

8-1-1978

Reflections on a Unified Theory of Motive

Theodore Eisenburg

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>



Part of the [Law Commons](#)

Recommended Citation

Theodore Eisenburg, *Reflections on a Unified Theory of Motive*, 15 SAN DIEGO L. REV. 1147 (1978).

Available at: <https://digital.sandiego.edu/sdlr/vol15/iss5/7>

This Commentators is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.

The Centrality and Limits of Motivation Analysis*

JOHN HART ELY**

It is ever the lot of elder statesmen to see their once radical suggestions outflanked on the left by succeeding generations.¹ When I seeded this briar patch,² the standard line of Court and commentator alike was that legislative motivation simply was not cognizable.³ I defied Heaven and shouted it was, girding myself for the inevitable conservative onslaught—only to find myself fairly swarmed by attackers from the left.⁴ “Ely,” in waves the younger voices came, “you are old and thus we revere you, but your sight is short, your horizons too near.” So I suppose it must be, and on the whole it seems good: Surely there is little danger of the present Court’s overreacting on the side of liberty or equality. Indeed, and it is this I mean to get to presently, the danger seems

* © 1978 by John Hart Ely.

** Professor of Law, Harvard University. A.B., Princeton University, 1960; LL.B., Yale Law School, 1963.

1. See generally F. DOSTOEVSKI, *THE POSSESSED* (A. MacAndrew ed. 1962).

2. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970).

3. *E.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 208-21 (1962).

4. *E.g.*, Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 *SUP. CT. REV.* 95. But see Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585 (1975). See also, *e.g.*, Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 *SAN DIEGO L. REV.* 953 (1978); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 *N.Y.U. L. REV.* 36 (1977); Samford, *Toward a Constitutional Definition of Racial Discrimination*, 25 *EMORY L. REV.* 509 (1976).

to run quite the other way, that by seeming to say more, the Court may end up giving us a good deal less.

Before I get there, though, I would like to devote a couple of the pages the *San Diego Law Review* has allowed me to elaborate a relationship that has begun to emerge in my own work⁵ and is developed further in Professor Simon's article,⁶ that between the doctrine of unconstitutional motivation and the doctrine of suspect classifications. My claim, and it seems to be Simon's as well, is that despite its more frequent judicial invocation and greater academic appeal, the suspect classification doctrine (and for that matter the more traditional "rational relation" test as well), when put in the proper theoretical context, will be seen as a sort of handmaiden doctrine,⁷ indirectly serving what on a proper understanding emerges as the central constitutional concern where the distribution of constitutionally gratuitous goods is in issue,⁸ namely, the existence of unconstitutional motivation. By elaborating this connection, we shall be able to make sense of certain aspects of the suspect classification doctrine that heretofore have seemed to lack it.

The doctrines work to support each other in this way. The goal the classification in issue is likely to fit most closely, obviously, is the goal the legislators actually had in mind.⁹ If that can directly be identified and is one that is unconstitutional, all well and good: The legislation is unconstitutional. But even if such a confident demonstration of motivation proves impossible, a classification that in fact was unconstitutionally motivated will nonetheless—thanks to the indirect pressure exerted by the suspect classification doctrine—find itself in serious constitutional difficulty. For an unconstitutional goal obviously cannot be invoked in a statute's defense, and that means, where the real goal was unconstitutional, that the goal that fits the classification best will not be invocable in its defense, and the classification will have to be defended in terms of others to which it relates more tenuously. Where the requirement is simply one of a "rational" relation between classification and goal, that will seldom matter (though it

5. This comment is an adaptation of part of a book in process on judicial review and representative government. See also Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CH. L. REV. 723 (1974).

6. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

7. I would welcome the suggestion of a nonsexist equivalent for this term, preferably before my book comes out.

8. See notes 24-27 and accompanying text *infra*.

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

will occasionally¹⁰): Even if the goal the classification fits best is disabled from invocation, there will likely be others whose relation to the classification is sufficient to be called rational. The "special scrutiny" that is afforded suspect classifications, however, insists that the classification fit the goal that is invoked in its defense more closely than any alternative. There is, however, only one goal the classification is likely to fit *that* closely, and that is the goal the legislators actually had in mind. If that goal cannot be invoked because it is unconstitutional, the classification will fall. Thus, functionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way (to invoke Simon's suitably sporting figure) of "flushing out" unconstitutional motivation, one that lacks the proof problems of a more direct inquiry and into the bargain permits courts—though in such circumstances it is hard to see why this should loom large—to be more politic, to invalidate something for illicit motivation without having to say so.

Furthermore, though I do not suggest the development has been other than intuitive, this dovetailing of doctrines represents more than coincidence. Considered in isolation, the combination of demands prevailing doctrine imposes on suspect classifica-

10. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), should have been decided on this basis. Given that an admission of the real goal of the distinction in issue (a desire to punish larcenists more harshly than embezzlers) would have rendered the law as applied to *Skinner* an ex post facto law (and a strongly arguable violation of the Cruel and Unusual Punishments Clause as well), the state understandably refrained from arguing that goal, which left the classification without another to which it related even rationally. Last Term's *Maher v. Roe*, 432 U.S. 464 (1977), upholding the exclusion of abortions from the class of operations for which poor people are entitled to funding, is susceptible to a similar analysis. The goal in terms of which the Court ended up upholding this legislative choice, discouraging abortions vis-à-vis births, is one that rather resoundingly had been declared unconstitutional in *Roe v. Wade*, 410 U.S. 113 (1973). That left only the goal of saving the taxpayer's money, to which discouraging abortions among poor people arguably does not relate even rationally. (The Court's outrageous compromise on this issue is the sort that becomes inevitable whenever it starts imposing on the political process values it deems important or "fundamental." See generally Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973). Thus the middle class is entitled to the abortions that prior to *Roe v. Wade* only the rich could afford—but the poor are not. Protecting those—and it turns out, only those—best able to protect themselves politically is hardly the proper function of the Supreme Court.)

Cf. *United States v. Brown*, 381 U.S. 437 (1965) (direct or "tautological" defense uninvocable due to unconstitutionality under first amendment; indirect or "empirical" defense to which government thus forced to resort held violation of bill of attainder clause).

tions—that the state (1) come up with a goal of substantial weight; and (2) show that the classification fits that goal with virtual perfection—is easy to regard as jerry-built, a patchwork without pattern. Once the suspect classification doctrine is put in proper context as a handmaiden of motivation analysis, however, this combination of demands can be understood to make good functional sense.

To take the clearest case of a classification that should count as suspect,¹¹ assume you have before you a law that classifies in racial terms to the disadvantage of a racial minority, and the state wishes to make an argument in justification of it. Naturally you suspect (*le mot just*) that the law's motivation was that most naturally suggested by its terms, namely a desire to disadvantage blacks. But you know that is not *necessarily* the case,¹² and so you listen. What would it take to allay your suspicion? To start with, a goal the classification fits as well as it fits the invidious goal you suspect was really operative. For if the goal the state comes up with turns out to fit the classification less well than the invidious one, you will ask why they did not classify in terms more germane to the goal they are now arguing, and your suspicion that the goal suggested by the face of the statute was the real one will hardly be allayed. If, however, the goal the state is arguing fits the classification as well as the invidious one you started out suspecting was really operative—note that at least in the case of a *de jure* racial classification this necessarily means there was no more direct way of reaching the goal the state is arguing—you should begin to pause. I say “begin” because another element should be required before your suspicion is allayed, and it turns out to be the other element the Court has in fact required, that the goal the state is arguing possess some degree of substantiality.

11. Surely there is no reason the analysis should be restricted to racial classifications to the exclusion of others that can be fairly regarded as suspicious. See generally Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). Neither need those *de facto* discriminations that were effected under suspicious circumstances be excluded. (Simon's article is most helpful in elaborating this latter point. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978)). As to racial classifications that favor minorities, though our terminology is somewhat different, we seem to have no substantive disagreement. “[A]ll racial classifications should be carefully examined to make sure they fall within the rather limited subset to which the more demanding standard of review is inappropriate. There are some racial classifications that do not merit ‘special scrutiny,’ but I cannot imagine one that does not merit a careful and skeptical look.” Ely, *supra* at 727 n.27.

12. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 61-62 (1962).

This latter requirement has been subjected to two sorts of criticism, each quite understandable in light of the Court's failure to connect up the notions of suspect classification and unconstitutional motivation: that it does not provide a standard (how important is important enough?)¹³ and that it bears no functional relation to the evil perceived here, which has to do, after all, with the terms of the classification and not with the importance of the good whose distribution is being limited.¹⁴ But once the connection is made, this requirement too makes sense, and in terms that begin to suggest a standard. For even a perfect fit between the classification in issue and the goal the state is arguing should not be enough to allay your initial suspicion if that goal is so unimportant you have to suspect it did not actually generate the choice and is being invoked merely as a pretext. Professor Brest poses the case of a school principal who seats the blacks on one side of the stage at the graduation ceremony and the whites on the other, and argues he did it for esthetic reasons.¹⁵ I suppose the fit is perfect (at least with *the principal's* notion of esthetics), but the goal is so trivial you know it is an afterthought. Contrast with this case one where the prison warden temporarily separates the black and white prisoners in order to quell a race riot:¹⁶ There, too, the fit is essentially perfect,¹⁷ and beyond that the goal of preserving life and limb is one we can count as compelling—which we are now in a position to define functionally, in terms of whether the claim it was the actual motivation is credible.¹⁸ Thus despite the Court's

13. *E.g.*, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 726 (1974).

14. *E.g.*, Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1251 (1974).

15. P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 489 (1975).

16. *See Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan & Stewart, JJ., concurring).

17. Essentially perfect, that is, only in the context of a pressing need for an immediate response: Permanent racial segregation would not be defensible on such a theory, even though the postulated goal of maintaining racial peace would remain the same (and therefore equally weighty). *But cf.* *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the Japanese relocation program). Simon treats *Korematsu* too charitably in my opinion. I agree that we cannot be sure we personally would not have behaved as the participants behaved. It is precisely to guard minorities against the panicked reactions of people like us that it is incumbent upon us in calmer times to seek to lock our consciences on course by condemning such decisions as often and loudly as we can.

18. Even a law that classifies by race to the disadvantage of a minority on very rare occasion might satisfy special scrutiny: A requirement that blacks, but not whites, contemplating marriage be tested for sickle-cell anemia and undergo ge-

failure to defend them and their apparent unrelatedness, the two requirements of special scrutiny, requirements of tight fit and substantial weight, turn out to be the sensible ones—once the critical connection is drawn between the doctrine of suspect classifications and that of unconstitutional motivation.

I suppose one whose scholarly work has stressed the constitutional relevance of official motivation should be pleased that the Supreme Court seems finally to have gotten the idea. The glee has to be restrained at least temporarily, though, when one recognizes that the effect of the Court's recent gyrations has been in each case to deny the constitutional claim. (Thus in *United States v. O'Brien*¹⁹ and *Palmer v. Thompson*,²⁰ the relevance of motivation was denied, and the complainant lost. In *Washington v. Davis*²¹ and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,²² the relevance of motivation was affirmed—and the complainant lost.²³) There is room for hope on that score, however: Justice White, who wrote the turnaround Court opinion in *Davis*, had dissented in *Palmer*, whose motivation holding he expressly disapproved in the later opinion. The danger I see is the somewhat different one that the Court, in its newfound enthusiasm for motivation analysis, will seek to export it to fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination²⁴ in the distribution of

netic counseling if they have it might be one. Where, however, the state seeks to prohibit interracial marriage and defend on the ground it wants to contain the spread of sickle-cell anemia—I know it sounds like I made it up, *but see* Brief for Appellee at 44, *McLaughlin v. Florida*, 379 U.S. 184 (1964)—the imposition so outweighs the harm on which the state relies that the suspicion of racially prejudiced behavior obviously cannot be allayed. (Note also that the goal the state argues boils down to confining the disease to the children of black couples). Yes, it will inevitably involve balancing, but balancing with a standard, whether what the state is arguing now really could have been the motivation.

19. 391 U.S. 367 (1968).

20. 403 U.S. 217 (1971). *But see* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *supra* note 2, at 1296 n.273.

21. 426 U.S. 229 (1976).

22. 429 U.S. 252 (1977).

23. *See also* *Wright v. Council of Emporia*, 407 U.S. 451, 482-83 (1972) (Burger, C.J., dissenting).

24. Note, however, that the discrimination need not be one directly among persons or classes of persons. *Epperson v. Arkansas*, 393 U.S. 97 (1968), for example, involved an improper discrimination among religious views, engaged in, presumably, not to disadvantage any particular class of persons but instead to promote among all people a particular viewpoint. *Griffin v. County School Bd.*, 377 U.S. 218 (1964), involved a discrimination among counties (or perhaps among public services) perpetrated to avoid desegregation, which at least arguably is not the same thing as harming a particular class of persons. Or Congress might discriminate among causes of action in limiting the jurisdiction of federal courts in order

goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right²⁵). In such cases the covert employment of a principle of selection that could not constitutionally be employed overtly is equally unconstitutional. However, *where what is denied is something to which the complainant has a substantive constitutional right*—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government²⁶—*the reasons it was denied are irrelevant.*²⁷ It may become important in court what justifications counsel for the state can *articulate* in support of its denial or non-provision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional.

to disadvantage certain constitutional rights, which might or might not be the same thing as disadvantaging an otherwise identifiable class of persons. See Ely, *supra* note 2, at 1306-08.

25. Thus, for example, there must be juries, but no one has a constitutional right to sit on one. Nor has any of us a constitutional right to have the boundaries of Tuskegee drawn to include his house: The point of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), was that that nonconstitutional right was distributed on an unconstitutional basis. On no theory of which I am aware (though Heaven knows where a fundamental values theory can take you) has anyone a substantive constitutional right to municipal swimming pools, which is what made a reference to motivation in *Palmer* critical. Nor has anyone, to mention one last example, a constitutional right to be taught Darwin (what if there is no biology course?): In *Epperson*, too, it was the principle of selection that was constitutionally offensive. See generally Ely, note 2 *supra*.

26. Some rights, such as the freedoms of speech, press, assembly and petition, are obviously both.

27. See also Ely, *supra* note 2, at 1281-84. The literature since my original article in general has not insisted on this point, which is one reason I think it is wise to do so here.

