Legislative Motivation and Fundamental Rights in Constitutional Law

J. MORRIS CLARK

Professor Clark argues that when courts decide whether a given law or regulation is unconstitutional, they should examine—as they sometimes do—the legislative or administrative motivation behind enactment or promulgation. The author suggests that “purpose” and “motivation” are functionally equivalent terms and that reference to legislative purpose (or motivation) should be central not only to equal protection analysis, but also to the analysis of “fundamental rights” such as freedom of speech or of travel. The article concludes by discussing how certain laws may be upheld despite an invidious purpose or motivation.

This article discusses the relevance of legislative motivation to the judicial decision whether to uphold or to strike down laws affecting certain “fundamental” constitutional rights, such as speech, press, and travel. Succinctly stated, the question is whether courts’ constitutional decisions ever do or should turn on the fact that legislators voted for a given law because of impermissible goals. One might conclude, and the Supreme Court has sometimes stated, that the legislators’ state of mind is irrelevant and that constitutionality should be determined solely by a law’s

* Professor of Law, University of Minnesota Law School. B.A., Yale University, 1966; J.D., Harvard Law School, 1969. The author expresses appreciation for the invaluable assistance of his colleagues, Professors Carl Auerbach and Robert Hudec, in the preparation of this article. The author would also like to thank his other colleagues on the faculty of the University of Minnesota Law School for their comments on an earlier version of this article at a faculty colloquium at which it was discussed.

August 1978 Vol. 15 No. 5
effects. However, the Court has also stated the contrary (and in my view correct) position that motivation is relevant to constitutionality. If motivation is relevant, further questions arise as to when motivation should be considered and how it can be demonstrated as a matter of evidence.

This article takes the position that courts regularly do and should consider the motivation behind the passage of laws in constitutional cases. Motivation is relevant to constitutional decisions, independently of a law’s effects, because laws passed for reasons of prejudice or animus frequently stigmatize those whom they burden, and they create feelings that the social contract between the government and the governed has been unfairly broken. This effect occurs with respect to laws restricting first amendment freedoms and the fundamental right to travel as well as laws burdening minority racial and other groups.

The major argument against a motivation-based test of constitutionality is a practical one. It is usually impossible to know the subjective motivation of legislators by direct evidence, such as legislative history, with enough certainty to declare a law unconstitutional as a result. However, courts should and do infer legislative motivation from a law’s foreseeable effects. For example, one can infer that a law serving no apparent purpose other than to place disproportionate burdens on black people was passed to discriminate against black people because of animus or prejudice.

It may be argued that such an inference is unnecessary because when a law’s undesirable effects outweigh its desirable effects, a balancing test can be used to hold it unconstitutional. However, a balancing approach not only fails to provide predictability and doctrinal certainty, but it also fails to articulate reasons why certain classifications should be considered “suspect” and certain rights should be considered “fundamental” for constitutional purposes. This article suggests that these conclusions are justifiable primarily because history demonstrates that legislatures have repeatedly treated suspect classes and fundamental rights not only arbitrarily but frequently with animus, or in a way that denies the equal moral worth of the individuals concerned. As a result, our collective sense of human nature leads us to approve “strict” scrutiny of laws burdening not only minority racial groups but also people who express unpopular political or religious views, or people from states other than the one enacting a given law. This suspicion of legislative bias justifies the anti-democratic intervention of the Supreme Court into the law-making process.

This article elucidates motivation theory, considering judicial decisions involving “fundamental” rights under the first amend-
ment and the rights of travel and of privacy. In addition, the first part of this article discusses motivation theory in the contexts of equal protection and administrative actions. No consensus exists on the Court or in the community of legal scholars about the meaning and the usage of the term "legislative motivation," and much of the analysis of this term has involved race and equal protection. Also, because a number of leading cases are concerned with administrative rather than legislative motivation, the first part of this article touches on motivation as it applies to administrative action.

THE MEANING OF LEGISLATIVE "MOTIVATION" AND "PURPOSE"

Various explanations of the role of legislative motivation in constitutional adjudication have been advanced, but none appears to have swept the field—a fact which doubtless explains this Colloquium in the San Diego Law Review. In recent years, the leading academic writers on the subject have been Professors John Ely, Paul Brest, and Theodore Eisenberg. I discuss their views at the end of this article, comparing them with my own. In addition, the Supreme Court recently has elaborated its view of legislative motivation in Washington v. Davis and in Village of Arlington Heights v. Metropolitan Housing Development Corp. I partially developed my own views on legislative motivation in an article on a more specific topic two years ago, and I have summarized and elaborated that material in the following discussion.

This section of the article deals at some length with the meaning of legislative motivation and purpose because I give a broader meaning and role to "motivation" than does either the Supreme Court or the other academic writers on the subject. In brief, I view legislative motivation and purpose as functionally synon-

7. Professor Brest's views of motivation may, however, be broader and closer to mine than his initial article, An Approach, note 2 supra, would indicate. See text accompanying notes 243-57 infra.
mous, both referring to the goals causing legislators to vote for a given law. In most cases, where this motivation involves prejudice or animus, I conclude that the law is unconstitutional unless it serves a clearly compelling state interest or does not involve affirmative state action in certain areas.

The Supreme Court on occasion has distinguished motivation from purpose without ever satisfactorily explaining the difference. As I view the Court’s usage, it has related not to a difference in functional meaning but only to a difference in the ability to prove motivation. Where the lawmaker’s goals have been adequately known, the Court has referred to them as “purpose.” Where they have not been adequately known, the Court has declined to rely on them. It has instead labeled lawmakers’ goals “motivation.”

Academic critics also use “motivation” differently from the way I use the term. I examine these theories more fully at the end of this article. In general, my concerns differ somewhat from the concerns of these authors primarily because I use the term more broadly, referring not only to possibly invidious intentions behind apparently “good” laws but also to intentions defining the substantive limits of constitutional doctrine. A great many questions of substantive constitutional doctrine, including the question whether compelling state interests sufficiently vindicate a given classification or burden, involve a determination of the lawmaker’s motivation. The likelihood of illicit motivation causes the Court not only to scrutinize strictly certain classifications or other laws but also influences the extent to which a given state interest is deemed compelling.

Motivation and Purpose

Because the Supreme Court frequently states that it will consider legislative purpose but not legislative motivation in determining the constitutionality of a law, I compare and contrast these two usages at the outset. Webster’s New International

8. For example, in Palmer v. Thompson, 403 U.S. 217 (1971), where a city had closed its swimming pools to avoid their racial integration, the Court took pains to show that legislative or administrative “motivation” was not a proper ground for holding a law or its application unconstitutional. Later, in Washington v. Davis, 426 U.S. 229 (1976), the Court stated that Palmer did not deny that plaintiffs must show an invidious “purpose” in order for the Court to hold a law unconstitutional, and it stated that Palmer had held only that “the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations.” Id. at 243.

9. See text accompanying notes 47-65 infra.

10. See text accompanying notes 226-74 infra.
Dictionary defines "motive" as "something within a person... that incites him to action" or as a "consideration or object influencing a choice or promoting an action."\(^{11}\) Webster's defines "purpose" as "something that one sets before himself as an object to be attained" or "an object, effect, or result aimed at, intended or attained."\(^{12}\)

Upon examining these definitions, it appears that all motives are also purposes: That which "incites [an individual] to action" presumably is always that which is "aimed at, intended or attained." Arguably, however, the converse is not true: An individual may not be motivated to attain an immediate goal for its own sake; he may be motivated to attain it as a means to an ultimate end.\(^{13}\) Someone thus might be said to have the purpose of wading a stream because he has the motivation of getting to the other side—even though wading was both foreseeable and intended.

The problem with this means-end distinction is that most intended results can be described as either means (by reference to more general ends) or as ends (by reference to more specific means).\(^{14}\) For example, a town councilperson's motivation for voting for a one-acre zoning requirement can be described as passage of the law. The motivation for passing the law might be requiring one-acre lots. The motivation for requiring one-acre lots might be to preserve a rural environment. The motivation for this effect, in turn, might be both to preserve a pleasant environment for existing residents and to enhance property values. One motive for enhancing property values could be to exclude people who are not wealthy from the community. A motive for achieving this result might be to exclude racial minorities from the town. At the

---

12. Id. at 1847.
13. It has been suggested that legislative "purpose" refers to the immediate meaning or application of a given statute, whereas legislative "motivation" refers to the general objectives justifying or explaining why a particular interpretation is preferred. See, e.g., Heyman, The Chief Justice, Racial Segregation, and the Friendly Critics, 49 CALIF. L. REV. 104, 115-16 (1961). According to this distinction, a town council might have the "purpose" of instituting one-acre zoning but the "motive" of excluding poor people or people of minority ethnic backgrounds from the town.
14. Professor Ely persuasively makes this point and attacks the distinction. Ely, supra note 1, at 1217-21. See also Jones, Statutory Doubts and Legislative Intention, 40 COLUM. L. REV. 957, 972 (1940) ("The phrase, 'legislative intention', may be taken to signify the teleological concept of legislative purpose, as well as the more immediate concept of legislative meaning.") (emphases original).
very end of the motivation chain might be generalizations such as preserving health, welfare, and morals.

One therefore can speak of having a purpose to do something because of a given motivation. However, one must bear in mind that most purposes can be described as the motivation of some other, more specific action, and most motivations can be described as purposes which in turn have some more general motivation. Consequently, the distinction has only relative meaning at best. One should also keep in mind that any given purpose can have motivations not only in the sense of derivative results but also in the sense of choices among alternative means. Thus, one might ask the wader what motivates him or her to wade the stream instead of using the bridge and be answered, “It is quicker,” or “I feel playful.”

Webster’s definitions of motivation and purpose also might suggest that one can describe some of the derivative but merely inci-

15. Professor Brest has tendered what appears to be an opposite definition of the distinction between “purpose” and “intent” (meaning apparently the same thing as “motivation”). He suggests that purpose equates with the general nature of the goals discussed by the legislature, whereas motivation equates with more specific goals. See P. BREST, PROCESSES OF CONSTITUTIONAL ADJUDICATION: CASES AND MATERIALS 43 (1975). He assumes that general goals of legislation are more likely to be commonly shared by all legislators and consequently can be deduced from the language of the statute itself. Thus, one can assume that lawmakers generally intended a statute providing one-acre zoning to contribute to the health, safety, and welfare of the community in some way. Brest presumably would say that such a “purpose” can be inferred from the ordinance itself. More specific goals—such as excluding the poor or members of racial minorities from the town—involve determination of “intent.” They require one to “examine closely the proceedings and debates that led to the provision’s adoption.” Id.

I agree with Professor Brest, see text accompanying notes 243-57 infra, that courts generally label investigation into legislative proceedings and debates as investigations into “intent” or into “motive,” and courts generally speak of investigating “purpose” when the statutory goals are deduced from statutory language alone. However, it hardly seems true that more specific goals are more difficult to identify from statutory language than are general ones. In the zoning case, the specific goals of promoting large lot size, uncrowded housing conditions, and low density population can be attributed to lawmakers with little hesitation. The derivative and more general goals—excluding people who cannot afford such amenities, and still more derivatively, ethnic groups who are not likely to be sufficiently wealthy to buy in—are more dubious. Unless Brest uses “specific” and “less specific” in a different way from the way I use them, I disagree with his generalization that “intent” can be associated with “specific” goals and “purpose” with “less specific” goals.

It also should be indicated that the criminal law uses purpose and motive in an opposite sense, using “purpose” to denote the intention to commit a criminal act, and “motive” to denote the more general, derivative goals to be served thereby—for example, avenging a grudge or escaping from prison. This usage demonstrates that a distinction can be made between specific and less specific, or between immediate and derivative, effects. Indeed, the distinction is useful in the criminal law, but I do not think that it is at all relevant for purposes of legislative interpretation.
dental effects resulting from pursuing a given motivation as purposes (but not as motivations). Thus, if the hypothetical wader's motive is simply to get to the other side of the stream, one could still say that he or she purposefully gets wet in the sense that getting wet is a knowing, foreseen consequence a person intentionally brings about. One also might say that the town council purposefully makes it impossible for the town to include poor people or to achieve a racial balance. In this sense, "purposefully" means intentionally.

Nonetheless, when one discusses the purpose of a given action, or even a purpose, he or she usually equates purpose with motivation and does not use the term to include merely incidental (though foreseeable) effects following from achieving this purpose.\(^6\) Thus, it would be abnormal to say that the hypothetical wader has the purpose of getting wet when he or she crosses the stream unless this effect actually is one of the things that motivates him or her. Similarly, if a town councilperson foresees that one-acre zoning would exclude racial minorities from the town but sincerely eschews that result as a desirable end or motive, it would not fit common usage to say that one of the councilperson's purposes in voting for the law is to bring about racial segregation. One might describe the purpose as preserving rural environments or high property values at the cost of creating a mostly caucasian community, but one nonetheless tends to use "purpose" to mean "causative" purpose—that is, to mean "motivation." A question whether the councilperson's purpose is to create a caucasian community would probably produce at most the clarification, "No, what I am really trying to do is to produce a rural-seeming community."

It should be pointed out that a person can have more than one purpose or motivation. However, this fact does not affect the basic equation of motivation with purpose.\(^7\)

\(^6\) The Supreme Court confirms this view of usage in Jefferson v. Hackney, 406 U.S. 535, 543 n.11 (1972), when it states that a foreseeable effect of a statute was nonetheless not one of the "two broad purposes" of Congress in enacting the law. Here the Court apparently uses "purpose" in the sense of "dominant" or "causative" purpose, or in other words, to mean "motive."

Likewise, in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977), the Court states that racial discrimination will be found where "a discriminatory purpose has been a motivating factor" in a decision—again equating purpose with motivation.

Another distinction between the terms motivation and purpose lies in the fact that one commonly speaks, perhaps loosely, of objects or things as having purposes but not motivations. When referring to the purpose of an object, one generally refers in fact to the purpose or to the motivation of some person who either wants it or will use it. Sometimes one thinks of an object's purpose as congruent with the purpose or with the motivation of its maker, as when one says that the purpose of an airplane is transportation, or that the purpose of a given novel is to entertain or to instruct. It is also common to speak of the purpose of an object in the context of its being put to use by someone other than its maker. Thus, nuclear energy can serve either peaceful or military purposes. So it is with laws. A law defining obscenity and authorizing its enforcement by a board of censors may be enacted by city fathers who intend and foresee that it will be used to suppress only material meeting the constitutional definition of obscenity. However, without the provision of adequate due process safeguards, such a law may in fact “serve the purpose” of the board of censors by censoring any material the board deems in bad taste. Similarly, a law requiring the registration of political dissidents may “serve the purpose” of private persons desiring to harass or to discriminate against such people.

To sum up this discussion, both common and judicial uses of the term “legislative motivation” usually refer to a goal causing legislators to vote for a statute. Alternatively, “motivation” de-

18. In connection with the notion that legislation has its own purpose, Justice Frankfurter wrote:

Legislation has an aim, it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 538-39 (1947).

Professor Brest criticizes a literal reading of Frankfurter's passage:

Things—including statutes and constitutional provisions—do not have "purposes" or "aims," they do not "seek to obviate" mischiefs. These terms require animate subjects... [T]he purpose of a provision... seems ultimately to refer to the purposes, aims, or seekings—in short the "intent"—of those who framed and adopted the provision... The concept of purpose incorporates an element of will. It would simply be a misuse of language to say that a thing's purpose is anything it does or can do, apart from human intention. For example, it is not a purpose of an automobile to pollute, maim, or kill, and, only by using a figurative anthropomorphism, is it an automobile's purpose to transport passengers.

P. BREST, PROCESSES OF CONSTITUTIONAL ADJUDICATION: CASES AND MATERIALS 42 (1975). I agree with Professor Brest, although I assert that the attribution of purpose to a law often refers in fact to the purpose of its enforcer or of its administrator as well as that of its enactor.
scribes the results the legislators hoped to achieve or to avoid by using one means rather than another to reach this goal.

Common and judicial use of the term “legislative purpose” is generally the same as the use of “legislative motivation.” Purpose generally refers to causative purpose—that is, motivation. Thus, one can enquire interchangeably of either the legislature’s purposes or motivations in passing a given law or its purposes or motivations in using a particular means to the end thus identified. It is possible to distinguish purpose from motivation by using the former term to denote means and the latter term to denote ends. However, because nearly any goal can be described as a means to some end, or as an end to another instrumental means, the distinction is only relative. Defining purpose to include incidental effects not motivating the legislators but following from their primary goal—for example, caucasian communities resulting from one-acre zoning motivated by aesthetics—is an unusual differentiation between purpose and motivation.

When one refers to a law’s purpose, one generally refers to the purpose or the motivation (again, using these terms interchangeably) of the legislators passing it. However, it is also possible to speak of the purpose a given law “can serve” at the behest of law enforcers or other parties taking advantage of the law’s effects. When one speaks of a law’s purpose in this way, one usually refers interchangeably to the motivation or purpose of the people who will make use of the law.

Thus far I have asserted that legislative motivation and legislative purpose have functionally identical conceptual referents. What, then, does the Supreme Court mean when it distinguishes these two terms by saying that it is improper for courts to inquire into legislative “motivation” to determine a law’s constitutionality? By contrast, courts regularly refer to the propriety or impropriety of legislative “purpose” in such contexts.19

In my opinion this distinction is misleading, for it arises not from a difference in the referents of the two terms but from a difference in the Court’s ability to establish the referents by reliable evidence.20 When the Court decries reference to “motivation” as a

19. See note 8 supra.
20. Writers elsewhere have posited a similar distinction by suggesting that legislative “motivation” refers to the reasons individual legislators vote for a given law, whereas “purpose” refers to the goals, determined by objective means, that the legislature as a body seeks to achieve. See A. BICKEL, THE LEAST DANGEROUS
reason for holding a law unconstitutional, it generally does so in a situation where evidence of the causative legislative goals is too uncertain to warrant holding the motivation or the purpose to be invidious. On the one hand, this evidence frequently consists of legislative history on which the Court generally declines to rely in constitutional cases.\textsuperscript{21} Sometimes this evidence consists of circumstantial facts leaving the true purpose of the legislature to speculation.\textsuperscript{22} On the other hand, when the Court holds a given legislative "purpose" to be unconstitutional, it does so on the basis of evidence it considers reliable, usually based on the effects of the law. These effects frequently include burdening or stigmatizing a traditionally unpopular group. Furthermore, the law frequently serves no particularly good purpose or serves good purposes in ways that unnecessarily impose the burden or stigma in question.\textsuperscript{23}

This article later examines at greater length reasons the Court considers some kinds of legislative motive/purpose evidence reliable and other kinds of such evidence unreliable. At this point, it is sufficient to state that the Court's distinction does not delineate any real difference in meaning between motivation and purpose; rather, the Court's distinction signals a conclusion concerning the


\textsuperscript{23} As I suggest below, invidious purpose generally is presumed in cases where a traditionally disfavored class (such as black people) or a traditionally vulnerable activity (such as political speech) is burdened. See generally Note, Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065, 1076-87 (1969). However, the Court also has made clear that on appropriate occasions it will find improper purpose based on the legislative history and specific events surrounding the enactment of a particular law. In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977), the Court suggests that evidence "whether invidious discriminatory purpose was a motivating factor" may include "a clear pattern" of state action, "[t]he historical background of the decision," "[t]he specific sequence of events leading up to the challenged decision," "[t]he legislative or administrative history," and occasionally even testimony of members of the decisionmaking body.
propriety of the Court's condemning, on the evidence before it, the legislature's motivation or purpose.

**The Meaning of "Invidious" Legislative Purpose or Motivation**

The following section discusses of what an "invidious" legislative motivation consists; why legislative motivation, as opposed to statutory effects, is important to constitutional adjudication; and how the Court does and should decide when such a motivation exists.

As a matter of common intuition, it seems clear that society cares about lawmakers' subjective states of mind. As Justice Holmes stated, even a dog knows the difference between being kicked and being stumbled over.\(^{24}\) Similarly, anyone would sense a sharp difference between being shoved in anger and being shoved from the path of an oncoming truck. As I have argued before,\(^{25}\) quite apart from whether the shove is necessary for safety, people react to the sincerity or to the mental state of shovers. Upon sensing an animus behind the action, people may become ambivalent in attitude, attempting to determine what the shover "really meant." One's reaction will be either gratitude or anger, depending on whether one concludes that the other intended to help or to manipulate and to hurt.

People instinctively react in much the same way to actions by government officials. If a city council grants a construction contract to a company other than the lowest bidder because the company's president is a councilperson's relative, or for that matter denies the contract to the lowest bidder because that company's president is a council member's personal enemy, all would agree that something unfair has happened that transcends any dollar cost to the city. For similar reasons, people deplore conflicts of interests in legislators or in judges, even though the laws they vote for or the judgments they render by reason of the conflict are not markedly detrimental to the public. Likewise, a jury selection process that purposefully, as opposed to accidentally, produces a lily-white jury creates a sense of discriminatory unfairness that

---

does not derive from the effect of the action alone, but rather from its purpose.

Similarly, people care about the intentions of legislators. People—and the Supreme Court as well—commonly speak of laws' purposes and not merely of their effects. This concern for purpose or motivation appears most clearly in equal protection cases. Tussman and tenBroek have stated:

It is indeed difficult to see that anything else is involved in these discriminatory legislative cases than questions of motivation. Hostility, antagonism, prejudice—these surely can be predicated not of laws but of men; they are attitudes, states of mind, feelings, and they are qualities of law-makers, not of laws.

Viewed in this light the prohibition against discriminatory legislation is a demand for purity of motive. It erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility, or, alternatively, of favoritism, and partiality. The imposition of special burdens, the granting of special benefits, must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good. When and if the proscribed motives replace a concern for the public good as the "purpose" of the law, there is a violation of the equal protection prohibition against discriminatory legislation.26

Laws enacted because of "impure" motive or prejudice have two undesirable effects: They stigmatize the victim, and they create a sense of breach of faith between the governor and the governed. A law segregating the races, even without imposing disproportionate burdens on the minority race—for example, a law segregating bathrooms or bathing beaches of equal quality—usually conveys the message that the people who enacted the law believe that members of other races are inferior or at least distasteful.27 Hostility is an inevitable part of this message, and when the lawmakers belong to the numerically and economically dominant race in the society—as is generally the case—a message of stigma or of social inferiority is also conveyed.28 Whether the


In our culture to be nonwhite—and especially to be black—is to be treated and seen to be a member of a group that is different from and inferior to the group of standard, fully developed persons, the adult white males. To be black is to be a member of what was a despised minority and what is still a disliked and oppressed one.

*Id.* at 586. See also *id.* at 586 n.11. See Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship*
victim associates this hostility and this stigma with the people making the law, with the policemen enforcing it, or with white society at large makes little practical difference. If the law cannot be justified in terms of social necessity, avoiding the inference that those responsible for the law have acted from beliefs of racial inferiority or from hostility, the stigma is likely to be attributed by those it affects to the law and to all those responsible for its passage and enforcement.

Laws implying hostility are not the only laws creating a perception that the moral worth of individuals has been discounted. Sex discrimination illustrates another kind of discounting: a view, frequently, that women deserve protection in a paternalistic way because they are insufficiently capable, forceful, intelligent, or educated to engage in the same kinds of work or to accept the same kinds of responsibility as men. Invidious motivation thus does not necessarily portend a malicious or even a conscious discounting of the individual. Doubtless many legislators who have passed sexually discriminatory laws that have since been held unconstitutional sincerely believed that they were doing the best thing possible for women. Some legislators who have voted for racially discriminatory laws probably possessed similar beliefs. However, considering a lawmaker's perception of another individual's low worth or stature honest but mistaken does not make that perception any less stigmatic, less infuriating, or less violative of the governor's obligation under the democratic social con-

Under the Fourteenth Amendment, 91 HArV. L. REv. 1, 6-7 nn.28-31 (1977). Brest states that "[d]ecisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries." Brest, supra.


30. Brest states that unselfconsciously discriminatory acts nonetheless "are unfair. They are also stigmatic, for to show less empathy for people because of their race is to treat them as less human because of their race." Brest, supra note 28, at 14. Some psychoanalytic theory suggests, however, that prejudice is generally a learned, aggressive reaction to frustration and that prejudice therefore generally does contain an element of hostility—whether conscious or unconscious. See Klineberg, Prejudice: The Concept, in 12 International Encyclopedia of the Social Sciences 439, 440-41 (D. Sills ed. 1968). Indeed, to the extent that prejudice consists of a persistent pattern of arbitrary behavior and of the devaluation of the individual, it is difficult to see how, apart from animus of some kind, such an obdurate attitude could originate or perpetuate itself. Klineberg suggests that the answer, if any, can be found in learned behavior and in tradition.
tract to consider equally the needs, capabilities, and moral worth of all the governed. Professor Brest articulates this point in his 1976 Supreme Court Foreword:

Although a court often cannot ascertain the true motives underlying a decision, our history and traditions provide strong reasons to suspect that racial classifications ultimately rest on assumptions of the differential worth of racial groups. These racial value judgments appear in forms besides "racial antagonism"—for example in paternalistic assumptions of racial inferiority.

By the phenomenon of racially selective sympathy and indifference I mean the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group. Although racially selective sympathy and indifference (hereafter, just indifference) is an inevitable consequence of attributing intrinsic value to membership in a racial group, it may also result from a desire to enhance our own power and esteem by enhancing the power and esteem of members of groups to which we belong. And it may also result—often unconsciously—from our tendency to sympathize most readily with those who seem most like ourselves. Whatever its cause, decisions that reflect this phenomenon, like those reflecting overt racial hostility, are unfair; for by hypothesis, they are decisions disadvantaging minority persons that would not be made under the identical circumstances if they disadvantaged members of the dominant group. The unequal treatment could be justified only if one group were in fact more worthy than the other. This justification failing, such treatment violates the cardinal rule of fairness—the Golden Rule.

As Professor Karst indicates, the devaluation resulting from stigmatizing a given group in society also serves to justify future deprivations of goods or benefits, so that "stigma's victims tend to lose not only self-respect, but other goods as well." In general terms, therefore, I submit that invidious motivation or invidious purpose consists of devaluing the needs, wants, capabilities, or

31. For a concise but thorough analysis of social science research bearing on prejudiced attitudes and behavior, including an analysis of their causes and remedies, see J. JONES, PREJUDICE AND RACISM 60-113 (1972).

Brest argues that:

Racial generalizations usually inflict psychic injury whether or not they are in fact premised on assumptions of differential moral worth. Although all of us recognize that institutional decisions must depend on generalizations based on objective characteristics of persons and things rather than on individualized judgments, we nonetheless tend to feel unfairly treated when disadvantaged by a generalization that is not true as applied to us. Generalizations based on immutable personal traits such as race or sex are especially frustrating because we can do nothing to escape their operation. These generalizations are still more pernicious, for they are often premised on the supposed correlation between the inherited characteristic and the undesirable voluntary behavior of those who possess the characteristic—for example, blacks are less industrious, trustworthy, or clean than whites. Because the behavior is voluntary, and hence the proper object for moral condemnation, individuals as to whom the generalization is inaccurate may justifiably feel that the decisionmaker has passed moral judgment on them.

Brest, supra note 28, at 10.


dignity of members of a group, whether for reasons of hostility or of other prejudice, on the unwarranted assumption that such group members are less capable or less worthy of consideration than other members of society. Moreover, the resulting sense of stigma is the product of the victim's perception of the lawmaker's or law enforcer's state of mind.

A second major reason exists for concern that a law is motivated by prejudice. A law communicating an evaluation in the sense just described also does something further: It creates a profound sense of injustice in society. The theory of democracy, that each person is of equal moral worth, demands that lawmakers represent all members of society and that the legitimate needs of each member be fairly considered. The extent to which this theory has ever been totally honored is doubtless open to debate; but whenever lawmakers have repeatedly discounted the moral worth of certain members of society—whenever lawmakers have treated these individuals with hostility—the lawmakers have breached the social contract which ultimately gives them power. The resulting sense of unfairness necessarily has bred a deep cynicism about the very legitimacy of government itself.

These observations should not be taken to imply that all stigmatizing laws break the social contract and are unconstitutional, or that only such laws are unconstitutional. Rather, certain laws communicating a sense of animus, hostility, and intentional stigmatization on the part of lawmakers also create a sense of unfairness and breach of faith between the governor and the governed. These perceptions seem to be clearly relevant considerations in constitutional adjudication. At a later point in this article, I discuss at greater length when the Court should intervene and de-

---


Prejudice can be defined as an inner tendency to respond to persons on the basis of their group membership; it is a rigid, emotional prejudgment that gives an individual confidence that he knows all about a person when he knows his membership in a symbolically important group. This tendency may or may not express itself in discriminatory behavior on the part of a person.

35. I assume that Professor Brest has some similar idea in mind when he states that treating a given group in a prejudicial way "violates the cardinal rule of fairness—the Golden Rule." Brest, *supra* note 28, at 8. Brest characterizes such treatment as embodying a "defect of process" as opposed to the harm caused to the victim by stigma. *Id., at* 6.
clare laws to be unconstitutional on the basis of invidious purpose or motivation.

Professor Karst makes a point I take to be similar to the above position. Although he does not write explicitly about invidious legislative motivation, it seems clear that he is concerned with exactly this problem when he discusses the demands of his “principle of equal citizenship”:

The principle of equal citizenship presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who “belongs.” Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant. Accordingly, the principle guards against degradation or the imposition of stigma. The inverse relationship between stigma and recognition as a person is evident. By definition, . . . we believe that the person with a stigma is not quite human.” The relationship between stigma and inequality is also clear: while not all inequalities stigmatize, the essence of any stigma lies in the fact that the affected individual is regarded as an unequal in some respect. A society devoted to the idea of equal citizenship, then, will repudiate those inequalities that impose the stigma of caste and thus “believe the principle that people are of equal ultimate worth.”

The state of legislators’ minds is relevant in certain cases, therefore, because laws motivated by prejudice produce feelings of anger, devaluation, and breach of the social contract demanding fair representation. Because these concerns are intuitively important, they are reflected in the way laws are discussed. Journalists constantly examine the purity of motive of legislators who are suspected of graft or other conflicts of interest. Politicians at election time accuse each other of trying to hurt, or of not caring about, certain electoral interests. Minority political groups, because of laws they dislike, frequently accuse the legislature of “fascist plots” or “communist conspiracies.” These accusations mirror both a tendency to impute evil motives to those with whom one strongly disagrees and perhaps an instinct for the rhetorical power of such language with regard to listeners.

If these concerns about legislative motivation are real and reflect the way people think and feel about law, it would be strange indeed to assert that such concerns disappear in court when a judge is asked to determine the constitutional validity of a given law. Such an assertion is all the more difficult because judges have generally spent lifetimes with the law before ascending to the bench. They know from experience that motivations range from good to bad. When they see a particular law and learn its

background, their experience gives them a better than average instinct, or perception, as to whether the legislative motivation was good or bad.

All this adds up to a strong real-world desire to consider motivation in judging the constitutional validity of laws. The dominant question is not whether motivation is relevant to such determinations, but how motivation can be properly attributed, given the difficulty of knowing what legislators are thinking when they enact a law. Not surprisingly, the Court has approached this problem by identifying types of legislation most likely to result from prejudice and has concentrated its investigation of purpose on these cases.

For the most part, the courts have permitted both state legislatures and Congress to serve as judges of the fundamental fairness of laws. Laws placing highly arbitrary and disproportionate burdens on one economic group, for example, have been subjected to the most minimal level of review by the Supreme Court since the demise of the economic substantive due process doctrine in 1937. The same has been true of judicial review, under the tenth amendment, of federal laws encroaching on states' police power to regulate private individuals' conduct. This minimalist approach contrasts sharply with the Court's activist intervention in reviewing state and federal laws affecting individual rights. The factor best justifying the Court's anti-democratic intervention in overturning laws passed by the democratic majority is that laws burdening racial minorities or other historically unpopular groups under the equal protection clause, or burdening communists, religious minorities, or other traditionally unpopular groups under the first amendment, or burdening out-of-staters under the commerce clause, are precisely the kind of laws that are most likely to have resulted from animus, or prejudice, or the arbitrary discounting of individuals or of groups. Significantly, it is also these same groups that, by reason of repeated acts of discrimination, feel the effects most sharply.

It is wise for the Supreme Court to intervene in cases such as these. That the above-mentioned groups have historically been

discriminated against sharply increases the likelihood that the legislature or Congress actually did break the social contract by acting through animus or prejudice.\textsuperscript{39} Such legislative acts not only reach socially undesirable results, but they also threaten the very legitimacy of government. Supreme Court intervention invalidates laws reasonably appearing to have been enacted because of improper animus or prejudice. The Court additionally can create rules inhibiting future legislatures from enacting laws for similarly invidious reasons.

Professor Fiss has articulated at length this same idea—that equal protection law, at least, should be sensitive to laws burdening or stigmatizing groups but not individuals.\textsuperscript{40} Fiss characterizes the key factor in such group-related discrimination as “status harm” rather than invidious motivation. However, the harms Fiss identifies and the reasons for judicial intervention growing out of them are generally similar to the motivational concerns with which this article deals.\textsuperscript{41} As Fiss states, “[t]he concern should be with those laws or practices that particularly hurt a disadvantaged group . . . . [W]hat is critical . . . . is that the state law or practice aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group. This is what the Equal Protection Clause prohibits.”\textsuperscript{42}

To assert the general significance of prejudice to legislation and the relative likelihood that certain kinds of legislation are prejudicially motivated is, of course, a good deal easier than to define or to identify when prejudice motivates given legislation. Absent the ability to know the hearts of legislators, such judgments necessarily involve a degree of indeterminacy. However, it is possible to sketch at least the elements of the inquiry.

First is the question of whose perception of discounting or of prejudice is relevant. In the above description of the harmful effects of prejudice, it should be observed that its appearance is nearly as important as its reality. On the one hand, because no

\textsuperscript{39} Thus, Brest states that “[t]his so-called ‘strict scrutiny’ or ‘suspect classification’ standard serves as a proxy for a direct (and problematic) inquiry into the integrity of the decisionmaking process: as the legitimate reasons for race-dependent decisions increase, so does the likelihood that they were not made for illegitimate reasons.” Brest, supra note 28, at 15.

\textsuperscript{40} Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107 (1976).

\textsuperscript{41} Fiss suggests that blacks serve as a paradigm for the kinds of classes that should be afforded special judicial protection under the equal protection clause in that “(a) they are a social group; (b) the group has been in a position of perpetual subordination; and (c) the political power of the group is severely circumscribed. Blacks are what might be called a specially disadvantaged group, and I would view the Equal Protection Clause as a protection for such groups.” Id. at 154-55. Fiss also suggests a motivational basis for his theory. See id. at 140.

\textsuperscript{42} Id. at 157.
one but the individual lawmakers can know their motivation with total certainty, even greater reason exists to rely on the appearance in its place. On the other hand, the simple fact that a given group believes that the legislature has discounted its needs and its worth cannot alone serve to invalidate the law, for most laws are likely to be so perceived by some group adversely affected. Consequently, the Court must serve as the arbiter of whether a given law reasonably appears to have been motivated by prejudice, knowing in many cases that no simple, "true" answer to this question exists apart from the Court's own conclusion.

A second problem is the need to define what facts should give rise to a finding that prejudice has motivated legislation. In my view, there are two major elements to this inquiry. First, the individual or individuals affected must possess traits characterizing a group that has traditionally been considered inferior in our society. Second, the law arbitrarily must single out or must burden people possessing these traits, or at least be insufficienly justified to dispel the sense that the law was passed out of animus or without recognition of the group's legitimate needs.

Turning to the first of these elements, the necessity of finding the group in question to be traditionally unpopular should be highlighted. On the one hand, legislatures pass many laws drawing relatively arbitrary lines between individuals in different professional categories or in different income levels. However, we do not consider these distinctions to be motivated by prejudice simply because such groups generally are not unpopular in our society, and given individuals are not burdened repeatedly by reason

43. The stigmatic effects of prejudice are generally said to correlate with their repetitive nature. Yinger states that:

When the drawing of "an unfair or injurious distinction" has become a matter of scattered, individual acts unsupported by group memberships and standards, it loses a number of the important qualities of social discrimination: random individual acts of discrimination tend to scatter throughout the population; they do not pile up on particular groups, creating self-perpetuating justifications from the responses of those continually discriminated against.

Yinger, Prejudice: Social Discrimination, in 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 448, 449 (D. Sills ed. 1968). I argue below that prejudiced motivation is a danger against which the first amendment as well as the equal protection clause guards. It perhaps could be argued that it is somewhat less likely that political speakers will be subjected to repeated acts of prejudice throughout their lives than will members of racial minorities. Nonetheless, the lengthy history of political and religious persecution in Western societies suggests that unchecked prejudice may be as intense and as repetitive as racial persecution, if not more so.

971
of membership in such groups. On the other hand, prejudice is a great deal more likely to be perceived by most of us when burdens are placed on groups traditionally deemed immoral, dangerous, or incompetent. A variety of groups have served as pariahs to a large number of people in our history. Black people, orientals, people of minority religious views, communists, hippies, draft resisters and evaders, recent immigrants, common criminals, gay people, out-of-power politicians and political parties, and people with mental disabilities are all groups that at one time or another have been ostracized and judged morally inferior. Women have been discounted in a different fashion. Similarly, state legislators frequently have passed laws placing disproportionate burdens on out-of-staters because they are easier to burden politically than the legislators' own constituents. All these groups can be said to suffer from prejudice in the sense that they have been considered either more immoral, untrustworthy, antisocial, dangerous, or incompetent than other groups in the population, or in some other way less worthy of political consideration (as in the case of out-of-state residents).

However, not all hostilities or judgments of incompetence are arbitrary. No one could be accused of prejudice for inveighing against granting human civil rights to man-eating tigers or for arguing in favor of putting murderers in jail. The justification (or lack thereof) for discounting an individual's moral worth makes a significant difference in perception of the motivation of the person making the judgment—in this case, the lawmaker. For example, a law requiring racial segregation in prisons conveys an entirely different sense of the administration's attitude toward prisoners, depending on whether the segregation is demonstrably necessary to prevent inmate violence. If the segregation is unnecessary, the law could convey a sense of hostility by white administrators toward black prisoners. If the segregation is necessary, the law could convey a sense of proper administrative concern for the safety of black (and/or white) prisoners. In other words, some judgments discounting an individual's worth or his ability would be considered fair by most people in this society because the individual has done something or possesses traits that most people would agree make the judgment rational. Other judgments would not be considered fair on this basis. Some criminals are statistically likely to recidivate, some mentally handicapped

44. Cf. Fiss, supra note 40, at 156 (arguing that economic classifications generally should not violate the equal protection clause simply because they do not affect "groups").
45. See note 39 supra.
people are likely to perform given jobs incompetently, and people from some ethnic backgrounds statistically might evince lower reading and writing skills than people from other ethnic backgrounds. At what point these tendencies become statistically predictable for the group, and at what point it becomes “fair” to prejudge and then to burden a given member of the group by statistical predictions based on the group as a whole—rather than on evidence of the individual’s own character and ability—are frequently difficult questions. The answers sometimes depend on the difficulty of measuring the individual’s own ability and making predictions on that basis. The moral capacity to refrain from crime is difficult to measure. The ability to read and write is not.

I do not intend at this point to suggest any general rules determining when judgments about groups are “prejudiced” and when they are not, or even to form an opinion whether any such general rules are possible. I merely intend to note that a necessary part of the Court’s job is to make such judgments.

In general, I think that the Court goes about determining whether laws have a valid or an invalid purpose by examining the questions I have just outlined: whether the law affects a traditionally vulnerable group or right, and if so, whether the law is justifiable. The next section deals with the reasons the Court uses this approach instead of relying on legislative history. The next section also addresses the question how a judgment about purpose inferred from effects differs from a simple balancing test which weighs the interests affected and determines their relative value.

At a subsequent point in the article, I demonstrate why the perception of legislative prejudice or animus in enacting given laws is relevant not only to decisions applying the equal protection clause but also to those applying the first amendment and the various clauses protecting the right to travel. Although the need to protect against legislative bias is a concern in many of the Court’s constitutionally appropriate areas of decision, these particular constitutional provisions serve to illustrate the theory.

Identifying Invidious Legislative Motivation or Purpose in Constitutional Cases

As stated above, the Supreme Court has sometimes indicated that it will look to legislative “purpose” but not to legislative “mo-

47. See note 8 supra.
tivation" in determining whether a law is constitutional. In general, this distinction seems to mean that the Court disbelieves the possibility of clearly demonstrating by direct evidence, such as legislative history, that a majority of individual legislators intended unconstitutional goals.

The use of either legislative history or speculation to determine motivation is commonplace where courts seek to interpret statutes not for purposes of constitutional adjudication but to decide whether to apply the statute to a particular set of facts. In such enterprises courts work in partnership with legislatures, seeking to determine the ways a legislature would have wanted a statute applied. Because there is no question of invalidating the statute, uncertainty about the motivation or the purpose of the statute does not lead to conflict between the courts and the political branches of government. Even inconclusive historical evidence of the legislative mindset, or even pure judicial speculation—as well as considerations of policy—may serve to provide an intelligible reason for applying a statute in a particular way. If a court arrives at an impractical interpretation of the statute, the legislature can correct the mistake. In any event, some interpretation of the statute must be made. A court therefore is entitled to rely on speculative evidence or even on no evidence at all.

However, when a court judges the constitutionality of a statute, speculative judgments about improper legislative motivation generally are condemned. The constitutionality of most statutes is presumed unless an improper purpose can be demonstrated in a convincing fashion. The Supreme Court and commentators have indicated why legislative history generally is inadequate to serve as the sole basis for impeaching statutory purpose in a constitutional case. First, different legislators might have conceived of different goals when they voted for a statute, so that no single purpose exists for the law. Furthermore, the executive may have had yet another motive in signing the act into law. Second, even if a consensus among legislators existed, it might be difficult to ascertain because the views of few legislators are recorded: In many states there is no record of the views of legislators. Third, even if the courts strike down a law because of improper legislative motivation, presumably the judicial action cannot prevent reenactment of the same law with a "laundered" legislative history. Fourth, the Court has declined to strike down useful laws passed

48. See cases cited note 8 supra.
49. See An Approach, supra note 2, at 119-30; Ely, supra note 1, at 1212-17; MacCallum, Legislative Intent, 75 Yale L.J. 754 (1966). However, Professor Eisenberg takes the position that some of the objections to deciding cases on the basis of motivation are not persuasive. Eisenberg, supra note 3, at 114-17.
for putatively bad purposes. Such action would be dysfunctional because it would serve only to chasten legislative immorality rather than to advance the public good. Fifth, psychological examination by courts of coordinate branches of government (or of state government) has been said to be demeaning or disrespectful.

By contrast, courts as a regular matter do reach conclusions in constitutional cases about the "purpose" of statutes by inferring such purpose from the statute's language and from its effects. These conclusions, however, do not necessarily purport to describe the actual legislative motivation with which a given law was passed. More frequently, they concern the likelihood that such a motivation was present. In this sense, conclusions about purpose deriving from statutory effects differ from conclusions drawn from legislative history: The former concern probabilities; the latter, historical fact. When a court concludes from analysis of statutory effects that the law's purpose is unconstitutional, it really concludes that in all probability the law was improperly motivated because laws such as the one in question usually involve bad motivation. Therefore, the court concludes that it is permissible to strike such laws.

An example illustrates this point. Under the equal protection clause, a statute creating an explicit racial classification is presumed to have the invidious purpose of discriminating to burden arbitrarily or punitively an unpopular minority group. This presumption can be rebutted by a showing that the statute in fact serves good and necessary goals. The Japanese prison camp cases of World War II are early (albeit dubious) examples; some affirmative-action programs now constitute palatable examples. However, the statute is usually stricken. Some classifications, such as those based on race, create such a strong presumption of invidious purpose that they can be redeemed only by demonstrating a compelling state interest. As Professor Karst has stated, "[w]hen the burden of legislation falls most heavily on a group that is likely to be a subject of the legislature's systematic ne-

51. Id. at 241. See also Note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1174-75 (1969).
52. Ex parte Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).
glect, it is natural for judicial scrutiny to be heightened.\textsuperscript{54} Other classifications, such as sex\textsuperscript{55} and illegitimacy,\textsuperscript{56} though suspect of arbitrariness or prejudice, have been justified more often than racial classifications by a demonstration that some legitimate state interest is served. Still other classifications, such as those based on economic disadvantage, are not suspect and may be justified by a showing that almost any state interests—even highly speculative ones—are served.\textsuperscript{57}

The process of suspicion and rebuttal by which courts determine legislative purpose does not necessarily produce certainty about the actual motivations of the legislators who passed the law. Indeed, the Court frequently recognizes an “uncertainty principle” when it formulates rules, saying in effect, “Because we cannot know with certainty the actual motivation of the legislature, we will set up preventive rules that will prohibit the legislature from passing the kinds of laws which have a probability of being invidiously motivated.” For example, because legislative investigative committees might be attempting to harass an unpopular group rather than to pursue the valid goal of passing legislation, the Court sometimes requires a showing of probable cause that the investigated group has members who are acting illegally. It also has required a valid committee authorization to pursue the investigation for proper legislative reasons.\textsuperscript{58}

Despite the recognition of an uncertainty principle in determinations of purpose by reference to effects, this method of proceeding nonetheless avoids some of the problems of reference to legislative history.\textsuperscript{59} There is no assumption that a legislative consensus can be known reliably by direct evidence. Evidence of illicit motivation serves at most to create a suspicion of improper purpose. The suspicion can be rebutted by a showing that the leg-


\textsuperscript{59} Cf. An Approach, supra note 2, at 143-46 (postulating the same rationale: constitutional decisions might not be rationally reviewable).
islation serves proper goals. The Court need not strike down a statute serving valid purposes simply because the Court suspects the legislators were pursuing the wrong goals. Such a law once stricken could not be reenacted simply with a “laundered” legislative history. In the rare case where the lawmakers admit an improper motivation despite the fact that the law also serves proper goals—for example, a law requiring elementary school students to buy their own books, which is motivated by the desire to discourage poor minority students from attending school—the Court could legitimately void the law and require any reenactment to occur without reference to the improper considerations.\(^6^0\) However, cases of admitted improper motivation are rare.

The kind of motivation (or purpose) that the Court determines by these methods usually does not refer to the debates or to the events immediately preceding the enactment of a given law. However, no doubt exists that the historical and factual setting in which the particular statute was passed affects the Court's perception of possible animus or prejudice in a given legislative act.\(^6^1\) It is no accident that the Court frequently struck down statutes burdening the NAACP in the 1960's and Jehovah's Witnesses in the 1940's.\(^6^2\) The Court could have articulated the likelihood of prejudice against such groups even more clearly than it did. The Court could have relied on illicit motivation in examining the statute for signs of legitimate goals or effects that would justify the law. Thus, the passage of a strict literacy test for new voters, immediately after a court held unconstitutional a previous law which had disenfranchised blacks, had the clear effect—and motivation—of subjecting black voters to a screening device white voters never had to face.\(^6^3\) Similarly, the imposition of a tax on


\(^6^1\) The Court suggests that evidence “whether invidious discriminatory purpose was a motivating factor” may include “a clear pattern” of state action, “[t]he historical background of the decision . . . , [t]he specific sequence of events leading up to the challenged decision . . . , [t]he legislative or administrative history,” and occasionally even testimony of members of the decisionmaking body. \textit{Id.} at 266-68.


newspapers of a given circulation takes on special meaning when it is shown that nearly all the newspapers affected opposed the political machine enacting the law.\textsuperscript{65} However, irrespective of whether the inference of improper motivation or purpose depends on the specific facts surrounding a bill's enactment, the method of judicial analysis remains the same: First, does this law create effects raising a suspicion of improper motivation; and second, does the law rebut this suspicion by adequately serving valid goals?

**Purpose Analysis Compared with Balancing Tests**

I assert above that the Court usually determines motivation by looking to the foreseeable effects of a law and by inferring from these effects the purpose or motivation of the legislators. However, does judicial discussion of unconstitutional motivation differ from a judicial conclusion, reached by a balancing test, that a statute's bad effects outweigh its good effects? If motivation is inferred by weighing a suspicion created by bad effects against a justification based on good effects, one can argue that labeling the outcome "purpose" adds nothing to the balance. Is not analysis of purpose by this means merely another name for an ad hoc balancing test?

The reason this argument is unpersuasive and courts refer to statutory purpose rather than to a balancing of interests seems reasonably clear in the area of equal protection, where the courts explicitly have recognized that the animus motivating a law, not the balance of its social effects, is an adequate and an independent ground for declaring the law unconstitutional. Equal protection is designed not only to prevent purposeless discriminations but also to identify those discriminations most likely to be invidious because they are historically repetitive and motivated by prejudice or animus.\textsuperscript{66} A law preventing black people from selling eyeglasses without a prescription would be unconstitutional. However, a law preventing optometrists from doing the same is not unconstitutional\textsuperscript{67} not only because race bears less relevance to the ability to fit eyeglasses properly but also because legislatures historically have been prone to legislate on the basis of this functional irrelevancy for reasons of animus or prejudice. Indeed, repeated and pointless burdening is the epitome of bigotry or animus. Equal protection cases inevitably involve determinations of


purpose because the historical expectation of bad purpose in relation to given kinds of discrimination conditions a court to scrutinize the state's justification with varying degrees of care. As Professor Brest indicates, this expectation or suspicion of bad purpose is inextricably tied to the strength or weakness of any other valid justification and also to the sequence of events:

For example, state voting officials are enjoined from refusing to register black applicants and the state then adopts difficult but apparently neutral registration requirements; or, school districts are ordered to cease assigning students by race and the state then enacts a tuition grant law, or abandons a public school system, or engages in other practices that tend to maintain segregation.68

Balancing tests are seldom referred to in equal protection cases involving suspect classifications. To speak in such cases of determining whether a statute produces proper effects or proper goals by considering the abstract "value" of such effects or goals is doubtless possible. However, it seems strained to deny that this determination is generally influenced by judicial knowledge of legislatures' historic attitudes toward minority or other unpopular groups or that the determination is made with an intuitive eye to legislative motivation or purpose.

By contrast, in cases involving "fundamental rights" under the first amendment, the equal protection clause, or the remainder of the Constitution, the Court, without referring to purpose, frequently undertakes to "balance" the individual interests protected by the Constitution against the state's interest in regulating them.69 This balancing approach, for reasons that can be briefly summarized, has been criticized—rightly in my view—by other scholars70 as a non-test or as a form of ad hoc judicial decisionmaking. As Professor Emerson concludes, ad hoc balancing contains no hard core of doctrine to guide a court in reaching a decision. The factual determinations involved in evaluating the utility of a given law and its impact on individual rights are complicated and time-consuming. Under the ad hoc balancing test, the courts tend to defer to legislative judgments on the ques-

68. An Approach, supra note 2, at 122-23.
tions of broad policy involved. The test gives no real meaning to constitutional provisions but states only that legislatures may restrict protected rights whenever it is reasonable for them to do so. Finally, the balancing process does not afford government officials or interested parties advance guidance concerning the way a court could decide any given case because each case turns largely on its given facts and on the intuitive and unpredictable judgment about these facts.\textsuperscript{71}

I do not suggest that the balancing of interests and intuitive judgments about their relative weights can be eliminated from constitutional adjudication; it is an inevitable part of this highly unscientific process. However, the Court should do its balancing with an eye to the requirements of the constitutional provisions it applies. In a great many instances these provisions guard against the possibility that certain kinds of legislative regulation will be motivated by prejudice against unpopular groups and interests. Indeed, it is this suspicion of malfunction in the majoritarian democratic process which requires enforcement of the Constitution by courts rather than by the political branches.\textsuperscript{72} In order to justify its intrusion upon the democratic process when it holds laws unconstitutional, the Court needs to explain in some principled way what kinds of laws will be suspect and for what reasons.\textsuperscript{73}

\textsuperscript{71} Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 912-13 (1963).

\textsuperscript{72} See A. Bickel, The Least Dangerous Branch 37-41 (1962) (stating that courts in constitutional cases distinguish between legislative acts based on "rationality" and those based on "uncontrolled emotion"); Choper, On the Warren Court and Judicial Review, 17 Cath. U.L. Rev. 20, 38-41 (1967). Choper states that:

[C]onstitutional guarantees [of individual rights]—such as the freedoms of speech and religion, the constitutional rights of those accused of crime, the right to be free from certain racial discrimination—are generally rights of 'politically impotent minorities.' By definition, the processes of democracy bode poorly for the security of such rights . . . . Thus, the task of guarding these constitutionally prescribed liberties sensibly falls upon a body that is not politically responsible, that is not beholden to the grace of excited majoritarianism—the United States Supreme Court. Herein lies the great justification for the power of judicial review, the wisdom of Marbury v. Madison. In this area, the Court, if it is properly to fulfill its place in American democratic society, must act more forcefully—perhaps 'by creating a presumption against the validity of the contested action,' perhaps 'by more closely scrutinizing the methods employed and the objectives to which they lead.'

\textsuperscript{73} Id. at 40-41.

\textsuperscript{74} See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 3 (1971): [T]he Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that
A determination by the Court that a suspect law is or is not arbitrary because it burdens racial minorities or free speech necessarily involves some balancing of interests. For example, as indicated above, a law segregating prisoners by race probably will be upheld or stricken depending on whether the segregation is demonstrably necessary to prevent racial violence among prisoners. A court confronted with such a case necessarily makes a subjective judgment on the basis of the evidence that such a threat is or is not serious, accordingly imputes to the prison officials either a good faith or a bad faith motivation, and on that basis upholds or strikes down the law. However, one can acknowledge a kind of balancing in this context and can also acknowledge as a matter of common sense and intuition that the process of looking for evidence of probable legislative prejudice is different from balancing the good and bad effects of the law. The Court should neither attempt to disguise the fact that it does consider the good and the bad effects of the law nor fail to articulate the fears of invidious legislative behavior to which that consideration relates.

The libel cases decided by the Supreme Court serve as an illustration. In *New York Times Co. v. Sullivan*, a southern jury had assessed a $500,000 defamation judgment against a northern newspaper because it published an editorial advertisement containing allegedly false statements criticizing unnamed state officials for their roles in opposing racial integration. The Court went through a balancing process, concluding that newspapers' freedom to publish would likely be chilled by such judgments and that on balance the Constitution requires that defamation judgments for speech critical of public officials should not be allowed unless the speech was knowingly or recklessly false and was made "of and concerning" the particular official suing. Such a balance clearly does take place and must be recognized simply because the interests of the press and of the defamed plaintiff alone justify its power. It then necessarily abets the tyranny either of the majority or of the minority.


5. My major disagreement with Professor Fiss is that he evaluates laws which violate his principle of status harm to a specially disadvantaged group by an apparently abstract balancing process, weighing the harm a given law causes the group against the benefits it causes society. Fiss, supra note 40, at 168.


conflict and thus require resolution. However, to say that the balancing occurs in a vacuum, by weighing values abstractly, ignores the facts in the Sullivan case. The heart of the matter is that a southern jury penalized a northern newspaper for publishing facts outraging the jury's sense of community values. The jury's anger certainly appeared to be inspired not so much by what was false in the civil rights advertisement as by what was true in it. Indeed, juries as a class are likely to react with animus against unpopular speakers because of their lack of legal training and their lack of accountability regarding the verdict they render. If the Supreme Court were to allow juries to censure political speech they disliked under the guise of rendering compensation for damaged reputation—and to rely upon the weak reed of the trial judge's power to order a remittitur to prevent such occurrences—censorship of political speech would be a reality.

This sense of animus, or of fair play versus foul play, is an inherent ingredient of any person's "gut reaction" to the fairness of governmental action. It is an inevitable part of the Court's reaction. It is this sense of animus or unfairness that entitles the Supreme Court to use its power under the Constitution to override legislatures which have acted unfairly or which have given local officials or even juries the power to do so.

The Court should express its balancing of values in terms of fear of legislative or of other governmental prejudice. When the Court fails to express itself, it also often fails to justify its intervention into the legislative process in situations where no legislative malfunction is apparent. The further discussion of the libel cases appearing below illustrates this point, as does the discus-

78. The editorial advertisement alleged that southern civil rights demonstrators were being met with "an unprecedented wave of terror" and illustrated this allegation with specific events. The defamed plaintiff, Sullivan, was one of three elected Commissioners of Public Affairs with jurisdiction over police and other departments in Montgomery, Alabama. He alleged inter alia that because the advertisement suggested Montgomery "police" had ringed a college campus after a demonstration, he was implicated and defamed. However, Sullivan failed to allege any pecuniary damages. Not only was the link between Sullivan and the alleged wrongdoing tenuous, but the alleged misstatements tended to matters of detail rather than substance. For example, the police had not "ringed" the campus but merely had been deployed in large numbers near it, the students had not sung "My Country 'tis of Thee" as alleged but rather the National Anthem, the students had not protested by refusing to re-register as alleged but rather by boycotting classes, and no one had padlocked the students' dining hall as alleged. However, it was apparently undisputed that the advertisement had truthfully alleged that the students' leaders were expelled from school for singing the anthem, that police were brought in as a result, and that Dr. Martin Luther King, Jr., was harassed because of his civil rights demonstrations. Id. at 256-60.

79. For example, consider the Court's actions with regard to commercial speech and libel. See text accompanying notes 126-48 infra.
sion of the Court's decision to protect commercial speech under the Constitution. In short, explicit discussion of the existence of animus or prejudice properly forces the Court to consider when the social contract has been broken and consequently when judicial intervention is warranted under the Constitution.

It also should be noted that it is an inadequate objection to say that in a given case the legislature might not actually be motivated by economic considerations when, for example, it passes a law restricting the right to travel which also has the effect of economic protectionism. First, as argued above, although the actual psychological motivation of the legislature never can be known accurately, its probability can be gauged by the law's language or by inference from the law's effects. The degree of indeterminacy necessarily inherent in this inference does not make the inference less necessary or less valid. Second, the presumption of unconstitutionality which should attach to such a law serves prophylactic purposes, warning legislatures that certain effects will not be tolerated because of the probability of prejudice quite apart from any showing of its actual existence.  

For these reasons, I see no reason to depart from my initial position that a good purpose or motivation will be presumed by the Court whenever a statutory burden or distinction logically relates to some proper governmental goals and that a bad purpose or motivation will be presumed when no such connection adequately rebuts a suspicion of bad purpose. It is possible to imagine a statute serving absolutely no purpose simply by mistake or by indi-

80. Because true psychological purpose in the sense of a consensus may be nonexistent in a group such as a jury, a legislature, or a series of judicial opinions—or if existent, unknowable in the majority of cases—certain effects are deemed proscribable without regard to purpose as a means of preventing or fencing off intentional interferences with rights. To use a homely example, assume that a small child decides to play a game at the dinner table which consists of dropping his or her spoon on the floor, to be retrieved by a parent. When the parent tires of this game after the second drop, the parent instructs the child to stop dropping the silverware. Shortly thereafter the child drops the spoon again, and in defense declares that the last drop was accidental. After several more repetitions of this "accident," the parent is liable to tell the child that if the spoon drops again, accidentally or otherwise, certain consequences will follow as a matter of strict liability—leaving the table, having the food removed, having to retrieve the spoon himself, or being visited by other consequences. All this could mean that the parent neither believes that any of the effects were accidental nor that any future ones could be. More likely, however, the parent is willing to run the risk of punishing behavior which is truly involuntary in order to avoid arguing over motivation before punishing a probably voluntary misdeed.
rection, rather than through bad motivation, and thus invalid because simply arbitrary. However, not all pointless statutes are unconstitutional. The Court does and should guard against only those mistaken laws occurring in areas of traditional legislative malfunction.81

**PURPOSE VERSUS BALANCING: THE RIGHT TO TRAVEL**

An illustration using the "fundamental" constitutional right to travel may serve to clarify the difference between ad hoc balancing and concern for legislative motivation. In the 1975 case of *Sosna v. Iowa,*82 the Court upheld against an equal protection right-to-travel challenge an Iowa law requiring a one-year residency period before a plaintiff could file for divorce. Although the Court had previously stricken requirements of one year and less for receiving welfare83 and medical care on the part of indigents,84 the Court in *Sosna* upheld the requirement with respect to divorce. In terms of a balance of interests, the case seems difficult to reconcile with its predecessors and may indeed simply signal an unannounced retreat from the right-to-travel activism of earlier cases. The plaintiff's interest in receiving a divorce in *Sosna* seems at least as important as the rights involved in previous cases. Indeed, the Court has characterized the right to divorce as "fundamental" and as something the state must furnish without cost to indigents,85 a requirement it has not set forth with regard to welfare or to medical care, for example. Moreover, the inability to obtain a divorce for a year very realistically might deter a plaintiff with marital difficulties from moving to a state with such a residency requirement, thus directly affecting the right to travel.86 Although the Court explained that the decree of divorce was merely postponed and not permanently denied87 by this requirement, the argument was equally available but did not prevail in all the previous cases where the Court upheld the right to travel.

On the other side of the balance, Iowa's interest in the law seems highly attenuated in comparison with the interests in pre-

---

81. Indeed, the Court has upheld laws which realistically can be described as pointless. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).
82. 419 U.S. 393 (1975).
86. Shapiro v. Thompson, 394 U.S. 618, 671-72 (1969) (Harlan, J., dissenting) (rej ecting state's evidence that only a small number of persons were deterred from moving by reason of one-year welfare residency requirement).
87. 419 U.S. at 406.
vious cases where the laws were stricken. The Court explained that the *Sosna* requirement was not based on purely budgetary considerations or on administrative convenience but rather assured a "modicum of attachment" to the state before marital rights were disturbed. The law also served an interest "in minimizing the susceptibility of its own divorce decrees to collateral attack," which might occur in the absence of a durational residency requirement. However, as Justice Marshall pointed out in dissent, the previous cases also involved laws which sought to assure a "modicum of attachment" to the state. Also, weighty interests hinging on a divorce adjudication cut as much in favor of a reasonably speedy adjudication as against one. Finally, the Court agreed that a one-year durational residency requirement is by no means essential in avoiding collateral attacks on divorce decrees under the full faith and credit clause.

At best, the balancing in *Sosna* identifies the state's interests in postponing adjudication as well as the individual's interests in obtaining a faster judgment. Yet, the reasons one set of interests should outweigh the other are not made apparent in other than conclusory terms emphasizing the reasonableness of the state's interest and minimizing those of the individual. At worst, the analysis in *Sosna* ignores individual interests protected in previous cases and fails to apply the kind of strict scrutiny that previous right-to-travel cases indicated is necessary.

A balancing approach not considering legislative purpose thus involves several difficulties. First, it is difficult to know what interests to weigh on each side of the balance. Is the right-to-travel interest only the interest of the individual plaintiff, or is it the interests of all persons moving into the state who may desire divorces? Must the court consider the extent to which the divorce waiting period actually deters people from moving into the state, or take notice of the nuisance effect of such a requirement, irrespective of whether travel is actually deterred? Are these quantifications irrelevant, so that the court only need find that some deterrence to travel for some indeterminate number of people is created and then go immediately to a consideration of the state's

88. Id. at 407.
89. Id. at 418 (Marshall, J., dissenting).
interest? Similarly, in considering the state’s interest, should the court examine only the argument that some divorce decrees will be collaterally attacked, or should it consider the state’s more diffuse interest in granting divorces only to persons with a significant interest in remaining in the state?

The second difficulty in a balancing approach that ignores legislative purpose is that the Constitution provides no guidance concerning when personal interests in travel or in speech outweigh countervailing state interests. Indeed, this very problem led Justices Douglas and Black to protest against balancing in the first amendment area. In their view, if the first amendment is not “absolute” so that free speech interests always prevail, then the first amendment is as subject to subversion by a balancing court as by a legislature.\(^9\) Similarly, in *Sosna*, how is the plaintiff’s right to unrestricted travel comparable with the state’s interest in due process contacts that shore up the validity of its adjudications? The Court provides no answer to this question, nor could it. The Court simply concludes that in this case, on these facts, the state’s interest is more important.

Nonetheless, in terms of legislative purpose, the decision in *Sosna* makes some sense with respect to the underlying concerns of the constitutional right-to-travel provisions and to the danger against which they are designed to guard. Although Justice Marshall dissented from the Court’s decision on the ground that the state’s law constituted a “penalty” on the right to travel,\(^9\) it can be argued that the law need not be suspected of the kind of invidious legislative purpose against which the right-to-travel provisions are designed to guard. It seems reasonable to conclude that the interstate commerce clause, the interstate privileges and immunities clause, the equal protection clause, and the penumbral right to travel referred to in some opinions\(^9\) all are centrally concerned with the prevention of repeated attempts by state legislatures to exclude undesirable persons, such as paupers or foreign business competitors, from their borders for economic or other selfish reasons.\(^9\) Indeed, the Constitution and *Marbury v. Madison* require such legislation to be overturned precisely because state legislatures would otherwise predictably opt for the


short-term benefits of economic protectionism rather than for the long-term benefits of free trade and free movement, given that out-of-staters bearing the most immediate burdens of economically protective laws are unrepresented in the legislatures. Reference to this constitutional policy suggests that laws which should be most suspected of infringing on the right to travel are those most frequently problematic: namely, laws passed with the legislative motivation of securing economic advantage over out-of-staters or that of excluding unpopular people or groups. For example, states have a venerable history of attempting to exclude indigents from their territories and their welfare rolls, primarily for economic reasons and also, possibly, for reasons of class animus. The *Sosna* Court’s explanation—that the state’s interest in these cases was merely “budgetary”—thus seems apt in light of the concerns of right-to-travel protection. The cases involving a residency requirement for voting perhaps can be explained better in terms of the fundamental right to vote than in terms of the fundamental right to travel. Although the state is unlikely to deny the vote in order to exclude undesirables from the state, the Court has been exceedingly critical of attempts to limit the franchise on the basis of voters’ qualifications in terms of their “stake” in the state, whether that stake is wealth, property ownership, or duration of residency. Likewise, the law in *Sosna* did not give rise to the kinds of concern that the right to travel guards against. Unlike indigents seeking welfare benefits, divorce plaintiffs hardly constitute a class of persons the state has any invidious reason for excluding. In the absence of any reason to suspect the state legislature of invidious motives, strict judicial scrutiny of the law’s constitutionality does not seem warranted.

This is not to say that the Court could not have found a way to rationalize striking the law by referring to purpose. It can be argued that newcomers to a state are an insular minority whose best interests are never represented in state government. There-

---


fore, all laws burdening them should be strictly scrutinized. Yet newcomers who are not economic, political, or religious undesirables hardly seem to meet the criteria characterizing other “insular minorities” receiving special judicial protection.\(^7\) Rather, they more closely resemble the many economic minorities receiving insubstantial constitutional protection from the courts.

If the *Sosna* Court had explicitly considered purpose or motivation, it would have achieved two primary advantages over the balancing approach. First, consideration of motive or purpose requires the Court to consider the reasons the Constitution requires judicial intervention in terms of whether the legislative process is likely to be inadequate. These reasons primarily involve legislative burdening of unpopular and unrepresented groups. Although out-of-staters differ from other typical victims of “majoritarianism” because they are less stigmatized by discrimination, the motivation of such laws is nonetheless invidious. That the invidiousness derives from the limits placed on economic self-protection by a federal system, rather than from proscriptions of race or of class animus, should not affect the Court’s concern for motivation rather than balancing. Were it not for consideration of the need for judicial intervention under the Constitution, economic substantive due process would have as equal a claim to judicial enforcement as do equal protection safeguards against racial discrimination.\(^\text{98}\) Indeed, the Court’s failure to explain why it, rather than the legislatures, should decide when to allow intrusions on constitutional rights such as privacy has given rise to charges that the Court has created a “revival of substantive due process”\(^\text{99}\) and is sitting as a superlegislature when such mi-

---

97. For a list of these criteria, see *Frontiero* v. Richardson, 411 U.S. 677 (1973) (plurality opinion). Newcomers may be considered members of a historically disadvantaged group, and in general they certainly lack proportionate representation in the legislature as a class. The status of being a newcomer also may be irrelevant to being a good citizen in most respects. However, the status of being a newcomer obviously is not immutable or permanent, unlike race or sex. Moreover, the newcomer is not obviously identifiable as such, nor is he or she likely to be treated as a second-class citizen in many of his or her social contacts.

98. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). One scholar has argued that the Court also could consider economic groups having little political clout “discrete and insular minorities” deserving of enhanced protection. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 50. Yet the “would-be barmaids of Michigan or the would-be plumbers of Illinois” are not persons immutably defined as members of these groups. Id. Furthermore, particular occupational groups such as these have not been subjected to persistent historical discrimination precisely because in the general population little animus or prejudice toward occupational groups exists except perhaps toward the most economically successful and therefore the most powerful groups.

noritarian control is neither needed nor justified.100

The second primary advantage of purpose or motivation over the balancing process is that reference to purpose permits a clearer explanation why certain laws will be stricken down and others will not. Obviously, the balancing process and its problems are not eliminated. However, at least the courts could establish categories of laws that they will scrutinize more carefully than others—for example, in addition to laws affecting travel, laws primarily affecting persons who will be expensive to the state or persons whom the state for some other reason has a selfish reason to exclude. The result would be that some kinds of laws—those affecting only "desirable" immigrants—would not need to be examined at all. With respect to "costly" immigrants, the Court could begin the job of defining when, in light of the constitutional scheme, the states should be permitted to burden travel. One example of a valid burden would be discouraging people from moving to the state in order to take advantage of benefits paid for by state taxes: If they were allowed to do so, the state's ability to offer this benefit might ultimately be destroyed.101 Denial of in-state tuition to state university students who have recently moved to the state is one example of a burden on travel the Court will sustain in order to prevent a resource from being depleted by out-of-staters entering the state to take advantage of it.102 Moreover, the Court could begin to formulate rules concerning the burden of proof in such cases, requiring, for example, that the state prove that the elimination of benefit restrictions for newcomers would indeed result in a critical impairment of the state's ability to offer benefits.103
By considering legislative motivation, the Court can begin to define both the impermissible and the permissible goals legislation affecting travel may serve. Furthermore, the Court can generalize to some extent about the proof it will require to demonstrate that the presence or the absence of the law will produce undesirable effects. In Professor Eisenberg's terms, the Court thus can begin to define limits on governmental power, with explicit reference to the need for preventive curbs on invidiously motivated laws. This is not to say that the Court will decide in each instance whether the legislature had the collective psychological intent in right-to-travel cases of advancing economic protectionism as opposed to some other, valid goal. It is to say that the Court can establish a prophylactic rule that given effects—for example, exclusion of poor persons—are those a legislature is prone to advance for the wrong reasons.

The latter part of this article sets forth specific examples of constitutional protections the purposes of which the Court could profitably state explicitly in terms of presumptions about improper legislative purpose or motivation. Because nearly all judicially enforced constitutional provisions could be discussed in this vein, this article undertakes to be illustrative but far from exhaustive.

**Freedom of Speech**

"Invidious motivation" and "invidious purpose" have been terms associated primarily with discrimination held unconstitutional under the equal protection clause. However, invidious motivation or purpose is also highly relevant to first amendment adjudication. These thoughts are not altogether new. I partially developed them in an article published two years ago, and Professors Karst, Eisenberg, and Tribe subsequently have highlighted the relevance of "first amendment equal protection" to certain issues of free speech. My intention here is to develop this viewpoint at greater length than before and then to apply it to a variety of free speech issues.

Historically, the animus produced by differences of politics and religion has closely paralleled, if not exceeded, the degree of animus generated by differences of race or of nationality. Indeed, the

---

104. Eisenberg, supra note 3, at 141-43.
original migrants to this continent from Europe and the British Isles were individuals whose religious and political beliefs and speech subjected them to persecution in their homelands. Laws regulating the content of speech or of religious belief have historically carried as much suspicion of prejudice or animus as laws discriminating on the basis of race, illegitimacy, alienage, or sex. Like racial laws, laws regulating speech content frequently produce stigma and a sense of unjustly inflicted animus. Also, like racial laws, laws regulating speech or religion frequently tend to be arbitrary because our Constitution embodies the premise that society at large cannot with certainty divine ultimate truths about politics, religion, morality, or lifestyle.

The ill effects of laws regulating speech or religion may produce not only a sense of stigma but a variety of other effects. As Professor Emerson has shown, the ill effects include interference with individual self-fulfillment, in terms of the ability both to form and to express opinions and beliefs; interference with the discovery of truth; interference with communication between the governors and the governed, resulting in interference with the responsiveness of the social system; and finally, interference with the balance between stability and change.

It can be argued that any law restricting speech or regulating religion causes these ill effects regardless of the motivation for its enactment. Under this view, the motivation of the lawmaker and the resulting senses of stigma and of breach of faith are consequently less important in the first amendment area than in the equal protection area. However, this assertion appears incorrect. If lawmakers could be trusted to maintain proper respect for the harms against which the first amendment guards, courts would need to play no greater role in enforcing this clause than they do in enforcing the tenth amendment and economic equal protection. It is precisely because lawmakers, whether legislators or law enforcers, do have the historical propensity, because of political and religious prejudice, to create these harms that intervention by the Court is needed to overturn such laws under the Constitution and to set out preventive rules of constitutional interpretation forestalling the enactment of laws that might be enforced discriminatorily against unpopular speech or religion. The Court’s extensive

activity in the first amendment area is not unlike the activity of a police department wisely concentrating its forces in areas of the highest crime potential.

In my view, the first amendment is needed primarily to protect against invidiously motivated suppression of unpopular points of view. Therefore, a concern for motivation suggests that certain types of speech regulation should be permitted because the speech in question is not likely to arouse prejudice (commercial speech, for instance) or because the law serves some valid purpose other than suppressing speech (for example, compensation for harm caused by defamatory statements).

Finally, a concern for motivation explains on the one hand why it is permissible in some cases to ban all political speech and on the other hand why it is impermissible to single out particular political viewpoints. If one were concerned only with effects, it certainly could be argued that the banning of all political speakers from an army base or from transit advertising creates a greater harm than the banning of only one faction. However, if the fear of intentional and invidious discrimination between rival points of view is a central first amendment concern, the banning of all political speech in certain contexts is far more innocuous than the banning of only one point of view.

As the motivational concerns of the equal protection clause and the first amendment are similar, so are the Court's approaches to cases under these two clauses. In equal protection, a "suspect classification" produces a presumption of invidious motivation or purpose which only a demonstration that the law serves a "compelling state interest" can rebut. Similarly, in the area of free speech, a law classifying on the basis of speech content is likewise suspected of an invidious motivation to suppress or to punish given points of view. Only a showing that a compelling state interest—usually described in terms of the likelihood that the speech produces a clear and present danger of a substantive evil the state has a right to prevent—can rebut the resulting presumption of invidious purpose. Such a compelling state interest may consist, for example, of the likelihood that the words will produce

---

112. According to the Court, the test is whether "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). As originally formulated by Justice Holmes, the test is whether the words are such "as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919).
acts of subversion,113 a breach of the peace,114 or unjustified harm
to another individual’s reputation.115

There are times when it clearly seems appropriate for the Court
to consider specific historical facts surrounding a particular piece
of legislation and to conclude that on balance it was motivated by
an illicit purpose. Such a case is Grosjean v. American Press
Co.,116 where a special tax was imposed only on large newspa-
pers, most of which opposed the political party in power. How-
ever, in most cases it is not the proven historical actuality but
the historically supported suspicion and fear of motivation that leads
the Court to strike down a given kind of law as a preventive or a
prophylactic measure. The following discussion serves only to il-
lustrate and not to exhaust this reasoning concerning the first
amendment. Obvious examples not addressed include the Court’s
holdings that broad delegations of investigative power to legisla-
tive committees117 and required disclosure of membership lists by
private organizations118 are unconstitutional because both kinds
of laws pose the clear risk of discriminatory enforcement against,
and harassment of, unpopular minority points of view.

Professor Tribe has provided a coherent articulation of this gen-
eral approach to the first amendment in his epochal treatise
American Constitutional Law, published earlier this year.119 Pro-
fessor Tribe describes two kinds of laws which can abridge free
speech and two corresponding judicial reactions to such laws:

   First, government can aim at ideas or information, in the sense of sin-
gling out actions for government control or penalty either (a) because of
the specific viewpoint such actions express, or (b) because of the effects
produced by awareness of the information such actions impart. . . .
   Second, without aiming at ideas or information in either of the above
senses, government can constrict the flow of information and ideas while
pursuing other goals, either (a) by limiting an activity through which in-
formation and ideas might be conveyed, or (b) by enforcing rules compli-
ance with which might discourage the communication of ideas or
information. . . . The first form of abridgement may be summarized as en-
ccompassing government actions aimed at communicative impact; the sec-
ond, as encompassing government actions aimed at noncommunicative

impact but nonetheless having adverse effects on communicative oppor-
tunity.120

With regard to the first kind of law, Professor Tribe states that
the regulation will be held unconstitutional (and indeed is pre-
sumed to be so) unless the government can show a clear and
present danger or can show that the regulated communication
falls outside the speech protected by the first amendment.121
With regard to the second kind of law, Professor Tribe states that
ad hoc balancing of free speech interests against other govern-
mental interests is permissible under the rubric that the law may
not "unduly" constrict the flow of information and ideas.122

In general, my agreement with Professor Tribe's view of first
amendment adjudication far outweighs my disagreements, and I
think he has done a thoroughly admirable job of organizing first
amendment doctrine. Professor Tribe's analysis is generally simi-
lar to the valuable views of Professors Karst and Eisenberg,
which I summarize and to some extent criticize below.123 I do,

120. Id. at 580.
121. Id. at 582.
122. Id.
123. Professor Karst enunciates an "equality principle," stating that the first
amendment is designed to prevent the government from discriminating against
speech or against speakers because of the content of the communication. Karst
also observes that the persons most likely to suffer from such discrimination are
the disadvantaged of our society. Karst, supra note 106, at 30. Karst would permit
regulation based on speech content only if a compelling state interest (or, presum-
ably, a "clear and present danger") required it. He therefore would have the Court
eliminate its doctrine that certain forms of expression such as obscenity, libel, and
fighting words are not "speech" and in each case would have the Court look to the
harm requiring regulation.

Professor Eisenberg similarly refers to "rights of equality" in the first amend-
ment, defined as "the right not to be disadvantaged because the government dis-
approves of one's expression." Eisenberg, supra note 3, at 136. In keeping with his
and Professor Brest's view of the role of motivation, Eisenberg states that motiv-
ation may be used to invalidate a law if it can be shown that a law not facially clas-
sifying or burdening on the basis of speech content in fact has, and was intended
to have, this effect by the lawmaker.

My view of the role of motivation in the first amendment is related to, but more
general than, the views of Karst, Eisenberg, and Tribe. Karst, like Tribe, does not
take into account the fact that regulation of certain kinds of speech content is
likely, in terms of governmental prejudice, to be more invidious than regulation of
other kinds. By stating simply that discrimination based on speech content is in-
valid until justified by a compelling state interest, Karst runs the danger of ignor-
ing the fact that discrimination in the area of commercial speech, and advertising
limitations against all political speech but in favor of all commercial speech, as in
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), are not discriminations sin-
gling out historically disadvantaged minorities and therefore can be considered
less suspect than other forms of discrimination. Karst, supra at 34.

My disagreement with Eisenberg lies in his relatively narrow concept of moti-
vation, see text accompanying notes 238-74 infra. Eisenberg's concept goes only to
finding "hidden" legislative goals and not to discussing the fears of legislative mal-
function which should make certain kinds of speech regulation suspect and others
not suspect—or at least less so.

994
however, differ from Professor Tribe on two points which are central to the discussion which follows and which I will briefly summarize.

First, Professor Tribe’s interest in legislative motivation is apparently limited to whether the law is “aimed at” regulation of speech content. This concern is indeed a major one in first amendment law. Focusing attention on this question clearly helps a great deal in explicating symbolic speech and other cases. However, after a court has found a purpose of regulating speech content, Professor Tribe appears to resort to a balancing test (albeit heavily weighted toward a finding of unconstitutionality) in determining whether a clear and present danger exists.\textsuperscript{124} I do not disagree that a sort of balancing does occur, but I think that, as stated above,\textsuperscript{125} it occurs in the context of determining whether an invidious, censorial motivation was likely present. Most laws regulating speech content evince such a motivation. Yet, as I argue below, the regulation of commercial speech content need not be seen as invidiously motivated, because such regulation is unlikely to be aimed at accomplishing the typical evil of censorship—namely, the prejudiced suppression of unpopular ideas. Neither properly drafted laws prohibiting fighting words nor

\textsuperscript{124} Professor Tribe states:

\textit{[T]he “balancers” are right in concluding that it is impossible to escape the task of weighing the competing considerations. Although only the case-by-case approach of track two takes the form of an explicit evaluation of the importance of the governmental interests said to justify each challenged regulation, similar judgments underlie the categorical definitions on track one. Any exclusion of a class of activities from first amendment safeguards represents an implicit conclusion that the governmental interests in regulating those activities are such as to justify whatever limitation is thereby placed on the free expression of ideas. Thus, determinations of the reach of first amendment protections on either track presuppose some form of “balancing” whether or not they appear to do so. The question is whether the “balance” should be struck for all cases in the process of framing particular categorical definitions, or whether the “balance” should be calibrated anew on a case-by-case basis.}


Professor Tribe goes on to acknowledge that “categorical rules, by drawing clear lines, are usually less open to manipulation because they leave less room for the prejudices of the factfinder to insinuate themselves into a decision.” \textit{Id.} at 594. In this sense, therefore, he acknowledges the utility of constitutional rules as a prophylactic defense against unconstitutionally motivated actions by law enforcers or law interpreters. He states that “[c]ategorical rules thus tend to protect the system of free expression better because they are more likely to work in spite of the defects in the human machinery on which we must rely to preserve fundamental liberties.” \textit{Id.}

\textsuperscript{125} \textit{See} text accompanying notes 66-81 \textit{supra.}
those prohibiting intentional incitement of subversion aim solely or primarily at the invidious suppression of truth. In short, as the following sections of this article illustrate, the inquiry into the justification for a law regulating speech content should be itself an inquiry into motivation, and recognition of this fact would lead to a difference in the outcome in a significant number of cases.

Second, I am not sure that Professor Tribe's second category of laws should be evaluated by an ad hoc balancing process independent of a concern for motivation. It is true that laws regulating the time, place, and manner of communication generally have been upheld or have been stricken depending on their "reasonableness" and that the Court has generally approached this evaluation on an ad hoc basis. However, as the following discussion illustrates, the Court needs to articulate the extent to which it fears that such time, place, and manner laws may be used for invidious, censorial reasons. In other words, one can recognize the greater presumption of constitutionality attaching to laws not expressly regulating speech content and still demand assurances that such laws probably were neither passed for censorial reasons nor are likely to enable the persons enforcing the law to make censorial decisions. Again, evaluations of the law's justifications—not just of its concern with time, place, and manner—need to consider expressly the motivation of the law's makers and the potential motivation of its enforcers.

Libel

Although proscriptions of libel generally originate in the common law rather than in legislation, analysis of purpose is nonetheless instructive. In general, the Court's rule limiting states' ability to regulate libel is consonant with the clear and present danger test it has applied to most other attempts to regulate speech content. In New York Times Co. v. Sullivan, the Court established that libel laws may prohibit only knowingly or recklessly false statements of fact made of and concerning individual public figures. This decision creates a test that squares with the general clear and present danger requirement that regulated speech must be willfully intended and likely to produce imminent harm. However, for a considerable time the Court remained uncertain about the relative protection to be given persons who allegedly defame private persons as opposed to public figures. Ultimately, in Gertz v. Robert Welch, Inc., the Court has concluded that a defamed private person can be compensated (though not subjected to puni-

tive damages) whenever a false statement of fact is made with negligence or with some other degree of fault.\textsuperscript{127}

The Court traditionally has defended its libel doctrine in balancing terms, weighing the harm to reputation from uncompensated falsehoods against the need to protect freedom of speech and of press from the chilling effect generated by an "intolerable" requirement that publishers meet the impossible goal of guaranteeing the accuracy of their statements.\textsuperscript{128} Similarly, the Court has used balancing to explain the difference in the protection that public and private figures receive. The Court has stated that the public figure should receive less protection because he or she is better able to rebut false statements than are most private persons. Also, the Court has stated that most public figures have chosen to seek public attention and thus have assumed the risk of false criticism, whereas private persons have not.\textsuperscript{129}

Certainly these factors identify ways in which public figures and private persons differ. However, the Court has made no attempt to measure or to quantify its conclusions. The argument that public figures realistically assume the risk of their reputations' wrongful destruction is unpersuasive. Surely, none would assume this risk absent the Court's pronouncement that he must. Also unconvincing is the argument that public figures realistically can rebut false criticism more effectively than can private persons. Furthermore, some people classified as "public figures" are, as the Court admits,\textsuperscript{130} drawn into the controversy involuntarily, not seeking publicity. Finally, in terms of newsworthiness, the public interest in knowing about some private persons may exceed the public interest in knowing about minor public officials. Thus, the protection needed by the press, under a balancing test, theoretically should be greater in these cases.

Little except the Court's collective intuition explains the ultimate decision that the interest in free speech and in free debate outweighs the interest in compensation for negligently false statements of fact about public figures but not about private figures. The Court has explained the factors it considers in its balance; yet only an ipse dixit explains the relative weight of these factors. It can, of course, be argued that this type of judicial explanation is

\begin{thebibliography}{99}
\bibitem{127} 418 U.S. 323 (1974).
\bibitem{128} Id. at 340.
\bibitem{129} Id. at 343-46.
\bibitem{130} Id. at 345.
\end{thebibliography}
adequate because the Court has been selected as the final bal-
ancer, albeit ad hoc and legislative, of such value conflicts. If this
method of resolution seems less than ideally principled, it none-
theless can be accepted as inevitably typical of the American sys-
tem of constitutional adjudication.131

Nonetheless, one can make a more systematic explanation of
the libel doctrine by reference to the purpose or motivation of
judges and juries assessing damages in such cases. The general
purpose of the first amendment is to prevent the government
from silencing the ideas of unpopular people, or from punishing
them for holding or voicing those ideas, when their views run
counter to the interests of government or of the popular majority.
In theory, the compensation of harm caused by defamatory state-
ments does not run counter to this first amendment interest, for it
seems legitimate, as the Court has stated, to conclude that de-
monstrable falsehoods are valueless and are not worth pro-
tecting.132 However, in practice, popular prejudice can easily
cause juries not only to find that unpopular statements are false
when they are not, but also to punish the publisher of the state-
ment rather than merely to compensate actual harm, which in
any case is usually vague and indefinite in amount.133 Indeed, this
seems to be precisely what happened in New York Times Co. v.
Sullivan,34 where a southern jury assessed $500,000 in damages
against the New York Times for publishing an editorial advertise-
ment criticizing local southern officials for suppressing civil rights
demonstrations. Although the advertisement was inaccurate in
minor respects,35 it seems clear that the jury was more incensed
by the unpopular political truths in the statement than by its in-
accuracies. The jury sought more to penalize the New York Times
than to compensate for whatever vague harm was suffered by the
unnamed official who claimed to be identifiable by innuendo.

It seems reasonable to interpret the Constitution as prohibiting
this jury-imposed penalty. However, the means by which the
Supreme Court has chosen to achieve this limitation have created
problems and do not clearly serve the purpose of preventing such
penalties. First of all, the New York Times and Gertz rules pro-
tect too few types of speech because a jury might decide to penal-

131. See Frantz, The First Amendment in the Balance, 71 YALE L.J. 1424, 1440-48
(1962).
133. See Monaghan, First Amendment "Due Process," 83 HARV. L. REV. 518, 529
(1970) (pointing out that the jury has been valuable in protecting the freedoms
of the majority but has never been particularly tolerant of dissent).
135. See note 78 supra.
ize unpopular speech directed at anyone—not just at a public official or at a public figure—if the speaker or the speech content were to rub the jury the wrong way. At the same time, the *New York Times* and *Gertz* rules protect too many kinds of speech because defamatory statements about unpopular public figures are unlikely to incense a jury sufficiently to impose a penalty.

Perhaps public figures are the most likely beneficiaries of undue jury sympathy and consequently of penalties assessed by juries for essentially truthful speech. Juries and judges justifiably might be assumed to be more prone to punish good faith criticism of government officials rather than of private persons because those who criticize the elected representatives of the majority are also those who historically have been most likely to be the unpopular victims of governmental retaliation. However, public figures are not necessarily the only likely beneficiaries of jury penalties. If the speaker is a Nazi or a communist, the temptation to penalize him or her may be equally strong even if the victim of the alleged libel is an unknown private individual.

Conversely, if the target of an allegedly libelous story is a highly unpopular public figure, again such as a Nazi or a communist, the newspaper publishing the story hardly needs enhanced constitutional protection against assessment of a penalty by an outraged jury. In my view, the *New York Times* rule unnecessarily prevents the award of reasonable, frequently nominal, damages. It also prevents the vindication of truth in all cases involving public officials (and by extension those involving public figures) where the untruth is not malicious. This limitation is unnecessary where the jury assesses no penalty for unpopular but truthful speech. Moreover, it seems likely that in many cases involving public officials or other public figures the jury is quite capable of rendering a dispassionate and purely compensatory verdict.

The Court might better fulfill the constitutional purpose of preventing wrongly motivated, censorial jury verdicts by means keyed more closely to the wrongful jury motivation itself. The Court could prohibit *punitive* damages except where the libel is shown to have been made maliciously of and concerning the plaintiff—that is, the *New York Times* rule—but permit *compensatory* damages (nominal damages plus out-of-pocket losses) in all cases of negligence. The Court could also permit damages for emotional distress in cases where the libel is malicious, as the *New York Times* case defines malice. Such a rule al-
most certainly would have limited the verdict in the *New York Times* case to nominal damages, and by limiting damages it also would reduce the incentive for nuisance suits against newspapers. Such a rule also would eliminate the need to draw the unmanageable distinction between public figures on the one hand and private figures involved in issues of public interest on the other. Yet, the rule would preserve the ability of all plaintiffs to recover at least nominal damages for negligent falsehoods and would give newspapers an incentive to settle and to publish retractions where negligent falsehoods occur. Had the Court focused more narrowly on the desirability of avoiding invidious motivation in *New York Times*, it could have protected newspapers from penalties more effectively than it has while also safeguarding the valid interests of libel plaintiffs in establishing the truth and recovering actual compensatory damages.

**Commercial Speech**

One of the Court's major changes of doctrine in the first amendment area during the past few years has come with regard to commercial speech. The change has come about by the re-doing of a balancing approach, and the results are objectionable in terms of constitutional doctrine.

In the past, commercial speech has received minimal constitutional protection. From the point of view of legislative motivation, this approach seems eminently reasonable. Whatever the interests are of consumers in receiving advertisements or of advertisers in informing the public about their products, it is undeniable that neither people offering goods or services for sale nor their audience of potential consumers present generically the kind of unpopular minority views likely to lead a legislative majority to silence them irrationally and with animus. Indeed, it is the lack of animus that best explains the Court's refusal to hold economic regulation unconstitutional on substantive due process or equal protection grounds. Of course, it can be argued that the Court's restraint in the areas of economic due process and equal protection is itself misguided and that when the legislature acts arbitrarily or prejudicially in the economic realm, the Court should intervene and correct the problem. However, nonintervention has been justified persuasively by Professor McCloskey

---

on the ground that the Court's workload is too great to allow the screening of large numbers of economic cases for evidence of occasional arbitrariness. Another justification is that the examination of economic policy for arbitrariness frequently involves the amassing of large volumes of evidence about economic data which judges are ill-equipped to evaluate as experts and which do not lend themselves to principled judgments capable of generalization from one case to the next. Also, even where prejudice exists in economic cases, its incidence against a given individual or group is far less likely to be repetitive—and is far more likely to be isolated and nonrecurring—than where the injustice results from ingrained societal prejudice on the part of the legislature. Consequently, the sense of betrayal by government is also likely to be less. For all these reasons, most observers of the Court probably would agree that its retreat forty years ago from the economic arena was well-advised and should not be reversed.

The need for a judicial check on legislative bias or prejudice does not require the Constitution to be read as providing a greater check on legislative regulation of commercial speech than on the underlying commercial transaction. At least in the case of advertising drugs and lawyers' services, the regulation at worst serves the narrow economic interests of the few and not the prejudices of the majority. In the case of lawyer advertising, a subject regulated by courts rather than legislatures, an attack might be mounted more appropriately on doctrines isolating lawyers from legislative control rather than on the content of the existing regulation under the first amendment.

Even assuming that the first amendment's protections should apply to commercial speech, most commercial messages should be prohibitable under the clear and present danger rule. Whenever goods or services are advertised, both an intention and an imminent likelihood exist—in effect, a "clear and present danger"—that a sale will occur which the state has the right to prevent or to regulate if the transaction is dangerous or undesirable. In recent commercial speech cases the Court has implied that to

140. See id. at 51.
141. See note 43 supra.
be regulable, speech must create an imminent likelihood of an actually illegal act. However, there is no need for such a requirement so long as the state has the power to make an act illegal.\textsuperscript{143} There seems little doubt that the state constitutionally can regulate the price of, for example, prescription drugs or even legal services if it so desires. Such regulation may or may not be undesirable, but it clearly seems constitutional. Given that basic power to regulate, it seems appropriate in terms of the clear and present danger doctrine to permit regulation of advertising designed to generate regulable sales.\textsuperscript{144} By analogy, speech intended to incite to riot and creating an imminent and reasonable likelihood of this result is subject to regulation under the first amendment.

However, the Court recently has held that states can regulate commercial advertising only if it solicits a transaction already illegal or if the advertising is false or misleading.\textsuperscript{145} Consequently, the Supreme Court appears to have imported into constitutional law the myriad questions arising under "printer's ink" statutes regulating the accuracy of advertising, and the many consumer protection statutes and regulations prohibiting and defining unfair and deceptive trade practices. One must question whether this extension of judicial oversight is useful, much less necessary, at a time when the Court has inveighed against the expansion of federal court caseloads, resulting in a restriction of federal court jurisdiction in areas affecting civil rights.\textsuperscript{146}

Perhaps the Court will limit commercial speech rights to factual representations neither alleged to be seriously misleading nor involving harmful transactions.\textsuperscript{147} Most of the cases the Court has

\textsuperscript{143} Although the classic clear and present danger cases have involved advocacy of illegal acts, Justice Holmes' original formulation of the standard referred to "substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919). Granted that a state should not be able to outlaw advertising of services such as abortion which it has no power to prohibit, see Bigelow v. Virginia, 421 U.S. 809 (1975), there nonetheless seems to be no persuasive reason why a state should not be able to regulate speech creating a "clear and present danger" of conduct the state constitutionally could but has not prohibited. Outlawing cigarette and liquor advertising constitutes one example of regulation which should not need to hinge on whether the underlying transaction has been prohibited.

\textsuperscript{144} But see L. Tribe, \textit{American Constitutional Law} 651-52 (1978).


\textsuperscript{147} But see Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85 (1977) (invalidating anti-blockbusting ordinance which forbade posting of "for sale" signs in front of houses).
decided to date fit into this narrow framework. However, even if so restricted, the commercial speech doctrine has not been explained by the Court in terms of why even misguided economic regulation needs to be reviewed by the courts under the Constitution.

Symbolic Speech

One of the frequently discussed applications of motivation analysis is the draft card burning case, United States v. O'Brien. Shortly after draft card burnings became a popular way of protesting the Vietnamese War, Congress added to the Selective Service Act's prohibitions against alteration, forgery, or nonpossession of draft cards an amendment prohibiting the knowing destruction or mutilation of a draft card. O'Brien claimed that the amendment was motivated by a desire to regulate speech and that the government's negligible interest in possession of the cards failed to justify such regulation. The Supreme Court rejected this argument and held that sufficiently important or substantial interests unrelated to regulation of expression justified this "incidental" limitation on speech.

In terms of a balancing of interests, O'Brien again seems difficult to justify in other than conclusory terms. On the one hand, the statute prevented an evocative method of protest. Moreover, because the law already prohibited nonpossession of cards, the amendment reached only those persons destroying other persons' cards, destroying a duplicate, or perhaps partially burning but not totally destroying their own cards. On the other hand, the government's stated need that registrants possess cards seems weak. Simplifying the verification of registration, detecting delinquents, determining availability for induction in case of emergency, informing the registrant of his draft board's address, and reminding registrants to report changes in status all could be accomplished, apparently, by "less burdensome alternatives." It is fairly clear that the Court did not apply the kind of strict scrutiny in O'Brien that is normally applied to laws regulating expressive activities.


The lack of strict scrutiny in *O'Brien* may be explained most easily by reference to the statute's purpose. Both the timing of the law and its legislative history confirm the common sense conclusion that Congress intended to attack draft card burning as a form of protest. Congress enacted the law only after draft card burning became a well-known form of protest, and speeches in both the House and the Senate inveighed against "beatniks,"150 "campus cults,"151 and "dissident persons"152 destroying their cards.

However, most of the rage directed against such activities appears not to have been directed at opposition to the war but at the fact that the protestors had chosen an already illegal means to protest. Draft card burning already violated the possession requirement in the regulations. In effect, Congress restated a prohibition already on the books in regulatory form, putting into statutory form the proposition, "You shall not break the law in order to communicate your protest." The statute only tangentially added substantive prohibitions to those already contained within the regulation.

The Court might have acted more forthrightly by upholding the statute on its facial purpose. *O'Brien* apparently did not argue that the pre-existing regulation requiring possession of draft cards was implemented for the purpose of suppressing speech. If the possession required were not intended to suppress speech, it would have been reasonable to hold that Congress acted with a permissible purpose under the first amendment in banning protest violating existing, valid laws.

However, it might be argued that the passage of the statute served little real purpose other than to symbolize congressional ire because the act in question was already forbidden by the regulations and therefore was subject to statutory penalties. It also might be argued that the statute prevented the Selective Service System from legitimating draft card burnings by changing its possession requirement for no reason other than to prevent such activity as a form of expression. Finally, it could be argued that to the extent the statute enlarged the prior prohibition by penalizing the burning of other people's cards or of duplicates, the statute created a new substantive prohibition for the primary purpose of restraining speech.

Nonetheless, it seems defensible to argue that it is not an illegitimate purpose under the first amendment for Congress to state

---

150. 111 CONG. REC. 19,871 (1965).
151. Id.
that the pre-existing regulation served some useful purpose, that the policies served by the regulation warranted incorporation and expansion in the statute, and that a violation of the policies underlying the regulation should be punished even if the violation was a defiant act undertaken as speech. Had Congress stated this purpose in the Act's preamble, the Court probably would not have voted differently. It is, after all, a cardinal first amendment tenet that Congress may prohibit words creating a clear and present danger of causing violation of a law not itself aimed at regulating the content of speech. That the prohibition reaches acts, not words, which themselves violate such a law makes the case stronger, not weaker.

Had the Court used this analysis, it could have held that the draft card burning law was aimed at regulating "speech" and not merely at facilitating the smooth functioning of the Selective Service registration process, as Professor Ely has suggested. However, the Court also could have recognized that the regulation of speech in question was permissible in light of first amendment concerns. I thus disagree with Professor Ely's analysis of O'Brien that "motivation is irrelevant" to the outcome of the case because the law rationally related to an acceptable goal other than regulation of speech.

In other "symbolic speech" cases the laws on their faces regulated the use of symbols. These cases include Tinker v. Des Moines School District, where the Court struck down a regulation banning the wearing of black arm bands in school to protest the Vietnamese War, and a trilogy of flag desecration cases where the Court struck down laws banning defacement, destruction, mutilation, or casting of contempt upon the American flag. The harm flowed either from the content of the communication itself, as in Tinker, or from interference with a particular symbolic message contained in the American flag. Professor Ely finds both situations to be cases in which the content of speech is regulated to prevent harms related to the message and hence subject to

154. Ely, supra note 1, at 1339.
scrutiny under the clear and present danger test.\textsuperscript{157} In all these cases, one can state in different language that the laws were motivated by the invidious desire to censor unpopular political expression and that no clear and present danger justified doing so. 

\textit{Overbroad Laws and Bills of Attainder}

The Court regularly has invalidated laws disqualifying people from government employment or attaching other civil burdens to people with certain political affiliations. Laws banning members of subversive organizations from government jobs,\textsuperscript{158} union offices,\textsuperscript{159} or bar membership\textsuperscript{160} also have been held unconstitutional. Usually, as a balancing matter, the reasons for holding such laws unconstitutional are largely conclusory. Proving membership in a subversive organization is doubtless much easier than proving an individual's role in the organization, and barring present or past members of such organizations from work in defense plants,\textsuperscript{161} for example, might constitute a valid method of preventing sabotage or theft of defense secrets. On the other side of the balance, the statutory exclusion from a defense plant job arguably causes little burden on the freedom of association where such jobs constitute only one percent of the job openings available to the plaintiff.\textsuperscript{162}

In analyzing the motivation or purpose of the statute, the same arguments can be made. Preventing sabotage is a compelling state interest. This interest, rather than punishment or inhibition of membership in subversive organizations, can be argued to motivate the statute. Nonetheless, the justification for invalidating the statute again can be made in prophylactic terms. Many people join subversive organizations without knowing the organizations' intent or without acting to further the organizations' goals. Such people are not demonstrably dangerous and a fortiori should not be punished.\textsuperscript{163} The Court should reason that a punitive, malevo-


\textsuperscript{158} Keyishian v. Board of Regents, 385 U.S. 589 (1967).


\textsuperscript{161} United States v. Robel, 389 U.S. 258 (1967).

\textsuperscript{162} \textit{Id.} at 287 (White, J., dissenting).

\textsuperscript{163} See Emerson, \textit{supra} note 69, at 942:

\begin{quote}
[U]se of qualifications [for government employment] based upon exercise of the right of free expression is wholly incompatible with a system of free expression, and ... the other social interests at stake can be adequately protected by prohibition of the conduct rather than the expression. Whether actually intended or not, the imposition of such qualifications operates as a penalty—a severe and pervasive one—upon
\end{quote}
lent desire to stigmatize persons espousing politically unpopular points of view, rather than a good faith desire to prevent subversion of the national defense, might well motivate exclusion of such persons from public employment. In other words, the process by which Congress decided to exclude such persons from public jobs is suspect under the first amendment, and in the absence of any way to determine the purity of congressional motives, the Court should require, as a prophylactic measure, that persons be excluded only if they otherwise could be punished because they knowingly and intentionally furthered a subversive organization's purpose and if the particular job involves national security interests. Moreover, the Court's holdings serve not only to prevent wrongly motivated enactment of such laws, but wrongly motivated enforcement as well.

All the above is not to deny that a balancing of values takes place in a discussion of legislative motivation or purpose. In recognizing the punitive potential of public-job denials, the Court necessarily must consider the danger that some known subversives will effectively conceal their true role in the organization and hence effectively be able to infiltrate defense plants or schools. This possibility is the cost of a prophylactic rule, just as in libel cases the cost is represented by permitting negligent defamation of public figures. A purpose analysis does not require the Court to measure the impact of the discrimination on the individual; the Court could decide generically that such laws if unjustified are bad because they are punitive. There would be no need to consider whether public jobs represent one percent of the total number of jobs available in industry, as in defense plants, or a figure much nearer one hundred percent, as in bar membership or in school teaching. Moreover, it may be more feasible to determine the difficulty of holding individual hearings to determine the role of the individual in the organization and the difficulties (if any) of securing testimony in light of the fifth amendment. The inquiry, in other words, is narrowed somewhat to a consider-

free expression. The administration of such restrictions—involving searching without limits or logic into every phase of a person's beliefs, opinions and associations, the imputation to individuals of the views of others with whom he associates, the creation of a far-reaching apparatus of investigation and enforcement, the stimulation of an atmosphere of fear and hysteria—is particularly destructive. The use of beliefs, opinions and associations as a guide to future improper conduct, where relevant at all, is of minimal value. Employment of such qualifications, even on a limited scale, seriously "abridges" freedom of expression.
ation of the additional costs of requiring a “less burdensome alter-

native.” This inquiry forecloses the legislature’s ability to im-
pose punitive effects purposefully by barring individuals who lack evil intent.

The Court also has stricken, as overbroad under the first amendment, laws involving prohibitions against language which is “offensive,” “opprobrious,” “profane,” and the like.164 The Court’s announced rationale is that such definitions include language which in no sense constitutes “fighting words” or creates an imminent danger of physical conflict or other harm. Moreover, such statutes chill permissible expression because people cannot ascertain the borderline between protected and unprotected speech. Hence, the Court has ruled, the state may ban such language only when it has “a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.”165

Again, as a balancing matter, it is not entirely clear why the Court should bother to protect the individual who uses the term “motherfucker” indiscriminately (but not toward any particular individual present who is likely to retaliate) at a PTA meeting,166 or the individual at a hockey game who consistently directs from a safe distance gross obscenities toward the referee or the opposing team. In terms of the speech the first amendment is designed to protect, the admitted emotive or emetic value of such language surely must be balanced against a societal interest in group morality, good taste, or parental desire to shield children from an early education in invective language. Surely public profanity is a far cry from the kind of language necessary to political dialogue that Meiklejohn167 and others have identified as the central value protected by the free speech clause.

The Court’s position might be explained better in terms of the need for a prophylactic rule preventing invidiously motivated governmental action against identifiable political and social minorities. The central problem with banning obscenity at the PTA meeting or the hockey game is that it is nearly impossible to formulate a prohibition reaching such expression while preventing the government from banning as “offensive,” “vituperative,” or “profane” any extreme castigation of leading politicians or

165. See Gooding v. Wilson, 405 U.S. 518, 523 (1972) (quoting State v. Chaplin-
sky, 91 N.H. 310, 313, 320-21, 18 A.2d 754, 758, 762 (1941)).
majoritarian religions through terms such as "scum" or "damned liars." The potential for selective enforcement of such a rule against politically unpopular groups and speakers is immense. The first amendment overbreadth cases in the 1960's revealed enforcement of vague loitering and fighting words statutes against unpopular civil rights demonstrators in the South and Vietnamese War protestors around the country. No good way exists to distinguish language addressed at "motherfuckers" on the schoolboard at a PTA meeting from language nearly as vigorous directed at the President during a war protest rally.

Again, by focusing on the need for a prophylactic rule guarding against delegation to police and to prosecutors of the power to discriminate against persons publicly espousing unpopular causes, the Court could avoid the need to defend the dubious "value" of expletives uttered in public places for whatever cause. Instead, it could more forthrightly recognize that it will require toleration of certain offensive speech of low value and some arguable harm in order to prevent all-inclusive statutes from accomplishing purposes the first amendment is primarily designed to forbid—namely, the prosecution of people for the expression of opinions which are politically or religiously highly unpopular but are not demonstrably harmful in any other sense.

Public Forums

There have been times, as Professor Ely observes, when the Court has stricken statutes as unconstitutional despite the fact that they have neither the purpose nor the function of regulating the content of speech. Laws forbidding distribution of handbills on public sidewalks are a leading example. Professor Ely suggests that this is an instance where balancing serves a valid function—weighing the state's interest in avoiding litter against the

---

168. Cf. Eisenberg, supra note 3, at 136-37 (the Court will not act solely on the effects of a facially valid statute).
first amendment interest in free speech.\textsuperscript{173} In different language, the Court is evaluating the \textit{reasonableness} of regulating the time, place, and manner of speech, rather than its content.

At the same time, however, one must recognize that handbilling and street corner meetings are more frequently the communications media of dissident political interests, small religious groups, and out-of-office politicians than of established and influential government officials and political parties.\textsuperscript{174} Eliminating the ability to distribute leaflets on public sidewalks would have substantially hurt the anti-war protestors of the 1960's but would not have hurt the Pentagon. Moreover, if an anti-litter ordinance forbidding handbills were not motivated by actual animus toward the points of view frequently expressed in handbills, it at least would be enacted—and perhaps selectively enforced—with an insouciance created by the feeling that these points of view are generally unwanted or unappreciated by their audiences and that the leafletting constitutes at best a nuisance of no practical value.\textsuperscript{175}

Again, it is obvious that the judgment that leafletting should be constitutionally protected despite the state interest in preventing litter involves some sort of balancing of these interests. However, balancing where motivation is a prime consideration focuses not on the abstract values of free speech versus litter prevention but rather focuses on the need for a prophylactic rule preventing discrimination against unpopular or "unimportant" points of view. The creation of a prophylactic rule against anti-litter ordinances involves an essentially arbitrary judgment that the fear of discrimination justifies either a certain amount of litter or the cost to the state of removing it. However, the concern for preventing discriminatory motivation accomplishes two things the Court's normal balancing process does not accomplish. First, it acknowledges forthrightly that no scientific "balance" is possible, but that a rule, however arbitrary, is necessary precisely because of the Court's inability to make fine determinations of motivation in individual cases where leafletters are arrested. Second, the articulation of a preventive rule, as opposed to balancing, states the fundamental concern justifying whatever arbitrariness inheres in the rule's selection—namely, a concern about discriminatory action against unpopular speakers or points of view. Such an articulation contains a built-in constitutional justification for judicial

\textsuperscript{173} Ely, \textit{Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis}, 88 Harv. L. Rev. 1482, 1486-87 (1975).

\textsuperscript{174} This point also has been made by Kalven, \textit{The Concept of the Public Forum}: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 30, and perhaps more directly by Karst, \textit{supra} note 106, at 35-43.

\textsuperscript{175} See Karst, \textit{supra} note 106, at 40-42.
intervention, however arbitrary. This justification is the need to prevent prejudiced action by government officials.

A similar process of legal reasoning applies to laws the Court has upheld which prohibited demonstrations close to courthouses\textsuperscript{176} or on jailhouse grounds.\textsuperscript{177} A simple explanation is that a balancing test was used and that the interest in courthouse serenity and jailhouse security outweighed the interest in speech. In terms of motivation or purpose, one can make a further observation: Even if the legislature or the local government board had not found the minority viewpoints valueless nuisances at best, the interest in protecting courthouses and jail houses is so strong that the same result would have been compelled. In this sense, the Court behaves much like any court faced with an administrative agency decision resting on an improper factor. Error may be held harmless in light of the compelling nature of other evidence supporting the decisions.\textsuperscript{178}

**Rights of Privacy: Abortion Funding, Legislative Purpose, and the Difference Between State Action and Inaction**

Even when faced with legislation apparently motivated by prejudice, the Court at times has held that a law is not unconstitutional if it resembles state passivity or inaction rather than affirmatively restricts individual rights. A case decided during the 1977 Term illustrates this approach and its attendant problems.

In *Maher v. Roe*,\textsuperscript{179} the Court held that the constitutional right to privacy entitling a woman and her physician to make an abortion decision during the first two trimesters of pregnancy without state interference does not invalidate a state's refusal to fund elective abortions under its Medicaid program. The Court held that the Constitution requires only that the state not create an "unduly burdensome interference with [a woman's] freedom to decide whether to terminate her pregnancy"\textsuperscript{180} presumably either by prohibiting the decision outright or by delegating a veto right to others. Alternatively, the state is permitted "to make a value

\textsuperscript{176} Cox v. Louisiana, 379 U.S. 536 (1965).
\textsuperscript{178} See text accompanying notes 250-56 infra.
\textsuperscript{179} 432 U.S. 464 (1977).
\textsuperscript{180} Id. at 474.
judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.”

In light of previous holdings that the state can neither prohibit abortions, require special facilities or medical consultation for abortions, nor require parental or spousal consent, the decision that states may except abortions from other kinds of medical treatment offered under Medicaid seems anomalous. Distinguishing abortion from other medical treatment to which an indigent woman is entitled at state expense under the Medicaid program and disallowing it indeed may constitute an unduly burdensome interference with her freedom of choice. It even might interfere to the point of making such a choice impossible. Concern that abortions might be made more difficult—albeit more safe than other operations—earlier led the Court to invalidate state requirements that abortions be performed only after consultation with additional doctors or in special hospitals or other facilities. Yet, in *Maher*, the Court has acknowledged that discriminating against abortions by singling them out for denial of funding is a permissible state goal.

The Court explained that refusal to fund abortions does not penalize the right to abort because the refusal to fund is not an “interference”; by contrast, it is simply an “encouragement” of alternative activity, namely childbearing. Paraphrased in language perhaps archaic, the Court seems to be saying that the funding refusal interferes with no right of the plaintiff, but only with a privilège that the state can withhold at will. Alternatively, one might assert that because state funding of medical treatment is discretionary with the state and because no vested right to it exists, the decision not to fund abortions is not state action at all, but rather state inaction.

This rationale for the Court’s different treatment of motivation correlates significantly with other cases which have raised similar questions about the relevance of legislative motivation. The Court

181. *Id.*
186. 432 U.S. at 475.
188. Professor Emerson makes a similar observation in Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 918 (1963), when he observes that the question whether Congress (or a state) has made a law abridging first amendment freedom involves questions of both state action and governmental purpose to regulate constitutionally protected authority, as opposed to some other purpose.

1012
has upheld laws, apparently motivated by the desire to aid religious education, permitting students to leave school during school hours to obtain religious education at a nearby church.\textsuperscript{189} Equivalent education under the school’s own roof, however, is unconstitutional.\textsuperscript{190} The difference in policy seems minimal; rather, the difference appears to be a conceptual one between a law actively involving the state in aiding religious education and a law merely permitting private individuals to pursue religious education.

The Court also has held in the area of establishment of religion that although the state may not prohibit private religious education of students,\textsuperscript{191} the state also may not affirmatively fund such education\textsuperscript{192}—again drawing a line between active assistance to religion and passive tolerance of private activity.

The Court similarly has upheld against equal protection charges states’ refusals to fund given activities or programs in other contexts. For example, \textit{Geduldig v. Aiello}\textsuperscript{193} upheld against sex discrimination charges California’s refusal to fund pregnancy leaves as part of an employees’ disability insurance program. Even so, it held that the state may not affirmatively “penalize” women by discharging them from employment because of pregnancy.\textsuperscript{194} Moreover, when in \textit{Palmer v. Thompson}\textsuperscript{195} the City of Jackson closed its public swimming pools rather than have them integrated, the Court denied that any affirmative act designed to penalize integration or to enforce segregation had occurred. Evidently, as argued more fully below, the closing of the pools represented state “inaction” more than state “action.”

These cases create an uneasy feeling that the Court’s distinctions are related more to a concept—state action versus state inaction—than to a policy. If the state declines to fund abortions, a poor woman may be deprived of one as effectively as if abortions were outlawed. By releasing children from public school so that they may pursue religious education next door, the state is using its compelled attendance laws to aid religious education and is

\begin{itemize}
\item \textsuperscript{189} Zorach v. Clauson, 343 U.S. 306 (1952).
\item \textsuperscript{190} McCollum v. Board of Educ., 333 U.S. 203 (1948).
\item \textsuperscript{191} The Court makes this point in Maher v. Roe, 432 U.S. 464, 476 (1977) (citing \textit{Pierce v. Society of Sisters}, 268 U.S. 510 (1925)).
\item \textsuperscript{192} E.g., \textit{Norwood v. Harrison}, 413 U.S. 455, 462 (1973).
\item \textsuperscript{193} 417 U.S. 484 (1974).
\item \textsuperscript{194} \textit{Cleveland Bd. of Educ. v. LaFleur}, 414 U.S. 632 (1974).
\item \textsuperscript{195} 403 U.S. 217 (1971).
\end{itemize}
creating as great a risk of religious coercion as would occur if the classes were held in the school building itself. In terms of the law's impact, therefore, the distinction may lack substance.

The same charge can be made in terms of the sense of discrimination the law produces. If a state disability insurance plan declines to fund pregnancy leaves, or if Medicaid programs decline to fund abortions, one is strongly led to suspect that the law was motivated by prejudice against women or against abortions. Likewise, a released-time program facilitating religious education—or for that matter a law permitting education requirements to be met entirely in private (including religious) schools—quite likely is motivated by a desire to aid religion.

Nonetheless, the conceptual distinction between state action and state inaction makes basic sense—although not of a nature which ultimately justifies the decision in *Maker*. The justifications for the doctrine are essentially two-fold. First, as a pragmatic, evidentiary matter, it is frequently difficult to prove invidious motivation in cases of state inaction because there usually exist many alternative explanations for the inaction. Second, under the "state action" notion that the Constitution limits only governmental and not private action, the government constitutionally should not be compelled either to limit or to enable private action of certain kinds.

The argument that motivation is more difficult to determine in cases in which the state does nothing seems generally persuasive, although of course it does not dispose of cases where the motivation is admitted or otherwise known. If a city were to refuse to rezone land to accommodate a high-density housing development which would include a large minority population, it would be difficult to render a conclusion of invidious motivation because there would be many alternative explanations for the failure to act. Preservation of a suburban lifestyle, fear of enhanced traffic problems and school costs, and the need for enlarged sewage disposal facilities all could justify the failure to rezone. Consequently, absent an admission of invidious intent, such intent can seldom be responsibly inferred by the Court. Similarly, the failure to fund an entire Medicaid program seldom can be presumed to result from the motivational fear that the program might be required to fund abortions, which the state lawmakers might oppose on moral grounds.

197. The Court indicates that a variety of information may, however, serve to indicate that these alternative explanations are unconvincing. See note 23 *supra*.

1014
If a government body declines to fund abortions, pregnancy leaves, or swimming pools, it frequently has available the excuse that these benefits cost money and that financial motives controlled the decision. This excuse may be suspect—but it is seldom demonstrably specious where the funding denial relates to services and not to groups of people. By contrast, the rationale that the government cannot afford a given service is unavailable if Medicaid, for example, is denied to specific groups like blacks or women who had previously obtained abortions. The only reason for eliminating funding to these groups would be that such groups are deemed less worthy of having their needs met than other groups in the society: in a word, prejudice.

Additional cases can be conceived where the Court could not legitimately conclude that the lawmakers were properly motivated simply because they offered funding concerns as an excuse for denying certain services. Had the City of Jackson operated swimming pools for years at a profit, its decision to save money immediately after an integration order might well have been totally unconvincing. Likewise, where it can be shown that childbirth costs exceed abortion costs (quite apart from costs of welfare support for the child after birth), a court could legitimately conclude that financial savings did not underlie the decision to refuse funding abortions.

Where such a conclusion is reached—or where the lawmaker admits prejudice against integration or abortions—the distinction between action and inaction still may be relevant for a different reason. Generally, the Constitution does not prevent the government from tolerating activity it may not further or from failing to propagate activity it may not prohibit.188 As the school integration cases abundantly indicate, the government is generally under no constitutional obligation to foster integration except as a remedy for past de jure discrimination.189 A suburban school district that has never engaged in de jure discrimination as the Court defines it and which has forthrightly declined to enter into a bussing contract with an inner-city school on grounds that it simply did not want to integrate would apparently not violate the Constitution as the Court presently construes it, simply because integration is not an affirmative duty of the state.

188. Cf. Fiss, supra note 40, at 168-70 (arguing that the difficulty of fashioning an effective remedy often results in inaction by the courts).
Such an interpretation of the Constitution of course is not inevitable, and respected scholars have challenged it. At the same time, it is far from indefensible. The distinction seems to be based ultimately on the notion that the Constitution is designed to prevent the state from enforcing segregation while leaving individuals free within certain limits to segregate themselves privately by race if they so desire. Authorities differ over where "state action" should end and where the private enclave of associational privacy should begin, but most would agree that the line exists somewhere. If the line does exist, it then would be anomalous to argue that the Constitution requires the state to eliminate private discrimination within the area of associational privacy by affirmative legislation banning discrimination.

Concerning requirements of state funding, as Professor Michelman has stated, "the negative right not to be officially subjected to unfavorable treatment by reason of poverty does not encompass the positive right to be educated at public expense" under conventional equal protection doctrine. Such a requirement effectively would eliminate whatever constitutional line exists between state action and private action in the area of invidious discrimination. If some notion of affirmative state duty either to provide services or to prevent private discrimination is to exist, this duty must grow out of some concept other than that of invidious denial of equal protection—a concept similar to that of "minimum protection" as discussed by Professor Michelman. Again, my purpose here is not to pinpoint the location of the line between state action and private action—the private area of association which is immune from state action may be as small as one's living room or as large as one's school district—but rather to argue that the line does exist, and probably should.

It also seems relevant to observe that the boundaries of state action the Constitution condemns, and the private action it tolerates, may vary from one area of the Constitution to another. Where a state-owned building leased space to a restaurant that engaged in racial discrimination, the Court held that state action was involved in the relationship and that, by inference, the state wrongly furthered the private action by becoming financially in-

203. Id. at 35-39.
In effect, the state acted affirmatively, and wrongly, in aiding racial discrimination by a private party. It is doubtful that a similar result would be reached, however, if the state-owned building leased its premises to the YMCA, which conducted religious services in its space. Although the state is clearly prohibited under the establishment clause from actively furthering religious belief, the Court probably would hold that the state can more closely assist or relate to religious groups than to racially discriminatory groups without engaging in constitutionally impermissible state action.

No one, to my knowledge, has ever suggested that the state action doctrine is generally capable of uniform—or even very coherent—policy-oriented doctrinal elaboration. Even so, few people would argue that the doctrine need not exist. The doctrine seems to go far toward explaining the concerns underlying the abortion funding decision as well as some of the other cases alluded to above. In *Maher v. Roe*, the Court takes non-funding of abortion as a zero point on the scale between discouragement and encouragement of abortion. By permitting private religious education to exist but not funding it, the state likewise achieves neutrality between encouraging and discouraging religion.

However, acknowledging the general utility of a distinction between state action and state inaction does not salvage the Court’s decision in *Maher v. Roe*. The Court’s assumption that zero funding equates with state inaction is seriously questionable. The state had acted by funding nearly all the medical needs an indigent person might incur, but it excepted abortion from this list.

There are problems not only in *Maher* but generally with this conceptually neat conclusion that normalcy, neutrality, or equal treatment always equates with zero funding. There are many areas where the state provides benefits equally to nearly all citizens for nearly all services and where the denial of funding would represent hostility rather than neutrality. For example, in the area of religion, it is doubtful that the Court would (or should) regard as "neutral" a policy whereby the state provides police and fire protection to all property owners except churches. Likewise, although the state has no constitutional obligation to enhance the education or the scholarship of racial minority group members, no one would contend that the state can refuse scholarships avail-

able to the rest of the population to black college students. In ef-
fect, one is brought back to all the problems of the old right-
privilege distinction. The state has no obligation to furnish jobs;
they are a privilege, not a right. However, this does not mean
that someone can be denied a job as a policeman for invidious
reasons, such as those relating to race, speech, or political associ-

The essential problem is that the distinction between inviduous
state action and permissible state inaction demands some notion
of a status quo. It is permissible for the state not to afford a black
person a job or an integrated education, assuming that the state
has never either afforded jobs to most other people in the popu-
lation or intruded into the business of moving students across
school district lines. Once the state starts providing these oppor-
tunities to the general public, and the black person is suddenly
excluded from the benefits, a constitutional problem surely re-

Similarly, in Griffin v. County School Board, the Court held
that the county could not close its public school system in order
to avoid integration and said that the closing instead constituted a
delegation of the essentially governmental function to the private
schools. However, public funding of the private segregated
schools was springing up, and more than any other this fact ex-

The problem in Maher v. Roe, therefore, boils down to this: The
status quo in Medicaid is not zero funding, but funding nearly all
medical costs, including childbirth, incurred by poor people.

205. See generally Van Alstyne, The Demise of the Right-Privilege Distinction in
206. Cf. Wieman v. Updegraff, 344 U.S. 183, 192 (1952) ("We need not pause to
consider whether an abstract right to public employment exists. It is sufficient to
say that constitutional protection does extend to the public servant whose exclusion
pursuant to a statute is patently arbitrary or discriminatory.").
There clearly was a departure from the status quo—and consequently an affirmative burdening—of poor people wanting abortions. The only remaining question is whether this burdening was invidious. Given the preferred position the Court has given the abortion right in *Roe v. Wade* and its progeny,\(^\text{209}\) it seems difficult to understand why any such burdening is not automatically suspect of being invidious. One major caveat is that the Supreme Court has never satisfactorily explained (for reasons too involved to detail here) why there should be a constitutional right to an abortion in the first place. It is not at all clear that there should be such a right.\(^\text{210}\) However, given that such a right exists and that the state can neither require more stringent health safeguards for abortion patients than for other patients\(^\text{211}\) nor require spousal or in most cases parental consent to abortions,\(^\text{212}\) the excision for nonfiscal reasons of abortion funding from the otherwise nearly plenary Medicaid program appears to be constitutionally fallible. A moral judgment of the state wrongfully displaces the moral judgment of the woman and the doctor who jointly opt for abortion.\(^\text{213}\)

Various other constitutional areas exist where a distinction is relevant between decisions not to provide services and decisions to “penalize” a class of persons or rights. Suppose a municipal theater refuses to permit a play to be presented on the ground that it is obscene, or a public library decides not to acquire a given book for the same reason. Is a decision that would be unconstitutional as censorship if the state actively were to prohibit possession of such a book or viewing of such a play nonetheless permissible because the state is merely refusing to fund or to supply the book or the play, which it need not do in the first place? In *Southeastern Promotions, Ltd. v. Conrad*,\(^\text{214}\) the Court responded that the denial of use of a municipal theater to a theatrical company on the ground that its play was obscene indeed violated the first amendment. The Court gave no weight to the


\(^{214}\) 420 U.S. 546 (1975).
possible argument that the state was not suppressing speech but was merely failing to aid it, holding instead that the theater's denial constituted a penalty based on the content of the speech.

The Court's conclusion in Conrad seems justifiable, though it might be dubious on the facts of most other cases because the censorial motivation would be difficult to establish. Municipal theaters are a scarce resource, more analogous to Lincoln Center than to the public sidewalk, and those who direct the theaters have wide discretion to reject as well as to accept plays to be produced. Similar judgments, for example, also are made by the boards of public libraries: Because not all books can be afforded, many must be rejected. In general, both the theater and the library may legitimately rely on rather vague, discretionary criteria for their decisions: for example, literary worth and popular demand.

However, in Conrad the city fathers admitted that their rejection of Hair was not based on its lack of literary worth (which could have covered a multitude of sins, including something such as "tasteless sexuality"), but instead designated the play "obscene." The Court apparently viewed the constitutional problem of refusing for such reasons to sponsor a play to be no less substantial than the problem of censoring a privately produced play for similar reasons; any distinction between state action and state inaction did not concern the Court, and it should not have. The state had acted by excluding the play from the generally available theater and had further declined to rely on justifications arguably within its proper discretion, including the idea that the play was unfit for juveniles and that the theater should be maintained for general audiences. Rather, the city made the judgment that the play was not fit for the adult public to see, and this is the same kind of constitutionally prohibited motivation the state has when it censors the private purchase or sale of books, films, or plays.215

All the above does not mean that library and theater boards do not make permissible moral choices. Discretionary notions of literary worth at least mask, and perhaps necessarily include, some judgment about the way sexuality and other human relationships are portrayed, or the way political activities are advocated. Clearly, a city has discretion to shield juveniles and unconsenting adults from certain material that is judged acceptable only for

---

215. Apparently for similar reasons, the Court held that a city could not prevent alleged communists from holding meetings on public streets and in public parks. Hague v. CIO, 307 U.S. 496 (1939).
mature, consenting adult audiences.216 Had the city in Conrad not confessed to censorial motivation, its action probably would have been unchallengeable. The decision as it emerged seems correct and fundamentally at odds with Maher's conclusion that even an invidious motivation is permissible if the state merely singles out a given production or activity for denial of state funding or state support.

In many ways the abortion funding case also raises issues similar to those presented in Palmer v. Thompson,217 the swimming pool case. Professor Brest views the city's decision in the latter case as based on an admitted desire to avoid integration and of merely conjectural justification in terms of avoiding violence or economic loss. Hence, Professor Brest believes the decision incorrect and would permit closing the pools only if violence and serious loss had actually occurred and could not have been prevented in any other practical way.218

However, the Court's position can be justified in a way that the Court did not use. Even had the motivation of the city council consisted solely of the desire not to encourage association between blacks and whites, and not of a fear of violence or of economic loss, this fact alone would not have required reversal of the case. The Court could have found lack of state action where the city simply failed to operate the pools.219 It seems clear that the city would not have been required to create a swimming program for the purpose of fostering racially integrated social contacts among its citizens. It can be argued persuasively that there should be no greater requirement to operate swimming pools for this purpose simply because pools had been operated in the past on a segregated basis. If one were to argue contrarily that the city was departing from a status quo for invidious racial reasons, the departure presumably would consist not in the fact that the city was continuing to fund segregated programs for whites while dis-

218. An Approach, supra note 2, at 131-33.
219. In Washington v. Davis, 426 U.S. 229, 243 (1976), the Court states of Palmer that "the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations." This language can support the interpretation that even if the council confessed its dislike of integration, the decision not to fund recreational facilities would be a valid purpose justifying the ordinance.
continuing programs in which blacks could also participate, but rather as deriving from the historical tradition of operating swimming pools. Yet, if the end point of the law is nondiscriminatory, it seems rigid and arbitrary to say that any movement away from a past system is unconstitutional.

Admittedly, the Court has vacillated on this point. The Court has justified property tax exemptions for religious organizations not only on the ground that such exemptions are available to nonprofit groups generally but also on the ground that the historical status quo has been to exempt religious groups from taxation. By contrast, the Court has condemned attempts to grant tax exemptions as well as tuition grants to those wanting to send their children to private (including religious) schools despite the fact that the state funds secular education. Likewise, the Court apparently considers it permissible to grant educational funds to most colleges and universities while excepting seminaries. The grounds for these latter decisions can be best explained by the view that the historical status quo has been to withhold tuition benefits or other aid for such schools. Despite the formal equality of the result, the move away from the historical status quo would serve primarily to benefit religion. It seems perfectly even-handed to give each parent a tax exemption reflecting money that could be spent on either public education, private nonsectarian education, or private religious education. That the Court has condemned such an approach, unlike the rendition of fire and police benefits or tax exemption to churches along with other nonprofit organizations, suggests that the Court views the movement away from the historical status quo as an affirmative movement toward the benefit of religion.

*Maher v. Roe* can also be viewed as a case involving a historical status quo, namely, the non-funding of abortions. It is at least possible that the Court would have been less friendly to this position had the law originally funded all elective surgery and the legislators then had amended the law to eliminate abortion funding. However, this hypothetical approach seems questionable and at odds with other Supreme Court cases, including *Palmer v. Thompson*. Such an approach freezes society into a status quo which may itself be deceptive because society itself is changing. For example, individuals are now far less able to afford quality private education than they were previously. In the abortion context, it is doubtful that the Court would or should say that one

state may not discontinue all its Medicaid programs to avoid funding abortions while another state may legitimately decline to establish such a program for the same reason. If a municipal theater were required to host musicals which the town fathers deemed offensive, such as Hair, it does not follow that the city should be required to continue operating the theater at all. Establishing a new theater should not be required where a city previously had none even if the only motivation for not having a theater is the problem of censorship.

A contrary approach would have at least three drawbacks. First, it would establish an essentially arbitrary difference between communities that have established a given program or "status quo" and those that have not. Second, it would freeze the community that has established the status quo into a decision to advance integration or the arts that could not be reversed despite the fact that the initial decision to do so was discretionary. Third, it would be misleading because in any event motivation can frequently be disguised to avoid the Court's objections. In terms of this third problem, a city wishing to close its swimming pools or municipal theater, or a state wishing to discontinue its Medicaid program, could in most cases cite fiscal reasons as a way of justifying the decision as nondiscriminatory. Perhaps doing so serves some purpose in itself; at least such a disguised decision reduces from certainty to suspicion the degree of stigma that a decision motivated by prejudice against blacks, abortion patients, or "offensive" theater pieces would otherwise convey. However, such benefits seem inadequate to justify freezing the historical status quo for indefinite periods.

One final context for the distinction between state action and inaction, and for the relevance of motivation, is Village of Arlington Heights v. Metropolitan Housing Development Corp. In this case, the Court held that the plaintiff had failed to prove a discriminatory racial intent when the city refused to rezone from single-family housing to accommodate multi-family development with a significantly higher population of minority racial groups. The Court further observed that a showing of discriminatory intent would render the city's inaction unconstitutional, although even then the city could still prevail by

establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.\textsuperscript{224}

Here again the Court appears to treat the role of discriminatory intent differently than in the abortion funding case. In effect, it states that if a purpose of avoiding integration were shown to have controlled the decision in the zoning context, the result would be unconstitutional, whereas a desire not to encourage abortion is not unconstitutional. In effect, failure to rezone is not a passive, discretionary act, whereas failure to fund abortion or swimming pools is passive and discretionary. The Court does not explain this distinction. Perhaps it lies in the fact that regulatory laws, like zoning, are essentially prohibitory of private activity. In addition, they affirmatively segregate and do not merely fail to encourage integration if the requisite intent is shown. The old, unchanged zoning law thus always constitutes state action. Yet it is also relevant that the Court takes the position that where a board fails to change a zoning law from low to high density when a low-income housing project is anticipated, invidious intent apparently will rarely be demonstrable.\textsuperscript{225} In essence, the Court could effectively state that the town is under a greater duty to avoid applying an existing, racially neutral law to achieve segregation than it is to operate swimming pools to achieve integration. Where there is no motive to retain the racially neutral law except the avoidance of integration, its retention would presumably be unconstitutional. Had the administrators admitted a racially oriented motive for failing to rezone in \textit{Arlington}, the decision would have been remanded for further support on non-racial grounds. But arguably in \textit{Palmer}, and certainly in \textit{Maher}, the admission of a policy oriented respectively to race or abortion would not have invalidated the decision. With regard to \textit{Maher}, at least, this difference seems highly dubious.

\textbf{A BRIEF COMMENT ON OTHER CRITICS' VIEWS OF LEGISLATIVE MOTIVATION IN CONSTITUTIONAL LAW}

Having stated and illustrated my own views of when and why I think legislative motivation should be a relevant constitutional concern, I will conclude this article by contrasting my position with those of three of the authors who have previously written on the subject: Professors Ely, Brest, and Eisenberg. In general, I

\textsuperscript{224} \textit{Id.} at 270 n.21.
\textsuperscript{225} \textit{Id.} at 287 & n.16.
think that each of these authors' articles is primarily concerned with the situation in which a court is asked to say to a legislature or administrative body, "You have enacted this facially valid law with the wrong purpose in mind. We know this from your own admission or from circumstantial evidence surrounding the creation of this particular law. Hence we will hold the law unconstitutional."

By contrast, my concerns with motivation are more general and go to the situation where a court is asked to say, "You have enacted a law which reasonably appears to us to have been motivated by prejudice. We cannot demonstrate with certainty that this is so. However, because of the high risk of prejudice in laws that make classifications like this, we will hold the law unconstitutional because you have not adequately proven that the law is necessary and that your motives were therefore pure."

Consequently, I differ from the authors discussed below not so much because I think their views of motivation are wrong, but because I, more than they, am concerned with extending the relevance of motivation in terms of defining the judicial role vis-à-vis suspect classifications and fundamental rights.

**Ely's Theory of Motivation**

Professor Ely states, as I also do, that purpose and motivation both refer to the goals or objectives that legislation is designed to accomplish. However, he distinguishes the usage of the terms in a way that seems unnecessarily complicated and ultimately unhelpful.

Ely states that certain laws imposing a burden on an individual or class—for example, a law requiring certain truck operators to post security or carry liability insurance but exempting others—create "disadvantageous distinctions" which automatically call for a rational justification in order to be held constitutional. However, two other kinds of laws do not normally require rational justifications for the burdens they create. First, some laws or administrative actions, such as the selection of jurors or the drawing of municipal boundaries, consist of permissible "random choices." Therefore, the inclusion of one person and

---

228. Ely, supra note 1, at 1223-30.
the exclusion of another need not be justified by any legitimately defensible difference between the two individuals but may instead be justified by the randomness of the selection.229 Second, some laws or administrative actions consist of "discretionary choices," such as the determination that a school dress code should prohibit the wearing of long hair by boys or short skirts by girls. These laws or actions also do not require a legitimately defensible difference in logical terms between the two styles, but may instead be justified by reference to the discretion of school administrators to inculcate good taste, or at least conformity, in students.230

The role of "motivation" in Professor Ely's scheme is to require a legitimately defensible difference in cases of random or discretionary choice where no such defense would normally be required.231 If it can be demonstrated that a normally random choice such as the drawing of a municipal boundary line in fact was not random, but was motivated by a desire to include within the city people of a given ethnic background or a given political affiliation while excluding others, then the general justification of random selection is eliminated. The line-drawing must instead be justified by showing that the demonstrated motivation in fact serves some legitimately defensible government goal such as the affirmation of traditional neighborhood allegiances.232 The disproportionate impact of a law on some given group merely calls for a demonstration that random choice was indeed followed; it does not automatically void the law.233

229. Id., at 1230-35.
230. Id., at 1235-49.
231. Id., at 1263-66.
232. Brest's reading of Ely differs from mine with respect to the consequences Ely would attach to showings of unconstitutional motivation. Brest assumes that in random choice situations, Ely would not consider racially discriminatory decisions to be "suspect"—even if it could be demonstrated that blacks systematically were being excluded from jury panels—but would only require some "rational" or "legitimate" defense for such a rule. An Approach, supra note 2, at 135. Ely does not seem to reach this conclusion. Rather, he seems to conclude that the criterion of decision must be defended in its own terms so that a racially discriminatory decision such as the exclusion of blacks from juries could be upheld only if some good justification existed for the practice—which, he states, there practically never would be. The reason, he states elsewhere, that "suspect" classifications are not automatically created seems to be that some nonrandom choices would not be suspect even if they were explicitly stated in the law—for example, the exclusion of deaf people (not blacks) from juries. His use of the term "legitimate" justification includes both "rational" and "compelling" justifications, each of which may be called upon depending on the nature of the deprivation or discrimination involved. Thus, political redistricting which can be shown not to be random but to have been based on the political makeup of the community may still be justifiable in terms of some legitimate, perhaps compelling, state interest. Ely, supra note 1, at 1271-72.
233. Ely, supra note 1, at 1254-63.
Similarly, in discretionary choice situations, if it can be demonstrated that the lawmaker was not motivated merely by a desire to inculcate good taste in enacting a dress code but instead desired to exclude from school or to burden children of a given religious or ethnic background—such as poor children who could not afford certain clothing like overcoats, or children from a religious or ethnic tradition prescribing long hair for boys—then the law must again be defended in terms of “a rational (at least) connection with some permissible governmental goal.”

Professor Ely states that the degree of justification thus required by a showing of improper motivation varies with the context. In random choice situations, the defense of the law's motivation must be in terms of this motivation. For example, a nonrandom attempt to exclude minority groups from juries would be constitutionally suspect and would require justification in terms of a compelling state interest. An attempt to exclude deaf persons from juries would presumably not be suspect and would require only a rational connection with a valid state interest. In discretionary choice situations, the same process of justification normally applies, with the demonstrated motivation requiring justification as legitimately defensible. However, even if a normally discretionary dress code requirement (for example, all students must wear overcoats to school in the winter) can be shown to have been motivated by an unconstitutional goal (for example, the exclusion of poor black children from school), Professor Ely would nonetheless permit the requirement to be sustained if it could be shown that the requirement was necessary not to some discretionary goal like “good taste” but to a relatively precise goal such as the protection of children's health.

I have difficulty with Professor Ely's analysis, not so much because it leads to wrong results in most cases but because it seems unnecessarily cumbersome and complicated. First, it seems artificial in terms of both logic and common usage to limit proof of “motivation” to a demonstration that a choice was neither random nor properly discretionary. In the first place, it is difficult to speak of “proving” that a choice was motivated by nonrandom or non-discretionary goals, which proof then triggers a requirement that the choice be justified by reference to a valid or compelling state

---

234. *Id.*, at 1207, 1267-69 (parenthetical original).
235. *Id.*, at 1271 n.190.
236. *Id.*, at 1272-75.
purpose. In the absence of a confession by the official involved, motivation normally must be proven by the very lack of any valid state interest the law serves; indeed, Ely himself recognizes that “alternative explanations [of legislative or administrative goals] will often render impossible a responsible inference of illicit motivation.” If no blacks are chosen to serve on a jury panel, no demonstration of illicit “motivation,” as that term is commonly used, can be made except by showing that this result was neither fortuitous—that is, the result of random choice—nor necessary to some valid state interest. In other words, the law is enacted with improper motivation if its impact is suspect and it is neither random nor logically justified. It seems artificial at best to divide this inquiry into two parts as Ely does when he states that a showing that the decision was not random constitutes a showing of “motivation” which then requires a logical justification. Absent such justification, Ely would presumably state that the law has a bad “purpose.” Yet he states earlier, as I would also do, that motivation and purpose mean the same thing. To distinguish them as he does—by using motivation to mean proof that a decision was not random or discretionary, followed by a search for logical justification to test “purpose”—again seems contradictory and artificial.

In short, there does not appear to be a difference in the way motivation is used or analyzed between Ely’s “disadvantageous distinction” model and situations of random or discretionary choice. I think that one can properly assert, contrary to Professor Ely’s position and more simply, that all burdens placed by law on an individual call for some rational justification. In some instances, random selection or discretionary choice constitute proper justifications for a law, indicating a proper motivation or purpose. However, if the official admits or circumstantial evidence indicates that the choice was not random or that he did not pursue proper discretionary goals, these justifications are of course unavailable. In these cases, some other, “rational,” justification for the law must be found, or it will be found to be wrongfully motivated and unconstitutional.

237. Id., at 1268.
238. Brest also takes the position, contrary to Ely, that judicial usage generally does not describe as an inquiry into “motivation” either the determination whether administrators were acting according to a rule (as opposed to a random or to an ad hoc choice) or the determination of the rule’s content. An Approach, supra note 2, at 111-15.
239. Moreover, as discussed more fully below, even if some other, rational justification does exist, the Court may remand for a new decision if the administrator admits initially having considered improper factors. See text accompanying notes 250-56 infra.
few exceptions, the only laws that are likely to be found arbitrary are those the impact of which creates a suspicion of invidious purpose or motivation in the first place, so that arbitrary laws and laws with an invidious purpose or motivation are essentially fungible. I do not think that Ely's more complicated theory adds anything of significance to this rather simple explanation.

A second problem with Ely's theory involves his conclusion that an admission by a lawmaker that a normally discretionary choice—for example, the overcoat hypothetical—in fact was made with a desire to harm a racial minority group need not result in the invalidation of a law which serves some other valid purpose—for example, student health. I would have to agree with Professors Brest and Eisenberg, who criticize Professor Ely's position on the grounds that even though the same decision could subsequently be made with a laundered history, the initial decision was contaminated by an improper consideration.

Subsequent to the Brest article, the Supreme Court in dictum seems to have accepted the Brest position. In the absence of a wrongful consideration, the rule might not have been adopted despite the presence of alternative justifications. At the least, the public deserves the assurance that an instance of state action was made without demonstrable consideration of impermissible factors. Where such a factor has been admitted, a court could legitimately either void the law for reconsideration by the lawmaker or go further and require the lawmaker to demonstrate before reenacting the law that student health was adversely affected. The court might even prevent reenactment of any similar law for a given period of time as a "cooling off" period. Of course, there may also be some laws that serve such essential interests that a court would not feel justified in voiding them even where improper purposes were confessed by the lawmaker. But this conclusion seems properly a matter of judicial discretion rather than constitutional necessity. In this sense, constitutional adjudication closely parallels judicial review of a lower court or administrative agency decision under a statute where the decision rested in part

240. See Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion) (holding arbitrary on grounds of substantive due process a zoning requirement recognizing as a "family" only a few categories of related individuals).


on evidence that the court or agency should not have considered relevant. Unless the same result is compelled by the other evidence, so that the wrongfully considered factor constituted only harmless error, the Court will remand to the court or agency for consideration based only on permissible factors. The decisionmaker may reach the same conclusion a second time, but the public and the parties are at least entitled to a decision uninfluenced by such improper concerns.

Brest's Theory of Motivation

Professor Brest has written on motivation twice: first and more explicitly in connection with Palmer v. Thompson, and second in his Supreme Court Foreword on the "antidiscrimination principle" in connection with Washington v. Davis. Additionally, correspondence between Brest and myself in connection with the present article has helped clarify my own understanding of his position. This correspondence indicates that it would probably be misleading to describe and criticize Brest's views on motivation as a rigorous "theory" which defines and delimits motivation's relevance; rather, he has dealt with the particular problems of motivation raised by the two cases just mentioned without necessarily attempting to limit the relevance of motivation to these areas.

For purposes of Palmer v. Thompson, Brest fences off the problem of motivation at stake by stating that "[i]n general, the courts have reserved the characterization 'motivation' for the . . . inquiry to determine whether impermissible criteria or objectives played a role in the decisionmaking process when the same result might have been achieved by the consideration of legitimate criteria or justified in terms of legitimate objectives." In other words, courts inquire into motivation in order to determine which of several possible goals or objectives were considered by lawmakers in adopting a rule, making an ad hoc decision, or deciding which of several rules to apply.

By contrast, Brest takes the position in his Palmer article that a finding of illicit motivation is not necessary for the requirement that laws which disadvantage minority groups, for example, must meet an extraordinary burden of justification: The classification itself produces this demand. Even so, he does note that suspicion

244. Brest, note 28 supra.
246. An Approach, supra note 2, at 115.
of an actual illicit motivation does "play an important role in the Court's decision to hold certain criteria 'suspect.'"247 Brest also rejects a definition of motivation that would establish whether a decisionmaker is in fact operating in a systematic or rule-determined fashion instead of randomly or on an ad hoc basis. He thus disagrees with Ely that analysis of "motivation" determines whether a "rule" is being followed and what its content is in the sense of trying, for example, to exclude minority racial groups from juries, colleges, or municipal boundaries. He simply explains that courts do not generally use the term "motivation" to describe this analysis.248

Again, I do not understand Brest to advance this description of motivation as a rigorous definition with functional implications, but rather as a means of stating the particular motivational problem involved in Palmer. Otherwise, I think (and Brest would probably agree) that the definition would be too limiting. There is no functional reason for saying that motivation is not involved in determining whether an "operative rule" is justified or what operative rule if any was being used in a given situation while saying that motivation is involved only in deciding why a decisionmaker made a given decision.

An example illustrates the reasons for this last assertion. Assume that a school requires all students to take courses in their own ethnic histories, in segregated classes. Assume likewise that no course is offered to Hispanic students, who instead are sent to study hall. Under Brest's view, motivation would not be a primary concern in determining whether an explicit rule segregating students for their classes is constitutional because any racial classification is already suspect. His limited description would also indicate that motivation is not at issue if the racial classification were not explicit, but students were instead assigned by name to separate classes, with racial segregation as the result. Rather, the existence and content of the operative rule would be deduced from the impact of the assignments and then analyzed as though the rule had been explicitly stated.

In essence, under Professor Brest's limited description of motivation as set forth above, motivation would be solely relevant to the question whether the refusal to offer a course to Hispanic stu-

247. *Id.*, at 108-09.
248. *Id.*, at 115.
dents was justified. The school administrators may have determined that no texts were available, that no qualified teachers were available, that only two Hispanic students attended the school so that a separate course was not warranted, that there was no need for Hispanic students to be treated as a separate ethnic group, or that Hispanic students were unpleasant and should be discriminated against.

In fact—contrary to this limited description of motivation—a court's analysis in the third situation would be the same as in the first two: Is the burdensome distinction—no courses for Hispanic students—justified by some legitimate state interest? If the court were to decide that any of the administrators' first three explanations were true and valid, it would uphold the law. It would not be possible, absent a confession by the administrator, to conclude that the fourth and fifth explanations were the true purpose of the decision or even contributed to it. In other words, the court would ask here, as it would of the rule segregating other students for purposes of the ethnic history course, whether some valid reason existed to support the decision. Only if the officials admit that they as a body also gave weight to the fourth and fifth considerations could a court properly conclude that the decisionmaker considered an improper factor.

It is my understanding that Professor Brest agrees with this conclusion and that he does not argue that his limited description of motivation should have functional implications. Instead, it should serve to describe and fence off the particular kind of motivational inquiry involved in *Palmer*. As such, I have no quarrel with the description, so long as semantic confusion is avoided. Indeed, in his subsequent *Supreme Court Foreword* on *Washington v. Davis*, Brest makes clear that invidious motivation is central to his view of the “antidiscrimination principle,” and is critical (at least) to problems of race, extending well beyond the kind of motivational problem involved in *Palmer*.

Professor Brest concludes that whenever the decisionmaker has taken into account, or given weight to, goals that are constitutionally impermissible, the decision should be voided. Determining whether the goal actually is impermissible involves the same kind of evaluation that would occur vis-à-vis an explicit racial classification: “It would be inappropriate to hold that the motivation [to segregate by race] as such invalidated the rule, for even if the rule explicitly classified by race it would not automatically fail, but would only trigger the demand for an extraordinary justi-

which may be proffered here as well.

However, I understand Professor Brest to say that once it is determined that a motivation actually was impermissible—for example, if the official involved admits that he or she acted for conscious reasons of animus—the decision should automatically be voided. "If the objective is illicit the decision should simply be invalidated." Elsewhere he states that "[i]f the decisionmaker gave weight to an illicit objective, the court should presume that his consideration of the objective determined the outcome of the decision and should invalidate the decision in the absence of clear proof to the contrary." Professor Brest acknowledges that a plaintiff will frequently be unable to prove that an illicit objective was considered at all unless the decisionmaker admits it or unless no valid explanation exists for the action, yet he asserts that the law should be overturned in those perhaps rare cases where an illegal objective was considered even if it was not demonstrably held determinative. The decisionmaker thereafter is generally entitled to reach the same decision again "in identical form, provided only that it is made for licit reasons." In general, I agree with Professor Brest's approach to courts' remedies. To the extent I disagree, it is because courts might in some cases uphold a decision, despite an admittedly improper motivation, on the ground that any other decision clearly would be impossible in light of the compelling nature of the other justifications. For example, a court probably should not invalidate an army regulation excluding pregnant women from combat, even if the official responsible for promulgating the regulation admits that he thought women should be kept barefoot, pregnant, and out of the military altogether and also admits that his regulation was one of the few ways he could legally implement his views. Such examples are as rare, however, and perhaps as far-fetched, as the one just offered. Moreover, Professor Brest may well provide for such cases by positing that it can sometimes be demonstrated that an admitted, illicit motivation was not in fact determinative of the outcome of the decision. The Court in the

250. An Approach, supra note 2, at 118.
251. Id., at 131.
252. Id., at 117.
253. Id., at 115.
Arlington Heights case has indicated that it shares this view.\footnote{254}{Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 n.21 (1977) (dictum).}

With respect to remedies it thus seems, as stated above, that constitutional law and administrative law are very similar: An administrative decision will be upheld unless it is unjustifiable or the record clearly establishes that improper factors were considered by the administrative agency, even if the decision is independently justifiable but not compelled.\footnote{255}{See generally K. DAVIS, ADMINISTRATIVE LAW, CASES-TEXT-PROBLEMS 75-98 (1977); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 646-87 (1976).} Moreover, proof that such factors were deemed relevant in administrative cases and in constitutional cases involving decisions by administrative officials is usually required to be stronger than that afforded by legislative history.\footnote{256}{Brest concurs that legislative history generally does not serve as an adequate basis for holding legislation unconstitutional. An Approach, supra note 2, at 117.}

Consequently, I would state that any statute or administrative decision constituting state "action" will be upheld either unless it serves no valid goals adequate to rebut a presumption, if any, of improper purpose or motivation resulting from its use of suspect classifications or its impact on specially protected interests, or unless the decisionmaker admits consideration of an improper goal, in which case a court should have discretion either to uphold, reverse, or remand the decision depending on the circumstances. "Motivation" and "purpose" are interchangeable terms, except that the Court uses "motivation" when it is asked to rely on evidence of the decisionmaker's own admission that he or she considered an improper goal or when it is asked to speculate about the consideration of some improper goal despite the fact that the law also serves proper goals.

With regard to legislative decisions, the courts rarely will find evidence of legislators' admissions alone sufficiently persuasive to hold a statute invalid. Professor Brest himself agrees that statements by individual legislators or sponsors, even if uncontradicted, merely "lend some support to an inference of illicit motivation . . . , though alone they would not provide a sufficient basis for invalidation."\footnote{257}{Id. See also text accompanying notes 47-49 supra.} Otherwise, motivation and purpose mean the same thing and are determined by reference to a statute's effects in light of the suspicions or presumptions about improper motivation or purpose that the Court has established with regard to distinctions based on race, sex, alienage, or illegitimacy,
or with regard to burdens on "fundamental rights" such as speech, press, assembly, religion, travel, or privacy.

*Eisenberg's Theory of Motivation*

Like Professor Brest, but perhaps intending a more rigorous definition, Professor Eisenberg would state that inquiries into motivation are irrelevant where suspect classifications exist because burdens based on such classifications are unconstitutional whether the legislature intended to harm or to help the minority group affected. An example would be the requirement of segregated schooling.258 In the first amendment area, statutes that impose burdens depending on the content of speech are unconstitutional without reference to motivation, for the same reason.259 Nor, in Professor Eisenberg's view, is inquiry into motive necessitated where a law fails to bear a rational relationship to a permissible state purpose. Arbitrary laws are unconstitutional whether or not invidiously motivated.260 In still other areas of constitutional law—for example, in those involving procedural rights to jury trial or to counsel—motivation is irrelevant and the Court simply looks to the effects or impact of the law to determine whether a constitutional safeguard has been violated.261 This determination is based on processes of definition or balancing rather than on inquiry into motivation.

Professor Eisenberg, like Professor Brest, limits the examination of motive to situations where a law purports to and does serve certain legitimate purposes and where it does not explicitly make a suspect classification, but where the legislature may have had an improper hidden purpose or motive in mind when it passed the law.262 Eisenberg criticizes Brest, not for his description of the role of motivation, but for his failure to explain the kinds of constitutional provisions to which motivation is critical and those to which it is not.263 Professor Eisenberg posits that improper motivation should serve to invalidate a law not only where the motivation involves discrimination based on race, but also where it is based on speech, religion, or association.264 He uses

259. *Id.*, at 102-03.
260. *Id.*, at 102.
261. *Id.*, at 139-46.
262. *Id.*, at 99-105, 132-46.
263. *Id.*, at 128-32.
the term "rights of equality" to demark those kinds of traits that the state may not constitutionally use as a basis for discrimination. A motive to do so renders a law unconstitutional unless the state meets the heavy burden of showing that the same result would have been compelled despite the illicit motive. An example is the situation in which a black teacher is fired because of race but would have been fired anyway because of incompetence.

By contrast, Professor Eisenberg states that motivation is irrelevant to the delineation of constitutional rights in several areas. One area has to do with motives "relating to the scope of governmental power." Motive is irrelevant not only to laws which abridge procedural rights conferred by the Constitution but also to laws which exceed other constitutional limits on governmental power, such as the tenth amendment limit on federal power vis-à-vis the states, and to rules defining obscenity or establishing time, place, and manner restrictions on speech. Rather, the Court simply looks to the impact or effect of the statute and compares this effect with the limit established by the Constitution, apparently in definitional or balancing terms. Finally, motive is irrelevant to still other areas of adjudication because no right to equality exists. For example, if it could have been shown in Railway Express Agency v. New York that the city's motive in forbidding advertising on trucks not owned by the advertiser was solely to disadvantage nonowner-operated trucks, there would have been no constitutional violation because this motive was effectively accepted by the Court as valid. In other words, there is no right of equality based on occupation or economic status of this sort. The distinction between those classifications which are barred by rights of equality and those which are not is defined not so much by the lesser rationality of certain classifications such as race or content of speech but by the historical propensity of lawmakers to discriminate prejudicially and with animus on the basis of these traits.

Because Professor Eisenberg's view of motivation is highly similar to Professor Brest's (except for Professor Eisenberg's delineation of the constitutional provisions to which motivation does and does not bear relevance), my criticisms of the two theories are largely interchangeable. To the extent that Professor Eisen-

265. Id., at 101.
266. Id., at 150-51.
267. Id., at 141-46.
268. Id., at 146-49.
270. Eisenberg, supra note 3, at 147-48.
271. Id., at 148-49.
berg purports to adopt as a rigorous definition Professor Brest's description of the problem of motivation, the problems raised earlier with regard to Professor Brest's limited description become real and not merely hypothetical. Perhaps these objections are largely semantic, dealing with the definition of motivation more than with recommended outcomes. Nonetheless, I see no reason to say that motivation is irrelevant to a determination that explicit statutory classifications which are suspect are or are not constitutionally justified by a compelling state interest. Suspect classifications—or burdens on "rights of equality"—whether under equal protection or the first amendment are simply those classifications which are suspected or presumed to be illicitly motivated as a generic matter. There is no essential or conceptual difference between these generic presumptions of illicit motivation and the more specific presumptions that might result, for example, from the way a given municipal boundary line is drawn, excluding blacks.272

I also disagree with Professor Eisenberg that motivation as a definitional matter is irrelevant to arbitrary laws. As a practical matter, only those laws the language or impact of which gives rise to a suspicion or presumption of improper motivation will generally be found to lack a rational or compelling connection to a valid state interest.273 Indeed, Professor Eisenberg states as much in defining "rights of equality." Motivation seems clearly relevant to this finding of arbitrariness. On the other hand, the ordinance in the Railway Express case was in fact essentially arbitrary, but the Court refused to hold it so because the kind of classification

273. But see Moore v. City of E. Cleveland, 431 U.S. 491 (1977) (plurality opinion) (overturning as arbitrary a zoning law with too narrow a definition of "family").

The law overturned in Morey v. Doud, 354 U.S. 457 (1957), overruled in City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976), was no exception to the general statement in text. In Morey, the Court overturned a law giving special privileges to one named company, American Express. The Court overturned this law not simply because it was arbitrary—American Express was an especially stable and reliable concern—but because laws granting special favors to particular companies are logically suspect not of animus but of unprincipled favoritism or even the graft powerful companies' well-paid lobbyists can generate. Motivation seems clearly relevant to this decision. It also comes as no surprise that Dukes, overruling Morey, involved a legal exemption granted to two individual pushcart operators in the Vieux Carre section of New Orleans—hardly the sort of beneficiaries who might have corrupted the legislative process. Had the Court referred sufficiently to motive, these two decisions could have been reviewed as compatible, not antithetical.
in question was not the sort which gave rise to a presumption that
the legislature had malfunctioned by reason of prejudice or ani-

Finally, Professor Eisenberg's view that motivation is relevant
to first amendment rights, in the sense that burdens keyed to
classifications based on speech, religion, or association are likely
to be motivated by irrational prejudice or animus, concurs with
my view.274 I think his contribution in this regard is highly useful.
However, I disagree with at least the sharpness of his distinction
between rights of equality, to which motivation is relevant, and
limits on governmental power, to which motivation is irrelevant. It
seems to me that constitutional procedural rights, which he de-
scribes as limits on governmental power, exist at least in part be-
cause of fear that the government may summarily convict people
it suspects of crimes rather than impartially seek truth in crim-
inal cases. Sixth amendment procedural requirements thus pre-
vent prejudiced judgments against criminal suspects. Similarly,
the tenth amendment has been judicially enforced against the
federal government because of the fear, right or wrong, that Con-
gress will be tempted to aggrandize its own power at the expense
of state governments. It is true to say that the limits placed on
governmental power to restrain these actions with potentially in-
vidious purposes require definition and that definition requires a
balancing of interests and a consideration of impact—but so do
Professor Eisenberg's "rights of equality." For example, the
equality right not to be discriminated against on the basis of one's
speech gives rise to a limitation on governmental power—namely,
that government cannot make penalties depend on the content of
speech unless required by a clear and present danger and unless
the speaker intended to bring this clear and present danger to
pass. This limitation on governmental power requires definition,
balancing, and consideration of impact. What is "speech" as op-
posed to action or as opposed to areas of "nonspeech" like ob-
scenity? What is a clear and present danger? Does a law limit
itself to intentionally wrongful speech? First amendment rules re-
garding libel, obscenity, and fighting words also illustrate such
limits. These rules were created to prevent wrongfully motivated
laws and require definition and balancing by reference to the
laws' impact.

In sum, I think that Professor Eisenberg is wrong to say that
motivation is irrelevant to limitations on governmental power.
Some procedural requirements do of course apply not only to

274. See Clark, Civil and Criminal Penalties and Forfeitures: A Framework for
Constitutional Analysis, 60 Minn. L. Rev. 379, 447-49 (1976).
groups which are traditionally unpopular in society, but to everyone; yet, the thrust of such requirements is nonetheless to prevent biased or incomplete decisionmaking. It is the suspicion of legislative malfunction or prejudice, in light of history, that gives rise to judicial enforcement of most constitutional limitations on governmental power. Defining these limitations intelligently requires reference to the fears of invidious purpose that give rise to them. Conversely, rights of equality which prohibit laws that serve invidious ends give rise to specific rules limiting governmental power. Hence, in my view, motivation is not irrelevant to limits on governmental power; rather, inquiry into motivation and into the definition of limits is part and parcel of the same process of constitutional adjudication.