

Introduction: Motivation and Constitutionality

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Perhaps I can do no better in introducing this Colloquium on legislative and administrative motivation in constitutional law than to begin with the letter I sent those who had agreed to author lead articles and responses. In this letter I noted that the Supreme Court in *Washington v. Davis*¹ and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*² had reopened the issue of legislative motive that it presumably had buried in *United States v. O'Brien*³ and *Palmer v. Thompson*.⁴ It was therefore appropriate for constitutional scholars to attempt to develop a complete theory of motivational inquiry in constitutional law. Such a theory would have to attempt at some point to answer the following obviously interrelated questions: (1) To which constitutional provisions and issues are legislative and administrative motivation relevant? (2) What is the rationale for focusing upon motivation as opposed to, or in addition to, effect? (3) What is the effect of finding particular motives upon the question of constitutionality? Do particular motives trigger review of effects or do they preclude it? (4) Is the relevant level of the legislator's or the administrator's motivation his ultimate motivation, his intermediate motivation (which he conceives of as a means to his ultimate motivation), or some other level of motivation? (5) Is the relevant strength of motivation the primary motivation, the "but for" moti-

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1. 426 U.S. 229 (1976).
2. 429 U.S. 252 (1976).
3. 391 U.S. 367 (1968).
4. 403 U.S. 217 (1971).

vation, or some other strength of motivation? (6) Should one classify as permissible, impermissible, or mandated such various motivations as disadvantaging blacks, separating races, pleasing one's constituents, logrolling, making a name in history, following a Benthamite utilitarian calculus, and suppressing certain views for the long-range general welfare? (7) How should one deal with the conceptual problems—such as problems of motivation behind opposing votes, abstentions, executive vetoes or approvals, and votes in referenda—in attributing “motives” to collective bodies? (8) How should one deal with the problems of legislative and administrative inaction, failure to propose, failure to repeal, old law/new motives, and so forth? (9) What evidence of motivation will be admissible, what burdens of proof and of going forward will obtain, and how will the doctrines of *res judicata* and *stare decisis* apply to decisions based upon motivations? (10) Is motivation relevant to the legislator or to the administrator himself, but irrelevant or less relevant to the judiciary? (11) Finally, what are the history and current state of the law on these issues? The letter concluded by noting that any serious scholar owes a huge debt of gratitude to Professors John Ely⁵ and Paul Brest⁶ for their groundbreaking work on most of these questions.

Those who read the contributions to this Colloquium probably will agree that although a complete theory of motivation inquiry, around which all will rally, as yet does not exist—and probably never will exist—scholars have at least a better idea than before about the shape such a theory might take, the difficulties with which its proponents must contend, and the moves they might make to cope with these difficulties. The theories offered by the two lead authors—Professor Larry Simon⁷ of the University of Southern California, and Professor Morris Clark⁸ of the University of Minnesota—surely have deepened our understanding of what is entailed in relating motivation to constitutionality.

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

6. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 *SUP. CT. REV.* 95.

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

8. Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 *SAN DIEGO L. REV.* 953 (1978).

A THEORETICAL OVERVIEW OF THE MOTIVATION/EFFECTS PROBLEM

Effects Theories of Constitutional Law

The problems of motivation inquiry might be best understood by first examining a theory of constitutional law in which the only inquiry relevant to the constitutionality of rules or decisions is an inquiry into their effects.⁹ Transgression of any constitutional limitation consists in producing, or being likely to produce, certain prohibited states of affairs. The prohibited states of affairs may be very specific—for example, a presidential term other than four years—or they may be very general—for example, states of affairs violating Rawls's two principles of justice,¹⁰ Nozick's individual rights,¹¹ Bentham's principle of aggregative utilitarianism,¹² or whichever other set of abstract principles or rights one might prefer to serve as the objective meaning of "equal protection," "due process," or other provision.¹³ Whatever the prohibited state of affairs, its production by the rule in question, not the motive behind the rule, is both necessary and sufficient for unconstitutionality.¹⁴ Motive (the "why" of the rule) of course will influence the meaning of the rule ("what" was done) and thereby be related to the effects, or the states of affairs, produced by the rule.¹⁵ However, ultimately only effects matter, not motives. Legislators desiring to produce forbidden effects and to avoid mandated ones may be violating their oaths. Nonetheless, their official acts may be immune from impeachment if the effects of these acts turn out to be either mandated or permissible.

Formidable difficulties face any theory of constitutional law grounded solely on certain mandated or prohibited effects. First,

9. From this point forward, the term "rule" stands for both legislative and administrative rules and for decisions by officials in particular cases. The phrase "legislative motive" refers both to the motive of collective bodies such as legislatures and some administrative agencies and to the motive of individual officials.

10. J. RAWLS, *A THEORY OF JUSTICE* (1971).

11. R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

12. J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789).

13. Owen Fiss adopts the well-chosen phrase "mediating principle" to stand for such a set of abstract principles or rights. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 107-08 (1976).

14. One consequence of holding that certain states of affairs are what violate the Constitution is that it is usually not the effects of only one law, but the combined effects of the entire set of laws in a jurisdiction, which are unconstitutional.

15. Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 *HARV. L. REV.* 1887 (1970).

it is notoriously difficult to generate any consensus under the most important constitutional clauses about *which* specific effects are relevant and *why* they are relevant. What kinds of inequalities suffered by individuals violate equal protection? Inequalities violating the basic tenets of some general normative theory which formed the Framers' root concept¹⁶ of equal protection, such as proposed by Rawls, Nozick, or Bentham? Or inequalities violating a more specific and limited principle, such as all inequalities produced by laws classifying on the basis of race, even if a few of these inequalities can be justified under a broader theory which the Framers might have held and which is usually, but not always, consistent with banning racial classifications? Disagreements about the identity and the proper level of generality of the root principles of equal protection, due process, freedom of speech and religion, and other clauses are as prevalent now as they ever have been.¹⁷

A second difficulty faced by a pure effects theory arises whenever the theory itself or, for institutional reasons, the judiciary permits two or more inconsistent effects.¹⁸ Assume, for example, that a range of effects, from those produced by libertarian principles to those produced by egalitarian ones, is permissible under the relevant constitutional provision. The effects *not* permissible include those produced by a rule such as "Laissez-faire capitalism for blacks, wealth redistribution for whites." Now suppose a legislative body is faced with the issue of whether to open public swimming pools. Neither the pools (a concession to redistributive notions) nor their absence is constitutionally compelled or forbidden. One day only whites desire to swim, and the legislative body opens the pools. The next day only blacks desire to swim, and the legislative body closes the pools. Whites and blacks continue desiring to swim on alternate days, and the legislative body continues to open the pools on the days when whites desire to swim and

16. On the distinction between basic concepts and specific conceptions, and the distinction's relevance to constitutional law, see Dworkin, *The Jurisprudence of Richard Nixon*, N.Y. REV. BOOKS, May 4, 1972, at 27.

17. See, e.g., the works cited in Alexander, *The Province of Constitutional Law Casebook Jurisprudence Redetermined*, 29 STAN. L. REV. 1299, 1306 n.25 (1977). See also these more recent works: R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

18. The "right/privilege" distinction in constitutional law may reflect a range of effects within which the Constitution permits legislative choice, or it may reflect judicial inability to identify the constitutionally mandated effects within that range.

close the pools on the days when blacks desire to swim. The rule existing at any particular moment is by hypothesis constitutional. Yet the effects are no different from those produced by the unconstitutional rule, "Public pools for whites only." The legislative body may in fact be covertly following this rule, or meta-rule. Unless a supplemental freezing principle requires the legislative body to continue with the libertarian or the egalitarian principles first chosen,¹⁹ a reviewing court must either uphold each of the actions or examine the motive to determine whether the legislative body is continually changing its mind about the desirability of redistributive services or instead is consistently following an impermissible, covert meta-rule.²⁰

An effects theory may also allow a range of inconsistent effects because it dictates only that certain decisionmaking procedures be followed and, within a range, attaches no consequences to the

19. Of course, some freezing principles protecting individuals against shifts in governmental policy are embodied in the Constitution. A shift may be deemed a "taking" proscribed by the fifth amendment or by the due process clause of the fourteenth amendment; it may be deemed an impairment of the obligations of contracts, proscribed by art. I, § 10, cl. 1 (and, with respect to the federal government, either the takings clause or the due process clause of the fifth amendment); it may simply be deemed egregiously unfair retroactive legislation violative of due process; or it may be deemed an *ex post facto* criminal law. Perhaps some changes of rules will even be deemed violative of equal protection solely for treating persons in the present differently from the way persons were treated in the past. However, a legislature generally is not precluded from changing the rules, even if the earlier rules promise by their terms to last for a certain period or even forever.

20. This problem arises because of the absence of a freezing principle and because the constitutionality of a rule is rarely the product of its effects at any one instant, but is most often the product of the effects it is predicted to have over time if it persists. For example, an effects account of the unconstitutionality of a law closing a section of beach to blacks is not the product of its effects at midnight when no one, black or white, desires to use the beach. Similarly, an effects account of the unconstitutionality of a law forbidding abortions is not the product of its effects on March 3, when no one is seeking an abortion. If the legislature does not intend for the rule to persist because the legislature is following a covert meta-rule dictating that the overt rule be changed under certain circumstances, the effects of the overt rule cannot be predicted without knowing the meta-rule. In a sense, the true rule, the effects of which are constitutionally relevant, is the meta-rule, and the overt rule is a "decision" under it much like an *ad hoc* administrative or judicial decision or a decision under an overt rule. The meta-rule, not the overt rule, is the true criterion of decision, and the effects of true criteria of decision are the relevant effects in an effects theory. (This explanation should clear up much of the confusion about whether administrative discrimination must be purposeful to be violative of equal protection.) Thus, one can maintain that motive is relevant in an effects theory in these circumstances only because "what" was done, the effects of which are in issue, coalesces completely with "why" it was done—the motive or covert meta-rule.

further effects produced by such procedures. A theory may require or permit a jury to be selected at random rather than require its members to have particular attributes. The "effect" required by the theory is a certain selection process; this process itself must be examined under the theory.²¹

Moreover, even where an effects theory requires one particular state of affairs to be produced, the judiciary may be reluctant to attempt to discern which of several different rules produces this state of affairs. It may be reluctant because the matter is one requiring complex factual assessments which the legislative body is better equipped to make. Furthermore, ordinarily no reason exists to suspect that the legislative body was motivated other than to produce the required state of affairs, and decisions by legislative bodies are, for reasons of dignity and efficiency, owed some presumption of regularity by the courts. However, when the suspicion of improper motivation becomes strong enough, the courts under an effects theory would be warranted in invalidating a rule unless it were demonstrated to be *the* rule necessary to produce the mandated effects.²²

21. This is basically the role of motive inquiry in Professor Ely's theory. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

Of course, in one sense all motive theories can be viewed simply as special types of effects theories because the relevant effects are decisionmaking processes and reasons for decisions. Moreover, concern with these "effects" usually stems from concern with the further social effects they produce. In other words, concerns with decisionmaking procedures and motives are usually concerns with the outcomes and with the byproducts of such procedures and motives (though not always, as the jury-selection example shows). These concerns are usually with what Rawls calls "perfect procedural justice" and "imperfect procedural justice." J. RAWLS, *A THEORY OF JUSTICE* 85-86 (1971). They are not usually concerns with the procedure or with the motives as ends in themselves, what Rawls calls "pure procedural justice." *Id.* at 86. However, the motive theorist emphasizes the decisionmaking process even when the effects beyond the process are benign. The effects theorist emphasizes the results beyond the process.

22. One problem at this point is what to do with similar rules enacted in other jurisdictions by well-intentioned legislatures. The court has found a suspect motive behind a rule to which it normally would grant a strong presumption of validity. It has engaged in a strict review of the rule's effects and has found that the government has not shown that the constitutionally mandated effects are produced. Theoretically, all similar rules with similar predicted effects should now be invalidated despite having been enacted with proper motives, even though had none of the rules been the product of a suspect motive they all would have been sustained under minimum scrutiny. The situation is comparable to one in which several juries (analogous to several different governmental bodies) render similar verdicts in the same lawsuit (analogous to similar rules). Presumably a correct verdict exists (analogous to the constitutionally mandated set of effects), which these juries either did or did not reach. The existence of evidence legally sufficient to support the verdict reached (analogous to the evidence required to survive minimum review) is assumed. However, one jury is discovered to have been biased against the losing party. The court might throw out that one verdict, except that several other unbiased juries have reached the same verdict. Alternatively, the

Motivation Theories of Constitutional Law

To this point, I have been discussing effects theories of constitutionality and the role of motivation within them. Basically, the effects theory uses motive only as evidence of effects.²³ A motivation theory begins with a set of mandated or proscribed motives. The set undoubtedly is selected because of the social effects associated with it,²⁴ and the presence of motives within the set is proved primarily through the effects of rules and decisions. However, in the final analysis, where motives and effects are inconsistent, the motives, not the effects, govern.

How one decides the following hypothetical provides a simple, litmus-paper test for whether one holds an effects or a motive theory. Suppose a city passes an ordinance prohibiting the burning of American flags on the sidewalks and streets.²⁵ Suppose in addition that the ordinance was passed by a terribly benighted city council which believed that the only objects flammable on sidewalks and streets were American flags. Rather than frame the ordinance as "Don't burn flammable objects," the city council decided to give further guidance to those who might not "know" that only American flags burn. How would effects and motive theorists view this ordinance?

The effects theorist, assuming he holds an orthodox view of which effects are important under the first amendment, probably

court might reach its own verdict (strict review), in which case it makes no sense to allow any verdict other than its own to stand.

Perhaps a court should not permanently invalidate the rule because of the suspect motive but should invalidate it pending reenactment with proper motives. This action would salvage the similar rules enacted by other governmental bodies.

The motive theorist would have no problem in such a case. He would not care that the effects of all the rules were the same (other than those effects produced by public awareness of the underlying motives), because only motives are important, and the motives behind the rule in question are materially different from the motives behind the other rules.

23. This statement is true if one includes among the allowed or the mandated effects certain decisionmaking procedures, such as random selection, which are deemed appropriate for certain kinds of decisions.

24. In other words, constitutional law ultimately is not concerned with passing judgment on legislators or administrators. It is concerned with social effects.

25. See *Street v. New York*, 394 U.S. 576 (1969). I select this example because it represents an area of constitutional law where principles of equality and principles governing clauses other than the equal protection clause are said to merge. See generally Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). See also *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

would conclude that because things other than American flags are flammable, the ordinance produces, or creates the potential for producing, an unnecessarily disproportionate harm to those political messages associated with burning American flags (presumably an improper effect under his theory).²⁶ He would consider the ordinance constitutionally defective from the moment it was passed. Therefore, he would consider warranted both an injunction and damages for past injury from the ordinance.²⁷

The motive theorist would view the ordinance differently. He would consider the ordinance valid at the time of enactment because the motive behind the ordinance was to prevent public conflagrations (presumably proper under his theory), not to suppress speech (presumably improper).²⁸ Of course, when the suit challenging the ordinance is brought, if not sooner, the city council will be made aware of its factual error. *Failure to repeal* the ordinance thus would be suspect and would provide grounds for an injunction or for declaratory relief.²⁹ However, no damages should lie for the period during which the city council remained ignorant.³⁰

26. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

As I have pointed out in another article, however, even a law not over- or under-inclusive with respect, for example, to flammable objects may disproportionately burden some political messages—namely, those which more often are expressed through burning objects. Alexander, *Speech in the Local Marketplace: Implications of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. for Local Regulatory Power*, 14 SAN DIEGO L. REV. 357, 370-73 n.49 (1977). See also Clark, *supra* note 8, at 1010.

27. Justice Fortas, dissenting in *Street*, argued that because a law banning the burning of all objects on the streets and sidewalks would be constitutional, a law banning the burning of only some objects should be constitutional. His argument is fallacious and would undermine the pure equal protection principles found in the equal protection clause, the first amendment, and elsewhere in the Constitution, unless he meant that it is constitutionally mandatory for governments to outlaw burning objects in public. Moreover, even if it were mandatory, *Street* should have been given relief as a reward for calling attention to the under-inclusiveness of the ordinance. This point is relevant in all cases in which a party identifies an unconstitutional inequality, and the legislative response to invalidation will most likely be, or is constitutionally required to be, an extension of the burden (or contraction of the benefit) to others.

28. In other words, the ordinance is considered valid when enacted, unless the motive theorist also holds that legislative mistakes in addition to improper motives invalidate their product. Clark and Simon appear to hold such a position, which has the potential for invalidating a considerable number of rules. Clark, *supra* note 8, at 983-84; Simon, *supra* note 7, at 1113-14. See also text accompanying note 58 *infra*.

29. This conclusion assumes, of course, that the term "American flag" in the ordinance will be given its standard meaning rather than a functional one reflecting the council's original motive.

30. See Simon, *supra* note 7, at 1074, 1121, 1126-27. Perhaps this point overstates the remedial differences between effects and motivation theories. First, in prac-

Relevant Motives in Both Effects and Motive Theories

Effects Theories

Any theory in which motive is relevant to constitutionality must, of course, specify which motives are relevant and why they are relevant. In an effects theory permitting a range of inconsistent effects, a legislative motive to follow an impermissible meta-rule and produce an impermissible effect over time by having the legislature move if necessary among permissible but inconsistent rules³¹ should be considered grounds for invalidation regardless of whether the motive is ultimate or intermediate. That is, such a motive should be grounds for invalidation so long as it, or the ultimate motive to which it is intermediate, is causally sufficient.³² Similarly, when a required or permissible "effect" consists of a

tice, rules producing improper effects and rules enacted with improper motives generally will be linked. Second, under some effects theories, especially those based on consequentialist principles like act-utilitarianism or Rawls's Difference Principle, J. RAWLS, *A THEORY OF JUSTICE* 75, 302 (1971), it may not be true that one should award damages or should otherwise restore the status quo ante because of the past enforcement of rules violative of these principles. In other words, even though a rule was and still is unconstitutional because it violates consequentialist principles, providing remedies for those who have been subjected to the rule may violate the same consequentialist principles. This point illustrates the problematic character of "rights" purporting to be derived from consequentialist principles. It also diminishes the usefulness for the various retrospectivity/prospectivity problems in jurisprudence of distinctions between principles and policies, so long as principles may be consequentialist. For positions relying on the principle/policy distinction, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221 (1973).

On the other hand, in motive theories not supplemented by a prohibition of mistakes, a rule enacted and not repealed for permissible purposes is constitutional no matter what effects it has. A rule with untoward effects becomes unconstitutional only when the legislature becomes aware of the bad effects. Yet one might still ask what the motive is for not compensating persons subjected to the rule in the past once the legislature becomes aware of the bad effects. If the relevant motive in the motive theory is the subjective counterpart to an effects principle warranting retrospective compensation, no legitimate motive may be available for failure to compensate, even though the rule was constitutional when applied to the persons in question. Conversely, where the effects principle is forward-looking and does not justify compensation for those subjected to the rule, neither would the motive counterpart to the effects principle justify such compensation.

Where a law was enacted for improper motives but later was reenacted or not repealed for proper motives, should damages lie for enforcement prior to the change of motives?

31. See text accompanying notes 18-20 *supra*.

32. An ultimate motive is the last answer the legislator gives to a series of "whys?" addressed to his action. An intermediate motive is any answer preceding the last. A causally sufficient motive is one the presence of which will produce the action in question. A causally necessary motive is one the absence of which will

particular decisionmaking process (for example, choosing jurors at random), circumvention of this process (choosing jurors other than at random) will be grounds for invalidation if no other permissible effect (for example, a better-educated jury) is what is aimed at as a permanent effect.³³

When the effects theory itself mandates one state of affairs, but the courts for reasons of institutional deference ordinarily do not,³⁴ motive is not relevant in itself, but only as a guide to the beliefs and attitudes of the legislators and to the effects they were attending to in their action. The presumption of constitutionality should hold only to the extent these beliefs and attitudes warrant confidence in the legislators' bringing about the mandated effects. Indeed, all facts about the actual legislative process—including facts about the actual evidence presented and the time taken for deliberation, as well as facts about ultimate and intermediate motives—are relevant to the amount of deference due the action.³⁵ Once the court decides the presumption of constitutionality is unwarranted, the court should then strictly scrutinize the rule or decision to see if the rule or decision will bring about the mandated effects. If the rule or decision will not, the court should declare it invalid.³⁶

Motive Theories

A motive theorist begins with a set of required or forbidden motives as the key to understanding particular constitutional commands. Motives are, no doubt, deemed pivotal because of their likely effects.³⁷ But they remain pivotal even in those circumstances where the rule or the decision will produce good effects despite the proscribed motive. For example, if the Framers of the

preclude the action in question. The sufficient motive for enactment of a rule will define a meta-rule behind the rule.

33. The phrase "aimed at as a permanent effect" is used because of the meta-rule problem of moving among optional effects in order to produce impermissible ones. See text accompanying notes 18-20 & 31-32 *supra*.

34. See text accompanying note 22 *supra*.

35. For an excellent discussion of judicial review of the legislative process in constitutional law, see Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

36. See note 22 *supra* for the stare decisis effect of such a declaration for similar rules enacted with proper motives.

37. There are probably hybrid theories between pure motive and effects theories which would count the *social reaction* to the *perceived* motive behind a rule or decision as part of the relevant effects of the rule or decision. Part of both Clark's and Simon's justification for the prohibition of racially prejudiced actions is based on these kinds of effects. Clark, *supra* note 8, at 964-67; Simon, *supra* note 7, at 1050-51. See also Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-12 (1976). However, in reality such a theory is merely a very sophisticated effects theory if in the end the effects of motives, and not the motives themselves, control.

equal protection clause meant it to prohibit actions based on racial hostility because they felt such actions in most instances would violate some more basic normative principle, the motive theorist would call for invalidation of such actions even where, because of changes in the social context or our understanding of race, a particular instance of racial hostility was unlikely to conflict with the deeper normative principle. The prohibition of the motive controls even in circumstances in which the principle giving rise to the prohibition would not warrant it. Similarly, motives remain pivotal for a motive theorist where the rule or decision will produce *bad* effects despite the presence of a *required* motive.

A motive theory may be either a theory of mandated motives or a theory of proscribed motives, and it may be either a theory of ultimate motives alone or a theory of both ultimate and intermediate motives. A theory of *mandated* motives might be a theory of ultimate motives (for example, "Always aim to produce the greatest good for the greatest number"), though more likely it would be a theory of causally sufficient motives, ultimate or intermediate.³⁸ A theory of *proscribed* motives usually attaches the same consequences to these motives regardless of whether they are ultimate or intermediate.³⁹ (For example, it is probably almost impossible to find a racist whose ultimate justification for his acts is racial oppression as an end in itself. Most racists operate within the same normative system, the same framework of justification, as non-racists do. Their racism is, in other words, a species of factual or means/ends mistake,⁴⁰ at least on the level at which they

38. For instance, one may construe the enumerated powers of art. I as requiring certain motives, which motives need only be causally sufficient, not necessary or ultimate.

If a motive is mandated, it will be so in order to bring about the effects specified by the motive. Where the motive is absent, but the effects nonetheless are present, no reason exists for invalidating the action. Therefore, it is most plausible to assume that the Constitution mandates motives in areas where motives are easier to detect than effects.

39. It is fair to characterize the motive theories of Clark and Simon as theories of proscribed motives and as theories indifferent to whether these motives are ultimate or intermediate. Clark, note 8 *supra*; Simon, note 7 *supra*. Brest's antidiscrimination principle also fits this description, as does Eisenberg's motive theory. Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 99-105 (1977).

40. Clark and Simon both supplement their proscription of certain motives with

would attempt to justify it.) Finally, although most theories of proscribed motives will probably focus on causally necessary motives, some might focus on causally sufficient motives or even on motives which are neither causally necessary nor causally sufficient because the presence of these motives might produce special effects beyond the particular action in question.⁴¹

Motives and the State Action Problem

I have attempted elsewhere to demonstrate that although some of the issues in "state action" cases are quite real and difficult, the problem of state action is a bogus problem. All private actions have legal significance in being either legally permitted, mandated, or prohibited; and permissive actions of a state can always be translated into their complementary mandatory or prohibitive actions. Consequently, there is no area of state "inaction."⁴² This position has several implications for the motive/effects controversy.

First, under an effects theory, one looks at the present and predicted effects of a rule—or, more accurately, the present and predicted effects of the entire set of rules in the jurisdiction—at the time of the constitutional challenge, not at the time of enactment. A rule's present and predicted effects may be proper when enacted but improper at some later time, or vice versa.⁴³ Therefore,

a general proscription of mistakes. However, the mistakes proscribed are factual, means/ends mistakes, not mistakes regarding normative principles. In my opinion, this is a defect in their theories. See text accompanying notes 67-71 & 86-92 *infra*. But see Greenwalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 Colum. L. Rev. 559, 601 n.194 (1975).

43. Query: Does it ever make sense to invalidate a law because of the presence of a proscribed motive which was not a necessary condition for the law's enactment? Only when one is searching for a meta-rule in an effects theory—or when the motive is proscribed not merely because of the laws it might produce, but also because of the effects of social awareness of its presence—does it make sense to invalidate a law on this ground.

42. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975).

43. Rules are assessed for their predicted future effects on the assumption that the rules will be relatively permanent and will not be repealed the very next day. Officials generally are not supposed to make decisions based on facts which are very time-bound, place-bound, or party-bound unless these facts have been determined through procedures resembling the standard judicial trial. This general policy at times has been located in the equal protection clause. *Morey v. Doud*, 354 U.S. 457 (1957). But see *City of New Orleans v. Duke*, 427 U.S. 297 (1976). It has been located in the bills of attainder clauses. *United States v. Brown*, 381 U.S. 437 (1965). But see *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977). Finally, it has been located in the due process clause. K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 241-76 (1976). But see *Bishop v. Wood*, 426 U.S. 341 (1976). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 484-501 (1978); Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 916 n.66 (1975).

because "inaction" can always be viewed as "action," or because a challenge to permission can always be viewed as a challenge to the permission's mandatory complements, both action and inaction may be constitutional at one point in time but become unconstitutional later, and vice versa.

Under a motive theory, the implication of the position that state inaction equals state action is less straightforward. At the least, this position means that present motives underlying either "action" or "inaction" are always relevant.⁴⁴ The fact that a rule is enacted with proper motives should not save it when it is retained for improper motives, whether it is retained through actual reenactment, through voting down a motion to repeal, or through failure even to move its repeal. Similarly, failure to enact a rule for improper reasons should make the inaction unconstitutional from the moment these reasons arise and become causally efficacious to the requisite degree, whether the inaction results from voting down a proposed action or from never proposing the action in the first place. In short, given the same motives, it should make no difference whether a city closes its swimming pools (as in *Palmer v. Thompson*⁴⁵), fails to reopen them, fails on a vote to open them for the first time, or fails even to propose that they be opened.⁴⁶

What if an action or an "inaction" was originally undertaken with proscribed motives, but there is reason to believe the motives underlying the action or "inaction" are now proper? Some would urge invalidating whatever actions or "inactions" were tainted by the original proscribed motive and remanding to the legislature to discover whether and with what motives it will restore the status quo ante.⁴⁷ Others might attempt merely to ascertain present motives and, if the motives are legitimate, overlook the original improper ones.

Motive and Collective Bodies

A problem confronting motive theories is that of attributing motives to collective bodies when it is the rules of such bodies that are in issue. (Effects theories also confront this problem to the

44. These motives are relevant right down to the motive behind the failure to add as much chlorine to the public pools today as was added yesterday.

45. 403 U.S. 217 (1971).

46. Of course, the evidentiary problems of attributing motives to failures to repeal, to enact, to propose, et cetera are staggering.

47. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1085-88 (1978).

extent that the meaning of the rule is a function of the motive behind it.) Passage of a rule is often the result of a rather complex institutional procedure, as, for instance, when the rule in question is the rule of Congress or of a state legislature. Usually such a rule is passed or repealed only if a majority of those voting in each of two legislative houses and the chief executive officer concur. Under some circumstances the improper motive of but one of the institutional actors, if it results in deeming the actor's vote a nullity, can lead to invalidation of a rule despite the proper motives of all the other actors—assuming it is the causal relation of certain motives to the passage, repeal, or failure to pass or repeal the rule which is in issue.⁴⁸ A Governor's or President's improper motive thus could lead to invalidation of rules passed by a less than two-thirds majority in the legislature, as could the motive of any legislator whose vote was a "but for" cause of the outcome. Motives underlying abstentions should in theory be relevant for the same reason that motives behind inaction are relevant. The major issues here are evidentiary, not conceptual, because each theory of which motives are important and why they are important should generate its own answers to the conceptual problems surrounding rules produced by collective bodies. However, the evidentiary problems are staggering, especially when one considers how complex is the production of a rule and how scant is the direct evidence of the motives of most of the actors, and when one keeps in mind that there is no difference in theory between enacting and repealing on the one hand (action), and failing to enact or repeal on the other (inaction).⁴⁹

48. Moreover, ideally the motives behind abstentions or absences should be considered, as well as the motives of members of the public when voting in referenda.

49. Despite the evidentiary difficulties which attend attributing certain motives to legislative inaction or "silence," it should be noted that in the area of state taxes or state regulations impinging upon interests of national concern, such as interstate commerce, one theory suggests that the state laws are upheld or struck down based upon Congress's silently expressed intent. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940). Under this theory, to avoid the problem of giving effect to "statutes" not passed through regular constitutional procedures, account would have to be taken of the separate silent intent of the President and both Houses of Congress. If one objects to treating silence as a "statute," one can read the negative implications for state laws not from silence but from all the other actions Congress has taken. In this way the "negative-inference-from-silence" doctrine and the "statutory-preemption" doctrine will merge, as they do and should in practice. A similar analysis might apply to presidential actions taken without express congressional approval. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Motive, Effects and Standing

Why a rule is unconstitutional—whether because of its effects or because of the motives underlying it, and which effects or motives—should determine who has standing to challenge it in court. Obviously, this statement reveals adherence to Professor Albert's view of standing, namely, that standing issues are issues of who have the rights correlative to the various legal duties—constitutional, statutory, and common law.⁵⁰ Of course, Albert's view is more a conceptual aid than a formula for deciding actual cases. Indeed, the questions of who have the rights correlative to various legal duties and which of these rights are primary rights, logically derivative rights, or instrumentally derivative rights are among the deepest, most difficult questions in the law, the answers to which implicate profound normative positions.⁵¹ It is sufficient to state at this point that whatever view one takes of why a rule is unconstitutional will have its own ramifications for standing.

Motive, Effects, and Extant Judicial Doctrines

Any theory of what makes rules unconstitutional under particular constitutional provisions should attempt to account for the judicial categories and doctrines developed under the provisions, even if only ultimately to label them aberrant or misguided. For example, under the equal protection clause the courts refer to suspect classifications, fundamental interests, degree of fit between classification and purpose, compelling governmental interests, and less restrictive alternatives. An effects theory of equal protection probably would describe suspect classifications as those suggesting that the rule will produce impermissible effects, either because of the harmful effects which usually flow from the classifications, the general lack of utility these classifications have in producing permissible or mandated effects, or the motives suggested by such classifications, which motives generally pro-

50. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139, 1144-54 (1978); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974).

51. Consider, for example, the model of rights (standing) suggested by *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), and compare it with the model suggested by the "transferred intent" cases, e.g., *Talmage v. Smith*, 101 Mich. 370, 59 N.W. 656 (1894).

duce rules with impermissible effects.⁵² Fundamental interests might be interests owing their significance to some other provision of the Constitution, such as the first amendment or the due process clause, in which case their presence would suggest effects impermissible under these provisions (or under some hybrid of equal protection and these provisions⁵³). Alternatively, they might, if related solely to equal protection, be recast as fundamental inequalities. Fundamental inequalities would be those which, because of their magnitude, their nature or their importance, suggest impermissible equal protection effects in the same ways as do suspect classifications.⁵⁴

52. For the relevance of motives in an effects theory, see text accompanying notes 9-22 *supra*.

53. See, e.g., *Police Dep't v. Mosley*, 408 U.S. 92 (1972); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). *Shapiro v. Thompson*, 394 U.S. 618 (1969), is usually classified as such a hybrid. However, because *Shapiro* presumably held unconstitutional all distinctions between old and new residents in the amounts of welfare benefits, regardless of how much new residents had received in their states of origin, it is arguable that the case should be classified as a pure equal protection case rather than as one in which the exercise of an independent constitutional right was deterred or penalized. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1002-06 (1978).

54. For example, if the effects theory allows a range of governmental choices on a continuum between libertarianism and egalitarianism, redistribution of wealth beyond a certain level will not be mandated. However, if the government chooses to redistribute wealth more extensively than required, but in order to save administrative costs it does not include the poor who live in remote areas, it may be deemed to have fallen off the plane of permissible effects lying between the libertarian and the egalitarian poles. For it is possible that, because the least advantaged are not benefited by the inequality, under no permissible theory of effects would the government be able to bring about such a pattern of redistribution. The same analysis might apply to the unconstitutional conditions attached to "privileges" or to denial of equal provision of "privileges" on the bases of speech, of religion, or of political affiliation. The consequences of such a position would be that inequalities in the provision of welfare among those with equal needs, although not inequalities in the provision of a constitutional right, are inequalities of a fundamental type because they strongly imply an impermissible set of effects. Compare *Maricopa Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Department of Agriculture v. Murry*, 413 U.S. 508 (1973); *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Shapiro v. Thompson*, 394 U.S. 618 (1969), with *Jefferson v. Hackney*, 406 U.S. 535 (1972), and *Dandridge v. Williams*, 397 U.S. 471 (1970). Administrative expense as a ground for over-inclusion in a welfare program may justifiably be viewed as relevantly different from such expense as a ground for under-inclusion. See, e.g., *Mathews v. Lucas*, 427 U.S. 495 (1976).

Some inequalities are fundamental because the benefit in question must be distributed equally (for example, voting rights); others are fundamental because the benefit, optional under the effects theory in question, is valued primarily from a competitive perspective, and unequal provision will leave the least advantaged under the distribution worse off than had no benefit been distributed at all. Redistributions tied to skills training or to information or resources affecting political influence, franchise access, or lawsuits between persons receiving the benefits may, if not governed solely by equal benefits for those with equal needs, occasion fundamental inequalities. Indeed, even unequal welfare for persons with equal needs may leave those receiving the lesser amount worse off than had no welfare

Once the court found a suspect classification or a fundamental inequality, it would closely examine all the rule's relevant effects, good and bad, in order to ascertain compliance with the ultimate principles of proper effects. Compelling governmental interests, factored by the degree to which they are served and discounted by the presence of alternatives producing fewer bad effects, would be those effects so important that they suggest compliance with the ultimate principles even in the face of suspect classifications and fundamental inequalities. Means/purpose fit would be irrelevant in an effects theory because actual rather than intended effects are what matter, and each rule "fits" perfectly its actual effects.⁵⁵

In a motive theory, suspect classifications, fundamental inequalities, compelling governmental interests, "fit," and less restrictive alternatives would all serve evidentiary functions with respect to uncovering the motivation behind the enactment, repeal, or failure to enact or repeal the rule in question. Suspect classifications would suggest certain proscribed motives. Fundamental inequalities would suggest the absence of a mandated motive of impartiality.⁵⁶ Compelling governmental interests, again

been provided because the tax levies required to support welfare dry up sources of private charity which might have been distributed more strictly on a basis of need. Similarly, the grant of a "privilege" to Republicans but not Democrats may be viewed less as a deterrent to joining the Democratic party than as a harm to the Democrats by making them worse off than had neither party received the "privilege." (Clark states that in an area where the government may exclude all speech, the effect of excluding one point of view is not worse than the effect of excluding all points of view. Clark, *supra* note 8, at 992. He clearly is mistaken. One-sided presentations are often worse for society than no presentation by either side.) See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1006 (1978).

55. See Note, *Legislative Purpose, Rationality and Equal Protection*, 82 *YALE L. J.* 123 (1972). See also Alito, *Equal Protection and Classifications Based on Family Membership*, 80 *DICK. L. REV.* 410, 413-14 (1976); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1247-48 (1970); Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 107-08 (1976); Shaman, *The Rule of Reason in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 *HASTINGS CONST. L.Q.* 153, 166-67 (1975).

56. Most theories of equal protection, whether they are effects or motive theories, refer at bottom to some notion of impartiality. Effects theories test rules by whether the effects they produce are the effects an omniscient legislature would produce were it motivated in the requisite impartial manner. Motive theories test rules by whether the actual motivation underlying them is impartial in the required sense.

The asserted relation of impartiality to equal protection generally takes one of two forms: (1) There is a mandated type of impartiality, elaborated in a thoroughgoing normative theory. Thus, egalitarianism, Rawls's two principles of jus-

factored by the degree served and discounted by the availability of less restrictive means, weigh against finding the prohibited motive(s). Lack of fit might also suggest impermissible purposes if the lack of fit is between the rule and the *articulated* purposes.⁵⁷ However, if the lack of fit is between the legislature's true purposes and its rule, and the true purposes are permissible, the motive theory must be supplemented by a theory that holds some or all legislative mistakes to be unconstitutional in order for the lack of fit to be significant.⁵⁸

SIMON'S THEORY OF MOTIVATION AND THE EQUAL PROTECTION CLAUSE

Simon posits the central meaning of the equal protection clause to be the prohibition of racially prejudiced governmental actions. The suspect classifications doctrine, the requirements of near-perfect fit and compelling governmental interests whenever a strong inference of racial prejudice is warranted, and other familiar judicial constructs under the equal protection clause all function to raise and dispel the judicial inference of racial prejudice

tice, aggregative utilitarianism, aggregative utilitarianism purged of "external preferences" (see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 232-38 (1977)), and even libertarianism such as Nozick's can all be viewed as elaborations of the meaning of the impartiality central to the moral point of view. (2) There is a specific, prohibited type of lack of impartiality. Fiss identifies a particular effect (exacerbation of the position of disadvantaged groups) as one specifically prohibited under the equal protection clause for want of the requisite impartiality. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 157-59 (1976). (Fiss bases his principle for violations of the equal protection clause either on a notion of group rights, which I believe to be incoherent, or on more individualistic premises which remain unstated and obscure. Moreover, given an appropriate view of state action, Fiss's principle leads to proportional racial-group equality in the distribution of all benefits and burdens, regardless of the desert of individuals—an impractically rigid and morally obnoxious result.) Simon, Clark, Brest, Ely, Eisenberg and others single out particular motives as being fatally non-impartial under the equal protection clause. See Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 *SUP. CT. REV.* 95; Clark, note 8 *supra*; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 *N.Y.U. L. REV.* 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970); Simon, note 7 *supra*.

57. See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 46-47 (1972). Of course, a legislature can avoid a failure of fit by describing its purposes at a very low level of generality. See authorities cited note 55 *supra*. A legislature can avoid running afoul of Gunther's test by articulating any purposes exactly fitting the rule because Gunther provides no theory of impermissible purposes, although he appears to assume one. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 995, 1083-85 (1978); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 *YALE L.J.* 123, 128 (1972).

58. Simon has such a supplemental theory regarding legislative mistakes. Simon, *supra* note 7, at 1113-14. See also note 28 *supra*.

behind the action in question.⁵⁹

Simon goes further than any other modern commentator who holds a motive theory of equal protection in specifying the proscribed mental state:

Racial (or ethnic) prejudice [such as the equal protection clause proscribes] is an attitude or emotion composed of two essential characteristics: The group against which prejudice is directed is regarded negatively, and this negative attitude is categorical—that is, it is directed against anyone who is a member of the group simply because of his membership.⁶⁰

Simon describes at some length not only the phenomenology of racial prejudice but also the two special harms attending racially prejudiced governmental action: process distortion and dignitary harm (insult). The remedy for the latter harm is essentially parasitic on the remedy for the former harm. He concludes that any governmental action which would not have been taken “but for” racial prejudice is invalid regardless of whether the “goal” of the action was to disadvantage a particular racial or ethnic group.⁶¹

Putting aside the basic problem of how it corresponds to the Framers' intentions, Simon's position has several interrelated difficulties. First, much action taken by governmental bodies and officials *not* caused by attitudes of racial hostility nonetheless *is* based on racial stereotypes. A stereotype may be true or false, and it may be positive, negative or neutral. Moreover, people continually act—indeed, people are required by canons of rationality to act—on the basis of stereotypes without believing that what holds true generally for members of a group holds true for every individual member. Many governmental actions could be based upon racial stereotypes—even false, negative stereotypes—which, because they do not assume a particular attitude toward every member of the racial group, arguably do not fit Simon's definition of racially prejudiced action.⁶²

59. The “fundamental interests” component of equal protection jurisprudence does not fall within the framework of the analysis, and Simon apparently would eliminate it.

60. Simon, *supra* note 7, at 1047.

61. Surely there are potential consequences for standing depending upon (1) whether process distortion or dignitary harm is primary, and (2) whether only actions aimed at disadvantaging racial groups or, in addition, all actions infected with racial prejudice violate the equal protection clause. However, Simon does not discuss these.

62. Of course, as Simon indicates, negative racial stereotypes may reflect what he defines as racial prejudice. Simon, *supra* note 7, at 1096.

For example, whites in a neighborhood into which blacks are moving may hold a stereotype of blacks leading them to believe that black neighbors are more likely than whites to let their property deteriorate, or that they are more likely than whites to bring with them an upsurge in crime, without believing that every black who moved in would bring with him these undesirable consequences. The stereotype would quite likely be false and would surely be considered negative. But it does not appear to meet Simon's stringent definition of racial prejudice.⁶³

Simon's criteria for proscribed action thus can be interpreted as more stringent than, for example, those of Brest, who apparently would invalidate all actions premised on unfavorable racial (or sexual) stereotypes, whether true or false.⁶⁴ Perhaps this difference is insignificant, for Simon supplements the proscription of actions premised on racial prejudice with a proscription of legislative mistakes.⁶⁵ The latter proscription invalidates the actions based on false racial stereotypes, leaving the problem of the action based on a true but negative racial stereotype. Simon apparently would not deem such an action unconstitutional, but he would instead demand convincing evidence that the action *was* based on a true stereotype and not on racial prejudice.⁶⁶

The proscription of legislative mistakes is potentially more far-reaching than the proscription of racially prejudiced actions. Many rules are enacted for purposes they turn out not to serve. These rules, according to Simon, are violative of the equal protection clause, at least until the decisionmakers adopt as their purposes those in fact served by the rule.⁶⁷ Thus, in the flag-burning example, either the lawmakers acted with improper motives, or they made a mistake. In either case they violated the Constitution. As Simon indicates, the proscription of mistakes, leading to a demand for justification in terms of purposes the rule actually

63. I say "appear," because it is not entirely clear from Simon's article whether he would regard false and negative stereotypes as tantamount to the racial prejudice at which the equal protection clause is directed. For example, Simon views paternalistic attitudes toward races as racial prejudice, although he does not specify whether such attitudes must be categorical in the sense of applying to each member of the racial group. *Id.*, at 1095-97.

64. See Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

65. Simon, *supra* note 7, at 1113-14.

66. *Id.*, at 1096.

67. I believe Simon would say that these rules are unconstitutional. I have some doubt, however, attributable to Simon's discussion of *Washington v. Davis*, 426 U.S. 229 (1976), where he seems to suggest that mistakes are only unconstitutional when they become known to the decisionmakers. See Simon, *supra* note 7, at 1121, 1126-27. The importance of deciding whether mistakes are unconstitutional when made or when discovered primarily relates to the retrospectivity of the remedy. *But see* note 30 *supra*.

serves, flushes out proscribed motives, and vice versa.⁶⁸ However, the truth of the matter is probably that more violations of Simon's principles will be in the category of mistakes than in the category of racially prejudiced actions.

Are racially prejudiced actions and mistakes all there are to equal protection? Are there not other kinds of prejudices and stereotypes that distort the legislative process? What about prejudices against opticians,⁶⁹ mental defectives,⁷⁰ nudists, or homosexuals? Is racial prejudice meeting Simon's rather stringent criteria really the most important process-distorting prejudice among governmental officials today?

Moreover, what is the model of the undistorted decisionmaking process (derived most likely from some normative position regarding effects) underlying the proscription of racial prejudice? Perhaps, if one knew what this model were, one could decide what other motives might be candidates for proscription. Simon leaves one with a position under which a law producing a gross inequality—for example, one enacted by a legislature comprised of Benthamite utilitarians, who decide that social happiness will be maximized by cruel treatment of blacks—is nonetheless constitutional if it is well-designed to serve the legislature's purposes, and if none of these purposes is tantamount to racial prejudice.⁷¹ I believe that treating blacks in certain ways violates the equal protection clause and thus invites judicial, not just political, remedy even if it satisfies completely some non-racial principle such as maximizing aggregate happiness.

Another difficulty with Simon's proscription of racially prejudiced action is that it may be too strong. One way it can be read is to forbid a decisionmaker's consideration of his constituents' racial prejudices. The decisionmaker might take account of these prejudices by seeing that the constituents' prejudiced desires regarding governmental policy are given effect. The action taken by the decisionmaker then is not relevantly different from action taken directly by the constituents themselves, and the pro-

68. Simon, *supra* note 7, at 1113-14.

69. See *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

70. See *Buck v. Bell*, 274 U.S. 200 (1927).

71. Locating one's basic normative principles in constitutional provisions other than the equal protection clause does not help because, at some deep theoretical level, it is probably impossible to separate the comparative treatment to which equal protection is directed from the absolute treatment to which substantive due process, freedom of speech, et cetera are directed.

scription of actions based on racial prejudice should apply. Suppose, however, the decisionmaker takes account of constituents' prejudices in attempting to keep the peace. He might, for example, segregate prison inmates in periods of racial strife,⁷² or he might assign, on a racial basis, police officers to certain neighborhoods because the prejudices of those in the neighborhoods would otherwise result in noncooperation. He might even wish to segregate swimming pools⁷³ or schools⁷⁴ during times of high racial tension.⁷⁵ The constituents are prejudiced, but the decisionmaker is not.

Likewise, suppose a person reports a crime only because of the race of the defendant. Is the prosecutor's action in bringing charges a violation of the equal protection clause if he is aware that race was a "but for" cause of the prosecution?⁷⁶

Moreover, are there not cases where the decisionmaker should be able to give effect to his and his constituents' racial prejudices? Suppose that a decisionmaker believes that he and his constituents, all of whom are racially prejudiced, have a right to sell their property to whomever they please. Suppose further that their belief in such a right is a product of their racial prejudice in a causal, though not a justificatory, sense. Should the action of the decisionmaker in establishing a legal right to discriminate be deemed a violation of the equal protection clause?⁷⁷ Would the action violate Simon's proscription?

Finally, suppose a decisionmaker's values, such as preferences for certain colors and musical styles, although non-racial in themselves, can be traced to racial prejudices in the decisionmaker's past or present environment. Are actions premised on these values impermissible? Simon hints that they might be.⁷⁸ Without a set of normative principles more basic than the proscription of racial prejudice in terms of which values can be assessed, the temptation is strong to assess them by their ancestry. To so assess them, however, would be to commit a particularly devastating

72. See *Lee v. Washington*, 390 U.S. 333 (1968).

73. See *Palmer v. Thompson*, 403 U.S. 217 (1971).

74. *Cooper v. Aaron*, 358 U.S. 1 (1958).

75. Segregation to avoid violence or other harms not only may not be racially hostile legislative action, it may not even be appropriately deemed race-dependent action. Only the actions of the violent private citizens, who perhaps constitute a small minority, may be racially motivated. See Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 70, 175 & n.77 (1977).

76. I owe this example to remarks by Professor Lane of the University of Southern California Law Center.

77. Compare *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), with *Reitman v. Mulkey*, 387 U.S. 369 (1967).

78. Simon, *supra* note 7, at 1062, 1121.

form of genetic fallacy: Which of the values one holds dear can one say with certainty are not products of some sort of tribal or parochial prejudice?

I conclude this section with a brief comment on the way Simon deals with the motives of collective bodies—what he labels “institutional motivation.” As I read Simon, he solves the evidentiary difficulties which attend attributing motives to institutions by asking what the probabilities of racial prejudice would be if the institution were but one person. He then says that the probability of racial prejudice attributable to one-person institutions can be attributed to each member of multi-member institutions, *quod erat demonstrandum*.⁷⁹

One difficulty, which I believe can be surmounted, exists in such an approach. Suppose the probability of racial prejudice behind a five-member school board’s action is one-third, insufficient to invalidate the action. Suppose, in addition, the action was approved by a three-to-two vote. Suppose, finally, that when the probability that a certain motive accompanies the action of three persons is one-third, it means that it is probable that one of the three members acted with this motive and that the other two did not so act. Therefore, where the vote was three to two, and the probability of the forbidden motive was one-third, the action would probably not have been taken but for that motive. Using Simon’s method, however, the action would be upheld.

An answer to this objection lies in attributing the reciprocal probability of racial prejudice to the losing votes. Thus, if the action of the three carries a one-third probability of racial prejudice, the action of the two dissenters carries a two-thirds probability of this prejudice. If one cancels out all the votes infected by racial prejudice—one-third of three and two-thirds of two—the action still would carry by a vote of two to two-thirds.

A more serious objection to Simon’s method for attributing motives to institutional actions is that it works only so long as one does not have evidence relating to the motives of specific members. Once such evidence is obtained, and distinct probabilities are available both for the institution and for some of or all its members, the task of assessing the role of specific motives in the actions of the institution necessarily becomes terribly complex.

79. *Id.*, at 1097, 1101.

Clark's theory of motivation is similar to Simon's, except that Clark finds motivation to be pivotal in many if not most provisions of the Constitution while Simon is silent on motive's role outside the equal protection clause. Clark defines the "invidious motivation" which is the key to interpreting various and sundry constitutional doctrines as "devaluing the needs, wants, capabilities, or dignity of members of a group, whether for reasons of hostility or of other prejudice, on the unwarranted assumption that such group members are less capable or less worthy of consideration than other members of society."⁸⁰ In other words, a legislature's *mistaken*⁸¹ assumption of *lesser moral worth* is the evil to which various constitutional guarantees are directed. This mistaken assumption is an evil because it stigmatizes the individuals so regarded and because it creates a feeling that the social contract between governors and governed has been breached.⁸²

Clark, like Simon, views many of the familiar judicial doctrines as performing an evidentiary function in the judicial search for proscribed motivation. Thus, suspect classes, fundamental interests, and compelling governmental interests are significant because of their strong implication or negation of improper motives.⁸³ Moreover, Clark goes beyond Simon in positing not only an evidentiary function for specific constitutional categories of rules and interests but also a *per se* rule function for many of these categories, at least in areas outside pure equal protection. Thus, because of institutional limitations in uncovering the true motives of decisionmakers, certain categories of rules are conclusively presumed to be violative of various constitutional guarantees as a prophylactic against time-consuming and usually unconvincing pleas of proper motivation.⁸⁴

Clark briefly takes on the issue of negative stereotypes versus prejudices.⁸⁵ He recognizes that some judgments of lesser worth may be justified (for example, those retributive judgments directed at certain lawbreakers). But he also recognizes that decisionmakers from time to time and in limited contexts may desire

80. Clark, *supra* note 8, at 966-67.

81. Clark indicates that a mistaken assumption of lesser moral worth is not less pernicious because it is honest. *Id.*, at 965-66. Furthermore, he indicates that if a mistaken assumption of lesser moral worth is one premise underlying a rule, the rule is no less an evil merely because the legislature's ultimate purpose is permissible. Thus, Clark's position is that the Constitution invalidates a particular type of legislative mistake, namely, a mistake regarding moral worth.

82. *Id.*, at 954, 964, 967.

83. *Id.*, at 954, 975-76.

84. *Id.*, at 976, 983.

85. *Id.*, at 972-73.

to act on negative stereotypes which they recognize do not hold true for all members of the affected group and do not necessarily warrant other kinds of actions affecting the group. But he avoids the issue of when negative stereotypes justifiably can result in prejudgment and when such prejudgment is proscribed prejudice.

Clark, again like Simon, supplements his motive theory with a proscription of legislative mistakes, though the proscription seems less a matter of regarding laws enacted by mistake as unconstitutional *per se* than a matter of smoking out improper motives by precluding a claim of mistake.⁸⁶ Thus, mistakes in areas where improper motives are unlikely may not be unconstitutional for Clark, whereas for Simon such mistakes are unconstitutional though almost totally impossible to detect.

One difficulty with Clark's general position is similar to a difficulty with Simon's, except that it is more serious given Clark's desire to relate a certain proscribed set of motives to almost all significant constitutional guarantees. The difficulty lies in Clark's failure to provide a positive model of what counts as an impartial motivation. I agree that a legislative view of blacks or Republicans or Vermonters as human beings of lesser worth displays a lack of impartiality that is morally and constitutionally significant—but I do so because I have in mind a definite model of what impartiality looks like. Clark appears to remain neutral among the various conceptions of impartiality endorsed by egalitarians, Rawlsians, utilitarians of various stripes, or libertarians.⁸⁷

The consequence of Clark's failure to provide a specific conception of impartiality is that his attempt to reduce practically everything of constitutional significance to a few proscribed motives is terribly strained. For example, with respect to the various first amendment areas—libel, commercial speech, neutrally-worded time, place, and manner restrictions, and so forth—Clark stretches either the notion or relevance of prejudice against certain groups. Clark states that the selectivity employed by the city regarding plays in *Southeastern Promotions, Ltd. v. Conrad*⁸⁸ evidenced proscribed prejudice because “the city made the judgment that the play was not fit for the adult public to see.”⁸⁹ If

86. *Id.*, at 983-84.

87. See note 56 *supra*.

88. 420 U.S. 546 (1975).

89. Clark, *supra* note 8, at 1020. Compare this view of “prejudice” with Clark's basic definition. See text accompanying note 80 *supra*.

this type of prejudice represents the prejudice proscribed by the first amendment, then so too does the type of "prejudice" displayed in banning certain commercial advertisements, to which Clark does not object.⁹⁰ Perhaps the notion of prejudice or its relevance seems strained because it is not clear in what sense a government must view all ideas, like races or sexes, as of equal worth. Even more than in the equal protection area, the omission of some general theory of the first amendment, framed in terms of some set of effects or in terms of the motives to bring about this set of effects, undermines the usefulness of Clark's analysis.⁹¹ I cannot tell whether for Clark a dispassionate (and obviously non-Millian) utilitarian, for example, who suppresses speech, but only when necessary to maximize aggregate happiness, would be engaging in "invidious" (read "violative of the first amendment") suppression.⁹²

Finally, Clark's attempt to disengage unconstitutionality from motivation at the border of state action is unconvincing. As I stated earlier and elsewhere,⁹³ at bottom no coherent distinction can be drawn between state "action" and "inaction," because the latter can always be recast as the former. However, it does not follow from the fact that state action is a concept devoid of analytical significance that private racial discrimination, for example, cannot constitutionally be allowed. All that follows is that its allowance *is* state action of a particular type. State action therefore cannot provide the baseline beyond which motivation ceases to impugn action.

90. Clark, *supra* note 8, at 1001-03. I do not deny that the criteria of selection that the government might employ in situations where it must perforce be selective—for example, in choosing the public school's curriculum, the public library's books, and the public auditorium's plays—may violate the first amendment. Indeed, I believe the contrary is true, although I find it immensely difficult to identify which criteria would and would not be impermissible in these areas. However, it is not in the suppression of unpopular views wherein lies the distinction, if any, between commercial speech and plays. Both forms of speech may be suppressed for the same reasons, some proper, some improper. See also Alexander, *Speech in the Local Marketplace: Implications of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. for Local Regulatory Power*, 14 SAN DIEGO L. REV. 357, 375-76 (1977).

91. For examples of comprehensive theories of the first amendment, see the first amendment works cited in Alexander, *The Province of Constitutional Law Casebook Jurisprudence Redetermined*, 29 STAN. L. REV. 1299, 1306 n.25 (1977). See also BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978).

92. For a similar point, see Bice, *Motivation Analysis as a Complete Explanation of the Justification Process*, 15 SAN DIEGO L. REV. 1131, 1138-39 (1978).

93. See Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975); text accompanying note 42 *supra*.

The concept of a baseline, however, can be of use in constitutional law. The baseline could represent a set of effects—or the corresponding motive to produce such a set of effects—marking the terminus of the range of effects the provision in question allows. One would identify this baseline by inference from the normative principles the provision deems acceptable. Movement away from the baseline in the direction of another terminus would be permissible, but not mandatory; and the principles might, for example, permit a fair amount of governmental toleration of private discrimination and even mandate protection of some private discrimination.

To say the government may move between one baseline set of effects and another is not to say that its motivation for picking a nonmandated but permitted set of effects is irrelevant. Quite the contrary is the case, and I refer the reader to the earlier discussion of the role of motivation in an effects theory.⁹⁴ It is in fact *only* when effects are permitted but not mandated by the Constitution itself or by the judiciary that motive is relevant. And despite what Clark says, it is no more difficult to assess motivation in the area of permissible effects than it is elsewhere.⁹⁵

94. See notes 9-22 and accompanying text *supra*.

95. Clark states, for example, that it is very difficult to infer improper motivation when a town terminates a nonmandated service such as public swimming pools, and he states that this is one reason for not deeming these terminations unconstitutional. Clark, *supra* note 8, at 1013-14. However, he also states that motive is relevant to the constitutionality of facially neutral anti-litter laws and that the possibility of improper motive justifies prophylactic rules forbidding application of such laws except in certain circumstances. *Id.*, at 1010-11. Clark's grounds for distinguishing the termination of services from the anti-litter laws are problematic, for in terms of ease of proof of motivation, the termination of services and the anti-litter laws appear indistinguishable. Clark offers no theory of mandated and permissible effects which would otherwise distinguish them.

