.* at 845 (alteration and ellipsis in original) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948)).

216. *Powers*, 506 N.E.2d at 845.

“[t]he guarantees of the equal protection clause of the Fourteenth Amendment are directed solely to limiting the actions of government.”²¹⁷ Second, the court summarized the basic facts at issue in *Shelley* and explained that “[t]he Supreme Court has not developed *Shelley* beyond these facts.”²¹⁸ Third, the court distinguished *Shelley*:

In *Shelley*, the Court had no doubt that State action was involved because it was clear that “but for the active intervention of the state courts, supported by the full panoply of state power, [the black] petitioners would have been free to occupy the properties in question without restraint.” State action was found because judicial enforcement of the “private law” of restrictive covenants effectively barred blacks from participation in a significant segment of the housing market. In *Mishou*, the court reaffirmed a definition for a word whose meaning, as judicial experience repeatedly showed, would remain ambiguous without judicial clarification. Under the court’s ruling, donors and testators enjoyed freedom to use the word “issue” without explication, confident that we would enforce the instrument containing it to exclude nonmarital children. Similarly, donors have been free to modify the word by stating an additional, contrary intent, in which case we have enforced the instrument to honor that intent. When “issue” is used in a legal instrument, with or without explication, it is the donors and testators who act, not this court nor any other arm of the State.²¹⁹

Thus, the court held that state action was not involved and that the Equal Protection Clause of the Fourteenth Amendment was not implicated by the court’s application of rules of construction to wills or trust instruments.²²⁰ The court concluded that “no constitutional rights would be violated if the [court applied] the rule stated in *Mishou*” to the case at hand.²²¹

The court also noted that the trustee’s equal protection argument relied primarily on *Trimble v. Gordon*, which invalidated an intestacy statute, not a judicially created rule, on equal protection grounds:

217. *Id.* at 844.

218. *Id.* at 845 (alteration and ellipsis in original) (quoting *Commonwealth v. Hood*, 452 N.E.2d 188, 193 (Mass. 1983)).

219. *Powers*, 506 N.E.2d at 845 (citation omitted).

220. *See id.*

221. *Id.* at 845–46.

While we do not deny that rules applying to what has traditionally been thought of as the area of “private law” may trench upon equal protection concerns, it is instructive to note that no decision by the United States Supreme Court ever has invalidated a common law rule of construction on the ground that it violated the equal protection clause by discriminating impermissibly against nonmarital children. The liberalizing decisions handed down by the Supreme Court in recent years have all been directed at statutory discrimination.²²²

Finally, the trustee argued that the *Mishou* rule “should not be applied because it is no longer appropriate to do so in light of current social mores and modern legal developments.”²²³ The court agreed, stating:

Ours is an era in which logic and compassion have impelled the law toward unburdening children from the stigma and the disadvantages heretofore attendant upon the status of illegitimacy. Consequently, we think it is more appropriate henceforth to place the burden of exclusion on those donors who insist on it.²²⁴

The court “overrule[d] so much of *Mishou* as depend[ed] upon the traditional rule of construction[] and . . . conclude[d] that the word ‘issue,’ absent clear expressions of a contrary intent, must be construed to include all biological descendants.”²²⁵ However, the court refused to apply the new rule of construction to the nonmarital child in the case at bar,²²⁶ deciding that the new rule would apply “only to trust instruments executed after the date of [the] opinion.”²²⁷ The case was “remanded to the Probate and Family Court for Suffolk County for entry of a declaration that, under the law applicable when the trust . . . was executed, the . . .

222. *Id.* at 845 n.9. Note that the rule of construction in *Dulles* was a statutory rule, not simply a judicially created rule. The new rule in Massachusetts, Mass. Gen. Laws Ann. Ch. 190B, § 2-705(a) discussed *infra* at n.234 and accompanying text, is also a statutory rule. Query whether that should make a difference in the court’s analysis of whether application of the rule by a court constitutes state action.

223. *Id.* at 846.

224. *Id.* at 848.

225. *Id.* (footnote omitted).

226. *See id.* at 849.

227. *Id.*

word ‘issue’ is presumed to encompass only lawful lineal descendants of the donor” born within wedlock.²²⁸

Justice Abrams, in dissent, joined the court’s decision to “overrul[e] the rule of construction of *Fiduciary Trust Co. v. Mishou*” and “to announce [a] new rule of construction which defines ‘issue’ to include all biological descendants regardless of the marital status of the parents.”²²⁹ However, Abrams did not “agree . . . with the court’s determination that the new rule [should] not apply in [the] case” at bar for two reasons.²³⁰ “First, by merely announcing the new rule without applying it, the court’s action amount[ed] to no more than dictum.”²³¹ Second, not granting relief in the case at hand “remove[d] [the] incentive to bring challenges to existing precedent because the appellant [was] deprived of the benefit . . . [of] challenging the old rule.”²³²

V. MOVING AWAY FROM AN AGENCY APPROACH

Which court has the more persuasive argument as to whether the application of a rule of construction constituted state action: the Pennsylvania Supreme Court in *Dulles* or the Massachusetts Supreme Judicial Court in *Powers*? Are rules of construction in inheritance law distinguishable in their purpose and effect from rules of construction in other substantive areas of the law? Given Justice Powell’s constitutional discrediting of the imputed intent argument in *Trimble*,²³³ one wonders if state statutes that adopt an agency approach would or should withstand similar scrutiny. It is interesting that when Massachusetts recently adopted the UPC, it altered the language of section 2-705 to eliminate any distinction between marital and nonmarital children when applying the rule of construction to class gifts.²³⁴ It chose to affirmatively reject the UPC’s agency approach, thus preserving that part of the Supreme Judicial Court’s decision in *Powers v. Wilkinson*²³⁵ that applied

228. *Id.*

229. *Id.* (Abrams, J., dissenting).

230. *Id.*

231. *Id.*

232. *Id.*

233. *See* *Trimble v. Gordon*, 430 U.S. 762, 774–76 (1977).

234. *See* MASS. GEN. LAWS ANN. ch. 190B, § 2-705(a) (Supp. 2011). “SECTION 2-705. [CLASS Gifts Construed to Accord with Intestate Succession.] (a) Adopted individuals and individuals born out of wedlock, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession . . . [Effective March 31, 2012].”

235. 506 N.E.2d 842 (Mass. 1987).

prospectively. The Massachusetts legislature is to be commended for adopting a default rule more akin to the UPC approach that existed from 1975 to 1990.

The application of rules of construction like section 2-705(e) of the UPC would arguably fit within the definition of state action that Rosen says survived the restrictive view of *Shelley*: “[T]he general rule outside the context of racial discrimination appears to be as follows: the underlying legal right will be attributed to the state under the state action doctrine only if government is the source of the underlying right.”²³⁶ Under section 2-705(e), the government would in fact be the source of the child’s membership in the class and her subsequent right to inherit valuable property. While the nonparent transferor drafts the private instrument that creates the class gift, in the absence of clear language or circumstances indicating whether she intended to include a nonmarital child, the judicial process requires a court to apply a rule of construction, which will either confer or deny the nonmarital child membership in the class.²³⁷ The court’s application of the rule determines whether or not the child will receive a share of the estate or trust.

Characterizing the application of a rule of construction that determines class membership as “state action” admittedly poses a slippery slope: that the application of all rules of construction—those used to interpret wills, trusts, contracts, or other instruments—will have to be considered state action. However, there is an argument that this risk is minimized because section 2-705(e) is distinguishable from other rules of construction; unlike many of these other rules, section 2-705(e) implicates a constitutionally protected group that courts have been willing to protect under an intermediate scrutiny standard.²³⁸ The rule of construction at issue applies in a way that remedies discrimination against an historically disadvantaged group that has received particular constitutional protection in the past. This fact should weigh against the argument that labeling as state action a court’s application of this particular rule of construction would require a finding of state action every time a court construes any contract between private parties.²³⁹

236. Rosen, *supra* note 145, at 192.

237. See *supra* Part I.

238. See *Clark v. Jeter*, 486 U.S. 456, 461–62 (1988) (applying intermediate scrutiny for statutory classifications that affect nonmarital children).

239. For a succinct description of this concern with an expansive reading of *Shelley v. Kraemer*, see Rosen, *supra* note 145:

Even if a court found that the application of such a rule of construction constituted state action, the rule would be subject to a second level of inquiry prior to a finding of unconstitutionality. Given the state's substantial interest in preventing fraud and ensuring the orderly disposition of estates,²⁴⁰ such a rule of construction would, in fact, be allowed to impose some disparate burdens on nonmarital children if it were sufficiently narrowly tailored to pass constitutional muster.

The underlying concern in earlier cases involving nonmarital children and inheritance statutes was that the child be given an opportunity to prove that the parent from or through whom he was taking was indeed his parent.²⁴¹ Once that fact was established, the state's interest in minimizing fraud in the inheritance process was alleviated.²⁴² The model of "function[ing] as a parent"²⁴³ is problematic in this regard because it echoes the old state statutes that did not provide an adequate mechanism for the child to control whether a parent could be found to be a parent in order for the child to inherit from the parent or his relatives.²⁴⁴ For example, in *Lowell v. Kowalski* the Massachusetts Supreme Judicial Court found that a state statute that required the later marriage of two parents, and that did not allow an order of filiation to suffice as evidence of parenthood,²⁴⁵ was

The problem with the categorical refusal of recent courts to enforce foreign judgments is not that they misunderstand *Shelley*, but that they have overlooked that subsequent case law has significantly narrowed its application. *Shelley's* holding was troubling to American courts and commentators alike because, under its reasoning, every private contract that a party wishes to judicially enforce triggers state action such that the substantive provisions of the contract are attributed to the state: "Such application [erodes] the distinction between public and private action." . . .

American courts regularly issue orders that would have been subject to constitutional constraints, and probably would have been found to be constitutionally infirm, if they had been enacted by a state legislature as a general law. Arguments that such court orders qualify as state action under *Shelley*, and accordingly trigger constitutional scrutiny, have been regularly rebuffed. . . . [T]he general rule outside the context of racial discrimination appears to be as follows: the underlying legal right will be attributed to the state under the state action doctrine only if government is the source of the underlying right.

Id. at 190–92 (first alteration in original) (footnotes omitted).

240. See Jarboe, *supra* note 98, at 1383.

241. See, e.g., *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (noting that the statutory scheme in that case was "a response to the often difficult problem of proving the paternity of illegitimate children and the related danger of spurious claims against intestate estates").

242. See *id.* at 271–72.

243. UNIF. PROBATE CODE § 2-705(e) (2011), 8 U.L.A. pt. I, at 141 (Supp. 2011).

244. See *Lalli*, 439 U.S. at 265–66.

245. See *Lowell v. Kowalski*, 405 N.E.2d 135, 137–38 (Mass. 1980).

insufficiently narrowly tailored.²⁴⁶ The concern is that it is unfair to the nonmarital child to put his ability to inherit completely in the hands of the parent from or through whom the child is trying to inherit. Section 2-705(e) effectively does just this because the child cannot control whether the parent or relatives functioned as a parent, and that is the only way the child can be included in the class gift. Unlike a paternity adjudication, which can be initiated by the child or his mother, whether the father functions as a parent is not something the child controls.

In addition, the agency approach taken in Section 2-705(e)'s has been justified on the basis that it is reasonable to presume that most nonparent transferors whose son or daughter did not function as a parent to his or her nonmarital child would likely not want to include such a nonmarital child in a class gift.²⁴⁷ This presumption that most nonparent transferors would choose to exclude nonmarital children is very similar to the presumption that Justice Powell criticized in *Trimble*, i.e., even if one assumed most citizens would prefer to discriminate against their illegitimate children, when that group has been the "frequent target of discrimination" it is doubtful that a state may constitutionally place a burden on that group by invoking the theory of presumed intent. I would argue that this presumption underlying the operation of section 2-705(e) raises very similar constitutional concerns.²⁴⁸

Under section 2-705(e), even if a child can prove he is the genetic child of a parent through whom he takes, he can still be excluded from a class gift by the default rule based on a presumed intent of the ancestor who created the gift.²⁴⁹ The state has an interest in preventing fraudulent paternity (or maternity) claims, but after that risk has been eliminated, the state could not likely sustain a claim that it also has a substantial interest in perpetuating an unexpressed, presumed intent on the part of a testator that errs on the side of excluding a group that has traditionally been discriminated against in our society.²⁵⁰

Admittedly, section 2-705(e) is unlike the absolute statute in *Trimble* that gave a nonmarital child no chance to prove that the

246. See *id.* at 139 (applying strict scrutiny, in reliance on the Equal Rights Amendment to the Massachusetts Constitution, to the gender-based distinctions in the portion of state inheritance law that applied to nonmarital children).

247. See *supra* note 85 and accompanying text.

248. See *Trimble v. Gordon*, 430 U.S. 762, 775 n.16 (1977).

249. See *supra* note 85 and accompanying text.

250. See *Powers v. Wilkinson*, 506 N.E.2d 842, 848 (Mass. 1987).

decedent was her biological father.²⁵¹ Unlike the statute in *Trimble*, section 2-705(e) does not automatically exclude a child from a class gift by virtue of his nonmarital status;²⁵² if his father “function[s] as a parent,”²⁵³ he can take from his paternal grandmother, for example. Even so, section 2-705(e) still seems to contravene the spirit of *Trimble* and the other Supreme Court cases that acknowledged that, while the state’s interest in preventing fraud allowed it to raise some barriers to nonmarital children when the purpose of those barriers was merely to prove that a parent was in fact a parent,²⁵⁴ once the child had met that burden, and parentage was proven, the child should be allowed to inherit with no further obstacles.²⁵⁵

Of course, a nonparent transferor like a grandmother has the right to draft a will or trust that states that only her son’s *marital* children shall share in a class gift. In the absence of such a directive, however, the state supplies a default rule—the applicable rule of construction—to determine who is a grandchild. Given the strong concern of the Supreme Court that nonmarital children be treated the same as marital children absent some substantial state interest,²⁵⁶ there is at least a constitutional argument against the default rule embodied in section 2-705(e), i.e., that a child may indeed be excluded—even absent an ancestor’s clear expression in writing—simply because of her nonmarital status if her parent did not function as a parent.²⁵⁷ If the application of this rule of construction is in fact state action, the rule of construction seems to do what Justice Powell said was unconstitutional—it creates a default rule that places “the burden of inertia”²⁵⁸ on the nonmarital child.²⁵⁹

If there is an argument that a court’s application of a rule of construction is sufficient to constitute state action, then will any such statute that distinguishes between marital and nonmarital

251. See *Estate of Dulles*, 431 A.2d 208, 214 (Pa. 1981) (quoting *Trimble*, 430 U.S. at 774).

252. See UNIF. PROBATE CODE § 2-705(e) (2011) 8 U.L.A. pt. I, at 141 (Supp. 2011).

253. RESTATEMENT (THIRD) OF PROP. WILLS AND OTHER DONATIVE TRANSFERS § 14.7.

254. See *Lalli*, 439 U.S. at 267 (“The single requirement at issue here is an evidentiary one—that the paternity of the father be declared in a judicial proceeding . . .”).

255. See *id.* In *Labine v. Vincent*, Justice Brennan notes that it is not just “insurmountable barriers” that may violate the Equal Protection Clause; it is also “discriminations that ‘merely’ disadvantage a class of persons . . . [that] are as subject to the command of the Fourteenth Amendment as discriminations that are in some sense more absolute.” *Labine v. Vincent*, 401 U.S. 532, 550–51 (Brennan, J., dissenting).

256. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972).

257. See UNIF. PROBATE CODE § 2-705(e) (2011), 8 U.L.A. pt. I, at 141 (Supp. 2011).

258. *Trimble v. Gordon*, 430 U.S. 762, 775 n.16 (1977).

259. See *Estate of Dulles*, 431 A.2d 208, 214 (Pa. 1981).

children (placing higher burdens on nonmarital children) withstand an intermediate level of scrutiny (or even a rational basis standard) given the new and inexpensive methods of DNA testing available?²⁶⁰ Such statutes met the intermediate standard in the past because the state arguably had a substantial interest in preventing fraudulent claims, which was the basis for the differential burdens on nonmarital children.²⁶¹ However, the easy means of testing genetic paternity today raises new questions about default rules that distinguish between marital and nonmarital children.²⁶² If one applied this analysis to statutes like section 2-705(e), one might conclude that a state could not enact such a law that discriminated against nonmarital children when the substantial state interest in preventing fraud is no longer clearly at issue given the ease and certainty of genetic testing today.

There is also a concern that a rule of construction that uses “function[ing] as a parent”²⁶³ as a standard for inclusion will have a greater disparate impact on children trying to inherit through or from fathers as opposed to mothers. For example, if a grandmother bequeaths a class gift to her son’s “children,” it is less likely that the son will have functioned as a parent than a daughter if she had left the bequest to her daughter’s “children”; this is because nonmarital children who are trying to inherit from or through their mothers are more likely to be living with their mothers than nonmarital children who are trying to inherit from

260. See June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1022–24 (2003). Carbone and Cahn lay out four issues involved in choosing a rule that would use biology to determine legal parenthood:

First, the mechanisms societies use to advance children’s claims on adult resources are social constructs that vary widely

Second, all societies condition children’s interests to some degree on the presence of a genetic tie, if only as a matter of practicality

Third, all societies, however much weight they place on the genetic tie, have exceptions

[Fourth,] not only is the importance of the genetic tie to children an issue capable of renegotiation in each generation, but moreover it is an issue that is even more critically important today [because][i]n this era, childrearing is increasingly taking place outside of marriage, and the issue of which adults a child has the right to claim as his own is an increasingly muddled, yet critical, issue.

Id. (footnotes omitted).

261. See *supra* note 119 and accompanying text; see also Monopoli, *supra* note 74.

262. See Carbone & Cahn, *supra* note 260, at 1013.

263. UNIF. PROBATE CODE § 2-705(e) (2011), 8 U.L.A. pt. I, at 141 (Supp. 2011).

or through their fathers are to be living with their fathers.²⁶⁴ While the language of section 2-705(e) is gender-neutral, fathers are less likely to meet its standard than mothers.²⁶⁵ This disparate impact raises gender-based equal protection concerns that, like illegitimacy, are subject to intermediate scrutiny (or, in states like Massachusetts that have state equal rights amendments, strict scrutiny).²⁶⁶

CONCLUSION

The drafters of the UPC and the UPA have been steadfast in their commitment to a broad equality framework for all children regardless of their parents' marital status. The current UPC embraces status neutrality for nonmarital children in every aspect except in section 2-705(e) governing class gifts by nonparents. In that small corner of the UPC, it is more likely that a nonmarital child will be excluded from a class gift than a marital child. Even if there is not a powerful constitutional argument against section 2-705(e), in balancing the nonparent's intent against the ability of the nonmarital child to take as a member of the class, the statute should not embrace an agency theory that places "the burden of inertia"²⁶⁷ on the nonmarital child rather than on the nonparent transferor. It may be true that the approach taken by former section 2-611 of the UPC yielded some outcomes in which a nonmarital child was included in a class gift in which a nonparent transferor would not have wanted him to share. However, the efficiency costs of an agency approach that imposes a "functioning as a parent" test are high, and the expressive dimension of the test with regard to how we treat nonmarital children in the law is troubling. It is not clear that the benefits of an arguably more precise divination of donors' subjective intent are worth the costs.

By amending section 2-705(e) to return to the inclusive approach taken between 1975 and 1990 in section 2-611, and most recently taken by the Massachusetts Legislature in Mass. Gen. Laws

264. More than five times as many children living with a never-married parent live with their mothers rather than with their fathers. *See* U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003 tbl.FG6, at 1 (2004), available at <http://www.census.gov/population/socdemo/hh-fam/cps2003/tabFG6-all-1.pdf>.

265. *See id.*

266. *See* *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (applying intermediate scrutiny). *But see* *Lowell v. Kowalski*, 405 N.E.2d 135, 139 (Mass. 1980) (applying strict scrutiny).

267. *Trimble v. Gordon*, 430 U.S. 762, 775 n.16 (1977).

Ann. Ch. 190B, section 2-705(a),²⁶⁸ the UPC would eliminate its last remaining barriers to nonmarital children. The number of cases in which a nonmarital child who never had any connection to the parent or family would claim an inheritance is presumably very small. Thus, one could argue that the price of a few of those children being included in class gifts from nonparents who might not have actually wanted such children to be included is well worth the expressive benefit yielded by erring on the side of inclusiveness.

Justice Powell cautioned against “the burden of inertia” being placed on the nonmarital child.²⁶⁹ With the exception of section 2-705(e), the UPC has been very responsive to this concern, embracing a general framework which treats marital and nonmarital children the same for inheritance purposes. The UPC has been a model for status equality and its drafters are to be commended for their leadership on this issue in the area of inheritance law.

268. Mass. Gen. Laws Ann. Ch. 190B, § 2-705(a) (Supp. 2011).

269. *Trimble*, 430 U.S. at 775 n.16.