JUSTIFYING INVIGORATED SCRUTINY AND THE LEAST RESTRICTIVE ALTERNATIVE AS A SUPERIOR FORM OF INTERMEDIATE REVIEW: CIVIL COMMITMENT AND THE RIGHT TO TREATMENT AS A CASE STUDY

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I. INTRODUCTION

My previous article in the *Arizona Law Review*[1] sought to strengthen the constitutional right to treatment for involuntarily committed persons ("patients" or "committees"). It demonstrated the theoretical and practical weaknesses of five right-to-treatment arguments that can be derived from important mental health law cases,[2] and then developed a sixth argument—the least restrictive alternative right to treatment theory—that might well be the sole firm constitutional foundation for a comprehensive right to treatment.[3] The latter theory was formulated as follows: As a derivative of the least restrictive alternative principle, and only under that standard of review or the more stringent compelling state interest test, virtually all patients are entitled to superior, individual treatment, irrespective of the purpose of their commitment, unless the state can meet the heavy burden of demonstrating either that treatment would neither hasten release nor enhance freedom

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The author wishes to thank his colleagues William E. Boyd of the Law Faculty, and Jeffrie G. Murphy of the Department of Philosophy, and Margaret Jane Radin and Michael H. Shapiro of the University of Southern California Law Center for reviewing an earlier draft of this piece.

1. Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1 (1978).

2. *Id.* at 4-33.

3. *Id.* at 33-46.

within the institution, or that confinement with treatment would be less effective than confinement simpliciter in achieving the state's commitment goals.[4]

This Article will examine the assumptions upon which the least restrictive alternative right-to-treatment theory is based:[5]

1. The least restrictive alternative principle is an independent constitutional standard of judicial review.
2. The form of the principle upon which the right to treatment rests entails that: a) The state must bear a heavy burden of proof; b) it need use only equally effective alternative means; c) it must not draw overinclusive classifications that include persons as to whom its purposes are not relevant; and d) it must also use alternative means that minimize intrusions upon those as to whom its purposes are relevant.
3. The principle constitutes a relatively mild intrusion into the political process[6] because it does not deny any goals to the state, but rather requires it to achieve its ends in certain ways.
4. Application of (at least) this mild form of review to determine whether, when, and what treatment is required can be thoroughly justified.

The purpose of this Article is not solely to examine and support these assumptions. Although intimately related to that task, an independent purpose of the Article is to establish a method for justifying application of particular forms of "invigorated scrutiny"[7] in specific cases. The Article will begin with the task of establishing the least restrictive alternative principle to be a discrete and superior form of "intermediate review"[8] that entails examination of the state's means but

4. *Id.* at 36-38.

5. *Id.* at 35.

6. "Political process" will refer to the activities and policies of government entities other than the courts, although the latter are, at least in certain senses, "political." *See* M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 29-30 (1966); L. Levy, *Judicial Review, History, and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT 1, 12 (L. Levy ed. 1967); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 199-209 (1952).

7. "Invigorated scrutiny" will refer to any scrutiny beyond that of the rational basis test (which is most commonly used in due process and equal protection litigation). *See* note 8 *infra*. This Article will only directly consider substantive equal protection, due process, and "quasi-due process" (of the sort employed in Griswold v. Connecticut, 381 U.S. 479 (1965), see text & note 221 *infra*) standards of review. Related procedural due process, first amendment, commerce clause, and irrebutable presumption doctrine will not be directly addressed. What is said here concerning the least restrictive alternative principle and justification for active review is, however, relevant to constitutional adjudication generally. For discussion of the principle's relationship to the aforementioned doctrines, see generally Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974).

8. "Intermediate review" will refer to any degree of scrutiny between the deference of the

not its ends. The full implications of the independent and attractive nature of the principle will not be traced,[9] but two suggestions are offered. First, the Supreme Court ought to explicitly recognize and apply the least restrictive alternative principle as an independent standard of review. Second, the Court should apply the principle, rather than more intrusive standards of review, when the issue before it can be resolved by focusing solely on the state's means as opposed to its ends.

Next, the Article will explain an approach for justifying application of particular forms of invigorated scrutiny to specific cases, and that approach will be applied to justify application of the least restrictive alternative principle to determine whether, when, and what treatment must be afforded to patients.[10] To establish what must be shown

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rational basis test and the activism of the compelling state interest test. The rational basis test is used in most due process and equal protection cases, and it (1) accepts as relevant any end asserted by the party claiming the constitutionality of the questioned action, means, or classification, and even accepts any goals that the court can imagine as being sought by the state; (2) deems valid any relevant end that is conceivably within the state's broad power; (3) requires only that the questioned action be conceivably related to the relevant and valid end; (4) considers irrelevant possible alternative means or classifications; and (5) places heavy burdens of proof concerning each of the above four elements upon the party asserting unconstitutionality. Spece, *A Purposive Analysis of Constitutional Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research*, 51 S. CAL. L. REV. 1281, 1292-98, 1313-14, 1340 (1978). *Compare* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 204-05 (1976) *and* Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977) (both adopting the position taken here) *with* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 308-15 (1976) (taking the position that the rational basis test requires an *in fact* ends-means connection). Regarding the compelling state interest test, see note 17 *infra*. The Court has explicitly or implicitly applied various forms of intermediate review in several cases, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082-89 (1978), and it has articulated a fairly explicit intermediate test to govern sex discrimination cases. See note 17 *infra* for a discussion of the latter standard.

9. In a subsequent Article, the author intends to demonstrate that the least restrictive alternative principle is superior to all other forms of intermediate due process or equal protection review the Supreme Court has used or been urged to use. More specifically, it will be shown to be superior to both the intermediate standard described in Professor Gunther's landmark article, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972), and the standard the Court has employed in recent sex discrimination cases, see note 17 *infra*. The former test allows the Court to engage in ends scrutiny by giving whatever definition it wishes to the requirements that the state's means "substantially advance" its ends, and yet it offers little improvement of the political process. The latter test may differ so little from the compelling state interest test, Spece, *supra* note 8, at 1317-31 & n.96, 1340-41 & n.144, that it is difficult to even characterize it as an intermediate standard. If all this is true, the Court might wish to: (1) Substitute the least restrictive alternative principle for the rational basis test; (2) use it in place of the intermediate test it has fashioned in recent sex discrimination cases; or (3) employ it in addition to the present rational basis, intermediate, and compelling state interest tests.

10. The questions about whether, when, and what treatment must be afforded to mental patients (hereafter "right-to-treatment questions") addressed in my earlier, companion piece, see note 1 *supra*, generally presuppose that the state previously has coercively restricted patients' freedom. There are many questions, however, about when, why, and how the state can initially restrict patients' freedom (hereafter "civil commitment questions"). "When" questions concern the standards for, or purposes of, limiting patients' freedom—can they be restrained because of danger to self, their danger to others, their need for treatment, or what? "Why" questions concern the underlying justifications for the standards for, or purposes of, restraint, e.g., if mental patients can be restrained because they are dangerous to others, why is this so when other dangerous persons can be restrained only after they have committed some offense? "How" questions are typified by the query: Can the state place a patient in an institution or must it use some less restrictive means

to justify the application of invigorated scrutiny, the Article will list, categorize, and examine factors the Court and other authorities have considered relevant to the issue.[11] It will also outline themes that underlie these various factors. The Article will not fully examine either the themes or the efficacy of each of the many factors.[12] It will be shown, however, that almost all of the factors favor application of invigorated scrutiny to right-to-treatment questions.

The justification for invigorated scrutiny of such questions will not be left, however, to the informed intuition that justification exists whenever most of the factors favor active review. It will be argued that any justification for invigorated scrutiny must derive from a consistent and ordered application of the factors. More specifically, the Court should explicitly establish a hierarchy among the factors and delineate a set of rules regarding which pairings of factors will justify application of particular standards of review. Such rules can only evolve over time, and what must be done at the outset is to examine the precedents and take from them what combinations of factors have been explicitly or implicitly deemed sufficient to justify application of specific standards of review. New rules either must be consistent with the precedents or the deficiencies of the precedents must be explained.

An article devoted primarily to the right to treatment obviously cannot review each of the precedents and derive a comprehensive set of rules for justification of all forms of invigorated scrutiny.[13] What will be done, however, is to discern rules the Court has implicitly followed in particularly representative precedents, including one case that directly deals with the rights of mental patients.[14] These "rules" will then be applied to the right-to-treatment context.

II. THE LEAST RESTRICTIVE ALTERNATIVE PRINCIPLE

Much has been written about the least restrictive alternative principle, but no one has focused upon it as an independent form of inter-

of control such as an out-patient facility? For the still most helpful overviews of these issues, see Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1201-59 (1974) (when and why); Chambers, *Alternatives to Civil Commitment: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108 (1972) (how). Another purpose of this Article is to justify application of the compelling state interest test to answer these civil commitment questions. See text & notes 48-253 *infra*. The Article does not explore, however, the extent of the state's obligation to provide treatment to patients who are subject to restraint short of institutionalization.

11. In considering these elements, it should be emphasized that the often-mouthed black letter platitude, "the Court will apply strict scrutiny when a fundamental right has been intruded upon or a suspect class has been burdened," is a gross oversimplification.

12. This seems a fair limitation since this Article is primarily devoted to the right to treatment. Others are invited to analyze and refine the various factors and underlying themes.

13. Once again, others are invited to refine the analysis.

14. See text & notes 185-95, 249-51 *infra*.

mediate due process or equal protection review.[15] Indeed, the commentary has almost uniformly discussed the principle as a constituent part of broader doctrines or standards of review.[16] Moreover, it is part of the compelling state interest test, and probably also is, or will be construed to be, a component of the intermediate standard the Court has applied in sex discrimination cases.[17] Thus, even if the Court were to solely apply the least restrictive alternative principle in a given case, there would be a question whether it implicitly applied the compelling state interest or intermediate test, discussing only the constituent element applicable to the case at hand.[18] Whether that is so is important because: (1) If the least restrictive alternative principle is only a constituent part of more comprehensive tests, applying it can only be justified if the more general test can also be justified; and (2) if the principle is only treated as a part of broader tests, substantial benefits that could be gained through its independent use will be forfeited.

The substantive merits of the principle will be explored below, but initially it should be observed that logic, tradition, and precedent favor its independent use. There is no theoretical or logical reason that the principle cannot be independently applied; it is a self-contained concept. Moreover, the principle has been used as a part of the Court's analysis in virtually every field of constitutional adjudication,[19] and its roots date back to at least 1894.[20] As one commentator has observed,

15. Major articles that discuss the principle are Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968); Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969); Note, *supra* note 7.

16. See generally the authorities cited in note 15 *supra*. Professor Singer has briefly mentioned that the least restrictive alternative principle could be separated from the compelling state interest test. He seemingly embraces a suggestion made by Justice Burger that the least restrictive alternative principle replace the compelling state interest test as the latter is too strict. *See* Singer, *Sending Men to Prison: Constitutional Aspects of the Least Restrictive Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 58-59 (1972).

17. Spece, *supra* note 8, at 1340-41 & n.144. The best construction of the relatively seldom used compelling state interest test is that it (1) accepts as relevant only actual or verifiable purposes of state action; (2) deems valid only "compelling" state interests; (3) requires a substantial connection between the state's action, means, or classification and its compelling interest; (4) requires the use of less restrictive alternatives; and (5) places heavy burdens of proof concerning each of the above four elements on the state. *Id.* at 1294, 1298-1302, 1314-24, 1340-45. The intermediate test the court has fashioned in recent sex discrimination cases, text & notes 53, 144 *infra*, (1) accepts as relevant only actual or verifiable purposes of state action; (2) deems valid only "important" state interests; (3) requires a substantial connection between the state's means or classification and its important interest; (4) requires use of less restrictive alternatives, *or at least those that entail more precise classifications*; and (5) places heavy burdens of proof on the state. Spece, *supra* note 8, at 1274-95, 1298 & n.52, 1303, 1313-25, 1340-45. In actuality, this test might differ little from the compelling state interest test. *Id.* at 1317 n.96.

18. Professor Singer has gotten to the heart of the issue, observing: "Because each recent Supreme Court case using the 'least drastic alternative' approach has also applied the 'compelling state interest' test, there is some danger that the two will be viewed as inseparable." Singer, *supra* note 16, at 58.

19. *See generally* Note, *supra* note 7.

20. Struve, *supra* note 15, at 1464 n.4.

"[T]he pervasiveness and long-recognized utility of the less drastic means concept are noted, for tradition and precedent are keystones of our constitutional law, in much the same way as they are to our common law."[21] In addition, the Court has independently applied the principle in several first amendment and commerce clause cases.[22]

Analysis of the least restrictive alternative principle as a separate standard of review will demonstrate its substantive merits: how it pays deference to the political process by venturing only means as opposed to ends scrutiny, and how it nevertheless promises significant protection of individual rights and improvement of the political process. The principle captures two important concepts. First, it provides that the state cannot use overbroad or overinclusive classifications or regulations.[23] For example, the state cannot involuntarily commit all mentally ill persons simply because some or many of them might be actively or passively dangerous to self *or* in need of treatment. Rather, it can only commit those particular mentally ill persons who cannot survive safely in freedom with the help of family or friends, or, perhaps, who are in need of treatment.[24] Second, the least restrictive alternative principle posits that the state must use alternative methods by which it can achieve its objectives but tread less upon individual rights.[25] If the state can achieve its goals of providing treatment or protection for the mentally ill both through involuntary civil commitment and through outpatient care, then perhaps the latter alternative must be used because it is less intrusive upon the right to freedom from confinement.[26]

Beyond these two concepts, there are several ambiguities in the least restrictive alternative principle:[27] (1) Whether the state must use alternatives only if they are equally effective or even if they are somewhat less effective; (2) what consideration must be given to pecuniary costs of various alternatives; (3) whether the state must use the *least* restrictive alternative; and (4) who must bear the burden of proving the

21. Note, *supra* note 7, at 1016.

22. Some of the cases have applied the principle to entail a modicum of sacrifice of state ends, but that would not be allowed under the interpretation of the principle embraced here. See text & notes 29-30 *infra*. For an exhaustive account of the cases alluded to in the text, see Note, *supra* note 7, at 971, 993-1005, 1011-16. For an earlier account see Wormuth & Mirkin, *supra* note 15, at 257-93. The commerce clause cases are distinguishable, of course, as they arguably involve federal versus state power as much or more than court versus legislative power.

23. Note, *supra* note 7, at 1032-33.

24. O'Connor v. Donaldson, 422 U.S. 563, 573-76 (1975). See text & notes 185-95, 249-51 *infra*. Of course, the state can also commit those who are dangerous to others.

25. Note, *supra* note 7, at 1032-33.

26. For an exhaustive discussion of this point as it might relate to any purpose of commitment, see generally Chambers, *supra* note 10.

27. This is to be expected especially as the principle has generally been applied as a constituent part of other constitutional tests. *See* text & notes 16-18 *supra*.

presence or absence of alternatives.[28]

In some cases, the state has been required to use *less effective* alternatives, the Court using the least restrictive alternative principle as a tool for balancing state interests and individual rights, while in other cases the Court has only required the use of equally effective alternatives.[29] The better interpretation of the principle, and the one upon which the least restrictive alternative right-to-treatment theory is based, is that only equally or substantially as effective (i.e., almost of the same degree of effectiveness) alternatives must be used.[30] This interpretation, if consistently followed, would prevent the *sub rosa* ends scrutiny that inevitably occurs if the principle is interpreted to force the state to use less effective alternatives (or alternatives that entail more than a *de minimis* sacrifice of state ends).[31]

As to the uncertainty whether the state must use the *least* restrictive alternative, the Court has taken both extreme positions, requiring strict necessity in at least one case, and "significantly less burdensome alternatives" in another.[32] The latter view would emasculate the principle, limiting its effect to only the most extreme cases.[33] Moreover, assuming as above that the state must only employ substantially as *effective* alternatives to protect its interests,[34] a parity of reasoning sug-

28. Spece, *supra* note 8, at 1341.

29. See text & note 22 *supra*; Chambers, *supra* note 10, at 1146-49.

30. Chambers, *supra* note 10, at 1111; Spece, *supra* note 8, at 1341-50.

31. It might be suggested that the Court would be invited to undertake such ends scrutiny by the stipulation that the state must use alternatives even if they are only *substantially* as effective. That stipulation is provided, however, to avoid the inaccuracy and inefficiency in decisionmaking that would inevitably result by requiring the Court to determine precise equality in effectiveness. See Spece, *supra* note 8, at 1342 regarding this and other possible merits of the suggested definition. If even this modicum of flexibility would lead to abuse, the principle ought to be construed to require use only of *equally* effective alternatives. *Id.*

Even requiring only the use of equally effective alternatives might deny the state one end—pecuniary savings. If an alternative is equally effective, the state might nevertheless have rejected it because of its greater expense. This question has received little attention, although in one compelling state interest test case the Court explicitly pointed out that alternatives will be required even if they entail additional expense. Bullock v. Carter, 405 U.S. 134, 148 (1972). This is consistent with the Court's reluctance to allow fiscal considerations to justify state actions when those actions are subjected to invigorated scrutiny, and it reflects a judgment that only interests more important than monetary ones should be allowed to override the important values or considerations that justify invigorated scrutiny in the first instance. Spece, *supra* note 8, at 1343. Fiscal considerations should become determinative, however, if they are so great that other programs, implicating values of even greater importance, are threatened. *Id.* This is a point that deserves the Court's close attention.

32. In Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), the Court required strict necessity or the least restrictive alternative. *Id.* at 626-27. It held unconstitutional a limit on the franchise in local school board elections to those who owned property or had children attending school within the district. *Id.* at 632-33. The Court struck down the classification because not "all those excluded [were] in fact substantially less interested or affected than those the statute includes." *Id.* at 632. *See also* Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (striking down a durational residency requirement for voting under an "exacting standard of precision"). On the other hand, the Court in American Party v. White, 415 U.S. 767 (1974), referred to a requirement that the state use any "significantly less burdensome" alternatives. *Id.* at 781.

33. Spece, *supra* note 8, at 1344-45.

34. *See* note 31 *supra*.

gests that individuals' rights be protected by requiring the state to use any alternatives that would entail more than a *de minimis* improvement in protection of individual rights. This view would excuse the Court from the burdensome task of deciding precise equalities in restrictiveness. A modicum of improvement in preserving individual rights would dictate use of alternatives, but the Court could disregard *de minimis* savings.

As to the final ambiguity in the principle—who must bear what burden of proving the presence or absence of alternatives—the weight of the few cases that address the point is in favor of placing a substantial "burden of proof" upon the state.[35] This allocation is consistent with the general placement of burdens of proof on the state concerning various elements of invigorated[36] scrutiny, and it reflects the important values that justify application of such scrutiny in the first instance. Nevertheless, since the precedents have generally dealt with the least restrictive alternative principle as a constituent part of other tests and since the principle might be applied independently and with commensurately less justification, placement of the burden of proof in the latter context must be explored further.

The Court should look to the underlying policies that inform placement of burdens and allocate them accordingly.[37] This proposal should be made clearer by its application to considering who should bear the burden of proving presence or absence of alternatives concerning whether, when, and what treatment committees should be afforded. The policies that inform placement of burdens are: (1) The party seeking to change the status quo, especially through the coercive power of the state, should bear any burdens; (2) certain facts are generally thought more probable than not, and it is reasonable to place a burden

35. The quotes are to flag questions regarding application of the term "burdens of proof" in constitutional adjudication. *See* Spece, *supra* note 8, at 1301 n.60.

The cases cited above are either silent on the point or refer to the state's duty to show the compellingness and necessity of its actions. See notes 31-32 *supra*; *cf.* Examining Bd. of Eng'rs., Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 602 (1976) ("only if the state . . . is able to satisfy the burden of demonstrating 'that its purpose . . . is both constitutionally permissible and substantial and that its use of the classification is necessary' " (quoting *In re* Griffiths, 413 U.S. 717, 721-22 (1977))). *See also* note 42 *infra*. The Court has not addressed the distinction between burdens of production and persuasion in constitutional adjudication. For discussion thereof see Spece, *supra* note 8, at 1322-40.

36. Spece, *supra* note 8, at 1300 & n.60.

37. One policy that should be considered is that it may be necessary to have an across-the-board rule regarding who will have the burden whenever a given standard of review is applied. Perhaps only then can a standard provide adequate guidance and serve its purpose as a constitutional rule. *See* Spece, *supra* note 8, at 1289-90. If this were true, the analysis would still yield the result argued for in the text: placement of the burden on the state. The least restrictive alternative principle will only be applied when there are important rights, interests, and values threatened and the state will generally have better access to information concerning alternatives it could have pursued. These factors strongly argue for general application of burdens on the state if there must be a general rule.

on one who asserts the existence of a relatively less probable fact; (3) certain findings might influence rights that are favored in a very rough preferential ordering of values, and to serve such preferences, burdens will be placed on the party who seeks to make a showing inimical to a preferred value; and (4) parties having greater access to information should bear the burden of producing evidence and perhaps the burden of persuasion.[38]

In applying the first factor to determining whether, when, and what treatment is required, it is clear that civil commitment involves a change of the status quo through what the Supreme Court has correctly called a massive deprivation of liberty.[39] The civil committee is taken from his place in the community, declared to be mentally ill and disabled or dangerous, and then institutionalized. Few would dispute that this is a coercive change of the status quo that should strongly cut in favor of placing the burden on the party seeking the change.

Second, civil commitment entails findings of mental illness *and* dangerousness or some form of disability such as inability to care for oneself or inability to make decisions regarding needed treatment. The probability of the existence of each of these statuses as to any given person is most likely below fifty percent: "the facts" upon which commitment depends are improbable in a relative sense.

Third, concerning protection of important rights by the placement of burdens, the right to freedom from confinement that is massively intruded upon by civil commitment is a preferred or fundamental right.[40] Since freedom from confinement is a preferred right, the state should bear the burden when it attempts to drastically limit the right.[41]

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38. C. MCCORMICK, MCCORMICK ON EVIDENCE 785-87 (2d ed. 1972).

39. Humphrey v. Cady, 405 U.S. 504, 509 (1972). *See* Jackson v. Indiana, 406 U.S. 715, 735 (1972).

40. The same is true of several associated rights trammeled by commitment. *See* text & notes 86-88, 106-08, 119-21 *infra*.

41. It might be argued, on the other hand, that civil commitment is designed to protect interests which are just as important as the right to freedom from confinement: the physical security of commitees, the mental health of patients, or the physical security of society. It has already been suggested, however, that the probability of the existence of mental illness, dangerousness, disability, or incompetence is probably less than fifty percent. *See* text following note 39 *supra*. Even if the probabilities have been underestimated, protection from these supposed statuses does not outweigh the *absolute probability* of abrogating the right to freedom from confinement (and attendant rights) entailed in civil commitment. Even if the statuses necessary for civil commitment exist, there is substantial evidence that confinement is likely not to be in the best interests of the patient in a net sense. Some have contended, for example, that civil commitment even shortens one's life expectancy. *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), *vacated and remanded on procedural grounds*, 421 U.S. 957 (1975). Also, dangerousness to society might encompass threats to property or minor physical harms of a sort which might not outweigh the right to liberty.

Speaking of a net effect might suggest endorsement of the sort of balancing and ends scrutiny that have been said to be avoided under the least restrictive alternative principle. See text & notes 26-40 *supra*. The discussion here relates, however, to placement of burdens of proof (in effect, defining part of a standard) as opposed to applying a standard of review and reaching a decision

In short, since civil commitment (1) involves the absolute probability of an intrusion upon a very important interest—freedom from confinement—of an identifiable person, (2) seeks to protect the same person or unidentified potential beneficiaries from speculative harms to, in some cases, not as important interests (property, minor physical harms), and (3) might not achieve its goals and might even be detrimental, it seems appropriate to place the burden of proof on the party who seeks to justify commitment.

Finally, the state has better access to the relevant information. It has constructed institutions to deal with the mentally ill and purports to know who they are and what should be done with them. It has massive technical resources compared to the typical civil committee. This access argues for placing the burden upon the state.

Thus, each of the four factors relevant to placement of burdens of proof indicates that burdens concerning whether, when, and what treatment must be afforded to patients should be placed on the state. The same is true of the few authorities that have examined the substantially identical question as to who should have the burden of proof concerning possible alternatives to institutional confinement.[42]

Having defined the form of the least restrictive alternative principle relied on here, the principle's merits can be summarized. The least restrictive alternative principle has been defined here to require use only of equally or substantially as effective less onerous alternatives.[43] As such, the principle avoids limiting the state's ends, but improves the political process by circumscribing its means. The principle avoids direct ends scrutiny of the sort entailed in the compelling state interest and intermediate tests by requiring only that the state's goals be legitimate as opposed to compelling or important.[44] By limiting the state's means only in light of alternatives and only after answering the specific

on the merits. Balancing interests at the former stage is unavoidable to the extent that burdens are to be placed to favor certain interests.

42. In Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974), the Court observed:

> In addition to the findings which are required to be made by the factfinder, the state, acting through the probate court or whichever of its agents designates the place of confinement, shall have the burden of demonstrating that the proposed commitment is to the least restrictive environment consistent with the needs of the person to be committed. This duty of investigation and burden of persuasion derive from the general and well-recognized principle that ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."
>
> Specifically, the state, which knows or has the means of knowing the available alternatives, must bear the burden of proving what alternatives are available, what alternatives were investigated, and why the investigated alternatives were not deemed suitable.

Id. at 392. (Citations omitted.) *See also* Chambers, *supra* note 10, at 1170-72.

43. See text & notes 29-31 *supra*. As explained in the text & notes 22, 29-31 *supra*, the least restrictive alternative principle has been interpreted, in certain cases, to capture some ends scrutiny, while the view or interpretation relied upon here is that it does not.

44. See note 17 *supra* regarding the compelling state interest and intermediate tests.

question whether the alternatives are substantially or equally effective, the principle also evades indirect ends scrutiny.

By requiring a minimization of the costs of means that are employed, the least restrictive alternative principle makes a genuine contribution to individual rights and the political process. Finally, the principle also tends to improve the political process by stimulating legislators to formulate legislation that achieves goals to a greater extent than any alternative legislation would.[45] By striking down poorly drawn legislation and remanding it to the legislature with an indication of alternatives that could achieve the same ends, it teaches the lesson that legislation must be carefully drafted.[46] Legislation must actually further state ends because if it does little or nothing, alternatives are most likely to be possible. In doing all this, the principle need not limit the state to actual purposes and thereby engender the problems associated with such a requirement.[47] The principle would indirectly force the state to rely on actual purposes as it is unlikely that the state would be able to manufacture and assert purposes that could not be similarly advanced by alternative means. Only legislation designed to achieve a specific purpose is likely to advance that purpose to an extent greater than would any alternatives.

III. FACTORS RELEVANT TO JUSTIFYING INVIGORATED SCRUTINY

Although the least restrictive alternative principle can be demonstrated to be an independent, useful, and nonintrusive standard of review, that alone is not enough to justify its use to determine whether,

45. Some would attack as irrational this attempt to make the legislative process rational. *See generally* Linde, *supra* note 8 (conception of the legislative process as essentially one of compromise and political wheeling and dealing). For a refutation of this view of the legislative process see Spece, *supra* note 8, at 1306; L. TRIBE, *supra* note 8, § 16-5, at 999.

Another criticism is implicit in Professor Tribe's point that judicial scrutiny might be especially intrusive if it can lead to a continual process of revision of political outcomes as opposed to a single, but seemingly more drastic, intervention. *Id.* § 16-6, at 1001. Drawing this point beyond Professor Tribe's application, a determination that a state end is not valid settles the matter with one intervention. A finding that the state has not used the least restrictive alternative invites, however, further attempts to fashion better legislation *and* perhaps subsequent challenges to the state's actions. The least restrictive alternative principle, however, only strikes down state actions if alternatives are possible, *see* text & notes 29-31 *supra*, and in applying the principle the Court will usually give some indication what those alternatives might be. *See* Chambers, *supra* note 10, at 1145. *See also* Note, *supra* note 7, at 998. The political process is required to be given a second chance and is usually provided with some guidance in the effort.

46. See text & notes 29-31 *supra*. Speaking of the benefits of the least restrictive alternative standard, one commentator has analogized the principle to Professor Bickel's passive virtues, claiming that it incorporates the charms, but excludes the vices, of those virtues by allowing remands to the legislature, but only on principled grounds. Note, *supra* note 7, at 1018-19.

47. See Spece, *supra* note 8, at 1296-1307, regarding these problems. The least restrictive alternative principle, however, could be applied along with a requirement that the state rely on actual purposes if the Court determined that the requirement would present more benefits than detriments. Regarding the benefits of such a requirement and the exaggeration of the problems of requiring actual purpose, see *id.*

when, and what treatment is owed to committees. The more general issue of what will ever justify any invigorated scrutiny must be addressed by examining factors the Court and other authorities have considered relevant to the question.

Initially these factors will be listed and applied to questions raised by coercive restraint of mental patients. Although the primary focus of this Article is on questions about whether, when, and what treatment must be afforded to patients, the factors will be applied to both those and questions about when, why, and how patients can be restrained.[48] The analysis is virtually the same for both sets of questions,[49] and the latter set of questions is both vitally important and prior to the former set. After discussing and applying the various factors to these contexts, a more general approach for applying the factors in all cases will be explained. It will then be shown that this approach justifies applying the compelling state interest test to determine when, why, and how patients can be restrained, and, *a fortiori*, justifies applying the least restrictive alternative principle to determine whether, when, and what treatment must be given to patients.

A. *Categorizing and Explaining Themes Behind the Factors*

The various factors relevant to determining the appropriate standard of review can be placed in these categories: (1) The nature of the right involved; (2) the nature of the holder of the right; (3) the nature and degree of the intrusion; and (4) various institutional factors. First, the nature of the right involved is obviously relevant, and many would think it dispositive in most cases. For example, constitutional law study aids tell us that the compelling state interest test will be applied when a "fundamental right" is intruded upon, and there is language in the Court's opinions to support this.[50] The nature of a right, however, is not and should not be the sole criterion for determining the appropriate standard of review. Otherwise, slight intrusions upon "fundamental rights" would demand strict scrutiny and possibly discourage a farsighted court from recognizing a right to be fundamental in a case of first impression, even if a drastic intrusion were involved.[51] The court

48. For an explanation of the two sets of questions, see note 10 *supra*.

49. See text & notes 58-253 *infra*.

50. *See* M. HILL, SMITH'S REVIEW—CONSTITUTIONAL LAW 259-61 (1976). Perhaps the most direct statement by the Court is in Shapiro v. Thompson, 394 U.S. 618, 629-33 (1969).

51. *See* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 505 (1973). Professor Goodpaster suggests the problem, but does not point out that the Court has dealt with it *de facto* by not considering the nature of the right a *sufficient* condition to justify use of strict scrutiny. (Professor Barrett goes beyond this and simply asserts that the degree of intrusion is irrelevant. Barrett, Jr., *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection*, 1976 B.Y.U. L. REV. 89, 111.) For example, in *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court upheld limits upon welfare receipts, *id.* at 486-87, thus, in a sense,

would fear binding itself to applying strict scrutiny in any subsequent case involving even slight intrusions on the right.[52]

Second, the nature of the holder of the right is dispositive in certain cases because of the suspect classification doctrine. The nature of the holder of a right, however, should not and is not considered only in conjunction with that doctrine. Rather, certain characteristics of the holder of a right might indicate that invigorated scrutiny is appropriate, even if they do not coincide with a set of necessary conditions for finding a "suspect classification."[53]

Third, the nature of the intrusion has been considered relevant because the Court should not waste its limited resources and good will by dealing with slight intrusions. Conversely, drastic intrusions upon moderately important rights perhaps should not be blinked at through the eyes of the traditional rational basis test.

Finally, several institutional factors are relevant to determining the proper degree of scrutiny. For example, *if* the Court should generally defer to legislative judgment, this does not mean that it should defer to actions not based upon any consideration of the issues involved.[54] Similarly, if the Court has generally been active in an area, its continued activism is less likely to breed controversy and ill will.[55]

Several themes underlie application of the various relevant factors, and these themes can be used to help explain or criticize the factors.[56]

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disfavoring families beyond a certain size. This affected the "fundamental right" to procreate mentioned in Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (using strict scrutiny and striking down statute allowing sterilization of certain criminals), but that alone was not sufficient to preclude the Court from upholding the welfare limits by using the traditional rational basis standard. Dandridge v. Williams, 397 U.S. 471, 520-21 & n.14 (1970). The Court, no doubt, used strict scrutiny in *Skinner* but not in *Dandridge*, at least in part because of the difference in the nature and degree of the deprivation of the right to procreate. See also text & notes 126-27 *infra*. Another difference between the two cases is that the latter involved a positive claim *to benefits*, while the former dealt with a negative claim *against intrusion*. *Compare* Dandridge v. Williams, 397 U.S. 471, 475 (1970) *with* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Regarding that general distinction, see text & notes 109-12 *infra*.

52. Note, *supra* note 7, at 996.

53. For example, in Craig v. Boren, 429 U.S. 190 (1976) and Califano v. Goldfarb, 430 U.S. 199 (1977), the Court applied an invigorated form of scrutiny short of the compelling state interest test because the government drew gender-based classifications. In an intriguing line of cases, the Court has resisted labeling sex as a suspect categorization that would invoke the compelling state interest test, but it has apparently embraced a milder form of invigorated review because sex shares many, although not all, of the characteristics of a suspect classification. *See* L. TRIBE, *supra* note 8, §§ 16-24 to 16-29, at 1060-82.

54. P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 583-603 (1975); Gunther, *supra* note 9, at 21. See text & notes 126-27 *infra*.

55. Gunther, *supra* note 9, at 24.

56. If the themes and factors discussed here ultimately determine the appropriate standard of review, then they become constitutional principles. Thus, they must derive from the Constitution. This is a very important and complex point that cannot be adequately developed here. Very briefly, however, consider as an example perhaps the toughest theme to explain as being derived from the Constitution—protecting the Court from political limitation of its power. This might intuitively strike some readers as a Machiavellian and extra-constitutional consideration. On the other hand, it can be argued that the Court has a *constitutional* obligation, based upon the consti-

The themes are: (1) Limiting intervention into the political or legislative process; (2) protecting the Court's limited resources so it can deal with only the most important issues of the day; (3) insulating the Court from political limitation of its power; (4) assuring accuracy and efficiency in decisionmaking; and (5) supporting certain values which are high in a rough preferential ordering.[57] These themes are all captured by the more general theme of directing the Court's decisionmaking so as to be consistent with its proper role in our tripartite, bilevel system of government. This overarching theme and the more specific ones must be kept in mind as the discussion turns to the many factors relevant to determining the appropriate standard of review.

B. *The Nature of the Protected Right*

Since many have argued that the nature of the protected right is the sole criterion in determining whether invigorated scrutiny should be used,[58] it is surprising that so little light has been cast on this factor. Typical is the statement of one writer who tells us that scrutiny beyond rational basis analysis will be applied to protect those rights that find "a place in the provisions of the Constitution *or* in the scheme of social organization the Constitution is believed to have sought to protect."[59]

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tutional doctrine of separation of powers, to preserve its power against political erosion. See the related discussion at text & notes 66-80 *infra*.

57. These themes are generally self-explanatory. A few comments are in order, however, concerning the first (democratic decisionmaking) and fourth (accuracy and efficiency) themes. First, it is often argued that the Court should defer to other, more democratic branches of government. A. BICKEL, THE LEAST DANGEROUS BRANCH 16-20 (1959); Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830-32 (1974); McCloskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 360-61 (1966). This is a far from axiomatic principle because judicial review might be part and parcel of an informed and effective democratic process. L. Levy, *supra* note 6, at 12; M. SHAPIRO, *supra* note 6, at 29-30; Rostow, *supra* note 6, at 199-209. Even if Court review is assumed *arguendo* to be generally undemocratic, however, this theme does not always favor nonintervention. For example, if an independent regulatory agency takes actions obviously out of step with majority sentiment and even sentiment among the people's elected representatives, the democratic/deference theme is either neutral or tends to support judicial intervention.

Second, it is a boilerplate for those arguing against Court intervention to mention its relative incompetence as a fact-finder and decisionmaker. *See* P. BREST, *supra* note 54, at 941-43, 982; Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1128 (1969). This too is far from clear. There are certain questions—*e.g.*, criminal procedural matters—as to which the Court *might* be one of the best possible decisionmakers. *See id.* at 1128-30 (suggesting the Court's special competence in criminal procedural matters). *See also* P. BREST, *supra* note 54, at 966-76 (setting forth arguments concerning the Court's possible superior competence in supervising state governments *vis-à-vis* the federal government, preserving fundamental values, or protecting minority interests).

Moreover, the legislative process might not even attempt to find facts. See text & note 45 *supra*.

Assuming *arguendo* that the Court is generally a relatively inadequate fact-finder, factors such as the unique nature of the question before it, long Court involvement in deciding similar questions, or the absence of actual consideration by other branches of government might make the "superior fact-finder argument" neutral or actually favorable to intervention.

58. See text & notes 50-51 *supra*.

59. Chambers, *supra* note 10, at 1155.

This formula is not too helpful because *no* standard of review, not even the deferential rational basis test, will be applied unless there is an intrusion upon a constitutional right. In other words, the question of which standard of review to apply does not even arise until a right is found.[60]

Nevertheless, the above formula does contain some truth. A right might be said to be constitutionally based because, although not specifically enumerated, it is part of the scheme of social or political organization the Constitution is believed to have sought to protect.[61] Further, a right might be considered a preferred one to be protected by an invigorated standard of review if it is thought to be a particularly important part of the scheme of social or political organization the Constitution is believed to have sought to protect. Thus, in *Shapiro v. Thompson*[62] the Court applied the compelling state interest test to protect the "fundamental right to travel interstate" in part because the right "occupies a position fundamental to the concept of our Federal Union."[63]

In other cases the Court has referred to the importance of rights—assembly, speech, and voting—*to our representative democracy*.[64] The concept of a right's importance to our federal system, alone might have led the *Shapiro* Court to apply the compelling state interest test; it also mentioned, however, the *importance of the right in our "constitutional concepts of personal liberty"* and the *"firmly established and repeatedly recognized"* nature of the right.[65] One cannot tell, therefore, whether a right's particularly important place in our federal system is a sufficient condition to justify use of the compelling state interest test or some

60. There *might* be rational basis scrutiny in equal protection cases even without any effect on an explicit or implicit constitutional right. *See, e.g.*, Maher v. Roe, 432 U.S. 464 (purporting to apply the rational basis test to state refusal to fund nontherapeutic abortions even though the Court opined that indigent women had no right to such services). Even if the Court does apply some standard without the existence of a right, however, invigorated scrutiny will not be applied to protect all explicit or implicit constitutional rights. *See* Goodpaster, *supra* note 51, at 502; note 61 *infra*.

61. This factor is very similar to the "concept of ordered liberty test" used to determine which provisions of the Bill of Rights should be incorporated into the due process clause of the fourteenth amendment. *See generally* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957). The latter test is beyond the scope of this Article, but it should be noted that just because a right is basic enough to be made applicable to the states does not mean that it is of a character that will justify invigorated scrutiny. For example, the eighth amendment has been incorporated and made applicable to the states, Robinson v. California, 370 U.S. 660, 667 (1962), but it does not alone, or as incorporated, support use of invigorated scrutiny. For a brief discussion of the Court's eighth amendment standards, see Spece, *supra* note 1, at 30-31 n.110.

62. 394 U.S. 618 (1969).

63. *Id.* at 629-30.

64. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 255-60 (1976); Cohen v. California, 403 U.S. 15, 23-26 (1971); Harper v. Virginia, 383 U.S. 663, 667-68 (1966); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

65. 394 U.S. at 629-30.

other form of invigorated scrutiny. One can draw from *Shapiro*, however, that it is a relevant factor, as is the unique place of a right in our constitutional concepts of personal liberty and a right's repeated recognition.

These three factors are interrelated, but distinct. A right's unique place in our social or political system reflects a utilitarian concern for vital institutions that enable our society to survive and flourish. Insofar as it relates to our political system, this factor is based on the accepted notion that the Court can legitimately intervene to protect both the political structure that the Constitution creates and the values that structure implies.[66] Although the Constitution does not create a specific social structure, the Court is nevertheless on firm ground when it intervenes to protect social institutions that are presupposed by the Constitution[67] and are vitally important to society as a whole.

The Court is on much less firm ground, however, when it intervenes to protect rights having a special place in our concepts of personal liberty. It cannot point to the constitutional structure or vital institutions, but must discern the most important concerns of our "moral culture."[68] These special concerns are not only elusive, but may also contend with the general good.[69] Commentators have spent entire articles grappling with the problems suggested by this factor, and it cannot be fully analyzed here.[70] One view is that the Court ought to find special personal liberties in an informed public opinion,[71] and another is that the Court ought to recognize only liberties that have been recognized both by history and by unadorned, contemporary public opinion.[72]

66. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1031 (1979).

67. The Constitution, for example, does not establish a system of social organization in which some form of the family is the basic unit. Nevertheless, the Constitution presupposes such an arrangement, as is partially evidenced by the third amendment.

68. The term is taken from Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417, 445 (1976), and Perry, *Abortion, the Public Morals and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 726 (1979) [hereinafter Perry, *Abortion*].

69. Individual rights can be based on deontological or nonconsequentialist analyzes that deem the general utility to be irrelevant. Somewhat paradoxically, however, they can be based on the utilitarian notion that individual rights sometimes must overcome the short-run majority desire because this will, in the long run, adduce to the general good.

70. *See, e.g.*, Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Dixon, *The "New" Substantive Due Process and Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43; Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261; note 68 *supra*.

71. Perry, *Abortion*, *supra* note 68, at 723-33. Perry is not as explicit as one might wish. The general drift of his article favors the informed citizenry view, and he directly refers to evolving and mature morality. *Id.* at 733. He also cites Gallup polls, however, as direct evidence of contemporary morality. *Id.* at 733 n.204.

72. Lupu, *supra* note 66, at 1040-41. Lupu does a good job of refuting the claim of Ely, *supra* note 70, at 52, that the Court ought not rely on this factor (however construed). Lupu, *supra* note 66, at 1032-50. *But see* note 78 *infra*.

The Court has not explained how it devines which liberties have a special place in our constitutional scheme, but tradition is certainly relevant, as shown by the *Shapiro* Court's reliance on the repeatedly recognized nature of a right as a relevant factor in determining the appropriate standard of review.[73] The latter should not, however, be a necessary condition to invigorated scrutiny. First, a right might be so basic as to have seldom been subject to challenge and recognition. Perhaps more importantly tradition might not have had a chance to consider and thus sanction certain values that merit special protection in a rapidly advancing technological society.[74] The objection is that without such a limitation, the Court might run amuck and recognize a number of questionable values.[75] Worse yet, if it relies on informed public opinion, rather than a poll of unadorned majority will, it will be elitist.[76]

It seems, however, that recent revelations make clear what many have suspected all along: the Court is not so politically naive that it is likely to abandon self-restraint to the extent it did in the *Lochner* era.[77] Moreover, the Court is on firmer ground when it intervenes to protect the concerns of an informed public opinion. It seems somewhat superfluous for the Court to intervene to protect rights from majoritarian onslaught only when the majority would approve of such intervention.[78] The view that such informed opinion is an elitist concept seems to rest on the idea that value questions are not subject to rational disputation, or that any attempt to discern what the person on the street would really feel is right if he carefully thought about it is either a silly notion or a *sub rosa* attempt by an elite to tell him what he ought to believe. Moral questions, however, are subject to rational analysis.[79] If they were not, it would be nonsensical to dispute the legitimacy of any form of constitutional analysis, including Court intervention to protect

73. *See* text & note 65 *supra*.

74. Lupu puts the example of a claim that might someday be made that persons have a right to reproduce through "cloning." Lupu, *supra* note 66, at 1046. He suggests that such a claim should be rejected as not sanctioned by history. *Id.* It seems, however, that individual liberties require more, not less, protection as they are both shaped and threatened by advancing technology. This is not to say that such rights cannot be regulated for important reasons. Advancing technology does not only affect individual rights, but societal and state interests as well.

75. Lupu, *supra* note 66, at 1037-39, 1047-48.

76. *Id.*

77. *See generally* B. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979).

78. For a similar objection, see Ely, *supra* note 70, at 52. It is not sufficient to answer (as Lupu, *supra* note 66, at 1041-43 does to Ely) that the political process might not reflect true majority sentiment or that it certainly makes sense to speak of protecting even majorities from local and state governments. Concerning the first point, it is likely very rare that legislation survives when it trenches on especially *important* individual liberties that are embraced by a majority. As to the second point, state and local governments generally regulate their limited citizenry, not national majorities. Additionally, the Constitution must provide protection against both state and national power, especially in an age of increasing federal power.

79. Spece, *supra* note 8, at 1326-31.

unenumerated rights. The Court is given much discretion in discerning such rights, but it can limit that discretion by conscientiously endeavoring to discern what decisions most citizens would reach, given their deep convictions, if they were fully informed and they tried to reconcile their competing ideals.[80] If the Court would not be so conscientious, then there is no reason to believe it would not also fail to adhere to the spirit of simple poll taking.

The interrelationship among the three factors mentioned in *Shapiro*—a right being basic to our social or political system, special to our concepts of liberty, and repeatedly recognized by the Court—is illustrated in *Moore v. City of East Cleveland*.[81] In *Moore*, the Court struck down a housing ordinance that only allowed the most immediate family members to live together. The Court spoke of the "basic values that underlie our society,"[82] of the family as an "institution . . . deeply rooted in this Nation's history and tradition,"[83] of the family as "basic in our structure of society,"[84] and, citing numerous cases, of the "long recognized" special protection of "freedom of personal choice in matters of marriage and family life."[85] In *Moore*, just as in *Shapiro*, the social utility, the ethical importance, and the repeatedly recognized nature of "family privacy" favored the use of invigorated scrutiny.[86]

These three factors similarly indicate that the compelling state interest test can justifiably be applied when the state intrudes upon mental patients' rights to freedom from confinement. When one thinks of the importance of the family or of the barriers to personal and commercial movement under the Articles of Confederation and of the federal system created in part to remove those barriers, he does not readily imagine freedom from confinement. One does immediately imagine, however, the right to travel. Upon closer reflection, moreover, it becomes apparent that there is not only an empirical connection, but a logically necessary connection or nexus, between the right to travel and the right to freedom from confinement.[87] There is also the same close relationship between family privacy and freedom from confinement. Neither the right to travel nor to family privacy can exist, *or even logi-*

80. This is a rough reference to John Rawls' notions of considered judgments and reflective equilibrium. J. RAWLS, A THEORY OF JUSTICE 47-48 (1971); Spece, *supra* note 8, at 1328-29.

81. 431 U.S. 494 (1977).

82. *Id.* at 503.

83. *Id.*

84. *Id.* at 503 n.12.

85. *Id.* at 499.

86. The Court did not explain what form of invigorated scrutiny it employed, but only stated that there was not a sufficient "fit" between the ordinance and the professed goals of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on the city's school system. *Id.* at 500.

87. A nexus to other important rights is an additional factor relevant in determining the appropriate standard of review. See text & notes 101-05 *infra*.

cally be imagined to exist, without the right to freedom from confinement. Moreover, the right to freedom from confinement bears a peculiarly close nexus to other rights—voting, assembly, and communication—which are necessary to maintaining our political system or representative democracy.

The right to freedom from confinement was and is one of the primary values sought to be protected by the Constitution. As will be explained below,[88] the right is at the core of the concept of liberty. In addition, the importance of the right to freedom from confinement is evidenced by the institution of the writ of habeas corpus which was given constitutional status even prior to the adoption of the Bill of Rights.[89] Great concern with the right to freedom from confinement is also evidenced in the several provisions of the Bill of Rights that give strict procedural protections to each citizen to insulate him from improper conviction and confinement.[90] That confinement is the concern, as opposed to conviction simpliciter, is evidenced by the Court's decision interpreting the right to counsel to extend to cases involving conviction *and* possibility of confinement as opposed to conviction simpliciter.[91]

In addition to the factors announced in *Shapiro*, several other factors relating to the nature of the right will be examined: (1) The right's noneconomic nature; (2) its importance to the individual; (3) its nexus to other rights that, in appropriate circumstances, have been accorded the protection of invigorated scrutiny; (4) whether it is a claim against government intervention or, rather, a claim of entitlement to fair distribution of benefits the state is not initially obliged to dispense; (5) the specificity of the right; and (6) whether it is a claim against paternalistic intervention. The *noneconomic nature* of a right is perhaps one of the few conditions assumed to be necessary for an application of invigorated scrutiny.[92] This assumption has been "supported" by postulating either that courts cannot deal with economic matters involving complex

88. See text at note 119-21 *infra*.

89. "The privilege of the writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. CONST. art. 1, § 9.

90. Most notable are the sixth amendment rights to a speedy and public trial by an impartial jury of one's peers, to be appraised of the charge and confront one's accusers, to have compulsory process to obtain witnesses, and to have counsel. U.S. CONST. amend. VI.

91. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). The point is made even stronger by the Court's recent limitation of *Argersinger*'s requirement of state-provided counsel for indigents in which there is actual confinement rather than the mere possibility thereof. *See* Scott v. Illinois, 99 S. Ct. 1158, 1162 (1979).

92. That a right's noneconomic nature is a necessary condition is suggested by the existence of only one case in the last few decades in which the Court has struck down an "economic" regulation. Even this case was recently overturned. Morey v. Doud, 354 U.S. 457 (1957) (overruled in City of New Orleans v. Dukes, 427 U.S. 297 (1976)). *See* Gunther, *supra* note 9, at 24. *But see* L. TRIBE, *supra* note 8, § 9-6, at 469 (regarding the Court's increased use of the constitutional prohibition against impairment of obligations of contracts).

factual questions or that economic rights are not as important as personal liberties.[93] These rationales have been vigorously attacked.[94]

What seems to actually explain the rigid application of this requirement is the Court's concern for protecting itself from political reaction. The history of substantive due process during the era of New Deal economic regulation is well-known. The Court's economic intervention during that period seriously threatened it as an institution, and because of this it has generally retreated from the economic arena.[95]

Whether this factor is defensible or not, the Court has treated the noneconomic nature of a right as a necessary condition to invigorated scrutiny. This condition can be met by patients asserting a right to freedom from confinement. Beyond the will to survive, one of the chief concerns of most persons is probably with freedom from physical restraint. This concern is clearly embodied in a personal or individual, as opposed to an economic, right.

Even though freedom from confinement is probably one of a person's chief concerns, that might be argued to be irrelevant to constitutional analysis. Citing *San Antonio Independent School District v. Rodriguez*,[96] one commentator has loosely suggested that the importance of a right to the individual is irrelevant in determining the appropriate standard of review.[97] In *Rodriguez*, however, the Court merely pointed out that subjective importance is not the *critical* factor in determining the applicable standard of review.[98] This suggests that subjective importance *is* somewhat relevant, and, indeed, the Court and other authorities have treated it as a relevant factor in deciding whether to invoke review beyond the rational basis test.[99] Thus, the vitally important nature of the right to freedom from confinement is a factor that argues in favor of invigorated scrutiny.

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93. *See* G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS 594 (1975); Note, *supra* note 57, at 1128.

94. *See, e.g.*, Lynch v. Household Finance Corp., 405 U.S. 538, 542-52 (1972) (interpreting federal statutes to protect property as well as personal rights and allowing plaintiffs to challenge summary prejudgment garnishments); L. HAND, THE BILL OF RIGHTS 50-51 (1964).

95. *See generally* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962); Struve, *supra* note 15.

96. 411 U.S. 1 (1973).

97. Chambers, *supra* note 10, at 1155.

98. 411 U.S. at 32.

99. Roe v. Wade, 410 U.S. 113, 153 (1973); Note, *supra* note 57, at 1128; Note, *supra* note 7, at 1030. At times it is difficult to separate the importance of a right to the individual and the nature of the particular detriment. In *Roe v. Wade*, for example, the Court alluded to the significance of the importance of the right to have an abortion by referring to the physical and mental health problems and the stigma that might befall a woman if she were denied the right to have an abortion in certain circumstances. Roe v. Wade, 410 U.S. at 153. In this instance, the importance of the right to have an abortion can only be gauged by reference to the harms that might befall the individual if the right did not exist, *i.e.*, reference to the deprivation's magnitude or its intractability. Thus, for example, a total denial of a right to an abortion is a significantly different deprivation on the independently important right to have an abortion than is a regulation as to when, where, or by whom an abortion can be done.

The *Rodriguez* case is also relevant to the next factor: the nexus between a right and other rights that, in appropriate circumstances,[100] have been held to deserve the protection of invigorated scrutiny. There, the Court refused to recognize a nexus between education and the "fundamental right" to freedom of speech.[101] It reasoned that if it accepted any such nexus argument, the same logic could be extended to conclude that there is a connection between speech and a right to state-provided basic welfare services necessary to maintain life.[102] The Court was unwilling to bind itself to such a position.[103]

The *Rodriguez* case, however, should not be interpreted to reject all nexus arguments. Respected authorities have argued the relevance of a nexus between a right and other rights already determined to be deserving of strict scrutiny.[104] Most importantly, the Court itself has utilized virtually the same form of nexus argument, reasoning that the right to vote generally deserves the protection of invigorated scrutiny because it is necessary to enable a citizen to compete in the political process to obtain a fair distribution of other "ordinary" rights and resources.[105]

Nevertheless, *Rodriguez* can be distinguished from the civil commitment and right to treatment contexts by the degree and nature of the nexus. There, the Court observed that there was no claim of a total denial of education,[106] apparently to indicate that there was not, in turn, a total deprivation of the right to speak. Moreover, one can imagine a person speaking without any formal education; the two are not logically necessary to each other. Conversely, deprivation of the right to freedom from confinement entails a virtual abrogation of several other rights that have been held deserving of the protection of invigorated scrutiny: the rights to travel, to association, to assembly, to communicate, to procreational privacy, to vote, and to live with one's family.[107] Indeed, limiting certain of these rights is often one of the

100. "Appropriate circumstances" are the additional considerations that have led the Court to apply invigorated scrutiny in cases dealing with "fundamental rights." See, e.g., the discussion of *Griswold v. Connecticut*, *Roe v. Wade*, and *O'Connor v. Donaldson* at text & notes 203-52 *infra*. At a minimum, the intrusion upon a fundamental right must be deliberate or substantial to support invigorated scrutiny. See text & notes 126-31 *infra*.

101. 411 U.S. at 37.

102. *Id.*

103. *Id.*

104. L. TRIBE, *supra* note 8, § 11-4, at 573; Chambers, *supra* note 10, at 1159-61.

105. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966) (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) and Reynolds v. Sims, 377 U.S. 533, 561-62 (1964)).

106. 411 U.S. at 36.

107. Chambers, *supra* note 10, at 1158-61 (citing *inter alia*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); United States v. Robel, 389 U.S. 258 (1967) (association); DeJonge v. Oregon, 297 U.S. 353 (1937) (assembly); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (communication); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972) (procreational privacy)).

If *Eisenstadt* left any doubt, Carey v. Population Serv. Inc., 431 U.S. 678, 693-94 (1977),

central purposes of civil commitment.[108] Similarly, there is a logically necessary connection between many of these rights and the right to freedom from confinement.

The *Rodriguez* case exemplifies still another factor related to the nature of the right: whether it is a claim against government intrusion upon a protected individual interest or whether it is a claim of entitlement to fair distribution of resources that the state is not in the first instance obligated to distribute. In *Rodriguez*, petitioners claimed entitlement to a fair distribution of educational resources that the state was possibly not obligated to provide in the first instance. Although the state might not have any obligation to dispense educational services to its citizens,[109] petitioners claimed that once the state began to distribute educational services, it had to do so under particularly strict guidelines.[110] Nevertheless, their argument came very close to demanding that the state provide a certain level of free education and it was rejected by the Court. Since then, the Court has reaffirmed its hesitance to apply any form of invigorated scrutiny to assess claims of entitlement to fair distribution of resources that the state in the first instance has no obligation to provide.[111]

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makes clear that procreational privacy extends beyond the marital relationship. Moreover, the Court has now indicated that the rights to control information about oneself and to live with one's family are also within the ambit of "fundamental" privacy. Although it is arguably the "core" of privacy, see generally Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979), the Court has never invoked the compelling state interest test to protect "informational privacy." In Whalen v. Roe, 429 U.S. 589 (1977), however, the Court seemed to indicate that it is a fundamental right along with other aspects of privacy. *Id.* at 600-03. The Court noted the important nature of the right, but applied rational basis scrutiny because the plaintiffs failed to demonstrate a sufficient danger that information about their use of prescription drugs would be made public simply because the state kept records of such data. *Id. Cf.* Zurcher v. Stanford Daily, 436 U.S. 547, 560 (1978) (fourth amendment allows search, pursuant to warrant, of newspaper offices even though owner of premises is not suspected of crime). Regarding family privacy, see Moore v. City of East Cleveland, 431 U.S. 494 (1977). Informational and family privacy are both destroyed by civil commitment. The right to vote is also fundamental, see text & note 105 *supra*, and it is usually forfeited when one is committed. Plotkin, *Too "Crazy" to Vote? Disenfranchisement of the Mentally Handicapped Citizen*, II MENTAL HEALTH LAW PROJECT, Summary of Activities, No. 3, at 1, 10-11 (Fall 1976).

108. Chambers, *supra* note 10, at 1160-61. The distinction suggested in the text was relied upon in Frederick L. v. Thomas, 408 F. Supp. 832, 835 & n.4 (E.D. Pa. 1976) (holding that mentally handicapped children stated a cause of action by alleging total deprivation of their rights to education, and distinguishing *Rodriguez* as involving a partial deprivation).

109. As indicated above, see note 107 *supra*, *Rodriguez* left open the question of a right to some minimum level of education as petitioners did not allege a total deprivation. The following cases indicate that the state need not dispense any services, even those vital to life itself: Dandridge v. Williams, 397 U.S. 471, 485 (1970) (applying rational basis "scrutiny" to welfare scheme although it dealt with "the most basic economic needs of impoverished human beings"); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (applying essentially the same reasoning to housing and tenants' rights). *See* Spece, *supra* note 1, at 33 n.112. *See also* cases cited note 111 *infra*.

110. 411 U.S. at 15-16.

111. For example, although the Court in Califano v. Goldfarb, 430 U.S. 199 (1977), used the intermediate test and thereby favored the individual litigant, it observed:

> We accept as settled the proposition that Congress has wide latitude to create classifications that allocate noncontractual benefits under a social welfare program. It is generally the case . . . [that] "[p]articularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that

The right to freedom from confinement, however, cannot be defeated by the *Rodriguez* entitlement limitation and resultant rational basis "review." Once again, freedom from confinement is the right that is most directly intruded upon by coercive restraint of mental patients. Even when intrusion upon that right is asserted as the foundation of a right to treatment, there is not a claim to an entitlement of the sort advanced in *Rodriguez*. The claim to treatment flows from the state's initial deprivation of the right to freedom from confinement, and it is advanced to ameliorate the state's intrusion.[112] It is part and parcel of a negative claim against interference rather than a positive claim of entitlement to some government assistance.

Another element outlined above—the specificity of the right—must be examined. This factor has often been recognized as relevant in determining the appropriate standard of review.[113] For example, recently the Court applied a strict form of scrutiny to strike down a state commuters tax because it abridged the *specific* prohibition against denial of privileges and immunities of citizenship.[114] The repeated recognition of specificity indicates its significance, and there is reason for the important status given to this element. Perhaps the principal criticism directed at the contemporary Court has been its alleged propensity to intervene into the political process to protect rights having no firm foundation in the Constitution.[115] This objection suggests that specificity has certainly not been considered a necessary condition for invigorated scrutiny, but it also indicates that the Court's critics are at a significant loss when it acts to protect rights specifically imbedded in the text of the Constitution. There seems to be a strong consensus that the Court can more readily intervene to protect rights or interests having a specific grounding in the Constitution.[116]

Though specific in a sense, certain rights—life, liberty, and property—have proved to be illusive in practice. Constitutional adjudication under the due process clauses of the fifth and fourteenth

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the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

Id. at 210 (citations omitted). The dissenters would have considered the distinction between claims of entitlement and contractual benefits not only relevant, but dispositive against the litigant. *Id.* at 235 (Rehnquist, J., dissenting). *See also* Maher v. Roe, 432 U.S. 464, 468 (1977) (applying the rational basis test to uphold state's refusal to fund nontherapeutic abortions).

112. *See* Spece, *supra* note 1, at 33-46.

113. Austin v. New Hampshire, 420 U.S. 656, 662 (1974); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); P. BREST, *supra* note 54, at 981 (1975); G. GUNTHER, *supra* note 93, at 595-96.

114. Austin v. New Hampshire, 420 U.S. 656, 662 (1974).

115. *See* Gunther, *supra* note 9, at 8.

116. *See* L. TRIBE, *supra* note 8, § 11-1, at 566. Some would contend, however, that the Court ought to intervene only to protect the politically powerless even if others assert very important, specific rights. *See generally* Sneed, *When Should the Lions be on the Throne? Reflections on Judicial Supremacy*, 21 ARIZ. L. REV. 925 (1979). *See also* Ely, *supra* note 70, at 6.

amendments is a testament to the ambiguity of these terms. Questions that might arise are, for example, whether "life" refers to the quality of life and what constitutes "property" or "liberty."[117] Although life, liberty, and property are not without ambiguity, all but the most skeptical semanticists would probably admit to certain "core meanings" of these terms.[118] Few would dispute, for example, that the death penalty strikes at the core of "life." Similarly, a "taking" of land should readily be conceded as involving "property."

What, then, of "liberty"? The position here is that the core meaning of liberty is the absence of physical restraint associated with confinement, and that civil commitment intrudes upon liberty in its most specific sense. This core meaning has been recognized by courts and commentators who have explicitly addressed the meaning of liberty. The great constitutional historian Charles Warren wrote that "liberty" was derived from the common law and that it meant simply "the right to have one's person free from physical restraint."[119] Even Justice Rehnquist, who has often criticized the Court for acting to protect rights that have no foundation in the Constitution, has described freedom from confinement as the "elemental liberty."[120] Indeed, much of the history of "liberty" has consisted of attempts to justify its application beyond the posited core meaning.[121]

Since freedom from confinement or bodily restraint is the core meaning of liberty, it is unquestionably a specific right. Therefore, this factor—specificity of the right—indicates that freedom from confinement should be protected by invigorated scrutiny.

The factors discussed thus far have fairly explicit support in the Court's decisions. A final, and more controversial, factor related to the nature of the right is its nature as a claim against paternalistic intervention.[122] This factor has fairly explicit support in some lower court opinions,[123] and it might, in part, explain the Court's opinion in *Stanley v.*

117. The Courts' recent decisions portray particular confusion regarding the term "liberty." *See* L. TRIBE, *supra* note 8, § 10-11, at 527-32.

118. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). *But cf.* Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (in statutory interpretation we seek the objectives of entire provisions rather than of single words).

119. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440 (1926).

120. Arnett v. Kennedy, 416 U.S. 134, 157 (1974).

121. Typical of this history is the following passage: "While this Court has not attempted to define with exactness the liberty thus guaranteed, . . . [w]ithout doubt it denotes *not merely freedom* from bodily restraint. . . ." Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added).

122. This factor invites the further attention of scholars. It might be described as relating to the nature of the intervention. *See* text & notes 127-35 *infra*. This factor might also be more broadly conceived so as to disfavor state intervention to protect only societal moral sensibilities as opposed to tangible societal interests or values the sacrifice of which might ultimately result in harm to more tangible interests.

123. *See, e.g.*, People v. Privitera, 23 Cal. 3d 697, 705, 591 P.2d 919, 927, 153 Cal. Rptr. 431,

Georgia.[124] The *Stanley* Court reasoned that the conduct the state attempted to proscribe (use of pornography in the privacy of the home) did not threaten others.[125] If the Court were to explicitly embrace this factor, it would not be interpreting the Constitution to enact Mill's famous essay, *On Liberty*.[126] Mill would proscribe paternalistic state action. That is very different from considering whether the state acts paternalistically to be one factor in determining whether invigorated scrutiny ought to be applied. Our tradition of rugged individualism probably rebels at the notion of paternalism, at least enough to justify considering close review whenever helping the individual is invoked as a reason for limiting his rights. The application of this factor to the civil commitment and right-to-treatment contexts would depend on the reason for the state's intervention. If the commitment were designed to help the patient, the "paternalism factor" would favor invigorated scrutiny, while the opposite would be true if the restraint were employed to further societal interests.

Thus, if the state acts to assist the patient, the antipaternalism factor favors invigorated scrutiny of civil commitment and right-to-treatment issues. Each of the other factors relating to a right's nature also supports invigorated scrutiny of such issues: the right's unique place in our form of social or political organization; its special place in our concepts of freedom; its repeated recognition; its noneconomic nature; its importance to the individual; its nexus to other rights that, in appropriate circumstances, merit the protection of invigorated scrutiny; and its nature as a claim against government interference as opposed to a claim of entitlement to some interest the state is not initially obliged to distribute.

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439 (1979) (Bird, C.J., dissenting) (indicating that use of laetrile to treat cancer falls within the purview of privacy primarily because it does not, as contended by the state, threaten others); Ravin v. State, 537 P.2d 494 (Alaska 1975) (use of marijuana in privacy of one's home protected by a form of invigorated scrutiny as it does not threaten others).

124. 394 U.S. 557 (1969).

125. *Id.* at 566-67.

126. *Cf.* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 125-26 & nn. 71, 73 (1979-80 Supp.) (arguing that although it may be thought that privacy ought to encompass a ban on criminal sanctions against adults who engage in voluntary acts that do not demonstrably harm anyone else, the Supreme Court's opinions do not necessitate such a conclusion). *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 & n.14 (1973) (citing Mill—"to say that a Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation is a step we are unable to take"); Harper v. Virginia, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting) ("It was not long ago that Mr. Justice Holmes felt impelled to remind the Court that the due process clause of the fourteenth amendment does not enact the lazissez-faire theory of society. . . . The times have changed, and perhaps it is appropriate to observe that neither does the equal protection clause of that amendment rigidly impose upon America an ideology of unrestrained egalitarianism.").

C. *The Nature of the Intrusion*

The Court ought to and does consider the degree of an intrusion[127] as a relevant factor in determining the appropriate standard of review. Indeed, language in recent Court opinions suggests that a substantial intrusion is a necessary condition to application of invigorated scrutiny.[128]

Beyond the substantiality of the intrusion, whether it is irreversible or intractable is also an important consideration. In justifying the application of "strict scrutiny" to a state sterilization statute, the Court in *Skinner v. Oklahoma*[129] was careful to note that "there is no redemption for the individual whom the law touches,"[130] indicating that the irreversible nature of the intrusion played an important part in the Court's decision to apply "strict scrutiny." Its attentiveness to the degree and nature of the intrusion can be explained by reference to the "political acumen" theme mentioned above:[131] The Court should not spend its limited resources and its political goodwill by deciding cases that are of slight importance—slight because of the limited nature of the intrusion. Conversely, citizens and other branches of government are more likely to understand the Court's activism if it intervenes to limit drastic deprivations of individual rights.

In applying these considerations to coercive commitment, the Supreme Court has characterized the deprivation entailed by such restraint as a massive one.[132] Thus, insofar as the degree of intrusion is relevant, civil commitment must certainly be closely scrutinized. More-

127. An intrusion can take place in various ways. Most obviously, the state can either directly prohibit exercise of a right or prescribe the circumstances under which it can be exercised. Less obviously, it can interfere with, chill, or deter the exercise of a right. L. TRIBE, *supra* note 8, §§ 16-7 to 16-10, at 1002-05. Least obviously, the state can structure its distribution of certain interests so as to penalize the exercise of a right independently protected against state interference. Thus, in *Shapiro v. Thompson*, discussed in the text at notes 62-65 *supra*, the Court struck down California's attempt to condition its distribution of welfare on whether potential recipients had recently exercised their independently protected right to travel. The plaintiffs, who were potential recipients, obviously had not been deterred from exercising their rights to travel. Their claims were assessed under the compelling state interest test, however, because the state conditioned the receipt of benefits on the exercise of their fundamental rights—it "penalized" the exercise of those rights. L. TRIBE, *supra* note 8, § 16-8, at 1003-04. An interesting question that has not been addressed is whether "penalty" means a state intent to "burden" exercise of a right or simply the effect of burdening it.

No matter how an intrusion takes place, it must be substantial to trigger invigorated scrutiny. In "penalty cases," the substantial intrusion is not on the independently protected right, but on the interest the state distributes in the first instance. Thus, in *Shapiro* there was a total deprivation of very important welfare services. *Cf. id.* at 1004-05 (noting that penalty analysis does, but ought not, focus on the severity of deprivation).

128. Zablocki v. Redhail, 434 U.S. 374, 390-91 (1978) (striking down requirement that persons with outstanding court-ordered support obligations to children not in their custody seek state court permission to marry).

129. 316 U.S. 535 (1942).

130. *Id.* at 535-41.

131. See text & note 56 *supra*.

132. See note 35 *supra*.

over, since the duration of civil commitment is indefinite in many states and since some committees can be confined for long periods of time, or perhaps even until they die, the intrusion wrought by civil commitment often can reasonably be characterized as irreversible or intractable.[133] Even if a committee is released, there is evidence that the institutional experience might leave him with irreversible or intractable iatrogenic defects.[134] Since there is even some evidence, moreover, that relatively long-term institutionalization might shorten lifespan, commitment could be characterized as an irreversible intrusion.[135]

D. *The Nature of the Right Holder*

The nature of the right holder is undoubtedly relevant in one sense: if he falls within a "suspect class," then the suspect classification doctrine will require some form of invigorated scrutiny.[136] Although the Court has not explained which elements are necessary or sufficient to make a group a "suspect class," this task has already been admirably completed by Professor Simson, who has concluded that, under the appropriate criteria, the mentally ill do constitute a suspect class.[137] This article establishes an independent justification for applying invigorated scrutiny to the questions raised by involuntary civil commitment. Moreover, the form of scrutiny Simson says is supported by the suspect classification doctrine might not support the least restrictive alternative right-to-treatment theory. He argues that the doctrine only justifies use of a limited form of invigorated scrutiny: careful examination of whether state drawn classifications are in any way over or underinclusive.[138]

Such examination is one of the two strands of the least restrictive alternative principle,[139] but the right-to-treatment theory rests on the other strand of the principle: requiring that even if the state captures every and only the relevant persons within its classification, that it still

133. Representative is O'Connor v. Donaldson, 422 U.S. 563 (1975), in which respondent had been confined for 15 years despite being able to live safely in freedom alone or with the assistance of willing family or friends. *Id.* at 568-69. See Note, *supra* note 10, at 1198: "While statistics reveal that the average length of stay in mental institutions is relatively short, in most states an individual facing civil commitment is potentially exposed to lifelong deprivation of many of his most basic civil rights."

134. L. ULLMAN & L. KRASNER, A PSYCHOLOGICAL APPROACH TO ABNORMAL BEHAVIOR 388-413 (1969); G. ANNAS, L. GLANTZ, & B. KATZ, INFORMED CONSENT TO EXPERIMENTATION 140 (1977).

135. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1089-90 (E.D. Wis. 1972) (authorities therein regarding the possibility of increased mortality within mental institutions), *vacated and remanded on other grounds*, 421 U.S. 957 (1975).

136. Note, *Mental Illness: A Suspect Classification*, 83 YALE L.J. 1237, 1239-41 (1974).

137. *Id.*

138. *Id.* at 1245-52.

139. See text & notes 23-26 *supra*.

use the method of achieving its goals that minimizes intrusions upon individual rights.[140]

Additionally, relying solely upon the suspect classification doctrine would require a demonstration that each of the necessary conditions to the application of that doctrine applies to the mentally ill. Simson has shown that this might well be the case,[141] but the Court's hesitance to formally recognize any additional suspect classes counsels alternative arguments.[142]

This is not to say that the factors relating to the suspect classification doctrine are to be ignored. The position here is that each of those factors should be independently considered relevant *along with* factors relating to the nature of the right, the intrusion upon the right, and institutional considerations. If a sufficient number[143] of these factors justify it, invigorated scrutiny should be applied. This should be so even if the group of factors relating to the holder of the right are not alone sufficient to justify invigorated scrutiny under the suspect classification doctrine. The Court has partially recognized this approach by applying invigorated scrutiny in gender discrimination cases even though it has found those cases do not fall within the suspect classification doctrine.[144]

Factors that have been mentioned as relevant and possibly necessary conditions to establishing suspect classes are: (1) Absence of a right to vote; (2) numerical minority status; (3) insularity from the majority of the population; (4) history of discriminatory actions directed at the group; (5) stigma attached to the classification (this strictly relates to the nature of the intrusion); and (6) the irreversible nature of the status which identifies the alleged suspect class.[145] The final factor has been explained as resting on the *undeservedness* of the status. If a status is irreversible or intractable, one presumably cannot be blamed for its continued existence.[146] It has also been emphasized that the Court's decisions are concerned with whether the status of the particular group

140. The same policies seem to support both strands, see Spece, *supra* note 8, at 1340-41 n. 144, and even if Professor Simson is correct about the Court's approach, it is not clear why the Court would apply only one strand and not the other. A conceivable reason is that allowing the state to use only carefully drawn classifications is supported and limited by equal protection notions, while requiring the state to use the least intrusive alternative when dealing with persons who have been carefully classified is neither supported nor limited by equal protection values. See text & notes 165-66 *infra* regarding the relationship between equal protection and due process.

141. *See generally* Note, *supra* note 136.

142. Regarding the Court's general hesitance to recognize any new suspect classifications, see Gunther, *supra* note 9, at 12-16.

143. See text & notes 201-52 *infra* regarding what constitutes a "sufficient number."

144. Califano v. Webster, 430 U.S. 313, 316-17 (1977) (per curiam); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1976); Craig v. Boren, 429 U.S. 190, 197-99 (1976).

145. Note, *supra* note 136, at 1254-58.

146. Note, *supra* note 57, at 1126-27.

involved is generally thought to be an improper basis for decisionmaking.[147]

Civil commitment alone deprives an individual of the right to vote in several states, while the finding of mental illness entailed in such commitment precludes the right to vote in many others.[148] Moreover, although there are thousands of persons in our mental institutions, the civilly committed are a minority in the literal, numerical sense.[149] The civilly committed are by definition geographically insulated from the rest of the population.[150] Additionally, there is a history of discrimination against the mentally ill[151] and a considerable stigma attached to being characterized as mentally ill or in need of institutionalization.[152] Although much mental illness is subject to significant amelioration through modern treatment techniques, complete "cures" are hard to come by: Mental illness is often partially irreversible or intractable,[153] indicating that there is little or no culpability associated with *most* mental illness. This is the premise that largely explains the Court's assertion in *Robinson v. California*[154] that it would certainly be cruel and unusual punishment to make it a crime to be mentally ill.[155] Finally, mental illness is often irrelevant in making distinctions for purposes of confinement. Although it is common to suppose that the mentally ill are more dangerous than the rest of us and that therefore it makes sense to commit them for protection of self or others, "studies indicate that the mentally ill as a class are at most slightly more dangerous, and quite possibly less dangerous, than their fellow citizens."[156]

147. *Id.* at 1088.

148. Plotkin, *supra* note 107, at 1, 10-11.

149. Including both voluntary and involuntary patients, there are approximately 205,000 persons in mental hospitals and 554,000 new additions each year. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 86 (97 ed. 1976).

150. Interesting zoning issues arise concerning half-way or out-patient care facilities, and they might affect large institutions as well. *See* R. Hopperton, *Zoning for Community Homes: Handbook for Local Legislative Change*, in COLUMBUS, OHIO: LAW REFORM PROJECT (Ohio State Univ., 1975); Note, *Zoning the Mentally Retarded Into Single-Family Residential Areas: A Grape of Wrath or the Fermentation of Wisdom*, 1979 Ariz. St. L.J. 385 *passim*.

151. Horrendous cases of their mistreatment have increasingly come to the attention of the courts. Indeed, in Jackson v. Indiana, 406 U.S. 715 (1972), the Supreme Court expressed surprise that there has not been more litigation designed to protect the mentally ill from too easy commitment. *Id.* at 737.

152. B. ENNIS, PRISONERS OF PSYCHIATRY 143-44 (1972); E. GOFFMAN, ASYLUMS 306 (1961).

153. O'Connor v. Donaldson, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring) (citing Schwitzgebel, *The Right to Effective Mental Treatment*, 62 CALIF. L. REV. 936, 941-48 (1974)); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 697-719 (1974). This obviously does not mean that there should be no right to treatment that might ameliorate, if not cure, one's condition to the extent of allowing release or greater freedom within the institution.

154. 370 U.S. 660 (1962).

155. *Id.* at 666. See Spece, *supra* note 1, at 17-28, for a discussion of *Robinson* and its applicability to the mentally ill.

156. Note, *supra* note 10, at 1230.

E. *Institutional Factors*

Professor Brest has cataloged certain institutional factors that might be considered relevant to the degree of scrutiny exercised in a particular case: (1) The availability of nonjudicial remedies; (2) the superior ability of the Court to interpret the text of the Constitution in light of the framers' intent; (3) the capability of formulating judicially manageable standards; (4) the reviewed decisionmaker's partiality; (5) the extent of the decisionmaker's actual consideration of the issues; and (6) the nature of the reviewed decisionmaking body.[157] Three important institutional factors not mentioned by Brest are: (1) The particular constitutional provision involved; (2) the particular form of review proposed to be applied; and (3) the Court's prior treatment of cases in the same area.

A brief word on each of these institutional factors is appropriate here. First, when Brest speaks of alternatives to judicial remedies, he refers to the federal and state governments' competing powers in our federal system as a check on abuses by Congress, on the one hand, and abuses by the states, on the other hand.[158] Second, Brest supports a predominant role for the Court in interpreting the text of the Constitution by asserting, "Judges are better trained, and the judiciary better equipped institutionally, than other decisionmakers to perform this function. The case for deference may be stronger as the Court moves from documentary interpretation to broad questions of policy on which the constitutional text and history shed little light."[159]

It was suggested above that promoting accurate and efficient decisionmaking is a theme underlying utilization of different standards of review, and that this theme raises the question whether the Court is a relatively fit fact-finding body.[160] Once again, whether nonjudicial bodies are superior fact-finders is not a yes/no question. It depends on additional factors mentioned by Professor Brest: the degree of actual consideration of facts by the nonjudicial body, its partiality, and the nature of the particular decisionmaking body. The *potential* for being a superior fact-finder should be irrelevant if no or little fact-finding has actually been done. Similarly, if a decisionmaker is partial and might want to find certain facts, his finding of such facts should be given less deference than if he were impartial.[161] Finally, Brest's attitude toward

157. P. BREST, *supra* note 54, at 981-86. Brest also mentions some of the other factors discussed here. *Id.*
158. *Id.* at 981-82.
159. *Id.* at 982.
160. See text & note 56 *supra*.
161. P. BREST, *supra* note 54, at 982-83.

the nature of the particular decisionmaking body is apparent from the following rhetorical questions:

> Might the decisions of some institutions call for greater deference than those of others? For example, might it be appropriate to accord more weight to policy determinations by a state legislature—a state's chief and most representative policy-making body—than to state and local agencies? Might it be appropriate to accord more weight to laws enacted by the Congress of the United States than to enactments of state legislatures, because the Congress is a coordinate branch to the federal judiciary?[162]

The final factor taken from Brest's work—the ability of the Court to formulate judicially manageable standards—is left unexplained by him. This concept has, of course, been institutionalized as the political question doctrine. That doctrine posits, however, that the Court will not even entertain the merits of certain substantive questions; it helps determine whether the Court will apply review *vel non*, not what standard of review will be used.[163] Even if the task of constructing judicially manageable standards is not so severe as to preclude any review, however, the relative difficulty in formulating standards might be helpful in determining the appropriate standard of review. For example, it would require special justification for the Court to apply a rigorous form of review, demanding precise lines to be drawn, in an area of moral and technical uncertainty in which standards would be most difficult to construct and administer.[164]

Concerning the three factors not mentioned by Brest, first note that a very important right held by all citizens might be affected by certain legislation and then questioned as a deprivation of life, liberty, or property without due process of law. The same right might be touched by other legislation only insofar as it is held by a particular class of individuals and then be challenged as a denial of equal protection of the laws. In the latter case, the Court might give less deference to the legislation because: (1) The embattled history of active substantive due process has led the Court to eschew that front, while there is no similar history concerning the equal protection clause;[165] (2) striking down an improper classification might entail a less drastic intrusion upon legislative or political prerogative because it might not deny certain ends but simply require that they be obtained by legislation falling equally

162. *Id.* at 983.

163. A. BICKEL, *supra* note 57, at 183-98; Weston, *Political Questions*, 38 HARV. L. REV. 296, 301, 331-33 (1925); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344 (1924).

164. *Cf.* Roe v. Wade, 410 U.S. 113, 160-62 (1973) (the Court seemed to impose a burden that the state prove beyond a reasonable doubt the moral proposition that life begins at conception). For further discussion of *Roe*, see text & notes 240-49 *infra*. For a brief discussion of decisionmaking in areas of moral and technical uncertainty, see Spece, *supra* note 8, at 1325-31.

165. Gunther, *supra* note 9, at 41-43.

upon all citizens; and (3) in the equal protection context, both the interest in protecting the important individual right *and* the desire to uphold the general ideal of equality are operative. These factors at least in part explain the Court's apparent preference for substantive equal protection as opposed to due process review.[166]

Second, it might seem somewhat odd to consider the particular form of scrutiny proposed to be applied to be relevant in determining the appropriate standard of review. Different forms of invigorated scrutiny, however, entail relatively more or less intrusion upon the political process. Each particular deviation from the rational basis test—be it a closer examination of the state's ends or means, a search for alternatives, or placement of burdens of proof—must be justified. The greater the number and degree of deviations, the more extensive is or ought to be the required justification.

Third, as to the Court's prior treatment of cases in the same area, it will be recalled that in *Shapiro v. Thompson* the Court specifically referred to the firm and repeated recognition of the right to travel in deciding to apply the very rigorous compelling state interest test.[167] This clearly implies that the Court considered past cases' affirmance of the right to travel as a relevant factor in determining the appropriate standard of review.[168] Similarly, Professor Gunther explains the Court's at least *de facto* use of invigorated scrutiny in the context of involuntary civil commitment by reference to its tradition of carefully reviewing the massive deprivations entailed by such commitment.[169]

Moving to application of the various institutional factors to civil commitment, the checks of federalism are generally irrelevant in protecting mental patients; assistance must come from the courts.[170] Sec-

166. *See id.* See also Lupu, *supra* note 66, at 728-29, for an argument that the Court has over used the equal protection clause.

167. 394 U.S. 618, 629 (1969). See text & notes 63-64 *supra.*

168. This deference to tradition is what is at the base of the doctrine of *stare decisis.* Any court must generally follow its approach to past, similar cases and rights as that tends to make its decisions the product of considered judgment rather than of the prejudices of the judge on the bench at any particular time. This stability not only controls judicial discretion, but also allows relatively secure reliance by those who are governed by the court's pronouncements. Without such stability, the law, and any body administering it, will come into disrespect, and this is especially true concerning a highly visible institution such as the Supreme Court. The Court has a constitutional obligation to preserve its independent role in our tripartite governmental system, and to do that it must take cognizance of the political effect of its decisions. Moreover, to the extent that the Court's intervention into the political process represents *continued* activism in an area, new controversies and ill will tend to be minimized. Finally, it has already been explained that perhaps the greatest recent criticism of the Court has been its asserted propensity to protect rights not firmly grounded in the Constitution. See text & notes 115-16 *supra.* The formerly recognized nature of a right suggests, although it surely does not establish, that a right is grounded in the text, history, and policy or values of the Constitution; and that in turn tends to diffuse criticism of the Court and encroachment on values related to limited Court intervention into the political process that are at the base of such criticism.

169. Gunther, *supra* note 9, at 30-31.

170. Indeed, it has been held that the federal government does not have standing to sue states

ond, the specific nature of the right to freedom from confinement and the historical concern with the right[171] indicate that civil confinement is not one of those contexts Brest speaks of as being inappropriate for close review because of the ambiguity of the constitutional text or history. Therefore, the Court's superior ability to interpret the constitutional text and history argue for judicial intervention.

The third factor cited from Brest's work—ability to formulate judicially manageable standards—also points toward judicial intervention in civil commitment and right-to-treatment cases. Indeed, the Supreme Court has virtually invited further challenges to a state's commitment power.[172] It also explicitly stated in *O'Connor v. Donaldson*[173] that questions concerning the therapeutic conditions of commitment are subject to control by judicially manageable standards. Moreover, although some contend otherwise, the best authorities argue that the courts can and must carefully scrutinize the type of treatment dispensed to patients.[174]

Fourth, to the extent that the legislatures have confronted the rights of the mentally ill, it is arguable they have generally spoken for the "healthy" majority and against the interests of the mentally ill: they have demonstrated a bias against the latter. In one case, for example, the state of Alabama argued that civil commitment should be permissible to, in effect, get the mentally ill out of the way; the state's true clientele being otherwise burdened family members.[175] At the very least, state legislatures have largely ignored civil rights questions raised by involuntary commitment until prodded to do so by the courts.[176] Therefore, in addition to partiality, another of Brest's factors—actual consideration of facts in the political process—would seem to argue for judicial activism.

An examination of the nature of the reviewed decisionmaking body suggests that this factor is neutral because both legislative and administrative and state and local decisions are implicated in reviews of civil commitment. Legislatures are responsible for establishing civil commitment standards and for funding state hospitals. Local administrators of these hospitals are then responsible for the day-to-day conditions of confinement. Therefore, Brest's apparent point that state and

for failure to give sufficient treatment and other care to institutionalized mentally disabled persons. United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir. 1979); United States v. Solomon, 563 F.2d 1121, 1123 (4th Cir. 1979).

171. See text & notes 119-21 *supra*.

172. See note 151 *supra*. *But see* note 184 *infra*.

173. 422 U.S. 563, 574 n.10 (1975).

174. *See* Spece, *supra* note 1, at 40-41 n.137 (authorities cited therein).

175. Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

176. Note, *supra* note 10, at 1198-99.

legislative decisions might, in certain circumstances, be favored over local and administrative decisions is either neutral or dependent upon the particular claims before the court.

The final three institutional factors identified above—the constitutional provision involved, the particular form of review, and the Court's prior treatment of similar cases—also indicate that invigorated scrutiny should be applied in civil commitment and right-to-treatment cases. First, because of history, the potentially more limited nature of equal protection review, and the added interest in equality implicated by the equal protection clause, it is generally easier to justify intervention under equal protection than under due process.[177] Equal protection is probably the relevant provision in assessing the constitutionality of the bulk of commitments. Not all dangerous, gravely disabled, and ill persons are subject to civil commitment; only those who are *mentally ill* and dangerous, gravely disabled, or in need of treatment are fair game.[178] The mentally ill are thus treated as a distinct class subject to greater state intervention. Indeed, as explained above, they might constitute a suspect class.[179]

The second factor applies differently to questions about when, why, and how patients can be restrained than to questions concerning whether, when, and what treatment patients must be given. Since patients could prevail on the former questions only by invoking a stringent form of scrutiny,[180] this tends to argue against judicial activism. Conversely, right-to-treatment claims can be firmly based on equal protection grounds and the circumscribed least restrictive alternative principle.[181] As specifically applied here, the principle does not deny use of confinement as a means; it simply requires that treatment accompany confinement. At the same time, it makes a significant contribution by minimizing intrusions upon the right to freedom from confinement.[182]

Previous Court decisions[183] indicate the appropriateness of using some form of invigorated scrutiny in civil commitment and right-to-treatment cases, and the same is true of lower court decisions.[184] Para-

177. See text & notes 165-66 *supra*.

178. Note, *supra* note 10, at 1229-30. The Note limits its point to police power commitments, resting its *parens patriae* analysis upon the distinction between the physically ill who are generally not required to accept treatment (analogized to accepting commitment), on the one hand, and the mentally ill, on the other hand. *Id.* at 1215-16.

179. See text & note 137 *supra*.

180. See text & note 227 *infra*.

181. See text & note 226 *infra*.

182. Spece, *supra* note 1, at 38-42.

183. See text at note 195 *infra*.

184. *See* Spece, *supra* note 1, at 7-8 n.25 (cases cited therein); note 196 *infra*.

It might be argued that the Court's recent decisions in Addington v. Texas, 441 U.S. 418, 425-433 (1979) (holding that standard of proof in involuntary commitment proceedings need not be

doxically, perhaps the single most persuasive element in favor of applying the least restrictive alternative principle here, and thereby establishing a right to treatment, is the Court's decision in *O'Connor v. Donaldson*[185] in which it avoided the question whether committees possess a right to treatment.[186] The reason *Donaldson* is so important to the present analysis is that it is a recent binding precedent that adopts, at a minimum, the least restrictive alternative principle in the civil commitment context. *Donaldson* can even be read to support use of compelling state interest test.[187]

The *Donaldson* Court held that a state "cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[188] The Court engaged in ends scrutiny of the sort associated with the compelling state interest test by rejecting two possibly legitimate state interests: saving healthy citizens from exposure to the idiosyncracies of mental patients and ensuring mental patients a standard of living superior to that they would enjoy

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proof beyond a reasonable doubt but must be equal to or greater than proof by clear and convincing evidence) and Parham v. J.R., 99 S. Ct. 2493, 2506 (1979) (holding that juveniles may be committed by the joint action of their parents and a physician without a court hearing), might alter the Court's stance regarding standards of review. Those cases, however, involve procedural, as opposed to substantive, due process; they decide what process must be used to determine the facts upon which substantive decisions about when and why persons can be committed are based. Of course, there is a substantial overlap between procedural and substantive due process, and if the individual's rights are very strong, this would tend to indicate that they ought to be met with similar procedural and substantive protections. That conclusion is not, however, a necessary concomitant of the Court's traditional approach: consider criminal law, and the strict procedural but lax substantive protections afforded by the Court in that context. *See* note 198 *infra*. It is entirely possible for a right to merit more or less procedural protection under the three-prong balancing test (degree of the individual's interests, of the state's interest in less elaborate procedures, and of the possibility of error without more elaborate procedures) used in *Addington, Parham*, and other procedural due process cases than under the rational basis, intermediate, and compelling state interest levels of scrutiny used in substantive due process and equal protection cases. In *Addington* and *Parham* the Court noted the importance of freedom from confinement but expressed fear that too stringent procedures would result in needy mentally ill patients going without treatment. It would thus be a perversion to interpret these decisions to disfavor strict substantive protections—such as the right to treatment—for mental patients.

185. 422 U.S. 563 (1975).

186. *Id.* at 573. In Sanchez v. State, 80 N.M. 438, 457 P.2d 370 (1968), the New Mexico Supreme Court rejected an argument that the least restrictive alternative principle dictates consideration of alternatives to civil commitment, *id.* at 431, 457 P.2d at 373, and the Supreme Court dismissed Sanchez's appeal "for want of a substantial federal question." Sanchez v. State, 396 U.S. 276 (1969). In 1972, Professor Chambers explained that this dismissal was not fatal to claims similar to Sanchez's because of the very limited effect of summary dismissals. Chambers, *supra* note 10, at 1152. *But see* Hicks v. Miranda, 422 U.S. 332, 343-45 (1975) (Court held that summary affirmances and dismissals for want of a substantial federal question are decisions on the merits which are binding on lower federal courts). Whatever retroactive significance *Hicks* may entail in other contexts, *Donaldson* clearly indicates that the Court has negated any inference regarding the least restrictive alternative principle that might be drawn from its dismissal of the *Sanchez* appeal, and has embraced the principle (at a minimum) for civil commitment cases. See text & notes 188-95 *infra*.

187. *See* Grant, *Donaldson, Dangerousness, and the Right to Treatment*, 3 HAST. CONST. L.Q. 599, 611-14 (1976).

188. 422 U.S. at 575-76.

in the community.[189] At least one of these purposes probably would have upheld the state's commitment of nondangerous persons if the rational basis test had been applied.

At the very least, the Court applied the least restrictive alternative test. The Court reasoned that "the State has a proper interest in providing care and assistance to the unfortunate."[190] It went on, however, to point out that commitment is "rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends."[191] In making these observations, the Court clearly evidenced its application of the least restrictive alternative principle. First, to support its reasoning the Court cited perhaps *the* landmark least restrictive alternative case[192]—*Shelton v. Tucker*.[193] Second, the reasoning rests upon use of appropriate least restrictive alternative language—commitment is "rarely if ever a *necessary* condition" or means of obtaining the "proper interest in providing care and assistance to the unfortunate."[194] Third, the quoted language represents the Court's application of the logic of least restrictive alternative analysis—even if the state has a legitimate goal ("providing care and assistance") it will be denied the power to achieve that goal by the use of means that due to the existence of alternative methods that impinge less on individual rights ("the help of family or friends"), are not necessary to achievement of the posited objective. In short, the Court used the precedent, the language, and the logic of the least restrictive alternative principle.

The *Donaldson* Court's use of the least restrictive alternative principle was not surprising in light of its prior civil commitment decisions. As Professor Gunther has pointed out, even though it has sometimes used the language of the rational basis test, the Court has traditionally carefully scrutinized the massive deprivations entailed in civil commitment.[195] He cites, as an example, *Jackson v. Indiana*[196] in which the Court employed a standard of review more vigorous than most articulations of the rational basis test, while explicitly reserving the question

189. *Id.* at 575.
190. *Id.*
191. *Id.*
192. *Id.*
193. 364 U.S. 479 (1960) (striking down statute that required teachers to list all organizations to which they belonged, including affiliations that had no possible bearing on their professional status).
194. 422 U.S. at 575. Requiring the use of alternatives to an *unnecessarily* intrusive means is one strand of the least restrictive alternative principle. See text & notes 23-26 *supra*. "Necessity" usually refers to the least restrictive alternative principle, but at times the Court seems to have interpreted it to capture notions that the state's interest is not sufficiently threatened or important to justify the infringement at issue. *See* Note, *supra* note 7, at 996-1006.
195. Gunther, *supra* note 9, at 27-29.
196. 406 U.S. 715 (1972).

whether some even more stringent form of scrutiny would be necessary in future cases.[197]

Thus, precedent and virtually all the other institutional factors seem to support use of invigorated scrutiny concerning commitment and right-to-treatment questions.[198] The same is true of almost all of

197. *Id.* at 738. It could be contended that *Donaldson* and *Jackson* are not controlling as they deal with whether one can be confined *vel non* as opposed to whether certain conditions must accompany confinement. O'Connor v. Donaldson, 422 U.S. 563, 573 (1975); Jackson v. Indiana, 406 U.S. 715, 737 (1971). The same could be said regarding the several lower court cases that use the least restrictive alternative principle to dictate that alternatives to commitment be considered and used if appropriate. *See* Spece, *supra* note 1, at 3 & n.11 (authorities cited therein). If courts, however, are willing to apply the least restrictive alternative principle to determine whether the state can confine *vel non, a fortiori* they must be willing to use the standard to identify the appropriate conditions of confinement. If a court determines that commitment is not permissible, it denies to the state an entire means of achieving its goals. On the other hand, if it decides that commitment can be used but only with certain conditions, it allows the state a choice whether or not to abandon its chosen means. In other words, just as means scrutiny is less intrusive than ends scrutiny, limited means scrutiny is less intrusive (and thus easier to justify) than broader means scrutiny.

Similarly, when courts require that alternatives to commitment be used, knotty questions of requiring the state to build outpatient facilities at substantial cost and perhaps some sacrifice in the efficiency of achieving its goals are raised. For example, outpatient placement (which could require building new facilities) might make it less probable that the state would be able to protect society or the mentally ill subject from his dangerous propensities. On the other hand, if the question is simply whether certain psychological treatment should be provided *within* existing institutions, it is much less likely that requiring additional facilities and sacrificing some efficiency in protective purpose will be involved. This is not to say that it is inappropriate to demand an exploration of alternatives to confinement. *Donaldson* is direct authority for requiring the state to forego confinement if it can achieve its goals without any such drastic curtailment of liberty. 422 U.S. at 576. The point is that if alternatives to commitment must be considered, then *a fortiori* directly relevant conditions of commitment must be addressed.

Moreover, courts have indicated that analysis must extend beyond the question of commitment *vel non* to encompass a determination of the appropriate conditions of commitment. In *Donaldson*, the Court specifically pointed out the absence of treatment in Donaldson's case, and it left open the question whether persons similarly situated could be confined if given treatment. *Id.* at 573. In other words, the Court indicated that the relevant question might not be commitment *vel non*, but commitment *with certain conditions* or not at all. Similarly, there is precedent for extending the least restrictive alternative principle to require placement in the least restrictive environment *within an institution*. See Spece, *supra* note 1, at 3 n.11 (cases cited therein).

In addition, even though it factually turned on exploring alternatives to commitment, in Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975), the court indicated that the least restrictive alternative principle applies both when considering whether commitment is initially appropriate and when determining the appropriate continued "treatment" of the committee. *Id.* at 978. Defendants argued in *Dixon* that the court should only apply the least restrictive alternative principle to "the commitment as opposed to the treatment stage," but the court roundly dismissed this contention. *Id.* at 978-79. Similarly, courts have used the least restrictive alternative principle in assessing patients' rights against treatment. *See, e.g.*, Rennie v. Klein, 462 F. Supp. 1131, 1146 (1978); State v. Maryott, 6 Wash. App. 96, 99, 492 P.2d 239, 242 (1971) (involving forcible use of drugs allegedly necessary to make defendant competent to stand trial); Price v. Sheppard, 307 Minn. 250, 257, 239 N.W.2d 905, 912 (1976) (avoiding question whether electroconvulsive therapy "was necessary and reasonable" for patients, but prescribing factors concerning the relative intrusiveness of therapies to be used in future cases in state mental hospitals).

198. See text & notes 164-96 *supra*. It might be suggested that invigorated scrutiny ought not be applied to civil commitment and right-to-treatment questions because cases dealing with criminal incarceration also involve the right to freedom from confinement, and the courts surely have not applied invigorated scrutiny in the latter context. Regarding the latter point, see Singer, *supra* note 16, at 51-54. Similarly, it might be argued that courts ought not apply invigorated scrutiny in the former context as then they would be obliged to use it in the latter context. It has been demonstrated, however, that two important factors that support use of invigorated scrutiny in civil commitment and right-to-treatment cases are the Supreme Court's prior use of invigorated scrutiny in such cases and the possibility of grounding such cases on equal protection, rather than due proc-

the factors relating to the nature of the protected right, the holder of the right, and the intrusion upon the right.[199] In turn, application of invigorated scrutiny to such questions seems to be consistent with a proper reconciliation of the sometimes conflicting themes that underlie the various factors, especially the overarching theme of preserving the Court's proper role in our tripartite, bilevel system of government.[200] Justification for application of invigorated scrutiny, however, cannot be left even to such informed intuition. An approach must be developed for settling which precise set of factors must coincide before particular standards of review can justifiably be applied. The next section describes such an approach.

IV. AN APPROACH FOR JUSTIFYING INVIGORATED SCRUTINY

The many factors relevant to determining the appropriate standard of review, the themes underlying those elements, and prior cases are the cloth from which the Court, and one addressing it, can fashion a consistent and coherent body of rules regarding which clusters of factors are sufficient to justify use of particular forms of invigorated scrutiny in specific cases. Representative precedents can be analyzed to determine which of the many factors have explicitly or implicitly supported invigorated scrutiny.[201] From such an analysis, one may discern: (1) A rough hierarchy of importance among the factors; and (2) an indication of what clusters of factors justify what forms of review. These "rules" can then be rejected, altered, or made explicit.

Such an approach will be employed here to determine what standards of review can be justified when the questions are when, why, and how patients can be deprived of their freedom from confinement, and whether, when, and what treatment they must be afforded. Since the analysis will demonstrate that use of the compelling state interest test to

ess, analysis. See text & notes 167-69, 177-78 *supra*. In contrast, challenges concerning when, why, and how the state can deal with criminals have traditionally been "scrutinized" under the rational basis test, and such claims generally rest on due process, rather than equal protection, notions. *See* Singer, *supra* note 16, at 51-54. (Even eighth amendment claims have been met with general deference to the political process. Spece, *supra* note 1, at 30-31 n.110.) These two important factors establish that the Court's past approach to criminal incarceration should not control its analysis of civil restraint, and, similarly, that its analysis of civil restraint does not bind it to a similar approach to criminal incarceration. Moreover, since criminal incarceration is the closest analogy to civil restraint and since those two contexts can be adequately distinguished, *a fortiori* courts need not fear that applying invigorated scrutiny to questions raised by civil restraint will bind them to applying such scrutiny in any other context. For a similar analysis, see Chambers, *supra* note 10, at 1164-68. This is not meant to take a position on whether some form of invigorated scrutiny ought to be applied in criminal cases. A cursory review indicates that several of the factors listed here favor use of invigorated scrutiny in such cases, and the questions deserve further study.

199. See text & notes 58-156 *supra*.

200. See text & note 56 *supra*.

201. The several factors analyzed above obviously should not be applied in an either/or fashion, but should be carefully examined for their degree of applicability in specific cases.

determine both sets of questions can be thoroughly justified, *a fortiori*, one can justify use of the least restrictive alternative standard to determine the latter group of inquiries.

Once again,[202] this Article does not purport to fully examine the efficacy of each of the factors discussed above, and it will not review each of the precedents and derive a comprehensive set of rules for justification of all forms of invigorated scrutiny. The Article calls for further work in the field, and it will venture the suggested approach through examination of the rules the Court has implicitly followed in three particularly representative precedents:[203] *Griswold v. Connecticut*,[204] *Roe v. Wade*,[205] and *O'Connor v. Donaldson*.[206] *Griswold* and *Roe* formally initiated the Court's privacy and due process compelling state interest analyses, respectively.[207] They have been constantly cited with approval[208] and the rules they announced are now firm constitutional doctrine.[209] It has already been established, moreover, that *Donaldson* is especially relevant to scrutinizing claims raised by committees.[210]

In *Griswold*, the Court recognized a right to be free from governmental regulation of the use of contraceptives (or, more broadly, regulation of procreational decisionmaking).[211] Derived from penumbras

202. See text at note 12 *supra*.

203. The questions whether and why the precedents employ a reasonable degree of intervention into the political process will not be addressed. It is noted, however, that several of the factors analyzed above support the Court's use of invigorated scrutiny in the precedents used here. Moreover, the doctrine of *stare decisis* places the burden of proof on those who would challenge the explicit or implicit rules the Court has followed in prior cases.

204. 381 U.S. 479 (1965).

205. 410 U.S. 113 (1973).

206. 422 U.S. 563 (1975).

207. Goodpaster, *supra* note 51, at 506 & n.103 (privacy); Epstein, *Substantive Due Process by any Other Name—the Abortion Cases*, 1973 SUP. CT. REV. 159, 183 (due process and compelling state interest).

208. *See, e.g.*, the following cases which have cited *Griswold* with approval: Carey v. Population Serv. Int'l, 431 U.S. 678, 684 (1977); Planned Parenthood v. Danforth, 428 U.S. 52, 70 n.10 (1975); Eisenstadt v. Baird, 405 U.S. 438, 446 (1971). Cases which have cited *Roe* with approval include: Carey v. Population Serv. Int'l, 431 U.S. 678, 684 (1977); Maher v. Roe, 432 U.S. 464, 472 (1977); Whalen v. Roe, 429 U.S. 589, 598 n.26, (1977); Planned Parenthood v. Danforth, 428 U.S. 52, 60 (1975).

That *Griswold* and *Roe* have been cited with approval obviously does not mean that they have not aroused substantial controversy. The articles supportive of *Griswold* include: Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 285-311 (1973); Kauper, *Penumbras, Peupheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965). Articles supportive of *Roe* include: L. TRIBE, *supra* note 8, § 15-10, at 924-34; Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765 *passim* (1973).

For commentary critical of *Roe*, see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *supra* note 207. For commentary critical of *Griswold*, see Ely, *supra*, at 928-29; Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965).

209. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 126, at 626, 630-31; Spece, *supra* note 8, at 1294.

210. See text & notes 183-95 *supra*.

211. 381 U.S. at 485. The Court arguably left open the possibility of regulation of manufacture and distribution of contraceptives as this would not entail the drastic enforcement procedure

formed by emanations from several constitutional provisions, the right to use contraceptives (or to procreational privacy) is as nonspecific as the right to freedom from confinement is specific.[212] Moreover, in *Griswold* this right was not asserted against paternalistic intervention as the state's only goal was to discourage pre and extramarital sexual relationships.[213] This can be contrasted with the substantial number of civil commitment and right to treatment claims predicated on states' intervention either to protect patients from themselves or to provide them with treatment.

Furthermore, since the regulation in *Griswold* applied to everyone, none of the factors relating to the nature of the holder of the right supported the use of invigorated scrutiny.[214]

Civil commitment, on the other hand, touches the mentally ill who, arguably, constitute a suspect class and who, at a minimum, share many of the characteristics of a suspect class.[215] Additionally, in *Griswold* the ambiguity of the right to use contraceptives made unpersuasive the argument that the Court's superior role in interpreting the text of the Constitution justified invigorated scrutiny.[216] The opposite is true of the right to freedom from confinement implicated in civil commitment and right-to-treatment cases.[217]

There also was little evidence in *Griswold* that the legislature had not considered its regulation or that it was biased against an identifiable class of users of contraceptives.[218] This can be contrasted to the traditional legislative neglect exhibited toward committees.[219] Again, in *Griswold*, existence of a rule established by the peoples' representatives at the state level, as opposed to some administrative or local body, argued against judicial intervention. This can be contrasted with the substantial amount of discretion given to administrative personnel who have a great deal to say about when, how, and why mental patients are

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of snooping about the connubial couch. *Id.* The Court has subsequently interpreted *Griswold*, however, to generally deny state power to regulate use of contraceptives. Carey v. Population Serv. Int'l, 431 U.S. 678, 687-89 (1977). In assessing the precedents under the approach suggested here, it is appropriate to read them in light of subsequent "clarification."

212. See text & notes 119-21 *supra* regarding specificity of the right to freedom from confinement.

213. 381 U.S. at 505 (White, J., concurring). There was no hint at the state's assertion of a health purpose, and it would be a bit bizarre to suppose that prohibitions against such illicit sexual relationships are solely paternalistic in nature. Note, however, that it might be appropriate (at least if other factors suggest the same approach) to carefully scrutinize state interventions that protect only moral principles, and that prohibitions against pre and extramarital affairs might be based solely on such abstract concerns. See note 126 *supra*.

214. 381 U.S. at 480.

215. See text & notes 147-56 *supra*.

216. See text & note 159 *supra*.

217. See text at notes 119-21 *supra*.

218. There was, of course, a possible bias in favor of the values of certain religions that opposed contraceptive use.

219. See text & notes 175-76 *supra*.

restrained and whether, when, and what treatment they are given.[220]

Also disfavoring judicial intervention was the *Griswold* Court's application of controversial due process, penumbra concepts rather than more limited equal protection notions.[221] Further, this controversial intervention did not find direct support in precedent; it broke new ground to protect, with invigorated scrutiny, a right arguably not well-grounded in the Constitution.[222] Committees' claims, on the other hand, can be grounded in limited equal protection concepts[223] and can be supported by firm precedents.[224]

Finally, the Court has now made clear that the holding in *Griswold* rested on a broad analysis that generally denied the state the power to regulate the use of contraceptives.[225] Civil commitment claims generally rest on a similarly broad form of review as they would deny certain goals or purposes of commitment to the state.[226] Right-to-treatment claims, however, rest on the least restrictive alternative principle that focuses solely on the state's means as opposed to its ends.[227]

Although many factors relevant to determining the appropriate standard of review did not favor use of invigorated scrutiny in *Griswold*, a number of important factors did support the Court's careful review. The right to use contraceptives bears a close relationship to marital privacy,[228] which in turn is obviously closely related to family

220. See the authority referred to in Spece, *supra* note 1, at 40 n.137, concerning the degree to which courts will or should review the discretion of mental health personnel.

221. Justice Douglas, delivering the opinion of the Court, noted that it was faced with "a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment." 381 U.S. at 481. He apparently tried to avoid a charge that these due process questions were similar to those decided under the Court's substantive due process analysis in the *Lochner* era by finding the right to use contraceptives in penumbras formed by emanations from several constitutional provisions, rather than in the guarantees to life, liberty, and property in the due process clause. *See id.* at 485. This facade was abandoned in *Roe v. Wade* where Justice Blackmun, delivering the opinion of the Court, found that the right to have an abortion is grounded exclusively in the due process clause's "liberty." 410 U.S. at 152-154, 164. In a concurring opinion in *Roe*, Justice Douglas steadfastly maintained that it too involved penumbral, rather than substantive due process, analysis. *Id.* at 210-15 (Douglas, J., concurring).

222. *See* Epstein, *supra* note 207, at 170-71; Kauper, *supra* note 208 at 253. There was precedent for procreational privacy, at least in the sense of a right to maintain one's reproductive capacity. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (decided on equal protection grounds). Moreover, there was a great deal of truth in Justice Douglas' assertion in *Griswold* that the Court had previously recognized several analogous nonspecific rights. *See* 381 U.S. at 482-85.

223. See text & notes 177-78 *supra*.

224. See text & notes 183-97 *supra*.

225. See text & notes 211 *supra*.

226. A purpose or reason for commitment can only be rejected because it is not "compelling" or, perhaps, "important." On the other hand, questions relating to how the state can restrain patients—by institutionalization or use of less restrictive alternatives such as out-patient care—can be subsumed within the least restrictive alternative principle. See text & notes 25-26 *supra*. An interesting issue is the proper characterization of claims relating to what facts the state must establish to demonstrate that its valid purposes of commitment apply to specific persons. Would the Court's specification of more stringent factual criteria than those stipulated by a legislature entail ends scrutiny, procedural due process review, or what?

227. See text & notes 43-44 *supra*.

228. *See* Griswold v. Connecticut, 381 U.S. at 485-86.

privacy. The latter right in turn is both a "fundamental right" that tends to support invigorated scrutiny and a right that finds a special place in our form of social organization.[229] The relationships among freedom from confinement, the rights to travel and family privacy, and our systems of social and political organization, however, are even closer. There are logically necessary relationships between the right to freedom from confinement and the rights to travel and family privacy,[230] while there is only an empirical relationship between the right to use contraceptives and family privacy.

The right to use contraceptives might also find a unique place in our concepts of personal liberty as it is bound up with special notions of bodily integrity and reproductive autonomy.[231] As such, the right is very important to the individual, and it is obviously a personal, as opposed to an economic, right.[232] Further, the claim in *Griswold* was that the state should refrain from prohibiting the use of contraceptives, not that it had a duty to provide the same.[233] Moreover, there were no nonjudicial remedies to deal with this intrusion,[234] and the case did not involve particularly difficult line-drawing questions that would be hard to administer with judicially manageable standards.[235] Of course, virtually all of this is true of questions raised by interference with persons' freedom from confinement.[236] It might be contended that coercive physical restraint does not directly impinge on sexual, reproductive, and family relationships, but careful reflection makes it clear that such restraint has perhaps an even more drastic impact on those relationships than does prohibition of the use of contraceptives.

In summary, the "rule" to be taken from *Griswold* is that invigorated scrutiny—involving both means and ends review such as is associated with the compelling state interest test—is justified when the following factors are present: (1) A substantial intrusion; (2) a right that bears a close nexus to another right that is both "fundamental" and of particular importance to our system of political or social organization; (3) a right that has a unique place in our concepts of personal liberty; (4) a noneconomic right; (5) a subjectively important right; (6) a claim against government interference as opposed to a demand to some entitlement; (7) no issues that are particularly difficult to govern with

229. *Id.* at 486 (marriage), and at 495-96 (Goldberg, J., concurring) (family); see text & notes 81-86 *supra*.
230. See text & note 87 *supra*.
231. L. TRIBE, *supra* note 8, § 15-10, at 921-23; note 222 *supra*.
232. See text & notes 92-99 *supra*.
233. 381 U.S. at 481. See text & notes 109-12 *supra*.
234. There was no real possibility of obtaining federal legislation to curb the state's regulation of birth control devices.
235. See text & notes 158, 163-64 *supra*.
236. See text & notes 58-199 *supra*.

judicially formulated standards; and (8) no feasible nonjudicial remedies.[237] Each of these factors and several others favor use of invigorated scrutiny in civil commitment and right-to-treatment cases.[238] Thus, if the use of invigorated scrutiny was justified in *Griswold*, *a fortiori* it should be employed in civil commitment and right-to-treatment cases.

A comparison of the application of the various factors in *Roe v. Wade* with the application of the factors in civil commitment and right-to-treatment cases is, in most respects, virtually identical to the analysis already ventured concerning *Griswold*.[239] In addition to the possible differences noted in the margin,[240] however, *Roe* is distinguishable as it required the Court to bridle a problem much less subject to the reins of judicially manageable standards. In *Griswold*, the Court essentially had to answer yes or no to the question whether the state could regulate the use of contraceptives,[241] while in *Roe* the Court confronted the much more difficult task of determining at what points and in what manner the state's interests in maternal health and potential life override the right to self-determination in procreational matters.

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237. See text & notes 211-36 *supra*.

238. See text & notes 58-199 *supra*.

239. In both cases the following factors argued against invigorated scrutiny: (1) The nonspecificity of the right (to use contraceptives or have an abortion); (2) the right was not asserted against solely paternalistic goals; (3) the "regulations" applied to everyone rather than a special class (but see note 241 *infra*); (4) the nonspecificity of the right made unpersuasive the argument that the Court's superior expertise in construing the text of the Constitution called for intervention; (5) there was no evidence that the respective legislative bodies had not even considered their actions or that those actions were aimed at any specific group (although in both instances the legislation particularly favored the ideals of certain religious groups); (6) at issue were laws passed by state legislatures rather than regulations promulgated by administrative or local bodies; (7) penumbral or due process, rather than equal protection, analyses were ventured; (8) new ground was broken (the closest analogy was to Skinner v. Oklahoma, 316 U.S. 535 (1942), which upheld the right to procreate (as opposed to the right *not* to procreate) on equal protection grounds); and (9) the Court scrutinized the states' ends, not just their means. Nevertheless, in both cases the following important factors supported invigorated scrutiny: (1) The close nexus between procreational self-determination and family privacy (the latter both being a "fundamental right" and having a special place in our system of social organization); (2) the unique place of bodily and procreational privacy in our concepts of personal liberty; (3) the noneconomic and subjectively vital importance of procreational privacy; (4) the nature of the claims as ones against government interference rather than as entitlements to government-provided benefits; and (5) the absence of nonjudicial remedies (but see note 240 *infra*). See text & notes 211-37 *supra*.

240. It might be argued that *Roe*, but not *Griswold*, involved discrimination against women, and that this favored use of invigorated scrutiny. See text & notes 16, 53, 144 *supra* regarding sex discrimination and the intermediate test. Somewhat surprisingly, however, the Court has treated analogous cases as dealing with classifications between pregnant persons and nonpregnant persons rather than distinctions between females and males. General Elec. Co. v. Gilbert, 429 U.S. 127, 137 (1976) (accord); Geduldig v. Aiello, 417 U.S. 484, 497 n.20 (1974) (upholding private insurance plan's denial of employment disability payments for normal pregnancies). It also might be contended that the *Roe* Court should have considered that women and others who favor abortion are a potent political force who can seek nonjudicial remedies such as protective federal legislation or a constitutional amendment. *See* Sneed, *supra* note 116, at 940-41. Professor Tribe appears correct, however, when he argues that the religious overtones of *Roe* indicated that "legislative accommodation to changing values would not function well." L. TRIBE, *supra* note 8, § 15-10, at 929-32.

241. See text & note 225 *supra* regarding the scope of *Griswold*.

Some have contended that the Court cannot deal with such difficult moral questions,[242] but the obvious response is that the Court sometimes does and must grapple with such questions.[243] Although the Court was faced with a more difficult issue in *Roe*, its use of invigorated scrutiny was arguably more necessary because the impact of a prohibition on abortion is even more drastic than the effect of a ban against contraceptive "devices." Birth control can proceed with alternatives to "artificial" means even though those alternatives are neither sufficiently effective nor practical to protect the right to self-determination in reproductive matters.[244] Once a woman becomes pregnant, however, there is simply no alternative, even an ineffective one, to an abortion.[245] Prohibition of abortion can cause serious and irreversible changes in one's emotional, psychological, financial, and sociological future.[246]

The rule to be taken from *Roe*, then, is substantially identical to the one already derived from *Griswold*.[247] *Roe* might differ from *Griswold*, however, in two respects: (1) It might require not just a substantial, but a massive or absolute deprivation; and (2) it does not require the absence of issues that are difficult to govern with judicially manageable standards. These possible discrepancies between the rules in *Roe* and *Griswold* do not present any impediment to justifying use of invigorated scrutiny in civil commitment and right-to-treatment cases. The line-drawing questions involved in such cases do require the Court to balance patients' rights and interests against those of society in general, but they are not as difficult as the questions posed in *Roe*. The best authorities and a unanimous Supreme Court have rejected the contention that right-to-treatment questions are not subject to judicially manageable standards.[248] Similarly, although *Roe* dealt with a massive intrusion, it was no more drastic than the virtual abrogation of liberty entailed in civil commitment.[249]

242. Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HAST. L.J. 867, 875 (1974); Epstein, *supra* note 207, at 159; Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Process*, 55 N.C. L. REV. 1, 96-104 (1976).

243. Spece, *supra* note 8, at 1325-31. *Cf.* L. TRIBE, *supra* note 8, § 15-10, at 933-34 (citing and criticizing Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1432 (1974), regarding the related argument that the state cannot prohibit abortion solely on moral grounds).

244. L. TRIBE, *supra* note 8, § 15-10, at 924 n.19; Carey v. Population Serv. Int'l, 431 U.S. 678, 689 (1977). The competing interest in potential life was not present in *Griswold*. That is relevant to determining whether the Court's final result was justified, but not to judging its use of invigorated scrutiny.

245. It does little good to argue that the woman should have avoided pregnancy or ought to have a child and then adopt it to another person. L. TRIBE, *supra* note 8, § 15-10, at 924 n.79.

246. Roe v. Wade, 410 U.S. at 153.

247. See text & note 239 *supra*.

248. O'Connor v. Donaldson, 422 U.S. 563, 574 n.10 (1975); Spece, *supra* note 1, at 40-41 n.137. If the Court can handle treatment questions, it should likewise be able to determine whether such treatment ought to occur in an institution or not.

249. See text & note 39 *supra*.

Donaldson indicates even more strongly than *Griswold* and *Roe* that invigorated scrutiny should be applied in civil commitment and right-to-treatment cases. The rule to be derived from *Donaldson*[250] is directly applicable because it is a civil commitment case. It has already been explained that *Donaldson* applied either the compelling state interest or intermediate test to limit the purposes for, and conditions under which, patients can be institutionalized.[251] Moreover, since right-to-treatment cases can be decided under the least restrictive alternative principle and without ends scrutiny, there is even greater justification for invigorated scrutiny in such cases.[252] This is particularly true because the means scrutiny in right-to-treatment cases is circumscribed. The state is not told, as it was in *Donaldson*, that it cannot use commitment as a means. It is simply told that certain therapeutic conditions must accompany that means if it is used. This recent, unanimous, and firmly grounded precedent, then, joins several other persuasive factors that more than support the least restrictive alternative right-to-treatment theory and the principles of constitutional adjudication upon which it is based.

CONCLUSION

This Article is a companion to a piece in an earlier issue of the *Arizona Law Review* that analyzed the least restrictive alternative right-to-treatment theory and set forth assumptions about constitutional adjudication upon which that theory is based. The Article has reiterated

250. The analysis ventured above regarding the applicability of the various factors relevant to determining the appropriate standard of review to civil commitment cases, see text & notes 58-199 *supra*, is directly applicable to *Donaldson*. That analysis illustrates that invigorated scrutiny—involving both means and ends review such as that associated with the compelling state interest test—is justified when the following factors are present: (1) A specific right; (2) a noneconomic right; (3) a subjectively important right; (4) a right that has a logically necessary connection to another right (travel) that is both "fundamental" and a special part of our social or political system; (5) a right that bears a logical or empirical nexus to several other "fundamental" rights; (6) a right that has a unique place in our concepts of personal liberty; (7) a repeatedly recognized right; (8) a right against government interference as opposed to a claim to some entitlement; (9) a suspect classification or many of the elements that mark such a classification; (10) a question that arguably calls into play the Court's superior ability to construe the constitutional text and history; (11) evidence of legislative neglect and bias; (12) at least a modicum of administrative, as opposed to legislative, discretion; (13) an equal protection claim; (14) the absence of viable nonjudicial remedies; and (15) the absence of issues that strongly resist judicially manageable standards. See text & notes 58-199 *supra*. It might be contended that *Donaldson* also requires a claim against paternalistic intervention. It has already been pointed out, however, that *Donaldson* rejected one state interest based on societal comfort. See text & note 189 *supra*. Even if *Donaldson* were to have involved solely paternalistic goals, that factor alone would not indicate that invigorated scrutiny ought not be applied to civil commitment and right to treatment claims predicated on nonpaternalistic state interventions. That factor is the only one discussed here that does not have fairly explicit support in the Court's opinions, see text & notes 122-26 *supra*, and it ought not be dispositive. This is especially true because of the large number of other vitally important factors that support invigorated scrutiny in civil commitment and right to treatment cases.

251. See text & note 188-95 *supra*.

252. See text & note 180-82 *supra*.

that theory and those assumptions. To support the assumptions and, independently, to add to constitutional analysis generally, the Article has: (1) Demonstrated that the least restrictive alternative principle is an independent superior form of intermediate review; (2) listed, categorized, and analyzed factors (and underlying themes) the Supreme Court and other authorities have considered relevant to determining the appropriate standard of review in specific cases; and (3) explained an approach for determining which clusters of these various factors justify application of particular forms of invigorated scrutiny in specific cases.

The latter approach has been applied to justify use of the compelling state interest test in civil commitment cases, and, *a fortiori*, to support use of the least restrictive alternative principle in right-to-treatment litigation. A particularly solid justification has been made for the formidable coupling of: (1) The accepted and attractive legal notion that when the pursuit of its interests substantially intrudes upon important personal rights, the state must use the least restrictive alternative and (2) the intuitive moral idea underlying many disparately reasoned cases[253] that the state must provide treatment to all those whom it involuntarily commits.

253. See Spece, *supra* note 1, at 2-3.