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Stephen K. Weber

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Illegitimacy and Equal Protection: Two Tiers or An Analytical Grab-Bag?

There are no illegitimate children . . . only illegitimate parents.¹

This spirited maxim, uttered almost half a century ago when illegitimate children still had few legal rights, now has the ring of indisputable folk wisdom. Few would disagree, in this enlightened era, that it is unjust to penalize children born out of wedlock for the acts of their parents.² Nor would many oppose the use of that maxim as a fundamental guide for making laws affecting the rights of such children.³ But the law is necessarily more complex than folk wisdom, for the rights of one person imply liabilities in another. Thus, despite a clearly discernible movement improving the legal status of those born illegitimate, substantial pockets of uncertainty still remain in this area of the law.

No small part of this remaining uncertainty can be traced to confusion in the methodology of the equal protection clause. Ironically, the manner in which the equal protection clause has been used by the United States Supreme Court to advance the rights of illegitimates has caused much of that confusion which now threatens to frustrate further clarification of those rights. It is the task of this comment to examine the interaction between those deceptively simple words in the fourteenth amendment ("No State shall . . . deny to any person . . . the equal protection of the laws"⁴) and the law affecting illegitimates. Review of Supreme Court decisions relating to illegitimacy demonstrates how the desire to extend constitutional protection to illegitimates helped to generate the current instability of equal protection analysis; in turn, recent Illinois decisions—in particular, In re Estate of Karas⁵—illustrate the difficulty which state and lower federal courts have in clarifying and extending that protection due to the unstable condition of the analytical technique.

1. This well-known quotation has been attributed to Judge Leon Yankwich, speaking in a 1928 Los Angeles County Superior Court case. Comment, 47 NOTRE DAME LAW. 392, 403 (1971).
2. In a survey taken among Illinois families in 1968, 96 per cent of respondents agreed that the law should not disadvantage the illegitimate child for the misdeeds of its parents; 95 per cent agreed that the child should have the same legal relationship with the mother as a legitimate child; 78 per cent that it should have the same right to support from the father; and 64 per cent that it should have full inheritance rights from the father. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 161-62, 166-74 (1971) [hereinafter cited as KRAUSE].
3. Id.
5. 61 Ill. 2d 40, 329 N.E.2d 234 (1975).
Background: The Rights of Illegitimates and Equal Protection

Analysis Before 1968

The relationship between the rights of illegitimates and the equal protection clause before 1968 is easy to state: there was none. At common law, and in the early years of this country, the lot of the illegitimate child was a harsh one. Socially he was the object of scorn, while legally he was nullius filius, the child of nobody. Without parents in the eyes of the law, it followed that the child had no claim to support by nor any right to inherit from his natural parents. But a society which in principle eliminated aristocracy-by-birth had some difficulty digesting the converse notion that certain infants are, by law, inferior to others. Moreover—and no doubt a more cogent concern than theoretical purity—the unpleasant effects of the industrial revolution in crowded cities stimulated fears that the care of illegitimates might become too great a burden on state governments. Thus, over the past century, states have enacted legislation which, by giving more rights to illegitimates against their parents (especially mothers), have gradually ameliorated the harsher aspects of the common law. A few states, in fact, have largely eliminated any legal distinction between legitimate and illegitimate children. But in most, including Illinois, certain substantial burdens have remained.

Until recent years the United States Supreme Court did little more than affirm the power of state legislatures to modify the com-


7. Id. A number of reasons have been offered to explain the historical basis for the legal disabilities inflicted on illegitimates. These have included church and state cooperation to discourage immorality and strengthen the family unit, and the motivation of fathers to protect feudal lands from claims asserted by unwanted offspring. Professor Krause has observed that it is hardly to be unexpected that men, as legislators, would have limited the possibility of claims against them by their accidental offspring. Id. at 499. See also the discussion of laws discriminating against illegitimates in Krause, supra note 2, at 1-7.


9. Historically, the paternity action has been treated as one primarily for the benefit of the public, with the good of the child as something of an afterthought. See Krause, supra note 2, at 83-84, 106.

10. Id. at 9.

11. Arizona, North Dakota and Oregon have eliminated all formal requirements of acknowledgment or legitimation for purposes of inheritance. Comment, 47 Notre Dame Law. 392 (1971). See, e.g., Ariz. Rev. Stat. Ann., § 14-2109(2)(1974), which provides that a child born out of wedlock may inherit from its natural father if, inter alia, paternity is established after the death of the father by "clear and convincing proof."

12. Even within one jurisdiction, the law [with respect to illegitimacy] rarely is consistent or clear. More often than not, it is an uncertain mixture of ancient English common law tempered with occasional flashes of modern thought . . . . Krause, supra note 2, at 6.
mon law on this subject. However, in 1968, in *Levy v. Louisiana* and *Glona v. American Guarantee and Liability Ins. Co.*, the Court first applied the strictures of the equal protection clause to the status of illegitimacy and found it to be in need of constitutional protection. A series of related decisions followed in the next six years.

Rarely invoked in the first decades of its existence, the equal protection clause was described by Justice Holmes in 1927 as "the usual last resort of constitutional arguments." At a time when the substantive view of due process led the Court into iron-fisted activism against welfare-state legislation, it settled on a deferential approach to equal protection which has generally been known as the "rational basis" or "reasonable basis" standard. This traditional standard of review, which is still viable as a means of insulating the Court from requests to invalidate state regulation of such matters as business and taxation, was articulated by Chief Justice Warren in *McGowan v. Maryland*:

The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

So stated, the traditional rational basis test is highly permissive towards state legislation. It requires such minimal scrutiny of challenged statutes that it has been said to result in "total abdication of judicial review."

However, the Court subsequently developed a second standard of equal protection review for those situations in which the discriminatory classification either threatens a fundamental constitutional right—such as the right to procreate, the right to vote or the right

13. *See, e.g.*, Cope v. Cope, 137 U.S. 682 (1891), which upheld a state intestate succession statute which permitted an illegitimate to inherit from its father.
20. *Id.* at 425-26.
to travel among the states—or involves a suspect classification—race, ancestry or alienage. Under these circumstances the Court will evaluate the legislation not under the reasonable basis test but with “strict scrutiny,” which requires the Court to rigorously analyze the necessity of the classificatory scheme as a means of accomplishing a compelling state interest.

One particularly powerful tool in the strict scrutiny approach—from the standpoint of those challenging a statutory classification—is consideration of less restrictive alternatives, which has no place in the rational basis test. The requirement of necessity in the strict scrutiny standard means that legislation will be invalidated if the Court can conceive of an alternative legislative scheme which would further the intended purpose in a manner less burdensome to the class of persons afflicted by the classification under review.

During the Warren Court years, these methods of equal protection analysis became solidified into the “two-tiered” approach, an apparently simple, easily-comprehended methodology for handling equal protection challenges. Indeed, although there might be difficult questions as to the existence of a fundamental right or a suspect classification, the bare methodology is simple: if a fundamental right or a suspect classification is involved, use strict scrutiny; if not, use the rational basis test. Moreover, in most cases the inquiry could be short-circuited: if a fundamental right or a suspect classification is involved, invalidate; if not, do not invalidate.

Despite this appealing simplicity (some commentators, emphasizing the infinite complexity in the affairs of men, would say because of this simplicity) the two-tiered method has contained

30. Id. at 999.
31. The result-selecting aspect of the two-tiered method has been a source of dissatisfaction. See Note, The Emerging Bifurcated Standard for Classifications Based on Sex, 1975 Duke L.J. 163, 165 (1975): “In marked contrast to the extremely slight risk of judicial disapproval under the traditional standard, application of strict scrutiny results in almost automatic invalidation.”
32. See Justice Marshall’s dissent in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973), criticizing the majority position that “equal protection cases fall into one of two neat categories. . . .”
enormous tension. It can easily handle the extremes. After the excesses of substantive due process, judicial deference to legislative regulation of business matters is a widely-accepted stance. There is also wide agreement that statutes which make racial classifications or threaten fundamental constitutional rights should be permissible only if supported by the most compelling justification.

But a quandary arises when the Court is confronted with matters which fall somewhere between those extremes. Simple deference to the legislative will under the traditional rational basis test can appear to offend common notions of justice where, for example, the right threatened is a personal right which, while not protected by the Bill of Rights, is vital to a decent standard of living; or where the classification, while not suspect under judicial precedent, seems to possess the general attributes of a suspect classification.

It has been suggested that the Supreme Court move to outright balancing of interests, to graduated levels of review or to stronger forms of the rational basis test. The Court has not granted its explicit *imprimatur* to any of these methods. Nevertheless, the two-

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33. See discussion of judicial self-restraint in A. Cox, THE WARREN COURT 3-4, 9 (1968) [hereinafter cited as Cox]. See also A. BICKEL, THE LEAST DANGEROUS BRANCH (1962) [hereinafter cited as BICKEL], who observes that, in the political process,

There are some conceivable groupings of victors and losers which we do not recognize as legitimate. . . But as to farmers, fishermen, truckers, billboard advertisers, and other economic groups, the legislature may simply make discriminatory choices. . .

*Id.* at 226-27.

34. Disagreement among the Justices as to particular applicability of strict scrutiny turns not on the basic concept of strict scrutiny but on what groups should be considered suspect and what rights should be considered fundamental. See generally the majority and dissenting opinions in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).


36. Justice Marshall has proposed a “sliding scale” approach to the importance of rights threatened by a classification in his dissents to Dandridge v. Williams, 397 U.S. 471, 519-21 (1970); Richardson v. Belcher, 404 U.S. 78, 80 (1971); and San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973). Under his suggested approach, the appropriate degree of scrutiny would be applied based upon the constitutional and societal importance of the individual interests and/or the invidiousness of the classification; the proper level of review would be applied to the substantiality of the state’s interest, the reasonableness of the means adopted and the availability of alternatives. See The Less Restrictive Alternative, *supra* note 17, at 1006.

tiered method, with its "all or nothing approach," could not stand untarnished for long. As the Supreme Court's illegitimacy decisions illustrate, it has not.

**Illegitimacy Decisions in the Supreme Court: Sub Rosa Dismantling of the Two-tiered Standard?**

The first decisions applying the equal protection clause to classifications based on legitimacy appeared to signal a significant change in emphasis in the reasonable basis test. In *Levy v. Louisiana* the Court invalidated a Louisiana statute which authorized a wrongful death action by legitimate children for the death of the mother but withheld such right of action from illegitimate children. In the companion case, *Glona v. American Guarantee and Liability Ins. Co.*, that part of the same statute which prohibited an action by the mother for the death of her illegitimate child was also held unconstitutional.

Although the theoretical basis of these decisions was not made entirely clear—certain language came close to characterizing illegitimacy as a suspect classification—the Court appeared to rely on a rephrasing of the reasonable basis test into mandatory language: that the equal protection clause requires at a minimum that the statutory classification bear some rational relationship to a legitimate state purpose. It was asserted that Louisiana had a valid interest in discouraging promiscuity and illegitimacy. The Court did not quarrel with the validity of these purposes, and under the traditional, permissive phrasing of the rational basis test, it might well have refused to question the tenuous connection between ends and means. But in *Glona* the Court did analyze the relationship of means to ends—albeit in rather summary fashion—and held that there could be "no possible rational basis for assuming that the cause of illegitimacy will be served" should a mother be allowed to recover for the wrongful death of her illegitimate child. Underly-

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41. The majority opinion by Justice Douglas described discrimination against illegitimates as "invidious... when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).
42. *Id.* at 75.
43. *Id.* Professor Krause, labelling the family-protection purpose a "tired concern," has resurrected an eighth century description by Saint Boniface of the English, "both Christians and pagans," as "refusing to have legitimate wives and continuing to live in lechery and adultery after the manner of neighing horses and braying asses..." *Krause, Bastard Finds His Father*, 3 Fam. L. Q. 100, 110 (1969) [hereinafter cited as *Bastard Finds His Father*].
ing this conclusion was an unspoken but unassailable premise: that it is absurd to contend that people adjust their sexual conduct according to the availability of a wrongful death remedy in the unlikely event that a child resulting from an illicit union should be killed. Sensible people do not guide their actions on the basis of such compounded, distant improbabilities.

Following these ground-breaking decisions, the Court appeared to take a giant stride in the opposite direction, not only in terms of the substantive rights of illegitimates, but also in the standard of equal protection review. In *Labine v. Vincent*, two new members joined the three *Levy-Glona* dissenters to uphold a provision of Louisiana’s intestate succession statute which did not permit an illegitimate child to inherit from its father even though the father had formally acknowledged the child as his own. The plurality opinion by Justice Black reasserted a policy of virtually total deference to state legislation, emphasizing that “the choices reflected by the intestate succession statute are choices which it is within the power of the State to make.”

In a curious footnote, the opinion asserted that “even if we were to apply the ‘rational basis’ test, that statute clearly has a rational basis in view of Louisiana’s interest in promoting family life and of directing disposition of property left within the state.”

Thus *Labine* suggested two wrinkles, one old and one new. In the footnote dictum it eschewed the strengthened rational basis test of *Levy* and *Glona* by allowing to pass unscathed an asserted connection between discriminating against illegitimates and protection of family life. In addition, the footnote, because it indicated that the Court was not using any form of the rational basis test, could be read as implying the emergence of a new, less-than-rational basis test, one reaching new extremes of permissiveness toward state legislation. The opinion appeared to say that the Court would refuse to review discriminatory legislation under the equal protection clause so long as the area of law—e.g., probate administration—were one which is within the power of the state to regulate. Justice Brennan’s dissent showed clearly the failure of logic in such a position, at least if the equal protection clause were not to be

45. The two new members, Justices Burger and Blackmun, joined Justices Stewart and Black in the plurality opinion, with Justice Harlan concurring. *Id.*
46. *Id.* at 537.
47. *Id.* at 536n.6.
rendered a nullity.\textsuperscript{49}

Subsequent decisions made \textit{Labine} seem more an aberration than a sturdy explication of equal protection theory. In \textit{Weber v. Aetna Casualty \& Surety Co.},\textsuperscript{50} Justice Powell spoke for eight members\textsuperscript{51} and invalidated a Louisiana workmen's compensation provision denying a dependent, unacknowledged illegitimate child the right to recover for the death of the father on an equal basis with the decedent's legitimate children. The opinion hinted at the possibility that the Court would use an explicit balancing process in equal protection cases:

\begin{quote}
The essential inquiry . . . is . . . inevitably a dual one: What legitimate state interests does the classification promote? What fundamental personal rights might the classification endanger?\textsuperscript{52}
\end{quote}

Despite this language, no clear balancing process was performed in the decision. Rather, the Court again seemed to rely on the strengthened rational basis test, with some degree of scrutiny directed toward the relationship of means to ends. While granting the validity of a state interest in promoting legitimate family relationships, it refused to accept the notion that this purpose would be served by the statute: "\textit{[P]ersons will [not] shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation.}"\textsuperscript{53} Thus, although the decision made no mention of any change in equal protection analysis, the Court in fact seemed to be applying again what Professor Gunther termed "rationality scrutiny," a somewhat more stringent mutation of the traditional test.\textsuperscript{54}

Two 1973 decisions, \textit{Gomez v. Perez}\textsuperscript{55} and \textit{New Jersey Welfare Rights Organization v. Cahill},\textsuperscript{56} expanded still further the rights of illegitimates but offered no clarification of the applicable mode of equal protection analysis. In \textit{Gomez} the Court held unconstitutional a Texas law which granted legitimate children an enforceable right to support from their natural fathers while completely denying that right to illegitimate children. In the \textit{New Jersey Welfare Rights} case

\begin{footnotesize}
\begin{enumerate}
\item But no one questions Louisiana's power to pass inheritance laws. Surely the Court cannot be saying that the Fourteenth Amendment's Equal Protection Clause is inapplicable to subjects regulable by the States—that extraordinary proposition would reverse a century of constitutional adjudication. . . .
\item \textit{Id.} at 548-49.
\item 406 U.S. 164 (1972).
\item Only Justice Rehnquist dissented. \textit{Id.} at 177.
\item \textit{Id.} at 173.
\item \textit{Id.}
\item Gunther, \textit{supra} note 37.
\item 409 U.S. 535 (1973).
\item 411 U.S. 619 (1973).
\end{enumerate}
\end{footnotesize}
it invalidated a state scheme of welfare assistance for the working poor which limited benefits to only those families in a household of two ceremonially-married adults and at least one legitimate child. In practical effect, therefore, assistance was denied to most illegitimate children.\textsuperscript{57}

Neither decision specified the equal protection test used. Both appeared to be predicated on the simple principle that it is "illogical and unjust"\textsuperscript{58} to discriminate against illegitimate children, and on the unsupported assertion that Levy, Glona and Weber "compel the conclusion" that the respective classifications were invalid.\textsuperscript{59}

Analysis of the opinion in Gomez raises particular problems about the state of equal protection review. The Texas no-right-to-support statute apparently was defended as a response to the difficulties of proof which attend the establishment of a paternal relationship.\textsuperscript{60} Preventing fraudulent paternity suits is certainly a valid state purpose, and it would be difficult to contend that denying the right to support does not substantially further that goal. Thus, under either the traditional or the strengthened rational basis test, the Texas statute, in theory, should have been upheld. The Court, faced with the fraud-prevention interest, stated in a \textit{per curiam} opinion that "lurking problems with respect to proof of paternity ... are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."\textsuperscript{61} This language suggests that the Gomez court was indeed balancing the relative importance of the state interest against the character of the discrimination caused by the classification—clearly a process beyond the ken of either form of the rational basis test. It would appear, therefore, that this unsigned opinion was using still another but unarticulated method of constitutional review.

Emergence of a potpourri of available analytical tools under the aegis of the equal protection clause was not arrested by the Court's most recent pronouncement on the rights of illegitimates, Jiminez v. Weinberger.\textsuperscript{62} Refurbishing an old due process concept, disapproval of conclusive or irrebuttable presumptions,\textsuperscript{63} the majority

\begin{itemize}
\item \textsuperscript{57} Id. at 621.
\item \textsuperscript{58} Gomez v. Perez, 409 U.S. 535, 538 (1973).
\item \textsuperscript{59} New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 621 (1973).
\item \textsuperscript{60} Gomez v. Perez, 409 U.S. 535, 538 (1973).
\item \textsuperscript{61} Id.
\item \textsuperscript{62} 417 U.S. 628 (1974).
\item \textsuperscript{63} See Note, \textit{Irrebuttable Presumptions: An Illusory Analysis}, 27 \textit{Stan. L. Rev.} 449 (1975). The conclusive presumption analysis has also been applied in a due process context
\end{itemize}

65. Id. at 636.
66. Id. at 637.
67. Id.
68. Id. at 631-32.
69. KRAUSE, supra note 2, at 25-26. See also Comment, 47 NOTRE DAME LAW. 392, 398-99 (1971).
experienced in firming the legal bonds between illegitimate and mother has been attributed to either a presumed special affinity between mother and child\(^7\) or to the fact that questions as to proof of parenthood are seldom raised.\(^7\) The thornier issue involves the rights of the illegitimate child with respect to the natural father.\(^7\)

While Weber and Gomez cut sharply into the old barriers which shielded the father from responsibility for the consequences of his actions, continued uncertainty over the importance of the proof problem leaves many questions unresolved.

If there are gray areas in delineating the substantive rights of illegitimates, the current status of equal protection analysis is even more obscure. In San Antonio Independent School District v. Rodriguez,\(^7\) the Supreme Court reasserted adherence to the two-tiered approach.\(^7\) Yet analysis of the illegitimacy decisions discloses the use, before and since Rodriguez, of at least three identifiable standards of review which are supposedly less intensive than strict scrutiny:

1. The traditional rational basis test is the line of least constitutional resistance to state laws. It accords maximum latitude to state legislation by accepting any explanation for a discriminatory classification which from a cursory look is not "wholly irrational".

2. The "strengthened" rational basis test, in form, is merely a rephrasing of the traditional test from permissive into mandatory language. It requires examination of the rationality in fact of the classification as a means to an end and will not let merely fanciful explanations pass.

3. A strongly heightened but nevertheless uncertain level of scrutiny will be applied where the Court finds that a conclusive presumption is involved. Apparently analysis of over-inclusiveness, under-inclusiveness and the availability of less onerous means may be utilized. To these standards we might add a fourth approach where their application fails to accomplish the proper result: a balancing or weighing of the interests as in Gomez.

It should also be noted that it is not solely the area of illegitimacy which has placed such strain on the two-tiered method. Although the proponents of suspect status for sex classifications have been

\(^{70}\) See Baston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968), which for this reason denied the applicability of Levy to the question of support rights against the father.


\(^{72}\) See Krause, supra note 2, at 72-73.

\(^{73}\) 411 U.S. 1 (1973).

\(^{74}\) Id. at 16-17.
unable to muster a majority,\textsuperscript{75} the Court has applied some unspecified stricter standard of review than that required by either version of the rational basis test and has invalidated classifications which work to the disadvantage of women.\textsuperscript{78} However, sex classifications which can be characterized as ameliorative in favor of women have been readily upheld.\textsuperscript{77}

Thus, a proliferation of less-than-strict standards of review has occurred in recent years. Moreover, even within the ostensibly unitary strict scrutiny approach, it has been observed that there are "angels and archangels," with race qualifying as a "super-suspect" class which may call forth not only strict scrutiny but also difficult and unpopular remedial measures to overcome the effects of past discrimination.\textsuperscript{78} The net effect is a grab-bag of different levels of review.

Although the disintegration of the two-tiered method might be applauded as a necessary response to the need for greater flexibility in equal protection review, several serious drawbacks can be observed. One difficulty which should be noted is that there is still a large gap between the strengthened rational basis test, in which the less restrictive alternative is an irrelevant consideration,\textsuperscript{79} and the conclusive presumption analysis, which apparently may utilize that technique.\textsuperscript{80} The strengthened reasonable basis test is adequate to indicate the folly of some asserted state interests which the traditional test will not challenge, such as the claim that placing extra burdens on the child born out of wedlock will discourage promiscuity and promote family life.

However, when the relationship involved is that of the illegitimate child to the father, it is not difficult to find a valid purpose

\textsuperscript{75} Four members of the Court have considered sex to be a suspect classification, at least in certain circumstances. See Frontiero v. Richardson, 411 U.S. 677 (1973).

\textsuperscript{76} In Reed v. Reed, 404 U.S. 71 (1971), for example, an Idaho statute which gave preference to males in appointment of personal representatives of estates was invalidated, although sex was not made a suspect classification. Although the Court ostensibly applied the rational basis test, it is at least arguable that the classification was rationally connected to the proffered state interests of avoiding intrafamily controversy and improving estate administration. The decision could have been reached only by using some higher level of scrutiny. See Note, The Emerging Bifurcated Standard for Classifications Based on Sex, 1975 Duke L.J. 163, 173.

\textsuperscript{77} Kahn v. Shevin, 416 U.S. 351 (1974), in which a special tax advantage available to widows but not widowers was upheld.

\textsuperscript{78} Wilkinson, supra note 35, at 978-79.

\textsuperscript{79} Professor Gunther would, in his means-focused rationality scrutiny, "permit the state to select any means that substantially furthered the legislative purpose." Gunther, supra note 37, at 21.

\textsuperscript{80} See text accompanying notes 63 through 68 supra.
which the classification does, in fact, substantially further. Even if it exhibits the character of new wine poured into old bottles, the state interest in preventing fraud is certainly a valid one, and it is difficult to claim that many state restrictions burdening illegitimates do not substantially further this purpose. Such impositions may go beyond the degree necessary to accomplish the goal of preventing fraud, but a rational basis test, in either form, does not require that the burden be no more onerous than necessary.

Thus the strengthened test, because it does not permit consideration of less restrictive alternatives, is not so strengthened after all. It represents merely a small step in narrowing the wide differential between traditional and strict levels of review, and therefore does little to relieve the tension which that gap creates. Application of the strengthened rational basis test in Labine would not have altered the result, for denial of inheritance from the father could be viewed as substantially furthering the goal of minimizing fraudulent assertions of paternity in probate. It is even doubtful that Weber, if it was in fact decided under this theory, can be logically supported. Refusal to permit the unacknowledged, illegitimate children of a disabled father to receive workmen's compensation benefits could also be seen as rationally connected to the goal of preventing fraudulent claims. Related recognition of the theoretical untenability of Weber probably explains why the Gomez court, again faced with a law bearing on the father-child relationship, used a concealed balancing approach, for the same result could not have been reached under the strengthened reasonable basis test.

Perhaps the most serious drawback in the demise of the two-tiered system is the fact that the Court is not doing what it purports to be doing. Nominally it still adheres to the two-tiered approach, but in fact it does not always use it. The existence of gradations of review suggests that the Court is actually engaging in some kind of balancing process, but beyond its brief flirtation with such an ap

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81. One expert insists that the basis for discriminatory laws "is found in history, not reason." Bastard Finds His Father, supra note 43, at 105.
82. See note 79 supra.
83. See text accompanying notes 52 through 54 supra.
84. See text accompanying note 74 supra. One commentator, however, has professed to see at least some variation from the traditional two-tiered approach within the Rodriguez opinion, for the Court majority did at least give consideration to what alternative taxing schemes might have been available to the Texas legislature. The implication drawn is that even under the lesser standard in the two-tiered approach the Court will at least review alternatives. Such review of alternatives may even be decisive, but to be so the alternatives must be widely accepted or clearly practical and effective as well as less restrictive. Note, The Less Restrictive Alternative, supra note 17, at 1010-11.
proach in Weber it has been unwilling to articulate an explicit bal-
ancing test. Moreover, it is extremely difficult to discern the princi-
pies, if any, which invoke the different standards of review.85 While
certain situations clearly call forth strict scrutiny, the circumstan-
ces in which a court should apply the strengthened rational basis
test or the conclusive presumption approach are uncertain.

EQUAL PROTECTION ANALYSIS IN RECENT ILLINOIS DECISIONS ON THE
RIGHTS OF ILLEGITIMATES

The wide divergence between what is stated to be proper equal
protection analysis and the behavior which can actually be observed
is not conducive to uniform, well-reasoned review by courts which
must attempt to follow the Supreme Court’s pronouncements on
constitutional law. This unsettled condition is reflected in two re-
cent Illinois decisions on the rights of illegitimate children with
respect to their fathers. The opinions in these cases illuminate the
fact that true flexibility cannot be achieved until the courts are
provided with some guidance in how to employ the new range of
available tools.

The Illinois Supreme Court, in In re Estate of Karas,86 was pre-
sented with a situation virtually identical to that in Labine v.
Vincent.87 Two appeals were consolidated, both presenting the com-
mon issue of the constitutionality of a provision in the Illinois Pro-
bate Act which permits an illegitimate child to inherit from an
intestate father only if the child had been acknowledged by the
father and the parents had married each other. In both cases the
petitioning child had been acknowledged, and one had received sup-
sport from her father. However, in neither instance had the natural
parents intermarried subsequent to the birth of the child; both ac-
tions for declaration of heirship were dismissed.88

The petitioners’ major contention was that this restriction on the
right of illegitimates to inherit from the father violated the equal
protection and due process clauses of both federal and state consti-
tutions. The court, relying heavily on the factual similarity to
Labine, refused to so hold and affirmed dismissals of both actions.
It held that, as in Labine, the intestate succession scheme created

85. Id. at 1021n.318 (discussing the failure to evolve standards and discipline for application
of the conclusive presumption analysis). See also Note, Irrebuttable Presumptions: An
Illusory Analysis, 27 Stan. L. Rev. 449, 456 (1975), which observes that “virtually any sum-
marily classifying rule is vulnerable to an irrebuttable presumption challenge.”
86. 61 Ill. 2d 40, 329 N.E.2d 234 (1975).
87. 401 U.S. 532 (1971).
by the state legislature was "rationally based" on the state's interest in encouraging family relationships and in maintaining a sound method of distributing property of intestates. Emphasis was also placed on the state's interest in preventing spurious claims against estates: "While establishing paternity in a proceeding to determine heirship is possible, situations may arise which are fraught with fraudulent circumstances."

The petitioners attempted several routes to circumvent the effect of Labine. They first argued that the impact of that decision had been eroded by subsequent Supreme Court decisions. The Illinois court, however, after reviewing those cases, summarily dismissed this argument without any explanation why it felt it to be unfounded. Petitioners also contended that illegitimacy should be declared a suspect classification, and that laws impinging on the rights of illegitimates should be strictly scrutinized. The court supported its refusal to do so by observing, first, that only four members of the Supreme Court have considered sex to be a suspect classification, and, second, that no decision of that court had expressly held illegitimacy to be a suspect classification. Quoting language of the Supreme Court asserting that a state "may not impose such greater restrictions as a matter of federal constitutional law when this Court . . . specifically refrains from imposing them," the Illinois court refused to apply strict scrutiny because it would "result in this court placing strictures on Labine v. Vincent." A further argument for applying strict scrutiny, that the challenged provision in the Probate Act had evolved into "a thinly disguised cover for racial discrimination" in view of the high statistical correlation between race and illegitimacy, was rejected on the ground that the section affects all illegitimates, regardless of race, in the same way, and that "incidental effects" do not make it racially discriminatory.

An ancillary argument raised by petitioners was that the Probate Act provision violated the Illinois Constitution by denying equal protection on the basis of sex. The 1974 case of People v. Ellis had

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89. Id. at 48, 329 N.E.2d at 238.
90. Id. at 52, 329 N.E.2d at 240.
91. Id. at 48-49, 329 N.E.2d at 238-39.
92. Id. at 51, 329 N.E.2d at 239.
93. Id. at 51, 329 N.E.2d at 240.
94. Id. at 53, 329 N.E.2d at 241.
95. Id.
96. Id. at 50, 329 N.E.2d at 239. See text accompanying notes 127 and 128 infra with respect to an alternative relevance, for purposes of suspect classification categorization, which the court could have found in these statistics.
97. 57 Ill. 2d 127, 311 N.E.2d 98 (1974).
held that sex is a suspect classification in Illinois in view of the language of article I, section 18 of the Illinois Constitution, which states that “equal protection of the laws shall not be denied or abridged on account of sex.” Petitioners contended that the illegitimate child is injured by discriminatory effects inflicted by the Probate Act on each parent because of his or her sex. The court dismissed this argument by holding that the petitioners had no right to assert in their own behalf a violation of someone else’s constitutional rights. It noted that the official explanation to article I, Section 18 states that “no government . . . may deny equal protection of the law to anyone because of his or her sex.”

The reasoning in a recent Illinois appellate court decision, Cessna v. Montgomery, which has been appealed to the Illinois Supreme Court, provides instructive contrast to Karas, not only in the approach to the problem of illegitimacy but also in the manner of applying the equal protection clause. The plaintiff, mother of an illegitimate daughter, brought an action to establish paternity—and therefore liability for support—against the alleged father. The suit was brought approximately two years and eight months after the birth of the daughter. The trial court dismissed the action on the grounds that it was barred by a provision in the Illinois Paternity Act which disallowed actions to compel support brought more than two years after either the birth of the child, the date of acknowledgment of paternity (under oath or in court), or the date of the father’s last contribution in support of the child. In this case there had been neither acknowledgment nor support payments, so the applicable benchmark for running of the two-year limitation was the date of birth.

The Appellate Court for the Fifth District held that the two-year limitation denied equal protection to both the illegitimate child and the mother, under either the rational basis test or what the court

100. 28 Ill. App. 3d 887, 329 N.E.2d 861 (1975).
101. The Cessna case was consolidated for appeal to the Supreme Court of Illinois with Malone v. Dunlap (unpublished opinion), in which the Circuit Court of Cook County dismissed a support action because it, like Cessna, was brought more than two years after the birth of the child. However, Malone v. Dunlap involved the potentially significant additional facts that the defendant had provided support for the child for over three years and had signed a witnessed but non-notarized acknowledgment of paternity the day before the child’s birth. The Illinois Supreme Court reversed on the issue of the constitutionality of the two-year limitation in the Paternity Act. 63 Ill.2d 71, 344 N.E.2d 447 (1976).
102. Id. at 889, 329 N.E.2d at 862.
called "the overinclusive/underinclusive test." In the court's view, the denial of equal protection rested in the fact that there is no time limit in Illinois law on the right of the mother to compel the natural father to support his legitimate minor children. Particularly noted was the case of Gill v. Gill, in which a mother was permitted to bring an action for support against her former husband 15 years after entry of a divorce decree which contained no order with respect to child support.

The validity of the objectives of the statutory provision—barring stale claims, bringing an end to litigation and providing incentive for the mother to initiate a paternity action early—was readily admitted. There would be no question of constitutionality, said the court, "were these objectives pursued in a statutory scheme which limited support actions against all natural fathers of legitimate as well as illegitimate children." The court dismissed the concern that passing time increases the unreliability of proof of paternity by citing the Gomez language that such difficulties could not justify erecting "an impenetrable barrier that works to shield otherwise invidious discrimination." Defendant made the argument that the two-year limitation reflected a desire to prevent a woman from waiting several years to select whichever of her several "lovers" could provide the best support. The court responded by noting that the provision does not include in the two-year period time which the father spent out of the state; thus it would be possible, even with the statute as worded, for a woman who had had several lovers who had moved in and out of the state to engage in the same wait-and-select operation.

Concluding that the equal protection clause "is not shackled to the social theories or sexual mores of a particular era," the court held that there was no rational relationship between illegitimacy as a classification and the purposes to be served by such a time limitation on support actions.

ANALYZING THE Karas AND Cessna Opinions: SUBSTANTIVE COMPATIBILITY, ANALYTICAL DISCORD

These opinions can be analyzed from at least two angles of in-
Illegitimacy and Equal Protection

query: the substantive aspect—the rights of illegitimates—and the aspect of equal protection theory. If focus is placed on the substantive view the decisions can be viewed as compatible. Cessna, in attempting to expand the illegitimate’s right to support, is in line with the rationale of Gomez v. Perez, although it reaches substantially further since Gomez dealt with a complete denial of the right to support. There is support in other states for both sides on the issue of time limitations in paternity actions. In Weaks v. Gallan a New York court invalidated a similar two-year limitation on a paternity suit, while the Colorado Supreme Court, in In re People ex rel. L.B., found a five-year limitation to be rationally related to the state’s valid interest in deterring fraudulent claims.

Karas, on the other hand, is strongly supported by Labine and decisions in other states which have also upheld strict formal requirements governing the right of an illegitimate to inherit from the father. Indeed it could be argued that the United States Supreme Court decisions exhibit a scheme which emphasizes concern for protecting basic and immediate sustenance of the illegitimate—support payments, welfare or Social Security benefits, tort damages—while showing less solicitude for such contingent interests as a right of inheritance. The Illinois decisions fit comfortably into this allocation of interests.

However, reconciliation becomes problematical when focus is directed to the equal protection methodology used. Although it was never directly articulated, Karas clearly applied the traditional two-tiered approach, rejecting claims of suspect status for illegitimates and upholding the rational relationship of the classification to each state purpose found in the statute. Use of the permissive rational basis test was the only way that a rational connection could be found between a discrimination adversely affecting illegitimates and the purpose of promoting family life. On the other hand, the other state interests asserted—efficient probate administration and

111. 498 P.2d 1157 (Colo. 1972).
112. See text accompanying notes 44 through 46 supra.
113. The Minnesota Supreme Court, for example, in In re Estate of Pakarinen, 287 Minn. 330, 178 N.W.2d 714 (1970), upheld a statutory requirement that an illegitimate, in order to inherit from an intestate father, must produce an attested written declaration of paternity made by the decedent. The Minnesota court noted that the provision did not exclude illegitimates as such, but only those who could not produce such a declaration. The requirement was deemed intelligibly related to the purpose of the descent statutes—to give effect to the presumed intent of an intestate—and to the need for reliable proof of paternity in order to prevent fraudulent claims.
prevention of fraudulent claims—are clearly furthered by barring the illegitimate from inheritance. Thus "rationality scrutiny" would not have helped the petitioner, further illustrating that the strengthened rational basis test has only a minor effect in closing the gap in the two-tiered method.\textsuperscript{14}

\textit{Cessna} also employed the two-tiered approach, but with an apparent variation. The less stringent standard of review, on which the court relied, appeared to be the strengthened rather than the traditional form of the rational basis test. In asserting that there was no rational connection between the classification and the purpose served by the statute, the court inspected in detail the relationship of the means to those purposes. However, the strengthened rational basis test, if properly applied, does not support the result reached in \textit{Cessna}. In fact, the two-year limitation \textit{does} further the objectives of encouraging mothers to bring paternity actions early and minimizing the possibility of fraud. A more stringent level of review—one which would demand stronger justification than a mere rational relationship to a valid state interest—was theoretically necessary to invalidate this two-year statute of limitations.

The failures of current equal protection analysis are evident in these opinions. Both accepted the two-tiered method as the governing mode of evaluation, and then each applied what it considered to be the rational basis test. But one used the traditional, permissive form while the other attempted to use the strengthened form, with neither court apparently feeling the necessity or having the resources to explain why that particular standard was being accepted. Here, then, is one aspect of the instability created by the Supreme Court: it has permitted two versions under the same name to exist, leaving a lower court free to adopt either approach, while claiming to be using "the" rational basis standard, in order to give effect to its own proclivities toward the challenged legislation. The seriousness of this particular problem is minimized, however, by the fact noted above that the strengthened test, if properly applied, as it was not in \textit{Cessna}, is really not so strengthened after all, and will not often create different results from those produced by the traditional test.\textsuperscript{15}

Another weakness in current equal protection analysis can be seen in the failure of both Illinois courts, because they accepted at face value the Supreme Court's expressed adherence to the two-tiered method, to utilize analytical tools which that court has actually

\textsuperscript{14} See text accompanying notes 80 through 82 \textit{supra}.

\textsuperscript{15} See text accompanying notes 80 through 82 and 114 \textit{supra}.
employed in illegitimacy cases. The two-year limitation on paternity actions does not appear to be susceptible to the conclusive presumption analysis used in Jiminez, because a time limit on a right of action does not involve any presumption of one fact from another. Thus, in the absence of suspect status characterization, the Cessna court could have reached the same result only by balancing the interests in the manner of Gomez.

However, in Karas, the court had at least two alternative approaches available which it did not consider. It could have engaged in balancing of interests; in addition, the absolute bar to inheritance by illegitimates in the absence of intermarriage by the parents—a formal requirement for proof of paternity—could have been subjected to the conclusive presumption approach, under the theory that the statute conclusively presumed that an illegitimate without such proof was not the child of the decedent. The purpose of preventing fraudulent inheritance claims could surely be served by means more finely tailored to the need for adequate proof and less onerous to the child, who of course has little to say in whether his natural parents marry or not. The rule is underinclusive because it denies inheritance to children born illegitimate whose parents do not marry but whose proof of the paternal relationship may be equally convincing to that of illegitimate children whose parents do marry.

WHY NOT SUSPECT STATUS FOR CLASSIFICATIONS BASED ON ILLEGITIMACY?

The variegated theoretical dilemmas resulting from proliferation of less-than-strict standards of review raises an obvious question: why the Supreme Court has not avoided much of this analytical agony by simply declaring illegitimacy a suspect classification? The Supreme Court has skirted this question several times, and the Karas opinion was able to avoid the merits of the issue by concluding that it lacked the authority to declare illegitimacy suspect because the Supreme Court had refrained from such a declaration. The Karas court did not discuss the fact that it could have done so not as a matter of federal constitutional law but, just as it had done for sex, under its power to interpret the equal protection provision

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116. See text accompanying notes 62 through 64 supra.
117. In Jiminez v. Weinberger, 417 U.S. 628 (1974), the Court specifically stated that it did not need to reach the question of suspect status. This evasion was facilitated by the use of the conclusive presumption approach, which appears to be the equivalent of strict scrutiny.
of the Illinois Constitution.\textsuperscript{119}

It is not easy to comprehend why there has been such reluctance to require that classifications imposing special burdens on illegitimates be subjected to strict scrutiny. Although the Court has not authoritatively specified any formal criteria of suspect status, several principles have been gleaned from the \textit{ad hoc} suspect classification decisions.\textsuperscript{120} Illegitimacy appears to fit those principles neatly. Like race and national origin, it is a condition "determined solely by accident of birth" and is "beyond the control of the child."\textsuperscript{121} Clearly it is a status which "subjects the child to a stigma of inferiority."\textsuperscript{122}

Indeed, illegitimates form the very type of politically weak minority subject to the vagaries of an unsympathetic majoritarian process which the suspect classification was designed to protect.\textsuperscript{123} The judiciary has largely accepted a sporting theory of political activity, under which "farmers, fishermen, truckers, billboard advertisers and other economic groups"\textsuperscript{124} must be content, in their struggles for political advantage, to win some contests and lose others. But it has also recognized that other groups, historically oppressed and politically ineffectual, cannot be fairly consigned to such gladiatorial combat in the political arena. The suspect classification was created as a species of judicial protection for such persons. It is difficult to justify treatment by courts of illegitimates in a fashion more like the former than the latter.

When consideration is given to this fundamental policy underlying the suspect concept, a stronger argument can even be made for making illegitimacy suspect than for according sex classifications that characterization. Women have demonstrated the ability to bat-

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\item \textsuperscript{119} \textit{Id.} at 54, 329 N.E.2d at 241. See text accompanying notes 97 and 98 supra.
\item \textsuperscript{120} See discussion in Wilkinson, \textit{supra} note 35, at 980. In addition to the classic but vague characterization of a suspect classification as a "discrete and insular minority," United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938), the plurality opinion in \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973), suggested three other criteria: that members of the class "suffer from immutable characteristics determined solely by accident of birth"; that they "have suffered historical vilification"; and that the class, largely because of past discrimination, lacks effective political power and redress.

In Jiminez v. Weinberger, 417 U.S. 628, 631 (1974), the criteria discussed included the requirement that the class be differentiated by a condition "determined solely by birth" which is "beyond the control of the children" and which "subjects the children to a stigma of inferiority."

\item \textsuperscript{121} Jiminez v. Weinberger, 417 U.S. 628, 631 (1974).
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} See Wilkinson, \textit{supra} note 35, at 978; Bickel, \textit{supra} note 33, at 226; Shaman, \textit{supra} note 35, at 153; and Cox, \textit{supra} note 33, at 9.
\item \textsuperscript{124} Bickel, \textit{supra} note 33, at 227.
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Illegitimacy and Equal Protection

tle for equal rights with relative fearlessness in the political sphere. Illegitimates, for obvious reasons, would be reluctant to do so. Ironically, there can be little doubt that the political efficacy of women’s rights groups was largely instrumental in forcing sex discrimination to be specifically prohibited in the Illinois Constitution. This specific prohibition in turn was the basis for the Illinois Supreme Court’s declaration that sex is a suspect classification.\(^{125}\) To deny suspect status for illegitimates because they lack the political power to secure specific protection in the Illinois Constitution is to turn the entire concept of the suspect category on its head. The court’s decision in *Karas* to opt for the status quo is thus highly vulnerable.

Illegitimacy would also seem to have a better claim to suspect status than alienage. Illegitimates are completely powerless to alter their condition. Aliens, on the other hand, are often present in this country of their own volition; they also have the opportunity to change their status by becoming citizens.\(^{126}\)

Recognition of the policy foundation of the suspect classification also compels another look at the high statistical correlation of race and poverty with illegitimacy.\(^{127}\) The *Karas* court misused the statistical evidence by seeing its relevance only in support of a theory that suspect status should be accorded because discrimination against illegitimates is in reality discrimination in disguise against blacks.\(^{128}\) It is not necessary to make that leap in order to give weight to the statistical correlation. Whether or not discrimination against illegitimates is disguised discrimination against blacks (the history of illegitimacy laws in the Anglo-American system would suggest otherwise), the statistical evidence is highly corroborative of the assertion that illegitimates are handicapped in the political marketplace and for that reason should be protected by the suspect classification.

In view of the strong argument in favor of characterizing illegitimacy of birth as a suspect classification, the failure of the courts to do so can probably be traced to fear of certain consequences. Because strict scrutiny has meant virtually automatic in-

\(^{125}\) See text accompanying notes 97 and 98 supra.

\(^{126}\) Wilkinson, supra note 35, at 980.

\(^{127}\) *Bastard Finds His Father*, supra note 43, at 109 n.22. Estimates made in 1965 indicated that approximately 26 per cent of all non-white births were out-of-wedlock, compared with four per cent of white births. In addition, 70 per cent of illegitimate white children are adopted, compared to only three-to-five per cent of non-white illegitimate children. Thus, even considering the fact that non-whites constitute a minority of the population, discriminatory laws do in fact fall disproportionately on non-white children. Significantly more non-white than white children are victimized by these laws.

\(^{128}\) See text accompanying note 96 supra.
validation, the jurisprudence of compelling state interests is not
well developed. The courts perhaps feel trepidation in defining when
necessity ends and excessive burden begins in a statute of limita-
tions on paternity actions; or in proclaiming just what degree of
proof, and no more, a state may require before allowing an illegiti-
mate to inherit from a putative father.

However, where application of the apparent principles of the sus-
pect concept produces such a clear answer, the courts should be
willing to push aside fear of the consequences. Over 30 years ago the
Supreme Court declared that “distinctions between citizens solely
because of their ancestry are by their very nature odious to a free
people whose institutions are founded upon the doctrine of equal-
ity.” In Weber the Court used similarly strong language in com-
menting on distinctions based on legitimacy of birth:

. . . [I]mposing disabilities on the illegitimate child is contrary
to the basic concept of our system that legal burdens should bear
some relationship to individual responsibility or wrongdoing. Ob-
viously, no child is responsible for his birth and penalizing the
illegitimate child is an ineffectual—as well as unjust—way of de-
terring the parent.

From such language it would seem but a natural step to say that
any burdens placed on the illegitimate should be no more onerous
than necessary to effectuate a compelling state interest.

Until the courts are willing to test such burdens against the de-
mands of strict scrutiny, decisions such as Labine and Karas will
continue to leave a residue of apparent injustice. It does not fit
accepted notions of fairness to deny the right of inheritance to illegi-
timates—regardless of the strength of the proof of patern-
ity—because the child cannot produce some formal proof require-
ment, such as subsequent intermarriage or acknowledgment under
oath, over which he has no control. Although the Court has been
accused of espousing an “ideology of unrestrained egalitarian-
ism,” in fact it has merely accepted into the framework of consti-
tutional law the limited, widely accepted notion of equality of op-
portunity. One type of opportunity embedded in our legal system

129. See text accompanying note 31 supra.
133. Harper v. Virginia Board of Elections, 383 U.S. 663, 686 (1966) (Harlan, J., dissent-
ing).
134. Wilkinson, supra note 35, at 984.
is the opportunity to inherit. It may well be true that the right of inheritance and equality of opportunity are inconsistent concepts, for the former, by giving some an initial advantage in the race for material rewards, undermines the latter. But it is hardly fair play to bring negative feelings about the windfall of inheritance into operation only against illegitimates. So long as inheritance is recognized in this society, the opportunity for illegitimate children to inherit equally with legitimate children should be maximized.

It is possible to do this and still take cognizance of society's need to prevent fraudulent claims without demanding formal requirements of proof. However, unwillingness to characterize illegitimacy as a suspect classification has left the courts without a recognized principle which would guarantee that illegitimates are burdened no more than necessary. Without such a principle, excessively discriminatory statutes will not disappear.

THE ROOT OF THE CONFUSION IN EQUAL PROTECTION ANALYSIS: DEFINING THE COURT'S PROPER ROLE IN THE CONSTITUTIONAL SYSTEM

There is limited utility in simply diagnosing the state of confusion in equal protection analysis, decrying its existence and exhorting the courts, especially the Supreme Court, to mend their ways. Confusion is the inevitable by-product when a particular pattern of thinking—here, the two-tiered method—is dislodged. Indeed, if necessity is the mother of invention, we should welcome the confusion as a necessary condition for formulating a new and more acceptable method of applying the equal protection clause. The best hope for generating a workable and theoretically sound approach lies in isolating the sources of confusion.

This uncertainty is not merely the product of judicial obtuseness or stubbornness. A common thread runs through the Supreme Court’s desire to avoid creating new suspect categories and its unwillingness to adopt a balancing approach to equal protection. Both

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135. The Uniform Probate Code would permit illegitimate children to inherit from intestate fathers so long as the claim were supported by "clear and convincing proof." UPC § 2-109. This proof requirement, because it is consistent with proof requirements generally in the probate area, would probably be acceptable under the strict scrutiny standard. See Note, 69 Mich. L. Rev. 112 (1970).

Professor Krause argues that it is "absurd to argue that because there is no proof in some cases, no obligation [on the father or on his estate] should be imposed in cases where there is proof." Bastard Finds His Father, supra note 43, at 103. He also argues that the factual impossibility of perfect equality for illegitimates is no excuse for failing to provide the degree of equality which the law can effectively furnish. He asserts that the experience in Arizona and Oregon demonstrates that the goal of legal equality can be largely achieved. Equal Protection for the Illegitimate, supra note 6, at 505.
courses would tend to push the Court toward a degree of judicial activism which it is unsure it should properly assume. Even though it is recognized that Supreme Court behavior inevitably involves both judicial and political modes of decision-making, there is wide agreement among constitutional scholars that the Court should avoid encroaching on those matters which are properly within the sphere of the majoritarian process. Thus, it is asserted that some interests—particularly those involving business and economic power—are adequately represented in the political process and have no need for judicial protection. Moreover, some matters, especially those involving difficult compromises of numerous conflicting interests, can actually be solved more rationally in the legislatures, which operate on the principle of compromise and, unlike the courts, have the research capability to reach acceptable resolutions.

It is this concern for its proper role which highlights the Court’s reluctance to create new suspect classifications or to embrace an explicit balancing test. A great number of groupings which have been subject to discrimination by the majority might have a claim to suspect status. The Court might have difficulty deciding where to re-draw this line once the present one is breached.

Balancing tests tend to be disfavored because of the difficulty in specifically defining the interests which should be weighed on the opposite sides of the scale. One side can become weighted to such an extent that the Court almost invariably will be forced to trespass on areas properly reserved to the legislature. Where legislation touches fundamental rights or involves suspect classifications, the inevitability of judicial review is accepted as a limitation on the majoritarian process. However, the scale can also be weighted as it was in the era of substantive due process, which was a balance-of-interests test in which one side became weighted with \textit{laissez-faire} economic theory. Under substantive due process, any legislation which limited freedom of contract was likely to be invalidated by the Court, in direct conflict with the political choices made in the

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137. \textit{See Cox, supra note 33, at 13-16; Bickel, supra note 33, at 113; Kurland, supra note 136, at xxii; B. Schwartz, American Constitutional Law} 207-20 (1955) [hereinafter cited as \textit{Schwartz}].

138. Cox, supra note 33, at 9; Bickel, supra note 33, at 226.

139. The concept of suspect category might also be applied to homosexuals, the aged, ex-felons, the mentally ill. Wilkinson, supra note 35, at 982. No doubt the Court would prefer to delay facing these questions.

140. Schwartz, supra note 137, at 208-10.
majoritarian process.\textsuperscript{141}

The institutional crisis which the excesses of substantive due process brought forth during the New Deal is still fresh in the minds of many who wish to see the Court’s opinions continue to command the respect of the public.\textsuperscript{142} The Court’s reluctance to adopt an explicit balancing process and its inability to articulate another method to replace the two-tiered approach can only be understood against this backdrop. The Court appears to be seeking a synthesis between Lochnerian activism and post-Lochnerian restraint which will carve out a sphere of proper judicial activity.\textsuperscript{143} We may plead for a restatement of equal protection analysis, but it probably will not occur until the limits of that sphere can be adequately defined.

Despite the importance of recognizing the underlying reasons for the Court’s paralysis, it is less than satisfying simply to leave on a note of apology for the confusion which exists. Allowing for justification does not change the fact that a condition exists which is likely to lead to disparate results in similar cases. A unitary, flexible balancing process cannot be expected in equal protection cases, for the Court clearly wishes to retain the deferential balance it has struck in the traditional rational basis test when dealing with matters of business and economy. It also has a workable method in strict scrutiny when faced with fundamental rights and suspect classifications. Perhaps, though, by maintaining these extremes, it could engage in balancing \textit{per se} in the intermediate regions without inviting the role conflict which threatened the integrity of the Court four decades ago. Certain kinds of classifications, such as illegitimacy and sex, could simply be recognized as exceptions which should be evaluated outside the two-tiered method.

\textbf{Conclusion}

Analysis of Supreme Court decisions which have dramatically improved the legal status of illegitimates reveals significant erosion in the two-tiered method of equal protection analysis. Although the Court has asserted that the two-tiered approach is still the operative procedure, at least three different “sub-strict” levels of review can be identified. It has even engaged in balancing the seriousness of the burden imposed by the classification against the importance of the

\textsuperscript{141} Id.
\textsuperscript{142} Cox, \textit{supra} note 33, at 13.
\textsuperscript{143} Lochner v. New York, 198 U.S. 45 (1905), in which a state law setting maximum working hours was invalidated because it impinged on freedom of contract, is usually considered to be the archetypal substantive due process case.
state interest it is intended to serve; it has only done this, however, in an abrupt per curiam opinion which withheld explicit endorsement of such a process.

Two recent Illinois cases, *In re Estate of Karas*¹⁴⁴ and *Cessna v. Montgomery*,¹⁴⁵ reveal the difficulties which face those courts which must try to follow the Supreme Court in the area of equal protection. The United States Supreme Court’s stated adherence to the two-tiered method will discourage use by some of new analytical tools which that Court has actually employed. On the other hand, no secure principles have emerged to guide the lower courts in applying these additional techniques. The result is likely to be a degree of semi-anarchy—unlike decisions in like cases—until the uncertainty is dispelled.

It should be recognized, however, that the confusion which exists is due to genuine and serious policy conflicts which permit no easy resolution. The Court has been unwilling to expand the suspect classification category, even though, had it done so, considerably less distortion of the two-tiered method would have occurred. It has also been unwilling to adopt explicitly a balancing process. The apparent reason for reluctance to take either of these steps is the fear that powerful pressures in the direction of greater judicial activism might be unleashed: “Once loosed,” observed one commentator, “the idea of equality is not easily cabined.”¹¹⁴⁶ Lacking a clear perception of where the outer limits of judicial activism would be drawn under a new methodology, the Court might be pushed into areas of decision-making which the rise and fall of substantive due process have taught should be left to the legislature.

Yet the Court has also been unwilling to let a broad equal protection methodology—the two-tiered system—subjugate another equal protection principle which is indeed more specific to the question of illegitimacy: that the law should minimize burdens placed on persons due to a condition of their birth. Although on superficial inspection the illegitimacy decisions appear to apply free-floating notions of justice—perhaps an “ideology of egalitarianism”—in fact the Court has been confronted with conflicting principles of constitutional law and has chosen the more particular over the more general.

In choosing this course the Court’s desire to do justice has outrun its ability to maintain analytical consistency. Thus, it has created

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¹⁴⁴. 61 Ill. 2d 40, 329 N.E.2d 234 (1975).
an uncertain, unstable condition in the methodology of equal protection review. In the interregnum of uncertainty between the old and the new, it is important for the lower courts to realize that the two-tiered method is no longer the iron-clad system it was, and that in certain situations new tools are available. Their discreet application is more likely to achieve the ultimate aims of the law than rigid adherence to a dying system.

A permanent stabilization of equal protection methodology, however, must come from the Supreme Court. Some of the stresses on the traditional mode of analysis could be removed by the simple expedient of finally declaring illegitimacy to be a suspect classification. But if this is not done, some new approach—perhaps balancing only between the fixed extremes of the two-tiered method—must eventually be adopted.

Stephen K. Weber