A MODEL OF JUDICIAL REVIEW
OF LEGISLATION †

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Of all the forms of power that may lawfully be exercised over the individual in a constitutional democracy such as the United States, that exercised in support of judicial decisions is in the popular mind perhaps the most awesome. In a constitutional democracy the phrase "rule of law" can be said to express the idea that all directives of the executive branch should be translated into judicial directives before physical force can be applied against individuals. This absolute quality of judicial decisions helps account for the high standards of justification that are imposed on judicial decisionmaking. Not only are judges outside the mainstream of the political process and therefore less subject to political check on the part of those affected by their decisions, but the decisions of the highest courts, at least on constitutional issues, are "unappealable." ¹ Accordingly, unless judicial decisions are accepted, even if only grudgingly, by those whom they affect, there is no other recourse but to the bayonet. Such a society, however, would be one in which the legitimacy of its lawmaking institutions is under severe attack and, if recourse to physical force were particularly frequent, would be considered a society governed by the rule of force.

In contrast to the judicial process, legislative decisionmaking, although governed neither by the direct concern with justice nor by the

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¹ One recognizes, however, that not only can the highest courts be "overruled" by the process of constitutional amendment, but that courts themselves are not completely oblivious to, or immune from, the pressures imposed by popular sentiment or by the other branches of government whose cooperation is needed to enforce judicial decrees.

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high standards of fairness that are operative in the law courts, nevertheless has certain built-in mechanisms for securing "grudging" acquiescence in compromise solutions that help ensure for legislative decisions a certain minimal acceptability to large numbers of people. These mechanisms are largely lacking in the judicial forum where the mechanics of the decisionmaking process favor a winner-take-all solution. This makes it even more important that the justifications given by courts for their decisions should meet the highest standards. Of course, if everyone approved of the decisions of the courts, it would not matter very much, except perhaps to pedants, what kind of justifications were given for those decisions. But we have seen too many school buses overturned and too many courtrooms reduced to shambles to believe that such a condition of affairs is possible. Since it is unreasonable to believe that everyone will approve of the decisions of the courts, we might say that judicial decisions should at least always be acceptable to a large majority of the citizenry. Not only, however, do many judicial decisions come nowhere close to meeting this condition, but this sort of "consensus politics" seems alien to the notion of the judicial function. While courts cannot remain completely oblivious to public opinion, surely one valuable purpose of constitutional law is to serve as a check on transient majority sentiment.

The quest for justification in the judicial process is, therefore, more than the perennial quest for "good reasons." Certainly, that the plaintiff is young, likable, or poor might be considered by many as good reasons for deciding a case in a certain way, but they are not adequate. What is sought is some indication that the decision is not only supported by "good reasons" but also that it is in some manner of speaking "legally compelled." This notion has been expressed by legal philosophers in the form of assertions that judicial decisionmaking is not arbitrary, that it is rule-determined, or that it is an instance of

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2. This is, however, a question of degree. Courts are institutions and as such are subject to institutional pressures that foster compromise and sometimes impel a court toward unanimous decisions. For a recent instance, see United States v. Nixon, 418 U.S. 683 (1974). For a discussion of the institutional dimensions of this case, see Van Alstine, A Political and Constitutional Review of United States v. Nixon, 22 U.C.L.A.L. Rev. 116 (1974). The possibility of embarrassing dissents, moreover, can lead a majority of a court to be more moderate than they might otherwise be.

3. The legitimacy of striking down statutes passed by a legislative majority will be enhanced to the extent that certain important social groups are either disenfranchised or substantially under-represented in the legislative forum.

quasi-logical reasoning.\footnote{See Dworkin, \textit{The Model of Rules}, 35 U. Chi. L. Rev. 14 (1967), reprinted as, \textit{Is Law a System of Rules?}, in \textit{Essays in Legal Philosophy} 25 (R. Summers ed. 1968). Starting from the premise that legal decisions must be rule-determined if one is to maintain that there is any such thing as an objectively correct legal decision, Professor Dworkin endeavors to explain how legal decisions can be rule-determined even when there are no legal rules on the point in question, there are conflicting relevant legal rules, or one wishes to change the existing legal rules. Dworkin finds the answers in so-called legal principles, which control the evolution of legal rules. For a discussion of the related though considerably weaker claim that judicial decisions are "rule-guided," see G. Gottlieb, \textit{The Logic of Choice} (1968). Professor Dworkin's article is discussed at some length in Christie, \textit{The Model of Principles}, 1968 Duke L.J. 649 (1968) [hereinafter cited as \textit{Model of Principles}].}

Unfortunately, the view that law consists of a set of authoritative rules does not suffice to supply the rigor that legal reasoning is generally considered to require.\footnote{See C. Perelman \& L. Olbrechts-Tyteca, \textit{The New Rhetoric: A Treatise on Argumentation} 218-20 (1969); \textit{cf. id.} at 99-104. That legal reasoning is a type of quasi-logical reasoning is of course the reason that it is not arbitrary. \textit{See note 4 supra.}} So-called rules of common law are too lacking in authoritative statement and too subject to exceptions to serve as premises in a chain of deductive reasoning. Statutes and constitutional provisions, which at least have a set verbal form, are likewise too vague, imprecise, and incomplete to serve in any such role. Of course, what are called "rules of law" help us to define the problem. Most importantly, they are a cataloging device for calling the relevant cases to mind, since even a statute does not exist apart from the cases described by it. When, for example, the Supreme Court declares a criminal statute "void for vagueness," it is, at the very least, saying that it is not clear what the paradigm cases covered by the statute are.\footnote{See Christie, \textit{Objectivity in the Law}, 78 Yale L.J. 1311, 1313-18, 1323-29 (1969) [hereinafter cited as \textit{Objectivity}]. \textit{See also Model of Principles, supra note 5.}}

This Article will demonstrate that judicial review of legislation can be accommodated with societal expectations of reasoned decision-making. To achieve this goal, however, a new model will be proposed that will provide a viable means of retaining the institution of judicial review while at the same time ensuring that judicial decisions are more than the sum of the collective consciences of the participating judges.
I. THE NEED FOR OBJECTIVE DECISIONMAKING IN CONSTITUTIONAL ADJUDICATION

A. THE MODEL OF JUDICIAL OBJECTIVITY

In a model of judicial decisionmaking, described elsewhere, I have tried to show why legal reasoning is more rigorous than other forms of informal reasoning. The model relies on the fact that legal reasoning has both statutes and cases as ascertainable starting points and known authoritative techniques for proceeding to the decision of new cases. Under this model it is not enough to know that one who unreasonably interferes with his neighbor’s enjoyment of his property will be liable to his neighbor for the damage he has caused; it is also necessary to examine the cases in order to determine what factual circumstances the courts have concluded were unreasonable uses of property. Is a piledriver generating 1.1 decibels an unreasonable use? What about a wild animal show? If the instant case is to be decided in a manner different from the past cases, there must exist a significant factual difference between it and all previous cases. Only then can the decision be an acceptable decision. Of course, it is almost always impossible to show that there is a uniquely correct decision to a case. Legal reasoning may recognize several “proper” decisions for a particular case. Nevertheless, criteria of what is a “proper decision” can be developed that indicate that a decision was more than supported by good reasons and that any decision that does not meet these criteria is an improper one, regardless of how many good reasons can be marshalled in its support. It is only this notion of “properss” that permits the claim that judicial decisionmaking can be objective. One may then disagree with the outcome of a case, yet agree that the case was “properly” decided—that is, within the narrow range of decisions permitted by the techniques of legal reasoning.

The crucial question is whether constitutional adjudication is able to conform to any such model or whether, in the adjudication of constitutional issues, the “rule of law” means nothing more than “rule by the courts.” It has been asserted, for example, that courts in the United States, particularly the Supreme Court, not only vitally affect the political process but also have a role in that process that is not essentially different from that of the legislative and executive branches of government. If this contention is correct, then constitutional adjudication

10. See, e.g., M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 1-49, 328-33 (1964) [hereinafter cited as SHAPIRO]; Wells & Grossman, The Concept of Judicial
cannot be expected to meet standards of reasoning any more rigorous than those used in legislative and executive decisionmaking. The most that might be hoped for is a greater degree of candor than is sometimes exhibited in other types of political decisionmaking. Indeed, if such an overly political role is accepted for the courts, perhaps the most that could justifiably be expected is that a sharp distinction be made between the judicial and political functions of the courts. Otherwise, the willingness of courts to enter the political or legislative arena will undermine the claim that, in exercising their judicial function, courts adhere to an objective decisionmaking procedure.

B. THE QUEST FOR JUDICIAL OBJECTIVITY IN CONSTITUTIONAL ADJUDICATION

1. The Mythology Concerning the Court’s Role in Constitutional Adjudication

Much of the public controversy presently surrounding the Supreme Court arises because, while it is widely believed that the Court exercises a predominantly political role in the structure of government, folklore describes the Supreme Court as a “court” in the traditional sense. This latter notion is sometimes expressed in statements to the effect that the Court exercises only a “judicial function.” The folklore is reinforced by the fact that no member of the Supreme Court has ever really acknowledged that the Court exercises anything but a “judicial function.” Even the most “activist” of justices insist that their func-


11. Chief Justice Warren, perhaps inadvertently, came perilously close to acknowledging such a role for the Court when, at the ceremonies surrounding his retirement, he said: “We serve only the public interest as we see it, guided only by the Constitution and our own consciences. And conscience sometimes is a very severe taskmaster.” 395 U.S. xi (1969). Elsewhere he said that disagreement among the Justices is inevitable because one cannot expect each Justice’s conscience to speak to him in the same way. Judge Skelly Wright, of the United States Court of Appeals for the District of Columbia,
tion is only to interpret the Constitution, not to exercise the essentially legislative role of making policy choices for society. 12

One might argue that it is time this image were adjusted to comport with political reality. However sacred the folklore might be, it must be re-examined and, where it no longer conforms to the facts, abandoned. Then might accommodations to the political nature of the courts, such as popular election of federal judges or the appointment of nonlawyers to the Court, be discussed. 18 Strong emotional reasons exist, however, for retaining the myth of judicial objectivity. 14 Individuals directly affected by final, unappealable judicial decisions would hardly welcome the knowledge that judicial decisions are no more than political decisions to use force, if necessary, in a particular case. More-

has, however, asserted that the Court has more than a traditional judicial function to fulfill. See Wright, supra note 10.

12. For very recent statements by Justice Douglas, that "activism" by the judiciary can only be justified in support of activist policies expressed in the Constitution and not by their own "individual notions of the public good," see Kewanee Oil Corp. v. Bicron Corp., 416 U.S. 470, 499 (1974) (dissenting opinion) and Donnelly v. De Christoforo, 416 U.S. 637, 651 (1974) (dissenting opinion). The agonized opinions of many of the Justices who voted to strike down the death penalty in Furman v. Georgia, 408 U.S. 238 (1970), is living testimony to their acceptance of the fact that the judicial role, with its requirement of objectivity in decisionmaking, is very different from the legislative role.

13. A motion favoring the popular election of federal judges was introduced at the North Carolina Republican Party Convention. Durham Morning Herald, Mar. 21, 1970, at 1, col. 6. On the national level the proposed S.J. Res. 13, 93d Cong., 1st Sess. (1973), required the reconfirmation of all federal judges every 8 years.

Justice Black publicly stated that the appointment of some nonlawyers to the Court might be a good idea. See Transcript, CBS News Special: Justice Black and the Bill of Rights 3 (aired Dec. 3, 1968, 10:00-11:00 p.m. E.S.T.) (E. Severeid & M. Agronsky reporters).

14. It has been suggested, for example, that in order to prevent a crisis in public confidence, the courts should perhaps maintain the myth that judges only declare and do not make law. See Mishkin, The Supreme Court 1964 Term, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 58-72 (1965). Professor Mishkin was writing in the context of Linkletter v. Walker, 381 U.S. 618 (1965), and was concerned with the effect of the device of prospective overruling (relied upon in that case to deny the benefits of Mapp v. Ohio, 367 U.S. 643 (1961), to a person whose conviction had become final prior to the Court's opinion in Mapp) upon the "declaratory theory" of law. For the same advice of caution to scholars, see Shapiro, supra note 7, at 24-32, especially at 27. See also T. Arnold, The Symbols of Government 49 (1935).

Professor Mishkin was correct in noting that the Court's use of prospective overruling is involving the Court in legislative-type determinations. See, e.g., Kaiser v. New York, 394 U.S. 280 (1969); Desist v. United States, 394 U.S. 244 (1969). For an example of the extreme difficulty in reconciling the function of adjudication with prospectivity of application in the context of administrative law, see NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765 (1969).
over, under present institutional arrangements, recognition of the political nature of judicial decisionmaking would seriously conflict with traditional theories of democratic participation. While legislative representatives are subject to voter influence, judges, even if popularly elected, are presently exempt from this sort of influence, ostensibly because they are not concerned with the same type of questions. To the extent that courts and legislatures are deciding the same type of questions, it therefore looks like a case of one man, no vote. 15

2. The Questioning of the Myths and the Crisis of Confidence

It is hardly surprising that the questioning of judicial objectivity, particularly in constitutional adjudication, would be accompanied by public uneasiness and loss of confidence in the system. It surely is not unnatural for the parties to feel that there are certain things to which they are entitled under the law which should not be taken away from them in the name of the asserted good of the community or of vague slogans, such as social justice, however laudable the ideas underlying them. 16

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15. If constitutional adjudication is merely another form of political decisionmaking, it seems ridiculous to let constitutional decisions, which can only be overthrown by the very cumbersome amendment procedure, be decided by 5-4 votes. One might insist on a 6-3 or 7-2 majority.

By being the party in a particularly important case or being an able lawyer, a particular person may have considerably more influence over the outcome of a judicial decision than over a legislative decision. This merely heightens the undemocratic nature of judicial decisionmaking. What we are talking about, however, is the influence of the citizens en masse on the decisionmaker.

16. The problem is hardly a new one. As long ago as the 17th century Lord Clarendon complained about judges "as sharpsighted as Secretaries of State" and "reason of State urged as elements of law." I. CLARENDON, THE HISTORY OF THE REBELLION 111 (Oxford ed. 1816). Lord Clarendon contended that the effect of the use by Charles I of the courts to legitimize the levying of ship money was to undermine public confidence in the ability of the law to give any protection to property rights and that the loss of this confidence was an important cause of "the rebellion" or what most people call the English Civil War.

Man's need and desire for objectivity in the judicial process has a long history. Recognizing the fallibility of the judgment of the individual on disputed issues, in more primitive times an attempt was made to place the resolution of these issues beyond the reach of individuals. For example, trial by battle and trial by ordeal were premised on the theory that God would intervene to insure the vindication of the innocent and the punishment of the guilty. While many people have viewed these aspects of early Western European law as an attempt by men to escape the responsibility of decision, the same phenomena can be interpreted as a recognition that certain types of dispute were unsolvable by the use of human reason alone, at least with the decisionmaking procedures available at the time. In this context it was eminently rational to try to devise techniques for putting the issue up to God, for whom no dispute was unsolvable. For a discussion of trial by battle and by ordeal, as well as the related use of compurgation and torture in legal proceedings, see H. LEA, SUPERSTITION AND FORCE (4th ed. 1892).
It is indeed unfortunate that the presence of a written constitution designed to circumscribe the powers of government should itself be a factor in giving rise to these fears. However illusory these fears, there is an increasing belief that the outcome of cases raising vital constitutional questions is not just partially determined by the historical accident of who happens to be sitting on the Court at that moment but is almost completely so determined. An example of this unrest can be seen in the controversy surrounding President Johnson's nomination of Justice Fortas to be Chief Justice of the United States and the resistance of Congress to President Nixon's attempts to nominate a successor to Justice Fortas after he resigned from the Court. Indeed, members of the Court have themselves expressed such fears.\footnote{17}

Similar doubts among academic observers have deprived the Court of one of its customary bulwarks against simple-minded partisan attacks.\footnote{18} As a result, the Court is being put on the defensive more than it might otherwise deserve to be,\footnote{19} even for decisions which its most disinterested observers would say were objectively correct. One example in particular that comes to mind is \textit{Engel v. Vitale},\footnote{20} the school prayer case. Although few have questioned the substantive decision that the establishment clause precludes state imposed prayers in public schools, the public outcry against \textit{Engel} was apparently fostered by a belief that a political decision had been made against religion in the United States. \textit{Powell v. McCormack},\footnote{21} in which the Court declared that the House of Representatives could not refuse to seat Adam Clayton Powell, is arguably another. Not one member of the Court ex-


\footnote{19. Responding to what he called the "unprecedented" extent of popular dissatisfaction with the Court, which he felt went beyond the inevitable criticisms that surround particular controversial decisions, John Mitchell, who himself had been a critic of the Court, felt compelled, when Attorney General, to come to the defense of the Court and to urge that the Bar should take steps to point out that "much of the popular dissatisfaction is ill-founded and maliciously motivated." N.Y. Times, May 2, 1970, at 1, col. 2.}

\footnote{20. 370 U.S. 421 (1962).}

\footnote{21. 395 U.S. 486 (1969).}
pressed disagreement with the substantive result in *Powell*, yet, for many, the decision was viewed as a political, rather than a judicial, victory for Powell. In more “normal” times, the prestige of the Court and the high regard in which it is held by the legal profession would probably have inhibited or at least muted much of the criticism. One would especially like to think that the leaders of the House of Representatives would have been more accommodating in the proceedings on the remand of the *Powell* case to the district court for the fashioning of an appropriate remedy. Admittedly, the Court could have adopted the safer approach and required the issue to be raised in an action for back pay brought in the Court of Claims. Nevertheless, a Court that was more respected by the House might have found that institution more accommodating.

This Article will examine the subject of constitutional adjudication and particularly the question of judicial review of legislation to explore a possible accommodation which would permit such adjudication to meet the demands for objectivity in judicial decisionmaking. It is assumed that courts should have an active constitutional role in the review of legislative and executive actions and that, therefore, the complete separation of the judicial from what is sometimes called a legislative or political role is impossible. However, modifications will be sought in the traditional model of legal argument that will accommodate this constitutional role without sacrificing the claim of judicial objectivity. This Article does not advocate “strict construction” of the Constitution, if “strict construction” is just a euphemism for the abandonment of judicial review. Rather, the model of legal argument is sufficiently flexible to permit either a “broad” or a “narrow” construction of the Constitution, and this flexibility should not be sacrificed in constitutional adjudication. Admittedly, however, whatever modifications are made in the model of legal argument to accommodate the special needs of constitutional adjudication will almost certainly not permit the courts, and more particularly the Supreme Court, to play as active a political role in national affairs as some would like. But such a modified model might

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22. The lone dissent by Justice Stewart was predicated on his procedural contention that the issue should have been raised first in the Court of Claims. *Id.* at 559. Justice Stewart’s main contention was that, except for the question of back pay, the case was moot and that the salary claim should be brought in the Court of Claims.

be worth the price if it permits the Court to fulfill most of the demands made upon it without sacrificing its claim to objectivity in its decision-making processes.

More than the question of objectivity in judicial decisionmaking or even the more basic question of the allocation of political power between courts and legislatures, what is involved is whether serious social problems are to be solved by basically prudential methods or by methods that proceed in relatively absolutist terms. The nature of the judicial process is such that even a court prepared to pay only lip service to historic notions of the judicial function is almost forced to proceed, especially on the constitutional level, in terms of rights and duties that are defined in relatively absolute terms. The utilitarian calculus thus becomes for many purposes irrelevant, for these rights can only be invaded upon a showing of the most compelling state interest. While courts necessarily legislate to some extent in the process of deciding all cases, present notions of justice and the legal system will not permit them adequately to exercise a predominantly legislative role, whatever the need to perform the functions not otherwise provided for in our system of government. 24

II. THE ROLE OF THE TRADITIONAL MODEL OF JUDICIAL DECISIONMAKING IN CONSTITUTIONAL ADJUDICATION

A. THE SEARCH FOR THE "MEANING" OF THE CONSTITUTION

Most Supreme Court decisions in the field of constitutional adjudication can be reconciled with the traditional model of judicial decisionmaking. While much of the Constitution is admittedly vague and imprecise, and while, even if parts of the Constitution can be said to have a "fixed meaning," actually stating that "meaning" is another question, still there are techniques for finding meaning in the Constitution. Some provisions of the Constitution are, of course, relatively precise. Other

24. Not only are the claims on the Court as a political organ potentially limitless, but the more receptive it is to these claims the more claims will be made on it that it cannot possibly fulfill. One might here briefly refer to the recurrent attempts—all unsuccessful—to get the Court to rule on the "legality" of the Vietnamese War. Anyone with any acquaintance with conditions at major American universities, at that time, could not help noticing the disillusionment of many students over the Court's refusal to rule on that matter. See, e.g., Editorial, The Duke Chronicle, Apr. 8, 1970, at 6. As will be noted in this Article (see note 152 infra), once a court starts deciding cases involving political issues, it would, by the refusal to hear a case, be appearing to act as a political organ.
provisions, even if somewhat vague, can be said to have had a fixed historical interpretation at the time of the adoption of the Constitution that has been accepted by the Court as providing the basis for interpreting them. Finally, and most importantly, other provisions, however vague and imprecise, have been the subject of so much litigation that their case-by-case interpretation has given them sufficient content to permit meaningful talk of paradigm situations to which new cases can be compared. Examples of this latter category are the case-by-case development of the scope of the commerce power and, particularly, the case-by-case development of criminal and civil procedure under the due process clauses of the fifth and fourteenth amendments. These latter cases might also be said to be developments from the limited historical meaning of "due process of law." These are the types of cases which in English law, are covered by the kindred notion of "natural justice." While the development of the law in these areas has not always been a paradigm of judicial reasoning, the extended history of case development in these areas is capable of focusing argument and setting limits to judicial discretion.

In all these areas of constitutional adjudication, limits are supplied by the terms of the Constitution itself, the history of the times, and the past course of judicial interpretation. Assuming that the Court will not at one sweep overrule all past cases, the Court is free to legislate, but only in small steps. In performing this legislative role in the field of constitutional adjudication, which is the same role it performs in all fields of adjudication, whether the Court can avoid criticism will depend on how carefully it adheres to the accepted model of judicial decisionmaking. It is only by close attention to precedent and to the significance of the factual differences among cases that the judicial decisionmaking process can make any viable claims to objectivity. Careful performance of this task, however, preserves for the Court its vital role in the constitutional framework without undermining its integrity as a "court of law."

Most of the advances in the field of racial integration, voting

25. For a discussion of the evolution and meanings of "due process of law," see E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948) [hereinafter cited as CORWIN]. Corwin’s main interest is in tracing how, in the 19th century, "the 'due process' clause which had been intended originally to consecrate a mode of procedure, had become a constitutional test of ever increasing reach of the substantive content of legislation." Id. at 114 (emphasis in original).

26. See Ridge v. Baldwin, [1964] A.C. 40 (1963) as an example of a prominent modern case dealing with this traditional concept and explaining that the content of the concept is derived from a long line of cases, some of great antiquity. In this regard see Lord Reid’s speech, id. at 63, 64-65.
rights, and procedural due process could have been accommodated within the traditional techniques of legal argument. Much of the professional criticism of the Court's activities in these areas has not been that there was no basis for the Court's decisions but, rather, that decisions that could have been adequately justified were not justified adequately. While it would have been impossible to satisfy all the critics, certainly, by being more careful and workmanlike in its opinion writing, the Court would have generated less doubt about its decisionmaking procedures. However, insofar as the Court's decisions in these areas could not have been accommodated within the traditional techniques of legal argument, even if they had been more carefully justified, one may wonder whether the advances made were worth the friction generated. In most of these fields Congress has authority to legislate, and, with the start provided by the Court in key cases like Brown v. Board of Education and Baker v. Carr, it would not have been totally unrealistic to allow Congress to take the lead in achieving further reform rather than risk the Court's prestige by exceeding the perceived restraints on judicial decisionmaking. Obviously, though, reasonable men can differ on the wisdom of this more cautious approach, particu-

27. In the public mind, probably the three most important decisions of the Warren Court were Brown v. Board of Education, 347 U.S. 483 (1954); Baker v. Carr, 369 U.S. 186 (1962); and Miranda v. Arizona, 384 U.S. 436 (1966). While one might have qualms about the opinion in Brown, the decision itself certainly flowed easily from the preexisting body of case law. See Pollack, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959); cf. Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960). Baker, likewise, had substantial support in the prior decisions of the Court. See R. McKay, Reapportionment ch. III (1965). The difficulties that have been experienced in the voting rights area have occurred when the Court extended Baker to require that both houses of a bicameral state legislature must be apportioned, with only minor variances, on an almost mathematically exact one-man-one-vote basis. See Reynolds v. Sims, 377 U.S. 533 (1964); cf. Kirkpatrick v. Preisler, 394 U.S. 526 (1969). The Court, however, has now begun to show some uneasiness with a formula that seeks complete mathematical equality. See Mahan v. Howell, 410 U.S. 315 (1973). This illustrates how the requirements of objectivity militate in favor of relatively inflexible formulas that are easy to apply but clash with the complexity of the underlying factual problem that seems to require more subtle methods. Miranda, however, which substituted a rigid formula for the previous flexible "voluntariness" standard in determining the admissibility of confessions, was clearly a large jump beyond the existing state of precedent and has brought forth a congressional attempt partially to overrule it in federal trials. See 18 U.S.C. § 3501 (1970).

28. See note 18 supra.
31. That Congress can effectively cooperate with the Court in these fields is shown by the various congressional acts cutting off federal assistance to educational bodies that are engaging in racial segregation. See, e.g., 20 U.S.C. § 1221e (1970); 20 U.S.C. § 1247 (1970).
larly in fields such as these that affect the most important personal rights.

The real problem, however, is not in these areas of traditional judicial activity. Rather, problems have arisen when those who have disagreed with the soundness of substantive measures taken by legislatures in the exercise of the general powers that all governments possess, or those who, in more recent times, wishing to force legislatures to embark on a major restructuring of the social order, have tried to challenge legislative judgments in the courts even in the absence of any specific constitutional provisions on which to pin their arguments. Challenges have centered mainly on the due process clauses of the fifth and fourteenth amendments and now, with increasing frequency, on the equal protection clause of the fourteenth amendment. The basis of the argument is not that the procedures by which rights are affected are not up to the standards prescribed by law, but that certain interests, though not explicitly named in the Constitution, cannot be infringed by the legislature except perhaps under the most compelling and exceptional factual circumstances. Consider, for example, the argument that minimum wage laws violate due process of law by depriving an employer and an employee of their liberty to enter into a contract. A normal reaction to such a claim would be, does one have a right to contract for one's labor at any price that one wishes? If so, why, and if not, why not? When the Supreme Court decided West Coast Hotel Co. v. Parrish in 1937, it appeared that the Court would no longer enter into such controversies. The Court held that it was for the legislature to decide the necessity of general social regulation, and it was not for the courts to second-guess the legislature. At most, under West Coast Hotel, judicial review based solely on due process claims would be limited to ascertaining whether distinctions made by the legislature were "arbitrary and capricious." Since these terms are hard to define in relation to legislative action, however, it seemed in 1937 that the striking down of general regulatory legislation solely on due process grounds was a thing of the past.

B. CONSTITUTIONAL ADJUDICATION AS A MEANS FOR FASHIONING SOCIAL POLICY

1. The Resurrection of Natural Law Theories

In recent years, however, the problem has again become troublesome.

32. 300 U.S. 379 (1937).
33. Id. at 399.
The first major rumblings arose in 1952 in what would initially seem to be a totally different type of case, *Rochin v. California*.*  

In Rochin, police officers, acting without a warrant, broke into Rochin's house at night, dragged him out of bed where he was lying with his common-law wife, and tried unsuccessfully to pry out of his mouth contraband material that they thought he had swallowed. Rochin was then taken to a hospital where his stomach was pumped out and a capsule of narcotics was found. He was thereupon tried and convicted in the California state courts for illegal possession of narcotics.

Although the Supreme Court was unanimous in reversing the conviction, the justices disagreed as to the rationale for the decision. Justice Frankfurter, writing for the majority, was unwilling to expand one of the existing categories of criminal procedure to cover the case.*  

The Court nevertheless struck down Rochin's conviction because it offended "those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses."* Justice Black and Douglas, concurring, argued that the reversal should hinge on the narrower ground that, in pumping Rochin's stomach, California had forced him to give evidence against himself in violation of the fifth amendment's privilege against self-incrimination.* Justice Black in a concurring opinion asked why, if the Court were free to base its decision on the grounds relied on by the majority, it should restrict itself only to the notions of English-

34. 342 U.S. 165 (1952). It has been asserted that these developments were presaged in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the Court struck down an Oklahoma statute that provided for sterilization of those convicted of certain felonies but which did not apply to what were in effect "white-collar" crimes, such as embezzlement. *Kast, Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. Rev. 716 (1969) (hereinafter cited as Kast). Professor Kast argues that Justice Douglas' opinion for the Court sufficiently intimates that he would have struck down the Oklahoma statute even if it had applied to all felons. *Id.* at 732-35.

35. Even if the Court had been prepared at that time to hold that the privilege against self-incrimination applied to the states, it would also have been forced to go further and overrule a line of cases delimiting the scope of the privilege, the validity of which was in fact subsequently reaffirmed. *See Schmerber v. California*, 384 U.S. 757 (1966) (forceful taking of blood sample to determine if accused was driving while intoxicated); *cf.* Gilbert v. California, 388 U.S. 263 (1967) (compulsion of handwriting sample).

The Court could, of course, also have struck down the conviction on the ground that it was based on the use of illegally seized evidence, but at that time it was unwilling to extend the federal exclusionary rule to the states.

36. 342 U.S. at 169. The conviction also did not respect those personal liberties "implicit in the concept of ordered liberty." *Id.*

37. 342 U.S. at 174 (Black, J., concurring); *id.* at 177 (Douglas, J., concurring).
speaking peoples as to what are the immutable and fundamental principles of justice.\textsuperscript{38}

\textit{Rochin} thus highlights the problem. It would certainly be nice if the role of the Court in constitutional review could be restricted to the application of the clear meaning of the Constitution. Unfortunately, there are very few things that are clearly enjoined or forbidden by the Constitution. What is involved is more than the old question of "meaning," although what the Constitution actually means presents enough problems.\textsuperscript{39} By no stretch of the imagination could the myriad of constitutional doctrines evolved over the past 175 years be said to be implicit in the "meaning" of the Constitution in any normal sense of the word. And, of course, certain phrases, such as "due process of law," are so vague as to be practically meaningless in themselves. The only way to give such a phrase anything approaching a precise meaning is to engraft on it 18th-century notions of "due process of law." Even then, however, "meaning" is a misnomer.\textsuperscript{40} Due process of law, in a sense, means what the Court says it means.

The majority in \textit{Rochin} was therefore correct in rejecting a plain meaning approach. The actual grounds for the decision are so broad and so relatively devoid of precise meaning, however, as to be equally unacceptable. The case is a perfect illustration of the inadequacy of the view of justice as action in conformity with a quasi-logical chain of reasoning leading back to the fundamental values of a society.\textsuperscript{41} Assuming that society \textit{does} have a fundamental commitment to "those canons of decency and fairness which express the notions of justice of English-speaking peoples," what specific legal conclusions follow? Certainly those same standards could and have permitted the exclusion of Negroes from juries, a procedure which, even if permitted in practice, was declared unlawful in the 19th century.\textsuperscript{42}

\begin{itemize}
\item[38.] \textit{Id.} at 176.
\item[39.] See \textit{Objectivity}, supra note 7, at 1327 n.73.
\item[40.] Cf. note 25 supra.
\item[41.] See notes 1-4 and accompanying text supra.
\item[42.] \textit{Strauder v. West Virginia}, 100 U.S. 303 (1874); \textit{Ex parte Virginia}, 100 U.S. 339 (1879).
\end{itemize}

In \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937), where Justice Cardozo first enunciated "the concept of ordered liberty" standard (see note 36 supra), the Court unanimously upheld a conviction and the resulting sentence that arose under questionable circumstances. Defendant was found guilty of murder in the second degree by a state court jury and was sentenced to life imprisonment. Connecticut, in what was a very rare practice in this country, which is now almost certainly no longer constitutional (see \textit{Benton v. Maryland}, 395 U.S. 784 (1969), \textit{explained in Price v. Georgia}, 398 U.S. 323, 330 n.9 (1970)), permitted an appeal by a prosecutor on the basis of errors of
What most nonlawyers would find offensive about the procedures used in *Rochin* is the pumping of the suspect's stomach against his will. And yet, this is the one aspect of the case that one cannot be sure would merit reversal today, at least if the police had an arrest or a search warrant. As recently as 1966, the Court reaffirmed the right of authorities to forcibly take a blood sample from a motorist whom they have probable cause to believe is intoxicated.\(^{43}\) While forcibly pumping one's stomach is different from forcibly taking a sample of one's blood, there are some disturbing similarities. In short, the trouble with the principles applied in *Rochin* is that they both permit too much and prohibit too much. Insofar as they are used in legal reasoning, they create somewhat the same effect as playing poker with deuces wild. More than that, all assertions of some sort of *Volksgeset*, like "the notions of justice of English-speaking peoples," rest, at least implicitly, on the unsubstantiated assumption that there is a natural aristocracy whose moral principles should serve as community standards.\(^{44}\) The law, of course, is shot through with vague notions like those enunciated in *Rochin*, but the utility of such terms or rules is as a convenient shorthand for a large group of somewhat related cases to which one must go for guidance.\(^{46}\) The disturbing thing about *Rochin* is that the broad notions used were not shorthand references to the cases against which the instant case was measured but were themselves the basis for the decision. It certainly is disturbing, as Justices Black and Douglas pointed out, to think of judges with a roaming warrant to enforce their conception of the fundamental notions of English-speaking peoples about anything.

2. *The Expansion of "Judicial Legislation"*

If *Rochin* were an aberration, it might hardly be worth the effort to pursue the inquiry. In recent years, however, the phenomenon has be-

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\(^{44}\) As John Chipman Gray has said:

The jurists set forth the opinions of the people no more and no less than
are the specially educated or trained class in a community set forth the opinions of that community... They in no other way set forth the *Volksgeset*
in the domain of Law than educated physicians set forth the *Volksgeset* in the matter of medicine.


\(^{45}\) See note 8 and accompanying text *supra*. 

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come more acute. The Court has often held general regulatory legislation unconstitutional not because similar legislation had been held to be unconstitutional in previous cases or because it conflicted with some relatively precise provision in the Constitution, but because of its incompatibility with the Court's notions of what was right and proper. In the most famous of these cases, Griswold v. Connecticut, the Court struck down a Connecticut law prohibiting the use of any drugs or devices for the purpose of preventing conception, apparently under the due process clause of the Fourteenth Amendment. An increasing inclination to examine the "merits" of general legislation and to explore the motives behind such legislation has also been evidenced in such widely different types of cases as City of El Paso v. Simmons and Reitman v. Mulkey.

47. 379 U.S. 497 (1965), where the Court upheld, against a contract clause objection, a Texas statute reducing to 5 years the previously unlimited right to repurchase state land which had been forfeited for nonpayment of interest on the unpaid balance of the original sales price. The Court held that the contractual right to repurchase after forfeiture was not the "central undertaking of the seller nor the primary consideration for the buyer's undertaking." Id. at 514. Accordingly, the statute restricting the right of repurchase was not unreasonable. Justice Black dissented, id. at 517, on the ground that the reasonableness of the statute was irrelevant. There were substantial differences between Simmons and the closest analogous case, where, at the height of the depression, a state statute extended, for a fixed period, the time in which the equity of redemption could be exercised and prohibited foreclosures on defaulted mortgages. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). That statute was upheld because of the national economic disaster and because that statute provided that the mortgagee must be paid a reasonable rental for the period in which he could not exercise his rights. To Justice Black the crucial difference in Simmons was the absence of a provision of compensation.
48. 387 U.S. 369 (1967), aff'd 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966). The California Supreme Court clearly indicated that California, having adopted fair housing legislation, could not repeal it either by constitutional amendment or by subsequent legislation. The California court also held that a private property owner who terminated a month-to-month tenancy for racial reasons could not resort to the courts for assistance because it would involve "state action." (Since Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), it may be true that the tenant cannot be ejected, not because of any state action but because of the 1866 Civil Rights Act). Rather than deal with either of these issues, the Court in a 5-to-4 decision treated the California Supreme Court's opinion as a finding that Proposition 14 was part of a state plan to encourage racial discrimination. "The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned." 387 U.S. at 381. Professor Black had argued that Proposition 14 was unconstitutional because, by making open housing legislation a constitutional matter, it made such legislation harder to enact. Black, The Supreme Court 1966 Term, Foreword: "State Action," Equal Protection and California's Proposition 14, 81 Harv. L. Rev. 69 (1967). This was the approach taken by the Court in Hunter v. Erickson, 393 U.S. 385 (1969), where the Court struck down an amendment to the charter of the City
Finally, in an important series of cases, the Court has read new life into the moribund equal protection clause of the fourteenth amendment as a restraint on the powers of state legislatures and, through the due process clause of the fifth amendment, as a restriction on congressional power. The actual parameters of this new doctrine, which has sometimes been referred to as "substantive equal protection" and at other times as a resurrection of "natural law," are unclear. From humble beginnings in the field of criminal procedure, it had blos-
somed, in Shapiro v. Thompson,54 into a tool that would seemingly allow the Court to inquire into the merits of almost any legislation. In Shapiro, for example, the Court, relying upon the equal protection clause and upon cases involving a federal right to travel from one state to another that could not be taxed, criminally prescribed, nor otherwise physically impeded by the states, declared that neither the states nor Congress itself could impose a 1-year residency requirement for eligibility for public welfare.

It is difficult to sketch any parameters for the doctrine emerging from these cases. It is, for example, not always clear whether the Court is adding new categories of impermissible or "suspect" classification, such as wealth,55 political association,56 sex,57 and legitimacy,58 to the fourteenth amendment's known concern with racial classification, so that distinctions based on these criteria must not only be rational but must also satisfy compelling state interests; or whether the Court is adding new rights, such as the right to an absolutely equal chance to vote,59 the right to travel,60 and the right of political association,61 to the traditional right to a fair trial, as to which differences with regard to accessibility among different classes of people are highly "suspect" and require a "strong justification." Most of these cases can readily be analyzed as involving both one of the so-called suspect classifications and one of the "rights" just alluded to. Others involve at least two

the fact that it was fairly certain that the drafters of the fourteenth amendment did not mean to reach matters like poll taxes.

56. See Williams v. Rhodes, 393 U.S. 23 (1968).
of these rights. Most of the recent equal protection cases have involved race, wealth, or voting rights or some combination of them. In each of the cases in which these new fundamental rights and suspect classifications were established, however, the statutes overturned were not patently unreasonable.62

Once it goes beyond some such threshold reasonableness test, the Court necessarily becomes embroiled in discussions of the desirability of the legislation before it. With each new fundamental right and suspect classification, the Court expands the area in which it claims the competence to examine the merits of legislative enactments. Moreover, this discretionary authority is broadened by the fact that it is often difficult to determine what these cases stand for,63 either collectively

62. See Karst, supra note 34. See also note 52 supra. One might note, moreover, that "equality" is too unwieldy a concept with which to resolve the problems of modern life. Indeed, for many people the issue is "minimal" not "equal" protection. See Michelman, supra note 52. A substantive due process approach might be more rational. This would certainly seem to be a natural development from the discussion of Karst, supra note 34, and of Michelman, supra note 52. Cf. Engdahl, Requiem for Roth: Obscenity Doctrine Is Changing, 68 Mich. L. Rev. 185 (1969), where the point is made that for adequate protection of speech, the all-or-nothing absolute approach will have to be replaced by something like a substantive due process approach. The late Justice Harlan expressed a similar preference for "procedural due process" over "equal protection" as a means for adequately protecting the rights of the defendants in criminal cases. See Williams v. Illinois, 399 U.S. 235, 259 (1970) (concurring opinion). On the expansion of procedural due process outside the criminal area, see Note, The Growth of Procedural Due Process into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . in Our Economic System," 66 NW. U.L. Rev. 502 (1971). There is some indication that the Court is moving in the direction of redefining the scope of the equal protection clause to meet these difficulties. See Roe v. Wade, 410 U.S. 113 (1973); cf. Vlandis v. Kline, 412 U.S. 441 (1973).

63. Thus, Williams v. Rhodes, 39 U.S. 23 (1968), an equal protection case which struck down a ballot eligibility requirement that favored existing parties, has quite different and more restricted implications if it is considered as a right to political affiliation case rather than as a right to vote case, which a fair reading of the case would also certainly support. But in McDonald v. Board of Elections Commrs', 394 U.S. 802 (1969), the court showed deference to a legislative judgment that would be inconsistent with an interpretation of Williams that involves recognition of a right to an absolutely equal chance to vote. In McDonald, a group of prisoners awaiting trial unsuccessfully challenged Illinois' denial of the right of prisoners to vote by absentee ballot. Indeed, in his dissent in Shapiro v. Thompson, 394 U.S. 618, 659 (1969), Justice Harlan continued to maintain, as he had in his concurring opinion in Williams v. Rhodes, 393 U.S. 23, 41 (1968), that Williams only involved the narrower right of political association. On the other hand, in two subsequent cases, O'Brien v. Skinner, 414 U.S. 524 (1974) and Goosby v. Osser, 409 U.S. 512 (1973), the Court decided in favor of pretrial detainees and explained that in McDonald there had been insufficient proof of an absolute bar to voting. The problem of interpretation was, of course, even greater with respect to Shapiro v. Thompson, which will be discussed in text accompanying note 10 infra. See also the discussion of the scope of Griswold v. Connecticut, 381 U.S. 479 (1965), in text accompanying note 88 infra.
or individually, and therefore to determine what their precedential value is over and above the proposition that it is proper to carve out new rights whenever it seems necessary.

The overriding question is: how is the Court to decide whether to create new rights, minimal or otherwise, that, except perhaps in exceptional circumstances, are immune from statutory infringement either on due process or equal protection grounds? Similarly, how would it proceed either in deciding when a "suspect" classification made a statute invalid or in creating new "suspect" classifications? The distinctions made by the Court are not adequately justified. Griswold held that there is a right to marital privacy, but subsequent cases have held that there is no such fundamental right to education or to welfare. Similarly, a woman's right to have an abortion has been held to be almost completely beyond state control during the first trimester of pregnancy but not afterwards. It is no wonder that the Court's decisions have been subjected to so much criticism.

C. The Attempt To Adapt the Traditional Model of Judicial Decisionmaking to the Expanded Scope of Judicial Review

The approach taken by the Court in Rochin clearly will not do. The only way for principles such as "the concept of ordered liberty" or the "notions of justice of English-speaking peoples" to play their proper role is to be fleshed-out by a great number of cases applying them. Then the cases themselves would serve as constraints on judicial decisionmaking with these broad principles as but shorthand references to the cases with not much, if any, independent normative significance. Whether, in the area of judicial review of general regulatory legislation, a sufficient jurisprudence could be developed in any reasonably finite period of time is questionable, however, given the wide range of such legislation.

As unsatisfactory as the Rochin-type approach is, the possible alternatives suggested by the Court and commentators have not been much better. Perhaps the most valiant, but nevertheless unsuccessful, effort to articulate the bounds of judicial decisionmaking to insulate judicial review of general regulatory legislation from the charge that the

67. See text accompanying notes 138-46 infra.
Court is sitting as a “super-legislature” is *Griswold v. Connecticut.*

Justice Douglas, writing for the Court, struck down legislation restricting the use of contraceptive devices by married couples on the basis of a constitutionally protected right of privacy evidenced in the right of association found in the penumbra of the first amendment, in the third amendment’s prohibition against the quartering of troops in times of peace in any house without the consent of the owner, in the fourth amendment’s affirmation of the “‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,’” and in the fifth amendment’s protection against self-incrimination.

Further support was found in the ninth amendment’s declaration that “the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”

Justice Goldberg, who also joined in the opinion of the Court, placed particular emphasis on the ninth amendment as indicating the existence of other fundamental rights beyond those enumerated in the Bill of Rights.

Justices Harlan and White concurred separately in the judgment but not in the opinion of the Court. Justice Harlan expressed his opposition to the incorporation doctrine, which he considered a poor device for controlling the personal predilections of the judiciary. The Connecticut statute was unconstitutional rather, because, in the language of *Palko v. Connecticut,* it violated basic values “‘implicit in the concept of ordered liberty.’” The necessary judicial self-restraint in the application of this standard could only be obtained by

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69. 381 U.S. at 484. It has also been pointed out that, insofar as these amendments are concerned with privacy at all, they are concerned with a very different sense of the term “privacy” and that the Court very improperly attempts
to create the illusion of a single referent for “privacy”. . . . Just as a kaleidoscope presents an image for which there is no corresponding object, the *Griswold* opinion presents a word “privacy” for which there is no referent. Here the pun does not consist in moving from one sense to another, but in contriving a composite term whose sense is illusory.


70. 381 U.S. at 484.

71. Whether a “principle is ‘so rooted . . . as to be ranked as fundamental’” was to be determined by the “‘traditions and [collective] conscience of our people.’” *Id.* at 493.

72. *Id.* at 499-502. In his concurring opinion in *Williams v. Florida,* 399 U.S. 78, 117 (1970), Justice Harlan strongly reiterated that “incorporation,” by attempting to accommodate diverse state practices, can also be used to dilute the protections afforded by the Bill of Rights against federal infringement.

73. 381 U.S. at 300.
continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.  

Justice White, on the other hand, did not find the question of the source of the Court’s power to strike down the statute worth extended debate. Statutes significantly encroaching upon personal liberty had been struck down in the past under the due process clause of the fourteenth amendment where no subordinating and compelling state interest had been established. Moreover, Justice White did not see how the ban on the use of contraceptives implemented Connecticut’s purpose to deter illicit sexual relationships, when the sale of contraceptives to prevent disease was legal under Connecticut law. Under these circumstances he had little difficulty in finding the Connecticut statute unconstitutional.

It is unnecessary to belabor the unsatisfactory nature of most of the arguments used by the majority. Many of their weaknesses were pointed out in the dissents of Justices Black and Stewart. The suggestion, if such was intended, that the ninth amendment is a source of power for the courts to fashion new rights entitled to protection Black considered as unfounded as it was novel. If, on the other hand, as actually seems to be the case, the discussion of the ninth amendment was only meant to buttress the contention that there are constitutionally protected fundamental rights which are not specifically enumerated in the Constitution, then the discussion is largely irrelevant, since it begs the important questions of what are these rights and what are their sources. It is thus not surprising that subsequent cases have not de-

74. Id. at 501.
75. Id. at 502-03.
76. Id. at 505-07.
77. Justice Black, in a very eloquent dissent, argued that reliance upon the grounds used by the majority was tantamount to claiming that the judiciary had the power to make law, which was certainly not the intention of the founding fathers. Id. at 513.
79. This is all that Justice Goldberg claimed that he was doing. See Griswold v. Connecticut, 381 U.S. 479, 486, 492 (1965). See also 1966 DUKE L.J. 562, 571-72.
veloped the point very much. In *Roe v. Wade*, however, where the Court held that the states could not prohibit or seriously limit the availability of abortion during the first 3 months of pregnancy, Justice Blackmun, author of the majority opinion, declared:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Unquestionably, statements like this have contributed to the almost universal conclusion that the reasoning in *Roe v. Wade* is simply unconvincing. A valiant attempt has nevertheless been made to justify the decision by abandoning its premise of an amorphous right of privacy. Some argue that what the case involves, rather, is the question of who decides the abortion issue—the woman, on the basis of the medical advice given her, or the state.

Admittedly, a "right to decide" seems more definite than a potentially limitless right of privacy, but it does not really resolve the problem. The state can and does deny the individual the right to decide to smoke.

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This student note contains citations to the pre-*Griswold* literature on the scope of the ninth amendment. What is troubling about Justice Goldberg's opinion is that, if this is all he meant to show, the discussion is largely irrelevant and hardly worth the extended treatment he gives it. Justice Douglas, writing for the Court, also briefly mentions the ninth amendment. One might conclude that Justice Douglas was thereby only making the minor point which Justice Goldberg claimed to be making; namely, there are constitutionally protected rights not specifically mentioned in the Constitution. The difficulty with this conclusion is that Justice Douglas has made too many statements criticizing attempts by the Court to find standards outside of the express provisions of the Constitution. See, e.g., *Rochin v. California*, 342 U.S. 165, 177 (1952) (Douglas, J., concurring). Presumably that is why he found the right to privacy, if not in the Constitution's specific provisions, at least in the penumbra of its specific provisions. Considered in this light, Justice Douglas' reference to the ninth amendment is itself a source of rights. See also Justice Douglas' dissent in *Poe v. Ullman*, 367 U.S. 497, 516 (1961), where he talked about a right of privacy without reference to the specific provisions of the Bill of Rights. *Id.* at 518-19, 521. Cf. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

81. *Id.* at 153.
marijuana, to drive a motorcycle without wearing a crash helmet, and to watch pornographic films in an adult art theater. Moreover, in the abortion context itself, the Court held that the state can substantially limit a woman's right to have an abortion in the second trimester of pregnancy. It is difficult to see why the mother's right is so absolute in the first 3 months that the state is virtually powerless to protect what it may perceive as the "right" of the fetus during that period. Talk about when the fetus quickens and when the fetus may be said to be a "human being" is interesting but does not seem to dictate any particular conclusion.

Indeed, one of the problems with both *Griswold* and *Roe* is that they seem sui generis. If there is such a right of privacy, what does it encompass? With regard to marital privacy, *Griswold* compels the conclusion that married couples, at least, can engage in deviant sexual practices in the "privacy" of their bedrooms. Beyond that, however, the concept is unclear. While the dearth of more direct authority

84. See People v. Aguiar, 257 Cal. App. 2d 597, 65 Cal. Rptr. 171, cert. denied, 393 U.S. 970 (1968). Before the *Aguiar* decision it was very seriously urged that, after *Griswold*, statutes punishing the possession of marijuana were unconstitutional. See Comment, The California Marijuana Possession Statute: An Infringement on the Right of Privacy or Other Peripheral Constitutional Rights?, 19 Hastings L.J. 758 (1968). The editors of this journal were candid enough to note in an addendum that their argument had, in the interim, been totally rejected in the *Aguiar* case. Cases like *Aguiar* show that the broad generalities on which cases like *Griswold* are pitched cannot be taken seriously without very serious risk of error. On the use of marijuana and fundamental human rights, see Note, Substantive Due Process and Felony Treatment of Pot Smokers: The Current Conflict, 2 Ga. L. Rev. 247 (1968).


86. See Paris Adult Art Theater I v. Slaton, 413 U.S. 49 (1973). For some suggestions as to how the right might and should develop in these areas, see Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U. L. Rev. 670 (1973).


88. It does not encompass, apparently, the activities involved in the cases cited in notes 84-86 supra.

forced the majority to resort to language about "penumbras" and "rights of marital privacy" and "the values implicit in the concept of ordered liberty," one would have thought that on the question of marital privacy a line of cases dealing with the use of the testimony of one spouse to convict the other might have been considered at least remotely analogous. In several of these cases, the Court declared that Congress, and by delegation even the courts, can abolish the common-law privilege permitting a criminal defendant to exclude the testimony of his spouse.90 Indeed, in one case, the Court expressly held that, in some circumstances, one spouse can even be compelled to testify against the other.91 One might argue in defense of the Court that these cases do not involve a constitutional question, but this only begs the question. It is unclear why judicial self-restraint should lead to deference to legislative judgments and common-law practice here but not in either the birth control or abortion contexts.

Justice White, in Griswold, would appear to be on firmer ground in eschewing rubrics and concentrating primarily on the actual justification advanced before the Court by the state of Connecticut. Connecticut attempted to justify the statute as part of its campaign against sexual promiscuity.92 Since, however, Justice White found that "it would appear that the sale of contraceptives to prevent disease is plainly legal under Connecticut law," the justification advanced appeared somewhat strained, to say the least.93 In fact, this apparent disparity between asserted and actual state justifications was one of the factors stressed in a later case in which a Massachusetts statute that was applied to unmar-

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91. Wyatt v. United States, 362 U.S. 525 (1960). Wyatt involved the common law exception to the privilege of a party to exclude his spouse's adverse testimony where the party had committed an offense against the spouse. The question was whether a husband's violation of the Mann Act by transporting his wife, a professional prostitute, across the state lines for purposes of prostitution could be considered an offense against the wife in the sense that she was the "victim" of the crime. Despite the fact that there was evidence that the wife had helped manage the enterprise (see id. at 533 (Warren, C.J., dissenting)), the Court held that she was the "victim" and could be compelled to testify. Id. at 530.
92. See text accompanying notes 75-76 supra.
ried persons was struck down. Of course, the Court had no other choice but to stress factors such as this, unless it was prepared to hold that the constitutional right of privacy, however ascertained, includes the right to engage in fornication. At the time the Connecticut statute was enacted, some 80 years prior to the Court's decision in Griswold, the probable justification present in the minds of the legislators was that contraceptive devices were per se plainly immoral. Connecticut's reluctance to urge this ground as the basis for the statute is understandable, but it left the statute with no seeming justification at all. Assuming that statutes have to be justified, however, how much of a justification would have satisfied Justice White? Moreover, does not a court's assumption of the power to judge the adequacy of a justification in effect constitute the establishment of the courts as super-legislatures?

The same sort of problems are presented in Shapiro v. Thompson, the welfare residency case. Assuming that the states cannot, consistently with the commerce clause, prevent people from peacefully traveling from one state to another, and assuming that the first amendment prohibits the Congress from denying a man the right to express unpopular ideas as the price of granting him a passport, where is the basis for a general right to travel, protected by the due process clause of the fifth amendment, which Congress cannot infringe by imposing, or authorizing the states to impose, a 1-year residency requirement for eligibility for welfare? What other congressional action does this "right to travel" forbid? The Court in Shapiro did not

94. Eisenstadt v. Baird, 405 U.S. 438, 447-50 (1972). The statute was struck down because, unlike the statute involved in Griswold, it discriminated, inter alia, between married and unmarried couples.

95. See Comment, supra note 68, at 99-100. Contraceptive devices were considered obscene and in the same category as pornography. Although Catholic opinion was not very instrumental in leading to the enactment of this and other contemporaneous anticontraceptive legislation that was passed in the wake of the federal Comstock Act, Catholic opinion, not necessarily always supported by the Church, was very instrumental in resisting attempts to repeal this legislation. Id. at 99-101. See also Dienes, Moral Beliefs and Legal Norms: Perspectives on Birth Control, 11 St. Louis U.L.J. 536, 542-47 (1967).


99. In Shapiro v. Thompson, 394 U.S. 618 (1969), the Court held that the states could not impose 1-year residency requirements for welfare benefits and that Congress had not authorized such requirements; that, if Congress tried to, the attempt would be unconstitutional; and, finally, that Congress' imposition of a 1-year residency requirement in the District of Columbia was unconstitutional.
intimate any views on the validity of residency requirements on voting, tuition at state universities, and admission to the Bar, but suggested that such statutory requirements either might be justified by compelling state interests or might not penalize the constitutional right to travel. 100 Only minimal residency requirements can now be imposed on voting 101 and, some lower federal courts have held, on admission to the Bar. 102 But a state apparently can impose a 1-year residency requirement for eligibility for in-state tuition at state universities 103 and for eligibility for divorce 104 and it can impose zoning requirements that prevent substantial numbers of people from moving into a particular area. 105

The Court's extreme reluctance in Shapiro to discuss its possible resolution of these questions indicates how little idea it had of what course it might be committing itself to. 106 What is particularly aggravating about Shapiro is that the Court struck down the 1-year residency requirements for eligibility for public welfare despite the fact that there were rational reasons for, as well as against, such requirements. 107

100. Id. at 638 n.21.
106. Of course, in proceeding case-by-case, a court is not and should not be expected, in any particular case, to provide "legislative-like" pronouncements as to the ambit of its decision. Nevertheless, as a court, it is committing itself to deciding in a similar way all cases that are not significantly different from the instant case. This is what consistency in judicial decisionmaking means. There is no room for the purely ad hoc sui generis decision. But see Wisconsin v. Yoder, 406 U.S. 205 (1972). For a discussion of consistency and the place of hypothetical cases in judicial decisionmaking, see Objectivity, supra note 7, at 1336-37.
107. The Court held that a rational relationship between welfare residency requirements and permissible state objectives was not enough. Only a compelling state interest was enough, and none of the justifications offered met this test. 394 U.S. at 634-38. In the course of this examination of the justifications for the residency requirements, the Court presented reasons against the imposition of residency requirements and then disingenuously concluded that the justifications for residency requirements did not even seem to meet the rational connection test. Id. at 638. In his dissent, Chief Justice War-
Whatever might be said about welfare residency requirements, they were not "uncommonly silly." Moreover, the record before the Court in Shapiro indicated that the presence or absence of residency requirements had little practical effect on interstate travel. Nevertheless, the Court held that only the most compelling reasons could justify such legislative restrictions and it found no such compelling reasons in the record.

The Court’s willingness to evolve such “rights” and its confidence in its ability to judge the weight of legislative justifications for legislation has ominous portents. Considering the massive economic and social needs of the country, the possibility that such simplistic and fragmented declarations of rights could paralyze meaningful reform is by no means fanciful. The so-called right to send one’s child to private elementary schools and private high schools may already have killed all chances of actually producing biracial education in public schools in accordance with the hope generated by Brown v. Board of Education. Of course, people have an interest in “privacy” and of course they have an interest in sending their children to private schools, if they can afford it. But to talk about interests is one thing. This is what legislatures do. To talk about “rights,” which is what the courts do, is another.

Thus, on its face, each of these landmark decisions provides little more than an assertion of its result. If these decisions are to be seen as more than prudential judgments in which the Court has substituted its judgment for the legislature’s, they must be reconciled with traditional notions of the judicial function. We must be shown why the right to be free from residency requirements for welfare eligibility involved in Shapiro is more basic than the right to an education, and why, if wealth is a suspect classification which prevents the imposition of court costs upon indigents in divorce actions, it does not do so in bankruptcy proceedings.

ren stated why the justifications rejected by the majority seemed very rational to him. Id. at 644-55, especially id. at 645-47, 650-52. Three other Justices agreed.


III. TOWARD A MORE ADEQUATE MODEL OF JUDICIAL REVIEW

A. Recent Proposals

Most of the literature discussing the Court's performance in the extended area of judicial review upon which we have been focusing has been critical. Indeed, one of the criticisms of this criticism has been that it has been too largely negative.114 It has been suggested that the failure of the critics to come up with alternate rationales had led the Court largely to ignore the criticisms as being merely intellectual games played by academicians who are divorced from the responsibility borne by the courts as active participants in the complex process of government.115 Nevertheless, while most of the academic discussion has been either critical or even only descriptive, there have been some attempts to fashion more adequate rationales and models of how the Court may go about the process of judicial review of general regulatory legislation.116

1. A Less Restrictive Alternative

Most of the suggested rationales and models for accommodating the Court's role in the judicial review of general legislation to prevalent notions as to the proper functioning of a court of law have themselves, quite appropriately, been built upon suggestions contained in the Court's own opinions. One such model is the "less restrictive alternative" test.117 At one time the Court was quite prepared to invalidate regulatory legislation on the ground that a less restrictive alternative was available to accomplish substantially the same legislative purpose. The principle was one particularly well adapted to judicial review of economic regulation. But, the Supreme Court engaged in a "precipi-

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114. Ely, supra note 18, at 943-49.
115. Id.
116. One solution is, of course, that the Court should never engage in any such review of this kind of legislation, but as this is really impossible—given the evolution of our constitutional structure—it is not an alternative worth pursuing.
tate withdrawal from application of the less-restrictive-alternative principle to economic regulations—in 1941 with Olsen v. Nebraska ex rel. Western Reference & Bond Association, Inc.”

About the only area where the principle seems to have any continued viability is that involving so-called “fundamental personal liberties,” particularly first amendment rights. There is no question that the Court’s opinions in this area do contain statements about less restrictive alternatives or “less drastic means.” However, “the phrase ‘less drastic means’ does not so much explain the result as announce it.” The Court has failed to give a careful analysis of the test, probably because “it does not believe itself competent to do so.” It obviously does not have the necessary staff of experts to do so, and one does not see how, given the nature of courts, it could or how the Court could even judge the adequacy of the evidence adduced by the parties. The problem of weighing the competing values does seem less difficult in the economic regulation area, but here the factual issues are more complex. The teaching of history, as illustrated by the course of the Court’s opinions, seems to be that a thoroughgoing use of the less restrictive alternative test in the process of judicial review would probably require a degree of intrusion into the legislative process that is unacceptable to most. Moreover, even if the Court were able to develop the administrative capability for implementing the test, the problem would remain how to decide the close case in which the less restrictive alternative was only marginally better than the one chosen by the legislature. Would the legislative judgment be upheld? How much margin of difference would be allowed?

2. The Gunther Model

A more modest but perhaps more promising model has recently been proposed by a perceptive observer of the Court, Professor Gerald Gunther.

118. Struve, supra note 117, at 1463, citing 313 U.S. 236 (1941). This trend was already well established in 1937. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). It is unlikely to be reversed. See North Dakota State Bd. of Pharmacy v. Snyder’s Drug Stores, Inc., 414 U.S. 156 (1973), where the Court subjected the regulatory legislation in question to what it would be charitable to call even minimum scrutiny.


120. Id. at 472.

121. For a discussion of the great difficulties the courts, including the Supreme Court, have encountered in adequately assessing the empirical evidence in several crucial areas of constitutional law involving questions of basic educational policy, see Goldstein, Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny, 120 U. Pa. L. Rev. 504 (1972); Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275 (1972).
Gunther first considers the two-level, equal protection doctrine evolved by the Warren Court. On the one hand, legislation regulating certain interests, particularly economic interests, was subjected to minimal scrutiny and was thus upheld upon a finding of minimum rationality. On the other hand, legislation regulating "fundamental interests" was subject to strict scrutiny and would only be upheld if it satisfied a "compelling state interest." The former approach makes judicial review of legislation a largely empty formality; the latter smacks of the repudiated "'Allgeyer-Lochner-Adair-Coppage constitutional doctrine.'" For Gunther, there is something unseemly in the Court disagreeing with legislatures in the choice of ends in the absence of a direct constitutional mandate. What is needed, rather, is some requirement that the state seek adequate means to achieve its ends, whatever they might be. The new strict-scrutiny equal protection lends itself to disputes over appropriate ends in the same way that the old substantive due process did. Believing that a resurrection of substantive due process is more likely to focus disputes on ends rather than means, Gunther proposed that the old two-tier equal protection tests be abandoned and replaced by a single test which subjected general regulatory legislation to more than minimal and less than strict scrutiny:

Stated most simply, it would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends. The equal protection requirement that legislative classifications must have a substantial relationship to legislative purposes is, after all, essentially a more specific formulation of that general principle.

122. Gunther, supra note 52.
123. Id. at 8-10.
125. Gunther, supra note 52, at 20. Gunther's analysis was based in part on his observation that the Court itself was moving in this direction in a number of decisions in the October, 1971, term. Id. at 25-37. Ostensibly the Court in these cases was applying the old "rational connection" test, but the examination was more thorough and less deferential to the legislative judgment than was customary under this test. Two cases in particular were stressed: Reed v. Reed, 404 U.S. 71 (1971), invalidating an Idaho statute giving men an absolute preference over women in any given category for appointment as an administrator of a decedent's estate; and Eisenstadt v. Baird, 405 U.S. 438 (1972), striking down Massachusetts' contraceptive statute. On the question of a new test for the constitutionality of legislation, see Comment, Fundamental Personal Rights: Another Approach to Equal Protection, 40 U. Chi. L. Rev. 807 (1973); Note, The Decline and Fall of the New Equal Protection: A Polemical Approach, 58 U. Va. L. Rev. 1489 (1972). In subsequent decisions the Court has indicated, however, a reluctance to abandon the two-tier test. See Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414
Should the Court adopt a new equal protection test? For reasons that will be made clear in the following sections of this Article, I would strongly urge not, although I certainly endorse the motives for which the test was proposed. What, after all, is it for legislation "substantially [to] further legislative ends?" Are there general tests for determining it? More to the point, does it not have a tendency to force constitutional disputes into the mold of sterile semantic quibbles in which the real grounds of decision are obscured?  

B. TOWARD A NEW MODEL OF JUDICIAL REVIEW

Any attempt to construct an adequate model for the performance of an extended type of judicial review must involve structural changes in the way cases are decided. Criticism that merely exhorts the Court to do better is in the last analysis sterile and quite naturally inclines the Justices to dismiss it and even perhaps to stop trying on the ground that nothing could satisfy their critics. One can always do a better job at anything. It is therefore incumbent upon the constructive critic to propose an alternative model of judicial review. The alternative models thus far proposed have been inadequate, in large part because they have not involved a sufficient structural change in the Court's current mode of procedure.

1. A New Procedural Device: The Heightened Use of Legislative Findings

When lawyers are asked to show why legal reasoning is more rigorous than other forms of informal argumentation, they have recourse to the authoritative procedures for manipulating the raw materials of the legal process—the statutes and cases. Accordingly, a solution to our present impasse concerning judicial review of general legislation might be found in a new procedural device that permits the Court to be more rigorous in its review of regulatory legislation. One possible way to give content to "due process of law" or "equal protection of the laws," when they are used as devices for authorizing courts to make a general

U.S. 156 (1973); Kusser v. Pontikes, 414 U.S. 51 (1973); Vlandis v. Kline, 412 U.S. 441 (1973). Indeed, certain other decisions have evidenced a willingness by the Court to evolve a three-tier equal protection model. See, e.g., Geduldig v. Aiello, 417 U.S. 484 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). These are cases where the rational connection test was applied fairly rigorously, as Professor Gunther suggests is necessary.

126. For an instance of the unproductive nature of such disputes, see note 107 supra.

127. See text accompanying note 114 supra.
review of legislation, is to require legislatures to give notice when legislation is pending and to afford the public an opportunity to submit views for and against the proposed legislation. If the legislation is controversial, perhaps public hearings should also be held. This, of course, is roughly what is presently done on the federal level and in a great many states. Where many states presently fall down, however, is in the recording and preservation of the legislative record so constructed. It would not, therefore, be hopelessly unrealistic to suggest that it might be worth the effort, at both the federal and state levels, to try to formalize and improve, either by statute or constitutional amendment, the notice and hearing requirements for legislation.

Full participation by the citizenry in the legislative process, no matter how desirable as a theoretical proposition, is, of course, impossible in a heterogeneous and complex society. It is possible, however, to increase the level of participation in a representative democracy with the legislative forum, constitutionally the official vehicle for the expression of popular sentiment, as one of the ideal places on which to focus such efforts. Public participation in the administrative process, although a commendable objective in itself, is not an adequate substitute. In many cases, basic policy decisions have either already been made or purposely avoided, resulting in ineffectual and frustrating participation in the administrative process for those who disagree with those legislative choices. Public participation in class actions, even if the

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128. For a valuable review of the literature on participatory democracy, see 29 Pub. Ad. Rev., Jan.-Feb., 1969, which is entirely devoted to this subject.

129. Such institutional arrangements would partially satisfy Lowi's criticism of the "pluralism" or "interest-group liberalism" of present-day America, which he sees as characterized by the extralegal nature of the participation of social groups in the formulation of government policy. See T. Lowi, The End of Liberalism (1969).

Increased public participation along these lines might even improve the quality of legislation. Given the fact that the imposing social, environmental, and economic problems of this country will require major legislative intervention if they are to be solved, this is no small matter. Attempts to shirk this responsibility by delegating authority to administrative agencies, with vague and often conflicting guidelines, have not been particularly successful.

130. See Kaufman, Power for the People—And by the People: Utilities, the Environment and the Public Interest, 46 N.Y.U.L. Rev. 867 (1971). It was Judge Kaufman's contention that the frustrations engendered during the protracted administrative and judicial proceedings surrounding the Storm King power project on the Hudson River resulted from the absence of a national policy on the issues involved, a question which could not really be raised and certainly not decided in the Storm King proceedings. For the contention that it is not the application of the Federal Water Quality Control Act amendments of 1972, but the basic policy choices made by the Congress, that need detailed attention by all concerned parties, see Ackerman, Ackerman & Henderson, The Uncertain Search for Environmental Policy: The Costs and Benefits of Controlling Pol-
Court were more inclined to expand the ease with which they may be brought, is an even less adequate substitute for participation at the legislative stage.

One of the effects of the model proposed in this Article would be to intensify the focus on the legislative forum. Under this model, the legislative record compiled at the hearing stage would then be completed by a legislative finding as to the reason and purpose of the proposed legislation. If this had been done in the case of the anticontraception legislation in Griswold, the finding probably would have been that the legislation was designed primarily to give expression to certain religious and moral beliefs. Since this would have been an unconstitutional ground under the standards of the first amendment, there would have been no need to talk about a right of privacy and other rights retained by the people under the ninth amendment or of the basic values implicit in the concept of ordered liberty.

Under the proposed model, due process of law could be construed to mean that no man may be deprived of his liberty without being given a better reason for it than that he has violated some statute. Equal


132. Insofar as the model suggested by Professor Gunther would encourage legislatures to make statements of legislative purpose (Gunther, supra note 52, at 46-47), it is a step in the right direction. It should be noted that, under his model, legislative findings are not required and that the governmental defenders of challenged legislation are permitted to provide the statement of legislative purpose.

133. See note 95 and accompanying text supra.

134. See Epperson v. Arkansas, 393 U.S. 97 (1968), where the Court struck down an Arkansas statute seemingly prohibiting the teaching of evolution in the public schools as a violation of the constitutional prohibition against the establishment of religion. For the view that much of our sex legislation is religiously motivated, see Hefner, The Legal Enforcement of Morality, 40 U. Colo. L. Rev. 199 (1968).

Of course, when the effects of a statute are unclear but nevertheless important in assessing the constitutionality of the statute, statements of legislative purpose may be helpful in assessing the possible effects of the statute. See Note, Legislative Purpose and Federal Constitutional Adjudication, 83 Harv. L. Rev. 1887 (1970). The point made here, of course, goes much farther.

135. In this regard, the first extensions of judicial review beyond the procedural field to what might be called substantive issues were in cases where the courts struck down regulatory legislation because it deprived persons of their property without a jury
protection of the laws could, outside of its limited historical context, likewise be construed to mean that no man may be treated differently from his fellows unless at least some reason for the classification relied upon is given by the legislature. It is not being suggested that courts should assess the wisdom or adequacy of the justifications given by legislatures in support of their handiwork. What is desired is that the legislature make some findings and give some reasons for the legislation it enacts and that it give some opportunity for opponents of the legislation to be heard. The only restriction on the legislature is that, just as the constitutionality of a statute (or its applications or even sometimes its effects)\textsuperscript{136} is judged against the specific provisions of the Constitution and the historical case-by-case interpretation of these and other provisions of the Constitution, so too must the legislative findings supporting legislation not otherwise constitutionally prohibited be measured against the provisions of the Constitution and the case-by-case interpretation of these provisions by the courts. Under our present form of government, it is believed that, if there is full enough discussion, the real reasons for a particular legislative measure will emerge. If, despite these safeguards, a particular legislature is willing and able\textsuperscript{137} to fabricate constitutionally permissible findings and reasons for justifying a measure actually designed to accomplish unconstitutional results, such as the implementation of religious or racial prejudice, then the courts have no alternative but to bow to the legislative will.

Admittedly, this could have been done in \textit{Griswold} if the procedure outlined above had been operative when the statute was enacted. A trial according to the common law. \textit{Corwin, supra} note 25, at 90 n.43, terms this invocation of the right to a jury trial (rather than more general notions such as "due process of law" or "law of the land") "curious," but it certainly does not seem curious to me, even if it was a departure from the previous common law tradition. It is only natural that legislation should first seem to be unconstitutional because it did something in an unconstitutional way, \textit{i.e.}, not in accordance with traditional procedures. Later, of course, courts were holding legislation unconstitutional not because the legislation did something in an unconstitutional way but because the subject matter of the legislation (\textit{e.g.}, the right to contract and the rights of property) was simply beyond legislative competence to regulate.

\textsuperscript{136} The phrases "or its applications" and "or even . . . its effects" are put in out of excess caution. A statute, though constitutional on its face, may, of course, be challenged if it is applied unconstitutionally. Likewise, the effects of legislation are, of course, also important in determining its constitutionality. \textit{See Gomillion v. Lightfoot}, 364 U.S. 339 (1960). Turning to less emotionally charged issues than race, the effect of state legislation is often very important, if not determinative, in deciding whether it can survive a challenge under the commerce clause. \textit{Cf.} notes 134 \textit{supra} and 175 \textit{infra}.

\textsuperscript{137} It is submitted that legislatures will not ordinarily be able to fabricate their findings because this would require cutting off legislative debate.
spurious legislative finding that the statute was aimed solely at sexual promiscuity could have been made, although the contemporaneous evidence makes such a restricted finding unlikely.\textsuperscript{138} If such a finding were made, however, barring conflict between the findings actually made and some specific constitutional provision or the historical case-by-case interpretation of the Constitution, the statute would have to be upheld.

2. \textit{The Alternative of Abandoning the Traditional Judicial Role: The Courts as Super-Legislatures}

To permit the courts to go beyond an examination of the stated legislative purpose would constitute them as super-legislatures. The absence of paradigm cases and the concrete criteria they provide make it impossible adequately to circumscribe judicial discretion. Nor will such criteria be developed on a case-by-case basis. The constitutional phrase “due process” is so vague and the historical context so lacking in appropriate concrete particulars that practically each case in this area is a “first case.” As a result, the issue before the Court in due process cases amounts to whether a particular measure contributes sufficiently to the public good. The same thing is true of the recently expanded notion of the reach of the equal protection clause. The cases, involving as they do the whole gamut of government, are too varied and disparate to permit the easy creation of a sufficient body of precedent. Even a relatively concrete subcategory like “residency requirements” covers a range of disparate activities ranging from welfare\textsuperscript{139} to voting\textsuperscript{140} to attendance at state universities\textsuperscript{141} to divorce.\textsuperscript{142} The Court would almost have to abandon its traditional role and review each piece of legislation as it was enacted to provide the necessary guidance as to the limits of its intervention in the legislative process. Only in this way could the Court begin to overcome the limitations imposed upon it by its present procedures and its restricted factfinding processes, which compel it to couch decisions in terms of simplistic and often vague slogans, such as “right to privacy” or “one-man-one-vote,” that are not only hard to interpret but often conflict with other broad statements of judicially “accepted” social policy.\textsuperscript{143}

\textsuperscript{138} See note 95 and accompanying text supra.
\textsuperscript{140} See Dunn v. Blumstein, 405 U.S. 330 (1972).
\textsuperscript{142} See Sosna v. Iowa, 419 U.S. 393 (1975).
\textsuperscript{143} In this regard, a prominent student and critic of the Court has recently rather persuasively argued that the “one-man-one-vote” formula will impede, rather than as-
Only if the Court were prepared to abandon the traditional view of its function and restructure its procedures to facilitate its weighing the desirability of legislation could it develop enough criteria applicable to the broad potential range of general regulatory legislation to make the process of judicial review of legislative goals somewhat objective, provided of course that the Court were prepared to be consistent in the application of its own social policy.\textsuperscript{144} Naturally, under these circumstances, the Court could make freer use of the device of prospective overruling; its frank acknowledgment of its role as a super-legislature would obviate the pressing questions of fairness that presently arise when an attempt is made to reconcile the somewhat arbitrary results of the Court's use of prospective overruling with the concept of the "judicial function."\textsuperscript{146} In the performance of this new role, the Court might also issue statements to the legislature akin to the President's State of the Union message, as to the kind of legislation it would approve and, perhaps, even as to the kinds of legislation needed. The individual members of the Court might also travel about the country speaking in favor of the Court's program and enter into debates with the general public on the merits of that program.\textsuperscript{146} The primary check on the Court would then be the public's reaction to its activities. The Court, presumably, would try not to push public opinion too far.

Not even the most activist judge has ever suggested anything like this, but there really is no other logical stopping place, since the basic...
question is really, “Who governs?” Indeed, under this expanded conception of the Court’s function, the occasionally mooted suggestion that its membership no longer be restricted to lawyers seems eminently sensible, even though this would further undermine the ability of the Court to mask its decisions under the aura of impartiality and objectivity connoted by the term “judicial” and that overused phrase “rule of law.”

The Court is very well aware of the pressures confronting it and is uneasy about further injecting itself into the political process. It recently, for example, used a rigorous notion of standing to avoid ruling on the adequacy of the accounts provided Congress by the Central Intelligence Agency. Nevertheless, however desirable it might be to pull back in these politically charged areas, the Court must proceed in a principled way. Unprincipled withdrawal is self-defeating.

One is inclined to believe that the Court’s uneasiness with being thrust into the middle of basic political controversy is motivated not only by the practical consideration of not risking its prestige in the tumult of the political process but also by considerations based on what might be called the logic of judicial decisionmaking. It is an intuitive and deeply felt belief held by most people that the judicial process has something to do with “justice.” Whatever else it might mean, “justice” in Western civilization focuses on the treatment of specific individuals in specific circumstances, leaving broad policy to be defined by some other notion until it has some effect on an individual. While any case can be framed in a way that one individual can be said to be claiming an entitlement from someone else, a case in which the basic issue is the place of secret intelligence agencies in American life and their relation to the Congress is quite far removed from the typical case in which suitors before a court are seeking “justice.” The refusal of the Court to decide the issues surrounding nondisclosure of CIA files undoubtedly reflects an instinct that its role is to adjudicate the problems of the individual—not to decide broad issues of public policy. This same concern for confining itself to the disputes of particular people is shown in its strict construction of the requirements that must be fulfilled in order to bring a class action.

148. See note 13 supra.
sonably identified must be specifically notified regardless of the cost
of such notification and the plaintiff representative of the class, not the
defendant, must bear these initial costs.\footnote{152}

Yet, by pursuing its broad review of regulatory legislation under
substantive due process and equal protection, the Court continues to
verge upon becoming a super-legislature. In the context of the
\textit{Griswold} case, one does not find it too difficult to accept this legislative
incursion by the Court, but arguably, this is only because the Connecti-

\textsuperscript{152} Having recognized a taxpayer's standing to challenge the spending of federal
funds in \textit{Flast v. Cohen}, 392 U.S. 83 (1968), the Court will be hard pressed to explain
why it will examine some federal programs and not others, as United States v. Rich-
dardson, 418 U.S. 166 (1974), illustrates. In \textit{Flast} the Court said it will only hear cases
where the expenditure is alleged to contravene a specific constitutional prohibition. Pro-

\begin{itemize}
  \item Professor Bickel is skeptical whether this new doctrine of standing can be confined within
        manageable limits (\textit{Bickel, supra} note 18, at 64-65, 76), since most federal expenditures
        are governed by specific constitutional provisions. Certainly, if the Court is prepared to
        engage in a broad-gauge general review of legislation, there is no reason why a tax-
        payer ought not to have standing to challenge any federal expenditure. Restricting the
taxpayer's actions to specific provisions of the Constitution only makes sense if the
Court accepts the same limitations for itself. However this may be, to keep these tax-
payer suits within politically acceptable limits the Court will have to rely on something
like the "political question doctrine." Whether the analysis of what constitutes a politi-

cal question contained in \textit{Baker v. Carr}, 369 U.S. 186 (1962), the leading modern case
on the subject, is adequate for this task remains to be seen. \textit{Cf. Schlesinger v. Reserv-

In connection with the general discussion of the function of courts in a modern
democratic society, it is interesting to note that many of the statements used in the opin-
ions of the majority in \textit{Griswold}, particularly in those of Justices Goldberg and Harlan,
\textsuperscript{152} remind one of Lord Tucker's speech in \textit{Shaw v. Director of Pub. Prosecutions}, [1962]
A.C. 220 (1961). There, in answer to charges that the courts had no power to define
new common law crimes, he asked whether it could be doubted that, if Parliament were

to repeal the legislation making homosexual acts between adult consenting males crimi-

\textsuperscript{152} nal offenses, the courts of England would nevertheless be able to convict, for conspiring
to corrupt public morals, those who created a society to promote homosexuality. \textit{Id.}
at 285. It could very well be argued that a view of the Court as the custodian and
protector of the "fundamental" rights of the people is also not very far removed from
Viscount Simond's similar reassertion in the \textit{Shaw} case that the "Court of King's Bench"
possesses a "residual power, where no statute has yet intervened to supersede the com-
mon law, to superintend those offenses which are prejudicial to the public welfare." \textit{Id.}
at 268. Both views of the power of the courts are partially justified by the difficulty of
obtaining legislative solutions to certain pressing social problems. In the one case, the
difficulty is that of motivating the legislature to repeal legislation no longer in tune
with contemporary moral values; in the other, it is the difficulty of focusing the legisla-
ture's attention on a new problem that needs solution. In \textit{Griswold}, this justification
may have been lacking because legislation repealing the statute struck down in that case
had already cleared one house of the Connecticut legislature. \textit{See Griswold v. Connec-
ticut}, 381 U.S. 479, 531 n.8 (1965). One might note finally that when Parliament did
change the law on homosexuality between consenting adult males, \textit{Shaw} was applied to
the publisher of a magazine that carried advertisements by homosexuals. \textit{Kneller v. Di-
cut statute would fall under a more satisfying decision predicated on an analysis of the legislative purpose. The statute in question was supported by no legislative findings and the justification for the statute put forth by counsel for Connecticut was implausible. How could a statute designed to prevent the distribution of contraceptives for purposes of preventing conception very much advance a policy of discouraging extramarital and premarital intercourse, when the sale of contraceptives for the purpose of preventing disease was apparently legal in Connecticut? Such a statute might also be vulnerable to attack under the equal protection clause of the fourteenth amendment, as that clause had been historically interpreted, insofar as there was no basis at all for the distinction. Where the legislature has made no findings to support a particular statute, one has less difficulty in permitting some degree of judicial examination of the adequacy of the justifications put forth by counsel in support of the legislation, perhaps to the extent of constructing hypothetical sets of findings and purposes. Indeed, by so doing, the courts would provide an incentive for the legislature to fulfill its duty to make its own findings and statements of purpose.

3. A Critique of a More Activist Model: The Substantial Evidence Test

No extension of this judicial inquiry should be made, however, either under “an arbitrary and capricious” test or under the proposal that “legislative classifications must have a substantial relationship to legislative purposes,” when a constitutionally permissible finding has actually been made by a legislature to support a particular statute. Such an extension would amount to a “substantial evidence” test for determining the constitutionality of challenged legislation. Unless the record, including facts of which the courts could take judicial notice, contains substantial evidence to support the legislative judgment, the statute would be struck down. Nevertheless, under a substantial evidence test, a statute would be upheld even if the courts disagreed with the wisdom of the legislation or would have drawn a different conclusion from the evidence than did the legislature. Far less would the legislature be required to show a “compelling” reason for its enactments. A statute would perhaps also be upheld even if a great deal of evidence actually conflicted with the legislative findings and determinations, so long as these findings were themselves supported by substantial evidence.

153. See text accompanying note 92 supra.
154. See note 132 supra.
155. See text accompanying note 125 supra.
Under such a test, for example, antimiscegenation statutes premised on a finding of biological inferiority of Negroes or of genetic harm that might be caused by racial intermarriage would be struck down, as a denial of the equal protection of the laws, because these findings were unsupported by substantial evidence.\footnote{156}

Under the more restricted scope of inquiry proposed herein for judicial review of legislation, on the other hand, it would be difficult for a court to strike down antimiscegenation statutes for which legislative findings indicate that genetic harm might be caused by racial intermarriage, except possibly in those instances, such as in Virginia, where only intermarriage between a white and a nonwhite was forbidden and where intermarriage between nonwhites, such as orientals and Negroes, was permitted.\footnote{157} Such a distinction could perhaps be held, within traditional doctrine, to deny nonwhites the equal protection of the laws, and perhaps to show conclusively that the purpose of the statute is to perpetuate racial discrimination against nonwhites. Similarly, antimiscegenation statutes forbidding whites and nonwhites married in other states to reside together as man and wife in that state could arguably be struck down under the full faith and credit clause. But, antimiscegenation statutes not having these defects, and having the requisite legislative findings to support them, would have to stand under traditional equal protection doctrine, if the courts, as we have suggested they should be, were unwilling to examine the validity of legislative findings made in support of legislation. For this is not the same situation as a state criminal statute that treats Negroes and Caucasians unequally. Under traditional doctrine, such a statute would be a denial of the equal protection of the laws regardless of the legislative findings made in justification of the statute. Rather, antimiscegenation statutes treat some Negroes and Caucasians differently from other Negroes and Caucasians. The equal protection clause, with its intolerance of racial classifications, could perhaps have reached even these statutes, if they were unsupported by any legislative findings. But, when actually supported by legislative findings that on their face are constitutionally permissible, such statutes would have to stand until either repealed by the state legislatures or overridden by an act of Congress pursuant to the enabling clauses of the thirteenth and fourteenth amendments.

\footnote{156} The tortured course that the Court actually followed in finally striking down antimiscegenation statutes that were unsupported by any legislative findings of genetic harm is described in text accompanying notes 159-65 infra.

\footnote{157} In Loving v. Virginia, 388 U.S. 1 (1967), the Court struck down such a statutory scheme as a denial of equal protection under the fourteenth amendment. For the specific point made in the text, see id. at 11, including n.11.
While one is, therefore, impressed by the ability of a substantial evidence test to reach iniquitous statutes like the antimiscegenation statutes, even when supported by legislative findings, it should be adopted by the courts neither as the standard for judicial review of legislation nor as a means whereby federal courts can review the validity of state legislative enactments but not those of Congress. It is too open to possible abuse. How much evidence is "substantial evidence" is a very open-ended question. Presumably it might vary with the asserted importance of the legislation in question. In the hands of aggressive judges such a test would leave the legislature too much at the mercy of the courts, and the proper distinction between legislatures and courts would be blurred.\textsuperscript{158} The benefits promised by a substantial evidence test of legislative findings would be more than offset by the dangers it would introduce.

The tortuous history of the demise of the antimiscegenation statutes is a perfect illustration of the dubious social benefit to be achieved by judicial intervention in the area of socially controversial legislation. It was not until 1964 that the Court struck down on equal protection grounds a statute making it a crime for an unmarried interracial couple to cohabit together, rejecting the argument that the statute was equally applicable to Negroes and Caucasians and that the penalties for violation of the statute were equally applicable to both races. In that case, \textit{McLaughlin v. Florida},\textsuperscript{159} the Court held that this class of persons was treated differently from the class of persons who only wanted to cohabit with members of their own race, and, since this difference in classification was obviously based on race, seven of the Justices declared that

\textsuperscript{158} In his dissent in \textit{Dandridge v. Williams}, 397 U.S. 471, 508, 528-29 (1970), Justice Marshall claimed that a limit on the maximum grant computed on the basis of the number of people in the family unit was not a reasonable means of limiting Maryland's expenditure on the Aid to Families with Dependent Children program. See also Justice Brennan's claim in \textit{Shapiro v. Thompson}, 394 U.S. 618, 632 (1969), that welfare residency requirements which could only be sustained if supported by a compelling state interest "would seem" irrational even under the "traditional" equal protection tests. He did not say, however, whether the "traditional" tests would "seem" to prohibit similar federal provisions.

The fact that courts apply a substantial evidence test in reviewing administrative determinations is not a relevant analogy. Administrative agencies are subordinate governmental bodies bound by a statutory framework. Moreover, a legislature that favors an administrative regulation that has been struck down by the courts for want of substantial evidence can always incorporate the substance of that administrative regulation in new legislation, which the courts are bound to apply. Striking down legislation on constitutional grounds is thus markedly different than striking down an administrative regulation.

\textsuperscript{159} 379 U.S. 184 (1964), rev'g the rule of \textit{Pace v. Alabama}, 106 U.S. 583 (1882).
it bore a heavy burden of justification. In its argument to the Court, the state attempted to justify this and related statutory prohibitions on interracial fornication and adultery as a means of implementing Florida's statutory policy against miscegenation. Without deciding the constitutionality of antimiscegenation statutes, the Court declared that the interracial cohabitation statute was not a necessary means of implementing the state's antimiscegenation policy. Two Justices concurred in the result but could not conceive of any racially-based criminal law classification as serving a constitutionally valid legislative purpose. Only after this step had been taken was the Court prepared to hold, over 2 years later in Loving v. Virginia, that state antimiscegenation statutes were per se a denial of the equal protection of the laws.

This history must be compared with legislative treatment of such statutes. In the 15 years prior to Loving, 14 states had repealed their antimiscegenation legislation, while such statutes were in force in only 16 states. Leaving the matter to the states for correction would not, therefore, have been entirely unrealistic. Moreover, support for federal legislation could reasonably have been expected. In view of the fact that antimiscegenation statutes had been in effect for over 100 years, the existence of a court willing to use more searching tests of constitutionality than the test suggested herein has been of very minimal assistance in achieving any measure of social justice in this field. Indeed, as recently as 1956, the Supreme Court refused to hear a case involving the constitutionality of the same Virginia statute it finally struck down in 1967.

160. 379 U.S. at 198 (Stewart & Douglas, J., concurring). Justice Douglas had also concurred in Korematsu v. United States, 323 U.S. 214 (1944), in which petitioner's conviction for violating an order directing that all persons of Japanese ancestry should be excluded from certain portions of the West Coast was upheld as a legitimate wartime measure. Under this scheme, persons of Japanese ancestry were eventually excluded from all of Washington, Oregon, California, Montana, Idaho, Nevada, and Utah, and from part of Arizona. Id. at 227. Petitioner, a resident of San Leandro, California, was an American citizen by birth, and his loyalty to the United States was never questioned. Although some of the related series of orders applied also to persons of German and Italian ancestry, only Americans of Japanese ancestry were excluded from these areas. Cf. Hirabayashi v. United States, 320 U.S. 81 (1943) (Japanese-American convicted for violating curfew order).


162. Id. at 6 n.5.

163. Id. at 6.

164. See id. at 9.

Similarly, in connection with Griswold, it should be noted that much of the anti-birth-control legislation in this country had been enacted in the 1870's and 1880's, and almost all of it was enacted before 1920.166 By the time Griswold was decided in 1965, not only had most of these statutes ceased to be generally enforced—if they ever had been—but it was becoming increasingly evident that congressional concern with the rise in the cost of public assistance would result in federal legislation making birth control information and devices available not only to married couples but also to unmarried people.167 Similarly, the Court overruled a unanimous previous decision and struck down state poll taxes in 1966—only after they had ceased to be of any significant practical importance.168 Whether, therefore, the symbolic blows struck by the Court for the public welfare in such cases were worth the damage to the public welfare occasioned by the Court's erosion of its image as a court of law is a matter well worth considering.

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166. The first complete review of the status of birth control legislation in each state seems to be Rupplethala, Criminal Statutes on Birth Control, 10 J. CRIM. LAW & CRIMINOLOGY 48, 51-61 (1919). This survey traces some of the state laws to initial enactment, but others are traced only to the date of codification in the "general" or "revised" statutes of the state. For example, Connecticut's birth control legislation is traced only as far back as 1902, whereas it was in fact enacted in 1879, 6 years after the federal "Comstock" law, which served as the prototype of much of the state legislation. See Comment, supra note 68, at 99. For a later, more comprehensive survey than that of Rupplethala, see the pamphlet, LAWS RELATING TO BIRTH CONTROL (1938), published by the Birth Control Clinical Research Bureau. For references to more recent studies, see Sulloway, The Legal and Political Aspects of Population Control in the United States, 25 LAW & CONTEMP. PROBS. 593, 598-601 (1960).


168. See Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). By the time Harper was decided, the twenty-fourth amendment had already abolished poll taxes in federal elections. At the time of the decision in Harper, such taxes were only nominal in amount, and only four states still had them. Id. at 680, 684-85 (Harlan, J., dissenting).

In this connection, one might also note that by the time the Court had, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), construed an 1866 statute to forbid racial discrimination in the sale or lease of real property, Congress had already enacted specific, and in some ways more extensive, open housing legislation. See Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19 (1970). For critical comments on Jones, see Casper, Jones v. Mayer: Clio, Bemused and Confused Muse, in THE SUPREME COURT REVIEW 1968, at 89 (1968); Henkin, supra note 18, at 82-83.
C. Legislative Findings as a Tool for More Rational Constitutional Adjudication

One thing is certain, however. What the enemies of the Court might call its "activist social reforming" bent has aroused expectations on the part of those who wish to reform American society that the Court will certainly be unable to fulfill. For example, it has recently denied the existence of a fundamental constitutional right to an education\(^\text{169}\) and it has beaten back an effort by "poverty lawyers" to create a right to welfare.\(^\text{170}\) The frustration thus engendered has already led to the expression of bitter disillusionment about the Court. The Warren Court, for example, was called a supporter of white racism at a time when many have thought it was showing its greatest concern for racial inequities.\(^\text{171}\) It would be tragic if the concept of an "activist" Court encouraged the Congress to duck its constitutional duty to deal with questions of broad general welfare and individual rights.\(^\text{172}\)

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171. See Steel, Nine Men in Black Who Think White, N.Y. Times, Oct. 13, 1968, Magazine, at 56. Mr. Steel, who was associate counsel of the NAACP at the time, was dismissed by the NAACP on October 14, 1968, and in the resulting furor the entire legal staff of that organization threatened to quit. See N.Y. Times, Oct. 27, 1968, § 1, at 36, col. 1. For a sharp attack on Steel by two attorneys for the American Jewish Congress, see the letter to the editor from Messrs. Maslow and Pfeffer, N.Y. Times, Oct. 27, 1968), Magazine, at 21.
172. For example, legislation authorizing the police of the District of Columbia to detain persons for investigation for up to 6 hours without probable cause was supported by a law professor who urged the Senate to pass the legislation, despite constitutional doubts, so that responsibility for the consequences should rest on the Supreme Court. Hearings on H.R. 7525 and S. 486 Before the Senate Comm. on the District of Columbia, 88th Cong., 1st Sess. 333-34 (1963); see also id. at 326. Senator Ervin thought the provision was unconstitutional and therefore opposed it (id. at 358, 363), as did, in stronger terms, Professor Kamisar (id. at 375). See also Dean Pye's testimony, id. at 385. Finally, the frequent changes of position by an activist Court have encouraged the Congress to include constitutionally questionable provisions in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 3501-02 (1970), on the ground that, by the time those provisions reached the Court, the Court might change its mind again. See S. REP. No. 1097, 90th Cong., 2d Sess. 51 (1969).

Another example is the sorry spectacle of the 17-year, unsuccessful attempt to get the Communist Party to register under the Subversive Activities Control Act of 1950, 64 Stat. 987, as amended 50 U.S.C. § 781 et seq. (1970). The Executive gave up only after the decision in Communist Party of the United States v. United States, 384 F.2d 937 (D.C. Cir. 1967). A few years earlier, Justice Clark had noted that, as Attorney General in 1948, he had advised the Senate Judiciary Committee that the statutory scheme was unconstitutional. Albertson v. Subversive Activities Control Bd., 382 U.S.
tedly, legislative equivocation would add more urgency to the demands that the Court adopt an active political posture and might even impel it to act in certain areas. The greater danger, however, is that the understandable reluctance of the Court, no matter how activist it might be, to get involved in the day-to-day problems of government will lead to no progress at all and to a growing sense of disillusionment with government in many areas where the evils besetting our society have not reached crisis proportions. The Court can present a legislature with the option of having no public schools or of having racially integrated ones. It cannot hope to be able to present a legislature with such options when it is dissatisfied with the student-teacher ratio in the public schools, and unfortunately the Court does not have very many other weapons for coercing a legislature into appropriating money to undertake programs that it, or even most rational observers, might believe are essential.

Legislation founded on spurious findings and reasons will not be permitted by the people to endure for long. New public awareness and the increased student interest in public issues will help ensure that legislatures take precautions to be truthful in accumulating findings. The fear of looking ridiculous is a factor that should not be underestimated. But, even if one does not share this faith in rationality, the alternative of permitting the soundness of legislative findings, which on their face are constitutionally permissible, to be judged against no other standard but that of the courts' own consciences as to the amount of proof necessary to support such findings, is not only unsound but subverts the ability of the judicial process to make any viable claim to objectivity. It is one thing for courts to disagree with legislatures as to the interpretation of the Constitution; it is another to disagree with legislatures as to the existence of certain purported facts. The suggestions proposed herein, requiring as they do legislative hearings and findings to forestall judicial inquiry into the merits of legislation, still preserve some scope for a general judicial power to review all legislation, even

70, 85-86 (1965) (concurring opinion). The history of this attempt to get the Party to register, an attempt which almost any sophisticated observer would have predicted would have been unsuccessful, can be traced in the cases cited above and in Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115 (1956); Communist Party of the United States v. United States, 331 F.2d 807 (D.C. Cir. 1963), cert. denied, 377 U.S. 968 (1964). In its 1961 decision, the Court intimated that it hoped that the Executive would be satisfied with a decision sustaining a registration order and would not actually try to enforce the order (367 U.S. at 70-82, 105-10), but that proved to be wishful thinking.

that which is not governed by either some specific constitutional provision or its historical case-by-case interpretation.\textsuperscript{174} When challenged, such legislation, in order to escape judicial assessment of its merits, must be supported by legislative findings which themselves contravene neither specific provisions of the Constitution nor the historical case-by-case interpretation of the Constitution.

Indeed, these proposals provide a concrete means for implementing suggestions that legislative "motivation" should be taken into account more often in determining the constitutionality of legislation.\textsuperscript{175} They would provide an additional means for determining legislative motivation, which must now largely be determined solely by inferences drawn from the impact or effect of a statute. They would also permit the use of legislative motivation to strike down a statute when its impact or effect was uncertain, something that is now difficult to do, even when so-called basic political rights are involved.\textsuperscript{176}

Naturally, as in all cases in which legislative motivation is taken into consideration in determining the constitutionality of a statute, the legislature might re-enact the same or similar legislation with different statements of legislative purpose. However, because legislative find-

\textsuperscript{174} To avoid any possible misunderstanding, the statement "legislation not within some specific constitutional provision or the historical case-by-case interpretation of some constitutional provision," means legislation not covered by provisions of the Constitution which, even if relatively broad, are either themselves specific enough, or through the course of judicial construction have been rendered sufficiently specific, to permit meaningful talk of paradigm cases. \textit{See} text accompanying notes 26-28 \textit{supra}.

175. In a very interesting and stimulating recent article, Professor Ely has tried to show how legislative motivation is used in constitutional adjudication to trigger the need for justifying legislative discrimination among different groups of persons that would otherwise not need to be justified. Ely, \textit{Legislative and Administrative Motivation in Constitutional Law}, 79 \textit{Yale L.J.} 1205 (1970). Under Professor Ely's analysis, if such discriminations can be justified by a valid legislative purpose, the legislation should be upheld despite an improper motivation. Under our analysis, such a statute would be struck down. Where, however, the discrimination is essentially totally discretionary, then, according to Professor Ely, the statute should fail if it reflects an improper motivation. I would agree. The effect of Professor Ely's analysis is limited by his recognition that "impact" is usually the best evidence of legislative motivation and, unfortunately, cannot always be ascertained; nor, as he also recognizes, does impact, even if ascertaining, always permit an inference of improper legislative motivation. On the question of legislative motivation in constitutional adjudication, \textit{see} note 134 \textit{supra}. \textit{See also} Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, in \textit{The Supreme Court Review} 1971, at 95 (1971); Note, \textit{Legislative Purpose, Rationality, and Equal Protection}, 82 \textit{Yale L.J.} 123 (1972).

176. \textit{See} United States v. O'Brien, 391 U.S. 367 (1968). There is no intention in this Article to suggest that the effects of a statute should not be considered in determining its constitutionality. \textit{Cf.} note 136 \textit{supra}. 
ings of fact would be required, this task would be made more difficult. Nevertheless, these new finds of fact and statements of purpose may not necessarily be so spurious as to subject the legislature to ridicule for behaving irrationally. Is this extension of the scope of traditional judicial review that has been suggested as an alternative to a greater judicial involvement in legislative decisionmaking therefore much ado about nothing in all but the more extreme cases where no constitutionally permissible "rational" justification can be given for a statute? I think not. In the first place, regularity is itself a virtue. If something is done improperly, it is no answer that the same result could have been accomplished in a proper manner. It should have been done properly.\textsuperscript{177} Second, it is not always clear that such legislation, which is usually controversial, will in fact be re-enacted in some similar form with different findings of fact and statements of purpose. Third, it takes time to re-enact legislation. Conditions may change, and this gives opponents of the legislation a chance to organize and to rely on the moral support of the Court's judgment. If nothing else, the effective date of the legislation may be substantially postponed. Thus, the present proposals can materially contribute to the integrity of governmental processes as well as provide a more objective basis for judicial review of legislation. If, however, even more power for the courts is required than these proposals provide, then the essentially legislative nature of this power must be recognized and the courts must be prepared to sacrifice the reverence and immunity from political pressures which adhere to their exercise of judicial power.\textsuperscript{178}

\textsuperscript{177} As the Chenery cases show, this is what is required of administrative agencies. Compare SEC v. Chenery Corp., 318 U.S. 80 (1943) with SEC v. Chenery Corp., 332 U.S. 194 (1947). It would also be shocking if a criminal case were disposed of in any different way. In regard to the entire question of legislative regularity, it is interesting to consider the problem posed by two types of hypothetical cases recently discussed by Professor Linde. Linde, "Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto, 22 Stan. L. Rev. 1163 (1970). In the first type a man is prosecuted for,\textit{inter alia}, making inflammatory statements under a statute that makes it a crime to cause or create a riot. In the second, a man is prosecuted for,\textit{inter alia}, making inflammatory statements under a statute that makes it a crime to incite a riot. Professor Linde thinks that only the first type of prosecution should be constitutionally permissible and rejects the view that, because a particular verbal act might be reachable by the legislature under the first type of statute, a prosecution based on the same verbal act under the second type of statute should be permitted. \textit{See id.} at 1174-86.

\textsuperscript{178} While this is hardly the place to pursue the inquiry, one might well consider procedures whereby factual issues touching on serious social issues are referred to bodies competent to decide them. This would seem preferable to the present system in which the legislature decides such issues on the basis of empirical guesswork or else the Court
CONCLUSION

For advocates of the broadest possible judicial review of the constitutionality of legislation, the crucial question to be faced is not so much what they would want the courts to do but what courts can do. What courts do best is to apply a complex body of precedents to individual cases and to insist on procedural regularity. It is here that they can meet the demands for objectivity that are made upon them. What they cannot do well is to govern. In the first place, they do not have the doctrinal base to do the job of governing given their stylized decision-making procedures which are designed to meet the demand for judicial objectivity. Second, their fact-gathering and enforcement machinery is inadequate to the tasks of government. Third, the absolute nature of judicial decisions, which supposedly have to be principled, makes judicial government somewhat inflexible. When the use of the track system in the District of Columbia public schools becomes a matter of constitutional dimensions, it becomes harder to return to a track system if the empirical evidence should show that, regardless of the other effects it may have, without some sort of grouping of students on the basis of ability it becomes impossible to teach anyone properly, and especially the most disadvantaged children for whose benefit the track system was initially outlawed. The law has a logic of its own that is often independent of the facts.

In my proposals, I have suggested new procedures for the enactment of legislation. The sanction for the failure of the legislature to follow these procedures is the authority of the courts to speculate on what the legislative findings of fact and purpose were and to determine the constitutionality of the legislation accordingly. To the objection that my proposals would slow up the legislative process, I must reply that the objection is perhaps well founded. But, I would also reply that increasing the speed with which legislation can be enacted is not one of the pressing needs of our country. Perhaps the most disillusioning aspect of the past 35 years of social legislation is that it has failed to achieve the goals set for it. Instead, overlapping and conflicting pro-

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grams have been enacted that often get in each others' way. There are many areas where the need is not so much for more legislation but the reorganization and simplification of existing legislation. One cannot escape the feeling that greater care rather than greater speed in enacting legislation is the more pressing social concern. Accordingly, if these proposals lead to a more careful legislative consideration of what it is that a piece of legislation is trying to do and how it fits in with existing legislation, they may be well worth their cost.

In the last analysis, meaningful social reform must lie along the path of increasing public knowledge about social issues and in increasing the opportunities of concerned citizens to be heard in the formulation of public policy. Implementation of these proposals would, in addition to facilitating the task of judicial review, be a modest beginning toward allowing more people to be heard in the formulation of public policy.

181. Even an area of relatively recent concern is endangered by a series of regulatory conflicts that have already interfered with the ability of our society to protect itself from pollution. See MacGregor, Too Many Cooks?, Wall Street Journal, Dec. 23, 1970, at 1, col. 6.