



10-1981

Mills v. Habluetzel

Lewis F. Powell Jr.

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John Wiley *Revised 1/8*
jsw 1/03/82

BENCH MEMORANDUM

To: Mr. Justice Powell
From: John Wiley
No. 80-6298: Mills v. Habluetzel

January 3, 1982

Question Presented

Whether Texas constitutionally may impose a one year limitations period on paternity suits brought for the benefit of illegitimate children.

I. Overview

Two preliminary issues must be resolved before the Court reaches the merits of this case. (1) The fact that a different lower Texas court recently has invalidated the law at issue (§13.01) probably means the Court should await the results of the Texas Supreme Court's review of that lower Texas decision. This could be accomplished by vacating and reversing

in light of this new decision (Miller). (2) The mootness claim raised by the appellee is insubstantial.

If the Court reaches the merits, the [✓]major intellectual groundwork already has been laid by your opinions in [✓]Trimble and [✓]Lalli, which set forth a "middle tier" Equal Protection analysis for this case. There has been some pressure on the Court to adopt a unified verbal formulation for all middle tier Equal Protection tests. But the recent nature of both Trimble and Lalli lead me to assume in this memo that the problem here is to apply rather than to reformulate the middle tier analysis of these two decisions. Their application is difficult enough a task; the fact situation in this law suit places this case between them. Neither controls. As a result, you are free to vote either to affirm or reverse. The resulting resolution of the problem will be significant because it will define further the degree of inquiry demanded by the somewhat uncertain middle tier standard.

Neither controls

II. Discussion

A. Preliminary Issues

There are two issues that must be resolved before the Court reaches the merits: (1) whether the Court should decide this case, given that an intermediate Texas court has declared the one year limitations statute at issue (§13.01) to be unconstitutional since the state CA decided this case; and (2) whether the case is moot, given that Texas has amended the lim-

There is now a conflict
bet. two Texas Ct/App decisions^{3.}
& Texas S/CT has granted Writ of Error
itiation statute by extending it to four years. — Should we
defer action?

1. Texas' subsequent invalidation of §13.01

The Texas court of appeals opinion in this case did not engage in any substantial reasoning about the constitutional issues involved. Instead, it relied on another decision decided the same day by the same court. See Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 189 (Tex. Ct. Civ. App. 1/31/80). Hernandez, in turn, relied on an earlier case: Texas Dep't of Human Resources v. Chapman, 570 S.W.2d 46 (Tex. Ct. Civ. App. 6/28/78).

✓ Chapman thus is the seminal case. Neither Hernandez nor the decision in this case has added to its reasoning. The Texas Supreme Court refused to grant a writ of error both in this case and in Chapman, stating that there was no error requiring reversal of the judgment. No appeal at all was taken in Hernandez.

After this case and Hernandez were decided, another Texas court of appeals faced with the same issue. In the Interest of Miller, 605 S.W.2d 332 (Tex. Ct. Civ. App. 7/24/80). Miller explicitly parted company with both Chapman and Hernandez, and decided that §13.01 violated Equal Protection. The Texas Supreme Court granted the writ of error but as yet has not decided the case. Apparently in response to Miller, the Texas legislature amended §13.01 to increase the limitation period for paternity suits for the benefit of illegitimates

from one to four years. See App. to red brief.

The Miller court's theory essentially parallels appellant's attack on §13.01: "[W]e find the statute unconstitutional in that it creates two classes, legitimates and illegitimates, invidiously discriminating against the latter class." 605 S.W.2d at _____. The Miller court stated at the outset that the appellant there attacked §13.01 "under Article 1, Sections 3 and 19 of the Texas Constitution, Fifth and Fourteenth Amendments to the United States Constitution and the Equal Rights Amendment to the Texas Constitution, alleging denial of due process and unequal protection under the law" (emphasis added). The Miller court made no further reference to the Texas constitution. It did cite decisions from other states, which it classified as "advisory", as well as decision from this Court. Miller thus either could rest solely on federal grounds, or jointly on federal and state constitutional law. Its language unfortunately does not permit a conclusive judgment. (Hopefully the Texas Supreme Court will clarify this issue in its review of Miller.)

In this situation, there are two reasons why I do not think this Court should rule on the merits of this suit. First, the imminent action by the Texas Supreme Court might reduce the wisdom of this Court's decision to decide this case—one cannot say until after the Texas court's decision. The Texas Supreme Court has three relevant options: it could affirm Miller on adequate and independent state grounds; it could

*What could happen
in Miller*

affirm solely on federal law; or it could reverse. Each option has a different implication for review by this Court.

If the Texas court affirms on independent state grounds, this would render the precedential effect of this Court's decision largely advisory; this Court would adjudicate only a state law that already had been invalidated on nonfederal grounds and that had been replaced by a different statute.¹ The best course would be to decline further review for what would amount to, at most, an individual case of unfairness. If the Texas court affirms on federal grounds, this Court might wish to vacate and remand this case in light of the new Miller decision and decline further review. (This assumes that the Court agrees with my view of the merits. See pages 8-20 infra.) If the Texas Supreme Court reverses, this action would leave the legal situation roughly similar to that at present. Presumably the Court then would want to decide this case on the merits.

The Court could preserve all of these options by vacating and remanding the decision below in light of Miller. By the time the case was ready to return here, the Texas Supreme Court would in all likelihood have decided Miller. This Court could proceed appropriately at that time.

*We
could
vacate*

¹This consideration is prudential rather than jurisdictional, because the Texas Supreme Court already has refused to act in the case at bar. Therefore the Court's decision will determine at least one live case or controversy: the fight between Mills and Habluetzel.

11
Vacating and remanding has a second and more substantial advantage. This advantage arises because §13.01 has yet to be given a thorough defense before this Court. Texas is not a party to this case and has not filed an amicus brief. The appellee, who is defending §13.01, submits a very poor brief. The state CA decisions upholding §13.01 rely entirely on Chapman, which contains a facially incorrect constitutional analysis. See Chapman, 570 S.W.2d at ____ ("the pertinent analytical approach is whether the statute bears a rational relationship to a legitimate governmental interest"). Cf. Lalli v. Lalli, 439 U.S. 259, 265 (1978) (classifications based on illegitimacy are invalid "if they are not substantially related to permissible state interests"). Yet this fairly recent "realm of less than strict scrutiny," Matthews v. Lucas, 427 U.S. 495, 510 (1976), demands very close attention to the State's asserted justification for the legislative category. Unlike many historic applications of both the "rational basis" and the "strict scrutiny" standards, the illegitimacy inquiry really is a test--not just a label for a result. The State's lively participation can do much to aid this inquiry. E.g., Lalli, 439 U.S. at 269-71 (analyzing NY's Bennett Commission report as part of NY statute's legislative history, which was extensively briefed by the NY AG). If the Texas Supreme Court does reverse Miller, at minimum that court can be expected to provide a more respectable and authoritative constitutional defense for §13.01 than this Court has seen to date.

*Texas
not
party
here*

I therefore recommend that the Court vacate the opinion below and remand in light of the Miller decision. The Texas Supreme Court should have decided the Miller appeal by the time the instant case is ready for return to this Court. At that time the Court can reassess the situation to determine the appropriate action--which may well be to do nothing besides summarily to affirm or dismiss.

If you decide these prudential concerns are not strong enough to delay this Court's decision in this case any longer, appellee's mootness argument become relevant.

2. Mootness

Appellee Habluetzel claims mootness. His argument is that the Texas legislature, as mentioned, very recently has amended §13.01 to extend the limitations period from one to four years. He points out that the instant appeal will be moot if appellant Duncan can gain the retroactive benefit of a four year statute, since appellant's support suit was filed within four years (although not within one year) of birth.

Suit may be timely under new 4 yr. statute

Appellant Duncan was born on 2/12/77. This suit was filed on his behalf on 10/6/78. The amendment was passed in the Texas legislature on 6/1/81 and was signed by the governor thereafter. The amendment specifies "[t]his Act takes effect September 1, 1981." Appellee's argument depends crucially on whether the amendment's four year statute of limitation "takes effect" in this suit, for which the one year statute already

has run but which was still pending on the effective date of the new amendment.

Appellee's retroactivity argument fails as a matter of state law:

It is well settled in [Texas] that laws may not operate retroactively to deprive or impair vested substantive rights acquired under existing laws, or create new obligations, impose new duties, or adopt new disabilities in respect to transactions or considerations past. On the other hand, no litigant has a vested right in a statute or rule which affects a remedy or is procedural and which affects no vested substantive right. * * * * In the protection of vested rights, the courts have held that when the statute of limitations has run on a cause of action, a right to assert that as a defense vests in the defendant and cannot be taken away by legislative enactment.

Ex parte Abell, 613 S.W.2d 255, 2__ - __ (Tex. 1981) (emphasis added).

See also, e.g., Texas Dep't of Human Resources v. Delley, 581 S.W.2d 519, text at n.2 (Tex Ct Civ App 1979); Petroleum Casualty Co. v. Canales, 499 S.W.2d 734, 737-38 (Tex Ct Civ App 1973).

Neither the appellee's brief nor his separate Motion to Dismiss as Moot cite state cases that conflict with this very recent pronouncement of the Texas Supreme Court. I conclude that the new amendment cannot operate retroactively under the Texas constitution. This appeal consequently is not moot,^x because appellant will lose his case unless he wins on the constitutional issue before the Court.

B. Merits

*because appellant
will lose unless
he*

Due Process

The appellant raises both a Due Process and an Equal Protection attack on the Texas law.²

1. Due Process *no*

I treat appellant's Due Process claim first in order to clear some brush. Appellant's claim is procedural rather than substantive. That is, he contends that Texas must afford more procedural protection--in particular, "both a mechanism seeing to it that either a [paternity] suit will be filed or knowingly not filed [before the statute runs] and . . . notice of the potential loss of rights [from the running of the statute]," blue brief at 7--before §13.01 takes away his cause of action for child support. Appellant does not make the substantive claim that Texas is barred absolutely from taking away his right to a suit for support.

Appellant is not entitled to any procedural process at all unless he loses a property or liberty right. Appellant does not assert that he has a "liberty interest" in bringing a support suit. And the only source of a relevant property interest is the challenged statute itself--which conveys only a one year right of actions to illegitimates.

Implied
²There is a potential sex discrimination claim in this suit because Texas limits paternity, but not maternity, suits. The lower court did not address this issue. The parties have not mentioned it. Neither should the Court, except to note that the question is not before it.

Appellant's problem thus is not that he is losing something without adequate process. Rather it is that he was not given something in the first place. The Court may well conclude that appellant must be given something more on Equal Protection grounds. But procedural due process logic is not apposite until appellant can claim the loss of a liberty or property right he formerly possessed. Appellant can make no such claim. His Due Process argument therefore loses.

2. Equal Protection

In contrast, appellant's Equal Protection challenge is very substantial. In fact, I think it ultimately wins-- although the issue is a very close one. The core of appellant's argument is that an illegitimate can only gain child support if suit is filed on his behalf within his first year of life. Legitimates, in contrast, are entitled to benefit from child support suits brought until they reach the age of 18.³

Texas' justification for this difference in treatment was articulated in Chapman: *(the leading Texas case)*

The state has a legitimate interest in preventing the litigation of stale or fraudulent claims. The purpose of statutes of limitations is to compel exercise of rights within a reasonable time, so as to afford the opposing

³A suit to vindicate support rights apparently can be brought by "any person with an interest in the child, including the child" VTCA, Tex. Family Code §11.03; blue brief at 3a.

party a fair opportunity to defend while the evidence is readily available. . . . It may be that the legislature has concluded that the longer the period between birth and suit, the greater the danger of fraud. At the very least, the defendant's problems of proof are substantially increased with the passage of time.

570 S.W.2d at ____.

Texas therefore advances only an evidentiary justification for its distinction.

This justification must be "substantially related to permissible state interests" to survive Equal Protection attack. Lalli, 439 U.S. at 265. Texas' justification obviously identifies an interest that is "permissible." The only remaining question, therefore, is whether §13.01's one year period is "substantially related" to this acceptable objective.

This inquiry is guided by your last two Equal Protection/illegitimacy opinions (Trimble and Lalli), which have forged the post-Labine "middle tier" analysis that now governs this field. Conveniently, both of these opinions examined state laws that purportedly were justified by permissible evidentiary considerations.

As you recall, Trimble v. Gordon, 430 U.S. 762 (1977), Trimble concerned an Illinois statute that prohibited illegitimates from inheriting from their intestate fathers unless the father had both "acknowledged" the child and married the mother. The Court invalidated the law. You wrote:

For at least some significant categories of illegitimate children, inheritance rights can be recognized without jeopardizing the orderly

settlement of estates or the dependability of titles of property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, [the statute at issue] is constitutionally flawed.

430 U.S. at 771 (emphasis added).

In Lalli, the Court confronted a New York statute that also barred intestate inheritance by illegitimates unless certain requirements had been met. Importantly, NY's requirement was only that illegitimates procure an "order of filiation" during their fathers' lifetime; NY did not require that the father actually marry the mother. The Court upheld the NY statute, despite Lalli's argument that a marriage consent certificate signed by his purported father identified Lalli as "my son." You responded:

*N.Y.
statute
upheld*

We do not question that there will be some illegitimate children who would be able to establish their relationship to their deceased father without serious disruption of the administration of estates and that, as applied to such individuals, [the statute in question] appears to operate unfairly. But few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. . . .

The Illinois statute in Trimble was constitutionally unacceptable because it effected a total statutory disinheritance of the children born out of wedlock who were not legitimated by the subsequent marriage of their parents. The reach of the statute was far in excess of its justifiable purposes. [The present NY law] does not share this defect. Inheritance is barred only where there has been a failure to secure evidence of paternity during the father's lifetime in a manner prescribed by the State. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.

.

As the history of [the statute] clearly illustrates, the New York Legislature desired to "grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children," [Bennett] Commission Report 265 (emphasis added), while protecting the important state interests we have described. . . .

Even if, as Mr. Justice Brennan believes, [the law] could have been written somewhat more equitably, it is not the function of a court "to hypothesize independently on the desirability or feasibility of any possible alternative[s]" to the statutory scheme formulated by New York. . . . ["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."

439 U.S. at 272-74 (unattributed emphasis added).

A comparison of Trimble and Lalli illustrates the bounds of the applicable standard of review. That standard demands that a State tailor evidentiary rules so as to avoid "inevitably disqualifi[ng] an unnecessarily large number" of illegitimates (who can prove paternity) from the benefit at issue. By the same token, this tailoring need only approximate the evidentiary problem; "precise accuracy" is not required and cases of individual unfairness will be tolerated. The size of the group that is unfairly treated therefore is key.

Trimble and Lalli are highly relevant, but neither controls this case. First, Texas' one year limitations period is considerably more logically related to Texas' problems of proof than was Trimble's Illinois requirement that the mother and the father eventually marry. Requiring the parents' mar-

yes

riage can produce evidence that, at best, is only indirect. At the same time it imposes a bar that cannot be lifted through unilateral action by either the father--whose wishes control in the testamentary context--or by the illegitimate--the innocent victim of the discrimination. Trimble's invalidation of the Illinois law therefore does not require a similar invalidation of the more logical Texas statute at bar.

Conversely, Texas' §13.01 is less justifiable than was Lalli's order of filiation requirement: the restrictive effect of a one year statute of limitation is more severe than that the law in Lalli at the same time that Texas' evidentiary problem is less severe.

*More
severe
than
Lalli*

The restrictive effect of Texas' limitation is more severe because it confers the support rights of illegitimates only during their first year of their life. In contrast, Lalli sustained a statute that required a judicial order of filiation anytime during the lifetime of the father of illegitimate child.⁴

⁴The statute in Lalli actually contained a two year limitation period similar to that at issue here. The Court, however, stated

[a]s the New York Court of Appeals has not passed upon the constitutionality of the two-year limitation, that question is not before us. Our decision today therefore sustains §4-1.2 under the Equal Protection Clause only with respect to its requirement that a judicial order of filiation be issued during the lifetime of the father of the illegitimate child.

Lalli distinguished

Correspondingly, Texas' evidentiary difficulties-- which must justify the statute's restrictive effect--are less severe than the situation in Lalli--for two reasons. First, the nature of the evidentiary problems are different. In Lalli, the concern to which the Court devoted the most attention was the unusual difficulty of identifying and notifying illegitimate intestate heirs--"of whose existence neither family nor personal representative may be aware," 439 U.S. at 270-- at the time of a putative father's death. The general problem of giving notice when there is no evidence of who is to receive notice is, of course, always a serious difficulty. This difficulty justified relatively roughly drawn categories.

In contrast, the sole evidentiary difficulty in this case is that of establishing whether a biological father/son relationship exists. This evidentiary problem, while not insubstantial, at least is less problematic than most evidentiary concerns. "[T]here is now . . . practically universal and unanimous judicial willingness to give decisive and controlling weight to a blood test exclusion of paternity." Little v. Streater, 101 S.Ct. 2202, 2206 (1981). The passage of time (which does not affect blood test evidence so long as the father remains alive) therefore is a less significant factor in paternity litigation than in other litigation, which relies on memories that can fade and physical evidence that can vanish. This relatively bounded evidentiary problem is less able to justify roughly drawn state categories.

A second reason why Texas' evidentiary difficulties are less severe than those in Lalli is that Lalli involved paternity assertions arising only when the putative father was dead. This case involves assertions arising only when the putative fathers are alive.⁵ Paternity proof issues obviously will be less difficult as a general matter when the key party always is alive rather than always dead. This difference also renders this case less able to support roughly drawn categories as compared to Lalli.

These distinctions do not resolve this case. They show only that it lies between Lalli and Trimble--and thus that neither case exercises controlling authority. You could decide this case either way with principle and consistency. Either disposition will give further definition to the size of the teeth in the standard of review for illegitimacy classifications.

My own view leans toward reversal, for two reasons. First, Texas' statute is apt "inevitably ^{to} disqualif[y] an unnec- *John's*
essarily large number" of illegitimates who in fact deserve and *reversal*
for

⁵Texas law provides:

provisions for the support of a child are terminated by the marriage of the child, the removal of the child's disabilities for general purposes, or the death of a parent obligated to support the child.

Tex. Family Code §14.05(d) (emphasis added).

could establish their right to child support. Put another way, the law places an excessive burden on illegitimates. By requiring their child support suit to be filed by their first birthday, the statute obviously requires someone to act in the child's behalf; one year olds are not mature enough to initiate such actions themselves. And I agree with appellant that "[t]he mother, usually that only other one with a personal interest in establishing paternity, may not be interested in doing so because of her relationship with the father, fear of the father, the social stigma of such a suit, ignorance, confusion, or lack of funds." Blue brief at 7. In short, the Texas law probably cuts off the rights of a large number of illegitimates because few paternity suits may be brought within a year of birth. The size of the class that is unfairly treated thus is apt to be quite large.⁶

⁶A factor that seems relevant is the extent to which the statutory category leaves illegitimates themselves free to overcome the handicap imposed by their classification. In Trimble, illegitimates had virtually no power to accomplish their parent marriage. By contrast, the filiation order in Lalli was to be obtained by the illegitimate's own actions, at any time during the life of the father. See note 4 supra. In this case, §13.01 leaves the illegitimates no option to overcome their handicap through their own effort since one year olds are never mature enough to litigate on their own behalf. In this respect, Texas' law is more similar to the Illinois statute that Trimble invalidated than the NY law that Lalli affirmed.

This difference in opportunity for illegitimates between Lalli and this case is made somewhat sharper by considering that appellant has a stronger right to the denied benefit than did Lalli. Lalli's testamentary context suggested that the father's desires about disposition of his own estate should have been controlling. Lalli's father died intestate, to be sure, and state intestacy laws do respond to society's own notions about just distributions in some degree. But primarily such laws are justified by the reasonableness

Footnote continued on next page.

Second, I am not convinced the Texas statute "grant[s] to illegitimates in so far as practicable rights of [support] on a par with those enjoyed by legitimate children." Texas tolls all other causes of action during a youth's minority. 91 VTCS Art. 5535. Difficulties of proof evidently do not convince Texas in these cases that the rights to legal actions must be sacrificed. Similarly, when a child support suit is brought against the husband of the minor's wife, difficulties of proof are not thought so severe as to bar entirely the father's possible disavowal of paternity. Instead the father is permitted to advance this defense, on the condition that he bear the burden of proof. A similar burden of proof could regulate the claims of illegitimates who claim support rights.

A somewhat related point observes that Texas does not moderate the harshness of its one year limitation with any

of their generalization about the likely targets of a father's affection: by who would have benefitted if the father in fact had left a will. Lalli's moral claim to the benefit of which the State deprived him thus was slight, because Lalli's father could have disinherited Lalli as an act of the father's own will.

This case involves just the opposite of such deference to the father's presumed wishes. Child support is a father's legal obligation. The need to resort to the courts to enforce the obligation suggests that the father here has attempted to evade that obligation. Unlike testamentary law, child support statutes thus intend to contravene, rather than effectuate, the father's wishes. The appellant in this case has a stronger moral claim to the benefit that the State denies him; appellant's father could not refuse to grant appellant the benefit as an act of the father's own will. The illegitimate's loss of opportunity to vindicate this right can be said to be sharper because the illegitimate's right to the benefit is stronger.

tolling provisions at all. For instance, the father could freely acknowledge and support an infant for one year, which would give great incentive for a child's representative to avoid the cost and effort of a paternity suit. If the father then repudiated his child on its first birthday, the child's support rights would disappear because Texas makes no provision for the tolling of the limitation period during the father's acknowledgement or support of the child.

These factors incline me to regard the Texas law as a vestige of the ancient discrimination against illegitimates--not as a good faith effort by the state to cope with real and serious dilemmas resulting from the lack of established family ties. This characterization is highlighted by recalling the considerable effort in which NY's Bennett Commission engaged to fashion the relatively fair law that the Lalli decision upheld. The Texas statute--apparently a grudging attempt to comply with the Gomez decision from this Court--leaves a stark contrast--at least in the absence of further legislative history evidence that would defend the Texas legislature. (I note that the lack of such evidence in the briefing before the Court is one reason that inclines me to recommend that the Court await the Texas Supreme Court's Miller decision, which could be counted upon either to unearth relevant legislative history or to acknowledge implicitly that none exists.)

I recommend that you vote to reverse if the Court reaches the merits.

II. Conclusion

The statute at issue in this case has been declared unconstitutional by a different lower Texas court since the lower Texas decision in this case. The Texas Supreme Court presently is reviewing this later case. Prudential considerations--primarily those that demand a state statute is given a hearty defense before it is invalidated by a middle tier Equal Protection analysis--counsel in favor of vacating and remanding this decision in light of that case.

Contrary to appellee's assertions, the Texas legislature's extension of the limitations statute from one to four year does not moot this case. Texas regards the running of a statute as a vested right in the defendant. The one year statute at issue has indeed run for these parties. The amendment does not moot the constitutional dispute.

On the merits, this case falls in between your previous Lalli and Trimble opinions. This fact leaves you free to decide this case either way with consistency. I recommend reversal on the grounds that the Texas limitation will unnecessarily exclude a significant number of claims that could be recognized without jeopardizing the interest that Texas asserts, and that Texas' law appears more similar to vestige of invidious discrimination that a good faith attempt to tailor a solution to a genuine social problem.

presently reviewing a decision invalidating
this statute. A note therefore seems inappropriate.
I would either hold this case or remand
it somehow to the Tex Sup Ct.

PS

80-6298 Miller v. Habluetzel (1/8/82)

Validity of Tex statute imposing one year limit on paternity suit brought for benefit of illegitimate child.

x x x

I Prelim Qs:

1. Not moot, even though the one yr. limit has been raised to four.
2. A dif. Texas Ct/appellate in Harris has recently held Texas statute invalid - creating a conflict in Texas
Tex S/Ct has granted writ/penn.

We should either:

- (a) Vacate & Remand, or
- (b) Hold, pending outcome of Harris, or
- (c) Decide the case

x x x

II Merits - Reverse on E/P

Falls bet. my opinions in Trimble & Lalli. Neither controls, but both apply a heightened E/P analysis

Trimble: father must have married mother & "acknowledged" child for it to inherit

Lalli: (closer case). N.Y. statute upheld that required the suit during father's lifetime.

80-6298 MILLS v. HABLUETZEL

Argued 1/12/82

Mankini (Oppant) (good argument)

Then one year s/kew on paternity suits by illegitimates is to be contrasted with ~~suit of less~~ no limitation on legitimates to sue for support until 18 yrs of age.

~~But~~ All other limitations ~~are~~ are tolled until age 18 w/r to cause of action by ~~illegitimate~~ illegitimate as well as legitimates.

Any different limitation for paternity suit - unless comparable to legitimates.

Illegitimates are not discriminated against in any other limitation statute (e.g. workmen comp., tort cases, etc). Thus - as WJB noted - there is discrimination within the ~~no~~ class of illegitimates itself.

Blood tests are 98% dependable & are as accurate at 18 ~~as at one~~ year after birth of child as at one year after. & Thus, if State's purpose is to prevent fraud by "stalemen" of evidence, it is not served by this limitation.

Blood tests are required in Texas.

Two facts must be proved: (1) intercourse within 9 mos, & (2) proof by blood tests.

WJB's note

But are negative

bad and heavily imposed if one father

Markin (cont)

Blood tests are negative: i.e. they exclude a specified % of potential fathers, e.g. 98%
Some doctors say 100%.

~~Father~~

Tests are not compulsory. If the putative father ~~refuses~~ ^{refuses}, the jury is instructed that ~~he~~ it may find him the father on basis of other evidence.

x x x x

John { JPS says 4 yr S/L is not before us. It is an aff. defense, & only one yr. lim. was pled.

Ms Bonner (Appellee) (Represents alleged father)

Appellee filed motion that enactment of 4 yr. mooted this case.

But - as JPS noted - unless Appellee waives right of her client to rely on the 4 yr. statute, this case is not mooted by that statute.

Blood tests are negative only. If they do not exclude a particular "A", he may be named as the father in subsequent litigation - e.g. to inherit - long after evidence has disappeared or become ^{un}reliable.

Rev 9-0 !!

No. 80-6298, Mills v. Habluetzel

Conf. 1/15/82

The Chief Justice Rev.

The one year statute is what is before us.
There is a sub. state interest.
Infancy does toll St/lim in ^{all} other
situations.

CJ expressed doubt & passed until
after discussion. He then voted to Rev.

Justice Brennan Rev.

Not an easy case.

The 4 year extension is not before us.

We can't wait for Tex S/ct to decide Miller.

The one year lim. is discriminatory. After
one year, the father is free forever. Thus
there is a disparate impact on illegitimates.

Texas tolls all other statutes during
infancy. This emphasizes the discrimination.

Standard is "substantial state interest" &
here support of minors is very substantial

Justice White Rev.

We have applied a heightened standard
in these cases.

Agree with W & B.

Texas advances no
substantive reason

Justice Marshall *Rev.*

Deliberate discrimination

Justice Blackmun *Rev.*

*Cited our P.C. in Gomey (?). Then in
a grand jury resp. by legislative to Gomey
We should not await Miller.*

*A father could support infant for
13 mos. & then quit.*

Gomey confederate.

Justice Powell *Rev.*

See my yellow notes.

Agree generally with WJB.

Justice Rehnquist Rev.

Can't draw line bet. one year & four.

But if our opinion were based on
the totality of all other analogous statutes,
But could join.

If we decide on this ground, there is
no E/R basis for drawing line bet.
one & 18 years.

Justice Stevens Rev.

No more likely of fraud from
loss of ev. here ~~the~~ than in other
fraud - or even neg. - cases.

Clear Reversal.

Justice O'Connor Rev.

There is a Uniform Act for Child Support
& State files these cases - its interest
is substantial.

WHR in ~~moderate~~ the one
year limitation but leave
open even the new 4 year
limit. over

It emphasizes ~~the~~ difficulty of
proof. But unlike Lalli, the
father has always been alive
& burden is on mother.

Read Lalli & Trumble, WHR
under different terms. 1st DRAFT 6 & 8

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

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SUPREME COURT OF THE UNITED STATES

No. 80-6298

LOIS MAE MILLS, APPELLANT v.
DAN HABLUTZEL

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS,
THIRTEENTH SUPREME JUDICIAL DISTRICT

[February —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

This Court has held that once a State posits a judicially enforceable right of children to support from their natural fathers, the Equal Protection Clause of the Fourteenth Amendment prohibits the State from denying that same right to illegitimate children. *Gomez v. Perez*, 409 U. S. 535 (1973). In this case we are required to determine the extent to which the right of illegitimate children recognized in *Gomez* may be circumscribed by a State's interest in avoiding the prosecution of stale or fraudulent claims. The Texas Court of Civil Appeals, Thirteenth Judicial District, upheld against federal constitutional challenges the State's one-year statute of limitation for suits to identify the natural fathers of illegitimate children. We noted probable jurisdiction. 451 U. S. 936. We begin by reviewing the history of the statute challenged by appellant.

I

Like all States, Texas imposes upon parents the primary responsibility for support of their legitimate children. See Tex. Fam. Code (Code) §§ 4.02, 12.04(3). That duty extends beyond the dissolution of marriage, Code § 14.05, regardless of whether the parent has custody of the child, *Hooten v. Hooten*, 15 S.W. 2d 141 (Tex. Ct. Civ. App. 1929), and may

I will be surprised if the Court accepts WHR's grant of permission to States to discriminate in support statutes of lim. between legits. and illegits. I do not like his approach myself; it creates the need for the federal courts to say "how long is long enough" -- a difficult problem in such an arbitrary (over)

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be enforced on the child's behalf in civil proceedings. Code § 14.05(a). Prior to our decision in *Gomez*, Texas recognized no enforceable duty on the part of a natural father to support his illegitimate children. See *Home of the Holy Infancy v. Kaska*, 397 S.W. 2d 208 (Tex. 1965); *Lane v. Phillips*, 69 Tex. 240, 6 S.W. 610 (1887); *Bjorgo v. Bjorgo*, 391 S.W. 2d 528 (Tex. Ct. Civ. App. 1965). A natural father could even assert illegitimacy as a defense to prosecution for criminal nonsupport. See *Curtin v. State*, 155 Tex. Cr. R. 625, 238 S.W. 2d 187 (1950).

Reviewing the Texas law in *Gomez*, we held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U. S., at 538. "[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers," we stated, "there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Id.* Although we recognized that "the lurking problems with respect to proof of paternity . . . are not to be lightly brushed aside," we concluded that they did not justify "an impenetrable barrier that works to shield otherwise invidious discrimination." *Id.* Accordingly, we held Texas' denial of support rights to illegitimate children to be a denial of equal protection of law.

In response to our decision in *Gomez*, the Texas legislature considered legislation that would have provided illegitimate children with a cause of action to establish the paternity of their natural fathers and would have imposed upon those fathers the same duty of support owed to legitimate children. The legislature did not enact that legislation, however, choosing instead to establish a procedure by which natural fathers voluntarily could legitimate their illegitimate children and thereby take upon themselves the obligation of supporting those children. *Texas Department of Human Resources v. Hernandez*, 595 S.W. 2d 189, 191 (Tex. Ct. Civ. App. 1980).

No provision was made for illegitimate children to seek support from fathers who fail to support them.

Not suprisingly, this legislation was found by Texas courts to be an inadequate response to *Gomez*. A panel of the Texas Court of Civil Appeals held that, because of *Gomez*, "[w]hen the legislature later provided judicial relief against the father on behalf of a legitimate child for support, it necessarily provided the same relief on behalf of an illegitimate child." *In the Interest of R — V — M —*, 530 S.W. 2d 921, 923 (1975). Only after this judicial recognition of a right to support did the Texas legislature establish procedures for a paternity and support action on behalf of illegitimate children. *Texas Department of Human Resources v. Hernandez, supra*, at 191.

The rights of illegitimate children to obtain support from their biological fathers are now governed by Chapter 13 of Title 2 of the Texas Family Code, § 13.01 *et seq.* The Code recognizes that establishment of paternity is the necessary first step in all suits by illegitimate children for support from their natural fathers. See *In the Interest of Miller*, 605 S.W. 2d 332, 334 (Tex. Ct. Civ. App. 1980); *Texas Department of Human Resources v. Delley*, 581 S.W. 2d 519, 522 (Tex. Ct. Civ. App. 1979). Accordingly, Chapter 13 establishes procedures to be followed in judicial determinations of paternity and works in conjunction with other provisions of the Code to establish the duty of fathers to support their illegitimate children. See Code §§ 12.04, 14.05. Once paternity has been determined, Chapter 13 authorizes the court to order the defendant father "to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age," Code § 14.05. Code § 13.42(b).

Although it granted illegitimate children the opportunity to obtain support by establishing paternity, Texas was less than generous. It significantly truncated that opportunity by the statutory provision at issue in this case, § 13.01:

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"A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

Texas views this provision as part of the substantive right accorded illegitimate children, not simply as a procedural limitation on that right. *Texas Department of Human Resources v. Hernandez*, 595 S.W. 2d, at 192-193. Moreover, Texas courts have applied § 13.01 literally to mean that failure to bring suit on behalf of illegitimate children within the first year of their life "results in [their] being forever barred from the right to sue their natural father for child support, a limitation their legitimate counterparts do not share." *In the Interest of Miller, supra*, at 334. Thus, in response to the constitutional requirements of *Gomez*, Texas has created a one-year window in its previously "impenetrable barrier," through which an illegitimate child may establish paternity and obtain paternal support.¹

¹ Since the Court of Civil Appeals' decision in this case, the Texas legislature has amended § 13.01 to increase to four years the period for asserting paternity claims. Appellee argues that this amendment renders appellant's claim moot, or at least requires a remand so that the Texas courts can determine whether the amendment is retroactive. We disagree.

The case is not moot because § 13.01, as applied by the courts below, continues to stand as a bar to appellant's assertion of a paternity claim against appellee. At the filing of appellant's claim the child was more than one year old, and on September 1, 1981, the effective date of the amendment, the child was more than four years old.

✓ It seems probable that the amendment would not be applied retroactively by Texas courts. "It is well established law in Texas that after a cause of action has become barred by a statute of limitation, the defendant has a vested right to rely on the statute as a defense, and the state legislature cannot divest the defendant of this right by thereafter lifting the bar of limitation which had accrued in favor of the defendant. Any statute that had such an effect would be considered a retroactive law violative of Article 1, sec. 16 of the Constitution of the State of Texas." *Penry v. Wm.*

II

Appellant in this case is the mother of a child born out of wedlock in early 1977. In October 1978, she and the Texas Department of Human Resources (TDHR), to which appellant had assigned the child's support rights,² brought suit on behalf of the child to establish that appellee was his natural father. Appellee answered by asserting that the action was barred by § 13.01 because the child was one year and seven months old when the suit was filed. The trial court agreed with appellee and dismissed the suit.

The dismissal was affirmed on appeal by the Texas Court of Civil Appeals, and discretionary review was denied by the Texas Supreme Court upon a finding of no reversible error.³ The Court of Civil Appeals, relying upon its decision in *Texas Department of Human Resources v. Hernandez*, *supra*, held that the one-year limitation was not tolled during minority and did not violate the Equal Protection Clause of the Fourteenth Amendment. The *Hernandez* decision in turn relied upon the constitutional analysis in *Texas Department of Human Resources v. Chapman*, 570 S.W. 2d 46 (Tex. Ct. Civ. App. 1978), where another division of the Court of Civil Appeals had found that "the legitimate state interest in preclud-

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²Prior to filing this support suit against appellee, appellant sought financial assistance under the Aid to Families with Dependent Children program. As conditions to eligibility for such assistance, appellant was required "to assign the State any rights to support" held by the child, 42 U. S. C. § 602(a)(26)(A), and "to cooperate with the State . . . in establishing the paternity of [the] child born out of wedlock with respect to whom aid [was] claimed." 42 U. S. C. § 602(a)(26)(B)(i).

³The decisions of the Texas Court of Civil Appeals and the Texas Supreme Court are not officially reported.

ing the litigation of stale or fraudulent claims" was rationally related to the one-year bar and therefore did not deny illegitimate children equal protection of the law. *Id.*, at 49.

Appellant argues that the § 13.01 bar imposes a burden on illegitimate children that is not shared by legitimate children, and that the burden is not justified by the State's interest in avoiding the prosecution of stale or fraudulent claims. In addition, appellant argues that § 13.01 deprives illegitimate children of their right to support without due process of law. Because we agree with appellant's first argument, we need not consider her second.

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III

Our decision in *Gomez* held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U. S., at 538. Specifically, we held that a State which grants an opportunity for legitimate children to obtain paternal support must also grant that opportunity to illegitimate children. If *Gomez* and the equal protection principles which underlie it are to have any meaning, it is clear that the support opportunity provided by the State to illegitimate children must be more than illusory. The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock. -- It would hardly satisfy the demands of equal protection and the holding of *Gomez* to remove an "impenetrable barrier" to support, only to replace it with an opportunity so truncated that few could utilize it effectively.

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The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded le-

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gitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses.

Indeed, the problems of proving paternity have been recognized repeatedly by this Court. *Parham v. Hughes*, 441 U. S. 347, 357, 361 (1979); *Lalli v. Lalli*, 439 U. S. 259, 269 (1978); *Trimble v. Gordon*, 430 U. S. 762, 772 (1977); *Gomez v. Perez*, *supra*, at 538.⁴

⁴ Appellant contends that time limitations on the right of illegitimate children to prove paternity would never be justified by the State's desire to avoid litigation of stale or fraudulent claims because "[t]he interests of the state, and those of the alleged father, to prevent incorrect claims of paternity are . . . protected by the recent advance in blood and genetic testing." Brief for Appellant 29. We previously have recognized that blood tests are highly probative in proving paternity, *Little v. Streater*, 452 U. S. 1, — (1981), but disagree with appellant's contention that their existence negates the State's interest in avoiding the prosecution of stale or fraudulent claims.

✓ Blood tests do not prove paternity. They prove nonpaternity, excluding from the class of possible fathers a high percentage of the general male population. Krause, *Illegitimacy: Law and Social Policy* 123-136 (1971). The fact that a certain male is not excluded by blood test evidence does not prove that he is the child's natural father, only that he is a member of the limited class of possible fathers. He must thereafter turn to more conventional forms of proof—evidence of lack of access to the mother, his own testimony, the testimony of others—to prove that, although not excluded by the blood test, he in fact is not the child's father. As to this latter form of proof the State clearly has an interest in litigating claims while the evidence is relatively fresh.

This interest is particularly real under Texas procedures. Texas law requires that putative fathers submit to blood tests. Code § 13.02. Refusal to submit to the tests may result in a citation for contempt, Code § 13.02(b), and may be introduced to the jury as evidence that the putative father has not been biologically excluded from the class of possible fathers. Code § 13.06(d). The results of the blood tests are introduced at a pretrial conference held for the purpose of dismissing the complaint if the father has been excluded by the tests from the class of possible fathers. Code

Proof is a problem

But less serious in light of blood tests

Blood tests

Therefore, in support suits by illegitimate children more than in support suits by legitimate children the State has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a (legitimate) state interest. See *Lalli v. Lalli*, *supra*, at 265; *Trimble v. Gordon*, *supra*, at 167; *Mathews v. Lucas*, 427 U. S. 495, 510 (1976).⁵ The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims.

The equal protection analysis in this case, therefore, focuses on two related requirements. First, the period for obtaining support granted by Texas to illegitimate children must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation

§§ 13.04, 13.05(a). Thus, the only paternity cases which actually go to trial in Texas are those in which the putative father has refused to submit to blood tests or has not been excluded by their results, cases in which conventional types of evidence are of paramount importance.

⁵*Lalli v. Lalli*, *supra*, and *Trimble v. Gordon*, *supra*, involved the right of illegitimate children to inherit from their natural fathers, while *Mathews v. Lucas*, *supra*, involved the right of illegitimate children to receive social security benefits. There is no reason to think that the factual differences between those cases and the present case call for a variation of the general principle which those cases have laid down. In *Lucas* the Court expressly relied on *Gomez v. Perez*, *supra*, in reaching its result. 427 U. S., at 507. And in *Lalli* the requirement imposed by New York law for an illegitimate child to inherit from its natural father was that the paternity of the father be declared in a judicial proceeding sometime before his death. 439 U. S., at 263. Thus, even those of our cases which have dealt with entitlement to government benefits, or with the intestate distribution of a natural father's property, have frequently involved support orders or adjudications of paternity as a means for establishing the entitlement or the right there sought.

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Analysis -
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placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. Applying these two requirements to the one-year right granted by Texas, we find a denial of equal protection.

By granting illegitimate children only one year in which to establish paternity, Texas has failed to provide them with an adequate opportunity to obtain support. Paternity suits in Texas "may be brought by any person with an interest in the child," Code § 11.03, but during the child's early years will often be brought by the mother. It requires little experience to appreciate the obstacles to such suits that confront unwed mothers during the child's first year. Financial difficulties caused by child-birth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within twelve months of birth. Even if the mother seeks public financial assistance and assigns the child's support claim to the State, it is not improbable that twelve months would elapse without the filing of a claim. Several months could pass before a mother finds the need to seek such assistance, takes steps to obtain it, and is willing to join the State in litigation against the natural father.⁶ A sense of the inadequacy of this one-year period is accentuated by a realization that failure to file within twelve months "results in illegitimates being forever barred from the right to sue their natural father for child support," *In the Interest of Miller*, 605 S.W. 2d, at 334, while legitimate children may seek such support at any time until the age of eighteen.⁷

⁶ See note 2, *supra*.

⁷ The Texas Family Code imposes no period of limitation on the right of a legitimate child to obtain support from its father, a right which lasts until the child is eighteen years old. Code § 14.05(a). Although Texas law includes a four-year limitations period applicable to "[e]very action . . . for

Moreover, this unrealistically short time limitation is not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims. In *Gomez* we recognized that the problems of proof in paternity suits "are not to be lightly brushed aside," but held that such problems do not justify a complete denial of support rights to illegitimate children. 409 U. S., at 538. Neither do they justify a period of limitation which so restricts those rights as effectively to extinguish them. We can conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of twelve months will appreciably increase the likelihood of fraudulent claims.⁸

Accordingly, we conclude that the one-year period for establishing paternity denies illegitimate children in Texas the equal protection of law.⁹ The judgment of the Texas

which ~~no~~ limitation is otherwise prescribed," Tex. Rev. Civ. Stat. § 5529, the running of that period is tolled during minority. Tex. Rev. Civ. Stat. § 5535. See also *In the Interest of Miller*, *supra*, at 334.

⁸Appellee contends that the one-year limitation of § 13.01 also is justified by the State's "interest in the continuation of the institutions of family and marriage" and the avoidance of any state actions that would "discourage either institution or . . . encourage persons to have children out of wedlock." Brief for Appellee 21. Important as such a state interest might be, we have repeatedly held that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty & Surety Co.*, 406 U. S., at 175. See also *Lalli v. Lalli*, 439 U. S., at 265; *Trimble v. Gordon*, 430 U. S., at 769-770; *Mathews v. Lucas*, 427 U. S., at 505.

⁹The restrictions imposed by States to control problems of proof, like the restriction imposed by Texas in this case, often take the form of statutes of limitation. "Statutes of limitation find their justification in necessity and convenience rather than in logic. . . . They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314 (1945). Because such statutes "are by definition arbitrary," *id.*, they are best left to legislative

Court of Civil Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

determination and control. Normally, therefore, States are free to set periods of limitation without fear of violating some provision of the Constitution. In this case, however, the limitation period enacted by the Texas legislature has the unusual effect of emasculating a right which the Equal Protection Clause requires the State to provide to illegitimate children.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

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This Court has held that once a State posits a judicially enforceable right of children to support from their natural fathers, the Equal Protection Clause of the Fourteenth Amendment prohibits the State from denying that same right to illegitimate children. *Gomez v. Perez*, 409 U. S. 535 (1973). In this case we are required to determine the extent to which the right of illegitimate children recognized in *Gomez* may be circumscribed by a State's interest in avoiding the prosecution of stale or fraudulent claims. The Texas Court of Civil Appeals, Thirteenth Judicial District, upheld against federal constitutional challenges the State's one-year statute of limitation for suits to identify the natural fathers of illegitimate children. We noted probable jurisdiction. 451 U. S. 936. We begin by reviewing the history of the statute challenged by appellant.

I

Like all States, Texas imposes upon parents the primary responsibility for support of their legitimate children. See Tex. Fam. Code (Code) §§ 4.02, 12.04(3). That duty extends beyond the dissolution of marriage, Code § 14.05, regardless of whether the parent has custody of the child, *Hooten v. Hooten*, 15 S.W. 2d 141 (Tex. Ct. Civ. App. 1929), and may

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be enforced on the child's behalf in civil proceedings. Code § 14.05(a). Prior to our decision in *Gomez*, Texas recognized no enforceable duty on the part of a natural father to support his illegitimate children. See *Home of the Holy Infancy v. Kaska*, 397 S.W. 2d 208 (Tex. 1965); *Lane v. Phillips*, 69 Tex. 240, 6 S.W. 610 (1887); *Bjorgo v. Bjorgo*, 391 S.W. 2d 528 (Tex. Ct. Civ. App. 1965). A natural father could even assert illegitimacy as a defense to prosecution for criminal nonsupport. See *Curtin v. State*, 155 Tex. Cr. R. 625, 238 S.W. 2d 187 (1950).

Reviewing the Texas law in *Gomez*, we held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U. S., at 538. "[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers," we stated, "there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Id.* Although we recognized that "the lurking problems with respect to proof of paternity . . . are not to be lightly brushed aside," we concluded that they did not justify "an impenetrable barrier that works to shield otherwise invidious discrimination." *Id.* Accordingly, we held Texas' denial of support rights to illegitimate children to be a denial of equal protection of law.

In response to our decision in *Gomez*, the Texas legislature considered legislation that would have provided illegitimate children with a cause of action to establish the paternity of their natural fathers and would have imposed upon those fathers the same duty of support owed to legitimate children. The legislature did not enact that legislation, however, choosing instead to establish a procedure by which natural fathers voluntarily could legitimate their illegitimate children and thereby take upon themselves the obligation of supporting those children. *Texas Department of Human Resources v. Hernandez*, 595 S.W. 2d 189, 191 (Tex. Ct. Civ. App. 1980).

No provision was made for illegitimate children to seek support from fathers who fail to support them.

Not suprisingly, this legislation was found by Texas courts to be an inadequate response to *Gomez*. A panel of the Texas Court of Civil Appeals held that, because of *Gomez*, "[w]hen the legislature later provided judicial relief against the father on behalf of a legitimate child for support, it necessarily provided the same relief on behalf of an illegitimate child." *In the Interest of R — V — M —*, 530 S.W. 2d 921, 923 (1975). Only after this judicial recognition of a right to support did the Texas legislature establish procedures for a paternity and support action on behalf of illegitimate children. *Texas Department of Human Resources v. Hernandez*, *supra*, at 191.

The rights of illegitimate children to obtain support from their biological fathers are now governed by Chapter 13 of Title 2 of the Texas Family Code, § 13.01 *et seq.* The Code recognizes that establishment of paternity is the necessary first step in all suits by illegitimate children for support from their natural fathers. See *In the Interest of Miller*, 605 S.W. 2d 332, 334 (Tex. Ct. Civ. App. 1980); *Texas Department of Human Resources v. Delley*, 581 S.W. 2d 519, 522 (Tex. Ct. Civ. App. 1979). Accordingly, Chapter 13 establishes procedures to be followed in judicial determinations of paternity and works in conjunction with other provisions of the Code to establish the duty of fathers to support their illegitimate children. See Code §§ 12.04, 14.05. Once paternity has been determined, Chapter 13 authorizes the court to order the defendant father "to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age," Code § 14.05. Code § 13.42(b).

Although it granted illegitimate children the opportunity to obtain support by establishing paternity, Texas was less than generous. It significantly truncated that opportunity by the statutory provision at issue in this case, § 13.01:

“A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child’s natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.”

Texas views this provision as part of the substantive right accorded illegitimate children, not simply as a procedural limitation on that right. *Texas Department of Human Resources v. Hernandez*, 595 S.W. 2d, at 192-193. Moreover, Texas courts have applied § 13.01 literally to mean that failure to bring suit on behalf of illegitimate children within the first year of their life “results in [their] being forever barred from the right to sue their natural father for child support, a limitation their legitimate counterparts do not share.” *In the Interest of Miller, supra*, at 334. Thus, in response to the constitutional requirements of *Gomez*, Texas has created a one-year window in its previously “impenetrable barrier,” through which an illegitimate child may establish paternity and obtain paternal support.¹

¹ Since the Court of Civil Appeals’ decision in this case, the Texas legislature has amended § 13.01 to increase to four years the period for asserting paternity claims. Appellee argues that this amendment renders appellant’s claim moot, or at least requires a remand so that the Texas courts can determine whether the amendment is retroactive. We disagree.

The case is not moot because § 13.01, as applied by the courts below, continues to stand as a bar to appellant’s assertion of a paternity claim against appellee. At the filing of appellant’s claim the child was more than one year old, and on September 1, 1981, the effective date of the amendment, the child was more than four years old.

It seems probable that the amendment would not be applied retroactively by Texas courts. “It is well established law in Texas that after a cause of action has become barred by a statute of limitation, the defendant has a vested right to rely on the statute as a defense, and the state legislature cannot divest the defendant of this right by thereafter lifting the bar of limitation which had accrued in favor of the defendant. Any statute that had such an effect would be considered a retroactive law violative of Article 1, sec. 16 of the Constitution of the State of Texas.” *Penry v. Wm.*

II

Appellant in this case is the mother of a child born out of wedlock in early 1977. In October 1978, she and the Texas Department of Human Resources (TDHR), to which appellant had assigned the child's support rights,² brought suit on behalf of the child to establish that appellee was his natural father. Appellee answered by asserting that the action was barred by § 13.01 because the child was one year and seven months old when the suit was filed. The trial court agreed with appellee and dismissed the suit.

The dismissal was affirmed on appeal by the Texas Court of Civil Appeals, and discretionary review was denied by the Texas Supreme Court upon a finding of no reversible error.³ The Court of Civil Appeals, relying upon its decision in *Texas Department of Human Resources v. Hernandez, supra*, held that the one-year limitation was not tolled during minority and did not violate the Equal Protection Clause of the Fourteenth Amendment. The *Hernandez* decision in turn relied upon the constitutional analysis in *Texas Department of Human Resources v. Chapman*, 570 S.W. 2d 46 (Tex. Ct. Civ. App. 1978), where another division of the Court of Civil Appeals had found that "the legitimate state interest in preclud-

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² Prior to filing this support suit against appellee, appellant sought financial assistance under the Aid to Families with Dependent Children program. As conditions to eligibility for such assistance, appellant was required "to assign the State any rights to support" held by the child, 42 U. S. C. § 602(a)(26)(A), and "to cooperate with the State . . . in establishing the paternity of [the] child born out of wedlock with respect to whom aid [was] claimed." 42 U. S. C. § 602(a)(26)(B)(i).

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III

Our decision in *Gomez* held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U. S., at 538. Specifically, we held that a State which grants an opportunity for legitimate children to obtain paternal support must also grant that opportunity to illegitimate children. If *Gomez* and the equal protection principles which underlie it are to have any meaning, it is clear that the support opportunity provided by the State to illegitimate children must be more than illusory. The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock. It would hardly satisfy the demands of equal protection and the holding of *Gomez* to remove an "impenetrable barrier" to support, only to replace it with an opportunity so truncated that few could utilize it effectively.

The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded le-

gitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this Court. *Parham v. Hughes*, 441 U. S. 347, 357, 361 (1979); *Lalli v. Lalli*, 439 U. S. 259, 269 (1978); *Trimble v. Gordon*, 430 U. S. 762, 772 (1977); *Gomez v. Perez*, *supra*, at 538.⁴

⁴ Appellant contends that time limitations on the right of illegitimate children to prove paternity would never be justified by the State's desire to avoid litigation of stale or fraudulent claims because "[t]he interests of the state, and those of the alleged father, to prevent incorrect claims of paternity are . . . protected by the recent advance in blood and genetic testing." Brief for Appellant 29. We previously have recognized that blood tests are highly probative in proving paternity, *Little v. Streater*, 452 U. S. 1, — (1981), but disagree with appellant's contention that their existence negates the State's interest in avoiding the prosecution of stale or fraudulent claims.

Blood tests do not prove paternity. They prove nonpaternity, excluding from the class of possible fathers a high percentage of the general male population. Krause, *Illegitimacy: Law and Social Policy* 123-136 (1971). The fact that a certain male is not excluded by blood test evidence does not prove that he is the child's natural father, only that he is a member of the limited class of possible fathers. He must thereafter turn to more conventional forms of proof—evidence of lack of access to the mother, his own testimony, the testimony of others—to prove that, although not excluded by the blood test, he in fact is not the child's father. As to this latter form of proof the State clearly has an interest in litigating claims while the evidence is relatively fresh.

This interest is particularly real under Texas procedures. Texas law requires that putative fathers submit to blood tests. Code § 13.02. Refusal to submit to the tests may result in a citation for contempt, Code § 13.02(b), and may be introduced to the jury as evidence that the putative father has not been biologically excluded from the class of possible fathers. Code § 13.06(d). The results of the blood tests are introduced at a pretrial conference held for the purpose of dismissing the complaint if the father has been excluded by the tests from the class of possible fathers. Code

Therefore, in support suits by illegitimate children more than in support suits by legitimate children the State has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest. See *Lalli v. Lalli*, *supra*, at 265; *Trimble v. Gordon*, *supra*, at 767; *Mathews v. Lucas*, 427 U. S. 495, 510 (1976).⁵ The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims.

The equal protection analysis in this case, therefore, focuses on two related requirements. First, the period for obtaining support granted by Texas to illegitimate children must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation

§§ 13.04, 13.05(a). Thus, the only paternity cases which actually go to trial in Texas are those in which the putative father has refused to submit to blood tests or has not been excluded by their results, cases in which conventional types of evidence are of paramount importance.

⁵*Lalli v. Lalli*, *supra*, and *Trimble v. Gordon*, *supra*, involved the right of illegitimate children to inherit from their natural fathers, while *Mathews v. Lucas*, *supra*, involved the right of illegitimate children to receive social security benefits. There is no reason to think that the factual differences between those cases and the present case call for a variation of the general principle which those cases have laid down. In *Lucas* the Court expressly relied on *Gomez v. Perez*, *supra*, in reaching its result. 427 U. S., at 507. And in *Lalli* the requirement imposed by New York law for an illegitimate child to inherit from its natural father was that the paternity of the father be declared in a judicial proceeding sometime before his death. 439 U. S., at 263. Thus, even those of our cases which have dealt with entitlement to government benefits, or with the intestate distribution of a natural father's property, have frequently involved support orders or adjudications of paternity as a means for establishing the entitlement or the right there sought.

placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. Applying these two requirements to the one-year right granted by Texas, we find a denial of equal protection.

By granting illegitimate children only one year in which to establish paternity, Texas has failed to provide them with an adequate opportunity to obtain support. Paternity suits in Texas "may be brought by any person with an interest in the child," Code § 11.03, but during the child's early years will often be brought by the mother. It requires little experience to appreciate the obstacles to such suits that confront unwed mothers during the child's first year. Financial difficulties caused by child-birth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within twelve months of birth. Even if the mother seeks public financial assistance and assigns the child's support claim to the State, it is not improbable that twelve months would elapse without the filing of a claim. Several months could pass before a mother finds the need to seek such assistance, takes steps to obtain it, and is willing to join the State in litigation against the natural father.⁶ A sense of the inadequacy of this one-year period is accentuated by a realization that failure to file within twelve months "results in illegitimates being forever barred from the right to sue their natural father for child support," *In the Interest of Miller*, 605 S.W. 2d, at 334, while legitimate children may seek such support at any time until the age of eighteen.⁷

⁶ See note 2, *supra*.

⁷ The Texas Family Code imposes no period of limitation on the right of a legitimate child to obtain support from its father, a right which lasts until the child is eighteen years old. Code § 14.05(a). Although Texas law includes a four-year limitations period applicable to "[e]very action . . . for

Moreover, this unrealistically short time limitation is not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims. In *Gomez* we recognized that the problems of proof in paternity suits "are not to be lightly brushed aside," but held that such problems do not justify a complete denial of support rights to illegitimate children. 409 U. S., at 538. Neither do they justify a period of limitation which so restricts those rights as effectively to extinguish them. We can conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of twelve months will appreciably increase the likelihood of fraudulent claims.⁸

Accordingly, we conclude that the one-year period for establishing paternity denies illegitimate children in Texas the equal protection of law.⁹ The judgment of the Texas

which no limitation is otherwise prescribed," Tex. Rev. Civ. Stat. § 5529, the running of that period is tolled during minority. Tex. Rev. Civ. Stat. § 5535. See also *In the Interest of Miller*, *supra*, at 334.

⁸ Appellee contends that the one-year limitation of § 13.01 also is justified by the State's "interest in the continuation of the institutions of family and marriage" and the avoidance of any state actions that would "discourage either institution or . . . encourage persons to have children out of wedlock." Brief for Appellee 21. Important as such a state interest might be, we have repeatedly held that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty & Surety Co.*, 406 U. S., at 175. See also *Lalli v. Lalli*, 439 U. S., at 265; *Trimble v. Gordon*, 430 U. S., at 769-770; *Mathews v. Lucas*, 427 U. S., at 505.

⁹ The restrictions imposed by States to control problems of proof, like the restriction imposed by Texas in this case, often take the form of statutes of limitation. "Statutes of limitation find their justification in necessity and convenience rather than in logic. . . . They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314 (1945). Because such statutes "are by definition arbitrary," *id.*, they are best left to legislative

Court of Civil Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

determination and control. Normally, therefore, States are free to set periods of limitation without fear of violating some provision of the Constitution. In this case, however, the limitation period enacted by the Texas legislature has the unusual effect of emasculating a right which the Equal Protection Clause requires the State to provide to illegitimate children.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 11, 1982.

No. 80-6298 -- Mills v. Habluetzel.

Dear Bill,

I have only one minor difficulty with your opinion. In footnote 4, you state categorically, "Blood tests do not prove paternity. They prove nonpaternity" Until recently, I would not have disagreed with this statement, but today's teaching is that more modern "blood testing" techniques, e.g., "HLA testing," can usually predict the paternity of a nonexcluded putative father with over 90 per cent probability. See Terasaki, Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing, 16 J. Family L. 543 (1978). That is to say, traditional, "ABO" tests could exclude some putative fathers -- "prove nonpaternity" -- but could say little about the probability that any particular nonexcluded putative father was the actual father. But we are now instructed that "HLA testing," which depends on the identification of the many different detectable antigens on the surface of a human cell, can predict paternity with high probabilities. Given this scientific development, I am concerned that the unequivocal phrasing of your footnote 4 would improperly deter trial courts around the country from accepting, or giving proper weight to, modern testing techniques. True, the proper legal weight to be given to these techniques is still a matter of academic dispute. See, e.g., Jaffee, Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: A Response to Terasaki, 17 J. Family L. 457 (1979). I think that my concern could be allayed by a revision of the footnote to acknowledge the existence of more modern tests and of a dispute over their proper legal significance, without foreclosing the issue as the present phrasing does; none of this proposed change would, in my view, detract at all from your basic point in the footnote, that the State retains a valid "interest in litigating claims of paternity while the ev-

*I am quite surprised that WJB is willing to join
WFR's current draft. jw*

idence is relatively fresh." Aside from this suggestion,
I am happy to agree with your opinion.

Sincerely,



W.J.B., Jr.

Justice Rehnquist.

Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 11, 1982

No. 80-6298 Mills v. Habluetzel

Dear Bill,

I presently plan to concur separately in the judgment in this case and will circulate something in due course.

Sincerely,



Justice Rehnquist

Copies to the Conference

February 11, 1982

80-6298 Mills v. Habluetzel

Dear Bill:

Your opinion emphasizes that a state need not "adopt procedures for illegitimate children that are co-terminus with those accorded legitimate children" because of the state's interest in "avoiding the litigation of stale or fraudulent claims". The suggested standard is that the period for obtaining support for illegitimate children "must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf." (p. 8).

If I were on the Texas Supreme Court, I could well conclude in the pending case that the new four year statute meets this standard, and we would soon be confronted with another appeal. For two reasons, I am reluctant to join your opinion as now written.

First, I do not view the evidentiary difficulties as seriously as you do. Under Texas law the suit for support is against a living defendant who is capable of protecting his own interest. This distinguishes this case from the many illegitimacy cases that have emphasized evidentiary problems and in which the parent necessarily is deceased.* As you suggest, there may well be conflicting testimony from only two witnesses, and yet often there will be - for many years - supportive evidence readily available to the father. Moreover, as your opinion notes, blood tests required by Texas law exclude a high percentage of possible fathers.

*E.g., Lalli v. Lalli; Trimble v. Gordon; Mathews v. Lucas; Labine v. Vincent; Weber v. Aetna Casualty & Surety Co.; Levy v. Louisiana.

Secondly, the interests of the state, the mother and particularly the illegitimate children in obtaining support from the natural father are very strong - if not compelling. In modern society where, in some environments, children born out of wedlock outnumber those blessed by marital vows, there is every reason to compel a father to support children he brings into this world. Otherwise, taxpayers support them - as now so expansively happens. One also can argue that if fathers of illegitimates were made more vulnerable to support their obligations, some at least may take appropriate precautions in their promiscuity. I add that becoming a father is rarely an involuntary act.

In sum, I am not at all persuaded that the asserted state interest in the prevention of "stale or fraudulent claims" is nearly as weighty as the bundle of interests that favor affording a continuing opportunity to make fathers shoulder their responsibilities.

The difficult question for me is whether to hold that the 18-year limitation applies alike to support of legitimates and illegitimates, or to leave open the period for illegitimates. If we do the latter, I would emphasize the interests I have identified and say explicitly that they outweigh concern as to proof.

For the foregoing reasons, I cannot join your opinion in its present form. I am sending this note only to you at this time so that you will understand my reasons for writing separately or awaiting further writing.

Sincerely,

Justice Rehnquist

lfp/ss

W.F.B. 7
Burrin
Gomez

Waiting Sandra

To: Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: FEB 12 1982

2nd
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-6298

LOIS MAE MILLS, APPELLANT *v.*
DAN HABLUETZEL

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS,
THIRTEENTH SUPREME JUDICIAL DISTRICT

[February —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

This Court has held that once a State posits a judicially enforceable right of children to support from their natural fathers, the Equal Protection Clause of the Fourteenth Amendment prohibits the State from denying that same right to illegitimate children. *Gomez v. Perez*, 409 U. S. 535 (1973). In this case we are required to determine the extent to which the right of illegitimate children recognized in *Gomez* may be circumscribed by a State's interest in avoiding the prosecution of stale or fraudulent claims. The Texas Court of Civil Appeals, Thirteenth Judicial District, upheld against federal constitutional challenges the State's one-year statute of limitation for suits to identify the natural fathers of illegitimate children. We noted probable jurisdiction. 451 U. S. 936. We begin by reviewing the history of the statute challenged by appellant.

I

Like all States, Texas imposes upon parents the primary responsibility for support of their legitimate children. See Tex. Fam. Code (Code) §§ 4.02, 12.04(3). That duty extends beyond the dissolution of marriage, Code § 14.05, regardless of whether the parent has custody of the child, *Hooten v. Hooten*, 15 S.W. 2d 141 (Tex. Ct. Civ. App. 1929), and may

WHR responds to WSB's letter on blood test evidence. Still await for response to your letter to WHR -- and for SOC's writing, as per her announcement.
ju

be enforced on the child's behalf in civil proceedings. Code § 14.05(a). Prior to our decision in *Gomez*, Texas recognized no enforceable duty on the part of a natural father to support his illegitimate children. See *Home of the Holy Infancy v. Kaska*, 397 S.W. 2d 208 (Tex. 1965); *Lane v. Phillips*, 69 Tex. 240, 6 S.W. 610 (1887); *Bjorgo v. Bjorgo*, 391 S.W. 2d 528 (Tex. Ct. Civ. App. 1965). A natural father could even assert illegitimacy as a defense to prosecution for criminal nonsupport. See *Curtin v. State*, 155 Tex. Cr. R. 625, 238 S.W. 2d 187 (1950).

Reviewing the Texas law in *Gomez*, we held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U. S., at 538. "[O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers," we stated, "there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother." *Id.* Although we recognized that "the lurking problems with respect to proof of paternity . . . are not to be lightly brushed aside," we concluded that they did not justify "an impenetrable barrier that works to shield otherwise invidious discrimination." *Id.* Accordingly, we held Texas' denial of support rights to illegitimate children to be a denial of equal protection of law.

In response to our decision in *Gomez*, the Texas legislature considered legislation that would have provided illegitimate children with a cause of action to establish the paternity of their natural fathers and would have imposed upon those fathers the same duty of support owed to legitimate children. The legislature did not enact that legislation, however, choosing instead to establish a procedure by which natural fathers voluntarily could legitimate their illegitimate children and thereby take upon themselves the obligation of supporting those children. *Texas Department of Human Resources v. Hernandez*, 595 S.W. 2d 189, 191 (Tex. Ct. Civ. App. 1980).

No provision was made for illegitimate children to seek support from fathers who fail to support them.

Not surprisingly, this legislation was found by Texas courts to be an inadequate response to *Gomez*. A panel of the Texas Court of Civil Appeals held that, because of *Gomez*, "[w]hen the legislature later provided judicial relief against the father on behalf of a legitimate child for support, it necessarily provided the same relief on behalf of an illegitimate child." *In the Interest of R — V — M —*, 530 S.W. 2d 921, 923 (1975). Only after this judicial recognition of a right to support did the Texas legislature establish procedures for a paternity and support action on behalf of illegitimate children. *Texas Department of Human Resources v. Hernandez, supra*, at 191.

The rights of illegitimate children to obtain support from their biological fathers are now governed by Chapter 13 of Title 2 of the Texas Family Code, § 13.01 *et seq.* The Code recognizes that establishment of paternity is the necessary first step in all suits by illegitimate children for support from their natural fathers. See *In the Interest of Miller*, 605 S.W. 2d 332, 334 (Tex. Ct. Civ. App. 1980); *Texas Department of Human Resources v. Delley*, 581 S.W. 2d 519, 522 (Tex. Ct. Civ. App. 1979). Accordingly, Chapter 13 establishes procedures to be followed in judicial determinations of paternity and works in conjunction with other provisions of the Code to establish the duty of fathers to support their illegitimate children. See Code §§ 12.04, 14.05. Once paternity has been determined, Chapter 13 authorizes the court to order the defendant father "to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age," Code § 14.05. Code § 13.42(b).

Although it granted illegitimate children the opportunity to obtain support by establishing paternity, Texas was less than generous. It significantly truncated that opportunity by the statutory provision at issue in this case, § 13.01:

"A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

Texas views this provision as part of the substantive right accorded illegitimate children, not simply as a procedural limitation on that right. *Texas Department of Human Resources v. Hernandez*, 595 S.W. 2d, at 192-193. Moreover, Texas courts have applied § 13.01 literally to mean that failure to bring suit on behalf of illegitimate children within the first year of their life "results in [their] being forever barred from the right to sue their natural father for child support, a limitation their legitimate counterparts do not share." *In the Interest of Miller, supra*, at 334. Thus, in response to the constitutional requirements of *Gomez*, Texas has created a one-year window in its previously "impenetrable barrier," through which an illegitimate child may establish paternity and obtain paternal support.¹

¹ Since the Court of Civil Appeals' decision in this case, the Texas legislature has amended § 13.01 to increase to four years the period for asserting paternity claims. Appellee argues that this amendment renders appellant's claim moot, or at least requires a remand so that the Texas courts can determine whether the amendment is retroactive. We disagree.

The case is not moot because § 13.01, as applied by the courts below, continues to stand as a bar to appellant's assertion of a paternity claim against appellee. At the filing of appellant's claim the child was more than one year old, and on September 1, 1981, the effective date of the amendment, the child was more than four years old.

It seems probable that the amendment would not be applied retroactively by Texas courts. "It is well established law in Texas that after a cause of action has become barred by a statute of limitation, the defendant has a vested right to rely on the statute as a defense, and the state legislature cannot divest the defendant of this right by thereafter lifting the bar of limitation which had accrued in favor of the defendant. Any statute that had such an effect would be considered a retroactive law violative of Article 1, sec. 16 of the Constitution of the State of Texas." *Penry v. Wm.*

II

Appellant in this case is the mother of a child born out of wedlock in early 1977. In October 1978, she and the Texas Department of Human Resources (TDHR), to which appellant had assigned the child's support rights,² brought suit on behalf of the child to establish that appellee was his natural father. Appellee answered by asserting that the action was barred by § 13.01 because the child was one year and seven months old when the suit was filed. The trial court agreed with appellee and dismissed the suit.

The dismissal was affirmed on appeal by the Texas Court of Civil Appeals, and discretionary review was denied by the Texas Supreme Court upon a finding of no reversible error.³ The Court of Civil Appeals, relying upon its decision in *Texas Department of Human Resources v. Hernandez, supra*, held that the one-year limitation was not tolled during minority and did not violate the Equal Protection Clause of the Fourteenth Amendment. The *Hernandez* decision in turn relied upon the constitutional analysis in *Texas Department of Human Resources v. Chapman*, 570 S.W. 2d 46 (Tex. Ct. Civ. App. 1978), where another division of the Court of Civil Appeals had found that "the legitimate state interest in preclud-

Barr, Inc., 415 F. Supp. 126, 128 (ED Tex. 1976) (citations omitted). See also *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 2d 249 (Tex. 1887); *Brantley v. Phoenix Insurance Co.*, 536 S.W. 2d 72, 74 (Tex. Ct. Civ. App. 1976); *Southern Pacific Transportation Co. v. State*, 380 S.W. 2d 123, 127 (Tex. Ct. Civ. App. 1964).

²Prior to filing this support suit against appellee, appellant sought financial assistance under the Aid to Families with Dependent Children program. As conditions to eligibility for such assistance, appellant was required "to assign the State any rights to support" held by the child, 42 U. S. C. § 602(a)(26)(A), and "to cooperate with the State . . . in establishing the paternity of [the] child born out of wedlock with respect to whom aid [was] claimed." 42 U. S. C. § 602(a)(26)(B)(i).

³The decisions of the Texas Court of Civil Appeals and the Texas Supreme Court are not officially reported.

ing the litigation of stale or fraudulent claims" was rationally related to the one-year bar and therefore did not deny illegitimate children equal protection of the law. *Id.*, at 49.

Appellant argues that the § 13.01 bar imposes a burden on illegitimate children that is not shared by legitimate children, and that the burden is not justified by the State's interest in avoiding the prosecution of stale or fraudulent claims. In addition, appellant argues that § 13.01 deprives illegitimate children of their right to support without due process of law. Because we agree with appellant's first argument, we need not consider her second.

III

Our decision in *Gomez* held that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U. S., at 538. Specifically, we held that a State which grants an opportunity for legitimate children to obtain paternal support must also grant that opportunity to illegitimate children. If *Gomez* and the equal protection principles which underlie it are to have any meaning, it is clear that the support opportunity provided by the State to illegitimate children must be more than illusory. The period for asserting the right to support must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock. It would hardly satisfy the demands of equal protection and the holding of *Gomez* to remove an "impenetrable barrier" to support, only to replace it with an opportunity so truncated that few could utilize it effectively.

The fact that Texas must provide illegitimate children with a bona fide opportunity to obtain paternal support does not mean, however, that it must adopt procedures for illegitimate children that are coterminous with those accorded le-

gitimate children. Paternal support suits on behalf of illegitimate children contain an element that such suits for legitimate children do not contain: proof of paternity. Such proof is often sketchy and strongly contested, frequently turning upon conflicting testimony from only two witnesses. Indeed, the problems of proving paternity have been recognized repeatedly by this Court. *Parham v. Hughes*, 441 U. S. 347, 357, 361 (1979); *Lalli v. Lalli*, 439 U. S. 259, 269 (1978); *Trimble v. Gordon*, 430 U. S. 762, 772 (1977); *Gomez v. Perez*, *supra*, at 538.⁴

⁴Appellant contends that time limitations on the right of illegitimate children to prove paternity would never be justified by the State's desire to avoid litigation of stale or fraudulent claims because "[t]he interests of the state, and those of the alleged father, to prevent incorrect claims of paternity are . . . protected by the recent advance in blood and genetic testing." Brief for Appellant 29. We previously have recognized that blood tests are highly probative in proving paternity, *Little v. Streater*, 452 U. S. 1, — (1981), but disagree with appellant's contention that their existence negates the State's interest in avoiding the prosecution of stale or fraudulent claims.

Traditional blood tests do not prove paternity. They prove nonpaternity, excluding from the case of possible fathers a high percentage of the general male population. Krause, *Illegitimacy: Law and Social Policy* 123-136 (1971). Thus the fact that certain male is not excluded by these tests does not prove that he is the child's natural father, only that he is a member of the limited class of possible fathers. More recent developments in the field of blood testing have sought not only to "prove nonpaternity" but also to predict paternity with a high degree of probability. See Teraski, *Resolution by HLA Testing of 1,000 Paternity Cases Not Excluded by ABO Testing*, 16 J. Fam. L. 543 (1978). The proper evidentiary weight to be given to these techniques is still a matter of academic dispute. See, e. g., Jaffee, *Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: Response to Teraski*, 17 J. Fam. L. 457 (1979). Whatever evidentiary rule the courts of a particular State choose to follow, if the blood test evidence does not exclude a certain male, he must thereafter turn to more conventional forms of proof—evidence of lack of access to the mother, his own testimony, the testimony of others—to prove that, although not excluded by the blood test, he is not in fact the child's father. As to this latter form of proof, the State clearly has an in-

Therefore, in support suits by illegitimate children more than in support suits by legitimate children the State has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions on the former than it imposes on the latter. Such restrictions will survive equal protection scrutiny to the extent they are substantially related to a legitimate state interest. See *Lalli v. Lalli*, *supra*, at 265; *Trimble v. Gordon*, *supra*, at 767; *Mathews v. Lucas*, 427 U. S. 495, 510 (1976).⁵ The State's interest in avoiding the litigation of stale or fraudulent claims will justify those periods of limitation that are sufficiently long to

terest in litigating claims while the evidence is relatively fresh.

This interest is particularly real under Texas procedures. Texas law requires that putative fathers submit to blood tests. Code § 13.02. Refusal to submit to the tests may result in a citation for contempt, Code § 13.02(b), and may be introduced to the jury as evidence that the putative father has not been biologically excluded from the class of possible fathers. Code § 13.06(d). The results of the blood tests are introduced at a pretrial conference held for the purpose of dismissing the complaint if the father has been excluded by the tests from the class of possible fathers. Code §§ 13.04, 13.05(a). Thus, the only paternity cases which actually go to trial in Texas are those in which the putative father has refused to submit to blood tests or has not been excluded by their results, cases in which conventional types of evidence are of paramount importance.

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present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims.

The equal protection analysis in this case, therefore, focuses on two related requirements. First, the period for obtaining support granted by Texas to illegitimate children must be sufficiently long in duration to present a reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims. Applying these two requirements to the one-year right granted by Texas, we find a denial of equal protection.

By granting illegitimate children only one year in which to establish paternity, Texas has failed to provide them with an adequate opportunity to obtain support. Paternity suits in Texas "may be brought by any person with an interest in the child," Code § 11.03, but during the child's early years will often be brought by the mother. It requires little experience to appreciate the obstacles to such suits that confront unwed mothers during the child's first year. Financial difficulties caused by child-birth expenses or a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within twelve months of birth. Even if the mother seeks public financial assistance and assigns the child's support claim to the State, it is not improbable that twelve months would elapse without the filing of a claim. Several months could pass before a mother finds the need to seek such assistance, takes steps to obtain it, and is willing to join the State in litigation against the natural father.⁶ A sense of the inad-

⁶ See note 2, *supra*.

equacy of this one-year period is accentuated by a realization that failure to file within twelve months "results in illegitimates being forever barred from the right to sue their natural father for child support," *In the Interest of Miller*, 605 S.W. 2d, at 334, while legitimate children may seek such support at any time until the age of eighteen.⁷

Moreover, this unrealistically short time limitation is not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims. In *Gomez* we recognized that the problems of proof in paternity suits "are not to be lightly brushed aside," but held that such problems do not justify a complete denial of support rights to illegitimate children. 409 U. S., at 538. Neither do they justify a period of limitation which so restricts those rights as effectively to extinguish them. We can conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of twelve months will appreciably increase the likelihood of fraudulent claims.⁸

Accordingly, we conclude that the one-year period for establishing paternity denies illegitimate children in Texas

⁷The Texas Family Code imposes no period of limitation on the right of a legitimate child to obtain support from its father, a right which lasts until the child is eighteen years old. Code § 14.05(a). Although Texas law includes a four-year limitations period applicable to "[e]very action . . . for which no limitation is otherwise prescribed," Tex. Rev. Civ. Stat. § 5529, the running of that period is tolled during minority. Tex. Rev. Civ. Stat. § 5535. See also *In the Interest of Miller*, *supra*, at 334.

⁸Appellee contends that the one-year limitation of § 13.01 also is justified by the State's "interest in the continuation of the institutions of family and marriage" and the avoidance of any state actions that would "discourage either institution or . . . encourage persons to have children out of wedlock." Brief for Appellee 21. Important as such a state interest might be, we have repeatedly held that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Casualty & Surety Co.*, 406 U. S., at 175. See also *Lalli v. Lalli*, 439 U. S., at 265; *Trimble v. Gordon*, 430 U. S., at 769-770; *Mathews v. Lucas*, 427 U. S., at 505.

the equal protection of law.⁹ The judgment of the Texas Court of Civil Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

⁹The restrictions imposed by States to control problems of proof, like the restriction imposed by Texas in this case, often take the form of statutes of limitation. "Statutes of limitation find their justification in necessity and convenience rather than in logic. . . . They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp. v. Donaldson*, 325 U. S. 304, 314 (1945). Because such statutes "are by definition arbitrary," *id.*, they are best left to legislative determination and control. Normally, therefore, States are free to set periods of limitation without fear of violating some provision of the Constitution. In this case, however, the limitation period enacted by the Texas legislature has the unusual effect of emasculating a right which the Equal Protection Clause requires the State to provide to illegitimate children.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 16, 1982

Re: 80-6298 - Mills v. Habluetzel

Dear Bill,

I join your latest circulation.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 18, 1982

✓

RE: No. 80-6298 Mills v. Habluetzel

Dear Bill:

If I haven't already, this is to formally join
your opinion in the above.

Sincerely,

Bill

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

✓
February 18, 1982

Re: No. 80-6298 - Mills v. Habluetzel

Dear Bill:

I shall wait to see what Sandra has to say in
this case.

Sincerely,

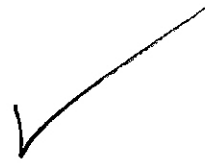
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Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE



February 25, 1982

Re: No. 80-6298 - Mills v. Habluetzel

Dear Bill:

I join your February 12 proposed opinion.

Regards,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL


February 25, 1982

Re: No. 80-6298 - Mills v. Habluetzel

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Rehnquist

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: **MAR 26 1982**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-6298

LOIS MAE MILLS, APPELLANT *v.*
DAN HABLUETZEL

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS,
THIRTEENTH SUPREME JUDICIAL DISTRICT

[March 26, 1982]

JUSTICE POWELL, concurring in the judgment.

I join Part I of Justice O'Connor's concurring opinion, but do not join the Court's opinion. I am concerned, for the reasons persuasively stated by Justice O'Connor, that the Court's opinion may be read as prejudging the constitutionality of longer periods of limitations. As she observes, it is significant "that a paternity suit is one of the few Texas causes of action not tolled during the minority of the plaintiff." *Post*, at 3.

Supreme Court of the United States
Washington, D. C. 20543

March 26, 1982

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Re: No. 80-6298 - Mills v. Habluetzel

Dear Sandra:

Please join me in your separate concurring opinion.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 27, 1982

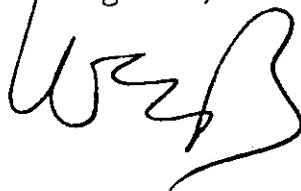
Re: No. 80-6298 - Mills v. Habluetzel

Dear Sandra:

This is a case where a concurrence serves a useful purpose and I join you.

I have already joined Bill's opinion.

Regards,

A handwritten signature in dark ink, appearing to be 'W. O'Connor', written in a cursive style.

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 29, 1982

RE: No. 80-6298 Mills v. Habluetzel

Dear Sandra:

I too join your concurrence in the above.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

✓

April 1, 1982

Re: 80-6298 - Mills v. Habluetzel

Dear Bill:

In order to simplify your problem in announcing the disposition in this case, I have decided to withdraw my separate writing.

Respectfully,

Jh

Justice Rehnquist

Copies to the Conference

500

TPS

[illegible]