

1-17-1973

## 01-17-1973 Justice Stewart, Dissenting

Potter Stewart  
*US Supreme Court Justice*

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# SUPREME COURT OF THE UNITED STATES

No. 71-575

Linda Gomez, Individually and as Next Friend of Zoraida Gomez, Appellant, <i>v.</i> Francisco Ocasio Perez.	} On Appeal from the Court of Civil Ap- peals for the Fourth Supreme Judicial District of Texas.
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[January 17, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE REHN-  
QUIST joins, dissenting.

This case came here as an appeal, on the representa-  
tion that the Texas courts had sustained the constitu-  
tionality of § 4.02, c. 4, of the Texas Family Code and  
Articles 602 and 602a of the Texas Penal Code,  
over a challenge to those statutes under the Equal Pro-  
tection Clause of the Fourteenth Amendment. We  
noted probable jurisdiction, 408 U. S. 920, to consider  
whether the alleged discrimination between legitimate  
and illegitimate children in terms of the support obliga-  
tions of their biological fathers denied equal protection  
to illegitimate children under the principles of *Weber v.*  
*Aetna Cas. & Surety Co.*, 406 U. S. 164, *Glonn v.*  
*American Guarantee and Liability Insurance Co.*, 391  
U. S. 73, and *Levy v. Louisiana*, 391 U. S. 68.

Upon the submission of briefs and oral argument, it  
became clear that neither statute had been the actual  
subject of litigation in the courts of Texas. Hence this  
is not properly an appeal under 28 U. S. C. § 1257 (2).  
I would, therefore, dismiss the appeal for want of juris-  
diction, and treat "the papers whereon the appeal was  
taken" as a petition for writ of certiorari. 28 U. S. C.  
§ 2103.

The parties were not prepared to submit this case as one challenging the common law treatment of illegitimates in Texas, and failed to provide this Court with a sufficient understanding of Texas law with respect to such matters as custodial versus noncustodial support obligations, legitimation, common law marriage, and the effect of a Texas statute, § 4.02 of the Family Code, which became law after this litigation had begun. With the issues so vaguely drawn and the alleged discriminations so imprecise, I would dismiss the writ of certiorari as improvidently granted.