DePaul Law Review

Volume 25
Issue 2 *Winter 1976*

Article 7

Equal Protection of the Laws in Illinois

Richard C. Turkington

EQUAL PROTECTION OF THE LAWS IN ILLINOIS

*Richard C. Turkington**

Equal protection of the laws has become a topic of growing importance in Illinois since the ratification of the 1970 Constitution. While federal equal protection standards have always played a dominant role in state decisions, the federal constitution provides that a state can extend protection against discrimination beyond the federal provisions. Professor Turkington pointedly notes that expansion of rights beyond the federal equal protection standard was only effectively accomplished through the special legislation prohibition of the 1870 Constitution. By sharp contrast the new state constitution recognizes the inadequacies of the federal equal protection clause by specific supplementary provisions referring to discrimination based upon sex or directed at the physically or mentally handicapped. Included is a discussion of recent Illinois court interpretations of the state constitution which illustrate that Illinois has relinquished a subordinate position and has come to the forefront in the protection of citizens against certain forms of governmental injustice.

Equal protection of the laws is a subject which has become extremely complicated in Illinois since the ratification of the 1970 Constitution. The 1870 Constitution contained no equal protection clause,[1] although some governmental discriminations were proscribed by a prohibition against "special legislation."[2] In stark contrast, the 1970 Constitution guarantees equal protection of the law[3] and specifically protects persons against discrimination in employment and the sale or rental of property, on the basis of

* Professor, DePaul University College of Law, B.A., J.D. Wayne State University, L.L.M. New York University. To write on the subject of equal protection of the laws without consulting Jeffrey Shaman would be extremely remiss. I am grateful for the numerous insights my colleague has given me in the preparation of this Article. The author also wishes to acknowledge the valuable research contributions made by Jeff Atkinson, a law student at DePaul.

1. Some Illinois courts found an equal protection clause implied in the due process provision of the text. *See, e.g.*, Fiorito v. Jones, 39 Ill.2d 531, 236 N.E.2d 698 (1968); Marallis v. City of Chicago, 349 Ill. 422, 182 N.E. 394 (1932); People v. Lloyd, 304 Ill. 23, 136 N.E. 505 (1922).

2. ILL. CONST. art. IV, § 22 (1870).

3. ILL. CONST. art. I, § 2, *see* note 34 *infra*.

race, color, creed, national ancestry, sex, or the condition of being physically or mentally handicapped.[4] An additional specific prohibition against sex discrimination by local and state governmental units is found in article I, section 18.[5] The prohibition against special legislation was carried over as well.[6]

The supremacy and equal protection clauses of the Federal Constitution, of course, operate as limitations on both the laws and constitution of a state.[7] Federal equal protection standards therefore become the starting point for analysis of equal protection in Illinois. While a state constitution *may expand protection* against discrimination beyond that provided citizens by the Federal Constitution, *it may not restrict* rights granted citizens by the United States Constitution. Moreover, as Illinois and other state high courts have recently learned, a state court, as a matter of federal constitutional law, may not impose greater restrictions on police power than those imposed by the United States Supreme Court.[8] The interrelationship between state and federal constitutional standards thus becomes quite important. This is particularly true in the equal protection area, since the Supreme Court has interpreted the federal equal protection clause so as to provide virtually no protection against governmental discriminations which solely effect property or contract interests[9] or which discriminate against the poor in the distribution of forms of public largess.[10]

---

4. ILL. CONST. art. I, §§ 17, 19, *see* notes 36-37 *infra*.

5. ILL. CONST. art. I, § 18, see note 35 *infra*.

6. ILL. CONST. art. IV, § 13, *see* note 38 *infra*.

7. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

8. *See* Oregon v. Hass, 420 U.S. 714 (1975); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

9. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972); Richardson v. Belcher, 404 U.S. 78 (1971). The Court is carrying over a philosophy of non-intervention in the economic area which had the support of the Warren and earlier courts. Ferguson v. Skrupa, 372 U.S. 726 (1963); Railway Express Agency Inc. v. New York, 336 U.S. 106 (1949).

10. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970). There is, however, some protection against discriminations directed at the poor in other areas. *Compare* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), *with* Ross v. Moffitt, 417 U.S. 600 (1974), *and* Griffin v. Illinois, 351 U.S. 12 (1956).

FEDERAL CONCEPTUAL FRAMEWORK

In constitutional adjudication under the fourteenth amendment the federal judiciary has repeatedly said that the equal protection clause requires public activity to be reasonable.[11] In 1948, Professors Tussman and tenBroek unpacked the concept of reasonableness in a seminal article.[12] They observed that reasonableness in equal protection cases has been employed in the context of purposeful public activity. The concept essentially has described a relationship between the method employed by public authority and the purpose for which the authority is exercised. Tussman and tenBroek pointed out that this means-ends analysis, embodied in the concept of reasonableness, involves several potentially distinct relationships. Sometimes the method utilized will promote the governmental purpose but overreaches in that it affects more persons than it needs to; sometimes the opposite will be true and the means chosen under reaches in that it affects fewer persons than it needs to; and sometimes the method used both under and overreaches.[13] Thus, legislative methods which are broader or narrower than necessary are reasonable but in an imperfect way. Such methods promote the governmental interest but could be more perfectly reasonable if the subjects of the public action were only those persons who need to be reached.

Central to an operational understanding of the reasonableness concept is recognition that the court has adopted a double standard in its employment. Since 1937, the federal judiciary in numerous cases has chosen not to review the reasonableness of public activity where equal protection claims have been raised against governmental action affecting individual property or contract interests.[14] Non-review of reasonableness in these cases is

11. *E.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

12. *See* Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

13. Tussman and tenBroek use the terms "over inclusive" and "under inclusive." In the text of this Article overreaching and under reaching will be used synonymously with over inclusive and under inclusive. The classic example of public activity which is both under inclusive and over inclusive is the World War II Japanese relocation order which was upheld against equal protection claims by the Supreme Court in Korematsu v. United States, 323 U.S. 214 (1944).

14. See H. ABRAHAM, FREEDOM AND THE COURT, 8-29 (2d ed. 1972); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process*

accompanied by judicial recitation of a "presumption of reasonableness," and the slogan that the legislature may deal with a problem "one step at a time" or a variation on that theme.[15] A major characteristic of these non-scrutiny cases is that a governmental purpose may not even be articulated; the court will hypothesize one.[16]

In certain cases since 1937, an opposite presumption has been invoked and rigid scrutiny of the reasonableness of public authority has occurred. When this happens, the court requires the government to show that the means employed are necessary for the accomplishment of a compelling state interest. In rigid scrutiny cases, imperfect reasonableness is constitutionally fatal. By the end of the Warren Court era in 1969,[17] a majority of the court took the view that rigid scrutiny and the presumption against reasonableness were licensed in cases where the government action discriminated against a suspect class or an interest, other than property or contract, which the Court designated as fundamental. A majority of the present Court also concurs in this distinction.[18] Classes designated as "suspect" include race,[19] nationality, or alienage;[20] interests treated as "fundamental" are speech, association, religion,[21] privacy,[22] and interstate travel.[23]

This two-tier standard of review has come to be the official theory of equal protection. As several writers have pointed out,

---

Formula," 16 U.C.L.A. L. REV. 716 (1969); Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause,* 2 HAST. CONST. L.Q. 153 (1975).

15. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

16. *Id.*

17. For an exhaustive account of the development of the two-tier approach until the end of the Warren Court era, *see Development-Equal Protection,* 82 HARV. L. REV. 1065 (1969).

18. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

19. Loving v. Virginia, 388 U.S. 1 (1967).

20. *In re* Griffins, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

21. Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972).

22. Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942).

23. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

however, this theory will not adequately explain employment of substantive review on equal protection grounds in several recent cases where both state and federal action have been found unconstitutional.[24] Preferential and detrimental governmental distinctions based on gender or directed at illegitimate children or the indigent, for example, have been scrutinized rather than subjected to the presumption of reasonableness.[25] This development has produced a spirited debate and various alternative equal protection theories have been proffered to supplant the official view. Justice Marshall's "sliding scale"[26] and Professor Gunther's "intermediate tier means-oriented"[27] position probably are the most influential of the newer approaches. The extent and continuation of critical comment in this area, however, suggests that a workable new conceptual framework yet to be written may be the consensus theory of the future.[28]

Although there is considerable instability in the federal courts' approach to cases which do not quite fit into either of the extreme

24. *See* Fielding, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807 (1973); Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973); Gunther, *The Supreme Court, 1971 Term - Forward: In Search of Evolving Doctrine on A Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071 (1974); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489 (1972).

25. *See* Kahn v. Shevin, 416 U.S. 351 (1974) (gender); Reed v. Reed, 404 U.S. 71 (1971) (gender); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimate children); James v. Strange, 407 U.S. 128 (1972) (indigents); Boddie v. Connecticut, 401 U.S. 371 (1971) (indigents); Griffin v. Illinois, 351 U.S. 12 (1956) (indigents).

26. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973)(Marshall, J., dissenting). Justice Marshall would end the rigid "tier" approach. In its stead he would determine the level of judicial scrutiny by evaluating: (1) the relationship between the individual interest effected and constitutionally guaranteed rights; (2) the relationship between the class effected and "suspect classes"; (3) the importance of the governmental interest promoted. The level of scrutiny warranted would depend primarily upon the closeness of the relationship in categories (1) and (2).

27. *See Gunther, supra* note 24. Professor Gunther supports meaningful scrutiny in non-suspect or non-fundamental interest cases. He suggests that purposes should be articulated and means established to bear a fair and substantial relationship to legitimate ends in such cases. He does not support review of the significance of articulated purposes outside the rigid scrutiny area and would limit judicial scrutiny in cases which involve intractable, economic, social and philosophical questions.

28. *See* note 24 *supra*.

tiers of the official equal protection theory,[29] it is possible to identify some patterns in the employment of constitutional review in this area. Where the discrimination is directed at sexual groups or illegitimates, the nature of judicial scrutiny more nearly approximates that of rigid scrutiny than the minimal scrutiny applicable to purely economic legislation. It appears, for example, that in these cases it is not the habit of courts to presume or judicially hypothesize valid purposes which have not been articulated by public authority.[30] It also appears that furtherance of administrative or economic efficiency is not a defense.[31] There is also an indication that it is not inappropriate for courts to evaluate and even set aside the articulated purpose if evidence of a contrary purpose is strongly supported in legislative history.[32] Scrutiny of sexual discrimination is distinguishable from scrutiny in suspect classification cases, however, in an important regard. More allowance for over and under reaching is tolerated in cases where a benefit is distributed to women for the purpose of undoing the effects of past discrimination than in cases involving a suspect class or fundamental interest.[33]

STATE CONCEPTUAL FRAMEWORK

Article I, section 2, of the 1970 Illinois Constitution guarantees equal protection of the laws to all persons.[34] This general provision, essentially paralleling the equal protection language of the fourteenth amendment, is supplemented in the 1970 Illinois Constitution with proscriptions against discriminations directed at specific groups by government units and private employers or other individuals. Section 18 of article I specifically extends protection against denial of equal protection of the laws "on account

29. *Compare* Griffin v. Illinois, 351 U.S. 120 (1956) *with* Ross v. Moffitt, 417 U.S. 600 (1974) *and* Geduldig v. Aiello, 417 U.S. 484 (1974).

30. *See* Reed v. Reed, 404 U.S. 71 (1971); Levy v. Louisiana, 391 U.S. 688 (1968).

31. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

32. Weinberger v. Wiesenfeld, 419 U.S. 636 (1975).

33. *Compare* Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974), *with* Dunn v. Blumstein, 405 U.S. 330 (1972); Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969).

34. ILL. CONST. art. I, § 2 reads: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

of sex" by the state or its units of local government and school districts.[35] Section 17 states that "all persons" shall be free from discrimination "in the hiring and promotion practices of any employer or in the sale or rental of property."[36] This same protection is extended to physically or mentally handicapped persons in section 19.[37] In addition, article IV, section 13 prohibits the passage of "special legislation" by the General Assembly.[38] This multifaceted textual basis for protection against discrimination in the Illinois Constitution differs considerably from the single-open-textured protection embodied in the fifth and fourteenth amendments to the Federal Constitution.

In the five years that have passed since adoption of the 1970 Constitution there have been relatively few decisions interpreting the skeletal language of the document. Since case law is more important than the actual textual language of a constitution,[39] it is too soon to fully understand all of the new provisions of the new Illinois Constitution. Yet, from the plain meaning and legislative history of article I, sections 17 and 19, it is evident that they clearly apply to certain kinds of *private discrimination* in employment and in the sale or rental of property by private individuals.

---

35. Art. I, § 18 reads: "The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."

36. Art. I, § 17 reads:

> All persons shall have the right to be free from discrimination on the basis of race, color, and, national ancestry and sex in any hiring and promotion practices of any employer or in the sale or rental of property.
>
> These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.

37. Article I, section 19 reads:

> All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

Section 19 does not have self-executing language. The fact that such language is found in section 17 may raise the question as to the scope of the provision. One writer has suggested that section 19 is self-executing by reason of section 12. Gertz, *Hortatory Language in the Preamble and Bill of Rights of the 1970 Constitution*, 6 JOHN MARSHALL J. PRACT. & PRO. 217, 234 (1973). Since the General Assembly has passed implementing legislation the matter is to some extent academic. ILL. REV. STAT. CH. 38 §§ 65-21 *et seq.* (1973).

38. Art. IV, § 13 reads: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination."

39. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

As such they represent a strong state policy against discrimination in important aspects of private life. These provisions expand state constitutional protection considerably beyond the protection against discrimination afforded by the Federal Constitution, which essentially is limited to federal or state action.[40]

Rigid Judicial Scrutiny in Illinois

Broad license to review public action directed at suspect classes or affecting fundamental interests is granted to the federal judiciary. When government action is directed at racial minorities, aliens, or nationalities, or affects a personal interest in speech, association, religion, privacy, or interstate travel under the equal protection clauses of both the fourteenth amendment and the Illinois Constitution, rigid judicial scrutiny is required. The merger of federal and state standards in these areas inescapably follows from the preemptive effect of the federal standards by virtue of the supremacy clause and the essentially identical broad language of article I, section 2 and the fourteenth amendment. It is therefore not surprising that this interpretation has already been given to article I, section 2, by the Illinois Supreme Court.[41] A major question that emerges from supplementary text embodied in the special legislation provision and sections 17, 18 and 19 of the Illinois Constitution is to what extent, if any, these provisions expand state constitutional protection beyond that granted in the Federal Constitution. Sufficient case law interpreting some of these provisions has occurred since 1971 to formulate a preliminary answer to this question.

Suspect Classifications

The special role of the judiciary in protecting suspect groups

40. The United States Supreme Court has reached some private action under an expanded interpretation of the equal protection clause of the fourteenth amendment. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). Some private conspiracies come within the scope of the fourteenth amendment. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971). Private racial discrimination in housing may be reached under the thirteenth amendment. *See, e.g.*, Jones v. Alfred Meyers, 392 U.S. 409 (1968).

41. *See In re* Estate of Karas, 61 Ill.2d 40, 329 N.E.2d 234 (1975); Ill. State Employees Ass'n v. Walker, 57 Ill. 2d 512, 315 N.E.2d 9 (1974).

against abusive governmental action is supported by notions of fairness and a practical assessment of the political process. Race, nationality, and alienage are accidents of birth for which the person is not responsibile; such characteristics are not ordinarily relevant to proper subjects of police power. The express selection of these groups as subjects of public action often implies their inferior status and stigmatizes members of the group. Moreover, each of these discrete and insular minority groups has been politically disadvantaged at some time by legally endorsed and supported discrimination. These groups, therefore, in particular need and deserve judicial protection from unfavorable legislation resulting from a majoritarian political process.[42]

CONSTITUTIONAL PROTECTION AGAINST GENDER DISCRIMINATIONS IN ILLINOIS

Despite rather obvious similarities between the laws directed at race, nationality and alienage and laws discriminating against women, as of this writing five Justices of the United States Supreme Court have not found sex to be a suspect classification. In *Frontiero v. Richardson,*[43] a 1973 decision, Justices Brennan, Douglas, White, and Marshall grounded their invalidation of a rule discriminating against female officers in respect to dependancy allowances on the basis that sex classifications were suspect and subject to rigid scrutiny. Justice Rehnquist dissented and clearly would not extend suspect classification status to sex. Justices Burger, Blackmun, Powell and Stewart found it unnecessary to treat the sex classification in the case as suspect to invalidate the policy. Since *Frontiero,* several sex classifications have been adjudicated by the Court, but without relying on the suspect classification.[44] In the latest sex discrimination case *Stanton v.*

42. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973); Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Hamilton v. Alabama, 376 U.S. 650 (1964)(per curiam); United States v. Carolene Prod. Co., 304 U.S. 144 n. 4 (1938) (Stone J., concurring); Plessy v. Ferguson, 163 U.S. 537, 562, (1896) (Harlan, J., dissenting.) Strauder v. West Virginia, 100 U.S. 303, 308 (1879); Hobsen v. Hansen, 269 F. Supp. 401 (D.D.C. 1967); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); Karst, *supra* note 14.

43. 411 U.S. 677 (1973).

44. *See* Weinberger v. Weisenfeld, 419 U.S. 636 (1975) where the court found a social security policy excluding widowers from receiving benefits in the event of the death of an

Stanton,[45] eight Justices found a Utah statute defining the age of majority as 18 for females and 21 for males for purposes of support payments an unconstitutional gender classification without discussing the suspect classification question.

There are three sections of article I of the 1970 Illinois Constitution which have a bearing on discrimination against persons of a particular sex. Section 2 provides that no person shall be denied equal protection of the laws. Section 17 specifically prohibits sexual discrimination in the hiring and promoting practices of any employer or in the sale or rental of property. Section 18 prohibits the "state or its unit of local government and school districts" from denying equal protection of the laws "on account of sex."[46]

In *People v. Ellis*,[47] the Illinois Supreme Court for the first time since the ratification of the 1970 Constitution set down a definitive interpretation of article I, section 18. Ellis was convicted of forgery and burglary at the age of 17. Section 2-7(1) of the Juvenile Court Act[48] authorized prosecution of 17 year old males and 18 year old females under the criminal laws of the state. Ellis persuaded the appellate court that the age discrimination against males violated the prohibition against sex discrimination. The supreme court agreed that the age distinction was unconstitutional but decided the appropriate remedy was elimination of the 18 year old provision applicable to females and affirmed the conviction.

Shortly after *Ellis* was decided, the Illinois high court once again had an occasion to expound on the scope of article I, section

income producing spouse unconstitutional. In Taylor v. Louisiana, 419 U.S. 522 (1975) the Supreme Court found systematic exclusion of women from juries unconstitutional; not on equal protection grounds but because it violates the sixth amendment right to trial by jury. *See also* Stanton v. Stanton, 421 U.S. 7 (1975). Three gender classifications have withstood constitutional challenges since *Frontiero:* Kahn v. Shevin, 416 U.S. 351 (1974) (upheld a property tax granted to widows only); Geduldig v. Aiello, 417 U.S. 484 (1974) (upheld a California policy excluding coverage for unemployment compensation for certain disabilities resulting from pregnancy); Schlesinger v. Ballard, 419 U.S. 498 (1975) (a nine year promotion or discharge policy which applied only to male officers was upheld against equal protection claims).

45. 421 U.S. 7 (1975).

46. *See* notes 34-38 *supra*.

47. 57 Ill.2d 127, 311 N.E.2d 98 (1974).

48. Law of July 31, 1967, ch. 37, § 702-7(1) [1967] Ill. Laws 2360, *as amended*, ILL. REV. STAT. ch. 37, § 702-7(1) (1973).

18 in a case involving sexual-based disabilities to marry without the consent of a parent. In *Phelps v. Bing*,[49] a unanimous court speaking through Chief Justice Underwood held invalid the section of the Marriage Act which required males to be 21 to obtain a license to marry without parental consent while allowing females to obtain the license at 18. Speaking of the scope of constitutional protection against sex discrimination embodied in section 18, Justice Underwood, repeating language in *Ellis*, said the section "was intended to supplement and expand guaranties of the equal protection provision of the [federal] bill of rights"[50] by making any classification based on sex suspect. As in *Ellis*, the court determined that the appropriate remedy would be to eliminate the higher age requirement and extend the lesser age requirement to both males and females.

Several appellate court decisions have followed the holding of *Ellis* regarding the gender distinction embodied in the Juvenile Court Act.[51] In addition, this decision has produced expressions of doubt at the appellate court level over the continued validity of any gender presumption in favor of one spouse in custody proceedings.[52]

The appellate courts are divided, however, in their evaluations of the sex based distinction between aggravated incest and ordinary incest contained in the Illinois Criminal Code. Section 11-10 defines "aggravated incest" as an act of sexual intercourse or deviate sexual conduct committed by a "male person" with a person he knows is his daughter. Aggravated incest is a Class II felony with a maximum prison term of 20 years.[53] Sexual relations between mother and son or brother and sister are punishable as ordinary incest, a Class III felony punishable by a maximum of 10 years imprisonment.[54]

---

49. 58 Ill.2d 32, 316 N.E.2d 775 (1974).

50. *Id.* at 35, 316 N.E.2d at 776.

51. *See* People v. Lawrence, 26 Ill.App.3d 685, 325 N.E.2d 363 (1st. Dist. 1975); People v. Robinson, 23 Ill.App. 3d 466, 319 N.E.2d 260 (4th Dist. 1974); People v. Schanuel, 22 Ill.App.3d 174, 317 N.E.2d 279 (5th Dist. 1974); People v. Jones, 21 Ill.App.3d 791, 315 N.E.2d 921 (1st Dist. 1974); People v. Keister, 21 Ill.App.3d 351, 315 N.E.2d 293 (2d Dist. 1974); People v. Gunn, 21 Ill. App.3d 233, 315 N.E.2d 186 (1st. Dist. 1974).

52. Randolph v. Dean, 27 Ill.App.3d 913, 327 N.E.2d 473 (3d Dist. 1975); Anagnostopoulos v. Anagnostopoulos, 22 Ill.App.3d 479, 317 N.E.2d 681 (1st Dist. 1974).

53. ILL. REV. STAT. ch. 38, § 11-10 (1973).

54. *Id.* § 11-11.

The Fourth District Appellate Court examined this classification in *People v. Boyer*.[55] The defendant was convicted of aggravated incest under section 11-10 and sentenced to one to five years imprisonment. He challenged the conviction as an unconstitutional gender classification under article I, section 18.

The court found the gender classification contained in the aggravated incest section invalid as a suspect classification which could not understand the requirement of strict judicial scrutiny and found no compelling reason for imposing a stronger penalty on father-daughter incest than was imposed on mother-son incest. Both situations give rise to the same biological risk and the possibility of abusing family authority. Legal and cultural traditions alone could not justify the distinction in the face of a constitutional requirement of equal treatment of the sexes. Applying the remedial approach of *Ellis*, the *Boyer* court affirmed the conviction.

In contrast, the first and fifth district appellate courts have affirmed aggravated incest convictions against sex discrimination claims without resorting to the reasoning of the *Boyer* majority. In *People v. Williams*,[56] a first district decision, the gender distinction embodied in the aggravated incest section was held to satisfy the standard of strict scrutiny applicable to sexual discriminations under article I, section 18 of the state constitution. Speaking for a unanimous court Justice Stamos found that "compelling considerations" supported the legislative decision to treat incest between a father and daughter more seriously than other incestuous conduct, including sexual relations between a mother and son. These considerations were the increased harm from unwanted pregnancy where the victim is a female child, the greater frequency of father-daughter incest prosecutions, and the greater psychological harm that occurs when a father sexually abuses a female child. Thus the court determined that the social harm involved in father-daughter relationships was greater and that a more severe punishment was necessary to deter the class of offenders who most often commit the offense.

Much of this analysis is inadequate. The fact that most incest

55. 24 Ill.App.3d 671, 321 N.E.2d 312 (4th Dist. 1975). *See also* People v. Yocum, 31 Ill.App.3d 586, 335 N.E.2d 183 (1975).

56. 29 Ill.App.3d 547, 336 N.E.2d 26 (1st Dist. 1975).

prosecutions involve fathers who have sexual relations with their daughters supports including such conduct in the criminal definition of incest but does not support punishing that form of incest more severely than other forms. It is the imposition of a more severe punishment for a crime of incest that only males can commit that needs to be justified, not the imposition of punishment for incestuous conduct itself.

Different punishment for incest on the basis of the gender of the parent is reasonable if the harm to the female child victim is greater than the harm to the male child in mother-son incestuous relationships. The First District Appellate Court in *Williams* said that it is not "subject to serious debate that the physical and psychological dangers of intercourse are greater when inflicted upon a female child."[57] It is not quite so clear as the opinion suggests that the psychological harm to a female child from sexual relations with her father is greater than harm to a male child from sexual relations with his mother. This unsupported conclusion brings the state judiciary dangerously close to adopting by judicial notice generalized propositions about a more fragile emotional and psychological structure in female children. Without significant support in empirical studies such pronouncement by the judiciary should be eschewed lest courts unwittingly contribute to the problem that article I, section 18 of the state constitution was designed to eliminate.[58]

It was also suggested in *Williams* that the harm from unwanted pregnancies is greater to a female child. This appears to be a credible line of analysis. Unfortunately the First District Appellate Court does not develop the point more thoroughly. An unwanted pregnancy would seem to have significant adverse effects on the future educational and career choices of a female child; the effect of an unwanted pregnancy is less severe on the mother whose life does not so much lie ahead of her. Further, the mother is not an unwilling victim of incest as may be the case of a female child in a father-daughter incestuous relationship. Finally, it may also be that there is a greater risk of physical harm from pregnancy to youthful females.

57. *Id.* at 551, 336 N.E.2d at 30.

58. *Compare* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) *with* Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

An additional ground for sustaining convictions for aggravated incest was profferred in *Williams* and in a fifth district case, *People v. York*.[59] This rationale suggests that no sex discrimination is embodied in the distinction between aggravated and ordinary incest. The classification was said not to be based "upon sex alone." Since a male may be convicted of ordinary incest for sexual relations with his sister the court concluded that the more severe penalties were levied against fathers and stepfathers because of their positions in the family and not solely because they were males.[60]

The imposition of more severe punishment on fathers who have sexual relations with their daughters is a discrimination on the basis of sex if language is to mean anything. Only males have the family position of fatherhood which is the basis of the more severe punishment. Moreover, the fact that only males who are fathers are subject to the section does not detract from the essential sexual basis of the statutory scheme of the incest provisions. To limit sex discrimination to state action which is directed solely and exclusively at all males or females would exempt much sex discrimination from the state constitution's purview. Under such criteria for example, a state law which excluded mothers from unemployment benefits would not be "based on sex" for purpose of article I, section 18 if unemployed females without children were eligible for benefits. This sex-plus criteria has been rejected by the United States Supreme Court in discrimination cases brought under federal civil rights statutes.[61]

The courts in *Boyer, Williams* and *York* are confronted with problems which are the apparent result of an inflexible statutory policy. Incest prosecutions for father-daughter sexual relations must be brought under the higher felony statute or not at all. Therefore, courts are forced to review a gender classification which if found unconstitutional would leave Illinois with a void in the criminal law on incest between father and daughter. In the alternative, courts will be forced to create remedial measures

59. 29 Ill.App.3d 113, 329 N.E.2d 845 (5th Dist. 1975).

60. The court in *Williams* does not emphasize this ground as a basis of decision and by so doing seems to recognize the tortured reasoning which the argument involves.

61. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) *rev'g*, Phillips v. Martin Marietta Corp., 411 F.2d 1 (5th Cir. 1969).

similar to those in *Ellis*[62] and *Bing*,[63] and thus, completely interject themselves in the heretofore legislative sphere of criminal law. The factual record of the three incest cases dramatically illustrates the need for regulation of incestuous relationships between father and daughter. However, if constitutional policy against sex discrimination is to have any bite in Illinois the higher punishment imposed for such conduct needs more justification than provided in the opinions.

Implications of Rigid Scrutiny under Section 18

In *Ellis* and *Bing* the Illinois Supreme Court interpreted article I, section 18 of the Illinois Constitution to place gender distinctions embodied in state action on the same basis as race distinctions under the Federal Constitution. By so doing, the Illinois Supreme Court has incorporated the rigid scrutiny-suspect classification concepts of federal equal protection. The scope of "rigid judicial scrutiny" in such cases is embodied in the requirement that the state show that such classifications are *necessary to further a compelling state interest.* State government units are not absolutely prohibited from taking constitutionally suspect traits into account in distributing benefits and burdens, but the compelling state interest concept severely circumscribes the situations when to do so would be constitutional.

From an evaluation of United States Supreme Court cases employing the compelling state interest standard several rather clear propositions have emerged. A three step analysis is adopted by the Supreme Court in rigid scrutiny cases. First, the articulated interest asserted by the state must be a permissible objective of the police power.[64] For example, if the Supreme Court determines that the purpose of the governmental action is to chill the exercise of a constitutional right, the action will be impermissible.[65] Second, the interest must be significant.[66] The Supreme Court has held on several occasions that a state interest in administrative or economic efficiency is not significant enough to be

62. 57 Ill.2d 127, 311 N.E.2d 98 (1974).

63. 58 Ill.2d 32, 316 N.E.2d 775 (1974).

64. *Compare* Dunn v. Blumstein, 405 U.S. 330 (1972) *and* Shapiro v. Thompson, 394 U.S. 618 (1969) *with* United States Dep't of Agri. v. Moreno, 413 U.S. 528 (1973).

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

66. *Id.*; Dunn v. Blumstein, 405 U.S. 330 (1972).

compelling under rigid scrutiny analysis.[67] Third, the method used to promote this significant interest must be necessary.[68] The Supreme Court had held that if a *less detrimental alternative method* for promoting the interest is available to the state, the law in question is unconstitutional.[69] The force of these latter holdings is to raise grave constitutional doubts about any law which over or under reaches if it is directed at a suspect class. By extending the federal standard of rigid judicial scrutiny in suspect classification cases to gender classifications, the Illinois Supreme Court has imposed a heavy burden of justification on the state as well as broad duties and responsibilities on the judiciary.

Implications of Remedial Approach

Having determined that the gender distinction embodied in the Juvenile Court Act was unconstitutional under article I, section 18, the Illinois Supreme Court in *Ellis* faced the question of what remedy was required. The court indicated that several alternatives were available. The 18 year old policy applicable to females could have been extended to males, thus making the conviction illegal or the policy could have been eliminated altogether, thus sustaining the conviction. In deciding on the latter alternative, the court relied heavily on the fact that since the conviction of Ellis the state legislature had amended the statute, eliminating the age distinction based upon gender to read "no minor who was under 17 years of age."[70]

Support for broad judicial discretion in granting remedial alternatives after a determination that the constitutional rights of a person challenging government action have been violated may be found in *Brown v. Board of Education*.[71] In the first *Brown* decision the United States Supreme Court ordered reargument on the issue of appropriate relief. After reargument the Court decided against immediate relief in favor of the controversial "all deliberate speed" formula. The decision to delay relief in *Brown* was contrary to the proposition embodied in several Supreme Court

67. *Compare* Graham v. Richardson, 403 U.S. 365 (1971) *and* Shapiro v. Thompson, 394 U.S. 618 (1969) *with* Goldberg v. Kelly, 397 U.S. 254 (1970).

68. *See* Dunn v. Blumstein, 405 U.S. 330 (1972).

69. *Id.*; Shapiro v. Thompson, 394 U.S. 618 (1969).

70. 57 Ill.2d at 133, 311 N.E.2d at 101.

71. 349 U.S. 294 (1955). *See also* Stanton v. Stanton, 421 U.S. 7 (1975).

decisions which indicated that constitutional rights are "personal and present."[72] Quite obviously, the severely criticized *Brown* implementing decision[73] was based upon practical assessments of the impact of an instant integration order on the affected school systems.

The problems confronted by a court in a case like *Ellis* are far removed from those confronting the United States Supreme Court in *Brown,* and the denial of immediate relief to a plaintiff who has been prosecuted pursuant to an unconstitutional statute should not be entered into lightly. One of the purposes of a constitutional limitation on government action such as that embodied in article I, section 18, is to discourage the use of gender as a basis for the imposition of criminal responsibility. Constitutional limitations on legislative power are not self-enforcing. Through the case and controversy requirement an injured party utilizing resources in challenging legislation plays a valuable role in enforcing constitutional policy. A decision like *Ellis,* which denies a party who successfully challenges criminal legislation on constitutional grounds immediate relief, hardly encourages other defendants subject to unconstitutional gender discriminations to vigorously assert constitutional defenses.

In *Ellis,* of course, the Illinois Supreme Court was faced with a legislature that had exorcised the unconstitutional gender classification from the statute by amendment. This factor influenced the court's selection of a remedy. When this is not the situation courts will hopefully consider alternatives other than elimination, when to do so would further constitutional policy.

Elimination of the unconstitutional gender classification will not always result in a decision which discourages the vigorous assertion of constitutional defenses. In *Phelps v. Bing,*[74] the effect of the elimination of the gender distinction was to remove the disability against marriage and grant the relief sought by the male plaintiff.

72. *See* Hartman, *U.S. Supreme Court and Desegregation,* 23 MODERN L. REV. 353 (1960); Note, *Supreme Court Equity Discretion: The Decrees in the Segregation Cases,* 64 YALE L. J. 124, 127 (1954).

73. *See* note 72 *supra.* Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification,* 63 COLUM. L. REV. 1163 (1963).

74. 58 Ill.2d 32, 316 N.E.2d 775 (1974). Compare the United States Supreme Court's analysis in Stanton v. Stanton, 421 U.S. 7 (1975).

An example of where the elimination remedy utilized in *Ellis* causes considerable problems is found in *People v. Boyer*.[75] As previously discussed,[76] the court in *Boyer* found the aggravated incest section under which the defendant was convicted an unconstitutional gender classification. Applying the elimination principle of *Ellis* and *Bing*, however, the court affirmed the conviction and remanded the case to the circuit court with instructions to resentence the defendant under the lesser penalty provision of ordinary incest.

Justice Smith, in dissent,[77] challenged the application of the elimination principle of *Ellis* and *Bing* to affirm the conviction. He noted that ordinary incest is inapplicable to the acts charged against the defendant—sexual intercourse between a father and daughter. Thus the effect of the majority decision was to impose a penalty on the defendant for ordinary incest, a crime for which he was not found guilty and could not have been tried. Application of the elimination principle to produce results such as occurred in *Boyer* is highly questionable. The most rudimentary principles of due process are abandoned if punishment is imposed for a crime that the defendant did not or could not have committed. As suggested by Justice Smith in dissent, if the court found the statute unconstitutional under section 18 it had no choice but to reverse the conviction. Such a result would have been more consistent with both due process and the strong constitutional policy against gender classifications embodied in the state constitution.

State Action Designed to Undo Past Discrimination Against Women

As previously noted, sex classifications are treated as intermediate level scrutiny cases under the federal equal protection clause.[78] The result of this type of scrutiny is to give public authority more flexibility in taking gender into account in the distri-

75. 24 Ill.App.3d 671, 321 N.E.2d 312 (4th Dist. 1975).

76. *See* text accompanying notes 52-56 *supra*.

77. 24 Ill.App.3d at 674, 321 N.E.2d at 315. Justice Smith further disagreed with the majority by taking the position that the prosecution for aggravated incest was not a discrimination of the basis of sex.

78. *See* notes 29-33 and accompanying text *supra*.

bution of benefits or burdens. Slight over or under inclusiveness in the distribution of a benefit to women for purposes of undoing the effects of past discrimination may satisfy federal equal protection standards. One United States Supreme Court case at least strongly supports this proposition. In *Kahn v. Shevin,*[79] six Justices of the court affirmed the constitutionality of a Florida tax exemption which was granted widows and not widowers. The exemption was supported by general statistical data showing significant disparities in the income producing abilities of men and women both generally and within job categories. The Court concluded that given this data the exemption bore a fair and substantial relationship to Florida's interest in reducing the income disparity between men and women produced by past discrimination against women. Given this purpose the exemption overreached in that widows who were not needy received it and under reached in that other needy women not widows, did not. Yet under federal intermediate scrutiny the gender classification withstood equal protection claims.

After *Ellis,* an Illinois tax exemption similar to the Florida tax exemption in *Kahn v. Shevin,* would be of questionable constitutionality under article I, section 18. Public authority is more limited under a rigid scrutiny-compelling state interest analysis; over or under inclusiveness is constitutionally fatal.[80] The suspect status of gender classification in Illinois thus restricts state government action to rectify past discrimination against women to a greater extent than would be the case if the state were subject only to fourteenth amendment equal protection restraints. This does not mean, of course, that such governmental programs in Illinois are prohibited totally under article I, section 18. They are not. Illinois clearly has a significant interest in undoing the effects of past discrimination against women. Article I, section 18, would seem to require, however, that such programs be carefully and precisely drawn so as to avoid over or under reaching as much as possible.

79. 416 U.S. 351 (1974).

80. *See* Shapiro v. Thompson, 394 U.S. 618 (1961).

Illegitimacy in Illinois: Intermediate Scrutiny

Illegitimate children share many of the characteristics of those groups who enjoy the protection of the suspect classification concept in equal protection adjudications. Illegitimacy, like race, nationality, and alienage, is an accident of birth for which the child is not responsible; illegitimacy has and still involves stigmatization of the child as inferior. Illegitimate children are a small, politically disadvantaged, discrete and insular minority. Discriminations against them have been formalized in cases and statutes and thus, to some extent, have been endorsed by the legal system. Illegitimate children have fared poorly with the majoritarian legislative process as their age prohibits participation in the political arena and works against their championing their own rights.

These considerations undoubtedly contributed to the initial invalidation of legal discrimination against illegitimate children by the United States Supreme Court in 1968 in *Levy v. Louisiana.*[81] The Court in *Levy* found unconstitutional a Louisiana law which prevented illegitimate children who had not been acknowledged by their father from receiving wrongful death benefits. Since *Levy* the United States Supreme Court has struck down state statutes discriminating against illegitimate children in workmen's compensation and support benefits in *Weber v. Aetna Casualty & Surety Co.*,[82] and *Gomez v. Perez*,[83] as well as federal discriminations in social security in *Jiminez v. Weinberger.*[84]

Levy, Weber, Gomez, and *Jiminez*[85] all contain language sug-

81. 391 U.S. 68 (1968). Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), a companion case, invalidated the same statute involved in *Levy*.

82. 406 U.S. 164 (1972).

83. 409 U.S. 535 (1973).

84. 417 U.S. 628 (1974). In New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973), the Court in a per curiam opinion found a New Jersey statute limiting benefits of the "assistance to families of the working poor" program to families where the children were legitimate violative of the equal protection clause. Disabilities worked on illegitimates have been found unconstitutional by the Supreme Court in other settings. *See* Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd* 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd* 409 U.S. 1069 (1972).

85. In Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) the Court stated:

> The status of illegitimacy has expressed throughout the ages society's condemnation of irresponsible liasons beyond the bounds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, impos-

gesting that scrutiny in such cases is licensed because illegitimacy is an accident of birth which stigmatizes the children as inferior. Yet none of these four recent cases held that illegitimacy is a suspect class. Rather, illegitimacy, like sex, was approached by a majority of the Supreme Court as a classification which licensed some degree of intermediate scrutiny. The classification warranted more justification than occurs in pure economic regulation cases but a somewhat lesser degree of judicial scrutiny than in a suspect classification case.

The rather clear development of constitutional protection for illegitimates from *Levy* to *Jiminez* was interrupted in 1971 by one case, *Labine v. Vincent*.[86] The Supreme Court there sustained the constitutionality of a Louisiana law which prevented illegitimate children, whether acknowledged or not, from acquiring property from the natural father if he died intestate.

Quite recently a case involving facts somewhat distinguishable from *Labine v. Vincent* reached the Illinois high court. In *In re Estate of Karas*[87] the Illinois Supreme Court entertained both state and federal constitutional challenges against Illinois law which precluded acknowledged illegitimate children from inheriting from a parent who died intestate. Justice Kluczynski, speaking for a unanimous court, found the statute constitutional following the strict holding of *Labine*.

The petitioner and an amicus brief[88] argued that discriminations against illegitimates in intestate succession were subject to the rigid scrutiny standard of suspect classifications under the federal equal protection clause because the impact of the law was

---

ing disabilities on the illegitimate child is contrary to the basic concept of our legal system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent social opprobrium suffered by those helpless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth alone where—as in this case—the classification is justified by no legitimate state interest—compelling or otherwise.

See Levy v. Louisiana, 391 U.S. 68, 71-72 (1968).

86. 401 U.S. 532 (1971).

87. 61 Ill.2d 40, 329 N.E. 2d 234 (1975).

88. An extensive, well-reasoned amicus brief was filed by the Legal Assistance Foundation of Chicago. The Illinois Supreme Court referred to the brief throughout the opinion.

to discriminate against racial minorities and because illegitimacy was a suspect class. Justice Kluczynski responded to the federal equal protection rigid scrutiny claims by relying almost exclusively on *Labine*. He noted that the impact analysis had been similarly made and rejected by the United States Supreme Court in *Labine* and concluded that, absent any racial classification in the statute itself, strict judicial scrutiny did not apply. Moreover, since the state court could not expand the scope of federal constitutional protections beyond United States Supreme Court interpretations and since the federal high court had not granted illegitimacy suspect classification status, those arguments were also rejected by the justice.

The court also rejected the invitation to view the case as an unconstitutional sex discrimination. Petitioners had argued that Probate Act policies allowing illegitimate children to inherit from mothers who die intestate and which prevented fathers but not mothers from inheriting from the illegitimate child's estate if he or she dies intestate, constituted sex discriminations in violation of article I, section 18 of the state constitution.[89] Justice Kluczynski found these arguments unpersuasive as raised by illegitimate children and concluded that the plaintiffs did not have standing to assert a claim of sexual discrimination based upon a law which was directed at their parents' sex. This limited holding suggests that sections 12(4), 12(5), and 12(7) of the Probate Act which distinguish between fathers and mothers of illegitimate children in regard to intestate succession policy may be challenged on sex discrimination grounds in a case where the parent claims direct injury.

Residual federal equal protection arguments relating to the continued vitality of *Labine* in view of subsequent Supreme Court illegitimacy decisions were also rejected by the court. Justice Kluczynski noted that *Labine* had been cited with approval and distinguished in the cases invalidating discriminations against illegitimates in distribution of workmen's compensation, support and social security benefits. Citing *Weber v. Aetna Casualty & Surety Co.*, the court noted that *Labine* "reflected,

89. ILL. REV. STAT. ch. 3, § 12 (1973) reads: "An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living. . . ."

in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its border."[90] Intestate succession law exempting illegitimate children from rights did not create "insurmountable barriers" to inheritance by the acknowledged illegitimate child since the father could marry the child's mother or execute a will including the child.

Applying the traditional, rational basis federal equal protection standard to the case, the court concluded that the discrimination against illegitimates was rationally related to Illinois' interest in encouraging family relationships and establishing a method of property dispositions which protects against spurious claims and assures stability of title.

Labine v. Vincent, upon which the Illinois Supreme Court relied both in reasoning and result in *Karas*, has provoked a spate of criticism since it was decided in 1971.[91] The controversy focuses primarily on whether the general approach and reasoning in that case is consistent with other cases where the United States Supreme Court has invalidated discriminations against illegitimate children on equal protection grounds. In these decisions involving grants of public largess, the Court clearly employed an intermediate level of scrutiny. It is also clear that the overall thrust of these cases is to raise serious doubts as to the continued vitality of many of the stereotyped historical prejudices against illegitimate children which were part of past social practices and embraced in the common law.

---

90. 61 Ill.2d. at 47, 329 N.E. 2d at 238.

91. *See* Pascal, *Louisiana Succession and Related Law and the Illegitimate: Thoughts Prompted by* Labine v. Vincent, 46 TUL. L. REV. 167 (1971); Petrillo, Labine v. Vincent, *Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377 (1971); Turton, *Unequal Protection of the Illegitimate Child*, 13 S. TEXAS L.J. 126 (1972); Note, Labine v. Vincent: *Louisiana Denies Intestate Succession Right to Illegitimates*, 38 BROOKLYN L. REV. 428 (1971); Comment, *Constitutional Law—Equal Protection of the Laws—Inheritance by Illegitimates*, 22 CASE W. RES. L. REV. 793 (1971); Comment, *Constitutional Law—Equal Protection—Denial of Illegitimate Child's Right of Inheritance from Father Who Had Acknowledged But Not Legitimatized Heir Does Not Constitute a Violation of Child's Equal Protection Rights under the Fourteenth Amendment*, 47 N.D. LAW. 392 (1971); Comment, *Why Bastards, Wherefore Bastards?* 25 SW. L.J. 659 (1971); Comment, *Constitutional Law—Illegitimacy—The Emasculation of Equal Protection for "Bastards,"* 3 RUTGERS-CAMDEN L.J. 316 (1971); Comment, *Inheritance Law—Illegitimacy—A State's Intestate Succession Statutes Denying Illegitimate Children Benefits Granted Legitimates Violates Neither Equal Protection Nor Due Process*, 49 TEXAS L. REV. 1132 (1971).

The facile conclusion that discrimination against illegitimates in intestate succession laws is different than discriminations in the distribution of social security, support, workmen's compensation or wrongful death benefits because the former involves distribution of property which is part of a decedent's estate and does not involve permanent deprivation of the child's interest is beset with insurmountable difficulties. *Levy v. Louisiana,*[92] for example, which began Supreme Court intervention in this area, involved a Louisiana statute that precluded only illegitimate children who had not been acknowledged by the father from receiving wrongful death benefits. Thus, the voluntary act by the father of acknowledging the children would result in distribution of the property interest to the child. Yet the statute was found unconstitutional. To distinguish *Labine* from *Levy* on the basis that the father could have granted the child an interest in the estate by writing a will and thus no "insurmountable barrier" to the child receiving the benefit existed is highly questionable. Moreover, several United States Supreme Court cases clearly state that permanent deprivation of a constitutionally protected interest is not a necessary element for an equal protection claim.[93]

There are also considerable difficulties with distinguishing the cases on the basis that *Labine* involved the state's interest in estates. If, for example, the limitation on illegitimate children inheriting intestate is said to promote the state's interest in stability of title to property, this interest is not implicated where the father has acknowledged parentage. If instability in title to property is the result of difficulty in proving parentage, then this problem has to some extent been alleviated by recent scientific developments.[94]

It has been suggested that the exclusion of illegitimates from intestate rights furthers the state's interest in distributing property in accordance with the intent of the owner, because it is reasonable to assume that the deceased would prefer not to leave property to an illegitimate child. Such an assumption, however,

92. 391 U.S. 68 (1968).

93. *See* Stanley v. Illinois, 405 U.S. 645 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); Hunter v. Erickson, 393 U.S. 385 (1969); Douglas v. California, 372 U.S. 353 (1963).

94. L. SUSSMAN, BLOOD GROUPING TESTS (1968); Ross, *The Value of Blood Tests in Paternity Cases,* 71 HARV. L. REV. 466 (1958).

seems to be premised on certain prejudiced attitudes about illegitimacy that the *Levy, Jiminez* line of cases were responses to.

The Illinois Supreme Court in *Karas* also suggested that the intestate succession policy promoted the state's interest in encouraging marriage and discouraging illegitimacy. It is highly dubious to assume that persons who enter into extramarital relationships consider whether the offspring of that relationship will receive property in the event the father dies without a will.[95] Moreover, it is unfair to impose disabilities on the innocent child of unmarried persons in order to regulate his parents' conduct. Finally, alternative methods for regulating sex conduct or encouraging marriage, such as tax incentives, are clearly available.

Labine v. Vincent is a five to four United States Supreme Court decision with shaky underpinnings. It is highly doubtful that the decision will be extended beyond its facts. The seventh circuit and at least one other federal district court have denied its current vitality.[96] There is nothing in *Karas* which suggests that the Illinois Supreme Court will be inclined to sustain government discriminations directed at illegitimates outside the narrow area of intestate succession. Leading federal decisions invalidating discriminations against illegitimate children were cited with approval. *Karas* will not change the Illinois Constitution which seems to clearly impose an obligation on the state judiciary in interpreting the Illinois equal protection clause to closely scrutinize distinctions against illegitimates.[97]

EQUAL PROTECTION LIMITATIONS ON STATE ECONOMIC POLICY AND POWER TO DEFINE CRIME AND PUNISHMENT

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a

95. The United States Supreme Court has totally discredited this rationale in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

96. Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975); Norton v. Weinberger, 364 F.Supp. 1117 (D. Md. 1973).

97. An example of current Illinois law discriminating against illegitimate children may be found in ILL. REV. STAT. ch. 108 ½, §§ 8-158, 11-153 (1973) which eliminates illegitimate children's rights to child annuity benefits under municipal pension funds.

> minority be imposed generally. Conversely nothing opens the door to arbitrary action so effectively as to allow these officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retributions that might be visited upon them if larger members were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.[98]

Selective Close Scrutiny: Lochnerism in Illinois

Perhaps the most dramatic divergence in the scope of protection between the federal and state constitution is in the area of discriminatory exercises of police power which affect property and contract interests. At the federal level there is virtually no fourteenth amendment substantive limitation on the power of the states or federal government to initiate policy through legislation in order to regulate economic units. This is, of course, not the case if the policy treats racial, national, or sexual groups differently or discriminates against aliens or illegitimate children. But in terms of substantive limitations on economic regulations, it is a fact that only one exercise of police power at the state and federal level has been found unconstitutional by the Supreme Court solely on substantive, economic due process or equal protection grounds since 1937.[99]

This lowly constitutional status of individual economic interests traces back to a period in the history of the United States Supreme Court generally said to extend from 1905 to 1937. During this period, substantive review was actively employed on behalf of fifth and fourteenth amendment due process, equal protection, property, and liberty claims to find state and federal legislation

98. Railway Express v. New York, 336 U.S. 106, 112-13 (1949) (Jackson J., concurring opinion).

99. That one case is Morey v. Dowd, 354 U.S. 457 (1957) (act which exempted American Express Co. money orders from regulation and licensing held unconstitutional). See H. ABRAHAM, FREEDOM AND THE COURT 8-28 (2d ed. 1972); Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973). Some substantive limitations on state economic policy still are imposed by the supremacy and interstate commerce clauses of the Federal Constitution. *See, e.g.*, Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). Procedural limits have been imposed under the fourteenth amendment in the economic area. *See, e.g.*, North Georgia Finishing Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970).

unconstitutional. Symbolic of this era is *Lochner v. New York,*[100] in which a New York statute establishing maximum hour limitations on the weekly employment of bakers was found unconstitutional. The effect of extensive use of economic, substantive due process and equal protection was to blunt state and federal police power designed to deal with exploitation of workers in industry and to cure the economic ills of the great depression.

It was during the "Lochner" era that the Court as an institution was most severely criticized. President Roosevelt's attempt to deal with federal judicial obstacles to the New Deal through a court packing plan failed. New appointments to the Court and changes of position by some Justices produced *West Coast Hotel v. Parrish,*[101] at 1937 decision in which Chief Justice Hughes, and Justices Roberts, Brandeis, Cardozo, and Stone found a *minimum* wage law for women and children constitutional and effectively brought an end to economic, substantive due process and equal protection.

In Illinois, however, "Lochnerism" has been maintained since 1937 by the high court's use of both the special legislation prohibitions and equal protection limits under the 1870 and 1970 Constitutions. In addition, federal due process and equal protection were employed by the Illinois Supreme Court to limit state police power to regulate economic units.[102] In *Grasse v. Dealers Transport Co.,*[103] a 1952 decision, for example, the Illinois Supreme Court found a section of the state Workmen's Compensation Act unconstitutional. They held that the legislation violated the equal protection and special legislation provisions of the Illinois Constitution as well as the equal protection and due process clauses of the federal constitution. The portion of the section in issue based the right of employees injured in the course of employment to elect to sue under common law negligence on whether the third-party tortfeasor was bound by the Workmen's

100. 198 U.S. 45 (1905).

101. 300 U.S. 379 (1937).

102. *See* Lake Shore Auto Parts Co. v. Korzen, 49 Ill.2d 137, 273 N.E.2d 592 (1971) *rev'd sub nom.* Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973); People v. McCabe, 49 Ill.2d 338, 275 N.E.2d 407 (1971); Fiorito v. Jones, 39 Ill.2d 531, 236 N.E.2d 698 (1968); People *ex. rel.* Toman v. Chicago Union Station, Co., 383 Ill. 153, 48 N.E.2d 524 (1943).

103. 412 Ill. 179, 106 N.E.2d 124 (1952).

Compensation Act. The effect of this section[103.1] was to treat employees injured within the course of employment differently depending on the driver and vehicle driven by the tortfeasor. For example, an employee injured by a farmer's truck would have significantly different rights than one injured by a bus. The Illinois Supreme Court found the distinctions embodied in the section unreasonable, given the purpose of the Workmen's Compensation Act, which is to impose liability without fault on employers by virtue of the master-servant relationship and the employers superior ability to insure against the risk.[103.2]

Another Illinois case illustrative of the use of constitutional review in economic regulation cases is *Fiorito v. Jones*,[104] a 1968 decision. In that case several amendments to legislation which taxed occupations and services were found unconstitutional. The effect of the amendments was to exclude from taxation some service businesses and service persons such as laundries, dry cleaners, and physicians who possessed the same relevant traits as those taxed, namely, they rendered a service which involved the incidental transfer of property. Since the tax failed to treat businesses, which were similarly situated in terms of the purpose of the tax, in the same manner, the tax violated equal protection guaranties of the state and federal constitution.

In addition, the court found the tax legislation constitutionally infirm because the tax was based upon the gross receipts of the service business. This fact, concluded the court, made the exemptions even more arbitrary. The result would be, for example, that an auto repairman who charged $51, which included the installation of a one dollar spark plug, would be taxed on the entire $51 under a gross receipt tax base approach. This type of tax would only significantly further a purpose to tax a service, yet other service professions such as the practice of medicine were excluded from tax coverage. Given this analysis there was no rational basis for some of the exclusions contained in the amendments to the acts.

103.1. Section 29 of the 1947 Workmen's Compensation Act was in issue.

103.2. 412 Ill. 179, 196, 106 N.E.2d 129, 133 (1952).

104. 39 Ill.2d 531, 236 N.E.2d 698 (1968).

People v. McCabe,[105] involved a successful substantive constitutional challenge to laws outside the realm of economic intervention. McCabe was convicted of unlawful sale of marijuana. Pursuant to provisions in the criminal code providing for mandatory minimum penalties, the defendant, who had no prior conviction, was sentenced to the penitentiary for a period of 10 years to 10 years and a day. The defendant argued that constitutional deficiencies existed because marijuana was classified with hard drugs under the Narcotic Drug Act rather than the Drug Abuse Control Act which carried lesser penalties. After a lengthly, detailed comparative analysis of the drugs regulated in the two statutes with marijuana, the court concluded that the properties and effects of hard drugs such as opiates and cocaine on users differ considerably from those of marijuana. Therefore, there was no reasonable basis for classifying marijuana under the harsher Narcotic Drug Act.

In finding classification of marijuana as a hard drug in violation of equal protection,[106] the Illinois Supreme Court essentially reviewed the factual assumptions about the effect of marijuana which underly its regulation. *People v. McCabe* involved techniques of constitutional substantive review which have generally been discarded by the federal judiciary in the post-*Lochner* era. As the court in *McCabe* noted, a substantial body of scientific and medical opinion is now available concerning the effect of marijuana and there is little reason why such evidence properly presented to a court ought not to be taken into account where relevant to the exercise of substantive review. Nevertheless, review of the legislative facts in a substantive challenge to state definitions of crime and punishment is highly unusual in both the state and federal system.[107]

The Special Legislation Prohibition

Recent decisions employing the special legislation provisions of

105. 49 Ill.2d 338,275 N.E.2d 407 (1971).

106. The court held that the classification violated the equal protection limitations of both the federal and Illinois Constitutions. In addition, *McCabe* contains dicta that the classification also violated the special legislation prohibition. *Id.* at 350, 275 N.E. 2d at 413. Justices Underwood and Ryan dissented.

107. Numerous federal and state court decisions have rejected constitutional attacks on

the 1970 Constitution to find legislation unconstitutional strongly suggest that Lochnerian constitutional review in areas of economic regulation by the Illinois high court is going to continue to be very much a part of constitutional law in this state.

Section 22 of article IV of the 1870 Constitution prohibited the enactment of a special law in many numerated instances and concluded: "In all other cases where a general law can be made applicable, no special law shall be enacted."[108] The prohibition against special legislation was carried over in article IV, section 13, of the 1970 Constitution which states, "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination."[109]

The Illinois Supreme Court found the state's no-fault legislation unconstitutional in *Grace v. Howlett*.[110] A new provision entitled Compensation of Automobile Accident Victims[111] was added to the Illinois Insurance Code which required automobile liability insurance to include some no-fault benefits. Section 608[112] of the code placed a dollar limitation on recovery for pain and suffering, mental anguish, and inconvenience in actions arising out of the use of motor vehicles in cases other than death, dismemberment, permanent disability, or serious disfigurement. Companion section 600[113] of the Code provided basic no-fault benefits to persons

federal and state statutes classifying marijuana with the "hard drugs." Indeed, successful substantive equal protection attacks on the tenth amendment police power to define crime or punishment are virtually non-existent at the federal court level. *See* United States v. Eramdjian, 155 F.Supp. 914 (S. D. Cal. 1957); People v. Stark, 157 Colo. 59, 400 P.2d 293 (1965); Borras v. State, 229 So.2d 244 (Fla. 1969); People v. Keyes, 117 Ill.App.2d 471, 253 N.E. 2d 537 (1st. Dist. 1969); Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969); State v. White, 153 Mont. 193, 456 P.2d 54 (1969); Spence v. Sacks, 173 Ohio 419, 183 N.E.2d 363 (1962); Gonzales v. State, 373 S.W.2d 249 (Tex. Crim. 1963). A few courts have found constitutional deficiencies in the classification of marijuana as a hard drug. *See* English v. Miller, 341 F. Supp. 714 (E.D. Va. 1972); People v. Sinclair, 387 Mich. 91, 194 N.W.2d 878 (1972); State v. Zornes, 78 Wash.2d 9, 469 P.2d 9 552 (1970). *See also* Leary v. United States, 395 U.S. 6 (1969) (judicial review of legislative facts).

108. ILL. CONST. art. IV, § 22.

109. ILL. CONST. art. IV, § 13.

110. 51 Ill.2d 478, 283 N.E.2d 474 (1972).

111. Law of Sept. 2, 1971, ch. 73, §§ 1065.150 *et seq.* [1971] Ill. Laws 2542 (repealed 1975).

112. *Id.* at 2548.

113. *Id.* at 2542-43.

injured in accidents with non-commercial business vehicles. The combined effect of the General Damage Limitation in section 608 and the specific exemption of commercial vehicles from no-fault benefits produces several anomalous consequences. If, for example, two persons received identical injuries in separate automobile collisions the rights of the person negligently injured by a business delivery vehicle would be quite different from the rights of a person injured by a person negligently driving the family automobile. The first party injured by the commercial vehicle would not receive any payment under the no-fault benefits of section 600 and would have to prove a common law tort suit. Yet, despite the fact that these people received no benefits under the no-fault plan, they suffered the burdens of the statute because their common law right to recover for pain and suffering was severely limited. The court found that the exemption for commercial vehicles and their accident victims from the benefits of the statute violated the prohibition against special legislation in section 13 of article IV of the 1970 Constitution.

The special legislation analysis of the court in *Grace v. Howlett*[114] proceeded along the following lines. The special legislation prohibition in the 1970 Constitution does more than simply restate the judiciary's role under the equal protection provision of the new constitution. Section 13 of article IV has limited the scope of legislative experimentation with special legislation and increased judical responsibility for determining whether a general law "is or can be made applicable."[115] Since the mischief the legislation was designed to eliminate is present when exempted vehicles such as buses, taxicabs, or trucks cause personal injury, a general law applicable to all cases tainted with the mischief can be made available. The no-fault law thus constituted prohibited special legislation.[116]

Other Illinois Supreme Court cases involving laws as special legislation under the 1970 Constitution have recognized the ex-

114. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

115. ILL. CONST. art. IV, § 13. *See* note 38 *supra*. The court also found that other provisions in the code violate the 1970 constitutional guarantees of trial by jury and the constitutonal provisions relative to the scope of original jurisdiction for circuit courts.

116. 51 Ill.2d at 488, 283 N.E.2d at 479.

panded role of the judiciary in exercising constitutional review in special legislation disputes.[117] In *People ex rel. East Side Levee & Sanitary Dist. v. Madison City,*[118] the supreme court found a 1972 statutory amendment altering and expanding sanitary districts in two counties unconstitutional as special legislation in violation of article IV, section 13 of the 1970 Constitution. Relying primarily on *Grace v. Howlett* and dicta in *Bridgewater v. Holtz*[119] the court reaffirmed its view that section 13 altered traditional deference granted the legislature in determining whether a general law could be held applicable. Applying the constitutional standard for special legislation, the court found no reasons for restricting the advantages of the statute to just two districts.

Special Legislation: Under Inclusiveness

Perhaps the most interesting aspect of the reasoning in *Grace v. Howlett* is that the court adopts a standard for constitutional review in special legislation cases which is drastically different from the federal equal protection standard. Under the special legislation standard the essential inquiry is whether a "general law can be made available." A primary effect of this inquiry is to license broad judicial review of laws which under reach in the sense that such laws are only directed at some of the persons tainted with the mischief the law is designed to eliminate. At the federal level it is clear that the equal protection clause does not license broad judicial review of legislation which deals with problems "one step at a time" where only property interests are affected. Two United States Supreme Court cases illustrate the difference between the federal equal protection standard and the state special legislation standard.

In *Williamson v. Lee Optical Inc.*,[120] in 1955, the Supreme Court upheld an Oklahoma law which limited persons who could lawfully fit lens or replace frames to licensed optometrists or

117. In Bridgewater v. Hotz, 51 Ill.2d 103, 281 N.E.2d 317, (1972) the Illinois Supreme Court sustained statutes establishing different periods of voter registration in different counties against special legislation claims but cited added judicial responsibility under the special legislative provision in the 1970 Constitution.

118. 54 Ill.2d 442, 298 N.E.2d 177 (1973).

119. 51 Ill.2d 103, 281 N.E.2d 317 (1972).

120. 348 U.S. 483 (1955).

ophthalmologists and thus effectively put opticians out of business in that state. A lower federal court had found that the Oklahoma law violated equal protection in part because it exempted sellers of ready-to-wear glasses. Reversing the district court, a unanimous Supreme Court, in an opinion written by Justice Douglas, stated that although the statute under reached by exempting ready-to-wear glasses, legislative reform may take "one step at a time" and that the legislature may select "one phase of one field and apply a remedy there, neglecting the other."[121]

A second dramatic example of under inclusive legislation which satisfied equal protection is found in *Railway Express Agency v. New York*,[122] a 1949 Supreme Court case in which a New York law prohibiting paid advertisement on a vehicle, unless it was advertising the business of the vehicle's owner, was upheld. The law was designed to eliminate distractions and promote safety in the use of streets by pedestrians and automobiles. The fact that signs on business vehicles or roadside advertisements would also be distractive, yet were not prohibited, did not make the legislation in violation of equal protection. The state action was constitutionally permissible as long as it reached some of the persons who were tainted with a mischief which could be regulated within the scope of tenth amendment police power.

Justice Schaefer recognized the difference in scope of constitutional review under the special legislation provision and federal equal protection principles in *Grace v. Howlett* and specifically rejected the "one step at a time" approach of *Williamson v. Lee Optical, Inc.* in article IV, section 13 cases.[123]

A most illustrative example of the difference between federal equal protection standards and state special legislation standards may be found by examining litigation involving the constitutionality of laws requiring employers to pay employees for time off of work on election day. A Missouri law penalizing employers for deducting employees wages for being absent for four hours on election day was sustained by the United States Supreme Court against equal protection claims in the 1952 decision of *Day-Brite*

121. *Id.* at 489.
122. 336 U.S. 106 (1949).
123. 51 Ill. 2d at 478, 283 N.E.2d at 479.

Lighting, Inc. v. Missouri.[124] The statute was designed to eliminate obstacles to the exercise of voting rights. Given this purpose, the statute overreached in that every employee who took leave of work for a period of time on election day had to be paid whether or not he in fact voted. In addition, the employee had to be paid for the time away from work whether or not he spent the entire time exercising his right to vote. The statute also under reached in that non-employee voters were not encouraged to vote by government economic "incentives." A nearly unanimous Court brushed aside these difficulties and affirmed the constitutionality of the law, saying to do otherwise would be to return to the philosophy of *Lochner*.

In 1955 when the Illinois Supreme Court dealt with a similar Illinois law the court took an opposite posture and found the Illinois pay-while-voting statute unconstitutional basing its opinion on the protection against "special legislation." In *Heimgaertner v. Benjamin Electric Manufacturing,*[125] the Illinois Supreme Court relied heavily on the analysis of the dissenting opinion in *Day-Brite Lighting.*[126] The primary infirmity of the statute was that in providing for increased election participation it was under inclusive. Self-employed persons, those who work for fees and commission, housewives, and farmers who work during the day were not included in the statute. Yet the exercise of the franchise by many of these workers may be inhibited to the same extent as wage earners by financial or other limitations. Thus, the pay-while-voting statute constituted prohibited special legislation. Under the Illinois Constitution the legislature could not deal with this problem "one step at a time."

An Evaluation of Lochnerism in Illinois

The Illinois Supreme Court has taken a major stride in ridding itself of some of the strictures of a rigid non-interventionist post-*Lochner* philosophy toward constitutional review in cases involving property or contract interests and definition of crime and punishment under the police power. This path taken by the court

124. 342 U.S. 421 (1952).
125. 6 Ill.2d 152, 128 N.E.2d 691 (1955).
126. 342 U.S. 421, 425 (1952)(Jackson, J., dissenting).

is not without its risks and difficulties.

Lochner is one of the most thoroughly discredited decisions of the Supreme Court. Yet, while there is general agreement that the Court went wrong, there is a great deal of disagreement about precisely what that wrong was. If there is a leading view, it probably is that the primary evil of *Lochner* was in the attempt by the Court to, "fasten on the country . . . a pattern of economic regulation believed by the Court to be essential to the fullest development of the nation's economy."[127] Only Justice Holmes, in dissent, was to stress that view. Other suggestions on the evils of *Lochner* are: (1) that the Court was adopting a subjective natural law interpretation of the Constitution;[128] (2) that substantive review in that era was irregular and unprincipled;[129] (3) that the Court was substituting its notion of the purpose of police power for the government's articulated purpose;[130] (4) that the Court was implying rights wholecloth from the Constitution;[131] (5) that protection of economic interests by constitutional review sacrificed the Courts primary responsibility in protecting fundamental personal rights and discrete and insular minorities.[132] To these might also be added the judicial technique of setting aside legislative or societal facts which prompted the legislation. Some of the criticisms of the United States Supreme Court in the discredited interventionist era may be applied to the present Illinois court's employment of constitutional review under the 1970 Constitution.

Sometimes in economic regulation cases the constitutional review in Illinois resembles a debate between economists over desirable policy,[133] rekindling the ghost of Justice Holmes' famous admonition in dissent in *Lochner* that the constitution was "not intended to embody a particular economic theory."[134] An example

127. Strong, *supra* note 99.

128. Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting).

129. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

130. Tribe, *Foreward: Toward A Model of Rules in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

131. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920 (1973).

132. United States, v. Richardson, 418 U.S. 166, 180 (1974) (Powell, J., concurring).

133. *See* Bloom v. Mahin, 61 Ill.2d 70, 329 N.E.2d 213. (1975).

134. Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

of this is found in *Bloom v. Mahin*,[135] where equal protection and special legislation challenges to a regressive graduated tax discount based upon volumes of revenue stamps purchased were rejected by the Illinois Supreme Court. In affirming the constitutionality of the statute, the court cited a Justice Cardozo statement in a *Lochner* era decision summarizing a diminishing returns kind of economic theory which said that when a certain degree of volume is reached efficiency in cost per unit decreases. Given this theory the Illinois Supreme Court concluded in *Bloom* that the graduated tax discount furthered the statutory purpose of shifting the "cost of collection" to the purchaser.

It also may be said that the Illinois Supreme Court selectively intervenes in a way that is not always consistent or principled in the economic regulation area. Some under inclusive classifications have recently withstood special legislation challenges in cases not readily distinguished from *Grace v. Howlett*.[136] The same can be said of equal protection and special legislation challenges to criminal prosecutions stimulated primarily by *McCabe*. Numerous such challenges to criminal prosecutions reached the appellate court level and lost in the 1974-75 term alone.[137]

To some extent, inconsistency in the exercise of constitutional review seems to be inherent in judicial assumption of broad constitutional responsibilities in the economic regulation area. The purposes which may be a proper basis for the exercise of police power are almost infinite. Much regulatory legislation designed to protect the health, safety, and general welfare of citizens is less than perfectly reasonable. A state court does not have the resources to closely scrutinize the reasonableness of every law enacted by state or municipal legislatures; nor would it be desirable for that to happen.

Governing units need some discretion for experimentation in economic policy and crime control. Therefore the fact that intervention is selective is not a sufficient reason by itself for not

135. 61 Ill.2d 70, 329 N.E.2d 213 (1975).

136. *See, e.g., id.* Delaney v. Badame, 49 Ill.2d 168, 274 N.E.2d 353 (1971).

137. *See, e.g.*, People v. Borlow, 58 Ill.2d 41, 317 N.E.2d 49 (1974); People v. Henninger, 28 Ill.App.3d 557, 328 N.E.2d 580 (4th Dist. 1975); People v. Warfield, 26 Ill.App.3d 772, 326 N.E.2d 211 (1st Dist. 1975); People v. Mitchell, 26 Ill.App.3d 300, 325 N.E.2d 93 (5th Dist. 1975).

permitting review in the economic area. The legislature ought to be allowed to experiment on the one hand and the courts check against palpably preferential or unreasonable exercise of police power on the other hand without provoking a constitutional crisis at the state level.

There is good reason to be concerned about a great deal of constitutional review in the economic regulation area where the price paid is the erosion of the court's effectiveness in exercising its primary responsibility to protect fundamental personal rights and government discriminations directed at discrete and insular minorities. Constitutional review under the special legislation provision should not be exercised at the expense of basic liberties. Such is the delicate tightrope that the Illinois Supreme Court must walk under the heavy and complex responsibilities imposed by the prohibition against special legislation in the 1970 Illinois Constitution. The future promises to be one of judicial activism and controversy.

CONCLUSION

The 1870 Illinois Constitution was interpreted by the Illinois Supreme Court to expand rights beyond federal equal protection in the area of governmental discrimination directed solely at property and contract interests. This was accomplished chiefly by relying on the constitutional prohibition against special legislation. Recent Illinois Supreme Court decisions interpreting the prohibitions against special legislation and the equal protection clauses of the 1970 Constitution have invalidated the classification of marijuana as a hard drug as well as no-fault legislation. These decisions suggest a continuation of the expansion of rights beyond federal equal protection in the area of governmental discrimination of economic interests. In addition, the new 1970 constitutional language directed specifically at sex discrimination has been interpreted by the supreme court to grant sex-based discriminations the status of "suspect" classification, demanding rigid scrutiny by the courts. This important development places Illinois in a unique position among the states. Not surprisingly, state appellate courts with virtually no federal or state precedents to guide them, have reached anomalous and contradictory interpretations of gender-based discriminations.

Several factors have contributed to the secondary role that state constitutions generally play in protecting individuals against governmental discrimination. The supremacy of the Federal Constitution prevents state constitutions from granting more power to state governments to discriminate than is allowed under the equal protection clause of the fourteenth amendment. State courts generally have concurrent jurisdiction over federal constitutional claims. Thus, even in cases initiated in state courts against governmental discriminations, federal equal protection plays a dominant role. Although a state may not restrict federal constitutional rights, a state constitution may expand rights against governmental discriminations at the state level. In the area of expanding constitutional protection, the Illinois constitution plays a significant role.[138]

138. The California Supreme Court has also interpreted the state constitution to grant suspect status to sex discrimination. *See* Sail'er Inn v. Kirby, 5 Cal.3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), *compare* Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 60 (1971) *with* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Yet despite the opportunity for expansion it is probably the case that state constitutional equal protection provisions will not be generally interpreted by state judges to give greater rights than those given by federal equal protection.