NOTES

Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guidelines

Introduction

In the field of family law, Congress has enacted legislation that culminated in requiring states to establish child support guidelines.[1] This measure was necessary in order to control the amount of income that must be transferred by the support-paying parent to the custodial parent in circumstances in which the family is not intact. But no law controls the number of children an individual may have. Should a support-paying parent establish a subsequent family, a conflict develops between the successive families over distribution of the support-paying parent's income. If a state applies its child support guidelines in a manner favoring first children over subsequent children, the result is a violation of the Equal Protection Clause of the federal constitution.[2]

For the custodial parent, the legislation was desperately needed relief. In the 1970s, the divorce rate more than doubled,[3] creating single-parent households most often headed by women.[4] Typical divorce economics inflicted poverty upon the mother and children while the father enjoyed an improved standard of living.[5] Many of these female-headed households faced severe financial hardship.[6] During this same period,

1. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. §§ 651-667 (1984)).

2. U.S. CONST. amend. XIV.

3. Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1, 1 (1983) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. 372, MARITAL STATUS AND LIVING ARRANGEMENTS 1, 5 (table D) (1982)).

4. Bowen v. Gilliard, 483 U.S. 587, 612 (1987) (Brennan, J., dissenting) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS 2 (1985)).

5. The standard of living of divorced fathers increased an average of 42% in the first year after divorce while the standard of living of divorced mothers and their children declined an average of 73%. L. WEITZMAN, THE DIVORCE REVOLUTION 323 (1985).

6. *Bowen*, 483 U.S. at 612 (Brennan, J., dissenting) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, HOUSEHOLD AND FAMILY CHARACTERISTICS 2 (1985)).

dependency upon federal welfare programs, particularly Aid to Families with Dependent Children (AFDC), increased.[7] Congress recognized that the failure of absent parents to support their children was a significant cause of the alarming increase in the number of children living in poverty and the resulting strain on the welfare system.[8]

Consequently, Congress attempted to shift the responsibility of supporting children from the federal government to parents "by improving the establishment and enforcement of child support orders."[9] Congress justified its measures on the ground that "all children have the right to receive support from their fathers"[10] and that "as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup."[11]

In 1974, Congress enacted the Social Services Amendments, Title IV-D of the Social Security Act.[12] Aimed at alleviating welfare dependence, the new program established four basic services: location of absent parents; establishment of paternity; establishment of support; and enforcement of support.[13] States that participated in the AFDC program would suffer a reduction in federal funding if they failed to implement the support enforcement program.[14]

Nevertheless ten years later, support orders either were ignored by absent parents or courts simply failed to issue them at all.[15] In an effort to increase the effectiveness of the Social Services Amendments of 1974, Congress unanimously[16] amended the law in 1984.[17] At this time, the support enforcement provision was enlarged from AFDC situations, in which the custodial parent is forced to seek the state's assistance in supporting the children, to private situations, in which the custodial parent

7. Barber, *Update on Title IV-D*, 1 AM. J. FAM. L. 383 (1987).

8. S. REP. NO. 1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8145.

9. Billings, *From Guesswork to Guidelines—The Adoption of Uniform Child Support Guidelines in Utah*, 1989 UTAH L. REV. 859, 873 (footnote omitted).

10. S. REP. NO. 1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8146.

11. *Id.*

12. Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended at 42 U.S.C. §§ 651-662 (1981)).

13. S. REP. NO. 1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8133. The purpose behind these services was to obtain financial contribution from the absent parent in order to defray the cost of state welfare expenditures made on behalf of children who were not receiving support from that parent.

14. S. REP. NO. 1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 8133, 8134.

15. Horowitz, *Congress Gets Tough*, 8 FAM. ADVOC. 3, 3 (1985).

16. Dodson, *A Guide to the Guidelines*, 10 FAM. ADVOC. 4, 5 (1988).

17. Child Support Enforcement Amendments of 1984, *supra* note 1.

is able to support the children without the state's help.[18] In order to enforce existing orders, the amendments required the states to adopt additional collection procedures. They included the following: mandatory wage withholding; expedited processes; interception of state and federal income tax refunds; imposition of liens against real or personal property; extension of statute of limitations on paternity; imposition of bonds or other security; reporting to consumer credit reporting agencies; and development and implementation of state child support guidelines.[19]

The states were directed to create their own particular child support guidelines by October 1, 1987.[20] Congress had originally intended state child support guidelines to serve merely an advisory function.[21] But because judges who deviated from the guidelines generally set inadequate awards,[22] Congress amended the Child Support Enforcement Amendments of 1984 as part of the Family Support Act of 1988[23] by mandating that each state's child support guidelines were to carry presumptive weight.[24] This new requirement became effective in October 1990.[25]

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18. S. REP. NO. 387, 98th Cong., 2d Sess. 1, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2397, 2397.

19. S. REP. NO. 387, 98th Cong., 2d Sess. 2-3, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2397, 2398-99.

20. H.R. CONF. REP. NO. 925, 98th Cong., 2d Sess. 54, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2397, 2472.

21. Before being amended in 1988, section 667 provided:

> (a) Establishment of guidelines; method
> Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action.
>
> (b) Availability of guidelines; binding nature
> The guidelines established pursuant to subsection (a) of this section shall be made available to all judges and other officials who have the power to determine child support awards within such State but need not be binding upon such judges or other officials.
>
> (c) Technical assistance to States; State to furnish Secretary with copies
> The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines.

42 U.S.C.A. § 667 (West Supp. 1985).

22. Billings, *supra* note 9, at 909 & n.277.

23. Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended at 42 U.S.C.A. §§ 641-669 (West Supp. 1990)).

24. S. REP. NO. 377, 100th Cong., 2d Sess. 2, 17, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2776, 2779, 2794; H.R. CONF. REP. NO. 998, 100th Cong., 2d Sess. 91-92, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2776, 2879-80.

As a result of the amendments to section 667, the entirety of subsection (b) became subsection (b)(1) and the language "but need not be binding upon such judges or other officials" was removed from the end of that subsection. A new subsection (b)(2) was also added:

> There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, deter-

Apart from creating that presumption, Congress left the job of defining child support guidelines to each state,[26] which inevitably led to a wide variety of guidelines. The federal law left the states to resolve such issues as what should constitute income, whether income should be adjusted by taxes, whether the income of one or both parents should be the basis of the support calculation, whether a second spouse's income should be included, and whether the state guidelines applicable to the support-paying parent or to the custodial parent should be applied in interstate situations.[27] Most importantly, the federal law failed to specify how successive families should be considered in the support award process.[28]

This Note argues that state child support guidelines which ignore subsequent children are unconstitutional. Part I identifies the violation of equal protection that occurs when application of state child support guidelines discriminates against subsequent children and support-paying parents. Part II analyzes the equal protection problem on all levels of judicial review: strict scrutiny, which is applied in cases concerning suspect classes or fundamental rights; heightened scrutiny; and mere rationality. The Note concludes with the assertion that constitutionally sound state child support guidelines must allow modification of prior support orders based on the support-paying parent's responsibility for subsequently born or adopted children.

I. The Dilemma of Subsequent Children

When a couple, having children, breaks off the relationship, and, thereafter, one of the parents has additional children by a new relationship, a subsequent family is made. If the parent who has established the subsequent family is also the parent who is obligated by court order to pay support to the prior family, a conflict exists that often leads the parties to the courts for resolution. In one common situation, the support-paying parent, whose income is stretched between two families, requests the court to reduce the support order based upon the need to support the new family. In another common situation, the prior family requests the court to increase the support award to reflect the growing needs of the children while the support-paying parent responds by arguing the need to support his or her new family.

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mined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

42 U.S.C.A. § 667 (West Supp. 1990).

25. Billings, *supra* note 9, at 909.

26. S. REP. NO. 387, 98th Cong., 2d Sess. 40, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2397, 2436.

27. Barber, *supra* note 7, at 390.

28. Malone, *Modification Lives*, 10 FAM. ADVOC. 42, 43 (1988).

When state child support guidelines require that an inflexible amount of the support-paying parent's income is to be awarded to the custodial parent, an equal protection argument arises in two forms. The first is that the two sets of children are treated unequally because the first children have priority over the support-paying parent's income. The second is that the two sets of parents are treated unequally in that the custodial parent, unlike the support-paying parent, is not forced to spend a fixed amount of money on the children.

Equal treatment of subsequent children under state child support guidelines is an emotionally charged issue.[29] On the one hand, opponents argue that "[a] parent should meet his first family's needs before taking on new obligations"[30] and that it is unfair to modify awards received by parties who relied on the original amount.[31]

On the other hand, proponents argue that it is unfair for judges to give first children priority at the expense of subsequent children. One commentator suggests that this type of intentional discrimination causes "suffering by a different class of children."[32] Judges in favor of recognizing the second family feel that "it is unfair, and perhaps unconstitutional, to discriminate among children whose support orders happen to be entered on different dates."[33] Another commentator suggests that "support enforcement for a 'first family' becomes socially counterproductive when it threatens to deprive a 'second family' of a realistic basis for economic survival."[34] Others argue that favoritism given to dependents of a prior family could encourage divorce in the second family.[35] Such a threat to the subsequent family is not difficult to imagine. A previously unknown, illegitimate, first-born child could suddenly present a demand for support to a father several years after the father marries and produces other children.[36] Or the difficulty in meeting an inflexible financial obligation to the prior family could strain a support-paying parent's new family to the breaking point. An inflexible financial obligation to the first family may even inhibit the support-paying parent from having additional children altogether. During public child support guideline hearings by one state task force, support-paying parents complained that, "after paying or-

29. *See* Billings, *supra* note 9, at 903 (discussing the recommendation "that the existence of after-born children [should] not affect existing child support orders," which was made by the Utah Task Force Committee on Needs of Children and the Committee on Parent's Ability to Pay).

30. Malone, *supra* note 28, at 44.

31. Billings, *supra* note 9, at 903.

32. Malone, *supra* note 28, at 44.

33. *Id.* at 45.

34. Krause, *Child Support Enforcement: Legislative Tasks for the Early 1980s*, 15 FAM. L.Q. 349, 356 (1982).

35. Malone, *supra* note 28, at 44.

36. Ginsburg, *Judging the New Support Guidelines*, 10 FAM. ADVOC. 28, 36 (1988).

dered child support they [could not afford] a new second family."[37] They raised the question whether state child support guidelines should recognize the expense of a second family as a factor when modifying a child support award for the prior family.[38]

Only fourteen states allow judges to consider subsequently born or adopted children when modifying original support orders.[39] "Few if any guidelines incorporate the expenses of second intact families directly into the support computation, although many permit judges discretion to consider such factors."[40]

Judicial discretion, however, is an insufficient remedy. Judges traditionally ignore a second family or downplay a support-paying parent's new responsibility[41] because creation of a second family is a voluntary act done with knowledge of obligation to the first family.[42] Moreover, a first family relies on child support as originally set and thus incurs permanent expenses based on that amount.[43] Yet, the burden should not fall on innocent children.[44]

Another approach is to preclude the second family from decreasing an existing child support award to the first family, but allow consideration of the second family in determining an increase.[45] This "first mortgage"[46] approach allows the prior family to base the support award on the full amount of the support-paying parent's income. In contrast, should a divorce occur in the second family, the second family begins with a lower amount on which to base a child support award. Judges subtract the amount of support paid to the first family before calculating support for the second family.[47] The inequity in this situation raises the question whether first children should have "superior claims to their par-

37. Billings, *supra* note 9, at 879.

38. *Id.* at 901. Eighty-three percent of the judges responding to the state task force questionnaire felt that the court should be able to consider the support-paying parent's subsequent children. *Id.* at 881.

39. *Id.* at 902 & n.248.

40. Malone, *supra* note 28, at 44.

41. Krause, *supra* note 34, at 357.

42. Billings, *supra* note 9, at 902.

43. *Id.* at 903.

44. Ginsburg, *supra* note 36, at 36.

45. Billings, *supra* note 9, at 903.

46. Malone, *supra* note 28, at 44.

47. *Id.* For example, assume that the support-paying parent has one child from the first marriage and one child from the second marriage, that the state child support guidelines require 20% of the support-paying parent's income for the support of one child, and that the support-paying parent's monthly income is $2,000. The support award for the first family would be $400 (based on the full $2,000). The support award for the second family, however, would only be $320 (based on $1,600, the $2,000 monthly income less the $400 support award for the first family).

ents' resources."[48]

The opposite approach would be to give the subsequent family priority over the first family. One commentator feels that, "despite the constitutional considerations that favor equality, it is a permissible, even a 'compelling' state purpose, first to assure a basis of economic and social survival for the current family before a payment to other dependents is exacted."[49] But this approach is just as unfair for the same reasons as the "first mortgage" approach. In fact, the same commentator recognizes that "[w]hile society's interest in the economic and social survival of the currently functioning family admittedly is great, even overwhelming, it does not follow that this social interest should be asserted at the sole expense of the 'earlier' children."[50]

The fairest judicial approach is to recognize the equality of all children to whom the support-paying parent is obligated. This goal could be achieved under state child support guidelines if the judge would use the guidelines to calculate the amount of support based on the total number of children and then prorate this amount between the families.[51]

Courts have not resolved the issue. On October 1, 1990, the United States Supreme Court, without comment, refused to grant certiorari in *Scheidegg v. Ferguson*.[52] Appellant had raised several constitutional challenges, including equal protection, to the New Hampshire child support guidelines;[53] had the Supreme Court decided the case, the equal protection issue may have been resolved.

State high courts have followed suit. While not quite ignoring the issue altogether, the Nevada Supreme Court, for example, avoided it in *Hoover v. Hoover*.[54] Appellant was the father of four children, two from a first marriage and two from a second marriage. The trial court awarded respondent, appellant's first wife, child support for her two children based on twenty-five percent of appellant's gross monthly income as required under Nevada's child support guidelines. Appellant appealed on the ground that the court failed to consider his two subsequent children. Appellant requested the court to base the award on thirty-one percent of his gross monthly income as required for four children under Nevada's child support guidelines, and then to divide this figure by four to arrive at a "per child" award.[55] The court refused to adopt appellant's

48. Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C. DAVIS L. REV. 49, 60 (1982).

49. Krause, *supra* note 34, at 357.

50. *Id.* at 359.

51. Billings, *supra* note 9, at 902-03.

52. 111 S. Ct. 75 (1990).

53. *See* Scheidegg v. Ferguson, 59 U.S.L.W. 3058 (U.S. July 24, 1990) (No. 89-2019).

54. 793 P.2d 1329 (Nev. 1990).

55. Whereas the "per child" figure advanced by appellant is only 7.75%, the Nevada Child Support Guidelines' figure of 25% for two children is equivalent to 12.5% per child.

formula and indicated that whether subsequent children should be treated equally or receive diminished support under state child support guidelines is an issue for the legislature.[56]

The South Dakota Supreme Court, however, in *Feltman v. Feltman*[57] squarely confronted the issue and upheld the constitutionality of state child support guidelines that resulted in priority of support for first children. As in *Hoover*, appellant was the father of four children, two from a first marriage and two from a second marriage. Respondent, appellant's first wife, requested the court to increase the amount of support for her two children. The court considered appellant's obligation to support his two subsequent children, but refused to mitigate the requested increase. The court found that the legislature intended to give priority to first children. The court then held that under the lowest standard of review the rational basis test was satisfied because the state had an interest in protecting the standard of living of children. Additionally, a second family is created with the knowledge of the obligation to the first family.[58]

An Illinois appellate court in *Boris v. Blaisdell*[59] found unpersuasive an equal protection argument that Illinois child support guidelines unfairly discriminate against men because men outnumber women as noncustodial parents. Using the lowest standard of judicial review, the court noted that with regard to economic regulations, "[t]he equal protection clause does not deny a state the power to differentiate between persons similarly situated if there is a rational basis for doing so."[60] While conceding that the father is typically the support-paying parent, the court indicated that the mother, as custodial parent, makes significant nonfinancial contributions. Therefore, there was a rational basis for the distinction and no violation of equal protection had occured.[61]

The Illinois appellate court also dismissed an argument suggesting that appellant, under the guidelines, was denied substantive due process in the right to remarry and have additional children.[62] The court felt

56. *Hoover*, 793 P.2d at 1329.

57. 434 N.W.2d 590 (S.D. 1989).

58. *Id.* at 593. In response to the *Feltman* decision, the South Dakota legislature in 1989 amended the state child support guidelines expressly to provide a list of deviation factors that included: "The obligation of either parent to provide for subsequent natural children or stepchildren. However, an existing support order may not be modified solely for this reason." S.D. CODIFIED LAWS ANN. § 25-7-6.10 (1989); *see also* Note, *Major Changes in South Dakota Child Support: The 1989 Revisions*, 34 S.D.L. REV. 573, 594-97 (1989) (discussing the 10 deviation factors enacted by the 1989 legislature).

59. 142 Ill. App. 3d 1034, 492 N.E.2d 622 (1986). The case did not involve subsequent children. Appellant father was defending against respondent mother's request for an increase in the child support award.

60. *Id.* at 1046, 492 N.E.2d at 630 (citations omitted).

61. *Id.* at 1048, 492 N.E.2d at 631.

62. *Id.* at 1046, 492 N.E.2d at 630.

that accepting appellant's argument would be detrimental to both the legislature's and the court's duties to regulate and enforce child support orders.[63]

One year before the Illinois appellate court set forth its opinion, a critic of the same Illinois child support guidelines reached a contrary conclusion.[64] The critic relied on three distinct arguments. Although agreeing that state child support guidelines are necessary because some parents fail to support their children, the critic first argued that inflexible awards are unconstitutional.[65] Under the theory that the state is intruding on the parent's fundamental right of choice in providing for children, the critic reasoned that the amount of money a parent spends on a child is a decision of conscience.[66] Second, the critic argued that the support-paying parent has a right to procreate, which is abridged by an unmodifiable support obligation to first children.[67] Third, the critic argued that children themselves have a right to equal support,[68] which is violated when inflexible awards are made to prior families. Inflexible awards create classes of children based on parental marital status.[69] By statute, children from the support-paying parent's first family are always assured a maintained standard of living regardless of when siblings enter the support-paying parent's second family.[70] This distinction deprives children of intact families a maintained standard of living when younger siblings enter the same family.

A Wisconsin trial court challenged the constitutionality of state child support guidelines sua sponte.[71] Indicating that a higher level of scrutiny was appropriate, the judge ruled that the state "must show a compelling interest in order to burden the relationship between parent

63. *Id.*

64. Note, *Recent Amendments to Illinois Child Support Statutes: Income Percentage Guidelines*, 19 J. MARSHALL L. REV. 207 (1985).

65. *Id.* at 209-10.

66. *Id.* at 209.

67. *Id.*

68. *Id.* at 211.

69. *Id.* at 211-12.

70. *See supra* note 47 and accompanying text. In the example in note 47, the support-paying parent is paying $720 (36% of monthly income) in child support for two children. Had both children been from the first marriage, the percentage of child support would have been significantly less. State child support guidelines require that a greater percentage of income is to be awarded as the number of children increases. The required increase in support, however, is not directly proportional to the number of children. To illustrate, a sole dependent child would get 20%, while each of six children would only get about 8%. *See* Note, *supra* note 64, at 212. In effect, when the children are all from the same family, subsequent children are indeed taken into consideration in the calculation of the child support award, but not so when the children are from different families.

71. The decision by Judge Dennis C. Luebke of the State of Wisconsin Circuit Court, Outagamie County, is unreported, but is reprinted in *Wisconsin Trial Court Holds Child Support Standards to be Unconstitutional*, 2 AM. J. FAM. L. 124 (1988).

and child . . . ."[72] Finding that the state had a compelling interest in the welfare of children from divorced families and an interest in the welfare of custodial parents, the court held that the regulation must be accomplished in a manner that is the least drastic means necessary to accomplish the result desired pursuant to Wisconsin child support guidelines.[73]

The judge identified three ways in which the state child support guidelines result in unjustified disparities. First, the support-paying parent of a nonintact family is required to spend a mandatory amount of money on the children. This requirement ignores the right of the wealthy to choose to live frugally, whereas an intact family is not similarly subject to state regulation.[74] Second, children from separate, nonintact families, who have the same parental combined income, will receive different awards depending upon who the support-paying parent is because the state does not mandate the amount the custodial parent must actually spend on the children.[75] Third, fathers, who are typically the noncustodial parents, are not allowed to make decisions regarding how money is to be spent on their children. The result is an unconstitutional inequality of treatment between males and females.[76]

II. Equal Protection Analysis

The Equal Protection Clause provides: "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws."[77]

When a statute, such as state child support guidelines, is challenged under this Clause, a court will apply one of three tests, or standards, that the statute must meet to withstand constitutional attack. The selection of the standard turns on the type of classification created by the statute. In a recent opinion,[78] the United States Supreme Court outlined these options:

> In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin, and classifications affecting fundamental rights, are

72. *Id.* at 142.

73. *Id.* at 143-44.

74. *Id.* at 142-43.

75. *Id.* at 143. For example, assume Parent *A* earns $10,000 per year and Parent *B* earns $20,000 per year. If the support-paying parent is *A*, the support award will be lower than if the support-paying parent is *B*, even though in either situation the total combined parental income is the same.

76. *Id.*

77. U.S. CONST. amend. XIV, § 1.

78. Clark v. Jeter, 486 U.S. 456 (1988).

> given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.[79]

Thus, the threshold question in equal protection analysis is to determine the appropriate level of scrutiny. This Note will discuss each of the three levels of scrutiny in regard to state child support guidelines.

A. Strict Scrutiny

Strict scrutiny is equal protection's highest standard.[80] A statute analyzed under strict scrutiny carries a heavy presumption of unconstitutionality because the state must overcome the burden of showing that the statute is necessary in order to achieve a compelling government interest.[81] Thus, the state interest behind the statute must be of the utmost importance. If the state interest is compelling, the statute must also achieve its purpose in a manner that is narrowly tailored to the purpose. Any less discriminatory means to achieve the same ends must always be used.[82] Most statutes fail to satisfy the exacting standard of strict scrutiny.[83]

In order for the court to apply strict scrutiny in its evaluation of a statute, the statute must either discriminate against a suspect class or interfere with a fundamental right.[84]

1. Suspect Class

In early equal protection analysis, the United States Supreme Court suggested that a higher level of scrutiny may be required for situations that cause "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ."[85] This suggestion developed into the "traditional indicia of suspectness" defined as whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[86] That test has remained essentially unchanged.

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79. *Id.* at 461 (citations omitted).

80. *Id.*

81. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

82. *Id.* at 17.

83. Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

84. *San Antonio Indep. School Dist.*, 411 U.S. at 16.

85. United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1937).

86. *San Antonio Indep. School Dist.*, 411 U.S. at 28.

More recently, the Supreme Court has set forth the modern elements identifying a suspect class: a history of discrimination against members of the class; exhibition of obvious, immutable, or distinguishing characteristics, such as skin color, which define a discrete group; and the political powerlessness of the class, due to their minority status, to be heard in the representative system.[87] The Court has also indicated that the class should be delineated with some particularity.[88]

With regard to subsequent children, two classes could be defined: that class which contains as its members support-paying parents and that class which contains as its members subsequent children.

(a) Support-Paying Parents as a Suspect Class

Thus far, the Supreme Court has been unwilling to extend suspect classification beyond the characteristics of race or national origin. Yet a trial judge, Dennis C. Luebke, argues for extending application of the strict scrutiny standard to Wisconsin child support guidelines.[89]

The judge's arguments are unpersuasive. First, Luebke attempts to satisfy the element of immutability by pointing out that one cannot choose one's parents.[90] While factually true, it is the parent, not the child, who is the subject of discrimination under Luebke's analysis. Luebke recognized that the relevant characteristic is the divorced status of the parent. But he dismissed this classification because the "fundamental relationship" is between parent and child.[91] Indeed, a classification based on divorced parents as a group would be inappropriate, but for a different reason. By failing to distinguish between custodial parents and support-paying parents, the classification is overinclusive. The disadvantaged class would be suitably narrowed if defined as composed of divorced support-paying parents. Both arguments fail because neither the divorced nor support-paying statuses are entirely immutable traits.

Alternatively, Luebke argues that divorced parents are "highly visible within the judicial system" while at the same time conceding that one cannot recognize a divorced parent by looking at them.[92] Becoming a divorced parent generally, or becoming a support-paying parent specifically, simply does not transfer visually obvious, distinguishing characteristics upon an individual to mark them into membership of a discrete group.

Second, Luebke argues that unmarried parents are historically dis-

87. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

88. *San Antonio Indep. School Dist.*, 411 U.S. at 19.

89. Luebke, *supra* note 71, at 140-42.

90. *Id.* at 140.

91. *Id.*

92. *Id.*

advantaged.[93] This group is overinclusive because it fails to distinguish between the custodial parent and the support-paying parent. Moreover, Luebke admits a lack of substantial empirical data to support his assertion.[94]

Finally, Luebke argues that there is a relative lack of political representation by proposing that the typical female custodial parent enjoys an awareness or ability to generate representation within the political arena that is unmatched by the typical male support-paying parent.[95] An argument that compares a male's political ability unfavorably with a female's political ability is simply historically unsupportable.[96]

Therefore, the characteristics of support-paying parents fall short of achieving the status of a suspect class.

(b) Subsequent Children as a Suspect Class

Similarly, an attempt to create a suspect class composed of subsequent children would not succeed. Subsequent children have not historically been the subject of discrimination. An argument to the contrary is unavailing in light of a recent case in which the Supreme Court refused to define close relatives as a suspect class.[97] If a group composed of close relatives that includes siblings cannot be a suspect class, then it would follow that a group composed of subsequent children, siblings to the first children, would likewise not reach suspect classification. Moreover, subsequent children do not exhibit obvious or distinguishing characteristics that result in their immediate identification into a discrete group.

The priority of one's birth, however, is undoubtedly an immutable characteristic. Furthermore, as minors without the power to vote, dependent subsequent children are politically powerless individually. They must rely upon their parents to represent their political interests. These characteristics may well demand quasi-suspect classification. Quasi-suspect classification does not merit strict scrutiny, but it does fall into the standard of heightened scrutiny.[98]

Although it is unlikely that the Supreme Court would grant suspect class status to either support-paying parents or subsequently born or

93. *Id.*

94. *Id.*

95. *Id.* at 141.

96. *See* Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, 26 TRIAL 28, 29-30 (1990).

97. Lyng v. Castillo, 477 U.S. 635 (1986). In *Lyng*, the Court refused to apply strict scrutiny to classifications composed of close relatives in regard to the Federal Food Stamp Program. *Id.* at 638. The Program provides funds to individual "households," which are defined as parents, children, and siblings who live together, but defines other relatives or unrelated persons who live together as "multiple households."

98. *See infra* notes 137-74 and accompanying text.

adopted children, strict scrutiny can still be invoked under the alternative theory of interference with a fundamental right.

2. Fundamental Right

A state may not deny a certain group access to fundamental rights, nor may it unduly burden a particular group in the exercise of those rights. If a state denies or burdens the exercise of fundamental rights, the state must articulate a compelling reason for its action in order to survive strict scrutiny.[99] "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' "[100]

The initial question, then, is whether a right is fundamental for equal protection purposes. Although the Supreme Court has refused to create substantive constitutional rights, it has cautioned that whether a right is fundamental may not be determined solely by the importance of the deprived benefit.[101] A fundamental right must be found either expressly or implicitly within the Constitution.[102] The Court has expressly recognized voting,[103] interstate migration,[104] and procreation[105] as constitutionally protected fundamental rights.

In regard to state child support guidelines, two distinct rights may be identified when considering subsequent children: the right of support-paying parents to procreate and the right of dependent subsequent children to receive support.

(a) Infringement of Support-Paying Parent's Fundamental Right to Procreate

The Supreme Court has expressly recognized that procreation is "one of the basic civil rights of man. . . . [It is] fundamental to the very existence and survival of the race."[106] Consequently, states have been restricted in their attempts to regulate individual reproductive

99. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

100. *Id.* at 631 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).

101. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973); *cf. id.* at 99, 102-03 (Marshall, J., dissenting) (advocating a sliding scale approach to the determination of fundamental rights under equal protection analysis that would offer protection against deprivation of rights in proportion to their degree of social value).

102. *See* 411 U.S. at 33.

103. Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating Tennessee voter statute that required residency within state for one year and residency within county for three months).

104. Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidating District of Columbia statute that denied welfare to residents who had not resided within jurisdiction for at least one year immediately prior to application for benefits).

105. Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating Oklahoma statute that provided for sterilization of habitual felons). *But see* Buck v. Bell, 274 U.S. 200 (1927) (sterilization allowed on person afflicted with a hereditary form of imbecility).

106. *Skinner*, 316 U.S. at 541.

freedom.[107]

Yet, recent Supreme Court opinions suggest that the state is not entirely restrained.[108] One commentator questions whether these opinions apply "only to impede a woman's decision not to bear children or whether [they] would also sustain financial disincentives for fathers who are considering more children."[109]

But the Supreme Court did denounce such egregious invasions of privacy when it wrote:

> Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. . . . [It would be] shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size . . . .[110]

When a state statute mandates that an inflexible amount of income from the support-paying parent must be given to the first family, the state decreases the amount of funds available for any future children contemplated by the support-paying parent. The state thus effectively inhibits the number of children the support-paying parent may have. By absolutely ignoring the needs of subsequent children, the state compromises the support-paying parent's fundamental right to procreate.

Because the fundamental right to procreate is implicated, any classification that serves to penalize the exercise of that right must be both "necessary to promote a compelling government interest"[111] and narrowly tailored to serve only that legitimate interest.[112] In other words, if a fundamental right is infringed, a state may only use the least discriminatory means to achieve its governmental purpose.[113]

To ascertain the government interest furthered by state child support guidelines, it is useful to turn to the legislative history.

(1) Fiscal Integrity of Government Programs

The original purpose of the Social Services Amendments of 1974[114]

107. Roe v. Wade, 410 U.S. 113 (1973) (invalidating Texas statute criminalizing abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating Connecticut statute criminalizing the use of contraceptives).

108. Bruch, *supra* note 48, at 61 (citing Harris v. McRae, 448 U.S. 297 (1980) (Medicare may fund childbirth but not abortions); Poelker v. Doe, 432 U.S. 519 (1977) (county hospital need not provide abortions)).

109. *Id.*

110. *Griswold*, 381 U.S. at 496-97.

111. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

112. *Griswold*, 381 U.S. at 485.

113. Shelton v. Tucker, 364 U.S. 479 (1960).

114. Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended at 42 U.S.C. §§ 651-662 (1981)).

was to relieve dependence on welfare funds.[115] Although recognizing "that a State has valid interest in preserving the fiscal integrity of its programs,"[116] the United States Supreme Court held that such a purpose is not sufficiently compelling to withstand strict scrutiny.[117]

Moreover, state regulation that fails to protect subsequent children is underinclusive with respect to the state's fiscal interest. It is not narrowly tailored to preserve welfare funds. By refusing to protect them, the state may in effect force the subsequent children to receive the very welfare funds saved by allocating funds to the first family. Therefore, the government's interest in conserving welfare funds will not excuse infringement upon the support-paying parent's fundamental right to procreate.

(2) Sufficient Support for Children

When the Social Services Amendments of 1974[118] were subsequently strengthened by the Child Support Enforcement Amendments of 1984,[119] Congress required the states to enact child support guidelines.[120] The primary purpose for requiring states to adopt guidelines was to correct deficiencies in child support awards. Congress encouraged states to increase awards that were set too low to provide adequately for the needs of children in light of the support-paying parent's ability to pay.[121] Therefore, providing sufficient support for dependent children of a first family was made a compelling government interest.

Providing sufficient support for dependent children of a subsequent family is an equally compelling interest. The government interest underlying state child support guidelines is in guaranteeing sufficient support for children generally. Application of state child support guidelines that ignore subsequent children is underinclusive in meeting the government interest. To avoid this problem of providing sufficient support for one class of children but not another, the support-paying parent's ability to pay should be determined with the needs of all the support-paying parent's dependent children in mind.

115. *See supra* notes 7-14 and accompanying text.

116. Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

117. *Id.*

118. Pub. L. No. 93-647, 88 Stat. 2337 (codified as amended at 42 U.S.C. §§ 651-662 (1981)).

119. Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended at 42 U.S.C. §§ 651-667 (1984)).

120. *See supra* notes 15-19 and accompanying text.

121. S. REP. NO. 387, 98th Cong., 2d Sess. 40, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2397, 2436.

(3) Limitation of Family Size

When a state ignores subsequent children in setting support for a prior family, the result is a restraint on the number of children a support-paying parent may have in proportion to earning power. Direct control of family size in relation to an individual's wealth has never been considered legitimate government interest. Moreover, an attempt to control family size by discriminating against the support-paying parent's ability to have more children is grossly underinclusive.[122]

(4) Discrimination Against Subsequent Children

States also promulgated child support guidelines because of the government interest in improving fairness.[123] Simply stated, similarly situated parties should be treated similarly. In regard to successive families, first children and subsequent children are similarly situated when they both are supported by the same parent. When that parent is required to pay different amounts to the same number of children in each successive family, the children are not treated similarly.

(5) Administrative Convenience

By promulgating child support guidelines, the states satisfy various government administrative interests, including: improved expediency in setting child support awards because the judge's determination of the amount was made easier;[124] elimination of forum shopping because the guidelines controlled judicial discretion, thereby discouraging the parties from searching for a judge who tended to make awards favorable to their situation; and avoidance of litigation because the amount of the award was predictable.[125] Nevertheless, the Supreme Court has established that administrative convenience is not a compelling government interest.[126] More recently, the Court indicated that "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny under the Equal Protection Clause,"[127]

122. *See infra* notes 178-79 and accompanying text.

123. S. REP. NO. 387, 98th Cong., 2d Sess. 40, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2397, 2436.

124. Munsterman, Grimm & Henderson, *The Current Status of State Child Support Guidelines*, 14 STATE CT. J. 4, 5 (1990).

125. Albano & Dennis Jr., *Child Support Guidelines: A Necessary Evil?*, 8 FAM. ADVOC. 4 (1985).

126. Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (widowers were discriminated against under the Federal Old-Age, Survivors, and Disability Insurance Benefits Program because wives generally were supported by husbands while the reverse was the exception; the Court held, however, that the administrative convenience achieved in not having to find out whether the husband was supported by the wife was not a compelling interest).

127. Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 152 (1980).

but so far the Court has refused to so find.[128]

In regard to child support awards, the only real savings may be in avoiding court costs for hearings sought by the support-paying parent to reduce child support awards when the support-paying parent assumes responsibility for subsequent children. But if the state child support guidelines clearly provided for subsequent children, the necessity for litigation would be significantly decreased.

(6) Prorating Support Between First Children and Subsequent Children

Prorating the amount of child support for the total number of children for whom the support-paying parent is responsible would serve the government's legitimate objectives in a manner that would not discriminate against either the support-paying parent or his or her subsequent children. First, the government interest in preserving welfare funds would be served because subsequent children would have an increased ability to avoid AFDC. Second, the government interest in providing support for children would be served because both families would have the same ability to receive sufficient support. Third, the government interest in fairness would be served because similarly situated children would receive the same level of support. Furthermore, discrimination against support-paying parents would be avoided because they would be allowed to spread income evenly among all their children.

In addition, the government interest in administrative convenience would be just as well served by state child support guidelines that unambiguously included subsequent children. There would be minimal need for litigation because the parties would know how the court would resolve the issue. For the same reason, the expediency goal would be served. Forum shopping would be eliminated because all judges would resolve the issue in the same way.

(b) Infringement of Subsequent Children's Fundamental Right to Receive Support

On many occasions litigants have argued that the right to receive certain necessities, such as welfare benefits,[129] housing,[130] and educa-

128. Justice Stevens thought that if offsetting costs were significant, administrative convenience might justify discrimination, but he did not offer examples of qualifying circumstances. *Califano*, 430 U.S. at 219 (Stevens, J., concurring).

129. Dandridge v. Williams, 397 U.S. 471 (1970) (upholding, against an equal protection argument advanced by large families, the maximum limit imposed under the AFDC program on the total amount of aid that any one family could receive).

130. James v. Valtierra, 402 U.S. 137 (1971) (upholding, against an equal protection argument advanced by low income persons who desired public housing, a provision in the California Constitution that allowed a city to vote on whether a low income housing project will be developed by the state).

tion,[131] is fundamental. The Supreme Court, however, has refused to extend the concept of fundamental rights to include these important essentials.[132] Therefore, it is likely that the Court would similarly refuse to characterize subsequent children's right to equivalent support as fundamental. Consequently, courts are prohibited from using the strict scrutiny standard when determining the constitutionality of state child support guidelines that discriminate against subsequent children.

Yet in *Memorial Hospital v. Maricopa County*,[133] the Supreme Court indicated that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements."[134] Applying this reasoning, the Court held that medical care was a basic necessity of life for which mid-level scrutiny was appropriate.[135] Thus, heightened scrutiny may be appropriate in regard to infringement of certain necessities.[136]

B. Heightened Scrutiny

Heightened scrutiny is the intermediate standard between strict scrutiny and mere rationality.[137] Heightened scrutiny has been applied to statutes that discriminate on the basis of quasi-suspect classification, including gender,[138] alienage,[139] and illegitimacy.[140]

The United States Supreme Court has stated that "[t]o withstand intermediate scrutiny, a statutory classification must be substantially re-

131. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding, against an equal protection argument advanced by school districts that were disparately treated, a Texas regulation that supplemented financing of public education by taxing property within a school district).

132. *Dandridge*, 397 U.S. 471; *James*, 402 U.S. 137; *San Antonio Indep. School Dist.*, 411 U.S. 1.

133. 415 U.S. 250, 259 (1974) (indigent medical care); *see also* United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (holding that a provision of the Food Stamps Act defining households to include only related persons created an irrational classification in violation of the equal protection component of the Due Process Clause).

134. *Memorial Hosp.*, 415 U.S. at 259.

135. *Id.*

136. *See infra* notes 137-74 and accompanying text.

137. Clark v. Jeter, 486 U.S. 456 (1988).

138. Craig v. Boren, 429 U.S. 190 (1976) (invalidating Oklahoma statute that prohibited the sale of "3.2 beer" to males under the age of 21 but allowed the sale to females 18 years old and over).

139. Plyler v. Doe, 457 U.S. 202 (1982) (invalidating Texas statute that authorized public school districts to deny enrollment to illegal alien children).

140. Pickett v. Brown, 462 U.S. 1, 8 (1983) (invalidating Tennessee statute that barred paternity suits on behalf of illegitimate children which had been filed more than two years after the child's birth).

The application of heightened scrutiny to laws that discriminate on the basis of illegitimacy was unanimously affirmed by the current Court, except for Justice Souter, who recently replaced Justice Brennan.

lated to an important governmental objective."[141] In contrast with the strict scrutiny standard, the fit between the means of the state law (the child support guidelines) and the end (the government interest) must be reasonably tight, but need not be perfect. The availability of regulatory alternatives that do not discriminate against the quasi-suspect class is an important consideration, but is not mandated.[142] In contrast with the lower, mere rationality, standard the Supreme Court will only consider the actual motives of the state legislature in enacting the statute in its equal protection analysis. A legitimate motive cannot be created to justify the statute after enactment. The parallels that can be drawn between illegitimate children and subsequent children under equal protection analysis are striking.

Illegitimacy, like one's birth order, is an immutable trait. "[T]he legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society."[143] Because discrimination against illegitimate children has never been as acute as discrimination based on race or gender, the Court has rejected the strict scrutiny standard.[144] Furthermore, because illegitimacy, like one's birth order, is not visibly obvious, as is race or sex, there is no reason to protect either illegitimate children or subsequent children against majoritarian political processes.[145]

The Supreme Court, however, has indicated that "the presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes."[146] When a state statute draws a distinction on the basis of an immutable characteristic, the statute creates a quasi-suspect class. For a statute that discriminates against a quasi-suspect class to survive a constitutional challenge, it must be able to withstand heightened scrutiny.

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141. *Clark*, 486 U.S. at 461.

142. Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); *cf.* Lalli v. Lalli, 439 U.S. 259, 274 (1978) ("it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' " (quoting *Mathews*, 427 U.S. at 515)).

143. *Mathews*, 427 U.S. at 505; *see* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (because mentally retarded individuals have a reduced ability to contribute to society, the state has a legitimate interest in regulating them; therefore, the Court refused to grant quasi-suspect classification to mentally retarded individuals).

144. *Mathews*, 427 U.S. at 506.

145. *See id.*

146. Parham v. Hughes, 441 U.S. 347, 351 (1979) (invalidating Georgia statute that allowed the mother a cause of action for the wrongful death of her illegitimate child, but required that the father meet certain conditions in order to sue for the wrongful death of his illegitimate child).

In *Levy v. Louisiana*,[147] the Supreme Court first considered the constitutionality of a state statute that denied benefits to illegitimate children.[148] The statute discriminated between groups of children on the basis of their parents' marital status. The state's purpose for the distinction was to protect public morality and discourage parents from having children out of wedlock.[149] The Court queried, "Why should the illegitimate child be denied rights merely because of his birth out of wedlock?"[150] The Court answered the question by finding that the state's interest was not sufficiently important to withstand heightened scrutiny. The Court accordingly found the statute to be unconstitutional.[151]

If protection of public morality is not a sufficiently important government interest, it follows that discouraging parents from divorcing is similarly an insufficient government interest to support discrimination against subsequent children.

Three years after *Levy*, the Supreme Court in *Labine v. Vincent*[152] upheld the constitutionality of an intestacy law that discriminated against illegitimate children.[153] The state's important interest was in settling land claims.[154] Similarly, in *Mathews v. Lucas*,[155] discrimination against illegitimate children in regard to claims against their father's survivorship benefits under the Social Security Act[156] was found substantially related to the government interest in administrative convenience, which was achieved by avoiding problems of proving parentage.[157]

With regard to subsequent children, however, there is no dispute as to the support-paying parent's responsibility. Thus the concerns raised with regard to illegitimate children do not apply. Administrative convenience, therefore, should not excuse discrimination against subsequent children. Additionally, the administrative inconvenience of resolving

147. 391 U.S. 68 (1968).

148. *Id.* (Louisiana statute denied to illegitimate children a cause of action for the wrongful death of their mother).

149. *Id.* at 69.

150. *Id.* at 71.

151. *Id.* at 72.

152. 401 U.S. 532 (1971).

153. *Id.* (Louisiana statute allowed illegitimate children to take their deceased father's estate only if the children were acknowledged by the father and if he left no legitimate descendants, ascendants, collateral relations, or spouse).

154. *Id.*; *see also* Lalli v. Lalli, 439 U.S. 259 (1978) (New York statute that allowed illegitimate children to inherit under intestacy laws only if an order of paternity had been entered during the father's lifetime survived constitutional attack).

155. 427 U.S. 495 (1976).

156. For the purpose of receiving survivorship benefits under the Federal Social Security Act, legitimate children were presumed dependents of their father but the presumption was not extended to illegitimate children.

157. *Mathews*, 427 U.S. at 509. The dissenters, however, "committed to the proposition that all persons are created equal," *id.* at 516 (Stevens, J., dissenting), required a "weightier" governmental interest to support heightened scrutiny, *id.* at 518-19 (Stevens, J., dissenting).

disputes over modification of child support orders for the purpose of considering subsequent children can easily be removed. Clear legislative direction under the state child support guidelines, for example, can dictate how the support-paying parent's income is to be distributed under the circumstances.

Moreover, the *Labine* majority distinguished *Levy* on the ground that the children in *Levy* faced an "insurmountable barrier" to relief, whereas in *Labine* the children's father could have removed the disability by legitimizing the children or providing for them in his will.[158] In regard to subsequent children, although the support-paying parent could voluntarily offer a higher level of support to the subsequent children equivalent to the first family, if state child support guidelines took too much income away, that remedy may be impossible to achieve.

More recently, the Court has indicated that it would be more willing to find an insurmountable barrier when the child himself or herself could not remove it.[159] The support-paying parent's inability or unwillingness to provide support at the greater rate required under state child support guidelines for first children would constitute such an insurmountable barrier to the subsequent child. A child's birth order is another factor over which the child has no control.

The Court's four dissenters in *Labine* recognized that "[t]his Court has generally treated as suspect a classification that discriminates against an individual on the basis of factors over which he has no control"[160] and found the state's real purpose was to "punish[ ] illegitimate children for the misdeeds of their parents."[161]

The very next year, the reasoning of the *Labine* dissenters was adopted by the majority in *Weber v. Aetna Casualty & Surety Co.*,[162] and has been persistently invoked over the last twenty years:[163]

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well

158. *Labine*, 401 U.S. at 539.

159. Pickett v. Brown, 462 U.S. 1 (1983); Mills v. Habluetzel, 456 U.S. 91 (1982).

160. *Labine*, 401 U.S. at 552 n.19 (Brennan, J., dissenting).

161. *Id.* at 557 (Brennan, J., dissenting).

162. 406 U.S. 164 (1972) (invalidating Louisiana statute that penalized illegitimate children under the state's workers' compensation laws).

163. Pickett v. Brown, 462 U.S. 1, 7 (1983); Parham v. Hughes, 441 U.S. 347, 352-53 (1979); Trimble v. Gordon, 430 U.S. 762, 769-70 (1977); Mathews v. Lucas, 427 U.S. 495, 505 (1976).

as unjust—way of deterring the parent.[164]

In addition, the Supreme Court in *Trimble v. Gordon*[165] held that a state may not "attempt to influence the actions of men and women by imposing sanctions on the children."[166] The Court explained that "[t]he parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status."[167]

The recurring argument in favor of ignoring subsequent children is that the support-paying parent has subsequent children with the knowledge of the obligation owed to the first family. The assumption underlying this argument is that one should be discouraged from having additional children unless one can afford to support all of the children. But this objective punishes children for their parents' actions, a result that the Court has found impermissible.

Furthermore, the *Weber* Court emphasized that "[the illegitimate children] are *dependent children*, and as such are entitled to rights granted other *dependent children*."[168] Expounding upon this principle, the Court in *Gomez v. Perez*[169] declared that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[170] The Court refused to deny illegitimate children support from their natural father.[171] Obviously, subsequent children are dependents of their parent, whether or not that parent is obligated to support prior children. In light of *Weber* and *Gomez*, child support guidelines that favor first children over subsequent children are indefensible. The parallels between an illegitimate child's right to support and a subsequent child's right to support are clear. "If discrimination on the basis of illegitimacy is impermissible, discrimination on the basis of priority of birth seems equally untenable."[172]

Chief Justice Rehnquist has argued that equal protection does not require that all persons be treated equally; only those persons similarly situated must be treated equally.[173] The strongest example of similarly situated persons is dependent children of the very same support-paying parent.

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164. *Weber*, 406 U.S. at 175 (citations omitted).

165. 430 U.S. 762 (1977) (invalidating provision of Illinois Probate Code that distinguished between legitimate and illegitimate children for the purpose of allowing only legitimate children to inherit from their mother's estate under intestacy laws).

166. *Id.* at 769.

167. *Id.* at 770.

168. 406 U.S. at 170 (emphasis in original).

169. 409 U.S. 535 (1973) (invalidating Texas statute that denied illegitimate children the right to enforce support judgments against their fathers).

170. *Id.* at 538.

171. *Id.* at 535.

172. Krause, *supra* note 34, at 357 (footnote omitted).

173. Trimble v. Gordon, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting).

Therefore, "[t]he logical conclusion would be to put all children on an equal footing regardless of priority . . . . The support award for children would thus be determined on the basis of full equality of each child's claim on the father's resources."[174]

C. Mere Rationality

The lowest level of scrutiny, which carries a heavy presumption of constitutionality, merely requires that the statute bear a rational relationship between the means and the ends.[175] The judiciary will afford extreme deference to the purpose of the statute.[176] If any plausible reason for enactment of the statute exists, the Court will not attempt to determine whether this reason actually motivated the legislature.[177]

State legislatures have argued that ignoring subsequent children in fixing the child support award for the first family is an appropriate means for achieving several government ends.[178] These ends, however, fail to meet the mere rationality test.

First, ignoring subsequent children as a means of preserving welfare funds is underinclusive. By forcing the support-paying parent to give a disproportionate share of income to the first family, the support-paying parent's second family may well be forced to seek welfare relief. The statute is therefore underinclusive because it fails to prevent subsequent children from resorting to welfare.

Second, ignoring subsequent children as a means of correcting deficiencies in the cost of raising children is similarly underinclusive. By giving a larger share of the support-paying parent's income to the first family, the income available to the support-paying parent's subsequent children is compromised. Because it fails to provide sufficient support for subsequent children, the statute is again underinclusive.

Third, the popular argument advanced for ignoring subsequent children is that "the problems of inadequate support for children of multiple relationships would be alleviated if parents were discouraged from having more children unless they were capable of contributing adequately to

174. Krause, *supra* note 34, at 357 (footnote omitted).

175. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

176. Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949). "This court in passing upon the validity of a state statute . . . must indulge in every presumption of constitutionality and construe the statute in any way which its language permits in order to sustain its validity. . . . All doubt should be resolved in favor of the constitutionality of the statute." *Id.* at 220.

177. *See Lindsley*, 220 U.S. at 61.

178. *See supra* notes 114-15 and accompanying text (relief of dependence on welfare funds); notes 118-21 and accompanying text (correct child support award to reflect real cost of raising children); notes 106-10 and accompanying text (restraint on family size); notes 124-25 and accompanying text (administrative convenience); note 149 and accompanying text (public morality); notes 29-31 and accompanying text (provide support for first family); note 173 and accompanying text (equal protection does not demand absolute equality).

the needs of all their offspring."[179] But the state's desire to discourage the support-paying parent from having more children is not a legitimate government interest. Even if one were to point out that overpopulation and welfare dependency substantiates this government interest, ignoring the subsequent children of support-paying parents is grossly underinclusive. This approach discourages neither the support-paying parent nor the population at large from having additional children.

Fourth, ignoring subsequent children is not rationally related to administrative convenience because the very same administrative convenience is served when child support guidelines clearly provide for subsequent children. The classification between first and second families could not be anything but arbitrary when the result is to take support from one group of children to give it to another for the sake of administrative convenience.

Fifth, ignoring subsequent children as a means of protecting public morality by discouraging divorce is underinclusive. While the thought of less support for contemplated future children may inhibit the potential support-paying parent from divorce, it would not so inhibit the potential custodial parent, or, for that matter, those couples who do not have children.

Lastly, ignoring subsequent children under state child support guidelines intentionally produces the incongruous result of inequity among children so similarly situated that they have the very same support-paying parent.

Conclusion: The Constitutional Model

All children are entitled to adequate support from their parents. This Note does not support reducing the overall obligation of the support-paying parent to his or her children. Rather, it advocates a redistribution of the support-paying parent's income between first and subsequent children so that all children receive an equal proportion of parental income.

In order to avoid violating the Equal Protection Clause of the federal constitution, state child support guidelines must take into consideration the support-paying parent's responsibility for subsequently born or adopted children. The prior support order must be modifiable so that all the children of the support-paying parent may be treated equally.

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179. Bruch, *supra* note 48, at 61.

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