Equal Protection Misapplied: The Politics of Gender and Legitimacy and the Denial of Inheritance

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INTRODUCTION

Does nature or nurture define a parent-child relationship? What is the relevance of a child's legitimacy or a parent's gender? In the inheritance context, the states' answers to these questions are critical. When an individual dies without a will or certain property has not been devised, a state's intestate provisions dictate how to distribute such property. Aspiring to reflect the "presumed desires" of the decedent, the intestate provisions proportion a decedent's estate to surviving family members based on a priority scheme designed to approximate the significance of familial relations.¹ Such normative judgements raise difficult constitutional questions.

In defining the parent-child relationship, the inheritance controversy centers around the role of the unwed father. In order to inherit, an unwed father who survives his child may be expected to demonstrate that he supported such child during his minority.² Likewise, a child who survives her unwed father may be held to a unique standard in order to qualify as a rightful "heir-at-law."³ Although provisions drawing such distinctions are challenged on the basis of gender and legitimacy, the Supreme Court fails to provide any uniform guidance. Instead, the Court either ignores the challenges or responds inconsistently.⁴

In reviewing the claims brought by surviving unwed fathers, the Supreme Court has equivocated, at times recognizing a gender

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¹. In re Estate of Pakarinen, 178 N.W.2d 714, 718 (Minn. 1970). For an overview of intestate considerations and the priority scheme offered by the Uniform Probate Code (UPC) see Jesse Dukeminier, Wills, Trusts, and Estates 59-64 (3d ed. 2005).

². For a discussion of the states that unilaterally place such demands on unwed fathers see infra note 21 and accompanying text. For the recognition and support of intestate schemes that equally place such support expectation on all parents, regardless of gender or legitimacy, see infra notes 27-29, 203-04 and accompanying text.

³. For a discussion of the states' evidentiary standards for establishing a parent-child relationship between a surviving unwed child and his father see infra notes 14-21 and accompanying text.

⁴. See infra notes 41-48, 58-79 and accompanying text.
claim and on other occasions relying on legitimacy. 5 By contrast, claims raised by surviving nonmarital children are strictly relegated to a review based upon legitimacy. 6 Consequently, the two standards of review are inconsistent, despite children and fathers having identical inheritance interests. This problem is exacerbated by the diverging constitutional standards of review for gender and legitimacy produced by United States v. Virginia. 7 Not surprisingly, the Supreme Court's misapplications of equal protection reverberate in state probate decisions.

While biases held against unwed fathers are central to such shortcomings, other problems also prevent a fair evaluation of state intestate schemes. In the rare case when there is consensus as to whether an intestate provision raises gender or legitimacy issues, the inability to standardize the means-ends fit for gender or legitimacy allows inconsistent results to persist. 8

Notwithstanding the misapplication of equal protection, the judicial evaluation of intestacy also fails by assuming the perspective of the beneficiary. Although intestate schemes are meant to reflect the intent of the decedent, challenges to such schemes are traditionally considered from the perspective of the surviving relation. 9 By ignoring the intestate's interest in how his estate is distributed, the right of inheritance is denied.

This article addresses how constitutional inconsistencies and political biases skew the definitions of parent and child in intestacy. Part I surveys the states' intestate provisions and explains how the varying definitions of parent and child carry terrific consequences for unwed fathers, their children, and other relations. After detailing in Part II how the equal protection review afforded to unwed fathers and children fails, Part III holds both politics and theory accountable. Such crisis is aggravated by the recognition in Part IV that constitutional claims to intestacy have not been properly oriented toward the rights of the decedent. Given the gamut of difficulties, Part V advances a twofold proposal capable of achieving greater constitutional accuracy and integrity in inheritance. Finally, Part VI applies such prescription in the hopes of demonstrating a consistent standard which fairly treats both sides in the nature-nurture debate.

5. Id.
6. See infra notes 83-90 and accompanying text.
8. See infra notes 138-73 and accompanying text.
9. See infra notes 174-83 and accompanying text.
I. THE STATUTES

A. The Significance of the Parent-Child Relationship

Because the parent-child relationship is the linchpin to establishing numerous familial relations, constitutional questions of gender and legitimacy often arise when a child has been born out-of-wedlock and intestate shares are at stake. Such questions obviously arise in cases in which a surviving parent wishes to inherit “from” a deceased child and in cases in which a surviving child wishes to inherit “from” a deceased father. However, satisfying the legal definition of a parent-child relationship also establishes a relationship between the family relations of the father and those of the child. Consequently, a surviving father or a surviving child may also inherit “through” the established parent-child relationship, thereby reaching the estates of other now legally recognized relations. The parent-child relationship also qualifies other surviving family members of the father or child as “heirs-at-law.” Such heirs also become eligible to receive an intestate share “from or through” the parent or child. Consequently, the existence of a legal parent-child relationship between an unwed child and his father is critical to many individuals. The states rely on various standards to establish a relationship. In recognizing such relations, however, the states also make a common distinction based upon whether it is the father or the child who has died intestate.

B. Inheritance “From or Through” the Unwed Father by the Child or Child’s Kindred

In order for the out-of-wedlock child or child’s kindred to inherit “from or through” his deceased father, paternity must be established.

10. For an excellent discussion of the potential of establishing a parent-child relationship in order to inherit “from and through” one’s relations and how such potential may double in the case of adoption see, e.g., Hall v. Vallandingham, 540 A.2d 1162 (Md. Ct. Spec. App. 1988).
11. See infra notes 14-29 (summarizing state statutory standards)
12. Id.
13. In the event it is a member of the father’s family or the child’s family who has died intestate, the state will also typically consider how the parent-child link factors into forging the relationship between the interested survivor and decedent in order to determine whether the survivor needs to meet the parent-child standard established for the child or the parent. See infra notes 14-29 (summarizing state statutory standards).
14. Significantly, Louisiana’s proof of “acknowledgment” or “filiation” is gender neutral. In the event the illegitimate child wants to be recognized either as a child of his mother or father, the same standard must be met. LA. CIV. CODE ANN. art. 209 (West 2005). For further discussion of the states’ use of gender neutral standards see infra notes 27-57 and accompanying text.
States are typically satisfied that the parent-child relationship has been established prior to the father's death by such events as the father's marriage to the mother after the child is born,\textsuperscript{15} adoption,\textsuperscript{16} voluntary acknowledgment of paternity\textsuperscript{17} or a legal adjudication of paternity.\textsuperscript{18} In addition, most states also allow paternity to be

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  \item In addition to recognizing a child born after a marriage (or after entering a void marriage) as presumptively the husband's child, a child born prior to a marriage (or after entering a void marriage) is often presumed to be the husband's child if a marriage occurs within three hundred days of the child's birth. See, e.g., \textsc{Colo. Rev. Stat. Ann.} § 15-11-114 (West 2006); \textsc{Haw. Rev. Stat.} § 560:2-114 (LexisNexis 2006); \textsc{N.M. Stat. Ann.} § 40-11-5 (2006).


established after the father dies. In order to establish the parent-child relationship after the alleged father dies, however, the evidentiary standard is often statutorily raised to a "clear and convincing" test. In addition to raising the evidentiary standard, a number of states also statutorily limit the type of evidence which can be used to establish a man's fatherhood after his death. Fourteen states require that the man publicly held himself out as the child's father prior to his death.


20. See, e.g., ALA. CODE § 43-8-48(2) (2006); CONN. GEN. STAT. ANN. § 45a-438(b) (West 2006); IDAHO CODE ANN. § 15-2-109(b) (2006); 755 ILL. COMP. STAT. ANN. 5/2-2 (LexisNexis 2006); KY. REV. STAT. ANN. § 391.105 (West 2006); LA CIV. CODE ANN. art. 209 (2005); ME. REV. STAT. ANN. tit. 18-A, § 2-109(2)(ii)(2006); NEB. REV. STAT. § 30-2309(2) (LexisNexis 2006) ("strict, clear and convincing"); N.H. REV. STAT. ANN. § 561:4 (West 2006); N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (LexisNexis 2006); 20 PA. CONS. STAT. ANN. § 2107(c) (West 2006); S.C. CODE ANN. § 62-5-1 (2004); W.VA. CODE ANN. § 42-1-5(a) (LexisNexis 2006); WIS. STAT. ANN. § 891.39 (West 2006); WYO. STAT. ANN. § 2-4-107 (2006).

21. In four states the law requires the party to establish public acknowledgment by clear and convincing evidence. See CAL. PROB. CODE § 6453(b) (West 2006) (requiring clear and convincing evidence that the father held the child out as his own or a showing that "it was impossible for the father to hold the child as his own"); CONN. GEN. STAT. ANN. § 45a-438(b) (West 2006); HAW. REV. STAT. ANN. § 584-4 (LexisNexis 2006) (receives into home and "openly holds out"); IOWA CODE ANN. § 633.222 (West 2006) (recognition of child by father which was "general and notorious" or in writing); MD. CODE ANN. EST. & TRUSTS §1-208 (West 2006) ("openly and notoriously recognized the child to be his child"); MINN. STAT. ANN. § 257.55 (West 2006) (receives into home and "openly holds out"); MONT. CODE ANN. § 40-6-105 (2004) (receives into home and "represents as his"); NEV. REV. STAT. ANN. § 126.051 (2006) (receives into home and "openly holds out"); N.M. STAT. ANN. § 40-11-5 (West 2006) (holds out minor child and establishes
C. Inheritance “From or Through” the Child By Unwed Father or Father’s Kindred

Likewise, if a child who was born out-of-wedlock (or his relations) die intestate, the state statutory treatment of the relationship between the father and child is critical. By statute, two states simply fail to recognize the father or his relations as heirs.22 In the remaining states, the father and his heirs may be recognized upon the establishment of paternity.23 Generally such means are either identical or consistent with those which must be demonstrated by the child when the father dies intestate.24 However, in eleven states, demonstrating the biological connection is insufficient. Such states also require that the father “has openly treated the child as his and has not refused to

relationship); N.D. CENT. CODE § 301-04-09 (2006) (child received into home and father “openly holds out”); OKLA. STAT. ANN. tit. 84, § 215 (West 2006) (“publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock”).

22. The relevant provisions of New Hampshire and Vermont are identical: “The estate of a person born of unwed parents dying intestate and leaving no issue, nor husband, nor wife shall descend to the mother, and, if the mother is dead, through the line of the mother as if the person so dying were born in lawful wedlock.” N.H. REV. STAT. ANN. § 561.4 (2006); VT. STAT. ANN. tit. 14 § 553 (LexisNexis 2006).

23. See ALA. CODE § 43-8-48 (2006); ALASKA STAT. § 13.12.114 (2006); ARK. CODE ANN. § 28-9-209 (2006); ARIZ. REV. STAT. ANN. § 14-2114 (2006); CAL. PROB. CODE § 6452 (West 2006); COLO. REV. STAT. § 15-11-114 (2004); CONN. GEN. STAT. ANN. § 45a-43b (West 2006); DEL. CODE ANN. tit. 12 § 508 (2006); D.C. CODE § 19-316 (2006); FLA. STAT. ANN. § 732.108 (West 2006); GA. CODE ANN. § 53-2-4(b) (2006); HAW. REV. STAT. ANN. § 560.2-114 (LexisNexis 2006); IDAHO CODE ANN. § 15-2-109 (2005); 755 ILL. COMP. STAT. ANN. 5/2-2 (West 2006); IND. CODE ANN. § 29-1-2-7 (West 2006); IOWA CODE ANN. § 633.222 (2006); KAN. STAT. ANN. § 38-111 (West 2006); KY. REV. STAT. ANN. § 391.105 (2006); LA CIV. CODE ANN. art. 203, 209 (2006); ME. REV. STAT. ANN. tit. 18-A § 2-109 (2006); MD. EST. & TRUSTS § 1-208 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 190 § 7 (West 2006); MICH. COMP. LAWS SERV. § 700.2114 (West 2006); MINN. STAT. ANN. § 524.2-114 (West 2006); MISS. CODE ANN. § 91-1-15 (2006); MO. ANN. STAT. § 474.060 (West 2006); MONT. CODE ANN. § 72-2-124 (2005); NEB. REV. STAT. § 30-2309 (West 2006); NEV. REV. STAT. ANN. § 126.051 (LexisNexis 2006); N.J. STAT. ANN. § 3B:5-10 (West 2006); N.M. STAT. ANN. § 45-2-114 (West 2006); N.Y. EST. POWERS & TRUSTS § 4-1.2 (West 2006); N.C. GEN. STAT. ANN. § 29-18 (2005); N.D. CENT. CODE § 301-04-09 (2005); OKLA. STAT. ANN. tit. 84 § 215 (West 2006); OR. REV. STAT. ANN. § 2105.10 (West 2006); OR. REV. STAT. ANN. § 112.105 (West 2006); PA. CONS. STAT. ANN. § 2107 (2006); R.I. GEN. LAWS §§ 33-1-8 (2006); S.C. CODE ANN. § 62-2-109 (2005); S.D. CODIFIED LAWS § 29A-2-114 (2006); TENN. CODE ANN. § 31-2-105(a)(2) (2006); TEX. PROT. CODE ANN. § 42.9 (Vernon 2006); UTAH CODE ANN. § 75-2-114 (2006); VA. CODE ANN. § 64.1-5.1 (2006); WASH. REV. CODE ANN. § 11.04.081 (2006); W.VA. CODE ANN. § 42-1-5 (West 2006); WIS. STAT. ANN. § 852.05 (West 2006); WYO. STAT. ANN. § 2-4-107 (2006).

24. See supra notes 11-21 and accompanying text (discussing the common means of establishing paternity).
support the child."\(^{26}\) This statutory requirement is retained despite the questions of gender and legitimacy it raises.\(^{26}\)

By contrast, fourteen other states have adopted inheritance standards which apply equally to married and unmarried parents.\(^{27}\) Following the current version of the Uniform Probate Code, six of such states preclude inheritance from or through a child by either natural parent or his kindred "unless that natural parent has openly treated the child as his or hers, and has not refused to support the child."\(^{28}\) The remaining eight states have adopted provisions which similarly prevent a parent or his kindred from inheriting if the parent has either abandoned or not supported a minor child.\(^{29}\) Given the limited use of such gender and marital neutral inheritance provisions, it is perhaps not surprising that there has been an inconsistent judicial response to the gender and legitimacy challenges raised against inheritance provisions.

The judicial evaluation of contested inheritance provisions ranges widely. At one extreme, courts have simply denied the provision creates a gender or a legitimacy disparity.\(^{30}\) At the other extreme,


See also former UNIF. PROBATE CODE § 2-109 (replaced by UNIF. PROBATE CODE § 2-114 (1990). For further discussion of the changes to the UPC parent-child relationship provision see infra notes 144, 191 and accompanying text.

\(^{26}\) For a discussion of such constitutional challenges see infra notes 34-57, 195-204 and accompanying text.

\(^{27}\) For a discussion of the constitutional challenges raised to such provisions in Georgia and Utah, respectively, see infra notes 35-40, 51-58 and accompanying text.

\(^{28}\) UNIF. PROBATE CODE § 2-114 (1990). See MICH. COMP. LAWS ANN. § 700.2114(4) (LexisNexis 2006); MONT. CODE ANN. § 72-2-124(3) (2006); N.M. STAT. ANN. § 45-2-114(C) (West 2006); N.D. CENT. CODE § 301-04-09 (2006); S.D. CODIFIED LAWS § 29A-2-114(a) (2004); UTAH CODE ANN. § 75-2-114(3) (2006).

\(^{29}\) See CONN. GEN. STAT. § 45a-439(a)(1) (2006) (abandonment); 755 ILL. COMP. STAT. 5/2-2 (West 2006) (acknowledgment, establish relationship and support); MD. CODE ANN. EST. & TRUSTS § 3-112 (West 2006) (abandonment and nonsupport); N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (LexisNexis 2006) (abandonment and nonsupport); OHIO REV. CODE ANN. § 2105.10(B) (West 2006) (abandonment); S.C. CODE ANN. § 62-2-114 (2005) (nonsupport); TENN. CODE ANN. § 31-2-105(a)(2)(B) (West 2006) (nonsupport); VA. CODE ANN. § 64.1-16.3(B) (2006) (desertion or abandonment). Such state provisions vary in three key ways: 1) whether there is reliance on abandonment and/or nonsupport; 2) how such terms are defined; and 3) if such consideration effects only the parents or the parents and their kindred.

While Tennessee imposes this requirement on both parents, it still requires that the unwed father demonstrate he "has openly treated the child as his, and has not refused to support the child." TENN. CODE ANN. § 31-2-105(a)(2)(B) (West 2006).

courts have found a gender or legitimacy disparity and deemed it unconstitutional.31 Between such extremes, are courts which have found a gender or legitimacy disparity but determined it to be constitutional.32 Yet despite such inconsistent constitutional results, the courts commonly evaluate the constitutional claim from the perspective of the heir rather than the decedent.33 This combination of inconsistent constitutional determinations and common orientation toward the heir leads to the misapplication of equal protection.

II. THE INCONSISTENT USE OF GENDER AND LEGITIMACY

A. Evaluating the Claims of Unwed Fathers

1. As a Matter of Gender

   a. Unconstitutional Gender Disparity

   In Rainey v. Chever, the Georgia Supreme Court struck down a statute denying an intestate share to an unwed father from his child's estate if the father had not openly treated the child as his own and supported the child.34 Without any similar demands for open treatment and support placed upon the mother of a child born out-of-wedlock, the Georgia Supreme Court easily found the provision created an unconstitutional gender-based classification which violated the equal protection clauses of both Georgia and the United States Constitutions.35 Relying on the traditional "important government interest" and "substantially related" catch phrases of intermediate scrutiny, the Georgia Supreme Court recognized the state's interest in encouraging fathers to take responsibility for their children born out-of-wedlock.36 However, the state also had an "equally important interest" in seeing mothers behave accordingly.37 Mothers could not be assumed any more so than fathers to care for their out-of-wedlock children.38 Georgia's efforts to promote father-child

31. See infra notes 34-40 and accompanying text (discussing the Georgia court's decision in Rainey v. Chever, 510 S.E.2d 823 (Ga. 1999)).
32. See infra notes 51-57 and accompanying text (discussing Scheller v. Pessetto, 783 P.2d 70 (Utah Ct. App. 1989)).
33. See infra notes 175-83 and accompanying text.
34. 510 S.E.2d 823, 824.
35. Id. at 824.
36. Id. (noting that "[a] statute containing a gender-based classification violates equal protection unless the classification furthers important governmental objectives, and the discriminatory means employed are 'substantially related' to the achievement of those governmental objectives").
37. Id.
38. Id.
relationships through its inheritance provision relied upon stereotypes and "overbroad generalizations" about men and women which the United States Supreme Court had repeatedly warned against accepting.\textsuperscript{39} Heeding the recent pronouncement of the United States Supreme Court, the Georgia Supreme Court also emphasized that gender-based classifications could no longer be accepted without demonstrating an "exceedingly persuasive justification."\textsuperscript{40}

\textit{b. The Supreme Court's Ambivalent Silence}

When \textit{Rainey} was appealed to the United States Supreme Court, a majority of justices joined in denying certiorari without opinion.\textsuperscript{41} The Supreme Court's silence could be given two drastically different interpretations. On the one hand, the decision could be an affirmation of the Georgia Supreme Court's reasoning. On the other hand, the silence could be read as federal deference in state matters of probate. Significantly, since \textit{Rainey}, gender specific inheritance statutes have not been judicially struck down in any other states.\textsuperscript{42} Such recognition, combined with the United States Supreme Court's ambivalent treatment of \textit{Rainey} and the prevalent mistrust of unwed fathers throughout the law point only toward one possibility.\textsuperscript{43} Georgia's decision in \textit{Rainey} is simply an anomaly. The outspoken opinion offered by the dissenting Supreme Court justices in \textit{Rainey} supports such conclusion.

\textit{c. Nonexistent Gender Disparity}

Disagreeing with the majority's decision to deny certiorari without opinion, the \textit{Rainey} dissent spoke quite openly.\textsuperscript{44} It began by

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\item \textsuperscript{40} \textit{Id.} at 825 (quoting \textit{Virginia}, 518 U.S. at 533). As Rehnquist recognized in his concurrence in \textit{United States v. Virginia}, there is an apparent tension between the traditional intermediate scrutiny language of "important" government interest and the "exceedingly persuasive justification" demanded by the majority. 518 U.S. at 558-59 (Rehnquist, C.J., concurring).
\item For a discussion of complications caused by the elevated gender standard in the inheritance context, see \textit{infra} notes 104-07 and accompanying text.
\item \textsuperscript{41} \textit{Rainey v. Chever}, \textit{cert. denied}, 527 U.S. 1044 (1999).
\item For recognition of the fourteen states that maintain inheritance provisions directed at unwed fathers see \textit{supra} notes 27-29 and accompanying text. Moreover, while Georgia's highest court may have chosen to reject its gender specific inheritance provision, other state courts have upheld similar provisions. \textit{See infra} notes 51-57 and accompanying text (discussing \textit{Scheller v. Pessetto}, 783 P.2d 70 (1989)).
\item For recognition of the disparagement of unwed fathers throughout the law see \textit{infra} notes 109-137 and accompanying text.
\item The dissent was written by Justice Thomas and joined by Chief Justice Rehnquist.
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remarking that "[t]he rising incidence of out-of-wedlock births and delinquent fathers has had dire social consequences."\(^{45}\) The dissent applauded Georgia's legislative effort "to address a particularly disturbing manifestation of this alarming trend" by denying an unwed, nonsupporting father from "profit[ing] from the death of the child."\(^{46}\)

Yet the dissent did not primarily rely on this perception of an unwed father's behavior to justify the statutory disparity. Instead, it struck to the very core: the Rainey dissent denied that any gender disparity existed.\(^{47}\) Georgia's legislation did not draw a distinction between men and women but rather "between two different categories of men: fathers who support their children born out-of-wedlock and fathers who do not."\(^{48}\) Without a gender or legitimacy classification, the Rainey dissent could easily proceed to apply a rational basis standard and uphold Georgia's disputed intestate provision.\(^{49}\)

d. Constitutional Gender Disparity

While the Georgia Supreme Court in Rainey found a gender classification entitled to intermediate scrutiny that was unconstitutional, the dissenters on the U.S. Supreme Court found no suspect class and determined the statute met the lower rational basis standard.\(^{50}\) Scheller v. Pessetto illustrates yet another perspective taken on intestate provisions restricting the inheritance of unwed fathers.\(^{51}\) Scheller challenged a statutory distinction in Utah identical to the Georgia

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\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) "Contrary to the Georgia Supreme Court's conclusion, § 53-2-4(b)(2) does not necessarily draw a gender-based classification." Id. at 1046.

\(^{48}\) It should be noted that to complete his opinion, Justice Thomas did conclude that even if heightened scrutiny did apply, Georgia's statute withstood a challenge based upon gender. Thomas found support for such gender disparities in the Court's recent plurality opinion in Miller v. Albright, 523 U.S. 420 (1998) in which the Court accepted a gender disparity in federal immigration law, as well as the Court's continued recognition of a "women's unique role in childbirth" in the (unilateral female control over) abortion context. Rainey v. Chever, cert. denied, 527 U.S. 1044, 1047-1048 (1999) (Thomas, J., dissenting). For further discussion of Miller see infra notes 92-100, 132, 158, 184-88 and accompanying text.

\(^{49}\) Rainey, 527 U.S. 1044, 1046. (Thomas., J. dissenting) (noting that finding any use of heightened scrutiny "appears to be in error").

\(^{50}\) Id.

\(^{51}\) 783 P.2d 70 (Utah Ct. App. 1989). For further discussion of Scheller see infra notes 60-71 and accompanying text (relying on Scheller to illustrate the varying constitutional means standards and their effect).
provision attacked in Rainey.\textsuperscript{52} As in Georgia, the Utah statute allowed a mother of a child born out-of-wedlock to inherit unconditionally and disqualified the unwed father for his failure to support the child or openly treat the child as his own.\textsuperscript{53} Like the Georgia Supreme Court in Rainey, the Utah appellate court in Scheller found the statute created a gender-based disparity requiring heightened scrutiny.\textsuperscript{54} Despite the heightened scrutiny, however, the Utah appellate court found the statute to be constitutionally sound.\textsuperscript{55} The Scheller court found the statute served two important government interests: supporting "the maintenance of a fair and efficient method of disposition of property at death" and "encouraging, albeit for pecuniary purposes, development of an actual familial relationship between a proven father of an illegitimate child and his child."\textsuperscript{56} According to Utah, the statute could justifiably be directed only at fathers because a woman's relationship with her child was easier to determine and more likely to develop after the child's birth.\textsuperscript{57}

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\item \textsuperscript{52} Scheller, 783 P.2d at 70.
\item \textsuperscript{53} Utah Code Ann. § 75-2-109 (2)(b) (1978). Repealed and replaced by Utah Code Ann. § 75-2-114 (3)(b) (2006) (precluding either the "natural parent or his kindred" from inheriting from or through a child unless "that natural parent has openly treated the child as his, and has not refused to support the child").
\item \textsuperscript{54} Scheller, 783 P.2d at 72-73. For the Georgia Supreme Court's similar characterization of its state statute in Rainey see supra notes 34-40 and accompanying text.
\item \textsuperscript{55} Id. at 74. For further discussion of Scheller see Martha F. Davis, Male Coverture: Law and the Illegitimate Family, 56 RUTGERS L. REV. 73, 87 (2003).
\item \textsuperscript{56} Scheller, 783 P.2d at 73-74.
\item \textsuperscript{57} The identity of the mother of an illegitimate child is rarely in doubt. In contrast, the father's identity is frequently unknown. It is possible, also, as in this case, that the father's identity becomes known only because the mother, or the state, forces the issue by filing a paternity action. In addition, the mother, because she physically bears the child, automatically is responsible for the child at least to the extent of deciding its immediate future. Further she bears the physical, emotional and psychological ramifications of pregnancy and must decide whether to abort the child, raise the child alone or give the child up for adoption. If she decides to raise the child, she endures further financial, emotional and psychological responsibilities. The putative father who does not support the child or openly treat the child as his own assumes none of these responsibilities. Id. at 74 (citations omitted).
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To further bolster the legitimacy of the challenged inheritance provision, Scheller noted that the legislation at issue relied on the UPC, which also at the time included such a provision. Scheller, 783 P.2d at 73-74. Ironically, one year after Scheller the UPC was revised, replacing the provision disqualifying nonsupporting fathers of children born out-of-wedlock with the exact gender neutral standard disqualifying nonsupporting
2. As a Matter of Legitimacy

a. Nonexistent Legitimacy Disparity

The Rainey decisions of the United States and Georgia Supreme Courts and Utah's ruling in Scheller illustrate the differing interpretations of gender raised in relation to the ability of unwed fathers to inherit. As the state opinions in Rainey and Scheller reflect, courts may find a gender disparity but disagree as to whether such disparity is unconstitutional. Alternatively, like the Supreme Court's dissent in Rainey, a court may opine that no gender disparity worthy of heightened scrutiny exists. Such constitutional confusion surrounding paternal inheritance is further complicated by the use of legitimacy.

Twenty years prior to Rainey, another Georgia statute limiting the inheritance rights of unwed fathers was challenged in Parham v. Hughes. The statute precluded the father of a child born out-of-wedlock from collecting from his child's wrongful death unless the father had taken affirmative action to legitimate the child. By contrast, the statute placed no similar affirmative duties upon the mother of a child born out-of-wedlock. Yet despite this difference in treatment of unwed mothers and fathers of children, a four justice plurality of the United States Supreme Court found that the statute did not create a gender-based classification. Distinguishing between fathers, Parham held that only fathers who failed to legitimate their children were precluded from filing wrongful death actions. Fathers who legitimated their children were treated like fathers of children born in wedlock. Consequently, Parham rejected the use of gender, requiring that "all members of one sex" must be denied a particular benefit or right despite being otherwise "similarly situated with members of the other sex." The Court proceeded to apply the relevant
rational basis standard.\textsuperscript{67} Parham recognized the State's "legitimate interest in the maintenance of an accurate and efficient system for the disposition of property at death."\textsuperscript{68} It rationally necessitated that paternity be established prior to a child's death in order to prevent "spurious claims."\textsuperscript{69} Unlike the mother of a child born out-of-wedlock whose identity "will rarely be in doubt,”\textsuperscript{70} the father was required to take action to legitimate the child because his identity "will frequently be unknown."\textsuperscript{71}

3. Reconciling the Use of Gender and Legitimacy in Paternal Inheritance

Trying to reconcile the recent use of gender in Rainey and Scheller with the older use of the legitimacy in Parham is a difficult task. While Rainey and Scheller consider the support expectation of an out-of-wedlock father and Parham considers his legitimation expectation, the difference in the type of statutory expectation does not explain the difference in the type of constitutional classification chosen. Requiring "all members of one sex" to suffer discrimination, the Parham plurality determined that because "only a father can by unilateral action legitimate a illegitimate child," fathers were not similarly situated to mothers and therefore there was no discrimination against fathers as a class.\textsuperscript{72} However, the Court's reasoning was circular: it was the State that imposed the legitimization requirement that prevented fathers from being similarly situated to mothers.\textsuperscript{73} Unlike the plurality, the Parham concurrence and dissent recognized a gender classification but disagreed regarding its constitutionality.\textsuperscript{74} In his concurrence, Justice Powell upheld the gender disparity upon determining that the legitimization requirement was "substantially related to achievement of the important state objective of avoiding difficult problems in proving paternity after the death of an illegitimate child."
child.\textsuperscript{75} The dissent clearly disagreed: “The plain facts of the matter are that the statute conferring the right to recovery for the wrongful death of a child discriminates between unmarried mothers and unmarried fathers, and that this discrimination is but one degree greater than the statutory discrimination between married mothers and married fathers.”\textsuperscript{76}

The five justices’ use of gender in \textit{Parham} discredits the plurality’s effort to deny a gender classification.\textsuperscript{77} Of course, one could as easily critique the plurality’s and concurrence’s agreement regarding the existence of a gender classification but disagreement regarding its constitutionality. Likewise, the exclusive use of gender in \textit{Rainey} and \textit{Scheller} is unsatisfying. Each state’s statute precluded only non-supporting fathers of children born out-of-wedlock.\textsuperscript{78} The inheritance of fathers of children born in wedlock was not conditioned in any manner upon support. \textit{Parham} suggests that the statutory preclusion of inheritance to non-supporting fathers reviewed in both cases could have been constitutionally assessed as a legitimacy-illegitimacy classification.\textsuperscript{79} Yet there was no discussion of the legitimacy-illegitimacy distinction on behalf of fathers in either \textit{Rainey} opinion issued by the Georgia Supreme Court\textsuperscript{80} or United States Supreme Court.\textsuperscript{81} Such discussion was also absent in \textit{Scheller}.\textsuperscript{82}

\textsuperscript{75} \textit{Id.} at 359-60 (Powell, J., concurring).
\textsuperscript{76} \textit{Id.} at 362 (White, J., dissenting).
\textsuperscript{77} Justice White’s dissent in \textit{Parham} was joined by Justices Brennan, Marshall and Blackmun. \textit{Id.} at 361-62 (White, J., dissenting). Justice Powell’s concurrence was not joined by any other justices. \textit{Id.} at 359 (Powell, J., concurring).
\textsuperscript{78} Georgia’s former statute stated:

\begin{quote}
\textit{[N]either the father nor any child of the father nor any other paternal kin shall inherit from or through a child born out-of-wedlock if it shall be established by a preponderance of evidence that the father failed or refused openly to treat the child as his own or failed or refused to provide support for the child.}
\end{quote}

\textbf{GA. CODE ANN.} \textsection{53-2-4(b)(2) (West 2006). For discussion of \textit{Rainey}’s role in bringing such statutory changes in Georgia see \textit{supra} notes 34-49 and accompanying text.}

Similarly, Utah’s former statute stated:

\begin{quote}
\textit{[P]aternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established . . . is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.}
\end{quote}

\textbf{UTAH CODE ANN.} \textsection{75-2-109 (West 2006) (repealed 2002). For discussion of \textit{Scheller}’s role in bringing such statutory changes in Utah see \textit{supra} notes 51-57 and accompanying text.}

\textsuperscript{79} \textit{Parham}, 441 U.S. at 356 (plurality opinion).
\textsuperscript{80} \textit{Rainey v. Chever}, 510 S.E.2d 823 (Ga. 1999).
B. Evaluating the Claims of Nonmarital Children

1. The Limited Use of Legitimacy

The cases are also inconsistent in the evaluation of intestate provisions directed at nonmarital children. Unlike the mixed use of gender and legitimacy in reviewing provisions focused on the ability of a surviving father or kindred to inherit “from or through” a deceased child born out-of-wedlock, legitimacy has been the single standard relied upon in evaluating the ability of a surviving, nonmarital child to inherit “from or through” his deceased father.\(^3\) However, the sole use of legitimacy to evaluate such children’s inheritance claims also poses problems.

On three separate occasions, the Supreme Court tested State efforts to limit the ability of nonmarital children to inherit from their fathers. These cases reviewed two types of measures — those requiring parents of a nonmarital child to marry in order to legitimate the child\(^8\) and those allowing an unwed father’s paternity to be established by additional means but requiring such actions be completed during the father’s lifetime.\(^5\) In Reed v. Campbell\(^6\) and Trimble v. Gordon,\(^7\) the Court struck down the marriage requirement because of its absolute nature. By contrast, the more flexible evidentiary provisions were upheld in Lalli v. Lalli.\(^9\)

In each case, the State’s interest in ensuring the “orderly and just distribution of a decedent’s property at death” was recognized as the strongest argument in favor of upholding limits on children’s claims. Reliance on legitimacy requirements “in order to express state disapproval of parents’ misconduct”\(^9\) was soundly rejected, interpreted as the “illogical and unjust” punishment of children.\(^9\)

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83. For a discussion of the mixed use of gender and legitimacy in evaluating the inheritance claims of unwed fathers see supra notes 35-82 and accompanying text.
84. Reed v. Campbell, 476 U.S. 852, 857, (1986) (striking down a Texas statute requiring parents of an illegitimate child to marry in order for the child to inherit from the father); Trimble v. Gordon, 430 U.S. 762 (1977) (striking down an Illinois statute requiring parents of an illegitimate child to marry in order for the child to inherit from the father). Reed effectively applied the reasoning of Trimble retroactively in order to strike down the Texas statute. The Texas courts in Reed had refused to apply Trimble because the decedent-father in Reed had died four months prior to the Supreme Court’s decision in Trimble and the child in Trimble did not file her claim until after Trimble was decided. Reed, 476 U.S. 852, 856 (1986).
88. Lalli, 439 U.S. 259 at 274-75.
89. Reed, 476 U.S. at 854.
90. [Visiting condemnation upon the child in order to express society’s disapproval of the parents’ liaison “is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our]
2. The Resistance to Gender

While the Supreme Court consistently uses legitimacy to evaluate intestate provisions restricting the ability of children to inherit from their unwed fathers, one might query why the gender implications have not been considered. Greater restrictions are placed on the ability of children to inherit from their unwed fathers than on the ability of children to inherit from their unwed mothers.\(^9\)

Outside the inheritance context, the Supreme Court has resisted considering a claim of gender raised by a child indirectly affected by state action.\(^9\) In the highly splintered \textit{Miller v. Albright}, deliberations centered around the child's gender claim.\(^9\) At issue was a federal immigration statute denying \textit{jus sanguinis} citizenship to a nonmarital child born abroad to a United States citizen father and an alien mother unless paternity had been established during the child's minority.\(^9\)

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\(^{91}\) See discussion of statutes \textit{supra} notes 11-26.


\(^{93}\) Id. The majority position in \textit{Miller} was comprised of three separate opinions, with the Court opinion written by Justice Stevens and joined only by Chief Justice Rehnquist. Two concurring opinions were written by Justice O'Connor (joined by Justice Kennedy) and Justice Scalia (joined by Justice Thomas). Two dissenting opinions were also issued by Justices Ginsburg and Breyer, who joined each other's opinions and were each joined by Justice Souter. While the opinions varied in their approach to the gender issue, they uniformly chose not to consider any difference drawn between legitimate and illegitimate children. \textit{Id.} at 428-29 (plurality opinion) (holding that certiorari was only granted to address the different statutory treatment based upon gender); \textit{Id.} at 451 (O'Connor, J., concurring) (refusing to review any possible legitimacy distinction because it had not been presented); \textit{Id.} 452-53 (Scalia, J., concurring) (refusing to review any claimed gender or legitimacy distinction due to the broad congressional authority over citizenship) \textit{Id.} at 457 (Ginsburg, J., dissenting) (reviewing only the gender disparity); \textit{Id.} at 469 (Breyer, J., dissenting) (reviewing only the gender disparity).


\(^{94}\) Immigration and Nationality Act (INA) §309(a)(4), 8 U.S.C. § 1409(a)(4) (2006). Because the plaintiff/child in \textit{Miller} was born prior to the 1986 amendments to this provision, paternity could be established by legitimation or a court adjudication of paternity prior to the child turning twenty-one. The 1986 amendments further restricted the ability to confer citizenship on a child born abroad and out-of-wedlock to a United States male citizen and an alien female by requiring that the father-child relationship be established prior to the child reaching eighteen and by requiring that the father evidence
By contrast, no such constraints were placed upon a nonmarital child’s ability to acquire citizenship if born abroad to a United States citizen mother and an alien father.\(^9\)

In an opinion written for the Court, Justice Stevens joined by Chief Justice Rehnquist recognized a gender distinction “between citizen fathers and citizen mothers of children born out-of-wedlock.”\(^9\) In two dissenting opinions, Justices Ginsburg, Breyer, and Souter also recognized a gender distinction worthy of review.\(^9\)

The concurring judges fundamentally disagreed with the plurality’s and dissent’s determination that a gender disparity existed which should be reviewed.\(^9\) While concurring in the decision to uphold the statute, Justices O’Connor joined by Justice Kennedy refused to recognize a gender disparity because the father was not before the Court.\(^9\) In another concurrence, Justice Scalia joined by Justice Thomas also refused to review any claimed gender distinction, holding that Congress’s plenary power over immigration trumped any individual equal protection concerns.\(^9\)

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96. Miller, 523 U.S. at 429 (plurality opinion). In determining that the gender distinction withstood constitutional challenge, Justice Stevens and Chief Justice Rehnquist relied on a somewhat muted level of intermediate scrutiny, perhaps reflecting that gender distinctions drawn in the immigration arena are subject to a lesser level of review because of the plenary power awarded the political branches in matters of immigration. While Justice Stevens’s opinion never clearly articulates his standard of review, the opinion suggests the statute served the “important purposes” of establishing paternity, encouraging parent and child relationships, and developing ties between a foreign-born child and the United States. Id. at 438. The opinion speaks in terms of “strong government interests,” with a statutory means that is “well tailored to serve those interests.” Id. at 440.

97. Having agreed with the plurality on the finding of a gender disparity but ultimately dissenting, the dissenting opinions both concluded that the gender disparity violated equal protection. Id. at 457 (Ginsburg, J., dissenting, joined by Breyer, J. and Souter, J.); id. at 469 (Breyer, J., dissenting, joined by Souter, J., and Ginsburg, J.).

98. Id. at 448 (O’Connor, J., concurring).

99. Although the Miller suit was originally brought by the foreign-born daughter and her United States citizen father, only the foreign-born daughter remained as a plaintiff when Miller reached the Supreme Court. Justice O’Connor acknowledged that the father was originally a party to the suit and that he had been “erroneously dismissed” by the Eastern District of Texas. However, Justice O’Connor concluded that such dismissal did not give the daughter proper third party standing but merely presented a matter for the father to appeal. Id. at 448 (O’Connor, J., concurring).

100. Disregarding the gender challenge altogether, Justices Scalia and Thomas simply determined the Court had “no power” to question congressional authority over matters of citizenship. Miller v. Albright, 523 U.S. 420, 452-53 (1998) (Scalia, J., concurring). Justice Scalia’s opinion is an extension of Congress’s plenary power over matters of immigration addressing questions of citizenship. For further discussion of the plenary power doctrine see infra note 127 and accompanying text.
The confusion caused by this multitude of opinions was somewhat ameliorated three years later. In *Nguyen v. INS*, an unwed United States citizen father joined his child born abroad to renew Miller's contest against the federal immigration statute denying *jus sanguinis* citizenship. The Supreme Court in *Nguyen* unanimously recognized the father's right to raise gender.

In other contexts, resolving the existing limits on gender by anticipating that nonmarital fathers and children will simply join together is not always realistic. When an intestate distribution is at stake, unwed fathers and their children may have conflicting interests that prevent such a solution. Resistance to the use of gender by children indirectly affected in the inheritance context poses significant problems as it prevents a balanced evaluation of intestate rights.

3. The Double-Edged Dilemma of Gender and the Inheritance Rights of Unwed Children

Challenges to inheritance provisions raised by unwed fathers have been evaluated, albeit inconsistently, based upon gender and legitimacy. By contrast, the claims raised by children against intestate schemes have only gone forward upon legitimacy. While gender and legitimacy are both identified as necessitating an intermediate level of review, the standards of gender and legitimacy have recently diverged. In *U.S. v. Virginia*, the Supreme Court announced that gender classifications could only be upheld upon a showing of an "exceedingly persuasive government interest." Untouched by *Virginia*, legitimacy remains at the standard of an "important state interest." Given the different measures for evaluating the ends, state inheritance provisions directed at fathers and those directed at their children, despite raising similar interests, are not subject to similar

102. "The father is before the Court in this case; and as all agree he has standing to raise the constitutional claim, we now resolve it." Id. at 58. However, while agreeing on the father's right to raise the issue of gender, the Court disagreed in its evaluation of the claimed gender disparity. For discussion of the *Nguyen* Court's divided treatment of the father's gender claim see infra notes 160-73 and accompanying text.
103. For recognition of the conflicting interests of unwed fathers and children in the inheritance context, as illustrated by the facts of *Rainey*, see infra notes 195-200 and accompanying text.
104. See supra notes 34-81 and accompanying text (discussing the inconsistent use of gender and legitimacy in the review of an unwed father's intestate distribution).
105. See supra notes 83-89 and accompanying text (discussing the review of an unwed child's intestate distribution).
III. THE MISAPPLICATION OF GENDER & LEGITIMACY

What explains such difficulties? The inconsistency and limits of gender and legitimacy apparent in inheritance is deeply rooted in a conflict between politics and theory that extends well beyond this area. Legal consideration of inheritance privileges are part of an agenda to protect innocent children from wayward fathers. Such effort competes with a more abstract desire to preserve constitutional methodology.

A. The Bias of Bastardy

Mistrust of unwed fathers exists throughout the law. Ironically, the disparagement of unwed fathers evident in such discrete areas as inheritance, custody, adoption, and immigration, grew from a desire to protect men. The notion of coverture, dedicated to giving a man effective ownership over his wife and legitimate children, extended to deny the relation between a father and his illegitimate children. Through the concept of *filius nullius*, the illegitimate child was the child and heir of no one. This rule ensured that a man remained in complete control of his property and family lineage.

108. For a discussion of the common state interests in inheritance restrictions placed upon unwed fathers and children see infra notes 192-93 and accompanying text. The common interests between such provisions and the need therefore to use a common standard of review has received some judicial recognition. In evaluating an intestate provision limiting the rights of unwed fathers based on legitimacy, a North Carolina appellate court recognized the provision was motivated by the same state interests recognized in the North Carolina Supreme Court's legitimacy-based evaluation of a intestate provision limiting the inheritance privileges of children born out-of-wedlock. See Stern v. Stern, 311 S.E.2d 909, 911-12 (N.C. App. 1984) (relying on Mitchell v. Freuler, 254 S.E.2d 762 (N.C. 1979)).

109. "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband." LESLIE J. HARRIS ET AL., FAMILY LAW 32 (3rd ed., 2005) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (W. Lewis ed., 1897); see also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 207-18 (1985). For further discussion of coverture see Kelly, Republican Mothers, supra note 92, at 561.

110. GROSSBERG, supra note 109, at 197.

111. Id. at 196. For recognition of how such legal treatment of illegitimacy adheres to liberalism's use of a facially neutral law to mask male dominance see Kelly, Republican Mothers, supra note 84, at 562, n. 23. For extensive discussions of liberalism's principle of neutrality see MARY ANN GLENDON, RIGHTS TALK: THE IMPROVEMENT OF POLITICAL DISCOURSE (1991); Robin L. West, The Supreme Court 1989 Term: Foreword: Taking
When the turn of the nineteenth century and the coming of the industrial revolution brought a shift to male employment outside the home, changes in the domestic roles of men and women also occurred.

Shedding the existing female image of "devious, sexually voracious, emotionally inconstant, or physically and intellectually inferior," women became the models of virtue and care. Once assigned the domestic child care role left vacant by their working husbands, it followed that women could be recognized as the "natural guardians" of children born out-of-wedlock. Recognition of the nurturing bond between the unwed mother and child would also alleviate the stigma of bastardy for their children.

In contrast to the nurturing role assigned unwed mothers and the destigmatization of nonmarital children, unwed fathers were cast as the "debtors and criminals." Given the ability to earn wages outside the home, men were expected to support their children conceived outside the home. Consistently, changes made to recognize the relationship between the unwed father and his child in inheritance were not motivated by a desire to recognize unwed fathers but rather by a desire to eliminate "outdated discrimination in inheritance laws against ‘‘half-bloods,’ illegitimates, aliens, and females."

1. Custody

Today, the financial "legacy of coverture" is the mainstay of the relationship between a father and his out-of-wedlock children.


112. MARY FRANCES BERRY, _THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS AND THE MYTH OF THE GOOD MOTHER_ 51 (1993); see also Kelly, _Republican Mothers, supra_ note 84, at 561-65 (describing the shift in gender roles).

113. Wright v. Wright, 2 Mass. 109, 110 (1 Tyng) (1806) (Parsons, C.J., concurring); _see also_ GROSSBERG, _supra_ note 109, at 208.

114. As one commentator describes, the destigmatization of illegitimate children occurred when the "aristocratic, property-conscious English view by which a heartless monetary interest in maintaining established lines of descent [was] overruled [by] compassion and common sense." GROSSBERG, _supra_ note 109, at 204; _see also_ Kelly, _Republican Mothers, supra_ note 92, at 563.

115. GROSSBERG, _supra_ note 109, at 215.

116. _Id._ at 207-18.


118. Janet Calvo developed the term "legacies of coverture" to recognize how existing immigration law allowed an abusive husband to control his wife's ability to secure lawful residency in the United States. Janet Calvo, _Spouse-Based Immigration Laws: The Legacies of Coverture_, 28 SAN DIEGO L. REV. 593, 595 (1991). The term also aptly describes the limited role accredited to unwed fathers. For further discussion of the disparagement
Given his minimal financial expectation, an unwed father must prove his capacity to care prior to being able to enjoy or exercise a paternal role. The “prove it or lose it” approach to fatherhood is evident in the willingness to uphold state provisions restricting an unwed father’s custodial rights. In *Stanley v. Illinois*, a statutory prohibition against an unwed father’s absolute right to custody of his children upon their mother’s death was only determined to amount to an equal protection violation after the father was deemed to have a pre-existing relationship with his children. The presumption that an unwed father cannot have a valuable relationship with his child is so strong that the Supreme Court has also been willing to deny standing to an unwed father (with a 98% scientific certainty of being the father) in his effort to establish himself as the father of a child born to a married woman.

2. Adoption

The presumed noninvolvement of unwed fathers in the lives of their children is in sharp contrast to the presumed care of unwed mothers. While nonmarital mothers are afforded the same recognition as married parents, nonmarital fathers remain suspect. Such difference is clearly evident in adoption. A nonmarital father’s right to notice, hearing, and consent prior to adoption have all been challenged. In each instance, the nonmarital father must prove his paternal role before he is legally accorded the same recognition unquestionably given to married parents and nonmarital mothers.

In *Caban v. Mohammed*, while the Court struck down a statute requiring consent of the mother but not the consent of the father of a child born out-of-wedlock prior to his adoption, it did so only to the
extent the father was known or ascertainable and the child was beyond infancy.\textsuperscript{124} Such ruling affirmed the Court's unanimous decision in \textit{Quilloin v. Walcott}, which allowed a child to be adopted by the husband of the natural mother over the objection of the natural father who had never sought custody or taken any responsibility for the child.\textsuperscript{125} Notwithstanding the constitutional niceties of due process and equal protection, the minimal expectations of notice and hearing cannot be taken for granted by nonmarital fathers. In \textit{Lehr v. Robertson}, while nonmarital fathers who filed a statement of paternity in the "putative father's registry" would be entitled to notice and hearing prior to his child's adoption, the state was not required to develop a more extensive system to ascertain and notify fathers who had never claimed responsibility for their children born out-of-wedlock.\textsuperscript{126}

\textbf{3. Immigration}

Similar mistreatment of nonmarital fathers in the immigration context should not be overlooked or explained simply as a product of the "plenary power" awarded Congress and the President over matters relating to immigration.\textsuperscript{127} Unlike \textit{jus soli} citizenship

\begin{itemize}
\item \textsuperscript{124} 441 U.S. 380, 394 (1979), \textit{on remand}, 47 N.Y.2d 880, 881 (1979). The New York statute treated the mother of an illegitimate child as it treated the parents of legitimate children by providing her with an absolute veto power over the adoption unless the parent had abandoned the child or had been otherwise judicially deemed unfit. \textit{Id.} at 385-86. By contrast, if a father of an illegitimate child protested his child's adoption, a hearing would ensue to determine the adoptive parent's fitness. See \textit{id.} at 387.
\item \textsuperscript{125} 434 U.S. 246, 255-56 (1978).
\item \textsuperscript{126} 463 U.S. 248, 264 (1983); see also Kelly, \textit{Alienation of Fathers}, supra note 118, at 188.
\item \textsuperscript{127} The plenary, or absolute, power of the political branches over immigration is widely recognized, interpreted, and critiqued. For the lead cases acknowledging the broad federal authority over immigration see for example, Shaughnessy v. United States \textit{ex rel.} Mezei, 345 U.S. 206, 216 (1953) (recognizing the Congressional authority to control the due process rights of returning legal residents); United States \textit{ex rel.} Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) (deeming federal power to exclude aliens free from judicial review); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) (determining absolute political power to deport aliens); Chae Chan Ping v. United States, 130 U.S. 581, 585 (1889) (determining absolute political power to exclude aliens).
\end{itemize}

conferred with birth upon U.S. land and constitutionally protected by the Fourteenth Amendment, a jus sanguinis citizenship conferred by blood is a statutory prerogative. Such opportunity has allowed Congress to exercise the bias of bastardy against non-marital fathers.

Current statutory provisions of jus sanguinis require that when a child is born abroad to a unmarried United States citizen man and an alien woman, the child must demonstrate that the father has legally recognized and agreed to financially support such child during his minority. By contrast, no similar requirements are imposed when a child is born abroad to an unmarried United States

128. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1 (1868). While this constitutional provision has served as the basis for citizenship for all non-aborigines physically born in the United States, the phrase "subject to the jurisdiction thereof" has been used to question such uncategorical recognition. See generally PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT — ILLEGAL ALIENS IN THE AMERICAN POLITY (1985), cf., Gerald L. Neuman, Back to Dred Scott?, 24 SAN DIEGO L. REV. 485 (1987). The "subject to the jurisdiction thereof" conditional has also required statutory recognition of the citizenship rights of individuals born in United States territories and (perhaps ironically) to aborigines. INA §301(b), 8 U.S.C.A. § 1401(b) (West 2006) (recognizing citizenship of individuals "born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe."); INA § 302, 8 U.S.C.A. § 1402 (West 2006) (recognizing citizenship of individuals born in Puerto Rico); INA § 306, 8 U.S.C.A. § 1406 (West 2006) (recognizing citizenship of individuals born in the Virgin Islands); INA § 307, 8 U.S.C.A. § 1407 (West 2006) (recognizing citizenship of individuals born in Guam).

129. While the statutes governing citizenship by descent have changed considerably over the years, the concept is currently governed largely by INA § 301, 8 U.S.C.A § 1401 (West 2006). The date of an individual's birth may subject him to older statutory provisions. For an excellent overview and guide to applying the changing requirements see Robert A. Mautino, Acquisition of Citizenship, IMMIGRA. BRIEFINGS (April, 1990), see also STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1269-73 (4th ed. 2005). For an extensive historical account of the changes in United States jus sanguinis policy, see CANDICE LEWIS BRED BENNER, A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP (1998); see also Kelly, Republican Mothers, supra note 92, at 565-71.

130.INA § 309(a)(3), 8 U.S.C.A. § 1409(a)(3) (West 2006) (requiring that the father "has agreed in writing to provide financial support for [the child] until [the child] reaches the age of 18 years"); INA § 309(a)(4), 8 U.S.C.A. §1409(a)(4) (West 2006) (requiring that the father legally recognize the child by either legitimating the child pursuant to the law of the child's country, acknowledging paternity of the child by written oath, or allowing a court to adjudicate paternity). Of course the blood relationship of the parent and child and the father's United States citizenship at the time of the child's birth must also be established. INA § 309(a)(4)(1)-(2), 8 U.S.C.A. § 1409(a)(4)(1)-(2) (West 2006). For a comparison of the historical developments of jus sanguinis and the distinctions drawn between the children of unmarried United States citizen men and alien women and those of unmarried United States women and alien men see Kelly, Republican Mothers, supra note 92, at 568-71.
citizen woman and an alien man. Through a pair of cases, the Supreme Court recently affirmed and re-affirmed this discriminatory practice. Sharing the stereotypical suspicion of nonmarital fathers, a majority of the Supreme Court in Miller v. Albright and again in Nguyen v. I.N.S. accepted the disparity as necessary in order to encourage caregiving by men.

Other provisions of the Immigration and Nationality Act similarly discriminate against nonmarital fathers. While married women, nonmarried women, and married men holding United States citizenship or lawful permanent residency may petition for the lawful permanent residency of their children born abroad simply by evidencing the biological connection, nonmarried fathers must demonstrate "a bona fide parent-child relationship." That particular disparity has not been reviewed by the Supreme Court; however, in Fiallo v. Bell, the Court willingly accepted a more restrictive provision that altogether denied both citizen and lawful permanent resident fathers the right to petition for the residency of their children born abroad and out-of-wedlock. Despite the provision's political amelioration...

131. In addition to proof of blood relationship and the mother's United States citizenship at the time of the child's birth, the current jus sanguinis statute also requires that United States citizen mothers of nonmarital children born abroad after December 23, 1952, evidence one year of physical presence in the United States. INA § 309(c), 8 U.S.C.A. § 1409(c) (West 2006).

132. Miller v. Albright, 523 U.S. 420, 440 (1998) (plurality opinion) (holding that "Congress obviously has a powerful interest in fostering ties" between the father and minor child). The Court's opinion in Miller was rendered by only two judges who found no constitutional violation to gender or legitimacy. Id. at 423. The Miller majority rendered two other opinions; however, neither squarely addressed the constitutional question. See Miller, 523 U.S. at 452 (Scalia, J., concurring) (finding that congressional authority over immigration controlled even assuming an equal protection violation); Miller, 523 U.S. at 445-46 (O'Connor, J., concurring) (finding that the petitioner/child in Miller lacked standing to raise her father's gender claim). For Miller's influence on the ability of a child to raise a gender claim against any state action directed at her father, see infra notes 184-91 and accompanying text.

133. Nguyen v. I.N.S., 533 U.S. 53, 67 (2001) ("Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as a citizen."). The Supreme Court's decision to review in Nguyen the gender challenge raised against the exact statutory provision reviewed only three years earlier resulted from the confusion fostered by Miller's failure to deliver a majority ruling regarding the gender-based classification. Nguyen, 533 U.S. 53, 58-59. For a discussion of Miller see supra note 132 and accompanying text. For Miller's precedential value in establishing the ability of a child to raise a gender claim against any state action directed at her parent, see infra notes 184-91 and accompanying text.


135. Fiallo v. Bell, 430 U.S. 787, 800 (1977). Although securing lawful permanent residency as a result of a father's citizenship is certainly less advantageous than having citizenship immediately conferred through the citizenship of one's father, both processes are necessary because a child is not eligible for derivative citizenship unless his parent was a citizen at the time of the child's birth and has met all the necessary physical...
several years later, its remaining discriminatory undercurrent evidences the legacy of deeply held social distrust of nonmarital fathers. Such ongoing disparagement undercuts Fiallo's confidence in the political branch's ability to correct discrimination.

B. The Principled Constitutional Debate

Difficulties raised by the prejudices held against nonmarital fathers are compounded by differences regarding the constitutional rigor required to evaluate a claimed constitutional disparity of gender or legitimacy. Such differences exist both inside and outside the inheritance context. While it is critical to acknowledge such differences, it cannot be done in the abstract. Methodological differences may be the product of deeply felt constitutional principles; they may also, however, simply be the means of reaching clearly identified ends.

1. In the Inheritance Context

The nature of the means-ends fit has been disputed several times in the context of inheritance. In Lalli v. Lalli, the Supreme Court evaluated a New York statute denying the ability of an illegitimate child to inherit from his father's estate unless paternity was legally established during the father's lifetime. Upholding the statute, the three judge plurality refused to consider whether a more "equitably" written provision could better serve the state's recognized interest in protecting fathers and rightful heirs from "fraudulent claims of heirship and harassing litigation." The Court noted that "[t]hese

residency criteria. Likewise, the children of lawful permanent residents must also rely on the residency process because of their parents' foreign citizenship. For a general discussion of the INA's family petitioning process, see LEGOMSKY, supra note 129, at 280-92. For further discussion of Fiallo and the post-Fiallo legislative developments regarding nonmarital fathers and their ability to petition for the residency of their children see ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 291-303 (5th ed., 2003); Kelly, Republican Mothers, supra note 92, at 572-74.

136. See Immigration Reform and Control Act § 315(a) (1986).
137. Fiallo, 430 U.S. at 798-99; see also ALEINIKOFF, supra note 135, at 301 (skeptically evaluating the political developments post-Fiallo).
138. The statute further required that paternity must be established either while the mother was pregnant or within two years of the child's birth. 439 U.S. 259, 261 n.2 (1978). The court did not focus on the two-year condition because appellant had not attempted to establish paternity at all. Id. at 262. He challenged the statute outright, rather than limiting his attack to the condition that paternity had to be established during the relevant two-year period, because attacking the provision did not improve his argument.
139. Id. at 274.
140. Id. at 271 (quoting the Fourth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, N.Y. Legis. Doc. No. 19 at 265 (1965)). Justice Powell wrote the court opinion and was joined by Chief Justice Burger and Justice Stewart. Id. at 259.
matters of practical judgment and empirical calculation are for [the State]. . . In the end, the precise accuracy of [the State's] calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality."141 The four judge dissent refused to defer so easily to the legislature:142 "[L]ess drastic means" of determining fraudulent claims of paternity existed.143 The state could recognize a father's formal acknowledgment of paternity.144 Alternatively, the illegitimate child could prove paternity after the father's death "by an elevated standard of proof."145

Since Lalli, many state inheritance statutes rely on exactly these types of "less drastic means" to establish paternity,146 the judicial equivocation between the standards of "less drastic means,"147 and "within constitutional limitations"148 prevents the forging of any predictable standard of review in cases of gender or legitimacy. The effect of this equivocation is evident in the review provided by two different states' courts to identical inheritance provisions.

a. The "Within Constitutional Limits" Standards

Relying upon the "within constitutional limits" test, the Utah Supreme Court in Scheller v. Pessetto upheld a Utah provision denying an unwed father and his kindred the ability to inherit "from or through" his child unless the father had established paternity, had "openly treated the child as his, and ha[d] not refused to support the child."149 Despite recognizing that the gender disparity could easily be eliminated by also holding mothers to a support and care standard, the Utah Supreme Court determined that consideration was beyond the scope of its judicial role:150 "[t]he relevant inquiry, however, is not whether the statute is drawn as precisely as it might have been

141. Id. at 274 (quoting Mathews v. Lucas, 427 U.S. 495, 515-16 (1976)).
142. Justice Brennan wrote the dissenting opinion and was joined by Justices White, Marshall and Stevens. Id. at 259, 277 (Brennan, J., dissenting).
143. Id. at 278-79.
144. Id. at 279.
145. Id. (suggesting such evidentiary standards as "clear and convincing evidence" or "beyond a reasonable doubt").
146. Id. at 278-79. See supra notes 14-21 and accompanying text (discussing state standards for a surviving child to establishing a parent-child relationship).
148. See, e.g., Scheller v. Pessetto, 783 P.2d 70, 74 (Utah Ct. App. 1989); see also Lalli, 439 U.S. at 274.
149. Scheller, 783 P.2d 70, 71-72 (quoting UTAH CODE ANN. § 75-2-109(1)(b)(ii) (1976)). For further discussion of Scheller, see supra notes 51-57 and accompanying text.
150. Id. at 74.
but whether the line chosen by the [legislature] is within constitutional limitations."

Ironically, the Utah legislature subsequently amended its inheritance scheme in accordance with the gender-neutral proposal dismissed by Scheller. In Utah, mothers and fathers are now both held to a support and care standard in order to inherit by and through children born out-of-wedlock.

b. The "Least Restrictive Means" Standard

Using the "least restrictive means analysis" allows gender-based statutes to be more critically evaluated by the courts. In Hicks v. Hicks, the Illinois Supreme Court struck down an Illinois provision denying an intestate share to unwed, nonsupporting fathers identical to the Utah provision upheld in Scheller. Even assuming the State's "compelling interest" in recognizing the presumed desire of the decedent to provide only for her mother because she was unlikely to have a relationship with her father, the Illinois Supreme Court recognized a less restrictive alternative. Rather than denying intestate shares to all out-of-wedlock fathers, intestate succession could be allowed "by any parent who has acknowledged and supported their [sic] illegitimate child."

Such differences between Scheller and Hicks stem from different judicial standards. Although ultimately the same gender-neutral change was made in Utah and Illinois, Utah's change was politically forced, while Illinois's was judicially willed. It would be foolish, however, to complacently believe similar results will always be achieved. Judicial and legislative thinking does not always reflect common interests. Statutory gender disparities may be left unresolved by state legislatures. Significantly, only fourteen states currently adhere to

151. Id. (quoting Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 473 (1981)).
152. Id.
155. Id. at 94-95.
156. Id. at 94 (recognizing the current UPC to require that “[i]nheritance from or through a child by either natural parent or his [or her] kindred is precluded unless the natural parent has openly treated the child as his [or hers], and has not refused to support the child”) (quoting Unif. Probate Code, 8 U.L.A. § 2-114(c) (1990) (additions in original).
gender-neutral support requirements as a precondition to inheritance by surviving parents.\footnote{157}{See supra notes 27-29 and accompanying text (discussing the states' use of gender neutral inheritance provisions).}

2. Outside the Inheritance Context

In matters unrelated to inheritance, the Supreme Court has also applied differing standards to review state action impacting unwed fathers and their children. When the Supreme Court revisited the contested citizenship statute upheld in Miller,\footnote{158}{Miller v. Albright, 523 U.S. 420, 424 (1998). For further discussions of Miller see supra note 120 and infra notes 184-91 and accompanying text.} the \textit{Nguyen} majority and the dissent formally spoke in terms of reviewing the statute based on a heightened scrutiny standard requiring the “discriminatory means [to be] substantially related [to an] important” government interest.\footnote{159}{Nguyen v. I.N.S., 533 U.S. 53, 60 (2001) (majority opinion) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)); id. at 77 (O'Connor, J., dissenting) (citing United States v. Virginia, 518 U.S. at 533). The \textit{Nguyen} majority opinion was issued by Justice Kennedy and joined by Justices Rehnquist, Stevens, Scalia, and Thomas. Id. at 56 (majority opinion). Although Justice Scalia joined the majority opinion, he also wrote a brief three sentence concurrence in order to emphasized that he “remain[ed] of the view that the Court” could not regulate Congress’s exclusive immigration power, he thought it “appropriate” to review the equal protection claim as the majority of the Court in Miller and \textit{Nguyen} had “concluded otherwise.” Id. at 73. Justice Thomas also joined both the majority and concurring opinions. Id.} The actual evaluation of the majority and dissent however evidences a deep divide.

The \textit{Nguyen} majority accepted the government interests in “assuring that a biological parent-child relationship exists”\footnote{160}{Id. at 62.} and in providing an “opportunity” for an actual relationship based upon “real, everyday ties” to develop.\footnote{161}{Id. at 64-65.} By contrast, the dissent rejected the government’s defense as post hoc rationale that had not been contemplated by Congress.\footnote{162}{Id. at 75. “[T]he majority hypothesizes about the interests served by the statute and fails adequately to inquire into the actual purposes of § 1409(a)(4).” Id. at 78 (O'Connor, J., dissenting).} The most critical difference between the majority and the dissent, however, turned on evaluating the relation between the statutory means used to achieve state interests.\footnote{163}{As recognized by the dissent, “[t]he most important difference between heightened scrutiny and rational basis review, of course, is the required fit between the means employed and the ends served.” Id. at 77.} While the majority asserted in theory its reliance upon a standard
of heightened scrutiny, it relied in fact on a much lesser standard.\textsuperscript{164} In order to be recognized as a father, the statute mandated "clear and convincing evidence" of a blood relationship\textsuperscript{165} and that paternity legally be established during the child's minority.\textsuperscript{166} The father challenged such an exacting standard, arguing that today's extremely reliable DNA testing was sufficient to meet the state interest in establishing paternity.\textsuperscript{167} Defending Congress, the majority stated, "[t]he Constitution ... does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity."\textsuperscript{168} Disputing the majority's assertion, the dissent emphasized that the rigors of heightened scrutiny demanded more serious consideration of proposed alternatives.\textsuperscript{169} Even assuming the constitutional "importance" of the asserted interest in providing the "opportunity" for a father-child relationship, the necessary constitutional fit between the statutory means and the ends was not achieved.\textsuperscript{170} "[A]vailable sex-neutral alternatives would at least replicate, and could easily exceed" the success of a statute directed only at unwed fathers.\textsuperscript{171} For example, if the mother's presence at birth is held out as a sufficient basis for the mother's "opportunity" for parent-child relationship to develop, then the father's presence at birth also could be recognized as a sex-neutral alternative to the statutory requirements.\textsuperscript{172} Alternatively, both parents could be required to show "some degree of regular contact" with the child which would not only satisfy the opportunity rationale but prove the existence of an actual relationship.\textsuperscript{173}

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\textsuperscript{164} No one should mistake the majority's analysis for a careful application of this Court's equal protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred.

\textsuperscript{165} INA § 309(a)(1), 8 U.S.C.A. § 1409(a)(1) (West 2006).

\textsuperscript{166} INA § 309(a)(4), 8 U.S.C.A. § 1409(a)(4) (West 2006) (requiring that while the child is under eighteen, the child is legitimated, the father acknowledges paternity in writing under oath, or paternity is established by court adjudication).

\textsuperscript{167} Nguyen v. I.N.S., 533 U.S. 53, 63 (2001).

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} \textit{Id. at 83} (O'Connor, J., dissenting).

\textsuperscript{170} The state interest in providing an "opportunity" for a relationship can also be criticized as a post hoc interest contrived by the majority which could be better tailored to the statute than the interest in developing an actual relationship which was offered by the government in defense of the statute. For further criticism of the majority's "simultaneously watered-down and beefed-up version" of the government interest see \textit{id. at 84-89}.

\textsuperscript{171} \textit{Id. at 86}.

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{Id. at 88}.
IV. THE FAILED PERSPECTIVE OF INHERITANCE

A. The Anomalous Heir Perspective of Gender and Legitimacy

The political and methodological differences surrounding the misapplication of gender and legitimacy is further complicated by a failure in perspective in the inheritance context. Attacks on inheritance disparities turning either on gender or legitimacy are brought by the beneficiary who believes he is being denied money that is rightfully his. But who is truly the injured party? The beneficiary or the decedent? A person is generally free to devise his estate in any manner he wishes upon his death. The intestate provisions effectively operate as a "statutory will," attempting to imitate how the decedent would have distributed his property if he had left a valid will. As one court has noted, "[t]he purpose of the statutes of descent and distribution is to make such a will for an intestate as he would have been most likely to make for himself." Consequently, whether an estate is distributed pursuant to a valid will or a state's intestate scheme, it is the decedent, not the surviving devisees or heirs, whose interests need to be safeguarded.

B. Reorienting Toward the Decedent

Apart from the gender and legitimacy challenges brought against intestate schemes, the Supreme Court recognizes that existing constitutional rights of devise and descent belong to the decedent. In Hodel v. Irving, the heirs and devisees could only establish standing to challenge the federal limitation on a Native American Indian's ability to distribute his territorial lands by devise and descent as third parties representing the decedents' interests. The survivors' effort to establish standing based on claimed violation of their own interests was soundly rejected at all judicial levels.

174. See Part II (discussing legal challenges to state inheritance schemes).
175. "The general policy is to follow the lead of the natural affections and to consider as most worthy the claims of those who stand nearest to the affection of the intestate." In re Estate of Pakarinen, 178 N.W. 2d 714, 717 (Minn. 1970) (quoting 23 AM. JUR. 2D Descent and Distribution § 10).
178. See infra notes 179-83.
180. Id. at 710.
Similarly, when a decedent has devised his estate pursuant to a will, interested beneficiaries have little success in raising their own perceived constitutional injuries. For example, in *Shapira v. Union National Bank* the testator instructed that his son should only be entitled to his estate if he was married to a Jewish girl by the time of the testator’s death or within seven years thereafter. The son argued that the court’s reliance on such provision in the distribution of his father’s estate amounted to state action which violated his constitutional right to marry. Rejecting the son’s constitutional argument, *Shapira* emphasized: “the right to receive property by will is a creature of the law . . . . It is a fundamental rule of law . . . that a testator may legally entirely disinherit his children. This would seem to demonstrate that, from a constitutional standpoint, a testator may restrict a child’s inheritance.”

Based on *Shapira*, one might distinguish a discriminatory testamentary provision from a discriminatory intestate scheme given the clear legislative role in enacting the disputed intestate statute. However, consistency with traditional principles of probate demand that any challenge to a state drawn intestate scheme be brought on behalf of the decedent.

V. RIGHTING THE MISAPPLICATION OF EQUAL PROTECTION

A. A Twofold Prescription

The right of intestacy belongs to a decedent, not to his or her heirs. Yet in righting the misapplication of equal protection, changing to a decedent’s perspective must be done in combination with correcting the inconsistent use of gender and legitimacy. Gender and legitimacy claims must both be entertained, whether inheritance challenges are brought on behalf of deceased children or deceased fathers.

182. *Id.* at 29-30. In support of his fundamental right to marry as protected under the constitutional right of privacy, the son relied on such cases as *Loving v. Virginia*, 388 U.S. 1 (1967), *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942)). In support of the probate court distribution amounting to state action, the son relied on *Shelley v. Kramer*, 334 U.S. 1 (1948).
183. *Id.* at 32. Dismissing the son’s analogy to the state action recognized in *Shelley* when a court was asked to enforce of racially restrictive covenants privately drawn between neighbors, *Shapira* held that the son was free, at least legally, to marry whomever he pleased. *Id.* at 31. In the event he married a Jewish girl, he would receive the estate. If he married a non-Jewish girl (or no one at all), he would not. *Id.*
As the comparison of *Miller v. Albright*\(^\text{184}\) and *Nguyen v. I.N.S.*\(^\text{185}\) reflects, the Supreme Court has not wholeheartedly embraced allowing children to raise gender claims against state action directed at their parents.\(^\text{186}\) While *Miller v. Albright* splintered on the constitutional treatment of gender, seven Supreme Court justices either relied upon or did not oppose the use of gender to review the equal protection challenge brought by a child born against an immigration statute distinguishing between the citizenship privileges of children born to United States citizen men and United States citizen women.\(^\text{187}\)

Perhaps any residual resistance to a child's use of gender can be overcome by highlighting the risk of inconsistency in allowing gender to be raised on behalf of fathers raising inheritance challenges but restricting children to raise legitimacy claims despite identical inheritance interests.\(^\text{188}\) Such risk is particularly significant given the "exceedingly persuasive"\(^\text{189}\) government interest standard now required for gender and the traditional "important"\(^\text{190}\) government interest maintained for legitimacy.\(^\text{191}\)

Dual testing based upon gender and legitimacy would also allow for all of the state interests to be fully evaluated in each case. Different state interests are raised in the legitimacy context than in the gender context. When inheritance statutes are challenged on the basis of legitimacy, the state interests typically concern the efficient administration of the decedent's estate and the related problem of preventing fraudulent paternity claims.\(^\text{192}\) By contrast, the gender

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186. See *supra* notes 92-103 and accompanying text (comparing the Court's limited reliance upon gender in *Miller v. Albright* to review a federal restriction of citizenship to an unwed child of a United States citizen father and the Court's unanimous use of gender in *Nguyen v. I.N.S.* to review the identical statute when the challenge was brought by an unwed father).
187. Four justices and the Chief Justice relied directly upon gender. *Miller v. Albright*, 523 U.S. 420, 445, 460-61, 470-71, 482-88 (1998) (plurality opinion of Stevens, J., joined by Rehnquist, Chief Justice, dissenting opinions of Ginsburg, joined by Souter and Breyer, and dissenting opinion of Breyer, joined by Ginsburg and Souter, respectively). Of the remaining four justices, only two directly opposed a child's use of gender distinctions drawn between his parents. *Id.* at 445-46 (concurring opinion of O'Connor, J., joined by Kennedy, J.). Deciding *Miller* as a political immigration matter outside the scope of judicial review, the remaining two justices simply did not address the viability of the indirect use of gender by a child. *Id.* at 453 (Scalia, J., concurring joined by Thomas, J.).

For further discussions of *Miller* and the use of gender or legitimacy in such case see *supra* note 132 and accompanying text.
188. For discussion of such inconsistent treatment see *supra* notes 104-08 and accompanying text.
191. For further discussion of applying such differences between gender and legitimacy to evaluate similar inheritance interests see *supra* notes 104-08 and accompanying text.
192. For a recognition of the State interests of efficient administration and establishing
distinctions are typically reviewed against a state interest in encouraging fathers to support and care for their children. This type of division is arbitrary. State interests in developing familial relationships and preventing fraudulent claims may often both be credibly raised, regardless of whether the case turns on legitimacy or gender.

B. The Limits of the Prescription

Shifting to a decedent's perspective and allowing gender and legitimacy to be fully evaluated in the cases of parents and children will not prevent the political disparaging of unwed fathers. If the bias is to be judicially addressed, it must first be recognized. Similarly, the arbitrary choice in equal protection claims between the "least restrictive means" or the "within constitutional limits" standard is not a distinction that can be corrected by a shift to the decedent's perspective or a combined application of gender and legitimacy. The lack of uniformity on this matter extends beyond equal protection challenges into the inheritance context. Raising the inconsistency will hopefully bring attention to another constitutional dilemma that must be resolved as a matter of judicial integrity.

VI. APPLYING THE PRESCRIPTION

If constitutional challenges to intestate statutes were consistently evaluated from the decedent's perspective, how would the review improve? Could the application of gender and legitimacy be more systematic? Imagine the following scenarios.

paternity in cases challenging the inheritance rights of either fathers or children on the basis of legitimacy see, for example, Lalli v. Lalli, 439 U.S. 259, 265 (1978) (evaluating such interests and upholding inheritance rights of illegitimate children unless paternity is established during a father's lifetime via judicial order); Parham v. Hughes, 441 U.S. 347, 357-58 (1979) (evaluating such interests and upholding a statute denying a father's wrongful death benefits absent his voluntary establishment of paternity). But see Trimble v. Gordon, 430 U.S. 762, 769-71 (1977) (striking down an absolute bar of inheritance rights of illegitimate children after evaluating both the state interest in establishing paternity and "promoti[ng] of legitimate family relationships," but recognizing the state interest in establishing paternity to be a "more substantial justification." Id. at 770. The Court did not believe punishing children for parents' out-of-wedlock relationships would discourage such relationships); see also Miller v. Albright, 523 U.S. 420, 445 (1998) (denying illegitimate daughter jus sanguinis citizenship upon recognition of state interest in valid relationships and to prevent false paternity claims).


194. See supra notes 138-57 and accompanying text (discussing inheritance and non-inheritance cases raising gender and legitimacy interests in which the variation between "least restrictive means" and "within constitutional limits" exists).
A. The Decedent-Child's Perspective: A Right to Gender and Legitimacy

Consider an intestate statute, which requires an unwed father to openly treat and support his child in order to qualify as an heir. Consider also the facts of Rainey v. Chever on which Georgia struck down its version of such a provision. Now assume that rather than recognizing the standing of a surviving, unwed father, any constitutional challenge to a state's inheritance scheme could only be brought on behalf of the deceased child.

Given the relationship of Robert Lee Chever with his son, DeAndre, it is unlikely that in this particular case a challenge against the gender-based intestate provision would have ever been raised on behalf of the decedent-child. Mr. Chever was no model father. Although his son lived less than one mile away, he never made any contact with him. Mr. Chever never legitimated his son, initiated any visits with him, or showed any interest in his development. He met his son one time, when DeAndre (at the age of fifteen) confronted him along with other children Mr. Chever had fathered. Yet, when DeAndre died along with others in an automobile crash, Chever was the first parent to file for monetary damages.

Who would argue that the DeAndre's interests would be best protected by requiring some portion of his estate be provided to his wayward father? From the perspective of the decedent-child in Rainey, the former Georgia statute got it absolutely right. Deadbeat dads should not collect. Does that mean, however, that absent consideration

195. For a discussion of the states which maintain such requirements see supra note 25 and accompanying text.
196. Rainey, 527 at 1044 (denying certiorari without opinion). For further discussion of Rainey see supra notes 34-49 and accompanying text.
197. This rule would allow a father denied inheritance to raise a claim on behalf of the decedent, but only as a representative of the child's interests. Additionally, an individual named administrator of a child's intestate estate could also represent the child/decedent and raise constitutional challenges on the child's behalf. Both third party possibilities were recognized in Hodel v. Hodel, 481 U.S. 704, 711-12 (1987).
198. The child's full name was DeAndre Bernard Hamilton. Rainey, 527 U.S. at 1044 (Thomas, J., dissenting). In the Rainey suit, the child's mother, Zenobia Hamilton Rainey was the named petitioner. Id.
199. Id. at 1044-45 (Thomas, J., dissenting).
200. Likewise, "deadbeat moms" should also not be entitled to inheritance. For the author's proposal of a gender neutral approach to support expectations in the parental inheritance context see infra note 203 and accompanying text.

The author has previously argued in the spousal context that "emotional fault" considerations such as abandonment, desertion and nonsupport (as well as adultery) should not provide the basis for estate preclusion. Courts should take into consideration factors such as abandonment and nonsupport in the parent-child context. The dynamics of the husband-wife relationship are entirely unlike those in the parent-child relationship.
of the survivor's perspective that a gender-based inheritance prohibition such as Georgia's could withstand all constitutional attacks?

Revisit the same statute with a different set of facts. Assume that a child is born in wedlock and is abandoned during her lifetime by her father. A statutory provision directed at unwed, nonsupporting fathers does not prevent the married, wayward father from inheriting. In this instance, the critical distinction is legitimacy.

If we accept that a decedent would not want to provide for a parent who has abandoned her regardless of marital status, the statute irrationally distinguishes between legitimate and illegitimate children. The statute fails its purported purpose of encouraging true familial relationships. A married man can abandon his child and still be rewarded. It also fails the decedent's interests as it is unlikely that an abandoned child would want to reward her wayward father, regardless of his "legitimate" relationship with his daughter.

Now assume another set of facts. Assume that a child born out-of-wedlock dies and that child has not been supported by her mother. Given a statute only directed at unwed, nonsupporting fathers, the mother will still qualify for an intestate share. Again, the statute works against interests. Recognizing a state interest in actualizing the "presumed desires" of a decedent who dies intestate and encouraging familial relationships, it is difficult to find that a statute that distinguishes based upon gender meets a standard of heightened scrutiny.

Working through such additional fact patterns demonstrates that rather than relying on the unsympathetic Mr. Chever, a case could certainly be imagined based upon the decedent-child's perspective in which an intestate provision directed only at unwed, nonsupporting fathers could still be struck. There seems no support for a statute which allows for any nonsupporting parent to inherit. By allowing both legitimacy and gender claims to be raised on behalf of a deceased child, such findings can be legally recognized.

The parent-child relationship is inherently rooted in notions of nurture and support. Moreover, unlike parents and children, husband and wives are increasingly viewed as equals who are each capable of protecting their individual interests. For the author's proposal against the use of "emotional fault" in the spousal context see Linda Kelly Hill, No-Fault Death: Wedding Inheritance Rights to Family Values, 94 KY. L. REV. 320 (2005).

201. For a recognition of such state interests in cases involving gender see supra note 185.

202. In re Estate of Pakarinen, 178 N.W.2d 714, 718 (Minn. 1970) (recognizing the state interest in protecting decedents as a basis for rejecting an illegitimate child's constitutional challenge to a statute precluding inheritance unless the father had affirmatively acknowledged the child in writing during his lifetime).
Reflecting an effort to respect the decedent-child's desires, states may easily condition parental inheritance upon support, regardless of gender and legitimacy. Fourteen states have adopted such a position. Their intestate provisions model the current version of the UPC which mandates, "Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child."  

B. The Decedent-Father's Perspective: A Return to Filius Nullius?

In the evaluation of intestate statutes drawn to limit a non-marital child's distribution, an effort to evaluate the perspective of the deceased father was short-lived. In Trimble v. Gordon, the Court recognized that intestate succession laws are intended to reflect "the natural affinities of decedents." Yet Trimble ultimately determined that such intestacy laws are "more convincingly explained" by efforts to act "more just to illegitimate children" and to prevent "spurious claims of paternity." However, if the decedent's desires are the basic rationale behind intestate succession laws, why not seriously evaluate whether a man would want to distinguish in the treatment of his legitimate and illegitimate children at the time of his death? Put in such explicit terms, consideration of the decedent's perspective may be regarded as nothing more than a distasteful revival of filius nullius; an effort to protect men from the claims of children they would prefer not to recognize or support. Yet would an evaluation from an out-of-wedlock father's perspective always reflect such unworthy objectives?

Imagine the case of a child born out-of-wedlock who is twenty-one at the time of his father's death. Assume further that although the father and child had a relationship in fact, it was not formally recognized during the prescribed period. Absent such legal recognition of paternity, a child may not be entitled to an intestate distribution of...
his father's estate. Yet while the child is being statutorily prevented from receiving a portion of his father's estate, could not it be argued that a father in these circumstances would want his child to inherit, despite not establishing the legal standard of paternity prior to death? Furthermore, should not these very valid interests of the decedent be evaluated alongside the traditionally raised state interests in efficient estate administration and prevention of fraudulent paternity claims when a constitutional challenge to such statutes is made?

To assume that all fathers of nonmarital children believe that their interests are best protected by preventing the inheritance of such children is to otherwise accept the biases of gender and legitimacy.

When a parent dies, recognition of a valid parent-child relationship should not turn on gender or legitimacy but rather on the parent's knowledge of the child's existence and relationship. Knowledge of the existence of one's child should be sufficient to assume that the decedent-parent's "presumed desires" are that such child should receive an intestate share.

Absent advanced technology or a well-written soap opera storyline, a woman's knowledge that she has a child is readily apparent upon the child's birth. Standards for establishing paternity should mirror this knowledge. Prior to a man's death, knowledge is established by such circumstances as marriage, adoption, or voluntary acknowledgment of paternity or its legal adjudication. As most states readily acknowledge, there should also be a basis for establishing paternity after the father's death. Yet such posthumous standards must recognize the perspective of the decedent-father and his knowledge of paternity. This dual emphasis lends support for "clear and convincing" evidence not simply to establish paternity but also to establish the father's knowledge of such. California's paternity statute beautifully illustrates such dual emphasis. In addition to

208. See, e.g., IND. CODE ANN. § 29-1-2-7(b)(1) (West 2006) (requiring paternity be established by a legal cause of action prior to the death of the decedent when the deceased man is survived by a child who is over twenty years of age and was born out-of-wedlock).  
209. For recognition of such interests of efficient administration and proving paternity see supra note 204.  
210. For a recognition of the ongoing acceptance of such biases see supra notes 118-37 and accompanying text.  
211. In re Estate of Pakarinen, 178 N.W. 2d 714, 717 (Minn. 1970).  
212. Consequently a mother relationship to her child is typically recognized regardless of her marital status at the time of birth. See, e.g., DEL. CODE ANN. tit. 12, § 508 (2006).  
213. For a review of the states' means of establishing paternity before the father's death see supra notes 15-18 and accompanying text.  
214. For a review of the states' means of establishing paternity after the father's death see supra notes 19-20 and accompanying text.  
215. For a review of the states' use of the clear and convincing standard in establishing paternity after the father's death see supra note 21 and accompanying text.
recognizing that paternity may be established during the father's lifetime, it allows for paternity to be established after the father's death only by showing "clear and convincing evidence that the father has openly held out the child as his own" or upon showing that "it was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence." Allowing an exception to knowledge only in the limited instance of "impossibility" is consistent with an effort to protect the decedent's "presumed desires" through state intestate schemes. Contrary to the negative image of a bastard's father, we are left with the positive image of a benevolent, unwed father. Had he known his child to exist, he would have wanted his child to inherit.

CONCLUSION

Inheritance is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." When a person dies without a valid will or certain property has not or can not be devised, the State must create a default plan to distribute the decedent's property. Yet while the State creates the intestate scheme, the right of inheritance remains with the decedent. Such right is not altered by one's familial position. The inheritance rights of unwed fathers and their children need to be afforded the same constitutional safeguards provided to all others. In accordance with equal protection, a State may create different, but constitutionally sound, evidentiary standards to prove the relationship between an unwed father and his child. States can also legitimately debate whether all parents, regardless of gender or marital status, should be held to a support standard in order to inherit from or through a deceased child. Such requirements can be established consistently with a decedent's interests. In so doing, equal protection will be properly applied, and the rights of inheritance will be affirmed.

217. Id. § 6453(b)(2).
218. Id. § 6453(b)(3).
220. The author has previously used the terms "republican mothers" and "bastards' fathers" to contrast and emphasize the effect of the positive images of unwed mothers and the negative images of unwed fathers. Kelly, Republican Mothers, supra note 92.