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JUSTIFYING MOTIVE ANALYSIS IN JUDICIAL REVIEW

Gordon G. Young*

ABSTRACT

Motives concern us in ordinary life and in the law of torts and crimes, and that concern is justified by consequentialist ethics. Despite occasional judicial protestations, motive analysis pervades large parts of constitutional law. Illegitimate motives aimed at suspect classes, or “designed to strike” at any number of rights identified as fundamental, presumptively invalidate the official actions that they animate. The consequentialist arguments for the use of motive review in this class of cases are relatively simple. Such illegitimate official motives tend to cause bad distributions of tangible benefits and burdens, or cause direct cognitive or emotional harm to the targets of derision or denigration. Difficulties emerge, along with some potentially generative possibilities, in a set of cases which includes *U.S. Department of Agriculture v. Moreno*, *Cleburne v. Cleburne Living Center*, and arguably *Romer v. Evans* and *Lawrence v. Texas*. Those cases involve neither suspect classes nor fundamental rights, yet in each case, the Court invalidated political branch action on grounds of more general destructive motives. Perhaps it is this broader normative concern that undergirds motive law in general.

Can motive analysis be justified in this set of cases on consequentialist grounds? Or is the only explanation deontological—that such actions are wrong in themselves, regardless of their consequences? Doubts about consequentialist justification are legitimate. In cases involving more ordinary interests, normally consigned to rational basis review, almost any set of consequences will be accepted by courts unless an illegitimate motive is found. Thus the deep concern seems to be with some inherently morally tainting property of illicit motives, not with the consequences of such motives. Despite these appearances, this Article argues that consequentialism is the moral theory best fitting these cases. Along the way, it explores other neglected issues

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connected with motive analysis, including whether judicial motive talk is inevitably about mental states, and the extent to which government actions can be prohibited based on the psychic harm caused by expression without unduly restricting the ability of governments to speak.

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INTRODUCTION

Outside of law, we often care about the mental states of others, and not always because of their consequences. I may care greatly, and entirely non-instrumentally, about whether my friend forgave me on his deathbed. But I worry about the mental states of the motorist in the next lane solely or largely instrumentally in avoiding the consequences of an accident. And there are many mixed cases, involving both some pure interest in motives and some instrumentalism. Sue may wonder whether her mother loves her, both because it matters to her for its own sake and because she is concerned about inheritance. And in law, particularly criminal law and torts, mental states play a key role. Perhaps this is because some mental states are regarded as inherently wrong or, perhaps, because they tend to cause consequences independently deemed bad. Maybe it is some combination of both.

Mental states play a significant, somewhat disputed, and puzzling role in American constitutional law. That body of law has been ambivalent about the relevance of political branch actors' motives to judicial assessments of the constitutionality of the actions resulting from such motives.¹ By the late 1970s, however, it had become apparent that illegitimate racial motives powerfully taint the actions that they cause.² For some time previously, this had been true under the Establishment Clause for official actions motivated by desires to support religious views.³ And I argue that motive analysis is a pervasive feature of equal protection law, of substantive due process, including the First Amendment's protections for speech, and even of Dormant Commerce Clause analysis.⁴ Fairly explicit endorsement of motive analysis exists in a variety of Supreme

¹ Compare *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (forswearing the consideration of legislative motives generally in assessments of constitutionality and particularly in the case before the court involving a law prohibiting the destruction of draft cards), with *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (finding a legislative motivation to advance religious beliefs key to invalidation of a statute). On the Court's inconsistency up to 1970, see John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1207-12 (1970).

² *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

³ Since the Court's pronouncement in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), that government action "must have a secular legislative purpose," the Court has found violations of the Establishment Clause where a legislature's religious purpose motivated the legislative enactment. See *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 871-72 (2005) (upholding a preliminary injunction preventing counties from displaying the Ten Commandments because ample evidence supported the lower court's finding of a predominantly religious purpose for the display); *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (concluding that a statute forbidding teaching of evolution in public schools unless accompanied by instruction of "creation science" was enacted for the "primary purpose" of endorsing "a particular religious doctrine").

⁴ See, e.g., *Gonzales v. Carhart*, 127 S. Ct. 1610, 1633-34 (2007) (indicating that a purpose "designed to strike" at the abortion right protected by *Casey* is illegitimate); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 876 (1992) (stating that a law with the purpose or effect of stopping early abortions is unconstitutional). As for motive review in the First Amendment speech clause, see *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429

Court opinions reviewing political branch action under constitutional provisions that consist of broad language invoking fairness and equality.⁵ Motive analysis is uncommon in cases decided under precise rules such as prohibitions of bills of attainder⁶ or ex post facto laws.⁷ Such precise provisions fairly clearly set forth outcomes that are not to be tolerated and, I think, reflect confidence on the part of the Framers that such outcomes cause serious harm while being unlikely necessary means to important governmental ends.

But explicit analysis of motives does occur under the broader fairness and equality provisions, which I think reflect the Framers' understanding of their limits in specifying permissible states of the world. Even those portions of due process and equal protection strict scrutiny analysis that seem focused on objective factors such as the tightness of fit of a statute⁸ to compelling governmental ends have been viewed by the Court and by commentators as aimed at ferreting out illegitimate motives. For instance, the Court has stated:

Thus, we have admonished time and again that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact *motivated by illegitimate notions* of racial inferiority or simple racial politics." We therefore apply strict scrutiny to *all* racial classifications to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool."⁹

U.S. 274, 283-84, 287 (1977) (remanding for lower courts to apply *Arlington's* doctrine in determining if refusal to rehire a teacher was motivated by the content of his public speech and whether, therefore, the refusal should be invalidated under the First Amendment); see also Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996) (arguing that hunting for illicit motives drives much First Amendment law, even those parts not explicitly sensitive to motives). As for the Dormant Commerce Clause, see Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) ("Despite what the Court has said, it has not been balancing. . . . [T]he court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism."); see also *id.* at 1092, 1143-60, 1284-87.

⁵ *Arlington Heights*, 429 U.S. at 265-67 (stating that a governmental action caused by a racially discriminatory intent or purpose violates equal protection requirements and, once such a motive is shown, placing the burden on the government to prove that it was not the but-for cause of the government's action).

⁶ U.S. CONST. art. I, § 9, cl. 3 (prohibiting Congress from passing any bill of attainder); *id.* at § 10, cl. 1 (prohibiting the states, among other things, from passing any bill of attainder).

⁷ See *id.* at § 9, cl. 3 (prohibiting Congress from passing ex post facto laws); *id.* at § 10, cl. 1 (prohibiting the states from passing ex post facto laws).

⁸ For the requirements of various levels of scrutiny in substantive due process and equal protection law, see *infra* notes 23-24 and accompanying text.

⁹ *Johnson v. California*, 543 U.S. 499, 505-06 (2005) (first emphasis added) (quoting

Elena Kagan has written, in the context of First Amendment law, that:

First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them. . . . [T]he application of First Amendment law is best understood and most readily explained as a kind of motive-hunting.¹⁰

Unlike relatively intelligible specific rules, requirements of due process and equal protection cannot be fully elaborated in any principled way without considering moral values. Since there is no constitutional text suggesting that motive analysis should be a pervasive part of judicial review, why is consideration of motives important to assuring fairness and equality, as constitutionally embodied in equal protection, due process, or the implicit anti-protectionist rules developed under the Commerce Clause?

To what extent, and under what circumstances, is constitutional law best seen as concerned about the actual mental states of officials (those of individuals and, more problematically, those of collective official bodies) as in themselves ultimately morally significant? Or is any concern with intentions and motives ultimately about the consequences of actions described as illegitimately motivated? Below, I consider the two most common moral philosophical views, consequentialism and deontology.¹¹ These are the most plausible candidates for the moral vision that would shape doctrine made to implement relatively imprecise constitutional provisions. Filling in the doctrinal details of such provisions, when not strongly constrained by text and tradition, must either be guided by some coherent moral vision concerning the nature of fairness and equality or simply be unconnected with anything that matters.

There is a relatively small body of scholarship of very high quality dealing with motive analysis in constitutional law.¹² Most of it is three decades old,¹³ but more

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion)).

¹⁰ Kagan, *supra* note 4, at 414.

¹¹ See *infra* Part II.B.

¹² See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 136-45 (1980); Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *supra* note 1; Kagan, *supra* note 4; Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1105-06 (1989) (stating that "[t]he ascendancy of process theory in constitutional law has led the Court to avoid review of the substance of government decisionmaking"); Regan, *supra* note 4, at 1092 ("Despite what the Court has said, it has not been balancing. . . . [T]he court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism."); Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

¹³ See *supra* note 12.

significantly, none of it considers, in any detailed way, the moral philosophical justification for considering motives as part of judicial review.¹⁴ The pre-existing scholarship concerning motive analysis in constitutional law deals well with a number of issues that I only briefly discuss in this Article: the meaning of collective motives,¹⁵ difficulty of proof of motives in general,¹⁶ and the potential problems of futility of striking an action for an illegitimate motive only to see it taken again for ostensibly constitutionally adequate ones.¹⁷

My central concern, however, is with how motive analysis might be justified on an attractive moral philosophical theory, one that fits reasonably well with the case law. I am especially concerned with whether a consequentialist justification is a good fit with the case law. Making consequentialism fit the case law is especially difficult, though I think possible, in certain rational basis cases such as *U.S. Department of Agriculture v. Moreno*,¹⁸ *Romer v. Evans*,¹⁹ and *City of Cleburne v. Cleburne Living Center, Inc.*²⁰ On the latter point, the existing scholarship on motive analysis offers nothing. On the more general problem of justification, the literature offers fragmentary suggestions and makes assumptions about motive analysis as aimed at bad consequences, both concrete (involving tangible burdens and benefits) and expressive (involving psychological harms resulting from denigration).²¹ And in the motive literature itself, sometimes it is difficult to determine if

¹⁴ See *infra* note 21 for a discussion of the existing scholarship.

¹⁵ See *infra* Part V.A., particularly notes 257-63 (citing various authorities). See, e.g., Brest *supra* note 12, at 125-27.

¹⁶ See *infra* note 61 and accompanying text; see, e.g., Brest, *supra* note 12, at 120-24; see also Ely, *supra* note 1, at 1275-79.

¹⁷ See *infra* note 290 and accompanying text (citing Brest, *supra* note 12, at 125-27); see also Ely, *supra* note 1, at 1279-80.

¹⁸ 413 U.S. 528, 529, 534, 538 (1973) (invalidating under the Due Process Clause of the Fifth Amendment an amendment to the Food Stamp Act that disqualified household units of unrelated "hippies" or other unrelated individuals).

¹⁹ 517 U.S. 620, 623-24, 635 (1996) (invalidating under the Equal Protection Clause a state constitutional amendment prohibiting any form of governmental protection against discrimination by reason of sexual orientation).

²⁰ 473 U.S. 432, 446-47, 448-50 (1985) (striking down a zoning ordinance that "rest[ed] on an irrational prejudice against the mentally retarded").

²¹ Lawrence Alexander distinguishes between "effects" theories of constitutional law and "motivation" theories. See Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 925-37 (1978) (beginning Symposium, cited *supra* note 12). Larry Simon discusses illegitimate motives, but only in the context of racial prejudice. See Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978). His analysis is most likely moored to a consequentialist viewpoint, aimed at avoiding both concrete harms (involving maldistribution of tangible burdens and benefits) and dignitary harms. *Id.* Paul Brest's foundational article on motive analysis ultimately seems grounded on consequentialism. See Brest, *supra* note 12. His discussion of actions based on bad motives as resting

the concerns are with deontological wrongness—illegitimate motives as wrong in themselves—or with consequential wrongness—illegitimate motives as wrong because they produce net bad consequences defined in some way that is independent of the motives that produce them.²²

In the sections that follow, I will explore what seems simple about justifying motive analysis based on consequentialist arguments and what seems more difficult to justify. In most circumstances—for example, those involving illegitimate motives

on process failure, informed and fit nicely into my framework, once I developed it. *See infra* note 237 and accompanying text. And Brest's initial article on motive analysis at least provided support for the decision in *Arlington Heights*, and may have catalyzed it. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 n.12 (1977). John Hart Ely's article is exceedingly complex but offers no basic normative grounding. *See* Ely, *supra* note 1. He seems to conclude that motive analysis is permissible when no more objective tests will work. *Id.* at 1262, 1340. But he offers no deep, systematic, or indeed even sketchy indication of what it means to work, of what the real enterprise is. *Id.*

²² My thoughts were catalyzed by Elena Kagan's article on the effects, overt and more obscured, that illegitimate motives play in shaping First Amendment law. *See* Kagan, *supra* note 4. In dealing with the more obscured role, she makes a compelling case that a hunt for bad motives drives even the objective-looking fit requirements of various First Amendment tests that require heightened scrutiny. She says:

I argue, notwithstanding the Court's protestations in *O'Brien*, that First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them. Or, to put the point another way, the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting.

Id. at 414. This argument sees the objective texts as proxies for the mental states, described at this stage of her article as the primary. That would seem to make her views deontological and contrary to my intuition that motive analysis is best seen as justified by a complex consequentialism. Toward the end of her article she briefly modifies, or perhaps elaborates her views on a normative basis. *Id.* at 505-15. She states that her article's focus was to show that a very large part of First Amendment doctrine is aimed at smoking out illegitimate motives, whether or not the doctrine deals overtly with motive. *Id.* at 501-02. But she recognizes that this too needs normative justification, and so she proceeds, briefly, to consider the possible normative underpinning, while making clear that she is doing no more than discussing possibilities for future exploration. *Id.* at 505-06. She then acknowledges that one might hunt for motives because they are wrong in themselves or because they correlate with bad consequences. *Id.* at 505-15. And she briefly discusses expressivism, though here it is not clear whether her concern with bad government expression is really deontological or is in a complex and ultimate way with the consequences that such expression causes. *Id.* One set of thoughts her article inspired was that if objective-looking was sometimes a proxy for bad motives, then bad motives might be a proxy for bad consequences. *Id.* at 505-06. Hence it would be a double proxy, and one would have to explain why the motive assessment step was necessary. *Id.* Why not aim at consequences from the beginning? I take this up later in this Article.

aimed at minority group members or at frustrating fundamental rights such as the right to birth control—the arguments are simple and intuitive. The everyday notion that people who aim at bad states of affairs are likely to bring them into existence goes a long way to justify concern with motives. There are only two complications for such simple explanations. First, it is important to establish the plausibility that constitutional law does implicitly disfavor some states of affairs, given that it does not do so expressly. On the surface of things, the various levels of scrutiny under due process and equal protection law rule out no set of consequences completely; they permit any set of results if there is a justification that is sufficient under the circumstances. In strict scrutiny, the justification must be compelling.²³ In rational basis law it need not be.²⁴ But in neither case is it possible simply to look at a still picture of the

²³ The Court applies strict scrutiny to discrimination based on race or national origin or infringement of fundamental rights. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to racial classification); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (same); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (same); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (same); *Carey v. Population Services Int'l*, 431 U.S. 678, 686 (1977) (applying strict scrutiny in the context of fundamental rights); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (same); *Sherbert v. Verner*, 374 U.S. 398 (1963) (same); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (same); *see also* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 542 (3d ed. 2006).

A law survives strict scrutiny analysis if it is necessary to achieve a compelling government purpose. *Id.* at 541 (citing *Adarand*, 515 U.S. 200; *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Sherbert*, 374 U.S. 398). The means must be necessary to accomplish the end, which requires the law to be the least restrictive or least discriminatory alternative. *Id.* (citing *Wygant*, 476 U.S. at 280 (“Under strict scrutiny the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly tailored to accomplish that purpose.”)).

In some circumstances an intermediate level of scrutiny is said to apply. I will use the term “stricter scrutiny” to refer generically to review that is more intense than rational basis review, and I will use “strict scrutiny” or “intermediate scrutiny,” respectively, to refer to the subsets. Intermediate scrutiny requires the law to be substantially related to an important government objective. *Id.* at 540 (citing *Craig v. Boren*, 419 U.S. 190, 197 (1976)). The purpose must be more than a legitimate goal, and the means to achieve the goal must be more than reasonable. *Id.* The Court has applied intermediate scrutiny for gender classifications. *See, e.g.,* *United States v. Virginia*, 518 U.S. 515 (1996); *Califano v. Westcott*, 443 U.S. 76, 89 (1980); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Califano v. Webster*, 430 U.S. 313, 316-17 (1977). In applying intermediate scrutiny in *United States v. Virginia*, the Court suggested that the burden rest with the government to demonstrate an “exceedingly persuasive justification.” 518 U.S. at 529 (quoting *United States v. Virginia*, 44 F.3d 1229, 1247 (4th Cir. 1995) (Philips, J., dissenting)).

²⁴ The rational basis test is the minimal level of review for laws challenged under the Due Process and Equal Protection Clauses. CHERMERINSKY, *supra* note 23, at 540. The test requires that the law be rationally related to a legitimate government purpose. *Id.* (citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988)); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166 (1980); *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952)). This requires that the goal must be legitimate and the means be reasonable to accomplish that goal. *Id.* Any conceivable legiti-

world and say that that state of affairs is constitutionally prohibited or even suspect. I will argue that the objective fit and subjective motive components of this sort of law implicitly disfavor certain consequences, while not ruling them out. Thus they are plausibly driven by the probability of bad consequences.

Second, it is important to explain why an action produced by bad motives (mental states) is unlikely to be justifiable for other reasons that were not motives, reasons that did not animate the actor but are objectively sufficient to justify an action. My more extended argument is that testing for the presence of a sufficient objective reason supporting a political branch action is constitutional law's best way of gauging the likely net good consequences of an action, since it is simply unworkable to consider the actual consequences of each action. I believe that reasons for governmental action are defined as illegitimate precisely because of their tendency to correlate with disfavored states caused by government action: for example lack of birth control drugs on pharmacy shelves and, perhaps, great racial disparities.²⁵ And reasons are defined as compelling or important precisely because they are viewed as sufficiently weighty to overcome the most significant individual interests in liberty, property, or equality.

My burden is to demonstrate why the presence of an actor's illegitimate motive (mental state) is likely to correlate with an absence of other objective reasons that are legitimate and sufficient under the circumstances to justify his action. For a consequentialist, the consequences of an act matter most and the motive matters only as it bears on the consequences.²⁶ If the presence of good reasons is the best practical gauge of consequences available to the judiciary, then a sufficiently powerful reason for action should permit it despite the underlying motivation. It is relatively easy to minimize the likelihood that an alternative legitimate and sufficient reason is available to justify an action secretly motivated by hostility to racial minorities or fundamental rights. Such interests are highly valued by constitutional law; thus reasons for seriously intruding into such interests must be compelling, and there are many fewer compelling interests than merely legitimate ones.²⁷

mate purpose satisfies as a goal, regardless of the actual purpose of the legislation. *Id.* (citing *Fritz*, 449 U.S. 166; *Schweiker v. Wilson*, 450 U.S. 221 (1981)). The challenger has the burden of proof to overcome a strong presumption that laws are constitutional. *Id.* at 678 (citing *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws, result in some inequality.")); *see also* *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981) ("Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose. Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." (citations omitted)).

²⁵ *See infra* text accompanying note 104; *see also infra* Part IV.B.1.

²⁶ *See infra* notes 85-88 and accompanying text.

²⁷ Compare Chemerinsky's description of strict scrutiny, CHEMERINSKY, *supra* note 23, at 542 ("Strict scrutiny . . . is the most intensive type of judicial review, and laws generally

So if a pool is closed for initially hidden racist motives that are excavated on judicial review, we are quite skeptical that the closing is justified. A consequentialist nevertheless would endorse closing the pool if an adequate alternative reason existed. Such alternative reasons would have to be compelling to be plausible, and there are few reasons that meet that threshold. So if the pool was closed for racist reasons, but could have been closed for reasons of extreme danger of electrocution to swimmers, a consequentialist would find the closing the right thing to do, though would be troubled by the destructive future possibilities of such a mind set. One might see the Court's motive doctrine, under *Arlington Heights*, roughly as aimed at placing the burden on a defender of illegitimately motivated action to establish a fairly compelling alternative good reason that would make net good consequences likely in that context.²⁸

are declared unconstitutional when it is applied.") with his description of rational basis, *id.* at 540 ("Under the rational basis test . . . the law will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose.").

²⁸ There is some slight distance between pure consequentialist analysis and *Arlington Heights*'s proviso permitting a government actor to defend an action that was illegitimately motivated. A consequentialist would ask whether there was a positive and sufficient reason for taking the action, regardless of whether it was the motivating reason. *Arlington Heights* instead says:

Proof the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision *would have resulted* even had the impermissible purpose not been considered.

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 271 n.21 (1977) (emphasis added). "Would have resulted" strongly indicates that the Village had an alternative acceptable at the time that would have caused it to act in the same way. The example I use elsewhere in this Article is a municipal swimming pool that was closed by racist administrators, both because it was integrated and because it was irremediably dangerous to swimmers. A consequentialist would not care whether the second reason was known or, if known, would have been a sufficient cause of the action. She would care that such a reason existed. But this apparent difference between *Arlington Heights* and pure consequentialism administered by courts is easily explained as insignificant.

Institutionally, courts are not capable of an independent search for all reasons that might have supported actions under the circumstances in which it occurred. In a variety of contexts, courts review on the record of the political branch actor's actual reasoning. *Cf.* SEC v. Chenery Corp., 318 U.S. 80, 87 (1947) (confining review to the record). And, at least in cases involving suspect classes and fundamental rights, skepticism is warranted about whether sufficient reasons exist (I take up the problems of motive review for lesser interests in detail later in this Article. *See infra* Part III.B.). Were a sufficient alternative reason to develop or be discovered, after a political action that was solely illegitimately motivated, the government could simply act again for such a reason. A court might be skeptical but should accept the decision if convinced that it is genuinely made on such grounds. For all of these reasons, *Arlington Heights*'s formula seems as close to some form of consequentialism as is possible for the judiciary, given its

But some rational basis illegitimate motive cases raise difficult problems for a consequentialist explanation. When political branch actions are challenged on grounds of illegitimate motives, but not by members of targeted suspect classes or holders of targeted fundamental rights,²⁹ the problem of alternative sufficient reasons apparently presents a serious obstacle to the consequentialist justification. Such rational basis motive cases are few but significant and potentially generative. They include *U.S. Department of Agriculture v. Moreno*,³⁰ *Cleburne v. Cleburne Living Center*,³¹ and arguably *Romer v. Evans*³² and *Lawrence v. Texas*.³³ In this sort of rational basis review, apparently the flimsiest of governmental regulatory reasons will suffice to justify the action inflicting the injury.³⁴ So a government actor can justify almost any set of consequences, unless it is the product of an illegitimate motive.³⁵ This suggests that illegitimate motives in constitutional law matter in ways unrelated to the consequences that they produce. These appearances are incompatible with the consequen-

operating constraints.

Later in this Article I note that in other respects the form of consequentialism involved in substantive due process and equal protection law is crude and not continuous, as is the formula for procedural due process under *Mathews v. Eldridge*: "The Court's modern procedural due process analysis, through its now familiar consequentialist tri-partite balancing test, attempts to gauge the appropriate levels of procedural protections after it has been established that there is a protected property or liberty interest." Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 356 n.9 (2002) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Given the wide array of liberty and property interests that could be challenged on substantive fairness grounds, courts have no choice but to triage and generally extend serious scrutiny to protect interests to which it assigns the highest value. At least one commentator sees the *Arlington Heights* proviso moving from a concern with whether the decision *would* have been the same without the impermissible motive to whether it could have been supportable without it. See Ortiz, *supra* note 12, at 1114-16 (finding that implication in the Court's language, applying *Arlington Heights*'s doctrine to a claim of illegitimate motives involving gender in *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979)).

²⁹ This is either because the illegitimate motives are atypical—not involving intended harm to suspect classes or fundamental rights, see *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (arguably finding an ordinance motivated by an unacceptable loathing toward the mentally retarded); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (invalidating parts of a federal law on grounds that it was based on a purely destructive motive toward a group), or it is because other plaintiffs, injured in their own liberty and property interests, are asserting interests primarily designed to protect fundamental rights holders or members of suspect classes against whom the government is discriminating, see *infra* Part III.B.2.

³⁰ 413 U.S. 528, 534-35 (1973).

³¹ 473 U.S. 432, 446-50 (1985) (striking down a zoning ordinance found to rest "on an irrational prejudice against the mentally retarded").

³² 517 U.S. 620 (1996).

³³ 539 U.S. 558, 580 (2003).

³⁴ CHEMERINSKY, *supra* note 23, at 540.

³⁵ See *Moreno*, 413 U.S. 528; *Cleburne*, 473 U.S. 432; *Romer*, 517 U.S. 620 (exemplifying cases finding laws at issue to be unconstitutional violations of the rational basis test).

tialist justification that I offer. Indeed it is a reversal of the hierarchy I propose, for it would gauge motives more significant in themselves than for the consequences that they produce. In Part IV below, I explain why such appearances should be seen as not fully reflecting constitutional reality as it might best be understood.

In dealing with the arguments above in greater detail, a number of apparently opposing, and possibly mutually supporting, strands of arguments must be identified and evaluated. The first opposition is whether motive talk concerns real mental states or is simply a label for a more objective analysis of reasons, whether or not they occurred to a political branch actor and drove her action. In the cases of legislatures and other large composite actors, the notion of motive as a real mental state of the collective is obviously fictitious, a construct. This raises the possibility that, sometimes, when motive is invoked, the real object of analysis is either not related to a mental state or is related only in some indirect way.³⁶

Another opposition is between what I call concrete consequentialism and expressivist consequentialism. Justifying doctrine on the first of these involves showing how illegitimate motives (whether actual mental states or a label for something else) tend to correlate with constitutionally disfavored states of the physical world—for example, the presence or absence of birth control on pharmacy shelves, or racial disparities concerning burdens and benefits.³⁷ Most of my attempt at consequentialist justification deals with how “motive” tends to lead to disfavored concrete states of the world. In a single section, toward the end of the Article, I briefly take up the very different possibility that sometimes bad motives are constitutionally unacceptable because they are detected and reasonably understood as government speech that disparages minority groups and inflicts emotional distress, while undermining such groups’ standing in the eyes of others. The consequentialist-expressionist justification best fits consideration of motives aimed at minorities and women. But even in such circumstances it seems to work alongside concrete justifications as well. This justification, however, is in tension with some intuitions about the freedom of government to speak, and I briefly sketch these out toward the end of this Article.

I. CURRENT DOCTRINE AND OPEN QUESTIONS

A. Arlington Heights

Village of Arlington Heights v. Metropolitan Development Corp. contains the Supreme Court’s clearest endorsement and most comprehensive explanation of motive

³⁶ See *infra* text accompanying note 134 (discussing modes of analysis independent of mental states, such as looking to the “‘plain meaning’ of text” or the “‘public-spirited purpose of a statute’”).

³⁷ See *infra* text accompanying note 104; see also *infra* Part IV.B.1.

analysis.³⁸ Despite statements in some majority opinions that analysis of motives is never permitted as part of judicial review,³⁹ the Court had been considering motives in cases under the Establishment Clause for many years.⁴⁰ And once *Arlington Heights* made clear the presumptive invalidating effect of invidious racial motivation, its methods were imported into Establishment Clause doctrine.⁴¹ In the next section, I make a case that motive analysis extends beyond racial equal protection or Establishment Clause cases to broadly-worded constitutional guaranties of substantive fairness and equality under the Due Process Clauses and the Equal Protection Clause. This then leads to questions of how one justifies motive analysis. First, it is necessary to understand *Arlington Heights*.

Arlington Heights forms a pair with *Washington v. Davis*,⁴² decided the year before. *Davis* reviewed an equal protection challenge to a verbal skills test for prospective District of Columbia police officers.⁴³ The test disproportionately disqualified African Americans.⁴⁴ It is in *Davis* that the Court made clear its current view that such racial “disparate impact” is not itself a violation of equal protection.⁴⁵ But *Davis* noted that an equal protection violation would exist if the official action leading to the

³⁸ 429 U.S. 252, 266 (1977).

³⁹ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968); see also Ely, *supra* note 1, at 1207-12 (discussing the courts’ vacillations on the use of motive up to 1971). For more recent cases taking opposite positions, compare *City of Erie v. Pap’s A. M.*, 529 U.S. 277, 292 (2000) (“[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive.”), with *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 871-73 (2005) (upholding a preliminary injunction preventing counties from displaying the Ten Commandments because ample evidence supported the lower court’s finding of a predominantly religious purpose for the display).

⁴⁰ See *supra* note 3.

⁴¹ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 595-97 (1987) (using *Arlington Heights*’s methods in ferreting out a “purpose” to advance religion and then striking the law under consideration on grounds that it “seeks to employ the symbolic and financial support of government to achieve a religious purpose”).

⁴² 426 U.S. 229 (1976).

⁴³ *Id.* at 233.

⁴⁴ *Id.* at 232-37.

⁴⁵ *Id.* at 242.

skewed impact were the product of an illegitimate racial motive.⁴⁶ In *Davis*, no such motive was alleged and so the Supreme Court simply reversed, having no occasion to give instructions on precisely what mental states or other facts constituted such a motive, the appropriate methods for finding motives, or the precise effect of such a motive once found.⁴⁷

In *Arlington Heights*, the lower federal courts treated the issue of illegitimate racial motive as before them, and the Supreme Court reviewed on this basis.⁴⁸ The Court carefully considered whether illegitimate racial considerations motivated a local zoning board's refusal to rezone land for higher-density housing.⁴⁹ In the process of affirming the conclusions of the court below on that point, the Supreme Court wrote a guideline opinion about the constitutional effect of such motives, once found, and about the sorts of evidence bearing on the existence of such motives.⁵⁰ While *Arlington Heights* came from the context of asserted illegitimate racial motives, the doctrinal rules have been used more broadly to cover vastly different illegitimate motives, such as a motive to favor a religion.⁵¹

How must such a motive, if illegitimate, be connected with an official action that harms a legally protected interest in order to undermine its constitutionality? The Court in *Arlington Heights* outlined a two-part analysis. First, to presumptively invalidate an action via motive analysis, a court need not find that an illegitimate motive was the exclusive or even the primary or dominant one.⁵² Rather, a court may find simply that it "has been a motivating factor in the decision."⁵³ The Court offered the explanation that this minimal involvement of bad motives in decision making properly eliminates justification for the normal judicial deference in the rational basis cases.⁵⁴ Supporting this view, the Court simply cited Paul Brest's admirable article, without fur-

⁴⁶ The Court stated:

[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is "a current condition of segregation resulting from intentional state action. The differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate."

Id. at 240 (quoting *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205, 208 (1973)).

⁴⁷ *Id.* at 235, 252.

⁴⁸ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-69 (1977).

⁴⁹ *Id.* at 254.

⁵⁰ *Id.* at 265-68.

⁵¹ See *supra* note 3 (listing cases concerning illegitimate motives under the Establishment Clause).

⁵² *Arlington Heights*, 429 U.S. at 265.

⁵³ *Id.* at 266.

⁵⁴ *Id.* at 265-66.

ther explanation.⁵⁵ The reference seems to be to Brest's suggestion, which I will discuss toward the end of this Article, that the problem signaled by bad motivation is that the legislature is acting *ultra vires*, beyond the powers conferred by the Constitution.⁵⁶ Brest does not explain, however, in any explicit way, what deeper principles undergird his view that the Constitution should be read to limit official actors based on their motives, though he does indicate that they can produce bad consequences.⁵⁷ My hope is to show how, despite some difficulties, such limits might be tied in a fairly convincing way to consequentialist moral philosophy.⁵⁸

A finding that an illegitimate motive was a motivating factor is the first, not the final, step in *Arlington Heights*'s motive protocols, though usually it will prove fatal to official action.⁵⁹ When a court determines an illegitimate motive was one "motivating factor" of an official act, the act, nevertheless, can be redeemed by a strong showing that it was not the "but for" cause of the action:

Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of 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. But in this case respondents failed to make the required threshold showing.⁶⁰

In passing, let me note a number of things that connect this part of *Arlington Heights* with arguments that I make below. First, it helps bolster the case that at least those motive cases using *Arlington Heights*'s protocols are not deeply undergirded by a philosophy of irreducible moral taint of the sort that might cause a non-consequentialist to condemn such actions. The concern is whether the motive *caused* the action that caused a sort of harm that otherwise satisfies both standing law and the substantive requirements of a constitutional cause of action. This, at the very least, suggests, though it does not decisively confirm, that consequentialism is a more plausible way of seeing constitutional motive law. I amplify this below.

⁵⁵ *Id.* at 266 n.12 (citing Brest, *supra* note 12, at 116-18).

⁵⁶ *See infra* Part IV.B.2.

⁵⁷ *See infra* text accompanying note 240.

⁵⁸ *See infra* Part IV.B.2.

⁵⁹ *Arlington Heights*, 429 U.S. at 266.

⁶⁰ *Id.* at 271 n.21 (emphasis added).

1. What Are Illegitimate Motives?

Arlington Heights proceeds on the assumption that it is clear what a motive is and what makes a motive illegitimate, and the Court's statement of methods for rooting out what it considers illegitimate motives suggests an aim at actual mental states, though sometimes partially by means of objective impact analysis.⁶¹ For now, the assumption is that a determination of a motive is always dependent, directly or indirectly, on the mental state of a person or persons, and we will revisit that issue when we return to special problems of some rational basis cases. But, on that assumption, which mental states does constitutional law regard as illegitimate? Understanding

⁶¹ The *Arlington Heights* Court stated: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. But all evidence of mental states, offered by someone other than the actor, is circumstantial, meaning that it cannot be directly observed by others. So statements by the actor about his own mental state, for example, a memorandum or a bar stool statement against the speaker's interest, count as direct. For example, in *Miller-El v. Dretke*, 545 U.S. 231 (2005), some of the evidence the Court relied on to find illegitimate racial motivation in jury selection practices traced its origins to internal office statements of a policy to exclude African Americans when possible. *Id.* at 263-64. The remainder of such evidence relied on a knowledge that such intent was plausible in the circumstances and that a number of practices and events were hard to explain for other reasons. *Id.* at 240-63. *Arlington Heights* explains the types of evidence that bear on the existence of illegitimate motives:

The impact of the official action whether it "bears more heavily on one race than another," may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy. But such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.

Arlington Heights, 429 U.S. at 266-69 (citations omitted).

this involves considerations of both the structure of a set of intentional mental states and of the contents of such states.

To the extent that constitutional law considers the motives of officials, it does so in considering the constitutionality of specific actions—for example, an arrest,⁶² a peremptory challenge,⁶³ the posting of the Ten Commandments in a school,⁶⁴ the enactment of a statute⁶⁵—based on the motives underlying them. So the motives ultimately in question are never simply unfocused desires or proclivities, but rather those that motivated a particular action. My assumption below is that motives are favorable attitudes⁶⁶ toward certain actions and, through them, toward the consequences that they produce. At times free floating “motives” result in more focused ones, “intentions,” that cause actions.⁶⁷

When is it that the attitudes that cause action are “illegitimate” in constitutional law? There is a dimension to this question that involves the structure of mental states and one that involves their content. Let us start with the structural dimension.⁶⁸

Philosophers of action often distinguish acting with no more than a present intention from acting as part of a set of further actions. H.L.A. Hart draws these distinctions: “Intention is to be divided into three related parts The first I shall call ‘intentionally doing something’; the second ‘doing something with a further intention’, and the third ‘bare intention’”⁶⁹

⁶² See, e.g., *United States v. Frazier*, 408 F.3d 1102, 1108 (8th Cir. 2005), *cert. denied*, 546 U.S. 1151 (2006); *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003).

⁶³ See, e.g., *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Hernandez v. New York*, 500 U.S. 352 (1991).

⁶⁴ See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980).

⁶⁵ *United States v. Morrison*, 529 U.S. 598 (2000); *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218 (1964); cf. *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding that a provision in the Alabama Constitution that disenfranchised criminals convicted of a crime involving moral turpitude violated the Equal Protection Clause because the original motive behind the provision was to discriminate against African-Americans based upon their race).

⁶⁶ What constitutional law describes as illegitimate motives are what Bratman would call pro-attitudes (or favorable attitudes) toward action of a certain sort that, by an act of mental volition, have turned into a commitment to action and, if uninterrupted, into the favored action itself. See MICHAEL E. BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON* 15-16 (1987).

⁶⁷ *Id.* at 16.

⁶⁸ In exploring the structural aspect in this subsection, I will use only illustrations of illegitimate motives involving indisputably illegitimate content of thought, for example, clearly racist motives. Ultimately it will be necessary to answer what other sorts of thought content are illegitimate.

⁶⁹ H. L. A. HART, *Intention and Punishment*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 113, 117 (7th prtg. 1988). See BRATMAN, *supra* note 66, at 8, for a reference to and discussion of Hart’s distinctions. Hart’s point is made in the context of the preoccupations of the criminal law. HART, *supra*, at 273. Bratman generalizes Hart’s analysis of intentions in a variety of simple non-legal contexts. BRATMAN, *supra* note 66.

The first sort of intention is motivated by the desire for what the action immediately causes.⁷⁰ The actions of opening curtains in order to luxuriate in sunshine, or of taking a pain-killing drug to ameliorate a toothache, are examples. In constitutional motive analysis, a racist officer's arresting a person because he is of another race in order to gratify his racist desires to subordinate members of such race is an example of this first sort of motive leading to an intentional action.⁷¹

Opening the curtains to watch for the neighbor's arrival in order to ask him for a favor is an example of an act done "with a *further* intention" in Hart's classification.⁷² Thus it is done with a motive beyond simply wanting the curtains open for some immediate gratification. Systematically, but secretly, striking minorities from the voting roles in order to assure less minority representation after the next election in order, in turn, to gratify one's constituents' desires to disempower African-Americans involves an action with a further intention and its further motive. From the perspective of constitutional law, both situations are examples of actions with "illegitimate" motives (whose meaning is further explored below) and both lead, at a minimum, to strongly presumptive invalidity. Note, for now, that in both of these cases, the ultimate aim of an action is an incontestably illegitimate one, whether or not there were intermediate intentions and related motives. By "ultimate" motive, I mean one that shaped all the subsequent motives and intentions leading to the action.⁷³

In due process and equal protection law, when an aim with forbidden content is ultimate in the sense that it is the object of the desires and intentions that follow it, and is not the means to some more general aim, then it is easy to classify it as illegitimate. An officer's making a traffic stop of a woman in order to gratify misogynist desires is an example. Structuring a test for government employment in a way designed to disqualify African-Americans disproportionately for ultimate reasons of racial antipathy is another.⁷⁴

In due process and equal protection law, when especially troubling mental states are not ultimate aims, then analytic difficulties arise.⁷⁵ There are, I believe, two circumstances worth considering: troubling means (intermediate aims) and troubling beliefs.

⁷⁰ HART, *supra* note 69.

⁷¹ See, e.g., *United States v. Frazier*, 408 F.3d 1102, 1108 (8th Cir. 2005), *cert. denied*, 546 U.S. 1151 (2006) (finding no constitutional motive by police officers); *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003) (same).

⁷² The curtain example is adapted to my purposes from BRATMAN, *supra* note 66, at 128-30.

⁷³ The ultimate desire for light and a resulting intention to bask, led to a desire and intention to grasp, and then one to pull, the curtain cord

⁷⁴ See *supra* notes 42-47 and accompanying text (discussing *Davis*, 426 U.S. 229).

⁷⁵ See, e.g., *Hernandez v. New York*, 500 U.S. 352 (1991); *Davis*, 426 U.S. 229; *United States v. Frazier*, 408 F.3d 1102 (8th Cir. 2005), *cert. denied*, 546 U.S. 1151 (2006); *Johnson v. Crooks*, 326 F.3d 995 (8th Cir. 2003) (all rejecting claims of discriminatory motives because other explanations for government actions existed).

First, from the structure of strict scrutiny, one would readily infer that troubling intermediate aims are not illegitimate, just highly suspect.⁷⁶ A statute explicitly segregating races in prison as a means to the end of avoiding racial violence does not have what is usually referred to as an illegitimate end. It is, as the law has developed, a very troubling means to a legitimate end and will not cause invalidation of an action if the end is compelling and the racially aimed law is a necessarily or tightly fitted means.⁷⁷ But suppose that there is simply a surface race-neutral prison policy of cell assignments that has the effect of nearly complete racial segregation and the non-explicit aim of doing so in order to avoid violence. Once this structure of thought is excavated, one would imagine that it would be treated precisely like its explicit counterpart, except perhaps for any extra skepticism about its real end that seems appropriate based on concealment. The cases simply are not clear about this.⁷⁸ Perhaps in most cases that are likely to arise this is a non issue. In many, an unearthed hidden aim at disparate impact is not plausibly simply a means to something else legitimate.

The second analytic problem is a little more difficult. Some illegitimate motives in constitutional law are not aims but impermissible beliefs that structure aims.⁷⁹ When this is true, the aims of action themselves do not have to be troubling. What matters is that impermissible beliefs are significant parts of the structure of thought leading to an action. Let us imagine that a government hiring officer has a secret policy of avoiding hiring members of racial minority groups. He honestly believes that members of such groups make much worse employees. In the specialized nomenclature of constitutional law, he acts out of a bad motive, although his ultimate aim is unimpeachable. Some official beliefs are forbidden by constitutional law to be used as premises in reasoning for action.⁸⁰ And when they are used, the harm that they do is dealt with by treating them as illegitimate motives under *Arlington Heights*.⁸¹ Thus, for practical purposes, illegitimate aims are defined partially by their place in a structure of thought, and some illegitimate beliefs taint the action that they prompt and are treated like bad aims. These are the features that define bad motive in structural terms. But what content of thought is illegitimate other than the few indisputable racist and sexist attitudes?

I argue later in this Article that such motives are identified and defined as illegitimate, largely by virtue of the likelihood that they will produce consequences that

⁷⁶ See CHEMERINSKY, *supra* note 23, at 541 (noting that as long as the law is deemed to be narrowly tailored to fit a compelling governmental interest, it will be upheld).

⁷⁷ See *supra* note 27.

⁷⁸ See *infra* Part V.B.

⁷⁹ BRATMAN, *supra* note 66, at 6, 15-16, 36-37 (concluding that desires and beliefs shape conduct but that they become intentions only when they cause a mental act of commitment). My point is that if a belief in racial inferiority shaped conduct with exemplary ultimate aims, constitutional law would regard that as an illegitimate "motive," even though it would be more analytically correct to describe it as an unacceptable conduct-shaping mental state. *Id.* at 107-10.

⁸⁰ See *supra* notes 42-47 and accompanying text (discussing *Davis*, 426 U.S. 229).

⁸¹ See *supra* note 28 and accompanying text.

are implicitly highly disfavored by constitutional law.⁸² That argument is best developed as part of the consequentialist justification for motive analysis that I offer below. Before developing those arguments I want to make the case that courts are drawn to considering official motives analysis, not just in race and gender cases, but across the spectrum of substantive due process and equal protection cases.

B. Pervasiveness of Motive as Part of Open Textured Constitutional Rules

It is helpful to start with cases involving allegations of racial discrimination. These are the cases in which the Court first embraced motive analysis with real clarity.⁸³ In such cases, the governing tests have both an objective and an apparently⁸⁴ subjective component. Courts must find an appropriately tight fit of the governmental action to a constitutionally acceptable "purpose" or interest,⁸⁵ and not find, after appropriate inquiries, an illegitimate racial motivation as the "but for" cause of the action.⁸⁶

The objective requirement applies to official action that clearly sorts results by referring to the races of those affected. The prime example is a statute whose language requires the different treatment of different races,⁸⁷ but there are other examples as well.⁸⁸ For such cases, the statute must be drawn to serve extremely important governmental interests and must be tightly fitted to those ends.⁸⁹ The standard formulation is that, to survive, such action must be "necessary" (or "narrowly tailored") to serve a governmental "end" or "purpose" that is not only legitimate, but also compelling.⁹⁰ The connection of such "ends" or "purposes" to motives is not precisely clear. Since courts often say that such "purposes" or "ends"

⁸² See *infra* note 182 and accompanying text.

⁸³ See *supra* notes 1-5 and accompanying text.

⁸⁴ See *infra* Part V.A. (discussing whether this appearance may to some extent be deceiving, suggesting that sometimes "motive talk" is about reasons, and through them, constitutionally disfavored consequences, with a search for anything resembling mental states playing no role at all).

⁸⁵ See *supra* notes 28-29.

⁸⁶ In all cases the end must be legitimate. This seems to have spawned a subjective component of scrutiny law, requiring that no illegitimate motives had underlain the official action under review. See *supra* notes 53-54 and accompanying text. When an action is even partially underlain by an illegitimate motive, it will not be sustained unless there is powerful proof that the government would have so acted anyway for an alternative and legitimate reason. See *supra* note 60 and accompanying text.

⁸⁷ See, e.g., *Johnson v. California*, 543 U.S. 499 (2005) (applying strict scrutiny even to segregation in prison assumed to be designed to reduce violence).

⁸⁸ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 9, 11 (1967) (assuming, for purposes of argument, that the unconstitutional statute treated both races similarly in some sense, but used race in defining a burden).

⁸⁹ See *supra* note 23.

⁹⁰ *Id.*

must be those actually sought by the political branch actors in acting,⁹¹ then that would make the relationship between such purposes and the ordinary language notion of "motive" either one of identity or a very close one.

But in strict scrutiny cases there is little evidence that actual motives are sought.⁹² This is because the way such cases are almost always disposed of is by identifying one or more governmental interests for purposes of argument and then finding the governmental action not sufficiently tightly tailored to such ends.⁹³ Certainly the ends or purposes that are analyzed for purposes of objective strict scrutiny are always ones that plausibly were motives in the sense that they either were in fact the objects sought or that they are obvious legitimate aims that might have underlain such action. But there is no deep probing of motivations of the sort one finds in disparate impact cases that really do turn on motivation.⁹⁴ In this sense the test is largely objective. It is theoretically true that in strict scrutiny cases the finding of an actual racist motive would presumptively invalidate any resulting action, but courts never need resort to this.⁹⁵ In strict scrutiny cases, almost every action is invalidated based on the action's poor fit with any purpose that might be compelling.⁹⁶ Fit is determined by the court in ways not dependent on underlying motives.⁹⁷

Most government action does not involve explicit racial distinctions, or the few other suspect classes and fundamental rights that would trigger what I am calling the objective portions of strict or intermediate scrutiny. So most governmental action is reviewed by courts under a less demanding "rational basis" standard.⁹⁸ Indeed this

⁹¹ See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996).

⁹² See *supra* note 23 (noting that strict scrutiny analyzes whether there is a compelling governmental interest and whether the governmental action is narrowly tailored to meet that interest).

⁹³ Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 743, 752 (1998) ("When the Court employs strict scrutiny—such as to review infringements of fundamental rights, content based suppression of speech, or suspect classifications—it is nearly impossible for the government to prove the law constitutional."). For an example of just how difficult the tailoring requirements of strict scrutiny are to meet, see *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (invalidating a statute prohibiting the publication of the name of a rape victim on grounds that in two ways it was broader than a nearly perfect fit and in one it was narrower). Such fit requirements are sufficient to kill almost all statutes subjected to them without ever getting to whether the fit is with a real purpose that is compelling. For an exception, see *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (finding an anti-littering aim, at least in the context of the facts of the case, not sufficient to warrant regulation of leafletting).

⁹⁴ See *supra* notes 23, 33; text accompanying notes 89-91 (noting that strict scrutiny requires a compelling governmental interest and narrow tailoring of the law to fit that interest, which give motive less weight in analysis).

⁹⁵ See *supra* text accompanying notes 57-58. A statute that contains a racist motive, because of its objective features, is subject to strict scrutiny. Almost invariably, statutes of this nature would be invalidated. Courts would thus not be able to get to the next step of analysis.

⁹⁶ See *supra* note 93.

⁹⁷ See *supra* note 23.

⁹⁸ See *supra* note 24.

standard is so lax that almost any governmental action survives rational basis scrutiny unless it is found to have been animated by an illegitimate motive.⁹⁹ These are cases reviewing actions that present no especially troubling surface features, such as racial or gender distinctions or serious and direct limitations on fundamental rights.¹⁰⁰ So, absent proof of an illegitimate motive, the search is an *ex post* one for an acceptable objective purpose. By this I mean a governmental end that would suffice to justify the action, regardless of whether it was either the actual motive of the actor or even his officially declared end. Even if the political branches have not suggested such legitimate purposes for their actions, the courts themselves in reviewing will search for them and almost always find them.¹⁰¹ What is required is something that a not entirely deluded legislature might have believed a public purpose, even if not particularly important.¹⁰²

Passing such objective tests is necessary and easy, but not sufficient, to ensure constitutionality. Alongside the objective tests in disparate impact racial cases, the Court also applies an apparently subjective motive test as an extra necessary hoop through which political branch action must pass in order to survive constitutionally.¹⁰³ Cases involving no surface distinction based on race, but a disparate racial impact, are presumptively rational basis cases.¹⁰⁴ But, the Court's finding of an illegitimate motive (most clearly to subordinate or demean a race) presumptively taints the resulting action, subject to the government's proof that it would have taken the same action for a reason that is of the level of importance required by the applicable level of scrutiny.¹⁰⁵ So such a finding of an illegitimate motive might be said to lead to stricter scrutiny of some sort. I think, if properly defined, illegitimate motives lead to something akin to, but not identical to, stricter forms of scrutiny.¹⁰⁶

⁹⁹ See *supra* note 28.

¹⁰⁰ See *supra* note 28.

¹⁰¹ See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

¹⁰² *Id.* at 488-91.

¹⁰³ See *supra* text accompanying notes 48-50 (explaining *Arlington Heights*'s subjective motive test).

¹⁰⁴ By this I mean simply that their surface features did not dictate strict scrutiny. It was only a successful search for a hidden illegitimate motive that spared them the usual extremely light scrutiny and almost certain judicial approval of the political branch action reviewed. Once a hidden illegitimate motive is found, the Court considers the cases much more carefully in a way that resembles strict scrutiny, but is not necessarily identical. See *supra* notes 53-54 and accompanying text.

¹⁰⁵ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66, 270-71 n.21 (1977).

¹⁰⁶ As a practical matter, such a motive test is never decisive in cases that are reviewed under stricter scrutiny based on their surface features. See CHEMERINSKY, *supra* note 23. The government loses nearly all of those cases under the demanding objective tests requiring a very tight fit with a compelling interest. For examples to the effect, see cases cited *supra* note 23. While it remains a theoretical possibility that a race case that survives the objective requirements of strict scrutiny could founder on illegitimate motivation, this seems unlikely ever to be put to the

Is this use of a subjective motive test alongside more objective tests a peculiar feature of race cases, among all of the sorts of cases governed by tests involving tiered levels of scrutiny, from free speech to the Dormant Commerce Clause? The case law suggests that it is in fact the norm.¹⁰⁷ Motive analysis seems a pervasive feature of doctrine employing levels of scrutiny tests and more specific related tests, such as *Casey*'s rules for assessing restrictions on abortion.¹⁰⁸ Many, if not all, such constitutional areas are governed by two layers of tests for constitutionality, both of which must be satisfied. At the first level are objective fit and purpose tests, having a rigor varying with the level of scrutiny which, in turn, is dependent on what is at stake in each area. After this, a motive test must be passed. This takes the form of prohibition of action taken for certain illegitimate motives (actual aims of the actor) if the motives are the single "but for cause" of the action.

This structure certainly fits gender discrimination cases. An objective standard invalidates most gender distinctions that are apparent on the face of official action.¹⁰⁹ For gender disparate impact cases, an at least apparently subjective motive standard applies.¹¹⁰ The Court requires proof of what counts as illegitimate motive for any sort of stricter scrutiny where gender distinctions do not appear on the face of the statute.¹¹¹

Analogy to race cases applied would by itself suggest the use of motive in such diverse domains as free speech, anti-establishment of religion, fundamental family and procreative rights, the Dormant Commerce Clause, etc. But more than analogy supports generalizing motive beyond matters of race and gender. The Supreme Court has made some general statements of doctrine suggesting that a subjective test for illegitimate motives usually complements the more objective fit to interest or hypothetical purpose test.¹¹² For example, *Wade v. United States* strongly suggests that objective and subjective tests go hand-in-hand well beyond race and gender:

test. Conversely, in rational basis cases, it at least appears that an illegitimate motive is nearly a necessary prerequisite of invalidation.

¹⁰⁷ Examples of cases other than race cases using the subjective motive test are given *infra* notes 109-11 (gender); note 113 (free exercise of religion); note 118 (Establishment Clause); note 119 (free speech); note 121 (Dormant Commerce Clause); note 123 (right to travel); and note 124 (abortion).

¹⁰⁸ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁰⁹ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that Virginia failed to show exceedingly persuasive justification for excluding women from a Virginia military college in violation of equal protection).

¹¹⁰ See, e.g., *Pers. Adm'r v. Feeney*, 442 U.S. 256 (1979) (applying *Arlington Heights*'s doctrine to a claim of illegitimate motives involving gender).

¹¹¹ *Id.*

¹¹² See, e.g., *Wade v. United States*, 504 U.S. 181 (1992). It is worth noting that the motive component is usually almost invisible where scrutiny is strict, because of surface use of suspect class or targeting of fundamental rights. See *supra* notes 95-97 and accompanying text.

[F]ederal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy *if they find that the refusal was based on an unconstitutional motive*. Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant's race or religion. . . . Wade would [also] be entitled to relief *if the prosecutor's refusal to move was not rationally related to any legitimate Government end*. . . .¹¹³

Wade involved no surface discrimination against a suspect class or direct and substantial harm to a fundamental right apparent on the face of official action.¹¹⁴ So, absent proof of an illegitimate motive, *Wade* would properly be a rational basis case, requiring merely that the action scrutinized be rationally related to any real or remotely possible governmental interest appearing to the reviewing court.¹¹⁵ The Court's phraseology suggests the general presence of a motive test in what would otherwise be a rational basis setting.¹¹⁶ The specific examples the Court uses of illegitimate motives go beyond race to include impingement on a fundamental right—free exercise of religion—and they are offered only as examples of an unspecified set of "unconstitutional motive[s]."¹¹⁷

Even beyond inference from race cases and the apparent thrust of some statements by the Supreme Court, there are further grounds to see this coupling of the objective with the apparently subjective as widespread across other sorts of cases using forms of heightened or relaxed scrutiny. For example, the Supreme Court acknowledges that actions scrutinized under the Establishment Clause often turn on the presence of motives that have been identified as illegitimate in that context.¹¹⁸ The Supreme Court stands ready to invalidate government action animated by hidden motives to punish or burden people based on the content of their speech.¹¹⁹ In fact, Dean Kagan asserts that large portions of free speech law seem to have an at least intermediate objective of rooting out actions motivated by hostility to particular messages.¹²⁰ The Court

¹¹³ *Wade*, 504 U.S. at 185-86 (emphasis added).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 186.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 185-86.

¹¹⁸ See *Edwards v. Aguillard*, 482 U.S. 578, 593-95 (1987) (invalidating a statute after applying *Arlington Heights* in finding its "primary purpose" was to advance a religious belief).

¹¹⁹ See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (remanding for lower courts to apply *Arlington Heights*'s doctrine in determining if refusal to rehire a teacher was motivated by the content of his public speech and whether, therefore, the refusal should be invalidated under the First Amendment).

¹²⁰ See *supra* text accompanying note 4; Kagan, *supra* note 4, at 414 (arguing that the more objective portions of stricter scrutiny tests in First Amendment law are aimed at detecting illegitimate motives). But see Kagan's later acknowledgment that an aim at motives reflects other, ultimate concerns that are either consequentialist or deontological. *Id.* at 505-15.

in the Dormant Commerce Clause cases can be taken at least to suggest that protectionist motives are among other features invalidating or tending to invalidate state laws.¹²¹ Donald Regan takes this one step further, arguing that such motives are the sole, ultimate criteria of invalidation in such cases.¹²²

With respect to the fundamental "right to travel" the Court has clearly recognized an illegitimate motive, apparently associated in its realm with the same methods and consequences as are rights to be free of certain racial motives under *Arlington Heights*: "[T]o the extent the *purpose* of the requirement is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible. . . . Moreover, 'a State may no more *try* to fence out those indigents who seek [better public medical facilities] than it may try to fence out indigents generally.'" ¹²³ "Purpose," when coupled with "try," is the language of intention and motivation and not simply shorthand for a legitimate state interest that a court might find sufficient to support an action under a more objective search for sufficient reasons that would justify the action *ex post*.

Might this dual structure extend generally to other fundamental rights as well? In abortion cases, the Court has used a "purpose or effect" test, as a substitute for

¹²¹ See, e.g., *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977) (suggesting a protectionist motive would have at least presumptively invalidated the statute before finding it suspect based on its impact as well). The Court stated:

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would "want to have the sentiment from our apple producers *since they were mainly responsible for this legislation being passed . . .*" Moreover, we find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers.

Id. (citation omitted).

¹²² Regan, *supra* note 4, at 1092, 1143-60, 1284-87.

¹²³ *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263-64 (1974) (emphasis added) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969)). In *Saenz v. Roe*, 526 U.S. 489, 502 (1999), the Court first identified the fundamental right to travel as one of the rights of citizens of the United States protected by the Privileges or Immunities Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."). But it is not clear if *Saenz* views such right to travel as created by the clause or acknowledged by it. In no event is *Saenz* inconsistent with regarding such a right as fundamental, whatever its source. And nothing in *Saenz* casts doubt on *Maricopa*'s suggestion that some motives are inconsistent with such a right, wherever it is located or reflected.

levels of scrutiny, that balances the concerns peculiar to this context.¹²⁴ Where levels of scrutiny analysis are applied with great frequency to a specific set of problems, more context-specific rules emerge.¹²⁵ And so the doctrine that has evolved in *Roe*, *Casey* and *Carhart* reflects the Court's context-specific weighing of interests as it sees them. But this test that has congealed out of general scrutiny analysis also has its motive component.

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had "undervalue[d] the State's interest in potential life." The plurality opinion indicated "[t]he fact that a law which serves a valid purpose, *one not designed to strike at the right itself*, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."¹²⁶

"Designed" is the language of motivation and intention suggesting both that certain *hypothetical* purposes might not be sufficient in themselves to sustain such a law and that an actual purpose to stop abortion on moral grounds would lead to unconstitutionality, subject to the very narrow possibility of a defense on grounds that other acceptable motivations would have led to the same action.¹²⁷ "Strike at the right itself" indicates that part of the core of the right recognized in *Roe* and *Casey* is not to be deprived of an abortion for the *sole* reason that officials believe abortions generally immoral in early stage pregnancies.¹²⁸

Generalizing from the right to travel and abortion cases suggests that the Court is likely to protect all fundamental rights—for example, to birth control or to certain family living situations—from at least those motives that simply would deprive one of a Court-defined right because of the official actor's disagreement with the Court's premises in recognizing the right.¹²⁹ So action motivated by the view that the exercise of such a right is immoral or even simply not worth protecting would be at least presumptively unconstitutional.

¹²⁴ See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1626 (2007); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

¹²⁵ See e.g., *Carhart*, 127 S. Ct. 1610; *Casey*, 505 U.S. 833; *Roe v. Wade*, 410 U.S. 113 (1973).

¹²⁶ *Carhart*, 127 S. Ct. at 1633(emphasis added) (citations omitted).

¹²⁷ See *supra* note 28 for a discussion of the narrow avenue of escape that *Arlington Heights* allows officials found to have acted on illegitimate motives.

¹²⁸ *Carhart*, 127 S. Ct. at 1633.

¹²⁹ See *supra* notes 123 (right to travel), 124 (abortion) and accompanying text.

One last set of cases is especially important to the issues this Article explores. It involves motives not aimed in certain ways at suspect classes or at the destruction or frustration of fundamental rights. In this second set, the invalidating motives are what I will call “atypical” motives to injure people simply to injure them.¹³⁰ This set is exemplified by *U.S. Department of Agriculture v. Moreno*, which struck down a law as motivated by a purely destructive and irrational dislike for people having certain characteristics.¹³¹ The few cases such as *Moreno* raise the most difficult problems for a consequentialist justification of motive analysis, and I address those cases in detail later in this Article.¹³²

II. BASIC ISSUES OF JUSTIFICATION: CHOICE OF MORAL PHILOSOPHY

A. *The Need for External Principles*

The pervasiveness of motive analysis is partially explainable by basic human tendencies to consider the motives of others in a wide variety of settings. To some extent it is natural that habits of mind from other parts of law, and from life in general, carry over to constitutional law. My aim, however, is at justification, not simply explanation. How Hitler’s murderous mindset developed might be explained psychologically, but certainly it could not be justified. The justification of something that exists is an explanation of why it ought to be as it is, not merely of why it is what it is.

Recognition of constitutional motive analysis dates back at least to *McCulloch v. Maryland*,¹³³ but there are no constitutional textual provisions or widely accepted legal-fundamental principles (such as representation reinforcement)¹³⁴ from which the constitutional desirability of motive analysis can be deduced or inferred. Indeed, through long-standing practice, constitutional condemnation of certain bad official motives has, itself, become such a second-order principle, having its own weight in judicial review in certain circumstances.¹³⁵ And the question explored here is whether

¹³⁰ See *infra* Part III.B.

¹³¹ 413 U.S. 528 (1973).

¹³² See *infra* Part V.C.

¹³³ 17 U.S. 316 (1819). The Court stated:

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Id. at 423.

¹³⁴ See ELY, *supra* note 12, at 101-04.

¹³⁵ See *supra* Part I.B.

and how the development of that second-order principle ultimately is justifiable. Is it grounded on something deeper than itself and intuitively satisfying?

Particularly in the very textually underdetermined provinces of the Due Process and Equal Protection Clauses, in which the levels of scrutiny rules and motive analysis dominate, justification is naturally much more dependent on one's more general views of what is right than on what is settled by relatively linguistically clear features of the constitutional system. The relative specificity of the latter makes them, in turn, relatively closed to interpretation—for example, rules against bills of attainder and ex post facto laws.¹³⁶ The former, more open-textured rules are my focus. Such vaguely phrased provisions typically require fairness in a very broad sense, including equal treatment of persons. And so it is a natural conclusion that doctrinal hardware developed by the Court to implement these constitutional provisions should be strongly dependent on some basic views of right and wrong extended to governmental action. Indeed, if they are not connected with some moral underpinnings, then what could possibly support them in some convincing way?

In seeking a justification for motive analysis—particularly as it plays a part in the default rules of rational basis, intermediate, and strict scrutiny—I am seeking the best fit of moral philosophy with the basic facts of levels of scrutiny and motive review. The moral philosophy must fit the facts of the system it seeks to justify and be a satisfying justification of that system.

Thus, I am applying, to external justification of constitutional motive analysis, tests that resemble those that Ronald Dworkin applies in determining justifications of decisions generally within the legal system.¹³⁷ Without the first feature—a good fit with existing law—a theory cannot be seen as a justification of existing scrutiny and motive doctrine, and that is what I am seeking. Rather it would be an argument for doctrinal change.¹³⁸ Conversely, if the fit of a moral philosophy with existing doctrine is tight, but the philosophy itself is unconvincing, then using it as justification would founder in that different way.¹³⁹ Richard Fallon's similar use of Dworkin's methods in seeking the best reading of specific constitutional doctrines is helpful in understanding my own attempt, here, to find the best one for motive analysis:

My answer, following Professor Dworkin, is that when more than one explanation of the practice and its rule structure is reasonably defensible, the best theory will be that which is not merely descriptively plausible, but also guides future conduct in the most normatively attractive way. This mixture of normative and descriptive criteria reflects an approach that Dworkin has labeled

¹³⁶ See *supra* notes 6 (bills of attainder), 7 (ex post facto laws) and accompanying text.

¹³⁷ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 64-68 (1977).

¹³⁸ *Id.*

¹³⁹ *Id.*

“interpretive.” The goal is to portray the practice in the best light that is reasonably compatible with the self-understanding of practitioners.¹⁴⁰

What are the most promising contending views of what might make official action wrong in circumstances where text and history have not already answered that question in ways that must be seen as settled? More particularly, how might motive analysis seem to make moral sense and not just be a thoughtless extension to constitutional law of the concern with motives that exists and is justified in other realms of life, including law?

I present the two most common moral philosophical views, consequentialism and deontology.¹⁴¹ These are the most plausible candidates for the moral vision that would shape doctrine made to implement constitutional requirements no more explicit than equality or fairness, such as the Equal Protection and Due Process Clauses. And to a lesser degree, more specific rights such as freedom of speech and religion require the creation of implementing doctrine that either is aimless or is underwritten by some coherent moral vision.

¹⁴⁰ Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1233-34 (1987) (citations omitted).

¹⁴¹ See Marcia Baron, *Introduction* to MARCIA W. BARON ET AL., *THREE METHODS OF ETHICS: A DEBATE* 1, 1 (1997). Marcia Baron writes:

In recent years, three ways of thinking about morality have come largely to dominate the landscape of ethical debate. These three are consequentialism, which emphasizes good results as the basis for evaluating human actions; Kantian ethics, which focuses on ideals of universal law and respect for others as the basis for morality; and virtue ethics, which views moral questions from the standpoint of the moral agent with virtuous character or motives.

Id. It is difficult to see how the notion of virtue ethics might be translated to apply, in some convincing way, to the actions of individual and collective government officials. Though the effort might be interesting, and even rewarding, nothing suggests that virtue ethics is a good fit with the cases dealing with the role of motive in constitutional law. One might say the same for John Rawls's complex contractarian theory of justice, which in any event is classifiable as a descendant of Kant's deontological theory. See JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999). Courts began developing levels of scrutiny law and motive analysis long before *A Theory of Justice* was published in 1971. For instance, in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), the Court utilized a rational basis review, but differentiated it from other review levels. And most of the modern law was further developed long before Rawls's views were widely known in judicial circles. One might say that consequentialist, deontological, and virtue ethical views have existed in some form for hundreds of years and might have exerted influence over law, particularly in the case of the first two forms. Rawls's theories are so complex and specific to him in their details that they had no plausible influence in precursor form, beyond what they share in general with contract theory and deontology in general.

B. Consequentialism Versus Deontology

For a consequentialist, the test of a right action is its net good consequences.¹⁴² In the most common form of consequentialism, utilitarianism, good results are defined in terms of the net amount of pleasure or displeasure an act produces as compared to alternative courses of action, including taking no action.¹⁴³ The right action to take, among the possibilities, is the one that maximizes net happiness.¹⁴⁴ Non-utilitarian forms of consequentialism seek to maximize the good, defined in many other possible ways.¹⁴⁵

The polar opposite variety of moral philosophical systems are described by the rough synonyms “non-consequentialist,” “Kantian,” and “deontological.”¹⁴⁶ These ethical positions judge acts as right or wrong based on their nature and independently of their consequences. Intuition plays a larger and continuing role in these latter philosophies.

¹⁴² See Marcia Baron, *Kantian Ethics*, in BARON ET AL., *supra* note 141, at 3, 5. Marcia Baron, who endorses Kantian ethics over the other two forms, wrote this passage in describing the rival view of consequentialism:

The core idea of consequentialism is that what makes an action (or a policy) right is that it brings about better consequences than any of its alternatives. “Right” is ambiguous between “obligatory” and “permissible,” so let’s clarify: what makes an action (or policy) obligatory is that it brings about better consequences than any of its alternatives. What makes it permissible is that it brings about consequences that are at least as good as any of its alternatives. “Better” or “better consequences” can be cashed out in a variety of ways, but we needn’t concern ourselves with that now. And the item whose consequences determine its moral status is typically an action, but could be a policy or, on some versions of consequentialism, a motive or trait. I shall generally suppose that it is an action, and shall signal when I do not.

Id.; see also “consequentialism,” as it is defined in THE OXFORD COMPANION TO PHILOSOPHY 162-65 (Ted Honderich ed., 2d ed. 2005).

¹⁴³ The utilitarian form of consequentialism views maximizing pleasure as the good end to be achieved. See HENRY SIDGWICK, THE METHODS OF ETHICS 411 (Hackett Publ’g Co. 1981) (1874). Both utilitarianism and other forms of consequentialism seek to maximize things other than pleasure, including some things seen as higher goods. See, for instance, a description of present day utilitarianism in THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 142, at 936 (“[C]ertain later and contemporary versions of utilitarianism broaden the notion . . . so that human or personal good is understood to be constituted by whatever satisfies people’s desires or preferences or makes people happy.”).

¹⁴⁴ See SIDGWICK, *supra* note 143, at 411.

¹⁴⁵ See THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 142, at 162-65.

¹⁴⁶ For a general description of deontological ethics, see *id.* at 200-01. In deontological systems, “certain acts are right or wrong in themselves.” *Id.* at 200. For a (1) fuller description of deontological ethics, (2) arguments for its superiority over other theories and (3) the use of “Kantian” in its most general usage as a synonym of deontological, see Baron, *supra* note 141.

In consequentialism, by contrast, two initial intuitions suffice: (1) that a right action is that which maximizes the good under all of the circumstances; and (2) an intuition as to what the good is.¹⁴⁷ But in Kantian philosophies, it is necessary to ask numerous, very situational, specific questions about the rightness of actions—for example, killing, torture, lying, breaking promises.¹⁴⁸ In some forms of Kantianism, one might intuit that it is always wrong to kill innocent people, regardless of how much good doing so would accomplish—for example, how many innocent lives killing one person might save.¹⁴⁹ The acts that are regarded as wrong regardless of their consequences vary depending on the Kantian.¹⁵⁰ Some might allow lying to save lives but would never allow torture; some would allow neither. Utilitarianism, to the extent it succeeds, is a sleeker moral equation. It reduces good to a common denominator and, as applied to each life decision, official or individual, reiteratively requires maximization of that common good.

For readers who have not attempted to systematize their moral intuitions, let me offer a simple test of whether they are better explained by a set of diverse intuitions about what actions are simply wrong in themselves, or by a judgment of rightness and wrongness of actions based on consequences. In *Utilitarianism: For & Against*, J.J.C. Smart and Bernard Williams engage in the classic debate over consequentialism versus deontology, taking respectively the for and against positions.¹⁵¹ Williams's arguments against consequentialism and in favor of irreducible transcendent rules feature a hypothetical situation aimed at persuading us that some actions are just wrong regardless of their comparative consequences.¹⁵²

However, I think that Williams's hypothetical is an effective litmus for fleshing out the true basis of a reader's moral views. Reduced to its essence, Williams's hypothetical is this: a man X, presumably a modern European, finds himself in a foreign land with an unfamiliar culture. Twenty prisoners are lined up for execution by firing squad. The execution seems entirely unjust to X as predicated either on no guilty actions by the prisoners or perhaps even on exemplary actions. The officer in charge of the execution offers X, as an "honored visitor from another land," the "privilege" of killing one of the prisoners himself. "If [X] accepts, then as a special mark of the occasion the other[s] will be let go." Williams asks: what should X do? He concludes that X should not engage in such an unjustified killing, regardless of its net good consequences.¹⁵³

¹⁴⁷ See THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 142, at 162-65.

¹⁴⁸ See Baron, *supra* note 142.

¹⁴⁹ See THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 142, at 164; *infra* note 91 and accompanying text.

¹⁵⁰ See Baron, *supra*, note 142.

¹⁵¹ J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR & AGAINST* (1973).

¹⁵² *Id.* at 98-99.

¹⁵³ *Id.* at 98-100.

Certainly I, and most readers, would recoil from pulling the trigger in these circumstances. But if a reader finds herself giving moral¹⁵⁴ reasons for such recoil that are defined solely in terms of the net bad consequences, then the reader is likely to be a consequentialist. It might be natural to react that accepting the officer's request might encourage such killings in the future by confirming the officer's sense that they are warranted. Refusing might raise moral doubts in the chief executioner that might spread to his officers and to others, ultimately leading to a net reduction in killings, even if these extra nineteen are killed as a result. The avoidance of such future killings or other harm might, net, outweigh the nineteen deaths caused by refusing to kill one person. Or one might conclude that X might develop a tolerance, or even taste, for violence as a result of a first such killing, and thus might be less resistant to such wrongs or even be an agent of such harm in the future.

Avoiding these bad consequences might justify the excess deaths of the nineteen currently in prospect. Williams is a subtle philosopher and considers such consequentialist possibilities.¹⁵⁵ What is significant is that he concludes that such calculations are irrelevant to determining the morally proper action.¹⁵⁶ For him, killing an innocent is wrong and is simply morally prohibited, regardless of its net comparative consequences.¹⁵⁷

My intuition is that, for most readers, if such negative consequentialist side effects are appropriately discounted for probability, weighed, and found likely to cause less harm than the avoidable death of nineteen innocent people, then killing one of the prisoners will be seen as the right thing to do, even if, psychologically, one is not strong enough to do the right thing. If you are such a reader, then you are very likely a consequentialist.

I am strongly inclined toward consequentialism, but will not, in the text of this Article, offer arguments that it is a superior moral theory—professional philosophers have long debated the relative merits of the two main moral theories and others.¹⁵⁸ I will admit to feeling the attractions of deontology in the contexts of rules for the behavior of small groups of people, family, friends, and close colleagues. And ultimately, the test of a moral theory must be that it feels right. But I see no attractive alternative to consequentialism for moral governance of decisions affecting very large groups of people who must largely remain abstract to the decision maker.¹⁵⁹ Decisions

¹⁵⁴ In this sense, "moral" is defined as a state that is opposed to a merely psychological one.

¹⁵⁵ SMART & WILLIAMS, *supra* note 151, at 98-107.

¹⁵⁶ *Id.* at 102-04.

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g., BARON ET AL., *supra* note 141. The Baron book offers a debate between three ethical theories, deontology, consequentialism, and virtue ethics, whose proponents are respectively Marcia W. Baron, Philip Pettit, and Michael Slote. For the classic two-sided debate between deontology and consequentialism, see SMART & WILLIAMS, *supra* note 151.

¹⁵⁹ Most current legal thinking seems ultimately consequentialist. See Kyron Huigens,

about legal doctrine are in this category. Thus this Article proceeds on the assumption both that consequentialist justification is what is required of motive analysis, if justification is to be had at all, and that most readers are themselves consequentialists. If that is true then, for most readers, serious unresolved problems of justifying existing motive analysis as aimed at bad consequences would suggest its use reflects a mistaken doctrinal turn. And for deontologists this would be interesting as well. There are apparent problems with a consequentialist explanation of motive analysis, particularly when done in some rational basis cases.

III. HOW MIGHT MOTIVE ANALYSIS BE JUSTIFIED ON CONSEQUENTIALIST GROUNDS?

A. The Plausible Consequentialist Underpinnings of Heightened Scrutiny and of Typical Motive Cases

For the reasons stated above, the following assumes that consequentialism is the most attractive moral theory, at least for making large scale public decisions that require dealing with the interests of people who must remain largely abstract to decision makers. But is consequentialism a plausible justification of the existing practice of judges to resort to motives in the framing of doctrine and deciding cases? Of course, there was never explicit agreement among framers or among judges that consequentialism controls constitutional doctrine where it is not settled by clear text or tradition. But it seems likely that, consciously or unconsciously, concern with consequences has powerfully shaped doctrine within the gaps left open by text, history, and tradition. And, following Ronald Dworkin, this Article asks whether consequentialism offers the most satisfactory account of existing law.

Matthew Adler argues persuasively that much constitutional law involves rights against unacceptable rules that produce outcomes rather than rights to particular out-

Nietzsche and Aretaic Legal Theory, 24 CARDOZO L. REV. 563 (2003):

Current Anglo-American legal theory is caught in this very dilemma and displays this same need. American law, at least, is constitutionally cut off from the support of revealed religion. With one exception, which I will discuss below, deontological morality has never played a significant role in Anglo-American law or legal theory. This leaves empirical consequentialism as the mainstay, which takes many forms other than classic English Utilitarianism. One is the crude consequentialism of “policy analysis,” in which the unrecognized and unexamined assumption is that law is a set of prescriptions that serve as incentive structures designed and administered to produce preferred states of affairs. The more self-conscious and rigorous version of this consequentialist legal theory is, of course, law and economics.

Id. at 565.

comes.¹⁶⁰ So, one has a right to burn a flag against a rule prohibiting such forms of expression,¹⁶¹ but not against a rule prohibiting, for reasons of safety, the burning of anything in certain geographic areas.¹⁶² Likewise one has a right to possess birth control against a general regulation prohibiting its sale, but not against one prohibiting its theft.¹⁶³ An act may fall under one or more various regulatory rules, and it is the rule, not the act, that is normally the focus of constitutional review.

Some constitutional rules against legislative rules are very precise. The law can punish me for selling a product over a price limit, but not if the limit operates as an *ex post facto* law in my case. Except possibly at the fringes, fully developed, relatively precise rules of this sort subsume and replace the policy concerns that prompt them. Once government actors adopt such rules, our system's basic norms dictate enforcement of the rules, not the formative policies. The latter play a continuing role only in elaborating and applying the rule in contestable applications and in justifying changing the rule through appropriate channels.

But the general due process and equal protection formulas are not precise at all. Their working parts involve analysis of sufficient reasons and of motives for action, the latter meaning reasons actually acted on. In a sense, the form of these constitutional rules creates rights against certain action supported insufficiently by reasons or based on illegitimate motives. Adler's notion of "rights against rules," in this realm at least, is largely one of rights against reasons and motives.

1. Let Us Ask Why Reasons and Then Ask Why Motives

A judge driven by consequentialism, but operating within current caseload and separation of powers constraints, could not attempt a direct assessment of consequences in each case. The best that might be done is to put certain reasons off limits on grounds that actions taken for such reasons tend to result in greatly more harm than good. May races ever be segregated as matter of official policy? Theoretically, yes. But the likely negative consequences of such segregation are implicitly so high, from the perspective of constitutional law, that the law requires an especially good reason to justify it.¹⁶⁴ One could make nearly the same statement for explicit gender

¹⁶⁰ See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 133-35 (1998).

¹⁶¹ *Id.* at 3.

¹⁶² *Id.* at 3-4.

¹⁶³ *Id.* at 31-32.

¹⁶⁴ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2751-52 (2007) (requiring strict scrutiny for racial classification in school district busing).

distinctions.¹⁶⁵ And fundamental rights are assigned a high value, requiring a very powerful reason to permit their frustration by government.¹⁶⁶

This, I believe, is the most satisfying way of understanding the purpose and fit requirements of strict and intermediate scrutiny, both of which require a very good regulatory reason indeed to cut significantly into a highly valued personal interest.¹⁶⁷ A good reason for a governmental action is not just a good end, but a good end that is likely to be worth the cost of pursuing given the negative side effects. So if there are ways of pursuing a regulatory agenda that do not involve cutting into an important individual interest, then those must be pursued instead.¹⁶⁸ And even if there are no other ways of pursuing it effectively, the governmental interest must be important indeed and sufficiently likely to be realized in order to warrant race or gender discrimination or serious injury to a fundamental right.¹⁶⁹

Reasons then are a rough-cut proxy for consequences, and a proxy that is within the authority and capacity of the judiciary to deploy. And in strict scrutiny, sufficient means-ends reasons would have to be powerful enough to warrant the very constitutionally expensive governmental action that triggers such intense review.¹⁷⁰

Motives, too, are reasons. But they are reasons that actually animate the actor. A consequentialist would care about whether an action was or could have been justified by good reasons precisely because actions that are justifiable in that way, by definition, correlate with avoiding the consequences constitutional law deems the worst. But a consequentialist would not care whether a reason was an actual motive or not, unless somehow its being a motive increased the risk of bad consequences. Can we say that it does increase the risk and thus makes motive analysis seem justifiable on consequentialist grounds? A positive answer to this question seems problematic only in certain rational basis cases and thus they are the most interesting. Let us see why that is so.

In race,¹⁷¹ gender,¹⁷² and fundamental rights cases,¹⁷³ motive analysis is never decisive for governmental action subjected to stricter scrutiny because of surface features of the action, for example, a statute's making a racial distinction.¹⁷⁴ The

¹⁶⁵ *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (confirming heightened scrutiny on gender classifications).

¹⁶⁶ *Roe v. Wade*, 410 U.S. 113, 155 (1973) (requiring strict scrutiny for fundamental rights violations).

¹⁶⁷ *Id.*

¹⁶⁸ *See, e.g., Toomer v. Witsell*, 334 U.S. 385, 398-99 (1948) (citing less restrictive means as a reason for overturning state fishing license requirements).

¹⁶⁹ *See, e.g., Roe*, 410 U.S. at 155.

¹⁷⁰ *Id.*

¹⁷¹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 127 S. Ct. 2738, 2751-52 (2007).

¹⁷² *See, e.g., United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

¹⁷³ *See, e.g., Roe*, 410 U.S. at 155.

¹⁷⁴ *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that all

Court identifies arguably weighty purposes without any real probing of motive and assumes the ends are sufficiently weighty (compelling or important) for the particular level of stricter scrutiny.¹⁷⁵ The action nearly always fails on grounds that it is not narrowly tailored to serve such ends.¹⁷⁶ I know of no case where the Court, in applying strict scrutiny because of the action's surface features, has gone beyond tailoring issues to probe deeply for a hidden illegitimate motive.

Rational basis cases bifurcate into one set that is easy to harmonize with consequentialism and one that is not. The first set of cases starts off as rational basis because there are no surface warning signs of improper government action, such as an explicit racial distinction.¹⁷⁷ But, these cases move to something like strict scrutiny,¹⁷⁸ because of indications that subterranean illegitimate motives connected with race, gender, or fundamental rights at least partially animated the action.¹⁷⁹ *Arlington Heights* is the exemplar of these cases.¹⁸⁰ They are the most prevalent motive cases and the easiest to harmonize with consequentialist moral underpinnings. I will call these "typical illegitimate motive cases." It is the second set of rational basis cases that pose the greatest difficulty for consequentialist justification. Before turning to these in the next section, let us see why typical motive cases are fairly easy to harmonize with a consequentialist justification.

Disparate impact cases driven by hidden motives to injure suspect classes or fundamental rights are closely connected with true strict scrutiny cases.¹⁸¹ This is the major category of illegitimate motive cases, and it is relatively easy to justify an aim at illegitimate motives, in such cases, on consequentialist grounds.

One explanation might simply note that where an illegitimate motive underlies an action that is neutral on its surface, the real rule in effect makes use of distinctions that are highly disfavored by strict scrutiny.¹⁸² And we have seen that the rules of strict scrutiny are plausibly consequentialist. The objective portions of strict scru-

racial classifications, whether benign or invidious, are subject to strict scrutiny).

¹⁷⁵ See, e.g., *Roe*, 410 U.S. at 155.

¹⁷⁶ See, e.g., *Parents Involved*, 1275 S. Ct. at 2760 ("Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives,' and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration." (citations omitted)).

¹⁷⁷ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (applying rational basis review to a police entrance exam with a disparate racial impact).

¹⁷⁸ See *supra* notes 85-86 and accompanying text.

¹⁷⁹ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1633 (2007) (stating that a purpose "designed to strike at the [abortion] right itself" is invalid).

¹⁸⁰ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

¹⁸¹ See, e.g., *Davis*, 426 U.S. 229.

¹⁸² *Brest*, *supra* note 12, at 103 ("An operative rule may be overt, 'No Chinese may operate laundries,' or may be covert, as where the official charged with issuing permits to operate laundries grants them to Caucasians and denies them to Chinese, and no variable other than nationality explains the pattern." (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886))).

tiny highly disfavor an explicit use of race-based criteria due to the resultant harms. Following a hidden racist rule (or rule to frustrate the use of birth control or early-term abortions) is largely the same.

The main way that it is not the same even more strongly supports a consequentialist interpretation. The use of a racial classification is excusable in some circumstances where it is a means to a constitutionally compelling end.¹⁸³ As defined above, an illegitimate motive is one that has a constitutionally unacceptable ultimate end—for example, racial denigration—or that is significantly based on beliefs that are a constitutionally impermissible basis for action.¹⁸⁴ *Arlington Heights* does provide that if a government can demonstrate that an action taken for such an unjustifiable motive was also taken for a sufficient one, then the action may be saved invalidation.¹⁸⁵

Let me reuse the example of a pool closed for two reasons, one purely racist and the other that it is gravely and irreparably dangerous to swimmers. But this demonstrates only that if the motive was not the “but for” cause of an action, because it is supported by other adequate grounds, then the motive does not invalidate the action. It is important to note that this does not mean that an illegitimate motive does not rightly raise suspicion of claims that other reasons exist that support the action. Indeed, *Arlington Heights* places the burden on a government to save a partially illegitimately motivated action by producing credible proof of a sufficient alternative.¹⁸⁶ So if, and only if, our suspicions concerning other grounds are eventually allayed, then the illegitimate motive becomes irrelevant.

This concern with whether adequate alternative reasons existed looks consequentialist. The question seems to be whether the illegitimately motivated action was justifiable for alternative reasons likely to produce net good consequences, in my example saving swimmers from drowning or electrocution. In cases involving initially hidden illegitimate motives aimed at suspect classes or fundamental rights, I think that it is fair to say that both destructive motives and sufficient saving reasons are defined in ways that are geared toward insuring against some of the constitutionally worst net consequences, within the limited ability of the judiciary to so insure on judicial review.

In short, I believe that if underwritten by a consequentialist view, constitutional strict scrutiny should be seen as preferring to aim at consequences to the extent that is consistent with the judiciary’s capacity to hear cases and with a proper separation of functions between it and the political branches. But calculation of consequences, case by case, is beyond the capacity of the judiciary. So courts use reasons as a proxy for consequences. Actions taken for illegitimate reasons (motives) involving suspect classes or fundamental rights are likely to correlate with especially bad consequences,

¹⁸³ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (holding the removal of Japanese Americans fulfilled a constitutionally compelling end).

¹⁸⁴ See *supra* Part I.A.

¹⁸⁵ *Arlington Heights*, 429 U.S. at 266.

¹⁸⁶ See *supra* note 105 and accompanying text.

and so they are presumptively tainted.¹⁸⁷ The likelihood of alternative reasons (not limited to the actor's motives) that would justify such presumptively tainted action is extremely unlikely, since such reasons would have to be extremely convincing, perhaps both especially believable and compelling. Such powerful reasons are rare, hence *Arlington Heights*'s placement of the burden on government to justify an action found to be even partially illegitimately motivated.¹⁸⁸

This set of explanations seems especially simple and powerful for motives connected with harming suspect classes and restricting fundamental rights. When we move to a narrower set of rational basis cases, the difficulties increase for a consequentialist justification of considering illegitimate motives.

B. Atypical Cases

When, as in cases turning on illegitimate racial motives, rational basis analysis is closely connected with the concerns that define the surface markers of strict scrutiny, two things can be said. The first is that what are defined as illegitimate motives are, by definition, likely to lead to constitutionally disfavored states of the world: concrete racial disparities and the direct psychic damage caused by communicated disparagement. A constitution cannot specify world states in advance. It can say, or be made by judges to say, something like "do not restrict speech or abortion, or classify by race or gender, without a very powerful reason." Second, it is extremely unlikely that an alternative sufficient reason exists in such cases. This is because in race discrimination cases it would have to be a compelling reason,¹⁸⁹ sufficient to warrant allowing something powerfully disfavored.¹⁹⁰ And before one starts to probe an official act, it is unlikely that such a reason exists.

But things are different in the rational basis cases discussed in this section, which ordinarily require only the flimsiest support for governmental action injuring more ordinary interests.¹⁹¹ If there is nearly a vacuum of compelling reasons tightly justifying the creation of strongly disfavored consequences—as means to avoid even worse consequences—the metaphorical air seems as filled with merely legitimate reasons as the actual air is with nitrogen. Based on the leading cases,¹⁹² almost any reason will do, as long as it is not one of the illegitimate ones discussed in the last section.¹⁹³ This means that the interests typically protected by the objective portions of rational basis

¹⁸⁷ Adler, *supra* note 160, at 34.

¹⁸⁸ *Arlington Heights*, 429 U.S. at 266.

¹⁸⁹ By "reason" I mean not just that the end would need to suffice as a goal, if properly pursued, but also that the regulations must have an appropriately tight fit to the end.

¹⁹⁰ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁹¹ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁹² See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); see also *supra* note 28 and accompanying text.

¹⁹³ See *infra* Part IV.B.

law appear to have almost no value. If almost any set of regulatory reasons can overwhelm them to the point of allowing their destruction, then how valuable can they be?

If the interests are of near zero value, why does motive law protect them even from illegitimate motives when the objective portions of rational basis law treat them as almost non-existent? When an illegitimate motive underpins an action, will there not almost always have been an alternative good reason for such an action, given how plentiful good reasons are? To return to my atmospheric metaphor, won't some of the plentiful and pressurized nitrogen flow in to any gap to provide support? And recall that a consequentialist would need just one good-enough reason.

Before offering a consequentialist justification for this set of rational basis cases not closely connected with the triggers of strict scrutiny, I want to address the issue of how real and plentifully populated is this set of cases. These are rational basis motive cases not involving illegitimate motives directed at suspect classes and fundamental rights.

The entire set of cases in which courts seriously consider motives is tiny compared to the set of cases decided under the objective portions of various scrutiny tests. The former, smaller set largely comprises cases alleging racial motives and some alleging a motive to promote religious doctrine.¹⁹⁴ Still it is a real and interesting phenomenon, requiring justification. When we move in this section to the subset of motive cases involving no allegations of hidden motives to injure suspect classes or fundamental rights, there are very few cases indeed. Here justification is more complex and more interesting than in the former cases. But there are legitimate questions concerning whether this set is very close to unpopulated with cases and whether those within it are aberrations and, perhaps, likely to be abandoned by the Court. I believe it is a worthwhile endeavor to expose and address these concerns honestly, though I cannot definitively resolve them.

What I can do is to point out that, if these sets are unpopulated or severely underpopulated for the reasons that I identify, then the importance of illegitimate motives to constitutional law turns out to be surprisingly limited almost entirely to cases involving hidden racial and gender motives and a very few involving fundamental rights, especially establishment cases. That is worth noting. If it is true, then on careful inspection the promise of rational basis doctrine is even much more limited than it seems.

On the other hand, if this subset is, or ought to be, significant, then providing a consequentialist justification for its existence is a complex matter. It involves a reconsideration of the importance of those individual liberty and property interests that strict scrutiny does not usually protect. Immediately below, I will lay out the difficulties with seeing this subset (and its two smaller subsets) as significant. The reader must decide for himself. After that, I will deal with the complexities of justify-

¹⁹⁴ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

ing this subset of cases in a consequentialist way. The subset itself has two subsets: (1) atypical illegitimate motives and (2) typical illegitimate motives (for example, racial denigration) that injure those other than the primary rights holder.

1. *U.S. Department of Agriculture v. Moreno, Romer v. Evans*, and Similar Cases

Certainly the first set of atypical cases, exemplified by *U.S. Department of Agriculture v. Moreno*,¹⁹⁵ seems to identify some illegitimate motives beyond the typical ones related to race, gender, and fundamental rights. In *Moreno*, the Court invalidated a statute limiting public benefits on grounds of its underlying illegitimate motivations:

The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."¹⁹⁶

This is open to a number of readings. But it speaks of a "bare congressional desire."¹⁹⁷ "Desire" suggests that the statute's flaw lay in the motive that underlay its enactment.¹⁹⁸ In his concurring opinion in *Kelo v. City of New London*, Justice Kennedy cites *Moreno* and *Cleburne v. Cleburne Living Center*, as precedent for his conclusion that:

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification *that is clearly intended to injure a*

¹⁹⁵ 413 U.S. 528 (1973).

¹⁹⁶ *Id.* at 534-35 (emphasis added except to the word "legitimate") (citations omitted).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

*particular class of private parties, with only incidental or pre-textual public justifications.*¹⁹⁹

“Intended,” like “desires,” is the language of mental states. And in her concurring opinion in *Lawrence v. Texas*, Justice O’Connor cites the same cases for the same proposition.²⁰⁰ *Romer v. Evans*, which struck down discriminatory state action against homosexuals, also cites and discusses *Moreno*.²⁰¹ The Court’s finding of a purely destructive motive played at least a supporting role in the decisions of both gay rights cases, and possibly the decisive role.²⁰²

Certainly it is possible to read these passages as not clearly differentiating between “purpose” in the more abstract sense used in the objective fit tests and in the sense of intention or motives, even though the words “desire” and “intended” are used. Given that these are, on first impression, rational basis cases, having no surface markers of strict scrutiny, perhaps the Court is just looking for some adequate reason to uphold a law that seems to lead to needlessly bad consequences. Perhaps, in the process, it considers, as one among many, the reason underlying a bare desire to do harm and finds it constitutionally inadequate. But I doubt that the Court in *Moreno* or Justices Kennedy and O’Connor are clear, in their own heads or in print, about these distinctions. The language of “motives” is used, though alongside more objective language, which serves only to bolster the view I advance that a search for motives often may cover, consciously or unconsciously, a search for adequate reasons.²⁰³

Assuming that *Moreno*, and possibly other cases as well, are motive cases, serious questions remain about their importance and, possibly, vitality. From one perspective, this set of atypical motives (not tied directly to suspect classes or fundamental rights) is potentially very important, perhaps foundational in a way that has not blossomed. Its prohibition on “bare” motive or intent to harm, not itself supported by “public justifications,” could be seen as the most general and foundational norm underlying equal protection strict scrutiny law, including its motive component. On this view, avoiding acts motivated by a desire to harm out of pure antipathy drives all such law, but, due to judicial capacity issues, is generally underenforced except where suspect classes or fundamental rights are involved.

¹⁹⁹ 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (emphasis added).

²⁰⁰ 539 U.S. 558, 580 (2003) (O’Connor, J., concurring).

²⁰¹ 517 U.S. 620, 634-35, 652 (1996) (striking down a state constitutional amendment that prohibited anti-discrimination laws from protecting homosexuals).

²⁰² *Lawrence*, 539 U.S. at 580 (quoting *Moreno* and suggesting the possibility that a governmental “desire to harm an unpopular group” may play a role in striking the law while also suggesting that the fact that a personal sexual choice was involved may have played a separate or related role); *Romer*, 517 U.S. at 634-35 (“[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”).

²⁰³ See *supra* Part I.B.

But this points out the atypical motive set's weaknesses as well. Which motives to harm are "bare," meaning unconnected in the right way with a sufficient public policy? Certainly, to take a clear example, antipathy to serial killers can no less be expressed in public law because legislators have come to hate them. This is regress, putting off the hard work of defining rights or perhaps more fairly, a first step in that work. To protect gay rights or those of hippies requires an a priori determination of which aims are illegitimate.

For these reasons there have been few cases and it remains to be seen whether this category, if seen as one built around illegitimate motives, continues to exist or will be more widely populated.

2. Some Apparently First-Party Rational Basis Claims Raising Third-Party Standing Issues

If the first set of atypical cases is a real one and one based on "motives" in some intelligible sense of that word, then there are at least a few atypical cases. And so the generalized promise of rational basis law apparently is fulfilled to that extent. But perhaps this appearance is deceiving in a second subset of atypical cases involving an actor's illegitimate motives aimed at race, gender, or fundamental rights, but asserted by someone other than the primary rights holder.

Perhaps as a result of standing requirements, the only persons who can challenge laws targeting birth control for elimination or reduction on moral grounds, or laws aiming at racial or gender classifications on bigoted grounds, are persons claiming harm to such specially protected interests. (Let me call such persons the "special beneficiaries" of strict scrutiny and related motive analysis.) If so, then the prohibition against illegitimate motives, as part of a requirement of minimal rationality, is much more limited than it seems on the doctrinal surface of rational basis cases. If so, then the section above provides a relatively simple and plausible explanation of why such smaller protections exist. In short, the consequentialist explanation for rational basis law proves easy because the doctrine has shrunk.

Arlington Heights itself suggests that third-party standing strictures virtually eliminate this category of cases as one with many or any real members.²⁰⁴ The Court assumes that what I call atypical plaintiff cases implicate the largely implacable rules against third-party standing²⁰⁵ and thus require a finding of special circumstances in order to go forward on that basis.²⁰⁶ The Court avoids having to make this finding by determining that some plaintiffs, members of the allegedly targeted racial minority, were asserting their own rights and met all of the other requirements for standing as

²⁰⁴ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

²⁰⁵ See *CHEMERINSKY*, *supra* note 23, at 82-90 (explaining that, with specified exceptions, "a plaintiff generally must assert his own legal rights and interests").

²⁰⁶ *Arlington Heights*, 429 U.S. at 262-65.

well.²⁰⁷ Thus the Court rationalized *Arlington Heights* as a first-party case, strongly suggesting that standing was seriously doubtful otherwise.

But can the *Arlington Heights* Court's view of third-party standing be squared with the basic premises, and perhaps promises, of rational basis law? Certainly the standard formulation of rational basis law seems to give all of us a right to be free from inequalities and from harm caused to life, liberty, or property by completely irrational and illegitimately motivated laws.²⁰⁸ Is it not true that a law aimed only at racial segregation is irrationally motivated in the sense that it is not aimed at furthering anything that government is permitted to further?²⁰⁹ It is designed precisely to be irrational within the domain of reasons in which it is permitted to operate, a domain that does not recognize the validity of its only aim. Certainly it may be instrumentally rational in the sense that it is a good way to advance the aims of, say, its racist architects. But it is systemically irrational in doing harm while aiming precisely at nothing that the legal system counts as an admissible end.

To be sure, in this category of atypical cases, only people with only ordinary interests are injured as a result of an animus toward others. But their harm is no less real than that caused by bystanders in a bar fight started by malice against another. Analogously, my tort rights against someone who attempts violence against X, unintentionally (but perhaps knowingly) injuring me, are greater if the actor acted out of pure malice than if he acted in reasonable defense of other people.²¹⁰ In my constitutional law examples, harm to those with only ordinary liberty and equality interests occurs without any acceptable legal justification, surely a violation of rational basis law as ordinarily articulated and understood.

Let us consider, for example, the law hypothesized above, aimed at banning the sale of birth control products.²¹¹ Assume that it also injures users of other drugs, persons not the special beneficiaries of fundamental procreative rights. Suppose that the law bans chemical X, a chemical used in all effective birth control drugs and also in the best anti-acne medicine. Imagine (improbably, just to make things clear) a preamble and legislative history stating that the law's object is to make purchase of birth control products impossible for reasons of moral opposition, and let us suppose that no other object is mentioned. At least on motive grounds, users of birth control would be able to challenge the law, invoking an almost certainly fatal strict scrutiny. Cases following *Griswold v. Connecticut*²¹² settled that moral disapproval of birth control is not a compelling justification for legislation.²¹³ And I think that *Griswold*

²⁰⁷ *Id.*

²⁰⁸ See *supra* note 24 (explaining that the rational basis test requires all laws to, at minimum, adhere to a legitimate governmental purpose).

²⁰⁹ Of course it is instrumentally rational from the perspective of the ends of its racist architects, but it is not rational based on any ends that government officers are permitted to pursue.

²¹⁰ DAN B. DOBBS, *THE LAW OF TORTS* 168–70 & n.4 (2000).

²¹¹ See *supra* notes 76–78 and accompanying text.

²¹² 381 U.S. 479 (1965).

²¹³ See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (moving the rationale of earlier cases from

also decided implicitly that such an interest is not even a legitimate one when aimed at birth control. What of those who would use non-birth control drugs containing chemical X, for example drugs to cure skin conditions? Their lesser, but real, liberty interests are the collateral damage of such a law. Courts do not usually strictly scrutinize the regulation of such interests, but review them under a rational basis test that allows regulation as long as it has any rational tendency to promote any legitimate governmental interest, no matter how small. As a result, plaintiffs desiring to use chemical X in non-birth control drugs would seem to have a right that the governmental ends of impinging laws not be illegitimate ends, whether or not what makes them illegitimate is a special concern with the interests of rightholders other than the plaintiff.

If this seems intuitively wrong, then consider a more vivid example. Suppose a law required all businesses to close for an hour a day for the reason that such closing will bring good luck to society. And let us suppose that this is not a religious view that would implicate the Establishment Clause. Undoubtedly, business owners, and probably consumers as well, would be able to successfully challenge the impact of this law on their liberty and property interests under due process rational basis scrutiny, given its utter irrationality.²¹⁴ But laws aimed only at unacceptable ends are equally irrational, given the set of premises that a reviewing court is permitted to entertain in considering justification. If the right apparently recognized by rational basis doctrine does exist, then those asserting it would be asserting first-party standing and the only standing questions would be whether they were in fact injured and whether judicial redress is meaningfully likely.

I know of no case exactly like that of the two hypothetical situations above. Perhaps concerns behind third party standing would win out over classical statements of rational basis law, gerrymandering the doctrine and thus eliminating many of the rights it seems to recognize. Perhaps in this constitutional area, "standing" concerns put pressure on the definition of rights in ways that mask a calculus of burdens on courts—the strength of comparative interests and the probability that the existence of some set of plaintiffs (with the strongest first party rights) exists to keep the government within limits.²¹⁵ If so, given that shrunken view of rational basis protection,

a basis in marital privacy to a more generalized right of access to birth control). The lower court had stated that the "statutory goal was to limit contraception in and of itself—a purpose that the [Supreme Court] held conflicted 'with fundamental human rights.'" *Id.* at 442-43 (citations omitted). The Court cited this portion of the lower court's opinion with no hint of disapproval, and after rejecting possibly legitimate purposes as not plausibly those of the Connecticut legislature.

²¹⁴ See *supra* note 24 (articulating the standard for the rational basis test).

²¹⁵ In administrative law cases, there are indications that the standing of one group may be influenced by the availability of another with a stronger claim and that other's ability to protect the interests of many constituencies in government adherence to law. Administrative law standing offers judicial protection to interests short of life, liberty, and property rights. When it protects such interests, it sometime shapes court access doctrines by considering which

there is little involved in presenting a plausible, concrete, consequentialist explanation of invalidation for illegitimate motives than that which appears in the previous sections, dealing with how motive law protects the more usual beneficiaries of strict scrutiny. That little would involve the assertion of first party rights against atypical motives.

IV. JUSTIFICATION FOR INVALIDATIONS BASED ON ATYPICAL ILLEGITIMATE MOTIVES: THE PROBLEM OF ALTERNATIVE REASONS

Let us assume that either of the two atypical sets of rational basis cases is a significant one. If so, then the problem of alternative reasons must be solved in order to make a consequentialist justification of motive law seem plausible in those sets. This problem refracts into two smaller but complex problems. First, in order to make motive analysis worth the courts' efforts in cases involving only ordinary interests, those interests must be understood as valued at appreciably more than zero. They would not need to be valued nearly as highly as rights not to be discriminated against on racial or gender grounds or not to be deprived of a fundamental right. But they would have to be entitled to some real weight against governmental regulation. If this were not true, then any bad consequences correlated with illegitimate motives would seem too small to be worth the effort of rooting them out.

But if this problem is solved, then a second one arises. Let us assume that ordinary liberty and property interests are revalued upward, but not nearly so far as to achieve the weight accorded the specially protected interests in fundamental rights and against gender and racial distinctions. There would still be a wide range of legitimate regulatory interests that justify any such action, regardless of whether one of them was the actual motive underlying governmental action. A consequentialist would find *Arlington Heights*-style motive analysis attractive only if it were sufficiently probable that an adequate alternative justification did not exist. Without the revaluation proposed

set of plaintiffs provides the best balance of private supervision of agency action and the costs of broadening standing. Cf. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (finding standing after considering factors such as those considered in *Block*); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 352 (1984) ("By contrast, preclusion of consumer suits will not threaten realization of the fundamental objectives of the statute. Handlers have interests similar to those of consumers. Handlers, like consumers, are interested in obtaining reliable supplies of milk at the cheapest possible prices. Handlers can therefore be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated." (citations omitted)). The standing and the implied preclusion cases seem to form a larger field of cases on access to review that mutually cross cite.

In constitutional law, the Court gives no clear indication of anything like this. The form of the doctrine is that one either has a right or one does not. And rights, sufficiently threatened, entail standing. Still it is possible that at the intersection of third-party standing doctrine and rational basis review, one can see rights somewhat shaped by a balancing of the costs and benefits of enforcement by various classes.

above and defended below, the slightest regulatory justification would be enough to overwhelm individual interests, ensuring that such a reason almost always would exist, whether or not it motivated the action. With the revaluation, we enter a more shadowy land of more middling-weight governmental interests to be weighed against more middling private interests. Why should we believe that constitutionally illegitimately motivated actions are especially likely also be actions not justifiable for other reasons (not those animating the actor) that are constitutionally adequate justification for impinging on the individual interests at stake?

A. The Problem of the Weight of the Least Protected ("Ordinary") Individual Liberty, Property, and Equality Interests

We are now considering atypical rational basis motive cases, not involving illegitimate racial or gender motives or motives to undercut fundamental rights.²¹⁶ Rational basis cases strongly suggest that, in the absence of illegitimate motives, almost any impingement of any interest can be justifiable.²¹⁷ The lengths to which the Court itself has gone, in cases such as *Williamson v. Lee Optical of Oklahoma, Inc.*, to identify a sufficient fit with some legitimate but weak regulatory interest, seem to suggest that interests of those other than suspect class members or of fundamental rights holders are weak indeed.²¹⁸ *Williamson* exudes an apparent lack of regard for ordinary interests when regulated by government in ways not involving suspect classes:

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.²¹⁹

Put another way, it would seem that existing doctrine so little disfavors the consequences of injuring more ordinary interests that they count for little in any consequentialist calculus that might underlie motive analysis. If that is true, then it is hard to make a consequentialist case for motive analysis precisely in that set of cases where objective tests permit nearly all government impingements. That would suggest that

²¹⁶ I am referring to the rights themselves, not simply the interests protected by them, which always can be injured for reasons that are legitimate and compelling enough. The rights are only rights not to have the interests injured in the absence of sufficient reasons.

²¹⁷ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

²¹⁸ *Id.* (rejecting a challenge to a state law permitting some classes of eye care professionals to engage in certain work, while excluding others for reasons widely thought flimsy).

²¹⁹ *Id.* at 487-88.

motive analysis in cases like *Moreno* stems from the deontological or irreducible wrongness of acting with illegitimate motives, rather than on some set of disfavored consequences that bad motives tend to promote. To sidestep this problem, it would be necessary to make a case that ordinary liberty and equality interests—all except for those protecting suspect classes and fundamental rights—receive more constitutional weight against regulation than it would seem, given the weakness of the rational basis court review that is their lot.

Certainly an upward revision of the minimum weight of “legitimate” regulatory interests seems inconsistent with existing case law, exemplified by *Williamson*.²²⁰ But I believe that recalibration can be harmonized with existing law, and is very appealing on grounds of principle as well. Such a revision would see the rational basis standard as ideally requiring more than just any tendency to promote any legitimate purpose, even though this requirement cannot be fully enforced by courts. So a regulatory interest would need real weight in order to outweigh ordinary liberty interests.

The necessary intensity might be seen as (1) still low but much higher than the just-above-zero weight suggested by rational basis doctrine or (2) varying along a continuum depending on what is at stake instead of making a discontinuous jump at the point where the right is classifiable as fundamental or aimed at protecting a suspect class. On the latter view, the Constitution’s requirements resemble a consequentialism of the type easily seen in cases such as *Mathews v. Eldridge*.²²¹ Each interest, private and regulatory, has its own unique weight; even non-fundamental individual interests have much more than zero weight and all are entitled to serious consideration.

Such a revised view could be harmonized with the existing refusal of courts to seriously review rational basis cases by seeing the weighing requirement as a constitutional ideal, one entrusted largely to the final judgment of the political branches. This hidden weight exists in constitutional law but I believe involves what Larry Sager would call “underenforced norms.”²²² Courts underenforce the real value of ordinary interests, except when they find bad motives. Why motives make such a difference calls for explanation if it is to be harmonized with a consequentialist account.

Analogously, cases decided based on the political question doctrine recognize the intelligibility of constitutional limits unenforceable by the judiciary. In rational basis cases, the reasons for the gap between the constitutionally ideal and the judicially enforceable are the institutional constraints discussed above.²²³ Courts simply

²²⁰ See *supra* note 146.

²²¹ 424 U.S. 319 (1976).

²²² Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

²²³ See *Nixon v. United States*, 506 U.S. 224, 228-30, 237-38 (1993) (finding that the constitutionality of the House of Representatives delegation of certain impeachment functions to a committee was to be decided by the House itself, not the courts); see also CHEMERINSKY, *supra* note 23, at 129 (making clear that to the extent courts find the constitutionality of an action a political question, they leave determination of constitutionality to other branches).

do not have the capacity to define such an intermediate weight of a continuum of non-fundamental liberty interests and to weigh them against a continuum of less-than-compelling regulatory interests. And the notion of political branch regulation itself carries with it the power of the political branches to definitively conduct such weighing within wide limits. Finally, it seems to me that finding in the Constitution a requirement that the interests necessary to overcome ordinary liberty and equality interests must have real weight, though perhaps one varying with all the circumstances, is part of a vision of responsible republican government. In a sense, one can see it as involving something like the *Mathews* calculus, but entrusted largely to the political branches for its application.²²⁴ Do we really believe that the Constitution should be read as permitting all government intrusions, short of the most harmful, on a showing of nearly nothing? Or do we believe that rational basis review's limits are more a product of the limits of judicial capacity to enforce the constitutional ideal?

B. The Problems of the Correlation of Illegitimate Motives with the Lack of Sufficient Middle Weight Regulatory Reasons Sufficient to Overcome Ordinary Individual Liberty, Property, and Equality Interests

Even if we re-evaluate upward the weight of interests that are protected only by rational basis scrutiny, the problem of alternative reasons has not been solved, just ameliorated. Let us recall once more that while a consequentialist would prefer to go straight to an assessment of consequences by skipping reasons, this is not practically possible. The particular consequences of an action may be impossible for a court to see, and even political branch actors cannot see the results comprehensively. Actions that look not only completely innocuous, but positively enlightened, can lead, through a series of twists and turns, to outrageously bad results, such as greater racial segregation or a decline in reproductive choice. Courts, as we know them, cannot assess constitutionality based on god-like hindsight applied to each regulatory action.

So, the best that can be done is to require that an adequate reason existed at the time of an action, whether or not it was the reason that actually inspired the action. But even this slightly reduced judicial inquiry would be impossible for courts to make in the myriad rational basis cases. Indeed, a really complete canvass for all possible good reasons of some middling weight existing at the time of the action would normally be beyond the capacity of even a legislature. Motive law as articulated in *Arlington Heights* might well be seen as congruent with this analysis.²²⁵ It does recognize that a sufficient reason can make an illegitimate one irrelevant if the political branch actor makes an overwhelming case that such reason existed. And that, itself, offers some support to the view that the penultimate issue (I assert the ultimate issue is conse-

²²⁴ *Mathews*, 424 U.S. 319, is the most explicitly consequentialist doctrine developed by the Supreme Court. See Book, *supra* note 28, at 356.

²²⁵ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

quences) is the sufficiency of reasons for an action and not simply the sufficiency of those reasons that were motives.

But in the ordinary case, while less strenuous than an assessment of each official action's actual consequences, an assessment of the availability of sufficient reasons *ex ante* is itself also too strenuous for courts to engage in constantly. Courts have never engaged in a serious intensive canvass of the circumstances of an action in order to see if they can find at least one reason that truly warrants it, *ex post*. There would be both judicial role and capacity problems with such an endeavor.

So we arrive at the key question: do we have grounds to believe that in identifying official actions that have been taken with illegitimate motives, we have also identified actions that are unacceptably unlikely to be justifiable by alternative sufficient reasons, thus justifying more intensive review? If so, we have solved or ameliorated two problems. The first is the judicial capacity problem. The set of rational basis cases in which illegitimate motives animate actions is a much smaller set than that of all rational basis cases, so court intervention in rational basis cases is no longer practically impossible. But this, by itself, is an abjectly unsatisfying explanation. A random basis for selecting a sufficiently small subset of rational basis cases would accomplish the same purpose and would be morally threadbare as a justification. What is necessary to warrant motive analysis is that, in addition to cutting down the size of the set of judicial interventions, it selects a subset in which sufficient alternative reasons are sufficiently unlikely to exist.

There are a number of ways in the abstract in which this might be true. For the first two of these, I will assume that "illegitimate motives" refers to mental states. In considering the third, I will return to a consideration of the possibility that a finding of illegitimate motive is more a finding of an absence of constitutionally sufficient reasons for an action, than it is a finding about a mental state.²²⁶

The first, which I will explore quickly and then reject, sees sufficient and insufficient reasons for a particular action as fairly objective facts about it. Just as one might look inside a box to see if it contained one or more blue marbles (my metaphor for good reasons), one might, though with great difficulty, imagine a court exploring all of the possible reasons under the circumstances for an action to see if any is objectively sufficient. This is a practically impossible task. It is much easier to search the actual reasons for decision, looking for illegitimate motivation. The issue here would be whether the presence of a red marble (a highly visible, easy to identify, illegitimate reason that was a motive) correlates with an unacceptable probability that the box contains no blue marble (a constitutionally acceptable reason), a finding otherwise requiring an arduous search. I will briefly discuss this view in the next subsection where I reject it on what may be obvious grounds.

By contrast, a second view seems very plausible. It sees sufficient reasons as more, but not entirely, subjective entities. To some large extent their very existence

²²⁶ See *infra* Part V.A.

or content is a matter of judgment left to the political branches. Indeed, to a large extent the political branches both find and define sufficient reasons. This is a view of adequate reasons, not as natural facts within the constitutional system precisely defined by doctrine, but as a product of processes operating within limits. At the extreme edges, a few conclusions as to the sufficiency of reasons may be obviously right or wrong to most judges (and thus objectively so in a limited legal systemic sense); however, courts permit most political branch decisions to define or create sufficiency.²²⁷ This suggests that the finding of an illegitimate motive might seriously undercut our faith in the process of assigning a proper middling weight to the ordinary interests affected by government action. Below I suggest that a finding of an illegitimate motive impeaches the trustworthiness of the political branches in a way that disqualifies them from making such judgments in the usual *de facto* final way and, thus, invites intensive judicial review. This argument seems more convincing but presents its own problems.

1. Pure Correlation: An Objective, but Unrealistic, View

It is worth briefly considering a view of why the presence of an illegitimate mental state animating an action might correlate at a usefully high level with the absence of any alternative and sufficient objective reason for such action, were courts to search extensively for such reasons. If this were true, then finding an illegitimate motive would correlate usefully with the existence of harm to ordinary liberty and equality interests that is not outweighed by other legitimate benefits of the action taken. This would spare courts an intensive search for alternative adequate reasons that they could not possibly undertake.

In this view, one that I find unconvincing but instructive, good reasons are objective, such that courts could find them by means of a proper inquiry. And finding an animating illegitimate mental state would be strong evidence that a decision could not be supported by any alternative objective and sufficient reasons. I am using "objective" in a less than completely stringent way so that it is not limited in reference to some sort of ultimate truths independent of human construction, such as truths in physics (which I believe "exist" but offer themselves up to science slowly).²²⁸ The notion of objectivity here is broader and also includes "truth" within cultural, social, and legal systems to the extent that widespread agreement about many of its features is possible.²²⁹

²²⁷ See *supra* note 223 and accompanying text.

²²⁸ See Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 203 *passim* (Andrei Marmor ed., 1995). Coleman and Leiter note that "one can be a metaphysical realist about certain objects in certain domains (. . . tables and chairs) and an anti-realist about the objects in other domains (for example, moral properties . . .)." *Id.* at 248.

²²⁹ My view of what legislatures do, when functioning properly, in weighing ordinary individual interests against regulatory interests that are less than compelling (or even important), and using the lexicon of strict scrutiny, is somewhere in between what Coleman and Leiter

So, to the extent that the notions of sufficiently weighty ends and sound methods of reasoning were that clear in our legal cultural context, then one could objectively identify facts about the context of action that would make it possible, if arduous, to determine whether or not any sufficient reasons existed that support it, whether those reasons animated the actor. Certainly constitutional law currently recognizes both sorts of objective errors that are detectable by courts. However, except in extreme circumstances, courts seldom find such clear errors of weighing interests outside of strict scrutiny. Beyond these clear mistakes, my arguments above might suggest that courts should engage in greater scrutiny in run-of-the-mill rational basis cases, presenting neither the surface markers of strict scrutiny nor a finding of hidden bad motives.

But I think that even that is unrealistic. How would courts objectively determine (an act of objective assessment of external reality and not of defining) the weight of such a large range of interests on both sides of the equation (both those of the regulated interests and of the state)? It seems unlikely that judges would agree much except at the extremes. And, whatever one thinks about the meaning of reality in science, agreement ultimately defines reality within this legal system. Except at the extremes, reaching such agreement is exclusively a characteristic of political branch decisions. I find it more plausible to see the weights, within wide limits, as *created, not found*, by the political branches and their processes.

This does not render meaningless the recalibration that I have suggested. Its meaning is that the Constitution requires the political branches to take such lesser interests seriously, to give them real weight, even if courts seldom enforce that requirement.²³⁰ On this view, only outrageous mistakes are “objective” in this frame of reference, for they obviously are actions outside the wide limits that the Constitution entrusts to the political branches. And courts can rectify these extreme mistakes under existing law. For example, requiring property sacrifices to ensure good luck for Maryland or for the United States would be ruled unconstitutional even under existing rational basis law.²³¹ But in other, less extreme cases, a finding of illegitimate motive would impeach the good faith of political branch actors in seriously considering the impact of their actions on ordinary interests that are not protected by strict scrutiny.²³² I deal with this in the next section.

would call minimal and modest objectivity if applied to a court’s deliberations. *Id.* at 256-78. (Bear in mind that I am assuming that the legislature is seriously weighing individual interests against constitutional values as part of enacting laws.) What a court does when it reviews such actions using rational basis scrutiny is something like an exercise in modest objectivity, where the requirements of the prevailing practices are for great deference. See SIMON BLACKBURN, *TRUTH: A GUIDE* 129-36, 220-21 (2005) (discussing Wittgenstein’s minimalist theory of truth and concluding that there is hope for stability in the realm of truth because “what goes for one area [of truth] need not go for all”).

²³⁰ See generally Sager, *supra* note 222 (discussing the lack of enforcement of certain constitutional rights by the federal judiciary).

²³¹ This hypothetical scenario is presented in Part III.B.2 *supra*.

²³² See, e.g., *infra* note 241 and accompanying text.

Before moving to that discussion it is worth noting that, beyond the problem with the objectivity of the notion of sufficient reasons, there is a further problem. Even if the appropriate weights for reasons are in some sense real independently of process and thus objectively knowable, it is practically impossible for a court to search for all possible reasons for a regulation or action in context to see if one or more of them sufficed.

So the key question would be whether there are any grounds to believe *ex ante* that finding an actual illegitimate motive (mental state) for an action sufficiently predicts that an exhaustive search for good reasons (even if not actual motives) would be insufficiently likely to find even one such reason of the appropriate middling weight. If so, then a bad motive is a proxy for an action that, very likely, has no sufficient reasons in context. But this correlation seems completely unsupportable and probably immediately counterintuitive to you as well.

It would require that there be a sufficiently strong correlation between a bad motive and an absence of other good reasons, not just for particular sorts of actions (zoning or drug regulation), but across the whole heterogeneous set of actions judged under a rational basis standard. Saying something like this in the abstract seems fanciful even in the more particular subsets; does not the sufficiency of reasons depend more on the individual facts of a regulatory or enforcement decision than on the subject matter subset in which they are located? And if so, nothing useful could be said about correlations between the presence of an illegitimate motive and an ultimate absence of sufficient reasons even in one subset. Any notion that such a correlation exists across the entire range of rational basis cases seems pure fantasy.

2. Disqualifying Conflict: A More Subjective and More Realistic View

Let us turn to a view of reasons for official action that seems more realistic, thus showing more promise for explaining motive analysis as a way of identifying an absence of sufficient reasons for official action that creates no suspect inequalities or impinges on non-fundamental liberties. We have already made the first part of the argument that absence of sufficient reasons for such official regulatory action, in turn, might be seen as a proxy for consequences that are likely to be unacceptable.²³³

In this model, except at the extremes, claims of objectivity in assigning weight to ordinary reasons are abandoned. What is a sufficient reason to overcome ordinary liberty interests is largely left to the political branches, both for reasons of judicial capacity and separation of powers.

It is not practically possible to specify in advance the correct trade-offs between ordinary individual interests and the general public good with any sort of precision. There are some that are clearly correct decisions and some clearly incorrect, but most

²³³ See *supra* Part IV.B.

decisions lie in between and must be left to process and not highly specific rules laid down in advance.²³⁴

Let me call the view that I now offer the conflict of interest or *ultra vires* view. A good metaphor is the fiduciary relationship of agency. Imagine an agent empowered by his principal to sell the latter's real property at a reasonable price. Let us concede that, at the extremes, there may be offers so extremely low or high, that, respectively, accepting them or failing to accept them should be seen as an objective breach of fiduciary duty. In between these "objective" extremes, there is simply the agent's judgment, influenced by factors too numerous and subjective to be supervised after the fact of sale.

Indeed, one could say that in nearly every case there is no objective right answer other than that yielded by the process. Were the agent to sell the property to himself, then that would be a different matter, presenting the clearest conflict and at least a presumptive breach of fiduciary duty. And, if the agent were to make a clear admission that he picked a buyer because the buyer was his friend or simply someone he instantly sympathized with as a person, that too would seem a fiduciary violation, although there remains a question of the harm caused. By this I mean, specifically, whether the price obtained was nevertheless as high as it would have been had the decision not been made based on *ultra vires* considerations. As a result, one might wish to view a sufficiently clear establishment of an illegitimate motive as shifting the burden to the agent to defend the sale price. This seems to track *Arlington Heights*'s allowance that government actors can redeem bad motives by proving the action would have occurred for good reasons, despite the illegitimate motive.²³⁵

Likewise, one might say that the Constitution requires public bodies and officers to seriously weigh even ordinary individual liberty interests and interests in equality against public regulatory interests. In most individual cases, there is no clear, right trade-off in advance, simply the answer provided by the process. But it is intelligible to fear that, in the great mass of actions based on illegitimate motives, individual interests are not considered seriously enough or at all. And that is a consequentialist concern, because one intuitively predicts that, in the long run, the mass of illegitimately motivated actions will form a world that is significantly concretely different from a world in which individual interests are taken seriously.

The harmful effects in an individual case may be difficult to demonstrate, but, intuitively, the proper consideration of liberty and equality interests will make a positive, concrete difference in gross as we look at the mass of ill-motivated decisions. Using an analogy to strict scrutiny, it is hard to imagine that the furniture of a world shaped by racist motives is not differently arranged than one shaped by race-neutral decisions. In rational basis cases too, a finding that illegitimate reasons motivated the action is a finding of *ultra vires* process, that officials were acting on their own

²³⁴ See *supra* note 228.

²³⁵ See *supra* note 28.

view of what is desirable and not the Constitution's.²³⁶ And statistically this would result in a world with very different laws and other official actions. After working through the arguments above, Paul Brest's conclusions in 1971, not explicitly moored in moral philosophy, now seem to me situated in an intelligible concrete consequentialist account:

Governments are constitutionally prohibited from pursuing certain objectives

The fact that a decisionmaker gives weight to an illicit objective may determine the outcome of the decision. . . . To the extent that the decisionmaker is illicitly motivated, he treats as a desirable consequence one to which the lawfully motivated decisionmaker would be indifferent or which he would view as undesirable.

Assuming that a person has no legitimate complaint against a particular decision merely because it affects him adversely, he does have a legitimate complaint if it would not have been adopted but for the decisionmaker's consideration of illicit objectives. . . . In our . . . system . . . only the political [branches have] authority to assess [the general utility of their actions]. And, since the decisionmaker has (by hypothesis) [of an illegitimate reason] assigned an incorrect value to a relevant factor, the party has been deprived of his only opportunity for a full, proper assessment.²³⁷

Brest's arguments mention consequences just once, but they fit nicely into a more developed set of consequentialist arguments. Indeed I believe that he understood the connection and lacked interest in supplying a full set of arguments.

Most illegitimate reasons define actions that are ultimately based on powerful emotional desires (either those of the governmental actor or, derivatively, of his constituency) that have been specifically identified as diametrically in opposition to constitutional policy, for example racist aims²³⁸ or moral opposition to certain reproductive freedoms.²³⁹ Others are less specifically defined, for example, the desire to inflict harm just to inflict it.²⁴⁰ But in all of these cases there is a strong reason to believe that whatever serious weighing we hope (or realistically expect) political branch officers to engage in has been powerfully warped and very likely short-circuited. We

²³⁶ See *supra* note 221 and accompanying text.

²³⁷ Brest, *supra* note 12, at 116-17 (citation omitted).

²³⁸ See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

²³⁹ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

²⁴⁰ *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." (emphasis added except to the word "legitimate"))).

need strong reason to believe that our political agents acting *intra vires* would have reached the same results. We require this, not just to ensure a fair consideration in the case at hand, but to deter such short circuiting in the great mass of cases, although the degree of effectiveness of any such deterrent might be questioned. While one cannot specify the precise difference in consequences such a conflict makes case by case, ordinary intuition suggests that a non-conflicted process, in gross, will produce vastly different results.²⁴¹

²⁴¹ It is my intuition that government actions that are based on illegitimate motives are likely to lead to worse concrete states of the world. This seems true whether or not such motives are directed at suspect classes or fundamental rights or are the more general destructive motives identified in cases such as *Moreno*. And I believe that most readers will share this intuition and that that intuition is likely to have played a substantial, if not fully conscious, role in shaping constitutional law and policy in cases such as *Moreno* and *Cleburne*.

The most difficult case involves non-fundamental liberties and other ordinary interests that are in some sense zero-sum. If a decision is made to raise taxes by a certain amount, then that deprivation of property can be imposed on a wide variety of groups or activities. If the incidence of such taxes does not especially fall on suspect classes or activities that are protected by fundamental rights, then it is hard to say from a constitutional perspective that one distribution of tax liability chosen by the legislature is worse or more problematic than others. The same model covers decisions about who will have access to limited resources. Can one say that a particular distribution of liabilities and benefits, shaped by illegitimate motives toward non-suspect classes and activities that are not protected by fundamental rights, is constitutionally worse than the alternatives simply by looking at the outcome apart from the motive that produced it?

To be able to do so one would have to have a set of constitutionally rooted criteria that would at least presumptively define better and worse world-states, without regard to motive. And one could not accomplish this by means of a premise that it is the motive itself that makes the resulting states bad, for that would be a deontological argument, not a consequentialist one. To make a powerful consequentialist argument one would have to tease out of the Constitution more than a sense that all liberties and groups are entitled to some protection, whether or not they are fundamental or suspect, respectively. In addition, one would need to show that certain groups or activities, all things being equal, are presumptively entitled to a certain degree of protection against government regulation, even before one knows the motivation for such regulation. But the number of non-suspect groups and non-fundamental activities is potentially as large as the government actor picking the criteria for regulation chooses it to be. And so are the possible political branch reasons for treating these classes of activities and people differently. It is hard to tell, just by looking at the consequences of regulation, whether it is a better world than other possible ones.

And in this section, dealing solely with tangible consequences of illegitimate motives, another consequentialist justification of motive analysis is unavailable. It is the argument that destructive motives, even against non-suspect groups, tend to make the world worse by virtue of being detected by the targets of such motives, causing them direct psychic harm. Those different consequentialist arguments are discussed *infra* Part V.C.

One possibility is that *Moreno* and *Cleburne* themselves identify quasi-suspect classes, probable repeat losers in the political process, suggesting a special constitutional concern with skewed outcomes for such groups and perhaps others.

But let us assume that one wishes to adhere strictly to the surface appearance of constitutional race law that no states of the world are so disfavored. By this I mean that no disparate impacts are disfavored, no matter how large. Even so, the problems of hurtful expression provide an alternative plausible consequentialist explanation, which I explore later in this Article.²⁴² This explanation extends to the pure rational basis cases discussed in this subsection, where the illegitimate motives that invalidated political branch action all have involved antipathy toward certain non-suspect groups. That might suggest that such groups—for example, homosexuals in *Romer* and *Lawrence*—are heading for suspect class status. But I think that it need not. The mentally retarded people protected in *Cleburne* and the “hippies” in *Moreno* were never likely to achieve such status. What I think is necessary for justification on grounds of expressive harms is that a group is sufficiently identifiable, cohesive, and discriminated against such that its members are likely to understand that they have been discriminated against in a way bearing no legitimate relationship to their public-spirited action, but based solely on membership in that group.

V. SOME REMAINING PROBLEMS

A. *Might Motive Talk Be About Something Other than Mental States?*

I began working on this Article with two hypotheses. The first, explored above, is that the presence of an illegitimate motive underlying political branch action correlates highly with the absence of a constitutionally sufficient reason to justify that action. That, in turn, correlates highly with the action’s having constitutionally undesirable consequences. This turned out to be plausible because (1) courts identify, as

Perhaps in many cases the problems described above do not exist. To the extent a set of liberties does not tend toward zero-sum, then limiting them for no good reason leads to less liberty: all things being equal a worse state of the world from a constitutional perspective. So, even if homosexual intimacy were not a fundamental right, limiting it, for reasons of pure hatred or irrational disgust, limits one set of freedoms in a way not necessary to support existence of other freedoms or other legitimate policy goals.

There remains the problem of defining the sort of general animus identified in *Moreno*—in other words, determining when hatred or disgust is not a naturally human incident of acceptable policy, for example, disgust toward thrill killers. And often it may not be clear whether a particular individual interest is tied to other interests in ways arguably tending toward a zero-sum relationship. While it may be difficult to know or demonstrate, with certainty, in any particular circumstances that no legitimate policy requires trade-offs between liberties within a set, it seems likely that that will often be true. For example there seems no legitimate need to choose between a right of homosexual intimacy and similar heterosexual rights or other rights often called privacy. At a minimum, when there is no need for trade-offs, then bad motives lead to the bad consequences of a reduction of liberty without reasonable hope of what might be seen as a legitimate gain.

²⁴² See *infra* Part V.C.

illegitimate, precisely those motives that seem likely to produce bad consequences,²⁴³ and (2) for reasons discussed in the last section, the presence of an illegitimate motive is a conflict of interest severely reducing our trust that sufficient, alternative reasons exist that override even the least protected liberty and property interests.²⁴⁴

It is time now to address my other hypothesis, which was interesting, but I now believe, largely false. I hypothesized that in a significant set of motive cases, judicial motive talk is not about mental states at all, but, rather, is a misleading label for a direct judicial assessment of the presence of some good reason for an action, whether or not that reason was the actor's motive. By this I mean an assessment of the presence of such reasons done without any search for or use of governmental actors' mental states.

Several features initially made this an attractive hypothesis. The first is the difficulty of attributing motives to groups. When all of the members of a legislature of one hundred convene to vote there are one hundred separate conscious states (to varying degrees congruent in content) not one hundred one, which would include the legislature as having a separate conscious state.²⁴⁵ Attributing conscious states to a collective body involves a choice of rules for applying a metaphor, though a choice that in some circumstances may be so easy as not to seem a metaphor or a choice at all. But in fact the choice is either unconscious personification²⁴⁶ or is made consciously for instrumental reasons. By the latter I mean that the criteria recognized for attributing fictive intention to a collective body would be recognized as such precisely because they are seen as likely to accomplish something desirable. If constitutional motive talk were misleading and described something other than mental states, then perhaps this problem would go away or be ameliorated. Perhaps one might speculate that a conclusion of an illegitimate underlying motive sometimes is just misleading shorthand for a conclusion that there are no evident sufficient supporting reasons for a governmental action.

Second, the methods for identifying motives (here meaning mental states) are all ultimately objective, whether in constitutional law, law more broadly, or indeed in life in general. It is not possible to know to a certainty what mental states people have or indeed that they have such states at all, though we often seem to be on very firm ground in speculating. All evidence of motives is objective and much of it comes from broad context, including the absence of sufficient objective good reasons that might have been an actor's motivating reason.

Still one might be tempted to think that perhaps the absence of any sufficient reasons for a legislative action might concern the court, not as evidence of a mental

²⁴³ See *supra* Part III.

²⁴⁴ See *supra* Part IV.B.2.

²⁴⁵ See generally Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as an Oxymoron*, 12 INT'L REV. L. & ECON. 239, 249, 254 (1992) (arguing that there is no single legislative intent).

²⁴⁶ *Id.*

state, but as itself the ultimately troubling feature of such action. This might take care of the difficulty of defining the mental states of collectives, since one can assess whether such group action was justifiable for objective, constitutionally sufficient reasons.

Finally, this purely objective approach has the intellectual aesthetic attraction of sleekness and simplicity and of seeing the world in a new light that any reductionist view of the world offers. Analogously, behaviorism cuts out mental states in ways deeply satisfying to some psychologists, though not to others.²⁴⁷ And so it might be tempting to extend such a revisionist view to some, many, or all of the actions of officials who are individuals as well. Perhaps in their case, too, mental states are irrelevant, meaning that courts are really concerned with the adequacy of reasons for action, ultimately, and not intermediately, as evidence of actual mental states. Finally, this seems to strengthen the core of my first hypothesis, that the law is concerned with motives because of their tendency to correlate with the adequacy of objective reasons for action. This would simply cut out an unnecessary term and so go straight to consideration of objective supporting reasons.

While I believe anyone who wishes to consider the role of motives in constitutional law needs to consider such a purely objective view, it seems to me largely unsupported. Let us start with inference from the evidentiary methods of determining motives. The fact that the methods of ferreting out motives are always objective and often large-scale and statistical, as opposed to involving actors' reports of their inner states, does not entail that a search for motives is not one for mental states. In the opening passage of this Article, I note that people often wonder, for non-instrumental reasons, whether others love them. This, too, must be probed by means of evidence that is objective, though often subtle. That does not undercut the obvious truth that the concern is about mental states and not states of the physical world. Here the point is that the objective nature of all evidence of mental states does not mean that the concern with them is ultimately about the evidence. But it does not rule out the hypothesis that motive analysis is purely objective in a significant subset of cases, so we need to consider other demonstrations of implausibility.

I think that the claim that a court's search for illegitimate motives is really itself a search for objective reasons is unjustifiable in a number of ways. First, the claim seems at least unhelpful in cases involving hidden motives to injure suspect classes or fundamental rights,²⁴⁸ and it seems especially wrong for reasons previously dis-

²⁴⁷ See, e.g., Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 559 n.103 (2006) ("For behaviorists, learning is an observed behavioral response and cognitive process and motivations are seen as irrelevant. Behaviorism has been criticized for this input/output 'black box' model and . . . researchers today have a more expansive approach viewing behavioral consequences, cognitive processes, and social motivations as playing important and inter-related roles.").

²⁴⁸ See *supra* note 188 and accompanying text.

cussed for cases involving motives to injure other lesser interests.²⁴⁹ As for suspect classes and fundamental rights, where no alternative and powerful reason exists to explain action that injures such interests, an actual motive to injure them is generally very plausible.²⁵⁰ As for lesser interests, I argue above that their precise weight against legitimate regulatory objectives is usually unknown and unknowable in the abstract.²⁵¹ We permit political branch actors to create (not discover) such weight as long as they are pursuing legitimate ends.²⁵² So determining motive (intentional aim) is, I argue above, crucial to determining whether sufficient reasons exist in such cases.²⁵³

It seems unjustifiable to see motive talk as a front for purely objective concerns, and that makes it less plausible. But it seems implausible for other reasons as well. In all of the major cases searching for illegitimate motives involving the interests most protected by constitutional law, there is no reason to doubt the genuineness of the Court's concern with real motives as mental states. In none of the major cases searching for illegitimate motives to injure lesser interests is there any doubt that the Court's concern about the instrumental irrationality of actions is caused by the prominent possibility of destructive mental states. That seems true of *Moreno*, *Cleburne*, and of *Romer*. In at least the first two of those cases, destructive motives provided the only plausible explanation for the invalidation of political branch action.

My arguments above make it clear that, absent some sort of suspicion of bad actual motives, courts lack the capacity to scan the huge and heterogeneous set of cases involving intrusions into lesser personal interests to see if regulatory interests justify those intrusions.²⁵⁴ This would be true even if the weight of these interests could be defined in some way that is independent of mental-state motives, which they cannot. Just as a pearl needs an irritant to grow, concern with adequacy of reasons in the most mundane rational basis cases requires a catalyst—otherwise courts would be overwhelmed and would usurp fine-scale weighing of interests whose weights are determined by the political process. That catalyst is most plausibly what courts say it is: a reason to believe in an animating destructive mental-state motive. It is this that forces the closer-than-usual scrutiny in such cases to see if something else plausibly explains the action.

Finally, what of the problematic nature of group motives which would have been easier to understand on a purely objective view? First, if the purely objective view is disqualified on grounds urged above, then we have no alternative but to deal with the problems. Second, I do not think the problems are insuperably difficult. Indeed, I do not think that they are difficult at all. Various difficulties with the notion of in-

²⁴⁹ See *supra* Part III.B.

²⁵⁰ See *supra* Part III.A.

²⁵¹ See *supra* Part IV.B.1.

²⁵² See *supra* Part IV.B.1.

²⁵³ See *supra* Part IV.B.2.

²⁵⁴ See *supra* Part IV.B.1.

tentions of official policy-making groups have generated a large literature.²⁵⁵ Much of it deals with determining (or more foundationally, defining) the intentions of a legislature as controlling the operative meaning of statutes.²⁵⁶ Some judges and commentators would determine such meaning independently of mental states, focusing instead on the “plain meaning” of the text.²⁵⁷ Others would focus not on intentions but on what might be the most plausible public-spirited purpose of a statute, given its text and the totality of its context.²⁵⁸

But others do equate the operative meaning of a statute—the totality of the distinctions it draws and the significance of each—with specific legislative “intentions.”²⁵⁹ If this means a mental state beyond those of the constituent members of such a body, it is a fictitious or constructive mental state. There are a variety of ways of constructing such a mental state.²⁶⁰ Some would ask, if the group’s act, in its context, were the act of a single person, what intentions would be inferred.²⁶¹ Others would, in various ways, sum the congruent real mental states of a majority of members, at some level of generality, or would consider those of pivotal players in the enactment.²⁶² Thus, many think that the problems of deploying the notion of group motives are not severe and that the notion is workable and useful.²⁶³

But even if the difficulties of the notion of group intentions were formidable for determining fine-grained issues of statutory meaning, they are not problematic in the case of illegitimate motives. These tend to be rather primal and largely shared prejudices. And in all the cases involving invalidation for illegitimate motives of legislative bodies, there has been reason to believe that such mental states drove a majority of members of a legislative body, or at least those members who were pivotal in enactment. The two enterprises, (1) determining the operative meaning of a statute or one of its provisions and (2) determining whether such a piece of statutory law was illegitimately motivated, are similar in invoking mental states. But these similarities obscure the vital differences. On an internationalist view, an intention must be found as to every distinction arguably covered by the statute. Illegitimate motives are found

²⁵⁵ See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 6 (2d ed. 2006).

²⁵⁶ *Id.* at 219.

²⁵⁷ See, e.g., *id.* at 231-35.

²⁵⁸ See, e.g., *id.* at 228-30.

²⁵⁹ See, e.g., *id.* at 221-26.

²⁶⁰ See, e.g., *id.* at 6.

²⁶¹ See, e.g., *id.* at 226-27.

²⁶² See, e.g., *id.* at 224-25; see also McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 711-12 (1992) (addressing the two primary “stylized theories of the legislative process”).

²⁶³ See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1514-31 (2000).

largely when there can be little doubt that bad actual mental states of individuals were instrumental.²⁶⁴

Let me close with a reminder that while I think that a search for an illegitimate motive is a search for mental states, that search is undertaken to determine the likelihood of adequate objective reasons. I am not denying that the adequacy of such reasons is the penultimate concern of motive law and that such adequacy is a proxy for the likelihood of acceptable consequences. What I am suggesting is that an aim at adequacy of reasons in rational basis cases, like *Moreno*, would be difficult to take except by using motive as a proxy. So in the end, illegitimate motive, meaning mental states, is a proxy for the presence of acceptable objective reasons which is in turn a proxy for the ultimate concern: consequences.

B. Must Motives Be Conscious?

Having addressed the problem of whether motive talk reflects an actual concern with mental states, I now turn to another problem: must motives be conscious? Imagine a simple case: A police officer stops a motorist thinking a much less pleasant version of “I stop this Asian-American [or woman] because I despise people in that group.” And for that reason he stops her. This is a clear example of official action animated by illegitimate motives. But what if the officer made the arrest without an interior hearing of anything resembling a crude syllogism? I believe that motive, nevertheless, can be viewed as conscious, or roughly so, in the absence of a mentally interior syllogistic dialogue, if an actor would say on honest and relatively immediate reflection, “Of course that is why I did it.” In such cases, action is the product of motives that the actor generally understands that he possesses, even though he does not articulate them in interior words before each action. Perhaps it is best to say that such actions are the product of a general disposition that the actor has articulated to himself, even if not before each action it animates. *Arlington Heights* never addresses motive at this level of detail, but my best guess is that the Court would recognize these sorts of close-to-the-surface mental attitudes as “motives” even though they are not part of an inner dialogue conducted in words.

What is described above, however, exhausts conscious motivation as I think constitutional law would recognize it. What of cases in which the actor himself would be surprised, on lengthy reflection or after objective reaction testing,²⁶⁵ to discover his motivation or disposition? Take the example of a police officer freshly considering his pattern of arrests in juxtaposition with his childhood memories excavated in psychotherapy. This is an uncertain area under the cases. They do not address the meaning of motive at this fine-grained level. Is such unconscious motive really not

²⁶⁴ See *supra* note 79.

²⁶⁵ See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1490 (2005) (dealing, among other things, with pervasive unconscious racial bias).

“motive” for these purposes and just part of disparate impact,²⁶⁶ which is officially insufficient in constitutional law to invalidate action *unless* accompanied by what *Arlington Heights* would recognize as an illegitimate motive? If forced to decide how to classify this sort of case, would the Supreme Court adopt a view of motive-in-motive law that recognized unconscious proclivities as motives when they are causes of an action? Or would the Court simply find such motives only when the patterns of discrimination are sufficiently strong to support a straight-faced claim of conscious discrimination? Based on the cases, we simply do not know.

This does suggest that, in the absence of some at least dimly conscious illegitimate motive, disparate racial impact refracts into two parts, either or both of which can be present in a particular case. The first is the product of an actor’s very deeply unconscious racial prejudices. It would skew the distribution of burdens and benefits, even if the playing field created by the past were level. The second, in its pure form, assumes an actor with no current prejudices of any sort and is the product of what happens when a purely motivated (and indeed objectively even) allocation of new burdens and benefits interact with an uneven playing field. In this form, new and fair distributions tend to roll down a tilted field: the burdens away from racial minorities and the benefits toward them.

The second sort of disparate impact clearly involves no bad motives connected with the particular action scrutinized. It is disparate impact of the first sort that is at the margin of current motive analysis and most probably officially excluded. Subtle prejudices, not present to the consciousness of those who act on them, are likely not to be described as motive on that basis alone. But where disparate impact is great and such unconscious biases are suspected, many judges may be inclined to strain to find conventional bad motives. On occasion judges may dishonestly find an illegitimate motive in order to permit striking down laws for especially bad impact alone. Even a narrow, officially declared notion of “motive” has the capacity to stretch, in practice, to cover a great deal of unconscious motivation, if a court is inclined to do so *sub rosa*.

C. Expressivism and the Consequentialist Explanation

The analysis above has focused largely on what might be called “concrete consequentialist” explanations of motive analysis. By this I mean that it has considered an explanation of why a constitutional system, having most of the features of ours, might evolve for consequentialist reasons to treat certain motives as illegitimate, thus often powerfully militating against constitutionality. The bad consequences considered

²⁶⁶ Of course, not all disparate impact cases involve unconscious motivation. One can act from pure motivations in a system that is skewed and thus can lead to skewed effects. So a qualification test beefed up to select for slightly better police officers might have the unintended consequences of hugely disproportionately disqualifying minority candidates in light of systematically unequal societal educational disadvantages.

above are all “concrete,” meaning that they are physical consequences, normally bad distributions of tangible burdens and benefits.

But an alternative and often mutually supporting set of consequentialist arguments exist. These I will call “expressivist” as opposed to “concrete.”²⁶⁷ These see the label of “illegitimate” often assigned to certain motives precisely because their harm comes from their being understood by their unfortunate targets who, as a result, suffer psychic pain. Concern with governmental expression endorsing religion has been a central occupation of Establishment Clause jurisprudence throughout its modern evolution.²⁶⁸ Traces of the expressivist concern reveal themselves occasionally in judicial opinions on race as well:

To separate [African-American students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs²⁶⁹

And various scholars have sought to find in expressive harms an at least partial implicit explanation of the workings of equal protection law.²⁷⁰

An explanation and consequentialist justification of motive based on the harm caused by official messages, say of racial inferiority, can work hand-in-hand with the concrete one. Plausibly the law is often concerned about the direct warping of the

²⁶⁷ See *infra* note 276.

²⁶⁸ See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (“Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.”). For a general discussion of plausible expressivist concerns underlying the Establishment Clause and many other constitutional rules and doctrines, see Anderson & Pildes, *supra* note 263, at 1504-05.

²⁶⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). See also the dissent in *Palmer v. Thompson*, emphasizing:

The fact is that closing the pools is an expression of official policy that Negroes are unfit to associate with whites. Closing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes and whites from eating together or from cohabiting or intermarrying. The *Equal Protection Clause* is a hollow promise if it does not forbid such official denigrations of the race the *Fourteenth Amendment* was designed to protect.

403 U.S. 217, 240-41 (1971) (White, J., joined by Brennan & Marshall, JJ., dissenting) (emphasis added) (citations omitted).

²⁷⁰ For a discussion of a number of doctrines as plausibly underwritten by a concern with bad governmental expression, see Anderson & Pildes, *supra* note 263, at 1503.

physical world that results from illegitimately motivated actions and about the direct psychic pain inflicted. But the expressivist strand seems to play a more dominant role in race, gender, and establishment cases than in, for example, birth control cases. But each is plausibly present, though in different mixtures, in all illegitimate motive concerns. And the relationship between the concrete and expressivist underpinnings is complex. Ultimately, constitutional law cares exclusively about human harm,²⁷¹ and, ultimately, such harm exists only psychically. So what I call expressivist vectors of bad consequences are simply more direct. The concrete vectors (illegitimate motives leading to a bad mix of concrete burdens and benefits) make lives less rich and often demoralize, and sometimes themselves communicate a message of government's lack of concern, contempt, or hatred. Still it is useful initially to keep separate these two different sorts of bad results of illegitimate motives.

Understanding motive law as partially aimed at the harmful consequences that occur when target groups easily decode bad motives underlying governmental action helps solve some difficulties. So even if we do not see disparate racial and gender impact (even rather large impacts) as officially constitutionally problematical in themselves, we might be especially concerned about them when they will be inevitably and reasonably understood (even if not intended) as evidencing such unconcern, contempt, or hatred. In this sense one can "express" a motive that one has but intends to hide or even a motive that one does not have. Here, in using the term expressivist, I am not tightly tethered to a speaker's meaning of expression. On this view what I "say" is what a reasonable listener either (1) correctly identifies as my actual meaning, or (2) if the former does not apply, then reasonably believes is my meaning.²⁷² And such hurtful meanings tend to reverberate like light in a hall of mirrors though not necessarily losing intensity with each reflection. For example, a minority group knows that it has been disrespected, a majority group knows that as well, and the minority group knows that the latter knows. The effects continue to reverberate, though eventually losing force. As one poet wrote: "An unhappy people in an unhappy world—Here are too many mirrors for misery."²⁷³

It is helpful to distinguish these consequential-expressivist views from views also called "expressivist" and held by non-consequentialists. Richard Pildes, Elizabeth

²⁷¹ Although there are interesting arguments worth some thought about whether some great apes should be treated as a very special case of "persons" for purposes of individual liberties. See Lee Hall & Anthony Jon Waters, *From Property to Person: The Case of Evelyn Hart*, 11 SETON HALL CONST. L.J. 1 *passim* (2000) (making the case for protecting the rights of certain animals as feeling and thinking creatures).

²⁷² Cf. RESTATEMENT (SECOND) OF CONTRACTS § 20 (1981) (recognizing existence of a contract (1) on the terms understood by both parties if they shared an understanding of the meaning of contractual language or (2) on the terms understood by one party if they differed and if her understanding of the language was significantly more reasonable than that of the other party).

²⁷³ WALLACE STEVENS, *The Auroras of Autumn*, in THE COLLECTED POEMS OF WALLACE STEVENS 411, 420 (1954).

Anderson,²⁷⁴ and Deborah Hellman²⁷⁵ have, at least from time to time, held the latter position.²⁷⁶ For them, an act can express a message even if understood neither by the speaker nor his primary audience. For example, a bad person's life can "express" evil nature, even if he keeps it concealed from everyone he hurts and indeed from all but the analyst making the judgment that his life "expresses" evil. The key point is that, for these deontological analysts, the consequences of an act that "expresses" something bad, is not what makes it bad.

But, in the view that this Article offers, it is the harmful consequences of some governmental expression that plausibly partially underwrites the concern with laws easily perceived as motivated by a desire to denigrate or harm minorities.²⁷⁷ This might be seen as providing consequentialist support where an earlier argument of mine might be perceived as vulnerable. I do believe that motive analysis reflects real constitutional concern about disparate impacts that the courts cannot easily deal with. So I view such impacts as states disfavored, but not prohibited by constitutional law and motive analysis as reflecting that disfavoring. But if one disputes this, discriminatory motive can be seen as presumptively invalidating governmental action precisely because of the likelihood that it will be detected by its targets and others and thus result in psychic harm. The quotation, presented earlier in this section, from the Court's opinion in *Brown v. Board of Education* strongly suggests a concern with expression of bad racial attitudes based on its consequences.²⁷⁸

²⁷⁴ Anderson & Pildes's concerns with expression are that certain expressions are inherently wrong regardless of consequences. Anderson & Pildes, *supra* note 263, at 1527. They refer to their view as "expressive" and those holding it as expressivists. *Id.* at 1504. Deborah Hellman uses the same vocabulary. See Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 25 (2000). Simon Blackburn makes the deontological nature of Anderson & Pildes's arguments clear. See Simon Blackburn, *Group Minds and Expressive Harms*, 60 MD. L. REV. 467, 470 n.14 (2001).

²⁷⁵ Hellman, *supra* note 274, at 13-15.

²⁷⁶ These writers describe their positions as "expressive." See *supra* note 274. The common element of their position is that an action can be wrong based on the attitude it "expresses" even if those attitudes are understood by no one and cause no harmful consequences. My position is the one Alan Strudler describes, though does not necessarily endorse. It is that what is wrong about certain expressive actions is the harm they cause when understood. Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492, 493 n.8 (2001). These expressive or expressivist views of ethics must be distinguished from an ethical expressivism in another sense. The former is a position concerning the criteria for determining what is good and what actions are right. The latter is a meta-ethical position concerning the nature of the former question and the criteria for answering it. Expressivism in meta-ethics is connected loosely at best with views such as Anderson's, Pildes's, and Hellman's, and any connections have no significance to the questions considered here. See SIMON BLACKBURN, *ESSAYS IN QUASI-REALISM* (1993).

²⁷⁷ Strudler, *supra* note 276.

²⁷⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); see *supra* note 269 and accompanying text.

I want to identify and briefly discuss one particularly interesting set of difficulties with the expressivist view, which I offer as a partial justification for motive analysis, which may work alongside a consequentialist view that is dependent on more concrete consequences. The problem is that it seems obvious that the Constitution, and its underlying principles and premises, should be read to protect a great deal of expression by the political branches against judicial interference. *To the extent* that such freedom of political branch speech exists against judicial invalidation, and is not lost in the courts' balancing it against other values, then an expressive justification for finding certain actions unconstitutional is implausible. In other words, to the extent such "freedom" exists and wins out in balancing, then government expression that inflicts expressive harms, but is within such "freedom," must be tolerated. And, so *to the extent* that such freedom for government to speak exists, then expressivist justifications do not fit well with existing constitutional law. To the extent that pure expression of an opinion by government is privileged from judicial correction, then it would seem that, in cases where such expression is embodied in or accompanied by non-speech acts, the latter may not be invalidated on grounds of the accompanying message.²⁷⁹

Of course these are strange ways of speaking. Neither the First Amendment nor the Due Process Clause confers rights on federal or state governments. Indeed the language of "rights" is inapt. In the usual vocabulary, government is the possessor of Hohfeldian²⁸⁰ powers, privileges, and immunities, and some rights, but not constitutional liberty rights, and the former governmental interests often end precisely where individual rights begin.²⁸¹ What I suggest is that a certain freedom of government to speak to its citizens (more analytically a constitutional privilege) seems intuitively

²⁷⁹ Surely sometimes it is a combination of two or more things that gives rise to new properties. But where this is true, presumably, there is a convincing explanation. Thus, the reason for demanding both a prohibited mens rea and actus reus in criminal law, arguably, is to make very sure of danger and avoid an oppressive world of purely mental crimes. In the case of government actions, otherwise constitutional, accompanied by troubling messages, no such explanation seems plausible. If the message taken alone is within government's power to convey constitutionally, then it is hard to see on what grounds it should taint otherwise constitutional action. Note this assumes that the message is one that is constitutional for government to convey. If that is not the case and the judiciary requires an accompanying political non-speech act to intervene, solely for reasons of standing, that would explain non-intervention. But it would not explain it on grounds that the government is privileged to speak. See *infra* Part III.B.2 for a discussion of standing.

²⁸⁰ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (presenting a typology of legal interests and their mutual relationship); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

²⁸¹ Of course government can possess property, contract, and tort rights. My only assertion here is that the rights created by the Bill of Rights and the Fourteenth Amendment are not rights of government.

obvious based on the structure of the Constitution (a macro-textual argument dependent on language but not solely that of a specific clause's text) and the context out of which it emerged and continues to operate. As I wrote in a recent article, parts of constitutional law were so important and obvious as to go without saying.²⁸² Certainly, the second part of *McCulloch v. Maryland*²⁸³ and *New York v. United States*²⁸⁴ make this point and do so correctly, even if they were overgenerous in the implicit limits that they teased out of the structure of government. And on this score Charles Black's *Structure and Relationship in Constitutional Law* convinces me.²⁸⁵

So, if there are obvious unstated limits on the ability of states to tax the federal government into oblivion and on the federal government to coerce states to enact "state" laws having a preferred federal content, then it seems at least as plausible that the Constitution must be read to give governments wide latitude to speak to their citizens and others without the interference of the courts, although the courts may disagree with the message of the speech.

There is some micro-text to this effect in the Speech and Debate Clause,²⁸⁶ but the immunity I am discussing must extend far beyond its literal protection of members from civil or criminal liability for things that they say on the floor of Congress, including things that they say collectively by enacting laws and concurrent resolutions. One would assume that, to the extent this privilege or immunity exists, then such expression cannot be the "but for" cause of the unconstitutionality of a law, though it might serve as proof of an illegitimate motive for accompanying action that goes beyond speech, a very subtly different matter. In short, to the extent government is free to speak, then by definition, expressivist justifications cannot support judgments of unconstitutionality.

²⁸² Gordon Young, *Does State Immunity Go Without Saying?*, 1 GEO. J.L. & PUB. POL'Y 37 (2002).

²⁸³ 17 U.S. 316 (1819) (invalidating a state tax on a federal financial instrumentality as inconsistent with the implicit powers of the federal government to function generally without state interference). *McCulloch* finds an implicit immunity from state regulations for federal activities or entities, at least to the extent that such regulation significantly threatens the ability of the federal government to function effectively. *Id.* at 425-37.

²⁸⁴ 505 U.S. 144 (1992). *New York* finds an implicit state immunity from federal coercion to enact as state laws policy specified by federal law. But it recognizes that Congress can often either offer states incentives to enact such laws or enact the desired policy as federal law. *Id.*

²⁸⁵ CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 14-15 (1969) (arguing that many constitutional rules, including rules protected by explicit textual provisions, might be inferred from the nature of the governments created and recognized by the Constitution and by the relationship of the two).

²⁸⁶ U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives . . . [I]n going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."). This is read, among other things, to protect Senators and members of the House of Representatives from liability for statements made on the floor of their respective bodies. See also *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

This raises the question of how far such implicit immunity or privilege extends, since, under existing law, it is implausible that it exists without limits. And where it meets its limits, expressivist justifications are sufficiently plausible to warrant serious consideration as at least partial underpinnings of various constitutional doctrines. For example, the Establishment Clause clearly bans some messages from the government at least as expressed in certain ways. The Clause is violated by a statute requiring the posting of the Ten Commandments in a public building and accompanied by a statement that they are presented as the actual and binding word of God in the view of the legislature.²⁸⁷

This suggests two lines of thought. First, perhaps the constitutional policy of protecting government speech must be balanced, clause by clause, against the policy of individual rights provisions of the Constitution in determining how broadly to interpret the latter. My only claim is that the Court has an obligation to consider, not just its view of the value of specific instances of governmental speech, but generally of the importance of allowing the legislature to express itself. Holmes's statements about tolerating speech that is unpleasant, dangerous, and "fraught with death," unless there is a very powerful reason to fear immediate harm,²⁸⁸ transpose, with some adjustment, to the speech of government to those it represents and affects. In short, it should take a powerful reason, stemming from the text and implicit aims of a constitutional-rights conferring provision, to conclude that it restricts government speech in any particular way. The Establishment Clause restrictions are understandable; what it means to establish religion greatly concerns words that make religious assertions, not just acts providing material support, though it also is concerned with material support that government offers to religion.

The second line of thought, which the Establishment Clause inspires, involves Article III and the limits it imposes on judicial action limiting government speech. A law telling school boards to post the Ten Commandments, as God's word, would be struck and its enforcement enjoined and enforced with contempt citations directed at non-compliant board members. But could a court do anything about statutes that did *nothing more than declare* Buddhism the official religion of the United States or of, say, Mississippi? Or to broaden it beyond Establishment Clause cases, what about an improbable (now) state statute that declared African Americans inferior and expressed regrets at the end of slavery? Article III advisory opinion problems suggest themselves.²⁸⁹ If real, are these problems simply the product of very general

²⁸⁷ *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 871-72 (2005) (upholding a preliminary injunction preventing counties from displaying the Ten Commandments because ample evidence supported the lower court's finding of a predominantly religious purpose for the display).

²⁸⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that the First Amendment requires us to tolerate speech even if we believe it is "fraught with death").

²⁸⁹ Portions of *Allen v. Wright* suggest that those harmed by such speech, unalloyed with other action, have no judicial protection. 468 U.S. 737, 753-56 (1984) (finding no standing

limits on the functioning of courts or also the product of assigning powerful weight to permitting government to speak freely? Should we consider a Court opinion, which concludes that these purely expressive laws are “unconstitutional,” a mere advisory opinion? Or should judicial counter speech in such a case be regarded as an opinion that “does” something as well as “says” something? Certainly it is hard to imagine a court ordering a U.S. Marshal to razor such statutes out of the code books in all libraries or to require a hollow repeal of such statutes on pain of contempt in not voting for it. Perhaps judicial counter speech, in some circumstances, should be seen as a remedial act, even if not fully remediating.

There is a large scholarly project, yet to be done, to determine how far, in a variety of contexts, governmental expression, made by authorized policy makers, should be overridden in the name of particular individual rights. Also remaining for debate is the accompanying problem of whether and when judicial counter speech should count as remedial action satisfying the requirements of Article III. This problem is most acute when the troublesome governmental action is unalloyed expression, meaning that it is not entangled with some non-expressive action that courts might undo in the name of more traditional remediation, for example a racial distinction regarding the distribution of concrete burdens or benefits.

D. Why Don't We Put Legislatures in Jail? Remedy and Time Dimension

Of course the question in the heading is metaphorical. The real question is why the Court does not disable legislatures, which have repeatedly demonstrated illegitimate motives by acting on them. Even Congress has been generally unwilling to do this to state lawmaking bodies that have demonstrated hostility to constitutional rights it champions. But in a sense this is what Congress did in Section 5 of the Voting Rights Act of 1965, which requires state governments that seemed especially likely to act out of base racial motives to receive approval from the Federal Justice Department before making certain changes in voting laws.²⁹⁰

Separation of powers and, in cases reviewing state governmental action, federalism make it all but impossible for the federal courts to even partially disable state

because, among other reasons, the alleged expressive harm caused by violation of a statute was too general and not sufficiently proximate to plaintiff). This seems to me to ignore the fact that the generalized harm of a statute expressing regret at the Thirteenth Amendment's ending of slavery would cause more psychological harm to nearly every African-American than some smaller but highly personalized denigration resulting from the violation of a statute. See generally Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313, 1322–23 nn. 84–91 (1999).

²⁹⁰ 42 U.S.C. 1973c (2000); see Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 228 (2003) (“The Voting Rights Act was passed in 1965 after almost a century of overt, rampant, and purposeful discrimination against minority voters, most notably against African-Americans in the Deep South.”).

official actors found to harbor, and be willing to act on illegitimate motives. Injunctions against executive officers can, to some extent, accomplish this by requiring a return to court to take action, found to have been illegitimately motivated, but which might turn out to be justifiable on other grounds. There are, however, almost no injunctions against legislative action, even after a pattern of badly motivated actions. The usual remedy is invalidation. The pre-existing literature on motive analysis deals with the problem of futility rather well.²⁹¹ As a theoretical matter, a legislature whose product is struck down on grounds of illegitimate motives could re-enact claiming acceptable ones. But I agree with previous commentators that a court will be extremely skeptical about such a rationalization, particularly if little has changed since the invalidating decision.²⁹²

I will briefly raise one last timing question, leaving its real exploration to another day, and possibly, to others. A consequentialist would not be concerned solely with whether an action, when taken, seemed to be supported by a reason that made it likely that its consequences would be net good or at least acceptable. Statutes are evaluated for motives at the time of review proceedings and based on motives and other considerations at the time of passage. Courts do not continue to reassess statutes based on their interaction with the world as it evolves. Features of our legal system that are too long settled and are supported by considerations of institutional sufficiency result in judgments of constitutionality that are offered as more than provisional.²⁹³ Despite this, a finding of a bad motivation animating a statute is a reasonably good, though not a perfect, proxy for the likelihood of unacceptable future consequences.

CONCLUSION

Certainly our habits of mind, developed both outside of law and in the law of crimes, torts, and contracts, go a long way toward explaining constitutional motive analysis. But explanation is not justification, or many bad things could be justified. I believe that a moral concern with consequences justifiably drives the subsidiary concerns with motives in all such realms of activity, including judicial review. Bad

²⁹¹ See Brest, *supra* note 12, at 125-27.

²⁹² See *id.* at 126 (noting the skepticism that is warranted for an attempt to reiterate action on a new, legitimate, and constitutionally sufficient rationale, after previous instances of such action have been invalidated as illegitimately motivated).

²⁹³ By this I mean that courts do not rule statutes constitutional on a "for now" basis, but roughly for all times. They do this, however, with the knowledge that later courts may read the Constitution differently and overrule them, and that the Constitution may be amended. What they do not do is decide that a statute is constitutional only for now, while offering continued supervision of its constitutionality as events unfold in the world outside of the immediate context of constitutional meaning. *But cf.* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163-66 (1982) (arguing at least partially on grounds rooted in consequentialism that courts should supervise statutes for contextual obsolescence).

motives can cause bad arrangements of the world's tangible furniture or go nearly straight to the brain in cases of harm caused by denigrating motives understood by targets as expressing derision.

Motive analysis pervades not only review of actions aimed at suspect classes in the wrong way, but also those "designed to strike" at a fundamental right out of disagreement with its foundational premises—for example, that people should be entitled to abortions in early pregnancy. Offering a plausible consequentialist justification is easy in these cases. Difficulties emerge in a set of cases that are already important and which offer real generative possibilities, for example, *Moreno*, *Cleburne*, and *Romer*. These involve neither suspect classes nor fundamental rights, yet they strike action on grounds of more generalized destructive motives. Indeed, one might see their concern as the most basic one, grounding the special scrutiny accorded heightened scrutiny cases, but extending well beyond.

Can this view be justified based on consequentialist ethics, or is the only explanation that such actions are wrong in themselves, regardless of their consequences? Rational basis cases raise doubts about consequentialist justifications where no suspect classes or fundamental rights are involved. They seem to permit almost any consequences involving liberty and property interests that are generally consigned to rational basis scrutiny. If that is true, then the deep concern in such cases when an illegitimate motive is found seems based on the inherently morally tainting nature of such motives. The concerns seem deontological, not consequentialist. These appearances are deceiving: consequentialism offers the best fit of moral theory with the cases. Along the way, this Article explored many other issues connected with motive analysis, including whether motive talk is inevitably about mental states and to what extent government actions can be prohibited based on the psychic harm caused by their expression.