# The Rule of Reasonableness In Constitutional Adjudication: Toward The End of Irresponsible Judicial Review And The Establishment of A Viable Theory of The Equal Protection Clause

*By* JEFFREY M. SHAMAN*

## Introduction

In the realm of constitutional law it is familiar doctrine that the Supreme Court will not declare legislation to be unconstitutional unless it is shown to be clearly unreasonable. According to this doctrine, which might be referred to as the Rule of Reasonableness, the Court will presume that legislation is constitutional until its unconstitutionality can be demonstrated beyond all reasonable doubt. The Rule of Reasonableness has had a persistent, if at times irregular, application to a variety of constitutional subjects,[1] and it has enjoyed a wide acceptance among Supreme Court justices as well as constitutional scholars.[2] In

* Associate Professor of Law, De Paul University College of Law. B.A., Pennsylvania State University; J.D., University of Southern California; L.L.M., Georgetown University.

1. Examples of some of the earlier Supreme Court decisions applying the Rule of Reasonableness are: Trade-Mark Cases, 100 U.S. 82, 96 (1879); Sinking-Fund Cases, 99 U.S. 700, 718 (1878); Legal-Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1870); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810). Later Supreme Court decisions applying the Rule are cited at notes 17, 19, 26 and 28 *infra*.

2. *See* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) [hereinafter cited as Thayer]; C.E. HUGHES, THE SUPREME COURT OF THE UNITED STATES 37 (1928); C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 203 (1935); P. Freund, "Review of Facts in Constitutional Cases" in SUPREME COURT AND SUPREME LAW 47 (E. Cahn ed. 1954); A. BICKEL, THE LEAST DANGEROUS BRANCH 35-44 (1962) [hereinafter cited as BICKEL]; Gunther, *The Supreme Court 1971 Term—Forward*, 86 HARV. L. REV. 1, 20-24 (1972) [hereinafter cited as Gunther]; *see also* Wechsler, *Toward Neutral Principles of Con-*

many areas of constitutional law the Rule of Reasonableness produces profound consequences, and in recent years the Rule has had particularly significant effect in its application to cases arising under the equal protection clause. The Rule has been used as a device to avoid judicial review or to obscure its exercise. Unfortunately, the Rule has been accepted without the critical appraisal which should be given any doctrine with such continuously significant influence. Thus, the validity of the Rule of Reasonableness as a recurring doctrine in constitutional adjudication, especially under the equal protection clause, should be seriously examined.

## The Historical Setting of the Rule of Reasonableness

The Supreme Court's power of judicial review, first established in *Marbury v. Madison*,[3] is a responsibility that the Court has not always suffered gladly. There is a dialectical tension concerning the nature of judicial review which has caused its acceptance to be quite tentative. Judicial review is essentially undemocratic in nature; it places an awesome authority in the hands of a relatively small body of persons who are virtually independent from and unaccountable to the electorate.[4] Yet it is this very characteristic of judicial review that may be the source of its greatest potential; by virtue of its independence, the Supreme Court is able to safeguard constitutional values that otherwise might be undermined by a tyranny of the majority.[5] There would be little constitutional restraint upon a majoritarian legislature that had the un-

*stitutional Law*, 73 HARV. L. REV. 1 (1959); *but see* THE LEGAL CONSCIENCE—SELECTED PAPERS OF FELIX S. COHEN 44 (L.K. Cohen ed. 1960); Miller and Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960) [hereinafter cited as Miller and Howell].

3. 5 U.S. (1 Cranch) 137 (1803).

4. See F. RODELL, NINE MEN ch. 1, p. 36, 37 (1955).

5. One commentator goes so far as to suggest the following: "The position of the Constitution as supreme law of the land has made judicial review a practical necessity . . . [Constitutional] limitations can be preserved in practice in no other way than through the courts; without them, all the reservations of particular rights and privileges amount to nothing.

"In practice, there can be no Constitution without judicial review. It provides the only adequate safeguard that has been invented against unconstitutional legislation. It is, in truth, the *sine qua non* of the constitutional structure." B. SCHWARTZ, CONSTITUTIONAL LAW 4 (1972). Such a statement might well be accused of question-begging in its assumption that only the courts properly can determine constitutionality, which is a proposition that may or may not be so. For a more balanced and in-depth consideration of the problem, see the sources collected in R. LOCKHART, Y. KAMISAR, AND J. CHOPER, CONSTITUTIONAL LAW 7-15 (2d ed. 1970) [hereinafter cited as LOCKHART]. An even more extensive collection of sources can be found in L. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 57-63 (1972).

bridled authority to decide the constitutionality of its own acts. However, the justices who sit upon the Supreme Court possess both the strengths and weaknesses of human nature, and therefore can and do use their unaccountable authority to accomplish unpopular as well as popular goals. Thus, it is a risk to invest the Supreme Court with the power of judicial review. By now it is firmly established both legally and politically that the Court does have the authority of judicial review; nevertheless, the dialectic about judicial review continues, as does the Court's reluctance to exercise this most significant power.

Even John Marshall, the author of *Marbury* and a strong supporter of judicial supervision of the other branches of government, recognized that judicial review could carry with it political vulnerability for the Court. During the impeachment trial of Justice Chase—a trial motivated at least in part by politcial and ideological differences with Congress[6]—Marshall went so far as to suggest that, in order to protect the Court's integrity and personnel, perhaps the exercise of judicial review should be subject to legislative reversal.[7] And it was not until the *Dred Scott* decision,[8] some fifty-four years after *Marbury*, that the Supreme Court again dared to declare an act of Congress unconstitutional.[9]

To avoid the political predicaments that can be brought on by judicial review, and perhaps also to avoid the burden of making difficult decisions about complex constitutional issues, the Supreme Court has devised several ways to avoid exercising its authority to review the constitutionality of state and federal action. The Court has often viewed the "case or controversy" mandate of article III not so much as a requirement for jurisdiction but as a device to avoid the task of having to decide constitutional issues.[10] Additionally, the Court has created

6. R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 76-82, 91-95 (1971).

7. A. BEVERIDGE, 3 THE LIFE OF JOHN MARSHALL 177-8 (1919). "In his letter to his colleague Chase, Marshall offered to abandon judicial supremacy in the interpretation of the Constitution in return for security against impeachments. Yet these obvious facts are ignored and Marshall has become a supposed model of rigorously logical thought to what is regarded as a learned profession . . ." M. COHEN, THE FAITH OF A LIBERAL 180 (1946).

8. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

9. C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 304 (1935).

10. *See* Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); BICKEL, *supra* note 2, at ch. 4; Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971).

several rules of "abstention" which are more or less admittedly designed to circumvent the adjudication of constitutional issues.[11] In a more subtle manner, the Court also has shifted the process of constitutional review from its own shoulders to those of the framers of the Constitution by interpreting the Constitution according to the "intent" of the framers.[12] Some of these devices are employed openly as a means to avoid constitutional review, while others are disguised so that this function is not readily apparent. Nevertheless, they all evidence a reluctance on the part of the Court to exercise the difficult responsibility of constitutional decision-making.

In keeping with the Court's general reluctance to face constitutional questions, the Supreme Court also has developed another doctrine that has had a history of utmost significance for constitutional law: the Rule of Reasonableness. According to the Rule of Reasonableness the Court must hold a presumption in favor of the constitutionality of any law "until its violation of the Constitution is proved beyond all reasonable doubt,"[13] or until it is shown that the legislators "not merely made a mistake but have made a very clear one—so clear that it is not open to rational question."[14] This credo has been stated in various terms, all of which boil down to the same thing: the Court should not strike down legislation unless the legislation is shown "beyond doubt" to be "clearly" or "totally" "mistaken," "capricious," "irrational," or

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In Flast v. Cohen, 392 U.S. 83 (1968), the Supreme Court held that under Article III, for taxpayer standing to exist, a double nexus must be established: first, the taxpayer must demonstrate a nexus between taxpaying status and the legislative enactment that is challenged, and secondly, the taxpayer must demonstrate a nexus between taxpaying status and the precise nature of the constitutional infringement alleged. The second nexus limits taxpayer standing to challenging legislation only upon specific constitutional limitations imposed upon the exercise of the Congressional taxing and spending power. The second nexus, as pointed out by both Justice Douglas in his concurring opinion and Justice Harlan in his dissent, is unrelated to a litigant's standing except to the extent that the litigant will be allowed to invoke a court's authority of judicial review; thus, the second nexus operates more as a limitation upon the authority of the courts than as a means to determine a litigant's actual stake in a controversy.

11. *See, e.g.*, Perez v. Ledesma, 401 U.S. 82 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Younger v. Harris, 401 U.S. 37 (1971); Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960); Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Albertson v. Millard, 345 U.S. 242 (1953); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944); Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293 (1943); Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).

12. See also Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1 (1965); cf. Shaman, *The Use of Congressional Committee Reports in the Administrative Process*, 6 IND. L. REV. 481 (1973).

13. Ogden v. Saunders, 25 U.S. (12 Wheat.) 212, 270 (1827).

14. Thayer, *supra* note 2, at 144.

"unreasonable." First used by the Supreme Court in its earliest cases,[15] the Rule of Reasonableness has been applied to a large variety of constitutional issues, although not always in a consistent manner. It seems to be a device for adjudication that is relied upon when it suits the purposes of the Court and then is rejected or ignored when it does not suit the Court's purposes.[16] For example, the Rule was promulgated as a principle of constitutional decision-making in one commerce clause case,[17] was then passed over or rejected in another case involving virtually the same commerce issue[18] (both cases written, ironically, by Justice Stone), only to be resuscitated some years later in another case involving another issue under the commerce clause.[19] It could be argued with some merit that in every case of constitutional review in which the Rule does not appear, the Court signifies disapproval of the Rule. Nevertheless, the Rule of Reasonableness has had a long, if vacillatory, endurance. It is perhaps the most recurring principle (or rationalization) of constitutional adjudication that exists.

There is no doubt that the Rule of Reasonableness has had its most persistent application and most significant consequences in due process[20] and equal protection cases. Judicial reluctance to exercise the power of constitutional review has been greatest when the Court is called upon to review legislation under either of these clauses. Due to the generality of the wording of both clauses, the potential scope of

15. See note 1 *supra* and cases cited therein.

16. "[T]he 'presumption of Constitutionality' often appeared in the decisions more as a ritual formula than as a working reality." Hurst, "Review and the Distribution of National Powers" in SUPREME COURT AND SUPREME LAW 140, 156 (E. Cahn ed. 1954).

17. South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) (holding that a state statute prescribing width and weight regulations for trucks using highways within the state did not violate the commerce clause):

"Hence, in reviewing the present determination, we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." 303 U.S. at 191-2.

18. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (holding that a state statute proscribing the maximum number of cars on trains within the state did violate the commerce clause):

[T]his Court, and the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." 325 U.S. at 769.

19. Katzenbach v. McClung, 379 U.S. 294 (1964) (holding that the Civil Rights Act of 1964 was within Congressional authority under the commerce clause):

"[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." 379 U.S. at 303-304.

20. Discussion of the due process clause in the text and notes refers generally to the due process clauses of both the Fifth and the Fourteenth Amendments.

judicial review under either of them is broader than under any other provision of the Constitution. While some justices have relished such wide authority, others have shirked it and have used a variety of the avoidance devices in order to relinquish exercise of their authority.

Prior to the end of the 1800's the due process and equal protection clauses were dormant as means of reviewing the substantive validity of legislation.[21] Then, around 1899, the Court began to strike down legislation on the ground that it violated "substantive" due process.[22] By incorporating an out-moded laissez-faire economic policy into the requirements of substantive due process, the Court invalidated many remedial statutes that were designed to regulate wages, prices, and working conditions.[23] With the onset of the depression, the Court by a slim majority continued to combine economic fundamentalism and due process of law to strike down both state and federal legislation that had been enacted to ameliorate the urgent conditions of the depression. When President Roosevelt responded to the Court's behavior with his infamous "court-packing plan," it was thought that the nation was near a constitutional crisis concerning the continued viability of the Supreme Court.[24] But suddenly Justice Roberts had a judicial change of heart,[25] and a newly constituted majority of the Court was formed which quickly set to work to save the New Deal; thus the constitutional crisis was averted. The newly formed majority began to demolish substantive due process review over economic legislation through the use of the Rule of Reasonableness; in case after case the Court responded to

21. LOCKHART, *supra* note 5, at 454-5; G. GUNTHER & N. DOWLING, CONSTITUTIONAL LAW 954-5 (1970).

22. B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 154 (1942).

23. *E.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Ribnik v. McBride, 277 U.S. 350 (1928); Tyson & Bro. v. Banton, 273 U.S. 418 (1927); Murphy v. Sardell, 269 U.S. 530 (1925); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905); Smyth v. Ames, 169 U.S. 466 (1898); Allgeyer v. Louisiana, 165 U.S. 578 (1897). It was in response to this situation that Justice Holmes made his famous riposte that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

24. *A. Schlesinger, The Politics of Upheaval* 447-496 (1960).

25. It was Justice Roberts and not Chief Justice Hughes who held the one man balance of power between the court's majority and minority:

"[N]ever once in a major case did [Hughes] cast the deciding vote; for never once in a major case was Hughes to the right of Roberts. Thus, with five brethren to right of him and three clearly to left, Hughes could only choose whether a conservative decision should be scored 5-4 or 6-3; he could never determine that a decision be liberal unless Roberts, the Court's swinging keystone, came along." F. RODELL, NINE MEN 223 (1955). *See also* A. SCHLESINGER, THE POLITICS OF UPHEAVAL 464-67, 474-79 (1960).

due process claims with the reply that "the guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious. . . ."[26]

When it became apparent that substantive due process attacks against economic legislation would no longer be accepted by the Court, attorneys began to press equal protection claims as a hoped-for replacement for substantive due process. However, the justices of the new majority were still in a state of reaction against the manner in which the due process clause had previously been wielded and saw the equal protection clause as a broad, general provision much like the due process clause, and therefore prone to the same abuses.[27] The Court transferred its suspicion of the due process clause to the equal protection clause. The Court normally held that under the equal protection clause, no legislation would be invalidated unless it constituted discrimination that was clearly "irrational" or "invidious".[28] From 1941 to 1970 there was not a single case in which the Court struck down economic legislation as violative of due process, and only one case, *Morey v. Doud*,[29] where the Court found economic legislation to violate the equal protection clause.[30] However, the justices soon found that their reaction to the New Deal court crisis was too extreme, and that they would have to retreat from their doctrinaire use of the Rule of Reasonableness.

Beginning in the mid-1950's, cases began reaching the Court in which noneconomic legislation was challenged as violating equal protection of the law. Some of these cases involved statutory classifica-

26. Nebbia v. New York, 291 U.S. 502, 525 (1934). Some other examples of this attitude are: "Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide." West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937); "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

27. However, compare Justice Jackson's view of the equal protection clause as expressed in his concurring opinion in R.E.A. v. New York, 336 U.S. 106 (1949), and Justice Douglas' later view of the equal protection clause as expressed in his concurrence in Flast v. Cohen, 392 U.S. 83 (1968).

28. *See* Goesaert v. Cleary, 335 U.S. 464 (1948). *See also* Ferguson v. Skrupa, 372 U.S. 726 (1963); Martin v. Walton, 368 U.S. 25 (1961); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical, 348 U.S. 483 (1955); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); R.E.A. v. New York, 336 U.S. 106 (1949); Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947).

29. 354 U.S. 457 (1957).

30. LOCKHART, *supra* note 5, at 481.

tions based on criteria such as race or national origin that the members of the Court perceived to be constitutionally unjust.[31] Other cases concerned classifications that the justices thought were constitutionally impermissible because they abrogated important personal rights.[32] In order for the Court to provide the constitutional protection that the justices thought should exist in these cases, it was necessary to depart from the Rule of Reasonableness. In doing so, the Court developed its so-called "two-tiered" approach of "selective intervention," under which it adhered to the Rule of Reasonableness in cases that did not involve a "suspect" classification or "fundamental" interest but did not adhere to it in other cases.[33] In the former kind of case, the Court applied "minimal" (or virtually no) scrutiny to the legislation under review by following the Rule of Reasonableness. In cases involving "suspect" classifications or "fundamental" interests the Court applied "strict" scrutiny to eschew the Rule of Reasonableness and review the legislation in depth.

Recently, there are some tentative indications that the Supreme Court, with new personnel, is about to develop a somewhat different approach to both due process and equal protection cases. There are a few signs that the equal protection two-tiered approach may crumble,[34] perhaps taking with it the Rule of Reasonableness. Also, there are signs that a kind of substantive due process may be revitalized in a limited category of cases involving the "right of privacy," although this revitalization seems to be proceeding along a two-tiered line similar to the approach previously taken to regenerate equal protection review in strict scrutiny situations.[35] Unfortunately, the Rule of Reasonableness still lays heavily upon both the due process and equal protection clauses, and any further changes in the Supreme Court's exercise of judicial review under those provisions will only occur by dismantling the formidable barrier of the Rule of Reasonableness.

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31. The school desegregation case, Brown v. Board of Education, 347 U.S. 483 (1954), is of course the most often cited and most famous case in which the Supreme Court held a racial classification to be unconstitutional. *See also* Loving v. Virginia, 388 U.S. 1, 11 (1967). *But see* Korematsu v. United States, 323 U.S. 214, 216 (1944).

32. *E.g.*, Harper v. Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Griffin v. Illinois, 351 U.S. 12 (1956).

33. The two-tiered approach is described in depth in *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-1132 (1969). See also Gunther, *supra* note 2, at 8-10.

34. Gunther, *supra* note 2, at 10-37.

35. P. Bender, *Privacies of Life*, HARPER'S MAGAZINE, April 1974, at 36 [hereinafter cited as Bender].

## An Analysis of the Rule of Reasonableness and a Reply to Professor Bickel

The Rule of Reasonableness should not be taken literally because to do so would in effect embrace the incorrect concept that there are quantitative degrees of constitutionality. A literal interpretation of the Rule necessarily implies that statutes may be slightly unreasonable, somewhat unreasonable, or totally unreasonable. It is nonsense to think of the constitutionality of statutes in quantitative terms; constitutionality is a *qualitative* matter, and the reasonableness of legislation is not akin to inches or pounds that can be measured in quantative degrees.

At best the Rule of Reasonableness is a metaphor that functions as a caution to judges that they should hesitate to substitute their own judgments for those of the legislature.[36] According to this conception of the Rule, judges should not strike down legislation unless they are certain that the legislation is unreasonable. The Rule thus becomes a doctrine of judicial restraint under which judges temper their power of judicial review by the most careful deliberation.

While it is a desirable practice for judges to be especially deliberate, the Rule of Reasonableness, even when understood to be only a metaphor, produces serious deficiencies in the adjudication process. First, the Rule can become a means by which judges totally abnegate their responsibility of judicial review. If the Rule is taken to be, as Professor Bickel in his renowned book[37] asserts that it should, a device "to limit the area of judicial policy-making, keeping the judicial function distinct from the legislative"[38] the result will be total abnegation of the responsibility of judicial review. This is so because courts, particularly the Supreme Court, are as much policy-makers as the legislature. The judicial function is not, as Professor Bickel would have it, distinct from the legislative function. At their foundation all rules or

36. "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt." Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827).

"Full and free play must be allowed to 'that wide margin of considerations which address themselves only to the practical judgment of a legislative body.' Moreover, every action of the other departments embodies an implicit decision on their part that it was within their constitutional power to act as they did. The judiciary must accord the utmost respect to this determination, even though it be a tacit one." BICKEL, *supra* note 2, at 35.

37. BICKEL, *supra* note 2.

38. *Id.* at 40.

laws are value judgments, whether their source is the legislature, the executive, or the judiciary. When a court reviews the constitutionality of a statute under the equal protection clause (or any other constitutional provision), the court is substituting its value judgment for that of the legislature. Whether the court upholds or invalidates a statute, the court is making policy, making value judgments, making the same sort of decisions as a legislature.[39] Philosophy has shown us that no human decisional process, not even that of pure science, is value free. Indeed, knowledge itself is "primarily *decisional* in nature,"[40] and therefore the result of subjective value choices.[41] In this respect, the legal process is no different from other decisional processes. Moreover, despite the law's early pretensions to allegiance with the pure sciences,[42] the law has always been less a pure science than a social science, and therefore susceptible to an even higher degree of subjectivity. Adherence to "neutral principles" or "pure reason" is an impossibility.[43] Although the value choices implicit in every legal decision may be more obvious in some cases than in others, they are always present.

> Throughout the history of American constitutional development may be found recurring evidence of the fact that Supreme Court Justices have been motivated by value preferences in reaching decisions. At no time have they resorted to neutrality or impersonality of principle in making choices between competing alternatives.[44]

This is by no means to suggest that logic and analytic reasoning are not indispensable tools for proper adjudication. Without logical thinking, adjudication will go awry, but the mere presence of logic is hardly enough; logic is but a framework that, without the foundation of values, is incapable of producing any sort of real decision. Professor Bickel's criticism of those persons he refers to as "neo-realists" and "ni-

39. "[I]n substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned." O.W. HOLMES, JR., THE COMMON LAW 35 (1881). Citing this quotation from Justice Holmes, Professor Karst makes the claim "that the [judicial] function is essentially legislative in character no one now disputes." Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 76 (1960) [hereinafter cited as Karst].

40. Miller and Howell, *supra* note 2, at 665 (emphasis in original).

41. *See* Shaman, *Responsibility and Insanity—Do They Exist?*, 31 U. PITT. L. REV. 243, 247-254 (1969).

42. *See* H. S. COMMAGER, THE AMERICAN MIND ch. XVII (1950).

43. Miller and Howell, *supra* note 2; *contra*, Wechsler, *supra* note 2.

44. Miller and Howell, *supra* note 2, at 671-2.

hilists"[45] for their cynicism toward logic shows that Professor Bickel does not fully understand the nature of the cynicism. While logic is an essential element of proper analysis, pure logic free of value judgments leads nowhere in the decisional process; therefore reliance on logic cannot be used to avoid value judgments.

Thus, when Professor Bickel claims that the Rule of Reasonableness would not result in a total abdication of the power of judicial review, he is contradicting his assertion that the Rule should operate to keep the judicial function distinct from the legislative function. If the Court uses the Rule to avoid "legislating", it thereby totally abdicates judicial review. There can be no such thing as judicial review if the Court is not willing to make value judgments; that is, if the Court is not willing to "legislate." The Rule, with its emphasis on "rationality" and "reasonableness" and with its avoidance of policy considerations, seeks the impossible: a means of making decisions by pure logic, free of value judgment.

A review of the case law wherein the Rule of Reasonableness is operative shows that, contrary to Professor Bickel's claim that the doctrine does not lead to a total abdication of judicial review, such abdication has occurred. In substantive due process cases involving economic legislation, the Supreme Court readily has admitted that it uses the Rule as a means to entirely evade judicial review. It has been the Rule of Reasonableness, and nothing else, by which the Court has made substantive due process a deadletter in review of economic legislation. Similarly, when the Supreme Court is using the Rule of Reasonableness in equal protection cases, it accepts the legislative judgment that is supposedly under review with virtually no critical examination. In fact, after the New Deal Court crisis when equal protection claims were first asserted as a replacement for the discredited substantive due process,[46] the Supreme Court intentionally used the Rule of Reasonableness to abnegate judicial review under the equal protection clause.[47] Reacting to the recent past which had seen a misguided use of the due process clause, and overly suspicious that the equal protection clause had an equivalent potential for judicial mischief, the Court cursorily rejected equal protection claims by subjecting them to essentially the same Rule of Reasonableness by which it rejected due process claims. The result was nullification of judicial review as far as equal protection of the law

45. BICKEL, *supra* note 2, at 75-84.
46. See text accompanying notes 23-30 *supra.*
47. See cases cited in note 28 *supra.*

was concerned. Under the sway of the Rule, the Supreme Court ordained that the equal protection clause only prohibited "arbitrary" or "invidious" discrimination, and that legislative classifications need be "merely rational" to meet the test of constitutionality. In using these tests to uphold statute after statute (*Morey v. Doud*[48] is the only exception), the Court made it quite clear that it was not about to substitute its judgment for that of the legislature. The Court upheld discriminatory statutes on the rationale that the legislature "may well have concluded"[49] or "evidently believes"[50] that the discrimination was justified. However, the imagined justification that the legislature might have had was never articulated by the Court. Often the Court upheld discriminatory legislation by presuming that the legislative classification was reasonable unless the party challenging it could "negate every conceivable basis which might support it,"[51] a difficult if not impossible burden.[52] Instead of meaningfully reviewing legislative classifications, the Court perfunctorily propagated the Rule of Reasonableness; a fantasy rationality was all that was required of the classifications. In both equal protection and due process cases the Court refused to evaluate legislation; it completely abnegated its power of judicial review under these two constitutional provisions, thereby rendering both the due process clause and the equal protection clause a deadletter as far as the Court was concerned.

By the heyday of the Warren Court, the Rule of Reasonableness

48. 354 U.S. 457 (1957).

49. R.E.A. v. New York, 336 U.S. 106, 110 (1949).

50. Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

51. Madden v. Kentucky, 309 U.S. 83, 88 (1940); *accord*, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973).

52. "If the (legislation) is to be sustained unless the party attacking it negates every conceivable basis for supporting it, then this seriously erodes (if not destroys) any test of equal protection. . . . For it is very difficult to prove the negative of something. And proving the negative of every conceivable basis which would justify legislation would appear impossible. The proof required amounts to showing that there could not have been any reasonable basis for the legislation. And this amounts to imagining all the possible bases for the legislation and then showing that one's imagination was faulty, that the bases imagined did not exist.

"It is clear from (this rationale) that the Court is unwilling to subject at least some of the state's business and economic legislation to more than nominal scrutiny (if that much) on equal protection grounds. This is consistent with the observations of Professors Tussman and tenBroek writing in 1949 that: 'There are broad areas in which the Court's use of the equal protection clause can only be described as an abandonment of it. . . .'" Blackman, *The Implication of Lehnhausen v. Lake Shore Auto Parts Co.: Weakening or Eliminating Equal Protection for Corporations as a Class*, 16 ARIZ. L. REV. 41 (1974). In a recent obscenity case the Supreme Court has recognized the difficulty of proving a negative. Miller v. California, 413 U.S. 15, 22 (1973).

when applied to equal protection cases was a clear signal of the Court's abdication of review and uncritical deference to the legislative judgment. The Warren Court did develop the so-called two-tiered system, under which it revived the equal protection clause to give it real application in cases involving a suspect classification or a fundamental interest.[53] However, in cases where neither a suspect classification nor a fundamental interest was present, the Rule worked its mesmerizism, and judicial review under the equal protection clause was a virtual nullity. As one constitutional scholar has put it, the Warren Court's application of the Rule of Reasonableness meant that there would be "minimal scrutiny in theory and virtually none in fact . . . the 'mere rationality' requirement symbolized virtually judicial abdication. . . ."[54] Indeed, it was because the Rule had operated as a near total nullification of the power of judicial review under the equal protection clause that the Warren Court was forced to create the two-tiered approach.

If judges do not use the Rule of Reasonableness as a total abdication of the power of judicial review, the Rule can only operate as a means to conceal the real reasons behind the judges' decisions. That is, judges can use the Rule, either consciously or unconsciously, to mask the policy considerations and value judgments which are the real basis of their decisions. The rule becomes a pretext that can be used, like other such pretexts, to manipulate substantive results. Platitudinizing over rationality and judicial deference to the legislature is easier and less politically precarious than facing up to making decisions about difficult constitutional issues.

> The 'liberals' of the 1930's and the 1940's could plead piously for the need of 'judicial self-restraint' precisely because their battle had already been won, both in the legislatures and in the 'public consensus.' It is easy, if somewhat sophistical, to insist that the function of the Court is to defer to the legislature in economic matters when the legislature is performing exactly as the Court majority would wish. Yet the liberals applied to their role no such self-restraint in the realm of civil liberties. *That* battle had not been won.[55]

But using the Rule of Reasonableness to conceal value judgments is dishonest if done consciously, and negligent if done subconsciously. Moreover, it destroys understanding and predictability of the law by obscuring the real reasons upon which decisions are rendered. There is also a risk that the Rule will come back to haunt the judge who facilely

53. See text accompanying notes 31-33 *supra*.
54. Gunther, *supra* note 2, at 8, 19.
55. Miller and Howell, *supra* note 2, at 678.

uses it to conceal the considerations that really influenced his or her decision. In one case the Rule might be employed as a mask for "liberal" value judgments, when in a later case seemingly calling for the Rule's application, it will work in favor of "conservative" value judgments. The justices who, in defusing the New Deal Court crisis, used the Rule of Reasonableness to refuse to review and thereby uphold "liberal" legislation soon found that very same Rule standing in their way when they were called upon to review "conservative" legislation. There is no justification for the use of an artificial doctrine that obscures the true nature of the judicial process by substituting spurious bromides for reasoned analysis.

The Rule of Reasonableness can only result either in abdication of judicial review or harmful concealment of the decision-making process. There may be some superficial appeal to the theory that legislation should not be deemed unconstitutional by the Supreme Court unless shown to be clearly unreasonable, but constitutionality cannot be measured in such quantitative degrees, and judicial review is only possible when the courts are willing to make value judgments that transcend the concept of reasonableness. To pretend otherwise is to evade or conceal the responsibility of judicial review.

## An Analysis of the Reasonable Relationship Test and a Reply to Professor Gunther

Recently, Professor Gerald Gunther has proposed a model of a more specialized version of the Rule of Reasonableness that he suggests the Supreme Court should adopt in cases that arise under the equal protection clause.[56] Professor Gunther submits that the Court should readjust its two-tiered test of strict and minimal (or no) scrutiny for equal protection cases.[57] According to the Gunther model, the Court in all cases would forego review of the ends or purposes of a legislative classification but would continue to review, on a less differentiated two-tiered approach, the reasonableness of the relationship between the legislative classification (or means) and its purposes.[58] In cases involving suspect classifications or fundamental interests, Gunther would permit the Court to apply strict scrutiny to the reasonableness of the relationship between classification and purpose, requiring the classification to be a "necessary" or the "least restrictive" means of accomplishing

56. Gunther, *supra* note 2.
57. The two-tiered approach is described in text accompanying notes 31-33 *supra*.
58. Gunther, *supra* note 2.

the legislative purpose.[59] In all other cases, Gunther would have the Court apply a less strict, but not minimal, scrutiny, requiring only that the classification have a "substantial" relationship to legislative purpose, or, to put it another way, by allowing the state to select any legislative classification that "substantially furthers legislative purpose."[60] Professor Gunther claims that his model would "close the wide gap" of the Warren Court's two-tiered approach by abandoning review of legislative ends in all cases while at the same time retaining strict scrutiny of means in some cases and in other cases increasing the scrutiny of means "from virtual abdication to genuine judicial inquiry."[61]

Unfortunately, the consequences that the Gunther model would lead to are the same as those of Professor Bickel's Rule of Reasonableness: either virtually total abdication of the power of judicial review or concealment of the real reasons upon which constitutional decisions are based. Like Professor Bickel, Professor Gunther wants his model to be used so that the Supreme Court will be done with "legislating" and "making value judgments." Gunther repeatedly refers to his model as a device to "avoid" judicial review in that "uncertain realm of ultimate constitutional values."[62] He reiterates continually the theme that his model should be adopted so that the Court will avoid "policy-making."[63] This would make it impossible for the Court to engage in the kind of analysis that is essential for there to be meaningful constitutional review.[64] If the Court did not engage in policy-making by evaluating legislative purposes, the Court's function would be severely restricted. Every law by its very nature is discriminatory in that every law sets up some classification or category. However, not every law discriminates unjustly. Whether the discrimination is unjust or not can only be determined by evaluating the purpose of the law and weighing the purpose against the disadvantages caused by the dis-

59. *Id.* at 24.

60. *Id.* at 21.

61. *Id.* at 24.

62. *Id.* at 28.

63. "The yardstick for the acceptability of the means would be the purposes chosen by the legislature, not 'constitutional' interests drawn from the value perceptions of the justices." *Id.* at 21.

"The avoidance of ultimate value judgments about the legitimacy and importance of legislative purposes would make the means-focused technique a preferred constitutional ground for a less interventionist Court." *Id.* at 21-22.

"The major limitation on the exercise of scrutiny would stem from particularized considerations of judicial competence, not from broad a priori categorizations of the 'social and economic' variety." *Id.* at 23.

64. See text accompanying notes 37-55 *supra.*

crimination. Any sort of meaningful review under the equal protection clause is not possible unless there is evaluation of legislative purposes or ends. Under the Gunther model, many of the equal protection decisions of the last twenty years striking down discriminatory legislation would have been impossible. Indeed, Professor Gunther's model, carried to its logical extreme, would have barred the Court's decisions against discrimination based upon suspect classifications or affecting fundamental interests. If, for instance, the Court had been powerless to decide that racial separation is not in itself a valid legislative purpose, then the Court would have been forced to accept racial classifications as reasonably related to the purpose of segregation. According to the Gunther model the Court would be bound to accept passively every legislative purpose. At best the Court would function as a mere reviser or editor of legislative phrasing to make certain that it was worded in terms reasonably related to the legislative purpose; at worst the Court would be an automatic rubber stamp for legislation. Without evaluation of legislative purposes, little, if any, judicial review is possible. By following the Gunther model and foresaking policy evaluation of legislative purposes, the Supreme Court would be abdicating its authority of judicial review in the vast majority of equal protection cases.

Furthermore, the Gunther model, being a slightly more sophisticated version of the Rule of Reasonableness, has the additional infirmity of possessing the potential to conceal the policy judgments that are the real basis of the Supreme Court's decisions in a slightly more subtle manner making it more difficult to ferret out exactly what the Court is doing. By manipulating logic the Court can set forth a putative statutory purpose[65] and then easily proceed to show that the statutory classification is not reasonably related to that particular statutory purpose.[66] This technique conceals the fact that the statutory classification may be reasonably related to some other statutory purpose which the Court believes, for unexpressed policy considerations, to be improper or not weighty enough to justify the resulting discrimination.[67] Since most, if not all statutes are related to a variety of purposes, it is not

65. In using the phrase "statutory purpose," I am referring to not only the legislative statement of purpose (if any), but also any effect that can be shown to be caused by application of the statute. However, this definition of statutory purpose is not a necessary ingredient of the analysis of equal protection presented in the text. While I submit that the definition is valid, indeed more valid than less broad definitions of statutory purpose, nevertheless the analysis in the text is not dependent upon the definition.

66. Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

67. *Id.*

at all difficult for a court to select some purposes and ignore others in order to establish or to eliminate a reasonable relationship to the statutory classification. But lurking behind such manipulation of logic is the Court's approval or rejection of legislative purposes; that is, the Court's essential policy-making function that can be hidden but never abrogated.

The inadequacy of evaluating only legislative means or classifications and not purposes is perhaps most blatantly apparent in the kind of factual situation presented by a group of cases typified by *REA v. New York*[68] or the more recent case of *James v. Strange*.[69] In *REA*, a 1949 case, the Supreme Court through an egregious application of the Rule of Reasonableness rejected an equal protection attack against a municipal ordinance that prohibited advertising upon vehicles but excepted from the prohibition advertising for one's own business upon delivery vehicles. In *James*, a 1972 case, the Court struck down as violative of equal protection a statute providing for recoupment of state funds used to pay the legal fees of indigent defendants but did not provide for recoupment exemptions, such as garnishment limitations, that were afforded to other civil judgment debtors. In both cases there exists what might be called a primary purpose (that we will assume is valid) for the legislation—traffic safety in *REA* and reimbursement of public funds in *James*—and there may or may not be a valid subsidiary purpose in selecting a particular class of persons to bear the burden of accomplishing the primary purpose. If the statutes were to be evaluated only in terms of their primary purposes, the statutes in both cases would be unjustly discriminatory, because there is no reason for the legislature to pick only the designated classes in order to accomplish the primary purpose. There is no reasonable relationship between the primary legislative purpose and the legislative classification. However, such an analysis would be overly simplistic in that it ignores the possible subsidiary purposes of the legislation, without which the cases cannot be properly decided. For example, in his concurring opinion in *REA*,[70] Justice Jackson suggested that self-sufficiency in business is a

68. 336 U.S. 106 (1949).

69. 407 U.S. 128 (1972). *See also* Geduldig v. Aiello, — U.S. —, 94 S. Ct. 2485 (1974); Fuller v. Oregon, — U.S. —, 94 S. Ct. 2116 (1974); Village of Belle Terre v. Boraas, — U.S. —, 94 S. Ct. 1536 (1974); Jefferson v. Hackney, 406 U.S. 535 (1972); James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Hunter v. Erickson, 393 U.S. 385 (1969); Rinaldi v. Yeager, 384 U.S. 305 (1966); Ferguson v. Skrupa, 372 U.S. 726 (1963); Morey v. Doud, 354 U.S. 457 (1957); *but see* Jiminez v. Weinberger, — U.S. —, 94 S. Ct. 2496 (1974).

70. 336 U.S. 106, 111 (1949).

goal which the state may encourage by affording an advantage to persons advertising their own business over those who engage in advertising "for hire."[71] In *Strange,* it might be contended that indigent defendants are not entitled to the same exemptive protection as other debtors because they should be penalized for putting the state to this kind of expense. Whether these state purposes are valid or not is beside the point being suggested here: that the cases cannot be properly decided unless the Court critically evaluates the validity of all the purposes to which the statute might be directed. If, in *REA*, the Court had stated that the statute violated the equal protection clause because the classification was not reasonably related to the legislature purpose of reducing traffic accidents, the Court would by implication be deciding that the subsidiary purpose suggested by Justice Jackson was invalid. In other words, the Court would be masking, consciously or unconsciously, its evaluation of a legislative purpose. In order to make a proper analytical decision, the Court must be able to pass upon legislative purpose. Every legislative classification is reasonably related to some purpose, but not necessarily to a valid purpose or to a purpose that outweighs the discriminatory deprivation which it causes. If the Court cannot evaluate all legislative purposes, it necessarily will not be capable of making fully analytic, well-reasoned decisions.

The above points are dramatized by the following example: Suppose that a city, after a scientific investigation, determines that in order to reduce its air pollution to an acceptable level, driving in the city must be reduced by fifty per cent. Several proposals are presented to city officials to accomplish the purpose of reducing air pollution. One proposal would ban all city driving during certain hours except driving for business purposes. Another proposal would ban all city driving during certain hours by anyone under the age of twenty-one. A third proposal would ban all city driving during certain hours for anyone whose last name begins with the letters A through M. All of the proposals have the same primary purpose (decreasing air pollution), but each has a different subsidiary purpose in selecting a particular class to bear the burden of accomplishing the primary purpose. Unless legislative purpose is first fully evaluated, the reasonable relationship test is of little help in reviewing the proposal because each proposal's classification is reasonably related to some purpose (encouraging business, recognizing seniority, disadvantaging "A's" to "M's"), but each classification may or may not be reasonably related to a valid purpose that justifies the dis-

71. *Id.* at 113-15.

crimination.[72] Only by completely reviewing and evaluating primary and secondary legislative purposes will the Court be able to properly pass upon the constitutionality of statutes challenged under the equal protection clause. Even if the Court reviewed the relationship between legislative means and ends to require that the means be the "least drastic," the review would be an empty ceremony unless there also was full review and evaluation of the legislative purposes. By eliminating full review of legislative purposes, the Gunther model leads to incomplete reasoning that abdicates judicial review or to manipulative reasoning that obscures the real meaning of constitutional decisions. Like its Bickellian precursor, the Gunther model is a spurious device that operates to pervert the adjudicatory process.

## A Realistic Theory of Constitutional Adjudication

By whatever term is chosen to describe it, "policy-making" or "value-judging" or "judicial-legislating," is a necessary component of judicial review; without it, no court can engage in true judicial review. It is this fact of life that the proponents of the various Rules of Reasonableness cannot tolerate. They would prefer some sort of sophisticated natural law procedure whereby the judicial function operates as a neutral calculating machine that applies reason devoid of values. But such a vision is a pipedream, and the dreamers have never faced up to this fact. They have never quite accepted the decision in *Marbury v. Madison*[73] that the Supreme Court possesses the power of judicial review, which necessarily entails the power of judicial legislating. It has been suggested by at least two law professors that ever since the rise of Legal Realism, members of the legal profession have been aware of the legislative nature of the judiciary, and that perhaps it is time to apprise the general public of this well kept secret.[74] Nevertheless it seems that some members of the legal profession are not so aware of the courts' legislative character—or, if they are aware of it, they cannot intellectually accept its ramifications. When they do recognize that judicial decision-making is in essence little different from any other form of decision-making, they are abashed at what they see as a dilemma:

72. The reasonable relationship test between legislative means and ends can be of value and should be used *after* there has been full and complete review of legislative ends. See text accompanying notes 80-83 *infra.*

73. 5 U.S. (1 Cranch) 137 (1803).

74. Miller and Scheflin, *The Power of the Supreme Court in the Age of the Positive State*, 1967 DUKE L.J. 273 (Part One), 522 (Part Two) (1967). *See also* Karst, *supra* note 39.

Why should significant policy-making be performed by a body as undemocratic in nature as the Supreme Court? Their way out of the dilemma is to try to repudiate the underlying proposition; that is, to attempt to limit the Court's policy-making function to exclude any sort of decision-making that entails anything other than the operation of pure logic.[75] Ironically, this way of dealing with the dilemma is itself a strange twist of logic: a premise (that judicial review requires policy-making) is recognized as true, which leads to a dilemma (why should an undemocratic institution be invested with the authority to make policy?), which dilemma is solved by denying the proposition which in the first instance was taken as correct and thereby giving rise to the dilemma. This kind of logic might be symbolized as: A equals B, B is bad, therefore A does not equal B. And so it is that members of the legal profession manifest their reluctance to admit the true nature of the judicial process. Instead, they quest for some safe middle ground whereby the Supreme Court would have a limited power of judicial review, but in exercising it would refrain from substituting its judicial value judgments for those of the legislature. Such a middle ground does not exist. It is time that the dreamers face up to this fact, and face up to the hard question of whether or not judicial review (particularly under the equal protection clause) is beneficial or not to our society.

The various proponents of doctrines of rationality are apologists for judicial review. They recognize the need for restraints upon the legislature because a legislature that sits upon constitutional judgment of its own acts poses a substantial risk of becoming a legislative tyranny of the majority that contravenes constitutional provisions. But at the same time the proponents of rationality cannot face up to giving the power of constitutional review—an awesome power indeed—to a relatively small number of persons who are unanswerable to the electorate

75. "(The progressive realists) held that a judge drawing on an arguable set of value choices is acting *no differently* than any other policymaker. . . . Thus a legal issue was depicted as similar in its essentials to other policy issues. . . . This equation of legal and ordinary decision making led the progenitors of the scholarly tradition to identify an apparent conflict with another root proposition of their creed: the overriding virtue of the democratic political process. . . . [T]hey asked the question that spawned the traditional mode of judicial criticism: What justifies allocation of important policy decisions to nonelected members of the judiciary? . . . In order to answer the question, Bickel's progressive realists found a way . . . (to narrow) the institutional role of the courts . . . [J]udges can confine themselves more rigorously and dependably within the contraints of strict reason . . . (Judges should) do no more than apply logic and reason to policy issues. . . ." Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 773-74 (1971).

and who, in their policymaking, are subject to all the foibles of human nature. The proponents of the Rule of Reasonableness recognize that the Court's independence from the electorate can be the source of either socially beneficial decisions or socially harmful decisions. Therefore they seek judicial review that is devoid of value judgments, which, unfortunately is an unattainable fantasy that leads to confusion, frustration and dishonesty.

The Rule of Reasonableness and all of its variations should be abandoned as a method of constitutional adjudication. This does not mean that the Supreme Court justices should not be especially deliberate in their review of legislation; nor would abolition of the Rule of Reasonableness necessarily dictate that the justices should reach constitutional issues that can be avoided by deciding cases on narrower grounds. Whether such avoidance is proper is not related to the abolition of the Rule of Reasonableness. However, the Rule itself should be foresaken as a fallacious rationalization which causes the judicial process to dysfunction. Even if it is believed that the Supreme Court should be a passive rather than an active institution and should curtail its exercise of judicial review (which is at best an arguable theory), the Rule of Reasonableness is hardly the proper way to accomplish such an objective.

When the Supreme Court relies upon the Rule of Reasonableness to forego real review, it is much the same as if the Court had refused to exercise its jurisdiction over a case. When the Court employs the Rule to avoid review, there is an exercise of jurisdiction in form, but hardly in substance; the Court is hearing the case, but with its ears closed. This approach is tantamount to a non-exercise of jurisdiction. Ironically, Professor Gunther himself previously has taken the position that the Supreme Court is justified in refusing to exercise its jurisdiction only in two instances: when it decides the merits of a case upon non-constitutional grounds or narrow constitutional grounds, or when the case or controversy requirement of Article III is not met.[76] As support for that position, Professor Gunther goes on to invoke[77] Chief Justice Marshall's statement that the Court has "no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."[78] Gunther concludes with a denunciation of the practice of

76. Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expedience in Judicial Review*, 64 COLUM. L. REV. 1, 16-18 (1964) (hereinafter cited as Gunther, *The Subtle Vices*).

77. *Id.* at 19.

78. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

avoiding judicial review that could well apply to his own more recent work:

> [T]here is an obligation to decide in some cases; there is a limit beyond which avoidance devices cannot be pressed . . . without enervating principle to an impermissible degree . . . (Avoidance devices) "lead either to a manipulative process, whose inherent, if high-minded, lack of candor raises issues of its own, or to the abandonment of principle. . . ."[79]

The Rule of Reasonableness has been expecially harmful in its application to cases arising under the equal protection clause, which in recent times has come to be one of the most important constitutional provisions for protection of individual liberties. However, due to the application of the Rule of Reasonableness to an entire variety of equal protection cases (that is, minimal scrutiny cases), there is in effect no judicial review under the equal protection clause. The Gunther model, by abandoning review of legislative purposes in all equal protection cases, would further decrease the exercise of judicial review under the equal protection clause. Currently, in a great many cases where legislation is challenged before the Court as violative of equal protection, the Court defers to the legislative judgment; the Court sits back and does nothing, and the Gunther model would exacerbate this intolerable situation.

How then should the Supreme Court go about analyzing equal protection cases? I would agree with professor Gunther that the two-tiered approach to equal protection cases does need to be readjusted, but not in the manner that Professor Gunther proposes. I would suggest that if the equal protection clause is to be viable in all cases, as it should be, the Supreme Court should in all instances engage in a complete and realistic balancing of interests—a weighing of legislative purposes against individual rights—and thereafter further evaluate, where necessary, the reasonableness of the relationship between the legislative purposes and the classifications. In those cases in which the Court does conclude that there is a valid state purpose that outweighs individual interests, the Court should then proceed to determine whether that purpose is reasonably related to the legislative classification. The Court should require in all cases that the classification be necessary or the least restrictive.[80] Professor Gunther only would apply this standard in strict scrutiny cases; in minimal scrutiny cases

79. Gunther, *The Subtle Vices, supra* note 76, at 25.

80. However, one might accept the model of equal protection review that has been suggested up to this point, but not accept the "least restrictive" standard as part of that model.

he would permit the state to select any means that substantially furthered the legislative purpose. But there is no justification to continue even this slight gap between minimal and strict scrutiny; it is unwarranted in any kind of case to allow a state to effectuate its purposes in a manner that causes unnecessary discrimination and harm to individual rights. To strike down legislation on the ground that its means are not necessary to accomplish its purposes only puts the state in the position, as Professor Gunther describes elsewhere, of "going back to the drawing board."[81] Therefore, the stricter standard of the "least restrictive" means should be adopted for all equal protection cases. And it cannot be overemphasized that unless the Court first undertakes a complete evaluation of legislative purposes, the reasonable relationship test is meaningless and can only obscure or avoid proper constitutional adjudication.

In a few very recent equal protection cases[82] that formerly would have been treated with minimal scrutiny, the Court has taken steps toward abandoning the Rule of Reasonableness. Only by engaging in this kind of real review, unfettered by the Rule, will the Supreme Court be able to make analytically sound decisions that restore the equal protection clause to the viability that it deserves as a constitutional provision.

Such a theoretical framework will not result in the Court finding equal protection violations in every case or even a majority of the cases presented to the Court. Those who are fearful of complete and meaningful judicial review under the equal protection clause may well be surprised to find that, even subject to such a full review, many legislative classifications are justifiable by state interests. Some classifications that cause discrimination are sustainable by countervailing state interests, others are not. Since the Court can expect to sustain much legislation brought before it, it should not shirk its responsibility to provide a reasoned assessment that balances state interests against individual ones in order to determine whether or not the equal protection clause has been violated.

Abandonment of the Rule of Reasonableness would abolish the uncalled for distinction between strict and minimal scrutiny. It could

81. Gunther, *supra* note 2, at 22-3.

82. See James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971); and *see* Gunther, *supra* note 2, at 18-20, 25-37.

also make it possible to redefine some of the concepts of suspect classification and fundamental interests as the justifiable result of the bona fide balancing of interests. The concepts of suspect classifications and fundamental interests would not be seen as manifestations of the gap between strict and minimal scrutiny, but rather as shorthand phrases that express the results of fully-reasoned decisions that have become well-established as precedent.

If there is to be full and complete judicial review under the equal protection clause, the one question raised is whether there should also be full and complete judicial review under the due process clause. Is substantive due process to be resurrected from its grave? In answer to this question it could be asserted that full and complete review under the equal protection clause would provide sufficient protection to individual rights so as to make substantive due process superfluous. Certainly there is some historical support for the proposition that the due process clause is directed only to ensuring procedural fairness. But this historical support may be debated, and while history should not be taken lightly, it hardly should be accepted as the controlling consideration in determining the meaning of the Constitution. Moreover, there is no valid reason to maintain the interment of substantive due process under the death knell of the Rule of Reasonableness. The Rule is no more justifiable in its application to the due process clause than it is in its application to the equal protection clause or to any other constitutional provision. If substantive due process is to remain interred, justification for its moribund condition will have to come from sources other than the Rule of Reasonableness.

It is true that due to the generality of their wording, both the due process and equal protection clauses provide a wider scope of judicial review than other constitutional provisions. But this wide scope of review is necessary so that the Court's authority will be coexistensive with that of the legislature. Were it otherwise, there would be a large body of legislation that entirely escaped judicial review. Moreover, it is impossible to devise any constitution that could specifically enumerate all of the values needed by a constantly evolving society. Therefore, flexible constitutional provisions, such as the due process and equal protection clauses, are necessary to allow judicial review that coequals legislative authority.

In fact, in a series of cases culminating in the recent abortion decision,[88] the Supreme Court has already taken a first step in reviving

83. Roe v. Wade, 410 U.S. 113 (1973). In the Roe opinion the Court discusses

substantive due process by establishing that there is a right of privacy "founded in the Fourteenth Amendment's concept of personal liberty."[84] Unfortunately, in reaching the holding in its abortion decision, the Court relied upon the position that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy."[85] So, unless the reasoning in the abortion case is a false start, it seems that any trend toward the return of substantive due process will follow the Warren Court's two-tiered approach to equal protection cases, with the Rule of Reasonableness playing the same devious role when fundamental interests are not deemed to be present. However, it is important to note that as Professor Gunther correctly points out, in some recent equal protection cases a new majority of the Supreme Court has departed from the old two-tiered approach by providing real review even in minimal scrutiny cases.[86] This trend may be extended to all equal protection cases by a thorough rejection of the Rule of Reasonableness, and the Court's treatment of substantive due process may follow the same path.

The suggested revival of substantive due process, as well as the model proposed here for full and complete equal protection review, no doubt will be greeted by alarm prompted by memories of the New Deal Court crises.[87] Such alarm is a manifestation of the inability to accept the dualistic uncertainty of judicial review; that if the Supreme Court is granted the power of judicial review, it can exercise it rightly or wrongly. There is no way to assure that the Court will always make the correct or the popular decision, but if it is believed that judicial review is necessary to protect individual rights from legislative encroachment, then the risks of judicial review must be taken. Yes, the Court, just like the legislature or the executive will make its mistakes—it will make them under the due process clause, the equal protection clause, and every other constitutional provision. But the Court will also make correct decisions that protect constitutional rights of which other branches of the government are not so solicitous. Supposedly judicial review is an authority that the Court possesses, and it is an authority that should be exercised to enforce the Constitution, to

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the series of cases from which the right of privacy emerges. See also Bender, *supra* note 35.

84. Roe v. Wade, 410 U.S. 113, 153 (1973).
85. *Id.* at 152.
86. Gunther, *supra* note 2, at 18-20, 25-37.
87. See text accompanying notes 23-30 *supra*.

make it a living Constitution, not a dead one. The Rule of Reasonableness in all of its variations is nothing more than a spurious rationalization by which the power of judicial review is covertly abdicated or concealed. Whether interpreting the equal protection clause, the due process clause, or other constitutional provisions, the Supreme Court owes the nation fully reasoned and analytically sound judicial review through a rejection of the Rule of Reasonableness.