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EQUAL PROTECTION OF THE LAW UNDER THE FEDERAL AND ILLINOIS CONSTITUTIONS: A CONTRAST IN UNEQUAL TREATMENT

Sidney Z. Karasik*

The United States and Illinois Constitutions guarantee citizens equal protection under the laws, but do not afford precisely the same measure of protection. In this Article, Mr. Karasik compares the limited value of the federal and Illinois equal protection clauses as grounds for challenging discriminatory legislation with the greater efficacy of attacks under Illinois' special legislation prohibition. He then criticizes a number of recent Illinois Supreme Court decisions that deviate from Illinois' unique equal protection perspective by applying a less exacting standard of review to laws attacked as unconstitutional special legislation. He urges the supreme court to return to its traditional, strict equal protection standards to ensure more meaningful review of arbitrary Illinois legislative classifications.

In the arsenal of constitutional weapons designed to attack legislation, the fourteenth amendment's equal protection clause has been neither as frequently nor as successfully deployed as its due process counterpart.¹ In a metaphorical sense, if due process has been a rifle, federal equal protection has been merely a handgun—deadly only within a limited range. Indeed, Justice Holmes once characterized the equal protection clause as "the usual last resort of constitutional arguments,"² reflecting the doctrine's narrow appeal to the courts. With so little utility, it is not surprising that myriad legislative classifications have survived challenges predicated on federal equal protection claims of governmental discrimination.³

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1. The Supreme Court generally has preferred due process rather than equal protection grounds when invalidating statutes. See, e.g., Railway Express Agency v. New York, 336 U.S. 106, 111 (1949) (Jackson, J., concurring) (while equal protection claims are often asserted but rarely sustained, the due process clause is frequently used to strike down municipal laws). This preference is illustrated by the Court's willingness to rely upon the fifth and fourteenth amendments' due process clauses to provide equal protection in situations just as easily treated under the equal protection clause. See, e.g., Boddie v. Connecticut, 401 U.S. 371 (1971) (discrimination that denied indigents access to the judicial system violated fourteenth amendment due process clause); Bolling v. Sharpe, 347 U.S. 497 (1954) (denying admission to public school solely on racial grounds contravened due process guarantee of the fifth amendment). The Illinois Supreme Court, on the other hand, has been more willing to use the equal protection clause. See, e.g., Grasse v. Dealer's Transp. Co., 412 Ill. 179, 194, 106 N.E.2d 124, 132 (although due process and equal protection overlap, their spheres of protection are not coterminous; the guaranty of equal protection of the laws extends beyond the requirements of due process), cert. denied, 344 U.S. 837 (1952).


3. See notes 11-13 & 16 and accompanying text infra. "It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons . . . . But [the Constitution] does require, in its concern for equality, that those similarly situated be similarly
Given the restricted usefulness of federal equal protection theory, equal protection under the Illinois Constitution becomes especially important to those attacking discriminatory Illinois laws. This Article reviews the historical evolution of federal and Illinois equal protection doctrine. It next examines certain contrasts between them and explains why Illinois' special equal protection perspective is not repugnant to the federal view. After presenting these well-recognized distinctions, it then criticizes a number of recent Illinois Supreme Court decisions that either obscure the significant differences between federal and Illinois equal protection or that carelessly misstate fundamental equal protection principles. Finally, it concludes that the Illinois Supreme Court should return to its well-established, activist role in reviewing state legislation under Illinois' strict constitutional standards.

EQUAL PROTECTION IN THE FEDERAL SYSTEM

Federal equal protection historically is rooted in the conflict between the states. Adopted after the Civil War, the fourteenth amendment's protections were originally recognized by the Supreme Court as primarily intended to benefit the newly freed slaves. The amendment became the matrix of future civil rights statutes and a lock against repeal of the former slaves' hard fought freedom. During the amendment's 110 year history, the Supreme Court has extended fourteenth amendment protection further, and its analysis of equal protection claims has seen two primary stages.

4. In Strauder v. West Virginia, 100 U.S. 303 (1880), the Court stated "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, . . . no discrimination shall be made against them because of their color." Id. at 307 (emphasis added). Although Strauder involved discrimination against blacks, the Supreme Court has readily found classifications resting on race and ancestry suspect. See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954) (fourteenth amendment is not directed solely against discrimination based upon differences between whites and blacks, but also protects persons of Mexican descent); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (fourteenth amendment's protections extend to those of Chinese descent).


6. Along with the thirteenth and fifteenth amendments, the fourteenth amendment guaranteed that the newly acquired rights of blacks would not be rescinded. The amendment effectively overruled the infamous decision of Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), where the Supreme Court construed the Constitution to grant citizenship only to the residents of states and not to blacks. In addition, the fourteenth amendment established national supremacy. See generally L. Tribe, American Constitutional Law § 7-2, at 416-17 (1978) [hereinafter cited as Tribe].
Under the "old" equal protection, judicial intervention was virtually unknown outside racial discrimination cases. The Supreme Court's initial response was to allow state statutes to treat classes of citizens differently if the legislature's classifications were merely "rationally related" to statutory purposes. This minimal test of "rational relationship" or "reasonable basis" was formulated early in the Court's efforts to define the reach of the fourteenth amendment.

While racial classifications were carefully scrutinized because of their direct relationship to the fourteenth amendment's purpose, non-racial legislative classifications generally were upheld under the reasonable basis standard. During the "old" equal protection period, the Supreme Court preferred a deferential, non-interventionist posture unless classifications were
drawn along patently racial lines.12 Thus, a vast realm of non-racial classifications pertaining to property, social, and economic regulations were invariably judged to be legitimate exercises of state police power under the reasonable basis test.13

The Warren Court adopted a markedly more interventionist approach to equal protection.14 That Court’s now familiar “two-tier” test divided legislative classifications into one of two levels and then applied the chosen level’s standard of review. Depending upon the level selected, statutes in virtually all cases were either automatically sustained or automatically invalidated.15

12. Until about 1905, the Supreme Court routinely sustained economic and police power classifications against equal protection challenges. See, e.g., Giozza v. Tiernan, 148 U.S. 657 (1893) (statute imposing license requirement and tax on persons selling liquor upheld); Bell’s Gap R.R. v. Pennsylvania, 134 U.S. 232 (1890) (tax law basing assessments upon face value rather than actual value of bonds upheld); Philadelphia Fire Ass’n v. New York, 119 U.S. 110 (1886) (tax on foreign but not domestic corporations upheld). From 1905 to approximately 1937, however, the Court temporarily abandoned its deferential view of economic regulations and struck down such statutes. See, e.g., Hartford Steam Boiler Inspection & Ins. Co. v. Harrison, 301 U.S. 459 (1937) (statute forbidding stock companies from acting through salaried employees but permitting mutual companies to do so violated equal protection); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928) (state tax imposed on gross receipts of foreign and domestic corporations but not on receipts of individuals or partnerships in same business violated equal protection); Air-Way Elec. Appliance Corp. v. Day, 266 U.S. 71 (1924) (statutory franchise tax only on foreign corporations violated equal protection); Southern Ry. v. Greene, 216 U.S. 400 (1910) (statute establishing larger franchise tax for foreign corporations than for domestic corporations violated equal protection). Other decisions during this period, now known as the “Lochner” era, relied upon the fourteenth amendment’s due process clause to invalidate economic and regulatory statutes. See, e.g., Coppage v. Kansas, 236 U.S. 1 (1915) (statute prohibiting employers from compelling employees to sign anti-union employment contracts violated due process); Adair v. United States, 208 U.S. 161 (1908) (federal law forbidding anti-union employment contracts for interstate railroad’s employees violated due process); Lochner v. New York, 198 U.S. 45 (1905) (statute limiting the number of hours bakery employees could work per day and per week violated due process). The Lochner era decisions were greatly criticized and, after 1937, the Supreme Court invariably approved economic and regulatory statutes, with the exception of Morey v. Dowd, 354 U.S. 457 (1957), which was recently overruled in City of New Orleans v. Dukes, 427 U.S. 297 (1976).

13. See, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948) (rejecting an equal protection challenge to a Michigan statute that prohibited a woman from obtaining a bartenders license unless she was the wife or daughter of a male tavern owner); Kotch v. Board of River Pilot Comm’rs, 330 U.S. 552 (1947) (rejecting an equal protection challenge to a Louisiana law requiring certified pilots on ships traveling the Mississippi River, even though the certification application was admitted to be intentionally discriminatory). See generally Gunther, supra note 7, at 670.

14. Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972) [hereinafter cited as Gunther, Newer Equal Protection]. Professor Gunther was the first to recognize the emerging distinction between the “old” equal protection and the Warren Court’s “new” equal protection analysis. He noted that “[t]he emergence of the ‘new’ equal protection during the Warren Court’s last decade brought a dramatic change. . . . The familiar signals of ‘suspect classification’ and ‘fundamental interest’ came to trigger the occasions for a new interventionist stance.” See Gunther, Newer Equal Protection, supra, at 8. See also Gunther, supra note 7, at 671; Note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969).

15. Professor Gunther described this mechanical approach as “‘strict’ in theory and fatal in fact.” See Gunther, Newer Equal Protection, supra note 14, at 8. See note 26 and accompanying text infra.
The "two-tier" test's lower level was little more than a new name for the "old," deferential equal protection analysis. It subjected the challenged statute to minimal scrutiny, requiring judicial intervention only if the classification was arbitrary or unreasonable. As a practical matter, statutes relegated to the bottom tier were always approved, even if mere conjecture by the Court was necessary to supply the legislative rationale underlying a particular category. Economic and police power regulations chronically have been well-recognized bottom-tier candidates.

The "top-tier," however, reflected a considerable departure from any previous equal protection standard. It expanded the early racial classification cases into a full-fledged "tier," thereby exposing a new category of legislation to constitutional attack. This expansion was accomplished by viewing race as simply a subset of a larger category of "suspect classes" deserving of four-
The fourteenth amendment protection. For example, alienage and national origin eventually joined race as "suspect classes" and were afforded "top-tier" status. Later, the Court extended this stricter standard of review to so-called "fundamental rights," such as the rights to vote, to travel, and to marry.

The key difference between bottom and top-tier analysis is, of course, the degree of scrutiny. Unlike the highly deferential lower-tier test of minimum rationality or reasonable basis, the upper-tier triggers a strict scrutiny standard under which any statute impinging on a suspect class or fundamental right violates equal protection absent a compelling state interest in the classification. Only a few statutes have survived strict scrutiny.

In recent years, some members of the Court have become dissatisfied with the rigid, predictable results of "two-tier" analysis. Preferring a more

Stone suggested that some non-racial classifications could also merit exacting scrutiny if they tended to restrict the political processes which usually bring about the repeal of undesirable legislation. He speculated whether "prejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities... may call for a correspondingly more searching judicial inquiry." Id. at 152-53 n.4.

21. See, e.g., Nyquist v. Mauclet, 432 U.S. 1 (1977) (state classifications based on alienage are inherently suspect and subject to strict judicial scrutiny); Graham v. Richardson, 403 U.S. 365 (1971) (alienage granted suspect classification status; therefore state cannot constitutionally deny welfare benefits to resident aliens). This standard has not always adhered, and appears to have been abrogated recently when a governmental function is involved. See Ambach v. Norwich, 441 U.S. 68 (1979) (state statute prohibiting aliens from teaching tested under rational basis standard); Foley v. Connelie, 435 U.S. 291 (1978) (mere rational basis required when state barred employment of aliens as state troopers).


23. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972) (because voting is fundamental right, law limiting voting to persons who resided in state for one year held unconstitutional under equal protection); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting declared fundamental right; therefore, denial of right to vote in state elections for failure to pay poll tax held unconstitutional under equal protection).

24. See, e.g., Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (Arizona law requiring one year residence in county as condition for receipt of free medical care held unconstitutional restriction on the fundamental right to travel); Shapiro v. Thompson, 394 U.S. 618 (1969) (limitation of welfare benefits to those who resided in a state for at least one year held unconstitutional restriction on fundamental right to travel).

25. See, e.g., Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry is fundamental; therefore, state law forbidding a person to marry when that person has unfulfilled obligations to support a minor child not in his or her custody held unconstitutional); Loving v. Virginia, 388 U.S. 1 (1967) (marriage declared a basic civil right, fundamental to existence and survival; Court therefore invalidated a state statute forbidding interracial marriage).


flexible approach, several justices have suggested a "three-tier" or "multiple-tier" analysis that would permit more meaningful review of statutes falling somewhere between the bottom and top tiers of the "two-tier" system. This emerging analytical framework, a hybrid of the Warren Court's "two-tier" position, has been termed "newer" equal protection by one commentator. It represents the Court's attempt to use the fourteenth amendment as the basis for some judicial activism while avoiding the confining language of strict scrutiny associated with the Warren Court's new equal protection.

The "newer" equal protection applies an intermediate scrutiny test that falls somewhere between the strict and minimal scrutiny standards. Intermediate scrutiny requires legislative classifications to be substantially related to an important state interest before they can be constitutionally

describe a completely logical method of deciding cases"; Id. at 210 (Powell, J., concurring) (valid reasons exist for dissatisfaction with the two-tier approach); Vlandis v. Kline, 412 U.S. 441, 458 (1973) (White, J., concurring) (the Court in fact employs a "spectrum of standards"); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (same view as expressed in his dissent in Murgia).

28. For example, in his dissent in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973), Justice Marshall criticized the Court's "rigidified approach to equal protection analysis," Id., contending that in fact the Court's decisions were applying a "spectrum of standards" that "clearly comprehends variations in degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." Id. at 98-99 (Marshall, J., dissenting). Justice Stevens has indicated that he views the two-tier approach as less than completely logical and that, in reality, the Supreme Court has employed that approach "to explain decisions that actually apply a single standard in a reasonably consistent fashion." Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring). Justice Powell has admitted that the Court's decisions concerning gender based classifications have engaged in "more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present . . .," id., but has expressly disapproved of the label "middle-tier" as a proper characterization of the Court's equal protection analysis for cases falling between the upper and lower tiers. Id. at 210-11 (Powell, J., concurring). See generally Gunther, Newer Equal Protection, supra note 14; Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945 (1975) [hereinafter cited as Wilkinson].


30. See Gunther, Newer Equal Protection, supra note 14, at 12.

31. See, e.g., Fullilove v. Klutznick, 448 U.S. 448 (1980) (congressional reliance on racial and ethnic criteria as a condition to receiving federal grant for voluntary affirmative action programs sustained after a "close" and "searching" examination); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (statute requiring widowers but not widows to prove dependency on spouse to receive death benefits not substantially related to an important state goal); Lalli v. Lalli, 439 U.S. 259 (1978) (statute which required illegitimate children to provide proof of paternity to inherit from father by intestate succession substantially related to important state interests); University of Cal. Bd. of Regents v. Bakke, 438 U.S. 265 (1978) (state's "legitimate and substantial interest" in ameliorating effects of past discrimination were insufficient to sustain
approved. Minimal scrutiny, on the other hand, merely requires that legislative means be rationally related to statutory ends, and strict scrutiny focuses on whether the legislative classification's ultimate objective furthers a compelling state interest. At present, however, intermediate scrutiny has not been explicitly adopted by a majority of the Court\(^{32}\) and its range of applicability is uncertain. Thus, the Warren Court's "two-tier" approach retains much of its vitality, at least in name, if not in practice.

Under contemporary federal equal protection, then, statutory classifications typically receive judicial deference to the point of non-review, unless a suspect class or fundamental right is involved. Absent a suspect class or fundamental right, a legislative category needs only a reasonable basis to pass equal protection muster, a minimal hurdle. A remarkably different profile, however, emerges from a long line of Illinois cases in which numerous statutes and ordinances have not withstood equal protection challenges—even when the sole ground for invalidation was the unreasonableness of the statutory scheme. The significance of this federal/Illinois dichotomy becomes clear through a review of Illinois' unusual equal protection stance.

**ILLINOIS EQUAL PROTECTION**

**A Tradition Against Special Laws for Special Classes**

Although state courts often articulate homage to legislative judgment under some deferential standard similar to the federal approach, Illinois courts have not hesitated to strike down scores of arbitrary or irrational Illinois statutory classifications. Illinois' departure from federal equal protection standards can be explained partly by its political history and partly by certain provisions in the Illinois Constitutions of 1870 and 1970. Although differences exist between federal and Illinois equal protection, the two approaches are not repugnant.

Before 1970, the Illinois Constitution lacked an explicit equal protection clause.\(^{33}\) Its absence, however, did not hinder Illinois' development of a venerable equal protection tradition. Illinois courts remedied the omission by treating the 1870 Illinois Constitution's due process \(^{34}\) and special legislation \(^{35}\) provisions as functional equivalents of equal protection.

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special admissions program favoring minorities); Kahn v. Shevin, 416 U.S. 351 (1974) (property tax exemption for widows but not widowers upheld because statutory classifications had "fair and substantial relation" to the subject of the legislation).


33. Illinois was only the eighth state to include an equal protection clause in its constitution. Most states, however, compensated for this constitutional defect by expanding other provisions, most commonly the due process clause. Grad, The State Bill of Rights, in CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 30, 35 (V. Ranney ed. 1970) [hereinafter cited as Grad].

34. ILL. CONST. of 1870, art. II, § 2. Illinois decisions implied equal protection standards into the due process clause. 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).

35. Ill. Const. of 1870, art. IV, § 22. See notes 41-48 and accompanying text infra.
Much like the federal equal protection clause, the Illinois ban on special\textsuperscript{36} and local\textsuperscript{37} laws arose from post-Civil War political pressure. Following the war, partisan politics was the norm in Springfield, with special interest groups and corporations able to secure favorable legislation.\textsuperscript{38} Strong public reaction against such legislative abuse occasioned the 1870 constitutional restriction on special and local legislation,\textsuperscript{39} which applied to twenty-three enumerated categories.\textsuperscript{40} In general terms, the special legislation clause

\textsuperscript{36} A special law is one which applies only to a portion of the state's people, institutions or economy. This distinction is not geographically based. G. \textsc{Braden} & R. \textsc{Cohn}, \textit{The Illinois Constitution: An Annotated and Comparative Analysis} 207 (1969) [hereinafter cited as \textsc{Braden} \& \textsc{Cohn}]. \textit{See}, e.g., \textit{Noel v. People}, 187 Ill. 587, 58 N.E. 616 (1900) (statute prohibiting home remedies by anyone except registered pharmacists was special legislation); \textit{Millikan v. Jensen}, 4 Ill. App. 3d 580, 281 N.E.2d 401 (3d Dist. 1972) (statute banning dancing on Sunday but not other forms of entertainment was special legislation).

\textsuperscript{37} A local law is one which applies only to a portion of the state and its government. \textsc{Braden} \& \textsc{Cohn}, supra note 36, at 206. \textit{See}, e.g., \textit{In re Struck}, 41 Ill. 2d 574, 244 N.E.2d 176 (1969) (statute which established a procedure for recalling elective officials under a commission form of municipal government but which provided no similar procedure for city council governments was an invalid local law); \textit{Kremers v. City of West Chicago}, 406 Ill. 546, 94 N.E.2d 337 (1950) (statute placing a maximum ceiling on library building fund tax rates for towns within counties of certain populations was invalid local legislation).

\textsuperscript{38} Indeed, by 1869 special laws filled four volumes totaling 3,350 pages.

\textsuperscript{39} \textit{See} \textsc{Braden} \& \textsc{Cohn}, supra note 36, at 204-05; J. \textsc{Cornelius}, \textit{Constitution Making in Illinois, 1818-1970}, at 67-68 (1972); \textit{Gove \& Carlson, The Legislature, in Con-Conn: Issues for the Illinois Constitutional Convention} 101, 105 (V. Ranney ed. 1970) [hereinafter cited as \textsc{Gove \& Carlson}]. The 1818 Constitution contained no prohibition on special or local legislation. \textsc{Braden} \& \textsc{Cohn}, supra note 36, at 204. The 1848 Constitution touched on the problem of special legislation by requiring extensive procedural formalities before a bill could be passed. By 1862, delegates to that convention proposed several bans on special legislation, notably in the area of corporate charters. This constitution, however, was never approved. J. \textsc{Cornelius}, \textit{Constitution Making in Illinois, 1818-1970}, at 34, 50-51 (1972).

The prohibition against special legislation adopted eight years later was designed to solve four problems. The clause was intended: (1) to prevent the legislature from spending its time on local matters and ignoring statewide concerns; (2) to prevent influence from special interest groups and the attendant corruption; (3) to prevent hard-to-remove vested rights from forming; and (4) to prevent the intrusion of the state into local problems. \textit{Gove \& Carlson, supra}, at 106.

\textsuperscript{40} Ill. \textit{Const.} of 1870, art. IV, § 22 provided:

\textit{The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For—(1) Granting divorces; (2) Changing the names of persons or places; (3) Laying out, opening, altering and working roads or highways; (4) Vacating roads, town plats, streets, alleys and public grounds; (5) Locating or changing county seats; (6) Regulating county and township affairs; (7) Regulating the practice in courts of justice; (8) Regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables; (9) Providing for changes of venue in civil and criminal cases; (10) Incorporating cities, towns, or villages, or changing or amending the charter of any town, city or village; (11) Providing for the election of members of the board of supervisors in townships, incorporated towns or cities; (12) Summoning and impaneling grand or petit juries; (13) Providing for the management of common schools; (14) Regulating the rate of interest on money; (15) The opening and conducting of any election, or designating the place of voting; (16) The sale or mortgage of real estate belonging to minors or others under disability;
prohibited "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." 41

Commentators 42 and the Illinois Supreme Court 43 regarded the 1870 prohibition against special laws as "supplementing" the federal equal protection clause. Representative Illinois decisions held unconstitutional laws governing civil procedure, 44 taxes, 45 licensing, 46 voting, 47 and health regulations, 48 although special legislation cases covered almost the entire range of governmental activity. 49 In many of these pre-1970 opinions, the Illinois Supreme

(17) The protection of game or fish; (18) Chartering or licensing ferries or toll bridges; (19) Remitting fines, penalties or forfeitures; (20) Creating, increasing, or decreasing fees, percentages or allowances of public officers, during the term for which said officers are elected or appointed; (21) Changing the law of descent; (22) Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purposes; (23) Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted.

41. Id.

42. Braden & Cohn, supra note 36, at 221; Gove & Carlson, supra note 39, at 108; Grad, supra note 33, at 41-42.


44. Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967) (statute of limitations restricting architect malpractice cases to four years from date of act was invalid because it did not apply to other construction professionals); Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 65, 203 N.E.2d 573, 576 (1966) (statute exempting park districts from tort liability unconstitutional on special legislation grounds); Funkhouser v. Randolph, 287 Ill. 94, 122 N.E.2d 144 (1919) (statute allowing only plaintiffs to seek appellate review of adverse findings of fact was invalid); Manowsky v. Stephan, 233 Ill. 409, 84 N.E. 365 (1908) (law which allowed only mechanics lienholders to obtain legal fees was invalid).

45. People ex rel. Toman v. Chicago Union Station Co., 383 Ill. 153, 48 N.E.2d 524 (1943) (equal protection was denied when appellant’s property was not assessed on the same basis as all other property in taxing district); People ex rel. Clarke v. Jareki, 363 Ill. 180, 1 N.E.2d 855 (1936) (special installment tax payment plan for counties of over 500,000 persons was invalid); People ex rel. Stuckhart v. Knopf, 183 Ill. 410, 56 N.E. 155 (1900) (law limiting smaller counties’ taxing rates was invalid).

46. People v. Brown, 407 Ill. 565, 95 N.E.2d 888 (1950) (statute requiring licensed plumbers to apprentice under a master plumber was unconstitutional); City of Elgin v. Winchester, 300 Ill. 214, 133 N.E. 205 (1921) (ordinance requiring only non-residents to pay for handbill distribution licenses was invalid).

47. Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955) (statute requiring employers to allow employees to leave work to vote while being paid was invalid); Grennan v. Sheldon, 401 Ill. 351, 82 N.E.2d 162 (1948) (special voting canvasses for areas outside municipal boundaries were unconstitutional).

48. People v. Schenck, 257 Ill. 384, 100 N.E. 994 (1913) (statute preventing the operation of emery wheels in all basements was invalid); Starne v. People, 222 Ill. 189, 78 N.E. 61 (1906) (law requiring coal mine owners to provide wash houses for their employees was unconstitutional); Bailey v. People, 190 Ill. 28, 60 N.E. 98 (1901) (ordinance making it unlawful for more than six persons to occupy one room in a lodging house was invalid).

49. Braden & Cohn, supra note 36, at 206.
Court used the federal equal protection and Illinois special legislation clauses interchangeably to strike down statutes or ordinances as unreasonable, arbitrary or capricious.50

In 1970, the constitutional convention adopted a revised special legislation prohibition.51 The new provision retained the same general principle52 but eliminated the much criticized “laundry list” of explicitly forbidden legislation.53 The convention delegates also added a clause specifically empowering the courts to determine whether a general law could or should be made applicable when statutory classifications are questioned.54 This subtle transfer of legislative power to the judiciary55 went virtually unnoticed by constitutional delegates.56

The convention members also failed to perceive the significance of the equal protection clause they adopted.57 Concerned more with efforts of anti-abortion proponents to extend due process protection to unborn children, delegates approved the new equal protection measure almost without debate.58 Similarly, the Bill of Rights committee report only briefly discussed the equal protection provision, viewing it simply as a formal, clear and complete59 expression of Illinois' well-established special legislation re-

50. See Sweney Gasoline & Oil Co. v. Toledo, Peoria & W. R.R., 42 Ill. 2d 265, 267, 247 N.E.2d 603, 605 (1969) (statute relieving railroads of their liability for accidents was unreasonable); Begich v. Industrial Comm'n, 42 Ill. 2d 32, 36, 245 N.E.2d 457, 459 (1969) (statute imposing damages on a body member was lost traumatically or through surgical necessity was arbitrary); People ex rel. Harding v. Chicago & N.W. Ry, 340 Ill. 102, 110, 172 N.E. 13, 16 (1930) (statute which allowed school districts in larger counties to assess an additional school tax was arbitrary); People ex rel. Hoeinghaus v. Campbell, 285 Ill. 557, 563, 121 N.E. 183, 185 (1918) (statute making it easier for smaller areas to incorporate into towns or cities was unreasonable); Jones v. Chicago, R.I. & P. Ry., 231 Ill. 302, 309, 83 N.E. 215, 217 (1907) (statute limiting review of appellate court decisions only for the appellee was arbitrary).

51. ILL. CONST. art. IV, § 13 provides: “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.”

52. IV SIXTH ILLINOIS CONSTITUTIONAL CONVENTION RECORD OF PROCEEDINGS 2707 (1970) [hereinafter cited as RECORD].

53. Many commentators urged the delegates to eliminate the twenty-three explicit prohibitions. VI RECORD, supra note 52, at 1394; BRADEN & COHN, supra note 36, at 225; Gove & Carlson, supra note 39, at 107. By eliminating the laundry list, the convention delegates intended to make the special legislation clause a more flexible provision. They did not intend to allow special legislation in areas where it previously had been forbidden. IV RECORD, supra note 52, at 2708-09.

54. ILL. CONST. art. IV, § 13.

55. See notes 100-102 and accompanying text infra.

56. See IV RECORD, supra note 52, at 2707-09 (the entire debate on art. IV, § 13).

57. ILL. CONST. art. I, § 2 provides: “No person shall . . . be denied the equal protection of the laws.”

58. III RECORD, supra note 52, at 1496-1523. A few convention members briefly noted that the proposed equal protection clause would be the first of its kind in Illinois, but only Delegate Arthur Lennon discussed the new clause’s implications beyond the abortion context, and his remarks consisted of only two paragraphs in the convention transcript. Id. at 1499.

59. Id.
The committee's failure to note the equal protection-special legislation distinction was not surprising since their research staff also overlooked it. As if this double-barreled approach was not sufficient to ensure equal protection, for good measure the convention also equipped the constitution with supplementary prohibitions against discrimination in employment, in the sale or rental of property, on the basis of sex, or on account of physical or mental handicaps. These specific restrictions, along with the more general equal protection and special legislation clauses, amply demonstrate Illinois' strong commitment to equal protection in the 1970 constitution. These measures did not create new constitutional doctrine, but rather reaffirmed and expanded Illinois' long-standing equal protection heritage.

**Deference in Reverse: From Legislature to Judiciary**

The evolution of the constitution's language suggests Illinois' special treatment of equal protection and Illinois decisions confirm the contrast between Illinois and federal equal protection. Both before and after the 1970 constitution, Illinois courts have exhibited markedly less deference to legislative discretion than have federal courts. Indeed, the Illinois judiciary's activist approach could aptly be termed "deference in reverse."

Illinois, of course, has emulated federal standards in appropriate cases involving fundamental rights or suspect classes. These categories have received strict scrutiny just as they would under the federal model. But in "bottom-tier" cases concerning property, contract, or other economic classifications, Illinois has departed from the deferential federal "rationality" test that countenances nearly all such legislative categories.

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60. VI Record, supra note 52, at 18-19.
61. Braden & Cohn, supra note 36, at 225; Gove & Carlson, supra note 39, at 108; Grad, supra note 33, at 41-42.
63. Id.
64. Id. § 18.
65. Id. § 19.
66. See, e.g., People ex rel. Holland v. Bleigh Constr. Co., 61 Ill. 2d 258, 335 N.E.2d 469 (1975) (alienage is a suspect classification; interstate travel is a fundamental right).
68. In contrast to the federal decisions, numerous property, contract, and economic classifications have been invalidated by the Illinois courts as obnoxious to the strict Illinois equal protection standards. See, e.g., Frost v. Village of Glen Ellyn, 30 Ill. 2d 241, 195 N.E.2d 616 (1964) (zoning ordinance which excluded drive-in restaurants from districts in which fully enclosed restaurants were permitted, was arbitrary, unreasonable and capricious); Ronda Realty Corp. v. Lawton, 414 Ill. 313, 111 N.E.2d 310 (1953) (zoning ordinance requiring apartment
A classic example of Illinois' lack of judicial deference is *Grasse v. Dealer's Transport Co.*, a watershed in Illinois jurisprudence. In *Grasse*, the Illinois Supreme Court declared unconstitutional a provision of the Worker's Compensation Act which restricted third parties' tort liability for negligently injuring employees. Relying upon both the federal equal protection clause and Illinois' special legislation prohibition, the *Grasse* court held that the statutory classification conditioning employees' recovery on whether third party tortfeasors happened to be covered by the compensation act was impermissible.

Aside from the large volume of third party litigation generated by *Grasse*, the case is notable for its characteristically Illinois approach to equal protection. Instead of presuming legislative reasonableness and validity, the court subtly shifted the burden of such proof to the legislation's proponents. While recognizing that the legislature has wide discretion in constructing "classifications to subserve public objects" and that "perfect uniformity of treatment of all persons is neither practical nor desirable," the supreme court nevertheless invalidated the statute as "arbitrary." This conclusion was reached after reviewing, *inter alia*, the federal "rationality" test under which federal courts had invariably sustained police power classifications. Thus, *Grasse* demonstrates the willingness of Illinois courts to strike down police power legislation if it is merely "arbitrary," a rare result in federal decisions.

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70. 412 Ill. at 199, 106 N.E.2d at 135.
71. 1d. at 200, 106 N.E.2d at 135.
72. 1d. at 193, 106 N.E.2d at 132.
73. 1d.
74. 1d. at 200, 106 N.E.2d at 135.
75. The *Grasse* court reiterated the federal rationality test, but ultimately interpreted it in light of strict Illinois equal protection standards. The court stated:

> For these classifications to be deemed constitutional . . . it must appear that the particular classification is based upon some real and substantial difference in kind, situation or circumstance in the persons or objects on which the classification rests, and which bears a *rational relation* to the evil to be remedied . . . otherwise the classification will be deemed arbitrary . . .

*Id.* at 193-94, 106 N.E.2d at 132 (emphasis added).
76. In Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), Justice Marshall analyzed the Court's mechanistic two-tier approach to equal protection. Comparing the top and bottom tiers of the federal equal protection approach, Marshall stated:
Further illustrating Illinois' "strict" rationality test is another worker's compensation case, *Begich v. Industrial Commission.* The challenged statute differentiated between persons suffering traumatic loss of appendages and those suffering such loss through surgical necessity. After invoking the federal equal protection clause and Illinois' special legislation restriction, the court strictly applied the "rational basis" test and found the traumatic-surgical loss distinction "arbitrary and unreasonable." Quite clearly, the high court exhibited no judicial deference to the legislature's judgment that traumatic and surgical amputations differ markedly. The dramatic difference between the slight scrutiny or liberal deference of the federal rationality standard and Illinois equal protection's strict rationality standard is perhaps best demonstrated by Sunday closing cases. In *McGowan v. Maryland,* the United States Supreme Court relied upon traditional, permissive standards in sustaining a Maryland Sunday closing law even though the statute affected only some businesses. The statute's

If a statute invades a "fundamental" right or discriminates against a "suspect" class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always, . . . is struck down . . . . But however understandable the Court's hesitancy to invoke strict scrutiny, all remaining legislation should not drop into the bottom tier, and be measured by the mere rationality test. For that test, too, when applied as articulated, leaves little doubt about the outcome; the challenged legislation is always upheld.

Id. at 319 (Marshall, J., dissenting) (emphasis added).

77. 42 Ill. 2d 32, 245 N.E.2d 457 (1969). For an example of the strict rationality standard in the criminal law context see People v. McCarty, 93 Ill. App. 3d 898, 418 N.E.2d 26 (4th Dist. 1981) (classification of cocaine as a "narcotic drug" under the Illinois Controlled Substance Act was not "rational" and thus violative of United States and Illinois Constitutions).

78. The statute read in relevant part:

When an accidental injury sustained is limited to a hand and results in the amputation thereof, and such amputation is performed at the point of election on the forearm for the purpose of permitting the use of an artificial member, such injury shall be compensated as the loss of a hand.

ILL. REV. STAT. ch. 48, § 138.8(e)(9) (1967).

79. 42 Ill. 2d at 36-37, 245 N.E.2d at 459.

80. Justice House recognized the majority's failure to give due deference to legislative judgment, especially in the area of Worker's Compensation. In dissent, he argued:

How can we interfere with the legislative judgment as to the comparative seriousness of loss of a hand as compared to the loss of an arm, or loss of sight to that of hearing, or between both arms and both legs, or between sight and the extremities?

This opinion does just that.

42 Ill. 2d at 39, 245 N.E.2d at 460 (House, J., dissenting).


82. The challenged statute prohibited all but certain exempted merchants from selling various types of merchandise on Sundays. Similar Sunday closing laws were upheld in other Supreme Court decisions that year. See, e.g., Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961) (statute forbidding retailers to operate on Sundays but allowing manufacturers and others to do so did not violate equal protection); Braunfeld v. Brown, 366 U.S. 599 (1961) (statute prohibiting clothing and furniture retailers from operating on Sundays but permitting other businesses to do so did not violate equal protection); Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961) (statute prohibiting some but not all businesses from operating on Sundays did not violate equal protection).
underinclusiveness was justified by the familiar “one-step-at-a-time” rationale, which affords legislatures wide discretion when classifying by allowing them to correct perceived problems piecemeal rather than requiring a comprehensive, uniform approach.

In contrast, Illinois courts have invalidated Sunday closing laws precisely because they affected only some businesses. For example, in Courtesy Motor Sales v. Ward, a statute prohibited the sale of automobiles on Sunday but imposed no similar restrictions on other businesses. The owners of a car dealership argued that the statute violated federal equal protection and Illinois' special legislation prohibition. The Illinois Supreme Court agreed and struck down the statute on special legislation grounds, reasoning that the statute arbitrarily and impermissibly singled out the automobile business even though that business was not significantly different from others permitted to operate on Sundays. Furthermore, a later Illinois Supreme Court decision specifically rejected the “one-step-at-a-time” rationale relied upon by the McGowan Court. Thus, before 1970, it was readily apparent that in the context of social, economic, and regulatory laws Illinois' strict rationality approach to equal protection resulted in far more judicial activism and much more meaningful scrutiny of legislative classifications than the federal view.

Although Grasse, Begich, and Courtesy Motor Sales preceded the 1970 Constitution, the Illinois Supreme Court continued its interventionist approach to equal protection soon after the new constitution, with its revised special legislation provision and new equal protection clause, was adopted. In the seminal decision of Grace v. Howlett, the high court considered a challenge to Illinois' first no-fault provision for auto insurance. By classifying insurance coverage on the basis of various categories of motor vehicles and their usage, the statute sought to compensate automobile accident victims more efficiently. The act's classifications were attacked as violating the

83. 366 U.S. at 426 n.3 (citing Williamson v. Lee Optical Co., 348 U.S. 483 (1955)). See also Minnesota v. Cloverleaf Creamery Co., ___ U.S. ___, 101 S. Ct. 715 (1981) ("[A] legislature need not 'strike at all levels at the same time or in the same way.'").
84. See Tussman & tenBroek, supra note 3, at 360.
85. See, e.g., Courtesy Motor Sales v. Ward, 24 Ill. 2d 82, 179 N.E.2d 692 (1962) (statute prohibiting automobile sales on Sundays struck down); City of Marengo v. Rowland, 263 Ill. 531 (1914) (ordinance singling out barbers for Sunday closing was unconstitutional); Eden v. People, 161 Ill. 296 (1896) (same restriction contained in barber statute invalidated); Millikan v. Jensen, 4 Ill. App. 3d 580, 281 N.E.2d 401 (3d Dist. 1972) (ordinance forbidding persons from conducting public dances on Sunday but not prohibiting other businesses from operating struck down).
86. 24 Ill. 2d 82, 179 N.E.2d 692 (1962).
88. 24 Ill. 2d at 84, 179 N.E.2d at 693.
89. Id. at 87, 179 N.E.2d at 694.
91. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).
92. The statute provided that every policy insuring against liability for accidental bodily injury or death suffered by any person arising out of the ownership, maintenance or use of any private passenger automobile registered or prin-
federal and state equal protection clauses as well as Illinois' special legislation prohibition.\(^{93}\)

Preferring to dispose of the equal protection contentions on special legislation grounds, the high court held the "no-fault" classification invalid because it created special legislative treatment of certain motor vehicle users where a general law could be made applicable.\(^{94}\) In reaching this result, Justice Schaefer observed that for the first time the 1970 Constitution included an equal protection clause in addition to the familiar special legislation prohibition.\(^{95}\) He also noted, however, that "while these two provisions . . . cover much of the same terrain, they are not duplicates."\(^{96}\)

Continuing his analysis, Justice Schaefer recognized that the 1970 constitution "increased judicial responsibility for determining whether a general law is or can be made applicable."\(^{97}\) Taking a strong stance typical of Illinois equal protection decisions, he forcefully stated:

"Unless this court is to abdicate its constitutional responsibility to determine whether a general law can be made applicable, the available scope for legislative experimentation with special legislation is limited, and this court cannot rule that the legislature is free to enact special legislation simply because "reform may take one step at a time."\(^{98}\)

Consistent with its constitutional mandate, the court strictly reviewed the no-fault statute and held that it was invalid special legislation because it limited tort recovery for some but not all classes of auto accident victims.\(^{99}\)

\(^{93}\) "primarily garaged in this State and insuring 5 or less private passenger automobiles, must provide coverage affording payment of the following minimum benefits.

\(^{94}\) ILL. REV. STAT. ch. 73, § 1065.150(a) (1971). It also provided a definition for "private passenger automobile" in an attempt to clarify the inexact language of § 1065.150(a):

"[p]rivate passenger automobile" means a sedan, station wagon or jeep-type automobile not used as a public livery conveyance for passengers, nor rented to others, and includes any other 4 wheel motor vehicle used as a utility automobile, pickup truck, sedan delivery truck or panel truck which is not used primarily in the occupation, profession or business of the insured.

\(^{95}\) Id. § 1065.150(c).

\(^{96}\) 51 Ill. 2d at 485, 283 N.E.2d at 478.

\(^{97}\) In holding the classification to be invalid, the court stated:

"The constitutional test under section 13 of article IV is whether a general law can be made applicable, and in this case that question must receive an affirmative answer.

There are many purposes for which the obvious differences between private passenger automobile, buses, taxicabs, trucks and other vehicles would justify different legislative treatment. But the determination of the amount to be recovered by persons injured by those vehicles . . . is not one of those purposes.

\(^{98}\) Id. at 487, 283 N.E.2d at 479.

\(^{99}\) Id. at 486-87, 283 N.E.2d at 479.
In light of Grasse, Begich, Courtesy Motor Sales and Grace, it is apparent that the Illinois Supreme Court has recognized and accepted its crucial, activist role in equal protection confrontations. Prior to 1970, special legislation issues generally were for the legislature to decide; the judiciary only considered such questions when they arose under one of the 1870 Constitution's twenty-three special legislation categories.\(^{100}\) Even if a challenged law did not fall within one of these categories, the supreme court still intervened when it concluded that no rational basis existed for special legislative treatment, as the Grasse, Begich, and Courtesy Motor Sales decisions demonstrate. Article IV, section 13 of the 1970 Constitution greatly expanded judicial responsibility in special legislation contexts by establishing that such questions "shall be a matter for judicial determination,"\(^{101}\) a change clearly understood and sanctioned by the Grace court. Thus, Illinois courts have a well-established duty to invalidate special legislation, regardless of the desires or motivations behind such enactments.\(^{102}\) This shift of power from legislature to judiciary therefore merits the label "deference in reverse."

**Illinois' Special Legislation-Equal Protection Counterpoint**

Although Illinois' equal protection clause and proscription against special legislation "cover much of the same terrain,"\(^{103}\) there are significant differences in the protections afforded. An equal protection claim under the Illinois Constitution activates the federal degrees-of-scrutiny test to determine whether the challenged legislation invidiously discriminates.\(^{104}\) Under the top-tier of the federal approach, inherently suspect or fundamental right

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100. See note 40 supra. Prior to 1970, the rule had been firmly established by a long line of cases, beginning with Owners of Lands v. People ex rel. Stookey, 113 Ill. 296, 315 (1885), soon after the adoption of the 1870 Constitution. A number of decisions espoused this rule prior to 1970. See, e.g., People ex rel. Coutrakon v. Lohr, 9 Ill. 2d 539, 549, 138 N.E.2d 471, 477 (1956); Sommers v. Patton, 399 Ill. 540, 547, 78 N.E.2d 313, 317 (1948); People v. Emerson, 323 Ill. 561, 563, 154 N.E. 474, 475 (1926).

101. ILL. CONST. art. IV, § 13 (emphasis added). In Bridgewater v. Hotz, 51 Ill. 2d 103, 110, 281 N.E.2d 317, 321 (1972), the Illinois Supreme Court first recognized that art. IV, § 13 of the 1970 Constitution specifically rejected the rule that the determination of whether a general law can be made applicable is for the legislature.

102. Many delegates to the 1969 Constitutional Convention believed increased judicial responsibility was desirable. This belief was based upon "optimism about judicial problem-solving generated by the activism of the Warren Court [and] pessimism about the capacities of the other institutions of government, particularly the General Assembly, to perform responsibly." See Whalen & Wolff, Constitutional Law: The Prudence of Judicial Restraint Under the New Illinois Constitution, 22 DePaul L. Rev. 63 (1972).

103. Grace v. Howlett, 51 Ill. 2d at 497, 283 N.E.2d at 479.

104. In Illinois Hous. Dev. Auth. v. Van Meter, 82 Ill. 2d 116, 412 N.E.2d 151 (1980), the Illinois Supreme Court compared the equal protection standards of both Illinois and federal courts. The court stated: "Under the traditional equal protection standards utilized by both the Federal and State courts, a legislative classification will be upheld if it bears a rational relationship to a legitimate legislative purpose." Id. at 121, 412 N.E.2d at 153. Before applying the "rational relation" test, however, the court stated the issue of the case: "The question has thus become whether the legislative classification created by the amendment is rationally related to the purpose set forth in the original act." Id. at 122, 412 N.E.2d at 154.
classifications trigger "strict scrutiny," which invariably results in invalidation.105 On the other hand, the bottom tier's "minimal scrutiny" signals relaxed judicial review and gives legislative judgment a wide berth, ultimately resulting in minimal protection of the laws.106

By contrast, a special legislation claim does not involve degrees of judicial scrutiny. Article IV, section 13 requires the courts to determine "whether a general law is or can be made applicable" in place of a special law. This judicial mandate precludes any passive, deferential attitude that is a component of the federal "two-tier" view. Illinois courts thus have an affirmative duty to determine whether a challenged statutory classification is impermissibly arbitrary in contravening the constitutional interdiction against special laws for special classes.

Although Illinois' aggressive equal protection stance differs from the federal model, there is no repugnancy. Under the federal supremacy and equal protection clauses, of course, Illinois courts cannot condone what the United States Supreme Court condemns.107 But the converse is not true: what the federal courts condone, Illinois courts are free to condemn. Put differently, in many instances, most notably economic and police power regulations, Illinois courts have properly invoked a more protective standard under the Illinois Constitution. The federal equal protection mode is merely a floor, not a ceiling.108

While the Illinois Supreme Court has held that the same standards apply under the federal and Illinois equal protection clauses,109 the court has carefully noted the subtle yet significant difference in analysis under Illinois' special legislation prohibition. In a recent decision, Illinois Polygraph Society v. Pellicano,110 Justice Clark explained the special legislation-equal protection distinction in considerable detail:

Special legislation confers a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situ-

105. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) (statutes subject to strict scrutiny are "always or nearly always" struck down); note 17 supra.
106. See notes 14-19 and accompanying text supra.
108. Along the same lines, Professor Turkington observed that "[w]hile a state constitution may expand protection against discrimination beyond that provided by the Federal Constitution, it may not restrict rights granted by the United States Constitution." Turkington, supra note 17, at 386 (emphasis in original). See, e.g., Minnesota v. Clover Leaf Creamery Co., ___ U.S. ___, 101 S. Ct. 715, 722 n.6 (1981) (state court may apply a more stringent standard of review as a matter of state law under the state's equivalent to the equal protection or due process clauses); Rozier v. St. Mary's Hosp., 88 Ill. App.3d 994, 1008, 411 N.E.2d 50, 60 (5th Dist. 1980) (Harrison, J., dissenting) (state constitution can guarantee more expansive rights than the federal constitution).
110. 83 Ill. 2d 130, 414 N.E.2d 458 (1980).
ated. ... It arbitrarily, and without a sound, reasonable basis, discriminates in favor of a select group. ... Special legislation differs from a violation of equal protection in that the latter consists of arbitrary and invidious discrimination against a person or class of persons. It results from the governmental withholding of a right, privilege or benefit from a person or a class of persons without a reasonable basis (or, where a fundamental right or suspect classification is involved, a compelling State interest) for doing so. Whether a law is attacked as special legislation or as violative of equal protection, it is still the duty of the courts to decide whether the classification is unreasonable in that it preferentially and arbitrarily includes a class (special legislation) to the exclusion of all others, or improperly denies a benefit to a class (equal protection). ... While certain pieces of legislation may be attacked as both special legislation and violative of equal protection since they confer a benefit on one class while denying a benefit to another, there will be many cases where a benefit is conferred on one class to which no other class has a right. In those cases, legislation would be attacked as special legislation but not as violative of equal protection.\textsuperscript{111}

Justice Clark's distinctions between equal protection and special legislation claims follow the traditional judicial trail landmarked in Grace and once again demonstrate Illinois' special concern for safeguarding the concept of even-handedness in legislative schemes. A number of fairly recent decisions preceding Pellicano, however, have strayed from the well-marked Grace path and have blurred the equal protection-special legislation contrast.\textsuperscript{112} One of these unfortunate deviations, just two months before Pellicano, prompted Justice Kluczynski to dissent and remark that:

> The majority's failure to recognize that the amendment before us is special legislation can only be attributed to its faulty perception of the court's role in addressing attacks made under the special legislation provisions of our constitution and its erroneous belief that a special legislation challenge is foreclosed by an unsuccessful equal protection attack.\textsuperscript{113}

**Deviations from the Grace Trail—and Return**

Justice Kluczynski's sharp dissent in Illinois Housing Development Authority v. Van Meter\textsuperscript{114} addresses the troublesome inconsistency that has plagued recent Illinois Supreme Court equal protection decisions. These questionable

\textsuperscript{111} Id. at 137-38, 414 N.E.2d at 462-63 (emphasis added and in original).


\textsuperscript{113} Illinois Hous. Dev. Auth. v. Van Meter, 82 Ill.2d 116, 127, 412 N.E.2d 151, 156 (Kluczynski, J., dissenting) (emphasis added).

\textsuperscript{114} Id.
opinions depart from the traditional Grace analysis and ignore or overlook the constitutionally mandated "reverse deference" from legislature to judiciary. Particularly distressing is the high court's recent tendency to assume that the same standards apply under the Illinois equal protection and special legislation clauses when previous decisions consistently applied different standards. In addition to confusing equal protection with special legislation, the supreme court in other recent decisions has expressed equal protection in terms so lax and contradictory as to render the concept virtually meaningless.

The Van Meter decision is the most patent aberration because it was delivered only weeks before Illinois Polygraph Society v. Pellicano. In Van Meter, an amendment to the Illinois Housing Development Act sought to alleviate serious housing shortages facing low and moderate income families by raising low interest mortgage funds through municipal bond sales. The amendment contained a provision requiring eligible lending institutions to restrict low interest mortgage loans to "persons in families who have never owned a single family home or condominium." Pursuant to the amendment, the Authority adopted a resolution authorizing a $50 million bond issue and directing its chairman, Van Meter, to execute the bonds and publish notice of their sale. Van Meter refused to do either, claiming that the loan restriction to "first time" homeowners violated the equal protection clauses of the United States and Illinois Constitutions as well as Illinois' special legislation prohibition. In an obvious "test case," the Authority sought a writ of mandamus to compel Van Meter to perform his duties, which the circuit court granted.

On direct appeal, the Illinois Supreme Court analyzed the equal protection claims according to the federal mode. The court found that the amendment neither operated to the disadvantage of a suspect class nor infringed upon a fundamental right. Responding to the argument that the amendment nevertheless created a suspect classification based on wealth that "should trigger a review under a strict-scrutiny standard," the high court

115. 83 Ill. 2d 130, 414 N.E.2d 458 (1980). Illinois Hous. Dev. Auth. v. Van Meter, 82 Ill. 2d 116, 412 N.E.2d 151 (1980), was decided on October 10, 1980. Approximately seven weeks later, on December 1, 1980, Pellicano was decided, not even citing Van Meter, although they both addressed the applicability of the Illinois special legislation prohibition.
117. The amendment at issue in Van Meter provided in part:
(b) The Authority may have outstanding at any one time bonds and notes in an aggregate principal amount... which... amount shall be used solely for the purposes of making loans to lending institutions... for use by such institutions in making residential mortgage loans where the proposed owner-occupant... has never previously owned a single family home or condominium.
118. Id.
119. 82 Ill. 2d at 119, 412 N.E.2d at 152.
120. Id.
121. Id. at 121, 412 N.E.2d at 153.
122. Id. at 120, 412 N.E.2d at 153.
instead chose to apply the lesser standard of "rational relationship."123 As authority for its minimal scrutiny approach, the Van Meter court cited San Antonio Independent School District v. Rodriguez,124 a United States Supreme Court decision that the Illinois Supreme Court read as holding that "such wealth classifications [are] regulations concerning economic and social welfare policy that do not merit active judicial review under the strict scrutiny or compelling interest standards."125

Since wealth did not constitute a suspect classification under the federal approach and since the Van Meter court rejected the notion that housing was a fundamental right,"126 the Van Meter majority had no difficulty discerning the amendment's "rational relationship to a legitimate legislative purpose."127 The legislative classification limiting low interest loans to "first-time buyers" was presumed valid, even though the court recognized that "the amendment may exclude certain non-first-time purchasers who are in greater financial need than some first time home buyers."128 Such under-inclusion was justified by the familiar Illinois equal protection principle that a statutory classification is not required to be "accurate, scientific or harmonious so long as it is not arbitrary and will accomplish the legislative design."129 The Van Meter majority then dispatched the special legislation argument by concluding that the "same standards appl[y] in both Federal and State equal protection analyses . . . to determine violations of the special legislation provision of the Illinois Constitution."130

The Van Meter majority's analysis is flawed on two significant grounds. First, it completely overlooked United States Supreme Court decisions since San Antonio Independent School District where the High Court adopted several intermediate levels of scrutiny between the upper and lower tiers.131

123. The court stated: "We hold in the instant case that a wealth classification infringing on a person's right to housing, a nonfundamental right, should be examined under a rational-relationship standard of review." Id. at 121, 412 N.E.2d at 153.
125. 82 Ill. 2d at 120, 412 N.E.2d at 153.
126. Id. at 121, 412 N.E.2d at 153 (citing James v. Valtierra, 402 U.S. 137, 141-43 (1971), and Village of Belle Terre v. Boras, 416 U.S. 1, 7 (1974)). In Valtierra, the Supreme Court sustained a provision in the California Constitution that any "low rent" housing project had to be approved by local referendum. An almost identical provision in the City of Akron (Ohio) charter was struck down as violative of equal protection in Hunter v. Erickson, 393 U.S. 385 (1969). The rationale in Hunter was that it involved race whereas in Valtierra the discrimination was allegedly based on wealth.
127. Utilizing the rational relationship test, the court held that "the statutory classification of the amendment bears a rational relationship to the legitimate legislative purpose of providing financing for housing to low- and moderate-income families." 82 Ill. 2d at 124, 412 N.E.2d at 154.
128. 82 Ill. 2d at 123, 412 N.E.2d at 154.
129. Id. (citing People v. Valdez, 79 Ill. 2d 74, 83-84, 402 N.E.2d 187, 192 (1980), and Schiller Park Colonial Inn, Inc. v. Berz, 63 Ill. 2d 499, 512, 349 N.E.2d 61, 68 (1976)).
130. 82 Ill. 2d at 124, 412 N.E.2d at 155. Cf. Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972). Justice Schaefer, writing for the court, stated: "While these two provisions of the 1970 constitution [art. I, § 2 and art. IV, § 13] cover much of the same terrain, they are not duplicates . . . ." Id. at 487, 283 N.E.2d at 479 (emphasis added).
131. See notes 27-32 and accompanying text supra.
The Supreme Court has usually tested wealth classifications by the “toothless” minimum rationality standard, but it has not always relegated poverty discrimination to the minimal scrutiny approach. In fact, although recent Supreme Court decisions have applied a “heightened standard of even-handedness” to certain poverty classifications, none of these cases were cited by the Van Meter majority. Thus, Van Meter’s analysis of the federal and state equal protection clauses’ impact on wealth classifications is questionable because it follows the federal approach, yet fails to consider the United States Supreme Court’s most recent pronouncements on the topic.

A far more serious mistake, however, is the Van Meter majority’s remark that the same standards apply to challenges under Illinois’ special legislation and equal protection clauses. As Justice Kluczynski’s dissent pointed out, there is a significant difference between these standards of review. He noted that “[w]hile an equal protection analysis may not suffice to expose the invidious nature of . . . legislative action, the special legislation clause . . . nonetheless provides a means by which more meaningful judicial review can be undertaken . . . .” Furthermore, Justice Schaefer’s well-reasoned opinion in Grace v. Howlett, in which he clearly distinguished equal protection from special legislation, specifically admonished the high court against abdicating its constitutional responsibility to determine “whether a general law can be made applicable” in special legislation cases. By confusing equal protection and special legislation standards, the Van Meter majority sharply departs from Illinois tradition and more than merits Justice Kluczynski’s criticism that their recent special legislation pronouncements and case law analysis “are indefensible.”

Van Meter’s shortcomings can perhaps be explained on practical rather than theoretical grounds. After all, to some extent the high court must rely upon opposing counsels’ presentations, and the friendly confrontation between the Authority and its chairman in Van Meter had all the adversarial

132. See, e.g., Ortwein v. Schwab, 410 U.S. 656 (1973) ($25 Oregon appellate court filing fee not violative of equal protection because requirement of rationality has been met); Dandridge v. Williams, 397 U.S. 471 (1970) (state has legitimate interest in encouraging employment and avoiding discrimination between welfare families; therefore Maryland’s maximum grant ceiling on family welfare benefits held not violative of equal protection).

133. Recently, the United States Supreme Court has applied a higher standard of rationality in certain poverty discrimination cases. See United States Dep’t of Agriculture v. Moreno, 413 U.S. 528 (1973) (congressional amendment to Federal Food Stamp Act denying assistance to households including one or more unrelated members stricken as violative of equal protection clause); United States Dep’t of Agriculture v. Murry, 413 U.S. 508 (1973) (invalidating provision in Federal Food Stamp Act excluding any member of eligible household over 18 years of age who had been claimed in prior year as dependent on federal income tax return).

134. Tamae, supra note 6, at 117.

135. 82 Ill. 2d at 124, 412 N.E.2d at 155.

136. Id. at 125-26, 412 N.E.2d at 155 (Kluczynski, J., dissenting).

137. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

138. Id. at 487, 283 N.E.2d at 479.

139. 82 Ill. 2d at 128, 412 N.E.2d at 156 (Kluczynski, J., dissenting).
quality of playing tennis without a net. This problem is apparent in the court's treatment of Van Meter's argument that a homeowner purchasing another home is not necessarily in a better financial position than a first-time buyer. Because defendant Van Meter presented neither "any factual basis nor any legal authority to support this [argument]," the court found it convenient to conclude that "the unsupported opinions of the defendant are insufficient to overcome the presumption that the law is constitutional." It is possible, then, that counsels' limited presentation of the issues may explain the Van Meter court's misguided analysis.

The Van Meter decision's divergence from Illinois' traditional technique for distinguishing equal protection from special legislation cases was foreshadowed in several preceding supreme court opinions. The first, Friedman & Rochester v. Walsh, involved a challenge to a provision of the Illinois Pension Code that immunized from garnishment or attachment pensions and annuities paid from the Firemen's Annuity and Benefit Fund. A creditor of a fireman's beneficiary attacked the firemen's exemption as violating federal equal protection as well as the Illinois Constitution's equal protection and special legislation clauses because private pensions were not similarly immune from creditor claims.

Without verbalizing the degree of scrutiny it applied, the Walsh court rejected the equal protection arguments on familiar grounds. The decision simply stated that the federal and state constitutions neither "prohibit the establishment of legislative classifications . . . nor . . . require that all persons be treated uniformly." The legislative classification exempting firemen pensions "enjoy[ed] a presumption of constitutionality" and could be sustained "if any state of facts reasonably may be conceived to justify it." The court then noted numerous distinctions between public and private pensions that could justify the statutory exemption for firemen, and there-

140. Id. at 122, 412 N.E.2d at 154. The Congressional Budget Office Report, relied upon by the majority in Van Meter, was also cited by the dissent as showing that "[t]he fact of previous ownership at some point in the individual's lifetime, does not ipso facto establish a preferred financial status." Id. at 126, 412 N.E.2d at 156 (Kluczynski, J., dissenting).
141. Id. at 122, 412 N.E.2d at 154 (emphasis added).
142. 67 Ill. 2d 413, 367 N.E.2d 1325 (1977).
143. ILL. REV. STAT. ch. 108½ (1975).
144. The section of the Illinois Pension Code, ILL. REV. STAT. ch. 108½ §§ 1-101 to 24-107 (1975), challenged in Walsh, was a revision and codification of the various acts relating to pension and annuity funds for public employees. The Code exempted all pensions, annuities, and benefits from the Firemen's Annuity and Benefit Fund from attachment or garnishment process. Specifically, § 6-213 was attacked. It read in pertinent part: "All pensions, annuities, refunds and disability benefits granted under this Article and every portion thereof, are exempt from attachment or garnishment process." Id. § 6-213.
145. 67 Ill. 2d at 418, 367 N.E.2d at 1327.
146. Id. at 419, 367 N.E.2d at 1327.
147. Id. (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970), and quoting McGowan v. Maryland, 366 U.S. 420, 426 (1961)).
148. After rejecting the plaintiff's contention that the immunity from garnishment and attachment granted by § 6-213 of the Pension Code must be struck down because a similar
fore concluded that the challenged classification was not arbitrary or unreasonable. Similarly, the statute’s failure to exempt pension funds for policemen from small municipalities was upheld because the federal and state equal protection clauses “do not prohibit the legislature from pursuing a reform ‘one step at a time’ or applying a remedy to one selected phase of a field while neglecting others.”

The Walsh court disposed of the special legislation claim by asserting that “[t]his Court has stated that violations of the special legislation prohibition are generally judged by the same standards employed under the equal protection clause . . . though the provisions are not duplicates.” Ironically, the Walsh court cited Grace v. Howlett as authority for this statement when, in fact, Grace explained in some detail that the same standards do not apply. Although the Walsh court acknowledged that the 1970 Constitution enlarged the scope of judicial review, it asserted that the constitution did not change the definition of special legislation, even though the Grace decision had held virtually the opposite. Finally, by claiming that “one step at a time” reform was permissible under equal protection and that the same standards apply to special legislation, the Walsh court adopted a position forcefully rejected by the Illinois Supreme Court in Grace. In short, the special legislation standards announced in Grace, if consistently applied in Walsh, should have invalidated the crazy-quilt exemptions and non-exemptions in the pension code.

The second decision presaging Van Meter was Anderson v. Wagner. The challenged provision in Wagner established a special limitations period for medical malpractice actions against physicians and hospitals. Plain-exemption was not granted to recipients of private pensions, the Walsh court outlined the distinctions between private and public pension funds. The court stated:

Pensions for public employees are primarily supported by public funds. The legislature could reasonably have felt that these public funds should go entirely to the beneficiary and not to his creditors through garnishment or wage deductions. The legislature may also have concluded that public pensions are subject to certain statutory limitations and restrictions that do not apply to private pension funds, thus justifying conferring an immunity from garnishment on the payments made from the public pension funds.

Id. at 419-20, 367 N.E.2d at 1327-28.

149. Id. at 420, 367 N.E.2d at 1328.

150. ILL. REV. STAT. ch. 108 1/2, §§ 3-101 to -150 (1975).

151. 67 Ill. 2d at 421, 367 N.E.2d at 1328.

152. Id. at 422, 367 N.E.2d at 1329 (emphasis added).

153. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

154. See notes 93-100 and accompanying text supra.

155. 67 Ill. 2d at 422, 367 N.E.2d at 1329.

156. Although the Grace court noted that the definition remained the same, it emphasized that the 1970 Constitution had changed the court’s role into one of intervention for determining whether a general law is or can be made applicable under § 13 of art. IV. 51 Ill. 2d at 487, 283 N.E.2d at 479.

157. 51 Ill. 2d at 487, 283 N.E.2d at 479. See text at note 98 supra.

158. 79 Ill. 2d 295, 402 N.E.2d 560 (1979).

159. The challenged statute provided:

No action for damages for injury or death against any physician or hospital . . .
ticals contended that the medical malpractice limitations period violated Illinois' special legislation prohibition because there was no reason for classifying physicians and hospitals differently than other tortfeasors covered by the general provisions of the Limitations Act.160

Relying upon federal equal protection analysis and distinguishing prior Illinois cases, the Wagner court found the special malpractice limitations period a reasonable classification.161 It also noted that the constitutional ban on special legislation did not preclude the legislature from "classifying persons and objects," 162 and thus dismissed the special legislation challenge. Although the Illinois Supreme Court had held a similar special limitations period for architects and contractors unconstitutional as special legislation in Skinner v. Anderson,163 the Wagner court concluded that Skinner was not controlling164 and upheld the manifestly arbitrary classification favoring doctors and hospitals.

Wagner cannot plausibly be squared with either the method or result of Skinner. Skinner viewed the shorter limitations period for architects and contractors as unconstitutional special legislation because the court envisioned situations where injuries resulting from improved property could result in suits against manufacturers but not against contractors or architects.165 The Skinner court found no justification for such disparate treatment of joint tortfeasors,166 unlike the court in Wagner. Yet, the Wagner statute also failed to shorten the limitations period for all potential joint tortfeasors in medical malpractice actions by covering only physicians and hospitals but not other personnel or health care facilities.167 Thus, even though Skinner and Wagner involved the same issue, they reached opposite results.

whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, . . . whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death.

161. 79 Ill. 2d at 318-19, 402 N.E.2d at 571.
162. Id. at 320, 402 N.E.2d at 572.
163. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).
164. 79 Ill. 2d at 320, 402 N.E.2d at 572.
165. In discussing the validity of the applicable statute, the Skinner court stated:

The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of a building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. . . . But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted.

38 Ill. 2d at 460, 231 N.E.2d at 591.
166. Id. at 460-61, 231 N.E.2d at 591.
167. See note 159 supra.
Yet another precursor to Van Meter was Fujimura v. Chicago Transit Authority, where the supreme court sustained a six month notice of claim period and a one year statute of limitations for personal injury suits against the Chicago Transit Authority (CTA). These provisions in the Metropolitan Transit Authority Act, under which the CTA was created, were challenged on equal protection grounds by Fujimura and others because the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) established a one year notice of claim period and a two year statute of limitations for personal injury actions against other governmental entities. The circuit court agreed and held the special CTA statute's provisions unconstitutional.

Reviewing the statute on appeal, the supreme court applied "traditional" equal protection analysis by noting that the CTA provisions had to bear a rational relationship to a legitimate state purpose. The Fujimura court admitted that the CTA was a public entity, but emphasized that the CTA's unique function and activities distinguished it from other governmental entities for purposes of shorter notice of claim and statute of limitations periods. The court explained that "classifications of governmental entities based upon their functions and activities are frequently made, and the CTA function is not the only one treated differently from others." After noting that the legislature may properly distinguish between public and private tortfeasors, the Fujimura court then cited numerous provisions of the Tort

169. The Act provides:
Within six (6) months from the date that such an injury was received or such cause of action accrued, any person who is about to commence any civil action in any court against the Authority for damages on account of any injury to his person shall file in the office of the secretary of the Board and also in the office of the General Attorney for the Authority . . . a statement, in writing, signed by himself. . . . If the notice provided for by this section is not filed as provided, any such civil action commenced against the Authority shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further suing. Ill. Rev. Stat. ch. 111 2/3, § 341 (1973).
170. The Tort Immunity Act is the common name for the Local Governmental and Governmental Employees Tort Immunity Act, Ill. Rev. Stat. ch. 85, §§ 8-101 to -103 (1973). In relevant part, section 8-102 provides:
Within 1 year from the date that the injury or cause of action, referred to in Sections 8-101, 8-102 and 8-103, was received or accrued, any person who is about to commence any civil action for damages on account of such injury against a local public entity, or against any of its employees . . . must serve . . . a written notice on the Secretary or Clerk as the case may be, for the entity against whom or against whose employee the action is contemplated. . . . Ill. Rev. Stat. ch. 85, § 8-102 (1973).
171. 67 Ill. 2d at 507, 368 N.E.2d at 105.
172. Id. at 512, 368 N.E.2d at 107.
173. Id. at 513-16, 368 N.E.2d at 108-10.
174. Id. at 514, 368 N.E.2d at 109.
Immunity Act that imposed liability only in certain instances or established varying pre-suit notice restrictions. In light of these differences, the court concluded that the special provisions of the CTA statute were neither unreasonable nor arbitrary because the CTA's immense size and unique problems justified different treatment.

Oddly enough, the Fujimura court claimed support for its decision could be found in Harvey v. Clyde Park District, an earlier case where the Illinois Supreme Court had struck down a statute that purported to establish tort immunity for park districts but failed to protect other governmental units. The Harvey court invalidated the park district immunity statute on special legislation grounds, noting that "[m]ore is involved here than just the classification of governmental units. Those persons who are injured by the negligence of particular governmental units are also classified, and [the Illinois Constitution's special legislation restriction] prohibits the granting of 'special or exclusive' privileges to individuals." The statute was arbitrary in the court's view because "[f]rom the perspective of the injured party, . . . there is no reason why one who is injured by a park district truck should be barred from recovery while one who is injured by a city or village truck is allowed to recover . . . ." Permitting or denying recovery on an arbitrary basis was the effect of the park district statute, which was impermissible under the special legislation prohibition's strict rationality standard.

The parallel between Harvey and Fujimura is striking. Although there may be differences between the CTA and other governmental entities, from

175. Id. at 514-15, 368 N.E.2d at 109. The court observed that the Tort Immunity Act provides for limited liability for police activities (ILL. REV. STAT. ch. 85, §§ 4-101 to -107 (1973)) and fire protection (Id. §§ 5-101 to -103). The court also noted that in certain situations the Illinois Municipal Code will impose absolute liability on a municipality for injuries suffered by a person assisting a police officer. (Id. ch. 24, §§ 1-4-5 to -6), although there are no similar statutes imposing liability for damages incurred while assisting other public employees.

More importantly, the court recognized that suits for damages for the wrongful removal, destruction, or vacation of a building require no notice (Id. ch. 24, § 1-4-7). Also, the Worker's Compensation Act requires a 45-day notice (Id. ch. 48, § 138.6(c)). Finally, the court noted that actions against different regional park districts require six months notice (Id. ch. 19, §§ 545, 634, 784, 844).

176. 67 Ill. 2d at 513, 516, 368 N.E.2d at 108, 109-10.
177. 32 Ill. 2d 60, 203 N.E.2d 573 (1964).
178. Id. at 67, 203 N.E.2d at 577. The statute considered by the court provided in relevant part:

Any park district shall not be liable for any injuries to person or property, or for the death of any person heretofore or hereafter caused by or resulting from the negligence of its agents, servants, officers or employees in the operation or maintenance of any property, equipment or facility under the jurisdiction, control or custody of the park district or otherwise occasioned by the acts or conduct of such agents, servants, officers or employees.


179. 32 Ill. 2d 65, 203 N.E.2d 576.
180. Id. (emphasis added).
181. Id. at 67, 203 N.E.2d at 577.
the perspective of the person injured by a CTA bus those differences are totally irrelevant. Whether crushed by a CTA bus or a City of Chicago garbage truck, the victim has suffered the same injury. This was the gist of the Harvey decision, where the invidious discrimination was the statute's different impact upon similarly situated tort victims rather than the classification between types of public tortfeasors. Thus, even though governmental units have different functions, it is the similarity of governmental activities giving rise to tort liability that may be common to all governmental units, regardless of classification. Equal protection therefore is denied when an injured person's recovery depends upon the tortfeasor's function, rather than its conduct. As the Harvey court noted, to the accident victim such differentiation is a mere "fortuitous circumstance" upon which statutory classification should not turn.182

Although the appellants in Fujimura did not raise the special legislation prohibition, the statute in Fujimura suffered from the same constitutional defect as the statutes struck down in Harvey, Grasse v. Dealer's Transport Co.,183 and Grace v. Howlett.184 In Grasse, a worker's compensation provision was invalidated because its attempted classification of tortfeasors resulted in disparate treatment of similarly situated tort victims. Relying upon Grasse, the Harvey court struck down a tort immunity statute because it purported to classify governmental units by function but allowed different treatment of similarly situated tort victims. Relying upon both Grasse and Harvey, the Grace court held unconstitutional a no-fault insurance statute because it classified tortfeasors but once again treated similarly situated tort victims differently.

Grasse, Harvey, and Grace all followed traditional special legislation analysis by not tolerating statutory arbitrariness that conditioned tort victims' recovery upon fortuitous circumstances. The same result should have been obtained in Fujimura because the pre-suit notice requirement favoring the CTA caused similarly situated tort victims to experience different treatment depending solely upon which governmental tortfeasor injured them. Just like Van Meter, Fujimura deviated from traditional Illinois analysis by sanctioning an arbitrary statutory classification clearly at odds with the special legislation prohibition's strict rationality standard.

In light of Walsh, Wagner, and Fujimura, Van Meter appeared to signal a new special legislation approach that differed greatly from the landmark Grace decision. But less than two months after Van Meter, as if responding to Mr. Justice Kluczynski's jeremiad, the Illinois Supreme Court in Illinois Polygraph Society v. Pellicano carefully noted that there is indeed a dispositional difference between equal protection and special legislation.185 The Pellicano court's exhaustive examination of the two doctrines, however,

182. Id. at 66, 203 N.E.2d at 576.
185. See text accompanying note 111 supra.
somehow overlooked Van Meter, its most recent prior pronouncement on the subject.

Despite its failure to address Van Meter, Pellicano represents an encouraging return to the main line established in Grace. Rather than abdicate its judicial responsibility, the Pellicano court forthrightly faced the issues of "reasonableness" and "special legislation." By distinguishing previous decisions covering similar licensing laws, the Pellicano court engaged in meaningful judicial review consistent with both its constitutional mandate under the special legislation prohibition and with its holding in Grace. Most importantly, the court was not detoured by the route of simple deference to legislative judgment.

In view of the Pellicano decision's return to the traditional Illinois approach, Walsh, Wagner, Fujimura, and Van Meter should be considered aberrant opinions. In those cases, the supreme court consciously muted the difference between equal protection and special legislation, as in Walsh, absently overemphasized the similarity between the two types of claims at the expense of their differences, as in Van Meter, or simply overlooked the special legislation clause altogether, as in Fujimura. The scholarly discussion of federal and Illinois equal protection in Wagner should be viewed as simply an elaborate rationalization for reaching the desired result of alleviating the perceived insurance crisis in medical malpractice coverage, which was the Wagner statute's purpose. In all four cases, the court misconceived its role by deferring to legislative judgment when it was faced with clearly invidious classifications or blatantly special legislation.

Although the Illinois Constitution's equal protection and special legislation clauses "cover much of the same terrain," quite clearly they are not one and the same. They impose distinctly different judicial duties based upon different historical purposes. Equal protection requires deference to legislative judgment, but not to arbitrary or unreasonable classifications. The special legislation prohibition, on the other hand, mandates reverse deference from legislature to judiciary by expressly empowering the judiciary to determine whether a general law can be made applicable. Overlapping similarities between these two types of claims should not, on that account, arbitrarily obliterate or obscure crucial differences. Van Meter, Walsh, Wagner, and Fujimura are unfortunate departures from the mainstream; Pellicano represents an encouraging return.

Straying from the Path Again?

More recently, the supreme court's language in People ex rel. Difanis v. Barr created a problem equally pressing but somewhat different from the confusion over the equal protection-special legislation distinction. Although Barr did not stray from the traditional Illinois equal protection-special legislation reasoning, that court was needlessly careless in expressing equal protection doctrine and the operative standards. In holding that the General

186. 83 Ill. 2d 191, 414 N.E.2d 731 (1980).
Assembly’s exemption of itself from the Open Meetings Act\textsuperscript{187} did not violate equal protection or special legislation restrictions, the Barr court said that “[u]nder the well-established standards regarding equal protection of the laws, the legislature may differentiate between persons similarly situated. . . .”\textsuperscript{188} On its face, this unqualified statement is self-contradictory, nugatory of equal protection under almost any circumstances, and therefore nonsensical. The legislature may classify and treat those different classes differently. But the very purpose of equal protection is to guarantee that persons similarly situated are not treated differently.\textsuperscript{189} Cited as support for the Barr proposition, however, was Kujawinski v. Kujawinski,\textsuperscript{190} which did enunciate a similarly worded rule: “the legislature may differentiate between persons similarly situated as long as the classification bears a reasonable relationship to a legitimate legislative purpose.”\textsuperscript{191} But unlike the quote from Barr, the Kujawinski assertion added the significant qualification that legislative differentiation be reasonably related to legitimate legislative purposes. By inaccurately paraphrasing Kujawinski, the Barr court drastically, though perhaps unintentionally, altered equal protection standards.

The same tendency to imprecisely paraphrase was demonstrated by Kujawinski. As authority for the Kujawinski proposition, McGowan v. Maryland\textsuperscript{192} is cited, complete with page references. Tracing to the McGowan citation, however, reveals nothing even remotely close to the Kujawinski statement of the rule. The page in McGowan credited as the source for the Kujawinski statement contains only the following discussion:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is only offended if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some

\textsuperscript{187} ILL. REV. STAT. ch. 102, § 41 (1979). Section 2 of the Open Meetings Act provides that the meetings of the General Assembly or its committees or commissions are not required to be public meetings. Id. § 42. Section 1 of the Open Meetings Act states:

> It is the public policy of this state that the public commissions, committees, boards and councils and the other public agencies of this state exist to aid in the conduct of the people’s business. It is the intent of this Act that their actions be taken openly and that their deliberations be conducted openly.

\textsuperscript{188} 83 Ill. 2d 204, 414 N.E.2d 736 (emphasis added).
\textsuperscript{189} See, e.g., People v. Nicholson, 401 Ill. 546, 82 N.E.2d 656 (1948); Schreiber v. Cook County, 388 Ill. 297, 55 N.E.2d 40 (1945); Lipman v. Goebel, 356 Ill. 315, 192 N.E. 203 (1934); Tussman & tenBroek, supra note 3, at 344.
\textsuperscript{190} 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).
\textsuperscript{191} Id. at 578, 376 N.E.2d at 1389.
\textsuperscript{192} 366 U.S. 420 (1966).
inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it...

The McGowan pronouncement of equal protection standards in no way resembles the disfigured version presented in Barr and Kujawinski. To transmute the McGowan formulation into the Barr rule that "the legislature may differentiate between persons similarly situated" is to transgress the limits of the license to paraphrase. If the bare statement in Barr is to be the governing standard of Illinois equal protection, then "equal protection of the laws" is an empty phrase and any claim thereunder is foredoomed to failure. Although the McGowan rule is indeed a relaxed standard, it is not the utterly worthless pronouncement found in Barr. Yet, the damage is now done because a number of subsequent Illinois opinions have relied upon the Kujawinski formulation. If this serious misstatement of the law is not soon corrected, future equal protection decisions may blindly quote a paraphrase of a non-existent Supreme Court test.

CONCLUSION

For reasons special to the Illinois Constitution and its history, equal protection claims in Illinois have always received judicial attention beyond that of the federal model. While many economic, property, and police power classifications have survived the federal system's "minimum rationality" standard, comparable statutes and ordinances often have been struck down by Illinois courts because Illinois' "rationality" test has been strictly applied. The Illinois tradition has been further strengthened by the 1970 Constitution's explicit equal protection clause, its cluster of equal protection-type provisions forbidding gender, employment, and handicap discrimination, and its re-adoption of the long-standing prohibition against special legislation. Significantly, even that well-established proscription was fortified with a new proviso that the judiciary, not the legislature, shall determine when a general law is or can be made applicable.

Because the Illinois Supreme Court in Grace v. Howlett recognized that its constitutional responsibility to invalidate special legislation is derived from and enlarged by the new Illinois Constitution, judicial deference to legislative judgment should be minimal. The 1970 Constitution mandated a more activist judicial role in equal protection confrontations—a role not accepted in cases like Wagner, Walsh, Fujimura, and Van Meter. Such abdications of the judiciary's responsibility to invalidate unreasonable statutory classifications are a disservice to, rather than a preservation of, the Illinois Constitution.

193. Id. at 425-26.
194. The McGowan discussion is an elaborate expression of the lower tier's minimum rationality standard, traditionally a relaxed test. Id. at 425-28.

Apart from returning to its activist role required by the Illinois Constitution, the supreme court must exercise greater care in expressing equal protection doctrine and standards of review. The inaccurate paraphrasing that occurred in *Barr* and *Kujawinski* resulted in the meaningless proposition that the legislature may differentiate between similarly situated persons. Without any qualification, this statement on its face undercuts equal protection under almost any circumstances. In the future, the Illinois Supreme Court should take care to note that the legislature may differentiate between similarly situated persons only in limited contexts and only with acceptable reasons.

To borrow Professor Gunther's words, Illinois courts "can and should engage in more serious, less deferential review in order to assure that legislative means generally promote articulated governmental . . . purposes." 196 Increased consciousness of Illinois' unique equal protection tradition will alert Illinois courts to the federal model's limitations and encourage more meaningful review of legislation under the Illinois Constitution's stricter standards.

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196. *Gunther, supra* note 7, at 689.