Illegitimacy And Veterans' Benefits Legislation

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Congress, in enacting federal benefit programs, has unfortunately tended to reflect the general attitude of our society at large by discriminating in numerous ways against illegitimate children. Because this disparate treatment went unchallenged until a recent series of Supreme Court cases banning, on equal protection grounds, several forms of discrimination against illegitimate children,[1] the federal benefits legislation of an earlier era is still replete with discriminatory rules and procedures which disadvantage those children unlucky enough to be labelled illegitimate.[2]

Thus, for example, illegitimate children are partially or fully excluded from obtaining social security benefits under the terms of the Social Security Act,[3] death and disability compensation under the additional proof requirements of the Longshoremen's and Harbor Worker's Compensation Act,[4] similar benefits under the Railroad Retirement Act of 1937,[5] and survivor's annuity benefits under the civil service retirement statute.[6]

Numerous roadblocks have been placed before illegitimate children as they attempt to qualify on a equal basis with legitimate children for their rightful share of federal entitlements. These obstacles have taken the forms of irrebuttable presumptions which prevent proof of eligibility,[7] additional burdens of proof not required of le-

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1. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Jimenez v. Weinberger, 417 U.S. 628 (1974).

2. *See* Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

3. *See, e.g.*, 42 U.S.C. §§ 402(d)(3), 416(h)(3)(C)(ii), *as applied* in Mathews v. Lucas, 427 U.S. 495 (1976).

4. *See* 33 U.S.C. § 902(14), requiring illegitimate but not legitimate children to prove dependency.

5. *See* 45 U.S.C. §§ 228e(c) & 228e(1) (1); 20 C.F.R. § 237.301 (1977).

6. *See* 5 U.S.C. §§ 41(a)(4) (A), apparently requiring illegitimate but not legitimate children to prove actual dependency on the worker at the time of his death.

7. *See, e.g.*, Sections 216(h)(3)(B)—216(h)(3)(C) of the Social Security Act, 42 U.S.C. §§ 416(h)(3)(B)—416(3)(C), which foreclose illegitimate children from proving eligibility for social security survivors' benefits on his or her deceased or disabled father's account after the

gitimate children,[8] and conditional[9] or total[10] exclusion of benefit eligibility.

Veterans' benefits legislation similarly suffers from potential consitutional infirmities which discriminate against illegitimate children. Although in many ways Congress has enacted progressive legislation which treats illegitimate children on an equal footing with legitimate children, veterans' legislation still has its major shortcomings, most notably in its methods for establishing entitlement to the various veterans' life insurance programs.

The following article will first review the discriminatory aspects of present veterans' benefits legislation. After delineating the present state of the law regarding discriminatory classifications against illegitimate children, an analysis of the effect of these prevailing judicial attitudes on veterans' legislation will be made. Finally, future possibilities of change through litigation or legislation will be explored.

I. VETERANS' BENEFIT PROGRAMS

Nearly 30 million veterans and their 64 million wives, children, parents and other dependents today receive some form of Veterans' Administration benefits.[11] These benefits take many forms, ranging from the fundamental right to monthly disability payments for veteran's service-connected injuries[12] to the near-trivial right to a free

death or onset of the father's disability. This provision was invalidated in Jimenez v. Weinberger, 417 U.S. 628 (1974). *See also* Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974); Severance v. Weinberger, 362 F. Supp. 1348 (D.D.C. 1973).

8. *See, e.g.*, Section 216(h)(3)(C)(ii) of the Social Security Act, 42 U.S.C. § 416(h)(3)(C)(ii), which requires certain illegitimate children to prove that they were supported by or lived with their deceased father in order to be eligible for social security survivors' benefits, a requirement not imposed on legitimate children. The constitutionality of this provision was recently upheld in Mathews v. Lucas, 427 U.S. 495 (1976). *See* text accompanying notes 85 to 104, *infra*.

9. A provision of the Social Security Act, 42 U.S.C. § 403(a), which was recently judicially voided, prevented certain illegitimate children from obtaining social security Conn.), *aff'd*, 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972).

10. Section 1072(2)(E) of the Dependents' Medical Care Act, 10 U.S.C. § 1072(2)(E), restricted medical and dental care to "legitimate" children of uniformed services personnel. This exclusion of illegitimate children from military services was invalidated in Miller v. Laird, 349 F. Supp. 1034 (D.D.C. 1972). No appeal was taken by the Government.

11. Statistical Summary of VA Activities, Veterans Administration, Washington, D.C. (Sept. 1977). Veterans and their families therefore account for about 44% of the total United States population. 1976 Annual Report, Administrator of Veterans Affairs, Veterans' Admin. 3.

12. 38 U.S.C. §§ 310, 331.

United States flag to drape a deceased veteran's casket.[13] Disability benefits are available to veterans and their families in amounts up to $1231 per month [14] for special service-connected disabilities' and are also available to the victims of nonservice-connected disabilities.[15] Survivors' benefits for service-connected[16] and nonservice-connected[17] deaths are also granted. Other available significant benefits include hospital and other medical care for veterans and their dependents,[18] educational loans and benefits,[19] home, farm and business loans and guaranties,[20] and veterans' life insurance policies.[21]

For most of these benefits a veteran's child is at least an indirect beneficiary due to the parent's duty to support the child. Many benefits, however, are directly earmarked for children of the eligible veteran. For most of these programs, the definition of who is a "child" of the veteran and therefore entitled to his or her benefits is statutorily prescribed. Section 101(4), the basic definitional provision of Title 38, defines a "child" as a person who is, *inter alia*,

> a legitimate child, a legally adopted child, a stepchild who is a member of the veteran's household . . . or an illegitimate child but, as to the alleged father, only if acknowledged in writing signed by him, or if he has been judicially ordered to contribute to the child's support or has been, before his death, judicially decreed to be the father of such child, or if he is otherwise shown by evidence satisfactory to the Administrator to be the father of such child.

Although this definition discriminates against illegitimate children by requiring special proof of their father's paternity, few would argue that their special status does not require as much. The nonexistence of the legal formalities accompanying marriage reasonably must require resort to more elaborate proof.[22] Section 101(4), however, commendably does not suffer from the pitfalls of so many

13. *Id.* at § 901.
14. *Id.* at § 314.
15. *Id.* §§ 501-545.
16. *Id.* at §§ 401-423.
17. *Id.* at §§ 531-545.
18. *Id.* at §§ 610-627; 10 U.S.C. §§ 1072-1088.
19. *Id.* §§ 1650-1768.
20. *Id.* at §§ 801-805, 1801-1824.
21. *Id.* at §§ 701-788.
22. *Cf.* Trimble v. Gordon, 430 U.S. 762, 770 (1977); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 174 (1972); Gomez v. Perez, 409 U.S. 535, 538 (1973). It might nevertheless be argued

other federal benefit definitions, which limit proof to unreasonably over-formalized procedures.[23] It gives the illegitimate child a full range of methods with which to establish his or her paternity and also provides a catchall form of proof by allowing other non-enumerated manners of proof.

This final catchall provision makes it possible for the child whose parents have obtained no court order or other source of formal proof to nevertheless establish his or her claim by "other secondary evidence which reasonably supports a finding of relationship."[24] Thus, for example, relatives, friends, and work acquaintances can testify as to having been told by the father of his paternity.[25] Documents inferring paternity can also be produced, such as income tax dependent claims or listings of paternity on birth certificates or other official records.[26]As a consequence, as long as an illegitimate child can, by any means, establish his or her paternity, the child will be entitled to all the rights and privileges of a legitimate child of a veteran. This parity of treatment surely fulfills the Fifth Amendment's promise of equal protection under the laws. Not every veteran's benefit program, however, has incorporated section 101(4)'s definition. Alternative definitions are principally encountered in the various insurance programs available to veterans and their dependents.[27] It is here that the Veteran's Administration unjustifiably discriminates against illegitimate children.

A. *Veterans' Insurance Programs*

Armed services veterans are eligible for various types of Veterans' Administration life and disability insurance which protects them and their dependents during and after military service. There are three major forms of life insurance policies: United States Government Life Insurance (USGLI),[28] National Service Life Insurance

that imposing this burden for fathers and not mothers poses an invalid form of sexual discrimination. For a discussion of this problem, *see* text accompanying notes 175-180, *infra*.

23. *See* text accompanying notes 164-174 *infra*.

24. 38 C.F.R. § 3.210(b)(3) (1976).

25. *See id.* at § 3.210(b)(3)(ii).

26. *See id.* at § 3.210(b)(3)(iii).

27. The terms of § 101(4) makes its definition inapplicable to the veteran's life insurance provisions of 38 U.S.C. §§ 701-788. The effect of this omission is discussed in the text accompanying notes 164-174 *infra*.

28. 38 U.S.C. §§ 740-760.

(NSLI),[29] and Servicemen's Group Life Insurance (SGLI).[30]

USGLI policies were made available until 1951 to World War I veterans. At the end of 1976 approximately 131,700 USGLI policies still remained in effect; the total benefit amount of these policies was over $550 million.[31]

NSLI policies were available to over 22 million World War II veterans.[32] At the end of 1976 there were almost four million NSLI policies still in force representing a total insurance benefit amount of approximately $25.6 billion.[33]

After World War II, but prior to the Vietnam War, several smaller insurance plans were available to veterans. These programs included Veterans Special Life Insurance (VSLI), which now has about 582,000 policies in force held by veterans without service-connected disabilities;[34] Service-Disabled Veterans Insurance (SDVI), which has about 183,000 policies in force held by veterans with service-connected disabilities;[35] and Veterans Reopened Insurance (VRI), which now has about 179,000 policies in force.[36] These policies have a total present benefit value of about $7.9 billion.[37]

The final major type of veterans' insurance plan is Servicemen's Group Life Insurance (SGLI). It was opened in 1965 and is primarily provided to Vietnam-era service men and women. At the end of 1976, over 3,200,000 persons had SGLI policies in effect.[38] These policies represented about $64.3 billion in life insurance proceeds.[39]

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29. *Id.* at §§ 701-725.

30. *Id.* at §§ 765-788.

31. *See* Government Life Insurance Programs for Veterans and Members of the Services, Annual Report Calendar Year 1976 [hereinafter "1976 Report"], Veterans Adm'n 6 (1977). Approximately 1,150,000 USGLI policies were issued. The program was closed to new issues in 1951. The number of policies in effect are diminishing at a 1976 rate of about 7% per year. *Id.*

32. *Id.*

33. *Id.* Because the average NSLI insured veteran is only about 55-years old, this program will have significant vitality for many more years to come. The average death rate for policy holders is 11 per 1000 per year. *Id.* at 7.

34. 38 U.S.C. § 723; 1976 Report at 7.

35. *Id.* at § 722; 1976 Report at 8.

36. 1976 Report at 9.

37. *Id.* at 7-9.

38. *See* Servicemen's & Veterans Group Life Insurance Program, Twelfth Annual Report, Dept. of Veterans Benefits, Veterans Adm'n 8 (1977).

39. *Id.*

The manner in which these insurance policy programs are structured is complex and confusing in many respects. But, when the dust has settled, illegitimate children usually come out on the short end of the distributed insurance benefits.

B. *Discriminatory Aspects of Insurance Policies*

None of the above insurance programs is fully free from discriminatory policies that disadvantage illegitimate children. When no specific beneficiary has been designated by the veteran, these policies discriminate against illegitimate children in three major ways. First, in certain situations there exist specific statutory exclusions against illegitimate children being beneficiaries of a deceased veteran's life insurance policy. Second, where there is no designated living beneficiary, several programs resort to state intestate laws to resolve who shall benefit under the policy. Because of existing discrimination in these intestate laws, illegitimate children often are excluded from benefits in this situation. Third, where illegitimate children are entitled to benefits upon proof of paternity of the veteran, unnecessarily narrow limitations on permissible forms of proof often preclude them from establishing their entitlement.

In each Veterans' Administration life insurance program illegitimate children can be beneficiaries of a veteran's policy if they were specifically designated by name and did not predecease the veteran. Their troubles begin, however, in the absence of a specific designation.

The USGLI, NSLI, SDVI, and VSLI policies permit an illegitimate child to benefit from a deceased veteran's life insurance policy only if the illegitimate child was specifically named by the veteran.[40] Thus, as is the usual practice, where a veteran has merely used the term "children" to designate his insurance beneficiaries, without specifying the name of any child, only a legitimate child will be eligible to receive life insurance proceeds upon the veteran's death.[41] Presumably, therefore, where a veteran had used only the term "child" to indicate his beneficiary and had, for example, one legitimate child

40. *See* 38 U.S.C. § 701(3), which defines "child" in this manner. By its wording, the definitions of section 701(3) apply to all insurance programs in that subchapter, including SDVI, *see* 38 U.S.C. § 722(b)(2), and VSLI, *see id.* at § 723(a) & (b).

41. 38 C.F.R. § 8.46(b) (1976).

and one illegitimate child, only the legitimate child would be a beneficiary.

The programs have varying ways of dealing with the situation where no beneficiary was designated. These include absolutely excluding illegitimate children, reference to state intestacy laws, and, in the SGLI program only, allowing an illegitimate child to prove his or her eligibility.[42]

The NSLI program could be read to exclude all illegitimate children in this situation from eligibility for benefits under insurance policies maturing before August 1, 1976. The applicable statutory provision sets forth an order of preference for the dissolution of benefits where no beneficiary is designated that grants a "child" benefits if a widow or widower is not alive.[43] The definition of "child," however, does not include an illegitimate child unless specifically designated.[44]

In the absence of a designated beneficiary, benefits paid by NSLI policies maturing after August 1, 1946, VSLI policies, and USGLI policies accrue under the veterans' benefits statutes to the estate of the deceased.[45] The matter is thereby left to the dictates of the intestate laws of the insured's state, which often exclude illegitimate children from inheritance eligibility.[46] Because the Supreme Court has recently invalidated this form of discrimination,[47] its incorporation by the veterans' statutes should be capable of circumvention in the future.

The most progressive, but still not flawless, program in this respect is the Vietnam era SGLI program. Under SGLI, whoever is designated as the beneficiary will receive the insured veteran's bene-

42. Under the SDVI programs, the policy lapses in the absence of a named or living beneficiary. 38 U.S.C. § 722(b)(5). Illegitimate children are therefore equally as disadvantaged as legitimate children.

43. 38 U.S.C. § 716(b)(2).

44. *Id.* 701(3). This reading is supported by 38 C.F.R. § 8.46(b) (1976): "A[n] . . . illegitimate child cannot be paid insurance which matured prior to August 1, 1946, unless specifically designated as a beneficiary by the insured." In the listing of those children who can benefit from a veteran's NSLI policy if no beneficiary designation was made, illegitimate children are omitted. *See.* 38 C.F.R. at § 8.48.

45. 38 U.S.C. §§ 717(d) (NSLI), 723(a) & (b) (VSLI), 750 (USGLI).

46. Approximately 21 states have intestate provisions excluding illegitimate children as heirs of their deceased parents' property. *See* note 145 *infra.*

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

fits.[48] If the veteran merely designated his "child" as the beneficiary, without any more explicit identity, an illegitimate child can qualify for SGLI proceeds by successfully coming forward with any accepted form of proof.[49] Although this is a liberalizing extension of benefits to more illegitimate children, it still suffers from several practical defects which undoubtedly deter many illegitimate children from establishing entitlement to SGLI benefits.[50]

If the insured veteran is a woman, her illegitimate child can be the beneficiary of her SBLI policy without a specific form of proof of maternity.[51] Similarly, if the veteran is an illegitimate child, his or her mother can recover under the SGLI policy without following any specific form of proving parentage.[52]

Fathers of illegitimate children are treated differently. To establish eligibility under an SGLI policy, either as a parent beneficiary or illegitimate child beneficiary, paternity must be proven in one of five ways: an acknowledgement by the father in writing, a court support order, a court paternity decree, a certified copy of birth records, or other public records.[53] An illegitimate child or his or her father is out of luck if proof of paternity cannot be obtained through these formalized procedures. Unlike the allowable proof mechanisms found in other portions of the Veterans' Administration Act,[54] proof of paternity cannot be made by secondary, non-record evidence, such as affidavits or statements of persons who knew the father and were aware that he orally acknowledged paternity. Because low-income veterans often do not have formal forms of proof available, the omission of broader methods of proof poses a significant handicap to intended beneficiaries.

II. THE SUPREME COURT AND ILLEGITIMACY

A. 1968-1974

Ten years ago, the Supreme Court was first called upon to test the constitutional sufficiency of a law which classified illegitimate

48. 38 U.S.C. § 770(a).
49. *Id.* at § 765(8).
50. *See* discussion at text accompanying notes 164 to 174 *infra*.
51. 38 U.S.C. § 765(8).
52. *Id.* at § 765(9).
53. *Id.* at §§ 765(8), (9).
54. 38 C.F.R. § 3.210(b)(3) (1976).

children in a less favorable manner than legitimate children.[55] From 1968 until 1974, the Court's response was, with but one narrowly-voted exception,[56] uniform and decisive in striking down barriers which discriminated against illegitimate children. Indeed, despite the development of a high court majority that was generally less supportive of minority rights and less prone to interfere with legislative decision-making, there appeared to exist a clear trend within the "Burger Court" to protect and expand upon the right of illegitimate children to be treated equally with legitimate offspring.[57]

The Court's first steps toward eradicating discrimination against illegitimate children came in 1968 in its tandem opinions in *Levy v. Louisiana*[58] and *Glona v. American Guarantee & Liability Ins. Co.*[59] Relying upon guarantees of equal protection of the laws, the

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

56. Labine v. Vincent, 401 U.S. 532 (1971).

57. A cataloguing of the Justices' votes from 1968 until 1974 in the nine major Supreme Court cases dealing with illegitimacy during that time produces some interesting results. The following table lists each Justice and his vote in those cases decided during his tenure. These cases are: Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Labine v. Vincent, 401 U.S. 532 (1971); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1973); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Jimenez v. Weinberger, 417 U.S. 628 (1974). "Pro" and "Con" refer to the outcome of the vote vis a vis the illegitimate child's interest.

Justice	Votes Pro	Votes Con	Justice	Votes Pro	Votes Con
Brennan	9	0	Blackmun	6	1
Douglas	9	0	Burger	4	3
Marshall	9	0	Stewart	3	6
White	9	0	Black	0	3
Powell	6	0	Harlan	0	3
Fortas	2	0	Rehnquist	0	3
Warren	2	9			

The 1974 Court therefore appeared strongly committed to protecting illegitimate children's rights. The replacement of Mr. Justice Black, who never voted in favor of illegitimate children, with Mr. Justice Powell, who through 1974 had consistently done so, created a solid five-vote majority with 100% pro-illegitimate child voting records. Adding to this the slightly less favorable vote of Mr. Justice Blackmun, would produce a strong 6-to-3 majority on these issues. Only Justices Rehnquist and Stewart could not usually be counted on to cast their votes with an illegitimate claimant.

The development of this new alignment led to the quite likely conclusion that the only case going against the interests of illegitimate children, Labine v. Vincent, would, if raised anew and without adverse precedent, be reversed. In 1977 this result was indeed almost attained. *See* Trimble v. Gordon, 430 U.S. 762 (1977).

58. 391 U.S. 68 (1968).

59. 391 U.S. 73 (1968).

six-to-three majorities per Mr. Justice Douglas invalidated two Louisiana laws that denied mothers the right to recover for the wrongful death of their illegitimate children (*Glona*) and denied illegitimate children the right to recover for the wrongful death of their mothers (*Levy*).[60] Had the children been legitimate, recovery would have been allowed. In, unfortunately, brief and cryptic opinions, the Court rejected Louisiana's argument that allowing recovery could compromise community morals by encouraging the birth of children out of wedlock. The Court found no reason to allow a tortfeasor to go free merely because his victim happened to be illegitimate.[61]

Glona and *Levy* were important because they happened first, but when all had settled, their import was limited. They were written so tersely and unanalytically as to have only minimal precedential value. They articulated very few, if any, guidelines for dealing with classifications which discriminated against illegitimate children.[62] Indeed, after the Court's next pronouncement in this area, the companion cases were left to look as if they were *sui generis*, and in no way a watershed for things to come.

Labine v. Vincent[63] marked the first setback for illegitimate children. The five-to-four decision authored by Mr. Justice Black in 1971 upheld Louisiana's intestacy law which barred acknowledged illegitimate children from sharing equally with legitimate children as beneficiaries of their father's estate. The unelucidating majority opinion[64] was issued during a political period which exuded the virtues of federalism. It refused to intervene into Louisiana's manners of dealing with the dissolution of intestate property "due to the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders."[65] Even with this obvious limi-

60. A discussion of Glona and Levy can be found in Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana, and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1 (1969).

61. *See* 391 U.S. at 75.

62. Glona and Levy side-stepped having to state the proper equal protection test. Minimal analysis was given to the actual or possible "rational basis" which could perhaps justify discrimination against illegitimate children (although the briefs to the Court very ably elucidated these logical details).

63. 401 U.S. 532 (1971).

64. The Labine opinion attempted to outdo Glona and Levy in terms of its brevity and unclear explanations. Its inadequacies provoked Justice Harlan to submit a bolstering concurrence and prompted a detailed and fully analytical dissent by Justice Brennan.

65. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170 (1972).

tation, however, the shocking fact at the time about *Labine* was the majority footnote inference that perhaps the state did not even have to meet the traditional "rational basis" equal protection test in order to justify this type of discrimination against illegitimate children.[66]

Later decisions significantly limited *Labine's* impact. A year later, a newly composed court had little trouble distinguishing it away.[67] Lower courts readily found ways to do likewise.[68] One three-judge court noted that the "vitality of the majority's opinion" had been "eroded" and chose to be guided by "the minority view of the four dissenting judges, all of whom are still on the Court, [which] is more in line with the Court's correct stance."[69]

Weber v. Aetna Casualty & Surety Co.[70] unlocked the stalemate and uncertainties created by the ambiguities of the three predecessor cases. *Weber* ruled violative of equal protection principles another Louisiana statute which prevented unacknowledged illegitimate children from recovering under the state's workmen's compensation program on an equal basis with legitimate and other illegitimate children if the latter class had exhausted the fund's maximum family benefit.

Weber was forcefully written by Mr. Justice Powell, who went to great lengths to fully analyze the equal protection shortcomings of the Louisiana statute. *Weber* carried a tone of moral indignation. It stands as the most eloquent and thoughtful decision by the Court in this area. Because of its author and its clear holding and strength, the *Weber* opinion provides the strongest precedent to be used in challenging discrimination against illegitimate children.

After minimizing *Labine's* effect, the *Weber* Court set forth a rather loose balancing test for cases in this area:

66. Justice Black stated that the Court would have reached its same conclusion "even if we were to apply the 'rational basis' test . . . ." 401 U.S. at 536 n.6. This implies a lesser standard was used. *See id.* at 548-49 (Brennan, J., dissenting). Mr. Justice Harlan's concurrence did, however, indicate that he recognized the need for at least a "reasonable basis" for the classification in order to pass equal protection muster. *See id.* at 540.

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

68. *See, e.g.*, Miller v. Laird, 349 U.S. 1034 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972). *But see*, Parker V. Secretary of H.E.W., 453 F.2d 850 (5th Cir. 1972).

69. Norton v. Weinberger, 364 F. Supp. 1117, 1124 (D. Md. 1973).

70. 406 U.S. 164 (1972).

> The essential inquiry . . . is . . . a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?[71]

The Court then evaluated each possible state interest which the classification of illegitimate children might promote and concluded that none bore any "significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve."[72] Then, in language which displayed a strong empathy for the victims of this discrimination, the Court ended its opinion by stating:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise.[73]

In the next term the Court continued its favorable treatment of illegitimate children by summarily affirming[74] and later favorably citing,[75] two three-judge court decisions invalidating as a denial of fifth amendment due process a portion of the Social Security Act which created a preference for legitimate children much like the Louisiana workmen's compensation law. Also in this term, in *Gomez v. Perez*,[76] the Court invalidated a Texas rule of law whereby legitimate, but not illegitimate, children had a judicially enforceable right to their natural father's support.

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71. *Id.* at 173.
72. *Id.* at 175.
73. *Id.* at 175-76 (footnotes omitted).
74. Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972).
75. *See* Gomez v. Perez, 409 U.S. 535, 538 n.3 (1973).
76. 409 U.S. 535 (1973).

Finally, in 1974 in *Jimenez v. Weinberger*,[77] even the Chief Justice joined the apparent bandwagon,[78] invalidating another Social Security Act provision by which a class of illegitimate children could establish their entitlement to social security disability benefits only by proving that they were supported by or lived with their disabled father prior to the onset of his disability. The overbreadth of this statute barred the illegitimate Jimenez children, who were born after the time their father became disabled, from being able to establish their eligibility. In language akin to the Court's treatment of irrebutable presumptions,[79] it found the offending classification to be both "underinclusive" and "overinclusive" in its treatment of all dependent children and accordingly excised the portion of the Act which prevented illegitimate children from enjoying an equal footing.

B. *1976—A Large Step Backwards*

The trend through *Jimenez* seemed clear and direct. But for *Labine*, the Court had always found a way to strike down statutes which disfavored illegitimate children. The Court had soundly rejected the various "rational bases" which the states or federal government had put forth to justify their discriminatory classifications.[80] Although it had not specifically brought illegitimate children within the ambit of those protected by strict judicial scrutiny,[81] the Justices seemed to be acting as if they had, or at least almost had done so.[82] Indeed, in early spring 1976, the Court granted probable jurisdiction

77. 417 U.S. 628 (1974).

78. It is biographically noteworthy that this marked the first time that Chief Justice Burger authored an opinion ruling unconstitutional an Act of Congress.

79. *Compare* 417 U.S. at 636 *with* 417 U.S. at 639-640 (Rehnquist, J., dissenting).

80. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), rejected discrimination against illegitimate children as a rational method to discourage illegitimacy, to discourage promiscuity and thereby promote morality, and to allow society to favor those more within the ambit of family care. *Id.* at 173-75.

81. Jimenez v. Weinberger, 417 U.S. 628 (1974), specifically declined to resolve this question. *Id.* at 631-32.

82. In opinions filed in three equal protection cases Justices Brennan, Douglas, White, Marshall, Stewart and Rehnquist had indicated that illegitimacy should be deemed a suspect classification and therefore receive the Court's strictest scrutiny. *See* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 61 (1973) (Stewart, J., concurring); *id.* at 108 (Marshall & Douglas, JJ., dissenting); Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion). Justices Stewart, White, and Rehnquist soon changed their minds. *See* Mathews v. Lucas, 427 U.S. 495, 506 (1976).

in a case which looked to be the occasion to specifically overrule *Labine*.[83]The Court's June 1976 opinion in *Mathews v. Lucas*,[84] however, put such optimistic speculation at an end.

The Court heard arguments in *Mathews v. Lucas* and *Norton v. Mathews*[85] in tandem.[86] Both raised the identical question of whether the provisions of Section 216(h)(3)(C) of the Social Security Act,[87]which require certain illegitimate children to prove actual dependency on a deceased wage earner in order to qualify for social security child's insurance benefits, while irrebuttably presuming such a showing by legitimate children and other classes of illegitimate children, violated the due process clause of the fifth amendment.

The Social Security Act sets up two categories of children with respect to proving eligibility for child's insurance benefits. To be eligible, legitimate children need merely establish that their fathers were wage earners covered by the Act and that they were their fathers' children. The Act does not require them to establish any degree of dependency on their fathers since by operation of law they are deemed to have been dependent.[88]

Certain illegitimate children are also irrebuttably presumed dependent on their fathers. This presumption applies to those illegitimate children who are the children of a marriage invalid because of the existence of an impediment when the marriage ceremony was performed;[89] those who establish their fathers' paternity by a written acknowledgement, court paternity decree, or court support order;[90]and those who could establish paternity under their father's domiciliary state's intestate succession law.[91]

All other illegitimate children who have satisfactorily established their fathers' paternity are not benefited by this presumption. Instead, they must establish the additional element that they were

83. Trimble v. Gordon, *probable jurisdiction noted*, 424 U.S. 964 (1976), discussed *infra* at text accompanying notes 111-119.

84. 427 U.S. 495 (1976). For an analysis of *Lucas, see The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 123-32 (1976).

85. 427 U.S. 524 (1976).

86. *See* 423 U.S. 819 (1975).

87. 42 U.S.C. § 416(h)(3)(C).

88. *Id.* at § 402(d)(3).

89. *Id.* at §§ 402(d)(3), 416(h)(2)(B).

90. *Id.* at §§ 402(d)(3), 416(h)(3)(C) (i).

91. *Id.* at §416(h)(2)(A). *Accord*, Jimenez v. Weinberger, 417 U.S. 628, 631 n.2 (1974).

living with or supported by their father at his death.[92]

The Court displayed no great difficulty in upholding this type of discrimination against a class of illegitimate children. Its task was made easier by its deciding for the first time that discrimination based on illegitimacy was not be be accorded the Court's "strict scrutiny" measure of equal protection review. Although the Court acknowledged the many correlations between the status of illegitimacy and those such as race and national origin which have been given its highest degree of scrutiny,[93] it concluded that;

> perhaps in part because the roots of the discrimination rest in the conduct of the parents rather than the child, and perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.[94]

Accordingly, the Court concluded that the Social Security Act's "discrimination between individuals on the basis of their legitimacy does not 'command extraordinary protection from the majoritarian political process' . . . which our most exacting scrutiny would entail."[95]

The Court then proceeded to evaluate the challenged classification by employing its less rigid "traditional" equal protection analysis. It initially determined that Congress had intended child's insurance benefits only to be given to those children who had actually been dependent upon their father prior to his death.[96] Thus, Congress had not intended to assist those whose fathers had ignored their duty of support at this time.

The Court concluded that it was permissible for Congress to irrebuttably presume the dependency of all legitimate children and certain categories of illegitimate children, while requiring the appellee's class of illegitimate children to actually prove their dependency. Congress could make this distinction in the name of "administrative

92. 42 U.S.C. §§ 402(d)(3)(A), 416(h)(3)(C)(ii).

93. 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, and it bears no relation to the individual's ability to participate in and contribute to society. 427 U.S. at 505.

94. *Id.* at 506 (footnote omitted).

95. *Id.*

96. *Id.* at 507-09.

convenience."[97] It could avoid the "burden and expense" of individualized inquiries into dependency by the use of presumptions that "approximate, rather than precisely mirror, the results that case-by-case adjudication would show . . . ."[98]

The Court then thrust the burden of proving the insubstantiality of these presumptions upon the claimants.[99] Without analyzing any of the proffered statistical evidence to the contrary, the Court evaluated each of the Act's presumptions and found this scheme to be "carefully tuned" and containing a "substantial relation to the likelihood of actual dependency."[100] The Court acknowledged that the relationships to dependency were not "compelled." But, because it proclaimed a duty to leave "matters of practical judgment and empirical calculation" to Congress,[101] it would only require the congressional presumptions to not be "so inconsistant or insubstantial as not to be reasonably supportive of its conclusions" of what individualized inquiries would show.[102] By employing this restrained scrutiny, the Court therefore held that:

> in failing to extend any presumption of dependency to [the claimants] and others like them, the Act does not impermissibly discriminate against them as compared with legitimate children or those illegitimate children who are statutorily deemed dependent.[103]

Lucas therefore clarified and arguably altered much of the Court's prior approach to judicial interference with legislative classifications discriminating against illegitimate children. The Court will not review such classifications with its "strict scrutiny" standard. The burden lies with the illegitimate child to refute the government's claim of statutory purpose and the reasonableness of the classification promoting that purpose. Illegitimate children can be discriminated against in instances where it will promote "administrative convenience." These theories of analysis obviously throw a significant hurdle before any illegitimate child who seeks to eliminate discriminatory legislative treatment.

97. *Id.* at 509.
98. *Id.*
99. *Id.* at 510.
100. *Id.* at 513.
101. *Id.* at 515.
102. *Id.* at 516.
103. *Id.* at 516.

C. *1977—The Court's Latest Words*

The Court's most recent expressions of relevance to the discriminatory classifications in the veterans' insurance programs came in two 1977 cases. The court again turned a deaf ear to claims of discrimination against illegitimate children and their natural fathers in *Fiallo v. Bell*.[104] *Fiallo* questioned the constitutionality of the provision of the Immigration and Nationality Act of 1952 which grants special preference immigration status to certain alien children and parents of United States citizens or lawful permanent residents.[105] The beneficiaries of such a preference included legitimate and legitimated children and illegitimate children seeking a preference by virtue of their relationship to their natural mother.[106] No preference at all was given, however, to an illegitimate child who sought such status due to his relationship to his natural father, nor to a natural father who sought this status due to his relationship to his child.[107]

The *Fiallo* appellants' claim failed primarily due to the nature of its special subject matter: congressional control over immigration. Finding that Congress' power to exclude aliens was almost absolute and "largely immune from judicial control," the Court refused even to subject this discriminatory treatment to traditional equal protection analysis.[108] Although the Court pointed to two reasons that "perhaps" had motivated this congressional classification,[109] it disclaimed a "judicial role in cases of this sort to probe and test the justifications for the legislative decision." *Fiallo*, as a consequence, adds little to our understanding of the Court's current treatment of illegitimacy in broader contexts.

On the same day that *Fiallo* was decided, however, the Court issued another opinion which did much to further define its views toward discriminatory governmental treatment of illegitimate chil-

104. 430 U.S. 787 (1977).

105. *See* 8 U.S.C. §§ 1101(b)(1)(D), 1101(b)(2).

106. *See id.* at §§ 1101(b)(1)(A), (C), (D).

107. *See* 430 U.S. at 789. The Court had no occasion to question whether discrimination against illegitimate children was to be reviewed with greater scrutiny than discrimination against the natural fathers of illegitimate children.

108. *Id.* at 792.

109. Congress obviously has determined that preferential status is not arranged for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations. *Id.* at 799 (footnotes omitted).

dren. In *Trimble v. Gordon*[110] the Court invalidated an Illinois intestate statute which granted illegitimate children the right to inherit by intestate succession from their mothers but not from their fathers. In so doing, the Court drastically undermined, but did not specifically overrule, its six-year old *Labine* opinion.

To the *Trimble* Court, "the difficulty of proving paternity and the related danger of spurious claims" might have supplied the best possible reason to justify Illinois' discrimination against this class of illegitimate children.[111] Although conceding that this state concern might permit "a more demanding standard" of proof of paternity to be imposed upon illegitimate children, the Court faulted the state for not considering "middle ground between the extremes of complete exclusion and case-by-case determination of paternity."[112] Because these problems of proof could readily be overcome "for at least some significant categories of illegitimate children of intestate men," it found the Illinois exclusion of these categories to be "constitutionally flawed."[113]

Although *Trimble* reaffirmed the Court's refusal in *Lucas* to treat illegitimacy as a "suspect" classification subject to its "strict scrutiny," it implied that its equal protection analysis would not be as passive as it would if less basic rights were at stake.[114] *Trimble* read *Lucas* to require a more active level of judicial scrutiny, one that at least would not be "a toothless one."[115]

In extreme contrast to *Fiallo*, the Court actively reviewed Illinois' bases for its discriminatory classification. It refused to find legitimating justification for a "mere incantation of a proper state purpose,"[116] and refused to "hypothesize an additional state purpose" unless it had specifically been relied upon by the Illinois court below.[117] The Court has therefore enunciated for these kinds of cases a middle level of more heightened scrutiny falling somewhere between its "strict scrutiny" and "traditional" inquiry standards of review.

110. 430 U.S. 762 (1977).
111. *Id.* at 770.
112. *Id.* at 770-71.
113. *Id.* at 771.
114. *Id.* at 767.
115. *Id.*
116. *Id.* at 769.
117. *Id.* at 776.

III. JUDICIAL CHALLENGES TO INSURANCE PROGRAM DISCRIMINATION

As has earlier been demonstrated,[118] the veterans' insurance programs contain three basic forms of discrimination against illegitimate children. Some programs automatically bar illegitimate children from becoming insurance beneficiaries in certain situations; some determine who can take a deceased veteran's insurance benefits by reference to state intestacy laws, which in turn often discriminate against illegitimate children; and finally, some programs set up restrictions on the methods of proof of entitlement that are available to illegitimate children.

After reviewing the major jurisdictional preconditions to a judicial challenge to these forms of discrimination, each will be analyzed below with a view toward determining the legal approaches most likely to result in an illegitimate child ultimately obtaining judicial relief from its adverse effects.

A. *Availability of a Remedy*

The source of an illegitimate claimant's relief when discriminatorily denied a form of veterans' benefits is the fifth amendment's due process clause. Although this provision of the Constitution does not explicitly contain a clause similar to the fourteenth amendment's guarantee of "equal protection of the laws" which applies to the states, the Supreme Court has clearly extended such protection to those resorting to the fifth amendment in order to correct discrimination by the federal government.[119]

A more serious potential barrier to judicial relief can come from the nonreviewability provision of 38 U.S.C. §211(a). After several unsuccessful attempts to insulate Veterans' Administration decision making from judicial review,[120] Congress amended section 211(a) in 1970 to provide in part that;

118. *See* text accompanying notes 40 to 54 *supra*.

119. *See* Jimenez v. Weinberger, 417 U.S. 628, 637 (1974). *See also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). "[I]f a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 361, 364-65 n.4 (1974) (citing Richardson v. Belcher, 404 U.S. 78, 81 (1971)).

120. A brief history of these unsuccessful congressional attempts is found in Johnson v. Robinson, 415 U.S. at 368-373.

> the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision . . . .

In *Johnson v. Robison*,[121] the Supreme Court held that Congress did not by this statute intend to bar judicial review of constitutional questions.[122] Such an issue would involve a decision of Congress, not the Administrator to which the words of the statute were limited. Therefore, the admonition of section 211(a) would be inapplicable. Thus, constitutional challenges to defects in veterans' legislation in general are permissible and not affected by the statutory nonreview provision.

Challenges to discriminatory provisions of veterans' insurance programs are even more clearly reviewable. Section 211(a) does not specifically apply to matters affected by sections 775 and 784 of Title 38.[123] These provisions grant original subject-matter jurisdiction to United States district courts with no limitations on judicial review. Thus, judicial review of denials under SGLI policies would be founded upon 38 U.S.C. § 775 and brought in a United States district court. Similar challenges to other veterans' insurance programs would find their subject-matter jurisdictional bases in 38 U.S.C. § 784. Accordingly there would appear to be no jurisdictional or other unique technical barrier which would prevent a federal court from reaching an illegitimate claimant's challenge to discriminatory veterans' benefit legislation.

B. *Absolute Exclusion*

The most drastic way in which several V.A. insurance programs discriminate against illegitimate children is to deny them absolutely or upon certain conditions the right to recover upon their father's

121. 415 U.S. 361 (1974).

122. *Id.* at 73-74. *See also* Taylor v. United States, 385 F. Supp. 1034, 1036 (N.D. Ill. 1974), *vacated & remanded*, 528 F.2d 60 (7th Cir. 1976); Plato v. Roudebush, 397 F. Supp. 1295, 1303-04 (D. Md. 1975).

123. *See* 38 U.S.C. § 211(a), which begins "On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title . . . ."

insurance policies.[124] Fortunately for these children, however, this form of discrimination appears easily susceptible to successful judicial challenge. The Supreme Court's recent decision in *Trimble v. Gordon*[125] has refused to uphold such an absolute prohibition.[126] There is furthermore nothing in *Lucas* which would hint at a departure from this precedent.

Congress has not explained why it chose to discriminate in this absolute fashion. By absolutely barring recovery, it in no way could claim the need to eliminate individualized adjudications which might thereby enhance administrative convenience. Thus, the purpose found to exist in *Lucas* surely cannot be said to exist here.

There are, however, two potential purposes which Congress might have had. First, it might have intended a two-fold goal: to promote its own concepts of morality and to discourage parents from bringing illegitimate children into the world by penalizing them. Second, it might have sought to promote a veteran's presumed wishes by allowing only his legitimate heirs to reap his insurance benefits, thus perhaps keeping this bounty within the more narrow ambit of the legally sanctioned family. An analysis of these potential governmental justifications, however, reveals a lack of any rational bases to support them.

1. Discouraging Illegitimacy and Immorality

On numerous occasions discrimination against illegitimate children has been rationalized by its proponents as serving either of two closely related goals: the discouragement of promiscuity or the encouragement of legitimate families.[127] Thus, it could be asserted that a legislature may permissibly discriminate against illegitimate children in order to discourage persons from engaging in extra-marital sexual practices which might produce an illegitimate child.[128] Simi-

124. Absolute exclusions exist in various applications of the USGLI, NSLI, SDVI, and VSLI policies. *See* text accompanying notes 40 to 44 *supra*.

125. 430 U.S. 762 (1977).

126. *See id.* at 770-71.

127. The various cases which have discussed these legislative purposes or in which the parties defending them have relied upon such purposes are listed in Note, *Illegitimacy and Equal Protection*, 49 N.Y.U.L. REV. 479, 506 n.186, 199, 508 (1974). *See also* Trimble v. Gordon, 430 U.S. 762, 768-70 (1977).

128. *See, e.g.*, New Jersey Welfare Rights Org. v. Cahill, 349 F. Supp. 491, 496 (D.N.J. 1972), *rev'd*, 411 U.S. 619 (1973).

larly, it is often argued that by denying illegitimate children certain benefits, their parents will be encouraged to legitimize them by marrying or otherwise creating a legitimate family.[129]

It is probable that these alleged purposes are proper ones for the state to be attempting to promote.[130] The break down in their logic, however, comes upon review of whether they would indeed promote such goals in a fair and legitimate manner. The Supreme Court's ready rejection of these assertions in analogous settings should portend a similar fate in the context of veterans' insurance benefits.

The basic flaw with these legislative justifications is that they presume a totally unrealistic sequence of events, namely that a couple contemplating or in the process of producing an illegitimate child would be deterred in any way by the possibility that their child will be ineligible years later for governmental benefits. In *Glona*, the Supreme Court tersely rejected a comparable assertion as "farfetched."[131] In *Weber* the Court similarly dispelled the notion that "persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation.[132]

Those who bring illegitimate children into the world are surely not concerned with such abstract notions as this legislative purpose would suppose. Indeed, the complexities of the benefit formulas in each insurance program make it difficult for anyone to speculate on who will and who will not be covered in the future.

The Court has pointed to an additional fatal flaw in these arguments: they seek to punish an innocent child for the arguably improper conduct of his parents. In *Weber*, the Court declared it to be "illogical and unjust" to effectuate "society's condemnation of irresponsible liasons" by "visiting this condemnation on the head of an infant . . . ."[133] As the Court further declared:

> [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. Obvi-

129. *See, e.g.*, Griffin v. Richardson, 346 F. Supp. 1226, 1234 (D. Md.), *aff'd*, 409 U.S. 1069 (1972); Miller v. Laird, 349 F. Supp. 1034, 1045 (D.D.C. 1972).

130. *Cf.* Trimble v. Gordon, 430 U.S. 762, 769 (1977); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972).

131. 391 U.S. at 75. *See also* Eskra v. Morton, 524 F.2d 9, 13-14 n.13 (7th Cir. 1975).

132. 406 U.S. at 173. *See also* Miller v. Laird, 349 F. Supp. at 1045.

133. 406 U.S. at 175. *Accord* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973).

ously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust— way of deterring the parent.[134]

It thus appears that little mileage could be obtained by the Government in attempting to justify its absolute ban on an illegitimate child's receiving veterans' insurance benefits based on these potential morality-related governmental purposes.

2. Limitation of Beneficial Purposes

Congress, of course, has no duty to be unlimited in the benefits it grants our citizenry.[135] Thus, another potential justification for denying illegitimate children veterans' insurance benefits would be that Congress only intended a limited class of beneficiaries, namely those within the normal family ambit, to benefit from the insurance programs.[136] Because it would be assumed that illegitimate children, due to their historical condemnation by society, are not often within a veteran's "closer family," they therefore, it would be argued, need not be protected by the insurance program. Alternatively, from the veteran's perspective, the exclusion of illegitimate children might be justified as Congress' best guess at whom the veteran would have wanted to receive his insurance benefits.

The initial flaw in such an alleged purpose would be the great difficulty in establishing that its protected parties—the parent and his or her "legitimate family," if any—actually would welcome such a result.[137] Undoubtedly, many members of society might wish, for arbitrary reasons, to deny illegitimate children insurance benefits. But could it really be said that an illegitimate child's own father or mother would have this same outmoded view? One public opinion poll answered this question negatively. It indicated that 64 percent of those interviewed believed that illegitimate children should have the

134. 406 U.S. at 175. *Accord* Trimble v. Gordon, 430 U.S. 762, 769-70 (1977) (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972)).

135. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

136. *Cf.* Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 173.

137. Circuit Judge Spottswood Robinson responded to such a claim in strong terms:

> This notion of a general lack of parental concern for the welfare of illegitimate children is nothing more than sheer speculation. In light of the many subtle motivations in human affection and behavior, an assumption that parents care only about their legitimate children, as history teaches us, would be impossible to substantiate. Such a premise is entirely too precarious to comprise a rational supporting basis for this classification. Miller v. Laird, 349 F. Supp. at 1044.

same inheritance rights as legitimate children.[138] Only five percent felt that illegitimate children should get no inheritance.[139] It therefore would indeed seem more reasonable to assume that the deceased veteran would have felt a comparable affinity to his or her illegitimate and legitimate children and therefore want them to share his insurance benefits equally.[140]

The structure of the insurance provisions also belies this purpose. It bars illegitimate children from receiving insurance benefits even if no other legitimate children survive the veteran. If a deceased veteran were of such a mind to prefer his legitimate offspring over his illegitimate ones, a priority scheme such as confronted in *Weber* might accomplish this purpose. But the veterans' insurance programs are not so qualified. They would deny illegitimate children benefits even if there existed no alternative children to receive the proceeds.

It should also be noted that the insurance policies already do have a provision whereby a veteran could, if he or she so desired, express a prejudice and exclude an illegitimate child. It is, of course, within each veteran's power to designate only certain of his or her children as beneficiaries. Thus, even if it were assumed that veterans would prefer this result, the programs are still structured to permit its accomplishment. The existence of this individual option makes it unnecessary for the government to serve as the spokesman for a veteran's presumed private prejudices.

Assuming that Congress would be accurate in predicting that many veterans would intend to bar recovery by their illegitimate offspring, an even more fatal flaw should invalidate these provisions. It is one thing to allow private parties to discriminate in their inheritance choices. But it is quite another for the government to help effectuate such discrimination, thus giving it the state's imprimatur.[141] As the Seventh Circuit has recognized:

> Just as private schools or private hospitals may place some arbitrary limits on the class of people they serve, so may testators make irrational choices in the distribution of their property. But when the choice is made by the government, the obligation to af-

138. *See* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 318-20 (1971).
139. *Id.*
140. *Cf.* Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 169.
141. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966).

ford all persons equal protection of the laws arises.[142]

When addressing a New Jersey statute which attempted to deny certain illegitimate children welfare benefits, the Supreme Court noted that "there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate."[143] Like the benefit provision systems in *Levy* and *Weber*, the veterans' insurance schemes are designed to provide close relatives and dependents of a deceased a means of recovery for an often abrupt death. Due to this similarity in purpose, and due to the absence of a valid countervailing legislative justification, *stare decisis* would seem to require a similar constitutional result.[144]

C. *Reference to State Intestacy Laws*

Approximately 21 states have laws which specifically preclude illegitimate children from receiving their mother's or father's property through intestate succession.[145] Thus, when the provisions of the NSLI, VSLI, and USGLI policies, which grant benefits in accord with state intestate law,[146] are called into play, the many illegitimate children residing in these states could survive their veteran parent empty handed. It seems likely, however, that if these children were to mount a judicial attack on the legislation's incorporation of discriminatory state laws, these statutory provisions would not survive constitutional scrutiny.

1. *Trimble's* Undermining of *Labine*

Until recently, the major barrier to such a challenge was *Labine v. Vincent*[147] which had upheld discrimination against illegitimate children in Louisiana's intestate laws. In *Trimble*, however, the Court all but eliminated this judicial impediment as it held a similar

142. Eskra v. Morton, 524 F.2d 9, 14 (7th Cir. 1975) (Stevens, J.).

143. New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973).

144. *Cf.* Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 171-72.

145. These states are Alabama, Arkansas, Connecticut, District of Columbia, Georgia, Hawaii, Illinois, Kentucky, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, West Virginia, and Wyoming. *See* Brief for Appellants, Trimble v. Gordon, Sup. Ct. No. 75-5952, Appendix A.

146. *See* text accompanying notes 45 to 47 *supra*.

147. 401 U.S. 532 (1971).

Illinois intestate provision to be unconstitutional. It began the process of undermining *Labine* by explaining it was "difficult to place in the pattern of this Court's equal protection decisions" and that "subsequent cases have limited its force as precedent."[148]

Much of the *Trimble* opinion was spent analyzing the state's profferred "rational bases" upon which its discrimination could be justified. In *Labine* in 1971, two of these claims had been found sufficient ground for upholding intestate discrimination against illegitimate children. In *Trimble* in 1977, however, closer analysis washed away these state claims.

Labine was first faulted for upholding Louisiana's intestate scheme as a "measured, if misguided, attempt to deter illegitimate relationships."[149] Because *Labine's* analysis of this possibility properly justifying state interest had been "perfunctory" and "incomplete,"[150]its value as precedent for such a claim was rejected.

Labine had also bolstered its decision with the claim that discriminatory intestate laws did not pose "insurmountable barriers" to illegitimate children.[151] Due to the fact that by adhering to "the simple formalities of executing a will"[152] a father could avoid the pitfalls of the intestacy scheme, *Labine* reasoned that its discrimination was not onerous.[153] *Trimble* flatly rejected this analysis, labelling it to be without "constitutional significance."[154] In essence, *Trimble* held that the existence of alternative avenues to obtaining a benefit has

148. 430 U.S. at 767 n.12.

149. *Id.* at 769 n.13.

150. *Id.* at 768-69.

151. 401 U.S. at 539.

152. *Id.*

153. A more direct attack on this assertion might have inquired into its application in real life situations. It is highly unrealistic to assume that people, including veterans, would have the legal knowledge, financial ability, and foresight to take these precautions. Although to a judge or lawyer a will may seem to be an easily achieved "simple formality," lay people generally do not utilize wills. One study, for example, has shown that only 15 percent of adult Americans leave wills. *See* Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963). Most people do not have enough wealth to either worry about its disposal or to be able to hire an attorney to administer it. Furthermore, even if they did, the pitfalls of the veteran's insurance programs are not expected problems which most veterans would have experience to avoid. Thus, the option which Labine gives to avoid discrimination against illegitimate children in state intestacy schemes is mainly illusory. It is a clear example of the Justices patrician attitude interfering with their ability to measure social reality.

154. 430 U.S. at 774. A second major flaw in this rationalization also exists. As the Seventh Circuit has noted when evaluating the "no insurmountable barrier" argument:

"We have some difficulty in evaluating the importance of the options open to the parents,

little, if anything, to do with justifying the basic discriminatory roadblock. This "analytical anomaly," which attempted to avoid "hard questions . . . by a hypothetical reshuffling of the facts," improperly permitted the *Labine* court to lose "sight of the essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law."[155]

Despite this severe criticism of *Labine*, the *Trimble* court left it with a few breaths of life in its final footnote. Without explaining itself, the Court declared that "[t]he Illinois statute can be distinguished in several respects from the Louisiana statute in *Labine* ."[156]But what little precedential hope this notation gave *Labine* was then quickly taken away:

> Despite these differences, it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls.[157]

Labine should therefore pose no serious hurdle to a judicial challenge to the incorporation of state intestacy laws in veterans insurance programs. A final factor which would distinguish away *Labine* should help guarantee the success of such a challenge.

2. Further Distinguishing *Labine*

In *Labine*, the federal judiciary had been asked "to nullify the deliberate choices of the elected representatives of the people of Louisiana."[158] The veterans' insurance structure poses a far different judicial problem. *Labine* put great stress on the federal judiciary's traditional reluctance to interfere with the methods by which a state regulates the descent and distribution of the property of intestate decedents.[159] These notions of federalism, however, are insignificant when a federal court is viewing a federal statute which in turn

since from the point of view of the child it really makes no difference whether options were non-existent or simply not exercised."

Eskra v. Morton, 524 F.2d at 15. In fact, once a parent dies intestate, the barrier is indeed "insurmountable;" it is too late to rectify the situation.

155. 430 U.S. at 773-74.

156. *Id.* at 776 n.17.

157. *Id.*

158. 401 U.S. at 540.

159. *See* 401 U.S. at 536. *See also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 170. In Reed v. Reed, 404 U.S. 71 (1971), however, the Court did involve itself in a state's probate system, overruling Idaho's discrimination against female administrators.

chooses to incorporate a state method of intestate disposition. It is the federal government's act of discrimination which is paramount and which would be nullified by a federal court. Thus, notions of federalism find no significant relevance in the veterans' insurance scheme.

Furthermore, insofar as *Labine* might have been posited upon a state's legitimate concern for noninterference with the speed and certainty of its system of passing on the property of its decedents, this concern would be of little relevance to veterans' insurance. The Veterans' Administration has no need nor interest in bolstering this state interest when it adopts and utilizes the state's intestate distribution provisions. It is not disposing of land within the state which must be promptly recorded in a proper fashion. Instead, it is federal money that is being dispensed. The accuracy and promptness of the dispatch of the Administration's insurance benefits operate independently of any state interest. Indeed, because the Veterans' Administration has distributed insurance benefits by less arbitrary intestate priorities in its other insurance programs, it should be hard pressed to rationalize resort to state intestacy systems as being based on similar administrative concerns.

The approach of Mr. Justice (then Circuit Judge) Steven's majority opinion for the Seventh Circuit in *Eskra v. Morton*[160] points the way in an analogous setting to a judicial solution to this form of governmental discrimination. *Eskra* encountered a federal statute which regulated the disposition of a Chippewa Indian's interest in Indian Trust Land upon her death.[161] The statute directed that this property be disposed of as determined by the state in which the land was located. The applicable Wisconsin intestate succession statute denied Eskra, solely because she was born out of wedlock, the right to receive property from the collateral heir of her deceased mother.[162]

By approaches similar to those discussed above, *Eskra* readily distinguished *Labine* and invalidated the federal Indian Trust Land resort to prejudicial state intestacy laws. Judge Stevens ascribed to

160. 524 F.2d 9 (7th Cir. 1975). No application for certiorari in the Supreme Court was filed by the Government.

161. 25 U.S.C. §§ 348, 464.

162. 524 F.2d at 11.

Weber the intent "narrowly to limit the *Labine* holding."[163] Because of *Labine's* erosion and the distinguishing characteristics between a direct attack on a state's intestacy scheme and an attack on a federal system which merely incorporates it, *Eskra* had little difficulty side stepping *Labine* and reaching the more charitable result.

The same route is available to challengers of these aspects of the veterans' insurance programs. Although, since *Lucas*, the degree of support for illegitimate children forthcoming from the Supreme Court is open to question, a challenge as outlined above should have a fair chance of success.

D. *Restrictions on Proof of Paternity*

The final major method by which the insurance programs discriminate against illegitimate children involves restrictions placed upon the manner in which they can prove their father's paternity and thereby establish eligibility as his son or daughter. The Supreme Court's pronouncements in *Lucas* and *Trimble*, however, cast doubt upon the prospects for a successful judicial challenge to this more subtle handicap.

1. Discrimination Against Illegitimate Children

The manners of proof permitted for illegitimate children attempting to establish eligibility for most veterans' benefits other than insurance proceeds take a reasonable approach to this problem. The relevant statute[164] first allows proof by most recognized formal methods, *e.g.*, reference to a judicial paternity decree, support order, or other documentary evidence.[165] But for the numerous occasions in which no formal proof can be obtained, the child may nevertheless resort to "other secondary evidence which reasonably supports a finding of relationship."[166]

Establishing eligibility for an illegitimate child under an SGLI policy, however, is made more difficult. Where the veteran merely designated his or her beneficiary as his or her "child," an illegitimate child is only permitted to establish paternity by resort to five specific

163. *Id.* at 13 n.12.
164. 38 U.S.C. § 101(4).
165. 38 C.F.R. § 3.210(b) (1976).
166. *Id.* at § 3.2103.

formal methods.[167] By precluding proof by more informal, secondary means, many illegitimate children will effectively be denied their own parent's insurance proceeds.

Many illegitimate children live in settings which make formalized proof most difficult. Illegitimate children tend to come from indigent families,[168] to suffer from educational handicaps,[169] and to have poorer health conditions.[170] Illegitimate children come from families who are unfamiliar with the availability of paternity decrees and court support orders to enforce support obligations. Although these avenues may seem reasonable and accommodating to the middle class ethos, they are strange and unfamiliar to the poor. Furthermore, if a mother knows her child's father has no money, he already has enough trouble; why also turn the court bureaucracy against him? And even more logically, why spend endless hours waiting in court and in a prosecutor's office to effect an order with little apparent meaning to a poor family's life?

Similarly, indigents do not neatly transcribe their thoughts for posterity in writing so as to later coincidentally serve as proof for veterans' insurance benefits. If indigency is a handmaiden of illegitimacy,[171] then illiteracy surely is also. It is unnatural to expect fathers of illegitimate children to perform this act.

There would seem to be no real necessity for the SGLI limitations on proof. A usual reason for such a rule might be to reduce the possibility of fraudulent claims of paternity. If more definite proof mechanisms are required, such as those involving the neutral judgment of a third party court or bureaucrat, the Administration can better be certain that the claimant for benefits is indeed the child of the deceased veteran. But the Veterans' Administration has proven

167. These are a written acknowledgment by the father, a court support order, a court paternity decree, a certified birth record, or other public records. *See* 38 U.S.C. § 765(8), (9).

168. "[C]ommon observation teaches that illegitimacy and indigency are often handmaidens." Griffin v. Richardson, 346 F. Supp. at 1232.

169. *See, e.g.*, Jenkins, *An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children*, 64 AM. J. SOC. 169, 173 (1958).

170. Illegitimate children generally begin life on an unhealthy footing. More often than legitimate children, they are born prematurely and are underweight at birth. *See* National Center for Health Statistics, Public Health Service, U.S. Dept. of H.E.W., "Trends in Illegitimacy—United States—1940-1965" at 17. They also have received less prenatal care and have had more prenatal complications. *Id.* As a result, their risk of death at birth is up to 50% greater than for legitimate births. *See id.* at 21.

171. *See* note 168 *supra*.

quite capable of functioning without this proof limitation in all of its other benefit programs. If there is no need for secondary proof restrictions in these programs, it is hard to understand why there would be a need in the SGLI insurance program. The lack of such a restriction in other V.A. programs surely undermines the existence of any rational basis in this one.

If courts were required to review discriminatory provisions such as this one with strict scrutiny, the SGLI proof restriction surely would not survive a constitutional attack. *Lucas* and *Trimble* teach, however, that this is not the case. Instead, it would only be necessary for the Government to establish that elimination of this secondary-source proof mechanism is necessary to serve the "administrative convenience" of the Veterans' Administration,[172] eliminating "imprecise and unduly burdensome methods of establishing paternity."[173]

The presumption underlying the exclusion of secondary proof methods would be that only formal means of proof can adequately guarantee paternity. A significant amount of perhaps nonexistent empirical data would have to be summoned in order to show a "lack of any substantial relationship of the likelihood of actual" paternity.[174] In light of the Court's lax attitude toward discrimination against illegitimate children, it seems quite unlikely that an illegitimate claimant could carry this burden. It should be an easy matter in such future challenges for the Government to successfully assert the cry of "administrative convenience."

2. Sexual Discrimination

The SGLI proof restrictions only apply to an illegitimate child's attempt to prove that the deceased veteran was his father. No such restriction is imposed where the deceased was the illegitimate child's mother. This distinction therefore poses a form of sexual discrimination. It can impose on the mother of an illegitimate child whose father dies intestate the burden of providing for the child's support without assistance from the father's insurance policy. No similar burden is placed on the father of an illegitimate child whose mother

172. *See* Mathews v. Lucas, 427 U.S. 495, 509 (1976).
173. *See* Trimble v. Gordon, 430 U.S. at 772 n.14.
174. *See* Mathews v. Lucas, 427 U.S. at 513.

dies intestate. This result therefore exacerbates the already significant problems a single woman faces in attempting to maintain her family's financial security.[175]

The sexual distinction also greatly disadvantages the illegitimate child's father by undermining his interest, but not that of the child's mother in providing for his child after death.[176]

In *Weinberger v. Wiesenfeld*,[177] the court invalidated a provision of the Social Security Act which denied benefits, based on the earnings of a deceased wife and mother, to a widower who had the couple's minor children in his care, while granting such benefits to a similarly situated widow. The Court found that this result undermined a primimary purpose of the challenged provision, to enable children of covered employees to receive the personal attention of the surviving parent. The classification accordingly was constitutionally infirm since it "discriminate[d] among surviving children solely on the basis of the sex of the surviving parent."[178]

It could readily be argued that the veterans' insurance scheme suffers the same deficiency. On the other hand, there might be acceptable reasons for a system of proof of parental status to be more exacting regarding proof of paternity, as compared to maternity. As Justice Stevens recognized while sitting as a Circuit Judge:

> The state's interest in certainty is manifestly different in a case involving the right of an illegitimate child to participate in her father's estate, than in one in which the right to share in the mother's estate . . . is involved. For . . . the problem of establishing the identity of an illegitimate child's father is, in many cases, vastly more difficult than identifying the mother.[179]

Proof of maternity is usually made quite simple by standard hospital procedures accompanying a child's birth. The linking of the mother and child's names on the birth certificate should in the usual situation make proof of maternity quite simple. As a consequence, the governmental interest in administrative safeguards against false

175. The Supreme Court has recognized the significance of these difficulties in Kahn v. Shevin, 416 U.S. 351, 353 (1974).

176. In Stanley v. Illinois, 405 U.S. 645, 651 (1972), the Court recognized the importance of a father's interest in the "care, custody, and management" of his children, regardless of their legitimate or illegitimate status.

177. 420 U.S. 636 (1975).

178. *Id.* at 651.

179. Eskra v. Morton, 524 F.2d at 14.

claims of paternity should loom significant in any attempt to judicially challenge this form of sex discrimination.[180]

VI. CONGRESSIONAL REMEDY

A congressional remedy for the insurance program defects described in this article is easy to devise and should be politically feasible to enact. The inequities now caused by the differing treatment accorded a veteran's legitimate and illegitimate children could easily be rectified by extending the definition of "child" found at 38 U.S.C. § 101(4) to all provisions of Title 38, the main source of veterans' benefit legislation. The progressive treatment of illegitimate children which is granted by this definitional clause is presently inapplicable to chapter 19 (the insurance program section) of Title 38.[181] If section 101(4) were amended to eliminate this exclusion of chapter 19 programs, and if the then unnecessary definitional provisions attached to each insurance program were deleted,[182] all veterans' benefit programs would seemingly be free of discriminatory classifications which penalize illegitimate children. With the exception of proof requirements by which illegitimate children would still have to establish their veteran father's paternity, which are probably necessary, both classes of children would be treated on an equal footing.

This legislative route for change would surely be the most easily accomplished and efficiently carried out. If illegitimate claimants must wait until successive court challenges eliminate on a piecemeal basis the discriminatory aspects of veterans' insurance programs, many unrepresented illegitimate children will be denied their rightful share of their fathers' insurance benefits during this long interval. Indeed, due to the low threshhold of visibility of these defects and the lack of full and available legal services to reach these children, it is not likely that these provisions will be promptly challenged. The slowness and uncertainties of this approach can only work to the detriment of the children who happen to have been born out of wedlock.

180. This issue of sexual discrimination was raised, but not resolved, in Trimble v. Gordon, 430 U.S. at 764 n.3, 766.

181. Section 101(4) defines "child" "except for purposes of chapter 19 . . . ."

182. These restrictions are described in the text accompanying notes 164 to 174 *supra*.

There should be no significant political opposition to eliminating these vestiges of discrimination. Those who would publicly cast their vote to perpetrate this invidious form of societal opprobrium should be few in number. No valid legislative purpose is actually served by such discrimination. If Congress would act to extend the definition of section 101(4) to all veterans' programs, it would help to eradicate one more badge of infamy which has unnecessarily helped to stigmatize a group of children who, due to no fault of their own, must grow up with the label, "illegitimate."