State Economic Substantive Due Process:
A Proposed Approach

A court relies on substantive due process grounds when it limits the content of state legislation solely on the basis of the due process clause in the United States Constitution or in a state constitution. One such ground is the prohibition against legislation that is "arbitrary" or bears no "rational relation" to a legitimate state end. This Note explores that prohibition as applied to challenges to state and local economic regulation.

Although federal courts no longer use substantive due process to strike down state economic legislation, many state courts have con-

2. See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955); Love v. Bell, 171 Colo. 27, 31, 465 P.2d 118, 121 (1970). The same standards are applied in cases in which the validity of a classification used in an economic regulation is challenged on equal protection grounds. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (economic regulations need only be "rationally related to a legitimate state interest" to withstand equal protection attack); D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 16, 520 P.2d 10, 21, 112 Cal. Rptr. 786, 797 (1974) (rational relationship test is constitutional standard when economic or social welfare legislation is attacked under equal protection clause). This Note uses the term "substantive due process" to include review of economic regulation under state equal protection clauses because the rational relationship inquiry in such cases is identical to that used in substantive due process analysis. Indeed, many courts perform a single analysis and then hold a statute unconstitutional on both due process and equal protection grounds. See, e.g., Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n, 245 So. 2d 625, 628-29 (Fla. 1971) (statute apportioning racing season among three tracks on basis of past revenues violates due process and equal protection); Blue Inv. Co. v. City of Raytown, 478 S.W.2d 361 (Mo. 1972) (statute levying sewer charges on businesses, hotels, churches, and schools according to water use but levying flat charge on residences and empty apartment units and no charge on empty residences violates due process and equal protection).
3. "Economic regulation" is defined to include regulation of business activity (such as price regulation, minimum wage regulation, health regulation, and safety regulation) and actions by the state in its enterprise capacity (such as raising taxes to fund government activities and establishing mechanisms—e.g., water districts—to deal with particular public problems). Some challenges to economic regulation involve claims based on rights other than the right to be free from legislation that has no "rational relation" to a legitimate state end. The approach advocated in this Note is meant to apply only to cases involving a challenge solely on the basis of the rational relationship issue.
4. Although the Supreme Court has not totally repudiated "rational relation" review of economic legislation, the cases reveal an extreme deference to legislative judgment. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-89 (1955). The Supreme Court has not invalidated a single economic regulation on substantive due process grounds since 1997. G. GUNTHER, supra note 1, at 591. The only Supreme Court case since the 1930s that has invalidated economic legislation under the equal protection clause on rational relation grounds, Morey v. Doud, 354 U.S. 457 (1957), see G. GUNTHER, supra note 1, at 591, was overruled in 1976, City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (Morey v. Doud was "needlessly intrusive judicial infringement on the State's legislative powers" whose equal protection analysis "should no longer be followed").
continued to apply the concept vigorously.\textsuperscript{5} Substantive due process review of economic legislation has been criticized,\textsuperscript{6} but there are plausible justifications for it. This Note does not resolve the controversy\textsuperscript{7} over the wisdom of employing such review; rather it criticizes the various modes of analysis now employed by state courts and suggests a framework for review that minimizes the dangers of economic substantive due process while promoting the goals advanced to justify it.

I. An Overview of Economic Substantive Due Process in State Courts: Dangers and Justifications

The danger of substantive due process review of economic regulation is that judges will impose on the legislature their own beliefs about


Vigorous substantive due process and equal protection scrutiny of state and local economic regulation has continued in many state courts over the last 16 years. State courts have struck down a variety of legislative enactments on due process grounds alone, see, e.g., Hand v. H & R Block, Inc., 258 Ark. 774, 528 S.W.2d 916 (1975) (statute limiting franchise royalties violates due process); Grocers Dairy Co. v. McIntyre, 377 Mich. 71, 138 N.W.2d 767 (1966) (statute prohibiting sale of milk in containers larger than one-half gallon and smaller than three gallons violates due process), on equal protection grounds alone, see, e.g., D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974) (statute establishing license fee for junkyards and auto graveyards based on distance from highway violates equal protection), and on due process and equal protection grounds simultaneously, see, e.g., Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973) (statute barring cosmetologists from cutting men's hair violates due process and equal protection); In re Martin, 88 Nev. 666, 504 P.2d 14 (1972) (city ordinance limiting capacity of trucks permitted to deliver gasoline to underground storage tanks violates due process and equal protection). One bold state court relied solely on the federal due process clause to invalidate a statute regulating cosmeticians. See Christianan's, Inc. v. Chobanian, 373 A.2d 160 (R.I. 1977) (statute barring cosmeticians from performing same service as performed for women violates federal due process clause).

6. Some commentators argue that state review should be as lax as at the federal level. See Paulsen, supra note 5, at 118 (courts should not undertake solution to problem of private interest legislation); Note, Substantive Due Process in the States Revisited, 18 OHIO ST. L.J. 384, 400-01 (1957) (adopter federal standard will move nation closer "to the realization of the democratic ideal"). But see Carpenter, supra note 5, at 1027 (active state review represents "return to the median tradition of reason and moderation" compared with Supreme Court's position); Hetherington, supra note 5, at 250 (different degree of review at state level warranted by different environment in which state courts operate); Note, supra note 5, at 330 (it appears most economic regulation struck down by state courts really is arbitrary; "counterrevolution in constitutional law long overdue"). See also Note, State Views on Economic Due Process: 1937-1953, 53 COLUM. L. REV. 827, 845 (1953) ("a balance must be struck between the control of ill-considered action by the legislature and the ability of the people to set economic policy through their representatives").

7. See note 6 supra.
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how an economy works or about what kind of economic policy is desirable. Such an imposition has been perceived as antidemocratic, and may impair the government’s ability to engage in effective economic regulation either by limiting the set of available policy tools or by foreclosing the state from experimenting with new, possibly superior policies.

On the other hand, three justifications for economic substantive due process review emerge from the case law and commentary. First is the fear, sometimes voiced by courts, that the state or its subdivisions will legislate in favor of a particular group at the expense of another when there is no “public interest” justification for the legislation. This concern is supported by public choice theory, which suggests that “private interest” legislation can be expected whenever democratic processes permit coalition formation. Second, legislatures may sometimes pass

8. In the early twentieth century, the Supreme Court often invalidated economic regulation by relying on a substantive due process approach. The seminal case was Lochner v. New York, 198 U.S. 45 (1905). Commentators have perceived Lochner and cases like it as imposition by the Supreme Court of its own normative economic beliefs on Congress and state legislatures. See id. at 75-76 (Holmes, J., dissenting) (holding and reasoning by majority in Lochner constitutionalizes particular “economic theory which a large part of the country does not entertain”); Strong, The Economic Philosophy of Lochner: Emergence, Embrasure, and Emasculation, 15 Ariz. L. Rev. 419, 427-28, 436-37 (1973) (Lochner and its progeny did not rest so much on construction of particular rights as on attempt to constitutionalize competitive capitalist economy).

The Supreme Court’s repudiation of the Lochner line of cases and the ensuing deferential review were predicated on the principle that, absent an explicit constitutional mandate, it is inappropriate in a democracy for an unelected judiciary to impose a set of values or beliefs. See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949).

9. See Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949) (concluding that “the due process clause is no longer to be so broadly construed” that Congress and state legislatures “are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare”); New State Ice Co. v. Liebmann, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting) (uncertainties in social science and need for experimentation make judicial deference desirable).

10. See, e.g., Independent Electricians & Electrical Contractors’ Ass’n v. New Jersey Bd. of Examiners, 48 N.J. 413, 420-21, 424, 226 A.2d 169, 173, 175 (1967) (case remanded for fact finding on due process issue on strong suspicion that statute was attempt to aid established full-time contractors at expense of part-time contractors and new full-time contractors); Trio Distrib. Corp. v. City of Albany, 2 N.Y.2d 690, 695-96, 143 N.E.2d 329, 331-32, 163 N.Y.S.2d 585, 589 (1957) (statute effectively prohibiting ice-cream truck sales violates due process as it attempts to prohibit business in order to aid its competitors).

11. Even highly sophisticated attempts to produce methods of voting that will invariably result in the choice of public projects most desired according to an intensity-weighted aggregate of individual preferences fail when the possibility of coalition formation is introduced. See Tideman & Tullock, A New and Superior Process for Making Public Choices, 84 J. Political Econ. 1145, 1145, 1157-58 (1976). One commentator has argued that the possibilities of perverse coalition legislation are particularly acute at the local level where "stable" coalitions may have control of the legislative apparatus. Note,
laws that are “arbitrary” or “irrational” despite the lack of any invidious design to aid or hinder particular groups. Some state and local legislatures meet for brief periods and lack the resources needed for sophisticated policy analysis. In addition, even carefully considered legislative choices may turn out to be seriously flawed because of unperceived defects in the legislative scheme or because of changes in the environment in which the legislation was designed to operate. A third justification is that careful judicial review can inform the legislature and the electorate of the “public interest” basis underlying a challenged economic regulation. Even if a court sustains legislation against substantive due process attack, the information provided in the accompanying analysis may spur revision of the law.

In order for a court to rely on any of these justifications, it must be able to conceive and articulate the public interest. Although a definition of the public interest is necessary to determine whether legislation is arbitrary and to inform legislators and the public of possible justifying bases for particular legislation, such a definition is even more crucial if a court is to detect “private interest” legislation. Providing aid to some groups, such as the poor or the elderly, is within the public interest. A court must have a method of deciding which forms of aid are within the power of the state and which are not.

II. Current Methods of Review

To determine whether legislation bears a “rational relation” to a legitimate state end and thus has a public interest rationale, a court

City Government in the State Courts, 78 Harv. L. Rev. 1596, 1596-97 (1965). In general, there is no reason to assume that the legislative product will conform to or even approximate the preferences of the public. See generally R. Musgrave & P. Musgrave, Public Finance in Theory and Practice 102-26 (2d ed. 1976).

One can argue that the fact that state court judges are elected in many jurisdictions and the fact that state constitutions are relatively easy to amend justify a relatively vigorous state substantive due process. Some counterarguments are that long terms of office for many judges insulate them from the political process, that the bar may play a large role in nominating candidates for the bench so that “elected” judges may not be as representative of the people as legislators, and that the constitutional amendment process is costly so that a “wrong” decision may stand because of the cost barrier. Whatever the outcome of the general dispute, it would seem hard to argue that a court should simply assert its economic beliefs and values in the face of a decision by a coordinate branch of government. Given that some deference is appropriate, finding a proper balance between deference and meeting the concerns that motivate active review becomes important.

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identifies legitimate state ends and assesses the "nexus" between those ends and the means employed by the legislature.\footnote{It is traditional in analysis of substantive due process and equal protection review to make the distinction between means and ends. See, e.g., id. at 21, 39-37; Ferry, supra note 1, at 422.} This task\footnote{In theory, a court could pursue two sharply different paths of analysis. See Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1207-08 (1970). A court could ascertain whether the purpose of legislation is to achieve some impermissible end; alternatively, a court could ask whether there is any legitimate state purpose that could support challenged legislation.} is particularly difficult because there is no clear division between means and ends.\footnote{It is traditional in analysis of substantive due process and equal protection review to make the distinction between means and ends. See, e.g., id. at 21, 39-37; Ferry, supra note 1, at 422.} Any end can be recast as a means to a more general end; on the other hand, statutory means can be defined as the end that the statute is designed to achieve.

State courts have adopted a variety of approaches to substantive due process review of economic regulation. Current approaches can be analyzed under three broad categories. The approaches in the first category illustrate that faulty ends analysis follows from an ends typology that is either too general or too specific. An examination of the second set of approaches establishes the central role that burdens and standards of proof play in means analysis. Finally, the third set of approaches demonstrates that means analysis must be used in conjunction with a solid ends analysis.

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15. In theory, a court could pursue two sharply different paths of analysis. See Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1207-08 (1970). A court could ascertain whether the purpose of legislation is to achieve some impermissible end; alternatively, a court could ask whether there is any legitimate state purpose that could support challenged legislation.

The first approach, "motives analysis," seems directly responsive to the justifications offered for economic substantive due process. If a court discovered that the purpose of the legislature was to aid a particular group as opposed to furthering the public interest, legislation would be unconstitutional. See, e.g., Trio Distrib. Corp. v. City of Albany, 2 N.Y.2d 690, 693-96, 143 N.E.2d 329, 350-52, 163 N.Y.S.2d 585, 587-88 (1957) (quoting People ex rel. Phillips v. Raynes, 136 A.D. 417, 423, 120 N.Y.S. 1053, 1057, aff'd, 198 N.Y. 539, 92 N.E. 1097 (1910)) (ordinance was one of series designed to aid competitors at expense of ice-cream truck business and was therefore unconstitutional under standard that legislation will be invalidated "where its purpose is 'to prohibit [a lawful activity] by onerous and exasperating restrictions, under the guise of regulation' ").

Unfortunately, motives analysis has several weaknesses: legislative motives are difficult to ascertain, the existence of motives analysis might encourage covert legislative activity to the detriment of the political process, legislative covertness in reenacting invalidated legislation might make motives inquiry futile, and striking down an otherwise legitimate law because of bad motives deprives the public of the value of that law. See Ely, supra, at 1212-17.

Because of the serious flaws of motives analysis, a court should adhere to the second approach; legislation should be supportable by any legitimate state end. Although Professor Ely has admitted some exceptions to his general critique of motives analysis, only one, the "distinguishing the indistinguishable" exception, is relevant to this Note. See id. at 1230-33, 1281-82. This exception covers situations in which a legislature confers benefits or burdens on individuals or groups indistinguishable from others not so benefited or burdened. Id. In order to deal with the exception a court must have a way of determining that parties are indistinguishable, and rules for decision when such a situation arises.

The method of review proposed in this Note provides a means of solving the "identification" problem. There exists a body of law for dealing with the second problem. See note 87 infra.

A. Faulty Methods of Review: Ends Analysis

State courts have upheld legislation if it advances one of the "police power" ends: the "public health, safety, morals or general welfare." This catalogue, however, often is not an effective device by itself for distinguishing between permissible and impermissible forms of economic regulation. One of the police powers is too general: in place of the amorphous "public interest," a court is faced with a crucial subcategory labeled the "general welfare." In the absence of further delineation of that term, there is great temptation for a court simply to impose its own opinion as to the content of the term. On the other hand, the more specific police power ends are so narrow that private interest legislation may be held constitutional merely because it promotes one of those ends to a small degree. As a result, courts sometimes "balance" the costs and the benefits of such legislation in a way that threatens to replace legislative judgments with judicial ones.

1. "Wild" Substantive Due Process of the First Kind

Ends analysis becomes "wild" substantive due process when a court asserts that a particular end is impermissible without demonstrating the absence of a police power justification. Although in New York Central Railroad Co. v. Lefkowitz the New York Court of Appeals narrowly upheld a series of "full-crew" laws requiring crews of certain sizes for various railroad operations and employment of firemen on some of the crews, the entire court agreed that the laws would violate the due process clause of the New York Constitution if they were employment statutes solely for the benefit of railroad firemen. Both the majority and dissenting opinions ignored the police power categories and failed to explain why a statute protecting employees threatened with loss of their jobs did not promote the general welfare. The ends analysis in Lefkowitz can thus be interpreted as an imposition of judicial beliefs about the desirability of a particular economic policy. This kind of wild substantive due process limitation on legislative options must be

19. Id. at 6-9, 241 N.E.2d at 731-33, 294 N.Y.S.2d at 520-23.
20. Id. at 11, 241 N.E.2d at 734, 294 N.Y.S.2d at 525; see id. at 18, 241 N.E.2d at 738, 294 N.Y.S.2d at 531 (Breitel, J., dissenting) (laws could only be upheld if they promoted safety and not if they were "economic adjustments between railroads and railroad labor"). Judge Breitel concluded that it was a matter of "common knowledge" that the purpose of the full-crew law was "‘feather-bedding’ in the interest of a special group." Id. at 19-20, 241 N.E.2d at 739, 294 N.Y.S.2d at 532.
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avoided because it represents unprincipled, direct interference with legislative judgments on matters of economic policy.\textsuperscript{21}

The analysis in the \textit{Lefkowitz} case would not have been any more acceptable if the court simply had asserted that aiding railroad firemen threatened with loss of their jobs did not promote the “general welfare” under the police power. A court must use an ends taxonomy that delineates the vague “general welfare” branch of the police power if it is to engage in principled ends analysis.

2. \textit{Balancing}

Another ends approach inquires whether challenged legislation results in more total benefit than harm. Although a statute might serve discrete police power ends such as health or safety, the statute will be held to violate due process if the harm it causes sufficiently outweighs its benefits. Because a balance in favor of benefits is a necessary and sufficient condition of constitutionality, the legitimate state ends lose their independent justifying power and become mere considerations in determining whether the overall balance is positive.

In \textit{Chicago & North Western Railway v. La Follette},\textsuperscript{22} involving another attack on full-crew laws,\textsuperscript{23} the Wisconsin Supreme Court noted that even if the laws achieved the legitimate end of promoting railroad safety, they would violate due process if the costs imposed on the plaintiff railroads were “grossly disproportionate” to the enhancement of safety.\textsuperscript{24} The court held a provision requiring a three-man crew for single locomotives not pulling cars unconstitutional, but upheld the rest of the full-crew laws.\textsuperscript{25}

Although the \textit{La Follette} court’s standard prohibiting only legislation imposing “grossly disproportionate” costs suggests a high degree

\textsuperscript{21} The analysis in \textit{Lefkowitz} seems particularly unprincipled in light of a subsequent equal protection case in which a Court of Appeals consisting of six of the seven judges who decided \textit{Lefkowitz} held unanimously that New York City could aid tenants who were aged and needy by exempting them from a general increase in rent-control ceilings. \textit{See} \textit{Parrino v. Lindsay}, 29 N.Y.2d 30, 272 N.E.2d 67, 323 N.Y.S.2d 689 (1971). The justifying end in \textit{Parrino} was “prevention of severe hardship to aging needy citizens resulting from the shortage of low and moderately priced housing accommodations.” \textit{Id.} at 35, 272 N.E.2d at 69, 323 N.Y.S.2d at 692. It is unclear why sheltering the poor and aged from rent increases by provisions aimed at landlords is constitutional while burdening railroads to protect railroad firemen from losing their jobs because of advances in technology is not.

Although the \textit{Lefkowitz} court did not actually strike down full-crew laws on the basis of unsupported ends analysis, at least one other court has done so. \textit{See} \textit{Chicago & N.W. Ry. v. La Follette}, 43 Wis. 2d 631, 169 N.W.2d 441 (1969).

\textsuperscript{22} 43 Wis. 2d 631, 169 N.W.2d 441 (1969).
\textsuperscript{23} \textit{Id.} at 639-41, 169 N.W.2d at 444-45.
\textsuperscript{24} \textit{Id.} at 645, 169 N.W.2d at 447.
\textsuperscript{25} \textit{Id.} at 652-53, 658, 169 N.W.2d at 451, 454.
of deference to the legislature, balancing inherently requires certain judicial economic judgments no matter how deferentially it is practiced. When safety legislation is challenged, a balancing standard necessitates a judicial decision as to how much of a reduction in the likelihood of injury or death justifies the costs imposed on the regulated party. Such an inquiry invites the court to substitute its valuation of life and limb for that implicitly adopted by the legislature. There is no one "objective" method of valuing life and limb, and different methods lead to sharply divergent conclusions.\textsuperscript{26} More generally, uncertainties inherent in cost-benefit assessment of many economic options\textsuperscript{27} suggest that the balancing approach will often amount to replacing legislative judgments about economic phenomena with judicial ones.

Despite the undesirability of balancing, it is not surprising that courts reviewing health and safety legislation often apply a balancing test.\textsuperscript{28} When health or safety legislation appears to impose large costs for de minimis gains, it is natural to suspect that such legislation may have been designed merely to aid some particular group rather than to promote the public interest.\textsuperscript{29}

26. See Mishan, \textit{Evaluation of Life and Limb: A Theoretical Approach}, 79 J. Political Econ. 687, 691-701 (1971) (presenting economic welfare analysis of valuation of life problems; analysis incorporates many factors that are hard to quantify). Compare Calabresi, \textit{Reflections on Medical Experimentation}, 98 Daedalus 387 (1969) (arguing that in some circumstances special symbolic value of life must be considered) with Fried, \textit{The Value of Life}, 82 Harv. L. Rev. 1415, 1424-25, 1437 (1969) (arguing that giving additional symbolic value to some lives is inappropriate; proper course is to spend more on "moral education" so that citizens will be ready to face death).

27. See note 88 infra.

28. See In re Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729 (1974). The case involved a statute permitting the state to deny a license for operation of a private hospital on the ground that existing bed capacity in the area of proposed operation was adequate. The state argued that there was a shortage of doctors and other medical personnel in North Carolina, so that additional unnecessary hospital capacity would increase the price of health care through increased average overhead costs and would decrease the quality of care because of the diffusion of doctors. The North Carolina Supreme Court suggested that the benefits of competition such as "more courteous and attentive service and a more diligent search for improved methods" might well be "deemed to balance, at least, the detriment of higher prices." \textit{Id.} at 549, 193 S.E.2d at 734. Having convinced itself that the net benefits of the statute were problematic, the court held that it failed a critical second balance: the "substantially greater benefit to the public" required when the state excludes parties from practicing a particular business, as opposed to regulating prices or business practices, was absent. \textit{Id.} at 550, 193 S.E.2d at 735.

29. The \textit{La Follette} court, like the New York Court of Appeals in the \textit{Lefkowitz} case, see p. 1492 supra, presumed that it would be impermissible for the state to pass legislation, unconnected with safety, aiding railroad firemen by requiring railroads to continue employing them. 43 Wis. 2d at 658, 169 N.W.2d at 454 (warning that in future statute would be held unconstitutional if shown to be "only an employment statute, with no reasonable relation to safety").
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B. *Faulty Methods of Means Analysis*

The scope of substantive due process review depends heavily on the degree of means scrutiny that courts apply to legislation. Means scrutiny is more or less rigorous depending on the extent to which courts use evidence and on the standard and burden of proof concerning the nexus between statutory means and the ends put forward to justify the statute. The burden and standard of proof applied determine the permissible level of uncertainty about the effectiveness of legislation.

1. "Wild" Substantive Due Process of the Second Kind

Means analysis becomes "wild" substantive due process when a court assesses the connection between means and ends on the basis of its own conceptions about how an economy works. For instance, in *Gillette Dairy, Inc. v. Nebraska Dairy Products Board* \(^{30}\) the Nebraska Supreme Court struck down a statute requiring an administrative agency to set minimum prices for milk\(^31\) on the ground that such a price floor would not, in the court's opinion, achieve the legislative goal of keeping the dairy industry "free from monopolistic and anticompetitive influences."\(^{32}\)

Given the scant evidence presented by plaintiffs,\(^33\) the *Gillette* majority's theorizing\(^34\) was tantamount to conjecture. The lone dissenter pointed out two justifications that were not considered in the

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\(^{30}\) 192 Neb. 89, 219 N.W.2d 214 (1974). This type of means analysis is not unique to the *Gillette* case. See, e.g., *Department of Ins. v. Schoonover*, 225 Ind. 187, 193-94, 72 N.E.2d 747, 750 (1947) (statute requiring that casualty and fire insurance be sold only on commission basis held to violate due process; state contention that sales on commission basis would result in better service than those on salaried basis declared to be "fanciful"); *Moore v. Grillis*, 205 Miss. 865, 889, 895-96, 39 So. 2d 505, 509, 512 (1949) (statute prohibiting all but lawyers or certified public accountants from charging for filling out tax returns violates due process; market will weed out those who make errors "with much frequency" thereby meeting state concern that tax returns be correctly prepared).

\(^{31}\) 192 Neb. at 92-94, 99, 219 N.W.2d at 217-18, 221. The statute required the agency to calculate minimum milk prices from a weighted average of distributor costs. *Id.* at 94, 219 N.W.2d at 218.

\(^{32}\) *Id.* at 92, 219 N.W.2d at 217. The *Gillette* court also seems to have engaged in wild substantive due process of the first kind by implicitly assuming that certain ends were impermissible. See note 37 infra.

\(^{33}\) The only evidence that the plaintiff dairy company had presented was a list of the kinds of competition available to milk distributors and a comparison of milk and gasoline price trends in Nebraska. 192 Neb. at 103, 219 N.W.2d at 223 (Clinton, J., dissenting).

\(^{34}\) The majority theorized that smaller local distributors had to rely on price competition made impossible by the statute in order to survive and grow in the face of competition from nationally known brands. *Id.* at 96, 219 N.W.2d at 219. As a result, it held that the setting of minimum prices would promote rather than hinder any tendency toward monopoly in the milk industry. *Id.*
majority opinion but that were equally consistent with the evidence;\(^3\) other possible justifications can be readily imagined.\(^3\) The regulation in *Gillette* may have been "special interest" legislation designed, as the majority asserted, to aid inefficient distributors at the expense of consumers.\(^3\) Yet the majority appears simply to have imposed its own opinion about the functioning of the milk industry in Nebraska.\(^3\)

2. *State Proof Required*

Courts sometimes require that the state establish the requisite connection between means and ends by at least a preponderance of the evidence. In *Cleere v. Bullock*,\(^3\) for example, the Colorado Supreme Court struck down a statute requiring all funeral directors to be trained formally as *embalmers*\(^4\) because the state failed to show that the laws were "necessary" for protection of the public health.\(^4\)

35. *Id.* at 105-06, 219 N.W.2d at 224 (Clinton, J., dissenting) (statute could have been attempt to ensure that dairy industry would not lose more processors, or could have been administrative replacement for previous unsuccessful statute attempting to prohibit sales below actual cost).

36. For example, if there were small companies that had not yet reached full physical economies of scale, the legislature might have attempted to shelter them from price competition in order to bring about a more desirable industrial structure in the long run. A shelter from price competition would not inevitably allow the hypothetical small companies to reach the economies of scale of the larger competitors. Setting a price floor might have given the larger companies extra profits which could be used to intensify service or advertising competition against the smaller companies. Whether such competition would be more effective than price competition is an empirical question that cannot be answered by a theoretical assertion of the kind made by the *Gillette* majority.

37. 192 Neb. at 98-99, 219 N.W.2d at 220-21. Although the court may have been correct in its suspicion that the statute under review was simply a device to aid inefficient distributors at the expense of consumers, it is by no means apparent that that kind of aid should be held unconstitutional. The state may have wanted to protect existing inefficient distributors and their employees from the consequences of business failure. Setting minimum milk prices would be a device for achieving such an end by insuring the continuing viability of many of the inefficient producers. Such a scheme might be accompanied by lower social and administrative costs than use of the normal fiscal system combined with welfare payments to some of the victims of business failure. The *Gillette* majority opinion, however, rests on the premise that aiding inefficient milk distributors is necessarily an improper state goal when accomplished by means of protecting those distributors from price competition. *Id.* Such an approach amounts to wild substantive due process of the first kind. See pp. 1492-93 *supra.*

38. The court's choice in favor of a competitive market economy is reminiscent of *Lochner*. See note 8 *supra.*


40. *Id.* at 288, 361 P.2d at 617.

41. *Id.* at 292, 361 P.2d at 619 ("The tendency has been to condemn provisions which impose regulations not shown to be necessary to the preservation of the public health, safety or morals.")

Embalmers were trained to detect disease and to prevent its spread. *Id.* at 287, 361 P.2d at 617. Although the state provided testimony that "established that a funeral director is sometimes called upon, in the absence of an embalmer, to detect the presence of a contagious disease and to take steps to prevent its spread," the court found that the
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The Cleere court's choice of burden and standard of proof restrained Colorado from acting to prevent a potential health danger unless it could prove a significant probability of potential harm. Although the court may have been motivated by a suspicion that the Colorado legislature had passed "special interest" legislation reserving all positions as funeral directors for embalmers, the "state proof required" approach must be rejected if the legislature is to have power commensurate with the uncertainties inherent in modern policymaking.

3. Any Conceivable Basis

A third approach is more deferential: economic legislation will be upheld by some courts if they can conceive any basis for the regulation. In Roosevelt Raceway, Inc. v. County of Nassau, the New York Court of Appeals held that the evidence was "inconclusive as to whether...disease can be communicated to a living person by a dead body." Id. In addition the court held that it had not been shown that funeral directors needed to have training in embalming in order to fulfills their duties of supervising embalmers. Id. at 287, 361 P.2d at 617.

Although the court did not explicitly state that the burden of proof was on the state, the process of decision indicates that it was. The court required a positive showing of necessity to support the challenged regulations and since the evidence was inconclusive, the state lost.

42. The degree of constraint on state policy that results from placing the burden of proof on the state depends on the standard of proof that is required. If a state were only required to make a showing by a preponderance of the evidence, a court might allow a statute to stand when there is only a moderate probability that there is a health danger and that the statute will alleviate the danger. In Cleere the state lost in part because the evidence on the communicability of disease from dead bodies to living persons was "inconclusive." Id. at 287, 361 P.2d at 617. It would seem, then, that the Colorado Supreme Court required that the state make showings by at least a preponderance of the evidence.

43. Much economic policymaking is accompanied by uncertainty either about the existence of a problem to be remedied, as in Cleere, or about the efficacy of various policies. See note 88 infra. Because social experimentation often occurs precisely when it is impossible to establish the efficacy of various policies (or of any policy), requiring proof by the state could hinder it not only in its short-run choice of policies but also in its long-run attempt to find effective new policies. See p. 1499 & note 9 supra (danger that lack of judicial deference in economic substantive due process cases will throttle experimentation with new policies).

44. The "any conceivable basis" approach is used by the federal courts. See, e.g., Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) (upholding ad valorem tax on corporations but not on individuals against equal protection attack); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (upholding state restrictions on licensed optometrists and ophthalmologists against due process and equal protection attack).

"Conceiving a basis" refers to both conceiving possible justifying ends and imagining facts that might establish a sufficient connection between statutory means and the justifying ends. Although this subsection analyzes the "any conceivable basis" approach as a method of means scrutiny, many of the criticisms of the approach apply equally when it is used for ends analysis.

45. 18 N.Y.2d 30, 218 N.E.2d 539, 271 N.Y.S.2d 662 (1966), appeal dismissed per curiam, 385 U.S. 453 (1967). State "any conceivable basis" decisions can be found in most time periods since 1937. See, e.g., Carolene Prods. Co. v. Mohler, 152 Kan. 2, 10, 102 P.2d 1044, 1050 (1940) (statute forbidding sale of filled milk upheld under standard that plaintiff was required to prove there was "no conceivable reason" for enactment in order
York Court of Appeals upheld a statute permitting counties adjacent to New York City to tax harness racing tracks at twice the rate allowed in other counties and at twice the rate allowed on running tracks anywhere in the state.\textsuperscript{46} The majority found that the higher rates could conceivably be justified by possible higher municipal costs associated with harness racing in the two favored counties.\textsuperscript{47} There was no evidence to support that possibility. The court merely adopted a weak chain of conjecture suggested by the county and by the state attorney general.\textsuperscript{48}

Such an analysis is incapable of protecting against special interest legislation or against irrational statutory schemes because judges can always imagine an end and a set of facts, no matter how improbable, to justify legislation.\textsuperscript{49} In addition, the approach can be unfair to the

to prevail); General Elec. Co. v. Kimball Jewelers, Inc., 333 Mass. 665, 675, 132 N.E.2d 652, 657 (1956) (fair trade law upheld under standard that burden is on challenging party to show “absence of any conceivable ground upon which [the challenged] enactments may be supported”).

\textsuperscript{46} Id. at 36, 218 N.E.2d at 540-41, 271 N.Y.S.2d at 665. Races with horses pulling sulks take place at harness tracks while races between horses without sulks take place at running tracks. The court dealt both with the distinction drawn between running and harness tracks and with the distinction between harness tracks in different parts of the state.

\textsuperscript{47} Id. at 40, 218 N.E.2d at 543-44, 271 N.Y.S.2d at 669.

\textsuperscript{48} Id. The justification for the distinction between harness tracks and running tracks was that harness tracks operated at night so that they might require more municipal services than running tracks. Id. Roosevelt Raceway had argued that the nighttime distinction was vacuous because the Raceway provided lighting for the track. Brief of Petitioner at 29. The court may have relied on the county’s argument that night operation might require more police and traffic personnel than operation during the day. Appellant’s Brief at 32-33. The argument seems rather weak as general traffic would probably be lower at night and the same number of personnel would seem to be required to direct traffic in the vicinity of the track whether it was day or night. Only the argument that more police might be required for night races is even mildly plausible. Such an argument rests on the premise that crowds at night require more control than those during the day. The municipal-cost argument for distinguishing harness tracks in different parts of the state was that the higher population in Nassau County would mean higher municipal costs. Although the congestion costs (some of which might fall on the municipality) might be higher when a track is operated in a densely populated area, the travel distance per customer might be less, thus reducing the amount of road wear per track customer. The municipal-cost justification for each of the classifications is therefore problematic.

\textsuperscript{49} There are, however, cases in which state courts use an “any conceivable basis” approach to invalidate economic regulation. See, e.g., Dunbar v. Hoffman, 171 Colo. 481, 485-86, 468 P.2d 742, 744-45 (1970) (statute prohibiting Sunday labor by barbers in larger municipalities but not in other areas lacked any conceivable basis and therefore violated Colorado equal protection clause); Mountain States Tel. & Tel. Co. v. Animas Mosquito Control Dist., 152 Colo. 73, 85, 380 P.2d 560, 566-67 (1963) (provision exempting land holdings of over 20 acres or over $25,000 in value from mosquito district was unconstitutional; it was inconceivable that mosquitoes could be eliminated given quantity of land exempted and it did not “seem likely or possible” that exemption was “inducement to the adoption of the balance of the act”). Use of the “any conceivable basis” approach to strike down legislation appears disingenuous because of the ease with which bases can be imagined. In Dunbar, for instance, the Colorado legislature conceivably could have
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challenging party who must rebut all conceivable bases, including those that a court might devise after the record is closed and appellate argument is complete.50

C. Two Desirable Forms of Means Analysis

When means analysis is accompanied by appropriate burdens and standards of proof, it can serve the useful purpose of determining when legislation does not achieve the ends put forward to justify it or when legislation serves such ends but is unnecessarily severe. The value of means analysis, however, depends on the strength of the preceding ends analysis. If important permissible ends have been neglected as possible justifications for challenged legislation, a careful means analysis may be insignificant.

1. Less-Drastic-Means Analysis

Courts sometimes find that a statute serves a permissible end but is invalid because equally effective "less drastic means" could have been used to achieve the same end. Overbreadth and unnecessary severity in legislation can signal that impermissible ends are mixed with permissible ones and that the latter may be a pretext included in order to accomplish the former. Less-drastic-means analysis provides a method of isolating and examining those aspects of a statute that are not necessary to the attainment of permissible ends.51

The New York Court of Appeals used this method in Defiance Milk Products Co. v. DuMond52 to examine a statute requiring condensed skim milk to be sold only in packages of ten pounds or more. The court found that the statute had the effect of prohibiting retail sales for household use and held that it could not be sustained as an attempt

found that busy urban barbers were more in need of rest than their rural and small-town counterparts. Alternatively, the legislature might have exempted rural and small-town barbers from the Sunday prohibition because it was more difficult for their customers to get haircuts during the week. In general a court's failure to conceive bases may raise the suspicion that the court will use its imagination only when upholding challenged legislation suits its own beliefs about the desirability of the legislation.50 In this respect the approach deviates from the jurisprudential canon that adversaries frame the terms of a dispute. See Jenkins v. McKeithen, 395 U.S. 411, 423 (1969).

51. Less-drastic-means analysis has met with scholarly approval: one leading commentator has suggested that it should be the primary mode of economic substantive due process review. Struve, The Less-Restrictive-Alternative Principle and Economic Due Process, 89 Harv. L. Rev. 1463, 1487-88 (1967).

52. 309 N.Y. 537, 132 N.E.2d 829 (1956). For another state court example of this approach, see Figura v. Cummins, 4 Ill. 2d 44, 51-52, 122 N.E.2d 162, 166 (1954) (ban on work done at home in processing metal springs violates due process; danger to children from foot press used in processing springs could be eliminated by requiring guards on presses rather than banning work in homes).
to prevent consumer confusion between evaporated skim milk and evaporated whole milk since that end could be achieved by labeling requirements.53

The holding in Defiance Milk relieved condensed skim milk producers of an onerous restriction that was not necessary to the achievement of the end of consumer protection. Yet the decision rests on the unstated premise that it would be impermissible to use a statute such as the one challenged to aid those selling condensed whole milk against their competitors selling condensed skim milk. Although less-drastic-means analysis serves the useful purpose of minimizing the unnecessary severity of legislation, a court must ascertain whether apparent undue severity has some permissible underlying justification. Such an inquiry requires a more comprehensive ends analysis than courts currently employ.54

2. Strong Presumption of Validity

Some courts test the connection between ends and means by requiring challengers to make a strong showing that statutory means fail to achieve the legitimate ends advanced to justify a statute. If the challengers fail to make this showing, a presumption that the statute's means have the requisite connection to the justifying ends saves the statute. The La Follette case55 illustrates this approach. The plaintiff railroads would have prevailed in their attack on the full-crew laws had they demonstrated beyond a reasonable doubt either that the legislation would result in no increase in safety or that the costs imposed would be grossly disproportionate to the safety gains.

Placing a heavy burden on challengers occupies an appropriate middle position between the "any conceivable basis" and "state proof required" approaches. The state cannot shield special interest legislation by mere assertions concerning specific permissible purposes, but the state is given the benefit of the doubt when uncertainties in economic or policy analysis preclude definitive assessment of the efficacy of alternative policies. The La Follette opinion, however, illustrates that even the most careful means analysis can be misdirected if the accompanying ends analysis is inadequate. If the full-crew laws could have been upheld as employment measures, the 10,000 pages of

54. In finding that no "reasonable basis" existed for the degree of severity inherent in what was effectively an absolute ban, the Defiance Milk court relied on an "any conceivable basis" approach. Id. at 541-42, 132 N.E.2d at 830-31.
55. See p. 1493 supra. For additional examples of use of the approach, see note 91 infra (citing cases).
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record and 369 exhibits generated during trial on the safety issue would have been irrelevant.

III. A Proposed Approach for Deciding Economic Substantive Due Process Cases

Analysis of current methods of economic substantive due process review indicates that the police-power test of permissible ends is unsatisfactory because the general welfare component is too vague to be an effective guide to courts and because health and safety regulation may be merely a pretext for aiding special interests. The first problem can be solved by using a more specific, but still comprehensive, ends typology. The second problem can be alleviated, but not entirely eliminated, by careful means analysis.

A. Ends Analysis

Because legislation without a “public interest” basis forms a residual category defined by the absence of any police-power end, a court needs a typology of ends specific enough to be applied to factual situations, but broad enough to capture the bulk of the “general welfare.” In order to facilitate definition of the general welfare, courts should employ a typology based on the functional categorization of state ends traditionally used by economists: allocation, stabilization, and redistribution. Allocative measures attempt to correct instances of “market failure” when markets do not work or work imperfectly. Stabilization measures attempt to ensure full employment, stable prices, adequate economic growth, and other aggregate goals.

56. 43 Wis. 2d at 636, 169 N.W. 2d at 442.
57. In particular, the “general welfare” branch of the police power is too vague to help courts distinguish impermissible transfers to private interest groups from transfers that the same courts have either explicitly recognized as permissible, see note 21 supra, or that pervade the statute books of the modern welfare state, see notes 64-66 infra.
58. See, e.g., D. Hyman, The Economics of Governmental Activity 5-6 (1973); R. Musgrave & P. Musgrave, supra note 11, at 6-19.
59. An example of an allocative measure is a tax on factories per unit of pollution emitted, set at a level representing the “social costs” imposed by each additional unit of pollution. The goal of such a tax would be to make manufacturing prices represent all the costs of manufacturing (including social costs) thus enabling consumers to receive the proper signals concerning the societal resources expended in producing the good. See R. Musgrave & P. Musgrave, supra note 11, at 702-07.
60. See id. at 517-76. Because stabilization is concerned with aggregate features of an economy, most stabilization policy is carried out at the national level. On the local level, however, devices such as rent controls are sometimes justified as stabilization measures, albeit for a single market. See Bucho Holding Co. v. Temporary State Hous. Rent Comm’n, 11 N.Y.2d 469, 478, 184 N.E.2d 569, 574, 230 N.Y.S.2d 977, 981-82 (1962) (traditional police powers include state goal of controlling rents in order to prevent massive increases during period of housing shortage).
focus on increasing net community welfare and therefore can be classified under the single term "efficiency measures." Redistributions, on the other hand, are transfers of wealth between economic units. This typology would permit a court to segregate the broad, permissible category of efficiency ends and concentrate on distinguishing between permissible and impermissible redistributions.

Three broad types of redistribution either have been mentioned favorably by courts or are inherent in present state and federal law. These should be recognized as permissible. First, "downward" redistribution of wealth from rich to poor is pervasive and widely accepted as a proper state function. Second, because legislation may have unintended distributional consequences, it should be within the legislative province to alleviate those consequences by supplemental

61. A common test for whether a measure increases net community welfare is whether there exists a hypothetical series of transfers such that no one would be worse off and some would be better off as a result of the measure. See Mishan, supra note 26, at 691-92. The concept of a net increase in community welfare, even when stated in the form of such a test, is not free from ambiguity. See Baker, The Ideology of the Economic Analysis of Law, 5 PHILOSOPHY & PUB. AFF. 3, 12-13, 19, 42-43 (1975) (transfers needed to ensure that no one is worse off as result of measure vary according to whether harm caused by measure is valued by what victim would pay to avoid it or by what he would have to be paid to accept it).


63. Although one might reject the particular typology articulated or aspects of it, some typology is necessary in order to ensure that ends analysis proceeds on a principled basis. The typology here is merely a "best effort" to capture a few broad types of redistributions that appear to have won general acceptance as permissible ends in themselves. The remainder of this Note's proposal depends only on the selection of some typology of permissible redistributions; moreover, flexibility with respect to use of a typology is introduced into the proposed method of ends analysis in the next section.

Professor Michelman, in discussing when a court should hold that government action has resulted in an unconstitutional taking without just compensation, uses the same delineation of permissible state ends as that chosen here except that he has no category corresponding to "personal security redistributions." See Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARY. L. REV. 1165, 1181-83 (1967).

64. Increases in progressive income taxes combined with public expenditures that aid low-income households is an example of a downward redistribution measure. See R. Musgrave & P. Musgrave, supra note 11, at 12. Some degree of downward redistribution can be rationalized by efficiency considerations. See id. at 86-88 (persons with low incomes may value each additional dollar more so that transfers from high-to low-income persons may increase total welfare); Hochman & Rodgers, Redistribution and the Pareto Criterion, 64 AM. ECON. REV. 752, 752-53 (1974) (governmental redistributive programs may be necessary to implement individual preferences for transfers to others; free-rider effects may block complete expression of the preferences under system limited to voluntary transfers). Downward redistribution, however, can also be rationalized on equity grounds independent of maximizing total net welfare, and some of those grounds seem to be widely accepted in the United States. See R. Musgrave & P. Musgrave, supra note 11, at 88-89. Courts sometimes explicitly acknowledge aid to the poor as a valid state goal. See Parrino v. Lindsay, 29 N.Y.2d 30, 35, 272 N.E.2d 67, 69-70, 323 N.Y.S.2d 689, 692 (1971).
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legislation serving the purpose of "correctional redistribution." Finally, there are numerous instances in which the state uses "personal-security redistribution" to aid individuals harmed by natural and market forces beyond their control.

It would be undesirable to adhere rigidly to a particular typology since the changing needs of society are sure to transform the borders of the police power in the future as they have in the past. In addition, there may be current legitimate ends either not captured by the particular set of permissible ends initially chosen or not capable of articulation in terms of efficiency or redistribution. Nevertheless, it would seem that economic legislation that does not aim at increasing net community welfare, does not aid a relatively disadvantaged group, does not aid those harmed by government regulation or by natural or market forces beyond their control, and does not enhance public health, safety, or morals, is likely to be private interest legislation. Therefore, it is reasonable to place on those defending challenged

65. Some examples of correctional redistribution can be found in various tax exemptions. Excluding direct government grants, such as welfare payments, from taxable income can be justified because indirect grants must be excluded as a practical matter and the tax laws were not intended to work a redistribution against those receiving direct grants. See Bittker, A Comprehensive Tax Base as a Goal of Income Tax Reform, 80 Harv. L. Rev. 925, 935-38 (1967) (discussing justifications for excluding public transfer payments from income subject to federal income tax).

66. Relief to victims of hurricanes, floods, or tornadoes is an example of attempts to aid those harmed by natural forces beyond their control. Unemployment compensation is an example of aid to those harmed by fluctuations in the labor market. Similarly, agricultural price supports insulate farmers from the impact of the downward portion of the large price swings that may characterize produce markets.

Some systematic personal-security redistributions can be rationalized by efficiency considerations. Large, compulsory social-insurance programs, for example, guarantee that victims of economic or natural misfortunes will be aided at the lowest possible cost. See M. Franklin, Cases and Materials on Tort Law and Alternatives 478-80 (1971).


68. Certain redistributions may be justified on grounds of "fairness" and yet not fall clearly within the categories of downward, correctional, or personal-security redistribution. Courts have sometimes recognized fairness arguments in situations in which the correctional redistribution category might be applied. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (statute exempting pushcart vendors with more than eight years' experience from general ban on pushcart vendors could be upheld as recognition of "reliance interest" of older vendors). Because of the large variety of situations in which one could argue that a particular policy should be upheld because it is fair, "fairness redistribution," like the "public interest" or the "general welfare," would seem to be a category that is too vague to be useful.

69. Government attempts to alter tastes, for example, defy evaluation in efficiency-redistribution terms. Efficiency analysis relies on the assumption of fixed personal preferences that a person uses to assess whether he or she will be better or worse off after a particular event takes place. The question whether a person will be made better or worse off by changing his or her preferences is intractable because the preferences themselves describe what better or worse off is for that person. See March, Bounded Rationality, Ambiguity, and the Engineering of Choice, 9 Bell J. Econ. 587, 600-01 (1978).
legislation the burden of convincing a court that other ends are legitimate as well. Establishing categories of permissible redistributions would provide the state with a fertile source of analogy that might be used when a new redistributive category was at issue. Legislation, or portions thereof, that cannot be justified under the ends typology or by ends proposed and accepted by the court can be held to violate due process because it falls within the residual category of impermissible “naked redistributions”—redistributions neither permissible as ends in themselves nor accompanied by a separate justifying end.

Although the proposed method of generating a set of legitimate ends eliminates much of the vagueness surrounding the concept of the general welfare, it does not solve the second problem of ends analysis—use of health and safety justifications as pretexts for achieving impermissible ends. A partial resolution of this second problem can be accomplished by means analysis.

B. Means Analysis

Once a court has adopted a method of distinguishing impermissible from permissible ends, less-drastic-means analysis and the “heavy pre-

70. Consider, for example, the issue of whether it is constitutional to provide aid for railroad firemen whose jobs are threatened by advancing technology. Even if the directly applicable category of personal-security redistribution were omitted as a known subset of the general welfare, a court would have to hold such aid unconstitutional in the face of the permissibility of downward redistribution. A strong argument could be made by the state that if it is permissible to aid those who have been reduced to poverty by circumstances beyond their control, it should be permissible to aid those who might lose their jobs because of circumstances beyond their control.

71. A statute that can be sustained as an efficiency measure or as a measure effecting a permissible redistribution may impose heavy incidental losses on some parties and such distributional consequences may be unavoidable if the statute is to achieve its permissible end. In such a situation, a substantive due process attack on the statute must fail because it cannot be said that the statute is arbitrary or serves no public purpose. A court, however, may be called upon to decide whether there has been “a taking of private property for a public purpose without just compensation” under the federal or state constitutions. A court thus has a constitutional mandate to “correct” the distributional consequences of some statutes when such consequences are found to be “takings.”

Takings law and economic substantive due process can thus be seen as complementary. It would be anomalous if a court could alleviate the distributional consequences of statutes that serve a public purpose, but was powerless when a legislature enacted a statute achieving the same distributional consequences but with no accompanying public purpose.

72. Of course, a legislature might enact an efficiency measure as a pretext to aid a particular group. Insofar as such a measure caused harm to individuals such that those individuals would have standing to seek redress in court, there are three ways in which relief could be claimed under existing law as altered by the proposal in this Note. First, challengers could claim that the statute does not achieve efficiency. Second, the breadth of the statute could be attacked, using less-drastic-means analysis. Third, even if the statute were upheld as an efficiency measure against both attacks, challengers could claim that there had been a compensable “taking.” See note 71 supra. Each of these forms of attack also would be available for health and safety measures.
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summation of validity" become workable methods of assessing the con-
nection between ends put forward to justify legislation and statutory
means. Nevertheless, before applying these approaches, a court must
isolate those ends against which statutory means will be tested.

1. Choosing a Set of Ends

The selection of a specific set of ends is necessary in order to de-
termine both whether a statute actually serves some permissible end
and whether the statute's severity can be justified by that end.73 The
problem of ends selection can be difficult because a statute may be justi-
ifiable only by a complicated mixture of ends,74 by reference to a net-
work of other legislation,76 or by articulation of an end not previously
included in any known subset of the general welfare.

Courts should require the state to articulate the ends that justify
economic legislation.78 This allocation of burden is justifiable for
several reasons. First, the state is likely to be the party most aware of
the web of state and federal law in which a particular statute operates.
Second, private litigants have an incentive not to articulate cogent ends
that run contrary to their broad interests beyond the litigation.77 Fi-

73. A technical argument can be made that determining whether a statute does serve
permissible ends is a form of less-drastic-means analysis comparing the statute with the
less drastic alternative of having no legislation at all. See Moore v. Grillis, 205 Miss. 865,
889, 895-96, 39 So. 2d 505, 509, 512 (1949) (statute prohibiting all but lawyers or certified
public accountants from filling out tax returns violates due process; market will weed out
those who make errors "with much frequency" thereby meeting state concern that tax
returns be correctly prepared). This Note speaks of less-drastic-means analysis strictly in
terms of attacks on unnecessarily severe statutes that do serve some permissible end.

74. There is a danger that a court will hold a statute that can be justified
by multiple
ends invalid by measuring it against only one particular end. See Note, supra note 16, at 195-37.

75. Legislation might be justifiable only because of its connection with other legisla-
tion. See pp. 1502-03 & note 65 supra.

76. The process of choosing ends would probably be iterative, like the process of
discovery. The state would postulate an initial set of ends that would be clarified by
questions from the party challenging the legislation. The initial generality and vagueness
of some possible ends would be narrowed until only factual disputes remained. A device
such as a motion for more definite statement, see Fed. R. Civ. P. 12(e), might be used to
permit challengers to ask for greater specificity.

77. A possible example is City Sav. Ass'n v. International Guar. & Ins. Co., 17 Ill. 2d
609, 162 N.E.2d 345 (1959), in which the Illinois Supreme Court found that a statute
requiring Illinois banks to insure their deposits through federally chartered insurers
violated due process because it arbitrarily excluded private insurance companies. Id. at
611-12, 162 N.E.2d at 346. The ground of decision was a less-drastic-means argument that
regulation and supervision of private insurance companies could provide adequate pro-
tection to depositors. Id. at 613, 162 N.E.2d at 347. Because the state was not a party in
the case, a crucial justification for the statute may have been omitted from deliberation.
For example, the state may have designed the statute so that banks would have to meet
the fiduciary standards set by federal insurers in order to claim that their deposits were
insured. This may have been the cheapest method for imposing the federal regulatory
nally, state articulation of ends satisfies the right of challengers to be
told by the state why legislation harmful to them is justified.\textsuperscript{78}

Although there would be no danger to the state's position if a court
added ends to the inquiry,\textsuperscript{79} such judicial supplementation should be
rare. If the state could not come forward with any justifying ends, a
court would be justified in holding for the challengers.\textsuperscript{80}

2. Less-Drastic-Means Analysis, Health and Safety Regulation,
and Distributional Attacks on Legislation

A court can sometimes use less-drastic-means analysis to strike down
private-interest legislation passed under the pretext of furthering the
public health or safety. For example, full-crew laws could be compared
with other means for providing railroad safety.\textsuperscript{81} If other, less costly,

standards at the state level. But if the bank, in arguing that the statute was constitutional,
had mentioned such an end, it might have been interpreted as an admission by the bank
that it could not meet the federal standards and thus had to resort to a private insurance
company.

There is a solution to the possible problems that can arise when the state is not a
party. A court could require that the state be joined whenever a substantive due process
attack is made on a statute. New York statutory law already requires the state attorney
general to appear to defend the statute in such an instance. See N.Y. Exec. Law § 71
(McKinney 1972).

78. The requirement of state articulation of ends can be viewed as an extension of
the tenet of procedural due process that the state must give a person who will be harmed
reasons why particular sanctions apply to him. See Tribe, Structural Due Process, 10
HARV. C.R.-C.L. L. REV. 269, 301 (1975).

79. See note 15 supra (rejecting approach requiring that legislation be tested against
ends that actually motivated legislature and advocating instead that courts uphold
legislation that serves any permissible state end). Court-proposed ends might be particular-
ly appropriate in situations in which a court had reason to believe that the executive
branch was attempting to "sabotage" legislation by not proposing the full range of
ends that might justify it. See note 80 infra (discussing possibility of executive branch
"sabotage" of legislation).

80. When it seems that there is no permissible end justifying legislation, a holding of
unconstitutionality based on the fact that the state failed in its understood duty to offer
justifying ends avoids suspicions of judicial usurpation connected with a failure by a
court to conceive any such ends. When no party is responsible for articulating ends,
courts are placed in a position in which they effectively must use an "any conceivable
basis" approach to strike down legislation.

There is a possible separation-of-powers problem with requiring the state to defend
legislation. The executive branch (e.g., the state attorney general), which may be of a
different political persuasion than the legislature, might attempt to "sabotage" legisla-
tion that it feels is undesirable by not defending it vigorously. This problem is raised
and answered in Tribe, supra note 78, at 300 n.97 (executive branch can already attempt
"sabotage" by failing to enforce legislation it dislikes; in some situations legislature could
intervene in court proceedings to see that its interests are served).

81. For instance, it might be that all accidents that firemen would help prevent
happen at grade crossings and that it is cheaper to tunnel the track underground at
grade crossings than to continue employing the firemen.

It is possible to construct a more general less-drastic-means analysis under which
measures to protect life and limb outside the area of railroad safety would be considered
as alternatives. If a showing were made that a substantial amount of protection of life
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measures could achieve the same degree of protection of life and limb, a court would be justified in holding the full-crew laws unconstitutional. Less-drastic-means analysis does not substitute judicial valuation of life and limb for that of the legislature, but merely examines the way in which that valuation is implemented.

It might be argued that such review allows litigants too much latitude in attacking legislation. Specifically, less-drastic-means attacks might be based solely on the distributional burdens imposed by a statute. In practice, however, the state could offer so many justifications that, if it were saddled only with a weak burden of proof, there is little possibility that these distributional claims would succeed.

and limb could be undertaken in other areas at lower cost to society and that the costs of the full-crew laws per unit of protection were higher than any other safety or health legislation, a court could hold the full-crew laws unconstitutional. The problem with this type of analysis in health and safety cases is that it would be analytically and factually intractable. In any given jurisdiction there are a plethora of health and safety regulations, most of which provide a degree of protection not susceptible of easy calculation. Moreover, the state may sometimes act to avert unproven but possible hazards. See pp. 1496-97 & note 41 supra.

Protecting life and limb in railroad operations can be viewed as an end in itself or as a means to the broader end of protecting life and limb generally. See p. 1491 supra. If challengers could not win by invoking more general means scrutiny, they would prevail using a less-drastic-means attack only if they could demonstrate the existence of some less-drastic alternative to protect life and limb in the sphere that the state had chosen to regulate.

If a safety statute were actually held unconstitutional using a less-drastic-means analysis, unsafe conditions would be legal until the legislature mandated that the less-drastic means be used. A court might wish to fashion special relief allowing the old statute to stand for some period so that safety ends could be met in the interim. In addition, the court might make it clear in dictum that the state could premise removal of the old safety requirements upon successful implementation of the less costly alternative by the challengers. Such a dictum would make it clear that the state has power to bar the challengers from permitting unsafe conditions while the new alternatives were not yet implemented.

Under less-drastic-means analysis, health and safety measures would be invalidated because of the existence of ways of achieving the same result at lower social cost. Although this amounts to a judgment that the prior legislation was inefficient, the legislature's health or safety goals would not be jeopardized in the sense that the degree of protection provided by the legislation would be preserved. If the legislature viewed its health and safety goals in terms of willingness to spend up to a certain amount for a particular increase in protection of life and limb, it might pass legislation increasing the amount of protection using the court-proposed lower-cost methods. Courts should hold such legislation constitutional. See pp. 1493-94 supra (courts should defer to legislative valuation of life and limb).

A concerned party can simply assert that someone else should bear the costs of legislation achieving permissible nonredistributional ends when shifting the costs would not reduce the total costs imposed by the legislation. One is reminded of Senator Russell Long's famous definition of tax reform: "Don't tax him, don't tax me, tax that fellow behind the tree." Economist, Dec. 3-9, 1977, at 54.

A state often could argue either that the chosen distribution of burdens is fair or that it results in lower administrative costs. The "fairness" argument might be particularly hard to reject by a court wary of substituting its own judgment for that of the legislature.
Even if unsuccessful, such litigation would both provide aggrieved citizens with reasons for the legislation's burdens and force courts to clarify the grounds of decision.87

3. Burden and Standard of Proof

Since the state is likely to be the party most aware of the connection between statutory means and ends, the burden of proof should be put on the state to establish a means-ends nexus. The analysis of the “state proof required” technique, however, indicates that saddling the state

Cf. note 68 supra (discussing “fairness redistribution” as rationale for legislation). The administrative costs argument is an efficiency argument. It might sometimes be effective against the alternative of public funding because of revenue collection and distribution costs.

In some situations the state has an additional weapon to defeat a distributional less-drastic-means attack. One of the areas of economics plagued with the greatest uncertainty is the determination of who bears the ultimate burden of particular measures. See note 88 infra. A tax might be levied on particular firms, but the firm might be able either to pass the tax on to their customers in the form of higher prices or to pass the tax back to the firm’s employees by reducing wages. The state could assert that challengers would ultimately bear the burden imposed by the challenged legislation. Given a weak burden of proof placed on the state, see pp. 1508-9 infra, it would almost surely prevail. The state would have difficulty in using these incidence arguments to defeat a distributional less-drastic-means attack, however, if the challengers included a spectrum of those most likely ultimately to bear the burden.

87. Clarification may take place even when a court does not actually reach the distributional less-drastic-means issue. In the Lefkowitz case, see pp. 1492-93 supra, it was unclear whether the New York Court of Appeals objected to the end of aiding railroad firemen or to the use of full-crew laws as means to achieve that end. If the railroads had claimed that aid to the firemen should be in the form of wage subsidies financed by general tax revenues, the court might have articulated whether the full-crew laws could not be upheld as employment statutes because the railroads rather than the general public had been selected to bear the burden or whether, independent of the burden bearer, it was impermissible to aid the firemen by requiring that they be continued to be employed as firemen.

Litigation based on a purely distributional less-drastic-means claim might serve a third useful purpose by identifying situations in which the legislature has simply chosen one of a number of equivalent parties to bear a burden necessary for the fulfillment of some public purpose. Professor Ely asserts that analysis of legislative motives might be appropriate in such situations of “distinguishing the indistinguishable.” See Ely, supra note 15, at 1230-33, 1281-82. Such an analysis, however, would still have some of the same general weaknesses of motives inquiry suggested by Professor Ely. See note 15 supra. As a result, a “takings” analysis might be more appropriate. See Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149, 169 (1971) (“compensation must continue to be constitutionally required” in situation in which government could have achieved its goals “by restraining any one of a number of similarly situated parties” but chose one or few “upon whom the loss is to fall”).

Struve seems to believe that less-drastic-means analysis should not be extended to attempted distribution shifting. See Struve, supra note 51, at 1463 (regulation “less restrictive for one group, but more restrictive for another, is not an adequate alternative”). Not to permit an inquiry as to whether the burdened party really is indistinguishable from others would seem to conflict sharply with the aim of blocking naked redistributions. When the government has singled out one of a group of indistinguishable parties, there is a substantial danger that some impermissible end is being implemented.
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with the burden of proving the means-ends nexus by a preponderance of the evidence or under some more rigorous standard would severely restrict legislative ability to deal with economic problems, given the uncertainties of economic analysis. Moreover, if courts are not to choose among competing theories, economic regulation must be upheld when there is a significant degree of doubt as to its theoretical or factual basis. Even allowing a state to prevail unless its showing were overcome by clear and convincing evidence would be problematic when judges carry strong preconceptions. The state should, therefore, be permitted to prevail if it can convince the trier that it is not "almost certain" that the means employed do not and will not achieve the permissible ends posited by the state to justify a statute. This standard is equivalent to the "beyond a reasonable doubt" standard already applied by some state courts and to the standard employed in the La Follette case, which exemplifies the "heavy presumption of validity" approach.

88. The uncertainties in economic analysis exist whether allocation, stabilization, or redistribution is at issue. It is generally accepted that economic theory with respect to allocation may be a poor guide to policy when there are significant "imperfections," deviations from the assumptions underlying the theory. If an important assumption does not apply for the situation being analyzed, the previous policy not only might be suboptimal but also might result in making the situation worse than it would have been without any intervention. See Lipsey & Lancaster, The General Theory of Second Best, 24 Rev. Econ. Stud. 11, 11-12 (1956).


Finally, economists are unable to agree on the ultimate burden of measures as basic as the corporation income tax. See Clark, The Morphogenesis of Subchapter C: An Essay in Statutory Evolution and Reform, 87 Yale L.J. 90, 99 & n.33 (1977). As a result, little can be said with near certainty about the redistributive effects of many programs.

89. The problem with using the clear and convincing standard in substantive due process litigation is that it is easy for a judge with strong preconceptions to find his viewpoint to be "highly probable" even when the actual evidence is rather scanty. In the Gillette case, see pp. 1495-96 supra, for instance, a majority of the Nebraska Supreme Court felt that plaintiff's rather scanty evidence "would indicate" that the statute at issue would have promoted rather than hindered monopoly in the milk industry. 192 Neb. at 96, 219 N.W.2d at 219.


91. See, e.g., People ex rel. Orcutt v. Instantwhip Denver, Inc., 176 Colo. 396, 391, 490 P.2d 940, 943 (1971); Leathers v. City of Burns, 251 Or. 206, 218, 444 P.2d 1010, 1015 (1968). Use of the reasonable-doubt standard in economic substantive due process cases can be justified by the need to avoid even the appearance of usurpation of government power, just as the standard is used in criminal cases to minimize the possibility of convicting the innocent.

92. See p. 1500 supra.
C. Evaluating the Proposed Method of Review

The method of review proposed in this Note contains substantial safeguards against constitutionalization of the economic beliefs of the judiciary. A relatively comprehensive but specific list of ends makes ends analysis by fiat unlikely. Imposing a light burden of proof on the state with respect to the means-ends connection ensures that the state will receive the benefit of the doubt when the factual or theoretical bases of legislation are uncertain. On the other hand, the proposed method of review serves as a substantial check on legislation that is arbitrary or that merely serves special interests.

There are many situations in which those challenging legislation would prevail. The evaporated-milk law in Defiance Milk and the full-crew laws (or portions of them) in La Follette, for example, would be subject to attack because of the possibility that less intrusive statutes could have served the purposes posited for the legislation equally well. Thus, the proposed method gives courts considerable power to overturn economic regulation that has no public interest basis or that is flawed either due to a lack of legislative consideration or the passage of time.93

Finally, the proposed analysis can enrich the political process even when challengers do not prevail. The fact that the state must justify challenged legislation with ends sufficiently cogent to survive the proposed means scrutiny might lead to reexamination of the challenged legislation.94 Even if the legislature did not reconsider legislation, public awareness of the questionable nature of particular enactments would be heightened. The dialogue that litigants could impose on the state would provide a new and important vehicle of political expression in an age when state intervention in the economy is becoming increasingly pervasive and complex.95

93. The test focuses on whether legislation does or will serve a permissible purpose and not on whether it did serve such a purpose at the time of passage. Otherwise the legislature could allow obsolete legislation to serve impermissible purposes by refusing to repeal it.

94. Consider the situation in which a court upholds full-crew laws, but only as employment statutes. Some legislators who thought they had voted for a safety measure might press for reconsideration of the laws. Even when a court stops short of invalidating legislation, the scrutiny by the court may induce legislative reform. See Independent Electricians & Electrical Contractors' Ass'n v. New Jersey Bd. of Examiners, 48 N.J. 413, 226 A.2d 169 (1967), aff'd, 54 N.J. 466, 256 A.2d 33 (1969) (in 1967 court remanded case on suspicion that provision challenged was special-interest legislation not safety regulation; before case returned to supreme court, legislature added much stricter amendments promoting safety goal than court had suggested).

95. A "forced dialogue" is a much more potent political weapon than advertising and similar devices. Advertising is easily dismissed by state officials who know that there is no forum in which they will be required to defend their dismissals systematically and formally.