CONSTITUTIONAL LAW—EQUAL PROTECTION—ILLEGITIMACY
CLASSIFICATIONS REQUIRE REASONABLY STRICT SCRUTINY—

In Trimble v. Gordon the United States Supreme Court
held that a probate statute which excluded an illegitimate child
as an heir of its father violated the equal protection clause of the
fourteenth amendment by discriminating invidiously against
illegitimates. In Trimble, the Court clarified its present attitude toward illegitimacy classifications and substantially
strengthened the equal protection standard of review in this
area. The purpose of this note is to analyze the United States
Supreme Court's evolving standard of review in the area of
illegitimacy in light of the Court's changing application of equal
protection models.

FACTS AND HOLDING

Deta Mona Trimble was born out of wedlock to Jessie Trim-
ble and Sherman Gordon. Gordon and Trimble had lived to-
gether from 1970 to 1974. In 1973, the Circuit Court of Cook
County entered a paternity order finding Gordon to be the
father of Deta Mona, and ordering him to pay $15.00 a week for
her support. Thereafter Gordon complied with the order and
openly acknowledged Deta Mona to be his offspring. In 1974
Gordon died intestate; his estate consisted of a 1974 Plymouth
automobile valued at $2,500.

Shortly after Gordon's death, Trimble, as mother and next
friend of Deta Mona, filed a petition for letters of administra-
tion, determination of heirship, and declaratory relief in the
Probate Division of the Circuit Court of Cook County, Illinois.
That court entered an order determining heirship, identifying
as Gordon's heirs his father, mother, brother, two sisters, and a
half brother. Deta Mona was excluded solely on the authority of
section 12 of the Illinois Probate Act, which provided that an
illegitimate child is the heir of its mother. After notice of appeal

3. 97 S. Ct. at 1468. Mr. Justice Powell, speaking for the Court, held that §
12 could "not be squared with the command of the Equal Protection Clause of
the Fourteenth Amendment." Id.
4. Id. at 1462.
5. Id.
was filed the Illinois Supreme Court entered an order allowing direct appeal of the trial court's decision to the Illinois Supreme Court. The appellants in *Trimble* were permitted to file an amicus brief in *In re Estate of Karas* which involved identical issues. In their amicus brief in the lower court, the appellants challenged section 12 on the grounds that it violated the equal protection clause of the fourteenth amendment by discriminating invidiously on the basis of illegitimacy and sex.

On June 2, 1975, the Illinois Supreme Court handed down its decision in *Karas*, which sustained section 12 against all constitutional challenges. The court based its decision on three

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7. 97 S. Ct. at 1462.
8. 61 Ill.2d 40, 329 N.E.2d 234 (1975).
9. The consolidated appeals presented the common issue of whether an acknowledged illegitimate child may inherit from her father who died intestate, never having married the child's mother.

In cause No. 46986 Louis Karas died intestate. The Circuit Court of Cook County declared his widow to be his only heir at law. Mary Sodermark, petitioner, sought to vacate the order of heirship claiming to be the child of Louis Karas and Estelle Ross, whom Karas never married. The circuit court granted Mrs. Karas' motion to strike and dismiss the petition, and the appellate court affirmed. *In re Estate of Karas*, 21 Ill. App. 3d 564, —, 315 N.E.2d 603, 608 (1974). Thereafter the Supreme Court of Illinois granted leave to appeal.

In cause No. 47092 Robert Woods died intestate at age 81. He left no surviving spouse nor legitimate children. The Circuit Court of Cook County determined that there were collateral heirs at law of the deceased. Margaret Marie Collins, petitioner, sought to obtain letters of administration and a declaration of heirship on her behalf. She claimed in her petition that she was the acknowledged illegitimate daughter of the deceased, and lawful heir to his estate. The circuit court sustained the motion of the collateral heirs at law to strike and dismiss the Collins' petition. The Illinois Supreme Court granted direct appeal to its court. 61 Ill.2d at —, 329 N.E.2d at 236.

10. Trimble, in her amicus brief, argued that both parents had a duty to support a child and that upon the death of one parent the other's responsibility increased. The appellant further urged that § 12 discriminated against women by failing to provide for their children a legal right of inheritance equivalent to that granted to the children of the surviving male parents. The Illinois Supreme Court found no merit to the amicus' arguments. 61 Ill.2d at —, 329 N.E.2d at 242.

11. *Id.* The Illinois Supreme Court concluded that petitioners were not denied equal protection of the law. The court further held that it was not a deprivation of due process of law "by the trial courts' refusals to permit a hearing wherein they might seek to establish the paternity of the decedents." *Id.*
rationales. First, it noted that the state had an interest in the promotion of legitimate family relationships. Second, it cited the state's interest in establishing a method of property distribution. And third, it reasoned that the state's discriminatory scheme did not create an "insurmountable burden" to illegitimates taking property, since a decedent could leave a will.\textsuperscript{12}

On September 24, 1975, oral argument was heard in the \textit{Trimble} case. In an oral opinion, the Illinois Supreme Court affirmed the trial court's decision on the authority of \textit{Karas}.\textsuperscript{13}

On appeal, the United States Supreme Court reversed, holding that section 12's discrimination against illegitimate children violated the equal protection clause of the fourteenth amendment.\textsuperscript{14}

\textbf{BACKGROUND}

Historically, blacks have been accorded special protection under the fourteenth amendment\textsuperscript{15} and judicial intervention under the equal protection clause originally was confined solely to cases involving discrimination against blacks.\textsuperscript{16} While statutes which use race as a classifying criterion have always been suspect, the number of "suspect classes" has grown in recent years to include other ethnic groups\textsuperscript{17} and aliens.\textsuperscript{18}

\begin{footnotes}
\item[12.]
Id. at —, 329 N.E.2d at 238-40. The Illinois Supreme Court, in sustaining these purposes, relied primarily upon the case of \textit{Labine v. Vincent}, 401 U.S. 532 (1971). \textit{See} text at notes 37 and 112 \textit{infra}.
\item[13.]
97 S. Ct. at 1462-63.
\item[14.]
Id. at 1468. The United States Supreme Court concluded that § 12 was unconstitutional in discriminating against illegitimates; for this reason it did not reach the appellant's sex discrimination claim. \textit{Id.} at 1463.
\item[15.]
In \textit{Loving v. Virginia}, 388 U.S. 1, 11 (1967), the United States Supreme Court held that "at the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny.'" For a comprehensive examination of suspect classifications, \textit{see} \textit{Developments in the Law — Equal Protection}, 82 \textit{Harv. L. Rev.} 1065, 1087-1120 (1969) [hereinafter cited as \textit{Developments}].
\item[16.]
Gunter, \textit{The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 \textit{Harv. L. Rev.} 1, 8 (1972). \textit{See also} \textit{Slaughter House Cases}, 83 U.S. (16 Wall.) 36, 81 (1872), in which the Court held that any action of a state not directed by way of discrimination against blacks as a class, or on account of their race, will not call into action the equal protection clause.
\item[17.]
In \textit{Korematsu v. United States}, 323 U.S. 214, 216 (1944), the Court held that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." \textit{See also} \textit{Developments}, supra note 15, at 1088, 1124-27. A classic study of equal protection before the Warren Court is Tussman & tenBroek, \textit{The Equal Protection of the Laws}, 37 \textit{Calif. L. Rev.} 341 (1949).
\item[18.]
The Court, in \textit{Graham v. Richardson}, 403 U.S. 365 (1971), invalidated Pennsylvania's and Arizona's denial of welfare benefits to aliens. The Court officially named alienage a "suspect" class. \textit{Id.} at 371-72. Even prior to \textit{Graham},
\end{footnotes}
Where a statute discriminates against members of a suspect class, the Court subjects such a statute to the “strict scrutiny” or “compelling state interest” test. Under this test, a statute containing a discriminatory classification is “subject to the most rigid scrutiny.” This scrutiny requires that the state, in order to save its statute, must either establish a compelling state interest for retaining the statute, or prove that it is necessary for some “overriding purpose.” Few such statutes have passed this constitutional requirement.

The strict scrutiny test has also been applied to statutes which infringe upon a “fundamental right.” In the area of equal protection analysis, such fundamental rights are few in number: privacy, procreation, voting, and the right of interstate laws which discriminated on the basis of alienage were subjected to strict scrutiny. See, e.g., Truax v. Raich, 239 U.S. 33 (1915). For a discussion of Truax and the import of discriminatory purpose see Developments, supra note 15, at 1091 n. 86, and accompanying text. For discussions of Graham, see Note, 10 Duq. L. Rev. 280 (1971).

19. In any statutory classification line drawing takes place and it is through this process that statutes are directed to cover only certain classes of individuals. A legislature defines a class when it enacts a law covering “all persons convicted of three felonies,” and when that statute denies the members of that class certain rights not denied to nonmembers, the members of the class have been the objects of discrimination (i.e., denied a right not denied to others). For a comprehensive analysis of discriminatory classifications, see Tussman & tenBroek, supra note 17, at 344-53.


22. Gunther, supra note 16, at 18 argues that the strict scrutiny test is “strict in theory and fatal in fact.” Chief Justice Burger, dissenting in Dunn v. Blumstein, 405 U.S. 330 (1972), stated that “to challenge [a statute] by the ‘compelling state interest’ standard is to condemn it. . . . [N]o state law has ever satisfied this seemingly unsurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.” Id. at 363-64. The Court in Dunn struck down a statutory residency requirement which required a would-be voter to have been a resident for a year in the state and three months in a county. The Court held that the statute did not further any compelling state interests. Id. at 360.

23. The decision in Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) held that to deny contraceptives to nonmarried adults violated the equal protection clause of the fourteenth amendment. See also Griswold v. Connecticut, 381 U.S. 479, 485 (1965), wherein the court recognized a protected zone of privacy for married persons.

24. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) invalidated an Oklahoma law which required mandatory sterilization of criminals guilty of certain crimes. Skinner has been recognized today as “the grandfather of fundamental interest equal protection cases. . . .” Gunther, supra note 16, at 28.

25. In Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966), the Court invalidated Virginia’s poll tax on the ground that it infringed the fundamental right to vote. Mr. Justice Douglas suggested that classifications on the basis of wealth were similar to those based on race and therefore traditionally disfavored. The case however turned on the fact that the right infringed was a
travel.\(^{26}\)

In the case of economic and social legislation, the Court has employed a more deferential approach in determining whether the classifications of such legislation violate the equal protection clause. This approach has been called the "rational basis" or "minimal scrutiny" test. The elements of this test have been thus stated by the Court: (1) The state may classify discriminatorily against persons so long as the classification is reasonable and not arbitrary; (2) a rational classification is not void merely because it is not made with mathematical nicety; (3) if any conceivable state of facts can be assumed which would sustain the statute's constitutionality, such facts shall be assumed and the statute shall pass constitutional muster; and (4) the challenger shall bear the burden of proving that the classification is arbitrarily drawn.\(^{27}\) As a result of this deferential analysis, few statutes have failed to pass constitutional muster.\(^{28}\)

The standard of review under the rational basis test provided insufficient protection outside the area of economic and social legislation. Therefore, in recent years the Court began to develop a test between the strict scrutiny and rational basis tests. In Reed v. Reed,\(^{29}\) the Court struck down an Idaho probate statute which gave men mandatory preference over women in administering a decedent's probate estate.\(^{30}\) Although the Court employed the traditional rational basis language, it went further
and found that the statute’s discrimination on the basis of sex did not rest upon some ground of difference having a “fair and substantial” relation to the object of the legislation. Thus, in Reed, the Court added to the requirement of “any conceivable purpose” the requirement that the statutory discrimination bear a “substantial relation” to the object of the legislation.

This intermediary test, which might be called one of reasonably strict scrutiny, has been used not only when a classification has been based on sex. It has also been applied in cases dealing with discriminatory schemes based upon illegitimacy classifications. In Levy v. Louisiana, the Court invalidated a state statute which precluded illegitimate children from recovering for the wrongful death of their mother under that state’s wrongful death statute. Decided on the same day as Levy, Glona v. American Guarantee & Liability Insurance Co. struck down a state statute which precluded a mother from recovering damages for the wrongful death of her illegitimate child. Both Levy and Glona used traditional equal protection language, and yet invalidated the statutory schemes. However, neither case clearly articulated the standard being applied. Likewise vague was Labine v. Vincent, which upheld a statute barring acknowledged illegitimates from sharing equally with legitimate children in the estate of their father who died intestate. Although Labine appeared to be a return to the deferential approach, the Court did not analyze the appropriate standard of review. However, it did distinguish Labine from the Levy

31. 404 U.S. at 76. The Court, citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), stated that “‘[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation...’”


37. 401 U.S. 532 (1971).

38. Id. at 539-40.

39. By upholding the discrimination in the Louisiana intestacy law, it appeared that the Court was not planning the “judicial demise of most inequities based on illegitimacy.” Note, 49 TEX. L. Rev. 1132, 1133 (1971). The Court in Labine did not analyze the Louisiana statute in terms of the requirements of the
Glona cases. It found the distinguishing feature to be that the earlier cases sounded in tort rather than property, and that the discrimination could have been overcome had the father left an expressed will.\footnote{40}

In Weber v. Aetna Casualty & Surety Co.\footnote{41} the Court struck down a Louisiana workmen’s compensation statute which denied equal recovery rights to unacknowledged illegitimates.\footnote{42} Here the Court made it clear that a test other than minimal scrutiny was appropriate. Mr. Justice Powell’s majority opinion asserted that the state did not establish a substantial\footnote{43} state interest in the Weber case, and that the classification did not bear a “significant”\footnote{44} relation to the purposes served by the statute.

In the October term of 1975, the Court handed down its decision in Mathews v. Lucas.\footnote{45} In Mathews, the Court upheld a section of the Social Security Act which required an illegitimate, prior to receiving surviving child’s insurance benefits, to show that the deceased wage earner was the claimant child’s parent, and that at the time of the wage earner’s death the claimant child was either living with the parent or that the parent was contributing to its support.\footnote{46}

The Court upheld the statute, but it did not articulate the traditional equal protection test. Mr. Justice Blackmun stated that the appropriate standard of review in the area of illegitimacy classifications is “not a toothless one,”\footnote{47} and that the statutory scheme should bear a substantial relation to the purpose of the statute. Mr. Justice Blackmun stated finally that the statute

\footnote{40} The Court did not explain the significance of the tort-property distinction. See note 39 supra.
\footnote{41} 406 U.S. 164 (1972).
\footnote{42} Id. at 170. For a discussion of the standard articulated in Weber, see text at notes 119-126 infra.
\footnote{43} 406 U.S. at 170.
\footnote{44} Id. at 175.
\footnote{45} 427 U.S. 495 (1976).
\footnote{46} Id. at 516. The Court held that the “Act does not impermissibly discriminate against [illegitimates]. . . .”Id.
\footnote{47} Id. at 510. The Court cited Reed to support its language here; Reed had required that a statute bear a fair and substantial relation to the object of the legislation. See text at note 31 supra.
did not impermissibly discriminate against illegitimates.\textsuperscript{48}

Although the Court failed to articulate an appropriate standard of review in these earlier illegitimacy cases, two conclusions could be drawn: (1) the appropriate standard of review lies somewhere between the deferential and strict scrutiny approaches,\textsuperscript{49} and (2) classifications on the basis of illegitimacy are not suspect.\textsuperscript{50}

The significance of \textit{Trimble} lies in its attempt to set a clear standard of review in this new area for equal protection analysis. Mr. Justice Powell's majority opinion articulated clearly and concisely the elements of the new reasonably strict scrutiny test.

\textbf{TRIMBLE V. GORDON}

\textbf{MR. JUSTICE POWELL'S MAJORITY OPINION}

In \textit{Trimble}, the Court required that section 12 of the Illinois Probate Code bear some rational relationship to a legitimate state purpose. In addressing this two-pronged problem—rational relationship and legitimate state purpose—the Court restricted itself to considering only those purposes proffered by the state supreme court.\textsuperscript{51}

One purpose proposed by the appellees was that section 12 mirrored the presumed intentions of the citizens of Illinois regarding the disposition of property at death.\textsuperscript{52} The Court rejected that purpose without consideration, holding that it did not believe that section 12 was enacted for that purpose.\textsuperscript{53} It further found that the Illinois Supreme Court, in its "careful opinion," had not relied on this theory of presumed intent and that "one would expect a state supreme court to identify the state inter-

\textsuperscript{48} 427 U.S. at 516.

\textsuperscript{49} Gunther, \textit{supra} note 16, at 20-24. Gunther in his article titles this intermediary standard "New Bite for the Old Equal Protection." \textit{Id.} at 20. He suggests that this new test focuses on the legislative means chosen to effectuate the object of the statute. The new test requires that the means chosen must "substantially further legislative ends." \textit{Id.}


\textsuperscript{51} \textit{Id.} at 1468. The Court rejected a possible purpose proffered by the appellees to justify § 12's discrimination, stating that the appellees' theory "is not relied upon in the careful opinion of the Illinois Supreme Court examining both the history and the text of § 12. This omission is not without significance, as one would expect a state supreme court to identify the state interests served by a statute of its state legislature." \textit{Id.}

\textsuperscript{52} \textit{Id.} at 1467-68.

\textsuperscript{53} \textit{Id.} at 1468.
ests served by a statute of its state legislature." Finally, the Court stated that it would restrict itself to considering only those purposes articulated by the Illinois court and that absent a convincing demonstration, it would not entertain an additional state purpose that had been ignored by the state supreme court.

The Court did find that the enactment of section 12 was motivated by the Illinois Legislature's wish to "ameliorate the harsh common-law rule under which an illegitimate child was filius nullius, and incapable of inheriting from anyone." Although section 12 did not bring illegitimate children into parity with legitimate children, it did operate to improve their position in that it allowed illegitimate children to inherit from their mothers. The Court stated that the remaining discrimination would have to be considered in the light of this "motivating purpose."

Turning to the problem of rational relationship, the Court relied primarily on Weber in determining the limits of rationality. In Weber the Court had required that the challenged statute, which precluded illegitimates from recovering under the Louisiana's workmen's compensation statute, bear "some rational relationship to a legitimate state purpose." The Court there understood "some rational relationship" to mean a "significant" relation, and involve a "substantial" state interest. 

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54.  Id.
55.  Id. This approach appears to negate the hypothesis stated in Note, 82 YALE L.J. 123, 128 (1972), that it is always possible for the Court to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it. See note 27 supra.
56.  97 S. Ct. at 1464. At common law, a child born out of wedlock was considered to be filius nullius (the child of no one). Such a child's parent had neither the duty of support nor the right of custody and the stigma of illegitimacy could not be cured by acknowledgment. Note, 18 VILL. L. REV. 759, 760 n. 12 (1973). Some states have attempted to mitigate the common law hardship by either narrowing the statutory definition of an illegitimate, or by providing a means of legitimizing an otherwise illegitimate. See Krause, Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy, 44 TEX. L. REV. 829, 841-45 (1966).
57.  97 S. Ct. at 1464.
58.  The Court's analysis began by isolating the legitimate state purposes, and proceeded by testing the statute against these purposes, requiring at minimum a reasonable relationship between the purpose and the statute's discriminatory scheme.
60.  Id. at 175.
61.  Id. at 170. The Trimble Court noted that Weber recognized that judicial deference is appropriate where the challenged statute involves a substantial state interest. 97 S. Ct. at 1464 n. 12. However, while reaffirming this position, the Trimble Court further held that there is a point beyond which such deference
In Trimble, the Court stated that despite the fact that the strict scrutiny test does not apply, the appropriate test "is not a toothless one . . . , a proposition clearly demonstrated by our previous decisions in this area." Armed with this standard of review, the Court analyzed the Illinois Supreme Court's articulated purposes.

Because there was no written opinion in the case of Trimble v. Gordon arising out of the Illinois Supreme Court, the Court's analysis focused upon the Karas decision.

In Karas, the Illinois Supreme Court had noted that one of the state's purported interests was the promotion of legitimate family relationships. The Court in Trimble recognized this interest as one of legitimate state concern. However, since the state court had not analyzed the relationship of this purpose to the discriminatory scheme, the Court held that this purpose failed to protect section 12 against the constitutional challenge. Mr. Justice Powell stated:

In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose. No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society. The flaw in the analysis lies elsewhere . . . . The court below did not address the relation between § 12 and the promotion of legitimate family relationships, thus leaving the constitutional analysis incomplete.

This was a substantial strengthening of the standard of review in this area. The Court made it clear that it would not allow the state's proffered purpose to protect section 12 when such is given incomplete analysis in the lower court. The Court's own analysis of the relationship between the promotion of legitimate family relationships and section 12 was stated in these terms:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust . . . . 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. cannot justify discrimination. In establishing this final proposition, the Court made clear that such statutes are subjected to more than minimal scrutiny. Id. at 1465 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1971)).
The Illinois Supreme Court had also noted the state’s interest in establishing a method of property distribution. The majority in Karas held that the discriminatory scheme was justified because “proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors.” The court had focused primarily upon the difficulty of proving paternity, and argued that this difficulty coupled with the threat of spurious claims supported the rationality of the statutory discrimination. The Trimble Court noted that “[h]ere the court’s analysis is more complete.”

However, the Court was still not satisfied with the lower court’s improved analysis: “We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between section 12 and the state’s proper objective of assuring accuracy and efficiency in the disposition of property at death.”

Mr. Justice Powell went further and said that since the lower court failed to consider the possibility of a “middle ground” between the extremes of complete exclusion and case by case determination, some “significant categories of illegitimate children” were unjustly discriminated against. He said that many children could have been recognized without jeopardizing the orderly settlement of estates.

Finally, the Illinois Supreme Court had noted that the dece-
dents could have left substantial portions of their estates to their illegitimate children by simply leaving a will. The state court reasoned that since this option was open to the decedents, the state's discriminatory scheme did not create an "insurmountable burden" preventing illegitimates from taking anything at all in any case.

The Court stated that by focusing attention upon a hypothetical set of facts, the state court's analysis lost sight of the essential question, which is the constitutionality of discriminating against illegitimates in a state intestate succession law. Mr. Justice Powell explained that "[h]ard questions cannot be avoided by a hypothetical reshuffling of the facts." He further stated that "[d]espite its appearance in two of our opinions, the focus on the presence or absence of an insurmountable barrier is somewhat of an analytical anomaly." The real question was whether the statute could pass the muster of rationality; if a law cannot be sustained under that analysis, "it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances." The Court concluded that for this reason, the available alternative of a father's ability to include an illegitimate child in his will had no constitutional significance.

Mr. Justice Rehnquist's Dissent

Mr. Justice Rehnquist initiated his disapproval of the majority's finding by stating that the fourteenth amendment's prohibition against any state denying to any person the equal protection of the laws "is undoubtedly one of the majestic generalities of the Constitution." He accused the Court of re-
garding the equal protection clause as a "cat-of-nine-tails to be kept in the judicial closet as a threat to legislatures . . . "81

Mr. Justice Rehnquist stated that except in areas where the "framers obviously meant it to apply — classifications based on race or on national origin . . . , the Court's decisions can fairly be described as an endless tinkering with legislative judgments. . . . "82 The dissent urged that the fourteenth amendment did not make the Court into a council of revision, and did not grant the Court the authority to nullify state laws which were "merely felt to be inimical to the Court's notion of the public interest."83

Specifically narrowing in on the classification in the instant case, Mr. Justice Rehnquist stated that it is apparent that a new standard of review was articulated by the Trimble Court, but that the precise scrutiny intended is confusing.84 He recognized that the appropriate scrutiny involved "some analysis of the relation of the 'purpose' of the legislature to the 'means' by which it chooses to carry out that purpose."85

The dissent stated that a large part of the Court's opinion was devoted to its assessment of whether section 12 of the Illinois Probate Code did or did not advance the purpose of the Illinois Legislature.86 He argued that the majority did not recognize the most obvious purpose. Mr. Justice Rehnquist stated that he failed to see how it could be doubted that the purpose of the Illinois legislature in enacting section 12 was to make the language contained in that section a part of the Illinois law.87

The dissent suggested that Mr. Justice Powell's use of the term "purpose" expanded its normal meaning, that its use in the majority opinion was more akin to "motive" than to purpose.88 Mr. Justice Rehnquist stated that inquiry into legislative motive is a delicate method of analysis; to ask what motivated the individual legislators to vote for this particular section of the Probate Act poses a very complex and difficult question. The dissent further argued that a statute is rarely passed into law by

81. 97 S. Ct. at 1469.
82. Id. Mr. Justice Rehnquist had voiced a similar concern in his dissent in Weber. There he stated that the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872), restricted application of the equal protection clause to discrimination based upon racial classifications. 406 U.S. at 178.
83. 97 S. Ct. at 1469.
84. Id. at 1470-71.
85. Id. at 1471.
86. Id.
87. Id.
88. Id.
a legislature motivated solely by a single concern, and to pursue that line of reasoning is therefore inappropriate. \(^8\)

Mr. Justice Rehnquist dissented not only as to the majority’s emphasis on the legislative purpose of section 12, but also as to the Court’s use of a “hybrid” test. He argued that this new test, by requiring a fit between legislative means and ends, places the Court in the position of second guessing the state legislatures. Since all statutes will involve a more or less imperfect fit, the Court is inherently required to ask itself: “[H]ow much ‘imperfection’ between means and ends is permissible? In making this judgment it must throw into the judicial hopper the whole range of factors which were first thrown into the legislative hopper.” \(^9\)

Mr. Justice Rehnquist summarized his dissent as to the use of the hybrid test by stating that as long ago as *Royster Guano Co. v. Virginia*, \(^9\)1 the Court at times required that a statute “must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .” \(^9\)2 He stated that the test represented a time where the Court was giving a broad reading to the equal protection clause. \(^9\)3

The dissent expressed the wish that it would not like to see the Burger Court follow the *Royster* standard in the future, but rather adhere to the test articulated in *McGowan v. Maryland*, \(^9\)4 the traditional minimal scrutiny test. And since Illinois’ distinction is not mindless and patently irrational, the judgment of the state supreme court should have been affirmed and the statute upheld. \(^9\)5

**TRIMBLE AND THE EMERGENCE OF A STANDARD OF REVIEW**

The significance of *Trimble* lies in its attempt to establish a

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89. Id. at 1471-72. In making this argument, Mr. Justice Rehnquist quoted Mr. Justice Powell’s majority opinion in Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 563 (1977): “Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was a ‘dominant’ or ‘primary’ one.” 97 S. Ct. at 1471. For an analysis of legislative motive, see Note, 82 YALE L.J. 123, 141-46 (1972).
90. 97 S. Ct. at 1472.
91. 253 U.S. 412 (1920). In *Royster*, the Court struck down a statute taxing all the income of a local corporation derived from business both within and without the state, while exempting entirely the income derived without the state by a domestic corporation which does no business within the state.
92. Id. at 415.
93. 97 S. Ct. at 1472.
95. 97 S. Ct. at 1473.
clear standard of review in illegitimacy cases. In articulating this standard the Court clarified the elements of its new reasonably strict scrutiny test.

Prior to the cases involving gender and illegitimacy-based discrimination, the Court operated under a two-tier test. One tier was strict scrutiny while the other tier was rational relation. In essence this two-tier approach operated in the nature of a deductive model in that the application of the strict scrutiny test guaranteed the conclusion of unconstitutionality. Likewise the Court's choosing the rational basis test necessarily required a finding of constitutionality.

This dual approach finds its most appropriate application in the well-defined areas of racial and alienage classifications and in those well-settled areas involving social and economic legislation. However, where the law is unsettled, the deductive two-tier model becomes too rigid and inappropriate. Recognizing this fact, the Court began to formulate a test of reasonably strict scrutiny.

The problem confronting the Court in formulating this test may be viewed as a problem in applying an appropriate model. Thus, the accepted judicial decision may be viewed as a model. It can serve as a method of approach in a particular area of law. Often a model developed for one set of phenomena is


97. As defined by a leading logician, "[a] deductive argument is one whose premises are claimed to provide conclusive grounds for the truth of its conclusion." I. COPI, INTRODUCTION TO LOGIC, 147 (4th ed. 1972). Describing, in effect, such a deductive test, Mr. Chief Justice Burger, dissenting in Dunn v. Blumstein, 405 U.S. 330 (1972), stated that "to challenge a statute by the 'compelling state interest' standard is to condemn it..." Id. at 363-64. See also note 22 supra.

98. Until recently, model systems were reserved for application in the fields of mathematics and mathematical sciences. However, the basic theory of model development is as comfortable in the area of law as it is in the formal sciences. Kuhn has stated that "[i]n a science...a [model] is rarely an object for replication. Instead, like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions." T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 23 (2d ed. 1971).

One model which operates within the science of the law is Professor Tribe's triangular analysis of the hearsay rule. Tribe stated that the purpose of his triangular model is to "present a heuristic device which I believe can aid in the analysis of the hearsay rule and its exceptions by exposing the rule's structure..." Tribe, Triangulating Hearsay, 87 HARV. L. REV. 957 (1974). Tribe's triangular model makes the workings of the hearsay rule more graphic; it makes it easier to identify the existence of a hearsay problem.

99. KUHN, supra note 98, at 23.
ambiguous when applied to other closely related ones. Then experiments are necessary to choose among the alternative ways of applying the model to the new area of interest.¹⁰⁰

When the Court was confronted with equal protection challenges to statutes discriminating against illegitimates, its model was the two-tier approach. This presented a dilemma since neither the strict scrutiny nor the rational relation tests properly applied to this new area of interest.¹⁰¹ The strict scrutiny test was not applicable since historically this test was applied only to classifications involving race or national origin;¹⁰² the traditional minimal scrutiny test was inappropriate since that test would dispose of the issue without judicial consideration.¹⁰³ Thus, it was necessary for the Court to choose among alternative ways of applying the model to the new area of interest. The evolution of a standard of review in the area of illegitimacy classifications documents these choices in newer applications of the traditional equal protection model.

_Levy_¹⁰⁴ and _Glona_¹⁰⁵ were two early examples of the Court's approach to illegitimacy classifications. In _Levy_ the Court cited to both a fundamental rights case¹⁰⁶ and a deferential standard case¹⁰⁷ in framing the appropriate standard of review to be used. Thus, the Court seemed to signal the intention to create a new test somewhere between the strict and minimal scrutiny tests. In _Levy_, the Court asserted that a state has broad

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¹⁰⁰. _Id._ at 29.

¹⁰¹. Gunther has recognized that the Court is building a new interventionist test under a more stringent rationality formula. Arguably, the Court found that discrimination on the basis of illegitimacy was a problem particularly worthy of their cognizance, but still not suspect. However, to apply the traditional standard articulated in _McGowan v. Maryland_, 366 U.S. 410 (1961) would be to dismiss the challenge without demanding consideration. Therefore, the Court employed an intermediate test which afforded constitutional protection to persons discriminated against who were not members of a suspect class. Gunther, _supra_ note 16, at 18-20.

¹⁰². _See_ text at note 16 _supra_.


¹⁰⁶. 391 U.S. at 71. Citing _Skinner v. Oklahoma_, 316 U.S. 535 (1942), the Court stated that it has been "extremely sensitive when it comes to basic civil rights. . . ." _Id._ The _Skinner_ case has come to be recognized as the "grandfather of fundamental interest equal protection cases . . . ." Gunther, _supra_ note 16, at 28.

¹⁰⁷. 391 U.S. at 71. The Court stated that "in applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications." _Id._ (citing _Williamson v. Lee Optical_, 348 U.S. 483 (1955)). The Court in _Lee Optical_ upheld a statute which prohibited anyone except optometrists and ophthalmologists from fitting eyeglasses.
powers when it comes to drawing the lines of statutory classifications but that it "may not draw a line which constitutes an invidious discrimination against a particular class."\textsuperscript{108} In the end, the Court will determine whether the "line drawn is a rational one."\textsuperscript{109}

Thus, although there was the suggestion in \textit{Levy} that discrimination on the basis of illegitimacy may be subject to strict scrutiny,\textsuperscript{110} the Court invalidated the statute on the ground that the discriminatory scheme had no rational relation to the wrong inflicted on the mother.

The majority in \textit{Levy} and \textit{Glona} apparently avoided applying the traditional rational basis standard because the Court felt the issue of discrimination against illegitimates was important. However, the Court was not equipped with an equal protection test which would adequately deal with the problem. The Court could not find authority for a strict scrutiny approach and yet ignored a rather apparent and rational purpose in order to invalidate the Louisiana schemes under the traditional rational basis language.\textsuperscript{111}

In \textit{Labine v. Vincent},\textsuperscript{112} the majority of the Court found a Louisiana statute discriminating against illegitimates to be constitutional because such discrimination was rationally related to the state's interest in preserving family ties by directing the intestate disposition of property located within the state.\textsuperscript{113} The Court in \textit{Labine} however did not analyze the relationship between the orderly disposition of property in a state and the denial of such inheritance rights to illegitimate children.\textsuperscript{114} Notwithstanding that fact, the Court went on to find the challenged

\textsuperscript{108} 391 U.S. at 71.
\textsuperscript{109} \textit{Id.}
\textsuperscript{111} For instance, Mr. Justice Harlan, in his dissent, recognized the following purpose:
If it be conceded, as I assume it is, that the State has power to provide that people who choose to live together should go through the formalities of marriage and, in default, that people who bear children should acknowledge them, it is logical to enforce these requirements by declaring that the general class of rights that are dependent upon family relationships shall be accorded only when the formalities as well as the biology of those relationships are present.
\textsuperscript{391} U.S. at 80.
\textsuperscript{112} 401 U.S. 532 (1971).
\textsuperscript{113} \textit{Id.} at 536. See generally Note, 49 \textit{TEX. L. REV.} 1132, 1135-36 (1971).
\textsuperscript{114} The \textit{Trimble} Court rebuked the \textit{Labine} decision for its incomplete analysis. See note 39 \textit{supra}.
statute was a valid "exercise of the power which every state and sovereignty possesses" and that "there is nothing in the vague generalities of the Equal Protection clause which empowers this court to nullify [the Louisiana statute]." The analysis in Labine suggested that the traditional deferential test was to be the intended standard of review.

Unlike models in the formal sciences, models in the law are usually not conspicuous in their evolution. Legal models, since they are found in judicial decisions, announce their evolution by changes in language. In an area of the law which is unsettled, it becomes even more difficult to pick out model changes. In such an area, it becomes unclear whether such new phrases denote new models, or merely suggest more experimentation is going on in the court’s own understanding of the problem.

Weber v. Aetna Casualty & Surety Co. was such an enigmatic case. In Weber, to a greater degree than in any earlier case, the Court inquired into the relationship between the purpose of the statute and the discrimination against illegitimates. Mr. Justice Powell recognized that the state’s interest in protecting legitimate family relationships is of unquestioned importance. The Court did not challenge the interest; rather, the Court invalidated the scheme because discrimination on the basis of illegitimacy would not promote that purpose. The Court recognized that the “status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.”

The language in the cases preceding Weber required that a statute bear “some rational relationship to a legitimate state purpose.” The Court in Weber held that the relationship between the statute’s purpose and the discriminatory scheme was not significant. Thus, it appears that the Court, aware of the fact that in the area of illegitimacy it was using a standard more demanding than the rational relation test, strengthened the in-

115. 401 U.S. at 539 n.16 (quoting Mager v. Grima, 49 U.S. (8 How.) 490, 492 (1850)).
118. Id. at 173.
119. Id.
120. Id.
121. Id. at 175.
122. Id. at 172.
123. Id. at 175.
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TERMINAL TEST BY DEMANDING A SIGNIFICANT RELATIONSHIP TO A
SUBSTANTIAL STATE INTEREST.'

FURTHER, MR. JUSTICE POWELL NOTED THAT THE STATE INTEREST
PROFFERED TO SUPPORT THE DISCRIMINATION WAS NOT COMPELLING.125
YET, THE NEED TO MAKE THIS FINDING IN ILLEGITIMACY CLASSIFICATIONS
IS UNCLEAR. THIS REQUIREMENT HAS PREVIOUSLY BEEN RESERVED FOR
APPLICATION IN CASES INVOLVING EITHER A FUNDAMENTAL RIGHT OR A
SUSPECT CLASSIFICATION, NEITHER OF WHICH WAS INVOLVED IN WEB-
Er.126 THE COURT, DESPITE ITS REFERENCE TO THE COMPPELLING STATE
INTEREST STANDARDS, APPEARS TO HAVE DECIDED THE CASE UNDER THE
NEWLY ARTICULATED "SIGNIFICANT AND SUBSTANTIAL" RELATION TEST, THE
REASONABLY STRICT SCRUTINY TEST.

IN MATHEWS V. LUCAS,127 THE COURT REVERSED A LOWER COURT'S
FINDING THAT ILLEGITIMATES WERE A SUSPECT CLASS AND THAT ANY
STATUTORY DISCRIMINATION AGAINST THEM THEREFORE REQUIRED STRIC-
T SCRUTINY.128 THE LOWER COURT NOTED THAT A REVIEW OF RECENT SU-
PREME COURT DECISIONS INDICATED THAT THE HIGHLY DEFERENTIAL RA-
TIONAL RELATION TEST WAS BEING RESHAPED INTO A MEANINGFUL STAN-
DARD OF REVIEW.129

THE COURT IN MATHEWS AGREED WITH THE LOWER COURT THAT AS A
CLASS, ILLEGITIMATES WERE SIMILAR TO RACE, NATIONAL ORIGIN, AND
ALIENAGE. HOWEVER, THE COURT WENT ON TO SAY THAT "WE HAVE HAD
NO DIFFICULTY IN FINDING THE DISCRIMINATION IMPERMISSIBLE ON LESS
DEMANDING STANDARDS . . . ."130 ALTHOUGH THE COURT REFUSED TO
APPLY THE STRICT SCRUTINY TEST, IT ALSO FAILED TO APPLY THE TRADITION-
AL RATIONAL BASIS TEST. INSTEAD, THE COURT APPLIED ITS NEW TEST IN
THESE WORDS: "[T]he scrutiny by which their showing is to be
judged is not a toothless one . . . ."131 THE COURT FURTHER HELD THAT ITS ROLE IS TO DETERMINE WHETHER CONGRESS' ASSUMPTIONS ARE
CONSISTENT AND SUBSTANTIALLY SUPPORTIVE OF ITS CONCLUSIONS. THE
COURT HELD THAT "[I]N THE END, THE PRECISE ACCURACY OF CONGRESS' CAL-
CULATIONS IS NOT A MATTER OF SPECIALIZED JUDICIAL COMPETENCE;

124. Id. at 170, 175.
125. Id. at 176.
126. See discussion of the strict scrutiny test in text at notes 21-26 supra.
128. Id. at 504. The lower court had stated that illegitimacy should be
    treated as a suspect classification. Lucas v. Secretary of HEW, 390 F. Supp. 1310,
129. Id. at 1316 n. 5. The district court cited Gunther, supra note 16, for the
    proposition that the Supreme Court has "forged a third middle ground test for
    certain classification. . . ." Id. Gunther has named this new test the "new bite"
130. 427 U.S. at 505.
131. Id. at 510.
and we have no basis to question their detail beyond the evident consistency and substantiality." The Court in framing the appropriate standard did so in language more akin to Weber than Labine, even though the challenged statute was upheld as constitutional. The decision in Mathews appears to support the lower court's assessment that a new equal protection test is being shaped in the area of illegitimacy, one which requires more bite.\footnote{133}

Trimble v. Gordon,\footnote{134} building on Mathews, represents the culmination of the Court's development of a standard of review in the area of illegitimacy classifications. In Trimble, the Court implemented the reasonably strict scrutiny test.\footnote{135} The Court held that this new test, though couched in traditional language, was "not a toothless [standard]." The Trimble Court articulated the fundamental elements which separate this test from the deferential traditional approach.

CONCLUSION

The elements of the Trimble test which distinguish it from its deferential predecessor are:

1. In the absence of a convincing demonstration the Court will not hypothesize state purposes, nor entertain those purposes proffered by either the appellee or the appellant where such are ignored by the state supreme court;\footnote{137}

2. The Court will demand of the state court a thorough going analysis of the relationship of those purposes proffered, and the discriminatory scheme challenged. A "mere incantation of a proper state purpose" will not suffice to sustain the scheme's constitutionality.\footnote{138}

3. The Court will demand that the lower court be cogniz-
ant of alternative considerations and consider the possibility of a middle ground in the classification challenged;\(^\text{139}\)

(4) The new reasonably strict scrutiny test requires a substantial relationship between the state purpose and the discriminatory classification.\(^\text{140}\)

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\(^{139}\) Id. at 1465.

\(^{140}\) The *Trimble* Court had stated that the new standard was "not a toothless one," *id.* at 1463, and cited its decision in *Reed v. Reed*, 404 U.S. 71 (1971), as the appropriate approach in dealing with statutes involving the disposition of property at death. 97 S. Ct. at 1464 n. 12. *Reed* had required that a statute bear a fair and substantial relation to the object of the legislation. *See* text at notes 29-32 *supra*. 

