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The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria

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NOTES

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INTRODUCTION

The past two decades have witnessed enormous changes in both substantive constitutional law and the courts' approach to constitutional questions. The frequent application of the doctrine of less restrictive alternatives has been a factor of increasingly significant proportions in effecting these changes. Although the doctrine has long been part of our jurisprudence,[1] it did not begin to have a serious impact until the Warren Court years,[2] and, despite its widely diversified use today, the concept is almost always applied without discussion.[3]

Succinctly and broadly stated, the doctrine requires that a state not employ a specific means to accomplish an admittedly legitimate purpose if it has available alternative means that are less restrictive upon some individual interest. The nuances of the doctrine are of course manifold, and it has been variously titled "less drastic means,"[4] "the reasonable alternative,"[5] "the less intrusive alternative,"[6] "precision of regulation,"[7] and "necessity."[8] In ac-

1. The doctrine has roots dating from 1821 and has been an element of our constitutional law in varying degrees of importance throughout the intervening years. *See* notes 286-90 and accompanying text, *infra.*

While the use of alternatives has not received the attention and analysis which its importance merits, it has not gone completely unnoticed by commentators. For a rather thorough cataloguing of the cases through 1964 see Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L. REV. 254 (1964). For more analytical approaches in particular areas of constitutional law see Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process,* 80 HARV. L. REV. 1463 (1967); Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969) [hereinafter cited as YALE NOTE]. *See also* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,* 70 MICH. L. REV. 1107, 1109-11, 1137-51 (1972); Ratner, *The Function of the Due Process Clause,* 116 U. PA. L. REV. 1048, 1049-51, 1082-93 (1968).

2. The movement for increased utilization of the doctrine began with statements in the NAACP cases of the early sixties. NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960). *See* notes 183 & 253 *infra.*

3. *See, e.g.,* YALE NOTE, *supra* note 1, at 464: "[I]t often appears that invocation of the phrase 'less drastic means' does not so much explain the result as announce it." The Court, however, has recently shown an inclination to hring the doctrine more into the open. *See* Richardson v. Ramirez, ___ U.S. ___ 94 S. Ct. 2655, 2682-83 (1974) (Marshall, J., dissenting); American Party of Texas v. White, 94 S. Ct. 1296 (1974); Storer v. Brown, 94 S. Ct. 1274 (1974); Lubin v. Panish, 94 S. Ct. 1315 (1974); notes 184-99 *infra* and accompanying text.

4. *See, e.g.,* United States v. Robel, 389 U.S. 258, 268 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960); YALE NOTE, *supra* note 1.

5. *E.g.,* Wormuth & Mirkin, *supra* note 1.

6. *E.g.,* Ratner, *supra* note 1, at 1082-93.

7. *E.g.,* NAACP v. Button, 371 U.S. 415, 438 (1963).

8. *E.g.,* Dunn v. Blumstein, 405 U.S. 330, 342 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

cordance with common usage, these titles will be used interchangeably in this Note.[9]

This Note has a three-fold purpose. Part I will examine the case law to decipher through inductive and comparative analysis how the doctrine has been applied in several areas of constitutional law.[10] Part II will attempt to deduce whether a court's scrutiny of legislative alternatives is consistent with the proper scope of judicial review. Part III will then proceed under the conclusion that such scrutiny is consistent and will develop criteria and standards for principled application of the doctrine. The focus there will be upon the extent to which the Court should pursue alternatives, defer to legislative judgments, or follow its own assessments.

I. Application of the Less Restrictive Alternative Doctrine in Existing Case Law

The diverse application of the doctrine of less restrictive alternatives necessitates an inquiry organized according to the doctrine's use under several relevant constitutional provisions. The inquiry begins with an examination of the varied significance of less drastic means in substantive and procedural due process cases and in the line of decisions dealing with conclusive statutory presumptions. Attention is then focused on the doctrine's use in commerce clause, equal protection (under "old," "new," and "newer" standards), and first amendment decisions.

The discussion generally progresses from those areas in which less drastic means are presently considered least relevant to instances where they are often decisive, although there are aberrations in that progression, particularly from recent happenings in substantive due process and conclusive presumption cases. The purpose here will be to illustrate the gamut of problems that arise from applica-

9. *See* Yale Note, *supra* note 1, at 464 n.2. As will be explained below, (see text accompanying notes 359-376 *infra*) consideration of alternatives really involves 2 different inquiries, one into "tailoring" the statute and another into other types of regulation. *See* Richardson v. Ramirez, ___ U.S. ___, 94 S. Ct. 2655, 2682-83 (1974) (Marshall, J., dissenting); Kahn v. Shevin, ___ U.S. ___, 94 S. Ct. 1734, 1738 (1974) (Brennan, J., dissenting).

There bas also been ambiguity concerning characterization of the doctrine as one of "less" or "least" drastic means. *Compare* Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Test for State Financial Structures*, 57 Cal. L. Rev. 305, 398 (1969), *with* Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. Rev. 1147, 1161 (1966). As demonstrated below, the Court has not always used the same standard and has not articulated the distinction. That is not to say, however, that there might not be some rationality to the Court's varied application of the doctrine. *See* Coons, Clune, & Sugarman, *supra*.

10. This will by no means be a complete cataloguing of all the cases or areas tbat have employed the doctrine. Rather, it will be illustrative.

tion of the less onerous means principle to diverse areas of constitutional law, while indicating the similarities and distinctions that ensue from its use. In order to demonstrate adequately the Court's use of alternatives, it is also important to differentiate between the various applications.

A. The Due Process Clause

1. Economic-Substantive Due Process

Beginning in the late nineteenth century, and with increasing regularity through the 1930's, the Supreme Court invalidated legislation because it infringed upon some notion of "liberty" or "property" protected by the due process clause. The analytical method employed has been characterized as "substantive" due process.[11] In determining whether the challenged legislation was a "fair and reasonable" exercise of the state's police power,[12] the Court relied on several criteria: whether the statute evidenced an illegitimate purpose; whether the means employed were not substantially related to a constitutional goal; or whether the statute intruded on liberty and property rights more than was necessary to achieve a concededly proper purpose.[13] Most of the legislation invalidated during this period concerned economic regulation,[14] and the Court's decisions reflected an underlying endorsement of free enterprise values.

Since the state's enactment had to be "necessary" to the achievement of its goals in order to satisfy the economic due process rationale, it was incumbent upon the Court to examine alternatives to see if any would satisfy the legislative purpose with less intrusion on liberty or property rights. In the Court's first encounter with the fourteenth amendment due process clause, Justice Field, speaking for himself and three other dissenters, maintained that the grant of a slaughterhouse monopoly could not be justified on the grounds of

11. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 S. CT. REV. 34; Ratner, *supra* note 1; Struve, *supra* note 1; Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); materials cited, *infra* note 13.

12. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905).

13. *See* Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943 (1927); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 941-42 (1973). *See generally* G. GUNTHER & N. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 954-82 (8th ed. 1970).

14. *But see* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to send children to private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (study of the German language cannot be proscribed); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

promoting sanitation because inspection and zoning requirements, already implemented, were sufficient to accomplish the state's purpose.[15] In light of these regulations, no legitimate reason was found for the monopoly and its concomitant destruction of the right of other butchers to pursue their occupation. The majority, however, rejected Field's argument and gave complete deference to the legislative determination.[16]

This judicial restraint held sway on the Court until at least the 1890's, although Field and a variety of other dissenters continued to urge intervention.[17] A most striking example of this intra-court disagreement was presented in an 1888 case, *Powell v. Pennsylvania,*[18] which sustained a prohibition on the manufacture and distribution of oleomargarine. The statute was justified on grounds of protecting public health and preventing fraud. Justice Field's dissent, however, raised contentions that permeated the economic due process cases. He particularly faulted the statute for outlawing a substance not at all inimical to the public health,[19] and for "ignor[ing] the distinction between regulation and prohibition."[20] That distinction was crucial to Justice Field's dissent and to the development of substantive due process, as it attacked broad blunderbuss applications of the States' police power for flatly proscribing certain activities, when narrowly confined regulations would have accomplished the State's purpose equally well, without undue prohibition of harmless private conduct. But according to Justice Harlan's opinion for the *Powell* majority, the legislature's determination that labeling and inspection were insufficient protection was "conclusive upon the courts."[21]

Just six years later, a majority opinion recognized the validity

15. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 87 (1873) (Field, J., dissenting).

16. *Id.* at 64-65.

17. *See, e.g.,* Lawton v. Steele, 152 U.S. 133, 144 (1894) (Fuller, C.J., dissenting); Powell v. Pennsylvania, 127 U.S. 678, 698 (1888) (Field, J., dissenting); Munn v. Illinois, 94 U.S. 113, 145, 154 (1877) (Field & Strong, JJ., dissenting); *cf.* Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 137 (1874) (Field, J., concurring).

18. 127 U.S. 678 (1888).

19. *Id.* at 698. The harmlessness of a substance has rarely been seen by the Court as a persuasive factor. *E.g.,* United States v. Carolene Products Co., 304 U.S. 144 (1938); Hebe Co. v. Shaw, 248 U.S. 297 (1919). *Cf.* Schollenberger v. Pennsylvania, 171 U.S. 1 (1898) (state could not exclude uncolored oleomargarine entering through interstate commerce, although it could prohibit its production within the state). *But see* Weaver v. Palmer Bros., 270 U.S. 402 (1926). *See also* Jacob Ruppert Co. v. Coffey, 251 U.S. 264 (1920); Wormuth & Mirkin, *supra* note 1, at 261-63.

20. 127 U.S. at 699. *Compare* Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928), *with* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 574-75 (1933) (Brandeis, J., dissenting). *See also* Munn v. Illinois, 94 U.S. 113, 146 (1877) (Field, J., dissenting).

21. 127 U.S. at 685. *See* cases cited *supra* note 19.

of judicial review of alternatives for due process challenges,[22] and in 1905 the Court invalidated a maximum working hours law, holding that a state cannot erect an "*unnecessary* . . . interference with the right of the individual to his personal liberty."[23] As the Court became more at ease in striking down legislation, the "necessity doctrine" became a device of more frequent, although inconsistent, application.[24] It was heavily relied upon in *Adams v. Tanner*[25] in which a Washington statute proscribing private employment agencies fell prey to the Court's rationale. Justice McReynold's majority opinion recognized that serious abuses were being perpetuated by such businesses, but they were "not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way."[26] This was especially true since control by regulation was feasible, and the state could establish its own employment agencies in order to protect and assist job seekers.[27] Also, in *Liggett Co. v. Baldridge*,[28] the Court invalidated a Pennsylvania statute that prohibited any corporation from owning a drug store unless all of its stockholders were licensed pharmacists. The Court put the burden on the state to produce evidence that proscription of nonpharmacists from own-

22. Lawton v. Steele, 152 U.S. 133, 137-38 (1894) (statute prohibiting net fishing was necessary to state purpose and therefore constitutional). Justice Brown, writing for the Court, stated:

> To justify the State in thus interposing its authority on behalf of the public, it must appear . . . that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not . . . impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Id. at 137.

Chief Justice Fuller agreed: "The police power rests upon necessity." He disagreed with its application, however, stating that "the lack of necessity for the arbitrary proceedings prescribed seems . . . too obvious to be ignored." *Id.* at 144.

23. Lochner v. New York, 198 U.S. 45, 56 (1905) (emphasis added).

24. The description of the doctrine often varied drastically depending upon the ultimate conclusion of the Court and the author of the opinion. *Compare* Norman v. Baltimore & O.R.R., 294 U.S. 240, 311 (1935) (Hughes, C.J.) ("the decision of the Congress as to the degree of necessity for the adoption of [its] means, is final"), *and* Hebe Co. v. Shaw, 248 U.S. 297, 303 (1919) (Holmes, J.) (legislature "is not to be denied simply because some innocent articles or transactions may be found within the proscribed class"), *with* Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926) (Butler, J.) (prohibition on use of shoddy in bedding invalidated because of alternatives of sterilization and inspection) *and* Adams v. Tanner, 244 U.S. 590 (1917) (McReynolds, J.).

25. 244 U.S. 590 (1917).

26. *Id.* at 594.

27. *Id.*

28. 278 U.S. 105 (1928), *overruled,* North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 94 S. Ct. 407 (1974).

ing drug store stock was essential to the public health.[29] It then found that the restriction was "unnecessary" to insure that drugs and prescriptions would be handled as safely as possible, reasoning that "[n]o facts [were] presented by the record, and, . . . none were presented to the legislature which enacted the statute, that properly could give rise to a different conclusion."[30]

As in most of the substantive due process cases of their day,[31] Justices Holmes and Brandeis dissented in *Adams* and *Liggett Co.* In the former, Brandeis wrote a long opinion, never really questioning the propriety of looking at alternatives. Rather he attempted to show that mere regulation could not cope adequately with the evils and abuses of private employment agencies and that experiences in Washington and other states demonstrated that their prohibition was necessary.[32] Justice Holmes authored the *Liggett* dissent, and did take issue with the Court's review of legislative options:

> The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less.[33]

Although there were other cases[34] applying the *Adams-Liggett* requirement of necessity, the Holmesian position of judicial deference on matters of socio-economic importance became prevalent during the late 1930's. The reasons for the demise of economic due process were manifold, but certainly of central significance was the Court's insistence on an immutable and stagnant "natural law" doctrine grounded in the justices' personal predilections for a

29. *Id.* at 114. *See also* Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926) (prohibition of shoddy from use in bedding was unnecessary and therefore unconstitutional, since evidence showed that sterilization and inspection sufficiently protected the public health).

30. 278 U.S. at 113.

31. *But see* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (Brandeis, J., joined the Court, but Holmes, J. dissented). *See also* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring, joined by Holmes, J.).

32. 244 U.S. at 597.

33. 278 U.S. at 115. *See also* Justice Holmes dissenting in Weaver v. Palmer Bros. Co., 270 U.S. 402, 416 (1926): "A classification . . . is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm. 'If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' " In both this quotation and the one appearing in the text, Justice Holmes was referring to an underinclusive classification. Unfortunately, in neither *Adams* nor *Weaver* does he discuss the overinclusiveness of the statutes, which was the basis for the invalidation. It should be considerably easier, and more appropriate, for a court to assess alternatives that narrow overly broad statutes than it is to assess alternatives that expand underinclusive classifications. *See* Part III *infra*.

34. Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926); Schlesinger v. Wisconsin, 270 U.S. 230 (1926). *See also* Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927); Tyson & Bros. v. Banton, 273 U.S. 418 (1927).

laissez-faire economic structure. Most of the economic due process decisions, however, were concerned with the "reasonableness" of state regulations rather than the prohibition-regulation distinction and the use of alternatives.[35] Yet, the Court was inconsistent in its applications of this reasonableness standard and failed to articulate distinctions adequately.[36] Moreover, the Court routinely ignored the conclusions of state legislatures concerning the effects of their statutes on highly technical and complex economic conditions.[37] Since the Court's decisions were also considered an obstacle to badly needed reform, undue tension was created between the federal judiciary and the states. Justice Roberts' "switch in time" coincided with the Court's desire to extricate itself from that predicament and with the desire to avoid difficult decisions on the projected impact of various economic regulations, issues not readily susceptible to judicial determination.

As New Deal and reform legislation was sustained, the Court simply stated that the legislature had wide discretion in making its choices, and substantive due process decisions were peremptorily overruled.[38] Thus *Carolene Products v. United States*[39] sustained an act that banned interstate distribution of evaporated skim milk enriched with vegetable oils and vitamins, while an earlier case[40] was distinguished because easy alternatives were there deemed to be available and sufficient.[41] Yet the *Carolene Products* Court ignored the possibilities of labeling and inspection, which were the alternatives in the earlier decision, as less restrictive methods for protecting consumers of skim milk. The moving force behind such

35. *See, e.g.*, Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Ely, *supra* note 11, at 937; Tribe, *supra* note 13, at 6-7 & 11-13. *See* also cases and materials cited notes 11-13 *supra*. The reader should note Justice Holmes's admonishing remark in his dissent in Lochner v. New York, 198 U.S. 45, 75 (1905): "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."

36. *Compare* Bunting v. Oregon, 243 U.S. 426 (1917) (sustaining work hour limit for flour mill workers), Muller v. Oregon, 208 U.S. 412 (1908) (sustaining work hour limit for women) *and* Holden v. Hardy, 169 U.S. 366 (1898) (sustaining work hour limit for miners), *with* Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidating minimum wage for women) *and* Lochner v. New York, 198 U.S. 45 (1905) (invalidating work hour limit for bakers). *See also* note 24 *supra*.

37. *E.g.*, Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924); Adams v. Tanner, 244 U.S. 590 (1917).

38. *E.g.*, Olsen v. Nebraska, 313 U.S. 236 (1941), *overruling* Ribnik v. McBride, 277 U.S. 350 (1928); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *overruling* Adkins v. Children's Hospital, 261 U.S. 525 (1923). *See* cases cited in Olsen v. Nebraska, 313 U.S. 236, 244-45 (1941). *See generally* GUNTHER & DOWLING, *supra* note 13, at 962-82.

39. 323 U.S. 18 (1944).

40. Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

41. 323 U.S. at 29. *See* Ratner, *supra* note 1, at 1088.

decisions was apparently a feeling that the delicate balancing of complex economic issues was best performed by a legislature and that the courts should not get caught on the slippery slope, even if the balance was not too delicate, nor the problems too complex.

A near-conclusive presumption evolved that the legislature had explored and rejected all alternatives. By 1955, the doctrine of necessity was unmistakably irrelevant to economic due process cases, as evidenced by the unanimous decision in *Williamson v. Lee Optical Co.*[42] Indeed, the Court conceded that the Oklahoma law under consideration "may exact a needless, wasteful requirement in many cases,"[43] by directing that only licensed optometrists or opthalmologists, or someone with their written prescriptive authority, could perform certain menial tasks. "But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement . . . . [T]he legislature might have concluded that [a written prescription] was needed often enough to require one in every case."[44]

The Court continued to accord total deference to economic legislation and gave economic due process its formal burial in 1963 in *Ferguson v. Skrupa.*[45] That case sustained a Kansas misdemeanor statute forbidding any nonlawyers from engaging in the business of debt adjustment. The state was said to have complete power in business and commercial matters, so long as no *specific* constitutional provision was violated.[46] The Court did not consider itself "able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' "[47] Moreover, during the 1973 term, the Court cursorily refused to exhume the doctrine, while simultaneously overruling the long discredited *Liggett Co. v. Baldridge.*[48]

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42. 348 U.S. 483 (1955).

43. *Id.* at 487.

44. *Id.* The Court has actually abandoned review in this instance. Cases such as *Williamson*, in which the state is unable to justify its classification and a discriminatory insulation of a particular group appears on the face of the statute, may be an appropriate situation for the Court to examine the legislature's motive, rather than supplying that body with a needed, but tenuous rationale. *Cf.* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

45. 372 U.S. 726 (1963). *But see* McCloskey, *supra* note 11.

46. 372 U.S. at 730-31, *quoting* Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949).

47. 372 U.S. at 732. The Court continued: "Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas." (footnotes omitted). *Id.*

48. North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973), *overruling* Liggett Co. v. Baldridge, 278 U.S. 105 (1928). *See* notes 28-33 *supra* and accompanying text.

Despite the fatal blows it has received from the Supreme Court, economic due process has nevertheless remained very much alive under the state constitutions. The analysis has usually been employed to invalidate licensing statutes,[49] zoning ordinances[50] and prohibitions of particular products or occupations.[51] Generally, these statutes have at least the appearance of protecting some special interest group[52] and the state courts have been more eager than the federal to take judicial notice of practical measures that would support less restrictive alternatives. One commentator has suggested that some states have developed a logically consistent analysis for use of alternatives in their economic due process decisions.[53] Using Illinois cases as an example, he formulated a rule "that the courts will reverse the burden of production if common knowledge and common sense strongly suggest that a less restrictive alternative would be adequate, and that no possible justification exists for selecting the more restrictive regulation."[54] No alternative would exist, however, unless it is considered as "equally effective" as the means already adopted.[55]

2. The "New" Substantive Due Process

Just two years after its uncomplimentary obituary for substantive due process in *Ferguson v. Skrupa*, the Court at least partially revitalized the discredited doctrine in *Griswold v. Connecticut*.[56] A chain of case law has since developed based upon the notions of fourteenth amendment "liberty," but the development has been limited in its scope to areas of civil liberties and individual rights.

Griswold invalidated a Connecticut ban on the use of contra-

49. *E.g.*, Schroeder v. Binks, 415 Ill. 192, 113 N.E.2d 169 (1953) (plumbers' licensing statute invalid); People v. Brown, 407 Ill. 565, 95 N.E.2d 888 (1950) (same); State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949) (photographers); Livesay v. Tennessee Bd. of Exam. in Watchmaking, 204 Tenn. 500, 322 S.W.2d 209 (1959) (watchmakers). Such cases definitely perform a useful function since licensing statutes have proliferated during this century and most of them are passed at the instance of a profession's lobby. *See* McCloskey, *supra* note 11, at 45-50; note 44 *supra*.

50. *E.g.*, Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970); National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965). *See also* note 321 *infra*.

51. *E.g.*, Figura v. Cummins, 4 Ill. 2d 44, 122 N.E.2d 162 (1954); Coffee-Rich, Inc. v. Commissioner of Pub. Health, 348 Mass. 414, 204 N.E.2d 281 (1965); Trio Distrib. Co. v. City of Albany, 2 N.Y.2d 690, 143 N.E.2d 329, 163 N.Y.S.2d 585 (1957); Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634 (1954). *See generally* Struve, *supra* note 1.

52. *See* McCloskey, *supra* note 11, at 45-50; notes 44 & 49 *supra*.

53. Struve, *supra* note 1.

54. *Id.* at 1473.

55. *Id.* at 1463.

56. 381 U.S. 479 (1965).

ceptives, holding that it violated married couples' right of privacy. Justice Douglas's opinion for the Court strained to avoid reliance upon fourteenth amendment liberty and relied instead upon penumbrae from the Bill of Rights.[57] Five concurring justices and the two dissenters, however, all saw the decision as involving, to some degree, the due process clause.[58] Subsequently, the recent abortion cases[59] have made it clear that the right of privacy,[60] and other individual interests,[61] derive substantive protection from fourteenth amendment "liberty,"[62] although Justice Douglas has maintained his penumbra theory.[63]

The standard used in modern substantive due process cases has been similar to or identical with the compelling interest test in equal protection cases.[64] That should not be surprising, since the Court

57. *Id.* at 482-86.

58. *Id.* at 486-99 (Goldberg, J., concurring, joined by Warren, C. J., and Brennan, J.), 499-502 (Harlan, J., concurring), 502-07 (White, J., concurring), 507-27 (Black, J., dissenting, joined by Stewart, J.), 527-31 (Stewart, J., dissenting, joined by Black, J.).

59. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

60. There is a rather long line of cases establishing the right of privacy. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972); *id.* at 463-65 (White, J., concurring); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Katz v. United States, 389 U.S. 347, 350 (1967); Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942). Although *Eisenstadt* was technically decided on equal protection grounds (*see* notes 229-31 and accompanying text *infra*) it was an important stepping stone from *Griswold* to *Roe* and *Doe*. The Court used some very broad language in concluding that the state could not distinguish between married and single individuals in permitting or prohibiting distribution of contraceptives: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453. The significance of alternatives in *Eisenstadt* is discussed below. *See* notes 231, 244 *infra* and accompanying text.

61. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (right to travel); NAACP v. Alabama, 357 U.S. 449 (1958) (rigbt of association); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) (right of law school graduate to engage in the practice of law); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (right to send children to a private school). *See* Roe v. Wade, 410 U.S. 113, 167-70 (1973) (Stewart, J., concurring); Ratner, *supra* note 1. *But see* Ely, *supra* note 13, at 936-37 n.97.

62. Roe v. Wade, 410 U.S. 113, 153 (1973); *id.* (Stewart, J., concurring). Even Justice Rehnquist has agreed that fourteenth amendment liberty "embraces more than the rights found in the Bill of Rights." *Id.* at 172-73 (dissenting opinion). *See* Tribe, *supra* note 1, at 5 n.26.

63. Doe v. Bolton, 410 U.S. 179, 182 n.4 (1973) (concurring opinion). Justice Douglas, however, also maintained in *Doe* that: "[A] catalogue of these [ninth amendment] rights includes customary, traditional and time-honored rights, amenities, privileges, and immunities that come within the sweep of 'the Blessings of Liberty' mentioned in the preamble to the Constitution. Many of them in my view come within the meaning of the term 'liberty' as used in the Fourteenth Amendment." *Id.* at 201-11.

64. For an examination of the compelling interest test see notes 162-224 *infra* and accompanying text. Justice Rehnquist in his dissent in *Roe* saw the case as importing tbat test into substantive due process, and he was especially critical of the Court for that transfer.

has considered only "fundamental" rights to be implicit in fourteenth amendment liberty,[65] and classifications that affect "fundamental" rights also trigger strict scrutiny under the equal protection clause.[66] While such characterizations are admittedly not always consistent, the list of rights now granted substantive protection coincides with those presently afforded more intensive equal protection review.[67] And under this standard, the Court will require not only a compelling justification for the statute, but also a minimal infringement on "fundamental" interests.

Thus, in *Griswold*, the Court would not sustain a law that forbade the *use* of birth control devices or drugs, when regulation of sale and distribution was available to the legislature.[68] It reasoned that in order to enforce the prohibition on use, the state would have to invade the sanctity of the marital bedroom, a remedy not necessary under alternative regulations.[69]

Two of the *Griswold* concurrences also found alternatives relevant. Justice Goldberg insisted that the threat upon a personal liberty could be justified only by a showing of necessity:[70] "The state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not . . . sweep unnecessarily broad, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples."[71] Existing statutes that prohibited adultery and fornication were found sufficient to achieve Connecticut's goals and made the challenged law superfluous.[72] Justice White agreed that the "nature of the right

410 U.S. at 173. One commentator has seen this aspect as the most egregious element of the *Roe* decision. Since the economic due process cases purportedly involved only a rationality determination, *Roe* is therefore a more dangerous decision since it also requires that the state interest meet a strict importance standard. *See* Ely, *supra* note 13, at 941-43.

65. Roe v. Wade, 410 U.S. 113, 152-53 (1973); Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

66. *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330, 335-36 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); *see* notes 162-224 *infra* and accompanying text.

67. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973), which defines fundamental rights as those "explicitly or implicitly guaranteed by the Constitution."

68. 381 U.S. at 485.

69. By invalidating only that portion of the Connecticut statute that proscribed the *use* of contraceptives, as opposed to their manufacture, sale or distribution, the Court avoided laying a basis for a right to contraceptives. *See* Ely, *supra* note 13, at 930.

70. 381 U.S. at 497.

71. *Id.* at 498.

72. *Id.* The Court has relied upon existing statutes as sufficient alternatives on other occasions. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (residency requirement was unnecessary since criminal fraud statutes adequately protect purity of the ballot box); Talley v. California, 362 U.S. 60 (1960) (libel statutes preempt need for handbills to identify author and sponsor). *See also* notes 266-72 *infra* and accompanying text.

invaded" demanded that the statute "be viewed in light of less drastic means."[73] He suggested that a ban on use in extra-marital relationships would serve the state's purpose as well as the existing, overly broad statute, although he recognized that both laws were unenforceable.[74]

Thus, *Griswold* provided the basis for strict scrutiny in the substantive protection of rights not explicitly mentioned in the Constitution. An element of that standard of review is the consideration of alternative means aimed at the state's goals but less intrusive on the individual rights at stake. This stance was exemplified most vividly in the recent decision striking down the Texas anti-abortion statute, *Roe v. Wade.*[75] The Court there maintained that a woman's decision to have an abortion was within the scope of the right to privacy,[76] and required the state to justify the legislation with a "compelling interest" and to demonstrate that the law was "narrowly drawn to express only the legitimate state interests at stake."[77] Unlike *Griswold* and other preceding substantive due process cases, however, the Court outlined with specificity permissible restrictions on abortions. Justice Blackmun, writing for himself and six other Justices, recognized that the state had legitimate interests in protecting the mother's health and in preserving the potential life of the fetus. These interests were found to intensify throughout the gestation period and reach the compelling level once the fetus has attained "viability." The Court concluded that the Texas statute swept beyond legitimate governmental interests when it was applied to abortions before viability or to those precipitated by the mother's "health."[78] The Court's decision reflected a balancing of the respective interests of the parties and set maximums on the state's ability to regulate abortions in accordance with a trimester plan for the period of pregnancy.[79]

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73. 381 U.S. at 503-04.

74. *Id.* at 506-07. *See also* Poe v. Ullman, 367 U.S. 497, 506 (1961); Ratner, *supra* note 1, at 1079. If Connecticut had subsequently chosen to adopt Justice White's suggested alternative, it is difficult to see how it could he enforced without the same invasion of personal privacy. *See* Ely, *supra* note 13, at 930. *See also* YALE NOTE, *supra* note 1, at 469 n.24; notes 199, 267, & 311-14 *infra.* and accompanying text.

75. 410 U.S. 113 (1973). *See also* Doe v. Bolton, 410 U.S. 179 (1973). The two cases had the effect of invalidating abortion laws in almost every state. *The Supreme Court, 1972 Term,* 87 HARV. L. REV. 1, 79 n.25 (1973). *See* Roe v. Wade, 410 U.S. at 118 n.2, 139 n.35, & 140 n.37.

76. 410 U.S. at 153. *Roe* has already spawned a great deal of significant commentary. *See* Ely, *supra* note 13; Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics,* 53 B.U.L. REV. 765 (1973); Tribe, *supra* note 11; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L.J. 221 (1973).

77. 410 U.S. at 155.

78. 410 U.S. at 162-64.

79. The Court provided a three-party summary of its holding in *Roe*:

Unlike the due process decisions discussed above, the Court in *Roe* was not offering the suggestion of less restrictive means merely as a factor to be weighed. Rather it was mandating fairly specific limits, which were the result of its balancing process. That result mirrored what the Court clearly felt was a workable compromise between the competing interests,[80] allowing the state to regulate, though not prohibit, abortions to the extent that its interests were legitimate.[81] This narrow definition of the bounds of that legitimacy, provided a defense against allegations that its alternative "legislation" was not as effective in accomplishing the permissible state goals as the invalidated legislation.

Another interesting facet of the *Roe* opinion was the Court's exploration of historical and modern perspectives on the religious, moral, and scientific issues of abortion.[82] Indeed, the records in *Roe* and in its companion case must have resembled a Congressional Hearings Report, since over twenty-five briefs were filed by amici curiae.[83] The Court relied heavily upon the diversified data submitted, particularly in its conclusion that the danger to a mother's health of an abortion during early pregnancy was no greater than the danger at childbirth,[84] and that "viability" of the fetus occurs between the 24th and 28th weeks.[85] The Court felt that such thorough inquiry into the various disciplines was essential in its effort

(a) For the stage prior to approximately the end of the first trimester [of pregnancy], the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164-65.

80. In its opinion the Court stated: "This holding we feel is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day." *Id.* at 165. *See also* notes 265, 267, & 311-14 *infra* and accompanying text on the question of how far a court should go in specifying and describing an alternative. In this regard, *compare Roe with* Miller v. California, 413 U.S. 15, 25-26 (1973) and Miranda v. Arizona, 384 U.S. 436 (1966).

81. 410 U.S. at 165-66.

82. *Id.* at 129-52.

83. 410 U.S. 179 (1973).

84. 410 U.S. at 149.

85. *Id.* at 160. The Court defined "viability" in terms of when the fetus could survive outside the womb. Since modern technology is constantly moving that date closer to the time of conception, the "mother's health" exception, which the Court left open for permitting an abortion after viability, may become of crucial significance. *See* note 79 *supra.*

"to resolve the issue by constitutional measurement free of emotion and of predilection," while bearing in mind a Holmesian plea for a neutral judiciary.[86] The emphasis on scientific and medical data "troubled" Chief Justice Burger in his concurrence,[87] and while the extensive data "command[ed the] respect" of dissenting Justice Rehnquist, he felt it was "far more appropriate to a legislative judgment than to a judicial one."[88]

Of course, for the Court to have ruled as it did without researching such information would most certainly have breached the limits of judicial notice. At least one commentator has opined that such informational inquiries are not only consistent with neutrally principled adjudication, but are often a prerequisite thereto.[89]

Modern substantive due process, then, has been concerned solely with rights deemed "fundamental" and has therefore evoked a judicial willingness to review legislative alternatives. The existence of less restrictive alternatives has been relied upon in invalidating legislation, both when the existing statute is overly broad and when another type regulation is available. The Court has suggested alternate courses of action that *might* be open to the state and in the abortion decisions has felt compelled to set forth specific limits on the legislature should that branch decide that further treatment of the problem is warranted.

3. The Conclusive Presumption

Within the past decade the Court has relied increasingly upon a due process concept that frowns upon the statutory creation of permanent irrebuttable presumptions.[90] This concept was not newly conceived by the Warren or Burger Courts; it was employed by the activist justices of the twenties and early thirties.[91] Until 1965, its application was pretty well restricted to criminal statutes.[92]

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86. 410 U.S. at 116-17.

87. *Id.* at 208.

88. *Id.* at 171-73. Rehnquist further maintained that the majority opinion "partakes of judicial legislation." *Id.* at 173.

89. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 110-12.

90. The recent development began with Carrington v. Rash, 380 U.S. 89 (1965) (Texas could not prohibit *all* migrant servicemen from voting there while in the service). *See* cases cited in Vlandis v. Kline, 412 U.S. 441, 446-47 (1973). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

91. Hoeper v. Tax Comm'n, 284 U.S. 206 (1931); Schlesinger v. Wisconsin, 270 U.S. 230 (1926).

92. *E.g.*, United States v. Romano, 382 U.S. 136 (1965); Tot v. United States, 319 U.S. 463, 468-69 (1943). *See also* Leary v. United States, 395 U.S. 6 (1969).

Recently, however, disagreement has occurred among the Supreme Court justices over the doctrinal foundation for the invalidation of conclusive presumptions, the majority characterizing it as an element of *procedural* due process. Since automatic classification into a disadvantaged group amounts to a denial of a hearing, in order to be valid, the classification must be defined to include only those individuals who possess the evil at which the statute is aimed.[93] As may be evident from that description, the conclusive presumption principle has the same analytical underpinnings as much of equal protection law.[94] Critics of this development have characterized it as substantive due process and have been particularly concerned about its open-ended nature, its alleged crippling of the legislature's ability to classify,[95] and the Court's supposed dishonesty in failing to describe the real *ratio decidendi* of its decisions.[96]

Illustrative of the conclusive presumption cases is *Vlandis v. Kline*,[97] in which a Connecticut statute establishing residency requirements for in-state tuition to the State's university system was voided. According to that law, all admitted students who were not Connecticut residents at the time of application were absolutely unable to gain in-state status while they were students in that state. Justice Stewart's opinion for the Court found the provision to be "so arbitrary as to constitute a denial of due process . . . ."[98] It was, said the Court, irrational and inconsistent in furthering the State's dual goals: ensuring that only bona fide residents receive the benefits of the lower tuition rates; and favoring "established" Connecticut citi-

93. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441 (1973). Of course, reliance on procedural due process is deceptive if there is actually no practical way of determining exactly who possesses the evil under attack. *See* notes 109, 113, 311-14 *infra* and accompanying text; *cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 657-60 (1974) (Rehnquist, J., dissenting).

94. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346-48 (1949); Note, *The Need for Reform of Ex-Felon Disenfranchisement Laws*, 83 YALE L.J. 580, 594-95 (1974). *Compare* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), *with id.* at 651-57 (Powell, J., concurring). *Compare* Vlandis v. Kline, 412 U.S. 441 (1973), *with id.* at 458-59 (White, J., concurring) *and id.* at 462 (Burger, C.J., dissenting). *Compare* Skinner v. Oklahoma, 316 U.S. 535 (1942), *with id.* at 543-45 (Stone, C.J., concurring) *and id.* at 546 (Jackson, J., concurring). *See also* United States Dep't of Agriculture v. Murry, 413 U.S. 508, 517-19 (Marshall, J., concurring); Stanley v. Illinois, 405 U.S. 645 (1972).

95. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 657-60 (1974) (Rehnquist, J., dissenting joined by Burger, C.J.); Vlandis v. Kline, 412 U.S. 441, 463-69 (1973) (Rehnquist, J., dissenting, joined by Burger, C.J., and Douglas, J.). *See* Cleveland Bd. of Educ. v. LaFleur, *supra* at 553 (Powell, J., concurring) (concern over doctrine's open-endedness).

96. United States Dep't of Agriculture v. Murry, 413 U.S. 508, 522-25 (1973) (Rehnquist, J., dissenting); Tribe, *supra* note 11, at 49 n.224; note 99 *infra*.

97. 412 U.S. 441 (1973).

98. *Id.* at 450.

zens for their years of tax contributions.[99] Nor could the state's interest in administrative ease and certainty justify the irrebuttable presumption, since "there [were] other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised."[100] Establishing reasonable criteria for determining residency was found sufficient to further the State's goals. Thus the Court concluded that a permanent and irrebuttable presumption may not be used to determine residency status for in-state tuition when it is "not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination."[101]

The Chief Justice's dissent in *Vlandis* was especially critical of the majority's reliance upon alternatives and its failure to articulate why that element of "strict scrutiny" was applied. For him, the Court's "function in constitutional adjudication is not to see whether there is some conceivably 'less restrictive' alternative to the statutory classifications under review."[102] Rather, such inquiry is to be reserved for the "strict scrutiny test," which, he contended, did not belong in due process cases.[103]

The Court returned to the examination of the conclusive presumption and reliance upon alternatives in *Cleveland Board of Education v. La Fleur,*[104] which involved penalties on significant privacy rights. At issue were school board regulations requiring pregnant

99. *Id.* at 449-50. The decision was substantive to the extent that it forbade Connecticut from characterizing "resident" in a particular way. *See* Tribe, *supra* note 11, at 8 n.41:

> In . . . Vlandis, . . . the effect of due process as construed hy the Court was to limit the substantive grounds on which certain denials of benefits . . . can lawfully be based. In the absence of some constitutional underpinning for whatever substantive limitation is involved, each such case becomes difficult to understand other than as an unsupported substantive conclusion cloaked in procedural guise.

100. 412 U.S. at 451.

101. *Id.* at 452. Stewart nevertheless distinguished and approved Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *summarily aff'd*, 401 U.S. 985 (1971) (one-year residency requirement for instate tuition upheld) 412 U.S. at 452. This would indicate that Justice Stewart's test is really one of reasonableness, and not "necessity." Both Justice Marshall, concurring, and Justice Rehnquist, dissenting, criticized Stewart for his distinction of *Starns.* 412 U.S. at 455 (Marshall, J., concurring); *id.* at 467 (Rehnquist, J., dissenting).

102. 412 U.S. at 460.

103. *Id.* at 460-61. Burger did not explain why constitutional adjudication does not include the strict scrutiny test. He distinguished prior conclusive presumption cases on the ground that they involved important individual interests, while the tuition fee in *Vlandis* was merely an economic benefit. Despite his *Vlandis* protestations, the Chief Justice has recently employed the conclusive presumption rationale for the Court in holding that an illegitimate child born after its father has suffered a disability for welfare purposes may not be irrebuttably presumed to be independent of the father. Jiminez v. Weinberger, ___ U.S. ___, 94 S. Ct. 2496 (1974).

104. 414 U.S. 632 (1974).

teachers to leave their positions by the end of the fourth month of pregnancy and not return until three months after giving birth. According to Justice Stewart, who again wrote for the Court, the regulations created a conclusive presumption that *all* teachers who reach that stage of pregnancy are incapable of fulfilling their professional duties for at least eight months thereafter. That presumption did not comport with the medical evidence.[105] It was therefore held that "[t]he Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty . . . ."[106] Easy alternatives were available, maintained Stewart, through medical examination or certification by a physician.[107]

From the foregoing it would seem that an inquiry into possible alternatives is a necessary element of any decision invalidating a statute because it entails a conclusive presumption. These presumptions classify according to an easily identifiable trait that is related to but not universally identical with the evil sought to be eliminated. The fault with irrebuttable presumptions therefore is that they inflict a disadvantage upon those who possess the trait but not the evil, as well as upon those who possess both.[108] Thus the alternative of inflicting the disadvantage *only* on those possessing the evil always exists and can always be accomplished by determinations made on individual bases. The question then becomes what methods are available for making that determination,[109] and what burden will be placed upon the state if it is forced to adopt one of those methods. The extent of the burden should be balanced against the individual interests threatened by the statute.[110] The Court has not yet been explicit in setting up that balance, and the criteria necessary for individual determinations remain uncertain. For ex-

105. *Id.* at 649 n.15.

106. *Id.* at 647.

107. *Id.* at 648-49. The easy alternatives left the presumption "patently unnecessary." *Id.* at 649.

108. Some who possess the evil sought to be elimmated might also escape the classification's application, but that should not be relevant to *procedural* due process. This is actually a question of equal protection or substantive due process.

109. For example, in *LaFleur* the examination and doctor's certificate were adequate and easy alternatives. In *Vlandis*, the criteria or standards and individual hearings are a bit more difficult for the state. In other instances, such as distinguishing between mature and immature persons under 18, (e.g., for permitting consumption of alcoholic beverages) there may be no objective and unbiased alternative procedures. *See* notes 113, 356-57 *infra* and accompanying text.

110. This would begin to provide the Court with some discipline in using the conclusive presumption rationale, so as to avoid the problem of openendedness posed by Justices Powell and Rehnquist in *LaFleur*. 414 U.S. at 651-60.

ample, the individual interests protected in conclusive presumption cases include rights with recognized constitutional status and those without such status, such as the right to education[111] or food stamps.[112]

If the Court fails to sustain a conclusive presumption, despite the fact that the methods for individual determination are so burdensome as to be impractical,[113] then the Court is, in effect, making a substantive ruling that the state cannot legislate in that area against the supposed problem. But if it does so only after an investigation of alternatives and an honest appraisal that there are *practical* means available for making the determination,[114] the state will be able to address the problem again in a more discriminating manner. In the latter case, the conclusive presumption is means-focused, as it should be, providing a narrower basis of decision than traditional substantive due process.[115]

Thus to the extent that a statute sweeps within its scope (and thereby injures) individuals who do not possess the evil proscribed, the conclusive presumption rationale is of the same nature as overbreadth arguments in first amendment cases,[116] overinclusive classifications under equal protection,[117] and the prohibition-regulation distinction prominent in substantive due process.[118] Each, by definition, entails the implication that a less restrictive alternative exists, one that could be narrowly tailored to reach only the evil.

4. Procedural Due Process

The Supreme Court has made it clear that the rudiments of due

111. Vlandis v. Kline, 412 U.S. 441 (1973).

112. United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973).

113. The alternative could be too burdensome in light of increased costs or decreased feasibility. An alternative would not he feasible if the state would be unable to determine consistently and accurately which individuals are in fact afflicted with the evil sougbt to be eliminated. In this regard see Chief Justice Stone's concurrence to Skinner v. Oklahoma, 316 U.S. 535, 543-45 (1942), in which he found unconstitutional an Oklahoma statute calling for sterilization of thrice-convicted larcenists. Stone maintained that the state could accomplish sucb sterilization, but only after a hearing in which it proves that the convict's evil traits are hereditary. The Chief Justice surely was aware that criminal habits are not hereditary, and that even if they were, it would be a question insusceptible of proof. Therefore, the effect of his opinion was to deny the state the right to sterilize anyone on the basis of criminal offenses. *See also* note 109 *supra.*

114. *See* notes 356-57 and accompanying text *infra.*

115. *Cf.* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 111-13 (1949) (Jackson, J., concurring); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

116. *See* notes 256-65 *infra* and accompanying text.

117. *See* notes 167-99 *infra* and accompanying text.

118. *See* notes 11-55 *supra* and accompanying text.

process come into play whenever an individual is made to suffer a grievous loss[119] of his liberty or property interests.[120] The hearing requirement is thus derived from the nature of the individual interests involved, but in determining the proper scope of the hearing or whether an existing state procedure is constitutionally adequate, the Court must conduct an involved balancing process, weighing numerous and complex factors.[121] Justice Frankfurter provided a classic statement of the relevant concerns:

> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the *available alternatives to the procedure that was followed,* the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.[122]

This process is a supple one and enjoys a time-honored status in our judicial tradition.

An excellent illustration of the manner in which the Court has used alternatives to arrive at a procedure particularly suited to the circumstances, yet protective of individual interests, was presented in *Mullane v. Central Hanover Bank & Trust Co.*[123] At issue was the constitutional sufficiency of statutory notice by publication to the beneficiaries of a common trust fund for a judicial settlement of account. Some of the beneficiaries' addresses were either local, unknown, or out-of-state and the Court determined that publication in a local newspaper was not reasonably calculated to attract the attention of those known to reside out-of-state. The means chosen for notice, the Court stated, cannot be "substantially less likely to bring home notice than other of the feasible and customary substitutes."[124] The statutory notice there failed to satisfy due process, not because it was unsuccessful in reaching all the beneficiaries, but because "under the circumstances it [was] not reasonably calculated to reach those who could easily be informed by other means at hand."[125] Two other methods existed that would have been more

119. Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

120. *See* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

121. *See* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); text accompanying note 136 *infra. See also* Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968).

122. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring) (emphasis added).

123. 339 U.S. 306 (1950).

124. *Id.* at 315.

125. *Id.* at 319.

effective. One was personal service, but the circumstances of the case eliminated the necessity of undertaking that burden. The identity of interests of the beneficiaries justified the risk that some of them might not be served. More important, though, inexpensive and reasonably efficient service by mail was available.[126] In other words, the Court sought the alternative best suited to the interests of all the parties concerned under the circumstances of the case, and not merely the one most solicitous of the individuals' rights. As a result of that balancing process, the service by publication was deemed adequate for those beneficiaries whose addresses were unknown, since no other method was "reasonably possible or practical to give more adequate warning."[127]

More recent decisions have evidenced the Court's willingness to prescribe in rather specific fashion the minimum procedural requirements to be followed by the state as a prerequisite to certain actions. These cases have produced holdings almost legislative in character, going beyond a decision on the mere sufficiency of the existing procedure. Thus, in *Goldberg v. Kelly*,[128] the Court outlined the due process rudiments to be observed before the government could terminate a recipient's welfare payments. Justice Brennan's majority opinion reflected a balancing of interests between the individual's need to preserve the continued influx of life's necessities versus the administrative burden and expense of pretermination hearings. Although a complete record and a comprehensive opinion would not be required, some elements of due process would have to be observed before suspension of benefits.[129] The Court stated that the "State [was] not without weapons to minimize these increased costs."[130] The only inkling, however, as to what alternative "weapons" were available, was a suggestion by the Court that the state could mitigate the burden "by developing procedures for prompt pretermination hearings and by skillful use of personnel and facilities."[131] The nebulous contours of the Court's suggestions indicate that *Goldberg* was not premised upon the existence of alternatives capable of substantially ameliorating the costs of the hearings. Rather, the Court seemed to hold that oral bipartisan hearings are *necessary* to protect the valuable interests of the recipients and that

126. *Id.*

127. *Id.* at 318.

128. 397 U.S. 254 (1970). *See* Miranda v. Arizona, 384 U.S. 436 (1966), for another example of the Court detailing a minimally acceptable procedure.

129. 397 U.S. at 267.

130. *Id.* at 266.

131. *Id.*

there are no effective alternative means for safeguarding recipients' rights. The state's suggestions for handling objections through caseworkers, written submissions, or post-termination hearings were deemed inadequate. In other words, the Court mandated the alternative that had to be followed by the government.[132]

Justice Frankfurter once maintained that "[o]nly the narrowest exceptions" to the requirements of notice and a hearing before adverse action is taken "are tolerated"—those "justified by history . . . or by obvious necessity."[133] Recently the Court has begun to attack the continued legitimacy of the former exception. In *Sniadach v. Family Finance Corp.*,[134] for example, a prejudgment garnishment procedure was invalidated, despite the long-standing use of such practices. In *Fuentes v. Shevin*,[135] prejudgment replevin provisions of two states were found lacking. The critical factor in each of these cases was the *timing* of the hearing. As in *Goldberg*, the Court in *Fuentes* emphasized the *necessity* of pre-seizure hearings and the inadequacy of attempted alternatives such as bond requirements:

> The minimal deterrent effect of a bond requirement is, in a practical sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.[136]

Despite the broad language of the *Fuentes* decision, the Court in its 1973 term accepted certain prejudgment "sequestration" (i.e., attachment) procedures as providing adequate protection to debtors. It retreated from *Fuentes* and called for a more flexible balanc-

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132. *Id.* at 269. *See also* Morrissey v. Brewer, 408 U.S. 471 (1972), in which the Court again legislated a procedure by requiring a hearing prior to revocation of parole. It weighed heavily the state's interest in rehabilitating the parolee, but reasoned that this interest would not be served by returning a parolee to prison without proof of a violation. *Id.* at 483-84. Thus the Court decided that its alternative was not only less drastic, and more precise, but also more facilitative of the state's attempt to rebabilitate.

133. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164-65 (1951) (Frankfurter, J., concurring).

134. 395 U.S. 337 (1969).

135. 407 U.S. 67 (1972). *See also* Lynch v. Household Fin. Co., 405 U.S. 538 (1972).

136. 407 U.S. at 83-84. The Court left the nature and the form of the hearing to the state legislature. *Id.* at 97. The *Sniadach-Goldberg-Fuentes* line of decisions evidence a reemerging concern for property rights, which bas also been prominent in conclusive presumption, pp. 985-89 *supra*, and "newer" equal protection cases. Pp. 1006-11 *infra*. *See* Lynch v. Household Fin. Co., 405 U.S. 538 (1972). *See also* McCloskey, *supra* note 11; Reich, *The New Property*, 73 YALE L.J. 733 (1964); Struve, *supra* note 1.

ing approach, one that would lead to procedures which would accommodate the interests of both debtors and creditors, rather than merely pursuing means "less restrictive" of the debtors' interests.[137] Presumably, alternatives would be relevant in striking that balance.

B. The Commerce Clause

The doctrine of reasonable alternatives has become an important consideration in determining whether a state law has unconstitutionally burdened interstate commerce, at least in those areas not already preempted by Congress.[138] Early cases point to the distinction between prohibition and regulation. Kansas was precluded from forbidding *all* Texas, Mexican or Indian cattle from entering its borders during eight months out of each year in order to prevent the influx of diseased cattle. *Railroad Co. v. Husen*[139] recognized that while a state may pass health and sanitary laws, "it may not interfere with transportation into or through the State, *beyond what is absolutely necessary* for its self-protection . . . ."[140] The reach of

137. Mitchell v. W.T. Grant Co., ___ U.S. ___, 94 S. Ct. 1895 (1974). The dissenters contended, of course, that *Fuentes* had struck that balance at the only constitutionally acceptable point, *i.e.*, with a biparty hearing prior to deprivation. *Id.*, ___ U.S. at ___, 94 S. Ct. at 1910-14 (Stewart, J., dissenting, joined by Douglas, Brennan & Marshall, JJ.).

An interesting contrast to the traditional tailoring of statutes is found in Gagnon v. Scarpelli, 411 U.S. 778 (1973). The Court there answered the question left open in Morrissey v. Brewer, 408 U.S. 471 (1972), note 128 *supra*, whether an indigent probationer or parolee must be provided assistance of counsel in revocation hearings. The Court of Appeals had held that due process was denied if counsel was not made available. Justice Powell's opinion, however, contended that such a blanket requirement was unnecessary and failed to afford proper weight to the direct costs and serious collateral disadvantages of counsel's presence. *Id.* at 787. Thus the Court tailored its holding so that counsel need only be provided where a colorable issue of fact has arisen as to whether the probationer or parolee committed the alleged violation, or where there may be substantial mitigating reasons which would make revocation inappropriate. *Compare* Betts v. Brady, 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963), *with* Gagnon v. Scarpelli, 411 U.S. 778 (1973).

138. Of course, when there is a conflict, congressional legislation passed pursuant to a national power will control by virtue of the Supremacy Clause.

It is important to distinguish between two necessity doctrines in commerce clause cases. One, the doctrine of less restrictive alternatives, is used as a *limitation* on *state* power and is the subject of this section. It holds that a state may not legislate so as to obstruct interstate commerce unless it is necessary to affect a legitimate purpose. The other necessity doctrine relates to the *source* of *federal* power, and is derived from the "necessary and proper clause" in Article I § 8 of the Constitution. Over 150 years ago Chief Justice Marshall construed that clause to mean that Congress can employ "*any* means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-14 (1819) (emphasis supplied). Unfortunately, commentators have not always distinguished between the 2 necessity doctrines. *See, e.g.*, Wormuth & Murkin, *supra* note 1, at 262.

139. 95 U.S. 465 (1877).

140. *Id.* at 472 (emphasis added). The Court relied on 2 cases that involved the regnlation of *foreign* commerce and immigration and which employed the necessity doctrine. Henderson v. Mayor of New York, 92 U.S. 259 (1875), Chy Lung v. Freeman, 92 U.S. 275 (1875).

the statute was far beyond its professed object, since it excluded healthy as well as diseased animals. Similarly, since oleomargarine was found to be a harmless substance,[141] Pennsylvania could not prohibit its transportation into the State, even though the due process clause did not preclude a ban on production and distribution within a state.[142]

The first commerce clause case, however, to place its holding squarely and solely on alternatives was *Dean Milk Co. v. Madison.*[143] Under challenge there were municipal ordinances limiting sale of milk in the city to milk pasteurized and bottled at an approved plant within five miles of the center of the city. The Court recognized the defendant's legitimate interests, and would have sustained the ordinance despite its burden on interstate commerce, except that "reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, [were] available."[144] Justice Black's dissent challenged the assumption that the reasonable alternative concept belonged in commerce clause cases, and argued that even if it did, there had not been a sufficient showing that the proffered alternatives were actually as effective as the existing ordinances.[145] He urged his brethren to give "the parties a chance to present evidence and get findings on the ultimate issues the Court thinks crucial—namely, the relative merits of the Madison ordinance and the alternatives suggested by the Court today."[146]

The record in *Bibb v. Navajo Freight Lines*[147] was constructed in accord with Justice Black's wishes and enabled a unanimous Court to invalidate an Illinois law requiring a specified type of rear fender mudguard on all motor carriers. Evidence adduced at trial showed that the expensive mudguards were no more and possibly even less effective than the simple mudflap, which satisfied state laws in at least forty-five other states. The Court was also able to

141. Schollenberger v. Pennsylvania, 171 U.S. 1 (1898).

142. Powell v. Pennsylvania, 127 U.S. 678 (1888) discussed *supra* at notes 18-21 and accompanying text.

143. 340 U.S. 349 (1951). *See* Wormuth & Mirkin, *supra* note 1, at 258.

144. 340 U.S. at 354.

145. *Id.* at 357-60 (Black, Douglas & Minton, JJ., dissenting). Black and Douglas subsequently agreed that alternatives were a proper subject in commerce clause cases. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) discussed *infra* at notes 147-48 and accompanying text; Castle v. Hayes Freight Line, Inc., 348 U.S. 61 (1954). In the latter case the Court held Illinois could not exclude overweight carriers from its highways. Justice Black wrote that he and his brethren were "not persuaded . . . that the conventional forms of punishment [were] inadequate to protect states from overweighted or improperly loaded motor trucks." *Id.* at 64.

146. 340 U.S. at 360.

147. 359 U.S. 520 (1959).

document well the burden placed on interstate commerce by the statute. Even though the Illinois regulation "would pass muster under the Due Process Clause," it nonetheless failed to meet the standards required of state laws that bring the supremacy clause into play.[148]

The Court's greater willingness to intervene in commerce clause as opposed to substantive due process cases was evident in *Dean Milk Co.* and *Bibb*, which involved substitute mechanisms for alternatives as well as simple statutory tailoring. The Court, however, has never required the same strict necessity under the commerce clause as is demanded when fundamental rights are affected.[149] Thus stringent state regulations prescribing the width and weight of trucks have been sustained as necessary to preserve safe passage on narrow and winding South Carolina roads.[150] Arkansas requirements for large train crews on freight trains were upheld against claims that they were unnecessary, on the grounds that the legislative judgment should prevail when the evidence is equivocal on necessity.[151] In *Breard v. Alexandria*[152] the Court upheld a city ordinance banning door-to-door magazine salesmen, despite the easy alternative of making a trespass action dependent upon a notice barring solicitors.

C. *The Equal Protection Clause*

1. "Traditional" Standard of Review

During the first seventy-five years of its existence the equal protection clause was rarely invoked to invalidate legislative enactments,[153] contrasting sharply with the use of its fourteenth amendment counterpart, the due process clause.[154] It was, as Justice Holmes termed it, "the usual last resort of constitutional arguments."[155] This historically based deference that equal protection cases paid to legislatures was rigidified when the Court rejected the

148. *Id.* at 529. Justice Harlan, joined by Justice Stewart, concurred since the mudflaps' "heavy burden [could not] be justified on the theory that the Illinois statute is a necessary, appropriate, or helpful local safety measure." *Id.* at 530.

149. *See* notes 133-96 *supra*, 220-44 *infra* and accompanying text.

150. South Carolina St. Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938).

151. Brotherhood of Locomotive Firemen v. Chicago, R.I.&P.R.R., 393 U.S. 129, 133-40 (1968).

152. 341 U.S. 622 (1951).

153. *See* GUNTHER & DOWLING, *supra* note 13, at 983. *But see* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

154. *See* notes 11-52 *supra* and accompanying text.

155. Buck v. Bell, 274 U.S. 200, 208 (1927).

activist, natural law philosophy that had prevailed under substantive due process. The traditional standard was articulated as the "rational basis test"—the government need only have a rational basis for the challenged classification that will further a legitimate goal.[156] The wide scope of discretion accorded the states under this standard is exemplified by Chief Justice Warren's opinion in *McGowan v. Maryland:*[157]

> The constitutional safeguard is offended *only if* the classification rests on grounds *wholly irrelevant* to the achievement of the State's objective . . . . A statutory discrimination will not be set aside *if any state of facts reasonably may be conceived to justify it.*[158]

This test provides for minimum scrutiny, but actually its application amounts to total abdication of judicial review. As might be expected, legislative alternatives have been considered wholly irrelevant to the test; the Court has refused to inquire beyond the determination that the statute bears some relation to the elimination of the evil.[159] This posture of restraint has unceasingly controlled the review of economic legislation,[160] including the most recent decisions.[161] Although social legislation also has been traditionally subject to the narrowest review, recent developments indicate that the Court may become more active in that area.[162]

2. The Compelling Interest Test

Because of the deferential nature of traditional equal protection review, and because of its desire to protect certain libertarian ideals, the Court developed a second, more intensive level of analysis. It began in the early forties,[163] but developed most rapidly during the Warren Court years.[164] This strict scrutiny, characterized as the

156. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

157. 366 U.S. 420.

158. *Id.* at 425-26 (1961) (emphasis added). *McGowan* is discussed further at notes 275-78 *infra* and accompanying text.

159. Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949).

160. *See* cases cited in GUNTHER & DOWLING, *supra* note 13, at 995-97. *But see* Morey v. Doud, 354 U.S. 457 (1957).

161. Kahn v. Shevin, ___ U.S. ___, 94 S. Ct. 1734-38 n.10 (1974); Village of Belle Terre v. Boraas, ___ U.S. ___, 94 S. Ct. 1536 (1974); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). *But compare* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

162. See notes 196-220 *infra* and accompanying text.

163. Skinner v. Oklahoma, 316 U.S. 535 (1942); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

164. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) (hereinafter cited as *Developments*).

"compelling interest test," is triggered whenever a governmental classification is based upon a "suspect classification"[165] or adversely affects a "fundamental right."[166] The state must then satisfy a three-pronged standard: (1) the means selected are *necessary*,[167] (2) to further a compelling interest, (3) aimed at a legitimate goal. As the requirement of necessity indicates, available alternatives must be investigated in every case applying this strict review.[168]

As with conclusive presumptions, there is always an alternative to an overinclusive categorization—the statute can be tailored to fit only the evil at hand.[169] The problem is whether practical means exist for making distinctions with the required precision. In several equal protection cases the Court has found sufficient means available and has determined that the establishment of objective criteria and individualized investigation provide reasonable alternatives to durational requirements for determining residency status.[170] Alternatives other than just "tailoring" an overinclusive statute have also been found to make a state's questioned classification unnecessary. Thus in *Dunn v. Blumstein*,[171] a case in which the necessity

165. The list of "suspect classifications" now includes race, Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Education, 347 U.S. 483 (1954), and alienage, *In re* Griffiths, ___ U.S. ___, 93 S. Ct. 2851 (1973); Sugarman v. Dougall, ___ U.S. ___, 93 S. Ct. 2842 (1973).

Classifications based on sex and pedigree have also required increased scrutiny. On the latter *see* Jiminez v. Weinberger, ___ U.S. ___, 94 S. Ct. 2496 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (lines drawn between legitimate and illegitimate offspring constitutes "invidious discrimination"); Levy v. Louisiana, 391 U.S. 68 (1968); on sex distinctions *see* Frontiero v. Richardson, 411 U.S. 677 (1973). *But see* Kahn v. Shevin, ___ U.S. ___, 94 S. Ct. 1734 (1974).

166. Fundamental rights for equal protection purposes are those "explicitly or implicitly guaranteed by the Constitution." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). *See Developments, supra* note 163.

167. Justices Brennan and Marshall have, with justification, divided the necessity element into 2 steps, one to examine possibilities for tailoring, and one to look at other types of legislation. Richardson v. Ramirez, ___ U.S. ___, 94 S. Ct. 2655, 2682-83 (Marshall, J., dissenting), Kahn v. Shevin, ___ U.S. ___, 94 S. Ct. 1734, 1738 (Brennan, J., dissenting). *See* nn.352a-65 *infra* and accompanying text.

168. While the Court adhered to its policy of total deference under the rational basis analysis, classification under the compelling interest test was the kiss of death for any statute. In fact, the dichotomy between the two tests became so severe, that the cases were actually being decided at the point at which the applicable standard was chosen, and the ensuing balancing of interests then became merely a post-mortem ritual. Seemingly aware of that, the Court on occasion would balance the competing interests while determining which test to apply. *Compare* O'Brien v. Skinner, 414 U.S. 524, 94 S. Ct. 740 (1974) *and* Goosby v. Osser, 409 U.S. 512 (1973), *with* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969). *See also* Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973).

169. *Compare* text accompanying notes 90-118 *supra*.

170. Dunn v. Blumstein, 405 U.S. 330, 348, 351 (1973); Shapiro v. Thompson, 394 U.S. 618, 637 (1969); Carrington v. Rash, 380 U.S. 89 (1965). *See also* Vlandis v. Kline, 412 U.S. 441 (1973), discussed *supra* at notes 97-103 and accompanying text.

171. 405 U.S. 330 (1973).

requirement was decisive, the Court maintained that voter registration and a variety of criminal fraud provisions were sufficient to protect the state's interest in purity of the ballot box, rendering durational residency requirements undue infringements on the exercise of the franchise and the right to travel.[172] Also, in *Bullock v. Carter,*[173] the Court dismissed as unnecessary Texas's primary election filing fees system. To advance its purpose of limiting the size of the primary ballot, the state was found to have an available alternative in restricting the ballot to those parties achieving a minimum of success in a prior election.[174] Moreover, the filing fees could not be justified as a means for reimbursing the state's coffers for the primaries' costs, since that could be spread among the voters and taxpayers. Chief Justice Burger's opinion reordered the Texas spending priorities:

> Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. Without making light of the state's interest in husbanding its revenues, we fail to see such an element of necessity in the state's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters.[175]

While the Court did specify alternative legislative routes in the above cases, it has on other occasions invalidated statutes as overinclusive and unnecessary without suggestions of other means. *Kramer v. Union Free School District No. 15*[176] held unconstitutional a limit on the franchise in local school board elections to property owners and parents of school children. The state proffered as justification for the classification its interest in having the electorate consist of those "primarily interested" and best informed. The Court assumed *arguendo* the legitimacy of those purposes; however, it found the constitutional validity of the statutory distinctions to depend upon "whether all those excluded [were] in fact substantially less interested or affected than those the statute includes."[177]

172. *Id.* at 353. *See also* Shapiro v. Thompson, 394 U.S. 618 (1969).

173. 405 U.S. 134 (1973).

174. Texas already had a statute that distinguished, for the purpose of requiring a primary, between parties on the basis of votes received in the previous guhernatorial election. *Id.* at 147. The constitutionality of such distinctions is discussed *infra* at notes 186-201 and accompanying text.

175. 405 U.S. at 148-49. Note that here the Court is intruding into tax matters. *Compare Bullock, with:* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) *and* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

176. 395 U.S. 621 (1969).

177. *Id.* at 632.

The classifications fell short of that exacting standard since they permitted some less interested to vote while excluding others with greater interest.[178] The Court volunteered no method by which the state could more precisely achieve its goal. Similarly, the durational residency requirement in *Dunn v. Blumstein* failed since many long-time Tennesseans were less informed on the candidates and issues than recent migrants.[179] There was "simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement" of durational residency. Thus "given the exacting standard of precision," the Court was unable to conclude that the challenged provisions were "necessary to further a compelling state interest."[180]

Although the element of necessity in the compelling interest test has been equated with the least drastic means doctrine,[181] there have been indications that more than legislative alternatives may be relevant to "necessity." The discussion in *Dunn v. Blumstein* of the attenuation between the state's means and its goals[182] indicates that the Court is measuring the *rationality* of the legislation. In addition, *Blumstein* pointed out that the residency requirements are unnecessary to insure a well-informed electorate due to modern communications and mass advertising campaigns that educate the voters during the last month of the election.[183] These are *not* suggested legislative alternatives, rather they dispute the conclusion of the legislature that there is a problem that needs remedying. When the doctrine of necessity is used in this manner, it is not being used solely to demonstrate that the state's classification is unnecessary in light of other, less drastic alternatives. Rather the doctrine is used to indicate that the classification is not needed since the supposed evil is not that great,[184] or that under the circumstances,

178. *Id.*

179. 405 U.S. at 358-61.

180. *Id.* at 360.

181. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972).

182. *See* text accompanying notes 179-80 *supra.*

183. 405 U.S. at 358.

184. This may be a legitimate inquiry for a court to make, especially when important individual rights are at stake. Certainly if the problem does not exist, then restrictive legislation would be unnecessary. Prior to *Blumstein*, however, the Court had viewed necessity only in light of *legislative* alternatives; it assumed that the problem did exist. An expansion of the necessity doctrine to include an inquiry into wbetber there is a need for *any* legislation would take the Court one step further into the legislative domain. For instead of remanding to the legislature for treatment in a less restrictive manner, the Court would be invalidating tbe statute with no remand. In effect, it would be concluding that tbe problem cannot be treated in *any* restrictive manner because it does not exist. *See* note 341 *infra* and accompanying text.

the state's interest is not substantial enough to justify the infringement of a fundamental interest.[185]

A trilogy of cases on access to the ballot recently decided on the same day indicate a possible modification of the necessity element of the compelling interest test. They illustrate the crucial analytical nature of that element, and reflect an increasing awareness of its importance by the Court. *Lubin v. Panish*[186] invalidated California's filing fees that were a prerequisite to a candidate's participation in the election process. *Storer v. Brown*[187] sustained the state's refusal to grant ballot positions to independent candidates who had voted in the preceding primary, or who had a registered affiliation with a political party at any time within one year prior to the immediately preceding primary.[188] In the third decision, *American Party of Texas v. White*,[189] the Court upheld the state's provisions dealing with minority of splinter parties. Texas could require political parties with less than two percent of the vote in the preceding gubernatorial election to nominate by convention rather than primary, and to demonstrate support from at least one percent of the same vote by either listing qualified voters who participated in the convention, or by filing a petition. Texas could also require independent candidates to submit petitions signed by a reasonable number of qualified voters, and it could exempt from public financing of primary elections those parties polling less than 200,000 votes in the preceding gubernatorial election. In each of the three decisions, the Court found a fundamental individual interest, and legitimate and com-

185. *See* Shelton v. Tucker, 364 U.S. 479 (1960), in which the Court invalidated a state requirement that its school teachers disclose all of their organizational memberships. The Court found that the state's ostensible goal of rooting out subversives could "be more narrowly achieved." *Id.* at 488. The Court, however, did not intimate how the state could narrow its statute. *See also* Aptheker v. Secretary of State, 378 U.S. 500, 513-14 (1964) (denial of passports to American Communist Party members violated their right to travel since government could achieve its goal in less restrictive ways).

Discussing the 2 cases above, one commentator has stated:

> [T]he fact that legislation may reach too many people does not necessarily mean that the legislature's ends could have been more narrowly achieved. It may be that only by reaching too many can the legislature be reasonably confident of reaching those it needs to. The Court's results in [*Shelton* and *Aptheker*] may still be justifiable but not on the basis of the principle it purported to apply. What the Court was doing in fact was weighing a federal constitutional interest in each case against the asserted legislative interest and deciding that the federal interest was more deserving of protection.

Chambers, *supra* note 1, at 1149 n.181.

186. 415 U.S. 709, 94 S. Ct. 1315 (1974).

187. 415 U.S. 724, 94 S. Ct. 1274 (1974).

188. The Court in *Storer* also remanded part of the case to the district court for further findings on the hardship caused by California's petition requirements for independent candidates. *Id.* at 1283-87.

189. 94 S. Ct. 1296 (1974).

pelling state interests.[190] Thus each of the holdings turned upon the existence (or nonexistence) of alternative means.

The opinions evidenced a concern for the effectiveness of suggested alternatives. Justice White, for the majority in *Storer*, maintained that the *Williams-Kramer-Dunn* rule does not invalidate "every substantial restriction on the right to vote or to associate"—it does not provide a "litmus paper test."[191] "[T]he Constitution does not require the state to choose ineffectual means to achieve its aims."[192] Justice Brennan's dissent in *Storer* agreed that "naturally," the state does not have to make such a choice. He criticized the majority, however, for having recognized the relevance of alternatives but then failing to inquire if there were adequate means available.[193] Brennan found the party disaffiliation requirement fatally overbroad, since it forced a potential candidate to make an important strategy decision a full seventeen months before the *general* election. He reasoned that the state could achieve its aims with a significantly shorter time period.[194] Of course, whenever numbers are involved there will always be some less drastic means available, and the majority may have desired to avoid second guessing the legislature in deciding where the line should be drawn. Yet, it must be admitted that at some point a time period (or any other classification based on numbers) can become too onerous and the Court should then intervene.[195]

In the *American Party* case, however, only Justice Douglas dissented from the result sustaining the Texas laws. The state had indeed shown consideration for splinter parties and independents, and had followed suggestions made to it by the Court in *Bullock v. Carter*.[196] In reaching the holding, Justice White's majority opinion concluded that the state's vital objectives "cannot be served *equally*

190. *But see* Part V of the Court's opinion in the *American Party* case, 94 S. Ct. at 1313-15 (no justification for including only 2 major political parties on absentee ballots).

191. 94 S. Ct. at 1279.

192. *Id.* at 1282.

193. *Id.* at 1293-94.

194. *Id.* at 1292-94.

195. *See* Struve, *supra* note 1, at 1476. *Compare* Kusper v. Pontikes, 414 U.S. 441 (1973), *with* Rosario v. Rockefeller, 410 U.S. 752 (1973). *Compare* Dunn v. Blumstein, 405 U.S. 330 (1972), *with* Burns v. Fortson, 410 U.S. 686 (1973) *and* Marston v. Lewis, 410 U.S. 679 (1973). *See also* notes 363-64 *infra* and accompanying text.

196. 405 U.S. 134 (1972). For a discussion of *Bullock*, see text accompanying notes 173-75. For a discussion of how far the Court should go in specifying suggestions, *see* notes 365-74 *infra* and accompanying text. *But cf.* Lubin v. Panish, 94 S. Ct. 1315, 1323 (1974) (Blackmun, J., concurring).

well in *significantly* less burdensome ways." (emphasis added).[197] This quote may signal an adjustment in the compelling interest test[198] because as has been demonstrated above, the Court has not required a showing that a less restrictive alternative be equally solicitous of the state's interest as the existing statute as a prerequisite for invalidation. Moreover, by maintaining that the alternative must be "significantly" less drastic, the Court may be retreating from its requirement of *strict* necessity. Indeed, Chief Justice Burger stated in *Lubin* that the state's means need only be "*reasonably* necessary."[199] (emphasis added). Justice Brennan quoted the above passage from *American Party* as controlling in his *Storer* dissent,[200] and Justice Blackmun, while concurring in *Lubin,* demonstrated a willingness to accept an alternative that was less restrictive, even though it was clearly not the *least* restrictive.[201]

The three cases, especially *Lubin*, resemble to a significant degree the analysis under an earlier due process doctrine. In the latter, access to the judicial forum was at issue, while in *Lubin* the issue is one of ballot access. *Boddie v. Connecticut*[202] invalidated filing fees for divorce court, since a couple had no alternative means for adjusting their marital relationship. Similarly, filing fees were struck down in *Lubin* since the state had not provided alternative methods of gaining a position on the ballot. This rationale also prompted the invalidation in *American Party v. White* of a Texas statute that limited absentee ballots to candidates from the two major parties.[203] In *Lubin* and *Boddie*, alternatives were decisive in that individuals had none available, but the state did have other means for affecting its purposes. *Boddie*'s holding has been subsequently modified by the decisions in *United States v. Kras*[204] and

197. 415 U.S. at 781, 94 S. Ct. at 1306.

198. Compare the discussion on the Court's recent remodeling of the first amendment overbreadth doctrine into one of substantial overbreadth, at notes 261-64 *infra*, and accompanying text. *See* Broaderick v. Oklahoma, 413 U.S. 601 (1973); United States Civ. Serv. Comm'n. v. Letter Carriers, 413 U.S. 548 (1973).

199. 94 S. Ct. at 1321. *See also* Bullock v. Carter, 405 U.S. 134 (1972).

200. 415 U.S. at 757, 94 S. Ct. at 1292.

201. 415 U.S. at 722, 94 S. Ct. at 1323. Although not a matter in issue in the case, Justice Blackmun, joined by Justice Rehnquist, explicitly stated he would accept a write-in procedure, "although not perfect,"as an acceptable alternative. He felt that the "Court seemingly would reject a write-in alternative while accepting many petition alternatives." *Id.* *See* notes 360-74 *infra*, and accompanying text. The *Lubin* Court did not express a final opinion on any of the alternatives.

202. 401 U.S. 371 (1971).

203. 415 U.S. at 794, 94 S. Ct. at 1312-13. *See also* O'Brien v. Skinner, 414 U.S. 524 (1974); Goosby v. Osser, 409 U.S. 512 (1973).

204. 409 U.S. 434 (1973).

Ortwein v. Schwab.[205] *Kras* sustained a federal requirement for filing fees as a prerequisite to a voluntary bankruptcy action. *Boddie* was not found to be controlling since that case involved the "fundamental" individual interest in marital privacy. By contrast, the Court maintained, bankruptcy involved merely a readjustment of personal finances which did not mandate strict scrutiny of alternatives. Similarly, *Ortwein* distinguished *Boddie* in upholding fees for a state welfare appeals procedure, since welfare interests do not enjoy a constitutional stature equivalent to the Boddies' privacy rights. Thus, the resulting *Boddie-Kras* due process doctrine now reflects the same dichotomy towards alternatives as exists in equal protection between the rational basis and compelling interest tests. *Lubin* and *American Party* provide further evidence of the overlap between equal protection and *Boddie-Kras*.[206]

When the compelling interest test is engaged, the Court has demonstrated a willingness to apply the least restrictive alternative principle to underinclusive as well as overinclusive classifications. With underinclusiveness, however, the alternatives are not matters of "tailoring," since the statute is by definition already too narrow. Statutes fatally underinclusive characteristically single out a particular group for special treatment—favorable or adverse. In *McLaughlin v. Florida*[207] the state had a criminal law prohibiting habitual nighttime cohabitation in the same room between a black and a white of opposite sexes. The proscription could not be justified as part of the state's policies against extramarital sex and interracial marriages, which were assumed *arguendo* to be valid. Other existing statutes that broadly banned promiscuous behavior in a neutral manner were found sufficient to preclude the necessity for the racially drawn classification.[208]

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205. 410 U.S. 656 (1973).

206. The plaintiffs in *Boddie, Kras & Ortwein* all presented an equal protection argument. Justice Douglas and Brennan concurred specially in *Boddie*, solely on equal protection grounds. 401 U.S. at 383-89.

207. 379 U.S. 184 (1964).

208. *Id.* at 193-94, 196. *See also Developments, supra* note 163, at 1102-04. Justices Stewart and Douglas concurred, arguing that such criminal statutes should be *per se* unconstitutional. 379 U.S. at 198.

A *per se* rule would, of course, make alternatives irrelevant because even if there were no less restrictive means, the statute would still fall. A good illustration is the distinction drawn in anti-trust law between "per se rules" and the "rule of reason." *Compare* United States v. Topco Associates, 405 U.S. 596 (1973) (horizontal territorial allocation schemes are *per se* violations of Sherman Act § 1, so that even the *least* restrictive schemes are unlawful) *with id.* at 613-24, *especially* 624 (Burger, C.J., dissenting) (urging application of the rule of reason and recognition for the necessity of the territorial scheme in the instant case). *See also* United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per*

Some members of the Court recently returned to the problem of alternatives to underinclusive legislation in *O'Brien v. Skinner*,[209] in which a New York statute was invalidated because it disfranchised convicted misdemeanants and pretrial detainees incarcerated in their county of residence, while granting the right of an absentee ballot to those incarcerated in counties other than the one of their residence. Although Justice Marshall's concurring opinion recognized the legitimate interest in preventing local officials from influencing the vote of in-county inmates, he suggested that a better, less restrictive approach would be through "stringent measures to prevent official misconduct," and through other means of voting besides the absentee ballot, since the latter might be more susceptible to influence.[210] Obviously, these alternatives are more in the nature of substitutes, rather than of the tailoring which is common with overinclusion.[211]

In certain instances involving underinclusive statutes, the significance of alternatives has a distinctive impact. For example, the purpose of an underinclusive statutory classification may be to avoid an increased burden on the state's treasury, especially when enlarging the class would require substantial expenditures for each new member as well as increased administrative costs. Cases demonstrating this purpose have involved the rights of indigent, criminal defendants to be provided with a transcript or counsel on direct appeal.[212] *Griffin v. Illinois*[213] held that a convicted indigent was

curiam 347 U.S. 521 (1954). *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965) & 75 YALE L.J. 373 (1966); Turner, *The Validity of Tying Arrangements—Under the Antitrust Laws*, 72 HARV. L. REV. 50, 59-74 (1958). It is interesting to note that *Topco* was argued the same day as Dunn v. Blumstein, yet the members of the Court exchange positions on the advisability of using alternatives in the 2 cases. Of course, the differences are significant, to say the least, between assessing alternative means for determining residency status and for maintaining economic competition. The clash over alternatives between the *per se* rule and the rule of reason in antitrust law is very analogous to that between the "absolutists" and the "balancers" in first amendment cases. *Compare* Konigsberg v. State Bar of California (II), 366 U.S. 36 (1961) (Harlan, J., for the Court, describing and employing the balancing technique) *with id.* at 61 (Black, J., arguing the absolute approach).

209. 414 U.S. 524 (1974).

210. *Id.* at 534. The alternatives suggested here were basically the same as those suggested in McDonald v. Board of Election Comm'rs., 394 U.S. 802 (1969), which sustained a provision similar to the one invalidated in *O'Brien*. The Court distinguished the 2 cases on the basis that in *McDonald* there was no proof that the state had not provided the prisoners with other means of voting besides absentee procedures. 414 U.S. at 529.

211. *See, e.g.*, Jiminez v. Weinberger, ___ U.S. ___, 94 S. Ct. 2496, 2502 (1974); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); Boddie v. Connecticut, 401 U.S. 371, 383-86 (Douglas and Brennan, JJ., concurring).

212. *See* Michelman, *The Supreme Court, 1968 Term—Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 25 & nn. 53-56 (1969) and cases cited therein.

213. 351 U.S. 12 (1956).

denied equal protection of the laws when he was not given a transcript of his trial or an "adequate and effective" alternative.[214] The Court thus left the state some leeway in providing methods for a meaningful appeal that would not be as expensive as buying a stenographer's transcript for every indigent convicted. The *Griffin* holding has recently been reaffirmed and extended,[215] and the Court has demonstrated its sincerity in allowing adequate substitutes for a transcript.[216]

Douglas v. California[217] applied the *Griffin* principle to representation by counsel on an appeal available as a matter of right[218] and held that denial of an attorney in such instances amounted to invidious discrimination against the poor.[219] The Court did not consider alternatives, nor did it evaluate the effect of its holding on the state's budget. This points to a nagging problem in these cases—if the Court applied the strict scrutiny-least drastic means test to a classification based upon one's ability to pay, then an alternative that the state provide the commodity at issue would of course be "least restrictive" of the individual's rights. While *Griffin-Douglas* could be confined to the proposition that a transcript (or substitute) and counsel are *necessary* for a "fair" review on appeal, and that each individual is entitled to a minimally effective review, once an appeal process has been established,[220] even this narrowed view could impose a substantial financial burden on the state. If the Court began to explore alternative means by which the state could achieve its purpose of limiting expenditures, the Court would be assuming a function legislative in character—the act of determining how much to spend for what, in light of *all* the demands on the budget.[221]

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214. *Id.* at 20.

215. Mayer v. City of Chicago, 404 U.S. 189 (1971) (unanimous Court held that transcript or its equivalent must be provided upon request on appeal of a misdemeanor conviction and fine).

216. Thus in Britt v. North Carolina, 404 U.S. 226 (1971), a defendant was not entitled to a free transcript of his first trial (which resulted in a mistrial), when the second trial occurred only one month later, and there were sufficient alternatives in the counsel's still fresh memory and a cooperative court reporter.

217. 372 U.S. 353 (1963).

218. The Supreme Court has recently refused to extend *Douglas* to appeals beyond those granted "by right." Ross v. Moffitt, 415 U.S. 909, 94 S. Ct. 2437 (1974).

219. Douglas would not have allowed counsel substitutes. The Court has, however, allowed counsel substitutes in areas of due process other than criminal procedure. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969).

220. *See* Michelman, *supra* note 210.

221. *See* Part III, *infra*. *But see* Wayatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); Chambers, *supra* note 1, at 1192-93; note 173 *supra* and accompanying text.

Considerations such as these persuaded the Court to circumscribe the open-ended categories of "fundamental right" and "suspect classification."[222] The need for containment was most critically felt after *Shapiro v. Thompson*[223] and *Harper v. Board of Elections*[224] when many Court-watchers feared, or hoped, that involvement of the "necessities of life" or a poverty distinction would provoke strict scrutiny. The Court, however, rejected the invitation, holding in *Dandridge v. Williams*[225] that legislative classifications affecting necessities of life were of an "economic" nature and therefore need only satisfy the minimum scrutiny-rational basis standard. As subsequently stated by Justice Rehnquist, the Court thus avoided the problems inherent in applying the necessity doctrine to complex economic problems for which it is ill-suited:[226]

> So long as its judgments are rational and not invidious the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

3. Recent Developments

While the Court retreated from extension of the compelling interest test, it began to display a dissatisfaction with the rigid two-tiered approach. Even if the "straitjacket" of strict scrutiny was an inappropriate fit for legislation involving welfare, social, or property issues, such interests were nevertheless deserving of greater judicial protection than the abdication of review traditionally associated

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

223. 394 U.S. 618 (1969).

224. 383 U.S. 663 (1966).

225. 397 U.S. 471 (1970).

226. Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972). *See also* Shapiro v. Thompson, 394 U.S. 618, 677 (1969) (Harlan, J., dissenting).

The Court recently reaffirmed the *Dandridge-Jefferson* rationale when it refused to order California to undertake the substantial financial responsibility of including pregnancy as a basis for receipt of disability benefits. Geduldig v. Aiello, 415 U.S. 973, 94 S. Ct. 2487 (1974). (The exclusion of pregnancy was claimed to be invidious sex discrimination, an argument which the majority specifically rejected. 94 S. Ct. at 2492 n.20). Yet just 2 days after *Geduldig* was announced, the Court handed down Jiminez v. Weinberger, ___ U.S. ___, 94 S. Ct. 2496 (1974), which invalidated a Social Security regulation and which will surely result in an increase in the number of eligible welfare recipients. That will certainly lead to a concomitant increase in the demand upon the Social Security Fund. *See, id.*, ___ U.S. at ___, 94 S. Ct. at 2503 (Rehnquist, J., dissenting). The cases can be distinguished on several grounds—that the Court found the *Jiminez* discrimination to be more invidious and less rational than in *Geduldig*, that it considered the state interests to be more substantial in the latter, and that the alternatives were more available and more practical in *Jiminez*. The contrast between these two cases, both purporting to rely upon a rational basis standard, provides support for the newer, more flexible approaches to equal protection discussed immediately below (Part I-C-3).

with the rational basis test.[227] The Court has not yet developed a cohesive approach for these cases, although several analyses have been offered. It is very difficult, therefore, to determine the impact alternatives presently have in cases not involving the compelling interest test.

The first notable development in the remodeling of two-tiered equal protection was a strengthening of the rational basis test. Thus, *Turner v. Fouche*[228] applied a rationality standard while invalidating a freeholder requirement for school board membership. The Court refused to supply the needed legislative rationale and found the statute lacking in justification. Although no alternatives were suggested, the state had to use "means more finely tailored to achieve the desired goal."[229] Subsequently, *Reed v. Reed*[230] struck down a sex-based classification, and *Eisenstadt v. Baird*[231] invalidated a ban on the use of contraceptives by single persons, both decisions citing and ostensibly relying upon traditional standards. *Reed* did not mention alternatives, and *Eisenstadt* did not rely upon them since the statute there failed "to satisfy even the more lenient equal protection standard."[232] In *Eisenstadt*, however, the Court did discuss alternatives and necessity in rejecting the state's argument that the statute was intended to be a health measure.[233] Several other decisions during the 1971 Term purported to apply traditional review in invalidating legislation and did not consider alternatives.[234]

There are numerous paths the Court could choose to follow in forging a "newer" equal protection that would be more solicitous of rights not privileged enough to have attained "fundamental" status. Two approaches in particular have been offered and widely discussed, and the importance of alternatives is one of the critical distinctions between the two. One of them, which may be characterized as the "sliding-scales" test, has found its chief proponent in Justice Thurgood Marshall,[235] while the other approach found extra-

227. *See* materials cited note 136 *supra*.

228. 396 U.S. 346, 361-64 (1970).

229. *Id.* at 364.

230. 404 U.S. 71 (1971). The Court has granted review on the question whether sex distinctions should trigger the compelling interest test. Schlesinger v. Ballard, 360 F. Supp. 643 (S.D. Cal. 1973), *prob. juris. noted*, 94 S. Ct. 1405 (1974).

231. 405 U.S. 438 (1972) (plurality opinion).

232. *Id.* at 447 n.7.

233. *Id.* at 452, quoting Commonwealth v. Baird, 355 Mass. 746, 759, 247 N.E.2d 574, 582 (1969) (Spiegel, J., dissenting).

234. *E.g.*, James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972).

235. *See also Developments, supra* note 163.

judicial expression in Professor Gerald Gunther's Foreword to Harvard's review of the 1971 Supreme Court Term.[236] Gunther proposed that equal protection should pursue a "means-focus" analysis in cases under the rational basis test. Under this analysis, the Court would require rationality in fact—the state would be required to articulate its reasoning and objectives, and the Court would no longer supply the legislature with the needed criteria. Professor Gunther postulated a narrowing of the gross dichotomy between the rational basis and compelling interest standards. He did not necessarily call for a recharacterization of the presently used tests, but he did advocate sincere and honest application, with genuine, but restrained, scrutiny of means. Judges' values, urged Gunther, should not affect the degree or rationality required; the Court should confine itself only to the relationship between means and ends. He did advocate a value-input, however, to the extent that the compelling interest test be maintained as it is presently defined. Alternatives are an appropriate consideration under this latter test, but not his means-focus test under which "[t]he more modest interventionism . . . would permit the state to select *any* means that substantially furthered the legislative purpose."[237]

Justice Marshall has urged adoption of his sliding-scales technique on several occasions, most elaborately in his dissent in *San Antonio Independent School District v. Rodriguez*.[238] He contends that the Court employs a spectrum of standards in equal protection, and he has postulated a two-step analysis.[239] The first step is to determine the degree of scrutiny appropriate in the particular case. That is dependent upon two variables: the constitutional and societal importance of the individual interests, and/or the invidiousness of the classification.[240] Once the proper level of review has been ascertained, it must be applied to the examination of three factors: the substantiality of the state's interests, the reasonableness of the means adopted, and the availability of alternatives.[241] If these fac-

236. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

237. *Id.* at 21. Professor Gunther summarized his model: "The intensified means scrutiny would, in short, close the wide gap between the strict scrutiny of the new equal protection and the minimal scrutiny of the old not by abandoning the strict but by raising the level of the minimal from virtual abdication to genuine judicial inquiry." *Id.* at 24.

238. 411 U.S. 1, 70 (1973). *Rodriguez* is discussed, *infra* at notes 245-51 and accompanying text. Marshall also urged the sliding scales technique upon the Court in his dissents to Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) and Richardson v. Belcher, 404 U.S. 78, 90 (1971).

239. 411 U.S. at 98.

240. *Id.* at 109.

241. *Id.* at 124-25.

tors cannot withstand the scrutiny of the designated standard, then the statute must fall. Presumably, the degree of necessity required in Justice Marshall's test would be directly proportionate to the importance of the individual interests at stake and the degree of the classification's invidiousness.[242]

By way of contrast,[243] the means-only test advocated by Gunther looks at Marshall's "variables" (the first step) only to see if a fundamental interest or suspect class is involved. If those two factors are not present, then the only remaining consideration is whether the means adopted substantially further the state's goal (assuming the latter is legitimate). The substantiality of the state's interests and alternatives would be relevant *only* in compelling interest cases.

The Court has the precedential authority to choose either of the above routes. It has begun to require that state goals be articulated, and there can be no question that the level of scrutiny applied under the rational basis banner has not been a constant. Thus in *Lehnhausen v. Lake Shore Auto Parts Co.*[244] the Court adhered to the absolute deference policy for cases involving a state's tax law, easily sustaining a provision taxing corporations, but not people. Yet *United States Department of Agriculture v. Moreno*[245] also applied the rational basis test when it invalidated a statute distinguishing between households with unrelated persons living therein and households without, only the latter being eligible for stamps. The importance of the right of association and the necessity of food apparently moved the Court to a more exacting standard. In noting that there were other provisions of the Food Stamp Act aimed specifically at preventing fraud, Justice Brennan's majority opinion cast "considerable doubt upon the proposition that the [challenged classification] could rationally have been intended to prevent those very same abuses."[246] Thus as in *Eisenstadt*, existing alternative procedures are cited as grounds for rejecting an offered state objec-

242. Marshall's test could also be accomplished in one step, wherein it would resemble a due process-type balancing of all the relevant factors. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972); Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Boraas v. Village of Belle Terre, 476 F.2d 806, 814 (2d Cir. 1973), *rev'd*, ___ U.S. ___, 94 S. Ct. 1536 (1974).

243. The opinions in the Second Circuit's decision in Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), *rev'd*, ___ U.S. ___, 94 S. Ct. 1536 (1974), provide an excellent comparison of the 2 methods in operation. The majority adopted Justice Marshall's approach, while the dissent used Gunther's model.

244. 410 U.S. 356 (1973). *See also* Village of Belle Terre v. Boraas, 94 S. Ct. 1536 (1974); Pharmacy Bd. v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

245. 413 U.S. 528 (1973).

246. *Id.* at 536-37.

tive. While this is not a traditional use of the alternatives concept (nor a completely logical one),[247] it does reflect a more intense brand of judicial review, which is not as interventionist as the compelling interest test.[248]

The most recent expanded treatment of the equal protection clause postponed judgment on how the "newer" equal protection approach will appear. Although *San Antonio Independent School District v. Rodriguez*[249] was a decision of great importance in this area of constitutional law, it was not conclusive upon the appropriate scope of review. Sustaining the Texas property tax scheme for school financing, Justice Powell's majority opinion demonstrated a very thoughtful consideration of the issues and did not reflect the peremptory dismissal typifying almost all of the Court's prior decisions on state taxation.[250]

After determining that the compelling interest test was not applicable, Justice Powell turned to the challenge on rationality grounds. He characterized the statute as state taxation and noted the traditional deference that the federal courts have accorded to the legislatures in that area. Lack of both expertise and familiarity with local problems explained that deference.[251] Powell expressed the concern, evidenced earlier in *Dandridge v. Williams*[252] and *Richardson v. Belcher*,[253] that "[i]n such a complex arena *in which no perfect alternatives exist*, the Court does well not to impose too rigorous a standard of scrutiny . . . ."[254] In a footnote immediately following, Powell discussed suggested alternatives, but concluded only that commentators and experts have been in disagreement as to the feasibility, effectiveness, and indeed constitutionality of the proposed alternatives.[255] Thus the Court was forced to reject the

247. If the legislative purpose could not have heen what the state says it was simply hecause there was alternative legislation existing, then there is an unspoken assumption that a state cannot attack a problem from more than one approach. Justice Brennan is prohably using the existence of alternatives in such instances as *evidence* that the stated purpose was not the real one, rather than as conclusive proof thereof. *Cf.* YALE NOTE, *supra* note 1, at 469-70 n.27.

248. For further evidence of the evaluation of a newer equal protection see the discussion in note 226 *supra* and cases cited therein.

249. 411 U.S. 1 (1973).

250. *E.g.*, Allied Stores, Inc. v. Bowers, 358 U.S. 522 (1959); Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938).

251. 411 U.S. at 41.

252. 397 U.S. 471 (1970).

253. 404 U.S. 78 (1971). *See* note 226 *supra* and accompanying text.

254. 411 U.S. at 41 (emphasis added).

255. *Id.* at 41-42 n.85. For a well developed alternative to existing school tax schemes, see J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

alternative proposals and was unable to strike down the tax statute on that ground.

The implication of the foregoing discussion is that alternatives will be at least reviewed, and may even be decisive in challenges under the rational basis test. To be decisive, however, the alternative must be widely accepted or clearly practical and effective, as well as less restrictive. Although, in areas as complex as social welfare legislation, such clear-cut alternatives may rarely be discerned, this approach does leave the Court with a useful tool should the opportunity arise.[256] It is clearly not judicial abdication, yet it provides for restraint.

D. The First Amendment

Several major considerations concerning alternatives have arisen from first amendment decisions[257] in which the principle of less drastic means has found its most frequent application, due primarily to the popularity of the overbreadth technique. As previously indicated, this method bears a strong resemblance to that employed under the prohibition-regulation distinction, and the analysis of the conclusive presumption and equal protection-overinclusiveness. The challenged statute is seen as sweeping too broadly, and there is a ready alternative available in a tailored, narrow statute.[258] The Court often utilizes the overbreadth method to avoid making precise substantive rulings on the first amendment questions. It will find that a statute has proscribed protected as well as unprotected speech, but it will not necessarily specify where the line of protection is to be drawn.[259] The only substantive decision made, then, is that *some* of the activity may not constitutionally be proscribed. Through this reasoning, the Court can require a continuous narrowing of the statute until the state's means of realizing its

256. *See* note 226 *supra* and cases cited therein. *But see* Kahn v. Shevin, ___ U.S. ___, ___, n.10, 94 S. Ct. 1734, 1737-38 n.10 (1974).

257. They have heen well discussed in the academic arena. *E.g.*, Gunther, *Reflections on Robel: It's Not What the Court Did But the Way It Did It*, 20 STAN. L. REV. 1140 (1968); Wormuth & Mirkin, *supra* note 1 at 267-93; Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); YALE NOTE, *supra* note 1.

258. The opinion in Shelton v. Tucker, 364 U.S. 479 (1960), which laid the basis for a right of association is often cited for its description of the less drastic means doctrine:

> [E]ven though the governmental purpose he legitimate and substantial, that purpose cannot be pursued hy means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

364 U.S. at 488.

259. *E.g.*, Shelton v. Tucker, 364 U.S. 479 (1960). *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 51-53 (1962).

purpose have been so circumscribed that the utmost precision is obtained, or the purpose is effectively rendered illegitimate. This tactic may often be necessitated by prevailing political realities and institutional self-preservation.[260]

The overbreadth doctrine was modified to some extent by two decisions during the 1972 Term. The principal case for present purposes, *Broaderick v. Oklahoma*,[261] sustained a statute restricting partisan political activities by state employees. A closely divided Court[262] injected a new element into the doctrine by requiring "substantial overbreadth" before the statute will be invalidated[263] if less than "pure speech" or speech-related *conduct* is involved. Furthermore, when only conduct is threatened, a party will not be granted standing to attack a law as overly broad, unless his activities are in themselves examples of the overbreadth.[264] Thus, by imposing a substantiality requirement that will vary the degree of scrutiny according to the value of the first amendment interests at stake, the Court has adopted an approach similar to equal protection's "sliding-scales" technique.[265]

The vagueness doctrine has been closely identified with the overbreadth technique, since each implies the alternative of a better

260. The loyalty oath cases offer a good example. The Court continuously found them unconstitutionally overbroad, at a time when the political and popular fervor would not permit the Court to say outright that a state could not demand "loyalty" of its employees and teachers. The legitimate scope of loyalty oaths has now been whittled down to the narrowest of areas. For examples of this process of confinement see Wieman v. Updegraff, 344 U.S. 183 (1952); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Elfbrandt v. Russell, 384 U.S. 11 (1966);Baird v. State Bar of Arizona, 401 U.S. 1 (1971). Compare the narrowing process which has occurred in the line of cases dealing with prior restraints, defamation laws, and other alternatives, discussed at notes 359-372 and accompanying text *infra*.

261. 413 U.S. 601. *See also* United States Civ. Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (sustained the Hatch Act); United Public Workers v. Mitchell, 330 U.S. 75 (1947) (same). The state statute in *Broaderick* was similar to the federal Hatch Act, which prohibits most employees in the executive branch from participating in any political management (party offices, committees, etc.) or political campaigns.

262. The decision was 5-4, with Douglas, Brennan, Stewart & Marshall, JJ., dissenting.

263. 413 U.S. at 614-16. *See also* Gooding v. Wilson, 405 U.S. 518, 530 (1972) (Burger, C.J., dissenting). The substantial overbreadth development appears to have a strong correlation to the newly stated requirement for significantly less restrictive alternatives (or for reasonably necessary means) in equal protection overinclusion cases. *See* American Party of Texas v. White, 94 S. Ct. 1296 (1974); Lubin v. Panish, 94 S. Ct. 1315 (1974); notes 184-99 *supra* and accompanying text. The Court seems to be restraining itself more in the area of fundamental rights, *see also* Mahan v. Howell, 410 U.S. 315 (1973), while expanding review in other contexts. *See* Part I-C-3 *supra*.

264. 413 U.S. at 610-11. *But cf.* Coates v. Cincinnati, 402 U.S. 611 (1971). The *Broaderick* dissenters claimed the majority was in clear contravention of *Coates*. 413 U.S. at 622 (Brennan, J., dissenting).

265. *See* notes 238-43 *supra* and accompanying text.

constructed statute. A statute, however, may be clear and precise, and susceptible to only one interpretation, yet still be unconstitutionally overbroad. Vagueness is a fatal defect when the statute is not susceptible of precise interpretation and could be construed in such a way as to include protected speech. It would therefore have an impermissible chilling effect.[266] The two methods are, however, often used in conjunction, especially in cases involving antipornography laws.

The dual impact of vagueness and overbreadth, combined with a sensitivity to the problems of state legislatures in this area, could explain why the obscenity decisions have been exceptional in prescribing standards for the redrafting of invalidated statutes. The Court first performed this favor in 1957,[267] modified its suggestions in 1966,[268] and then in 1974 established wholly new criteria while *sustaining* a series of state antipornography statutes.[269] In the latter cases an offering of alternatives was unnecessary to achieve the result, but the Court's eagerness to assist in constructing model legislation was evident.[270]

In addition to overbreadth and vagueness, the Court has often turned to "traditional legal methods"[271] for alternatives in invalidating legislation infringing on first amendment rights. This has been most apparent in the requirement of after-the-fact prosecutions, such as libel, fraud, or false advertising, in lieu of a more prohibitive prior restraint.[272] Thus *Schneider v. New Jersey*[273] held that an at-

266. Zwickler v. Koota, 389 U.S. 241, 253-54 (1967). *See also* Keyishian v. Board of Regents, 385 U.S. 589, 603-04, 608-10 (1967). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

267. Roth v. United States, 354 U.S. 476 (1957).

268. Memoirs v. Massachusetts, 383 U.S. 413 (1966).

269. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). *See also* United States v. 12 200-Ft. Reels of Super 8 MM Film, 413 U.S. 123 (1973); United States v. Orito, 413 U.S. 139 (1973).

270. Despite Chief Justice Burger's disclaimer in *Miller* that "it is not [the Court's] function to propose regulatory schemes for the States," he nevertheless decided "to give a few plain examples of what a state statute could define for regulation" under the "basic guidelines" announced in that opinion. 413 U.S. at 25. He then proceeded to inform the states by hypothetical situations what would not be protected by the first amendment. *Id.* at 25-26.

The "basic guidelines" offered by the Court were tripartite, basically allowing the states (1) to judge by "community standards" whether a work is (2) "patently offensive" as "specifically defined" by state law, and (3) "lacks serious literary, artistic, political or scientific value." *Id.* at 24. The "carnal knowledge" case has added the qualification only "hard-core" pronography can be banned, i.e., only that which focuses on the actors' bodies during scenes of "ultimate sexual acts" or upon their genitalia. Jenkins v. Georgia, ___ U.S. ___, 94 S. Ct. 2750 (1974).

271. Schneider v. New Jersey, 308 U.S. 147, 162 (1939).

272. This points again to the Court's dilemma of whether to prescribe alternatives and

tempt to control litter through a prohibition on the distribution of handbills could not withstand a first amendment challenge, since an ordinance punishing those who litter was constitutionally preferable. The effectiveness of the alternatives has not always been a factor of major consideration. In fact, the *Schneider* Court conceded that the alternatives suggested there may have been "less efficient and convenient" than the existing laws, but retorted "that considerations of this sort do not empower a municipality to abridge freedom of speech."[274] In other words, the first amendment required the government in that instance to sacrifice some of its effectiveness. Subsequent cases have often failed to evidence even the limited reference to the state's losses that appeared in *Schneider*.[275] The extreme importance of the individual rights being jeopardized has apparently compelled the Court to cease analysis once less drastic means are discovered.[276] Once alternatives have been found,[277] the balance automatically tips to the first amendment side.

Even if a statute could reasonably be deemed necessary to accomplish fully the state's purpose, a less successful alternative has dictated invalidation. Thus in *Butler v. Michigan*[278] a statute was declared unconstitutional to the extent that it prohibited the sale of or the offer to sell (to anyone) any books that contained language "tending to the corruption of the morals of youth." Clearly, the only way to effectively prevent such literature from reaching juveniles' hands would be to ban their sale. The first amendment interest, however, simply outweighed the governmental interest in the mar-

run the risk of issuing advisory opinions or usurping the legislative function, or to refuse to detail alternatives, perhaps producing dishonest opinions and confused legislatures. Furthermore, some may feel that the Court should be estopped from invalidating an alternative that it has previously suggested as less restrictive. This problem is particularly acute in the first amendment area, where the scope of permissible governmental control is very narrow, and a stricter necessity requirement is employed. *See* notes 367-74 *infra* and accompanying text.

273. 308 U.S. 147 (1939).

274. *Id.* at 164.

275. *E.g.*, Talley v. California, 362 U.S. 60 (1960) (suggestion that libel and fraud statutes were less drastic and sufficient to warrant invalidation of a law requiring handbills to disclose the names of their preparer, sponsor and distributor, failed to make any reference to the relative merits of the several methods).

276. *See* Gunther, *supra* note 257, at 1148-49; YALE NOTE, *supra* note 1, at 464-65; material cited note 3 *supra*.

277. Alternatives would not, of course, be relevant to an absolutist, whose analysis should cease once he determines that first amendment activities are being abridged. For him the statute would fall, even if there were no less drastic means. *See* YALE NOTE, *supra* note 1, at 466-67 n.16; note 208 *supra*.

278. 352 U.S. 380 (1957). Justice Frankfurter wrote for an unanimous Court and premised the decision upon substantive due process, since he saw first amendment values as implicit in fourteenth amendment "liberty."

ginal difference between the old statute and a new prohibition applicable only to sales to minors.[279]

The Court has occasionally strayed from its normal course of accepting at face value *any* reasonable alternatives in order to invalidate legislation obstructing first amendment rights. The upholding of Sunday Blue Laws in *Braunfeld v. Brown*[280] and *McGowan v. Maryland*[281] was most illustrative. In those cases the Court respectively rejected challenges under the free exercise and establishment of religion clauses. Each opinion was authored by Chief Justice Warren, and each applied a reasonableness standard. Alternatives were offered by the parties, considered by the Court, and rejected. Warren even conceded that one of the proposed alternatives, an exemption for Sabbatarians, "may well be the wiser solution to the problem." But the Court could not be concerned with the wisdom of legislation because a state might well find that the suggestions were inadequate to achieve its purpose of having a general day of rest.[282] In his dissent Justice Brennan was understandably perplexed by the majority's adoption of a more flexible standard of review, and he was especially troubled by its rejection of the proffered alternatives, particularly in light of the fact that twenty-one of the thirty-four states with blue laws had already incorporated the exemption in their statutes without any significant disruption of the state's purpose.[283]

Braunfeld and *McGowan* and a handful of similar decisions[284] rejecting rather reasonable alternatives can only be distinguished on

279. By setting up the balance in this manner, by comparing the *marginal* interests, the Court can afford to be more solicitous of individual rights. YALE NOTE, *supra* note 1, at 467-68.

280. 366 U.S. 599 (1961).

281. 366 U.S. 420 (1961). *See also* two other companion cases, Gallagher v. Crown Kosher Supermarket of Massachusetts, Inc., 366 U.S. 617 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

282. 366 U.S. at 608. The Court's analysis of alternatives in these cases corresponded closely to Justice Frankfurter's dissent in Shelton v. Tucker, 364 U.S. 479, 493-94 (1960), in which he advocated that alternatives be an element of a due process type balancing. He was also explicit in stating that the test should he one of less drastic means, and not tbe *least* drastic. Frankfurter there offered one of the most extended discussions of alternatives. *Id.* His approach was later substantially rejected for first amendment cases in Sherbert v. Verner, 374 U.S. 398 (1963).

283. 366 U.S. at 614-15. Justice Brennan's views stated in his *Braunfeld* dissent were vindicated in Sherbert v. Verner, 374 U.S. 398, 407 (1963), in whicb the Court put the burden *on the state* to demonstrate that no alternatives existed which would alleviate the necessity of requiring Sabbatarians to accept work which required Saturday employment. *See also* Talley v. California, 362 U.S. 60, 66-67 (Harlan, J., concurring).

284. *See* Breard v. Alexandria, 341 U.S. 622 (1951); *cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

grounds that the Court did not consider the particular individual interests at stake to be as important as in most other first amendment cases.[285] Chief Justice Warren indicated as much in *Braunfeld*.[286] That would be consistent with the approach subsequently developed in *Broaderick*, which has the degree of permissible overbreadth vary with the relative importance of the rights affected. It is also similar to an equal protection sliding-scales analysis, or a fiexible due process balancing.

II. The Place of Alternatives in the Scope of Judicial Review

Part I of this Note has canvassed the various ways in which alternatives have been employed to arrive at a constitutional determination. In the process, serious problems have arisen and become apparent. Part III attempts to deal with those problems and to develop criteria for principled application of the less drastic means doctrine. But first, a much broader, threshold question must be addressed—whether the Court's scrutiny of legislative alternatives is consistent with the American tradition of judicial review.

There are two aspects to the question of judicial review: first, whether there should be any; and, secondly, if so, what should be its scope.[287] The first aspect has already been positively answered in this country.[288] The use of alternatives, however, relates to the proper *scope* of review, and it is on this that the inquiry must focus.

At the outset the pervasiveness and the long-recognized utility of the less drastic means concept are noted, for tradition and precedent are keystones to our constitutional law, in much the same way as they are to our common law.[289] Although a method is not proper

285. *But see* Kleindienst v. Mandel, 408 U.S. 753 (1972), in which the Court rejected alternatives, despite the presence of first amendment rights, because the questions involved alien visitations to the United States, questions over which Congress has traditionally maintained "plenary power;" notes 342-47 *infra* and accompanying text; *cf.* California v. LaRue, 409 U.S. 109 (1972).

286. "To strike down, without the most critical scrutiny, legislation *which imposes only an indirect burden on the exercise of religion*, . . . would radically restrict the operating latitude of the legislature." 366 U.S. at 606 (emphasis added).

287. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265-66 (1973). Of course, as Wellington points out, the 2 questions do intertwine.

288. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); R. BERGER, CONGRESS v. THE SUPREME COURT (1969). *But see* L. HAND, THE BILL OF RIGHTS 1-30 (1958).

289. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 230-35 (1968); Wellington, *supra* note 282. *But see* Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 23-25 (1969). *See also* Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 778-79 & n.37 (1971); note 305, *infra*.

solely because the Court employs it, continued use must be considered evidence. Our constitutional law, despite protestations to the contrary,[290] has developed from a case by case evolution of principles and doctrine.

The tradition of less drastic means in the Supreme Court dates to at least 1821, when the contempt power of Congress was limited to "the least possible power adequate to the end proposed."[291] In the mid-nineteenth century, the doctrine of necessity was held applicable in reviewing statutes in alleged conflict with the federal power over immigrants, foreign relations, and interstate commerce.[292] Shortly thereafter it was extended to substantive due process analysis, and Justice Holmes later embraced it in a decision applying the just compensation clause.[293] By 1927, a leading commentator saw necessity as a common element in due process adjudication.[294] Part I of this Note has demonstrated the expanding application of the less restrictive alternative doctrine in all areas of constitutional law. Further, many of our state courts have also made the doctrine a basic element of their jurisprudence.[295]

Despite this long tradition, the Supreme Court has never really paused to assess the legitimacy of the judiciary's scrutiny of legislative alternatives. Mere recitation of cases will not suffice to justify its continuation, however, for under the best concepts of our common and our constitutional law, doctrines that cannot be premised upon articulated, principled reasons should be discarded.[296] That must surely apply here, whether the doctrine of less drastic means is characterized as "substantive" or "methodological."[297]

One attempting to justify the doctrine is immediately faced with a dilemma, one which focuses on the crucial issues inherent in judicial review of alternatives. On the one hand, the Court in using alternatives is searching for a narrow basis for decision, a basis that will permit a redraft by the legislature. On the other hand, however, the Court is in effect second-guessing the legislative judgment on

290. Linkletter v. Walker, 381 U.S. 618, 640-45 (1965) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting). For a discussion of Black's views see Miller, *Change and the Constitution*, 1970 L. & Soc. Ord. 231, 239.

291. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821). The reader should compare the German "mildest means doctrine" discussed in Marx, *Comparative Administrative Law: Exercise of Police Power*, 90 U. Pa. L. Rev. 266, 276-91 (1942); note 374 *infra*.

292. Chy Lung v. Freeman, 92 U.S. 275 (1875); Henderson v. Mayor of New York, 92 U.S. 259 (1875).

293. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922). *See* note 33 *supra*.

294. Brown, *supra* note 13, at 954-55.

295. Struve, *supra* note 1.

296. *Cf.* Miller, *supra* note 290, at 236.

297. *Cf.* Wright, *supra* note 289, at 782 n.53.

the statute's effects, and is perhaps holding the legislature to an impractical standard, especially in those instances where necessity is required. Each of these problems now must be examined closely in order to arrive at a balance that will best reflect the proper scope of review.

In many ways the use of alternatives in constitutional adjudication resembles the "passive virtues" depicted by Professor Alexander Bickel[298] and described by Justice Brandeis in his classic concurring opinion in *Ashwander v. TVA*.[299] Indeed, as illustrations of virtuous judicial techniques, Bickel employs the vagueness and delegation doctrines, which are nothing more than remands to the legislature for a more skillfully drawn statute.[300] This is, of course, the precise effect of application of the less drastic means doctrine. The advantages to this technique are evident. The Court is not making a final determination that the legislature's purpose is unconstitutional; it is merely circumscribing the *means* by which that goal can be reached.[301] The legislature is given another chance, hopefully with guidance from the Court's opinion. In effect, a colloquy is established between the two branches of government.[302]

Bickel contended that four of his devices, vagueness, delegation, procedure and construction, to which alternatives may be added, "leave the other institutions, particularly the legislature, free—and generally invite them—to make or remake their own decisions for prospective application to everyone in like cases . . . ."[303] In the process, the Court would also be engaging in a socratic dialogue with the public and with social institutions, thus fulfilling its educative function.[304] The continued colloquy and feedback from lay and scholarly commentary would permit the Court to evolve endur-

298. The passive virtues concept was originally formulated in Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) [hereinafter cited as *Bickel Foreword*]. The description was later expanded into a book. A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT OF THE BAR OF POLITICS (1962) [hereinafter cited as LEAST DANGEROUS]. *Cf.* Note, *The Need for Reform of Ex-Felon Disenfranchisement Laws*, 83 YALE L.J. 580, 594-96 (1974); YALE NOTE, *supra* note 1.

299. 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). *See* in particular Brandeis's third rule: "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.' "

300. LEAST DANGEROUS, *supra* note 298, at 179, 188; *Bickel Foreword, supra* note 298, at 62-64. *See also* Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959) [hereinafter cited as *Stanford Note*]; note 266 *supra* and accompanying text.

301. *Cf.* Gunther, *supra* note 236; *Stanford Note, supra* note 300, at 224-25.

302. LEAST DANGEROUS, *supra* note 298, at 206. *See also* Wellington, *supra* note 287.

303. LEAST DANGEROUS, *supra* note 298, at 202. *See also id.* at 225; *Stanford Note, supra* note 300.

304. *Bickel Foreword, supra* note 298, at 50.

ing solutions to complex constitutional issues. Such solutions are not always immediately decipherable, and use of alternatives might allow the Court to face an issue several times before final decision on the ultimate constitutional question.[305] By forcing the legislature to consider less drastic means, and thereby concentrate on precision drafting, the Court would be effecting better legislation.[306]

Of course the use of alternatives does involve a greater degree of judicial interventionism than do Bickel's devices, especially the use of devices such as ripeness or standing, in which all authoritative consideration of the merits is postponed.[307] Admittedly, the application of the less drastic means doctrine does require a decision that constitutional rights are being threatened, and that no law of a *more* restrictive nature can subsequently be passed. That is, the Court must perform some line drawing, although it need not be the final demarcator.

Nevertheless, invalidating a statute because of available alternatives does have some advantages over the avoidance techniques espoused by Bickel. Bickel would have the Court escape *any* decision on the constitutional merits whenever it feels that political or popular winds, or other expediencies, so demand. Bickel repeatedly admits that the virtues, so used, would not and could not result in principled adjudication.[308] Such expediency, however, does not promote the ideals of candor and accountability we expect from our judges.[309] It relegates the Court to a political forum, permitting its members to make decisions on an ad hoc basis without the con-

305. LEAST DANGEROUS, *supra* note 298, at 176, 202. The reader should compare Justice Holmes on the incremental growth of the common law: "It is only after a series of determinations on the same subject-matter, that it becomes necessary to 'reconcile the cases,' as it is called, that is, by a true induction to state the principle which has until then been obscurely felt." Holmes, *Code, and the Arrangement of Law*, 44 HARV. L. REV. 725 (1931), *quoted in* Wright, *supra* note 284, at 778. *See also* Deutsch, *supra* note 289, at 232-35.

306. *See* Gunther, *supra* note 236; Note, *The Need for Reform of Ex-Felon Disenfranchisement Laws*, 83 YALE L.J. 580, 595 (1974).

307. Bickel's broader avoidance techniques, such as ripeness, however, would result in a great quantity of dicta, (*see, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961) which one commentator charged was tantamount to a "virulent variety of free-wheeling interventionism,") Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964).

308. LEAST DANGEROUS, *supra* note 298, at 170 (lack of standards for their application), 183 ("no set rules of selection, nor can there be"), 197 ("process . . . is not that of principled . . . adjudication"), 205 (passive devices "are not themselves principled"). *See also* Gunther, *supra* note 307.

309. Professor Gunther sees Bickel's devices as carrying "dangers to both the integrity of the means [of constitutional adjudication] and the purity of the ends." Gunther, *supra* note 307, at 21, 25.

straint of precedent or standards,[310] and thereby jeopardizes the "integrity of the Court's principled process."[311] Moreover, Bickel's concepts would leave the Court insensitive to the claims of individual parties.[312] Thus he ignores the fact that the Court derives much of its credibility from its ability to dispense justice and to safeguard individual liberties.[313]

The doctrine of reasonable alternatives can be divorced from Bickel's insistence on discretionary or "prudential" application of his devices. As Part III of this Note will attempt to demonstrate, principles can be developed that will facilitate honest and neutral employment of alternatives. That method will reflect, as it must, a compromise among the needs of the system: "preserving the purity of substantive constitutional principle[s];"[314] protecting important constitutional rights; rendering assistance on legislative redrafting; and doing justice in the immediate case. The less drastic means doctrine can avoid the critical shortcomings of Bickel's avoidance tactics since it requires at least some decision, however narrow, on the constitutional merits, a decision that would be subject to the restraints of precedent[315] and principle, and that would necessarily be attached to judicial concepts, not political whim.

Of course, the danger is always lurking that the least drastic means doctrine could be used to camouflage an assault upon the state's purpose, that the alternatives available are so impractical as not to afford the state any choice but to abandon its purpose. The argument can be made that, even though the tactic is surreptitious, it would at least leave the Court a loophole should the state's purpose attain enhanced importance. The resolution of that problem necessarily depends upon the premium placed on forthrightness and articulation of premises in judicial opinions. Clearly institutional constraints, like the need for a court majority or unanimity, and the realities of the political climate[316] necessarily will have some inhibi-

310. Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 912 (1973).

311. GUNTHER, *supra* note 307, at 16.

312. Blumstein, *supra* note 310, at 914.

313. Deutsch, *supra* note 289, at 216. *See also* Blumstein, *supra* note 310, at 914.

314. The quote is from Gunther, *supra* note 307, at 21.

315. On the effectiveness of precedent as a restraint see Blumstein, *supra* note 318, at 910 n.99, *citing* White v. Weiser, 93 S. Ct. 2348 (1973) (Burger, C.J., & Powell & Rehnquist, JJ., concurring in congressional redistricting solely because of a recent dispositive precedent). *But see* Mitchell v. W.T. Grant Co., 94 S. Ct. 1895, 1910 (1974) (Stewart, J., dissenting).

316. *See* Miller, *supra* note 290, at 247; Snortland & Stanga, *Neutral Principles and Decision-Making Theory; An Alternative to Incrementalism*, 41 GEO. WASH. L. REV. 1006, 1016 (1973).

tory effect upon the explanation of a decision. One of the most important justifications we have for judicial review, however, is the restraint placed thereon by the requirement of a reasoned opinion.[317] If that requirement is diluted, we will be faced with a real opportunity for judicial abuse of power.

A further argument for forthright, nonexpedient judicial opinions is inherent in the very fabric of constitutional adjudication. The Court is not able to announce broad and far reaching principles when it first confronts serious constitutional questions. Such principles must be developed in building block fashion,[318] with the Court always striving for a governing principle.[319] Such decision-making methodology serves as both a constraint on the Court and as a justification for its role as our primary constitutional arbiter. That justification, however, is premised upon *articulated* reasons, for principles cannot (or at least should not) be constructed or evolved out of air.

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317. *See* Wechsler, *supra* note 288; Snortland & Stanga, *supra* note 316, at 1006.

318. For example, the Court in its first major ballot access case, Williams v. Rhodes, 393 U.S. 23 (1968), could not have developed the meaningful principles necessary to decide the diverse issues and problems of that area. *See* text accompanying notes 186-201 *supra*. At times, the Court may announce broad principles and then permit them to be fitted to individual situations as they arise. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Brown v. Board of Education, 347 U.S. 483 (1954). But even in those instances, the Court had experimented prior to the landmark decision. *E.g.*, Gray v. Sanders, 372 U.S. 368 (1963); Baker v. Carr, 369 U.S. 186 (1962); Sweatt v. Painter, 339 U.S. 629 (1950).

The process is a continuous definition and redefinition of principles. For instance, the "rules" governing the traditional rational basis test are now mechanically applied and need reformulation. *See* Parts C-1,3, *supra*. *E.g.*, Village of Belle Terre v. Boraas, 94 S. Ct. 1536 (1974). The compelling interest test, however, seems to have found a proper niche and is now acceptably confined. *See* Part I-C-2, *supra*. By contrast, the Court had laid down the broad principles for conclusive presumption analysis but it has not yet evolved standards and discipline for its application. *See* Part I-A-3, *supra*. The ground has just been broken in the area of the "new" substantive due process, with courts and commentators alike groping for both the broad principles and the case-by-case standards. *See* Roe v. Wade, 410 U.S. 113 (1973); Ely, *supra* note 61; Tribe, *supra* note 11; Wellington, *supra* note 287; Part I-A-2, *supra*. *See also* the confluence of the common and constitutional law of libel in Gertz v. Welch, Inc., —— U.S. ——, ——, ——, 94 S. Ct. 2997, 3009, 3022 (1974) (*ad hoc* determinations were deemed to be unfeasible in such cases, so broad constitutional values were reduced to workable rules).

319. The concept of neutral principles reflects "both a search and an end result." Snortland & Stanga, *supra* note 316, at 1012.

Snortland and Stanga propose a "mixed-scanning" approach which combines elements of the Wechsler "principled" decision-making with the "incrementalism" of Deutsch, Arthur S. Miller, and others. *Id.* at 1021-32. Their approach is similar to that being suggested in this paper (though not identical), at least to the extent that courts should decide the equities of individual cases, but with an ever-vigilant consciousness of broad-ranging policy considerations and with reasoned opinions which will facilitate the evolution of neutral principles. That is, the Court would be working *toward* the ideals of neutral principles, therefore making them both a "search and an end result."

As pointed out above, the scrutiny of alternatives by the courts has elements of judicial activism as well as restraint. In addition to invalidating the legislation, the Court is reviewing the same range of choices that most likely confronted the legislature, and is imposing its judgment as the best approach, all things considered. This can create considerable intragovernmental (and popular) discord, and it is especially egregious when the Court's suggested alternatives are much more costly than the legislative choice and require a reordering of priorities or reshuffling of the budget. The Court may be subject to the criticism that it is making policy decisions without the benefit of information on each of the conflicting budget demands and other priorities, and that such decisions are antimajoritarian, since federal judges are not elected officials.[320]

These are, to be sure, valid criticisms, and they must be recognized by the judiciary. Nonetheless, the Court must not be oblivious to valid alternatives. If a solution exists that is equally solicitous of the state's interests (including costs), but is more solicitous of individual interests, a court certainly should not be precluded from protecting the individual.[321]

If it is not readily apparent that available alternatives are equivalent in cost and effectiveness to the existing legislation, however, then further factors should be considered before the Court proceeds in its inquiry. These factors relate to some of the thorniest problems in the exercise of judicial review, and would appear to justify a double or multiple standard system of review, which would permit varying degrees of scrutiny over alternatives.

The primary consideration confronting the Court is the nature of the issues presented. The Court can address that consideration from two interrelated perspectives. The issues can be viewed in terms of the importance of the individual interests at stake—their "fundamentality." This has basically been the approach used by the Court.[322] "Fundamentality" is determined from guidance pro-

320. *See generally* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

321. The Court cannot, of course, order the legislature to enact the alternative, it can only invalidate the old statute. *But cf.* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); Chambers, *supra* note 1, at 1192-93. Note 374 *supra*.

The existence of a clearly less restrictive alternative that would be as effective as the enacted statute, however, may be evidence of improper legislative motive—that is, the statute was enacted in order to abridge the constitutional interest being asserted. *See* YALE NOTE, *supra* note 1, at 469-70 n.27. *See also* note 184 *supra*.

322. The approach is exemplified in equal protection's compelling interest test (including the "right" to be free from racial discrimination, i.e., the suspect classification principle), the strict scrutiny required hy interests derived from the Bill of Rights, and the development of a right of privacy. The latter has not heen without doctrinal difficulties. *See* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965).

vided by the constitutional text, Anglo-American traditions, precedents of the Court, and to some degree, changing social conditions. If, in light of these criteria, the individual interest is ranked as fundamental, it is incumbent upon the Court to review legislative alternatives to afford the interest its due protection. The only state interest that *should* be balanced against the individual's is that marginal difference between the existing statute and the alternative. For as one commentator has pointed out, "[a] scale which puts in one pan the public interest in some legitimate end of government—national security, civil peace, or preservation of the machinery of justice—rather than the interest in a particular means to that end will rarely tip in favor of competing values."[323] Thus by considering alternatives, the Court affords the individual interest greater protection with the comforting realization that the state has other avenues open.

There is a second view that the Court could adopt in determining the extent to which alternatives are relevant. This approach is basically a matter of role allocation.[324] The Court would initially focus on whether the questions presented are best solved by the political process, or are appropriate for close review by an independent judiciary. To answer that, the Court must consider whether the case involves interests or minorities that are not properly protected by the whims and emotions of the majoritarian process.[325] Legislators must react to the desires of their constituency, desires that are not always consistent with the Constitution. Moreover, legislators often arrive at conclusions that substantially affect citizens outside their own constituency, thus defeating the presumption that the legislation was arrived at democratically.[326] That presumption is

323. YALE NOTE, *supra* note 1, at 467.

324. The term "role allocation" is borrowed from Tribe, *supra* note 11. In analyzing the appropriateness of the abortion decisions, Professor Tribe framed the ultimate question: "whether the specific protections of liberty decreed in *Roe* and *Doe* allocate roles in a constitutionally defensible way, viewing the Constitution as a framework independent of any immutable catalog of allowable and forbidden ends." *Id.* at 13. *See also* Wellington, *supra* note 287.

325. *See* Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). Rostow argues that the American system is not strictly a majoritarian one and that the Constitution was designed to ensure a free and democratic society through the limitation of power. The first amendment and other fundamental values are placed beyond the control of the majority by the Constitution, and the Court has the duty to decide cases that involve these values. For the view that the Court represents minority interests see SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 34-39 (1966), Snortland & Stanga, *supra* note 316, at 1007 n.5.

326. A good example of that problem lies in local zoning laws, in which "snob zoning" ordinances can have a serious impact on the housing and employment picture of an entire region, an area well beyond the boundaries of a local government unit. There are, however,

also defeated when access to the ballot is abridged or foreclosed.[327] The courts, however, are entrusted by society to sit independently of the political whirlwinds, and we have come to rely upon the courts to check the action of the legislatures in these instances. Certainly the constitutional text and tradition are important considerations here, but also of significance is the basic feeling that a political body cannot always be trusted to properly respect unpopular ideas and groups. And, even if the legislature is sensitive to individual rights, it does not have the advantage of seeing its laws in operation, under a concrete set of facts, as do the courts.

As thus far described, the "fundamentality" and the role allocation approaches would probably produce the same results in most cases.[328] The latter, however, is preferable as the Court attempts to define the right of privacy and other liberties through the fourteenth amendment due process clause. One of the problems inherent in the fundamental rights approach is that the Court could easily become too mechanistic by failing to appreciate drastically changing social conditions and mores.[329] At the other extreme, "fundamental right" is an ideal not easily confined, and it could facilitate a rampaging interventionism. The role allocation analysis, however, would at least focus the Court's attention on the essential issues; it would force the justices to consider whether they constitute the proper governmental forum for resolution of the questions before them. Role allocation analysis would include all of the inquiries associated with a fundamental rights determination, but would proceed further into an institutional analysis.

In the allocation analysis, or "allocation of competences," an important distinction must be made between policy and principles.[330] A court is not equipped to make broad policy decisions; it cannot have before it the multitude of considerations that confront

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obvious difficulties involved in judicial re-examination of specific zoning classifications, as there are in any boundary drawing cases. These difficulties would necessarily preclude intensive review; however, concern for those citizens adversely affected by a political body into which they have no input should provoke a greater degree of scrutiny than the total hands-off review accorded by Village of Belle Terre v. Boraas, ___ U.S. ___, 94 S. Ct. 1536 (1974). *See* Note, *The Constitutionality of Local Zoning*, 79 YALE L.J. 896 (1970).

327. *See* Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964).

328. *But compare* Roe v. Wade, 410 U.S. 113 (1973) *with* Wellington, *supra* note 287, at 297-311. *See also* Tribe, *supra* note 11.

329. *See* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

330. Both the term "allocation of competences" (which correlates with "role allocation") and the principle-policy distinction are taken from Wellington, *supra* note 287. *See also* McCloskey, *supra* note 11.

the legislature in a political decision.[331] Budgetary matters are prime examples. But when decisions can be based upon principles founded in "conventional morality"[332] or the "national conscience,"[333] then the Court is a most appropriate arbiter. It is the Court's task "to convert the moral principle into a legal one by connecting it with the body of constitutional law."[334] Thus our courts traditionally have assumed responsibility for protecting rights enumerated in the first eight amendments, and for reviewing aspects of procedure.[335] More recently, principles of racial equality, integrity of the political process and the right of privacy have impressed themselves upon the Court and into the Constitution. Given the Court's assumption of

331. In areas such as antitrust and labor law, however, Congress has delegated that kind of decision making to the courts. *See* Miller, *supra* note 290, at 247-49.

332. Wellington, *supra* note 287, at 284.

333. Miller, *supra* note 292, at 241.

334. Wellington, *supra* note 287, at 284.

An excellent example of tbe process at work is the recent decision that in effect overturned almost all existing capital punishment statutes. Furman v. Georgia, 408 U.S. 238 (1972). While only 2 of tbe justices concluded that the death penalty was per se unconstitutional, 3 others found it invalid as applied in such unequal or arbitrary fashion.

First, the case illustrates the colloquy that can be established between the Court, the legislatures, and the public. Since *Furman* was the first time that the Court had seriously considered an eighth amendment challenge to the death penalty, it is understandable (and possibly desirable) that the justices could not reach a consensus. While the 9 opinions may seem labyrinthine, they did have the net effect of striking down existing laws, clearing away their most egregious aspects, and permitting the legislatures to try again. The legislatures can take guidance from the three pivotal concurrences (by Douglas, Stewart and White, JJ., and as interpreted by Burger, C.J. 408 U.S. at 397-98), and when the Court is again confronted with a capital punishment law it will have some case law to build upon, a more narrowly defined statute, which would hetter facilitate a decision on the ultimate issue, and feedback from scholarly and public reaction. Even the dissenting Chief Justice was not "altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment." *Id.* at 403.

Secondly, the opinions are fraught with the justices' viewpoints as to the proper role for the Court to play in construing the Constitution. All agreed that the prohibition on "cruel and unusual punishment" was not intended to eradicate the death penalty when adopted in 1791, and all agreed that it is a flexible provision, susceptible of reinterpretation by succeeding generations. *But see* McGautha v. California, 402 U.S. 183, 225-26 (1971) (Black, J., concurring). The 2 most extensive of the *Furman* opinions are representative of the views on where the Court should be in the process of reinterpretation. Although hoth Marshall and Powell saw a role for the Court in the process of reinterpretation, they disagreed on how far justices should go in relying upon their own assessment of the nation's moral conscience, in lieu of an existing legislative assessment. Their opinions also differed over what data was most pertinent and the proper evaluation of that data.

335. In reviewing a fifth amendment challenge to a distress warrant procedure, Justice Curtis stated in Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856): "It is manifest that it was not left to the legislative power to enact any process which might he devised. The [due process clause] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will."

responsibility in these areas, justified by the allocation of competence between the legislative and judicial branches and the Court's role as protector of certain interests susceptible to political abuse, it should have as a necessary adjunct to that responsibility the authority to determine if there are other means to effectuate a state's goals that are less restrictive of the individual's interests. Under this rationale, it is also part of the Court's role to determine if the difference in cost and effectiveness to the state outweighs the restriction on the individual. If that choice lay elsewhere, both the principle and the individual would lose their protection.

Another important consideration in role allocation decisions is that certain governmental interests grant the executive or legislative branches extraordinary powers. In certain cases the courts should give special deference to the conclusions of the coordinate branches, even though the questions may be susceptible of judicial determination. Thus, courts have granted total deference to the State Department when the latter is acting under the executive's foreign relations power, on questions involving a foreign government's sovereign immunity.[336] The particular state interest, therefore, may affect the appropriateness of judicial review in a given case.

The problem, however, drastically changes complexion when an important individual interest is abridged by state action conducted under an extraordinary governmental interest. These situations have occasioned some of the most troubling cases in constitutional law. The World War II removal under Congress's war powers of Japanese aliens from the west coast to inland camps is an example.[337] Another example is the attempted prior restraint on publication of the Pentagon Papers, in which national security was asserted to effect what would otherwise have been a constitutional violation.[338] The problem is not one of balancing the respective governmental and individual interests, but of deciding which branch should have the ultimate responsibility for striking that balance, including the assessment of alternatives. Because of the very nature of the cases—the presence of two extremely strong competing considerations—it is impossible to account properly for *all* the relevant values by a mechanical deference to the legislature. Therefore, as

336. *E.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); Rich v. Naviera Vacuba S.A., 295 F.2d 24 (4th Cir. 1961).

337. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

338. New York Times Co. v. United States, 403 U.S. 713 (1971).

the final protector of individual rights, courts should decide such cases in light of their determination of the necessity for the infringement.

Thus, the Court in *United States v. Robel*[339] was within its proper role when it stated that war power is not a "talismanic incantation" for total deference to the legislature.[340] It then proceeded to invalidate as unnecessary a criminal statute prohibiting members of Communist action organizations from working in a defense facility. The Court, however, violated its judicial responsibility when it failed to offer any viable alternatives. If it is going to intrude into questions of national security, then the Court should have an added duty to provide fully articulated opinions. Of course, *Robel* may reflect a feeling on the Court that the national security interests asserted were grossly exaggerated.[341]

An example of what happens when the Court declines to balance can be found in *Kleindienst v. Mandel*,[342] in which the exclusion of an alien was upheld, despite the fact that he was excluded on the basis of his political and economic beliefs. The alien, Mandel, was a renowned academician, and a significant number of people in the United States wanted to hear his views on a variety of subjects. Although the Court recognized the rights of the prospective audiences as within the ambit of the first amendment,[343] it noted the traditional and plenary congressional power over aliens and immigrants, and found the attorney general's decision, acting under a congressional delegation, to be unreviewable.[344] Suggested alternatives were dismissed as inappropriate in the context of the case.[345] This type of mechanical approach fails to properly account for the Court's responsibility as a protector of certain constitutional values.

339. 389 U.S. 258 (1967).

340. *Id.* at 236. For an excellent illustration of the type of problem under discussion here and how it can be resolved, see International Prod. Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963), in which a party to a civil suit, reinforced with a Suggestion of Interest from the State Department, sought to have certain evidence barred from public disclosure on grounds that it would be embarrassing to the party and to the United States. Speaking for the court, Judge Friendly held that the first amendment proscribed such a prior restraint where the evidence was independently acquired by the citizen, regardless of the interests of the State Department. Evidence gained through compulsory discovery procedures, however, could be withheld from distribution.

341. If that was the underlying reason, then the Court, in effect, was saying the statute was "unnecessary" because the problem did not exist. This variation on the necessity requirement is discussed in note 182 *supra*.

342. 408 U.S. 753 (1972).

343. *Id.* at 762-65.

344. *Id.* at 770.

345. *Id.* at 768.

Mandel is particularly troublesome since the interests to be balanced apparently were weighted in favor of the individuals. Congressional alien and immigration policy stood to lose very little from Mr. Mandel's visit,[346] and his academic contributions to American audiences could have been substantial. Because he was a nonresident alien, however, the majority never set up that balance.[347]

The ultimate conclusion of this discussion is that if important individual constitutional interests are threatened, the judiciary should perform the final balance and assign alternatives the same weight, regardless of the asserted governmental interest. Otherwise, the individual would *always* lose when challenging the exercise of a special power. Of course, the greater the state's interest, the more likely that its action will be sustained by the Court. A neutral judiciary must be trusted to strike the proper balance.

Once the concept of judicial review is established, no absolute protection exists against abuse of that power. The Court, however, is subject to many institutional constraints: its inability to enforce its judgments without cooperation from the other governmental branches and its awareness of that inability; its assessment of the strength of its principles in the contemporary society; the requirement of a reasoned opinion; respect for precedents; and tradition. These constraints were stretched somewhat in the 1920's and 30's, but it would be an error to deprive the Court now of an effective judicial tool—the less drastic means doctrine—solely because of lingering doubts aroused by that era.[348]

346. In fact, as both the State Department (*id.* at 759) and Justice Marshall's dissenting opinion (*id.* at 784-85) indicated, the continued refusal to permit Mandel's entrance could detrimentally affect our foreign relations image.

347. A danger of the *Mandel* rationale is that the Court could create further "extraordinary" governmental powers, to which it would mechanically defer, in order to camouflage a decision on the substantive constitutional rights involved. *See* California v. LaRue, 409 U.S. 109 (1972); Kamenshine, *California v. LaRue: The Twenty-First Amendment as a Preferred Power*, 26 VAND. L. REV. 1035, 1039-43, 1064 (1973).

A good example of a sincere balancing approach to these cases is Justice Stewart's concurrence in the Pentagon Papers case. New York Times Co. v. United States, 403 U.S. 713, 727-30 (1971).

348. A system of judicial review is not without its risks, but the constraints outlined in the text have reduced the risks to a minimum. Even the decisions of 1910 to 1940 had some laudable features, particularly the fact that most of the invalidations during that era were based on the premise that the adopted means failed to rationally further its ends. The Court's standards were within the proper scope of judicial review, but the *application* of those standards was not always consistent with their articulation. *See* Ely, *supra* note 13.

The judicial activists of that era have been assigned little respect in our constitutional history because they misperceived their proper roles. That is, they failed to recognize that corporations received adequate representation in the political process, and that in protecting contract and property rights of corporations, they were denying to the individual those very

III. Criteria and Principles for Application of the Less Restrictive Alternative Doctrine

Assuming that the less drastic means concept has a proper niche in our system of judicial review, this part attempts to establish criteria that will facilitate a principled use of the doctrine. In the process certain specific problems facing its application will be addressed. The standard of reference will continue to be the rationale outlined in Part II, for the doctrine's application must be consistent with, and follow from, its justification. Guidance is also drawn from the discussion of the cases in Part I. It should become obvious that the basic formula proposed here is to a great extent implicit in the holdings of those decisions, although most do not articulate it well, if at all.

The scope of the Court's inquiry into alternatives has assumed a more intensive character when a "fundamental" interest is abridged, or when the interest or issue is specially entrusted to the protection of the judiciary. A basic formula can be advanced that would provide discipline for the increased scrutiny. Once the Court has determined that an alternative is truly less restrictive on an individual interest, then it should balance four factors:

1. The importance of the individual interest and the extent to which the interest has been, or should be, committed to judicial protection. This must be deduced from the factors discussed in Part II that justify varying standards of review: the language of the constitutional text; the Court's precedents; the ability of the legislative-political process to properly handle the issues and to afford important interests their full value;[349] the Court's ability to reduce its decisions, *including* its remedy, to judicially manageable concepts; and the Court's reading of contemporary moral standards.
2. The difference in effectiveness between the challenged statute and the alternative. This is the state's interest in the outcome. Naturally, the greater the governmental interest involved

same rights. Despite these shortcomings, many of the substantive due process decisions from that era have retained or regained their vitality, albeit under a different rationale, and many dormant property rights are once again being asserted. The protection of aliens, the rights of parents to have a greater voice in their child's education, and the right to work, among other interests, are again finding a receptive bench. Reinstituting the reasonable alternative rationale, and especially the prohibition-regulation distinction, would serve well to safeguard those interests, if applied sincerely and with the proper restraint.

349. This includes a determination whether there are individuals or groups involved that do not have just representation in the political forum because of prejudice against them or unequal access to the relevant political body.

the more significant will any loss in effectiveness become.[350]

3. The approximate difference in costs between the challenged statute and the alternative.

4. The extent to which the alternative is less restrictive on the individual.

The greater the importance attached by the Court to the individual interest, the less relevant the other factors become, and the more the Court should depend upon its own assessments as opposed to the legislature's. If, for example, important first amendment rights are threatened, almost any less restrictive alternative would be preferable, regardless of costs and effectiveness.[351] Factor number four would also be irrelevant since the Court will be looking for the *least* drastic means, irrespective of the degree to which it is less restrictive. Naturally, as the importance of individual interest diminishes, or as the interest becomes more a matter for legislative policy decision, then factors two, three and four become increasingly important to the Court's determination, and greater deference should be afforded the judgment of the legislature.

The formula employs a multiple standard theory of review, as it must if proper weight is to be given the competing interests.[352] It reflects what courts actually do, even if *sub silentio*. The formula is also a balancing of the doctrine's characteristics as a passive virtue and as an interventionist tactic. It is passive when used in those instances in which the individual interest, the class affected, and/or other facts of the case mandate strict review, because it provides the Court with a narrow basis for decision while permitting a remand to the legislature.[353] However, when the facts dictate judicial defer-

350. The fact that foreign affairs, national security, or other interests normally vested in Congress or the Executive are implicated may affect the degree to which a court can "reduce its decision to judicially manageable concepts," which would in turn affect factor one of the formula. As indicated in Part II, however, if fundamental individual rights are threatened, then the final balancing including assessment of alternatives should be done by the Court, regardless of the state interest asserted. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); United States v. Robel, 389 U.S. 258 (1967); text accompanying notes 336-447 *supra*. *But see* Kleindienst v. Mandel, 408 U.S. 753 (1972).

351. This would, of course, vary to some extent with the value the individual judge places upon first amendment rights. For the absolutist, alternatives would be irrelevant, *see* note 208 *supra*, while some judges would settle for *any* less restrictive alternative, that is, would demand the strictest necessity for a first amendment infringement. Other jurists would require a greater showing—that the alternatives are at least practical and within the state's means.

352. *See* Snortland & Stanga, *supra* note 311, at 1024-34; Wellington, *supra* note 287, at 265-311.

353. That is, if the Court must strike down the statute, the less restrictive alternative principle is a "preferred ground." *See* Gunther, *Reflections on Robel: It's Not What the Court Did But the Way That It Did It*, 20 STAN. L. REV. 1140 (1968).

ence to be the appropriate standard, then a close scrutiny of alternatives would be an unjustified intervention into, and second-guessing of the legislative domain. Thus the formula narrowly defines and limits the review of alternatives in these cases.

The basic formula has two corollaries implicit in the first factor, which require some elaboration. Each deals with the relative roles of the court and legislature. The first corollary comes into play when considerations of federalism affect the stance a court normally would take toward a particular statute and its alternatives.

Usually state socio-economic statutes challenged under the due process and equal protection clauses are shown special deference. This posture of restraint has become far too exaggerated since 1937,[354] but unquestionably there are several strong reasons why the Court should be slow to strike down such a regulation. A Supreme Court decision on such a matter would be binding on all fifty states, would choke off diversity and experimentation, would damage the comity between the federal courts and the states, and would inhibit the states' ability to cope with complex problems.[355] The *Rodriguez* decision provides an excellent example of how this rationale should be applied. As the Court's opinion there demonstrated, the alternatives available were not clearly as effective, and their costs were speculative. Thus policies of federalism precluded invalidation.[356]

If the same statute were subjected to a serious challenge under the commerce clause, however, the interests of federalism would *require* the Court to review alternatives more receptively.[357] This is basically a role allocation decision, since the Supreme Court historically has been left with the responsibility of invalidating state laws under the commerce clause.[358]

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354. *See generally* Part I-A-1 *supra.*

355. The Court, however, should be slow to decide cases in the manner of North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973), which peremptorily sustained a statute forbidding corporations from opening a pharmacy. *See* notes 28-33, 44-48 *supra* and accompanying text. Not only did the Court completely abdicate review, but it also had to reverse the North Dakota Supreme Court to do it. State courts should be permitted to maintain greater vigilance over such laws, and over alternatives. State courts are close to the local issues and are more aware of the state's problems, including its special interest groups. No interest of federal-state comity is at stake should a statute be invalidated, and the holding would be authority for only one jurisdiction. Moreover, many States elect their judges.

356. That is, of course, now the accepted practice. *See* Part I-B *supra.*

357. 411 U.S. at 41-44, 55-59.

358. The Supreme Court has this duty mainly because Congress rarely takes the time to give it much attention. LEAST DANGEROUS, *supra* note 293, at 232-33. It is one area, however, in which Congress may override the Court's assessment. *See Stanford Note supra* note 300.

The second corollary to the basic formula also has its foundation in the allocation of competences. As indicated in Part I, there are two different types of inquiries that a court can make in searching for alternatives.[359] One relates to the mode of statutory classification, almost always in an overbreadth context. As demonstrated above, tailoring a statute is always a possible alternative in cases presenting a fiat prohibition, a conclusive presumption, equal protection overinclusiveness, or first amendment overbreadth. The other type of inquiry relates to the existence of a different method of achieving the state's purpose. Mudflaps in lieu of expensive mudguards is one example,[360] and libel statutes instead of prior restraint is another.[361]

The distinction between these two inquiries is important in terms of what a court must do to evaluate the alternatives properly. When tailoring is under consideration, the Court need only determine whether means exist for distinguishing between items or individuals who possess the evil characteristic under attack and those who do not. This is basically a question of assessing and determining procedure, a task traditionally considered to be within a court's competence and expertise.[362] Moreover, the same questions recur throughout the cases and have permitted the courts to develop a body of law that should facilitate adjudication. Also, some very practical considerations are important. The greater the overbreadth of the classification, the more egregious are its consequences, and all the more compelling is the need for judicial relief. Moreover, if the State can define its classifications with precision and clarity, then individual determinations and/or hearings will not prove burdensome. These considerations offer further justifications why the individual interest involved should not vary to a great extent the Court's willingness to require tailoring for a statute. An additional reason can be found in the fact that overinclusive classifications are often a very irrational means for achieving a state's purpose. For example, a fiat prohibition against the manufacture of oleomargine

See also Railroad Co., v. Husen, 95 U.S. 465, 474 (1878): "And as . . . [the state statute's] range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

359. Justices Marshall and Brennan have recently recognized the distinction. *See* Richardson v. Ramirez, ___ U.S. ___, ___, 94 S. Ct. 2655, 2682-83 (1974) (Marshall, J., dissenting), Kahn v. Shevin, ___ U.S. ___, ___, 94 S. Ct. 1734, 1738 (1974) (Brennan, J., dissenting).

360. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

361. *E.g.*, Talley v. California, 362 U.S. 60 (1960).

362. *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149-74 (1951) (Frankfurter, J., concurring); note 335 *supra*.

in order to guard against fraud and to protect the public health should no longer be allowed to stand, in light of easy means for tailoring.

A word of caution is appropriate at this juncture concerning the problem of legislative line-drawing, especially when numbers are involved. In some cases rigid classification through line-drawing is necessarily arbitrary, and the courts should defer to the legislative judgment. Take, for example, statutes prohibiting those under eighteen years of age from possessing or consuming alcoholic beverages.[363] Clearly the state should be able to establish such a conclusive presumption, and it is just as clear that the reasonable alternative doctrine would not preclude it from doing so. While many youngsters under eighteen might hold their liquor better than many people over eighteen, no practical means exist at this time for making such a determination (Of course if the State offers as its purpose the protection of its dairy industry, then wholly different questions would become relevant.)

In some instances, however, alternative means may be established already or so readily available that the need for rigid classifications is alleviated. A good example is a minimum age requirement for political candidates, because the election process should be capable of screening out those too immature to hold office. Age classifications of this type would thereby become susceptible to attack.[364]

When the alternatives under consideration involve more than mere classification, the Court's ability to evaluate them is somewhat reduced. Questions of cost and efficiency become more diffuse and conjectural. This is not to say that such alternatives are to be ignored, but as the case becomes more entwined with policy and subjective opinions, or less concerned with fundamental interests, the greater the weight that should be afforded the legislative judgment. Of course, a court should not refuse to recognize easy solutions that may be offered by less restrictive alternatives, but it is unwise for a court to move beyond its areas of expertise without great caution.

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363. This was an example in the parade of horribles that Justice Rehnquist posed in his dissent in Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791, 805 (1974).

364. *But see* Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973). The state, of course, may have an interest that would justify the rough classification. Questions of degree and rationality are also relevant in these instances.

Age minimums for voter classifications would probably withstand scrutiny due to overriding interests in preserving an effective political process and the absence of a truly trustworthy and nondiscriminatory means for distinguishing between "mature" and "immature" voters.

In applying these standards, a court will always be faced with the problem of how far it should go in delineating the alternative. If it completely fails to discuss what means might be acceptable, then the Court's role of assisting the legislature in the enactment of rational regulations would be considerably diminished. Moreover, if no obligation to outline an alternative existed, then the temptation and the proclivity to use the doctrine recklessly, or at least insincerely,[365] in invalidating legislation would be dangerously increased.

On the other hand, if the Court depicts in detail an alternative, then it will be subject to the criticism that it is assuming the legislature's task, rather than merely assisting in it.[366] More importantly though, when alternate means are identified, the Court might consider itself precluded from subsequently finding the alternative unconstitutional. Certainly the Court does not want to rule on the constitutional merits of each alternative it suggests. This problem has become acute when the alternative involves more than tailoring an overbroad classification. An illustration of the problem is the frequent suggestion in first amendment cases that traditional legal remedies such as libel and fraud are less drastic than prior restraints.[367] As *New York Times v. Sullivan*[368] demonstrated, the traditional methods have a very narrow area within which they can constitutionally operate. Also, only three years after a suggestion that right of reply statutes might be less restrictive than, and preferable to, libel laws,[369] the Court in its 1973 term unanimously invalidated such a statute.[370]

365. *See* Shelton v. Tucker, 364 U.S. 479 (1960); LEAST DANGEROUS, *supra* note 298, at 51-53.

366. For an example of such a "legislative" proposal, *see* Bivins v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting).

367. *E.g.*, Talley v. California, 362 U.S. 60 (1960).

368. 376 U.S. 254 (1964).

369. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47 n.15 (1971) (per Brennan and Blackmun, JJ., and Burger, C.J.). *But see* Gertz v. Robert Welch Inc., ___ U.S. ___, 94 S. Ct. 2997 (1974).

370. Miami Herald Publishing Co. v. Tornillo, ___ U.S. ___, 94 S. Ct. 2831 (1974). The Court's opinion by Chief Justice Burger recognized that right of reply laws might be desirable in some respects, and that they have been espoused as a means of guaranteeing access to our modern mass media. ___ U.S. at ___, 94 S. Ct. at 2836-39. Nevertheless, he reasoned that such statutes place too heavy a burden on the press, and could not withstand first amendment attack. The Court declined to use the vagueness doctrine to postpone a decision on the ultimate merits, and instead met the issue head-on. 94 S. Ct. at 2838 n.20. Justices Brennan and Rehnquist concurred, stating that they did not see the decision as affecting retraction statutes. 94 S. Ct. at 2840.

Tornillo should be read in the light of Gertz v. Robert Welch, Inc., ___ U.S. ___, 94 S. Ct. 2997 (1974), which established new guidelines for civil libel laws as applied to the alleged defamation of a nonpublic figure. Justice Powell's majority opinion in *Gertz* employed a

While these considerations do present a difficult problem for the Court, it cannot shirk its responsibility to articulate the alternatives forming a basis for its decisions, for well reasoned and fully articulated opinions are a major safeguard against judicial abuse of power.[371] Moreover, one of the advantages of a passive virtue, it should be recalled, is to allow postponement of judgment on the ultimate constitutional merits for as long as possible. This will allow a "whittling" process, through which the Court will continuously narrow legislative offerings in a given area until it finds an acceptable statute, or until it is forced to find the purpose unconstitutional. Moreover, the ultimate constitutional principle, or the best statutory alternative, may not be readily apparent, so that it is to the Court's advantage to take several looks at an issue, to build some case law, and to get feedback from the public and from scholarly commentary. The recent decision on capital punishment provides an excellent example of this process in operation.[372]

For these reasons, the Court should suggest alternatives whenever it relies upon the less drastic means doctrine. When overbreadth is the basis of decision, the opinion should indicate the degree of overbreadth, although exact detail would not be warranted. There are two narrow situations in which the Court may want to delineate in some detail the manner of legislative redrafting. First, in certain areas, such as anti-pornography laws or criminal procedure,[373] legislatures have come to depend heavily upon the Court for specific instructions. Secondly, the law may have degenerated into a state of utter confusion and clarification is badly needed.

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balancing approacb aimed at accommodating the competing values of a free press and the individual's interest in preserving his reputation and/or privacy. Justices Brennan and White, in their separate dissenting opinions, however, viewed the issue from a somewhat broader perspective as they engaged in a brief colloquy on alternatives. 94 S. Ct. at 3021 n.3 (Brennan, J., dissenting), 3037 n.43 (White, J., dissenting). The 2 discussed previously rejected alternatives, and pointed to a new one, one which they intimated might be more solicitous (or less restrictive) of the complex of interests raised in *Tornillo* and in *Gertz*. They suggested a statutory procedure by which a forced retraction of a defamatory statement could be obtained from a publisher after proof of the statement's falsity has been established in a judicial proceeding.

371. Indeed, articulation of the alternative may bring out some latent deficiencies that are infringements on individual interests other than those restricted by the existing law. *Cf.* YALE NOTE, *supra* note 1, at 469 n.24.

372. Furman v. Georgia, 408 U.S. 238 (1972). *See* note 334 *supra* for discussion of *Furman* and the constitutional process.

373. Gertz v. Robert Welch, Inc., ___ U.S. ___, 94 S. Ct. 2997 (1974); Wolff v. McDonnell, ___ U.S. ___, 94 S. Ct. 2963 (1974); *see* Miranda v. Arizona, 384 U.S. 436 (1966). *See also* Morrissey v. Brewer, 408 U.S. 471 (1972).

Again, the anti-pornography cases[374] of June, 1973 are a good example.

SUMMARY AND CONCLUSIONS

Under the doctrine of the less restrictive alternative, a statute that intrudes upon an individual interest may be susceptible to constitutional attack if alternative means exist for accomplishing the state's purpose in a manner less restrictive of an individual interest. The concept has had a widely varied application with little articulation. It has been subjected to different standards and levels of scrutiny according to the constitutional provision under which the statute is challenged and the context of the case. Recent decisions indicate, however, that the Court may be ready to develop a more comprehensive approach, or at least provide needed discussion when the doctrine is employed. Whatever its content, the least drastic means concept is being increasingly utilized, with a permeating impact on our constitutional law.

Substantive due process and the reasonable alternative doctrine have had an off-again-on-again affair since adoption of the fourteenth amendment. The original construction of the fourteenth amendment was that the liberty and property concepts of the due process clause confer no substantive protection of individual rights. That interpretation, however, changed radically at the turn of the

374. Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). *Compare* Chambers, *supra* note 1.

A problem related to that of suggesting alternatives is the use of alternatives as a remedy. That is, the Court could order that an alternative be adopted, rather than merely suggest it. This approach has been successfully utilized in administrative law. *See* Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946) (case remanded to agency for determination whether labeling regulations will not suffice in lieu of flat prohibition); *cf.* Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) (*en banc*) (A court of civil commitment must consider the range of alternative courses of treatment and place the patient in least restrictive alternative found suitable); Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1426 & n.185 (1973) (urging administrative agencies to exhaust alternatives before issuing adverse publicity).

German administative law is instructive, for it has developed a concept called the "mildest means doctrine." Marx, *Comparative Administrative Law: Exercise of Police Power*, 90 U. PA. L. REV. 266, 276-91 (1942). Under that doctrine, if an individual is aggrieved by an administrative body, he is given the prerogative of suggesting an alternative that would be less restrictive upon himself, but equally solicitous of the government's interest. The administrative agency must then accept the alternative. In addition to the mildest means doctrine, the less restrictive alternative concept has found other guises in foreign courts. The Swiss "principles of proportionality," and the "principle of excess" in the constitutional law of the German Federal Republic are examples. Struve, *supra* note 1 at 1464-65 n.10. *See also* Baade, *Social Science Evidence and the Federal Constitutional Court of West Germany*, 23 J. POL. 421, 451-53 (1961); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 525-26 n.31 (1966).

century, as the Court became active in striking down social and economic legislation that interfered with property and contract interests. With this new approach came the requirement that statutes infringing upon liberty or property must be necessary to achieve the state's goal. Although inconsistently applied, the Court did use this requirement to develop a prohibition-regulation distinction, whereby flat proscriptions on products or occupations would not withstand constitutional attack if mere regulation would suffice to protect the public. Despite the viability of that distinction, it did not survive the frontal attack on federal substantive due process, which ensued after 1937. State courts, however, have retained the distinction, and rightly so, in order to maintain a check on overstepping legislatures and the gross influence of special interest groups.

After denying for thirty years substantive protection to fourteenth amendment liberty interests beyond those recorded in the Bill of Rights, the Supreme Court resurrected substantive due process in order to safeguard interests of privacy threatened by an age of overcrowdedness, highly advanced technology, and a massive government. This new substantive due process, much like equal protection's compelling interest test, requires the legislature to tailor finely any statute affecting a liberty interest. The scope of the liberty deserving this protection has not yet been delineated, although there have been appeals to include, to some extent, certain liberty and property interests of an earlier era.

In keeping with this need for some kind of safeguard against repressive or blunderbuss legislation when less than fundamental rights are involved, the Court has also closely scrutinized conclusive statutory presumptions. The decisions have been based on mixed substantive and procedural due process rationales. They illustrate the increasing importance of alternatives since each of these cases is premised on an assumption that the state could achieve its goal by redefining its classification to reach only those individuals who possess the evil sought to be eliminated. The question becomes, however, whether adequate means exist for making the finer distinction.

Since the assault on conclusive presumptions has only recently become persistent, the Court has not yet evolved a discipline for applying the rationale. Nonetheless, the language of the opinions thus far indicates that strict precision is being demanded of the legislature if any feasible means exist for making individual determinations.

Alternatives have also been a traditional consideration in pro-

cedural due process decisions. Once the Court decides that interests are involved that cannot be deprived or abridged without a hearing, it must perform a delicate balancing process in order to determine the extent of a minimally acceptable procedure. Alternatives constitute one element to be weighed in that intricate balance.

Cases under the commerce clause have been analyzed in terms of less restrictive means since the mid-nineteenth century. Alternatives have been reviewed and relied upon here due to the special role the federal courts have been assigned in preserving federalism. The case law in this area reflects a more flexible and practical approach to alternatives than that developed under other constitutional provisions. This is understandable, since commerce clause decisions often involve alternatives differing in kind from the existing statute, while most other alternative cases deal with questions of tailoring or procedure.

Equal protection law mirrors many of the same concerns found in recent due process developments. The rational basis test, as *traditionally* applied, scrutinizes no alternatives, and little else. In contrast, the compelling interest test requires that a classification based upon or discriminating against a suspect classification or the exercise of a fundamental right must be *necessary* to further a state interest that is legitimate and compelling in the context of the case. Until recently, the Court had required the strictest necessity whenever this test was found applicable. Three April 1973 decisions on ballot access, however, indicate that the state's means need only be reasonably necessary to satisfy the test, or the alternative must be significantly less burdensome.

While the Court has retained the traditional, hands-off equal protection standard through the present term, it has also expanded or intensified the rational basis test in some areas. This "newer" equal protection is still undefined, since no authoritative or consistent approach has yet emerged. It is therefore very difficult to assess the impact of less drastic means in such cases, except to say that alternatives seem relevant. The "stepped-up" rational basis illustrates the same concern as the conclusive presumption decisions for individual interests that do not trigger the compelling interest test, yet which deserve some protection. This expansion of review has been accompanied, though, by a loosening of standards in compelling interest decisions.

Recent first amendment developments also follow that trend and grant more leeway to the legislatures. First amendment law has long relied upon the overbreadth doctrine, which is analogous to the

prohibition-regulation distinction and conclusive presumptions in due process and overinclusive classifications in equal protection. It holds that a state must construct its statutes so as not to "sweep unnecessarily broadly and thereby invade the area of protected freedoms."[375] The recent Hatch Act cases have modified the doctrine so that if less than "pure speech" is the subject of regulation, an individual will not have standing to challenge the statute unless his conduct is protected, that is, unless the statute *as applied* is unconstitutional, or the statute's overbreadth is *substantial.*

Aside from this modification, first amendment values have generally required the maximum of precision in any regulation affecting them. The Court has at times invalidated statutes when any tailoring at all would strip the laws of their effectiveness. The latter decisions, however, have had factual settings that probably led the Court to conclude, *sub silentio*, that the statute was enacted under an improper legislative motive[376] or that the danger sought to be eliminated was highly exaggerated.[377]

First amendment cases have also frequently relied upon alternatives that vary not in degree but in kind. This has been most common in the near universal invalidation of prior restraints in favor of traditional legal methods, such as libel, fraud, or *post hoc* criminal statutes.

The cases taken together, under each of the constitutional provisions discussed above, demonstrate that the more important the Court considers the individual interest involved to be, the more likely it becomes that alternatives will be closely scrutinized. Alternatives that involve only the task of assessing procedure or the feasibility of tailoring the state's classification are also more likely to be relied upon than alternatives differing in kind from the existing statute.

In light of these conclusions, an investigation of the tradition of judicial review and scholarly commentary on the subject reveals that the doctrine of less restrictive alternatives is consistent with the role of the judiciary in our system of government. The doctrine has some marks of an activist Court, but that is counterbalanced by its narrow basis for deciding cases with serious constitutional questions. Through the use of alternatives the Court can postpone ultimate disposition on these questions and develop principles and solutions for them through the use of a whittling process. The doctrine

375. NAACP v. Alabama, 377 U.S. 288, 307 (1964).
376. Shelton v. Tucker, 364 U.S. 479 (1960).
377. United States v. Rohel, 389 U.S. 258 (1967).

permits the legislature to readdress a problem and assists that branch in its efforts to reach results that are both promotive of a particular governmental purpose and protective of individual rights.

Intervention by a court to invalidate legislation because there are less drastic alternatives available can be further justified by the special role played by the judiciary in our constitutional scheme and by the need for protection of special groups and fundamental interests from the vagaries of the political process. This justification will necessarily vary the amount of deference that should be paid the legislative judgment in a particular case.

A set of criteria utilizing a flexible, multi-tiered review has been proposed. To a great extent this formulation reflects what the Court has already been doing. By concentrating on role allocation, however, the proposed criteria force a court to focus upon the critical issues that should determine the scope of judicial review, and thus the Court should avoid both mechanical decision-making and arbitrary, *ad hoc* conclusions. The proposal will facilitate consideration of alternatives to some extent when important individual interests are affected, even though the interests are not fundamental or specifically mentioned in the Constitution. Since articulation and reasoned opinions are required by the formulation, the dangers of rampaging judicial activism are reduced.

When confronted with a statute challenged on the ground that an alternative exists that is less restrictive upon an individual interest, the Court should balance four factors:

1. The importance of the individual interest and the extent to which the interest has been, or should be, committed to judicial protection. This must be deduced from the factors discussed in Part II that justify varying standards of review: the language of the constitutional text; the Court's precedents; the ability of the legislative-political process to properly handle the issues and to afford important interests their full value; the Court's ability to reduce its decision, *including* its remedy, to judicially manageable concepts; and the Court's reading of contemporary moral standards.

This factor should indicate how much deference is owed to the legislative judgment and how far the Court should go in reviewing alternatives. It should also determine the degree of scrutiny to be applied in considering the final three factors:

2. The difference in effectiveness between the existing law and the alternative. Of course, the more sensitive or critical the gov-

ernmental interest, the more significant becomes any difference in effectiveness.

3. The approximate difference in costs between the existing law and the alternative.

4. The extent to which the alternative is less restrictive upon the individual.

In deciding on its competence to assess the alternatives, the Court should keep in mind the principles of federalism and distinguish between the types of alternatives—"tailoring" or a completely different approach—that would have to be investigated. The doctrine of less restrictive means should never be imposed without specifying what means are available to the state. The Court, however, should not elaborate beyond the requirements of the case before it, unless legislatures have traditionally relied on the Court's guidance in drafting regulations of that type or there is a special need for clarification and development in that particular area of the law.

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