Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children

Gloria J. Banks
TRADITIONAL CONCEPTS AND
NONTRADITIONAL CONCEPTIONS: SOCIAL
SECURITY SURVIVOR’S BENEFITS FOR
POSTHUMOUSLY CONCEIVED CHILDREN

Gloria J. Banks*

PROLOGUE: THE HART CASE

On June 4, 1991, a baby girl named Judith Christine Hart was
born to Nancy Young Hart and the late Edward W. Hart, Jr. The
child would never know her father because she was conceived by
gamete intrafallopian transfer three months after his death, as he lay
in his grave.¹

Almost one year later, Nancy Hart applied for social security
survivor’s benefits for her daughter based upon the earnings of her

* Associate Professor of Law, Widener University School of Law. The
author wishes to thank the competent assistance and legal research of students
Sandra Thompson, Angela Haynes, and Joan Balderamos. Invaluable com-
ments and review were also provided by Professors Robert Hayman, John Ge-
did, Randy Lee, Anthony Fajfar, and Kevin Hopkins.

¹ See Plaintiff’s Second Amended Complaint at 5, Hart v. Shalala (E.D.
La. 1994) (No. 94-3944) (on file with Loyola of Los Angeles Law Review). For
explanations and discussions on posthumous conception and its treatment by
the law, see Ronald Chester, Freezing the Heir Apparent: A Dialogue on
Postmortem Conception, Parental Responsibility, and Inheritance, 33 HOUS.
L. REV. 967, 972-79 (1996); Robert J. Kerekes, My Child . . . But Not My Heir:
Technology, the Law, and Post-Mortem Conception, 31 REAL PROP. PROB. &
TR. J. 213 (1996); Kathryn Venturatos Lorio, From Cradle to Tomb: Estate
Planning Considerations of the New Procreation, 57 LA. L. REV. 27 (1996); Laurence C. Nolan, Posthumous Conception: A Private or Public Matter?, 11
BYU J. PUB. L. 1 (1997); Michael H. Shapiro, Illicit Reasons and Means for
Reproduction: On Excessive Choice and Categorical and Technological Im-
peratives, 47 HASTINGS L.J. 1081, 1127-32 (1996); Helene S. Shapo, Matters
of Life And Death: Inheritance Consequences of Reproductive Technologies,
25 HOFSTRA L. REV. 1091, 1158-60 (1997); Ellen J. Garside, Comment, Post-
humous Progeny: A Proposed Resolution to the Dilemma of the Posthumously
deceased husband. By opinion letter dated November 17, 1993, the Social Security Administration denied her claim. It determined that under relevant federal and Louisiana law, Judith was not Edward’s legal child based upon several grounds. First, because Judith did not qualify as her father’s heir for intestacy purposes under Louisiana law, she could not meet the requirements of the Social Security Act (Act), which provides that when “determining whether an applicant is the child . . . of an individual . . ., the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual . . . was domiciled at the time of his death.”

Under Louisiana’s intestate succession laws, qualifying heirs were limited to those persons alive at the time of the decedent’s death or born within at least 300 days thereafter. Judith failed to meet either requirement because she was born thirteen months after her biological father’s death. As such, she was not a legal heir of his estate, and was therefore preempted from qualifying for social security survivor’s benefits under this provision of the Act.

Second, Judith was also legally considered an illegitimate child because she was born more than 300 days after the dissolution of her parents’ marriage at her father’s death. As an illegitimate child, Judith had to prove filiation within one year after the death of her father. She was unable to meet this time requirement because she was only ten days old at the time the statute of limitations expired in her case, no birth certificate was available, and Mrs. Hart was unable to file a petition while recovering from childbirth.

2. See Plaintiff’s Second Amended Complaint at 6, Hart (No. 94-3944).
6. See Plaintiff’s Second Amended Complaint at 6, Hart (No. 94-3944).
7. See LA. CIV. CODE ANN. arts. 178-180, 184 (West 1993); id. art. 185 (West 1991); see also Lambert v. Lambert, 164 So. 2d 661, 664 (La. Ct. App. 1964) (stating that the presumption of paternal parentage is rebutted if the child is born more than 300 days after the dissolution of the couple’s marriage).
8. See LA. CIV. CODE ANN. art. 209 (West 1997).
9. See Plaintiff’s Second Amended Complaint at 10, Hart (No. 94-3944);
Finally, Judith was unable to prove her paternity by showing that her father acknowledged her, prior to his death, as his biological daughter either under the laws of Louisiana, or under other relevant provisions of the Act. Social Security officials acknowledged that it was a biophysical impracticality under existing law for Judith to prove her father’s acknowledgment because she was in a frozen embryonic state when he died.

The circumstances of Judith’s birth had never been contemplated by the drafters of the relevant legislation. Thus, extant federal and Louisiana statutes were ill-equipped to address her nonconventional conception and birth under traditional administrative or jurisprudential protocol. Judith’s conclusive proof of her biological paternity was the only vehicle providing her a probable constitutional

---

see also Sudwischer v. Estate of Hoffpaur, 589 So. 2d 474, 476 (La. 1991) (recognizing an illegitimate child’s constitutional right to prove filiation to deceased father); Malek v. Yekani-Fard, 422 So. 2d 1151, 1154 (La. 1982) (holding that an action to prove filiation can be brought before the child is born).

10. See Plaintiff’s Second Amended Complaint at 6, Hart (No. 94-3944). Louisiana has at least two means of establishing paternity: (1) showing that the mother and putative father were married at the time the child was conceived; and (2) showing that the father legitimized the child as his own by acknowledging so in a notarial act. See LA. CIV. CODE ANN. arts. 184, 185 (West 1991); id. art. 200 (West 1993). The mere placement of the father’s name on the child’s birth certificate by others without the father’s accompanying signature is insufficient to prove legal acknowledgment in Louisiana. See In re Wildeboer, 406 So. 2d 687, 691 (La. Ct. App. 1981); In re Succession of Brown, 522 So. 2d 1382, 1385 (La. Ct. App. 1988); see also LA. CIV. CODE ANN. art. 203 (West 1993) (defining legal acknowledgement).

11. Pursuant to 42 U.S.C. §§ 416(h)(3)(C)(i)-(III) (1994), there are several ways in which a putative father can acknowledge paternity, such as the father’s written acknowledgment that the child is his own, or a court decree entered prior to the father’s death establishing paternity or ordering child support on behalf of the child. The only other means of establishing paternity for purposes of qualifying for survivor death benefits under the Act is a showing that the deceased was in fact the biological father and that he resided with the child or contributed to the child’s support at the time of his death. See id. § 416(h)(3)(C)(ii). Cf. Jimenez v. Weinberger, 417 U.S. 628, 635 (1974) (stating that legitimate children qualify for survivor’s benefits even if the deceased did not live with or support the children at the time of death).

12. See Plaintiff’s Second Amended Complaint at 5, Hart (No. 94-3944).

nexus for securing her entitlement to benefits based upon her deceased father’s work history and earnings record.\footnote{14} At the administrative level, the hearing officer awarded both Judith and her mother survivor’s benefits based upon Judith’s biological connection with her father.\footnote{15} The hearing officer interpreted evidence showing that Mr. Hart had, on at least one occasion, contemplated the prospect of his wife’s posthumous conception of his child by artificial insemination,\footnote{16} and of his assignment to his wife of the rights to use his sperm as sufficiently establishing his intent to acknowledge paternity and his support of any posthumous child resulting from his wife’s artificial insemination.\footnote{17}

The Appeals Council of the Social Security Administration overturned the hearing officer’s opinion because the officer had failed to apply proper law. The Council did adopt the hearing officer’s findings that Judith was Mr. Hart’s biological daughter, and that he had donated his sperm to his wife for whatever use she chose after his death. The Council did not, however, opine that these facts substantiated a conclusive finding that Mr. Hart intended to father and acknowledge children posthumously conceived by his wife. The Council concluded that Judith, albeit Mr. Hart’s biological child, did

\footnote{14}{ See infra Part IV.  
15. The hearing officer relied primarily on Smith ex rel. Sisk v. Bowen, 862 F.2d 1165 (5th Cir. 1989) (citing Mills v. Habluetzel, 456 U.S. 91 (1982)) and Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982). These affiliation cases recognized the constitutionally protected right of illegitimate children, under the United States Constitution’s Equal Protection Clause, to prove paternity of a parent within a reasonable time period. The hearing officer also based his decision on his prediction that the highest court of Louisiana would have ruled in favor of Judith’s paternity for intestacy purposes under Louisiana law if the particular circumstances had allowed her to do so within the one year statutory time frame. See In re Hart, at 10 (Soc. Sec. Admin. Office of Hearings & Appeals Mar. 27, 1995) [hereinafter Soc. Sec. Admin. Hearings Office Decision] (on file with Loyola of Los Angeles Law Review).  
16. The hearing officer also emphasized the fact that Judith’s family and friends recognized her as Mr. Hart’s daughter. See Soc. Sec. Admin. Hearings Office Decision, at 3. He further stated that “[t]he record indicates that no heir or legatee who held an interest in the succession of the wage earner would be reduced as filed to contest or to otherwise oppose the claim affiliation on the part of Judith Christine Hart pursuant to Article 207 of Louisiana Civil Code (Rev. 1870).” Id.  
17. See id. at 7.}
not meet the threshold statutory requirement of being a child who was dependent upon her father at the time of his death.

On March 11, 1996, before the United States District Court for the Eastern District of Louisiana, Social Security Commissioner Shirley S. Chater announced that survivor’s benefits would be paid to Judith Hart upon return of the case from the court to the Social

---

18. The Council’s written decision nicely summarizes ten relationships which could qualify a child for benefits from a wage earner:

1. A natural legitimate child is a child who was born of a valid marriage of the worker ([42 U.S.C.] section 216(h)(2)(A)).

2. A natural child of the worker who was born outside of a marriage but the child could inherit the worker’s intestate personal property under State law ([42 U.S.C.] section 216(h)(2)(A)).

3. A natural child of the worker who was born outside of a marriage but was legitimated under State law by an act(s) of the worker ([42 U.S.C.] section 216(h)(2)(A)).


5. A natural child of the worker who was born of a void or voidable marriage ([42 U.S.C.] section 216(h)(2)(B)).

6. A natural child of the worker who was born outside of a marriage but the worker has either acknowledged in writing that the child is his son or daughter; or been decreed by a court to be the father of the child; or been ordered by a court to contribute to the child’s support because the child is his son or daughter; or was either living with the child or contributing to the child’s support at the time the application for child’s insurance benefits was filed or at the time of the worker’s death ([42 U.S.C.] section 216(h)(3)(C)).

7. A child who was legally adopted by the worker. In addition, a child or grandchild who was legally adopted after the worker’s death by his or her surviving spouse ([42 U.S.C.] section 216(e)).

8. A stepchild if, after the child’s birth, his or her natural or adopting parent married the worker, inclusive of step-relationships created by an invalid ceremonial marriage ([42 U.S.C.] section 216(e)).

9. A grandchild or step-grandchild if the child is the natural child, adopted child, or stepchild of a person who is the worker’s child and if the child’s parents are either deceased or under a disability ([42 U.S.C.] section 216(e)).

10. An equitably adopted child of the worker, i.e., a child whom the worker agreed to adopt but no legal adoption actually occurred ([42 U.S.C.] section 216(h)(2)(A)).

Security Administration. The Commissioner stated that the review and resolution of the significant public policy issues raised in Hart, in light of "[r]ecent advances in modem medical practice, particularly in the field of reproductive medicine, . . . should involve the executive and legislative branches, rather than the courts." 19 This Article is written in response to Commissioner Chater's plea for the enactment of such legislation.

I. INTRODUCTION

This Article will discuss the legal, ethical and moral issues raised in the Judith Hart case as they relate to the determination of paternity and social security survivor's benefits of posthumously conceived children. The uncertainty of the rights and status of this newly created class of children is a direct consequence of the advancements in medical technology that have made tremendous inroads in assisted reproduction in the last ten years. 20 These inroads have plagued the legal community with a myriad of novel issues and controversies that, before this time, could never have been contemplated by lawmaking bodies. 21 The combination of the long existing process of artificial insemination 22 with recently developed reproductive techniques 23 has all but made noncoital human reproduction

---

20. See EUGENE B. BRODY, BIOMEDICAL TECHNOLOGY AND HUMAN RIGHTS 63-96 (1993) (discussing the impact of reproductive technology on American and international social and cultural systems as they relate to parenting, gender and reproductive human rights).
21. See Lorio, supra note 1, at 27-29, 48-50. Some of these controversies range from the determination of the legal status of children born from such innovative technology and include the evaluation of parental prerogatives such as custody, paternity, child support and the like. Ultimately, modern reproductive technology has caused the legal community to more closely scrutinize the meaning, beginning, and ending of human conception, birth, life, and death.
22. Artificial insemination is defined as "the introduction of semen into the vagina other than by coitus." STEDMAN'S MEDICAL DICTIONARY 876 (26th ed. 1995). Semen which is supplied in artificial insemination by a "donor who is not the woman's husband" is referred to as heterologous insemination, whereas homologous insemination refers to artificial insemination which utilizes the woman's husband's semen. See id.
23. One of the most popular techniques is cryopreservation, which consists of the freezing of human semen, ova, and embryos at very low temperatures
survivor's benefits

an everyday occurrence. Unfortunately, as seen in Hart, the rapid growth of this technology has continued to outpace the regulatory response of government.

The increase in the use of assisted reproduction is due largely to the development of the process of cryogenetical “freezing” of human concepti. The cryogenetical preservation of gametes grants gamete providers the luxury of postponing their final decision to procreate to some later, more convenient and advantageous time. Ultimately, these processes provide prospective biological parents with the opportunity to determine whether or when they would like to participate in the gestational development of future children. Should a couple decide to wait until either or both of the progenitors have died to conceive by artificial reproductive means, the resulting child’s legal status may be uncertain, severely limiting any accompanying rights based upon the parent-child relationship.

This paper raises the query of whether social security survivor’s benefits should be made available to children who are posthumously

for extended periods of time once extracted from the donor source. See Monica Shah, Comment, Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception, 17 J. LEGAL MED. 547, 550 (1996). Eugene B. Brody also discusses political and social implications in the development of reproductive techniques such as: surrogate embryo transplantation, “the removal by uterine lavage of the fertilized egg a few days after artificial insemination of a surrogate mother, and its transfer to the uterus of the ‘wish mother’”; gamete intrafallopian transfer, “transferring ova and sperm by catheter to the Fallopian tubes where fertilization may take place”; and in vitro fertilization, “fertilization outside of [the] body.” BRODY, supra note 20, at 90, 93. See infra Part II.A for a detailed discussion and explanation of these and other techniques.


conceived. This evaluation requires an examination of posthumous conception, the parental prerogatives related thereto and finally, a determination of whether Congress ever intended to include such children as beneficiaries of social security survivor’s insurance. In any event, this evaluation requires an inquiry into whether the intentional or unintentional exclusion of such children is constitutionally permissible pursuant to principles of due process and equal protection under the United States Constitution. This Article provides several approaches which would alleviate any existing constitutional impediments by suggesting that the Act be interpreted or amended so as to minimally afford this newly created class of children the opportunity to qualify for survivor’s benefits.

Posthumous conception is the beginning of the human gestational process after the death of one or both biological parents. Employment-related death benefits such as social security insurance, along with inheritance, are often the primary financial means available to support such orphaned children. The posthumously conceived child’s ability to receive survivor’s benefits hinges upon whether they can prove legal paternity and actual or statutory presumptive dependency on a deceased wage earning parent. The Social Security Administration’s first official attempt at resolving this statutory interpretive issue on behalf of Judith Hart resulted in an executive compromise because the legislature did not enact the Act with these children in mind.

A literal interpretation of the Act provides only one plausible, albeit unlikely, means for most posthumously conceived children to qualify for survivor’s benefits. The Act presumes paternity and


28. See supra Prologue.
dependency of applicants who qualify as heirs under the intestate laws of the deceased parent's state of domicile.\textsuperscript{29} Unfortunately, only a few states have legislation addressing the inheritance rights of posthumously conceived children.\textsuperscript{30} Actual dependency can also be proven by a showing that the child applicant was either living with or supported by the worker at death.\textsuperscript{31} Because of the timing of the posthumously conceived child's conception and birth, they are usually unable to establish either of these dependency standards.\textsuperscript{32}

Two approaches can resolve this legislative paucity. One approach is to embark upon a nationwide campaign to adopt a Uniform Rights of Posthumous Conceived Children Act,\textsuperscript{33} while the other approach is to amend state paternity and inheritance laws throughout the country.\textsuperscript{34} The latter approach is unlikely to occur in a timely and uniform manner due to the unique and rather individualized public policy platforms, legislative reform agendas, and political climates facing each jurisdiction. This is most evident when considering the current administrative nightmare Social Security officials struggle to overcome by unraveling the massive web of inconsistent state inheritance and paternity laws that are so heavily relied upon in child survivor's claims.\textsuperscript{35} The Act's presumptive deference to local law is no longer an appropriate means in determining the outcome of survivor's benefits that are provided by a national social insurance program.\textsuperscript{36} A more exacting standard would be for Congress to amend the Act so that it expressly addresses the relational status of such children.\textsuperscript{37}

\textsuperscript{29} See Mathews v. Lucas, 427 U.S. 495, 495-97 (1976); Haas v. Chater, 79 F.3d 559, 564 (7th Cir. 1996); Wolfe v. Sullivan, 988 F.2d 1025, 1027 (10th Cir. 1993).
\textsuperscript{30} See infra Part II.C.1.
\textsuperscript{31} See infra Part III.B.
\textsuperscript{32} See Mathews, 427 U.S. at 500-01; Haas, 79 F.3d at 563-65; Wolfe, 988 F.2d at 1025, 1028-29.
\textsuperscript{33} See Thies, supra note 26, at 922.
\textsuperscript{34} See McAllister, supra note 25, at 100-12; Garside, supra note 1, at 731-34.
\textsuperscript{35} See infra Part IV.
\textsuperscript{36} See infra Part IV.
\textsuperscript{37} It is possible that nontraditional reproductive activities have caused the substance of Congress' delegation of administrative power and rule making authority under the Act to become unintelligible in identifying whether this
Judicial intervention has helped to establish the legislative intent and constitutional boundaries of the Act’s class restrictive provisions. Historically, the Act has been amended and broadly interpreted so as to award benefits to qualified applicants whenever possible.38 Courts construing the legislative purpose of survivor’s provisions have consistently recognized that:

[the expansive inclusion of related individuals illustrates the Act’s goal to help and protect aged and disabled persons and their families against the financial burden of illness and old age and helps achieve the Act’s goal to keep families together and to give children the opportunity to grow up in health and security.39

In light of the current bleak political outlook for the social security program, this expansive trend may jettison into a more conservative approach when providing coverage to the families of deceased qualified workers.40

A denial of death benefits based solely on the timing of one’s birth might seem constitutionally impermissible. Survivor’s insurance, however, under public employment-related programs like newly created class of individuals are to benefit from social insurance. Moreover, congressional action as a source of determinative relief assures the integrity of democratic representational overtures essential in our country’s political framework. Amending the Social Security Act is also the better approach in resolving this matter in light of the Administration’s preemptive jurisdiction over state court decisions. Although the Social Security Administration must apply the laws of the wage earner’s domicile, it is not required to give full faith and credit to a state court decree deciding the relational status between the wage earner and a particular applicant. See generally Gray v. Richardson, 474 F.2d 1370 (6th Cir. 1973) (holding that the Social Security Administration should have followed the state court determination that the deceased was the father of plaintiff’s daughter).

38. See STANSBURY, supra note 27, at 2.
39. See id. at 14. See generally Mathews, 427 U.S. at 495 (discussing the statutory classification of children entitled to survivor’s benefits).
40. See SHERYL R. TYNES, TURNING POINTS IN SOCIAL SECURITY: FROM “CRUEL HOAX” TO “SACRED ENTITLEMENT” 155-93 (1996); SOCIAL SECURITY’S LOOMING SURPLUSES: PROSPECTS AND IMPLICATION (Carolyn L. Weaver ed., 1990); see also Teresa Tritch, Cast Your Vote On Social Security, MONEY, Dec. 1996, at 96 (stating that “[a]ccording to a 1996 report of the Social Security Trustees, starting in just 16 years—2012—the taxes paid into Social Security will no longer cover the benefits going out, as millions of baby boomers begin retiring”).
social security and worker’s compensation, is conceptually different than benevolent government funded public welfare programs which aid all qualified, needy families. The Supreme Court has interpreted the legislative intent of survivor’s benefits as simply to replace “lost” income the child would have continued to receive but for the death of the wage earner. This interpretation has led to the understanding that “Congress is not obligated to provide benefits for every individual who might conceivably have been dependent on the wage earner for support.”

Amending the Act requires adherence to extant constitutional parameters set by the Supreme Court in cases dealing with the classification of children based upon their relational status with a parent.

41. See STANSBURY, supra note 27, at 2.
43. Id.
44. See Ralph C. Brashier, Children and Inheritance in the Nontraditional Family, 1996 UTAH L. REV. 93, 105-13 & n.35 (discussing in detail three major Supreme Court Cases addressing the inheritance rights of nonmarital children). The three cases discussed by Brashier, Reed v. Campbell, 476 U.S. 852 (1986), Lalli v. Lalli, 439 U.S. 259 (1978) (plurality opinion), and Trimble v. Gordon, 430 U.S. 762 (1977), all dealt with state statutes which limited the rights of nonmarital children from inheriting from their biological fathers’ estates under intestate laws. The author provides a chronological listing of the twelve cases leading up to these three. Of the twelve listed, five cases were social security-related cases which will be addressed later in this Article. Cases based upon claims against the constitutionality of the Act as applied to illegitimate children are as follows: Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md. 1972), aff’d, 409 U.S. 1069 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn. 1972), aff’d, 409 U.S. 1069 (1972).

A number of other constitutional issues involved in determining the legal status and entitlement rights of posthumously conceived children will not be addressed in this Article. Potential progenitors argue that their decision to procreate by artificial means, even after death, is an exercise of their constitutionally protected liberty interests and choices in private matters concerning the family. This raises the issue of whether there is a constitutional right to transmit ones’ gametes after death. See Chester, supra note 1, at 979-82; Shapiro, supra note 1, at 1127-29. This then raises the unique question of whether such fundamental rights should be afforded protection beyond a person’s lifetime in the context of posthumous conception. It is unlikely that the Supreme Court will recognize the protection of so-called postmortem fundamental privacy rights in dead persons. Instead, mainstream constitutional discourse should fo-
Equal protection guarantees under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution,\textsuperscript{45} restrict Congress and states from making or enforcing laws that treat similarly situated individuals differently based upon the circumstances of their birth, such as the timing,\textsuperscript{46} the reproductive technique employed,\textsuperscript{47} and the marital status of the progenitors.\textsuperscript{48} Posthumously conceived children are de facto nonmarital children because their parents’ marital union dissolves at either spouse’s death.\textsuperscript{49} Equal protection concerns are clearly implicated in attempting to make such class-based determinations under the Act.\textsuperscript{50} There are, however, interposed socio-political ramifications inherent in considering whether congressional actions are constitutionally permissible.

American jurisprudential history and cultural traditions have often played pivotal roles in determining the constitutionality of laws that have class-based restrictive provisions.\textsuperscript{51} Over the past twenty years, the legal system has slowly overturned impermissible discriminatory laws motivated by institutionalized traditional bias against nonmarital children, mandating that they be accorded the

cus primarily on the affected rights of survivors such as the after-conceived child, the conceptus recipient, the intended custodial parents, and other surviving relatives.

Posthumous conception also calls forth the controversy of whether the right to inherit and transmit one’s property after death is a civil or natural right. In the rather obscure 1987 case of \textit{Hodel v. Irving}, 481 U.S. 704 (1987), the Supreme Court embraced the concept that the nature of inheritance implicates some constitutional safeguards. Should inheritance rights garner further constitutional kinship in future decisions, states’ ability to forestall inheritance rights of after-conceived children will be greatly impeded. Statutorily created probate time restrictions based upon a state’s interest in the orderly distribution of the intestate estates of dead persons may no longer past constitutional muster. \textit{See} Chester, \textit{supra} note 1, at 979-82; Nolan, \textit{supra} note 1, at 14-19.

\textsuperscript{45} U.S. CONST. amends. V, XIV.

\textsuperscript{46} \textit{See} Garside, \textit{supra} note 1, at 717-23.

\textsuperscript{47} \textit{See} Shapiro, \textit{supra} note 1, at 1099-1100.

\textsuperscript{48} \textit{See} Gilbert, \textit{supra} note 25, at 539-40.

\textsuperscript{49} \textit{See infra} Part IV.B.1.b.iii.

\textsuperscript{50} \textit{See generally} Brashier, \textit{supra} note 44, at 105-13 (providing a brief history of modern Supreme Court cases challenging discrimination against nonmarital children).

\textsuperscript{51} \textit{See infra} Part IV.C.4.
same rights, benefits and legal status as marital children.\textsuperscript{52} All jurisdictions now provide some statutory means of establishing paternity and inheritance rights of nonmarital children born or conceived prior to the death of a putative parent.\textsuperscript{53}

Posthumously conceived children are a newly created class of nonmarital children whose rights, entitlements, and status remain unsettled.\textsuperscript{54} As tradition would have it, these children are conceived by nonconventional reproductive techniques and practices which have no history in the archives of normative familial or procreative infrastructures. Assuring the equal protection of laws for such after-conceived children may therefore necessitate progressive judicial activism premised on moral and ethical principles of fair treatment.\textsuperscript{55} Otherwise, it would seem pragmatic to simply statutorily extend survivor’s benefits to a qualifying, deceased worker’s surviving children, irrespective of the parent’s reproductive choice or marital status.\textsuperscript{56} Unfortunately, posthumously conceived children, like

\textsuperscript{52} See Brashier, supra note 44, at 105-13.

\textsuperscript{53} See id.; see also Trimble v. Gordon, 430 U.S. 762 (1977) (discussing the Illinois statute giving legitimate status to illegitimate children who are acknowledged by their fathers after their parents inter-marry).

\textsuperscript{54} In both Hart v. Shalala (E.D. La. 1994) (No. 94-3944) and Hecht v. Superior Court, 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275 (1993), the courts never reached the determination of what the paternity status of the respective posthumously conceived children would be to their predeceased parents for inheritance and social security survivorship insurance purposes. Only a few courts have addressed these issues as they apply to after-conceived children. Neither Congress, nor any judicial body, has directly addressed the paternity status and resulting entitlement rights of this emerging class of children.

\textsuperscript{55} See infra Part IV.B.

\textsuperscript{56} Under section 4 of the Uniform Parentage Act, a presumption of paternity arises for children who are born within 300 days after the death of a putative parent who was married to the mother of the child at death. See UNIF. PARENTAGE ACT § 4(a)(1), 9B U.L.A. 298 (West 1987). All states have statutorily recognized the paternity of children who are conceived prior to a parent’s death, but born within at least 280 days thereafter. For a list of statewide statutes which provide for the traditional posthumous child and other qualified relatives who are conceived prior to the decedent’s death, but born alive thereafter, see Nolan, supra note 1, at 30 n.179. The author also identifies the survivorship benefits which are available to the traditional posthumous child under state worker’s compensation laws. See Nolan, supra note 1, at 29 n.177. See also Byerly v. Tolbert, 108 S.E.2d 29 (N.C. 1959) (discussing whether a child in gestation for over 10 months and born 322 days after the death of the father was the legal child of the deceased). Virtually every state
Judith Hart, are practically unable to establish their requisite legal status under the Act. The very nature of posthumous conception has created this legal vacuum. Who would think that individuals would ever desire or be able to conceive a child from the grave? Laws simply have not kept up with medical technology and ever-changing public sentiment. Yet, posthumous conception is not just a technological mishap with a dim and bleak future. In an age of human cloning, abortion by pill, wombs for rent, and even male birth moms, posthumous conception may represent only a glimpse of the legislative challenges on the horizon. Perhaps the greatest feat will be to reconcile socio-political agendas while balancing traditional family constructs with emerging nontraditional expressions of individual liberty within familial associations.

has also enacted pretermitted heir statutes which permit children born or adopted after the execution of a decedent's will to take a share of the estate. See, e.g., UNIF. PROBATE CODE § 2-302, 8 U.L.A. 135 (West 1998).

57. See infra Part IV.


59. See REBECCA CHALKER & CAROL DOWNER, A WOMAN'S BOOK OF CHOICES: ABORTION, MENSTRUAL EXTRACTION, RU-486, at 207-20 (1992) (discussing the French abortifacient drug, RU-486 also known as mifepristone, the first in a new category of drugs called antiprogestins which, among other actions, interfere with the production of progesterone, the hormone that supports and nurtures pregnancy). The identification and development of RU-486 began as early as 1968, but has yet to receive world-wide approval, especially in the United States. See id. at 213. See also ETIENNE-EMILE BAULIEU, THE "ABORTION PILL" RU-486: A WOMAN'S CHOICE 126-55 (1990) (providing a historical and political overview of the abortion pill in the United States).

60. See generally BRODY, supra note 20, at 90-91 (discussing surrogacy motherhood relationships where a noncustodial woman serves as a gestational host for an infertile couple). The womb for rent process may include artificial insemination of the surrogate with sperm from the custodial father or from a donor. See id. In vitro fertilization and embryo transfer are used to accomplish a true "womb rental" where the test tube fertilized embryo of the custodial parents is transferred directly into the womb of the host surrogate. See id. Since 1978, over 20,000 live births have resulted from such technology. See id.

61. See generally Celestine Bohlen, Almost Anything Goes in Birth Science in Italy, N.Y. TIMES, Apr. 4, 1995, at A14 (discussing the theoretical possibility of male pregnancy).
This Article will begin by describing, in rather technical terms, the medical technology and biophysical qualities of human reproduction which make posthumous conception possible. Some rather intriguing uncertainties arise from society’s use of reproductive techniques, requiring the reconsideration of once universally-settled law, such as whether a birth mother is a child’s legal mother. Similar issues were implicated in determining Judith Hart’s paternity, inheritance rights, and her survivor’s benefits. This Article will also discuss the following two queries resonating in Judith’s posthumous conception: (1) the determination of her legal status as frozen human concepti prior to implantation, and (2) the assignment of parental prerogatives to progenitors, such as her mother, who decide to procreate posthumously. These issues will be explored as addressed in prevailing jurisprudential fora and as implicated in the Act’s evolving definition of “children” and qualifying familial relationships.

Although significant legal discourse exists regarding inheritance rights of posthumously conceived children, scholars have only recently begun to consider whether such children should be entitled to survivor’s insurance. The Judith Hart case prompted a reevaluation of the legislative intent behind survivor’s benefits in social security legislation. Historically, courts interpreted the legislative purpose as purely humanitarian, aimed to support surviving children who were “dependent” upon the wage earner at the time of his death. It must now be determined whether posthumously conceived children are capable of being “dependent” upon a predeceased parent. Thus,

62. See infra Part II.A.
63. See generally Johnson v. Calvert, 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494 (1993) (holding that a surrogate mother, although the child’s birth mother, was not the legal mother of the child).
64. See infra Part II.C.
65. See infra Part II.C.
66. See infra Part II.C.
67. See supra note 1.
68. See id.
69. See Jimenez v. Weinberger, 417 U.S. 628, 634-35 (1974) (recognizing that the purpose of awarding social security survivorship benefits is to provide financial support for children who were dependent upon the deceased wage earner at his or her death).
70. The tests most often used to establish dependency require a showing that the deceased parent was living with the child claimant at his or her death.
the historical and political framework of social security in this country will be explored in order to understand the executive and congressional sentiment which motivated the Act's adoption sixty years ago.71 Next, existing social security programs will be examined generally to foster a contextual understanding of survivor's benefits. Finally, child survivor's insurance will be explored in greater detail to determine whether children conceived posthumously should be included in the class of survivor beneficiaries.

There are three approaches to addressing the posthumously conceived child's status under social security. The course of least resistance in maintaining the traditional status quo is simply to do nothing. This means that certain laws will soon be outdated in their ability to govern the legal conduct of the polity they were enacted to regulate. Such "slouching off" by elected legislative officials in traditional areas of immense public concern, such as procreation and

or a showing that the deceased parent supported the child during the deceased parent's life. See infra Part IV.B.1.b.iii. The dependency requirement under social security legislation is representative of the legislative intent supporting other types of employment-related child survivorship benefits under Veteran's Administration and Worker's Compensation legislation. See infra Part V.B.1.b.iii. The postmortem determination of a child's legal paternity for purposes of proving dependency is also critical in assuring that the child is provided the greatest degree of financial support from various sources based upon the lifetime activities of a predeceased, putative parent. See generally Sondra S. v. Jay O., 482 N.Y.S.2d 660, 662 (Fam. Ct. 1984) (holding that a paternity proceeding in New York was the appropriate forum to determine fatherhood by a predeceased man). The Sondra S. court explained its decision by stating that:

[1] The purpose of paternity proceedings has traditionally been 'to insure support for the child born out of wedlock and to provide a procedure for the government to obtain indemnification for the expense of supporting the child.'... While an order of filiation does not confer the status of legitimacy, it serves as a foundation upon which certain rights, interests and obligations of all parties may be based. ... An order of filiation determines rights of inheritance; the right to recover benefits under the New York Workers' Compensation Law, the Veterans' Benefits Act, and the Social Security Act; the right to recover serviceman's life insurance proceeds and a military allowance, the right to notice in adoption proceedings; and under the Family Court Act, the right to support by parents, custody or visitation, and an order of protection.

Id. (citations omitted).

71. See infra Part III.
familial relationships, threatens to undermine the majoritarian virtues of democracy.

A second approach calls forth judicial activism to reinterpret the congressional intent in enacting survivor’s insurance so as to expand its coverage to all children who suffer financial loss due to the death of a parent who has made qualified payments into the program. Enlisting courts to serve in this capacity may, however, have the counter-majoritarian effect of usurping public opinion and desires in areas typically reserved for deliberation in legislative representative forums.

Foremost, however, unleashed judicial restraint upon the wrong court or bench at the wrong time may result in an unpopular outcome which is the sole product of a judge’s own individual bias and preferences.

This Article promotes congressional response as the final and more workable approach in resolving the issues posed by Hart. The Act regulates a national insurance program created by Congress to promote the ongoing health and welfare of workers and their families by providing supplemental support upon their retirement, disability, or death. No local governing body or other branch of government should speak on behalf of Congress in matters so deeply immersed within its constitutionally derived authority. This Article suggests a reasonable approach in filling the posthumous conception legislative gap by urging Congress to enact an expanded view of dependency, as either a constructive or prospective determination. This approach more properly reflects the reproductive choices of parents who elect to conceive through modern day assisted reproduction.

II. MEDICAL, LEGAL AND POLITICAL STRATA IMPLICATED IN POSTHUMOUS CONCEPTION

A. An Overview of Assisted Reproductive Technology

Advancements in reproductive technology have consistently challenged traditional legal concepts governing the human gestational process. Assisted reproduction has become a viable

72. See infra Part IV.C.
73. See infra Part IV.C.
74. See infra Part V.
75. See BRODY, supra note 20, at 83.
alternative for many infertile couples seeking to have children of their own. In the United States alone, an estimated 2.3 million couples seek help for infertility every year. It has been reported that at least 40,000 of these infertile couples employ some type of assisted reproduction technique. The use of these techniques is on the rise. In 1985, there were 3,921 in vitro fertilization procedures performed in the United States. By 1993, the number had risen to 31,900. As the ranks of infertile couples grow steadily, they are also joined by fertile couples who decide, for whatever reason, against traditional coital reproduction.

It is essential to review the physiology of human gametes in order to understand the process of posthumous conception and to fully grasp the extent to which assisted reproductive techniques have progressed in recent years. The utilization of such techniques for reproduction purposes has led to problems in determining whether one's biological connection to a child is determinative in parental controversies. Courts often rely upon the biophysical characteristics of human gametes as well as upon the stage and manner of conception and the gestational processes in resolving the rather novel parental...
complexities resulting from nontraditional reproduction. Thus, this overview may help to further explicate the judicial reasoning of assisted reproductive cases discussed in this Article.

Prior to conception, human gametes consist of the female egg and male sperm. Spermatogenesis, the production of sperm, begins at age thirteen in the typical male adolescent and continues until death. It takes an average of seventy-four days to form a single mature sperm during this process. Intracytoplasmic Sperm Injection (ICSI) or Nonsurgical Sperm Aspiration may be used to


83. “Sperm,” also referred to as “spermatozoon” or “semen” is defined as “[t]he male gamete or sex cell that contains the genetic information to be transmitted by the male, exhibits autokinesia, and is able to effect zygosis with an ovum. The human sperm is composed of a head and a tail, the tail being divisible into a neck, a middle piece, a principal piece, and an end piece; the head, 4 to 6 μm in length, is a broadly oval, flattened body containing the nucleus; the tail is about 55 μm in length.” STEDMAN’S MEDICAL DICTIONARY, supra note 22, at 1644-45. “Egg,” also referred to as “ovum,” “oocyte” (immature ovum) or “ova” (plural of ovum) is characterized as “[t]he female sex cell. When fertilized by a spermatozoon, an ovum is capable of developing into a new individual . . . ; during maturation, the ovum, like the spermatozoon, undergoes a halving of its chromosomal complement so that, at its union with the male gamete, the species number of chromosomes (46 in humans) is maintained.” Id. at 1275.

84. See GUYTON, supra note 77, at 885.

85. See id. at 886.

86. ICSI involves the use of a microscopic pipette to inject a single sperm from a man’s ejaculate into an egg. The zygote is then returned to the uterus. Doctors perform approximately 1,000 of these procedures per year, with a 24 percent success rate, at a cost of $10,000 to $12,000 per attempt. See Begley, supra note 77, at 41. This process helps sluggish or low count sperm and is often used in conjunction with the latest technique of nonsurgical sperm aspiration, which removes immature sperm from male testes with a thin needle. See Gina Kolata, Revolution in Treating Infertile Men Turns Hopelessness to Parenthood, N.Y. TIMES, July 19, 1995, at C8.

87. The latest use of this technique has gone as far as removing immature sperm from male testes with a thin needle and fertilizing an egg with a single sperm. “Even men who have no sperm at all or only dead sperm in their ejaculate or men whose sperm cannot swim or cannot penetrate an egg may be
extract either mature sperm from the male ejaculate or immature sperm directly from the male testes for use in artificial insemination. Although the fertilization of an oocyte requires the penetration by only one sperm during sexual intercourse, a single ejaculate could contain more than 400 million sperm.

The average life span of expelled sperm depends largely upon the temperature to which it is exposed. Upon ejaculation, at normal body temperature, sperm can last between twenty-four and forty-eight hours. At freezing temperatures as low as minus 100 degrees Celsius, sperm can be stored in a frozen state for ten years or more. The process of cryopreservation, with the use of liquid nitrogen, permits this long term storage of sperm.

The female human body does not produce ova during the female’s post-birth lifetime. Oogenesis, the formation of ova, takes place during the fetal development of the female fetus. “At the thirtieth week of gestation, the number of ova reaches about 6 million; . . . about 1 million are present in the two ovaries at birth, and only 300,000 to 400,000 at puberty.” A woman’s normal reproductive capability begins at the onset of her monthly menstrual cycle, which normally occurs, during puberty, between the ages of eleven and sixteen.

On the fourteenth day of the typical woman’s cycle, ovulation facilitates the expulsion of one ovum, usually, from the ovarian

88. See Begley, supra note 77, at 41.
89. An ejaculate consists of semen, which “is composed of the fluid and sperm from the vas deferens . . . , fluid from the seminal vesicles . . . , fluid from the prostate gland . . . , and small amounts from the mucous glands. . . . [T]he bulk of the semen is seminal vesicle fluid, which is the last to be ejaculated and serves to wash the sperm out of the ejaculatory duct and urethra.” GUYTON, supra note 77, at 888.
90. See id. at 890. An ejaculate must usually contain more than 20 million sperm in order to penetrate the oocyte for fertilization. See id. Male infertility is often associated with a sperm count at or below this level. See id. at 889-90.
91. See id. at 888.
92. See id.
94. GUYTON, supra note 77, at 899.
95. See id. at 900. The normal range of the female sexual cycle is 28 days; irregularities in the length of the cycle may cause infertility. See id.
follicle into the uterus. Pregnancy occurs if the ovum is fertilized by at least one vital sperm present in the uterine cavity. The fertilized ovum then implants itself onto the uterine wall for fetal development within twenty-four hours after its expulsion from an ovary. Thus, in any given month, there are only one to three days during which a typical pregnancy can occur.

The use of fertility drugs and assisted reproductive techniques have permitted physicians to manipulate this time frame and to expand the number of pregnancies that can occur in a woman in any given month. The process of ovum aspiration is used to retrieve multiple eggs directly from the ovaries by using a hollow needle guided by an ultrasound image. The micromanipulation of oocytes facilitates the in vitro fertilization (IVF) of any such retrieved oocytes with sperm through reproductive techniques such as Intracytoplasmic Sperm Injection and Nonsurgical Sperm Aspiration. Upon the laboratory fertilization of gametes in petri dishes, either Gamete Intrafallopian Transfer (GIFT), Zygote Intrafallopian Transfer (ZIFT), or Surrogate Embryo Transplantation, can

---

96. See id. at 899.
97. See id.
98. See id. at 899-903.
99. See id. at 912.
102. In vitro fertilization involves combining an egg and sperm (forming an embryo) in a laboratory dish. See BRODY, supra note 20, at 90-92.
103. See supra note 86 and accompanying text.
104. See supra note 87 and accompanying text.
105. Gamete Intrafallopian Transfer involves the use of a laparoscope to insert eggs and sperm directly into a woman’s fallopian tube. Any resulting embryo floats into the uterus. Doctors initiate approximately 4,200 procedures each year, with a 28 percent success rate, at a cost of $6,000 to $10,000 per procedure. This process was used to conceive Judith Hart after her father’s death. See Begley, supra note 77, at 41.
106. In a two-step procedure, eggs are fertilized in the laboratory (IVF) and any resulting zygotes (fertilized eggs) are transferred to a fallopian tube. Approximately 1,500 of these procedures are performed each year, with a 24 percent success rate, at a cost of $8,000 to $10,000 per attempt. See Begley, supra note 77, at 41.
107. Surrogate Embryo Transplantation involves “[t]he removal by uterine lavage of the fertilized egg a few days after artificial insemination of a surro-
be used to insert the resulting conceptus into the uterus or fallopian tubes of the intended gestational host.

The fertilization of human gametes initially creates one two-cell entity whose medical name changes based upon its developmental stage and the continued division of its cells in the gestational process. After the earliest stage of fertilization, the union of the egg and sperm is called a zygote or preembryo. Shortly thereafter, the conceptus becomes an embryo. Eight weeks later, it becomes a fetus until birth.

During the first eight weeks of embryonic development, the process of cryopreservation can also be used to freeze unused embryos for future use. The cryopreservation of human embryos has become a routine procedure essential for use in procedures such as embryo transfer and in vitro fertilization. The freezing and the storage of human gametes and embryos through this process are crucial in facilitating posthumous conception. Posthumous conception is made possible when such concepti are frozen for the purposes of

gate mother, and its transfer to the uterus of the ‘wish mother.’” BRODY, supra note 20, at 93.

108. See generally STEDMAN’S MEDICAL DICTIONARY, supra note 22, at 559, 638, 1976 (defining an embryo, fetus, and zygote in relation to the gestational process).

109. See id. at 1976.

110. See id. at 559 (stating that embryogenesis, the process of establishing the characteristic configuration of the embryonic body, concludes by the end of the eight week).

111. See id. at 638 (describing a fetus as “the product of conception from the end of the eighth week to the moment of birth”).

112. The legal status and constitutional safeguarding of human conceptus has historically been based upon the stage of fetal development. The United States Supreme Court has, in its litany of abortion cases, conferred the greatest degree of protection upon viable fetuses. See Planned Parenthood of South-eastern Pa. v. Casey, 505 U.S. 833 (1992). The moral dilemma in assigning rights to human conceptus has exploded with the advent of assisted reproductive techniques. The Court’s reliance on viability is rather tenuous as technology threatens to expand fetal viability into the embryonic and zygote stages of human development. This, of course, hinges upon an even greater moral question of when life begins. Does life begin during the processes of spermatogenesis and oogenesis, at conception, during gestation, at birth, or did conceptual human life begin before the creation of the earth?

113. See BRODY, supra note 20, at 92.

114. See id.
fertilization or implantation into a gestational host after the death of the gamete provider.\footnote{15}

All of the reproductive procedures identified have, in some way, made possible the option of posthumous conception. These processes all aid in some stage of the extraction, fertilization, or implantation of conceptus in assisted reproduction.\footnote{16} When combined with the cryogenetical process, they make posthumous conception possible and have thus served as the impetus of the legal issues which this Article addresses.\footnote{17}

\section*{B. Defining the Legal Posture of Human Gametes and Parental Relational Prerogatives in Assisted Reproduction}

The use of assisted reproductive techniques challenges the legal community to define parental relationships and other prerogatives such as child custody, visitation and support.\footnote{18} The traditional

\begin{footnotes}
\footnote{15. See id. (discussing the process of cryopreservation).}
\footnote{16. See BRODY, supra note 19, at 92.}
\footnote{17. See supra Part I.}
\footnote{18. See, e.g., In re Baby M., 537 A.2d 1227 (N.J. 1988). In re Baby M. represents a traditional surrogacy case involving three possible sets of biological and legal parents. These sets include the biological father and his wife as the adoptive mother, the biological mother and her husband as the presumptive father under marital and paternity laws, and the intended custodial parents through adoption or some other legal or biological configuration. This case presented rare issues involving the paternity, maternity, child custody, visitation, and support of children born through surrogacy. Other cases dealing with issues raised by assisted reproductive techniques include Johnson v. Calvert, 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494 (1993) and Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986). Johnson is a gestational surrogacy case also creating the potential of three possible sets of parents. These sets include the biological father and mother, the gestational mother (and her husband, if married under the marital presumption of paternity), and finally the intended custodial parents, whether through adoption or some other legal or biological configuration. This case raised the novel query of whether a child can have two legal natural mothers. The court chose to abide by the parties' own predetermination of which woman would have custody of the resulting child. See Johnson, 5 Cal. 4th at 93, 851 P.2d at 780, 19 Cal. Rptr. 2d at 498. In Jhordan C., the court held that the sperm donor was the legal father of a child born into a two-female relationship because the parties failed to satisfy the statutory requirements regarding artificial insemination under laws designed to exclude sperm donors from being the legal father of resulting children. See Jhordan C., 179 Cal. App. 3d at 398, 224 Cal. Rptr. at 538. See also McAllister, supra note 25, at 103-11 (discussing several nontraditional parental
notions of the American family structure continue to evolve as courts are asked to decipher some rather complex configurations of potential progenitors. The resolution of *Hart* relied heavily upon a determination of Judith Hart’s biological and legal relationship with her father. This section examines the progression of assisted reproductive decisions providing judicial precedence helpful in resolving the relational status of children conceived after a parent’s death.

California courts have provided significant leadership in resolving the paternity and maternity of children conceived through assisted reproduction. In *Jhordan C. v. Mary K.*, the California Court of Appeals addressed the paternity rights of a male donor who privately provided semen to a woman and her female lover desirous of having and raising a child of their own. The women sued to prevent the sperm donor’s claim of paternity and to confirm their relationship as the child’s birth mother and de facto parent. They claimed that all parties had agreed, prior to conception, that the sperm donor would have no parental relationship, rights or obligations towards the child. The sperm donor argued that any such agreement was nullified or waived by the parties post agreement conduct. He presented evidence showing that he was allowed to actively participate in the various stages of the gestational mother’s

configurations involving two or more persons regardless of sex or marital status); Lorio, *supra* note 1, at 32-36 (suggesting that Louisiana adopt the Uniform Act for Children of Assisted Conception as a means of clarifying the parental conflicts arising from artificial insemination and examining other parental configurations and conflicts emanating from assisted reproductive techniques).

120. 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986).
121. See *Jhordan C.*, 179 Cal. App. 3d at 389, 224 Cal. Rptr. at 532.
122. See *id*. at 391, 224 Cal. Rptr. at 533.
123. See *id*. at 389, 224 Cal. Rptr. at 532.
124. See *id*. at 396, 224 Cal. Rptr. at 536. See generally K.B. v. N.B., 811 S.W.2d 634, 638-39 (Tex. Ct. App. 1991) (applying the concept of ratification in a child support case to overcome the statutory requirement of a husband’s written consent to his wife’s heterologous artificial insemination, where the husband’s conduct during the resulting child’s life indicated his intent to be acknowledged as the child’s legal father). The putative father’s denial of biological paternity was raised as a defense to child support. See *id*. This decision reflects a judicial predisposition in legitimizing intent-based parentage determinations.
pregnancy and that he was afforded early visitation rights with the child.  

The court resolved this case by considering California’s version of the Uniform Parentage Act, California Civil Code section 7005, which provides, in relevant part, that

(A) a husband of any woman who conceives a child from donated sperm from a man not her husband through artificial insemination, is the father of that child if he consented to the process;

(B) a sperm donor is not the father of a child born through assisted reproduction from any woman who is not his wife.  

The court determined, however, that a literal interpretation of the Uniform Parentage Act rendered it inapplicable to this case. The statute expressly required that sperm used in artificial insemination be delivered for use by a licensed physician in order to invoke the parental status afforded by the above section.  The sperm donor in this case had provided his sperm directly to the intended gestational

125. See Jhordan C., 179 Cal. App. 3d at 396, 224 Cal. Rptr. at 536.
The appellate court affirmed the lower court's decision declaring the sperm donor as the legal father of the child and awarding him visitation rights. Although the nongestational woman's visitation rights were undisturbed by the court, the court also determined that it was premature to address the woman's claim as the child's de facto parent.

Parental prerogatives such as custody, support, and visitation are not exclusively assigned based upon a person's biological connection with a child. This proposition is evident in the court's granting of visitation rights to the biological mother's female lover. Judicial and legislative preferences have traditionally placed great normative value upon traditional social constructs, such as the unitary family, in exacting parental roles and responsibilities. This unyielding gravitation toward such normative constructs is represented by the conclusive statutory presumption that children conceived through heterologous artificial insemination, with the husband's consent, will be deemed the offspring of the marital union.

The Jhordan C. decision represents a strict adherence to the plain language of the assisted reproduction law which, parenthetically, is supported by substantial jurisprudential fora resembling the court's final outcome, but on different grounds. The outcome in

128. See id. at 390, 224 Cal. Rptr. at 532.
129. See id. at 397-98, 224 Cal. Rptr. at 537-38.
130. See id. at 397, 224 Cal. Rptr. at 537.
131. See infra Part IV.C.
132. See Michael H. v. Gerald D., 491 U.S. 110, 125-30 (1988) (holding that although the California statute in question permitted the granting of visitation rights to anyone having an interest in a child's well being, the nonmarital father had no right to visitation and custody of his biological child conceived and born while the mother was lawfully married to another man). The Supreme Court upheld the statute's provisions restricting standing to challenge a marital child's paternity to actions brought by the marital mother and father within two years after the child's birth. The Court determined that society's protection of the sanctity and tranquility of an intact marital familial association justified the statute's preemptive effect on putative biological parents. See id. at 131-32.
133. See id. at 129-30.
134. See Gursky v. Gursky, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963) (applying equitable principles of estoppel and implied contract in determining that "[t]he husband's declarations and conduct respecting the artificial insemination of his wife by means of a third-party donor, including the husband's written 'consent' to the procedure, implied a promise on his part to furnish support for any offspring resulting from the insemination"). Gursky thus held the husband
Jhordan C. reflects an intent-based parentage context premised upon progenitors' consensual representations and conduct enforced through traditional contractual and equitable modules. Finally, liable for child support even though, under then-existing law, the child was not the husband’s legitimate offspring. See id. The court concluded that “the husband [was] liable for the support of the child . . . whether on the basis [of] an implied contract to support or by reason of application of the doctrine of equitable estoppel.” Id. at 412. See also People v. Sorensen, 68 Cal. 2d 280, 289, 437 P.2d 495, 501, 66 Cal. Rptr. 7, 13 (1968) (addressing the issue of whether a husband who consents to his wife's heterologous artificial insemination can be considered the resulting child’s lawful father for purposes of violating a criminal statute for his willful failure to support the child). Sorensen rejected the view that the child was illegitimate in the absence of laws prohibiting such reproductive practices and in furtherance of strong public policy favoring legitimacy. See id. As such, the court found the defendant guilty of the offense while recognizing that “legitimacy is a legal status that may exist despite the fact that the husband is not the natural father of the child.” Id. See also In re Estate of Gordon, 501 N.Y.S.2d 969, 971 (Sup. Ct. 1986) (holding that children born by heterologous artificial insemination were the decedent's legal children for purposes of inheritance, where procedure was performed with the deceased’s oral consent and acknowledgment prior to death); In re Adoption of Anonymous, 345 N.Y.S.2d 430, 435-36 (Sup. Ct. 1973) (rejecting a divorced mother’s claim that the ex-husband’s consent to adoption of their marital child born through heterologous artificial insemination was not required because he was not the child’s lawful parent. Again, the court determined that the husband’s consensual conduct prior to the couple’s use of the reproductive procedure substantiated a finding that he was the child’s parent for adoption pur-
poses by putting to rest prior judicial discourse in holding “a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage.”); Anonymous v. Anonymous, 246 N.Y.S.2d 835, 836-37 (Sup. Ct. 1964) (adopting the Gursky decision in holding a husband liable for the support of children conceived through heterologous artificial insemination based upon the husband’s consent and implied contractual obligation to support such children); People v. Dennett, 184 N.Y.S.2d 178, 184-85 (Sup. Ct. 1958) (holding that a wife was equitably estopped in a custody or visitation action from claiming, as a defense, for the first time that the children were not the biological children of the husband because they were conceived by artificial insemination); K.B. v. N.B., 811 S.W.2d at 638-39 (holding that where a husband failed to provide statutorily required written consent for his wife’s heterolo-
gous artificial insemination, his subsequent conduct ratified his intent to con-
ceive for purposes of rendering him liable for child support).

See generally Shapo, supra note 1, at 1182-94 (discussing intent-based parenting resulting from contractual relationships as emanating from a person’s constitutionally protected right to procreate). The author views parenthood by intent as determin[ing] the parents of children born of reproductive technolo-
Jhordan C. reflects the expansion of libertarian judicial activism beyond the Supreme Court’s early recognition of married couples’ fundamental procreational rights by embracing unmarried persons’ exercise of that right, even if by nontraditional means and between nontraditional partners.\(^\text{136}\)

Later, in the 1993 gestational surrogacy\(^\text{137}\) case of *Johnson v. Calvert*,\(^\text{138}\) the California Supreme Court was presented with an unusual twist in a controversy between a child’s biological mother and her surrogate birth mother—a case of dual motherhood.\(^\text{139}\) The female surrogate served as a gestational host, or womb, for a zygote created from the artificially inseminated sperm and eggs of the intended custodial parents.\(^\text{140}\)

---

\(^1\) Id. at 1182.

\(^{136}\) See id. at 1121-29. See also Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (discussing the fundamental right of privacy in those matters concerning family and reproductive decisions, such as birth control).

\(^{137}\) Traditional surrogacy refers to a surrogate’s artificial insemination with sperm from (or copulation with) the intended custodial father. The surrogate is therefore biologically related to the resulting child. See Susan A. Ferguson, Comment, *Surrogacy Contracts in the 1990’s: The Controversy and Debate Continues*, 33 DUQ. L. REV. 903, 904 (1995). The New Jersey courts addressed the parental legal issues arising from traditional surrogacy in the well noted case of *In re Baby M*, 537 A.2d 1227 (N.J. 1988). Gestational surrogacy occurs when the egg and sperm of the intended custodial parents are transplanted into a surrogate who then carries the child to term. Although the gestational surrogate gives birth to the child, she and the child are not biologically related. See *Johnson v. Calvert*, 5 Cal. 4th 84, 92-93, 851 P.2d 776, 781-82, 19 Cal. Rptr. 2d 496, 499-500 (1993); *McDonald v. McDonald*, 608 N.Y.S.2d 477, 480 (Sup. Ct. 1994); *Belsito v. Clark*, 644 N.E.2d 760, 766-67 (Ohio 1994). For a more detailed discussion on surrogacy contracts, statutes, and judicial precedents, see Shapo, *supra* note 1, at 1160-81.

\(^{138}\) 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494 (1993).

\(^{139}\) See Shapo, *supra* note 1, at 1194-1207 (discussing multiple parenthood as it relates to dual inheritance). See also Michael H., 491 U.S. at 123-30 (resolving a dual fatherhood controversy against the unmarried, biological father in favor of the husband of the child’s mother where the child was conceived and born during their marriage).

\(^{140}\) See *Johnson*, 5 Cal. 4th at 87, 851 P.2d at 778, 19 Cal. Rptr. 2d at 496.
Both women, the gamete provider and the gestational host, claimed to be the biological mother of the child born through this process. The gamete provider was genetically related to the child, whereas the surrogate had given birth to the child. The determination of maternity under state law was relatively uniform in that a child’s birth mother was traditionally presumed to be the child’s mother. Never before had a court considered the biological possibility of a child having more than one natural mother. The court determined that the common law presumption of maternity would not apply in this case because it was rebutted by evidence showing that the surrogate birth mother had entered into the surrogacy agreement with the understanding that she would not have custody of any resulting child. The court’s intent-based decision upheld the parties’ reproductive agreement and determined that both the male and female gamete providers were the intended, and therefore lawful, parents of the offspring.

Both of these California decisions developed the foundational groundwork needed to pave the analytical framework substantiating the far-reaching abstraction that procreative liberties might extend to individuals seeking to conceive posthumously. The courts’ affirmance of nonmarital conception by artificial insemination and

141. See id. at 88, 851 P.2d at 778, 19 Cal. Rptr. 2d at 496.
142. See id.
143. See id. at 88-97, 851 P.2d at 778-85, 19 Cal. Rptr. 2d at 496-503.
144. See id.
145. See id. at 90-96, 851 P.2d at 780-84, 19 Cal. Rptr. 2d at 498-502.
146. See id. at 93-95, 851 P.2d at 782-84, 19 Cal. Rptr. 2d at 500-02. No legal controversy arose with respect to the male gamete provider’s claim of paternity. However, this case would have presented a more complex parental web if the gestational host had been married. The common law presumption of paternity of a child born within the marital relationship would have been implicated, thereby creating an issue of paternity between the male gamete provider and the surrogate’s husband. Some states have enacted surrogacy statutes that have outlawed surrogacy arrangements or that specifically define the paternity and maternity of children conceived and born through this process. See Shapo, supra note 1, at 1167-71 (reviewing the statutory treatment of surrogacy by the Uniform Status of Children of Assisted Conception Act and various state statutes).
intent-based parentage determinations are inherent components of posthumous conception.\(^{148}\) The consideration of parental prerogatives in assisted reproduction cases has not been the only approach courts have resorted to in resolving the fate of such progenitors and their resulting children.

Some jurisdictions have faced such issues by shifting the emphasis from assigning parental status to resolving the legal status of frozen human concepti. One approach has been to identify the point in the assisted gestational process in which the "potential life" or "life" will acquire personhood status, thus invoking constitutional protection under state and federal constitutions.\(^{149}\) Hence lies the unrelenting controversy of whether human gametes are property,\(^{150}\) persons,\(^{151}\) or something else.\(^{152}\)

---

148. See infra Parts II.C, IV.B.1.a.iii, IV.B.1.b.iii. Paternity and maternity problems associated with posthumous conception are most prevalent where a progenitor’s death dissolves an existing marital union. As such, the surviving custodian of frozen gametes most often seeks to engage in nonmarital conception due to the gamete provider’s death. The judicial recognition of nonmarital progenitors’ constitutionally protected right to procreate by assisted production, in turn, ensures their ability to conceive a child posthumously.


150. See generally York, 717 F. Supp. at 425 (discussing the written agreement which referred to the pre-zygote as "property"). Treating human concepti as property would afford concepti providers with the greatest degree of control over the concepti. In employing the notions of ownership, gamete providers could avail themselves of the full "bundle of sticks" with respect to such concepti. They would have the enforceable right to use, possess, enure profits, exclude, destroy and dispose of by sale, loan, abandonment, pledge, or gift their concepti. However, posthumously conceived children would have the least degree of protected rights prior to birth if human concepti are considered mere property. Personhood status and attending rights would not attach until
In *Davis v. Davis*, the Tennessee Supreme Court dealt with a divorce custody battle over cryopreserved preembryos stored in a Knoxville fertility clinic by a couple during harmonious marital times. The eggs and sperm were extracted from each party, fertilized in a petri dish, and frozen for later use by the couple. The wife initially sued to preserve the preembryos for her own later use. After a subsequent marriage, however, she requested that the preembryos be donated for use by some other third party donee(s). The husband sought to have them destroyed because of his unwillingness to father unwanted biological children that he might never know.

after the birth of the child. *See also* Steinbock, *supra* note 25, at 59-62 (discussing property rights in stored sperm).

151. *See generally* Pieper, *supra* note 149 (discussing frozen embryos); Robertson, *supra* note 149 (discussing sperm and frozen embryos). Concepti providers would have the least amount of dispositional control if personhood status was assigned to human concepti. If regarded as persons, human concepti would be entitled to constitutionally protected rights and assigned a greater degree of moral human significance. This would severely impede the provider’s ability to exercise the rights and powers represented by the “bundle of sticks” in a manner which would not be in the concepti’s best interests. Treating human concepti as persons, however, gives posthumously conceived children the greatest level of legally enforceable and constitutionally protected rights in their efforts to secure financial benefits from a deceased parent. Their future rights to such entitlement would attach the moment the conceptus is removed from the parent’s body.

152. *See generally* Pieper, *supra* note 149 (discussing frozen embryos); Robertson, *supra* note 149 (accepting, but not defining the property-like nature of a decedent’s frozen sperm); Steinbock, *supra* note 25, at 58-62; Hecht v. Superior Court, 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275 (1993). *See also* Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) (adopting the “other” status for human concepti which is considered the interim category). This approach equips providers with just enough of an ownership interest in their own concepti, so as to exercise a “decisional-making authority.” Steinbock, *supra* note 25, at 60. It has yet to be judicially determined exactly how this type of authority differs from the traditional notions of property ownership. The trend in affording human concepti special respect as “potential life” has left for further judicial determination whether such biological material has any legally protected rights prior to fertilization, implantation, or birth, and if so, the exact nature of any such rights. The courts’ reliance on this interim category resembles a judicial manipulation intended to avoid the inevitable question of when constitutionally protected human life begins. *See id.* at 58-62.

153. 842 S.W.2d at 588 (Tenn. 1992).
154. *See Davis*, 842 S.W.2d at 591-92.
155. *See id.* at 590.
156. *See id.*
The court resolved this case by first evaluating whether human concepti qualified as property which could be distributed pursuant to a divorce settlement. Thus, it was necessary to assign legal status to the frozen preembryos as either property, human life or something else. The court chose the "something else" category, which was, quite possibly, a compromised attempt to at least symbolically recognize the moral significance of the human body. It concluded that the preembryos were not property nor human life, but occupied an interim category of potential life deserving of special respect.

This interim category did however, create limited decisional authority in the gamete providers akin to an ownership interest in property which would enable them to decide the embryo's fate. In assigning frozen embryos a status greater than mere biological material, the Davis court assumed that it could justify awarding the gamete providers the unbridled, exclusive right to dispose of the embryos....

157. See id. at 594-97. See also Hecht v. Superior Court, 50 Cal. App. 4th 1289, 59 Cal. Rptr. 2d 222 (1996) (holding that decedent’s sperm was not an “asset” for purposes of property settlement agreement). In Hecht, the last of a series of actions regarding the determination of whether a decedent’s cryopreserved sperm could serve as probate property, the court opined that sperm was a proper asset that could devolve under probate jurisdiction, but that it would not be considered property for purposes of a compromise property settlement agreement between the parties. In recognizing the interim category of human sperm, the court determined that the decedent’s dispositional authority over the sperm would control in determining its ultimate disposition. Documentary evidence presented in the case clearly established the decedent’s intent to leave his sperm behind for his surviving partner’s sole procreational use. One interesting outcome is that the court extended its prohibition against any unauthorized use to restrict the partner’s disposal of the sperm in a manner inconsistent with the decedent’s expressed wishes. See id. at 1289, 59 Cal. Rptr. 2d at 222. The decedent alone would have the postmortem control in determining whether, how, and with whom to procreate from the grave. This, of course, has far-reaching implications on the extant “dead-hand rule” public policy, which limits the control the dead can exert over the living. See id.

158. See Davis, 842 S.W.2d at 594-97.

159. See id. at 597. The court “conclud[ed] that preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.” Id.

160. See id.

161. See id. The court states that the couple, as progenitors, “have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.” Id.
as they so chose.\textsuperscript{162} The sole dispute rested in resolving the dispositional rights between affected private parties. It is most difficult to reconcile the court's assignment of this right to dispose of human embryos in a property-like fashion without any significant discourse on the attenuating limitations and responsibilities placed upon this right due to the embryos' heightened status beyond mere personality.

Perhaps this heightened status compels increased governmental regulation based upon a substantial government interest in protecting and respecting biological material which has the potential of becoming human life. One level of potential government mandated progenitor responsibility supports long standing public interests in promoting the best interest of children by preventing state wards. Persons who dispose of their frozen sperm could be held accountable for the care and support of such offspring, perhaps even beyond the progenitor's death in cases of posthumous conception.\textsuperscript{163}

The progeny of constitutional abortion rights cases minimally concede that the incremental intervention of government action is warranted as the unborn's gestational developmental status nears birth.\textsuperscript{164} On the other hand, extending greater governmental protection to unborn, frozen concepti by limiting the progenitor's dispositional rights would likely have far reaching implications on extant Supreme Court precedents. Assigning enhanced rights to gametes prior to conception or implantation would raise even greater concern of whether the viability standard is still warranted as the point at which states can place greater limitations on abortion.\textsuperscript{165}

\textsuperscript{162} See id.

\textsuperscript{163} See infra Part V for further discussion; Steinbock, supra note 25, at 63. Steinbock states that:
[a] responsible decision to procreate, however, requires thoughtful consideration of the welfare of the children one brings into the world.
[B]efore having children likely to have seriously burdened lives, individuals should think about whether they will be able to compensate for the difficulties and give their children lives that are well worth living.

Id.


\textsuperscript{165} Some local governments have taken great measures to regulate non-abortive conduct towards the unborn by proscribing infanticide and fetal murder, negligence, and abuse. Some states affirm the personhood status of the
This anomaly provides greater insight into the Tennessee court's measured hesitancy in classifying embryos as persons.\(^\text{166}\) The court's rationale was even based, in part, upon Tennessee's statutory incorporation of the *Roe v. Wade*\(^\text{167}\) trimester approach to abortion.\(^\text{168}\) "This statutory scheme indicates that as embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for life."\(^\text{169}\) However, the court reiterated that "even after viability, [human embryos] are not given legal status equivalent to that of a person already born."\(^\text{170}\) What the court leaves unsaid, however, is exactly what level of respect, through government intervention, is warranted in protecting frozen embryos assigned to this interim category.

unborn for all purposes beyond permitted abortive procedures. *See infra* note 166. The fallible nature of the *Roe* Court's viability standard is also evident in light of developing reproductive technology which enables fertilization, implantation, and even possible gestation outside of the progenitor's body. Furthermore, the technique of embryo transplantation permits one woman's conceptus to be implanted into a host carrier for gestation to full term. The traditional viability standard—measured by a determination of whether the fetus can survive independently outside of the womb—stands to be reconciled with such technological advances. There may no longer be a gestational time frame of non-viability that would promote a woman's unbridled right to have an abortion. These issues implicate constitutional discourse which is far beyond the scope of this Article. It is important to at least note the far reaching impact reproductive technology may have on existing reproductive jurisprudence in determining the legal status and rights of the unborn.

166. Louisiana's Human Embryo statute, LA. REV. STAT. ANN. § 9:121 (West 1991), specifically confers protection over frozen embryos in a manner consonant with laws protecting infants and children. The statute prevents the destruction of unwanted embryos, requiring instead that they be adopted. In any case, the disposition of any such unwanted embryos is to be made in light of their best interest. Pennsylvania's legislature has enacted similar legislation which affirmatively promotes the life interest of the unborn and of those children born alive during attempted abortive procedures. *See, e.g.*, 18 PA. CONS. STAT. ANN. § 3212(a)(b)(c) (West 1983); 18 PA. CONS. STAT. ANN. §§ 2601, 2603-2607 (West Supp. 1998). *See also* Davis, 842 S.W.2d at 590 n.1 (referring to the Louisiana Human Embryo statute); Webster, 492 U.S. at 521 (upholding the preamble to the Missouri abortion control statute referring to unborn children as persons protectable under the U.S. Constitution).
168. *See* Davis, 842 S.W.2d at 595.
169. *Id.*
170. *Id.*
After weighing the procreative rights and relevant circumstances of each party where no disposition agreement existed, as in this case, the court concluded that the father’s right not to procreate would prevail over the mother’s desire to donate the embryos to some third party for implantation. The embryos were eventually destroyed pursuant to a final court order affirming what might be construed as a man’s right not to procreate.

The use of reproductive technology continues to challenge existing legal parameters concerning parentage and personhood determinations. The most compelling issue thus far, however, raises questions germane to society’s most treasured concepts of human existence and death. The Davis decision facilitated judicial movement toward recognizing some form of limited property rights in human gametes. The court’s adoption of this interim category, along with intent-based parental determinations, paved the road for technology which would call forth the reproductive capability of dead persons while providing the legal foundation necessary to support such activity. The very nature of posthumous reproduction requires some degree of dispositional control over one’s gametes for post-death conception by surviving third parties. This would later be substantiated by Davis and by forthcoming cases addressing the rights of parties seeking to procreate posthumously.

C. Posthumous Conception

The prospect of posthumous conception and the attending legal issues were considered by legal scholars as early as 1962. Amidst more recent accounts of “the widow and the sperm,” the “birth of

171. See id. at 604.
173. See Davis, 842 S.W.2d at 588.
174. See generally Leach, supra note 26 (addressing the threat which posthumous conception could pose to the Rule Against Perpetuities).
175. E. Donald Shapiro & Benedene Sonnenblick, The Widow and the Sperm: The Law of Post-Mortem Insemination, 1 J.L. & HEALTH 229, 276-77 (1986-87). This Article discusses the 1984 French case Parpalaix v. CECOS,
a baby from the egg of a dead woman,“ and “sperm extracted from a dead man at his widow’s request,” many people were repulsed to learn that the dead were actually parenting children from their graves. Alas, a new frontier of legal controversy had finally begun, posthumous conception—the fertilization of eggs with sperm from gamete providers, one or both of whom are dead at the time of conception and implantation.

This new form of alternate reproduction has raised significant legal issues involving the determination of the respective rights of potential progenitors, resulting children, and other surviving third parties. A few courts, legislatures, and progressive legal scholars have recognized, to some degree, that posthumous conception should fall within the protection of existing constitutional safeguards which was credited with starting much of the early debate on the efficacy of postmortem conception. Parpalaix differed from Hecht in that the widow’s deceased husband failed to leave any written acknowledgment of his desire to have his sperm used by his wife after his death. See id. at 230. The deceased gamete provider in Hecht, William E. Kane, Jr., left behind several written expressions of his intent and desire to leave his fifteen vials of sperm to his girlfriend for the specific purpose of postmortem conception. He executed a “Specimen Storage Agreement” with the sperm bank designating Deborah Hecht as the intended recipient upon his death. He also provided for the disposition of his frozen sperm in his will executed on September 27, 1991, bequeathing all “right, title, and interest that I may have in any specimens of my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht.” See Hecht v. Superior Court, 16 Cal. App. 4th 836, 840, 20 Cal. Rptr. 2d 275, 276 (1993). He further expressed his intent that the sperm be used by Ms. Hecht to have children after his death if she would so choose. Lastly, the decedent left behind a letter specifically written to any such children. See id.


177. Carole Agus, Woman Saves Sperm of Her Dead Husband: She Needs to Raise $12,000 to Have Babies of Man Who Died in Police Custody, DET. NEWS, Jan. 19, 1995, at A5. Mirabel Baez, after the death of her husband, Anthony Baez, requested the removal of her husband’s sperm for freezing and her later reproductive use. The article reports the attending physician’s account of “mak[ing] a small nick in the tube that carries the sperm from the testicles back to the body and directly flush[ing] the sperm out of that tube using a very fine plastic needle.” Id.

178. See id.

179. See Garside, supra note 1; Gilbert, supra note 25; Leach, supra note 26; Robertson, supra note 25; Thies, supra note 26.

180. See Nolan, supra note 1, at 6 n.35.
afforded to expressions of traditional procreative liberty. The legal community has yet to fully embrace the multifaceted legal, moral, and ethical ramifications inherent in postmortem conception. Perhaps, ultimate discourse will shift the focus, at some point in time, from whether posthumous conception is permissible to a discussion on how best to promote and protect the interests of affected persons—such as the resulting children. The following discussion considers the legal and ethical aspects of posthumous conception with the ultimate goal of determining whether such after-conceived children should be entitled to social security survivor’s benefits.

1. Inheritance and posthumous conception: a judicial, legislative, and constitutional response

The new frontier of posthumous conception was spurred on by a California case of first impression, Hecht v. Superior Court. In Hecht, a California Court of Appeals had to resolve the legal status of frozen sperm disposed of by will to the decedent’s surviving girlfriend, Deborah E. Hecht, for her reproductive use after his suicide. In a rather strange letter, the decedent left behind for his potential postmortem offspring, he wrote

I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah will decide—as I hope she will—to have a child by me after my death. I’ve been assiduously generating frozen sperm samples for that eventuality. If she does, then this letter is for my posthumous offspring, as well, with the thought that I have

182. See Hecht, 16 Cal. App. 4th at 840-41, 20 Cal. Rptr. 2d at 276-77. See also Hall v. Fertility Institute of New Orleans, 647 So. 2d 1348, 1351 (La. Ct. App. 1994) (upholding a trial court’s preliminary injunction preventing a fertility institute’s distribution of frozen sperm to a decedent’s surviving nonmarital partner based upon a claim by his surviving relatives that decedent was coerced into executing a pre-death act of donation on the partner’s behalf). The Hall court also rejected the argument that the sperm donation was against Louisiana public policy, stating that, “[t]he sole issue relevant to disposition of the instant case is the validity vel non of the authentic act of donation that purports to convey to St. John the decedent’s fifteen vials of sperm now on deposit with the Institute. If it is shown at trial that decedent was competent and not under undue influence at the time the act was passed, the frozen semen is St. John’s property, and she has full rights to its disposition.” Id.
loved you in my dreams, even though I never got to see you born. If you are receiving this letter, it means that I am dead—whether by my own hand or that of another makes very little difference.\textsuperscript{183}

Similarly to \textit{Davis}, the \textit{Hecht} court first had to explicate the legal status of frozen sperm under California probate law.\textsuperscript{184} Parenthetically, the court’s final decision was based upon the Tennessee Supreme Court’s rationale in \textit{Davis}.\textsuperscript{185} The California Appeals Court also recognized gamete providers’ decisional authority, which was akin to a property-like ownership interest, in controlling the disposition of their frozen gametes.\textsuperscript{186}

The court concluded that human gametes and concepti were neither property, nor human life, but were “potential human life” deserving special respect.\textsuperscript{187} Probate jurisdiction was confirmed and Mr. Hart’s sperm was considered “probate property” for the purposes of inheritance.\textsuperscript{188} The court concluded that the frozen sperm would be best afforded this special respect by acknowledging Mr. Hart’s decisional authority to dispose of the sperm as expressed in his will.\textsuperscript{189} This aspect of the \textit{Hecht} decision alone may have provided the greatest assurance of the future existence of posthumous conception. Deceased gamete providers would be unable to conceive from the grave unless they were permitted to transfer to some surviving person or entity the ownership of their frozen human concepti for postmortem conception.\textsuperscript{190} The recognition of human concepti as

---

\textsuperscript{183} \textit{Id.} at 841, 20 Cal. Rptr. 2d at 277. The decedent left a will, a specimen storage agreement, and a letter indicating his desire that the sperm be given to Ms. Hecht upon his death.

\textsuperscript{184} \textit{See id.} at 846, 20 Cal. Rptr. 2d at 281.

\textsuperscript{185} \textit{See id.} at 858-59, 20 Cal. Rptr. 2d at 288-89.

\textsuperscript{186} \textit{See id.} at 845-52, 20 Cal. Rptr. 2d at 280-84.

\textsuperscript{187} \textit{See id.} at 846, 20 Cal. Rptr. 2d at 281.

\textsuperscript{188} \textit{See id.}

\textsuperscript{189} \textit{See id.} at 850, 20 Cal. Rptr. 2d at 283.

\textsuperscript{190} It is conceded that decedents could attempt to transfer their concepti by some inter vivos transfer prior to death. Existing law, however, would not permit persons to sell their sperm, eggs, or preembryos during their lifetime to another person, while retaining a legal parental relationship with the resulting child. This, of course, would defeat the purpose of posthumous conception and eliminate the issue of whether the child is entitled to inherit or otherwise benefit from the decedent’s estate.

Inter vivos transfers of concepti by gift may also prove futile because of
probate property ensures a deceased gamete provider's right to utilize the primary means of postmortem transfer—the transmission of one's property through the well-established institution of inheritance.\textsuperscript{191}

Ms. Hecht, the intended donee, sought possession of the sperm for her reproductive use and claimed that the court's failure to do so would infringe upon her privacy and procreative liberty protected by the federal and California Constitutions.\textsuperscript{192} Ms. Hecht's action was strongly opposed by the decedent's two surviving children from a prior marriage. They countered that it was against strong public policy to allow an unmarried woman to be artificially inseminated with the sperm of a dead man.\textsuperscript{193} The court rejected the children's argument by holding that it was a forgone legal issue already resolved by the California legislature and courts.\textsuperscript{194} The court reasoned that under California's version of the Uniform Parentage Act, unmarried women had already been given the right to procreate by

\textsuperscript{191} See generally, John A. Gibbons, Comment, \textit{Who's Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination}, 14 \textit{J. CONTEMP. HEALTH L. & POL'Y} 187 (1997) (arguing that the "constitutional right to the use of reproductive technology encompasses the use of post-mortem insemination. However, the right to procreative decision-making does not encompass a right of the parents to have the 'posthumous child' declared the child of the male donor"). For a brief discussion on the constitutional ramifications of the right to transmit one's concepti by inheritance for postmortem conception, see Chester, \textit{supra} note 1, at 979-82 (acknowledging an existing right to transmit one's gametes through inheritance based upon the U.S. Supreme Court's holding in \textit{Hodel v. Irving}, 481 U.S. 704 (1987)).

\textsuperscript{192} See \textit{Hecht}, 16 Cal. App. 4th at 844, 20 Cal. Rptr. 2d at 279.

\textsuperscript{193} See id.

\textsuperscript{194} See id. at 854, 20 Cal. Rptr. 2d at 286.
artificial conception, as was recognized in the *Jhordan C. v. Mary K.* case.

The court also assigned little merit to the surviving children’s primary concern, which was to prevent Ms. Hecht from having additional half-siblings who would potentially lay claim to a share of their dead father’s estate. The court, relying upon relevant sections of the Uniform Status of Children of Assisted Conception Act (U.S.C.A.C. Act) and the California Probate Code, concluded that, “it [was] unlikely that the estate would be subject to claims with respect to any such children.”

With respect to other public policy concerns raised by the decedent’s surviving children regarding the birth, custody, and conception of posthumously conceived children, the *Hecht* court adopted the California Supreme Court’s pronouncement in the gestational surrogacy case of *Johnson v. Calvert,* that “[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.”

Posthumous conception is an area which most state legislatures have yet to address, although considerable scholarly attention has recently been drawn to the inheritance rights of posthumously conceived children. The laws of most states currently do not entitle such children to take under or through their deceased parent’s estate because of the timing of the child’s birth. The most relevant legislative initiative thus far determining the relational status of

195. See id. at 852-56, 20 Cal. Rptr. 2d at 284-88.
197. See *Hecht*, 16 Cal. App. 4th at 860-61, 20 Cal. Rptr. 2d at 290-91.
199. See *CAL. PROB. CODE § 6407 (West 1996).*
201. 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494 (1993).
203. See *Chester, supra note 1; Lorio, supra note 1; Shapiro, supra note 1.*
204. See infra notes 208-15 and accompanying text.
posthumously conceived children is represented by the U.S.C.A.C. Act. Pursuant to section 4(b) of the U.S.C.A.C. Act, "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child." The comments accompanying this section indicate that its purpose is to:

provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death. [Section 4(b)] deals with procreation by those who are married to each other. It is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their wills may do so.

Although this provision directly addresses the relational status of posthumously conceived children, it does not promote or protect the beneficial interests of such children under intestate succession or social security entitlements. Three states, Virginia, North Dakota, and Florida, have taken varying stances in addressing the legal status of posthumously conceived children. Virginia's version of the uniform act, Status of Children of Assisted Conception, § 20-158(b), provides that:

[a]ny child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died. However, any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the

---

206. Id. at 189-90.
207. Id. at 190.
210. See FLA. STAT. ANN. § 742.17 (West 1997).
parent of any resulting child, unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.\textsuperscript{211}

Florida has adopted a similar version which provides that "[a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."\textsuperscript{212} North Dakota has also implemented similar legislation providing that "[a] person who dies before a conception using that person's sperm or egg is not a parent of any resulting child born of the conception."\textsuperscript{213} These laws all reflect a growing legislative movement to foster individual procreative liberty through an "intent-based" framework in addressing the legal status and rights of children and progenitors involved in assisted reproduction. Florida conditions the testate inheritance rights of resulting children upon the existence of a will so providing and executed by the deceased parent prior to death.\textsuperscript{214} These states, completely forestall the intestate succession rights of posthumously conceived children. In Virginia, the posthumously conceived child's right to intestate succession would not be recognized without some express writing by the predeceased parent indicating an appropriate pre-death intent to become the child's postmortem parent.\textsuperscript{215}

It is questionable whether these statutory exclusions or limitations upon the posthumously conceived child's right to inheritance is constitutional.\textsuperscript{216} Although no court has affirmatively recognized a

\begin{footnotes}
\item[211] VA. CODE ANN. § 20-158 (emphasis added).
\item[212] FLA. STAT. ANN. § 742.17.
\item[213] N.D. CENT. CODE § 14-18-04.
\item[214] See FLA. STAT. ANN. § 742.17.
\item[215] See VA. CODE ANN. §§ 20-156 to 165.
\item[216] See generally, Gibbons, supra note 191 (contending that the constitutional right to procreative decision-making does not encompass the right to determine paternity for inheritance purposes); Chester, supra note 1, at 979-82. See also Hodel v. Irving, 481 U.S. 704 (1987) (holding that federal law preventing Native Americans from passing small parcels of reservation lands to heirs constituted a "taking" under the Fifth Amendment).
\end{footnotes}
217. Inheritance has long been a means of transferring property after death. The two probate classifications of inheritance include the transfer of property by will (or testacy) and the default transfer of property by state succession statutes (or intestacy). Inheritance does not include non-probate transfers such as inter vivos trusts, life insurance policies, and other techniques such as joint tenancy ownership with rights of survivorship. Although inheritance is not the sole means of postmortem transfer, it has existed as the greatest assurance that the devolution of private property will start with either the decedent’s designees or nearest relatives, instead of escheating directly to the state.

An effectual transfer of property through inheritance permits the owner to transmit the property and allows the recipient to receive the property. See Daniel J. Kornstein, Inheritance: A Constitutional Right?, 36 Rutgers L. Rev. 741, 749 (1983-84). Hence, the ability to transmit and receive property are both a part of determining the nature of inheritance rights. See id. These rights are implicated in the major stages of posthumous conception. The nature of the gamete provider’s right to transmit the concepti by inheritance must be determined, as well as the recipient’s right to receive such unique property. Ultimately, the resulting child’s right to inherit from and through the deceased provider’s estate is summoned. The pivotal question affecting the outcome is whether there is some life, liberty, or property interest being threatened. The 1993 Hecht decision had the potential of resolving this query by holding that proper probate jurisdiction was implicated in determining a decedent’s right to transmit and a beneficiary’s right to receive human concepti which should be regarded as probate property for postmortem reproduction. The California Appellate Court’s most recent decision in the ongoing saga of Hecht indicates, however, a greater judicial preference for treating frozen sperm in a manner which most respects its potential for becoming human life. See Gibbons, supra note 191 and accompanying text.

Inherent in the ongoing debate on inheritance rights implicated in posthumous conception is the query of whether the right to inheritance is a fundamental liberty protected under the U.S. Constitution. See generally Ronald Chester, Essay: Is The Right To Devise Property Constitutionally Protected? The Strange Case of Hodel v. Irving, 24 Sw. U. L. Rev. 1195 (1995) (arguing for a very narrow construction of the nature of the right protected in Irving—the right to dispose of property at death by will, but only where inter vivos transfers would have been impracticable). As early as 1789, American critics argued that there were no constitutional provisions to support such a finding. See id. at 1195-96 (citing 15 The Writings of Thomas Jefferson 470-71 (Andrew A. Lipscomb & Albert E. Bergh eds., 1907)). The author refers to a 1789 letter written by Thomas Jefferson to James Madison where he suggests that the “dead have neither powers nor rights over” the earth and that “the portion occupied by any individual ceases to be . . . and reverts to the society.” Id. at 1195. The traditional, common-law treatment of inheritance rights is “that any rights to transmit or to receive property at an owner’s death were ‘civil’ not ‘natural rights’: rights created by our society for its own convenience.” Id.
This represents the Jeffersonian argument regarding the institution of inheritance rights. On the other hand, antagonists have maintained that “inheritance [is] a natural right that predates civil government and is beyond its power.” Kornstein, supra, at 749. These approaches, rooted in positivism and natural rights theories, have historically fueled arguments justifying or denying fundamental inheritance rights. See id.

The preliminary determination of the source of a possessor’s ownership interest in property emerges in almost every discussion on the nature of a property right. The natural rights theory as applied to a property interest, provides the rightful possessor with the greatest degree of protectable ownership in their property. The owner’s right to control the disposition, destruction, exclusion, enjoyment, use, and possession of the property is viewed as one which he was born with, a right so embedded in the law of nature that no man could create. See id. at 750. Property ownership derived from natural rights is most likely to implicate protection as property or liberty interests which are “fundamental” under the U.S. Constitution. See Chester, supra, at 1196-97. Chester states that “[i]f inheritance—or some component of it—is a natural right, it is then but a short step to constitutionally protecting this right under the 5th and 14th Amendments to the Constitution.” Id.

Hugo Grotius and John Locke both claimed that natural law provides the source of inheritance rights. See Kornstein, supra, at 750. These early promoters of inheritance viewed both the right to inherit and the right to transmit one’s property as natural rights. Within this context, the inquiry becomes whether inheritance calls forth constitutional safeguarding. See Chester, supra, at 1196-97.

No federal constitutional provision expressly identifies inheritance as a constitutional right. Among possible indirect sources of federal protection of inheritance are the Ninth Amendment; the Privileges and Immunities Clause of the Fourteenth Amendment; the Takings Clause under the Fifth Amendment; the Griswold v. Connecticut “penumbra theory” of the right of privacy; and substantive Due Process under the Fifth and Fourteenth Amendments. See Chester, supra, at 1196-97. For the most part, American courts have been reluctant to attribute any of these sources as the appropriate basis. Even though one pre-Irving scholar determined that substantive due process was the most likely source of safeguarding inheritance, he concluded that there was no due process right of inheritance. See id. This summation has found little support in more recent findings of state and federal courts that have seemed to recognize greater due process-like rights in one’s right to transmit and receive property after death.

The deprivation of a person’s “life, liberty or property without due process of law” by state or federal governments is expressly prohibited under the Fifth and Fourteenth Amendments of the U.S. Constitution. U.S. CONST. amends. V, XIV. Protection under the Due Process clauses is therefore warranted only when the claimed interest impacts a person’s life, liberty, or property. This means that no state or federal government can enact laws that deprive such personal rights if the law does not satisfy the requisite level of scrutiny by showing a compelling, substantial, or reasonable governmental purpose. Thus, due process protection of inheritance would require a finding
probate laws where there is some unlawful exclusion of a protected class of persons without a compelling government interest, or where such limitations are not rationally or substantially related to the furthering of an important or legitimate government purpose. Posthumously conceived children, as a class, do not fall within the traditionally protected suspect classes which are accorded the strictest level of review. Where state action discriminates based upon the timing or circumstances of a child’s birth, like in cases involving nonmarital children, either the intermediate or lower levels of judicial review are applied in determining the legality of exclusionary legislation. Thus, a state’s denial of inheritance based solely on the circumstances of birth would survive constitutional scrutiny only

that it is life, liberty, or property. Inheritance is more accurately seen as a property right or as incidental to the ownership of property. Transmitting property through inheritance is but one way to dispose of property. The disposition of property by other means, such as a sale, gift, or loan are essential aspects in the bundle of sticks of property rights, which have enjoyed the greatest level of constitutional protection under the Due Process Clause. The U.S. Supreme Court has undoubtedly protected property interests that are “well beyond actual ownership of real estate, chattels, or money,” and has embraced the concept of property as a “broad range of interests that are secured by ‘existing rules or understandings.’” Kornstein, supra, at 767-68 (citations omitted).

In the ordinary context, inheritances would not implicate any protectable life interests under due process guarantees. This requires further analysis in posthumous conception cases due to the “life potential” of human concepti. Does the nature of the object transmitted and received implicate due process rights over interests not ordinarily protected? Maybe so. Although inheritance is but one means to accomplish postmortem conception, concepti providers must be able to securely transmit their concepti to an intended beneficiary for reproductive use after their death. Likewise, the intended beneficiary must also be able to receive the concepti. State or federal laws unduly restricting or prohibiting transmission by inheritance of human concepti could be an infringement on the “potential life” interests of the unborn human concepti.

218. See Chester, supra note 217; Kornstein, supra note 217.
219. See Gibbons, supra note 191, at 202-10; Chester, supra note 1, at 979-82.
220. See infra Parts IV.A.2, IV.B, IV.C.1. See generally Mathews v. Lucas, 427 U.S. 495 (1976) (holding that strict scrutiny does not apply to legislation that treats legitimate and illegitimate children differently); Robertson, supra note 25, at 1040-41 (arguing that interests other than the decedent’s directions for disposition of stored sperm would fail to pass muster under a heightened standard of scrutiny).
if there were substantial or legitimate state interests which support the statutory exclusion.\textsuperscript{221}

There are several state interests which are relevant in determining the classes of children entitled to take from a deceased parent’s estate. The primary state interest asserted as justification of the exclusion of posthumously conceived children from inheritance is the administrative convenience of preserving orderly distribution of the affairs and estates of the deceased.\textsuperscript{222} This purpose, although legitimate, does not justify a total abrogation of a child’s right to inherit from his parent(s) based upon the timing of birth.\textsuperscript{223} Minimally, this state interest could be promoted by less intrusive means simply by allowing all children, who are born or conceived prior to the final disposition of the estate, to inherit from their deceased parent(s).\textsuperscript{224} Another less intrusive means would be to require that children be conceived prior to some reasonable future date, such as two years after the parent’s death.\textsuperscript{225}

A second state interest in preventing certain children from taking under probate law is the prevention of dubious and spurious claims which overburden the judicial system and delay the settlement of estates.\textsuperscript{226} It is feared that extending inheritance rights to after-conceived children increases the number of potential stale claims in multitudinous proportions.\textsuperscript{227} One less intrusive approach in addressing this concern would be to allow parents to execute intent-based, prospective transmissions of property to unconceived children.\textsuperscript{228} These pre-death acknowledgments—by will, letter, assignment, sperm storage agreement, or hybrid “Procreative

221. See Brashier, supra note 25, at 105-12.
222. See Robertson, supra note 25, at 1040.
223. See Chester, supra note 1, at 990-94.
224. See Thies, supra note 26, at 960.
225. See id.
226. See Robertson, supra note 25, at 1040; Chester, supra note 1, at 995.
227. See Chester, supra note 1, at 995.
228. See Robertson, supra note 25, at 1031 (“Because a person reproducing posthumously is by definition dead, the meaning or value of posthumous reproduction lies in the importance that individuals place on being able to determine the fate of their gametes, embryos, and fetuses after they have died. The key normative issue is the reproductive importance or significance of advance directives for or against posthumous reproduction.”); Steinbock, supra note 25, at 62.
SURVIVOR'S BENEFITS

Will’—would serve both as proof of the after-conceived child’s parental relationship and as verification of the deceased parent’s intent to procreate posthumously.\(^\text{229}\)

A more liberal definition of children for inheritance purposes actually promotes other important state interests—the prevention of state wards and the preservation of state revenue. Allowing after-conceived children to inherit from and through a deceased parent could create a surplus of public revenue which could in turn be used to support and aid other orphaned, dependent children. Furthermore, prospective parents would again be able to meet a moral obligation to continue supporting children who survive their death.\(^\text{230}\)

\(^{229}\) A rebuttable presumption of parental acknowledgment of resulting children and their right to inherit should arise where the human concepti providers were married at the death of one of the progenitors. This presumption furthers the state’s interests in promoting concepts of a nuclear family. Permitting a decedent to make provisions for after-conceived children also furthers the decedents’ right to transmit property after death (especially if constitutionally protected as a natural right and not a mere civil right). If a decedent is permitted to provide for after-conceived children by will, then intestate laws should reflect what a decedent would want to happen under intestacy as well. Absent the progenitor’s written consent and authorization, gametes used to conceive children posthumously should be considered as having been donated for third party insemination and adoption. See Hecht, 16 Cal. App. 4th at 860, 20 Cal. Rptr. 2d at 290.

\(^{230}\) Post-death support agreements and orders have been found enforceable. Such agreements are in furtherance of strong public policy seeking to hold progenitors financially liable for their offspring. See Garney v. Estate of Hain, 653 A.2d 21 (Pa. 1995) (holding that a deceased divorced father’s estate could not be forced to pay post-death child support payments where there was no support order or contractual agreement in place prior to the father’s death); Kathryn Gehrels, Comment, Liability of Estate of Divorced Father for Support of Minor Child, 22 CAL. L. REV. 79 (1934). In this very early comment, Gehrels explores the old common law rule that a father’s liability “for the support of his child [is] terminated by his death.” Id. at 82. This common law rule is reviewed in terms of case law existing at that time in various jurisdictions, some of which recognized an exception to the rule where there was a pre-existing child support order incorporated into a divorce decree. The author concludes that following the common law rule of no survival of support obligations would “work the... ludicrous result of making it advantageous to be a child whose family life has been sufficiently upset as to necessitate court interference.” Id. at 85. But see Chester, supra note 1, at 994 (proposing that “the Supreme Court and the legislature... encourage only those forms of posthumous conception that provide support from and connection with the dead father—that any right of the male to procreate posthumously subsumes the re-
2. Moral and ethical considerations implicated in posthumous conception

   a. the rule of the dead hand

One of the major arguments espoused against posthumous conception is that it fosters the procreative activities of dead persons in violation of long-standing public policy that restricts dead hand control from the grave.\(^\text{231}\) Posthumous conception does not significantly promote the control over the living by the dead beyond existing parameters set forth by rules permitting the devolution of traditional property after death. Posthumous conception can only occur if there is a surviving, willing party who seeks to exercise their own procreative rights.

The *Hecht* court took a realistic approach in addressing the issues of whether procreative rights are indeed assigned to the dead in posthumous conception. Even though the court recognized the deceased’s pre-death decision making control over his frozen sperm by will, it properly relegated its determination of procreational rights to the living.\(^\text{232}\) The final decision in *Hecht* promoted only the procreational rights of the living party to whom the deceased had determined, prior to death, would be entitled to use the frozen sperm for such purposes—his girlfriend, Ms. Hecht.\(^\text{233}\)

There are indeed certain social risks inherent in permitting individuals to designate by will persons whom they would like to have the custody of property which has life-creating potential. Of primary concern is the welfare and best interests of the after-conceived child who, for the most part, will be born without the benefit of at least one biologically related parent. Although public policy should not foster

\(^{231}\) See generally Chester, supra note 1, at 994-1003 (implicating dead hand control issues in posthumous conception by proposing that deceased progenitors make pre-death support arrangements for any after-born children).

\(^{232}\) See *Hecht*, 16 Cal. App. 4th at 852-55, 20 Cal. Rptr. 2d at 284-87. The court stated, “[w]e thus conclude that real parties fail to establish with any pertinent authority that the public policy of California prohibits the artificial insemination of Hecht because of her status as an unmarried woman.” *Id.* at 855, 20 Cal. Rptr. 2d at 287.

\(^{233}\) See *id.* at 852-55, 20 Cal. Rptr. 2d at 284-87.
procreative choices which result in orphaned children, fundamental constitutional safeguards would not substantiate laws restricting such activities without compelling government interests.\(^{234}\)

There are levels of permissible government regulation which would address the concern of preventing posthumous conception from creating dependent orphans and wards of the state. The first approach is again to permit persons seeking to leave behind their biological material for post-death conception to provide means of child support for any such children who are conceived within a reasonable time after death.\(^{235}\) This would permit the parent to meet a moral, if not legal, obligation to support any offspring after death.\(^{236}\) Permitting children to inherit through or from a deceased parent’s estate also furthers strong public policy to hold progenitors financially liable for their offspring. Finally, another permissible approach would be to extend employment-related entitlements, such as social security and workers’ compensation survivor’s benefits that are based upon the earnings record of the deceased parent, to after-conceived children who are born within a reasonable time after the worker’s death.\(^{237}\)

One last policy concern under the dead hand control objection against posthumous conception is that it promotes a society of the living dead by diminishing the structure of the traditional American family. Opponents fear that this form of conception will result in large numbers of gamete bank orphans available for “stranger

---

\(^{234}\) See Steinbock, supra note 25, at 62-64, 66 (refuting the argument that posthumous conception will negatively impact the emotional, psychological, and social well-being of resulting children). See also Gilbert, supra note 25, at 546-47 (refuting claim that the state has a compelling interest in protecting children from psychological harm which might arise when they learn they were conceived non-coitally).

\(^{235}\) See Steinbock, supra note 25, at 63-64; Chester, supra note 1, at 994-1003. Unlike Professor Chester’s proposition, this is not a proposal to mandate post-death child support as a precondition to post-death procreation. Greater consideration would need be made regarding the constitutional ramifications of attaching the exercise of procreational liberty to one’s economic status and position. Further constitutional issues arise, along with administrative concerns of enforcement and execution, in conditioning a living person’s right to procreate on the pre-death actions of dead persons.

\(^{236}\) See Chester, supra note 1, at 994-1003.

\(^{237}\) See Thies, supra note 26, at 922-23, 960.
procreation. This of course means that the resulting children would never have an opportunity to know of or have relations with their predeceased biological parent(s). Arguably, this scenario could possibly present economic, developmental, and social disadvantages for such children.

However, this argument does not justify the elimination of an entire means of procreation. The approach taken by many gamete banks regarding abandoned gametes is first to follow the express wishes of the gamete providers as provided in the storage agreement. Although one option would be to make available such gametes for stranger procreation, most gametes are discarded upon abandonment or after their useful life expires. This of course raises other ethical and moral issues regarding the proper disposal of biological material having the potentiality of becoming human life.

Intent-based, stranger procreation by assisted reproduction can be compared to society's current stranger adoption system. Both systems provide homes for orphaned children, or gametes with the potential of becoming children, with parents who usually have a great desire to parent children in a responsible and committed fashion. The obvious distinction, of course, is that stranger adoptions work mostly to alleviate the societal burden of orphaned children.

238. See generally Gilbert, supra note 25, at 539-47 (refuting state interests concerning the protection of the traditional family structure and concerns regarding the well-being of posthumous offspring as justifiable means for restricting posthumous procreation).

239. See id.

240. See id. (discussing constitutional implications based upon equal protection and due process principles which would preclude states' total abrogation of posthumous conception as an expression of one's procreative choice). See also John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 Va. L. Rev. 405 (1983) (contending that a single person has a constitutional right to procreate via non-coital, collaborative conception).

241. See York, 717 F. Supp. at 421; Hecht, 16 Cal. App. 4th at 836, 20 Cal. Rptr. 2d at 275; Hall, 647 So. 2d at 1348; Davis, 842 S.W.2d at 588. These cases deal with controversies involving clinics and their disposition of stored frozen human gametes.


243. See id.

who are already in gestation or born. Assisted reproductive technology is becoming a more popular means of exercising the constitutional right to procreate. This reproductive option, however, cannot be restricted in any greater manner than laws restricting the reproductive activities of progenitors who later decide to give up their children for adoption.

It may be possible that intent-based parenting may produce more healthy, well-balanced offspring regardless of the system creating the parental relationship. Traditional bias and prejudice against adopted children also continue to diminish as society embraces higher concepts of responsible parenting reflected in providing a child with a loving, nurturing, and disciplined environment. Most states' inheritance laws historically prevented adopted children from inheriting from both biological or birth parents. Now, adopted children are statutorily recognized by states as the legal children of adoptive parents for all purposes, including inheritance.

The modern reality of a traditional American family structure today does not depend solely upon one's biological affiliation with those within the familial association. Of most importance is the creation of voluntary familial associations by parents who intensively accept the attending rights, responsibilities, and benefits of raising children. After all, what is the familial tie that really binds—blood or commitment?

245. See id. at 511-12.
246. See supra Part II.A.
247. See generally, Gilbert, supra note 25, at 531-38 (assuming the existence of a constitutional right to procreate by artificial means based upon longstanding precedents supporting a constitutional right to traditional procreation). Johnson v. Calvert, 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494 (1993), provides significant support and judicial recognition that assisted reproduction is a protected form of fundamental constitutional activity.
248. See Shapo, supra note 1, at 1182-85 (suggesting that intent-based parenting may not negatively impact traditional familial structures, but that it promotes the procreative choices of persons intensively seeking to raise children).
249. See Wadlington, supra note 244, at 511-12.
250. See infra Part IV.A.2.
251. See infra Part IV.A.
b. *in the best interests of the unconceived*

Some administrative accommodation for posthumously conceived children in their pursuit of survivor’s benefits is reasonable. As it stands, the Act virtually excludes them as a subclass from benefiting from their own deceased parent’s actual contributions into a social retirement insurance program. Unconceived, as well as unborn, children understandably have some degree of moral expectancy of being supported by their predeceased biological or intended progenitors.\(^{252}\)

This moral expectancy of support is reflected in state inheritance laws which were extended to incorporate the class of after-born children as appropriate takers of the intestate estates of predeceased parents.\(^{253}\) Some level of minimal protection should also attach to the unconceived, who are later born alive within a reasonable gestation period after the parent’s death. A few states have at least acknowledged this approach by permitting predeceased parents to provide for such children by will.\(^{254}\)

Society should not punish posthumously conceived children because their parents elected to procreate by assisted reproduction. The right to procreate has long-standing judicial recognition as a fundamentally protected constitutional right that is “one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.”\(^{255}\) *Jhordan C.* represented the majority view that progenitors should not be discriminated against based upon their chosen method of procreation, which includes the assisted reproductive options discussed in this paper.\(^{256}\) It has also been firmly established that judicial and legislative actions determining the rights and

---

254. See *supra* Part II.C.1.
256. See *Jhordan C.*, 179 Cal. App. 3d at 386, 224 Cal. Rptr. at 530. California’s Supreme Court concluded in the gestational surrogacy case of *Johnson v. Calvert*, 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494 (1993), that “[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.” Id. at 101, 851 P.2d at 787, 19 Cal. Rptr. 2d at 505.
entitlements of children should not be an attempt to control the social behavior and procreational choices of their parents.\textsuperscript{257}

A pervasive prejudice and strong bias against nonmarital children is deeply embedded in the lawmaking history of this country. This prejudice has resulted in the unfair and unequal treatment of such children as though they were inferior persons entitled to less protection and to fewer rights based solely on their status.\textsuperscript{258} Society continues in its struggle to unweave this web of disenfranchisement traditionally associated with the procreational choices of parents. Nonmarital children have suffered long enough for the improvident actions of their ancestors. As reproductive technology advances, creating new means of exercising one's procreative choices and thereby potentially creating new legal classes of nonmarital children, existing relevant laws should be revisited and revamped accordingly.

Although the method of reproduction is unusual, nontraditional, and, perhaps to some, reminiscent of the mad scientist era, society must remember that frozen embryos represent the potentiality of human life in the form of real, living children. Once these children are born, should they be labeled or even treated as modern day Frankenstein's? One should hope not, for they are indeed individuals.\textsuperscript{259}

\textsuperscript{257} See generally Mathews v. Lucas, 427 U.S. 495 (1976) (upholding a statutory provision barring intestate inheritance by an illegitimate child who had not established paternity during the lifetime of its father).

\textsuperscript{258} See id. at 505. See also Lalli v. Lalli, 439 U.S. 259 (1978) (limiting a nonmarital child's right to inherit from the biological father's estate under intestacy laws).

\textsuperscript{259} See Clifford Grobstein, Science and the Unborn: Choosing Human Futures 22-23 (1988). The moral, ethical, political, and biophysical implications in assigning individuality status to the unborn has become a rather complex, yet abstract arena for philosophical and legal debate due to the advent of reproductive technology. This author provides a rather insightful discussion on the policy ramifications of assigning such status to the unborn in the various stages of biophysical development. The individuality and humanness of the preembryo, embryo, and fetus is discussed in six separable aspects . . . that arise during a life history: genetic, developmental, functional, behavioral, psychic, and social. Genetic individuality refers to hereditary uniqueness, where "hereditary" means "able to be transmitted from generation to generation"; developmental individuality refers to achievement of singleness and its consequences; functional individuality refers to diverse activities essential to survival; behavioral individuality refers to integrated activities of the whole in relation to environments; psychic individuality refers to inner
They are persons whose liberties and rights are indisputably protected by principles of fairness and equity promoted by the Constitution as was once vehemently interpreted through the judicial activism and leadership of the Warren Court.\textsuperscript{260}

III. OVERVIEW OF SOCIAL SECURITY LEGISLATION AND THE NATURE OF SURVIVOR’S DEATH BENEFITS

A. An Overview of the Historical and Political Schemes of Social Security

By the turn of the twentieth century, the poverty level of this rapidly industrialized nation was in epidemic proportions.\textsuperscript{261} Under experiences accompanying behaviors; and social individuality refers to self-aware interactions within a community of individuals. 

\textit{Id.} at 22-23.

\textsuperscript{260} The political demography of the Warren Court’s majority is marked by remnants of Chief Justice Warren’s progressivism—a political ideology of affirmative government which embraced the impact technological progress would have in making America a better place to live; promoted the return of moralistic canons of social values and decency to replace corrupted government public offices politicized by deference to monopolistic corporate overtures; and which refuted anti-patriotic foreign nationals, their ideologies, and organizations which were perceived as threats to national security, and radical liberalism which resulted in high profile landmark civil liberties decisions such as Brown \textit{v. Board of Educ.}, 347 U.S. 483 (1954); Loving \textit{v. Virginia}, 388 U.S. 1 (1967); and \textit{Miranda v. Arizona}, 384 U.S. 436 (1966). The Warren Court’s overall interpretive ideology represented a radical metamorphosis from past Courts’ adherence to judicial restraint in matters of traditional public policy and law making vestiges. Judicial activism motivated by egalitarian and libertarian principles, sometimes criticized as being devoid of any legal principles, fueled the Warren Court’s reputation in that 

[n]o group of judges before the Warren Court had sought simultaneously to encourage affirmative government and to protect rights against the state. No group of judges had been willing to depart so markedly from canons of judicial restraint and at the same time to champion so vigorously the rights of disadvantaged and dissident persons. Warren and his fellow members of the liberal majorities on the Warren Court took those positions, in the face of severe professional and lay criticism, because they believed in the rightness and justice of their undertaking.


\textsuperscript{261} After the Great Depression in the late 1920s and early 30s, many Americans no longer had confidence in their ability to forestall the economic uncertainties of poverty through savings, extended families, and an agricultural
the leadership of President Franklin D. Roosevelt, Congress responded with the enactment of the Social Security Act in 1935.262 President Roosevelt’s intent was to create a social insurance program to pay one-time lump sum benefits to retired workers over age 65.263 During remarks at the signing of the Act, he envisioned that

This social security measure gives at least some measure of protection to thirty million of our citizens who will reap direct benefits through unemployment compensation, through old-age pensions and through increased services for the protection of children and the prevention of ill health.

We can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age.264

The Act has been amended in monumental ways to reflect the economic conditions and political trends in America. Some of the most significant amendments were enacted to expand the coverage of social security programs.265 For instance, in 1939, insurance benefits were made available to the dependents and survivors of workers with earnings base. The problem of economic insecurity was further compounded by the Industrial Revolution, as many agricultural and rural families left their homes in search of the promised economic rewards of urban living. See ROBERT J. MYERS, SOCIAL SECURITY 1-20 (4th ed. 1993); SOCIAL SEC. ADMIN., A BRIEF HISTORY OF THE SOCIAL SECURITY ADMINISTRATION (1995) [hereinafter A BRIEF HISTORY].

262. See A BRIEF HISTORY, supra note 261, at 3; MYERS, supra note 261, at 228-32.
263. See A BRIEF HISTORY, supra note 261, at 3.
264. Id. at 4.
265. Current coverage under the Act includes the following programs: Retirement Insurance, Survivor's Insurance, Disability Insurance, hospital and medical insurance for the aged, the disabled, and those with end-stage renal disease, Black Lung benefits, Supplemental Security Income, Unemployment Insurance, public assistance and welfare services (aid to needy families with children, medical assistance, maternal and child health services, child support enforcement, family and child welfare services, food stamps, and energy assistance). See S.S. HANDBOOK, supra note 27, at 5; Stansbury, supra note 27, at 1-3.
qualified earnings. In the next decade, between 1950 and 1956, the Act’s coverage was expanded to include disability insurance payments to disabled adult workers and their dependents. Between 1965 and 1977, the Act’s coverage expanded further when the Medicare bill was signed into law to provide health coverage insurance to all Americans aged 65 or older.

This progressive and steady expansion of coverage and programs came to a halt in the early 1980s when it became evident that the long-term financial viability of social security was at risk. When signing into law the Social Security Amendments of 1983, President Reagan stated that

Just a few months ago, there was legitimate alarm that Social Security would soon run out of money. The Social Security System must be preserved. And rescuing the System has meant re-examining its original intent, purposes and practical limits. The amendments embodied in this legislation recognize that Social Security cannot do as much for us as we might have hoped when trust funds were overflowing. These amendments reaffirm the commitment of our government to the performance and stability of Social Security. It was nearly 50 years ago when, under the leadership of Franklin Delano Roosevelt, the American people reached a turning point, setting up the...
During this decade, President Ronald Reagan signed into law the first of a series of retrenchment amendments which limited eligibility threshold requirements and permitted the taxation of social security benefits as an additional source of government revenue.\textsuperscript{272} The 1990s have led to significant legislation which increased the percentage of social security income subject to taxation,\textsuperscript{273} placed additional limits on disability payments to alcoholics and drug addicts,\textsuperscript{274} and created a progressive increase in the threshold retirement age for social security eligibility over the next decade.\textsuperscript{275} The financial crisis facing the social security program has led to great public debate and re-evaluation of program objectives and possible alternative funding sources in the future.\textsuperscript{276}

The funding of the social insurance program, through specially created trust funds, began in January, 1937, by the collection of

---

Social Security System . . . . Today we reaffirm Franklin Roosevelt's commitment that Social Security must always provide a secure and stable base so that older Americans may live in dignity. MYERS, supra note 261, at 893-95 (citing PUBLIC PAPERS: RONALD REAGAN 1983 (1984)).


\textsuperscript{273} See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, tit. 13, § 13215, 107 Stat. 312, 475-77. See also MYERS, supra note 261, at 258-60 (discussing legislative retrenchment measures on the social security program taken in the last decade).


\textsuperscript{275} See A BRIEF HISTORY, supra note 261, at 16.

\textsuperscript{276} See Tritch, supra note 40, at 96-99. Tritch discusses several alternatives, which include: (1) Personal Security Accounts—individuals would reinvest the difference in a reduced payroll tax in a personal security account with a private investment source; (2) Personal Investment Plans—individuals would take a smaller reduction in payroll taxes to be reinvested in an investment fund; (3) Individual Accounts—taxpayers would be required to open a separate individual retirement account without any corresponding reduction in payroll taxes; (4) Maintain Benefits Plan—calls for an investment of "as much as 40% of the trust fund in a stock index fund;" and (5) Raise taxes and cut benefits—proposes a progressive payroll tax increase and increasing the retirement age to 70 by the year 2037. See id; see also Tynes, supra note 40, at 155-92 (discussing changes in the program between 1977 and 1990).
Federal Insurance Contributions Act (FICA) taxes from qualified employers and workers based upon their reported wages. Since then, a reported $4.1 trillion has been paid out in benefits from the total collected fund balance of $4.5 trillion. It has been estimated that the remaining balance of the trust fund, some $496 billion, along with funds to be collected over the next 14 years will not be enough to pay out benefits starting in the year 2012.

As Congress determines the political outcome and financial future of Social Security, American courts continue to address cases challenging the constitutionality of the Act's statutory restrictions on eligibility requirements for certain classes of people, such as posthumous children. Federal courts have adopted a liberal approach in interpreting the legislative intent of social security provisions so as to award benefits in marginal cases when at all possible.

277. See A BRIEF HISTORY, supra note 261, at 8. See also MYERS, supra note 261, at 229-94 (providing a detailed overview on the legislative history of the Act affecting areas of monthly lump sum benefits coverage for workers and auxiliaries—family and spouses; adjustments to the minimum retirement age; designations of qualified “insured status,” and the taxation of benefits, relevant tax rates and other funding issues).

278. See A BRIEF HISTORY, supra note 261, at 8. In 1937, a total of $1,278,000 in social security benefits were paid out to recipients, compared to a total of $316,812,000,000 paid out in 1994. A total of $5,096,000,000 in Supplemental Security Income was paid out in the first year of federally administered payments in 1974, whereas the total paid out in 1994 was $25,291,000,000. See id. at 22.

279. See Tritch, supra note 40, at 96 (stating that “[a]ccording to a 1996 report of the Social Security Trustees, starting in just 16 years—2012—the taxes paid into Social Security will no longer cover the benefits going out, as millions of baby boomers begin retiring”).

280. The constitutionality of various portions of the Social Security Act was determined in Califano v. Boles, 443 U.S. 282 (1979); Fleming v. Nestor, 363 U.S. 603 (1960); Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937). For a case dealing specifically with provisions related to the determination of paternity of a posthumous child, see Haas v. Chater, 79 F.3d 559 (7th Cir. 1996) holding that the Social Security Act’s incorporation of the Indiana state inheritance statute as a basis for determining the paternity of a posthumous child for insurance benefits was constitutional.

Conversely, courts have also recognized their duty to uphold the
constitutionality of the Act’s eligibility requirements when necessary
to prevent spurious claims. This existing “tension between hon-
orning the broad remedial scope of the [A]ct and protecting the social
security system from becoming abused and overburdened” is likely to polarize even further due to the bleak financial outlook of
social security.

The social security laws of this country offer a broad range of
financial and medical supportive services “providing for the material
needs of individuals and families, protecting aged and disabled per-
sons against the expenses of illnesses that could otherwise exhaust
their savings, keeping families together, and giving children the op-
portunity to grow up in health and security.” These services range
from Black Lung benefits, railroad retirement, and sickness and un-
employment insurance to hospital and medical insurance for those
with end-stage renal disease. State social security-related benefit
programs which operate in concert with the federal government in-
clude: Unemployment Insurance, Worker’s Compensation, Veteran’s Benefits, Public Assistance and Welfare (Workfare) to
Families with Children, Food Stamp assistance, and child support en-
forcement and establishment of paternity.

Services which are typically referred to as “social security bene-
fits” are governed by the Old-Age, Survivors, and Disability Insur-
ance (OASDI) program under the Act and are specifically designed
to protect disabled and aged (retired) persons and their qualifying
family members from financial destitution. Events which trigger

1947) (applying Alabama law and pronouncing that the Social Security Act
was to be liberally construed).

283. Stansbury, supra note 27, at 2.
284. S.S. HANDBOOK, supra note 27, at 5.
285. See id.
286. See id. at 439-53.
287. See id. at 485-509.
288. See id. at 459-62.
289. See id. at 474-75.
290. See id. at 464-74.
The Supplemental Security Income, Medicare, and Food Stamps programs are
also major components of the typical social security benefits.
the Act's provision of retirement, disability, dependent's and survivor's insurance include: a wage earner's retirement at the threshold age, a person's disability at any age, and the death of a qualifying wage earner.²⁹²

In order to qualify for retirement, disability, and survivor's insurance, applicants must establish that they or their qualifying wage earner has worked the requisite number of years and paid social security taxes on earnings.²⁹³ The employee's earning record determines whether the worker has enough covered employment experience or "credits" to qualify for insurance payments and the amount the applicant is entitled to receive.²⁹⁴ The higher the worker's average lifetime earnings are during covered work experience, the higher insurance payment the applicant receives.²⁹⁵ Applicants for full retirement benefits must have also reached the required age of retirement which was 65 between 1994 and 1999, and increases to 67 in the year 2022 and later.²⁹⁶ Additional disability status requirements must be met for applicants seeking disability insurance.²⁹⁷

Retirement and disability insurance benefits are more properly characterized as rights of entitlement available to living wage earners or their families based upon a lifetime condition or activity such as the worker's disability or work history. Disability and retirement benefits are terminated when the worker dies.²⁹⁸ It is the wage earner's death which triggers a surviving applicant's right to apply for survivor's insurance. As such, posthumous conception is relevant in certain claims for survivor's benefits because the conception and birth of the child applicant occurs after the death of his or her putative wage earner parent.²⁹⁹ A pragmatic stance would lead to the conclusion that only those who are alive and survive the death of the

²⁹². See S.S. HANDBOOK, supra note 27, at 33-35. See generally Garner v. Richardson, 333 F. Supp. 1191, 1195 (N.D. Cal. 1971) (interpreting the legislative intent of survivor's benefits as simply to replace lost income the child would have continued to receive but for the death of the wage earner).
²⁹³. See S.S. HANDBOOK, supra note 27, at 29-38.
²⁹⁴. See id.
²⁹⁵. See id.
²⁹⁶. See id.
²⁹⁷. See id.
²⁹⁸. See id. at 345.
²⁹⁹. See Kerekes, supra note 1, at 232-40 (discussing the fate of Judith Hart and other posthumously conceived children under the Act).
worker should be entitled to survivor’s death benefits.\textsuperscript{300} This approach, of course, might result in having different survivor’s status and benefits assigned to whole blood siblings within the same family unit.\textsuperscript{301}

\textbf{B. Survivor’s Death Insurance Under Social Security}

In furtherance of the Act’s goal of keeping families together, dependent’s and survivor’s death benefits were added to worker’s retirement benefits under social security by amendment in 1939.\textsuperscript{302} Depending on the applicant’s relationship to the deceased worker, survivor’s insurance benefits are payable on a monthly basis, and may include a one-time lump sum death payment.\textsuperscript{303} The amount of the monthly payment represents a set percentage of the worker’s primary insurance amount (PIA)\textsuperscript{304} which is based upon the worker’s earnings, the applicant’s age and relationship to the worker, and the extent to which the payment exceeds the “family maximum” limit.\textsuperscript{305}

The establishment of an applicant’s relational status to a deceased wage earner is paramount in qualifying for survivor’s insurance under social security. Upon the death of a worker who has earned the requisite employment credits, survivor’s benefits may be payable to a range of family members. Qualifying family members include the worker’s widow or widower,\textsuperscript{306} unmarried children under 18,\textsuperscript{307} father or mother of the worker’s children under sixteen years

\begin{itemize}
\item \textsuperscript{300} See id. at 238-39 (discussing the original decision of the Social Security Administration Appeals Council in Judith Hart’s case).
\item \textsuperscript{301} See id. at 240-41.
\item \textsuperscript{302} See Social Security Act Amendments of 1939, ch. 666, 53 Stat. 1360 (1939); Myers, supra note 261, at 238.
\item \textsuperscript{303} See 42 U.S.C. § 402(i), (j) (1994).
\item \textsuperscript{304} The computation of the primary insurance amount depends upon the type of coverage, benefit, age and status of the worker or auxiliary or surviving familial beneficiaries. The ultimate determination of an insured’s benefit amount is based upon the worker’s Average Monthly Wage (AMW) as computed by set formulas to reach the Primary Insurance Amount (PIA). See Myers, supra note 261, at 60-62, 247-58.
\item \textsuperscript{305} The Maximum Family Benefit (MFB) caps the amount of auxiliary and surviving benefits payable in one given family based upon the earnings record of a particular worker. See id. at 169-70, 213-14.
\item \textsuperscript{306} See 42 U.S.C. § 402(e), (f) (1994).
\item \textsuperscript{307} See id. § 402(d).
\end{itemize}
of age, dependent parents sixty-two years of age or older, and surviving divorced spouses.

Of all potential survivors, the widow(er) is entitled to the greatest proportionate share of the worker’s PIA. Survivor’s benefits are payable to the wage earner’s unmarried, surviving widow(er) who is at least sixty, or fifty if disabled, and who meets one of six qualifications, two of which include: (1) being married to the deceased for at least nine months prior to death, and (2) being the biological or adoptive parent of a child of the deceased wage earner. Posthumous conception issues are clearly implicated in two other types of survivor’s insurance: mother’s or father’s insurance, and unmarried children’s insurance.

Where widow(er)’s insurance is unavailable, survivor’s benefits may still be payable to the surviving spouse or divorced spouse who is a mother or father of the deceased worker’s children who are under 16 years of age, where that surviving parent is caring for the child and meets certain other criteria. Qualifying for mother’s or

308. See id. § 402(g).
309. See id. § 402(h).
310. See id. § 402(b), (c).
311. See id. § 402(e), (f); SOCIAL SECURITY ADMINISTRATION, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY 15 (Office of Research, Evaluation and Statistics 1998) [hereinafter FAST FACTS & FIGURES]. See also MYERS, supra note 261, at 50-52, 54-57, 60 (confirming that the widow(er)’s survivor’s benefits are the highest because they are entitled to 100 percent of the PIA if the claim is made at the normal retirement age as statutorily provided).
312. See 42 U.S.C. § 402(e), (f); S.S. HANDBOOK, supra note 27, at 69-70. The second requirement is met simply by showing that “a live child was born to the worker and the claimant, although the child need not still survive.” Id. at 70. With assisted reproductive technology, more aged surviving widow(er)s may now qualify for benefits under this second criterion. More elderly persons could join the ranks of such applicants by artificially conceiving children, even after the wage earner’s death, at a time beyond their normal reproductive years. See Margaret Carlson, Old Enough to Be Your Mother: Two Women Stir Up the Question of When is it Too Late to Bear Children, TIME, Jan. 10, 1994, at 41. As such, it is possible that the legal status of “biological child” will require future administrative and judicial scrutiny to determine whether the child’s live birth must occur prior to the worker’s death.
313. See 42 U.S.C. § 402(g)(1). Upon filing an application for such benefits in a timely fashion, surviving spouses or surviving divorced spouses qualify for mother’s or father’s insurance if they are unmarried and are not entitled to other surviving spouse insurance or old-age benefits. They must also have in their care a child who qualifies as a child of the deceased worker. See id.
father’s benefits is contingent upon establishing a parental relationship between the deceased worker and the children who are in the care of the surviving mother or father. Since reproductive technology has expanded the configuration of such relationships, the most challenging task now confronting Social Security officials is the determination of whether the posthumously conceived children of a surviving mother or father qualify as the deceased worker’s surviving “children.” Judith Hart’s mother’s application for surviving mother’s benefits would have raised this very issue to be addressed under the Act.

Mrs. Hart’s primary claim was on behalf of her daughter Judith as the child of her predeceased husband. Ordinarily, child survivor’s benefits are payable to the unmarried, dependent children of a deceased worker until the child reaches age eighteen; or nineteen if the child is a full-time elementary or secondary school student; or older if the child has a disability which began prior to age twenty-two. Child survivors, who constitute approximately half of all children receiving social security benefits, receive the highest average monthly benefit among child beneficiaries because they are entitled to receive three-quarters of their deceased parent’s PIA. In 1997, the average monthly benefit payable to all children of disabled, retired or deceased workers was $345 per month, whereas child survivors alone received an average monthly payment of $493.

These benefits were established to replace the surviving child’s loss of income resulting from the worker’s death. Courts have thus found that the legislative intent behind such payments is to support surviving children who were actually “dependent” upon the

314. See id. § 402(g)(1)(E). The child must in turn qualify for child’s insurance benefits under § 402(d).
315. See supra Prologue.
316. See Kerekes, supra note 1, at 232-40.
318. See FAST FACTS & FIGURES, supra note 311, at 33.
319. See id.
320. See Wolfe v. Sullivan, 988 F.2d 1025, 1028 (10th Cir. 1993) (recognizing that pursuant to the Supreme Court decision in Mathews v. Lucas, 427 U.S. 495, 507, 508 & n.14 (1976), Congress intended to replace the loss of income and support children experienced at their parent’s death, which is not based upon an applicant’s otherwise legitimate claim for support).
The Act’s dependency requirement may be presumed, however, by establishing a child’s required relational status with the wage earner, as discussed below. Where dependency becomes an issue, the applicant must produce evidence of actual dependency. Actual dependency can be proven with evidence that the child was living with the worker at the worker’s death, or that the worker was contributing to the child’s support when the worker died.

321. See id. In Wolfe, the Court recognized that the purpose of awarding social security survivorship benefits is to provide financial support for children who were dependent upon the deceased wage earner at his or her death. The benefits are intended to replace the loss of support income that a dependent child received while the wage earner was alive and working. See id.

322. See Stansbury, supra note 27, at 40-43; Wolfe, 988 F.2d at 1028. Wolfe recognized that pursuant to the Supreme Court decision in Mathews, Congress intended that actual dependency would not need to be shown in instances where

the child would be entitled to inherit under state laws governing intestate succession of personal property, 42 U.S.C. § 416(h)(2)(A); if the parents went through a marriage ceremony but the marriage is invalid due to a legal impediment, 42 U.S.C. § 416(h)(2)(B); or if the parent, before death, acknowledged in writing that the applicant is his or her child, had been decreed by a court to be the parent, or had been ordered to contribute child support because the applicant was his child. 42 U.S.C. § 416(h)(3)(C)(i).

Wolfe, 988 F.2d at 1028.

323. See Wolfe, 988 F.2d at 1028 (holding that actual dependency will become an issue when applications for survivor’s benefits are submitted by posthumous illegitimate children, pursuant to Parsons ex rel. Bryant v. Health & Human Servs., 762 F.2d 1188, 1191 (4th Cir. 1985); Doran v. Schweiker, 681 F.2d 605, 608 (9th Cir. 1982); and Adams v. Weinberger, 521 F.2d 656, 660 (2d Cir. 1975)).

324. See 42 U.S.C. § 402(d)(3), (4); id. § 416(h)(3)(A)(ii), (h)(3)(B)(ii), (h)(3)(C)(ii); Wolfe, 988 F.2d at 1028; Parsons, 762 F.2d at 1191; Doran, 681 F.2d at 608; Adams, 521 F.2d at 660. These cases recognize the practical impossibility in requiring illegitimate, posthumous children to prove actual dependency under this test. Instead, they hold that a more reasonable approach would be to permit such children to show that their deceased parent’s support was commensurate to the child’s needs at the time the parent died. See Wolfe, 988 F.2d at 1028. The “commensurate test” has not been extended to posthumously conceived illegitimate children who would have an even greater difficulty in establishing the factors under the actual dependency tests. See Stansbury, supra note 27, at 40-43.
As mentioned earlier, actual proof of these factors may not be necessary where the applicant is shown to be the decedent’s “child” under the Act.\textsuperscript{325} There are six statutory definitions of a qualifying “child” upon which a proof of actual dependency may not be required. These are a worker’s: (1) legitimate child under state intestate law,\textsuperscript{326} (2) stepchild under certain criteria,\textsuperscript{327} (3) legally adopted child,\textsuperscript{328} (4) ceremonial marital child under certain situations,\textsuperscript{329} (5) dependent grandchild or step grandchild,\textsuperscript{330} or (6) natural child.\textsuperscript{331} It has been determined that Congress intended that under these circumstances, dependency is “objectively probable.”\textsuperscript{332}

Most recipients of child survivor’s insurance qualify for benefits either as a “legitimate child” under state intestate law or as a “natural child” of the worker. The statutory deference to states’ intestate laws exists, in part, because in 1939 these laws were fairly uniform, consistent and reliable in determining the paternity of children for intestate purposes.\textsuperscript{333} All states’ intestate laws presume the paternity of legitimate children born during the marriage or within a reasonable gestation period beyond the dissolution of the marriage.\textsuperscript{334} Due to this presumption of paternity, marital children are deemed dependent on a deceased marital parent for survivor’s benefits.\textsuperscript{335} No proof of

\begin{itemize}
\item[325.] See 42 U.S.C. §§ 402(d)(3), 416(e)(1), (h)(2).
\item[326.] See id. § 416(h)(2)(A).
\item[327.] See id. § 416(e)(2).
\item[328.] See id. § 416(e)(1).
\item[329.] See id. § 416(h)(2)(B).
\item[330.] See id. § 416(e)(3).
\item[331.] See id. § 416(h)(3)(C)(i); S.S. HANDBOOK, supra note 27, at 74-76.
\item[332.] Wolfe, 988 F.2d at 1028 (quoting Mathews v. Lucas, 427 U.S. 495, 509 (1976), which upheld the Act’s additional requirements of actual dependency for posthumous illegitimate children who are unable to meet the Act’s presumed tests of dependency).
\item[334.] See SOCIAL SECURITY ADMINISTRATIVE PROCEDURES § 649, at 158; Le Ray, supra note 333, at 750-59.
\item[335.] See Wolfe, 988 F.2d at 1027; Stansbury, supra note 27, at 40.
\end{itemize}
actual dependency is usually required of legitimate, marital children.\textsuperscript{336} Qualifying as a “legitimate child” under state intestate laws is generally not an option for nonmarital and most posthumously conceived children because they are conceived outside the bounds of marriage, and thus are unable to avail themselves of a state’s paternity presumption as legitimate children.\textsuperscript{337} Often, their only recourse in establishing dependency upon a deceased wage earner is to prove that they are the worker’s “natural child.”\textsuperscript{338}

There are four tests used to prove one’s status as a worker’s “natural child.” A deceased worker’s natural child is a child who has been: (1) acknowledged in writing by the worker as his or her child prior to death,\textsuperscript{339} (2) decreed by a court as the worker’s child prior to the worker’s death,\textsuperscript{340} (3) a recipient of court-ordered child support from the worker prior to the worker’s death,\textsuperscript{341} or (4) shown to be the child of the worker by other satisfactory evidence and by having lived with the decedent or been supported by the decedent at his death.\textsuperscript{342}

Many nonmarital children are deemed dependent on their deceased parent by proving the factors under one of the first three tests. These tests are rarely suitable, however, for nonmarital children who are conceived or born postmortem because the Act requires the acknowledgment or court order of support or paternity to occur prior to the worker’s death.\textsuperscript{343} Thus, these children are almost always required to show actual dependency under the final test of natural

\textsuperscript{336} See Stansbury, supra note 27, at 40-43.
\textsuperscript{337} See infra Part IV.
\textsuperscript{338} See infra Part IV.
\textsuperscript{343} The acknowledgment and court order of support or paternity will be “deemed to have occurred on the first day of the month in which it actually occurred.” Id. § 416(h)(3).
child. This final means of establishing dependency, known as the "last resort test," is essentially their only plausible option.

The last resort test involves a two-tier analysis. First, the claimant must submit satisfactory evidence of paternity, and then show that the decedent was living with the claimant or supporting the claimant at the time of the decedent’s death. After-born as well as posthumously conceived children are usually able to establish paternity, especially when the deceased worker’s DNA samples are available for testing. Most find it difficult, however, to prove they were living with or supported by the worker at his death because they were either in utero or in some other stage of an assisted reproduction process.

It is practically impossible for such children to meet the statutory requirement that they and the predeceased worker had “ordinarily live[d] in the same home and the worker exercise[d], or ha[d] the right to exercise, parental control or authority over the child’s activities.” In Wharton v. Bowen, the Eastern District Court of New York opined that even an unborn child should have the ability to prove the “living with” requirement in marginal cases. The court recognized that the Act’s humanitarian aim supported a liberal interpretation where it could be proven that the unborn, illegitimate child was the worker’s biological child.

The Act’s “support” standard, which mandates that the wage earner’s contributions to a child applicant be made “regularly and [be] large enough to meet an important part of the [child’s] ordinary

---

344. See Stansbury, supra note 27, at 40-43; Wolfe, 988 F.2d at 1025; Parsons ex rel. Bryant, 762 F.2d at 1191; Doran, 681 F.2d at 608; Adams, 521 F.2d at 660.
345. See Wolfe, 988 F.2d at 1025; Parsons ex rel. Bryant, 762 F.2d at 1191; Doran, 681 F.2d at 608; Adams, 521 F.2d at 660.
347. See Doran, 681 F.2d at 608 (stating that such a test does not serve the remedial nature of the Act because it denies virtually all posthumous illegitimate children the ability to demonstrate their father’s support).
348. Stansbury, supra note 27, at 43.
350. See id. at 906.
351. See id.
living costs," also presents an impenetrable impasse for nonmarital, posthumously conceived and after-born children. As early as 1975, a slow erosion of the "regular and substantial" support standard began as a number of courts liberally construed the standard when applying it to such children. Other, more relevant factors such as the deceased parent's financial support of the unborn child's mother were considered in determining whether the support requirement was met. The contributions made to the pregnant mother were constructively attributed to the care and support of the unborn child, as courts began to concentrate on the nature of the pre-death relationship between the child's unwed parents. By 1993, the Tenth Circuit, in Wolfe v. Sullivan, ratified Doran's commensurate support test which allowed after-born, nonmarital children to prove that their parent's support was commensurate with their needs as an unborn child given their father's financial status and the stage of their mother's pregnancy at the father's death.

Wolfe substantiated the need to adjust the administrative interpretation of traditional support standards to reflect current trends in society's relational and reproductive habits. The unmarried couple in Wolfe had met in late April of 1988 and began living together in early May, 1988. The mother informed the father of her pregnancy in late August, 1988, and the couple separated in early

353. Wolfe, 988 F.2d at 1028.
354. See Adams, 521 F.2d at 659.
355. See Wolfe, 988 F.2d at 1025; Orsini v. Sullivan, 903 F.2d 1393 (11th Cir. 1990), cert. denied, 498 U.S. 1024 (1991); Smith v. Heckler, 820 F.2d 1093 (9th Cir. 1987); Dubinski ex rel. Van Schindel v. Bowen, 808 F.2d 611 (7th Cir. 1986); Imani v. Heckler, 797 F.2d 508 (7th Cir.), cert. denied, 479 U.S. 988 (1986); Parsons ex rel. Bryant, 762 F.2d at 1191; Doran, 681 F.2d at 605; Parker v. Schweiker, 673 F.2d 160 (6th Cir. 1982); Boyland v. Califano, 633 F.2d 430 (6th Cir. 1980); Jones v. Harris, 629 F.2d 334 (4th Cir. 1980); Fleming v. Califano, 594 F.2d 1081 (5th Cir.), cert. denied, 444 U.S. 918 (1979); Gay ex rel. McBride v. Heckler, 583 F. Supp. 499 (N.D. Ga. 1984); Adams, 521 F.2d at 659.
356. See Doran, 681 F.2d at 609.
357. See id.
358. 988 F.2d 1025 (10th Cir. 1993).
359. See id. at 1028.
360. See id.
361. See id. at 1027.
The child was born on April 26, 1989, six months after the father's death on October 5, 1988. The claimant in this case, however, was unable to satisfy the "commensurate support" test because none of the deceased putative father's contributions to the mother were made to support the unborn child. Although he had the requisite pre-death knowledge of the unborn child, his contributions were made for courtship purposes which he had discontinued by the time of his death. He had not purchased any baby clothes, baby furniture, or provided for the mother's food, housing, or prenatal and medical care. The court concluded that there was simply no evidentiary basis in this case upon which even the commensurate support test could stand.

Most courts have, whenever possible, taken a liberal approach when applying the commensurate test because of the Act's remedial nature. In one earlier case, another illegitimate, posthumous child successfully met the test even where there was only a one-time contribution to the child's medical care by the deceased worker.

No court has yet been willing, however, to extend the commensurate support test to allow nonmarital children conceived after the death of a parent to satisfactorily prove their dependency upon that parent. The Hart case prompted a further inquiry into whether
such children are even capable of being dependent, under either the "living with" or "commensurate support" tests, on a parent who died prior to the child's conception.\textsuperscript{370} This inquiry raised the initial question of whether Congress ever contemplated extending social security coverage to such children when the survivor's provisions were added to the Act in 1939. It is highly unlikely, especially because the requisite reproductive technology was nonexistent during that time. Moreover, in \textit{Hart}, the Social Security Administration conceded that it was unable to conclusively determine this inquiry.\textsuperscript{371}

\textbf{IV. CATEGORICAL PARADIGMS IN DETERMINING CHILD SURVIVORS UNDER SOCIAL SECURITY}

The Act's definition of children has evolved over the last sixty years to reflect constitutional challenges from nontraditional classes of aggrieved child applicants.\textsuperscript{372} There is no doubt that early lawmakers never envisioned a time when social protocol and scientific advancements would compel equal treatment for dependent nonmarital children, after-born children, grandchildren, adopted children and even stepchildren.\textsuperscript{373} The final resolution of this inquiry must ultimately depend upon whether there is sufficient elasticity in the Act's current definition and treatment of "children" to extend survivor's coverage to posthumously conceived children.\textsuperscript{374} Thus, in that vein, the evolution of the Act's treatment of certain classes of

\begin{itemize}
  \item such children are even capable of being dependent, under either the "living with" or "commensurate support" tests, on a parent who died prior to the child's conception.\textsuperscript{370}
  \item The final resolution of this inquiry must ultimately depend upon whether there is sufficient elasticity in the Act's current definition and treatment of "children" to extend survivor's coverage to posthumously conceived children.\textsuperscript{374}
  \item The legal status of posthumously conceived children must be addressed in order to determine whether they are entitled to survivor's benefits. This requires that the child prove that she is the legal, albeit, biological child of the parent for entitlement purposes. Establishing this relational status is essential before the child can make any such claims derived from or through the deceased biological parent.
\end{itemize}
children will be evaluated to determine whether further expansion is warranted.

A. The Evolving Definition of Children for Social Security Survivor’s Benefits Under State Inheritance, Paternity, and Assisted Reproduction Laws

Prior to 1965, the Social Security Administration relied primarily on state inheritance and paternity laws to determine whether child applicants met the relational status required to receive survivor’s benefits.\textsuperscript{375} State inheritance and paternity laws were predicated upon standards that resulted in social security benefits being awarded mostly to marital children who were conceived prior to the deceased worker’s death.\textsuperscript{376}

1. State paternity laws—presumptive inheritance

The presumption of paternity for marital children is, in part, a result of the evidentiary bar against introducing testimony disproving the paternity of marital children under “Lord Mansfield’s Rule.”\textsuperscript{377} Nationwide departure from this rule began as states changed evidentiary standards in proving paternity due to the development of more reliable blood and DNA paternity testing.\textsuperscript{378}

\textsuperscript{375} See Kelly Wall Schemenauer, Adams v. Weinberger \textit{and} Dubinski v. Bowen: \textit{Posthumous Illegitimate Children and the Social Security Survivorship Provision}, 73 IOWA L. REV. 1213, 1214-17 (1988). This article also describes how the 1939 amendment limited survivor’s benefits to either children who qualified as a worker’s natural children and who could inherit the worker’s estate under state intestacy laws or children born to parents whose ceremonial marriage was invalidated due to some legal impediment. \textit{See id.} In 1965, the Act was amended to expand the illegitimate child’s options when applying for survivor’s benefits. \textit{See id.} at 1215.

\textsuperscript{376} See Doran v. Schweiker, 681 F.2d 605, 608 (9th Cir. 1982) (stating that the dependency test under survivor’s benefits “denie[d] virtually all posthumous illegitimate children the ability to demonstrate their father’s support”); Schemenauer, \textit{supra} note 375, at 1213.

\textsuperscript{377} HARVEY L. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES § 649, at 158. \textit{See also} SIDNEY B. SCHATKIN, \textit{DISPUTED PATERNITY PROCEEDINGS} 17 (3d ed. 1953) (referring to the early English case of Russell v. Russell, 1924 App. Cas. 721, where Lord Dunedin affirms “the rule that husband or wife may not testify to non-access where the result may be to bastardize the issue”).

\textsuperscript{378} See Le Ray, \textit{supra} note 333, at 786-89.
Other socio-political factors, such as the erosion of the traditional family structure, as well as greater public acceptance of alternate lifestyles and conception choices in assisted reproduction and adoption, also diminished uniformity in state paternity laws. These factors prompted greater flexibility in evidentiary standards which prove or disprove paternity regardless of the parent's marital status. State courts now tend to permit "all competent evidence, including that of the husband and wife regarding such issues as non-access and infidelity," in proving a child's paternity. Thus, putative fathers now have a greater ability to rebut the presumption of paternity of marital children, thus forestalling them from qualifying as takers of an intestate share under the putative father's estate.

2. The equal protection of state inheritance laws

No early statutory presumption of paternity existed for non-marital children. Historically, intestate laws reflected the Latin phrase nullius filius in disallowing nonmarital children from inheriting because they were considered "the children of no one." Georgia's modern statutory reference emphasizes this historical bias, providing that "[a] child born out of wedlock [shall] have no inheritable blood except that given to them by express law." All states now categorically provide that nonmarital children are minimally their biological mother's child, and for intestate purposes, can inherit from the estates of their mother and her relatives.

379. See id.
380. See id.
381. MCCORMICK, supra note 377, at 158.
382. See Le Ray, supra note 326, at 750.
383. See Schemenauer, supra note 375, at 1213 n.4 (citing 1 W. BLACKSTONE, COMMENTARIES 458, which states that "[t]he incapacity of a bastard consists principally in . . . that he cannot be heir to any one, neither can he have heirs, but of his own body; for being nullius filius, he is therefore of kin to nobody"). See also SCHATKIN, supra note 377, at 619-88 (providing an extensive overview of various state paternity and affiliation laws as of 1946).

385. These statutes typically provide that "[a]n illegitimate child shall be considered as an heir to his mother, and shall inherit her estate, in whole or in part, as the case may be, as if he had been born in lawful wedlock." HAW. REV. STAT. § 532-6 (1993). Other similar statutes include ARK. CODE ANN. §
SURVIVOR'S BENEFITS

The determination of whether such children can inherit from their father’s estate varies among state paternity and intestate laws. Most state inheritance laws start from a standpoint which bars non-marital children from inheriting from their putative biological fathers. Where permitted, the establishment of paternity of such children for inheritance purposes requires meeting an additional, heightened evidentiary standard often based upon actual biological and relational proof.  

For the purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, and from a person. A person born out of wedlock is the child of the mother. That child is also the father’s child if: a) the natural parents were married before or after the child’s birth, even though the attempted marriage is void; or b) paternity is established by adjudication before the father’s death or after his death by clear and convincing evidence; or c) the father and mother acknowledged paternity in writing.

See Schemenauer, supra note 375, at 1215-17 (discussing the inequitable differences between legitimate and illegitimate children and their ability to prove dependency upon a predeceased parent under the Act).

See Ark. Code Ann. § 28-9-209(d) (Michie 1987); Ky. Rev. Stat. Ann. § 391.105 (Michie Supp. 1996); Me. Rev. Stat. Ann. tit. 18-A, § 2-109(2)(ii) (West 1998). Other conditions to establish paternity would be if the father’s name appeared on the child’s birth certificate with the father’s permission or if the putative father was obligated to pay child support through volun-
Some statutes delineate the types of qualifying written acknowledgments which include: a court order declaring the child legitimate as provided by law; a court order establishing the father as parent; a sworn statement executed by the father attesting to the parent-child relationship; or the child's birth certificate signed by the father.\footnote{388} Petitioners in one state can also establish paternity for intestate purposes by presenting "clear and convincing evidence the child is the child of the father and the father intended to share in his estate as if the child were legitimate."\footnote{389}

A rebuttable presumption of paternity for inheritance purposes may also arise in some states where a genetic test is performed after the conception of the child which establishes paternity with at least a 95 to 99 percent probability, depending on the jurisdiction.\footnote{390} All

\footnote{388. See GA. CODE ANN. § 53-4-4 (1998).}
\footnote{389. Id.}
\footnote{390. States requiring at least a 95 percent probability of paternity include Arizona, Montana, Oklahoma, and Tennessee. See ARIZ. REV. STAT. ANN. §}
states have enacted some statutory time frame or limitation in which a paternity action must be commenced for purposes of inheriting from the estate of a deceased putative parent.\textsuperscript{391}

The most popular time frame under early state paternity laws often required that a child’s paternity be proven prior to the putative parent’s death and during the lifetime of both child and father. In 1978, the United States Supreme Court denied a Fourteenth Amendment Equal Protection Clause challenge to such a time requirement under the then New York inheritance statute in \textit{Lalli v. Lalli}.\textsuperscript{392} This statute conditioned a nonmarital child’s right to inherit based solely on the existence of an order of filiation filed “during the pregnancy of the mother or within two years from the birth of the child” and finalized during the father’s lifetime.\textsuperscript{393} The Court, in applying the middle-tier of scrutiny, concluded that this statutory requirement was substantially related to the important state purpose of administrative convenience and accuracy in establishing paternity of deceased putative fathers.\textsuperscript{394} The Court further stated that “requiring that the order be issued during the father’s lifetime permits a man to defend his reputation against ‘unjust accusations in paternity claims’ which was a secondary purpose” of the statute.\textsuperscript{395}

It seems that protecting the reputation of a deceased person would rarely justify the denial of that person’s living, biological child’s right to inheritance by intestacy solely because the child

\textsuperscript{391} See Clark v. Jeter, 486 U.S. 456, 460 (1988) (noting that states are required to enact a statutory scheme pursuant to the federal Child Support Enforcement Amendments).

\textsuperscript{392} 439 U.S. 259 (1978).

\textsuperscript{393} \textit{Id.} at 262 (quoting N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967)).

\textsuperscript{394} \textit{Id.} at 275-76.

\textsuperscript{395} \textit{Id.} at 271.
failed to or was practically unable to secure orders of filiation during his predeceased father's lifetime.

Justice Brennan's dissenting opinion rejected the premise that a legitimate state purpose was served by requiring a formal acknowledgment of paternity in all cases, especially where there is clear and convincing evidence of paternity. Brennan surmised that this requirement could exclude an entire class of nonmarital children from inheriting from parents with whom they may have had harmonious relations. Nonmarital children who were informally and openly acknowledged as well as supported by a putative parent would not, in most cases, see the need in bringing an adversarial proceeding of paternity during the parent's lifetime. The dissent found even less tenuous the state purpose of protecting estates from dubious and stale claims by unknown nonmarital children. A less intrusive means of meeting this state objective could be served by "[p]ublication notice and a short limitations period in which claims against the estate could be filed."

Justice Brennan's pronouncement has become a part of the modern statutory standard in proving paternity for inheritance purposes. Jurisdictional time frames for filing such actions now range from five months to one year after the decedent's death, within six months of an appointment of a personal representative over the deceased's estate, prior to the pending of the deceased parent's estate, or within three to six months after the posting of notice to creditors.

Georgia's inheritance statute, however, continues to restrict nonmarital children from inheriting through or from their deceased putative parent's estate "unless, during the father's lifetime and after

396. See id. at 277-79 (Brennan, J., dissenting).
397. See id. at 278 (Brennan, J., dissenting).
398. See id. (Brennan, J., dissenting).
399. See id. at 279 (Brennan, J., dissenting).
400. Id. (Brennan, J., dissenting).
the conception of the child,” a presumption of paternity arises by one of the delineated statutory factors. Such time limits, when unreasonably applied, may have the greatest negative impact on posthumously conceived children who often cannot be practically conceived or born within the required jurisdictional time frame.

Traditional constructs represented in state family laws were constitutionally challenged to reflect changing patterns in parental and familial relationships. The Uniform Paternity Act of 1973 “was enacted to eliminate the legal distinction between legitimate and illegitimate children and to provide a comprehensive scheme for judicial determination of paternity.” A number of states have adopted some form of section two of the uniform law which states that, “for purposes of intestate succession by, through, and from a person, an individual is the child of his natural parents, regardless of their marital status.” For the most part, marital status of the putative parent(s) has now become but only one means of determining paternity of nonmarital children under state inheritance laws.

406. See GA. CODE ANN. § 53-4-4(c)(2)(A) (providing that a child may inherit from his father and his father’s family if a presumption of paternity is filed before an estate is pending and the presumption of paternity is not overcome by clear and convincing evidence).
407. See supra Prologue.
408. See supra Part II.B. and infra Part IV.B.2.
409. People v. Vega, 33 Cal. App. 4th 706, 710, 39 Cal. Rptr. 2d 479, 483 (1995) (citations omitted). See also Michael M. v. Giovanna F., 5 Cal. App. 4th 1272, 1278, 7 Cal. Rptr. 2d 460, 463 (1992) (stating that in addition to providing a comprehensive scheme for judicial determination of paternity, the Uniform Paternity Act was intended to rationalize procedure, to eliminate constitutional infirmities in then-existing state law, and to improve state systems of support enforcement).
3. Assisted reproduction and state inheritance laws

Assisted reproductive technology has also had significant impact on the parameters of family law in this regard. During the last two decades, state legislatures have struggled to enact laws which reflect the evolving definition of children, paternity and familial relationships resulting from assisted reproduction. The U.S.C.A.C. Act has provided the most comprehensive coverage of parenting issues involving surrogacy, artificial insemination, and posthumous conception.

Heterologous artificial insemination presents the problem of determining the child's paternity because donor sperm is used. Traditional surrogacy arrangements create the possibility of three separate sets of parents: the child's biological parents, the child's gestational mother and her husband, and the child's intended custodial parents. Finally, gestational surrogacy raises the unique issue of whether the biological or gestational mother is the resulting child's legal mother. The uniform law addresses these controversies by assigning parental rights and duties to participants pursuant to an "intent-based" analysis. The paternity of children born from artificial insemination by donor is only assigned to the impregnated mother's husband, where the husband has consented in writing to the procedure. No parental status is assigned to the sperm donor. Likewise, in surrogacy arrangements, the law, upon court approval, awards paternity and maternity to the child's

412. See supra Part II.B.
414. See supra Part II.A.
415. See supra Part II.A.
416. See supra Part II.A.
417. See supra Part II.A.
418. Arizona's statutory approach to surrogacy is that "[a] surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child." If the said mother is married, "her husband is presumed to be the legal father of the [resulting] child." ARIZ. REV. STAT. ANN. § 25-218(B), (C) (West 1991); see also D.C. CODE ANN. § 16-401 (1997) (stating that custody is awarded to the adoptive mother where the woman agrees to relinquish all parental rights and responsibilities towards the child).
419. See ARIZ. REV. STAT. ANN. § 25-218(B), (C).
420. See id.
intended parents, who are defined as “a man and woman, married to each other, who enter into an agreement under [the U.S.C.A.C. Act] providing that they will be the parents of a child born to a surrogate through assisted conception using egg or sperm of one or both of the intended parents.”\textsuperscript{421}

Some progress has been made by states in addressing the parental issues which resonate from artificial insemination and surrogacy. Most state statutes reflect a form of the U.S.C.A.C. Act’s intent-based paternity outcome in heterologous artificial insemination.\textsuperscript{422} Children born through artificial insemination are considered the natural and legitimate children of the consenting husband and mother for all purposes, including child support.\textsuperscript{423}

For the most part, however, the inheritance rights and legal status of nonmarital children conceived through artificial insemination remains in nationwide limbo.\textsuperscript{424} A few progressive legislatures have adopted statutes which provide that “[a] child born [by] A.I.D. may inherit the estate of his mother and her consenting spouse or their relatives as [if he was their] natural child.”\textsuperscript{425} These statutes do not allow the child to “inherit from his natural father or his natural father’s relatives.”\textsuperscript{426} Only three states addressing the status of posthumously conceived children have passed laws which specifically


\textsuperscript{422} Most states follow the approach taken by the Illinois statute which provides, in relevant part, that, “[a]ny child . . . born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife so requesting and consenting to the use of [the] technique.” 750 ILL. COMP. STAT. 40/2 (West 1993). Additionally, Louisiana provides that “[t]he husband also cannot disavow paternity of a child born as the result of artificial insemination of the mother to which he consented.” LA. CIV. CODE ANN. art. 188 (West 1993).

\textsuperscript{423} For instance, in Arizona, “[a] child who is born [from] artificial insemination is entitled to support from the mother as prescribed by this section and the mother’s spouse if the spouse is either the biological father of the child or agreed in writing to the insemination before or after [it] occurred.” ARIZ. REV. STAT. ANN. § 25-501(B) (West Supp. 1997).

\textsuperscript{424} See supra note 1.

\textsuperscript{425} CONN. GEN. STAT. § 45a-777 (1993).

\textsuperscript{426} Id.
determine the inheritance rights of children conceived after the death of an alleged parent. Of the three, Florida and North Dakota statutes specifically provide that, "[a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will." Both of these innovative statutes reflect an intent-determinative parentage analysis, which gives the greatest degree of protection to posthumously conceived children.

4. The inadequacies of state law in establishing social security survivors

The fast-paced advancement of reproductive technology has resulted in many inconsistencies in state inheritance, paternity, and assisted reproduction laws upon which Social Security officials rely heavily in determining the legal status of children for survivor's benefits. These phenomena increase the presence of distributional inequity where claimants of equal relational status to a worker are treated differently based solely upon their deceased parent's domicile at death.


429. See LeRay, supra note 333, at 794-95.

430. See Schemenauer, supra note 375, at 1229 (stating that "[t]he fate of these [posthumous, illegitimate] children should not depend on the location of the court in which they must bring their claims"). A challenge ever before social security enthusiasts has been to reconcile the relationship between individual equity and social adequacy in determining the amount and relevant proportions of benefits. See Myers, supra note 261, at 24-29. One of the basic principles of the Old Age, Survivors, and Disability Insurance (OASDI) program under social security is the balance between individual equity and social adequacy. Most assume that complete individual equity exist providing a direct return on a taxpayers' individual contributions into the general trust fund.
The departure from such heavy reliance on state intestate laws began as early as 1965 when Congress amended the child survivor’s provisions to expand presumptive dependency beyond state intestate laws. The congressional report accompanying the 1965 amendment stated that

In a national program that is intended to pay benefits to replace the support lost by a child when his father retires, dies, or becomes disabled, whether a child gets benefits should not depend on whether he can inherit his father’s intestate personal property under the laws of the State in which his father happens to live.431

Yet, the inconsistencies resulting from state intestate laws continue to plague Social Security officials, often leaving them in a legal quandary. A recently proposed ruling seeks to clarify and provide greater uniformity in the administration’s application of state inheritance laws.432 State inheritance and paternity laws no longer provide the degree of reliability, consistency and constitutional nexus required in determining whether a child is entitled to survivor’s benefits under social security.

---

A more accurate view considers the Act’s original purpose and goal of providing social adequacy within a benefit structure which does not always foster a proportionate payment of benefits based upon a worker’s higher earnings or longer periods of covered participation. See id.  


432. See Application of State Law in Determining Child Relationship, 20 C.F.R. pt. 404 (1997). This regulation states, in pertinent part that  

We are proposing to revise our rules on determining whether a natural child has inheritance rights under appropriate State law and therefore may be entitled to Social Security benefits as the child of an insured worker. Specifically, we propose to revise our rules to explain which version of State law we will apply, depending on whether the insured is living or deceased, how we will apply State law requirements on time limits for determining inheritance rights, and how we will apply State law requirements for a court determination of paternity. We are also proposing to clarify our current rule on determining an applicant’s status as a legally adopted child of an insured individual.

Id.
B. Constitutional Parameters: Social Security's Classification of Conception, Legitimacy, and Dependency

1. The Act’s classification of children

An evaluation of the statutory treatment of the relational status of qualifying children under the Act raises tangential Fifth Amendment equal protection claims that posthumously conceived children are certain to raise. The survivorship provisions as applied have resulted in differential treatment based upon the marital status of a child claimant’s parents. The two classes of marital and nonmarital children can be subdivided into three additional subclasses of children which laws have treated differently based upon the nature and timing of the child’s birth. These subclasses are: (1) intervivos children (children who are conceived and born prior to both parents’ death); (2) after-born or traditional posthumous children (children who are conceived during the deceased parents’ life, but are born alive within 280 to 300 days after the parents’ death); and (3) after-conceived or posthumous conceived children (children who are conceived and born after the parents’ death). Social security survivor’s benefits are most often awarded based upon the marital status of the child’s parents and the timing of the child’s birth. Consider the following diagram which illustrates the legal classification of children based upon these factors:

<table>
<thead>
<tr>
<th>LEGAL CLASSIFICATIONS OF CHILDREN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marital Children</td>
</tr>
<tr>
<td>Intervivos Conception</td>
</tr>
<tr>
<td>Nonmarital Children</td>
</tr>
<tr>
<td>Intervivos Conception</td>
</tr>
</tbody>
</table>

434. See id.
SURVIVOR'S BENEFITS

a. marital children

i. marital intervivos children

For the most part, marital intervivos children are not required to prove paternity or dependency on a deceased parent in order to qualify for social security survivor's benefits or other similar employment-related death benefits under worker's compensation and veteran's administration laws due to the marital presumption of paternity. The marital union is considered the most reliable probability of dependency required under the Act.\(^{435}\)

ii. marital after-born children

Most jurisdictions recognize the statutory presumption of legitimacy of marital children born within 300 days after the dissolution of marriage by the death of one of the child’s parents.\(^{436}\) "After-born"\(^{437}\) children who are conceived prior to the death of a parent, but are later born alive within the statutory time period are generally entitled to take under and through the estate of a deceased marital parent pursuant to most states' posthumous or after-born statutes.\(^{438}\)

\(^{435}\) See id. at 499.

\(^{436}\) Statutes of inheritance as well as other statutory entitlements have traditionally adopted this presumption in an effort to preserve the traditional bounds of the two-parent family unit.

\(^{437}\) An after-born heir is defined as "[a]n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." UNIF. PROBATE CODE § 2-108, 8 U.L.A. 87 (1998).

\(^{438}\) ALABAMA—Posthumous children are included in “heirs,” “issues” or “children” when these terms are used to limit a future estate. They are entitled to the estate as if they were born before the death of the parent. Any future estate which is conditioned upon the parent's death without heirs is revoked by the birth of a posthumous child capable of taking by descent. See ALA. CODE § 35-4-8 (1991). ALASKA—After-born heirs: “An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.” ALASKA STAT. § 13.12.108 (Michie 1996).

ARIZONA—Posthumous children are included in “heirs,” “issues” and “children” when these terms are used to limit a future estate. They are entitled to the estate as if they were born before the death of the parent. Any future estate which is conditioned upon the parent’s death without heirs is revoked by the birth of a posthumous child capable of taking by descent. See ARIZ. REV. STAT. § 33-237 (1990). ARKANSAS—Posthumous heirs: Descendants of the estate conceived before his death, but born afterwards shall inherit as if born in the lifetime of the intestate. No right of inheritance shall be given to any other
Due to this presumption of paternity and inheritance under state laws, marital after-born children are presumed dependent upon their deceased parent at death and therefore conclusively entitled to survivor's death benefits under the Act.\footnote{See also 5 U.S.C. § 8101(9) (1994) (defining a child as "one who at the time of the death of the employee is under 18 years of age or over that age and incapable of self-support, and includes stepchildren, adopted children, and posthumous children, but it does not include married children.") (emphasis added); 38 U.S.C. § 101(4)(A) (1991) (defining a child as one who is under 18 years of age, incapable of self-support, or pursuing an education up to age 23, and is a legitimate child, a legally adopted child, a stepchild, or an illegitimate child acknowledged by his father or otherwise shown to be the child of the alleged father). An administrative decision reported at 1938, A.D.V.A. 432, approved the survivorship death benefit claim filed by a widow prior to the birth}
iii. marital after-conceived children

Posthumously conceived children may not avail themselves of the marital presumption of filiation with a deceased parent because that parent’s death dissolves the marital relationship with the child’s surviving parent prior to the child’s conception. The inheritance laws of most jurisdictions require a child to be conceived prior to the death of the deceased parent in order to take as an “after-born child.”\textsuperscript{440} Therefore, most state inheritance laws view the birth of a posthumously conceived child as illegitimate due to the timing of conception after the death of the putative parent.\textsuperscript{441}

Under social security, marital after-conceived children would therefore be unable to avail themselves of the dependency presumptions related to a parent’s marital status. Likewise, they would have to establish dependency under the “last resort” test related to the child’s cohabitation with or support received from the predeceased insured parent.

b. nonmarital children

i. nonmarital intervivos children

Social security benefits for children in this category are contingent upon proof of the child’s paternity and dependency upon the wage earner. These criteria are presumed if the relevant state intestate laws consider the applicant entitled to inherit from the deceased worker’s estate. Paternity and dependency can also be presumed by meeting any one of the formal parental acknowledgment tests provided by the Act.\textsuperscript{442} Finally, nonmarital intervivos children may need to use the “last resort” test by proving that they were living with

\begin{footnotesize}
440. See, e.g., ALA. CODE § 35-4-8; ALASKA STAT. § 13.12.108.
441. See, e.g., ALA. CODE § 35-4-8; ALASKA STAT. § 13.12.108.
442. See 42 U.S.C. § 416(h)(3)(C)(i)(I)-(III). These include: a preexisting judicial order of paternity; formal parental acknowledgments through certain conduct, such as written and verbal statements, residing with the child and custodial parent, or other ordinary parental interaction with the child; informal or formalized child support; or other evidence of dependency upon the parent. See id.
\end{footnotesize}
the deceased parent at death, or that the deceased was supporting them at his death.443

ii. nonmarital after-born children

Where this traditional posthumous child is conceived outside the bounds of marriage, the child is still entitled to file an action to prove paternity under local paternity laws.444 Local probate statutes generally do not treat nonmarital posthumous children any differently than marital posthumous children for purposes of inheritance once filiation is proven.445

Posthumous nonmarital children have brought considerable litigation by claiming social security survivor’s benefits.446 The

443. See supra notes 345-46 and accompanying text.
444. For instance, in New York, such proceedings are allowed

If, at any time before or after a petition is filed, the putative father dies, . . . neither the proceeding nor the right to commence the proceeding shall necessarily abate but may be commenced or continued by any of the persons authorized by this article to commence a paternity proceeding where:

(c) a blood genetic marker test had been administered to the putative father prior to death; or,

(d) the putative father has openly and notoriously acknowledged the child as his own.


445. The difficulty in bringing such actions initially lies in securing the deceased parent’s biological material such as blood and DNA samples needed to prove the biological relationship between the parties. See generally Corbett v. Corbett, 418 N.Y.S.2d 981, 983 (Fam. Ct. 1979), affd sub nom. Mary Ellen C. v. Joseph William C., 435 N.Y.S.2d 738 (App. Div. 1981) (denying petitioners request to bring a paternity action under local statute because such action must be filed prior to the death of the alleged father). See also In re Will of Janis, 600 N.Y.S.2d 416, 419 (Sur. Ct. 1993) (refusing to allow a non-marital child to exhume decedent’s body for purposes of establishing standing to contest the admission of a will into probate); Anne R. v. Estate of Francis C., 634 N.Y.S.2d 339, 341 (Fam. Ct. 1995); Estate of Sandler, 612 N.Y.S.2d 756, 758 (Sur. Ct. 1994) (holding that DNA testing “of the putative paternal grandparents with that of the infant may be performed in an effort to provide the ‘clear and convincing evidence’ that is required to establish paternity under [New York probate law]”). Nonmarital posthumous children thereby have standing to bring an action of filiation where they can show biological or other “conduct” oriented proof such as acknowledgment, support, or judicial decree.

446. See Smith v. Heckler, 820 F.2d 1093, 1097 (9th Cir. 1987) (holding that to establish benefit eligibility, the posthumous, illegitimate claimant was not
survivors' benefits are normally unavailable to this class of children based upon the timing of their birth. They are often required to prove paternity by clear and convincing evidence and to show actual dependency. Even where paternity is proven, dependency is often difficult to prove because the child was in gestation during the wage earner's lifetime. The only viable option is to use the "commensurate support test" to prove that the deceased parent's support was commensurate with the needs of the unborn child given the parents' financial status and the stage of the mother's pregnancy.

required to show that the insured parent knew of her conception or intended to contribute to her support); Dubinski ex rel. Van Schindel v. Bowen, 808 F.2d 611, 613-14 (7th Cir. 1986) (holding that an illegitimate child born six months after the wage earner father's death was not entitled to survivor's benefits where the record did not show that the wage earner paid for the mother's medical care or donated significant amounts of cash); Johnson v. Secretary of Health and Human Servs., 801 F.2d 797, 798-99 (6th Cir. 1986) (holding that the determination that a father's payment of the pregnant mother's transportation qualified as a significant contribution was insufficient to entitle an illegitimate, posthumous child to survivor's death benefits); Imani ex rel. Hayes v. Heckler, 797 F.2d 508, 511 (7th Cir. 1986) (holding that under Missouri intestacy law the illegitimate, posthumous child was not a successor in interest because she did not establish paternity either by an adjudication before the death of the father or thereafter by clear and convincing proof; she was also not entitled under Act's dependency requirements because the father was not living with or contributing to the support of the child at the time of his death); Parsons ex rel. Bryant v. Health and Human Servs., 762 F.2d 1188, 1191 (4th Cir. 1985) (holding that, under North Carolina inheritance law, a wage earners' contribution to the illegitimate posthumous child's mother during gestation does not require significant contributions; support by the father for the unborn child need only be commensurate with the needs of the unborn child at time of the father's death); Adams v. Weinberger, 521 F.2d 656, 660 (2d Cir. 1975) (holding that with respect to an illegitimate unborn child, it was not necessary that support be substantial, regular or continuous but only that it be commensurate with the needs of the unborn child at the time of the father's death; the support provided in the instant case was clearly commensurate with such needs; and that a posthumous child is not foreclosed from social security child benefits merely because he was not born prior to the insured individual's death); Gay ex rel. McBride v. Heckler, 583 F. Supp. 499, 504 (N.D. Ga. 1984) (holding that the support requirement of the illegitimate, posthumous child met the statutory standard).

Dependent, nonmarital after-born children are also entitled to survivorship benefits under state Worker's Compensation Laws. See, e.g., Burns v. Miller Constr., 55 N.Y.S.2d 501, 509-10 (1982) (holding that proof of acknowledgment by a predeceased father of an after-born child would not be re-
iii. nonmarital after-conceived children

As previously mentioned, posthumously conceived children currently have no legal status for purposes of inheritance in most states today. As such, they cannot avail themselves of the marital presumption of paternity, intestacy or dependency under the social security provisions. This class of children must prove actual paternity and dependency in order to qualify for survivor’s benefits. Their greatest obstacle is proving actual dependency by establishing cohabitation or support at the worker’s death. The commensurate support test again becomes the only viable option for these children. However, even under the most tenable variant of this test, children who are conceived after the worker’s death will still find it impossible, if not impractical, to prove that their deceased parent’s support was commensurate with their needs as an unborn child given the parents’ financial status and the stage of their mother’s pregnancy.

2. Equal Protection under the Fifth Amendment’s Substantive Due Process

The outcome of a child’s paternity has traditionally been determined based upon the variables represented in the above chart. As shown, marital children conceived and born prior to the parent’s death are provided the greatest level of protection, whereas children
who are conceived after the death of a parent are afforded little or no assurance in establishing paternity and dependency for social security benefits. The underlying inquiry then becomes whether equal protection safeguards under the United States Constitution will permit social security laws to treat similarly situated children differently based upon circumstances of marital status and birth.\textsuperscript{449}

Child social security survivor’s benefits are premised upon establishing two relational criteria with the deceased wage earner: paternity and dependency.\textsuperscript{450} As discussed earlier, benefits are awarded to all child applicants who satisfy certain objective factors, such as a marriage ceremony between the child’s parents, which create statutory presumptions of paternity and dependency. These classes of children, therefore, almost never have to prove actual dependency or paternity.\textsuperscript{451}

Where an applicant does not meet any of the statutory presumptions, actual proof of paternity and dependency is necessary. Understandably, survivor’s benefits are categorically denied to children who are unable to establish paternity. Failure to meet the Act’s dependency standard, however, may also disenfranchise even those classes of applicants whose paternity has been satisfactorily proven. This classification distinction, most often present between nonmarital and marital child applicants, led to the constitutional challenge of the Act’s dependency requirement in Mathews v. Lucas.\textsuperscript{452}

This 1976 case summoned a judicial interpretation of the legislative intent and history of child survivor’s benefits under the Act. The Supreme Court’s primary objective was to determine whether Congress intended to exclude child applicants solely upon their failure to prove dependency. The nonmarital claimants in Mathews argued that the Act’s statutory classifications which created a presumption of dependency for marital children and certain other qualifying classes of nonmarital children infringed upon their equal protection guarantees under the Fifth Amendment’s Due Process Clause.\textsuperscript{453}

\textsuperscript{449} See Mathews, 427 U.S. at 497.
\textsuperscript{450} See id. at 497-99.
\textsuperscript{451} See id. at 498-99.
\textsuperscript{452} See id. at 497.
\textsuperscript{453} See id. at 502.
The claimants were able to prove paternity with their deceased father, Robert Cuffee. They failed, however, to raise any statutory presumption of dependency because their father had not supported or lived with them at death; had not acknowledged them in writing or by a pre-death court support or paternity order; had not married or attempted to marry their mother, Ruby M. Lucas, prior to death; and had not by his conduct entitled them to take under the intestate laws of his domicile at death.

The Lucas children’s application for survivor’s benefits was initially denied by the Social Security Administration, but was later upheld by the United States District Court for the District of Rhode Island which determined that the Act’s dependency classifications were unconstitutional. The Supreme Court summarized the lower court’s recognition that

the web of statutory provisions regarding presumptive dependency was overinclusive because it entitled some children, who were not actually dependent, to survivorship benefits under the Act [which] ... was not intended merely to replace actual support that a child lost through the death of the insured parent. ... Rather, ... the statute [was] designed to replace obligations of support or potential support lost through death, where the obligation was perceived by Congress, on the basis of the responsibility of the relation between the child’s parents, to be a valid one.

The district court concluded that Congress’ apparent view that marital children were more entitled to child support than nonmarital children was not a justifiable legitimate governmental interest which would sustain the Act’s classifications of dependency presumptions.

The Supreme Court acknowledged that the Act’s dependency classifications might result in similarly situated classes of children being treated differently where no proof of paternity or dependency

454. See id. at 500.
455. See id. at 500-01.
457. Mathews, 427 U.S. at 502-03 (emphasis in original) (citation omitted).
458. See id. (citing Lucas, 390 F. Supp. at 1320).
The Court upheld the Act, however, because it determined that the statutory classifications were substantially related to the likelihood of dependency at death, which furthered the legitimate governmental interest in administrative convenience.\footnote{See id. at 503.}

The district court's decision was reversed and criticized in two significant ways. The Court first determined that the appropriate level of scrutiny in cases of legitimacy "does not 'command extraordinary protection from the majoritarian political process' . . . which [the] most exacting scrutiny would entail,"\footnote{Id. at 506 (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).} as was suggested by the lower court in this case. Instead, the Supreme Court applied the intermediate standard of review to determine whether the statute's dependency classifications excluding certain illegitimates bore a significant or substantial relationship to some important governmental interest.\footnote{See id. at 510.} The Court's "role [was] simply to determine whether Congress' assumptions [were] so inconsistent or insubstantial as not to be reasonably supportive of its conclusions that individualized factual inquiry in order to isolate each nondependent child in a given class of cases is unwarranted as an administrative exercise."\footnote{Id. at 516.}

Finally, the Mathews court pronounced that the congressional intent in enacting child survivor's benefits under the Act was to "provide for all children of deceased insureds who can demonstrate their 'need' in terms of dependency at the times of the insureds' deaths."\footnote{Id. at 507.} This meant "that the statute was not a general welfare provision for legitimate or otherwise 'approved' children of deceased insureds, but was intended just 'to replace the support lost by a child when his father . . . dies.'"\footnote{Id. at 507 (quoting S. REP. NO. 89-404, at 110 (1965)).}

The Court therefore reasoned that the statutory dependency presumptions, as objective standards of probable dependency, were constitutionally permissible even where certain classes of nonmarital children were practically precluded from benefits because of their inability to prove dependency upon their

\footnotesize{\begin{itemize}
  \item \footnote{See id. at 503.}
  \item \footnote{See id. at 509-10.}
  \item \footnote{Id. at 506 (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).}
  \item \footnote{See id. at 510.}
  \item \footnote{Id. at 516.}
  \item \footnote{Id. at 507.}
  \item \footnote{Id. at 507 (quoting S. REP. NO. 89-404, at 110 (1965)).}
\end{itemize}}
deceased insured parent. The statutory presumptions were "permissible under the Fifth Amendment, so long as [the] lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny."\textsuperscript{466} The Court determined that "the materiality of the relation between the statutory classifications and the likelihood of dependency they assertively reflect need not be 'scientifically substantiated.'"\textsuperscript{467} The dependency presumptions were found to be reasonably related to the likelihood of dependency and in furtherance of substantial governmental interests in "avoid[ing] the burden and expense of specific case-by-case determination in the large number of cases where dependency is objectively probable."\textsuperscript{468}

The Court distinguished the Act's dependency classifications from other discriminatory and impermissible statutory classifications which conditioned a claimant's entitlement to benefits explicitly upon his or her legitimacy. In \textit{Mathews}, the Court opined that an applicant's legitimacy was only relevant as an "indication of dependency," and that benefits were not denied solely on the basis of legitimacy under the relevant statute.\textsuperscript{469} In other cases, statutes were held unconstitutional where marital children were all presumptively entitled to benefits and nonmarital children were conclusively foreclosed from qualifying for such benefits based solely upon their status.\textsuperscript{470} Applicants' illegitimacy preempted entitlement even where there was clear and convincing relational evidence establishing paternity between the parties.\textsuperscript{471}

Statutory classifications based upon the timing of conception were also distinguished and reconciled by the \textit{Mathews} court in its review of the \textit{Jimenez v. Weinberger}\textsuperscript{472} decision, which "invalidated discrimination among afterborn illegitimate children as to

\textsuperscript{466} \textit{Id.} at 509 (citing Weinberger v. Salfi, 422 U.S. 748, 772 (1975)).
\textsuperscript{467} \textit{Id.} at 510 (quoting James v. Strange, 407 U.S. 128, 133 (1972)).
\textsuperscript{468} \textit{Id.} at 509.
\textsuperscript{469} \textit{Id.} at 511-14.
\textsuperscript{470} \textit{See id.}
\textsuperscript{472} 417 U.S. 628 (1974).
entitlement to a child’s disability benefits under the Social Security Act.473 The Jimenez statute denied after-born children social security benefits even where both paternity and dependency were proven by claimants.474 The Supreme Court in Jimenez correctly determined that “to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.”475

The Court distinguished the Jimenez decision from the case at hand by showing that the statute as applied in Jimenez denied posthumous children the right to prove dependency, whereas the Act, as challenged in Mathews, provided substantial and reasonable alternate means of proving dependency upon a deceased insured by a showing of the parent’s cohabitation or support at death.476 Unfortunately, the Court further opined that rights to benefits for posthumous children were reasonably preserved by the Act’s dependency requirements in Mathews because of the greater likelihood of children being “dependent during the parent’s life and at his death.”477

Justice Stevens’ dissent opined that the majority failed to adequately distinguish between these two decisions in a manner justifying a different outcome.478 Stevens reasoned that the governmental purpose supporting the provisions in both cases were one and the same. Mathews pronounced administrative convenience as justification for the statutory litany of presumptive dependency, whereas Jimenez resorted to a similar government interest in preventing spurious and dubious claims.479 Neither case, in the dissent’s opinion, provided a reasonable basis for the statutory exclusion of an entire class or subclass of nonmarital children.480

The dissent also refused to accept the Court’s premise that administrative convenience substantiated the over-inclusiveness of the Act’s presumptions of dependency. Instead, Justice Stevens sharply criticized what was characterized as the majority’s rather tenuous

473. Mathews, 427 U.S. at 511.
474. See Jimenez, 417 U.S. at 630.
475. Id. at 637.
476. See Mathews, 427 U.S. at 512.
477. Id. at 514.
478. See id. at 516-18 (Stevens, J., dissenting).
479. See id. (Stevens, J., dissenting).
480. See id. (Stevens, J., dissenting).
justification of how the Act’s presumptions of dependency at an insured’s death are “rationally and substantially related to the actual fact of dependency.”481 The presumption of dependency based upon state intestate law was viewed as the most tenuous nexus to actual dependency.482

Finally, the Mathews dissent concluded “that the classification which [was] sustained . . . in the name of ‘administrative convenience’ [was] more probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates.”483 It was painstakingly clear to these dissenting justices that the Nation’s commitment to the premise that all persons are created equal demanded fair and equal treatment for all regardless of a person’s circumstances of birth.484

The post-Mathews era embellished greater judicial flexibility in addressing the dependency at death requirement. Lower federal district courts slowly began to recognize the impracticality of strictly imposing the actual dependency requirement on children who were born after the death of a parent. The adoption of “commensurate support” under the last resort test provided a means for courts to fashion some type of remedy for after-born children while still maintaining a somewhat abstract version of the dependency requirement upheld in Mathews. The posthumous conception frontier presents an even greater challenge in substantiating the Act’s actual dependency requirement. The unresolved query, as raised in Hart, is how to expand the dependency standard so that posthumously conceived children are treated fairly, if not equally, in their pursuit of survivor’s benefits under the Act.

C. Constitutional Considerations in Expanding Dependency

1. Dependency and a new class of survivors

The Hart case proves that Social Security’s sole reliance upon state intestate and paternity law along with the Act’s statutory dependency presumptions will, in most cases, exclude posthumously

481. Id. (Stevens, J., dissenting).
482. See id. at 521-22 (Stevens, J., dissenting).
483. Id. at 523 (Stevens, J., dissenting).
484. See id. at 516 (Stevens, J., dissenting).
conceived, nonmarital claimants from benefiting from the social security contributions of a deceased worker. It is doubtful that Congress ever intended to create social legislation geared to ameliorate poverty that would exclude a particular group of orphaned children based solely on the timing of their birth.

History has shown that Congress' approach has been to expand coverage to persons most likely to suffer severe economic loss due to a wage earner's death. This view towards inclusiveness has been most prominent in judicial recognition of the Act's remedial nature by applying the most liberal interpretation appropriate and necessary to award benefits whenever possible.

Congress once thought it prudent and efficient to conclusively presume statutory dependency for marital and voidable marital children. The presumption of dependency was then expanded to include nonmarital children who qualify under state intestate and paternity laws, or who were formally or informally acknowledged by the deceased worker prior to death, or who were equitably adopted. Further provisions enlarged the class of potential beneficiaries to include those applicants who could actually prove paternity and dependency under the "last resort test."

The Lucas children in Mathews experienced first-hand the detriment in being unable to meet the presumptive or actual dependency standards due to the timing of their father's death. The judicial stonewall built by the Supreme Court through upholding presumptive and actual dependency standards has the potential to totally extinguish the payment of survivor's benefits to an entire subclass of nonmarital children who are unable to meet the Mathews standard because they were born after their parent's death.

Lower federal courts, recognizing this potential subclass exclusion, applied an abstract version of actual dependency to allow after-born children to overcome this biophysical impracticality.

---

485. See supra notes 353-71 and accompanying text for a discussion on the "commensurate support test."
486. See supra Prologue.
487. See supra notes 302-71 and accompanying text for a discussion on the dependency requirement of survivor's provisions under the Social Security Act.
488. See supra notes 449-84 and accompanying text for a discussion on the Mathews decision.
fashioned a commensurate support test tailored to accommodate this final subclass of potential applicants. The lower federal courts are doing what Congress intended—to replace the loss of financial support a child suffers due to the death of a qualified deceased worker. 489

Reproductive technology has created an entirely new subclass of nonmarital children whom Congress has yet to consider as potential claimants entitled to benefits under social security legislation. Constitutional principles of equal treatment pronounced by the Supreme Court in Mathews and Lalli compel some level of inclusion for this newly created class. 490 Fairness and equity should always be questioned where certain classes of persons benefit greatly with little or no effort, while entire classes of others are precluded from the same benefits based on conditions for which they have no control.

A Fifth Amendment equal protection analysis requires at least some minimal accommodation for a reasonable segment of the subclass population. The Mathews Court was less inclined to invalidate the dependency requirement under the Act because the statute did not result in a total abrogation of the right to benefits for all subclass members. The Court found that the Act's presumptive dependency provisions and last resort test provided a means by which "any otherwise eligible child may qualify for survivorship benefits by showing contribution to support, or cohabitation at the time of death...", and that the "statute [was] carefully tuned to alternate considerations." 491

There are no viable alternate considerations or means by which most posthumously conceived children can secure their entitlement to survivor's benefits. The statute as it stands is overinclusive in that children who may not be actually dependent are presumed dependent, and underinclusive due to the total exclusion of after-conceived children who have no statutory opportunity in which to prove dependency on a deceased parent. 492

489. See supra notes 353-71 and accompanying text for a discussion on the "commensurate support test."
492. See id. at 513.
Even lower federal courts would be hard pressed to fashion a means by which a reasonable segment of this new class of children could qualify for survivor’s benefits under the Act. Although the commensurate support analysis under the last resort test was applied in *Hart*, the lack of direct relevant evidence of the father’s intent to conceive and support future offspring prevented a positive outcome.493 What level of evidentiary proffer could substantiate the support of or cohabitation with an unconceived child? Could the worker’s predeath support of the intended gestational or custodial parents qualify as the support of the unconceived child? Perhaps the worker’s prepayment of a frozen sperm or embryo storage contract might meet the support at death standard under the last resort test. The last resort test really provides no resort at all for posthumously conceived children.

*Hart* was only the first of many potential actions that may be filed by similar claimants seeking survivor’s benefits. State intestate and paternity laws offer little or no assistance to Social Security officials in addressing these cases. A national standard must be established. Congress should speak affirmatively in order to clarify whether after-conceived children will be given an opportunity to apply and qualify for survivor’s benefits based upon a deceased parent’s earnings record.

2. Failing government interests

The so-called middle tier of judicial scrutiny, when applied, requires that a substantial relationship exists between government interest and statutory classifications based upon legitimacy under Due Process standards of the Fifth Amendment.494 Although the Court has resisted applying the highest level of scrutiny to such classifications, it has clearly rejected legitimacy as a sole basis which would either substantially or rationally relate to any important or legitimate public purpose.495

493. See *supra* Prologue.
494. See *supra* Part IV.B. for a discussion on the Fifth Amendment implications of failing to provide survivor’s benefits to posthumously conceived children.
495. See *supra* notes 433-84 and accompanying text.
The governmental interest most often meeting the substantiality test in social security legislation is the safeguarding of administrative convenience. The Court in Mathews found that conditioning survivor’s benefits on a showing of presumed or actual dependency was substantially related to this governmental interest. The specific administrative convenience asserted was that the dependency requirement reduced the number of case-by-case determinations and prevented dubious and spurious claims.

More than twenty years ago, the dissent in Mathews raised serious doubt of whether this interest justified the total exclusion of a nonmarital subclass. Today, there is even greater speculation as to whether this same interest could substantiate the statutory exclusion of nonmarital, posthumously conceived children.

Medical technology has greatly diminished if not eliminated the greatest concern in preventing dubious postdeath claims by nonmarital children because such claims can now be more easily discredited. The difficulty of proving paternity is no longer adequate justification for denial of death benefits to posthumous born or conceived children. Where samples have been retrieved, DNA determinative paternity testing can now be readily performed after death. Moreover, a number of states have incorporated DNA testing as a means of proving a child’s paternity for inheritance purposes. The reliability of DNA paternity testing also addresses the Mathews court’s concern that a decedent’s reputation should be protected by preventing potential dubious claims after death. Finally, in light of the computer and cyberspace revolution since the 1976 Mathews decision, which, parenthetically, is reflected in the Social Security Administration’s own systems modernization over the last decade, it is questionable whether the same evidentiary value can be

496. See supra notes 460-84 and accompanying text.
497. See Mathews, 427 U.S. at 509.
498. See id.
499. See id. at 523 (Stevens, J., dissenting).
500. See, e.g., In re Estate of Sandler, 612 N.Y.S.2d 756, 758 (Sur. Ct. 1994) (holding that DNA testing “of the putative paternal grandparents with that of the infant may be performed in an effort to provide the ‘clear and convincing evidence’ that is required to establish paternity” under New York probate law).
501. See supra note 383.
assigned to the overall administrative convenience that presumptive dependency serves in preventing case-by-case determinations.502

Promoting intent-based parenting in inheritance and social security benefits determinations actually serves greater governmental interests than would the total abrogation of such entitlements for posthumously conceived children. Most governmental concerns related to reducing dubious and spurious claims would be eliminated in survivor's benefit claims if the dependency requirement could be satisfied by a worker's predeath, formally written document acknowledging the intent to support potential posthumously born or conceived children.503 The written document, possibly a "Procreation Will," could serve as proof of paternity as well as dependency under the Act.504 There would also be little concern in safeguarding the deceased's reputation due to the existence of a written acknowledgment similar to the letter written by the decedent in Hecht.505

Where no procreation will exists, a rebuttable presumption of paternity and dependency of resulting children should arise where the concepti providers were married at the death of one of the progenitors. This presumption furthers the state's interests in promoting concepts of a nuclear family, ensuring that whole-blood siblings share equal legal status. Extending the dependency presumption to nonmarital children places this subclass in constitutional parity with intervivos and after-born marital children whose paternity and dependency is also presumed without actual proof.506

502. See A BRIEF HISTORY, supra note 261, at 17-18. "The SMP [Systems Modernization Plan] was a major success and it positioned SSA to adapt to the changes of the 1980s and to take advantage of new and emerging technologies in the 1990s and beyond." Id. The SMP is reported as changing the time it took to receive a Social Security card from six weeks to five days, and the time to post annual wage reports from thirty-nine months to six months. See id. at 18.

503. See infra notes 545-47 and accompanying text for a discussion on intent-based parenthood and posthumously conceived children.

504. See infra notes 545-47 and accompanying text for a discussion on intent-based parenthood and posthumously conceived children.


506. On another level, constitutional parity is also implicated in terms of a possible takings analysis under the Fifth Amendment of the U.S. Constitution. Permitting decedents to make testamentary provisions for after-conceived children fosters the emerging judicial recognition of one's right to transmit pro-
3. A constitutional interpretation of traditional concepts and nontraditional conception

Justice Brennan's dissent in Mathews correctly assessed the interpretive approach taken by the Court in allowing an entire subclass of illegitimate children to be statutorily excluded from entitlements presumptively available to other illegitimates as having been rooted in a history of traditional prejudice against such children.\textsuperscript{507} It is questionable, however, whether the decision is premised upon a majoritarian construct or if it reflects judicial activism tainted by individual judicial bias.\textsuperscript{508}

In one respect, the opinion relies heavily on the representative democracy inhering in the enactment of state inheritance laws upon which a presumption of dependency arises for certain classes of illegitimates. While reaching its final analysis in upholding the dependency requirement, the Court concludes that where state intestacy law provides that a child may take personal property from a father's estate, it may reasonably

\footnotesize{bate, “property-like, potential life” interests after death as recognized by the Hecht court. The total abrogation of a testamentary right of substantial economic value without just compensation by the government may be construed as an unconstitutional taking under Hodel v. Irving, 481 U.S. 704 (1987), and Babbitt v. Youpee, 519 U.S. 234 (1997). See Chester, supra note 217; Kornstein, supra note 217. The Irving decision greatly threatened the positivist view that no constitutional safeguards are attached to the right to inherit, prompting courts to reconsider the rationality of legislation attempting to forestall the aggregate sum of the right to transmit and receive property by inheritance. See Irving, 481 U.S. at 715-17. Perhaps the few states which have statutorily addressed the legal status of posthumously conceived children were cognizant of the constitutional impediment implicated in completely destroying both intestate and testate rights of unconceived children. The statutes all preserve the after-conceived child’s right to inherit property through their pre-deceased parent’s testate estate.

\textsuperscript{507} See Mathews, 427 U.S. at 516-23 (Stevens, J., dissenting). The dissent concluded “that the classification which [was] sustained ... in the name of ‘administrative convenience’[was] more probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates.” Id. at 523 (Stevens, J., dissenting).

\textsuperscript{508} See GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 31-38 (2d ed. 1991) (providing an insightful overview of the interpretive mechanisms used in constitutional judicial review on the Supreme Court level and a discussion on the inherent tension between jurisprudential decision-making and the democratic process).}
be thought that the child will more likely be dependent during the parent’s life and at his death. For in its embodiment of the popular view within the jurisdiction of how a parent would have his property devolve among his children in the event of death, without specific directions, such legislation also reflects to some degree the popular conception within the jurisdiction of the felt parental obligation to such an “illegitimate” child in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life.\textsuperscript{509}

The Court’s unfounded retreat to historical tradition by enlisting representational reinforcement relegating its constitutional interpretation to a consideration of society’s “popular views” regarding the legal status and treatment of nonmarital children. Earlier in the opinion, the Court had rejected the popular view while lamenting that “the law has long placed the illegitimate child in an inferior position relative to the legitimate in certain circumstances, particularly in regard to obligations of support or other aspects of family law.”\textsuperscript{510}

This circular analysis only leads to one conclusion—judicial restraint resulting in the summary exclusion of an entire subclass of nonmarital children due to the Court’s unwillingness to exercise any degree of judicial discretion.

Society’s traditional views as represented in past laws through democratic pedigree have rarely provided a justifiable basis in determining the legal status and rights of persons who, as the Court identifies, have “characteristic[s] determined by causes not within the control of the . . . individual, and [that] bear[] no relation to the individual’s ability to participate in and contribute to society.”\textsuperscript{511}

Tradition then, as a means of judicial interpretation, will consistently provide reasonable outcomes for members of the majority polity, while those who are underrepresented or excluded from the democratic process have no voice in public policy which might at some point in time, through the judicial process, determine their substantive individual rights.\textsuperscript{512}

\textsuperscript{509} Mathews, 427 U.S. at 514-15.
\textsuperscript{510} Id. at 505-06.
\textsuperscript{511} Id. at 505.
\textsuperscript{512} See generally Robin West, Progressive and Conservative Constitution-
For members of the minority polity, including African-Americans, women, and illegitimates, tradition may have provided the greatest obstacle to overcome in securing their equal protection rights. \(^\text{513}\) African-Americans were traditionally defined as mere property to be owned, sold, used, or destroyed in whatever way deemed by their owner. \(^\text{514}\) The only interim category held by them which resembled some respect for their humanistic qualities was the Constitution’s recognition of their three-fifth’s of a person count for southern congressional seats. \(^\text{515}\) Women, on the other hand, were deemed persons who had no legal status to own property, except through their husbands. \(^\text{516}\) As stated earlier, tradition propelled the

---

\(^\text{alism, 88 Mich. L. Rev. 641 (1990) (supporting a progressive constitutional view, while evaluating and comparing two constitutional paradigms: conservative constitutionalism and progressive constitutionalism). Professor West raises the modern constitutional law question of whether the Constitution [should] be read, and the courts used, as a vehicle to preserve existing social and private orderings against majoritarian political change—making it an essentially conservative document, protecting the status quo against democratic excess—or should it be read and implemented in such a way as to facilitate continuous, inventive challenges to the dominant private and social order, making it a guarantor of at least progressive inspiration, if not progressive change? Id. at 645.}

\(^\text{513. See Mathews, 427 U.S. at 506; see also Stone, supra note 508, at 31-38 (discussing equal protection rights).}

\(^\text{514. See Richard H. Fallon Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189 (1987) (proposing a coherent theory of constitutional interpretation, “the constructivist coherence theory,” which seeks to explain, compare, and contrast existing constitutional interpretive theories in a manner that presents factors which should be considered in constitutional interpretation). The author provides an insightful account of the inadequacies of traditional constitutional interpretive theories from the historical, legislative, and jurisprudential treatment of African-Americans. See id. at 1209-17, 1262-85.}

\(^\text{515. See id. at 1283 n.400 (citing U.S. Const. art. I, § 2, cl. 3).}

\(^\text{516. See Judith G. Greenberg et al., Women and the Law 369 (2d ed. 1998). Greenberg states that in the past, the roles of wife and husband assigned to the husband the control over property, power to enter into contracts, and duty to assure economic support for the wife and children at least as to items necessary for subsistence. In his Commentaries on the Laws of England, William Blackstone explained the doctrine of martial [sic] unity upon marriage, the husband and wife became one person in the law; the legal existence of the woman was suspended during the marriage. The husband served as the family’s representative to the state through property, contract, and suffrage.}


treatment of nonmarital children as though they were "nullius filius," the children of no one. As such, they were traditionally denied all legal status necessary to inherit by, through or from a biological parent or to receive support or to benefit from any other parental prerogative.

The Court's adherence to tradition was pivotal in a dual fatherhood case determining the visitation rights of an unmarried father to his biological child conceived in an adulterous affair with a married woman. In *Michael H. v. Gerald D.*, Justice Scalia's opinion upheld the states' interests in safeguarding an extant unitary family over invalidating a state law preventing the putative father from proving legal paternity with his biological child. Under this statute, the mother's husband was conclusively presumed to be the legal father of the child because she was conceived during the marriage. Only the child's mother or marital father were permitted to rebut the presumption within two years of the child's birth. In this case, the

---

517. *See supra* notes 382-84 and accompanying text.
518. *See supra* notes 382-84 and accompanying text.
520. *See id.* at 128-30. The case reported that the results of a blood test showed a 98.07 percent probability of the child's paternity to the putative father. *See id.* at 114. The child countersued through her guardian *ad litem* claiming her right to associate with both "psychological or de facto father[s]." *Id.*
521. The statute provides, in relevant part, that

(b) [I]f the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests . . . that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion . . . may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.
mother reunited with her husband, both of whom refused to challenge the child’s paternity. The putative father attacked the constitutionality of the California statute’s conclusive presumption of paternity for marital children upon grounds that it denied him the right to associate with his daughter under procedural and substantive due process guarantees. The Court refused to declare any such protectable rights because it deemed essential that the father’s “asserted liberty interest be rooted in history and tradition . . . as . . . according constitutional protection to certain parental rights.”

The opinion rallied strongly behind judicial restraint in interpreting the Due Process Clause’s core textual meaning of the term “liberty” as applied specifically to an unmarried man’s right to associate with his biological child conceived with another man’s wife. This conservative interpretation led to the Court’s conclusion that although strong constitutional precedents exist recognizing fundamentally protected rights generally assigned to parenthood, the Court prefers to “refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”

522. See Michael H., 491 U.S. at 119-21.
523. Id. at 123.
524. See id. at 126-27.
525. Id. at 127-28 & n.6; see also Fallon, supra note 514, at 1209-30 (evaluating the inadequacies of traditional constitutional interpretive theories). Fallon classifies interpretative theories into two basic groupings: open-system theories and privileged factor theories. Originalism and interpretivism would be considered privileged factor theories under this analysis. Interpretivism is viewed by supporters as preserving the Constitution’s original meaning by drawing analysis from within the framers’ intent and the language of the text. This approach reflects great deference to the democratic and majoritarian foundation of traditional government. Interpretivism is criticized as an interpretive approach which breeds ambiguity in assuring determinative analysis of the framers’ actual intent and of the true meaning of words written by them as an expression of their intent. Fallon argues that originalism encounters a daunting array of historiographical, conceptual, and interpretive problems. If, for example, the framers are taken individually, a problem exists in defining what, among a person’s mental attitudes, ought to count as an intention. Moreover, the originalist confronts a perplexity that borders on paradox if it turns out that many of the framers had a certain kind of ‘interpretive intent’: if they in-
In this case, unfortunately, a tunneled view of constitutional interpretative methodology meant that the protection of substantive due process would rarely embrace derivative rights of liberty unpopular or previously unfamiliar to the majority. Scalia’s opinion may have reflected the analytical redundancy inhering in the fora of jurisprudential precedents where overly cautious judicial restraint, based solely on society’s deeply embedded traditions and history, has resulted in decisions that fail to promote even basic liberty interests which form the core of freedom embodied in the Constitution.

The downfall of unrestrained judicial activism has countermajoritarian implications where judicial review is tainted by a judge’s replacement of the democratic cry with their own personal voice. The dissenting opinions in Mathews and Michael H. raised some speculation of whether tradition and individual bias prevents the Court from reaching constitutionally-driven outcomes. Some responsible jurisprudential interpretive balance is needed to ensure that judge-made law has some “cognizable roots in the language or even the design of the Constitution.” Under either interpretive approach taken by the Court in such cases, the unresolved query remains the same: who will speak for the politically mute?

Justice Scalia’s opinion in Michael H. recognized the Court’s role in creating new constitutional rights through measured judicial expansion of the Due Process Clause beyond the Constitution’s explicit language and as anticipated by the framers. Perhaps Justice O’Connor’s concurring opinion provides a more appropriate vehicle of constitutional interpretation; she “would not foreclose the

---

526. See generally STONE, supra note 508, at 35-44 (discussing the inherent tension between judicial review, democracy, and constitutional interpretation).

527. See id.

528. See id. at 33-44.

529. The Mathews dissent concluded “that the classification which [was] sustained . . . in the name of ‘administrative convenience’[was] more probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates.” Mathews, 427 U.S. at 523 (Stevens, J., dissenting).


531. See id. at 122-23.
The Court is likely to retreat to history or tradition as a primary interpretive module in determining whether Congress should expand dependency to permit posthumously conceived children the opportunity to qualify for social security survivor's benefits pursuant to their asserted rights of equal protection under due process. Jurisprudential history shows that this newly created subclass of nonmarital children are unlikely to prevail under this interpretive construct. Posthumously conceived children have no long standing history, nor do they have a place in society's traditions. As in Michael H., should

532. Id. at 132 (O'Connor, J., concurring) (citing Poe v. Ullman, 367 U.S. 497, 542-44 (1961) (Harlan, J., dissenting)). Interpretive approaches providing constructs for constitutional analysis include: (1) Originalism, which interprets constitutional provisions so as to reflect the framers' and ratifiers' original meaning or intent in adopting the Constitution and the Bill of Rights; (2) Textualism, which means that the Constitution should be narrowly construed so as to remain within the confines of the plain meaning of its text; (3) Tradition & Common Law, which recognizes that society's traditions and history, as represented in part by local laws enacted through the democratic process, should play a role in determining the boundaries of judicial review in consideration of jurisprudential precedence; (4) Prevailing Morality & Social Conscience, which recognizes that judges should consider society's overall moralistic and ethical values in determining whether outcomes are inherently good, bad, or offensive to the public psyche and may include a consideration of central, prevailing religious paradigms; (5) Principles of Equity, Justice, and Fairness, which suggests that courts should participate in assuring that principles of equity, fairness, and justice form the core basis of judicial review. Under the leadership of Chief Justice Earl Warren, the Warren Court years are known as best refining these principles in its decision-making role. See STONE, supra note 508, at 35-44.

Cf. Fallon, supra note 514, at 1227-30 (rejecting a pure balancing theory and incorporating all interpretive theories on a weighted basis depending upon their reliability and relevance in a particular constitutional argument, as an effective means of constitutional analysis, stating that “[i]t fails to explain precisely how conclusions within the various categories ought to be reached once their lack of independence is recognized”). Fallon proposes an alternate constitutional interpretive theory, the “Constructivist Coherence Theory,” as a more complete adaptation to a balancing approach. This theory incorporates the five predominant interpretive arguments: text, historical intent, theory, precedent, and value into a conceptual balancing methodology geared to achieve a coherent result among the different types of theories. See id. at 1237-51 (providing a detailed description and explanation of the constructivist coherence theory, thesis, and methodology).
the Court apply a very narrow inquiry in assessing whether society has traditionally embraced the rights of social entitlements of non-marital children who are conceived after the death of a parent, the resounding response will be no. Should the Court, however, consider whether some level of constitutional protection has, in recent history, been extended to the entire class of nonmarital children, perhaps tradition can be redefined to overshadow society’s failure in past history to treat all children equally regardless of their parents’ marital status. Under this construct, the matter of equal entitlements for these children is “stare decisis” under well-settled constitutional precedence.533

Beyond a historical mode of constitutional interpretation, the Court is most justified in exercising its judicial discretion where un-anticipated rights arise from inevitable changes in normative social constructs due to modern technology and progressively evolving cultures.534 Perhaps the Court should interpret and apply the Constitution so that its provisions defy tradition, when necessary, where the letter and spirit of its embodiment are threatened by improper government executive or legislative action. If the Constitution is to remain a forceful, living source of individual freedom, the Supreme Court must continue to apply it so that it reflects a changing world.535

A new class of persons now exists which the framers never anticipated. They are, nevertheless, members of the general group of persons whom the framers sought to protect from unwarranted governmental action. Judicial activism motivated by this equitable principle most certainly has its place in resuscitating the plain meaning of constitutional text which promotes the life, liberty, and property of all persons.536

533. See, e.g., Wolfe v. Sullivan, 988 F.2d 1025, 1027 (10th Cir. 1993) (requiring that illegitimate children prove dependency while dependency is presumed for legitimate children).
534. See generally STONE, supra note 508, at 35-44 (exploring the tension among judicial review, democracy, and interpretation).
535. See Michael H., 491 U.S. at 140-41 (Brennan, J., dissenting).
536. See U.S. CONST. amend. XIV, § 1.
V. THE LEGISLATIVE IMPERATIVE: AMENDMENT TO THE SOCIAL SECURITY ACT—A VIEW TOWARDS DEPENDENCY AND POSTHUMOUS CONCEPTION

A. A Social Security Approach: Dependency and Its Progeny

The initial question is whether the legislative purpose in enacting social security survivor’s provisions intended to support children who are conceived and born after the death of the deceased wage earner. Of Congress’ objectives in its enactment of the Act, the keeping of families together and giving children the opportunity to grow up in health and security provides the most persuasive ammunition against the complete abrogation of survivor’s benefits for posthumously conceived children. Social security survivor’s provisions were drafted to supplement the support of orphaned children who, because of the death of their qualifying wage earning parent, would undoubtedly suffer severe financial misfortune throughout their childhood and possibly beyond their adulthood. Thus, Congress sought to remedy the social ills and devastating economic plight most likely confronting a worker’s orphaned children, so as to preserve their opportunity to one day become working productive members of society despite their parents’ own reproductive choices and untimely deaths.

The Court has translated this legislative objective into a prerequisite of statutory dependency under the Act. Dependence means “relying on or requiring the aid of another for support.” There is more than one variant of dependency, however, that meets the legislative purpose of providing orphaned children with a secure and healthy childhood. The Act provides two approaches in this regard. The Act presumes dependency based upon many circumstances which equate to an objective “probable dependency,” and bases “actual dependency” on criteria of the worker’s conduct under the last resort test.

537. See supra notes 261-64 and accompanying text for a discussion on the legislative history of the Act.
538. See supra notes 261-64 and accompanying text.
540. See supra notes 321-53 and accompanying text for a discussion on the dependency requirement under social security.
Proving an applicant's reliance on a deceased worker is pivotal in establishing actual dependency under the Act. This presupposes that the applicant had the physical capability of doing so prior to the worker's death. Where this is impractical, an applicant's last resort is to prove that the worker was either living with or supporting them at his death.\textsuperscript{541}

Lower federal district courts established yet a third course to dependency by adopting a commensurate support test which enabled after-born applicants to establish their prebirth reliance on their deceased parent's support.\textsuperscript{542} For these children, this prebirth reliance is based solely on the deceased parent's conduct toward the mother and the fictitious needs of the unborn child at the worker's death.\textsuperscript{543} Thus, the determinative evidence establishing dependency is the worker's pre-death conduct regarding the care and safeguarding of an unborn child. It is this conduct, accompanied by the worker's pre-death acknowledgment of his or her impending parentage which is interpreted as supporting an unborn child. This interpretive analysis amounts to nothing more than the intent-based parental analysis found in contemporary jurisprudence and legislation determining the rights and status of children of assisted reproduction.\textsuperscript{544}

1. 

Intent-based parenthood and posthumous conception

Academicians have generally supported some aspects of the growing concept of intent-based parenting in determining parental prerogatives and establishing legal familial relationships.\textsuperscript{545} Professor Shapo recognizes that

\textsuperscript{541} See supra notes 321-53 and accompanying text for a discussion on the dependency requirement under social security.

\textsuperscript{542} See supra notes 354-69 and accompanying text for a discussion on the "Commensurate Support Test."

\textsuperscript{543} See supra notes 354-69 and accompanying text for a discussion on the "Commensurate Support Test."

\textsuperscript{544} See infra notes 545-47 and accompanying text for a discussion on intent-based parenthood and posthumous reproduction.

\textsuperscript{545} See Shapo, supra note 1, at 1182-94 (discussing two major theories postulated by legal scholars on intent-based parenting as being rights-based (or constitutionally supported) or as based upon enforcing the contractual relations entered into between progenitors. A detailed analysis on the impact of intent-based parenting as it relates to inheritance, artificial insemination, in vitro fertilization and surrogate contracts is also provided). The author lends overall
intent-based theories of parenthood do not necessarily aim to reshape the American family. Indeed, intent-based parenthood tends to support the traditional family since the principal users of noncoital reproduction are married couples who want to raise a child genetically related to at least one of them. Moreover, commentators argue that intent-based parenthood serves the resulting child’s best interests by placing the child with adults who clearly want to raise him or her.546

My support of intent-based parenting in alternate reproductive cases extends beyond the proposition that it fosters a child’s psychological and relational development. An intent-based analysis can also be utilized as a means of settling the financial interests of resulting children in terms of inheritance and employment-related survivor’s benefits such as social security.

Although Professor Shapo and other scholars have addressed the inheritance rights of children conceived through assisted reproduction under an intent-based parenthood analysis, I propose to show that this analytical methodology also supports the posthumously conceived child’s right to survivor’s benefits under current jurisprudential interpretation of the Act’s survivor’s provisions. As discussed previously in this Article, the commensurate support test as it support towards intent-based parenting, but raises significant issues regarding the practical implications of establishing probative evidence substantiating progenitors’ preconception intent in all cases. Professor Shapo concludes that in many instances involving reproductive technology, decisions based upon intent-based parenting will often necessitate litigation unless some formalized reproductive registry system is established. The ultimate question which must be considered in any intent-based parental analysis is the impact such determinations will have on the resulting child. It may not be in a child’s best interest to have parental determinations held up by litigation if such activities will impact the child’s early social adjustment and bonding needs. The child’s well-being must also be considered in alternate reproductive scenarios where an intent-based resolution produces nontraditional family structures involving dual, multiple or same-sex parents. See id. at 1194-1207.

546. Id. at 1182 (footnotes omitted).

547. See id. at 1188-94 (arguing that intent-based parenthood decisions would simplify the determination of whether a child is entitled to inherit from the intended social parent, but recognizing that further complications would arise under existing alternate reproductive laws where the nonexistence of evidence substantiating the requisite intent requires heightened levels of government intervention or regulation).
currently exists provides little if any recourse to posthumously conceived children. This test does, however, provide the requisite elasticity in expanding statutory dependency so that class members of after-conceived children may qualify for survivor’s benefits under the Act.

An intent-based parental analysis provides at least minimal statutory protection for this class of children because determinative evidence would consist of the deceased parent’s pre-death conduct and posthumous procreative intent. However, before an intent-based analysis can be applied, we must engage in a public policy analysis addressing the possible moral and ethical outcomes in response to the expansion of dependency in a manner that extends social security survivor’s benefits to a worker’s after-conceived children.

2. Moral and ethical implications in expanding dependency

The expansion of social security survivor’s benefits to after-conceived children raises certain moral considerations in determining the efficacy of the inclusive approach I will ultimately promote in this Article. Initial concerns of distributive justice and equality arise in determining whether this newly created class of nonmarital children should benefit from social programs in a manner comparable to other children. On the other hand, a purely communitarian response would employ the consideration of whether the greatest overall good to society as a whole is promoted by expanding the dependency standard. The analytical methodology which perhaps preserves the virtues of both approaches is presented by John Rawls’ book, A Theory Of Justice, as he explores the political and moral implications of theories of justice.

Rawls introduces his reader to a philosophical interpretation based upon the original position using hypothetical contracting parties who possess certain motivational characteristics: they are generally uninformed about moral and political external choices (the veil

548. See TOM L. BEACHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 77 (4th ed. 1994) (defining communitarianism as “theories [that] view everything fundamental in ethics as deriving from communal values, the common good, social goals, traditional practices, and the cooperative virtues”).

549. JOHN RAWLS, A THEORY OF JUSTICE (1971).
of ignorance); they are objective, rational beings (mutually disinterested and untainted by envy), and they are "continuing persons (family heads, or genetic lines)." For the limited purposes of this paper, I will borrow from Rawls' basic interpretive concept of the original position in evaluating predictable responses from affected, as well as unaffected, ideal citizens as they consider whether survivor's benefits should be extended to a worker's after-conceived children.

\[ \text{a. the unaffected ideal citizen} \]

The unaffected ideal citizen is a person who has no preconceived frame of reference concerning posthumous conception or social security survivor's benefits. This person could also be an individual who is not necessarily paying into the social security system, having no measurable connection to the system beyond that of a general taxpayer. When confronted with the choice of whether posthumously conceived children should be entitled to benefits, the truly unaffected ideal citizen's most likely response would be one of passive indifference. This result is premised on the assumption that awarding such benefits to other persons would provide the citizen with little or no tangible social advantage. Further thought, however, requires a consideration of whether expanding survivor's benefits reduces the unaffected ideal citizen's ability to obtain social goods otherwise available.

Thus, this indifferent response might change if the favorable respondent views the current denial of benefits as a future obstacle which might impede their own ability in the future to provide for any after-conceived children should they ever become affected participants. As such, the preservation of a general social right of no current consequence may invoke favorable responses from unaffected ideal citizens seeking to secure their own greatest share of future social commodities or rights. Moral principles of beneficence and

\[ 550. \text{See id. at 128-29, 136-38, 142-47.} \]
\[ 551. \text{See BEACHAMP & CHILDRESS, supra note 548, at 259 ("[m]orality requires not only that we treat persons autonomously and refrain from harming them, but also that we contribute to their welfare. Such beneficial actions fall under the heading of beneficence. . . . [P]rinciples of beneficence potentially demand more than the principle of nonmaleficence because agents must take} \]
maleficence\textsuperscript{552} might also motivate this citizen to support the equal treatment of such children, or at least dissuade the citizen from speaking out against permitting such benefits. An even more favorable response is likely if the veil of ignorance is pierced by introducing religious constructs promoting human life and rights for all persons conceived or in the process of being conceived.\textsuperscript{553}

An opposing respondent could argue that the provision of benefits to persons who are conceived after death threatens the overall financial well-being of society by allocating limited resources to persons who would not normally be born by traditional coital relations. This concern raises the ancillary issue of whether posthumous conception is a form of procreative liberty which should be encouraged by securing survivor’s benefits for resulting children. Additionally, one could find it unreasonable to provide such an economic incentive to persons seeking to procreate posthumously. Finally, one could argue that providing benefits to posthumous children negatively impacts natural population controls created by once infertile couples.

\begin{itemize}
\item \textbf{b. the affected ideal citizen}
\end{itemize}

There are two distinct classes of affected ideal citizens: those who pay into the social security system, but who have no interest in posthumous conception; and those who may or may not pay into the system, but who are participants in the process of posthumous reproduction as either the posthumous progenitor, the surviving custodial parent, or the after-conceived child. Again, these ideal citizens are positive steps to help others, not merely refrain from harmful acts\textsuperscript{\textquotedblright}).

\textsuperscript{552} See id. at 189 (defining “[t]he principle of nonmaleficence [as] an obligation not to inflict harm intentionally. It has been closely associated in medical ethics with the maxim \textit{Primum non nocere}: ‘Above all [or first] do no harm’\textsuperscript{\textquotedblright}).

\textsuperscript{553} See, e.g., ROBERT D. ORR, M.D. ET AL., \textit{LIFE AND DEATH DECISIONS: HELP IN MAKING TOUGH CHOICES ABOUT BIOETHICAL ISSUES} 70-71 (1990) (stating that “[s]cripture speaks of man being made in the image of God (Genesis 1:26-27, 5:1; 1 Corinthians 11:7). This Judeo-Christian tradition of the \textit{imago dei} is the basis for personhood, dignity, and basic human rights. This biblical concept of the person affirms that each infant born possesses an intrinsic dignity which entitles him to receive whatever ... care is thought to be in his or her best interests\textsuperscript{\textquotedblright}).
normalized, for interpretive purposes, by viewing their response from the "original position"\textsuperscript{554} of persons so situated.

i. payor of social security benefits

The response of this affected ideal citizen in the original position would, on one level, be based on the assumption that the broader provisions of rights to others ensures the greatest social good, even though this person has no intent to procreate posthumously. The reciprocity of good will supports this response as the favorable respondent seeks to treat others the way he or she would have others treat them.\textsuperscript{555} The favorable respondent would be more reluctant to restrict the expression of libertarian rights by others where there is no threat to their own obtainment of desired social goods. This approach supports expanded coverage for all persons so long as coverage is provided in an equitable and fair manner.

An opposing affected ideal citizen, tainted somewhat by heightened concerns of financial self-interest, would oppose the provision of expanded benefits to after-conceived children on the basis that third parties should not have to pay for another person's exercise of nontraditional procreative activity. This position supports the responsibility theory of parental choice which imputes individual financial accountability to one's parenting decisions. This respondent does not necessarily view posthumous conception as a social ill, but instead fears bearing the partial financial responsibility for another person's procreative choices.\textsuperscript{556}

\textsuperscript{554} This is not strictly speaking Rawls' "original position" since these persons have some knowledge of their position in society and of their desired ends. See \textit{RAWLS, supra} note 549, at 118-50. As affected citizens, their response to the query of whether survivor's benefits should be provided to all posthumously conceived children will inherently reflect some degree of individual bias and preference. The opposing respondent would thus place little substantive value on a favorable response from affected ideal citizens because of their tainted motives of self-interest. \textit{See id.}

\textsuperscript{555} Jesus states the Golden Rule as follows: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets." \textit{Matthew 7:12} (King James).

\textsuperscript{556} Using the analogy of private insurance law, this concern is based upon the assumption that the opposing respondent's premiums (or taxes) would increase if benefits are made available to posthumously conceived children.
An opposing respondent might further argue on moral or religious grounds that a quasi-governmental social insurance program should not support the nontraditional procreative choices of a few with public funds provided by private individuals who have no biological or legal connection to the resulting offspring. The moral-political position supporting current restrictions against using government funds for abortions is supportive of this position.\footnote{557}{See, e.g., 42 U.S.C. § 300a-6 (1994) (prohibiting federal funds from being used to support family planning “programs where abortion is a method of family planning”).}

ii. posthumous progenitor

The affected ideal citizen in the original position desiring to procreate posthumously would quite easily rationalize the efficacy of providing survivor’s benefits to their resulting children. Their response would in most cases be tainted by self-interest in assuring for themselves and their offspring the greatest degree of social rights and privileges. On a more objective level, this respondent might justify the provisions of benefits based upon their having made contributions into the social security system for this very purpose. Principles of equity and fairness would support their argument that all of their children, regardless of the timing of their births, should be able to benefit from a parent’s lifetime contributions into a social insurance program.

In theory, there may be some hypothetical ideal citizens who would not want benefits expanded to include the children they intend to conceive after death. One rational basis for this conclusion would exist if the respondent’s veil of ignorance is breached by informing him about the system’s family maximum limits which restrict the overall amount of survivor’s benefits payable on a deceased worker’s earnings record.\footnote{558}{See supra notes 304-05 and accompanying text for discussion of the concept of the maximum family benefit under social security law.} Armed with this information, the ideal citizen desiring to procreate posthumously might choose to provide greater financial security to children conceived prior to the citizen’s death.
iii. surviving custodial parent

In practice, the rational response by a surviving custodial parent would be motivated by self-interest concerns of maintaining a certain living standard for their surviving family. In this regard, the ideal citizen again would seek to obtain the greatest degree of social advantages by choosing to expand benefits to their custodial children. On a more objective level, this citizen would also consider it proper and just to provide coverage to the children of deceased biological parents who paid lifetime contributions into the system.

In theory, there may be some surviving custodial parents who would choose not to expand survivor's coverage to children they are raising. Depending on external information beyond the context of the original position of such parents, there may be certain self-interest economic benefits which would motivate such an unlikely choice. A possible situation might arise where the surviving parent is dependent on other quasi-public funding or benefits which restrict or cap recipient earning levels, such as in certain auxiliary social security benefits.\(^5^5^9\) One additional possibility which could motivate an unfavorable response is where the parent's acceptance of additional income from the child's survivor's benefits would result in unfavorable income tax consequences.\(^5^6^0\)

iv. after-conceived child

In the abstract, the ideal citizen as an after-conceived child would almost always prefer to be born and economically supported by whatever means available. Again, motives of self-interest call forth the response that would ensure the availability of the greatest degree of social resources in a fair and equitable manner. The

559. See, e.g., MYERS, supra note 261, at 60 (stating that “[u]nder certain circumstances, the [monthly social security survivor’s] benefit otherwise payable to a widowed spouse is reduced if such spouse also has a pension based on employment under a retirement system for federal, state, or local government employees which is not coordinated with or supplementary to OASDI”).

560. See id. at 146-52, 498-500 (discussing the social and political implications of the taxation of OASDI benefits in 1983). The likelihood of this option occurring is weakened, however, due to the fact that child survivor’s benefits are not considered a part of the custodial parent’s income for taxation purposes. Child survivor’s benefits belong to the beneficiary for income tax purposes. See id. at 150.
after-conceived child is unlikely to inherently view him or herself as a lesser person having a nonlegal existence which does not deserve to be supported by biological parents. Such a child is also unlikely to place considerable moral value or weight on the practice of assigning financial advantages to children based upon the timing of their birth. Once born, the rational ideal citizen would seek to secure all rights and benefits necessary to further their individual advancement in society.

In theory, it is also possible that there may be some hypothetical after-conceived child who would not choose to expand survivor’s benefits. This position would almost always be supplanted with the child’s attending desire not to be born if their parents fail to provide the financial and relational support the child needs to achieve their own social goals. One might venture further to say that unfavorable social conditions, if known in advance by the unconceived child, might cause the child to decide against being born into an overly populated world. In this case, the question of expanding survivor’s benefits becomes a nonissue. Finally, one might find unconvincing any analytical process which assigns rights to a nonexisting, hypothetical child.

\[c. \text{ balancing the rationality of response}\]

Three basic arguments, which I classify as either conservative, moderate, or progressive, support the response provided by the foregoing affected and unaffected ideal citizens in the original position.

\[i. \text{ the progressive response}\]

Affected participants of posthumous procreation who seek to derive the greatest benefit available from the relevant worker’s earning record present the progressive response. This approach would liberalize the expansion of benefits in every case to all children who are conceived posthumously. Some aspects of this view are also reflected in the favorable response from the unaffected ideal citizen who would not ordinarily be opposed to postmortem conception and the payment of survivor’s benefits to after-conceived children. The progressive view substantiates the provision of benefits by assigning equal value and status to all existing and potential human life. This response has strong kinship to the tenets of prolife supporters. This
approach ignores the counter arguments of moderate and conservative respondents that some measurable limitations should be placed upon the practice of posthumous conception to ensure the greatest individual and communal equity.

ii. the conservative response

On the other end of the spectrum exists the conservative response which only supports posthumous reproduction as a procreative choice where the progenitors have sole economic responsibility for resulting offspring. This approach is supported by affected payers into the social security system who do not ever intend to procreate posthumously. The ideal citizen providing this response argues that posthumous conception is a nontraditional private practice which does not deserve the public or private funding by unaffected third parties.

Parental responsibility is portrayed as a means of discouraging assisted reproduction by persons who have not made alternative financial arrangements to support such offspring. Likewise, this position would consider it bad public policy to utilize social security insurance as a source of postmortem child support. The conservative approach only awards survivor's benefits to children who are conceived through traditional means of reproduction where conception occurs prior to the progenitor's death.

iii. the moderate response

The moderate view represents a middle ground between the other two approaches. It requires some level of preconception activity by the progenitor so as to insure that the parent intended to provide postmortem support to after-conceived children. This approach only permits posthumously conceived children to receive survivor's benefits where their predeceased parent indicated some intent to provide for the child. The harshness of a strict parental responsibility theory is therefore ameliorated by allowing parents to utilize social security benefits as an additional means of fulfilling their moral if not legal obligation to support offspring. Under this approach, progenitors and their families would avoid the punitive nature of the conservative view which is premised upon a progenitor's use of alternate reproductive technology during conception.
The moderate response is supported by segments of analysis presented by the unaffected and affected ideal citizen. Most respondents view the provision of survivor's insurance to after-conceived children as the preferable course of action so long as certain variables are in place. One concern expressed by the unaffected citizen was that survivor's benefits be made available to all similarly situated persons in a fair and equitable manner. This approach protects any future rights to benefits unaffected citizens might desire in the future. Likewise, the moderate approach imposes certain limitations and requirements in the provision of survivor’s benefits to ensure the financial viability of the social security system and the overall financial well-being of society. This middle-course rejects the progressive view that survivor’s benefits should be provided to all children who are conceived posthumously. Progressive respondents thus criticize the moderate view as being too exclusionary. The conservative respondent criticizes the moderate approach as being too inclusive.

There are three support tests which come within the moderate approach which help determine whether a predeceased parent intended to provide support for an after-conceived child for purposes of securing social security survivor’s benefits: commensurate support;\textsuperscript{561} constructive support;\textsuperscript{562} and prospective support.\textsuperscript{563}

d. the better view towards dependency

In balancing these considerations, it is my contention that the moderate approach is the preferential response in determining whether benefits should be provided to after-conceived children. The conservative stance fails to properly balance the individual autonomy of participants with asserted political and moral arguments which suggests some limitations should be placed upon the provisions of benefits to such children. Likewise, the progressive position fails to consider the practical and political realities of posthumous conception which warrant some level of restrictions being attached to such benefits. The moderate approach more closely represents the legislative intent of the survivorship provisions and leading jurisprudential precedents which seek to provide survivor’s benefits in a liberal

\textsuperscript{561} See infra Part V.B.1.
\textsuperscript{562} See infra Part V.B.2.
\textsuperscript{563} See infra Part V.B.3.
manner to those children to whom their parents intended to provide support.

After-conceived children are ideally the type of intended beneficiaries Congress envisioned would need and rely heavily upon the after death support of a deceased wage earning parent. These children are prone to suffer the greatest financial loss than would any other group of orphaned children. Their sole means of receiving support directly from a deceased parent’s estate may be through employment-related survivor’s benefits such as social security. Current state inheritance laws either implicitly forestall such children from taking anything under their biological parent(s)’ testate or intestate estates, or expressly limit them to inheritance from their parent(s)’ testate estate.\(^{564}\)

**B. A Social Security Approach: Constructive Support**

1. Commensurate support and posthumous conception

The interpretive analysis utilized in the commensurate support test would need to be adjusted to reflect the biophysical impediments inherent in posthumous conception.\(^{565}\) In this regard, however, the path to statutory dependency should not create a substantially greater burden upon after-conceived children in establishing their predeath reliance upon a deceased parent, than the paths of marital, nonmarital, or after-born children under principles of equal protection and distributive justice.\(^{566}\)

There are several reasonable paradigms of the commensurate support test which I have developed to meet these objectives. The commensurate support test allows children to prove that their deceased biological parent’s support was commensurate with the needs of the unborn child given the father’s financial status and the stage of

\(^{564}\) *See supra* notes 203-21 and accompanying text for a discussion on state inheritance laws.

\(^{565}\) The commensurate support test is inapplicable to posthumously conceived children because the child’s mother is not pregnant at the time of the worker’s death.

\(^{566}\) *See generally* Wolfe v. Sullivan, 988 F.2d 1025, 1026 (10th Cir. 1993) (holding the same test should be used for posthumous children as is used for all children).
the mother’s pregnancy.\footnote{See id. at 1028.} I propose a deviation from this test which is designed to allow posthumously conceived children the opportunity to meet the support requirement by a predeceased biological parent first, under a “Constructive Support” test, and secondarily under a “Prospective Support” test.

2. Constructive support and posthumous conception

Under a constructive support test, which I am proposing as a new approach, applicants would be able to show that their deceased, biological parent supported the child’s intended custodial parent during a preexisting, substantial relationship between the progenitors prior to the wage earner’s death. The type of support given by the worker should relate specifically to the intended custodial parent’s impending care of an unconceived child. Thus, the worker’s procreative support of the intended custodial parent would be construed as the worker’s constructive support of the unconceived child.

A constructive application is required under this test because of the unsubstantial needs of unconceived children. It is impractical to require the actual support of an unconceived child who, at the time of the worker’s death, could not possibly have material needs during the preconception stage which would satisfy the Act’s support requirement that contributions be “made regularly and [are] large enough to meet [an] important part of [the child’s] ordinary living costs.”\footnote{Id. at 1026. See also 42 U.S.C. § 416(h)(3) (1991) (describing the support requirements under the Act).} Thus, by operation of law, certain pre-death conduct towards the intended custodial parent would translate into the support of an impending child.\footnote{Some aspects of the doctrines of equitable legitimation and virtual adoption may support this constructive analysis by utilizing equitable principles which consider that which should have been done based upon the conduct of the relevant parties. See Prince v. Black, 344 S.E.2d 411, 412-13 (Ga. 1986); Davis v. Jones, 626 S.W.2d 303, 308-09 (Tex. 1982).}

Probative weight could be assigned to evidence tending to show that the deceased worker made regular payments toward the intended custodial parent’s ordinary living expenses in preparation for the impending pregnancy. This might include the worker’s maintenance of

\footnote{567. See id. at 1028.}
appropriate shelter, food, and furniture for the purpose of preparing the surviving parent for childbearing and rearing.

The constructive support test might be most difficult to prove under circumstances where it is hard to ascertain the worker’s true intent in providing for the ordinary living expenses of the intended custodial parent. There must exist additional evidence linking the worker’s support to an intent to procreate at some future date. This type of evidence may be more properly characterized as the worker’s prospective support of an unconceived child. I would therefore propose the adoption of an alternate route to statutory dependency which would focus, instead, on affirmative pre-death actions taken by the worker to care for their concepti and future offspring under a prospective support test.

3. Prospective support and posthumous conception

The birth of “prospective support” was recognized in its earliest form as a proper means of determining statutory dependency by the lower district court in Mathews, when it stated that

survivorship benefits under the Act . . . [were] not intended merely to replace actual support that a child lost through the death of the insured parent . . . Rather, . . . the statute . . . [was] designed to replace obligations of support or potential support lost through death, where the obligation was perceived by Congress, on the basis of the responsibility of the relation between the child’s parents, to be a valid one.570

This judicial interpretation more properly reflects the remedial nature and humanitarian purpose resonate in the Act’s foundational congressional purpose than does the Court’s rejection of this approach in favor of the current strict view of an actual dependency requirement.

I am proposing the adoption of a prospective support test as a means of equipping this potential support standard with the teeth needed to overcome the Court’s view on statutory dependence. It is more than just basing an applicant’s future right to potential support on their deceased biological parents’ legal or moral obligation to

support them. My proposed prospective support test equates to a showing that the deceased worker acknowledged an intent and made a firm commitment to provide future support to potential biological offspring prior to death. This would enable survivor’s benefits to supplement the formalized anticipated support a child would continue needing in spite of the timing of a parent’s demise. The commensurate support test is, in its simplest terms, more properly characterized as a showing of the worker’s prospective support of an unborn biological child. The actual support of a worker’s child does not really begin until after the child is born because the Act refers to the support requirement as being met when a worker contributes to a child’s ordinary “living” expenses on a regular and substantial basis. The Act implies, therefore, that only children who are living at the worker’s death are capable of being supported. It then follows that qualifying after-born applicants under the current commensurate test are actually awarded survivor’s benefits based upon their parent’s prospective support.

My proposal seeks to have evidence of this same prospective support also qualify as statutory dependency on behalf of applicants who were unconceived at their biological parent’s death. This approach recognizes a worker’s prospective support of concepti having the potential of becoming human life.

The interim category assigning the status of frozen concepti requires a minimal level of respect and treatment of concepti prior to its entry into the gestation process. This level of special respect might be initially reflected in the care and maintenance of frozen concepti in appropriate storage facilities at a cryobank. Proper maintenance and care would also be represented where concepti providers exercise their decisional control over the concepti by executing a storage agreement which set forth their intended purpose in

---

572. This proposal, based upon the special respect which should be afforded frozen human gametes recognizes the potential of gametes becoming human life. See, e.g., Hecht v. Superior Ct., 16 Cal. App. 4th 836, 20 Cal. Rptr. 2d 275 (1993); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).
573. See Hecht, 16 Cal. App. 4th at 840, 20 Cal. Rptr. 2d at 276; Davis, 842 S.W.2d at 592.
depositing the concepti and their desired future use of the concepti as well as their designation of any intended concepti recipients.\textsuperscript{574}

More determinative evidence would be necessary, however, to show that the worker intended to extend this preconception support to and beyond the point of the conceptus’ actualization in becoming a living being capable of support under a strict interpretation of statutory dependency. Prospective support provided during the impending child’s gestation and life could be represented by clear and convincing proof formally expressed by the deceased worker prior to death.

The worker’s pre-death conduct could consist of evidence showing that the worker paid for the future, long term cryobank storage of the concepti and for the assisted reproductive procedures to be performed on the intended gestational parents. Other evidence of probative value would be the worker’s prearranged preparations for the requisite prenatal and medical care of the gestational parent during any post-death pregnancies. This might also include the worker’s prearranged payment and securement of the impending child’s necessary lifetime medical and health insurance as well as educational costs, perhaps by some type of testamentary trust instrument.

Beyond such instances of the worker’s predeath conduct, there should be further dispositive evidence of his expressly-stated intent to support biological children later born from deposited concepti. This expressed intent could be shown informally by representations made in formal documents such as beneficiary designations in life insurance policies and employment beneficiary contracts, designations in testamentary devices, or any other written or verbal

\textsuperscript{574} This approach is consistent with views of legal commentators addressing the status of frozen gametes and the implications of parenthood by intent in posthumous conception. See, e.g., Shapo, supra note 1, at 1182-93 (presenting the various arguments and views of legal scholars regarding parenthood by intent). Many of the examples of evidentiary standards of proof in establishing parenthood by intent for social security benefits which I suggest in these support tests are consistent with evidentiary standards suggested by the wealth of legal commentaries addressing the status of frozen embryos, posthumous conception, and human gametes for purposes of inheritance rights and paternity. I adopt some of these same evidentiary standards for the novel purpose of determining a child applicant’s dependency on a predeceased parent for social security survivor’s benefits. See generally Garside, supra note 1 (discussing the rights of posthumously conceived children).
statements made to reliable sources such as medical insurance and health care providers, close associates or family members.

A worker’s formalized public acknowledgment would, of course, provide the greatest reliable source of evidence in establishing postmortem procreative intent. The decedent in Hecht attempted to provide such documentation when writing a letter directly to unconceived children, by acknowledging his intent to parent them and his regrets for not surviving to do so. Such letters of acknowledgment written to future children and possibly even reservations of specific personal property of sentimental value could be formalized into a document such as the previously mentioned procreative will.

The adoption of a standard of prospective support furthers the intent-based analysis which recognizes individual procreative rights existing in assisted reproductive technology law. Parental rights are determined by the intentional conduct of participants. Assisted reproduction has impacted reproductive traditions of society by altering the expectation that concepti donors will or should always become the intended gestational or custodial parents of resulting children. Laws are changing to reflect this social progression by assigning parental status to the husband of a woman impregnated with donor sperm by artificial insemination where he consents to the procedure. Even though there may not be a biological connection between the intended custodial parent and child, paternity is based upon the potential parent’s preconception conduct showing a commitment to becoming a parent. The prospective support approach also places determinative weight upon the progenitor’s express commitment to procreate and parent in determining the legal status of children to be born some time in the future, even if after the intended parent’s death.

C. Social-Political Considerations of Prospective Support

1. Financial responsibility and posthumous conception

Perhaps the inevitable question in determining the legal entitlements of posthumously conceived children is the determination of

575. See Hecht, 16 Cal. App. 4th at 841, 20 Cal. Rptr. 2d at 277.
576. See, e.g., N.Y. DOM. REL. § 73 (McKinney 1988).
who should bear the cost of supporting them. Professor Shapo and other scholars present this query in terms of whether procreative expressions through alternate reproductive technology should be conditioned upon a person’s ability or willingness to financially support and care for resulting offspring.\textsuperscript{577} One commentator proposes the imposition of mandatory financially responsibility through inheritance upon progenitors seeking to procreate posthumously.\textsuperscript{578} This proposal thus requires such progenitors to formalize their procreation and child support intent as a precondition to posthumous reproduction.\textsuperscript{579}

I find that the question of parenting responsibility is also implicated in determining whether social security survivor’s benefits should be made available to posthumously conceived children. In this regard the query becomes whether the social welfare, or revised Workfare system, should fully embrace total responsibility for these children, or should some means of cost-sharing be employed to shift at least partial responsibility upon the child’s predeceased parents? This, of course, requires a reconsideration of the limits placed upon a deceased parent’s legal obligation to support offspring beyond his or her death. It would seem that the existence of the type of informal conduct discussed under prospective support and formal procreative intent as possibly expressed in a procreative will, could be construed as an enforceable pre-death agreement to support one’s after-conceived children.\textsuperscript{580} In any case, the recognition of deceased workers’ prospective support of future offspring certainly fosters the parents’ moral obligation to support their biological children.

One public policy argument which supports the prospective support test is the prevention of state wards and orphans. Permitting an additional class of nonmarital children the opportunity to qualify for survivor’s benefits furthers this interest. The increased financial

\textsuperscript{577} See Shapo, supra note 1, at 1207-20 (discussing the concept of fostering responsibility in alternate reproductive cases upon intended social parents by comparing the works of scholars preferring the communitarian goals of imputing individual responsibility over personal autonomous pursuits of protecting individual rights of procreation).

\textsuperscript{578} See Burkdall, supra note 25, at 898-99.

\textsuperscript{579} See id. at 898.

\textsuperscript{580} See supra notes 229-37 and accompanying text for a discussion on post-death support obligations.
burden placed upon the social security system would at least be borne in part by contributions and employment taxes paid into the fund by the child’s parent prior to his or her death. Most would consider the better approach in supporting orphaned children is with social security survivor’s benefits than with funds from the general public treasury which have no direct nexus to the work history and activities of the child’s biological parents. The prospective support test helps to reserve limited welfare funds for those children whose parents have truly never recognized their legal or moral obligation to support the child, or who have never acknowledged any parental responsibility or biological connection with the child.

2. Statute of limitations and posthumous conception

There are some political realities which must be reflected in increasing the class of qualified applicants under a bankrupt social insurance system. To help foster the ongoing long-term viability of the social security program as it stands, or as it is subject to change, there should be placed a time limitation upon which potential applicants must be conceived, born and therefore qualify to apply for such benefits after the worker’s death. The absence of such a time frame stretches the constructive and prospective dependency standards to rather tenuous abstractions. There must be placed a limit upon one’s expectation of postmortem parenting and any attending rights of resulting children.

Such statutory limitations should however, meet existing constitutional parameters applied to existing statutes of limitations related to proving a nonmarital child’s paternity and resulting legal rights and entitlements. A beginning point would be to require the

---

581. From a comparative standpoint, it is interesting to note one court’s interpretation of the proper financial chain of responsibility in such quasi-public insurance programs. For instance, Workmen’s Compensation Survivor’s benefits are based upon “statutory scheme[s] . . . designed to provide economic support efficiently to the employee injured on the job or to his or her dependents when the employee has died, and to place the cost of such support upon the employer, and ultimately, the consumer, rather than upon the general public.” Burns v. Robert Miller Constr., 55 N.Y.S.2d 501, 508 (1982) (citation omitted).

582. See generally Clark v. Jeter, 486 U.S. 456 (1988) (holding that a statute of limitations should be long enough to present a reasonable opportunity for a person to assert a claim on behalf of an illegitimate child and must also be sub-
child’s conception or birth within a period no later than the final closing of the deceased worker’s estate. On the outset, a two-year statute of limitations accruing from the worker’s date of death would seem to provide a substantial portion of the protected class the opportunity to become potential life deserving the opportunity to be respected and supported as the worker’s potential children.\(^{583}\)

VI. CONCLUSION

The greatest obstacle in overcoming the provision of survivor’s benefits to after-conceived children is the reconciliation of whether Congress intended to exclude this newly created class of orphaned children from benefiting from the employment and earnings of their predeceased parents. The legislative intent has shown that survivor’s benefits should replace the loss of support an orphaned child would have received but for the untimely death of a parent with a qualifying work history. The Act’s application to all such children needs further clarification in order to properly carry out this congressional intent.

There are also very prominent political hindrances in expanding the Act’s coverage in a time when the nation’s social security system faces the imminent prospect of becoming bankrupt. The political climate of social legislation provides, however, no justifiable reason upon which Congress should refuse to fairly provide current coverage across the board to all equally qualifying applicants. The overhaul of a bankrupt system does not command the forestalling of the rights of one class of persons over another. Instead, any structural modifications in benefits under the existing system should be equitably borne by all persons similarly situated.

It has further become evident that the Social Security Administration can no longer rely upon state paternity and inheritance laws substantially related to the state’s interest in avoiding stale or fraudulent claims).

\(^{583}\) Most commentators supporting the practice of posthumous conception propose a similar time frame, or minimally concede that the assignment of financial benefits based upon a resulting child’s biological connection with a predeceased parent should not exist in perpetuity. See supra note 1. See also Thies, supra note 26, at 923, 960 (proposing that an additional justification for imposing a statute of limitations is to reconcile issues dealing with the application of the Rule Against Perpetuities to conveyances intended to benefit posthumously conceived children).
in determining entitlement to survivor’s benefits under the Act. The fragmented state legislation, or lack thereof, and inadequacy of state action in areas dealing with assisted reproductive technology summons congressional action to the forefront in order to provide greater uniformity in awarding survivor’s benefits.

The congressional purpose of this social legislation mandates that minimal accommodations be expressly provided for the new class of nonmarital children—the posthumously conceived. The adoption of a constructive support standard would be a move in the right direction in at least considering how one might address this problem. The more reasonable approach would be to call an “egg” an “egg” by adopting the commensurate support test as it works under a prospective support analysis. Intent-based parenting is undoubtedly becoming a primary consideration in determining the status and rights of children and progenitors participating in assisted reproduction. The application of the prospective support test as proposed here incorporates this important concept while also recognizing the moral significance of recognizing concepti as having the potential of becoming human life or children who also deserve the opportunity to grow up in health and security.

**EPILOGUE: HART AND AN EXTENDED VIEW OF DEPENDENCY**

The outcome in *Hart* would remain unchanged, but on different grounds, if the constructive or prospective support tests had been made available to Judith Hart upon her application for survivor’s benefits. Upon her proof of paternity, she would have been required to prove that her predeceased biological father made every effort to support her preconception existence in expectation of becoming her father some time in the future. Thus, her mother’s proffered testimony and documentary evidence establishing her husband’s intent to procreate by depositing his sperm prior to death would in most instances meet the required evidentiary burden of prospective support.