The Emerging Constitutional Protection of the Putative Father's Parental Rights

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I. INTRODUCTION:
A SURVEY OF STATE LAWS CURTAILING THE PUTATIVE FATHER'S PARENTAL RIGHTS

The constitutionality of the legal disabilities that the states inflict upon the illegitimate child has been the subject of recent discussion both in the legal literature and in the cases. However, the constitutionality of similar discriminations against the father of an illegitimate child is only beginning to gain the same attention. State laws currently treat the putative father less favorably than other parents with respect to privileges of parenthood such as custody of the child, visitation rights, and an opportunity to be heard at adoption proceedings.


5. In almost every state, the father of an illegitimate child has some sort of support obligation. This obligation, although perhaps burdensome, is not here considered to be a discrimination against the father. Actually, these obligations make the father's duties more equal to those of legitimate parents. See generally H. Clark, The Law of Domestic Relations § 5.3 (1968). The Supreme Court has recently granted review in two cases raising the issue whether the equal protection clause mandates that states require putative fathers to support their children because other parents must do so. S. v. D., 335 F. Supp. 804 (N.D. Tex. 1971), prob. juris. postponed, 405 U.S. 1064 (1972); L — G — v. F — O. P — , 486 S.W.2d 41 (Tex. Civ. App. 1971), prob. juris. noted sub nom. Gomez v. Perez, 49 U.S.L.W. 5017 (U.S. June 26, 1972). See also R — v. R — , 481 S.W.2d 182 (Mo. 1968); Baston v. Sears, 15 Ohio St. 2d 166, 299 N.E.2d 62 (1968).
A brief survey of these state laws illustrates the nature and scope of discrimination against the putative father. In the case of the legitimate child, if the parents should separate, each parent generally has an equal right to custody. However, the father of an illegitimate child has no such equality with the child's mother. If the mother of an illegitimate child is a fit parent, she is given custody. This automatic preference for the mother has been applied even when it is far from clear that granting the mother custody will best serve the child's welfare. If the mother is dead or unfit, several states give custody of the child to a putative father who is a fit parent; but


Legitimation statutes will be largely ignored in this Comment since these statutes are often too narrow in their formalistic requirements to legitimate many children. See H. Clark, supra note 5, § 5.2, at 159. Also, many of these statutes only legitimate the child for the purpose of intestate succession. E.g., Cal. Prob. Code § 255 (West 1950); Colo. Rev. Stat. § 153-2-4 (1964); Conn. Gen. Stat. Ann. § 45-274 (1960); Ind. Stat. Ann. § 6-207 (Burns 1953); Ill. Rev. Stat. ch. 3, § 12 (1971).


10. Caruso v. Superior Court, 100 Ariz. 167, 412 P.2d 463 (1966); In re Guardianship
even under these circumstances, some states still deny custody to 
the putative father.\footnote{11} Thus, the putative father’s right to custody is 
sharply circumscribed.

A parent who does not have custody of the child may desire visitation 
privileges. Usually this is not a problem for the separated parents 
of legitimate children.\footnote{12} There are few reported cases concerning the 
efforts of the putative father to gain visitation rights, perhaps because 
few putative fathers desire to visit their illegitimate children or 
because the issue arises only if the mother refuses to allow the visits. 
Most courts that have considered the matter grant visitation privileges 
to the putative father if a close familial relationship has 
existed between father and child.\footnote{13} One court has even ordered 
visitation when there had been no previous social relationship 
between the father and his one-year-old child.\footnote{14} Only the Illinois courts 
have refused under any circumstances to enforce visitation privileges 
for the putative father.\footnote{15} In regard to visitation rights, at least, the 
putative father has gained a measure of legal equality with other 
parents.

Adoption terminates the existing legal relationship between par- 
ents and child and substitutes a new legal relationship with a 
different set of parents.\footnote{16} In normal circumstances, both parents of a 
legitimate child must consent to their child’s adoption, while only 
the mother’s consent is a prerequisite to the adoption of an illegiti-

\begin{thebibliography}{9}
\item 11. In re Adoption of A., 226 A.2d 823 (Del. 1967); Hall v. Hall, 222 Ga. 820, 152 
\item 12. See H. CLARK, supra note 5, § 17.4, at 590.
1967); In re Anonymous, 12 Misc. 2d 211, 172 N.Y.S.2d 186 (Sup. Ct. 1958); Ex parte 
Hendrix, 166 Okla. 712, 100 P.2d 444 (1940) (child legitimated); Commonwealth v. 
Development, A Father’s Right To Visit His Illegitimate Child, 27 Ohio St. L.J. 738 
(1966).
\item 15. DePhillips v. DePhillips, 35 Ill. 2d 154, 219 N.E.2d 465 (1966); Wallace v. Walla-
"ce, 60 Ill. App. 2d 300, 210 N.E.2d 9 (1965).
\item 16. See, e.g., ILL. REV. STAT. ch. 4, § 9.1-17 (1971); N.D. CENT. CODE § 14-15-14 
(1971); UTATH CODE ANN. §§ 78-30-10, 78-30-11 (1955). See generally H. CLARK, supra 
ote 5, § 18.9
\end{thebibliography}
maternal child. The putative father is usually completely ignored in adoption proceedings; neither his consent nor notice to him of the pending adoption is necessary. If the father learns of the adoption proceedings and attempts to intervene, some courts allow him to do so and, in appropriate cases, to gain custody of the child. However, this is a minor exception to the generally valid proposition that the putative father plays no role in adoption. It remains possible for a concerned putative father to lose his parental rights simply because he is unaware of the pending adoption.

The number of children and fathers affected by laws disfavoring the putative father is by no means insignificant. In 1968 alone there were approximately 339,200 illegitimate births. In 1969 approximately 109,000 children who had been born out of wedlock were adopted, representing almost ninety per cent of all adoptions by non-relatives of the child. As late as the fall of 1971 it appeared that no change in this area of family law would be mandated by any doctrine. However, recent cases and the proposed constitutional amendment requiring that equality of rights not be denied on grounds of sex may portend impending change. This Comment will first examine whether the equal protection or due process clauses of the

17. E.g., CAL. CIV. CODE § 224 (West Supp. 1972); N.Y. DOM. REL. LAW § 111 (McKinney Supp. 1971). The only exceptions to this general rule are when a parent is somehow unfit or when a divorced parent of a legitimate child does not have custody. See Katz, Judicial and Statutory Trends in the Law of Adoption, 51 Geo. L.J. 64, 77-85 (1963).

18. See H. Krause, supra note 6, at 32.


Some states require the father's consent if his parenthood has been adjudged in a paternity proceeding, e.g., ALA. CODE tit. 27, § 5 (1958); ARK. STAT. ANN. § 56-106 (1971).


25. H.R.J. RES. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8-9, 92d Cong., 1st Sess. (1971). These resolutions are identical; later citations will be to the House resolution alone.
Constitution presently proscribe disparate treatment of the putative father, as compared with other parents, in regard to parental privileges. Attention will then be given to an assessment of the potential impact of the proposed "equal rights" amendment on the putative father's rights in relation to his illegitimate child.

II. EQUAL PROTECTION

A. Review Under the Traditional Equal Protection Standard

The equal protection clause does not require that a state treat all persons, no matter how situated, alike. It is necessary that laws classify persons into different groups for a variety of purposes. Under the traditional equal protection standard, only a permissible purpose and a classification rationally related to that purpose are required. Although there are some indications to the contrary, classifications are generally set aside only if "no grounds can be conceived to justify them."28

The Court normally does not require that the classification perfectly separate those who are targets of the statute's purpose from those who are not.29 When the standard of review is the existence of a rational relation, the Court has said that classifications need not be "mathematically precise,"30 and has upheld some classifications that on their face appear rather arbitrary.31

While the legislative purposes of state laws that single out putative fathers for differential treatment are not clear, at least two primary


31. See Richardson v. Belcher, 404 U.S. 78 (1971) (offset in Social Security disability payments if worker receives workmen's compensation payments but not if he receives private insurance payments); Dandridge v. Williams, 397 U.S. 471 (1970) (maximum limit on welfare payments no matter how large the family and its needs and regardless of the parents' inability to work); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (owner of truck could post on it advertising for his own business but not for another's business); Goesert v. Cleary, 335 U.S. 464 (1948) (only women who were wives or daughters of male bar owners could work as bartenders); Kotch v. Board of River Port Pilot Commrs., 330 U.S. 552 (1947) (jobs as riverboat pilots given only to relatives and friends of current pilots).
purposes can reasonably be attributed to such laws.\textsuperscript{32} The first is to punish the putative father for his "sins" in order to deter promiscuity and illegitimacy and to encourage marriage and the preservation of the legitimate family unit.\textsuperscript{33} A second purpose, and surely what ought to be the controlling consideration, is to further the welfare of the illegitimate child.\textsuperscript{34} Legislatures and courts might believe that the putative father is generally not likely to have an actual social relationship with his child and is not likely to be a fit parent.

Statutory discriminations against putative fathers do not in every case accomplish the purposes that they are ostensibly designed to advance. Whether the denial of parental privileges deters promiscuity and illegitimacy is particularly doubtful. The Supreme Court has flatly rejected the contention that the denial of recovery to a mother for the wrongful death of her illegitimate child would deter illegitimacy.\textsuperscript{35} The purpose of discouraging promiscuity and illegitimacy is perhaps less farfetched in the context of laws affecting parental privileges such as custody, since parents are more likely to have children in order to enjoy their custody than to collect damages for their wrongful death. But the state has denigrated this purpose by refusing to apply the sanctions curtailing parental privileges to mothers of illegitimate children.\textsuperscript{36} In addition, even if both the mother and the father of an illegitimate child were denied parental privileges, it would appear questionable whether such sanctions could counteract the complex social and psychological forces that foster illegitimacy and promiscuity.\textsuperscript{37} Finally, it is submitted that the purpose of deterring promiscuity should be disregarded if its furtherance by means of depriving parents of custody would conflict with what should be the controlling purpose—promoting the child's welfare. Certainly, this is the case whenever a fit parent is separated from or denied custody of his illegitimate child.

Nevertheless, a court that is merely looking for a rational relation between the classification and its purpose would be likely to uphold laws that discriminate against the putative father. Broad generalizations concerning the illegitimate child's welfare support classifications limiting the custody, visitation, and adoption interests of the putative father. A rational legislature could believe that usually the illegitimate child's welfare will be furthered by living with the mother

\textsuperscript{32} For a discussion on attributing purposes to laws, see Developments in the Law, supra note 26, at 1077-81.

\textsuperscript{33} See H. Krause, supra note 6, at 73-78.


\textsuperscript{36} See notes 6-22 supra and accompanying text.

\textsuperscript{37} See R. Pannor, F. Massarik & B. Evans, supra note 4, at 147-55; H. Krause, supra note 6, at 257-67.
rather than with the father. Those states that deny the putative father any right to custody, even when the mother is dead or unfit, may rationally believe that the interests of the child will be best served by his living with other relatives or guardians. The putative father may generally be less fit as a guardian than others. Even Illinois, the only state that completely denies the father visitation privileges, is not necessarily irrational in assuming that the putative father's visits may harm the child. For example, the visits might well impress upon the child a stigma of illegitimacy or embarrass both mother and child by advertising the child's illegitimacy to the neighbors. Finally, the current exclusion of the putative father from adoption proceedings is justifiable if one assumes that adoption, with the mother's consent, usually advances the child's interest. This assumption appears rational since adoptive parents are carefully screened and presumably the child will be better off with two such parents than with his natural father.

Thus, current state laws have a conceivable basis supporting them and would pass the rational relation test. This conclusion is confirmed by two recent state decisions that upheld under this test classifications that discriminated against the putative father.

B. Review Under the Compelling Interest Test: The Search for a Fundamental Interest or Suspect Classification

I. The Validity of Current Classifications Under Strict Review

Although classifications that affect the rights of putative fathers would be upheld under the rational relation test, in certain instances the Court will abandon its laissez-faire attitude and will uphold a
classification only if it is justified by a compelling state interest. Under this standard of review, the Court will indeed demand that the classification further the state's interest with mathematical precision. Thus, the choice of the applicable standard of review will usually determine the outcome of a case. Almost every classification can meet the rational relation test; few can withstand the strict scrutiny of the compelling state interest standard.

It is unlikely that the laws curtailing the parental rights of putative fathers could withstand such strict scrutiny. The assertion that these laws deter promiscuity and illegitimacy, thereby protecting the integrity of the legitimate family unit, would fail since mathematical precision would require that the same sanctions be applied against the mother as are now imposed against the putative father. Similarly, the purpose of promoting the child's welfare does not justify automatically disfavoring all putative fathers.

Certainly, the welfare of the child must be considered a compelling interest. But however true it may generally be that the mother should be awarded custody in order to further this interest, there are situations in which the father can provide a better environment for the child's development than the mother. Resolving the controversy over whose custody will further the best interest of the child is complex, and no rule of thumb is adequate in every case. Since in custody proceedings the parties are already in court, it should not be difficult for the court to consider evidence regarding what each parent has to offer the child. This might expend more

49. Some states grant known fathers of illegitimate children full equality of parental rights with the mother, but only if they prove their identity and legitimize the child in accordance with a specified procedure. See, e.g., CAL. CIV. CODE § 230 (West 1954). Such statutes may also fail to survive strict scrutiny, for their imprecise classifications still ignore the individual fact situation. The identity of the father and his concern for the child may be clear, and yet, for one reason or another, he may not have legitimated the child in the only permissible way. There appears to be no compelling reason for precluding all putative fathers from presenting evidence concerning their paternity if the issue has not been foreclosed in previous litigation. The states may provide simple means of legitimation, but should not make them the exclusive prerequisite for recognition of the putative father's rights.
However, some states have adopted the so-called "parental right" theory to resolve disputes between a natural parent and an outsider. Under this theory the parent is to be preferred, unless shown to be unfit; and the child's best interest, as such, is not an issue. See H. CLARK, supra note 5, § 17.5, at 291-93; Note, Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties, 73 YALE L.J. 151, 152-66 (1963). Arguably, those states that take this approach cannot contend that the child's interest is to them a compelling state interest for they decline to regard it as compelling in every case.
52. Such court hearings do not guarantee that the evidence will be of high quality
court time, but the saving of court time is certainly not a compelling
state interest. Similarly, in custody controversies between the father
and third parties the best interest of the child in the individual case
can and should be determined.

The same solution is required for any disputes concerning visitation
rights: laws will not withstand strict scrutiny unless they decide
the issue of the child's welfare in the individual case. While it is
possible that the putative father's visits will harm the child, they
might instill in the child a sense of his father's love. The father may
be able to develop desirable qualities in the child that the mother
cannot. He may also be able to ensure that his support money is
being spent wisely and to investigate whether the mother is fulfilling
her parental duties.

These results do not necessarily mean that there would be large
numbers of putative fathers gaining custody of their children or
even rights to visit their children. Probably most fathers, even if
interested in their child, would be content to leave the child in the
mother's custody; and in custody suits between parents, it seems
likely that the mother will usually prevail. Although the putative
father may be more interested in his offspring than is commonly
thought, the fact remains, especially for young children, that the
mother-child relationship is very special in our society. Courts
might decide in many cases that visitation would do everyone con-
cerned more harm than good. The constitutional objection to
custody and visitation laws automatically disfavoring the putative
father is not that they are grounded on generally invalid justifica-
tions, but rather that they fail to take into account particular cases
and individual characteristics. The child's welfare is best promoted by
laws that allow at least a consideration of what impact either custody
of or visitation by the putative father will have on the child.

The current laws that fail to give the putative father notice of a
pending adoption and fail to require his consent likewise are not
mathematically precise: The consent of the mother of an illegitimate
child has been required in situations when adoption would further
the child's welfare; and the putative father's consent has not been
required when adoption may have harmed the child by separating

or the court competent to decide the custody issue; but this is a problem for family-law
reform, not constitutional law. See generally Watson, supra note 51, at 57-64.

54. See text accompanying note 42 supra.
55. See Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965); Recent
Development, supra note 13.
56. See R. PANNOR, F. MASSARIE & B. EVANS, supra note 4, at 85.
57. See J. BOWLBY, supra note 58, at 15.
58. In re Mathers, 371 Mich. 516, 124 N.W.2d 878 (1963); Harvey Adoption Case,
him from a fit parent. This impression of classification would normally be enough to invalidate the classifications under the compelling state interest test. Consent laws affecting adoption can be more precisely formulated to protect the welfare of the child by means less restrictive of the putative father's interest. Requiring his consent will not necessarily harm the child. It need not delay adoption proceedings to the child's detriment, for some delay is already built into these proceedings. While consultations that decide the child's future have typically involved only the mother, successful efforts have been made to include the father. Thus, little inconvenience would result if he too must acquiesce in the adoption decision.

Given a general consent requirement, an adoption that might further the child's interests could still be completed if the putative father could not be found or refused to give his consent. Certainly, as a matter of due process the father's rights to his child could be terminated at a hearing even though he was not present if a reasonable effort had been made to find him. Moreover, even now the mother's consent is not required in all circumstances. One very common substantive ground for dispensing with consent is abandonment; surely, if a father neglects to support or even to visit his child, his inaction must be considered abandonment. Should the father refuse to consent to an adoption that would be in the child's

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60. Procedures such as hearings, agency investigations, and placement invariably take time. Also, there is often a six-month delay between interlocutory and final decrees. See H. CLARK, supra note 5, § 18.5; C. & H. Doss, If You Adopt a Child 102-25, 147-58 (1957); Katz, supra note 17, at 91-94.

61. R. PANNER, F. MASSARIE & B. EVANS, supra note 4, at 85-92. This book is the result of the study of the efforts of one social agency randomly to include the putative father in decisions concerning the child's future. The researchers found that in most cases the mother will name the father and that the father will respond to the agency's invitation to discuss the situation. Id. at 44. This sharing of responsibility by the father actually proved to help the mother psychologically. Id. at 92.

The leading chain of maternal-care homes—the Florence Crittenton Association—has now begun to counsel the putative father as part of its program for the unwed mother. NEWSWEEK, March 27, 1972, at 100.

62. Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 110, 314-15 (1950). A similar situation arises if the mother refuses to or cannot name the father, although there is some indication that this is rare. See R. PANNER, F. MASSARIE & B. EVANS, supra note 4, at 44.


best interest, his rights could be terminated if the adoption statute provided that a consent requirement may be waived when such waiver is in the child’s best interest. Indeed, some states already have statutes of this sort.66 This procedure would further the child’s welfare and effect a lesser infringement upon the putative father’s interests than current laws. A possible failure to gain the father’s consent is no reason to require only the mother’s. Under the compelling state interest test, the states must use “less drastic means”67 to further the child’s interests.

It is unlikely that requiring the putative father’s consent would deter prospective adoptive parents and cause children to go unadopted. An additional consent requirement would add merely a small increment to the large amount of red tape adoptive parents already face. Also, it might be noted that those states that allow the mother to revoke her consent and regain custody after the child has been placed in an adoptive home68 can scarcely argue that they are encouraging adoption. No compelling reason seems to exist for declining to require generally the father’s consent.69

Thus, although the laws curtailing the parental privileges of the putative father are rationally related to the state’s objectives, they are not able to withstand review under the more demanding equal protection standard. The critical inquiry, therefore, is whether these laws are indeed subject to review under the compelling state interest standard. Before that standard can be utilized, a classification must either affect a “fundamental interest,” such as voting,70 or be based upon a “suspect classification,” such as race.71

The state laws that govern the putative father’s parental rights classify parents by two methods. The first is by the legitimacy of the child: the father of an illegitimate child has fewer parental rights than the father of a legitimate child.72 The second is by sex: the

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72. In the subsequent discussion, any distinction between the classifications that
father of an illegitimate child has fewer rights than the mother of the same child. In addition, these laws infringe upon the relationship between the putative father and his illegitimate child. Therefore, the compelling interest test might be invoked—with a resulting invalidation of the laws discriminating against the putative father—if illegitimacy or sex are "suspect classifications," or if the putative father's interest in a relationship with his illegitimate child is "fundamental."

2. The Rise and Fall of Illegitimacy as a Suspect Classification, and the Unlikely Possibility That the Putative Father's Interest in His Child Is Fundamental

Recently, Levy v. Louisiana78 and Glona v. American Guarantee & Liability Insurance Co.74 raised the possibility that the putative father-illegitimate child relationship may be entitled to protection as a fundamental interest, or, alternatively, that classifications based on illegitimacy are, like racial classifications, inherently suspect. Both cases involved statutory classifications based on a child's legitimacy.

In Levy, five illegitimate children were precluded from suing for their mother's wrongful death solely because of their illegitimacy. The Supreme Court held that the statutory denial of wrongful death benefits to these illegitimate children for the death of their mother violated the equal protection clause.75 The grounds for the decision, however, were unclear.76 Some of the Court's language stressed that there was no rational relationship between the classification and some legitimate state purpose.77 However, the decision might have suggested that illegitimacy was a suspect classification,78 invoking a

73. 391 U.S. 68 (1968).
74. 391 U.S. 73 (1968).
75. 391 U.S. at 72.
77. "Though the test has been variously stated, the end result is whether the line drawn is a rational one." 391 U.S. at 71.
78. "We conclude that it is invidious to discriminate against them when no action,
stricter scrutiny of the classification by the Court. In addition, the Court stated:

[W]e have been extremely sensitive when it comes to basic civil rights . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. . . . The rights asserted here involve the intimate, familial relationship between a child and his own mother.79

Thus, the decision may also be read broadly to suggest that the “familial relationship” between mother and child is a fundamental interest. By analogy, the relationship between the putative father and his child may also be fundamental.

In Glona, the companion case to Levy, a mother was precluded by statute from suing for her illegitimate son’s wrongful death. Again the Court held that the statutory classification, discriminating this time against the mother of the illegitimate child, violated the equal protection clause.80 However, in Glona, the Court’s language suggests unambiguously that the statutory classification was irrational under the traditional equal protection standard.81 If the Court intended to hold in Levy that the relationship between mother and illegitimate child is fundamental, or that illegitimacy is a suspect classification, it could have decided Glona more easily by applying the compelling state interest standard to invalidate the state wrongful death statute that was hostile to the relationship between the mother and her illegitimate children. Unlike the case in Levy, the sanction in Glona applied directly to the “sinning” mother rather than against the innocent child. Thus, the relationship between the asserted purpose to deter illegitimacy and the classification denying wrongful death benefits seems somewhat more rational than that in Levy.82 Indeed, when one considers some of the classifications based on tenuous grounds that have been upheld by the Court before and since Glona,83 the result reached by the Court is a bit puzzling. It might have appeared that the Court’s ostensible application of the conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.” 391 U.S. at 72.

79. 391 U.S. at 71.
80. 391 U.S. at 75-76.
81. “Yet we see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served.” 391 U.S. at 75.
82. Cf, 391 U.S. at 76-82 (Harlan, J., dissenting). Justice Harlan argued, inter alia, that it is logical for the state to enforce its requirements of marriage by declaring that certain rights are dependent upon formal family relationships. Whatever the efficacy of this argument in Levy, where the child had no control over its parents’ activities, it certainly is stronger as applied in Glona to the mother of the child. See H. Krause, supra note 6, at 67.
83. See cases cited in note 31 supra.
rationality test in *Glona*, as well as its ambiguous language in *Levy*, was an initial step toward holding that illegitimacy was a suspect classification or that the relationship between parent and illegitimate child was fundamental.\(^{84}\)

Whatever those two decisions meant, they were limited by the Court's five-to-four decision in *Labine v. Vincent*.\(^{85}\) In that case the father of an illegitimate girl, who had lived with him, died intestate. Because he had acknowledged her as his daughter, she could have been a legatee in his will under Louisiana law, but not his heir.\(^{86}\) In contrast, a legitimate child was not only an heir, but could not even be disinherited by a will.\(^{87}\) In an opinion with remarkably little discussion about equal protection the Court, applying at best the rational relation test,\(^{88}\) upheld the classification. The Court in this case made it clear that illegitimacy is not a suspect classification.\(^{89}\) Moreover, the Court's summary treatment of the equal protection issue suggests that the relationship between an illegitimate child and his father is not fundamental. *Labine* may have closed the door to several of the possible routes to invocation of the compelling interest test when laws curtailing the parental rights of putative fathers are at issue.

This conclusion is not changed by the recent decision of *Weber v. Aetna Casualty & Surety Co.*\(^{90}\) Under Louisiana law, an unacknowledged illegitimate child could not recover under the workmen's compensation statute for his father's death on the same basis as a legitimate child or an acknowledged illegitimate child.\(^{91}\) The decedent had four dependent legitimate children and two illegitimate children, whom he could not legally acknowledge.\(^{92}\) The latter children were totally denied a share of the workmen's compensation benefits for their father's death. The Supreme Court, relying heavily on *Levy*,\(^{93}\) said that the inquiry in equal protection was a dual one:

\(^{84}\) Cf. Gray & Rudovsky, *supra* note 1, at 14, in which the authors express their belief that the Court in *Glona* took the middle position between the two standards of review.

\(^{85}\) 401 U.S. 532 (1971).

\(^{86}\) *See* LA. CIV. CODE ANN. arts. 200, 202, 206, 919 (West 1952).

\(^{87}\) LA. CIV. CODE ANN. art. 1495 (West 1952).

\(^{88}\) *See* 401 U.S. at 536 n.6:

Even if we were to apply the "rational basis" test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State.

\(^{89}\) "Levy did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring." 401 U.S. at 536.

\(^{90}\) 406 U.S. 164 (1972).

\(^{91}\) LA. REV. STAT. tit. 23, §§ 1021(3), 1232(4)-(6), 1232(8) (West 1954).

\(^{92}\) *See* LA. CIV. CODE art. 204 (West 1952).

\(^{93}\) Given the similarities in the origins and purposes of [the wrongful death and workmen's compensation statutes] . . . it would require a disregard of precedent
"What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"\textsuperscript{94} The Court held that no legitimate state interest justified Louisiana's classification scheme,\textsuperscript{86} but did not discuss whether the state's discrimination against unacknowledged illegitimate children endangered any fundamental personal rights. The Weber Court's language does not suggest that it viewed illegitimacy as a suspect classification or the father-illegitimate child relationship as fundamental. This reading of the opinion is reinforced by the fact that the Court carefully distinguished Labine.\textsuperscript{96} Weber is best viewed as an attempt to reconcile Labine and Levy. The notion that the compelling state interest standard of review may be applied to any classification based on illegitimacy or hostile to the relationship between a father and his illegitimate child remains dubious.

However, it might be contended more narrowly that those laws that curtail the parental privileges of the putative father still deserve strict scrutiny. This possibility may not be wholly foreclosed by the Court's decisions discussed above. Significantly, in Levy, Labine, and Weber the Court dealt, respectively, with laws that barred the illegitimate child from wrongful death benefits, the ability to succeed to property as an heir, and workmen's compensation benefits—all after the death of the parent. These laws did not directly infringe upon or curtail a possibly extant personal relationship between parent and illegitimate child. Rather, they merely limited the rights of the illegitimate child after the death of his parent in relation to rights he would otherwise have had as a legitimate child. Similarly, the classification in Glona merely precluded the mother from a cash and the principles of \textit{stare decisis} to hold that Levy did not control the facts of the case before us. 406 U.S. at 172.

\textsuperscript{94} 406 U.S. at 173.

\textsuperscript{95} 406 U.S. at 176. The Court noted that, as in Glona, it cannot reasonably be thought that persons will shun illicit relations because illegitimate children cannot receive workmen's compensation benefits. 406 U.S. at 173. The Court also stated that the statutory distinctions do not reflect a greater closeness between a father and his legitimate children since dependency was a prerequisite to anyone's recovery. 406 U.S. 173-74.

\textsuperscript{96} The first ground for distinction was that \textit{Labine} reflected a "traditional deference to a State's prerogative to regulate the disposition at death of property within its borders." 406 U.S. at 170. The second distinction was that in \textit{Labine} the intestate, unlike the deceased in the present action, might easily have modified his illegitimate daughter's unfavorable position. 406 U.S. at 170-71. In \textit{Labine} the deceased could have written a will leaving property to his daughter who could not be an heir if he died intestate. But the deceased in \textit{Weber} could not acknowledge his children since he could not marry their mother, and thus they could not be qualified for protection under the Louisiana workmen's compensation statute. It is unclear what the Court would have done if decedent could have acknowledged his child, although Justice Blackmun, concurring in the result, felt that the Court would have struck down the classification anyway. 406 U.S. at 175-77.
benefit after the death of her illegitimate child. Certainly, it is another thing for the law to discourage or preclude a personal relationship between a living father and his illegitimate child. The question remains whether this is a constitutionally significant distinction, providing a stronger ground for application of the compelling interest test in the latter situation. Despite the Court's utilization of the traditional equal protection standard when reviewing laws that were hostile to the legal relationship between father and illegitimate child, is it possible that the putative father's interest in a personal relationship with his child might be viewed as fundamental?

The interest most directly affected by the illegitimacy classifications in the cases discussed above was primarily economic—the denial of some sort of after-death dollar benefit. Viewed in this light, the use of the traditional standard of review under the equal protection clause is not surprising. The putative father's interest in custody, visitation rights, or notice and an opportunity to be heard at adoption proceedings is noneconomic; it is an intimate, personal interest, arguably deserving greater judicial protection.

Recently in Stanley v. Illinois the Supreme Court was squarely confronted with a case involving the parental rights of the putative father of an illegitimate child. Avoiding a clarification of the issue whether the putative father has a fundamental interest in maintaining a personal relationship with his illegitimate child, the Court decided the case essentially upon due process grounds. Since the Court's due process rationale has potentially far-reaching implications regarding the parental rights of the putative father, it is given independent consideration below. However, in finding the father's claims to be cognizable and substantial under the due process clause the Court commented:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

The Court in Stanley seemed to feel that the relationship between

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98. 405 U.S. 645 (1972).
99. 405 U.S. at 658.
100. See text accompanying notes 132-78 infra.
the petitioner, a putative father, and his child was as important as that between a parent and a legitimate child. Indeed, the Court expressly noted that "the law [has not] refused to recognize those family relationships unlegitimized by a marriage ceremony."\textsuperscript{102}

Read broadly, the language in \textit{Stanley} supports the contention that the personal relationship between any father and child is fundamental. But in its context the quoted language may have only meant that the putative father's interests are protected by the requirements of procedural due process. \textit{Stanley}'s primary reliance on a due process rationale, rather than an equal protection one, may suggest that infringement upon the father's interest will not invoke the compelling state interest test.

The chronology of \textit{Levy-Labine-Weber} seems clearly to pronounce the end of any possibility of illegitimacy classifications being held suspect. These cases also may have foreclosed the possibility of the father-child relationship being held fundamental. After all, the Court itself raised the possibility in \textit{Levy} only seemingly to foreclose it in \textit{Labine}. While the distinction between a legal and a personal relationship has some appeal, it is unlikely that the Court will declare a personal relationship between a putative father and his child to be fundamental. In recent equal protection cases, the Court has refused to declare fundamental two personal interests of equal or greater importance, sustenance\textsuperscript{103} and housing.\textsuperscript{104} Thus, one seeking to challenge current laws would be well advised to concentrate his arguments elsewhere.

\textbf{3. Sex as a New Suspect Classification?}

\textit{The Impact of Reed v. Reed}

The laws governing the parental privileges of custody, visitation, and notice and an opportunity to be heard at adoption proceedings clearly discriminate against the father of an illegitimate child as contrasted with the mother of the same child. Thus, these laws are quite properly viewed as creating sexual classifications.

Traditionally, the Supreme Court has not regarded sex as a suspect classification.\textsuperscript{105} However, recently in \textit{Reed v. Reed} the

\begin{itemize}
  \item[102.] 405 U.S. at 651.
  \item[103.] Dandridge v. Williams, 397 U.S. 471, 483-87 (1970).
Court struck down an Idaho law that discriminated against women. In order to resolve controversies over the appointment of estate administrators, the Idaho law provided for a series of statutory preferences based on the relation of the petitioner to the decedent. Within each class of relations men were to be preferred over women. In *Reed* the separated parents of a deceased minor petitioned independently for appointment to administer his estate. Since, as parents, both were in the same class of relatives, the statutory preference favoring the male required that the father be appointed administrator. The mother's claim that this treatment violated the equal protection clause was rejected by the Idaho supreme court but sustained by a unanimous Supreme Court of the United States.

The Idaho court supplied two grounds for upholding the administrator preference law. The first ground was that the statute was not designed to discriminate against women but to reduce controversies over who should be appointed administrator, which would otherwise require a hearing on the merits. To this end, some order of preference among various classes was necessary. Under the statute, not only were men preferred over women, but children were preferred over parents, parents over brothers and sisters, and so on. If the preference of child over parent is valid, why not that of men over women? Apparently, the court believed that the state could quite properly resolve these controversies by a set of mechanical rules. The second ground was that the legislature evidently concluded that men are, on the whole, better qualified to administer estates. The court noted that this generalization is not true in every case, but was not prepared to say that it was "so completely without a basis in fact as to be irrational and arbitrary." A third

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110. 89 Idaho at 514, 465 P.2d at 698.
111. 89 Idaho at 514, 465 P.2d at 698.
112. 89 Idaho at 514, 465 P.2d at 698.
rationale for the Idaho administrator preference scheme, noted in the Supreme Court opinion, was that such a law may prevent intrafamily squabbles over who shall be appointed administrator. To fulfill this purpose, the Idaho legislature had to prefer one relation over another, one sex over the other. This is essentially another “mechanical rule” argument.

In reversing the Idaho court’s judgment, the Supreme Court did not say that sex was a suspect classification. Rather, the Court purported to apply the rational relation test. The purposes of reducing the workload of the probate courts and promoting family harmony were found to be permissible state purposes; but the means chosen, the mandatory preference based on sex, was deemed an “arbitrary legislative choice.” Noting that those within the same class of relatives were similarly situated, the Court held that it was a violation of equal protection to favor one sex over the other within each class. The Court did not squarely note the argument, relied upon by the Idaho court, that men are generally better estate administrators than women. It did, however, disparage this argument obliquely, noting that under the statutory scheme “a woman whose spouse dies intestate has a preference over a son, father, brother, or any other male relative of the decedent.” Moreover, the Court took judicial notice that a large proportion of estates are administered by surviving widows.

The Court in Reed failed to mention or cite earlier cases that had upheld sexual classifications. These cases had looked for, at best, a minimal rational relation between classification and purpose. Goesaert v. Cleary, for example, upheld a Michigan law that prohibited women from tending bar unless they were the wife or daughter of the bar’s male owner. The Court ignored the statute’s most obvious legislative purpose—monopolization of the trade for males—and found a purpose in protecting women from social vices. Because of this, “Michigan could, beyond question, forbid all women from working behind a bar.” An exception for wives and daughters of male tavernkeepers was deemed reasonable since the presence of a male family member would tend to reduce danger to a barmaid. The Court made clear its view that sex was not an impermissible classification: “The fact that women may now have achieved the

113. 404 U.S. at 76-77.
114. 404 U.S. at 76.
115. 404 U.S. at 76-77.
116. 404 U.S. at 76.
117. 404 U.S. at 77.
118. 404 U.S. at 75.
119. 404 U.S. at 75.
120. 335 U.S. 464 (1948).
121. 335 U.S. at 465.
virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes...”

In Hoyt v. Florida, the Court upheld Florida’s automatic exemption from jury service for women. Since women who desired to become jurors were required to register, there were few female jurors. The Court concluded that a state could reasonably believe that since a woman is still the center of the home life, she should automatically be relieved of jury duty unless she felt such duty was consistent with her responsibilities. Justice Harlan, speaking for the Court, added:

This case in no way resembles those involving race or color in which the circumstances shown were found by this Court to compel a conclusion of purposeful discriminatory exclusions from jury service... There is present here neither the unfortunate atmosphere of ethnic or racial prejudices which underlay the situations depicted in those cases nor the long course of discriminatory administrative practice which the statistical showing in each of them evinced.

Thus, the Court did not consider sexual classifications to be inherently suspect, as were racial classifications.

The judicial attitude toward the sexual classifications in Reed may represent a departure from the attitude evidenced in Goesaert and Hoyt. The Court may be beginning to look at sexual classifications more seriously. There are several indications that the Court would have upheld those classifications in Reed that favored one set of relatives over another without favoring one sex over another. Yet, if the vice of the sexual classification was that the mechanical rules saved court time “arbitrarily” by favoring males over females without determining the best administrator, then the rules favoring some relatives over others would be equally arbitrary. It could be argued that the children of the deceased are generally closer to the deceased than his parents and hence are better administrators of the estate. But is it any less conceivable that, all other factors being equal, men are better qualified, if only from practical business experience, as administrators? If no tenable distinction exists between the rationality of sexual classifications as compared with lineal rela-

122. 385 U.S. at 466.
124. 368 U.S. at 61-62.
126. The Court continually stressed the arbitrary nature of the mandatory sex classification. See 404 U.S. at 74, 76, 77. Indeed, the Court hinted that only one other part of the Idaho statutory scheme was invalid—the section that favored brothers over sisters. 404 U.S. at 74-75 n.4. Moreover, the Court pointed out that the favoritism given males over females was not redeemed by the fact that it was part of a broader scheme, thus implying that the favoritism given some relatives was valid. 404 U.S. at 77.
tionship classifications in regard to the purpose of obtaining the best administrator, then one may infer that the Court may have regarded sex as a special criterion for classification. While the Court will uphold arbitrary mechanical rules favoring one class of relatives over another in order to decrease the workload of the probate courts and to promote intrafamily harmony, it will not uphold a mechanical rule favoring one sex over the other. Thus, although the Court ostensibly employed the rationality test, it is arguable that it was in fact applying a stricter standard of review to the sexual classifications.

However, the argument that because the Court employed a stricter standard of review in Reed, sex is now a suspect classification, would probably fail in the face of the Court's explicit "rationality" language. Reed v. Reed is a Janus-like decision. It might be viewed as a cautious first step in a line of precedent that will conclude with the express recognition of sex as a suspect classification.127 But the decision will probably be read narrowly as a rather unique case that struck down a peculiar statute under the traditional equal protection standard, and the potentially broader implications of the decision may be ignored.

Two recent Supreme Court summary affirmances of lower federal court decisions suggest that the latter reading of Reed is the more likely. In Williams v. McNair128 the Court upheld a state university's exclusion of males on the ground that all-male and coeducational state schools of similar quality were available. Forbush v. Wallace129 upheld a regulation requiring that a married woman use her husband's surname on a driver's license application. Although both of these cases involved difficult problems of the extent to which the equal protection clause invalidates sexual classifications, the Court's disposition of them manifested a reluctance to proceed, if proceed at all, at anything more than a deliberate pace. Indeed, the cases cast serious doubt on the proposition that sex is a suspect classification.

Two cases decided in the spring of 1972 might have clarified this area but did not do so. In Alexander v. Louisiana,130 the Court

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127. One technique of overruling prior decisions is first to set up a line of contrary decisions so that the Court can later say that the prior decisions have been drained of all vitality. See Israel, Gideon v. Wainwright, The "Art" of Overruling, 1965 Surv. Cr. Rev. 211, 223-26.


130. 405 U.S. 625 (1972).
avoided the issue of whether equal protection prohibits exclusion of
women from grand juries and instead decided the case on the ground
that the state had unconstitutionally excluded blacks from grand
juries. More significantly, in *Stanley v. Illinois* the Court avoided a
clarification of the sexual classification issue as well as the funda­
mental interest issue. Thus, the proposition that classifications dis­
favoring the putative father are suspect classifications based upon
sex, as well as the proposition that the putative father has a funda­
mental interest in maintaining or developing a personal relationship
with his illegitimate child, remains dubious. *Stanley*, however, de­
serves a detailed examination since its due process rationale may
provide a touchstone for future litigation concerning the parental
rights of the putative father.

III. THE SURPRISING EMERGENCE OF DUE PROCESS

A. *Stanley v. Illinois*

The Illinois Juvenile Court Act has special provisions estab­
lishing procedures for the care of dependent children. The statutory
definition of “dependent child” includes those minor children who
are living without a “parent” or court-appointed guardian. Signifi­
cantly, the definition of “parent” includes the mother, but not
the father, of an illegitimate child. In *Stanley* an unmarried man
and woman lived together intermittently for eighteen years, during
which time they had three children. After the mother died, the
state instituted proceedings to have the two youngest children ad­
judicated dependent. The trial court concluded that since the chil­
dren’s father had never married their mother, the father was not a
“parent” under the statutory scheme. Thus, the children were “de­
pendent,” and became wards of the court upon their mother’s death.
Consequently, the court granted the state’s request for appointment
of two neighbors as guardians. The father’s claim that the Illinois
statute’s discrimination between mother and father violated the
equal protection clause was rejected on appeal by the Illinois su­
preme court, which held that the classification was rational, given
the purposes of the Act.

The Supreme Court reversed the Illinois judgment, holding that
the statutory procedure violated both the due process and equal pro­  

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131. See text accompanying notes 98-100 supra.
133. ILL. REV. STAT. ch. 37, § 702-5 (1971).
134. ILL. REV. STAT. ch. 37, § 701-14 (1971).
135. 405 U.S. at 646.
tection clauses of the fourteenth amendment.\textsuperscript{138} The Court's equal protection holding was deduced from and dependent upon its due process holding, as the following passage indicates:

&ldquo;We have concluded that &ldquo;[under the Due Process Clause] all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.&rdquo;\textsuperscript{139}

Thus, it is the due process holding on which the decision turned.\textsuperscript{140}

In considering the Illinois procedure under the due process clause, the Court observed that it was &ldquo;firmly established that &ldquo;'what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action.' &rdquo;\textsuperscript{141} Stressing the strong &ldquo;'private interest . . . of a man in the children he has sired and raised'&rdquo;\textsuperscript{142} and drawing no distinction between legitimate and illegitimate family relationships,\textsuperscript{143} the Court noted that &ldquo;'Stanley's interest in retaining custody of his children is cognizable and substantial.'&rdquo;\textsuperscript{144}

The Court did not question Illinois' statutory purpose, but only the means used by the state in order to achieve its objective. The Court observed that the stated purpose of the Juvenile Court Act is to protect &ldquo;'the moral, emotional, mental and physical welfare of the minor and the best interests of the community'&rdquo; and to &ldquo;'strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal . . . .&rdquo;\textsuperscript{145}

Given this purpose, the Court observed that

\textsuperscript{138} 405 U.S. at 649.

\textsuperscript{139} 405 U.S. at 658. In reply, Chief Justice Burger in dissent said, &ldquo;'This 'method of analysis' is, of course, no more or less than the use of the Equal Protection Clause as a shorthand condensation of the entire Constitution . . . .&rdquo; 405 U.S. at 660.

\textsuperscript{140} The due process rationale was surprising since it had not been argued in any court. See Brief for Petitioner, Stanley v. Illinois, 405 U.S. 645 (1972). Chief Justice Burger noted that, under precedent, this was exceeding the Court's jurisdiction. 405 U.S. at 659-60 (dissenting opinion). The Court replied by pointing to its feeble equal protection holding and saying, &ldquo;'[w]e dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court.'&rdquo; 405 U.S. at 658 n.10.


\textsuperscript{142} 405 U.S. at 651.

\textsuperscript{143} 405 U.S. at 651-52.

\textsuperscript{144} 405 U.S. at 652.

\textsuperscript{145} 405 U.S. at 652, \textit{quoting ILL. REV. STAT. ch. 37, § 701-2 (1971).}
the State registers no gain toward its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.146

From this reasoning, and relying on Bell v. Burson147 and Carrington v. Rash,148 the Court held that Illinois must give the putative father a hearing on his fitness before depriving him of his children. Administrative convenience could not justify the state’s failure to provide such a hearing.149 The Court stated:

Procedure by presumption is always cheaper and easier than individualized interpretation. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.150

The curious aspect of this decision was that in the guise of procedural due process, the Court struck down Illinois' substantive law. The father in Stanley in fact had been granted a hearing. What the Court objected to was that the only issue in the father’s hearing was whether he had ever married his children’s mother. The Court dictated to Illinois the substance of the putative father’s hearing when it insisted that the state inquire into his fitness before removing his children. Conceding that the difference between substance and procedure is unclear in many contexts,151 the result in Stanley appears clearly substantive.

Since the judicial crisis of the 1930’s, the Court, when reviewing statutes under the due process clause, has been very reluctant to strike down substantive rules but quite willing to require that states adopt certain procedural safeguards.152 The two cases relied upon by the Court in Stanley do not provide a solid foundation for the apparent mixing of these two concepts.

Bell v. Burson involved a Georgia administrative system in which the driver’s license of an uninsured motorist was suspended when the motorist became involved in an accident, unless the motorist could post sufficient security to meet possible claims.153 The Supreme Court

146. 405 U.S. at 652-53.
149. 405 U.S. at 656-57.
150. 405 U.S. at 657.
held that a hearing on a driver’s probable liability for any claims arising out of the accident was mandatory before his license could be suspended.\textsuperscript{154} \textit{Bell} is distinguishable from \textit{Stanley} since in \textit{Bell} there would have eventually been a hearing to determine the driver’s liability in the accident and a finding that the driver was without liability would have lifted his suspension at that time.\textsuperscript{155} Indeed, the Court made this point in rejecting Georgia’s argument “that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme.”\textsuperscript{156} Thus, \textit{Bell} is a classic example of the judicial imposition of a procedural safeguard that does not contradict the state’s substantive scheme. In \textit{Stanley}, on the other hand, Illinois never required a later hearing on the father’s parental fitness; his fitness in the particular case was irrelevant to the substantive scheme.

The other case relied on by the Court, \textit{Carrington v. Rash}, involved an equal protection challenge to a Texas law creating an irrebuttable presumption that servicemen were not bona fide residents and hence precluding them from voting. \textit{Carrington} involved access to the ballot, clearly a fundamental interest.\textsuperscript{157} The Court in that case demanded that more precise classifications be employed to determine which servicemen were bona fide residents of the state. Imprecision of classification is a problem in \textit{Stanley}—a child’s welfare may be diminished if he is taken away from a fit putative father. But the Court in \textit{Stanley} did not deal with this problem under the equal protection clause; rather, it held that a hearing on the putative father’s fitness was a requisite of due process. Thus, the Court’s application of \textit{Carrington}’s imprecise classification rationale to the statute involved in \textit{Stanley} was an unusual use of precedent.

B. \textbf{The Application of \textit{Stanley v. Illinois} to Other Discriminations Against the Putative Father}

The effect of \textit{Stanley} on other discriminations against the putative father is unclear. As Chief Justice Burger said in his dissent, the decision “embarks on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible.”\textsuperscript{158} Because the Court used the language of procedural due

\textsuperscript{154} 402 U.S. at 542-43.
\textsuperscript{156} 402 U.S. at 541.
\textsuperscript{157} Dunn v. Blumstein, 405 U.S. 330, 336-38 (1972). The opinion in \textit{Carrington} itself is unclear. The Court first states that there must be a reasonable relation between the classification and its purpose, 380 U.S. at 93, and then later states that the right to vote is close “to the core of our constitutional system” and may not be casually denied, 380 U.S. at 96. Despite this ambiguity, \textit{Carrington} has been recognized as applying a more stringent equal protection test. Shapiro v. Thompson, 394 U.S. 618, 660 & n.8 (1969) (Harlan, J., dissenting).
\textsuperscript{158} 405 U.S. at 668.
process, Stanley should be solid precedent in that area. But since its holding affected state substantive law, Stanley may also have substantive implications.

1. Procedural Effects of Stanley

As discussed above, 159 most states deny the putative father notice of a pending adoption. Notice and a right to be heard are traditional requirements of procedural due process. 160 In holding that the putative father's interest in his child is "cognizable" under the due process clause, 161 Stanley raises the issue whether these requirements of due process apply to the putative father's interest in his child's adoption. 162 It might be contended that due process only protects the interest of a "man in the children he has sired and raised," 163 not that of a father who has never seen or who rarely sees his child. This argument, however, is totally impractical because such a limitation would require an investigation in every case to determine the extent of the putative father's relationship with the child prior to the adoption, 164 and such investigations would not be without borderline situations of interpretive difficulty. Therefore, it seems far simpler and the only reasonable reading of Stanley to hold that the blood relationship between father and child is in itself a substantial interest protected by due process.

In order to evaluate the procedural due process claim that notice and a hearing must be given the putative father, one must consider not only the interests of the father, but also those of the state. 165 Because the father may provide suggestions concerning the child's future that would not otherwise be considered, the state cannot argue that denying the putative father notice and an opportunity to be heard would necessarily further the child's interests. 166 It is especially important that the father be given some hearing within a short time after the child is surrendered for adoption so that any custody issues are resolved before the child becomes attached to one guardian. 167

The contention that such a procedural requirement would upset

159. See text accompanying notes 17-20 supra.
161. 405 U.S. at 652.
162. In Armstrong v. Manzo, 380 U.S. 545 (1965), the Court held that due process requires notice to the father of a legitimate child before adoption.
163. 405 U.S. at 651.
166. See Note, Father of an Illegitimate Child—His Right To Be Heard, 50 MINN. L. REV. 1071, 1084 (1966).
167. See id. at 1080, 1085.
adoption proceedings and create uncertainty is dubious. Only reasonable efforts to notify the father are necessary; if he cannot be located, the adoption may still proceed. The increased costs of serving process would not justify the failure to give notice since relatively inexpensive means, such as the mail, could be used. Because there is no apparent substantial countervailing state interest, notice to the putative father and an opportunity to be heard at adoption proceedings should be required by the due process clause. The father should be heard, if he so desires, at the parental termination hearing. If no parental termination hearing is required by state law, he should be allowed to bring an independent custody proceeding within a reasonable time. Only such procedures can ensure that an interested parent’s suggestions for his child’s future will at least be considered before the adoption becomes final.

2. Substantive Effects of Stanley

While the impact of Stanley on procedural due process issues is fairly clear, its effect on substantive discriminations is uncertain. If Stanley presages strict scrutiny of the substantive laws that discriminate against the putative father, its effect could be devastating. Unless held to its facts, Stanley would vitiate the current state laws that automatically favor the mother, if she is a fit parent, in custody disputes with the putative father. In this situation it might


One aggravating problem is finding an appropriate remedy for a failure to give notice to the father. To give the father custody after the child had spent some time with the adoptive parents would vindicate the father’s rights but also would likely harm the child. The Court in vacating the judgment in Rothstein for consideration in light of Stanley recognized this, for it ordered due consideration be given “for the completion of the adoption proceeding and the fact that the child has apparently lived with the adoptive parents for the intervening period of time.” 405 U.S. at 1051. One student commentator has argued that this lack of an effective remedy vitiates the right. Note, 1971 WIS. L. REV. 1262, supra note 3, at 1270-73. This ignores the fact that usually the Court has created remendies when needed to vindicate a recognized right. See, e.g., Mapp v. Ohio, 367 U.S. 643 (1961). A possible alternative remedy is to give the father a cause of action against the adoption agency that allowed adoption without attempting to give the father notice. Cf. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). In any case, it is likely that responsible agencies, not wanting to risk a change in custody after placement, would attempt to give the father notice. See Comment, supra note 164, at 237.

173. See authorities cited in notes 8-9 supra.
be said that the state is still proceeding by presumption contrary to the spirit of Stanley. The Court noted in Stanley that while many putative fathers may be unsuitable parents, “some are wholly suited to have custody of their children.” Similarly, some putative fathers will provide a better environment and have a better relationship with the child than its mother, although she too is a fit parent. This result may be desirable in terms of policy; but if the focus is upon the state's failure to further the child's welfare in every case, then all of the laws that discriminate against the putative father share this defect. For this reason, courts might be reluctant to extend Stanley at all for fear that, absent a stopping point, all of these laws would be invalid.

There is at least one tenable argument to limit Stanley to its facts. In Stanley the state on its own initiative intervened into a family's life and took the child away from the father. Suits between private individuals are probably a more common method of determining child custody than dependency actions initiated by government. It might be contended that Stanley only requires a hearing on the father's fitness when the state intervenes to take custody away from the father; the courts may still irrebuttably presume that the father is unfit, or less fit, when there is a custody dispute between private individuals. This limitation would reconcile the result in Stanley with its procedural due process language: when a state takes custody of a child or something else of importance from an individual, it must hold a hearing to ensure that it is furthering its announced goals. This “procedural” limitation of Stanley's value as precedent, however, ignores the substantive impact the case had on Illinois' Juvenile Court Act. Apparently no other procedural due process case has required that a state determine certain issues in its hearings; prior cases required only that, given the substantive law, states grant individuals notice and a hearing. Although one cannot be sure what course the courts will take, procedural limitation of Stanley appears to be a likely result. Given the apparent reluctance of the Supreme Court to extend the reach of constitutional adjudication—

174. 405 U.S. at 654.
175. See text accompanying notes 49-59 supra.
176. Among the most common procedural devices in private custody disputes is the writ of habeas corpus. Unlike the writ used in criminal cases, the welfare of the child rather than the legal right to custody is the ultimate issue. See, e.g., New York Foundling Hospital v. Gatt., 203 U.S. 429 (1906); Commonwealth ex rel. Children's Aid Society v. Gard, 362 Pa. 85, 66 A.2d 300 (1949). Other procedural mechanisms include petitions in equity and petitions for guardianship. See generally H. CLARK, supra note 5, § 17.3.
tion in this area, the Court is not likely to force states to change their current laws without some outside impetus. The political process, however, may be providing this impetus in the form of a constitutional amendment.

IV. THE EFFECT OF THE PROPOSED EQUAL RIGHTS AMENDMENT

While the decisions discussed above were being argued, considered, and decided, Congress was deliberating and passing a proposed amendment to the Constitution that would provide for equality of rights between men and women. If this amendment is ratified by the required three fourths of the states the issues raised by the cases will be rendered moot since the amendment will mandate the far-reaching changes only tenuously suggested by the case law.

With deceptive simplicity the operative provision of the proposed amendment provides: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Although the ambiguity of this provision has been extensively criticized for present purposes only two issues need be discussed: (1) Does the amendment prohibit discrimination that favors women over men; and (2) what is the proper standard for judicial review under the amendment?

The first issue can be resolved readily by reference to the amendment's legislative history, which indicates that the amendment was intended to grant complete equality between the sexes. Both houses of Congress defeated amendments that would have exempted women from the draft. Specifically in regard to child custody one House supporter of the amendment stated:

[T]he amendment would eliminate any legal presumption favoring the granting of custody to the mother. As a result, child custody cases would have to be determined by the courts in terms of the needs and best interests of each individual child.


180. At least twenty states of the required thirty-eight have ratified the amendment, 30 CONG. Q. WEEKLY REP. 1529 (1972).


The legislative history in the Senate also supports the conclusion that
domestic relations laws favoring women would be void. The Senate
Report stated the basic principle of the amendment: "[S]ex should
not be a factor in determining the legal rights of men or of
women." Thus, the amendment will protect men as well as women.

The second issue, the appropriate level of judicial review of
statutes that classify by sex, cannot, but need not, be answered
definitively. One thing is certain—Congress did not intend that
sexual classifications should be upheld on the basis of a mere rational
relation between the classification and some state objective. A Judi­
ciciary Committee amendment that would have upheld sex classifica­
tions that "reasonably promote the health and safety of the people" was
defeated on the floor of the House. The Senate Report, adopting
the minority statement of the House Report, stated generally:

The legal principle underlying the [proposed amendment] is that
the law must deal with the individual attributes of the particular
person and not with stereotypes of over-classification based on sex.
However, [the amendment] does not require that women must be
treated in all respects the same as men. "Equality" does not mean
"sameness." As a result, the [amendment] would not prohibit reason­
able classifications based on characteristics that are unique to one sex.
For example, [sic] a law providing for payment of the medical costs
of child bearing could only apply to women. In contrast, if a par­
ticular characteristic is found among members of both sexes, then
under the proposed amendment it is not the sex factor but the in­
dividual factor which should be determinative.

The laws disfavoring the putative father's parental rights are not
based on characteristics unique to one sex or the other, for good
parents can be found among both sexes. Thus, these laws will prob­
ably be in violation of the Constitution upon ratification of the pro­
posed amendment. Read literally, the Senate Report would bar
blanket discrimination against the putative father no matter how
compelling the interest supporting the classification. Indeed, an in­
fluential article saw this as an advantage to the amendment.

However, it is possible that, by judicial interpretation, a mini­
imum standard of review under the amendment might be to scrutinize
sexual classifications under a standard, derived from existing case

185. 118 CONG. REc. S.4389 (daily ed. March 21, 1972) (remarks of Senator Bayh);
186. S. REP. No. 92-689, supra note 185, at 2.
188. S. REP. No. 92-689, supra note 185, at 12, quoting H.R. Rep. No. 92-359, supra
note 187, at 7.
law, that would incorporate the compelling state interest test. This difference is more theoretical than real, for, as illustrated above, the laws disfavoring the putative father cannot withstand the strict scrutiny of the compelling interest test.

V. CONCLUSION

A range of constitutional doctrines and cases potentially affect the laws governing the parental rights of the putative father. But the most important cases, Reed v. Reed and Stanley v. Illinois, are ambiguous. Absent a ratification of the proposed equal rights amendment, a narrow reading of these cases is likely. The Court would naturally be reluctant to strike down many sexual classifications following a defeat of the proposed amendment, and the Court would have little incentive to extend Stanley beyond procedural due process.

However, all doubts raised by the cases and all current laws that discriminate against the putative father would be swept away if the proposed constitutional amendment is ratified by the states. Consequently, the putative father would be able to gain custody of his child when he is the best available guardian, gain the right to visit his child in suitable circumstances, and would have an equal voice when adoption is considered for his child.

These changes will come more from the logic of legal arguments than from any outpouring of public sympathy for the plight of the putative father. But to focus only upon the legal gains of the putative father is to miss the crux of the social problem involved. The primary public concern should be for the welfare of the illegitimate child. Current laws with their wooden preferences for the mother are simply not promoting this interest in every case. A forced change in current laws may not significantly affect current social relations—the mother will probably remain the parent closest to the illegitimate child. These changes will, however, require courts to engage in the difficult task of determining the welfare of the illegitimate child in each dispute concerning the child. Only then can the states claim that their domestic relations laws promote the best interests of the illegitimate child.

190. See S. REP. No. 92-689, supra note 185, at 12-13, quoting H.R. REP. No. 92-359, supra note 187, at 7 (minority statement).

191. See text accompanying notes 49-69 supra.