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Astrue v. Capato: Relegating Posthumously Conceived Children to Second-Class Citizens

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Note

ASTRUE v. CAPATO: RELEGATING POSTHUMOUSLY CONCEIVED CHILDREN TO SECOND-CLASS CITIZENS

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> *[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth . . . .*[1]

In *Astrue v. Capato*,[2] the Supreme Court of the United States examined the status of posthumously conceived children[3] under the survivor insurance benefits provision of the Social Security Act[4] ("the Act"). The Court upheld the Social Security Administration's ("SSA") interpretation of the provisions of the Act that allow state intestacy law to determine whether a posthumously conceived child qualifies as a "child" under the Act and, therefore, is eligible to receive federal sur-

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1. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

2. 132 S. Ct. 2021 (2012).

3. A posthumously conceived child is a child who is conceived through the use of assisted reproductive technology "*after* the death of a genetic parent." Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 581 (2005).

4. 42 U.S.C. §§ 301–1397mm (2006); *Capato*, 132 S. Ct. at 2027. The survivor child's insurance benefits provision of the Act is codified at 42 U.S.C. § 402(d).

vivor benefits.[5] The Court reasoned that such an interpretation was consistent with the statute's textual meaning and purpose, passed inspection under the rational basis test, and was entitled to judicial deference.[6]

In so holding, the Court failed to protect the rights of a unique class of citizens. The Court improperly distinguished posthumously conceived children from other illegitimate children who are protected under the equal protection component of the Due Process Clause of the Fifth Amendment.[7] Instead, the Court should have remanded the case to allow the parties to present evidence on the question of whether posthumously conceived children represent a different subcategory of illegitimate children not entitled to intermediate scrutiny.[8] By failing to do so, the Supreme Court improperly applied rational basis review and found that the SSA's interests for deferring to state intestacy law were legitimate.[9] As a result, the Court upheld a policy by the SSA that applied state intestacy laws without limitation to a previously protected class, thereby failing to protect this vulnerable segment of society.[10] The Court should have followed its own precedent and applied intermediate scrutiny to this discriminatory policy so that posthumously conceived children receive equal protection under the law.[11]

I. THE CASE

In August 1999, shortly after Robert and Karen Capato married, Mr. Capato was diagnosed with cancer.[12] Mr. Capato deposited his semen in a sperm bank because the couple wanted to have children

5. 42 U.S.C. § 416(h)(2), (h)(3)(C); *Capato*, 132 S. Ct. at 2026.

6. *Capato*, 132 S. Ct. at 2026, 2033.

7. *See infra* Part IV.A. For a detailed explanation of why posthumously conceived children are properly classified as "illegitimate," see *infra* notes 161–168, 173–178 and accompanying text.

8. *See infra* Part IV.B.

9. *See infra* Part IV.C.

10. *See infra* Part IV.D.

11. *See infra* Part IV.D.

12. Capato *ex rel.* B.N.C., K.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 627 (3d Cir. 2011), *rev'd sub nom.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012).

but feared that cancer treatments could cause sterility.[13] Notwithstanding Mr. Capato's cancer treatments, Mrs. Capato conceived naturally, giving birth to a son in August 2001.[14] The Capatos desired a sibling for their son, but Mr. Capato died in March 2002.[15]

At the time of his death, Mr. Capato was a Florida resident and had executed a will in Florida.[16] Mr. Capato's will named his son, who was born to Karen Capato in August 2001, and two other children from a previous marriage as beneficiaries.[17] The will did not contain a provision for posthumously conceived children.[18]

Shortly after Mr. Capato died, Mrs. Capato underwent in vitro fertilization ("IVF") treatments using Mr. Capato's frozen sperm.[19] In January 2003, Mrs. Capato became pregnant and, in September 2003, eighteen months after Mr. Capato's death, Mrs. Capato gave birth to twins.[20]

One month later, Mrs. Capato applied for survivor insurance benefits from the SSA on behalf of the twins, but the SSA denied her claims.[21] On reconsideration, the SSA again denied Mrs. Capato's claims.[22] An administrative law judge, hearing the evidence de novo,

13. Capato *ex rel.* B.N.C., K.N.C. v. Astrue, Civ. No. 08-5405 (DMC), 2010 WL 1076522, at *1–2 (D.N.J. Mar. 23, 2010), *aff'd in part, vacated in part sub nom.* Capato *ex rel.* B.N.C., K.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626 (3d Cir. 2011).

14. Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2026 (2012).

15. *Id.*

16. *Id.*; *Capato ex rel. B.N.C., K.N.C.*, 631 F.3d at 627.

17. *Capato ex rel. B.N.C., K.N.C.*, 631 F.3d at 627–28.

18. *Capato*, 132 S. Ct. at 2026. Specifically, Mr. Capato's will distributed his tangible personal property to Mrs. Capato, "and then to any of his children who survive him." *Capato ex rel. B.N.C., K.N.C.*, 2010 WL 1076522, at *2.

19. *Capato*, 132 S. Ct. at 2026. There is a discrepancy as to whether Mrs. Capato conceived through artificial insemination or through in vitro fertilization. *Compare Capato ex rel. B.N.C., K.N.C.*, 2010 WL 1076522, at *3 (stating that "[Mrs. Capato] underwent artificial insemination treatments in Florida"), *with Capato ex rel. B.N.C., K.N.C.*, 631 F.3d at 628 (stating that "Ms. Capato began in vitro fertilization using the frozen sperm of her husband").

20. *Capato ex rel. B.N.C., K.N.C.*, 2010 WL 1076522, at *3. The twins were Mr. Capato's biological children. *Capato ex rel. B.N.C., K.N.C.*, 631 F.3d at 630.

21. *Capato*, 132 S. Ct. at 2026; *Capato ex rel. B.N.C., K.N.C.*, 631 F.3d at 628.

22. *Capato ex rel. B.N.C., K.N.C.*, 2010 WL 1076522, at *1.

also denied the claims.[23] A year later in 2008, the SSA's Appeals Council denied Mrs. Capato's request for review.[24]

After exhausting the administrative appeals process, Mrs. Capato filed a lawsuit against the Commissioner of Social Security, Michael J. Astrue, in the United States District Court for the District of New Jersey.[25] The district court affirmed the SSA's final decision finding that the Capato twins were not "children" within the meaning of the Act.[26] The district court reasoned that under 42 U.S.C. § 416(h)(2)(A),[27] a decedent's posthumously conceived child qualifies for survivor insurance benefits only if the child can inherit as an heir under state intestacy law.[28] The district court concluded that the Capato twins did not qualify as children under Florida's inheritance laws because they were conceived after Mr. Capato's death.[29] Thus, the Capato twins were deemed ineligible for Social Security survivor benefits.[30]

The United States Court of Appeals for the Third Circuit affirmed in part and vacated in part.[31] The Third Circuit noted that

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at *4–5.

27. The provision for determining whether an applicant for survivor benefits is a child of the insured reads as follows:

> In determining whether an applicant is the child . . . of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such.

42 U.S.C. § 416(h)(2)(A) (2006). To maintain consistency with the Supreme Court and lower court opinions in *Capato*, this Note uses "§ 402" and "§ 416" to refer to subsections of Title 42 of the United States Code, not to subsections of the individual Social Security Act.

28. *Capato ex rel. B.N.C., K.N.C.*, 2010 WL 1076522, at *5.

29. *Id.* at *6–7.

30. *Id.* at *5, *7.

31. Capato *ex rel.* B.N.C., K.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 628 & n.1, 632 (3d Cir. 2011), *rev'd sub nom.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012).

§ 416(h) was relevant only "where a claimant's status as a deceased wage-earner's child is in doubt."[32] The court reasoned that the plain language of § 416(e)[33] is clear as to the definition of "child," and that neither § 416(h) nor state intestacy law needs to be considered in situations involving the "undisputed biological children of a deceased wage earner and his widow."[34] Accordingly, the Third Circuit concluded that the Capato twins were children within the meaning of the Act's survivor insurance benefits provision and required an evaluation of dependency to determine whether the twins were entitled to Social Security survivor insurance benefits.[35]

The Supreme Court granted certiorari to resolve the conflict among the federal circuit courts of appeal regarding the status of posthumously conceived children under the Act's survivor insurance benefits provision.[36]

II. LEGAL BACKGROUND

Since the Social Security Amendments of 1939, Congress has recognized the need to provide survivor insurance benefits to certain family members, including children.[37] Legitimacy of birth has played a significant part in determinations of which children receive these benefits.[38] The nation's highest court has, for nearly half a century, recognized the need to protect illegitimate children, one of the most vulnerable populations, from the often harsh and unforgiving policies of state and local governments.[39] More recently, lower courts have differed on how to handle situations involving entitlement to benefits and the development of fertility technology, namely a new subcatego-

32. *Id.* at 631.

33. *See* 42 U.S.C. § 416(e) (2006) (defining the term "child" under the Act).

34. *Capato ex rel. B.N.C., K.N.C.*, 631 F.3d at 631–32.

35. *Id.* at 632. Applying reasoning from Ninth Circuit's decision in *Vernoff v. Astrue*, 568 F.3d 1102, 1112 (9th Cir. 2009), the Third Circuit affirmed the district court's dismissal of the Capatos' equal protection claim. *Id.* at 628 n.1 ("Such a classification does not violate Equal Protection laws because it is reasonably related to the government's interest in assuring that survivor benefits reach children who depended on the support of a wage-earner and lost that support due to the wage-earner's death.").

36. Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2027 (2012).

37. *See infra* Part II.A.

38. *See infra* Part II.A.

39. *See infra* Part II.B.

ry of illegitimate children who are conceived using IVF after the death of one parent.[40]

A. The Social Security Act

During the Great Depression, President Franklin D. Roosevelt signed the Social Security Act into law.[41] Initially, the Act created a "social insurance program" designed to provide retired workers with an income after retirement.[42] Congress amended the Act in 1939, adding survivor insurance benefits for certain family members of covered workers who had died.[43] Beneficiaries under this provision included widows, children, and the insured's parents.[44] The purpose of the Act and the dependent benefits provision was to provide support for the dependants of a disabled or deceased worker and to relieve some of the burdens of life.[45] Courts have since interpreted the Act as a remedial statute intended to serve humanitarian aims.[46]

Today, to be eligible for survivor insurance benefits under the Act, a child applicant of a deceased insured worker must prove that

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40. *See infra* Part II.C.

41. Pub. L. No. 74-271, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397mm (2006)); *Historical Background and Development of Social Security*, SOC. SECURITY ADMIN., http://www.ssa.gov/history/briefhistory3.html (last visited Mar. 4, 2013).

42. *Historical Background and Development of Social Security*, *supra* note 41; *see also* § 702, 49 Stat. at 636 ("The [Social Security] Board . . . shall also have the duty of studying and making recommendations as to the most effective methods of providing economic security through social insurance . . . .").

43. Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 202, 53 Stat. 1360, 1363–67 (1939) (codified as amended at 42 U.S.C. § 402 (2006)).

44. § 202(b)–(e), 53 Stat. at 1362–66.

45. Jimenez v. Weinberger, 417 U.S. 628, 633–34 (1974); Graham v. Barnhart, 278 F. Supp. 2d 1251, 1262–63 (D. Kan. 2003).

46. *See, e.g.*, Capato *ex rel.* B.N.C., K.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 629 (3d Cir. 2011) (acknowledging the need for a liberal application of the Act in light of "'its remedial and humanitarian aims'" (citation omitted), *rev'd sub nom.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012); Dorsey v. Bowen, 828 F.2d 246, 248 (4th Cir. 1987) ("The Social Security Act is a remedial statute, to be broadly construed and liberally applied in favor of beneficiaries."); *see also* Acierno v. Barnhart, 475 F.3d 77, 81 (2d Cir. 2007) (same); Cohen v. Sec'y of Dep't of Health & Human Servs., 964 F.2d 524, 531 (6th Cir. 1992) (same); Marcus v. Califano, 615 F.2d 23, 29 (2d Cir. 1979) (same); Eisenhauer v. Mathews, 535 F.2d 681, 686 (2d Cir. 1976) (same).

he: (1) meets the Act's definition of a "child" and (2) is dependent on the insured parent.[47] Whether an applicant qualifies as a child under the Act depends on the applicant's relationship to the insured. In § 416(e), the Act broadly defines a child as "the child or legally adopted child of an individual."[48] The Act asserts in § 416(h)(2)(A), however, that state intestacy law determines if an applicant is a child under the Act.[49] The SSA has required applicants to satisfy both § 416(e) and § 416(h) to secure the status of a child under the Act.[50] Regarding the dependency requirement, children who are considered legitimate are presumed dependent.[51] When a child is not considered legitimate, however, the child must attempt to prove dependency because there is no parallel presumption of dependency for illegitimate children.[52]

47. 42 U.S.C. § 402(d)(1) (2006); 20 C.F.R. § 404.350 (2012).

48. 42 U.S.C. § 416(e)(1) (2006).

49. *Id.* § 416(h)(2)(A). The Act also provides additional ways for an applicant to qualify as a child eligible to receive survivorship benefits, which include the following: (1) if the insured and the other parent "went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment . . . would have been a valid marriage"; (2) if a deceased insured individual, *before death*, "(I) had acknowledged in writing that the applicant [wa]s his or her son or daughter, (II) had been decreed . . . to be the mother or father of the applicant, or (III) had been ordered . . . to contribute to the support of the applicant"; or (3) if the deceased insured individual "is shown . . . to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died." 42 U.S.C. § 416 (h)(2)(B), (h)(3)(C)(i)–(ii) (2006). The SSA noted in an acquiescence ruling that "[t]hese additional tests for eligibility require action by the insured during the lifetime of the child." SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,657 n.3 (Sept. 22, 2005).

50. *See, e.g.*, Schafer v. Astrue, 641 F.3d 49, 52–53 (4th Cir. 2011) ("On the SSA's view, § 416(h) 'provides the analytical framework that [it] must follow for determining whether a child is the insured's child' for purposes of § 416(e)(1)'s definition." (alteration in original)), *cert. denied*, 132 S. Ct. 2680 (2012).

51. *See, e.g.*, Jimenez v. Weinberger, 417 U.S. 628, 635 (1974) (noting that legitimate children are "by statute 'deemed dependent'").

52. *Id.* at 635. For example, a natural child whose mother or father did not marry the insured individual may be entitled to benefits if "the insured was either living with [the applicant] or contributing to [his] support at the time [he] applied for benefits" or, in the case of an "insured [who] is not alive at the time of [the applicant's] application, [if the applicant] ha[s] evidence to show that the insured was either living with [him] or contributing to [his] support when he or she died." 20 C.F.R. § 404.355 (2012).

In the case of a posthumously conceived child, an applicant's eligibility to inherit under state intestacy law is dispositive to determining whether the posthumously conceived child is eligible for Social Security survivor insurance benefits.[53] If a posthumously conceived child is considered legitimate under state intestacy law, then the child qualifies as a child under the Act, is presumed dependent, and is eligible for survivor insurance benefits.[54] If, however, the posthumously conceived child is illegitimate under state intestacy law, the child is not even considered a "child" under the Act and, thus, cannot receive the benefits.[55] In effect, the SSA incorporates a state's definition of a child when determining the inheritance rights of a posthumously conceived child seeking survivor insurance benefits.

B. Establishing Intermediate Scrutiny for Classifications Based on Illegitimacy

Since the early 1970s, the Supreme Court's equal protection jurisprudence has steadily progressed toward establishing intermediate scrutiny for classifications based on illegitimacy. In *Weber v. Aetna Casualty and Surety Co.*,[56] the Supreme Court struck down a Louisiana state law that set different standards for legitimate and illegitimate children to obtain worker's compensation benefits after the death of a parent.[57] The Court stated that the law relegated dependent but "unacknowledged illegitimates" to a lower status than that afforded to legitimate children.[58] Applying a form of intermediate scrutiny,[59] the

53. *See, e.g.*, *Schafer*, 641 F.3d at 53 (noting that "[t]o meet the definition of 'child' under the Act, an after-conceived child must be able to inherit under State law" (citation omitted)).

54. 42 U.S.C. §§ 402 (d)(1),(3), 416(e), (h) (2006).

55. *Cf.* SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,657 (Sept. 22, 2005) ("A child who cannot inherit personal property from the deceased insured individual under State intestacy law may nonetheless be eligible for child's insurance benefits under limited circumstances under sections 216(h)(2)(B) and (3)(C); these circumstances do not apply to an after-conceived child. Consequently, to meet the definition of ''child'' under the Act, an after-conceived child must be able to inherit under State law.").

56. 406 U.S. 164 (1972).

57. *Id.* at 165, 167–69.

58. *Id.* at 169–70.

59. Intermediate scrutiny assesses whether a law serves an "important governmental objective" and whether the law is substantially related to achieving that goal. Clark v. Jeter, 486 U.S. 456, 461 (1988).

Court concluded that this lower status bore "no significant relationship" to the State's interests of promoting family relationships and minimizing problems of proof of parentage.[60] The Supreme Court reasoned that condemning a child for the actions of the parents was "illogical and unjust."[61]

Two years later, the Supreme Court affirmed *Weber*'s use of intermediate scrutiny for legitimacy-based classifications. In *Jimenez v. Weinberger*,[62] the Court addressed an equal protection challenge based on the Act's different dependency standards for legitimate and illegitimate children.[63] *Jimenez* dealt with the denial of disability benefits to two illegitimate children who were born out of wedlock after the onset of their parent's disability. The *Jimenez* Court, applying a form of intermediate scrutiny, determined that the nonlegitimated illegitimate children were deprived of equal protection because both classifications of illegitimate children, legitimated and nonlegitimated, were similarly situated and posed the same potential to generate spurious claims.[64] The Court explained that the subclassifications within the Act's illegitimate children classification, which included those children who were presumed dependent due to state intestacy law and those who were not, were both overinclusive and underinclusive and, thus, were unconstitutional because they barred recovery for illegitimate children born after the onset of the parental disability.[65]

Shortly thereafter, in *Mathews v. Lucas*,[66] the Supreme Court again addressed the constitutionality of the Act's dependency provisions under the equal protection component of the Due Process Clause of the Fifth Amendment.[67] The Court acknowledged that the dependency presumptions in the Act resulted in the different treatment of similarly situated classes of children—legitimate and illegiti-

60. *Weber*, 406 U.S. at 172–73, 175–76.

61. *Id.* at 175–76.

62. 417 U.S. 628 (1974).

63. *Id.* at 631, 634–37.

64. *Id.* at 632, 635–37.

65. *See id.* at 637 ("[T]he two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.").

66. 427 U.S. 495 (1976).

67. U.S. CONST. amend. V; *Mathews*, 427 U.S. at 497, 502.

mate.[68] The *Mathews* Court was not clear as to the level of scrutiny it applied, but the Court still found that the classifications, which excluded a subclass of illegitimate children, were reasonably related to the government interest of administrative convenience and the likelihood of dependency.[69]

In the cases that followed, the Supreme Court regularly applied intermediate scrutiny to determine inheritance rights for illegitimate children. For example, in *Trimble v. Gordon*,[70] the Court addressed the constitutionality of an Illinois law that allowed an illegitimate child to inherit under state intestacy law only from his mother and not from his father.[71] By contrast, Illinois intestacy law allowed a legitimate child to inherit from both his mother and his father.[72] Following its precedent regarding illegitimacy-based classifications,[73] the Supreme Court applied intermediate scrutiny and deemed the Illinois law unconstitutional.[74]

68. *Mathews*, 427 U.S. at 507–09.

69. *See id.* at 509–10 ("[W]e think that the statutory classifications challenged here are justified as reasonable empirical judgments that are consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death."). The Court rejected applying either strict scrutiny or toothless rational basis review. *Cf. id.* ("Under the standard of review applicable here . . . the materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be 'scientifically substantiated.' . . . [T]he scrutiny . . . is not a toothless one." (citations omitted)). In dissent, Justice Stevens highlighted the Court's failure to explain the applicable level of scrutiny. *See id.* at 519–20 (Stevens, J., dissenting) ("[A]n admittedly illogical and unjust result should not be accepted without both a better explanation and also something more than a 'possibly rational' basis."). Justice Stevens also opined that the dependency presumptions violated equal protection because administrative convenience did not justify the overinclusiveness and underinclusiveness of the Act's classifications regarding the presumption of dependency. *Id.* at 517–23 ("[I]n the name of 'administrative convenience' the Court allows these survivors' benefits to be allocated on grounds which have only the most tenuous connection to the supposedly controlling factor—the child's dependency on his father.").

70. 430 U.S. 762 (1977).

71. *Id.* at 763–65.

72. *Id.* at 763.

73. *See id.* at 766 n.11 (listing a line of cases and noting that "[the instant] case represents the 12th time since 1968 that [the Court] ha[s] considered the constitutionality of alleged discrimination on the basis of illegitimacy").

74. *See id.* at 762, 769–71 ("Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' . . . the scrutiny 'is not a toothless

Likewise, in *Clark v. Jeter*,[75] the Supreme Court considered the constitutionality of a Pennsylvania law that contained two different sets of requirements for a child to receive support from his father based on the child's legitimacy status.[76] For an illegitimate child to receive support, the Pennsylvania law required the child to (1) "prove paternity before seeking support from his or her father" and (2) file "a suit to establish paternity . . . within six years of [the] child's birth."[77] A legitimate child, by contrast, could seek support from his father at any time, without the requirements placed on an illegitimate child.[78] Applying intermediate scrutiny, the Court unanimously concluded that the Pennsylvania law violated the Equal Protection Clause of the Fourteenth Amendment because "the 6-year statute of limitations [wa]s not substantially related to [the state's] interest in avoiding the litigation of stale or fraudulent claims."[79] Thus, by the late 1980s, the Supreme Court had clearly established its reliance on intermediate scrutiny to evaluate illegitimacy-based classifications.

C. Posthumously Conceived Children and Their Rights to Social Security Survivor Insurance Benefits

The line of cases from the 1970s to 1980s that addressed claims involving illegitimate children did not consider the issue of posthumously conceived children.[80] Today, thanks to advancements in med-

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one,' . . . ." (citations omitted)). In dissent, Justice Rehnquist noted that the majority of the Court's equal protection cases involving illegitimacy-based classifications applied a heightened scrutiny that was more searching than that applied to other laws that regulated economic and social conditions. *See id.* at 781–86 (Rehnquist, J., dissenting) (critiquing the majority's standard of scrutiny application and writing that "[t]he appropriate 'scrutiny,' in the eyes of the Court, appears to involve some analysis of the relation of the 'purpose' of the legislature to the 'means' by which it chooses to carry out that purpose."). Of the seven cases that Justice Rehnquist cited, he noted that only one outlier case, *Mathews v. Lucas*, 427 U.S. 495 (1976), failed to apply heightened scrutiny. *Id.*

75. 486 U.S. 456 (1988).

76. *Id.* at 457.

77. *Id.*

78. *Id.*

79. *Id.* at 457, 461, 463–65.

80. *See, e.g.*, *id.* at 457–58 (addressing claims of a child conceived and born during the lifetime of both parents); Trimble v. Gordon, 430 U.S. 762, 763–64 (1977) (same); Mathews v. Lucas, 427 U.S. 495, 497 (1976) (same); Jimenez v. Weinberger, 417 U.S. 628, 630 (1974) (same); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (addressing

ical technology and the use of IVF, posthumously conceived children are a reality. As a result, cases that center on the ability of posthumously conceived children to inherit from their deceased parent(s) have appeared in state courts.[81] Within the last decade, cases addressing the eligibility of posthumously conceived children to receive Social Security survivor insurance benefits have surfaced in federal court.[82] During this brief time period, a circuit court split developed regarding the role of state intestacy law in defining a "child" under the Act.

1. *Initial State Court Cases Regarding the Inheritance Rights of Posthumously Conceived Children*

In re Estate of Kolacy[83] was the first notable case that addressed posthumously conceived children in the context of Social Security survivor benefits. In November 1996, more than eighteen months after William J. Kolacy died, his wife gave birth to twins who were conceived through IVF using sperm that Mr. Kolacy had deposited in a sperm bank.[84] Mrs. Kolacy filed for Social Security survivor insurance benefits on behalf of the twins.[85] The SSA denied the request, indicating that under New Jersey intestacy law, the twins were not considered children of the deceased.[86] The Superior Court of New Jersey, however, granted declaratory relief, concluding that the posthumously

claims of one illegitimate child born during the parents' lifetime and a second child conceived during the parents' lifetime, but born after the father's death); *see also In re* Estate of Kolacy, 753 A.2d 1257, 1260 (N.J. Super. Ct. Ch. Div. 2000) ("I have not been able to find any American appellate court decisions dealing with th[e] central issue" of intestacy rights of posthumously conceived children).

81. *See, e.g.*, Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 259 (Mass. 2002); *In re Kolacy*, 753 A.2d at 1258–60.

82. *See, e.g.*, Beeler v. Astrue, 651 F.3d 954, 956 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012); Schafer v. Astrue, 641 F.3d 49, 50–51 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012); Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009); Gillett-Netting v. Barnhart, 371 F.3d 593, 594–95 (9th Cir. 2004), *abrogated by* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012).

83. 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

84. *Id.* at 1258.

85. *Id.* at 1259.

86. *Id.*

conceived twins were Mr. Kolacy's legal heirs under New Jersey intestacy law.[87]

In 2002, the Supreme Judicial Court of Massachusetts addressed a similar issue in *Woodward v. Commissioner of Social Security*.[88] In 1995, two years after her husband died, Lauren Woodward gave birth to twin girls conceived through artificial insemination using her husband's preserved sperm.[89] Similar to the wife in *Kolacy*, Mrs. Woodward sought Social Security survivor insurance benefits on behalf of the twins, which the SSA denied.[90] Answering a question certified to it by the United States District Court for the District of Massachusetts,[91] the *Woodward* court concluded that, under Massachusetts law, the twins did not have intestacy rights because there was no evidence that their father "affirmatively consented (1) to posthumous reproduction and (2) to support any resulting child."[92] To make this determination, however, the court established a balancing test that considered "three powerful State interests: the best interests of children, the State's interest in the orderly administration of estates, and the reproductive rights of the genetic parent."[93] Noting that "posthumously conceived children are always nonmarital children,"[94] the court also proclaimed that all children are entitled to the same rights, including the right to support from their parents' estates, "regardless of the ac-

87. *Id.* at 1263–64. The court indicated that once paternity is established, a child "should routinely [be] grant[ed] . . . the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates." *Id.* at 1262. The court, however, did not reach the issue of entitlement to Social Security survivor insurance benefits. *Id.* at 1258 (noting that "it is appropriate for me to interpret New Jersey statutory law as it applies to [the Kolacy twins]" but that "[t]he ultimate question of whether [the twins] are entitled to Social Security benefits is something which is exclusively a matter for federal tribunals.").

88. 760 N.E.2d 257 (Mass. 2002).

89. *Id.* at 260.

90. *Id.* at 260–61.

91. *Id.* at 261 ("The United States District Court judge certified the above question to this court because '[t]he parties agree that a determination of these children's rights under the law of Massachusetts is dispositive of the case and . . . no directly applicable Massachusetts precedent exists.'" (alterations in original)).

92. *Id.* at 270–72.

93. *Id.* at 264–66.

94. *Id.* at 266–67.

cidents of their birth."[95] In arriving at its ultimate conclusion, however, the court acknowledged that "the best interests of the posthumously conceived child, while of great importance, are not in themselves conclusive," in part because "[a]ny inheritance rights of posthumously conceived children will reduce the intestate share available to children born prior to the decedent's death."[96]

2. *Inconsistency Among Federal Circuits Regarding Posthumously Conceived Children's Eligibility to Receive Survivor Insurance Benefits*

A pivotal moment regarding the rights of posthumously conceived children and their eligibility for Social Security survivor insurance benefits occurred when the Ninth Circuit decided *Gillett-Netting v. Barnhart*.[97] In 1996, after Rhonda Gillett-Netting gave birth to twins who were posthumously conceived following her husband's death, Mrs. Gillett-Netting filed for child survivor benefits on their behalf.[98] The SSA denied her claim.[99] On judicial review of the SSA's final determination, the United States District Court for the District of Arizona concluded that because the twins did not qualify as children under Arizona intestacy law and they could not prove dependency on the deceased insured, the SSA properly denied benefits.[100] Addressing Mrs. Gillett-Netting's equal protection claims, the district court applied rational basis review, reasoning that no suspect or quasi-suspect class was involved in the classification of distinguishing between biological children in existence at the time of the insured's death and those not in existence at that time.[101] The district court then rejected Mrs. Gillett-Netting's equal protection claim, noting that the SSA rationally relied on state intestacy law and that because the posthumous-

95. *Id.* at 265.

96. *Id.* at 266.

97. 371 F.3d 593 (9th Cir. 2004), *abrogated by* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012).

98. *Id.* at 594–95.

99. *See id.* (noting that the claim was denied by the SSA and an administrative law judge and that the Social Security Appeals Council denied a request for review).

100. Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 965–67, 970 (D. Ariz. 2002), *rev'd*, 371 F.3d 593 (9th Cir. 2004), *abrogated by* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012).

101. *Id.* at 970.

ly conceived twins could not prove dependency, they were not entitled to Social Security survivor benefits.[102]

The Ninth Circuit reversed the district court's decision, concluding that the twins were legitimate children under Arizona law[103] and were therefore "deemed dependent under § 402(d)(3) and need not demonstrate actual dependency nor deemed dependency under the provisions of § 416(h)."[104] The Ninth Circuit, however, never addressed the equal protection claim.[105]

Following the Ninth Circuit's ruling in *Gillett-Netting*, the SSA issued an acquiescence ruling that clarified how the Ninth Circuit's reasoning in *Gillett-Netting* differed from the SSA's interpretation of the Act.[106] The SSA explained how it would apply *Gillett-Netting* in the Ninth Circuit when determining eligibility for survivor's benefits of a child conceived by artificial means after an insured individual's death.[107] The SSA observed that "[a]ll of the States and jurisdictions within the Ninth Circuit, except Guam, have eliminated distinctions between legitimate and illegitimate children."[108] The SSA also point-

102. *See id.* at 969–70 ("Because Juliet and Piers had not been conceived at the time of Robert's death, they are not entitled to survivor's benefits under the Act. Additionally, their equal protection rights have not been violated.").

103. *See Gillett-Netting*, 371 F.3d at 598 (explaining that Arizona eliminated legitimacy-based distinctions to protect innocent children from the actions of their parents). The Ninth Circuit recognized that "[i]n Arizona, '[e]very child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock.'" *Id.* (quoting ARIZ. REV. STAT. § 8-601 (2011)).

104. *Id.* at 599.

105. *See id.* at 594 n.1 ("Because we conclude that [the twins] are entitled to benefits under the Act, we do not reach Gillett–Netting's equal protection claim.").

106. *See generally* SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,657 (Sept. 22, 2005).

107. *Id.* at 55657; *see also id.* ("This ruling applies only to cases involving an applicant for surviving child's benefits who applies on the earnings record of a person who, at the time of death, had his permanent home in [the Ninth Circuit,] Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.").

108. *Id.* The SSA stated that, within the Ninth Circuit, determinations of eligibility for survivor's benefits for posthumously conceived children would differ from the determinations used in other circuits:

> In a claim for survivor's benefits, we will determine that a biological child of an insured individual who was conceived by artificial means after the insured's death is the insured's "child" for purposes of the Act. We will not apply section 216(h) of the Act in determining the child's status. In addition, if such child is

ed out that the *only* way a posthumously conceived child could qualify as a "child" under the Act was if the child could inherit under state intestacy law.[109]

In addition to differences created by the *Gillett-Netting* decision and the SSA's subsequent acquiescence ruling regarding the application of the Act in the Ninth Circuit, a clear circuit court split developed in 2011 over whether posthumously conceived children were eligible for Social Security survivor insurance benefits. On the one hand, the Third Circuit in *Capato ex rel. B.N.C, K.N.C. v. Commissioner of Social Security*[110] agreed with the Ninth Circuit's position regarding the SSA's interpretation of the Act and determined that posthumous-

> considered legitimate under State law, we will consider the child to be the insured's "legitimate" child and thus deemed dependent upon the insured for purposes of section 202(d)(3) of the Act. . . . These States [in the Ninth Circuit] allow all children the same rights which flow between parents and their children, regardless of the parents' marital status. A child acquires these rights if he establishes that an individual is his parent under State family law provisions. Accordingly, if all other requirements are met, adjudicators will consider such child entitled to child's benefits under section 202(d) [of the Act].

Id.

109. *See id.* (explaining that "to meet the definition of 'child' under the Act, an after-conceived child must be able to inherit under State law"). Indeed, courts have understood the SSA's interpretation of the Act to mean that a posthumously conceived child cannot satisfy the alternative mechanisms for qualifying as a child under the Act found in either 42 U.S.C. § 416(h)(2)(B) or § 416(h)(3)(C). *See, e.g.*, Capato *ex rel.* B.N.C., K.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 631 (3d Cir. 2011) ("An 'after-conceived' child, [the SSA] continued, cannot satisfy the alternative mechanisms in §§ 416(h)(2)(B) and 416(h)(3)(C) . . . . There was no explanation as to why the statute even suggests, much less compels, that result."), *rev'd sub nom.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012); *see also supra* note 49. The SSA also explained that a posthumously conceived child that is considered legitimate under state law is deemed dependent upon the insured and need not prove anything else. SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,657 (Sept. 22, 2005). The SSA, however, noted that if state law considers a posthumously conceived child illegitimate, then the child must prove dependency by showing that the father was living with the child or contributing to the child's support prior to his death, which a posthumously conceived child cannot show. *Cf. id.* ("Other children, though, must establish that they were living with their father at the time of his death or that he was contributing to their support in order to be found dependent . . . .").

110. 631 F.3d 626 (3d Cir. 2011), *rev'd sub nom.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012). For an explanation of *Capato ex rel. B.N.C, K.N.C.*, see *supra* text accompanying notes 31–35.

ly conceived children were children under the Act.[111] On the other hand, the Fourth Circuit in *Schafer v. Astrue*[112] and the Eighth Circuit in *Beeler v. Astrue*[113] concluded that posthumously conceived children were not children under the Act and, thus, were not eligible to receive survivorship benefits.[114]

In *Schafer v. Astrue*, the Fourth Circuit ruled that posthumously conceived children were not eligible to collect Social Security survivorship benefits because, under Virginia law, the children did not qualify as intestate heirs.[115] The Fourth Circuit's decision, therefore, upheld the SSA's interpretation of the Act.[116] The court, noting that "Congress understood § 416(h)(2)(A)'s intestacy provisions to be the backbone of all child status determinations," reasoned that 42 U.S.C. § 416(h) was the gateway through which all children had to pass to receive survivorship benefits.[117] The court further explained, however, that in the 1965 Amendments to the Act,[118] Congress had recognized the need to provide a means for illegitimate children to establish child status and "add[ed] § 416(h)(3)(C) so that child status could also exist where parentage was acknowledged, decreed, implicit in a contribution order, or proven along with cohabitation or contri-

111. *See Capato ex rel. B.N.C., K.N.C.*, 631 F.3d at 630–32 ("To accept the argument of the [SSA], one would have to ignore the plain language of § 416(e) and find that the biological child of a married couple is not a 'child' within the meaning of § 402(d) unless that child can inherit under the intestacy laws of the domicile of the decedent. There is no reason apparent to us why that should be so, and we join the Ninth Circuit in so concluding.").

112. 641 F.3d 49 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

113. 651 F.3d 954 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012).

114. *Id.* at 956, 966; *Schafer*, 641 F.3d at 50–51, 63. The facts for these cases are similar in that each dealt with a wife who conceived children through the use of assisted reproduction with her deceased husband's frozen sperm. *Beeler*, 651 F.3d at 956–57; *Schafer*, 641 F.3d at 51. In each case it was undisputed that the deceased husband was the biological father of the child. *Beeler*, 651 F.3d at 957; *Schafer*, 641 F.3d at 51.

115. *See Schafer*, 641 F.3d at 50–51, 63 ("Virginia intestacy law, as incorporated by the Act, does render survivorship benefits unavailable here."). The posthumously conceived child in *Schafer* was born almost seven years after his father died. *Id.* at 51. Virginia law, however, states that "a child born more than ten months after the death of a parent" cannot inherit intestate. VA. CODE ANN. § 20-164 (2008).

116. *Schafer*, 641 F.3d at 50–51, 63.

117. *Id.* at 57.

118. Social Security Act Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended at 26 U.S.C. § 6053 and in scattered sections of 42 U.S.C.).

bution."[119] Months later, in *Beeler v. Astrue*, the Eighth Circuit relied on the Fourth Circuit's reasoning in *Schafer* and concluded that the SSA's interpretation of the Act was reasonable, thereby solidifying a circuit split.[120]

Although some cases that involve the issue of posthumously conceived children and Social Security survivorship benefits have found that such children are legitimate under state intestacy law and have awarded survivor benefits, few cases have addressed the equal protection argument.[121] In *Vernoff v. Astrue*,[122] however, the Ninth Circuit addressed the equal protection argument that the SSA's interpretation and application of its survivorship provision violated equal protection because the SSA excluded some posthumously conceived children from receiving survivor insurance benefits.[123] The Ninth Circuit opined that the SSA's interpretation only excluded posthumously conceived children who did not meet the requirements under state intestacy law and therefore, because the interpretation did not exclude all posthumously conceived children, *Mathews* was controlling.[124] Following *Mathews*, the Ninth Circuit applied rational basis re-

119. *Id.* at 57–58.

120. *See* 651 F.3d 954, 956, 962–63 (8th Cir. 2011) (noting the conflict in the circuits regarding the eligibility of posthumously conceived children to receive Social Security survivorship benefits).

121. *Cf.* Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 235 (2005) ("[T]he few courts and legislatures that have dealt with this issue [whether posthumously conceived children can inherit from a parent who has died prior to the child's conception] have ignored the Equal Protection rights of these posthumously conceived children.").

122. 568 F.3d 1102 (9th Cir. 2009).

123. *Id.* at 1112.

124. *See id.* ("Because the SSA's interpretation does not exclude all posthumously-conceived children, we follow the Court's example in *Lucas* and apply only rational basis review"). The Ninth Circuit explained:

> In *Lucas,* the deemed dependency provisions of § 402(d)(3) were challenged because the SSA's application of those provisions resulted in the extension of benefits only to certain classes of illegitimate children. The Court did not apply heightened scrutiny, but instead upheld the provisions under rational basis review. Rational basis review was appropriate because the provisions did not draw a line between legitimate and illegitimate children, but rather included some illegitimate children while excluding others. The Court accepted the SSA's uncontested view of the purpose of the Act, which "was not a general welfare provi-

view and determined that the SSA's interpretation of the Act was constitutional because the classifications were reasonably related to limiting benefits and administrative convenience.[125]

III. THE COURT'S REASONING

In *Astrue v. Capato*, the Supreme Court unanimously reversed the judgment of the Third Circuit.[126] The Court concluded that the SSA's interpretation of the Act's survivor insurance benefits provision, which allowed state intestacy law to determine whether a posthumously conceived child was a child under the Act and eligible to receive survivor benefits, was consistent with the statute's textual meaning and purpose and was entitled to judicial deference.[127] Accordingly, the Court agreed with the SSA that the Capato twins were not children under the Act and, thus, were not eligible to receive Social Security survivor insurance benefits.[128]

Writing for the Court, Justice Ginsburg rejected the Third Circuit's conclusion that 42 U.S.C. § 416(h) governs only when a child's family status is undetermined.[129] Instead, the Court was persuaded by the SSA's interpretation of § 416(h) as "a gateway through which all applicants for insurance benefits as a 'child' must pass."[130] The Court

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> sion for legitimate or otherwise 'approved' children of deceased insureds, but was intended just 'to replace the support lost by a child when his father . . . dies . . . .'" The Court concluded that "the statutory classifications are permissible . . . because they are reasonably related to the likelihood of dependency at death." Moreover, the dependency presumptions were not impermissibly overinclusive, because they served the reasonable goal of "administrative convenience."

Id. (internal citations omitted). For a discussion of *Mathews*, see *supra* text accompanying notes 66–69.

125. *Id.*

126. 132 S. Ct. 2021, 2025, 2034 (2012).

127. *See id.* at 2026, 2033 ("We conclude that the SSA's reading is better attuned to the statute's text and its design [and] is at least a permissible construction that garners the Court's respect . . . .").

128. *Id.* at 2029, 2033.

129. *Id.* at 2029.

130. *Id.* ("The regulations make clear that the SSA interprets the Act to mean that the provisions of § 416(h) are the exclusive means by which an applicant can establish 'child' status under § 416(e) as a natural child." (quoting Beeler v. Astrue, 651 F.3d 954, 960 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012))).

also rejected the Third Circuit's conclusion that § 416(e) was dispositive of the benefits eligibility question, and subsequently rejected the conclusion that the Capato twins were eligible for the survivor insurance benefits simply because they fit the definition of child under § 416(e).[131] The Supreme Court reasoned that "[n]othing in § 416(e)'s tautological definition ('child' means . . . the child . . . of an individual) suggests that Congress understood the word 'child' to refer only to the children of married parents."[132] For support, Justice Ginsburg offered dictionary definitions of the term "child," references to "child" elsewhere in the Act that "expressly limited the category of children covered to offspring of a marital union," and other statutes that "differentiate child of a marriage ('legitimate child') from the unmodified term 'child.'"[133]

The Court then pointed out that § 416(e) does not "indicate that Congress intended 'biological parentage' to be [a] prerequisite to 'child' status."[134] Justice Ginsburg noted that when the Act was passed in 1939, a biological relationship could not be scientifically proven.[135] Further, she reasoned that "a biological parent is not necessarily a child's parent under law" and that marriage does not indicate with certainty a child's parentage.[136] Moreover, the Court contended that even if Mrs. Capato's proposed definition of "child"—the "biological child of married parents"[137]—was correct, it was unclear whether the posthumously conceived Capato twins would qualify under this definition because, under Florida law, a marriage ends when one spouse dies, and the Capato twins were conceived after the death of Mr. Capato.[138]

Next, the Supreme Court explained why the SSA's interpretation of the Act's provision was more persuasive than that of Mrs. Capato. Addressing Mrs. Capato's assertion that the use of state intestacy law was not mentioned in § 416(e) and, therefore, should not apply, Justice Ginsburg reasoned that the text of § 416(h) "explicitly comple-

131. *Id.* at 2029.

132. *Id.*

133. *Id.* at 2029–30.

134. *Id.* at 2030.

135. *Id.*

136. *Id.*

137. *Id.* (citing Brief for Respondent at 9, Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012) (No. 11-159)).

138. *Id.* ("If that [Florida] law applies, . . . the Capato twins . . . would not qualify as 'marital' children.").

mented" § 416(e), making it unnecessary to place redundant language in § 416(e) as to how a child's status is determined.[139] Thus, the Court agreed with the SSA that "[r]eliance on state intestacy law to determine who is a 'child' . . . serves the Act's driving objective."[140]

The Court emphasized that Congress's "reference to state law to determine an applicant's status as a 'child'" is not an uncommon approach to defining family status.[141] To illustrate that point, Justice Ginsburg pointed out that state law is referenced in other provisions in the Act.[142] The Court also stated that Congress did not perceive "the core purpose" of the Act to be the creation of a program to benefit the needy, but rather "to 'provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings.'"[143] The Court opined that the SSA's reliance on state intestacy law to determine whether an applicant is a child under the Act better serves this purpose.[144] Though acknowledging that some children who fall "outside the Act's central concern" benefit from this interpretation, the Court nevertheless determined that Congress's regime of using state intestacy law to determine which children were dependent on the insured's earnings was a workable solution within Congress's authority.[145]

The Court next rejected Mrs. Capato's argument that "[t]he SSA's construction of the Act raises serious constitutional concerns under the equal protection component of the Due Process Clause."[146] The Court observed that this argument had been rejected by several courts, including the Ninth Circuit in *Vernoff*.[147] Justice Ginsburg ex-

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139. *Id.* at 2029, 2031.

140. *Id.* at 2032.

141. *Id.* at 2031.

142. *Id.*

143. *Id.* at 2032 (alterations in original) (quoting Califano v. Jobst, 434 U.S. 47, 52 (1977)).

144. *Id.*

145. *See id.* ("[T]he intestacy criterion yields benefits to some children outside the Act's central concern. . . . It was nonetheless Congress' prerogative to legislate for the generality of cases. It did so here by employing eligibility to inherit under state intestacy law as a workable substitute for burdensome case-by-case determinations whether the child was, in fact, dependent on her father's earnings.").

146. *Id.* at 2033.

147. *See id.* (citing Vernoff v. Astrue, 568 F.3d 1102, 1112 (9th Cir. 2009) (noting the Ninth Circuit's approval of Congress's regime as being reasonably related to the govern-

plained that even though there are additional eligibility requirements for natural children under § 416(h), compared to, for example, adopted children or stepchildren, that does not necessarily indicate an advantage for non-biological children.[148] Justice Ginsburg then stated that the proper level of scrutiny was rational basis review and determined that Congress's regime of using state intestacy law was a "workable substitute for burdensome case-by-case determinations."[149]

Finally, the Supreme Court noted that, despite the fact that the SSA's construction of the Act may not be the only reasonable interpretation, it is a rational construction that deserves deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[150] While the Court acknowledged the tragic circumstances of the case, it nevertheless explained that it could not replace the law that Congress en-

ment's interests in benefiting children who lose support and reducing administrative burdens). For a discussion of *Vernoff*, see *supra* text accompanying notes 122–125.

148. *See id.* at 2032–33 ("In short, the Act and regulations set different eligibility requirements for adopted children, stepchildren, grandchildren, and stepgrandchildren, but it hardly follows that applicants in those categories are treated more advantageously than are children who must meet a § 416(h) criterion." (internal citation omitted)).

149. *Id.* at 2033 ("Under rational-basis review, the regime Congress adopted easily passes inspection." (internal footnote omitted)).

150. *Id.* at 2026, 2033–34 ("The SSA's interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to this Court's deference under *Chevron*." (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984))). In *Capato*, the Supreme Court noted that "*Chevron* deference is appropriate 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Id.* at 2033–24 (quoting United States v. Mead Corp., 533 U.S. 218, 226–27 (2001)). Under *Chevron*, however, even if Congress has not expressly delegated authority to fill in a gap in a provision, the authority generally conferred to an agency can allow the agency to interpret the provisions of the statute it administers with the force of law. *See Chevron*, 467 U.S. at 844–45 ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). Provided that the agency interpretation is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2) (2006), a reviewing court is obligated to give "legislative regulations . . . controlling weight." *Chevron*, 467 U.S. at 843–44. This has led the Supreme Court to conclude that *Chevron* deference "has produced a spectrum of judicial responses, from great respect at one end . . . to near indifference at the other." *Mead Corp.*, 533 U.S. at 228 (citations omitted).

acted, which determines eligibility for child survivor benefits under the Act based on state intestacy law, with a judicial mandate that "the statute's text scarcely supports."[151]

IV. ANALYSIS

In *Astrue v. Capato*, the Supreme Court upheld the SSA's interpretation of the survivor benefits provision of the Act, thereby allowing state intestacy law to continue to determine whether a posthumously conceived child qualifies as a child under the Act and can receive Social Security survivor insurance benefits.[152] With little discussion regarding the equal protection claim, the Court incorrectly distinguished between two classes of illegitimate children[153] and failed to remand the case for a determination of whether posthumously conceived illegitimate children are entitled to the heightened scrutiny usually applied to illegitimacy-based classifications.[154] As a result, the Court erred in applying rational basis review to the SSA's interpretation of the survivor benefits provision and unnecessarily delayed a ruling that would have protected this unique group of illegitimate children.[155] The Supreme Court should have honored its equal protection precedent regarding illegitimate children and applied intermediate scrutiny to these discriminatory measures.[156] Moreover, even under rational basis review, the Court should have found that the SSA's asserted interests are insufficient to justify denying survivor insurance benefits to these children.[157]

A. The Court Erred in Finding a Distinction Between Posthumously Conceived Children and Other Illegitimate Children

From a legal and factual perspective, a posthumously conceived child is an illegitimate child. In *Capato*, the Court upheld the SSA's determination that the posthumously conceived Capato children were not children under the Act because, under state law, they were not entitled to an inheritance through intestate succession, thus implying that the twins were illegitimate children at the time of their actual

151. *Capato*, 132 S. Ct. at 2034.

152. *See supra* Part III.

153. *See infra* Part IV.A.

154. *See infra* Part IV.B.

155. *See infra* Part IV.C.

156. *See infra* Part IV.D.

157. *See infra* Part IV.D.2.

birth.[158] Nonetheless, in addressing Mrs. Capato's equal protection claim, the Court was inconsistent in its reasoning that posthumously conceived children are distinguishable from other illegitimate children.[159] This distinction stemmed from an erroneous determination that, unlike the stigma suffered by traditional illegitimate children, there was no indication that posthumously conceived children suffered such a stigma.[160]

1. Posthumously Conceived Children Are Illegitimate Children by Definition

Historically, the Supreme Court has interpreted the phrase "illegitimate child" to mean any non-marital child.[161] In *Capato*, the Court found a distinction between posthumously conceived children and other illegitimate children based on presumptions regarding different conduct by the parents.[162] The only distinction that can truly be made between posthumously conceived children and other illegitimate children is that the natural parents in the first instance used assisted reproductive technology to enable their pregnancies.[163] This method

158. *Cf.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2026–27 (2012) ("Under [Florida] law, . . . a child born posthumously may inherit through intestate succession only if conceived during the decedent's lifetime.").

159. *See infra* Part IV.A.1.

160. *See infra* Part IV.A.2.

161. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 457, 461–64 (1988) (addressing the rights of a minor child born out of wedlock as an illegitimate child); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage."); *see also* Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 SANTA CLARA L. REV. 857, 857 & n.4 (2008) (referring to children born out of wedlock and explaining that "[t]he law has evolved from using the term 'bastard' for such children to using the phrase 'illegitimate,' then to 'out-of-wedlock,' and most recently 'nonmarital.'").

162. *See Capato*, 132 S. Ct. at 2033 (indicating such a distinction by stating that "[n]o showing has been made that posthumously conceived children share the characteristics that prompted our skepticism of classifications disadvantaging children of unwed parents.").

163. *See* Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 263 (1999) ("Posthumously conceived children are a newly created class of nonmarital children [who] are conceived by nonconventional reproductive techniques . . . ."); Goodwin, *supra* note

of conception, however, makes posthumously conceived children no less illegitimate under the law.[164]

A "legitimate child" is a child (1) "conceived or born in lawful wedlock" or (2) "legitimated by the parents' later marriage or by a declaration or judgment of legitimation."[165] Posthumously conceived children do not satisfy the first part of the definition because in most states, a marriage ends upon the death of one of the spouses.[166] In addition, a posthumously conceived child cannot be legitimated by a deceased parent.[167] It then follows that posthumously conceived children cannot be "legitimate." Many state intestacy laws, including the Florida laws relied on in *Capato*, recognize this, and therefore treat posthumously conceived children as illegitimate under the law.[168]

121, at 241, 254, 271 (noting that, historically, non-marital children were considered "children of no one"; that current law generally states that if a child is not born within ten months of the death of the father, the child is considered illegitimate; and that "posthumously conceived children are a class of non-marital children"); Christopher A. Scharman, Note, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1044 (2002) ("Nonmarital children and nonmarital posthumous children are similarly situated as they are both indisputably the genetic offspring of the parent, differing only in the timing and circumstances of their birth.").

164. *Cf.* Goodwin, *supra* note 121, at 271 (asserting that "posthumously conceived children are a class of non-marital children"); Scharman, *supra* note 163, at 1039 (noting that "posthumous children are viewed as illegitimate").

165. BLACK'S LAW DICTIONARY 100 (3d pocket ed. 2006).

166. *See* Banks, *supra* note 163, at 262 (stating that "[p]osthumously conceived children are de facto nonmarital children because their parents' marital union dissolves at either spouse's death."); Ellen J. Garside, Comment, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713, 717 (1996) ("Marriage dissolves at death.").

167. *See supra* note 49 and accompanying text.

168. *Cf. Capato*, 132 S. Ct. at 2030 (noting that a marriage ends when a spouse dies and concluding that "the Capato twins . . . would not qualify as 'marital' children"); Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 266–67 (Mass. 2002) ("[P]osthumously conceived children are always nonmarital children. . . . [I]t follows that, under the intestacy statute, posthumously conceived children must obtain a judgment of paternity as a necessary prerequisite to enjoying inheritance rights in the estate of the deceased genetic father.").

2. Posthumously Conceived Children Do Share the Characteristics and Stigma of Illegitimate Children

While recognizing that in both instances—being born out of wedlock and being posthumously conceived—the child is not at fault, the *Capato* Court reasoned that there was "[n]o showing . . . that posthumously conceived children share the characteristics that prompted [the Court's] skepticism of classifications disadvantaging children of unwed parents."[169] The Court, however, failed to fully explain what these characteristics are.[170] Previously, the Court's rationale for applying intermediate scrutiny to illegitimacy-based classifications was that it was unfair to punish children for the conduct of their parents.[171] This rationale did not stem from a showing that the parents acted immorally; rather, it developed because society sought to punish what it considered or thought was immoral.[172]

There is ample evidentiary support for believing that posthumously conceived children are or will be subjected to the same stigma that other illegitimate children have traditionally faced and that, therefore, grouping posthumously conceived children with other illegitimate children is justified. First, society cannot distinguish between these illegitimate children because the difference is not noticeable to the public.[173] In *Mathews*, the Court suggested that illegitimate children have an immutable characteristic—the circumstances of their birth.[174] Just like the "traditional" illegitimate children who were born

169. *Capato*, 132 S. Ct. at 2033.

170. The Court did acknowledge that it applies intermediate scrutiny when faced with challenges to laws that burden "'illegitimate children for the sake of punishing the illicit relations of their parents.'" *Id.* (citation omitted).

171. *See e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988); Trimble v. Gordon, 430 U.S. 762, 769–70 (1977); Mathews v. Lucas, 427 U.S. 495, 505 (1976); Jimenez v. Weinberger, 417 U.S. 628, 631–32 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

172. *See, e.g.*, *Weber*, 406 U.S. at 175 ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.").

173. *See Mathews*, 427 U.S. at 506 (observing that "illegitimacy does not carry an obvious badge").

174. *See id.* at 505 ("It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual . . . ."); *see also* Goodwin, *supra* note 121, at 245 n.76 ("Illegitimacy is immutable because children born out of wedlock cannot control the sta-

out of wedlock while both parents were alive, posthumously conceived children cannot control the circumstances of their birth.[175] Second, to the average person, both sets of children may appear to consist of a child with one parent, subjecting them to social rejection and stigma.[176] Indeed, posthumously conceived children are the topic of moral debates regarding whether posthumous conception should even be allowed.[177] Furthermore, similar to their earlier objections to traditional illegitimate children in the era when illegitimate children born to unwed mothers was less common, numerous religions now find posthumous conception immoral and oppose the practice.[178]

As a result, just like society relegated traditional illegitimate children to second-class status, posthumously conceived children are discriminated against by society, state intestacy laws, government agencies, and courts.[179] Then in *Capato*, by failing to recognize that an

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tus of their birth and cannot force their parents to legitimate them through subsequent marriage.").

175. Goodwin, *supra* note 121, at 272.

176. *See, e.g.*, *id.* at 272–73 ("[P]osthumously conceived children share the same familial circumstances as other non-marital children, by growing up outside the confines of a 'traditional' marital family. Therefore, posthumously conceived children may experience the same social stigma as other non-marital children, especially if raised by single parents who do not remarry.").

177. *See, e.g.*, Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 272 (Mass. 2002) (noting the "complex moral, legal, social, and ethical questions that surround [posthumously conceived children's] birth" will continue to increase); *In re* Estate of Kolacy, 753 A.2d 1257, 1263 (N.J. Super. Ct. Ch. Div. 2000) (stating that "[t]here are . . . ethical problems, social policy problems and legal problems which are presented when a child is brought into existence under circumstances where a traditionally normal parenting situation is not available. . . . The law should certainly be cautious about encouraging parents to move precipitously in this area."); *see also* Bonnie Steinbock, *Sperm As Property*, 6 STAN. L. & POL'Y REV. 57, 62 (1995) ("There are also moral arguments against treating sperm as property. One such argument opposes posthumous reproduction, based on a desire to protect the resulting offspring.").

178. *See, e.g.*, Cyrene Grothaus-Day, *From Pipette to Cradle, from Immortality to Extinction*, 7 RUTGERS J.L. & RELIGION ¶¶ 41, 44–51 (2005) (noting that "[t]he Catholic Church generally disapproves of [assisted reproductive technology] because it 'separates the unitive from the procreative aspect of the marital act'" and that "[t]he Lutheran Church is adamantly opposed to [posthumous conception]" (footnotes omitted)).

179. *See* Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC L.J. 171, 180–84 (2008) (discussing the different treatment for posthu-

"illegitimate for one purpose but not for another" standard was being applied to posthumously conceived children, the Supreme Court undermined the fundamental fairness emphasized by its prior holdings.[180]

B. The Capato *Court Failed to Remand the Case to Determine Whether Posthumously Conceived Children Have the Same Characteristics as Traditional Illegitimate Children*

Instead of discarding the equal protection argument, the *Capato* Court should have remanded the case for a determination of whether posthumously conceived children represent a different subcategory of illegitimate children who are not entitled to intermediate scrutiny. When a factual inquiry is essential to decide a constitutional question, a court should ensure that it has a complete factual record.[181] A remand is appropriate where there are important constitutional interests at stake, and the additional information is needed to resolve a complex question.[182]

In *Capato*, the district court did not evaluate whether posthumously conceived children should be considered illegitimate children.[183] The district court did not even use the term "illegitimate" in conducting its abbreviated equal protection analysis. The Third Circuit did even less, dedicating only a footnote to its affirmance of the district court's equal protection conclusion.[184] The court failed to consider whether posthumously conceived children should be pro-

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mously conceived children in court cases and state statutes); *see also supra* notes 173–178 and accompanying text.

180. *See supra* text accompanying note 171.

181. Columbia Union Coll. v. Clarke, 159 F.3d 151, 168 (4th Cir. 1998) ("Particularly when deciding difficult constitutional questions dependent on intensely factual determinations, as in the case at hand, a court must assure itself that it has before it a full and complete factual record.").

182. *Cf. id.* (noting instances in which the Supreme Court remanded cases involving determinations of whether "an institution was 'pervasively sectarian'" because of the lower courts' "diligence in holding lengthy evidentiary hearings and making numerous factual findings").

183. *See generally* Capato *ex rel.* B.N.C., K.N.C. v. Astrue, Civ. No. 08-5405 (DMC), 2010 WL 1076522 (D. N.J. Mar. 23, 2010), *aff'd in part, vacated in part sub nom.* Capato *ex rel.* B.N.C., K.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626 (3d Cir. 2011).

184. Capato *ex rel.* B.N.C., K.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 628 n.1 (3d Cir. 2011), *rev'd and remanded sub nom.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021 (2012).

tected as illegitimate children and made no inquiry or review of the issues later identified in the Supreme Court opinion. The Supreme Court then, unsurprisingly, found no evidence available on the shared characteristics between posthumously conceived children and other illegitimate children, an issue into which neither of the lower courts had inquired.[185]

Nevertheless, the Supreme Court implied that evidence establishing that posthumously conceived children needed protection might have influenced its decision.[186] Because the district court is the appropriate place to hear evidence and make findings of fact,[187] once the Court identified an unexplored factual question, it should have remanded the case to the lower court to determine whether posthumously conceived children are sufficiently similar to children born out of wedlock to be similarly classified as illegitimate.[188]

C. The Capato *Court Erred by Applying Rational Basis Review*

Unfortunately, with little explanation, the *Capato* Court wrongly applied rational basis review, imposing a consequence on the Capato twins based on the family planning of their parents.[189] As a result, the posthumously conceived Capato twins were doubly punished—first, in the denial of benefits and, second, in the level of scrutiny used to evaluate that denial. Regarding illegitimate children, heightened scrutiny is appropriate where the policy or law in question indirectly punishes the child through no fault of his own but instead punishes the child because of the acts of his parents.[190] While there is some in-

185. *See supra* note 162 and accompanying text.

186. *Cf.* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2033 (2012) ("No showing has been made that posthumously conceived children share the characteristics that prompted our skepticism of classifications disadvantaging children of unwed parents.").

187. *See supra* notes 181–182 and accompanying text; *see also* Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1948) ("We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.").

188. *See supra* notes 181–182.

189. *See supra* text accompanying note 150.

190. *See supra* Part II.B.

consistency regarding what level of scrutiny applies to such circumstances,[191] scholars generally agree that laws discriminating on the basis of illegitimacy are subject to intermediate scrutiny.[192] Contrary to the Supreme Court's assertion in *Capato*, the two types of illegitimate children—those posthumously conceived and those born out of wedlock—whose difference lies only in their method and timing of conception, are similarly situated and, thus, are both entitled to one of the few protections that comes with a title of illegitimacy: receiving intermediate scrutiny in equal protection claims.

D. In Its Abbreviated Equal Protection Analysis, the Capato *Court Erred by Finding That the SSA's Asserted Interests Were Legitimate and Passed the Rational Basis Test*

The *Capato* Court erred in affirming the SSA's interpretation, which invoked state intestacy law and accepted a state determination of legitimacy in creating a presumption of dependency, without making an inquiry into the constitutionality of the state law the SSA applied.[193] Further, the Court's determination that the SSA's interests in using state intestacy law were legitimate was flawed and led to the incorrect conclusion that the interpretation passed rational review.[194]

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191. *Compare* Clark v. Jeter, 486 U.S. 456, 463–65 (1988) (applying intermediate scrutiny and requiring a "substantial relation" between the classification and the government interest); Trimble v. Gordon, 430 U.S. 762, 769–72 (1977) (applying a heightened form of scrutiny and noting that no legitimate state interest justified the classification); Jimenez v. Weinberger, 417 U.S. 628, 631–33 (1974) (same); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172–74 (1972) (same), *with* Mathews v. Lucas, 427 U.S. 495, 505–06, 509 (1976) (applying an unclear level of scrutiny that required a reasonable, but not a substantial, relation between the classification and the government interest). For a criticism highlighting the Court's failure to explain the applicable level of scrutiny used in *Mathews*, see *Mathews*, 427 U.S. at 519–20 (Stevens, J., dissenting).

192. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 797–801 (4th ed. 2011) ("It is now clearly established that intermediate scrutiny is applied in evaluating laws that discriminate against nonmarital children . . . ."); JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 453–54 (3d ed. 2007) ("Under the modern cases, the courts will uphold a governmental use of a classification based on the status of a person having been 'legitimate' or 'illegitimate' at birth only if the classification is 'substantially' related to an 'important' government interest.").

193. *See infra* Part IV.D.1.

194. *See infra* Part IV.D.2.

1. The Court Failed to Determine the Purpose or Constitutionality of the State Law That the SSA Applied

Under a rational basis analysis, a legitimate state interest must be consistent with the Constitution.[195] The *Capato* Court wrongly allowed the SSA to rely on a stated purpose of administrative convenience to support its interpretation, while never considering the state's reasons for establishing the law in the first instance.[196] Posthumously conceived children suffer a disparate impact regarding eligibility for survivor benefits because state intestacy laws determine legitimacy and generally classify posthumously conceived children as illegitimate, thereby denying these children a presumption of dependency under the Act.[197] Once a disparate impact is identified, a court should evaluate whether the state intestacy law shows any discriminatory intent or purpose.[198]

The *Capato* Court, however, only evaluated the constitutionality of the "regime Congress adopted."[199] It made no inquiry into the purpose or constitutionality of the Florida law that the SSA applied. The question, therefore, of whether the state statute purposefully punished illegitimate children was never evaluated by the Supreme Court and never considered by the SSA before giving the law federal force in determinations of Social Security survivor benefits. A congressional statutory regime that allows the executive branch to give force to a state law without regard to its constitutionality is an arbi-

195. *See* Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional concept of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

196. *Cf.* Mathews v. Lucas, 427 U.S. 495, 518–23 (1976) (Stevens, J., dissenting) (opining that the presumptions of dependency in the Act violated equal protection because administrative convenience did not justify the overinclusiveness and underinclusiveness of the classifications).

197. *See* Kindregan & McBrien, *supra* note 3, at 581, 586–87, 594 (highlighting the general absence of state intestacy laws that protect the inheritance rights of posthumously conceived children); *see also* Banks, *supra* note 163, at 259 ("[O]nly a few states have legislation addressing the inheritance rights of posthumously conceived children. . . . Because of the timing of the posthumously conceived child's conception and birth, they are usually unable to establish either of these dependency standards." (footnotes omitted)).

198. CHEMERINSKY, *supra* note 192, at 686–87.

199. Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2033 (2012).

trary use of authority.[200] Even though the Supreme Court and other federal courts have identified some state statutes as discriminating against illegitimate children,[201] the SSA Program Operations Manual System ("POMS") does not offer any guidance on what the SSA should do when state statutes discriminate against illegitimate children.[202] Because the POMS contains no requirement that the underlying state statute be consistent with the Constitution, the SSA is allowed to enforce potentially unconstitutional state statutes.[203] Blindly following state law, which is dispositive regarding whether posthumously conceived children can receive survivor benefits, makes little sense either constitutionally or practically.

200. *See* REPUBLICAN STUDY COMM., RSC POLICY BRIEF: CONGRESS'S ROLE AND RESPONSIBILITY IN DETERMINING THE CONSTITUTIONALITY OF LEGISLATION 1–2 (2012), *available at* http://rsc.scalise.house.gov/uploadedfiles/the_role_and_responsibility_of_congress_in_determing_constitutionality_of_legislation.pdf (asserting that all three branches of government have the obligation to examine the constitutionality of the laws they pass and enforce).

201. *See, e.g.*, Reed v. Campbell, 476 U.S. 852, 852–53 (1986) (determining that a Texas intestacy statute was unconstitutional); Picket v. Brown, 462 U.S. 1, 3–7 (1983) (determining that a Tennessee paternity suit and support statute was unconstitutional); Mills v. Habluetzel, 456 U.S. 91, 92–93, 99–100 (1982) (determining that a Texas paternity suit and support statute was unconstitutional); Trimble v. Gordon, 430 U.S. 762, 763, 766 (1977) (determining that an Illinois intestacy statute was unconstitutional); Gomez v. Perez, 409 U.S. 535, 536–38 (1973) (per curiam) (determining that a Texas paternity support statute was unconstitutional); Daniels v. Sullivan, 979 F.2d 1516, 1516–17, 1520–22 (11th Cir. 1992) (determining that a Georgia intestacy statute was unconstitutional as applied and interpreted by the SSA); Handley v. Schweiker, 697 F.2d 999, 1000–01, 1003–04 (11th Cir. 1983) (determining that an Alabama intestacy statute was unconstitutional as applied to an illegitimate child).

202. *See generally* , *Program Operations Manual System, GN 00306.075, State Laws on Legitimation and Inheritance Rights*, SOC. SECURITY ADMIN., https://secure.ssa.gov/poms.nsf/lnx/0200306075#b (last visited Mar. 7, 2013).

203. *Cf.* REPUBLICAN STUDY COMM., *supra* note 200, at 4 ("Inaction by Congress can have the effect of validating unconstitutional actions. This inaction may then be followed as precedent.").

2. *Through Its Application of Rational Basis Review, the Capato Court Erroneously Accepted the SSA's Asserted Interests and Unsurprisingly Found a Reasonable Relationship Between the Means and the End*

The *Capato* Court upheld the SSA's action based on the "twin interests in [reserving] benefits [for] those children who have lost a parent's support, and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis."[204] Part of the problem with the Court applying rational basis review is that these asserted government interests were accepted as true.[205] Under a proper intermediate scrutiny analysis, the asserted interests would have been open to the Court's evaluation.[206]

As to the SSA's interest in "reserving benefits," the Court should have concluded that, in light of the Act's humanitarian goals, the Act warrants a liberal construction in favor of providing benefits.[207] Indeed, in the past, Congress has expanded coverage of the Act to provide benefits for illegitimate children.[208] Similar to the sentiment expressed in *Jimenez*, however, the *Capato* Court should not have accepted the SSA's reasoning without requiring the agency to provide evidence to support the contention that the Capato twins, and other posthumously conceived children, do not lose parental support.[209]

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204. Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2033 (2012) (alteration in original) (citation omitted).

205. *See* CHEMERINSKY, *supra* note 192, at 700–01 (explaining that under rational basis review, the Court is deferential to the government's asserted purpose regardless of whether the asserted purpose is the actual purpose) .

206. *See id.* at 687 (noting that intermediate scrutiny is less deferential to the government and explaining that the government has the burden of proof to demonstrate that its asserted interest is an important objective).

207. *See supra* notes 43–46 and accompanying text.

208. *See e.g.*, SSR 66-47, 1966 WL 3044 (Jan. 1, 1966) (noting the status of illegitimate children under the Social Security Act Amendments of 1965 and how, in some cases, an illegitimate child can be a "child" under the Act and can thus be entitled to benefits); SSR 67-59, 1967 WL 2995 (Jan. 1, 1967) (same); SSR 67-60, 1967 WL 2996 (Jan. 1, 1967) (same).

209. *See* Jimenez v. Weinberger, 417 U.S. 628, 633 (1974) (requiring "evidence [to] support[] the contention that to allow illegitimates in the classification of appellants to receive benefits would significantly impair" the ability of others to receive benefits); *see also* Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057, 1112 (2013) ("The Capato children had lost a parent's support.

Again, had the Court applied intermediate scrutiny, the SSA would have had this burden of proof.[210] Unfortunately, because the Court applied highly deferential rational basis review, it opined that the scheme must only be a reasonable means of accomplishing the asserted goals,[211] despite suggestions that the reasons and policy are both underinclusive and overinclusive.[212]

As to the SSA's interest in administrative convenience, the Supreme Court has traditionally scrutinized the propriety of administrative efficiency as a legitimate goal when the consequence of the efficiency harms an otherwise helpless class of citizens.[213] Illegitimate

That they would have been dependent on Robert, had he survived, was conceded—there was no administrative burden in proving it.").

210. *See supra* note 206 and accompanying text.

211. Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2033 (2012).

212. *See id.* at 2032 ("[T]he intestacy criterion yields benefits to some children outside the Act's central concern."); *see also* Banks, *supra* note 163, at 346 ("There are no viable alternate considerations or means by which most posthumously conceived children can secure their entitlement to survivor's benefits [unless these children can inherit through state intestacy law]. The statute as it stands is overinclusive in that children who may not be actually dependent are presumed dependent, and underinclusive due to the total exclusion of after-conceived children who have no statutory opportunity in which to prove dependency on a deceased parent."). In *Capato*, if the Court applied intermediate scrutiny, it is unlikely that the Court would have found a substantial relation between the government interests and the classification because the underinclusiveness and overinclusiveness would likely not be tolerated. *See* CHEMERINSKY, *supra* note 192, at 689–90 (explaining that when evaluating the fit between the government's purpose and the means used to achieve that purpose, the stricter the level of scrutiny applied by the Court, the less tolerance there is for overinclusiveness and underinclusiveness).

213. *See* Mathews v. Lucas, 427 U.S. 495, 519–20 (1976) (Stevens, J., dissenting) (criticizing the Court's acceptance of administrative convenience and noting that illegitimacy-based classifications demand justification "by a weightier governmental interest than merely 'administrative convenience'"); Banks, *supra* note 163, at 348–49 (asserting that because of computer and Internet technology modernization since the *Mathews* decision in 1976, there is great doubt as to whether the government interest of administrative convenience "could substantiate the statutory exclusion of nonmarital, posthumously conceived children"); *see also* I.N.S. v. Chadha, 462 U.S. 919, 944 (1983) ("[T]the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."). *But see Mathews*, 427 U.S. at 509 (majority opinion) (stating that "[s]uch presumptions in aid of administrative functions, though they may approximate, rather than

children are a class that has been historically discriminated against by states in assigning intestacy rights and government benefits.[214] This history was essentially ignored in *Capato* because the Capato twins' illegitimacy—posthumous conception—was different than the traditional type of illegitimacy—conception and birth out of wedlock during the parents' lifetimes. In *Jimenez*, however, the Court concluded that the state cannot rely on a government interest in preventing spurious claims to deprive children of the opportunity to receive benefits.[215] The *Jimenez* Court found that where the state effectively "denies [children] any opportunity to prove dependency," the rationale cannot be the prevention of spurious claims.[216] This sentiment was also echoed by the three dissenters in *Mathews*.[217] Finding no "relevant difference between *Jimenez* and [*Mathews*]," Justice Stevens stated:

> In *Jimenez* the Secretary told the Court that the classification was "designed only to prevent spurious claims." The Court held that objective insufficient to justify "the blanket and conclusive exclusion" of a subclass of illegitimates. The statute has not changed but now we are told that the justification for a similar blanket and conclusive exclusion is "administrative convenience." I suggest that this is merely a different name for the same federal interest.[218]

Justice Stevens further reasoned that, like the government interest of preventing spurious claims, the government interest of administrative convenience should not be relied on as a rationale for depriving illegitimate children the opportunity to prove dependency.[219]

What the *Capato* Court failed to recognize was that, while the Act provides additional ways for a child applicant to qualify for survivor insurance benefits,[220] posthumously conceived children are unable to

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precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, *so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny*" (emphasis added)).

214. *See supra* Parts IV.A.1–2.

215. Jimenez v. Weinberger, 417 U.S. 628, 635–37 (1974).

216. *Id.*

217. *Mathews*, 427 U.S. at 518–20, 523 (Stevens, J., dissenting).

218. *Id.* at 518 (internal citations omitted).

219. *See id.* at 519 ("It seems rather plain . . . that . . . the classification is invalid unless it is justified by a weightier governmental interest than merely 'administrative convenience.'").

220. *See supra* note 49 and accompanying text.

meet any of those criteria.[221] Indeed, the SSA and the Fourth Circuit have explicitly recognized that posthumously conceived children cannot meet any of these additional requirements and are, therefore, totally excluded from obtaining survivor benefits unless they qualify under state intestacy law.[222] Nevertheless, the Supreme Court failed to notice this, and its decision in *Capato* allowed the exclusion of posthumously conceived children to perpetuate for the asserted purpose of administrative convenience.

Arguably, even under rational basis review, the illegitimacy-based classifications are not reasonably related to the administrative convenience of using state intestacy law to prevent case-by-case survivor benefits determinations. The SSA is actually set up to review benefits on a case-by-case basis.[223] Indeed, the SSA has its own legal staff, administrative law judges, and Appeals Council.[224] In 2012, the SSA individually reviewed over five million retirement, survivorship, and Medicare claims.[225] Also in 2012, the SSA stated that it "has received more than one hundred claims for survivor benefits by posthumously conceived

221. *See* Banks, *supra* note 163, at 346 ("There are no viable alternate considerations or means by which most posthumously conceived children can secure their entitlement to survivor's benefits.").

222. Schafer v. Astrue, 641 F.3d 49, 53 (4th Cir. 2011) ("The insured parent of such a [posthumously conceived] child by definition died prior to the child's conception, and therefore parentage could not have been acknowledged or decreed prior to death, nor could the applicant have been living with or receiving contributions from the decedent when the decedent passed away."), *cert. denied*, 132 S. Ct. 2680 (2012). The SSA has stated that "[t]hese additional tests for eligibility require action by the insured during the lifetime of the child." SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,657 n.3 (Sept. 22, 2005).

223. *See Survivor's Planner: How You Apply for Survivor's Benefits*, SOC. SECURITY ADMIN., http://www.ssa.gov/survivorplan/howtoapply.htm#ht=1 (last visited Feb. 5, 2013) (detailing the individual information and documents needed to apply for survivor benefits and noting that "[s]ince every person's situation is different, you cannot apply for survivors benefits online"); *see generally* SOCIAL SECURITY ADMIN., ONLINE SOCIAL SECURITY HANDBOOK (2012), *available at* http://ssa.gov/OP_Home/handbook/handbook.html (explaining the process for filing claims with the SSA).

224. *Organizational Structure of the Social Security Administration*, SOC. SECURITY ADMIN. (2012), *available at* http://www.ssa.gov/org/ssachart.pdf.

225. SOCIAL SECURITY ADMIN. PERFORMANCE SECTION, SSA'S FY 2012 PERFORMANCE AND ACCOUNTABILITY REPORT 73 (2012), *available at* http://www.socialsecurity.gov/finance/2012/Complete%20Performance%20Section.pdf.

children, with claims increasing significantly in recent years."[226] Assuming that there were 100 child survivor claims from posthumously conceived children in 2012 alone, these numbers indicate that only about .002%, or 100 out of 5,000,000, of the claims are from posthumously conceived children seeking survivor benefits. If, however, the cumulative total of child survivor claims is 100, then the percentage of SSA survivor benefits claims from posthumously conceived children is even lower. Given these figures, one must wonder whether it would really be that administratively inconvenient for these claims to be considered on a case-by-case basis. Probably not. It is therefore difficult to find a reasonable relationship between the means and the end. To be sure, scholars have begun to find the Court's reasoning in *Capato* "an offense to justice as well as reason."[227] If the *Capato* Court had been presented with this information, perhaps it would have found that, even under the rational basis test, the government's contention lacked merit. Moreover, if the Court had properly applied intermediate scrutiny, then the SSA's use of state intestacy law would fail an equal protection analysis because even if the asserted government interests were found to be important, they are not *substantially* related to achieving the purpose of administrative convenience.

V. CONCLUSION

In *Astrue v. Capato*, the Supreme Court addressed the SSA's illegitimacy-based classification and use of state intestacy law in determining whether posthumously conceived children are eligible for Social Security survivor benefits.[228] In determining that the SSA's use of state intestacy law was consistent with the statute's textual meaning and purpose and was entitled only to rational basis review,[229] the Supreme Court demonstrated that it has not yet accepted posthumously conceived children as deserving of the protection of other illegitimate

226. James Vicini, *U.S. Top Court Decides In Vitro Fertilization Benefits*, REUTERS, May 21, 2012, http://www.reuters.com/article/2012/05/21/us-usa-socialsecurity-benefits-idUSBRE84K0SD20120521.

227. Weinberg, *supra* note 209, at 1113; *see also id.* at 1112 ("[I]t is hard to see why discrimination against a subclass of posthumously born infants is more justifiable than discrimination against all posthumously born infants, when the subclass has no rational relation to the child. No amount of creative subclassing can save *Astrue* [*v. Capato*, 132 S. Ct. 2021 (2012)] from its denial of equal protection.").

228. *See supra* Part III.

229. *See supra* notes 127–128, 149–150 and accompanying text.

children, even though both sets of children are unfairly impacted because of the decisions of their parents.

Instead of protecting the rights of these innocent children, the Court's equal protection review mistakenly used a highly deferential rational basis test that failed to honor its precedent and improperly allowed a federal agency to enforce state laws without regard to those laws' constitutionality.[230] If the Court believed that posthumously conceived children may not qualify as illegitimate children under the law, then the Court should have remanded the case to the district court to allow the parties to present evidence on whether these children are a different subcategory of illegitimate children not entitled to heightened scrutiny.[231] Ultimately, the Court should have applied intermediate scrutiny,[232] but it should not have been so easily persuaded that the SSA's asserted purposes were legitimate, even under the rational basis test.[233] Until the Supreme Court honors the precedent of its own jurisprudence and applies intermediate scrutiny to these discriminatory classifications, posthumously conceived children will continue to be regarded as second-class citizens and denied equal protection for reasons beyond their control.

230. *See supra* Part IV.A, D.1.

231. *See supra* Part IV.B.

232. *See supra* Part IV.C.

233. *See supra* Part IV.D.