8-1-1979

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Lawrence A. Alexander

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Motivation and Constitutionality: A Postscript

LAWRENCE A. ALEXANDER*

The editors of the *San Diego Law Review* have been kind enough to allow me to add briefly to my prior remarks on motivation and constitutionality.¹

First, I wish to amend my comments on Larry Simon’s method for determining the motivation of collective bodies.² Simon took the position that, for the purpose of determining motivation, collective bodies should be treated as if they were individuals.³ Thus, if the probability of illicit motivation raised by the circumstances is one-third where the action in question is that of a one-member school board, the probability of illicit motivation of a five-member school board should also be one-third if the circumstances surrounding the action are the same. In neither case should the action be deemed invalid because of illicit motivation.

I raised a problem for Simon’s method presented by a five-member school board’s taking an action after a three-to-two vote. Suppose the probability of illicit motivation behind the action is one-third if the school board consists of but one person. Simon says to uphold the action. But if a one-third probability means one of the three “Ayes” probably had the illicit motivation, the ac-

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* Professor of Law, University of San Diego. B.A., Williams College, 1965; LL.B., Yale Law School, 1968.


2. *Id.* at 947.

tion would not have received majority approval "but for" an illicitly motivated vote.

I went on to suggest that Simon might handle the problem I had raised by attributing the reciprocal probability of illicit motivation to the "Nays." Thus, if there were a one-third probability of illicit motivation among the "Ayes," there would be a two-thirds probability of illicit motivation among the "Nays," tainting one and one-third of the two "Nay" votes.

What I failed to say, and what was quickly pointed out to me by an observant colleague, is that the technique I had suggested for avoiding the problem I had raised works only in those very rare cases where a certain probability of illicit motivation among "Ayes" in fact suggests the reciprocal probability of illicit motivation among "Nays." Most of the time the probability of illicit motive (say, racial prejudice) in voting for something (say, neighborhood schools) does not suggest the reciprocal probability of illicit motive in voting against it. So the problem I raised for Simon remains.

The second item I wish to address is a problem that the proponent of any motive theory faces if he accepts two premises which are widely accepted among constitutional lawyers. Premise one is that a law may in fact be unconstitutional even though a reviewing court, for institutional reasons, would not declare it so. Premise two is that a legislator has a constitutional obligation to oppose any law which is in fact unconstitutional, including laws which come under Premise one and would be upheld in the courts.

When these two premises are joined with the motive theorist's Premise three—that laws which are the product of certain motives are in fact unconstitutional—they produce a conclusion that will seem highly counter-intuitive to many: a legislator who believes a law is wise, just, and perhaps essential for the public welfare, and who is motivated to vote for it because of those beliefs, nevertheless has a constitutional obligation to vote against it if he knows that a critical number of his colleagues are voting for it for improper reasons. Only if the term "unconstitutional" carries a meaning in Premise two that is more restrictive than its meaning in Premise three can this conclusion be avoided.

Perhaps this paradoxical conclusion is no different from and no more embarrassing than other conclusions about principled deci-

5. The best exposition and defense of these premises are found in Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 STAN. L. REV. 585 (1975).
sionmaking by collective bodies. It surely has its analogues. Consider the obligation of the juror who believes beyond a reasonable doubt that the defendant is guilty of a heinous crime, but who also knows that his fellow jurors believe the defendant to be innocent but plan to vote "guilty" out of prejudice. Yet, analogues or not, I see the problem as one with which the motive theorist must somehow deal.

The third and final matter I wish to mention should have been included in a footnote to my discussion of legislative mistake as a basis of unconstitutionality. What I want to say is that some form of the theory which deems legislative mistakes to be pivotal has been popular as an alternative to either effects theories or theories about proscribed motives because a legislative mistakes theory appears to avoid the value choices inherent in theories about proscribed motives or effects. In the post-Lochner era of aversion to value-laden jurisprudence, the allure of an objective, value-free test of constitutionality has been strong. From Tussman and tenBroek to Gunther to the Supreme Court in 

The Achilles' heel of any such theory lies in specifying the legislative objectives against which the law is measured. Tussman and tenBroek provide no test for what are permissible objectives.


and at what level of generality those objectives should be described in order to determine means/ends fit.\textsuperscript{12} If any objective or objectives, described as specifically as one wants, are permissible, each law tautologically "fits" with the precise "objectives" its terms mandate.\textsuperscript{13}

Gunther would measure legislative means against officially promulgated objectives.\textsuperscript{14} However, with no constitutional limitations on the promulgated objectives, in terms of either permissibility or level of generality, his test merely becomes one of official ingenuity in formulating objectives. Ironically, a legislature which articulates sufficiently malign objectives behind a mischievous statute will have proved "fit"—the absence of mistake: neither bad effects nor bad motives produce unconstitutional laws so long as they accompany each other.\textsuperscript{15}

The Supreme Court's approach in \textit{Weinberger, Trimble}, and other cases is to test legislative means by actual legislative objectives, presumably articulated at whatever level of generality the legislature held them. Here the game shifts from articulating bad motives for bad laws to actually having bad motives for those laws.\textsuperscript{16}

Equal protection, as well as other constitutional norms, is not value-free but heavily value-laden. It requires not merely that legislative means fit legislative ends, whatever those ends may be, but that the laws produce (effects theories), or reflect a motivation to produce (motive theories), effects consistent with a particular normative conception of human equality. Because Simon's and Clark's proscription of legislative mistakes fits within a normative theory regarding the proper conception of human equality required of legislators, their proscription of legislative mistakes is

\textsuperscript{13} Note, \textit{Legislative Purpose, Rationality and Equal Protection}, 82 YALE L. J. 123 (1972).
\textsuperscript{15} Gunther's approach appears to treat equal protection, not as a proscription of certain inequalities, but as a means of guaranteeing that the public really does endorse those inequalities.
\textsuperscript{16} The Supreme Court's approach appears to treat equal protection, not as a proscription of inequalities, but as a means of guaranteeing that the legislature really does endorse those inequalities.

There is another possible approach which focuses not so much on whether the legislative means fit the real legislative ends, but on whether the legislature had sufficient evidence of such fit when it acted. This approach would emphasize the regularity of government action, the "due process of lawmaking." \textit{See} Linde, \textit{Due Process of Lawmaking}, 55 NEB. L. REV. 197 (1976).
not subject to the criticisms directed at the value-free approaches to mistakes.  

17. A recent article attempts to meet the criticisms of means/ends approaches to equal protection by conceding that specifying the level of generality at which legislative objectives must be formulated for means/ends scrutiny and determining the legitimacy of those objectives so formulated are not value-free processes. However, because the article fails itself to identify the root normative values behind the equal protection and due process clauses, its otherwise brilliant analysis of the structure of means/ends scrutiny ultimately provides only an empty vessel, to be filled with whatever values one chooses, and capable of rationalizing any particular decision. Note, Equal Protection: A Closer Look at Closer Scrutiny, 76 Mich. L. Rev. 771 (1978).