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Rationality Analysis in Constitutional Law

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TABLE OF CONTENTS

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I. INTRODUCTION

Courts often require that legislation must be rationally related to a legitimate governmental interest.[1] This "rational ba-

1. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (federal equal protection minimum standard); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (federal due process minimum standard); Hand v. H. & R. Block, Inc., 258 Ark. 774, 528 S.W.2d 916 (1975) (state due process); D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974) (state

sis test" is commonly said to be the minimum standard of judicial review—the standard that all legislation must meet to survive constitutional attack, whether challenged under the due process clause or the equal protection clause.[2] For many

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equal protection). *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

In recent years, the Supreme Court has used three standards of review or burdens of justification: 1) rationally related to legitimate state interest (the "rational basis" test); 2) substantially related to an important state interest (the so-called "middle-tier" test); and 3) necessary to a compelling state interest (the "strict scrutiny" test). *See* Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689, 693-711 (1977). Only the first standard purports to be a mere rationality test; the second and third by their terms go beyond simple rationality to assess the value of the government's ends and to balance the costs and benefits of legislation. For example, in a middle-tier case, Craig v. Boren, 429 U.S. 190, 198 (1976), the Court recognized that legislation restricting alcohol consumption by young men but not young women would be invalid if the goals of the legislation "were deemed of insufficient importance to sustain use of an overt gender criterion." Strict scrutiny also employs a balancing approach, although to sustain legislation the government must overcome a much greater burden to demonstrate that the benefits of using a suspect classification outweigh the costs. Bice, *supra*, at 718.

Much of the confusion surrounding rationality analysis can be traced to the fact that it means different things to different courts. One of the goals of this Article is therefore to clarify the analytical distinction between two different standards of review: rational basis and balancing. Some courts lump both of these standards under a "rationality" or "reasonableness" heading, and thereby exacerbate the confusion, *see, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971); it is hoped that this Article will provide the necessary clarification. For a similar attempt to provide analytical clarity, see P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 987-1010 (1975).

This Article focuses on American law, but much of the discussion of rationality analysis may be applicable to judicial review in other nations as well. Many foreign courts use "rationality" or "reasonable basis" standards of judicial review. *See, e.g.*, Katz, *Benign Preferences: An Indian Decision and the Bakke Case*, 25 AM. J. COMP. L. 611, 619 (1977) (use of a "reasonable basis" test by Indian Supreme Court); Taylor, *Judicial Review of Improper Purposes and Irrelevant Considerations*, 35 CAMBRIDGE L.J. 272 (1976) (use of rational connection standard).

2. This Article will not distinguish between the requirements of equal protection and due process. Thus, the requirement that a classification disadvantaging some persons but not others must be rational (equal protection) and the requirement that an imposition of a burden or restraint on liberty must be rational (due process) will be treated as identical. *See* Bice, *supra* note 1, at 717. *But cf.* Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 831-42 (1978) (equal protection and due process analyses contrasted).

Rationality tests have also been employed in areas other than the equal protection and due process contexts. For example, the Supreme Court has used rational basis review to determine whether a person must answer questions at a congressional investigation. Since there is "no congressional power to expose for the sake of exposure," Watkins v. United States, 354 U.S. 178, 200 (1957), a person need answer only those questions that are rationally related to a legitimate congressional objective. Similarly, statutues are within Congress' power to regulate commerce among the states only if there is "a rational basis

years, however, the rational basis test in federal constitutional law was so "toothless" that its application was tantamount to declaring that the legislation was constitutional.[3] Many thus questioned whether the federal rational basis test was a "test" at all; some rightly concluded that it was simply a quaint and insincere method of announcing that the legislation would receive no meaningful scrutiny and perhaps should not be subject to judicial review at all.[4] In recent years, however, the United States Supreme Court has occasionally departed from its previous pattern and has purported to use the rational basis test to invalidate legislation.[5] Similarly, application of the rationality requirement in state constitutional law has sometimes resulted in the invalidation of legislative action.[6] Commenta-

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for finding that a chosen regulatory scheme is necessary to the protection of commerce." Katzenbach v. McClung, 379 U.S. 294, 304 (1964). Thus, for example, in deciding whether a state has properly apportioned taxes that are imposed on persons engaged in interstate commerce, the test is whether the apportionment bears a "rational relationship . . . to property values connected with the taxing state." Norfolk & W. Ry. v. Missouri State Tax Comm'n, 390 U.S. 317, 325 (1968).

The analytic steps in these applications of rationality are the same as those under the equal protection and due process clauses. Use of rationality analysis in these other contexts is often less controversial, however, because there is general agreement, based on common understanding of the Constitution, that the ends the legislature may pursue are limited. As the range of permissible goals broadens, the use of rationality analysis becomes more controversial. *See generally* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

3. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963) (statute permitting only lawyers to engage in business of debt adjusting upheld); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (law requiring ship pilots to serve apprenticeship in state upheld). *See also* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

4. *See, e.g.*, McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 38-40.

5. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (Food Stamp Act regulation requiring all members of recipient households to be related held not rationally related to Act); Eisenstadt v. Baird, 405 U.S. 438 (1973) (dissimilar treatment of married and unmarried people held violative of equal protection clause); Reed v. Reed, 404 U.S. 71 (1971) (preference given men over women in appointments of administrators of decedents' estates held violative of equal protection clause).

6. *See, e.g.*, Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974) (distinction between paying and nonpaying automobile guests rejected); Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973) (distinction between paying and nonpaying automobile guests rejected); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971) (statute prohibiting price advertising by pharmacists held unconstitutional); Reynolds v. Louisiana Bd. of Alcoholic Beverage Control, 249 La. 127, 185 So.2d 794 (statute governing price of alcohol held violative of due process), *cert. denied*, 335 U.S. 946 (1966). *See generally* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *Without "Due Process"*, 49 ORE. L. REV. 125 (1970).

tors who question whether it is feasible or appropriate for the judiciary to assess the rationality of legislative action have criticized these developments.[7]

This Article seeks to answer two basic questions about rationality analysis.[8] First, can the judiciary construct an intelligible rational basis standard that is analytically distinct from other standards of judicial review and that is capable of invalidating legislation? This is essentially a question about the logic of legal reasoning. For the most part, the reasoning of constitutional law is concerned with different degrees of justification. That is, once a person challenging the constitutionality of legislation establishes jurisdiction, courts ask the government to "justify" the law by imposing varying standards of justification in different contexts. These standards of justification—including what are commonly called the rational basis, middle-tier, and strict scrutiny tests[9]—constitute the reasoning courts provide in their opinions and lawyers therefore use in their arguments.

Second, assuming that a coherent, distinct, and meaningful rationality standard can be constructed, what normative functions will it serve? In other words, what standards of behavior will the rational basis test impose on legislators and executive officials responsible for the enforcement of legislation? This is essentially an inquiry into the normative effects of a form of legal reasoning. Presumably, if the legislative branch is on notice

7. *See, e.g.*, Linde, *supra* note 2, at 220; Linde, *supra* note 6, at 166-71; *cf.* Posner, *The Defunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 29 (rationality analysis ineffective in altering characteristic process and product of political system); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 654-63 (1975) (use of equal protection clause as a measure of the validity of legislation); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 124-28 (1972) (problems with increased use of rationality test). Justice Linde's insightful and provocative article, *Due Process of Lawmaking*, *supra* note 2, has prompted additional articles on the rational basis test. *See, e.g.*, Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049 (1979); Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487 (1979).

8. The discussion seeks to follow the course charted by Justice Linde: "our concern is not with the current state of the Court's case law. Rather, I propose to look at the assumptions about constitutional lawmaking that are implicit in the judicial formulas in order to examine whether they represent a tenable constitutional theory." Linde, *supra* note 2, at 199. Although some attention will be paid to judicial decisions, this Article will not attempt to provide extensive case citations.

9. *See* note 1 *supra*.

that its acts will be reviewed according to a particular standard, legislative behavior will be influenced.

To answer these questions about the rational basis test, this Article will first detail the contents of rationality analysis in a nonlegal setting involving the actions of an individual person. Part II defines rationality as selecting the means that will achieve the chosen ends efficiently, and demonstrates that rationality analysis can be used in two different ways: to *interpret* or explain observed conduct and to *evaluate* or judge the quality of the actor's cognitive function. Since evaluation is the role that rationality analysis—or the rational basis test—purports to serve in assessing the constitutionality of legislation, the Article will describe the use of rationality analysis to evaluate an individual's cognitive function in some detail.

Part III explores the interpretive and evaluative uses of rationality in law, and argues that both forms of rationality analysis are logically premised on a "social good" model of legislative behavior. This model assumes that the legislature acts to achieve the public or social good, not simply to broker conflicting individual wants like a market. Part III thus explains how acceptance of the social good model is a prerequisite for the interpretive use of rationality analysis in law and it also argues that the evaluative use of rationality analysis presupposes that the social good model is the normatively correct standard for legislative conduct. The Article then identifies the various elements of evaluative rationality in law and concludes that an analytically distinct rational basis test that is capable of invalidating legislation can be constructed.

II. THE TWO USES OF RATIONALITY ANALYSIS

A. Interpretive and Evaluative Rationality Analysis

"Rationality" means, at a minimum, that a positive relationship exists between means and ends,[10] but the concept can be used in two different ways that are relevant to law. First, ra-

10. This appears to be the least stringent of the several definitions that have been given for rational choice or rational decision making. Other formulations include the "economic" definition, which requires the selection of the "most effective" means to given ends, *see* J. Rawls, A Theory of Justice 14 (1971); text accompanying notes 20-22 *infra*, and the "moral" definition, which requires that the ends pursued be among those that "some human being" would desire, *see* Berlin, *Rationality of Value Judgments*, in Rational Decision [1964] Y.B. Am. Soc'y Pol. & Legal Philosophy 221; *cf.* Gibson, *Rationality*, 6 Philosophy & Pub. Aff. 193 (1977) (rationality as a social goal). Although there is debate about whether rationality ought to include these more rigorous

tionality can be used to *interpret* or explain observed conduct.[11] Using the concept in this fashion, a person's observed conduct is assumed to reflect an attempt to achieve the person's goals; and these goals or ends are determined in light of observed conduct. Economists employ rationality analysis in this interpretive or explanatory fashion when they assume that a person is acting rationally to maximize his or her utility and then proceed to infer that person's probable beliefs and preferences.[12] Judges often use the concept in this fashion when they interpret statutes.[13]

The interpretive use of rationality analysis can be illustrated by a simple, nonlegal illustration. On a cold morning in February, Adam is walking toward the ocean on a beach in California. An observer asked to explain the meaning of Adam's conduct would assume that his behavior is aimed at achieving some ends, and would then attempt to determine the goal or goals that Adam is most probably pursuing. If the observer had information about Adam, such as knowledge that Adam is a member of a "polar bear" swimming club, he or she would use this information in determining Adam's goal, and might therefore conclude that Adam probably seeks to go swimming. If the observer had no information about Adam, the observer would rely on his or her notions about the ends people ordinarily pursue. Because membership in "polar bear" clubs is rare, the ob-

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requirements, there seems to be agreement that it necessarily entails a positive relationship between means and ends.

The definition of rationality employed in this Article is based on a common sense, rather than a probabilistic, notion of what constitutes a positive relationship between means and ends. For example, under a given circumstance there may be a slight probability that an action will promote a given end, but the common sense point of view may refute the existence of a positive relationship and therefore deem the action irrational.

11. It is possible to distinguish between the explanation and interpretation of conduct. Explanation can be viewed as a subjective enterprise—one that seeks to determine the actual thoughts and motivations of the actor as he perceives them. Interpretation, on the other hand, can be viewed as an objective enterprise—one that seeks to create a scheme of meaning that is not dependent on what the actor actually believes. Commonly the actor himself has not perceived this scheme of meaning; often it is only implicit in the pattern of his behavior. *Cf.*, Jones, *Dream Interpretation and the Psychology of Dreaming*, 13 J. AM. PSYCHOANALYTIC A. 304 (1965) (explaining the distinction between dream analysis and dream interpretation). The terms "explanation" and "interpretation" shall be used interchangeably to mean the process of determining the most plausible description of the actor's beliefs and goals.

12. For a review and critique of this approach, see Simon, *Rationality as Process and as a Product of Thought*, 68 AM. ECON. REV. 1, 2 (1978).

13. *See* text accompanying notes 41-58 *infra*.

server might therefore conclude that Adam's conduct is best explained as, for example, a means of catching surf fish.

Second, rationality analysis can be used to *evaluate* or judge the quality of an actor's cognitive function as reflected in his justification or explanation for his action.[14] Using rationality in this fashion, the observer identifies the actor's ends, determines whether the actor himself actually believes that his actions will achieve those ends, and decides whether the actor's beliefs are empirically plausible. This form of rationality analysis is often used in psychological evaluation in which the actor's ability to think rationally may be germane to the tasks of diagnosis and treatment.[15] Since the rational basis test in constitutional law purports to use rationality to evaluate legislative behavior, the analytical steps in the evaluation of Adam's conduct will be discussed in some detail.

Before turning to this discussion, however, it must be emphasized that, in any particular case, the interpretive and evaluative uses of rationality are mutually exclusive. If the observer seeks to evaluate an actor's cognitive function, the observer cannot identify the actor's ends and beliefs through interpretive rationality because the succeeding "evaluation" would be an empty tautological exercise. To illustrate, suppose that the observer did not (or could not) ask Adam to identify his beliefs and goals. The observer might try to identify Adam's ends through interpretive rationality, essentially saying, "assuming that Adam is pursuing his goals, what ends could he plausibly believe would be achieved through his present course of conduct?" It should be plain, however, that if the observer identified Adam's ends in this fashion, his or her *evaluation* of Adam's conduct would be foreordained. The cognitive function will always be evaluated as rational because the observed conduct will necessarily be a means to the identified ends. Therefore, to use rationality analysis for evaluation, the observer must use some method of identifying the actor's beliefs and ends other than interpretive rationality.

14. The explanation for an actor's conduct may be one that he actually provides or one that he is presumed to provide for his behavior. Evaluation of an actor's or legislature's "cognitive function," involves an assessment of the adequacy of such explanations. If it is said that an actor has behaved irrationally, this statement can be interpreted as proposing that the actor's explanation does not meet the criteria of rationality, namely a positive and efficient relationship between means and ends.

15. *See, e.g.*, Moore, *Some Myths About "Mental Illness,"* 32 ARCHIVES GENERAL PSYCH. 1483, 1485 (1975).

B. Elements of Evaluative Rationality Analysis: The Single Actor Illustration

1. *Identifying Instances of Irrationality*

It makes sense to use rationality to evaluate cognitive function only if the relevant societal norms require that the action be justified in means-ends terms. Sometimes, however, the relevant norms do not require this kind of justification. In some instances, for example, society sanctions what can be termed "expressive" conduct in which the actor's behavior is a means of self-expression with solely personal significance.[16] When behavior falls into this category, the actor is not expected to provide an instrumental explanation of his conduct.

For example, if A takes B's property and burns it, A is generally required to proffer an explanation in means-ends terms such as "I destroyed the property because it was diseased and posed a danger to me and others." On the other hand, if A burns his *own* property, his explanation that "I wanted to express anger" or "it gave me pleasure" might suffice. Societal norms, expressed in part in property law, seem to require rational explanation in some circumstances and to allow an expressive explanation in others.

The issue of when societal norms require rational explanation is complicated. Without attempting to state anything resembling a complete theory, it seems that factors such as the magnitude and importance of the harm inflicted are important in identifying the circumstances in which an instrumental explanation must be given.[17] For present purposes, however, it is important merely to recognize that evaluation of an actor's rationality is appropriate only when some norm requires a means-ends justification. In the hypothetical discussion of Adam's behavior that follows, it is therefore assumed that a person will act rationally. It is further assumed that an observer can ask Adam directly about his beliefs and ends, and

16. This variety of behavior may be more accurately characterized as "noncommunicative self-expressive" conduct. Such behavior is distinguished from communicative action. The concept of non-communicative self-expressive behavior is suggested by the elements of first amendment theory that view the amendment as a protection for behavior that is primarily a means of self-expression, rather than a means of communication to others. *See* G. Gunther, Cases and Materials on Constitutional Law 1044 (9th ed. 1975).

17. The requirement of an instrumental justification may be controversial when applied in the context of judicial review of legislation. *See* notes 33-35 *infra* and accompanying text.

that Adam will give candid responses. The following are instances in which Adam's responses could lead the observer to conclude that Adam is acting irrationally.

a. Actor Does Not Believe That His Actions Will Achieve His Goals

Suppose Adam is walking toward the ocean. Further, suppose he says that his goal is to reach the desert and that he believes that heading for the ocean will *not* achieve this goal. Here is a clear instance of irrationality: the actor himself does not believe that his means are positively related to his ends. The observer may suspect that Adam is lying about his goals, but assuming that Adam's statements accurately reflect his beliefs and goals, the observer should conclude that Adam's behavior is irrational.

b. Although Actor Believes That His Actions Will Achieve His Goals, His Belief is Empirically Implausible

Suppose Adam responds that his goal is to reach the desert and that he believes that this goal will be achieved by walking toward the ocean. This response appears irrational because Adam's belief in a positive relation between the means and the ends he has chosen is implausible,[18] measured by what a reasonable observer knows about the physical universe. Adam may, however, be able to contribute additional plausible information that a reasonable observer would not usually know and thus satisfy the requirements of evaluative rationality. For example, Adam might say he believes his conduct will achieve his goal because he expects a private amphibious airplane to land on the ocean and fly him to a desert airport. If Adam can plausibly account for this expectation (for example, he may have ordered the airplane from a seaplane service), the observer should conclude that the action is rational after all. If Adam has no such explanation, the conduct remains irrational.[19]

18. "Plausibility" is a degree of probability, and is probably satisfied at a rather low threshold. An actor's view of the world must, in other words, be quite unlikely before it can be labeled "irrational" rather than merely "wrong" or "incorrect." For a discussion of the relation between lack of knowledge and irrationality, see note 23 *infra*.

19. *See* text accompanying notes 148-65 *infra*.

c. Actor Believes That the Goal of His Action is in Conflict With Other Goals He Deems Superior

Suppose Adam responds that he is walking toward the ocean to go swimming, but that the turbulence of the water is such that even the best ocean swimmers would drown if they attempted to swim. The observer therefore asks Adam how Adam ranks living for another day among his goals, and he responds that living for another day is a goal far superior to his goal of swimming in the ocean. Adam's behavior thus appears irrational because he is pursuing an end that is *inconsistent with and inferior to* an end he deems superior.[20] Of course, Adam may have information, unknown to the reasonable observer, that renders the two goals compatible. For example, he may have a plausible belief that he can use special flotation and breathing devices to prevent his drowning. In the absence of such a plausible belief, however, the observer should conclude that the action is irrational, given Adam's preference among his goals.

d. Actor Believes That He Has Not Selected the Efficient Means of Achieving His Goals

Suppose Adam responds that he is walking toward the ocean because he wishes to get to Catalina Island, located twenty-two miles offshore. Assume further that Adam says he is capable of swimming the distance and that his belief in this regard is plausible. Prima facie, the action appears rational because there is a positive connection between his means (going toward the ocean) and his ends (arriving at Catalina Island). But additional inquiry may show that the action is irrational. Suppose, for example, that the observer asks if Adam believes that there are "easier" ways of getting to Catalina, such as by boat or by airplane. Adam admits that these alternatives provide easier ways of traveling to the island, and he is unable to give any reason for failing to take one of the less difficult

20. If Adam responds that he prefers to end his life rather than forego swimming, his action is rational, although questionable on other grounds. *See* text accompanying notes 24-26 *infra*.

It is important to note that the irrationality that Adam displays in going swimming when he prefers to live for another day occurs when the identified goal is both inconsistent with *and* inferior to another goal. Both elements are required before an observer can say that Adam's conduct is irrational. If Adam responds that the pursued goal is inconsistent with and equal to another goal, the observer could conclude that Adam does not have a fully integrated preference ordering, but the observer could not conclude that it is irrational for the actor to select randomly among inconsistent goals in instances of a "tie."

means. Adam has admitted that his action is inconsistent with a concept of rationality that is "standard in economic theory, [that] of taking the most effective means to given ends."[21] In other words, Adam recognizes that there are less onerous means available to achieve his goal and offers no explanation for his failure to use those less costly means. The *additional* costs he is bearing are not positively related to any goal or end he wishes to pursue, and thus his choice of the more difficult means is irrational. This type of irrationalty will be called "marginal" irrationality to distinguish it from the illustrations in sections a and b above of "total" irrationality in which there is no positive relation between the actor's means and his ends.[22]

e. Although Actor Believes He Has Selected the Efficient Means of Achieving His Goals, His Belief is Empirically Implausible

The observer can test the plausibility of Adam's beliefs about the efficiency of his means in the same way that the observer can test the plausibility of Adam's belief in a positive relationship between means and ends. Thus, even though Adam believes he has adopted the most efficient means to accomplish his ends, the observer may judge Adam irrational if his beliefs are empirically implausible. For example, if Adam believes that taking a boat to Catalina poses a greater risk to his life than swimming, his risk calculation would appear implausible to a reasonable observer. Similarly, if Adam believes that no boats go to Catalina Island and therefore that swimming is the only way to get across the channel, his belief should be judged empirically implausible since the availability of such boats is common knowledge.[23]

21. J. RAWLS, *supra* note 10, at 14.

22. Of course, Adam might offer an explanation for not taking the "easiest" means of getting to Catalina that would show he believed that he was acting efficiently. Adam might explain that he has two goals: to get to Catalina and to have an article printed about himself in the newspaper. In effect, he would be denying his failure to choose "the most effective means to a given end" by specifying additional ends (or by redefining the ends) of his action. At that point the observer might inquire whether Adam believes that there are "easier" ways of achieving his dual goals.

23. Adam's empirically implausible belief may be the result of a faulty view of reality or a simple lack of knowledge. For example, if he had been locked in a prison for 25 years and had not learned that a charter company initiated regular ferry service to Catalina during the time of his incarceration, his belief about the lack of boat service to Catalina would be based on lack of knowledge. From the standpoint of evaluative rationality analysis, his belief is

2. *Formal and Empricial Elements of Evaluation*

Evaluative rationality requires two types of inquiries: formal and empirical. The formal elements of evaluation concern the logical pattern of the actor's beliefs, namely whether the *actor* believes that his behavior will achieve *his* goals and whether *he* believes that his actions will do so efficiently. The empirical elements of evaluation cannot be satisfied formally; they must be satisfied by reference to an objective standard outside the actor, the "reasonable person's" perception of how the world works.[24]

One might ask whether an actor's selection of goals or his preferences among them should also be evaluated by standards "outside" the actor. For example, if Adam prefers swimming to living another day, perhaps the observer should conclude that this preference is "irrational." Contemporary thinking about rationality, however, has been heavily influenced by positivism and its associated value skepticism.[25] As a result, there has been a marked tendency to exclude an evaluation of a person's selection of ends from an assessment of his or her rationality.[26] Thus it is usually said that to be judged a "rational" individual, a person should pursue his or her ends, *whatever they may be*, in an efficient manner. For present purposes, this formulation of the requirements of rationality is accepted, but it should be

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just as implausible as if he had a faulty view of reality. The distinction between an implausible belief based on lack of knowledge and one rooted in a faulty view of reality, however, may be significant where evaluative rationality is being used to determine whether to hire a particular individual for a job. *See* text accompanying notes 28-29 *infra*. Simple lack of knowledge on the part of the prospective employee may be viewed by the employer as remediable, and therefore not fatal to the success of the individual's application for employment. By contrast, a faulty view of reality may suggest that the employee is incapable of maintaining consistently plausible empirical beliefs, and is therefore incapable of acting rationally.

24. Of course, as with all "reasonable person" standards, the prevailing view may be proved wrong. It is therefore important to allow the actor an opportunity to rebut the prevailing view. For a discussion of the burdens of proof in cases determining the rationality of legislation, see text accompanying notes 148-60 *infra*. Of course, no objective standard is completely accurate when measured against later discovered information. *See* text accompanying notes 125-41 *infra*.

25. *See generally* M. HORKHEIMER, ECLIPSE OF REASON (1949). The influence of positivism has made many wary about evaluating the "reasonableness" of the goals that another individual chooses. *See* Oppenheim, *Rational Decisions and Intrinsic Valuations*, in RATIONAL DECISION [1964] Y.B. AM. SOC'Y POL. & LEGAL PHILOSOPHY 217.

26. The trend is, however, by no means unchallenged. *See* Kaplan, *Some Limitations on Rationality*, in RATIONAL DECISION [1964] Y.B. AM. SOC'Y POL. & LEGAL PHILOSOPHY 55.

emphasized that when rationality is defined in this fashion, the rationality of an act does not establish its moral, ethical, or legal acceptability. Considerations in each of these categories may condemn rational action aimed at furthering certain prohibited ends.

3. *Impediments to Evaluation*

In the foregoing discussion Adam was cooperative in responding to the observer's inquiries. This section considers circumstances that can be more troublesome to an observer charged with evaluating the rationality of an actor's conduct. At times these impediments can render the observer's task impossible, or at least cast serious doubt on the validity of the observer's evaluation.

a. Means as Ends

Suppose that in response to the observer's question, "why are you walking toward the ocean?" Adam simply says, "to move toward the water." This response might be understood in at least two ways. First, the actor could be saying that the observer has characterized as a means what the actor views as an end. Interpreted in this way, Adam's response invites further inquiry. For example, the observer might accept "going toward the water" as an accurate account of Adam's goal and might inquire about a more particularized aspect of Adam's conduct, asking, for example, "why are you placing your right foot in front of your left foot and then shifting your weight from your left foot to your right?" Adam's response to this question, "to move toward the water," would provide the basis for an evaluation of Adam's rationality.[27] Alternatively, the observer might accept Adam's statement as a characterization of an "intermediate" goal, and might then say something like "yes, but what do you seek to accomplish by getting closer to the water?" This second line of questioning is really an attempt to have Adam conceive of "walking toward the water" as an instrumental means to an "ultimate" end.

Second, the actor could be understood as denying that his action can be characterized in means-ends terms—that his action is instead, for example, expressive conduct. Understood in this way, the actor's response indicates that his cognitive activ-

27. The "evaluation" would be highly circular, however, since the "more particularized" aspect of the conduct naturally leads to the end previously characterized by the observer as a means.

ity is not the type that is assumed to be required under the circumstances.

b. Subjective and Abstract Ends

Another type of response that poses problems for the observer is illustrated by Adam's explanation that he is walking toward the water "to achieve happiness." This response is not irrational in form because Adam characterizes his action as a means to an end. The observer's problem is created by the difficulty of testing the empirical plausibility of Adam's belief about the positive connection between his actions and the desired mental state. A mental state depends, among other things, on the individual's tastes and such preferences can vary greatly from person to person. If Adam says that going toward the water will make him happy, his belief about the positive relation between means and ends is subject to limited objective scrutiny.

Similarly, suppose Adam responds that he is walking toward the water "to increase the general welfare of society." Adam's explanation is formally rational, but because it includes the type of end that is couched in exceedingly general terms, the observer's ability to scrutinize Adam's beliefs is again limited. Adam's notion of "promoting the general welfare" might include going swimming or reaching the desert; absent further refinement, such an end poses the same problem as an end cast in terms of the actor's mental state. If the actor is uncooperative and persists in giving only these limited responses, the observer would be hindered in his or her task, and would probably press the actor for more precise answers.[28]

c. The Non-Responding Actor

To this point it has been assumed that the observer can inquire about the actor's goals and beliefs. But what if the observer cannot ask Adam to respond? If the observer is to evaluate the rationality of Adam's action, other sources will have to be consulted for evidence of Adam's goals and beliefs. As information about Adam becomes increasingly scarce, the observer will have to make more *assumptions* about Adam's

28. Narrowness or precision in goal statement does not, however, always provide sufficient information for evaluation. For example, suppose Adam says that he is holding his hands together and "praying" in order to get to heaven. The existence of a positive connection between means and ends is difficult to verify even though the end is stated precisely.

beliefs and goals. The observer is then, however, in danger of slipping into interpretive rationality and hence circular analysis.

To illustrate, suppose the observer sees Adam walking toward a turbulent sea. Absent other information the observer may be tempted to reason as follows: "Adam's goal in walking toward the turbulent sea might be to collect sea shells or to go fishing. Adam's belief that his action is the efficient means to achieve one of those ends could be plausible, and he could have a set of preferences such that the pursuit of one of these goals in this context would be consistent with those preferences. Hence the action is rational."

Note that the observer has made two important assumptions: first, that Adam ranks living another day as an important goal (therefore the observer has not considered swimming as a potential end of Adam's conduct); and second, that Adam has "average" beliefs about the physical universe (therefore the observer has not considered the possibility that Adam believes that he is on his way to the desert). Both of these assumptions ascribe to Adam the beliefs and goals of the "average person." Although an evaluation based on these assumptions does not have a very high likelihood of accuracy because of the many individual variations from the "average," the evaluation is not circular or tautological.

As Adam's behavior becomes increasingly difficult to explain in terms of average beliefs and goals, the observer may be tempted to ascribe more unusual goals, preferences, and beliefs to Adam. Suppose, for example, that Adam is observed plunging into the turbulent sea. The observer might reason that Adam prefers swimming to living another day or that Adam plausibly believes he will not drown because he is in fact a superior swimmer. These *departures* from the "average person" assumptions seem based on the interpretive use of rationality. Without any evidence that Adam has nonaverage attributes, the observer has attributed such attributes to Adam solely on the basis of Adam's observed conduct. The observer's evaluation tends toward circularity.

C. The Functions of Evaluative Rationality Analysis

The foregoing discussion indicates that evaluative rationality makes two central inquiries in assessing cognitive functioning. First, it asks whether people believe that their action will efficiently further their ends, given *their own* beliefs and goal

preferences. Second, it determines whether the actors' beliefs about empirical reality are plausible. Before examining the elements and uses of rationality analysis in constitutional law, two of the reasons for assessing cognitive functioning in this way should be identified.

First, there are numerous contexts and roles in which persons must behave rationally if they are to respond appropriately and predictably to society's incentives and constraints. Evaluating a person's rationality is often important in determining whether the person should be placed or should remain in one of these roles or contexts. Second, when the applicable norm dictates rational action, it may be important to determine whether a person is behaving rationally to decide whether to approve of the person's conduct. The rational basis test in law purports to serve this second reason for assessing an actor's cognitive functioning. That is, the test denies judicial approval of legislative acts when those acts should be rational and the judiciary determines that they are, in fact, irrational.

III. INTERPRETIVE AND EVALUATIVE RATIONALITY ANALYSIS IN LAW

A. Rationality Analysis' Model of the Legislative Process

Judges purport to use rationality analysis both to interpret and to evaluate legislation. In using rationality to *interpret* laws an important assumption must be made about how legislatures *behave*; in using rationality to *evaluate* legislative enactments an important assumption must be made about how legislatures *should behave*. The assumption is the same in both instances: legislatures act to serve the public interest, to advance the social good.

Several scholars have recently commented on the two competing models used to describe legislative bodies.[29] One view—"idealistic, somewhat communal, and perhaps sentimental"—is that legislators struggle in good faith to identify and achieve social good.[30] Under this view, legislation is a means of achieving

29. *See, e.g.*, Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148-57 (1978).

30. *Id.* at 149. Michelman posits that this model depends on a belief in public values and ends for human action, a view associated with Kant and Rousseau. *See* A. LEVINE, THE POLITICS OF AUTONOMY: A KANTIAN READING OF ROUSSEAU'S SOCIAL CONTRACT 56 (1976).

what a majority of the legislature has identified as desirable "social objectives." As Professor Michelman describes the "social good" model, the legislature is the "forum for identifying or defining [objectives], and acting toward those ends. The process is one of mutual search through joint deliberation. . . . [M]oral insight, sociological understanding, and goodwill are all legislative virtues."[31]

The social good model does not require that *all* legislation be justified in means-ends terms. For example, on some occasions legislative action can be analogous to an individual's expressive conduct and thus acceptably justified in non-instrumental terms.[32] One of the most perplexing questions about the social good model is precisely *when* it requires that legislation be justified in means-ends terms.[33] A complete theory of when the social good model requires instrumental justification cannot be attempted here, although the issue is central

31. Michelman, *supra* note 29, at 149. The ultimate social good can be conceived of in at least three ways: as a utilitarian concept in which the legislature aims to increase the net individual utility; as a more limited, though still utilitarian, concept in which the legislature aims to increase net utility so that the "gainers" benefit enough that they would be willing to compensate the "losers"; and as a non-utilitarian "moral" concept in which the legislature transfers wealth from losers to gainers because it is "just" or "fair." *See* Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1024-27, (1978); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 104-11 (1979). For present purposes, we need not decide which of these or other conceptions of the ultimate public good is the most valid. Whichever theory is adopted, the important fact about the social good model is that it views most legislation as an *instrumental* attempt to achieve *discrete* social goods that are compatible with some ultimate normative conception of good. At least one commentator, however, suggests that judicial use of rationality analysis is best understood from the perspective that the goal of legislation is the maximization of social wealth. *See* Michelman, *supra* note 7, at 490-92, 500-02.

32. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1237-49 (1970). Ely argues that a demand for rational justification is inapposite when the legislature is allowed to pursue essentially undefined and expressive ends such as "good taste." He also argues that courts have been willing to credit such goals in some contexts. Although rational justification is inapposite at times, he explains that this does not mean all visions of good taste are acceptable. *Id.* at 1249-50. Separating school children by color at a graduation exercise would not, for example, be an acceptable expression of public taste: constitutional norms prohibit such behavior.

33. In this Article means-ends justification for laws is regarded as a requirement of the social good model. That is, although the model does not require such justification for all legislation, the requirement that certain laws must be rational is derived from the model. An alternative and perhaps more analytically precise conception, however, is that the requirement that some laws must be rational is implied directly from constitutional norms and that the rationality analysis these norms demand necessitates the use of a social good model. *See* text accompanying notes 71-73 *infra*.

to a complete theory of rationality analysis in law.[34] Without attempting to draw this difficult line, it is assumed, much as in the single actor model, that social norms—in this case those imbedded in the social good model of legislative behavior—require that legislative actions be justified in means-ends terms,[35] and therefore that the social good model can, in these circumstances, provide the basis for both interpretive and evaluative rationality.

An opposing view of the legislative process that is realistic and individualistic, assumes that the legislature is simply a "market-like arena"[36] in which individuals and special interest groups trade with each other through representatives to further their own private ends.[37] There is no "public interest," no identifiable "social good"; there are only bargains struck between those helped by legislation and those who are harmed. Under this "public choice" model of the legislative process, interpretive rationality is not helpful in ascribing meaning to legislative action. More important, it makes no sense under this model to speak of "evaluating the rationality" of legislative action. All collective action by the legislature is, by definition, arational: the legislature simply does what it does—means and ends are merged.[38]

34. Intuition suggests that factors such as the magnitude of the detriment to individual interests caused by the legislation and the value accorded to those interests are significant. Ely argues that the determination of when an instrumental justification is necessary is a crucial inquiry and notes that the courts have not developed a "process of reasoning" to explain when rational justification is required and when expressive "justification" is sufficient. Ely, *supra* note 32, at 1241-49.

35. *But cf.* Michelman, *supra* note 7, at 507-10 (values are discovered through the political process; judging laws according to how well they serve pre-existing goals is counter to the essential nature of the political process).

36. Michelman, *supra* note 29, at 148.

37. This model is rooted in skepticism about the reality or even the possibility of public values. It posits that the only intelligible conception of the "public" good is the maximum feasible satisfaction of *individual* preferences. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 10-12 (2d ed. 1977). Thus, assuming that the legislature operates as a proper market, legislation is, by definition, an accurate expression of that maximum satisfaction.

38. Even though the social good model sometimes does not require means-ends justifications, it does not merge with the public choice model in these instances, at least insofar as it gives normative directions to *legislators.* The public choice model counsels legislators to act like market traders and to express whatever view or attitude that is consistent with their trading. The social good model, by contrast, counsels legislators at all times to make independent, statesmanlike decisions about the public interest.

As *descriptions*, both the social good and the public choice models—like all fairly simple theories—provide only rough approximations of an incredibly complex and probably "unmodelable" reality. One might still ask, however, which model gives the "more useful" picture of the legislative process. The answer depends on the reason one needs a model. If a political scientist is seeking the model that will best explain why certain legislation was enacted, the public choice model is probably most appropriate.[39] On the other hand, if one is choosing a model that will best interpret legislative commands in ambiguous cases, the social good model seems more useful.[40]

As *normative* prescriptions for legislative action, the models present very different visions of representative government. The social good model posits legislators as statesmen who, although informed by public opinion, strive to do what is "right," and submit their conception of the social good to periodic review by the electorate. By contrast, the public choice model views legislators as conduits who respond to relevant exertions of power, much like traders in a market. The choice between these two opposing visions is a central question of the theory of representation and an important issue of political morality.

The next section attempts to show that courts have adopted the social good model in interpreting statutes and determining whether legislation is directed toward illegitimate ends. Adoption of the social good model in these contexts allows courts to employ rationality to *interpret* legislative behavior. Using the social good model for this interpretive purpose does not, however, require legislatures to adhere precisely to it. Rather, the model serves only as a basis for giving meaning to legislative actions. Legislatures are perfectly free to follow the public choice model in their deliberations, although they will doubtlessly "dress up" their enactments to give the proper signals for later judicial interpretation.

Subsequent sections address judicial adoption of the social

39. *See generally* J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962); G. STIGLER, THE CITIZEN AND THE STATE (1975). *Cf.* D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) (Congressmen act to maximize votes). Recent attention directed towards the growth of single-issue interest groups at the federal level lends support to the public choice model. *Cf.* Broder, "Let 100 Single-Issue Groups Bloom," Washington Post, Jan. 7, 1979, § C, at 1, col. 1 (single-issue groups evade the constraint of the two-party system by threats of ouster at election time).

40. This is due in part to the inability of the public choice model to generate answers in difficult cases of statutory interpretation. *See* text accompanying notes 46-48 *infra*.

good model as a predicate for *evaluative* rationality analysis. Once again, it is not necessary that legislators actually behave in the manner the social good model postulates, but the effect of invalidating legislation on the basis of the rationality requirement is a strong normative exhortation by the judiciary that legislators should act in accordance with the model. Thus the effects of judicial adoption of the social good model as a predicate for evaluative rationality are much more significant than the effects of adoption of the model for interpretation.[41]

B. Interpretive Rationality Analysis in Law

1. *Statutory Interpretation*

Courts are routinely required to apply statutes in resolving disputes. When judges are confronted with ambiguous cases and therefore cannot rely on the "plain meaning" of a statute, they commonly use a "purposive analysis" to determine the appropriate application of the statutory directive.[42] This is an example of the interpretive use of rationality analysis in law. The analysis is premised on an assumption that the legislature has acted rationally to achieve certain social objectives; relying on this assumption the court attempts to identify the probable social objectives and resolve the dispute in a fashion that best serves those goals.

Consider a statute that bars "vehicles" from a public park.[43] Suppose that a veterans' group proposes to place a decommissioned tank in the park as a monument to war dead, but a group of naturalists, arguing that placement of the tank would violate the statute, sues to enjoin the city from allowing the monument. The court must decide whether the tank is a "vehicle." A commonly accepted view is that a court confronted with this question should attempt to identify the goals or purposes that the legislature sought to further and then determine whether or not those goals would be served by barring the monument.[44] If, for example, the legislature's goal was to

41. This is not to deny that when courts use the social good model to interpret laws that there is some exhortation to legislators to act in accord with the model.

42. *See generally* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947); MacCallum, *Legislative Intent*, 75 Yale L.J. 754 (1966); Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 Harv. L. Rev. 1887 (1970).

43. The illustration is drawn from Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 607 (1958).

44. For a discussion of the problems associated with identification of the goals of multi-member bodies, see notes 61-94 *infra* and accompanying text.

keep the park free of sights thought incompatible with a rustic setting, the monument should probably be banned. On the other hand, if the legislature's goal was only to reduce mechanical noise and fumes, the tank should probably be allowed. In determining what set of goals the legislature sought to further, a court will commonly consider several evidentiary factors, including the type of statute involved (aesthetic zoning or noise abatement), specific legislative history of the enactment, general social history surrounding the law, previous judicial constructions of the same or similar provisions, and sometimes even the judge's own notion of what a "reasonable" legislature would have desired to accomplish through such a statute.[45]

There is reason, however, to doubt the empirical accuracy of the social good model of legislation. Perhaps the model persists because no other method of statutory interpretation has proved workable. Consider the problems of interpretation[46] faced by a court that subscribes to the public choice model. Such a court would recognize that barring vehicles from the park was the result of a complex interaction of political factors and that the legislature simply responded to the ultimate mix of pressures to which it was subjected. The court would thus recognize, for example, that some legislators voted for the ban simply because their constituents wanted them to do so; some voted for it because a particular legislator, Sam, was in favor of it and they "owed Sam a favor" or "wanted Sam's vote" on another piece of legislation; Sam voted for it even though he was in favor of prohibiting all activities other than hiking because of strong lobbying by equestrian groups; other legislators supported the legislation because they wanted to ban model airplanes; still others voted for it simply because the political party to which they belonged favored it; and so on and so on.

45. For a collection of illustrative cases, see C. MORRIS AND P. MISHKIN, ON LAW IN COURTS 318-513 (1965).

46. Of course, calling the process statutory "interpretation" limits the models that seem appropriate. "Interpretation" presupposes that the courts are, in some fashion, implementing or carrying out legislative directives, hence searching for the meaning of those directives in ambiguous cases. But "interpretation" is not the only conceivable way that a legal system might characterize the process of judicial decision-making with respect to statutory law. For example, a system might adopt "judicial policy-making subject to explicit legislative restriction." In ambiguous cases the court could then apply the common law rules evolved by the court, whenever the clear and unambiguous commands of the legislature did not require otherwise. The court would not be much concerned with attributing purposes to legislative acts. At present, judicial commitment to "interpretation" seems tied to a particular distribution of lawmaking power.

What would the court make of this "realistic" information in deciding whether to ban the tank? Perhaps the court could conclude that the law was enacted because those who wanted to keep the park in a rustic state "prevailed" over those who wanted it open to other uses,[47] and could therefore decide that the statute should be applied in ambiguous cases to favor rustic use. The problem with this approach is that it seems just as accurate to conclude that those who favored wider uses "prevailed" to the extent that they retained rights to use the park for many such purposes. Thus, if the legislation reflects a complex compromise among competing individualistic interests, granting deference to one viewpoint over the others "distorts" the compromise, regardless of which side is favored. It may therefore be difficult for a court to use the "realistic" public choice model of the legislative process in statutory interpretation. A model of the legislative process that answers the question "what does the enactment undertake?" by stating that a majority of the legislators supported the law, "no more, no less,"[48] is probably not a useful model for the judiciary.

The social good model makes statutory interpretation feasible even if such a theory is empirically inaccurate.[49] So long as the assumption of rationality is used as a basis for statutory interpretation, it is immaterial whether the legislature's actions are in fact irrational. Lawmakers can state reasons for their actions in terms that make the identification of legislative purposes and goals feasible.[50] If the court upsets complex political

47. The concept of an interest "prevailing" does not involve the attribution of purpose. Rather, it purports only to identify which private interests were successful or favored.

48. Linde, *supra* note 2, at 220.

49. Even if there is significant doubt about their "truth," models are often retained until an alternative model is constructed. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 77 (2d ed. 1970). Political scientists have noted this fact, even though there is considerable doubt about whether people are capable of carrying out the complex mental operations that the assumption of rational action at the nation-state level presupposes. This assumption will continue, however, until a new and workable model of nation-state action emerges. *See, e.g.*, J. STEINBRUNER, THE CYBERNETIC THEORY OF DECISION 12-13 (1974); Kinder & Weiss, *In Lieu of Rationality*, 22 J. CONFLICT RESOLUTION 707, 708-09, 714-15 (1978).

50. Quite apart from any consideration of whether starting the practice [of identifying legislative purpose] was a good idea in the first place, once it *has* been started it provides part of the institutional background against which legislators recognize themselves to be acting when proposing, investigating, discussing, and voting for bills. . . . If the legislators have a capacity to contribute to the materials and to rebut the presumptions they know will be used by judges and administrators as indicia of the intentions of the legislature, their behavior will influence what the intentions of the legislature can reasonably be said to be.

MacCallum, note 42 *supra*, at 784-85.

compromises in identifying legislative purposes and goals, statutes can often be amended to rectify the damage. Neither legislators nor courts need necessarily believe that the social good model—the necessary premise for the interpretative use of rationality in statutory interpretation—is an accurate description of the legislative process for the model to function effectively in the judicial enforcement of legislative commands.

2. *Identification of Illicit Objectives*

Before turning to evaluative rationality analysis, it should be noted that interpretive rationality also seems to play an important part in the judicial analysis of whether legislation furthers constitutionally illegitimate goals.[51] This "illicit goal" analysis is similar to the purposive analysis of statutory interpretation. The courts assume that the legislature has behaved rationally in attempting to achieve its goals, and then ask whether the challenged legislation is aimed at achieving goals or objectives that the constitution (or other relevant norm) prohibits the legislature from pursuing.[52]

Consider, for example, local legislation that precludes construction of high density apartments in a suburban community. Black persons complain that the legislation excludes them from the community, and that the legislature intended this segregative effect.[53] Once jurisdiction is established, a court will probably assume that the law furthers goals of the enacting body, and will then use interpretive rationality to determine what these goals were. The plaintiffs can be expected to submit circumstantial and, if possible, direct evidence to show that the government unit "intended" to achieve (that is, had as its goal) racial exclusion.[54] The defendants will, of course, pro-

51. Goals may be "illegitimate" in two ways. First, the unit of government involved may be precluded from pursuing the objective, although other units are not. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 116-17 (1976); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436-37 (1819). Second, the constitution may prohibit all units of government from pursuing the objective. *See, e.g.*, School District v. Schempp, 374 U.S. 203, 222-27 (1963) (requiring religious practices in schools); Griffin v. County School Bd., 377 U.S. 218, 229-32 (1964) (advancement of racial segregation in schools through selective funding); Gomillion v. Lightfoot, 364 U.S. 339, 344-46 (1960) (exclusion of racial minority voters through city boundary change).

52. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968).

53. The example is drawn from Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). For other cases applying a similar approach, see Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) and Washington v. Davis, 426 U.S. 229 (1976).

54. There is currently controversy over the extent to which some "dispro-

duce evidence tending to show that the government was pursuing only permissible ends, such as avoiding traffic congestion, limiting the demand for municipal services, preserving a rural lifestyle, and the like.

The evidentiary issues involved in this process of characterizing the government's goals are complex and engrossing.[55] Even if the plaintiffs succeed in convincing the court that exclusion of blacks was a goal of the legislation, they will still not prevail under current federal law if the government is able to show that the same legislation could have been enacted to serve only legitimate goals.[56] The purpose of this Article is not to explore these difficult evidentiary questions or to decide whether pursuit of an illegitimate goal is a necessary condition for invalidation.[57] It should be noted, however, that this type of judicial scrutiny of legislative behavior is compatible with the social good model of legislation in that it involves the interpretive use of rationality and is premised on the assumption that legislatures act rationally to pursue their goals.[58]

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portionate impact" on minority group members should by itself be dispositive or presumptive evidence of the illicit goal of disadvantaging those members. *Compare* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) *with* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 57 (1977) *and* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 556 (1977).

55. *See* Simon, *Racially Prejudiced Governmental Actions: A Motivational Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1066 (1978).

56. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

57. Some urge that disproportionate impact is not merely evidence of a legislative purpose to disadvantage minority groups, but is itself an evil *effect* that must specially be justified. *See, e.g.*, Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFF. 107, 153 (1976); Perry, *supra* note 54, at 556-59; Perry, *A Brief Comment on Motivation and Impact*, 15 SAN DIEGO L. REV. 1173, 1178-79 (1978).

58. Interpretive rationality is not, however, a necessary element in judicial scrutiny of legislative behavior. Courts can and do adopt methods of judicial analysis that are compatible with the public choice model of legislation. Such analyses typically focus on the effect of legislative action and ask whether that effect is either prohibited by constitutional text or unduly burdensome to constitutional values. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 682-88 (1978). For example, the Supreme Court invalidated an ordinance prohibiting the distribution of handbills on the ground that the ordinance unduly limited opportunities for public communication, even though the Court assumed that the government's goal was the perfectly legitimate end of reducing litter. Schneider v. New Jersey, 308 U.S. 147, 162 (1939). Impact tests, however, often "balance" constitutionally negative effects and governmental "interests," *see* L. TRIBE, *supra*, at 683; Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 466-67 (1969), and thus often seem to assume institutional rationality in their identification of the "interests" the government seeks to further.

C. Evaluative Rationality Analysis in Law

In the single actor illustration, the use of rationality analysis to evaluate the cognitive function of an individual person was discussed,[59] and five analytically distinct instances of irrationality were identified. Three of these instances involved defects in the actor's ability to think in a logical means-ends fashion ("formal irrationality"); the other two involved the actor's inability to apprehend empirical reality in a plausible fashion ("empirical irrationality"). In the following sections the problems encountered in departing from the single actor model will be discussed and the use of rationality to evaluate the "cognitive function" of a legislature will be examined. At the outset, it should be noted that rationality analysis will not often disclose instances of formal irrationality in law because a government that takes the trouble to defend a law is not apt to admit that the legislation fails to serve goals efficiently.[60] On the other hand, rationality analysis may well identify instances of empirical irrationality in law, especially if the plausibility of the legislature's empirical beliefs is measured at the time of the legislation's *enforcement* rather than *enactment.*

1. *Identifying the Legislature's Goals*

a. Characterizing the Goals of Multi-Member Bodies

Evaluative rationality requires the observer to ascertain the actor's goals. When the "actor" is a multi-member body, the observer must determine how to identify the group's goals. A court faces a similar problem when it uses interpretive rationality to apply statutes and to determine when the government is pursuing illicit objectives. In both evaluative and interpretive rationality, the court must somehow ascribe purposes or goals to legislative action.[61]

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59. *See* text accompanying notes 16-23 *supra.*

60. The government's admission that its goal is inconsistent with other equally important goals may be more common. For example, the government might seek to encourage less consumption of a substance, like tobacco, in one law and yet encourage production of the same substance in another law. Though it appears to be acting inconsistently, the government might not concede that either enactment was, by itself, irrational. In such circumstances, the government is in the position of the individual actor who cannot make a binding choice between two conflicting goals. As this Article has defined irrationality, this inconsistent action does not mean that either of the particular acts is irrational. *See* note 20 *supra.*

61. Ascribing goals or governmental "interests" to multi-member bodies is important to other standards of judicial review as well, since many require identification of the "legislature's" or "government's" interests. *See* note 42

There are at least two approaches to the problem of ascribing goals and beliefs to the collective actions of multi-member bodies. First, the observer might attempt to ascertain the beliefs and goals of *each member* of the body and then attempt to aggregate those individual ends to construct a set of goals for the group, *qua* group.[62] This approach is fraught with difficulty, however. Gathering the necessary information about each member's goals is often impossible.[63] Further, there is deep theoretical controversy about how to aggregate individual goals into a set of group preferences when the members of the group have widely different and often conflicting reasons for supporting legislation.[64]

A more promising alternative—a type of "black box" approach—is to treat the multi-member body *as if* it were a single individual and to consider the various pieces of information about the legislature's goals as if they all evidenced the goals of a single actor.[65] Under this approach, the multi-member body is essentially anthropomorphized. The various utterances of the members are considered along with any other historical data on the enactment process, such as committee reports,[66] in

supra and accompanying text. It bears repeating that in ascribing goals for purposes of evaluation, a court cannot rely on the assumption that the body has acted rationally, lest its analysis become circular. *See* text accompanying notes 14-16 *supra*.

62. "With [two exceptions] we have found no author reluctant to agree that a legislature should be admitted to have an intention vis-à-vis a statute if each and every member of the legislature had that intention." MacCallum, *supra* note 42, at 768. The two exceptions that MacCallum cites are A. KOCOUREK, AN INTRODUCTION TO THE SCIENCES OF LAW (1930) and Bruncken, *Interpretation of Written Law*, 25 YALE L.J. 129 (1915). Even those who are skeptical of attributing an "intent" to a legislature on the basis of an aggregation of the intentions of individual members, however, seem to recognize the validity of ascribing "purposes" or "objectives" to the legislation itself in this fashion. *See* Frankfurter, *supra* note 42, at 538-39; MacCallum, *supra* note 42, at 754-55.

63. *See* Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888 (1930).

64. *See, e.g.*, K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 2 (2d ed. 1963); Fishburn, *Paradoxes of Voting*, 68 AM. POL. SCI. REV. 537, 537 (1974).

65. MacCallum refers to an approach similar to this as the "agency" model of legislative intent and notes that such a model is consistent with the investigations that the judiciary actually makes in attributing legislative purpose. The agency model holds that the legislature, as principal, delegates to certain individuals the task of articulating the goals of legislative action. MacCallum, *supra* note 42, at 780-84.

66. The courts have established numerous presumptions about the probative value of data on legislative history. For example, a committee report commonly has more weight than a conflicting statement from an opponent or proponent of the legislation. "[Courts] recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees;

determining the goal that a single actor would probably have had. This of course is the prevailing method of gathering and considering evidence of legislative intent or purpose in statutory interpretation.[67]

Sometimes the identification of legislative goals under this approach will not be difficult because the legislature will have enunciated a specific goal or purpose for its enactment. Such a statement places the court in a position similar to that of the observer who can ask the single actor to identify his goals. If the legislative goal is stated in precise terms, the court may use it as the basis for evaluative rationality analysis. If the goal is stated in exceedingly general terms (e.g., "to promote the general welfare") the court may be inclined to consult other sources of evidence to narrow the characterization of the goal so that the court's evaluation will not be a meaningless tautological exercise.[68] Of course, if there is no statement of legislative purpose, the court will have to rely exclusively on these additional sources. As evidence becomes less and less available the court will increasingly be placed in the position of the observer who cannot query the actor about his goals. The court must therefore rely on its own notion of the goals that most legislatures seek to achieve in such situations.[69]

Many who doubt the feasibility of evaluative rationality in law seem skeptical of the ability of courts to identify the goals of legislation. Justice Linde clearly states this skepticism in his comprehensive discussion of rational basis review:

> [T]he test depends on attributing a purpose to the lawmakers; but laws are often an accommodation of several unrelated purposes. Commonly, a law will push toward a goal only within the limits of objectives that may or may not be apparent in retrospect. Legislative declarations and legislative history cannot be relied on to reflect the actual balance of considerations that shaped the law, and often no such records are available. Although proponents might have wished for more and opponents for less, all that is certain about the law as a means to an end is that a majority could be found to undertake what the law in fact undertakes, no more, no less. That much is its immediate goal.[70]

This line of criticism seems to reject evaluative rationality be-

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so much they delegate because legislation could not go on in any other way." SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935).

67. *See generally* MacCallum, *supra* note 42, at 777-84.

68. *See* text accompanying note 28 *supra*; text accompanying notes 95-96 *infra*.

69. Professor Ely's "consensus" theory of legislative aims becomes especially important in such circumstances. *See* text accompanying notes 84-94 *infra*.

70. Linde, *supra* note 2, at 220.

cause it rejects the social good model of the legislative process, apparently in favor of the public choice scheme.[71] As long as the social good model of legislation is accepted, however, courts seem quite capable of using the "black box" approach to determine legislative goals,[72] and regularly use this method in statutory interpretation.[73]

Justice Linde also notes that even where evidence of legislative goals such as legislative history exists, "the degree to which legislative purpose is scrutinized is easily manipulated."[74] He apparently views this manipulation as another reason to doubt the feasibility of evaluative rationality in law. Justice Linde is correct that courts "manipulate" legislative purpose on occasion,[75] but this fact alone does not prove that goal characterization is hopelessly subjective. Even if some judges occasionally manipulate the goals of legislation, this does not mean that a judge committed to determining the goals of a statute as honestly as possible is unable to do so. The very claim that judges manipulate or even lie about the goals of legislation presupposes a standard of objectivity that conscientious judges should be able to follow. Rather than leading to the conclusion that goal characterization is a subjective process, judicial "manipulation" of legislative purpose could just as well be explained by a desire on the part of judges to avoid the results that an objective characterization of legislative goals would yield.

Two aspects of the "black box" approach to characterizing

71. Linde's skepticism also seems to be premised on the view that ascribing a purpose to a legislative body requires aggregation of the preferences or goals of the individual members. *Id.* But the aggregation model of individual intents is not the dominant model of legislative purpose in statutory interpretation. *See* note 67 *supra* and accompanying text.

72. *See* text accompanying notes 65-69 *supra*. The question of whether the social good model *ought* to be employed outside the realm of statutory interpretation will be discussed. *See* text accompanying notes 163-67 *infra*.

73. *See* text accompanying notes 42-45 *supra*. Of course, in statutory interpretation the identification of goals is premised on the assumption that the "black box" acts rationally. Identification of goals cannot be premised on this assumption in evaluative rationality. Where evidence of goals is sparse, the court will have to impose its own notion of what "average reasonable legislatures" seek to achieve through such enactments. *See* note 69 *supra* and accompanying text.

74. Linde, *supra* note 2, at 213.

75. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 385-86 (1968) (court found the purpose of enacting 1965 statutory amendment prohibiting the burning of draft cards was to ensure smooth functioning of selective service system not to discourage anti-war expression despite evidence to the contrary); *cf.* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 87-101 (1975) (discussing *O'Brien* in light of the legislative history of the 1965 amendment).

legislative objectives deserve further comment. First, like the observer in the single actor model, the court must be careful to avoid the use of interpretive rationality to identify or characterize the legislature's goals. Courts often seem to ignore this constraint when they use the "any conceivable goal" form of the rational basis test.[76] Under this common approach, the court upholds legislation if it can conceive of any goal whatsoever that the legislation could serve,[77] and judges often strain mightily to find such conceivable goals.[78] Courts that behave in this fashion are like the observer in the single actor model who, using a strong presumption of rational behavior, posits bizzare goals to explain unusual activity and then uses those bizzare goals to determine that the behavior is rational.[79] It should not be surprising that when courts approach evaluative rationality in this way, the "evaluation" of the legislature's rationality is always a positive one. If evaluative rationality is to be a meaningful standard of review, the court must conceive of its task as identifying the legislature's *probable* goals based on the available evidence.[80] Progression from the "any conceivable goal" approach to the requirement that there be some actual evidence that the legislature intended a particular goal is commonly associated with "intermediate" scrutiny.[81] This more stringent method of goal characterization is necessary, however, if the rational basis test is to be capable of invalidating

76. *See, e.g.*, Williamson v. Lee Optical Co. 348 U.S. 483, 487-88 (1955); L. TRIBE, *supra* note 58, at 996.

77. In its most extreme form this approach asks only whether the legislature could have believed that the legislation would serve some conceivable goal. *See* P. FREUND, ON UNDERSTANDING THE SUPREME COURT 88-89 (1949).

78. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 222-23 (1949).

79. *See* text accompanying notes 28-29 *supra*.

80. The Supreme Court has shown willingness in some circumstances to abandon the "any conceivable goal" approach and credit only those purposes supported by legislative history. In Craig v. Boren, 429 U.S. 190, 199 n.7 (1976), the Court, while accepting the district court's characterization of the purposes of a statutory gender classification, left open the question of "whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, post hoc rationalization." Subsequent decisions indicate that in some circumstances the Court will not credit legislative goals that are not supported by available evidence. Califano v. Westcott, 443 U.S. 76, 86-89 (1979); Trimble v. Gordon, 430 U.S. 762, 768-70 (1977); Califano v. Goldfarb, 430 U.S. 199, 212-17 (1977). These cases have involved legislation that either makes classifications or affects interests that trigger an "intermediate" standard of review, a standard more demanding than the rational basis test. *See* L. TRIBE, *supra* note 58, at 1085-87.

81. *Id.*

legislation.[82]

Second, the court should be careful to avoid exclusion of goals on normative grounds. At least as this Article has defined the concept, rationality analysis by itself precludes no goals. Sometimes courts fail to recognize this limitation on rationality analysis and refer to legislation as "irrational" when they apparently mean to say that the legislation furthers illegitimate goals or has constitutionally impermissible effects.[83]

These two aspects of goal characterization should be considered in light of Professor Ely's suggestion that courts sometimes use a "consensus theory" about the objectives that legislatures usually pursue to characterize the goals of legislation.[84] *Smith v. Cahoon*[85] may be an example of this approach. In *Smith*, a Florida statute required commercial truckers to post liability bonds but exempted carriers engaged exclusively in transporting farm and seafood products. The Supreme Court invalidated this statute on the ground that the exemption of carriers of farm and seafood products was unrelated to the goal of the statute and thus was "wholly arbitrary."[86] In characterizing the goal of the statute, the Court noted that "the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety."[87] Of course, as Professor Ely notes, promotion of the public safety was not the only conceivable goal of the legislative scheme. The legislation also seemed adapted to subsidizing the farming and seafood industries, albeit at the expense of persons injured by the unbonded and judgment-proof carriers of the farm and seafood products.[88] In refusing to view this subsidy interest as a goal of the legislation, the Court, Professor Ely suggests, may have been asking "what such laws are generally concerned with, [and] what most legislators intend to accomplish by most such laws considered in their entirety."[89]

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82. Although the "any conceivable goal" approach is inappropriate for minimum scrutiny, familiar forms of "intermediate" scrutiny should not necessarily replace rationality review. Evaluative rationality is distinct from intermediate tests that employ a balancing approach. *See* text accompanying notes 114-19 *infra*.

83. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971).

84. Ely, *supra* note 32, at 1224-28.

85. 283 U.S. 553 (1931).

86. *Id.* at 567.

87. *Id.*

88. Ely, *supra* note 32, at 1225.

89. *Id.* at 1226.

The consensus theory can be understood in two different ways. First, it can be considered an evidentiary theory. The goals of legislation in particular contexts may be "deemed" to be those goals that "most legislators intend to accomplish by most such laws considered in their entirety."[90] The ends that this inquiry identifies are the presumed goals of the legislation, subject to rebuttal by proof of alternative purposes. Whether such proof of additional goals can be accomplished simply by reference to the implications of the statutory scheme is open to question.[91] This view of the theory, however, surely allows proof of other goals through evidence such as legislative history. When used as an evidentiary rule, the consensus theory does not exclude goals because they are *illegitimate*; it excludes them because they are *improbable*. The theory thus conceives of goals in much the same way as the observer in the individual actor model when the observer is unable to query the actor about his goals.[92]

The consensus theory can also be understood in a different sense—one that imports a normative limitation on the selection of goals. Under this view, when the Supreme Court said in *Smith v. Cahoon* that "in order to be sustained"[93] a bond requirement "must be deemed to relate to the public safety,"[94] the Court could be understood to mean that no matter how clear the legislature was in designating promotion of the farm and seafood industries as goals of the legislation, those goals could not sustain exemptions from a bond requirement. In other words, the Court may have said that the Constitution prohibits the judiciary from recognizing promotion of the farm and

90. *Id.*

91. The statutory scheme is the principal indicator of the "type" of legislation the enactment is, whether it is aimed at promoting public safety, subsidizing industries, or some other general purpose. The title and preamble of a piece of legislation, for example, often provide evidence along these lines. If a statute is codified, the particular code in which the statute appears can be quite helpful.

92. If used in this evidentiary fashion, the consensus theory is sound and is distinguished from the "any conceivable goal" approach. For example, in Smith v. Cahoon, 283 U.S. 553 (1931), the Court held that the classification established by the statute in question related to safety, since this was the goal usually attributed to that type of legislation. The legislature may also have sought to subsidize a particular industry, but the consensus theory would have required more evidence of that objective than the mere fact of the classification. By contrast, the "any conceivable goal" approach would have accepted the statutory classification as sufficient evidence of the subsidy goal, thus predicating evaluative rationality on interpretive rationality and rendering the evaluation meaningless on grounds of circularity.

93. Smith v. Cahoon, 283 U.S. 553, 567 (1930).

94. *Id.*

seafood industries as goals when assessing the rationality of a statutory scheme. Such a judgment is not grounded in the formal requirements of rationality.

b. Abstract Goals in the Legislative Context

In the single actor context, explanations might be rational in form but nevertheless might be difficult to evaluate because the actor states his goals at too high a level of generality.[95] Ends such as "the promotion of the general welfare" are so general and vague that it is difficult if not impossible to evaluate the plausibility of the actor's belief that his goals will be served. In the legislative context, abstract ends present a similar problem. Such statements of legislative purpose provide an insufficient basis for determining whether, in an empirical sense, the legislation is the most efficient means to the stated ends. Thus abstract goals defeat evaluative rationality.

While it is fairly easy to explain why "abstract" ends are not acceptable when the social good model calls for instrumental justification of legislation, it is much more difficult to state any rule about the level of generality that is required. Generally, it seems that the goals must be stated with sufficient particularity to give the party attacking legislation notice of the evidence that must be adduced to demonstrate that the legislation does not achieve the specified ends.[96]

2. *Determining the Plausibility of the Government's Beliefs About Empirical Reality: The Relevance of Changed Conditions*

Enforcement of legislation may be irrational in one of two empirical senses: a court may conclude that enforcement will not plausibly further the goals of the legislation or the court may conclude that the law will not do so efficiently. These two empirical findings have been termed "total" and "marginal" irrationality.[97] How often the courts will identify the presence of either type of irrationality depends in large part on whether judges consider evidence of conditions at the time of the legislation's enactment or enforcement. For example, a court today may be faced with the task of assessing legislation that was

95. *See* text accompanying note 28 *supra*.

96. *Cf.* Delgado, *Active Rationality in Judicial Review*, 64 MINN. L. REV. 467, 469 (1980) (discussing the difficulty of challenging the rationality of a statute when the government controls access to empirical information).

97. *See* text accompanying note 22 *supra*.

passed in 1920 banning a certain food additive to prevent disease. The court might ask whether it was plausible *in 1920* to believe that there was a link between the food additive and the disease,[98] or the court might consider the limits of empirical knowledge at the time of enforcement.[99] Suppose that the judge is presented with conclusive evidence, based on research conducted in 1970, showing that no link exists between the additive and the disease.[100] Following the "changed conditions" approach, the court should conclude that enforcement of the ban is irrational.[101] For evaluative rationality to have much im-

98. *Cf.* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) ("if any state of facts reasonably can be conceived that would sustain [a rational connection between the classification and statutory purpose], the existence of that state of facts *at the time the law was enacted* must be assumed") (emphasis added).

99. As legislation grows older, it can become "outmoded" in two empirical respects. First, because of changes in technology, the original goals of the legislation may no longer be served by its enforcement. For example, advances in medical care may make the suspension of pregnant teachers at the end of their first trimester outmoded if such suspensions no longer promote the goal of a healthy and productive faculty. Second, new methodology in the physical and social sciences may demonstrate that beliefs once generally accepted are now implausible. Thus new research may show that there is no link between a certain food additive and disease. Both instances result in outmoded legislation, but in the first instance the empirical reality itself has changed; in the second instance our knowledge about that reality has changed. If evaluative rationality includes consideration of changed conditions, the standard of review serves to invalidate legislation that has become grossly "outmoded" in either of these two respects.

When, a statute no longer furthers its original goal because of changed empirical conditions, some might argue that it is valid to enforce the legislation if the court can posit some new goal that renders enforcement of the statute rational. At an extreme, however, this willingness to posit new goals converges with the "any conceivable goal" approach to characterizing the purposes of legislation. As already demonstrated, the latter approach amounts to use of interpretive rationality for goal characterization and is thus inconsistent with evaluative rationality. *See* text accompanying notes 76-80 *supra.*

Beyond changes in empirical conditions, legislation can, of course, become outmoded when *goals* change. For example, the enforcement of a law might continue to serve its original purpose, but that goal might no longer be politically acceptable. Whether the rational basis test serves to invalidate such legislation is a question of goal characterization, and depends in part on who is empowered to state the goals of the enforcement of legislation.

100. The question of how to allocate the burden of proof when changed empirical conditions are alleged will be discussed later. *See* text accompanying notes 155-60 *supra.* One commentator has proposed that when the government controls access to information relating to conditions that might render a law irrational, the court should, under certain conditions, impose a duty on the government to investigate or perhaps prove the rationality of the statute. *See* Delgado, *supra* note 96, at 499-503.

101. "There is no . . . need to preserve the . . . findings of legislative fact beyond the time when they cease to reflect judicially determined reality. [O]utmoded assumptions of legislative fact need not be extended to new cases, and the obvious corollary is that counsel must be

pact in law, courts must consider evidence of changed conditions. Measured at the time of enactment, legislative action will rarely be based on implausible beliefs, other than in cases of "clear mistake."[102]

The principal argument against consideration of changed conditions by the courts is one of institutional competence; the political branches, so the argument runs, are charged with keeping legislation up to date, and citizens who complain of antiquated legislation should address their representatives, not the courts.[103] This argument, however, is by no means compelling. The institutional distinctions between courts and legislatures suggest that courts may often be in a better position to conduct empirical fact-finding and thus to protect against the enforcement of outmoded legislation.[104] People may not know of a law's applicability to them until they are faced with an enforcement proceeding. In such circumstances it seems unrealistic to urge that they should have presented their arguments

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given the opportunity to show that earlier findings fail to describe present fact."

Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 108.

When a court finds that enforcement of a law is irrational on the basis of changed conditions, it is inaccurate to say that the court is evaluating the *legislative* function unless the legislature has a duty to monitor and repeal legislation as it becomes outmoded. In other words, if the legislature is not under a constitutional obligation to monitor legislation for factual obsolescence, the court's consideration of changed conditions goes beyond evaluation of legislative performance. In effect, the court assumes the task of evaluating the rationality of government enforcement of legislative commands.

It is reasonable to suppose that the social good model imposes a duty on legislatures to monitor and react to changed conditions. If the legislature is to serve the social good, then it is not too farfetched to think that representatives should endeavor to keep laws up to date.

102. Of course, increased judicial acceptance is not, by itself, an adequate reason for adoption of the changed conditions approach. Although the matter is disputed, there are reasons grounded in the theory of institutional competence that support judicial consideration of changed conditions. *See* text accompanying notes 104-05 *infra*. *Cf.* Delgado, *supra* note 96, at 492-99 (attention to changed conditions in rationality review protects legitimacy and integrity of political process).

103. *See* Linde, *supra* note 2, at 216-17. A second argument is that courts should not invalidate legislation unless they can say that the legislature acted wrongly, either in passing the legislation or in failing to repeal it. If a legislative duty to keep laws up to date is posited on the basis of the social good model, however, then it is possible to conclude that the legislature has acted wrongly if it has failed to repeal or otherwise act upon outmoded laws. *See* note 101 *supra*.

104. It is important to emphasize that the issue being addressed is empirical fact-finding, not policy making. The democratic nature of the legislative branch in American government and considerations of separation of powers argue for judicial deference to legislative value judgments. But legislatures are not inherently more competent than courts when it comes to fact-finding.

for repeal to the legislative forum. Even if people know of the legislation, there are reasons unrelated to the merits of their claim why their attempts at legislative repeal could be unsuccessful. For example, if few people are affected by an outmoded law, the problem may simply be viewed as too insignificant to justify legislative action. Similarly, the press of other business, deemed more important, may preclude legislative action.

Even if courts are regarded as the better institution to identify outmoded legislation and to preclude its enforcement, there are problems with judging the rationality of legislation in terms of conditions at the time of enforcement. First, if changed conditions are relevant, the constitutionality of legislation will never be settled, and repetitious litigation and undesirable instability in the legal system will result.[105] Nevertheless, the stability of constitutional doctrine and the finality of judicial judgments have not been considered such important values, that any change in judicial assessments of constitutionality is precluded. American constitutional history includes numerous reversals in Supreme Court positions, such as the demise of the doctrines that approved segregated education[106] and that allowed state trials of indigent criminal defendants without state provision of counsel.[107]

Second, since conditions in one locality will not necessarily be duplicated in another, the rationality of legislation will vary from place to place within a given jurisdiction,[108] especially if conditions have changed in some locales but not in others. Although consideration of changed conditions may increase the possiblity of relevant locale differences, such consideration does not create a totally new problem for rationality analysis because the differences may have existed when the law was enacted. In addition, the goal of "administrative convenience" may often support enforcement of legislation in localities even when the primary substantive goals of the law are not furthered.[109] In the final analysis the benefits of invalidating empirically outmoded legislation must be weighed against the costs in terms of instability, relitigation, and lack of uniformity.

105. *See* Linde, *supra* note 2, at 217-19.

106. *Compare* Plessy v. Ferguson, 163 U.S. 537 (1896) *with* Brown v. Board of Educ., 347 U.S. 483 (1954).

107. *Compare* Betts v. Brady, 316 U.S. 455 (1942) *with* Argersinger v. Hamlin, 407 U.S. 25 (1972) *and* Gideon v. Wainwright, 372 U.S. 335 (1963).

108. Linde, *supra* note 2, at 219-20.

109. *See* text accompanying notes 170-73 *infra.*

Reasonable minds may differ about the outcome of the balance, but these costs do not seem sufficient to sustain the claim that changed conditions should never be considered.[110]

3. *The Relevance of "Marginal" Rationality Analysis in Law*

In the single actor model, behavior was judged irrational when it was implausible to believe that the action was the *efficient* means of achieving the actor's goals.[111] Legislative actions can also be irrational in this marginal, "economic" sense. Suppose, for example, that the sole purpose of a 1910 statute suspending pregnant teachers from elementary teaching duties at the end of their first trimester of pregnancy was to provide an able-bodied faculty. Assume further that in 1910 it was plausible to believe that many pregnant teachers would not be able to perform the strenuous activities required of elementary teachers and that there was no accepted medical procedure to determine which pregnant teachers would be prone to weakness and absence after their first trimester. The bright-line three month rule was thus chosen as the least expensive method of pursuing the legislative goal. Suppose that by 1980, however, medical tests have been developed that can predict with accuracy which teachers are likely to suffer weakness or be absent and that the costs of these tests are far less than the costs incurred through disruption of classes and training of substitutes under the automatic suspension procedure. Maintaining the three month suspension rule thus seems irrational in the marginal, economic sense: the legislature's goals can be served to the *same* extent at less cost.

Is there any reason why such "marginal" rationality analysis is inappropriate in law? One objection might be that this form of evaluation imposes too rigorous a standard of review for all legislation, since it cannot be distinguished from other standards that are commonly applied only in special circumstances.[112] It could be argued, for example, that marginal ra-

110. On occasion the Supreme Court has indicated a willingness to consider arguments favoring changed conditions. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts . . ., such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (citations omitted)). *See also* Leary v. United States, 395 U.S. 6, 38 & n.68 (1969); Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-49 (1924).

111. *See* text accompanying notes 20-23 *supra.*

112. The "special" circumstances that trigger more rigorous scrutiny are va-

tionality analysis is analytically the same as the "less restrictive alternative" standard[113] sometimes applied by courts. Close inspection, however, reveals that the "less restrictive alternative" test can be understood in two very different ways, only one of which is analytically the same as marginal rationality analysis. Moreover, whether the proposed test is called "marginal rationality" or a form of the "less restrictive alternative," it can serve as a minimum standard of review that can be applied to all legislation.

Marginal rationality analysis is analytically indistinguishable from the formulation of the "less restrictive alternative" test that invalidates legislation which advances the government's legitimate goals if there are less costly ways of advancing these *same* goals to the *same extent*.[114] In contrast, marginal rationality analysis is analytically distinct from the other, more common formulation of the "less restrictive alternative" test which imposes a standard of review that is in effect a balancing test. This second formulation may invalidate legislation if the legislature's goals can be served by imposing less "intrusion" on individual interests, even though the legislature's goals are not advanced to the same extent through the less intrusive means. In effect, this form of analysis balances the marginal costs imposed with the *marginal* gains achieved.[115] The key difference between the two formulations of the less intrusive alternative analysis is that the first does

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ried. Among them are classifications that are "suspect" under the equal protection clause, *see* the cases collected in W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 1296-1316 (4th ed. 1975), classifications that, while not "suspect," are deserving of strict scrutiny because they burden "fundamental" or textually protected individual interests, *see, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (voting in school board elections); Wisconsin v. Yoder, 406 U.S. 205 (1972) (religious liberty), and classifications that are subject to "intermediate" scrutiny if important interests are at stake or sensitive criteria are employed to draw distinctions between groups of people, *see* L. TRIBE, *supra* note 58, at 1089-90; Brimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (gender).

113. *See* Struve, *The Less Restrictive Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969). *Cf.* Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1082-93 (1968) (less restrictive alternative discussed within framework of due process clause).

114. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) ("reasonable and adequate alternatives are available"); Wormuth & Mirkin, *supra* note 113, at 256-57.

115. *See* P. BREST, *supra* note 1, at 990-94; Note, *supra* note 113, at 466-67; Shelton v. Tucker, 364 U.S. 479, 488, 490 (1960).

not limit the effectiveness of the legislature's pursuit of its chosen goals, while the second formulation often does.

The second formulation of the less restrictive alternative test and other balancing tests are more rigorous standards of review than rationality analysis.[116] Because of the increased judicial scrutiny that these standards impose, they are not commonly applied to all legislation. Unless judicial review is intended to test the soundness of the legislature's cost-benefit conclusions with respect to every enactment, these heightened standards are properly reserved for instances in which such scrutiny is specifically justified by constitutional text or theory.

Evaluative rationality must thus remain analytically distinct from more rigorous standards to serve as an across-the-board minimum standard of judicial review.[117] Rationality analysis will remain distinct as long as it does not compare the importance of the legislature's objectives with the magnitude of the costs that the enactment imposes. Only legislation that is irrational in one of the five senses outlined in the single actor illustration should be invalidated. Thus while marginal irrationality is an appropriate part of rationality analysis, "balancing on the margin" is not.[118] Evaluative rationality in law should therefore lead to the invalidation of legislation when the court finds that it is implausible to believe that enforcement serves the goals of the enactment efficiently.[119]

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116. *See* note 1 *supra.*

117. Not all proponents of rationality analysis think such a distinction is necessary. *See* Bennett, *supra* note 7, at 1065. But, as these proponents recognize, when the distinction is not maintained, "mere" rationality review becomes a balancing analysis that reevaluates costs and benefits and cannot be justified as an analytically distinct standard of review. "Balancing" may be an appropriate standard of review, but analysis of the merits of this approach is not advanced by equating the standard with rationality analysis.

118. One might argue, however, that a distinction between marginal rationality analysis and balancing on the margin is difficult to maintain, and that evaluative rationality should therefore exclude the marginal sense of rationality, limiting the test's invalidation of legislation to instances of total irrationality—that is, to instances in which the legislature's goals are not served to any appreciable degree by enforcement of the legislation. This argument is basically that of the "slippery slope": courts will, under the guise of evaluative rationality, assess the cost-benefit wisdom of the legislative output. Such a claim may have force, but it is not persuasive in the context of an enterprise that seeks to identify a logic of legal reasoning for rationality analysis.

119. A possible criticism of this position is that it is difficult if not impossible to determine whether a particular law is the most efficient means to certain ends, and that marginal rationality is thus an inappropriate standard for application to all legislative acts. This criticism, however, misconceives the criterion imposed by the marginal rationality test for the invalidation of legislation. It is not suggested that the government should have the burden of proving that all of the laws it desires to enforce are the *most* efficient means to their particular

4. *Summary: The Evaluative Rationality Standard for Law*

Like the observer in the single actor illustration, a court may evaluate a legislature's "cognitive function" by adopting the social good model of legislative bodies, which, in conjunction with the "black box" approach to characterizing the goals of legislation, allows observers to posit purposes for legislative enactments. In accordance with perspectives gleaned from the individual actor model, courts should not, however, use interpretive rationality to ascribe purposes for legislative action. The "any conceivable goal" method of goal characterization common in rational basis review must, therefore, be avoided.[120] Courts should instead search for evidence of the legislature's actual objectives. When such evidence is unavailable or scarce, courts should recognize as goals those objectives that legislatures commonly pursue in certain kinds of enactments, an approach similar to the evidentiary interpretation of Professor Ely's consensus theory of legislative purpose. Further, courts should judge legislation in terms of empirical conditions at the time of enforcement rather than enactment.

Finally, following the paradigm sketched in the individual actor model, courts should adhere to the marginal rationality criterion and should invalidate laws when there is a less costly means of achieving the same goal to the same extent. Although this marginal rationality approach is similar to one form of the less restrictive alternative test employed in constitutional law, it can be distinguished from the version of the less restrictive alternative test that balances the costs of legislation against the benefits. The absence of a balancing component in the rationality standard proposed in this Article is one of the key analytic distinctions between this test and the familiar forms of intermediate review and strict scrutiny in the equal protection and due process contexts.[121] Nonetheless, rejection of the "any conceivable goal" approach to goal characterization, attention to current conditions, and enforcement of marginal rationality renders the proposed "minimum" standard of review capable of invalidating legislation.

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ends. Rather, it is merely proposed that in any case where an individual can establish that there is at least one *more* efficient way of achieving the same goals, the law is presumptively irrational. For a discussion of the burden of proof rules associated with rationality analysis, see text accompanying notes 148-60 *infra*.

120. *See* L. TRIBE, *supra* note 58, at 1083.

121. *See* note 1 *supra*.

D. Application of Evaluative Rationality by Courts

Having sketched the basic outlines of evaluative rationality analysis in law,[122] it is important to discuss the further complications associated with use of the theory in actual practice. This section will consider the implications of the federal structure of American government and the separation of powers doctrine for the process of goal characterization, and will also discuss the modifications in the burdens of proof associated with traditional rational basis review that the proposed model of evaluative rationality analysis requires.

1. *Separation of Powers, Federalism, and Goal Characterization*

As the process of goal characterization has been described, the search for legislative goals is a historical one: the legislature's goals are identified through the text and the relevant history of the enactment. Although the consensus theory may seem to depart from the historical approach, Professor Ely's theory is actually a means of determining the likely historical purpose of an enactment when documentary evidence is sparse. The ultimate task of characterization is one for the court, even though the parties to the litigation may submit evidence of legislative goals and will often argue for the interpretation of the text that best serves their positions.

In his well-known article on equal protection analysis,[123] Professor Gunther has suggested a somewhat different method of goal characterization. In the course of discussing his proposal that the judiciary ask whether the "means" adopted by the legislature "substantially further legislative ends,"[124] Gunther emphasizes that courts should count as "legislative ends" only those "legislative purposes that have substantial basis in actuality, not merely in conjecture."[125] In effect, Gunther urges that the courts avoid the circularity posed by the "any conceivable

122. The argument for the proposed rationality standard has proceeded along two tracks. First, and foremost, the argument has drawn upon the single actor model and its five paradigms of irrationality to explicate those aspects of rational basis review that are formally required by the definition of rationality. Second, arguments based on political theory and normative considerations have been advanced in favor of the proposed theory of rationality review. Reasonable minds may differ on elements of the proposal that are based on this second category of factors, but the elements resting on formal justifications seem less open to dispute.

123. Gunther, *supra* note 3.

124. *Id.* at 20.

125. *Id.* at 21.

goal" method of goal characterization, a recommendation that is compatible with the argument that interpretive rationality should not be used to identify the legislature's goals in the context of *evaluative* rationality analysis. Gunther also argues that explicit statements in the statutory preamble and legislative history should not be the only sources of goal characterization, urging that a "state court's or attorney general office's description of purpose should be acceptable."[126]

Gunther is, of course, discussing the role of the United States Supreme Court, and he suggests two nonlegislative "voices"—the state courts and the state attorney general—that the Supreme Court should view as acceptable sources for a statement of the goals of state legislation.[127] A federal court may accept characterizations of legislative goals promulgated by the state attorney general or by the state courts because of the important federal concerns involved in review of state legislation. Supreme Court review of state legislation, however, is only one of the three instances in which evaluative rationality can be used. Rationality analysis can also be employed by federal courts to evaluate the enforcement of federal legislation and by state courts to evaluate the enforcement of state legislation under state constitutions. In these latter two contexts considerations of federalism are not commonly involved.

a. State Court Review of State Statutes and Federal Court Review of Federal Statutes

In assessing the desirability of Professor Gunther's proposal in the two instances in which federalism is *not* commonly involved, state court review of the enforcement of a state statute under a state constitution will be used as an example, but the analysis applies to federal court review of the enforcement of federal statutes as well. Suppose that in 1910 the legislature enacted a statute requiring school boards to suspend pregnant elementary teachers at the end of the first trimester of pregnancy, and that the legislative history of this statute demonstrates conclusively that the legislature's goal in 1910 was to insure that teachers would be physically able to perform their tasks.[128]

In defending the law in 1980, the attorney general suggests

126. *Id.* at 47.

127. Presumably Gunther would say that these sources should also be acceptable to a lower federal court if litigation were initially brought there.

128. Assume that the statutory preamble says, "The purpose of this legislation is to insure that teachers will be able to perform the strenuous aspects of

that an additional goal for this legislation is to protect the sensibilities of parents of small children who fear that exposure to visibly pregnant teachers will cause premature interest in sex and reproduction. The attorney general thus assumes an independent power to state the goals of the legislation. In other words, the attorney general asserts that judicial characterization of goals should not be limited to those adopted by the legislature; the court should also accept the objectives that the attorney general cites in support of the enforcement of the legislation.

At first blush, it might seem that adherence to the social good model of the legislative process requires the court to reject the attorney general's assertion of an independent power to add to the goals adopted by the legislature. In the social good model, the legislature appears to be the forum for identifying public goals, and the model emphasizes the representative character of the legislative body in support of the legislature's right to determine the public interest.[129] Moreover, the notion of the separation of governmental powers posits that "executive branch" officials should be faithful to legislative intent in enforcing legislation, meaning that the executive should pursue only those objectives that the legislature has authorized.[130]

Although this interpretation of the social good model suggests that the attorney general's claim of independent power to state the goals of legislation should be rejected, the model does not, by itself, preclude such a power. Rather the model re-

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their duties," and that the following exchange between two legislators constitutes the entire legislative history:

A. What is this bill aimed at accomplishing? Is it to keep young children from being distracted from their studies by seeing a teacher progress during the stages of pregnancy? Is it to protect parents who don't want their children exposed to such experiences?

B. We are simply interested in maintaining a teaching force that is able to respond to the physical requirements of elementary education.

A. Well, I want it known that I don't think that most pregnant teachers are all that weak, and I surely don't think that we ought to be about protecting the so-called sensibilities of small children or their parents. Therefore, I can't support this bill.

B. We are satisfied that there are good reasons to believe that pregnancy has a significant debilitating effect on most teachers after the first three months.

It goes without saying that the goals of legislation will rarely appear with such clarity.

129. *See* Michelman, *supra* note 29, at 148-49.

130. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 105 (1976). In areas such as foreign affairs at the federal level, however, the executive has independent authority to set objectives. *See* L. TRIBE, *supra* note 58, at 158-67.

quires that the enforcement of legislation serve the objectives of the enactment. The state can still give the attorney general the power to specify enforcement goals. In other words, consistent with the notion that enforcement of legislation must serve the objectives of that law, a state might decide that either the legislature *or* the enforcement officials can specify the goals of enforcement. There are, in fact, some sensible reasons for a constitution to provide such a role for the attorney general. Legislation originally adopted to serve one goal may through time retain vitality because it has come to serve additional goals, goals that the enacting legislature did not adopt but which subsequent legislatures have come to value. Without enacting new legislation, the government can allow enforcement officials to shift emphasis from one goal to another, subject to legislative review through repeal or modification of the statute. So long as the language of the enactment provides those regulated with fair warning of its application,[131] the attorney general's power provides a significant, legitimate flexibility to state government.

Thus a political theory consistent with the social good model of the "legislative process" (including both enactment and enforcement) can be constructed to support the attorney general's power to specify additional goals. Admittedly, this is a novel proposal.[132] As far as the federal government is concerned, such a theory is in conflict with the well-established separation of powers doctrine,[133] and there is probably no state that openly affords its attorney general such power. Most important, however, the legitimacy of recognizing the attorney

131. A fundamental tenant of due process is that persons must be given "fair notice" of what the law requires them to avoid. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Carmp v. Board of Pub. Instr., 368 U.S. 278, 287 (1961); United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

132. Allowing the attorney general to pursue whatever goals the language of the enactment can conceivably support is tantamount to a delegation of legislative power to the executive. While the limits on delegation are unclear, few commentators would assert that a broad delegation such as this raises no serious separation of powers issues. The issues of political accountability and institutional competence color the delegation debate and are, of course, basic to political theory. *See generally* Freedmen, *Delegation of Powers and Institutional Competence*, 43 U. CHI. L. REV. 307, 307-10 (1976). The continued vitality of the delegation doctrine is evidence of the limited role that the separation of powers doctrine accords to executive, as opposed to legislative, officials. Professor Tribe has suggested that these separation of powers values may emerge as a sort of "structural" due process right. *See* L. TRIBE, *supra* note 58, at 1137-46; Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

133. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 123-25 (1976) (Rehnquist, J., dissenting); Panama Refining Co. v. Ryan, 293 U.S. 388, 432 (1935).

general's independent power to specify the goals of enforcement depends on the separation of powers theory that the relevant political unit has adopted in its constitutional doctrine.

The same point is valid in assessing the attorney general's power to subtract from the legislature's historical goals. Because some executive discretion to refuse to enforce legislation seems a legitimate and desirable part of our legal process, the recognition of the attorney general's power to subtract from goals may not be so novel.[134] For example, the executive branch commonly decides whether to appeal a judgment interpreting or invalidating legislation,[135] and is sometimes thought to have the power to "confess error" and admit that enforcement of the legislature's enactment is unconstitutional.[136] A prosecutor's refusal to enforce—or at least refusal to allocate any significant resources to enforce—criminal laws deemed unimportant or out of date may also be viewed as legitimate.[137] This discretion provides an efficient method of keeping the standards of social control reasonably in touch with contemporary notions of appropriate governmental regulation. Although the legislature is able to reconsider and refine many areas of law, its resources are limited. A legislative body presiding over a hundred years of enactment would not reenact much of the legislation and would not endorse all the objectives adopted by earlier legislatures. Executive discretion in effect allows another public official to "clean up" the statute books.

134. Some indication of these differing views of the attorney general's power may be reflected in the United States Supreme Court's occasional reluctance to consider goals that are not "currently articulated" by the attorney general (thereby arguably recognizing a power to subtract), while also declining to consider goals suggested as an "afterthought" by the attorney general (thereby arguably refusing to recognize a power to add). *Compare, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974) (recognizing freedom of personal choice in matters of family planning) *and* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (recognizing right of privacy) *with* Califano v. Goldfarb, 430 U.S. 199, 207 (1977) (dismissing "old" and "archaic" notions about women) *and* Weinberger v. Weisenfeld, 420 U.S. 636, 653 (1975) (dismissing "irrational" gender-based distinction that presupposes female dependency).

135. *See* Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 YALE L.J. 1442, 1445 (1969).

136. *See id.* at 1467-74; *cf.* P. BATOR, D. SHAPIRO, P. MISHKIN & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 104-05 (2d ed. 1973) (examples of the solicitor general's confession of error).

137. *See* La Fave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533-39 (1970). *Cf.* Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974) (comparison of prosecutorial discretion in Germany and America).

b. Federal Court Review of State Legislation

The problems of federalism that arise when a federal court is asked to review the enforcement of state legislation are slightly different. The first pregnant teacher illustration will be used to illustrate these complexities: the legislative history discloses only the able-bodied teacher goal but the state attorney general also advances the objective of protecting the parents' sensibilities. Suppose that a teacher who is suspended under the rule sues in federal court claiming that the state law violates the *federal* constitution.

The threshold inquiry is whether the federal constitution inposes the social good model of legislation on state government. Assuming that the federal constitution imposes the social good model on the federal government and the state constitution imposes the model on the state government, unless the federal constitution also imposes the social good model on the states, the only normative basis for requiring rational state behavior would be the state constitution. In other words, the necessary premises for the use of a federal rational basis to judge state legislation is that the federal constitution requires state selection of the social good model rather than the public choice model of legislative behavior.[138] Assuming that the federal constitution imposes this requirement on the states,[139] the issue is whether the federal court should accept the state attorney general's statement of the additional objective for the state legislation.

If adoption of the social good model does not resolve the issue of the attorney general's power, the federal court must consider the relevant state's separation of powers doctrine. If that doctrine recognizes the attorney general's power, then the federal court should uphold the legislation. If state law does not recognize such power, the federal court should reject the attorney general's offer—just as a state court presumably would—and invalidate the enforcement of the legislation. Although it

138. Another prerequisite to the use of rationality analysis under the social good model is the requirement of instrumental justification under the circumstances. *See* text accompanying notes 32-34 *supra.*

139. There is support for such an assumption in the existing body of constitutional law. For example, the Supreme Court has held that equal protection analysis is identical under both the Fifth Amendment (federal standard) and the Fourteenth Amendment (state standard). Buckley v. Valeo, 424 U.S. 1, 93 (1975) (citing Weinberger v. Weisenfeld, 420 U.S. 636, 638 n.2 (1975)); L. TRIBE, *supra* note 58, at 992. Similarly, to the extent the Bill of Rights is incorporated in the Fourteenth Amendment, this bespeaks a convergence of state and federal standards. *See id.* at 567-69.

has been assumed that the federal constitution requires that states follow the social good model, the states still have latitude in designing their lawmaking institutions. Within the bounds of the social good model, the distribution of lawmaking power is a question of state law, and under our prevailing notions of federalism, the federal courts are bound to follow the state's interpretation of state law.[140]

Similar considerations of federalism will aid in the analysis of Professor Gunther's suggestion that a federal court should accept a state court's articulation of legislative goals.[141] Suppose that the teacher in our first pregnant teacher example[142] files her case in a state forum, the highest state court finds enforcement of the law rational, and the United States Supreme Court grants certiorari. There are three different grounds on which the state court might have upheld the legislation, and each illustrates a somewhat different issue concerning the power of state courts to specify goals for enforcement.

First, the state court might have ruled that the attorney general has independent power to specify additional goals for legislation and thus upheld enforcement of the law because it serves the attorney general's goal of protecting the parents' sensibilities. The United States Supreme Court should accept this interpretation of state law because in effect the Court would be recognizing the state attorney general's power to specify goals, not an independent power of the state courts to posit goals.

Second, the state court might have held that, even though the attorney general has no independent power to specify goals of enforcement, the assertion that the protection of parent sensibilities is an objective of the legislation should be accepted because, in the state court's view, the legislative history indicates that this was one of the *legislature's* goals. Here matters become more difficult because the mythical legislative history indicates that the state court has erroneously interpreted the legislative objectives.[143] If a federal court had misread the state legislative history in this fashion, the Supreme Court would have no difficulty in reversing. The doctrine of federalism, however, maintains that state courts are the authoritative

140. *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

141. Gunther, *supra* note 3, at 46-48. A state court decision might be relevant to federal courts as precedent or as the "law of the case" in an appeal to the Supreme Court.

142. *See* text accompanying notes 127-29 *supra.*

143. *See* note 128 *supra* and accompanying text.

expositors of state law, hence the Surpeme Court might be bound to accept the state court's interpretation of the state legislature's objectives.

There is an important limitation on this principle of federalism, however. When there is a question of whether state law has created an interest that is entitled to constitutional protection, the Supreme Court will refuse to accept a state court's decision that no such interest was created by state law when there is "no fair or substantial" support for the state court's decision.[144] This "adequate state ground" doctrine is generally thought necessary to ensure federal protection of interests that a state need not necessarily create but that, once created, it cannot impair without justification or, in some instances, without compensation.[145] Arguably, analagous reasoning could limit the Supreme Court's acceptance of a state court's interpretation of legislative goals to prevent state courts from abrogating the requirements of rationality through specious statutory interpretation. To fully assess the force of this argument, the third ground that the state court might rely upon in upholding enforcement of the statute must first be considered.

Under the third ground, the state court would uphold the legislation because the state court *itself* identifies legitimate state interests that are furthered by enforcement of the law. In effect, the state court would assert an independent power—like the attorney general's hypothetical power posited above—to specify the present goals of enforcement. If the state court has such a power under the applicable state constitution, the Supreme Court should accept the goals identified by the state court. If the social good model does not preclude a state from giving the attorney general power to specify the goals of enforcement, it is difficult to see why the model would preclude a state from giving its courts such power. So long as the enforcement furthers the ends specified by the state court, the federal requirement of rationality seems satisfied.

144. In Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938), for example, a teacher argued that state law had created an employment contract between himself and his school district, and that a subsequent state law impaired the obligation on that contract. The state court held that state law had not created a contract and thus declined to reach the impairment question. The Supreme Court refused to accept the state court's determination that no contract had been created, finding on its own evaluation of state law that there was no fair support for the state court's interpretation of the state action. *Id.* at 100, 108-09. *See generally* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965).

145. *See* Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 43 (1944); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540-541, *aff'd on rehearing*, 282 U.S. 187 (1930).

But what if the state court asserts no such independent power and purports only to decide what the legislature's goals were? Arguably the Supreme Court should not be conclusively bound by the state court's interpretation. If the federal constitution imposes the social good model on the states, the state courts would seem obligated to apply the federal rational basis test consistent with whichever of the model's divisions of lawmaking power the state has selected. In other words, the distribution of the state's lawmaking authority is an important element in the determination of whether the federal rationality test has been properly applied. When the state has given the power of identifying goals exclusively to the state legislature, the Supreme Court should not blindly accept a state court's interpretation of what those goals are. While considerations of federalism should lead the Supreme Court to give deference to the state court's identification of legislative goals,[146] the Court should not accept a state court's blatant mischaracterization of legislative goals, if it is to insure that the federal test is meaningfully applied. Thus the Supreme Court should apply the "adequate state ground" doctrine to characterizations of state legislative goals by state courts.[147]

In a similar vein, the Supreme Court should not accept a state court's use of the "any conceivable goal" method of goal characterization. Although a state *might* give its courts an independent power to select goals, this does not justify a state court's application of a circular and therefore meaningless version of federal evaluative rationality.

2. *Allocating the Burdens of Proof*

Because evaluative rationality in law will be applied in an adversary system, a complete picture of the use of rationality analysis requires at least brief discussion of the details of the litigation process. In characterizing the goals of legislation and

146. *See* Reitman v. Mulkey, 387 U.S. 369, 373-74 (1967).

147. The adequate state ground doctrine should also limit the Supreme Court's acceptance of a state court's determination that either the state attorney general or the state court itself can independently state the goals of enforcement. For example, if the state court upholds enforcement of a statute solely because it accepts the attorney general's "after-the-fact rationalization" of the legislative goals, the person challenging the legislation on certiorari in the United States Supreme Court should be allowed to show that there is no support in state law for the attorney general to have independent power to state goals. This scrutiny of state law by federal courts should have the effect of insuring that state institutions afford the "structural" due process guaranteed by state law to persons subject to state authority. *See generally* Tribe, *Structural Due Process, supra* note 132.

in determining whether those goals are served, a court will have to allocate the burden of producing evidence and assign the appropriate risk of nonpersuasion.[148]

Professor Brest has suggested the following outline for what he describes as the "traditional approach" to these issues in rational basis review:

> Once the complainant demonstrates that the challenged regulation works to his disadvantage, the government must come forward with a plausible explanation suggesting how the regulation might promote some legitimate objective.
>
> (a) If the government fails to meet this burden, the regulation will be held invalid.
>
> (b) If the government meets the burden, then
>
> (i) on one view, this ends the matter, and the regulation will be upheld.
>
> (ii) on an alternative view, however, the complainant can still succeed in invalidating the regulation by proving beyond a reasonable doubt that it does not promote the objective.[149]

The two major elements of evaluative rationality analysis—characterization of the government's goals and determination of whether the goals are served—will be dealt with separately in considering this traditional approach.

a. Characterization of Goals

The relevant separation of powers doctrine is clearly important in determining who can authoritatively state the goals for the enforcement of legislation. Brest's traditional approach assumes that the attorney general's specification of goals should be accepted. Thus he says that the government's initial burden is satisfied if the government can point to "some" goal that enforcement would serve, rather than to "the goals" that the legislature meant to pursue. It is probably only the novel and infrequent separation of powers doctrine that gives the attorney general power to *add* to legislative goals, however.[150] If the attorney general does not have this power, then the "traditional" articulation of the government's initial burden is inappropriate. Perhaps the government should be required to "come forward with a plausible explanation suggesting how the regulation might promote some legitimate objective."[151]

If the burden is couched in these terms, the government

148. *See generally* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 15, at 40-47 (1978); C. MCCORMICK, LAW OF EVIDENCE 783-835 (2d ed. 1972).

149. P. BREST, *supra* note 1, at 1006 (footnote omitted).

150. *See* text accompanying notes 132-34 *supra*.

151. P. BREST, *supra* note 1, at 1006.

must initially advance certain evidence to meet its burden of showing what the objectives of the regulation are. Although a full discussion and evaluation of these evidentiary issues is not possible, a plausible, but certainly not exclusive, method of allocating the burdens of producing evidence can be proposed. This method is basically an elaboration of the evidentiary use of Professor Ely's "consensus theory" of goal characterization.[152]

As an initial step, the terms of the legislation should be offered into evidence. The government should be able to meet the burden of showing that the legislation's posited goals are inferable from the statutory language or, in accordance with the consensus theory, are goals that this type of legislation is usually aimed at achieving.[153] The court can rely on judicial notice and on any additional evidence of legislative behavior supplied by the parties to determine what "this type of legislation" includes and what it is aimed at achieving. If the government wishes to establish goals that cannot be determined by the statutory language or the consensus approach, it will have to produce additional evidence of legislative and social history. Once the government has met its burden of going forward, challengers should be allowed an appropriate opportunity to rebut the government's showing by introducing their own historical evidence.

The risks of nonpersuasion can be allocated as follows: the challengers have the burden of showing by "clear and convincing evidence" that the legislation was not designed to serve the goals posited by the government. If the government desires to show that the legislation was designed to serve goals excluded by application of the consensus theory, it has to meet a preponderance of the evidence standard. This allocation of burdens produces a presumption that either side can rebut, and it places legislators on notice that they should adopt a "clear statement" of purposes if they wish to serve goals or objectives not usually acknowledged in the particular context involved.[154]

152. *See* text accompanying notes 90-92 *supra*. The discussion assumes that neither the attorney general nor the courts have an independent power to specify goals of enforcement.

153. Of course, if the attorney general has the power to subtract from the legislative goals, only those goals that the attorney general advances should be considered candidates for characterization as the goals of the enforcement, notwithstanding any other goals that inference from the statute and the consensus theory might yield. *See* text accompanying notes 133-38 *supra*.

154. *Cf.* Christie, *A Model of Judicial Review of Legislation*, 48 S. CAL. L.

b. Belief That Enforcement Serves the Goals

As Professor Brest indicates, the burden of proof can be allocated such that challengers are not allowed to rebut the government's initial suggestion of a plausible relationship between means and ends. Refusal to allow rebuttal, however, renders the government less accountable for the rationality of enforcement in light of current conditions,[155] and prevents challengers from exercising what are normally considered to be their prerogatives in an adversary system.

Brest's second approach is more compatible with the elements of evaluative rationality and with the tenets of the adversary system. Under this approach, once the existence of a positive means-ends relationship seems plausible,[156] the complainant has the burden of disproving its existence. In other words, the persons attacking the statute have the burden of presenting evidence that establishes to the required degree of certainty that the identified objectives of the enactment are not served by its enforcement.[157] Placing the burden on the persons attacking the enforcement of the statute accords with a presumption of constitutionality, and appropriately places the burden on the parties who allege circumstances that are counter to most common experience.[158]

Professor Brest also argues convincingly that the challengers should carry a heavy burden of persuasion and thus should have to establish, beyond a mere preponderance of the evidence, that the goals are not served.[159] He notes that legislatures should be able to impose regulations even when it is less than certain that their goals will be advanced, as for example,

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REV. 1306, 1338-56 (1975) (proposed model of judicial review that focuses on legislative findings as statement of purpose).

155. For a proposed allocation of the burdens of proof for rationality review in light of changed empirical conditions, see Delgado, *supra* note 96, at 499-503.

156. The government's showing of a plausible means-ends relationship should establish that the relationship is also plausibly efficient. It would place an intolerable burden on the government to have to establish that the means are in fact the efficient means because this would require the government to present evidence concerning the efficacy of many other methods of achieving the desired goals. It would, in effect, mean that the government had to prove a negative: that there are no other ways of achieving the goal at the desired level.

157. The person attacking the statute may endeavor to show that the enforcement is lacking either in total or in marginal rationality. In the latter case, the party would only need to demonstrate to the required degree of certainty that there is at least one more efficient way of achieving the same goals to the same extent.

158. *See* sources cited in note 148 *supra*.

159. P. BREST, *supra* note 1, at 1010.

in the banning of a food additive that *may* increase the risk of cancer. People attacking such a statute might be able to show by a preponderance of the evidence that the food additive does not increase the risk of cancer. This showing does not mean that the regulation is arbitrary; the legislature is justified in paying less attention to the causal relationship between the additive and disease because of the magnitude of the potential harm. In effect, circumstances allow the legislature to discount the probability of the link. The imposition of the regulation can be said to be arbitrary only when no reasonable person could conclude that such discounting is appropriate. Thus Brest correctly suggests that a burden such as "clear-and-convincing evidence" or "beyond a reasonable doubt" is appropriate when the challenger attempts to show that the goals are not served by enforcement of the legislation.[160]

IV. CONCLUSION: JUDICIAL FIDELITY TO THE SOCIAL GOOD MODEL

This Article has attempted to make two inquiries. The first was whether a meaningful and analytically distinct rational basis test can be constructed. This inquiry required an analysis of the logic of legal reasoning; that is, an analysis of the discourse that lawyers and judges use at the formal level of legal communication. Based on judicial acceptance of the social good model of the legislative process, the Article concluded that courts can construct a meaningful and analytically distinct rational basis test, and attempted to identify and to discuss the elements of that test.[161]

The second inquiry identified and evaluated the effects of using this form of legal reasoning. Use of the rational basis test provides some incentive for legislatures to enact legislation that is compatible with the social good model, at least in form if not in substance. Courts that use the test can also block enforcement of legislation that no longer serves the goals that the appropriate lawmaking body sought to further.

Because evaluative rationality in law is premised on the social good model of legislation, an ultimate judgment about the legitimacy of the rational basis test depends on whether constitutional theory requires fidelity to the social good model. Although the content of constitutional theory may differ, there

160. See the Appendix following this Article for further illustration of the application of burdens of proof in evaluative rationality analysis.

161. For a summary, see text accompanying notes 120-21 *supra*.

are three different contexts in which the issue can arise: federal constitutional norms for federal legislation, state constitutional norms for state legislation, and federal constitutional norms for state legislation.

In his extensive and illuminating discussion of the rational basis test, Justice Linde argues forcefully that legislatures should *not* be required to act in a rational manner. According to Linde, to legislate rationally the legislature must identify goals, obtain information about the extent to which those goals are not presently realized, and select the means that will advance them:

> Rational lawmaking, if we take the formula seriously, would oblige this collective body to reach and to articulate some agreement on a desired goal. It would oblige legislators to inform themselves in some fashion about the existing conditions on which the proposed law would operate, and about the likelihood that the proposal would in fact further the intended purpose. In order to weigh the anticipated benefits for some against the burdens the law would impose on others, legislators must inform themselves also about those burdens.[162]

Linde observes that such a rational decisionmaking process is certainly not descriptive of a vast amount of legislation. More important, he urges, legislatures should not be required to act in this fashion because, first, such a process imposes enormous time demands and, second, "nonrational" decision-making is simply an acceptable way of accommodating conflicting political pressures—a legitimate function of legislatures.[163] Linde in effect reasons that legislatures should not be required to act rationally in accord with the social good model because of the cumbersomeness of rational decision-making and the acceptability of nonrational decision-making.

In response, it should first be noted that Linde seems to overstate the requirements of rational decision-making that the social good model would impose on legislatures. He appears to say that the model requires that *each legislator* act rationally and that individual actions be aggregated systematically into a group decision. The requirements of the social good model can be stated far more modestly however. The model requires only that an observer be able to characterize the final legislative output in plausible means-ends terms when rational action is necessary. This allows wide variation in the methods that legislators can follow.

Second, the social good model does not entirely preclude

162. Linde, *supra* note 2, at 223-24.
163. *Id.*

nonrational action. For example, it allows some expressive or "discretionary" actions, actions that cannot be meaningfully characterized in means-ends terms. In sum, Linde's argument is correct to the extent that he urges that not all legislative action need be rational, but he overstates the intrusion on the legislative process that requiring *some* legislation to be rational would cause. Fidelity to the social good model, with its requirement of rational legislative output in many instances, poses no insuperable burdens on legislative action.

This is simply to say, however, that fidelity to the social good model is feasible. The question then becomes whether the model is desirable. In other words, what is the affirmative argument supporting the assertion that legislatures should conform to the social good model? Here issues of "first principles" are confronted: which view of collective legislative action—"market arena" or "search for the public good"—does the relevant constitution adopt? The answer may differ from one constitution to another, but most American governments at least *aspire* to the social good model, treating it as the ideal to be achieved. For example, politicians typically justify legislation by showing how the enactments serve some conception of the public interest; they rarely defend their actions on the ground that the legislation is simply an accommodation of competing private wants. Of course, legislators sometimes admit to political compromise, but the compromise is usually cited as justification for failing to pursue the public interest to the full extent, rather than as the sole justification for the legislation. Even when legislation benefits a narrow group or a single corporation, politicians stress the public benefits of the enactment. A legislator who sought to justify such legislation simply in terms of a desire to accommodate private ends would probably be widely condemned as "caving in" to powerful "special interests."

Some might argue, however, that while political rhetoric may retain the trappings of loyalty to the social good model, recent developments in American government demonstrate the superficiality of this professed allegiance. The realities of single-issue interest groups, powerful lobbyists and large sum political contributions lead to legislative behavior that is more in accord with the public choice model. At the very least, these developments demonstrate an ambivalence about the desirability of the social good model.

It is not possible to resolve this very difficult question here.

Indeed, there may be no answer applicable in all three of the contexts in which evaluative rationality analysis can be used. For example, a state court may be more justified in imposing the social good model if the state's constitution clearly said that legislation is to be in the "public interest."

Yet even assuming that the social good model is accepted, the question remains as to whether *judicial* invalidation of nonrational legislation serves any useful function. Since invalidation does not prevent the legislature from reenacting the same statutory provision with a citation of additional goals, critics have questioned the utility of evaluative rationality analysis.[164] Although the legislature may have the power to reenact the same law, it probably will not do so when the additional goals needed to revise the legislation are politically controversial. Hence, the required acknowledgment of the new goals may, for practical purposes, preclude reenactment of the law.[165] Even if the legislation is reenacted in substantially the same form, reenactment can be beneficial. The invalidation of legislation by the courts forces the legislature to reconsider the justification for the law. This process of reassessment, even if it generates a substantially similar law, can be democratically beneficial in providing those *currently* burdened by the legislation with an opportunity to participate in a decision that affects them. Thus, if one concludes that relevant constitutional norms support adherence to the social good model, courts invested with the power of judicial review seem justified in applying evaluative rationality analysis.[166]

164. *See, e.g.*, Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 29.

165. For example, in Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955), legislation forbade opticians to replace eyeglass frames without a prescription, and the purported purpose was to promote the public health. Suppose that a state court held that the legislation did not promote public health. While it is true that the legislation would be rational if the legislature stated a new goal of providing optometrists with additional economic security, it is questionable whether legislation with such an express purpose would easily be reenacted.

166. Suppose, however, that one concludes that the relevant constitutional theory holds that the public choice model is an acceptable model for the legislative process. Does this mean that evaluative rationality has no place in judicial review? Justice Linde has argued that "[w]hatever the source of [a constitutional] rule, in theory a conscientious government must have been able to comply with it if a court is to hold that it should have complied, or at least the government must be able to know how to comply in the future." Linde, *supra* note 2, at 207. If this view is accepted, courts should not refuse to enforce legislation that fails to meet the requirements of evaluative rationality. If they do so, they invalidate acts that the legislature was entitled to enact and enforce.

APPENDIX

THE RATIONAL BASIS TEST IN OPERATION: INTEGRATING THE VALUES OF ADMINISTRATIVE CONVENIENCE

Oftentimes discussions of proposed constitutional doctrine tend to be abstract and fail to provide adequate illustration of how courts might decide actual cases. This Appendix returns to the hypothetical drawn from *Cleveland Board of Education v. LaFleur*[167] for a more complete illustration of evaluative rationality in practice. Although *LaFleur* did not involve strictly "economic" interests and therefore is not exemplary of the kind of case in which only rational basis review is currently applied by the United States Supreme Court,[168] the facts of the case are useful for describing the role of "administrative convenience" in the application of the test.

Assume that in 1910 a state passed a statute providing that "a teacher in any state elementary school who becomes pregnant shall not teach beyond the end of her first trimester of pregnancy." The legislative history indicates that three problems were presented to the legislature. First, school administrators complained that pregnant teachers suffered from weakness and loss of stamina, causing them to be less able to manage the strenuous aspects of their jobs. Second, the administrators urged that pregnant teachers were absent more often than other female teachers. Third, some parents and church groups complained that exposing children to the sight of pregnant teachers created a "premature" curiosity about human reproduction that led to unwanted pressures at home to discuss sex.

Ms. Brown, employed as a teacher at an elementary school in 1980, reaches her third month of pregnancy, and is suspended from her position. She sues to regain her job and to enjoin further enforcement of the statute, asserting that enforcement is irrational on two grounds.[169] First, she argues that advances in medical care have eliminated any basis for believing that pregnant women as a class are more prone to weakness or absence than other teachers—at least until the eighth month of pregnancy. Second, she claims that even if some or most pregnant teachers are more likely to suffer weakness and be absent, her past pregnancies demonstrate that she is not

167. 414 U.S. 632 (1974).

168. *See id.* at 639.

169. We shall avoid the problem of federalism in this discussion and assume that suit has been brought in state court under the state constitution.

subject to these problems. Therefore, *her suspension* does not serve the government's interest in maintaining able-bodied faculties in elementary schools.

In support of Ms. Brown's suspension, the attorney general, representing the school board, argues that the enforcement of the statute against Ms. Brown is rational because it serves the state's goals of removing teachers who are likely to be absent or to work at a sub-par level and of identifying those teachers in an administratively efficient fashion. The attorney general also argues that enforcement serves another governmental interest: providing temporary employment to unemployed teachers—of whom there is an oversupply. The attorney general says that providing such long-term employment enables administrators to evaluate the temporary teachers' performance and to gauge their fitness for the limited number of new permanent positions that become available each year. The attorney general thus advances two of the goals evidenced by the legislative history and asserts an additional goal of providing employment to unemployed teachers.

Assuming that the burdens of going forward and the risks of nonpersuasion will be allocated as suggested above,[171] the attorney general will be able to meet the burden of going forward simply by introducing the legislation and calling the court's attention to those goals that are typical and those that are inferable from the terms of the legislation. Of course, reasonable minds can differ about what legislation of this type usually seeks to achieve. Assuming, however, that the court concludes that suspension-of-workers legislation is usually aimed at excluding persons from the work force who are no longer able to perform their duties competently, the court will accept the claim that producing an able work force was a legislative goal without requiring further evidence of legislative aims. Ms. Brown would have the opportunity to present rebuttal evidence, but the legislative history reinforces the able work force goal, and Ms. Brown will therefore be unable to meet her burden of persuading the court that this "typical" goal was not in fact an objective of the legislation.

The attorney general has not asserted the goal of protecting the parents' sensibilities. Since there is evidence of this ob-

170. That is, the statute identifies problem teachers without the necessity of individualized hearings and without waiting for the problems actually to materialize.

171. *See* text accompanying notes 148-60 *supra.*

jective in the legislative history, the attorney general might be able to establish by a "preponderance of the evidence"—that standard applicable to the assertion of goals not included by the consensus theory—that protecting sensibilities was a goal of the legislation. Nevertheless, since the government bears the burden of going forward, and since it has not advanced the parents' sensibilities goal, this objective should not be considered a goal of the legislation if it is excluded by the consensus theory.

Suppose, however, that the court has concluded that protecting parents' sensibilities was included by application of the consensus theory. The court might reason, for example, that legislation suspending *teachers* is often aimed at accommodating parents' concerns about the effect that these teachers are having on their children's moral development. If the goal is included by the consensus theory, the government will meet its burden of going forward by introducing the statute, and given the legislative history, Ms. Brown will probably not be able to rebut it. In these circumstances, whether the court should credit a goal such as the parents' sensibilities will depend on the attorney general's power to subtract from the legislative goals, a question of the states' separation of powers doctrine.

The attorney general *has* advanced another goal that is not included by the consensus theory: providing temporary work for unemployed teachers. The attorney general bears the burden of going forward with some evidence of this goal, a burden that will be difficult to satisfy given the legislative history that has been posited. Although the teacher employment goal is "conceivable," it will not be sufficient to meet the attorney general's burden. Only those "conceivable goals" that are included by the consensus theory should be recognized without any additional evidence. Thus the court should recognize the teacher employment goal only if the attorney general has the independent power to state the goals of enforcement. This is again a question of the relevant jurisdiction's separation of powers doctrine.

If the court characterizes either the parents' sensibilities or the teacher employment objectives as goals of the legislation, Ms. Brown's suit will fail. She has offered no proof that these goals are not served by enforcement of the legislation, and hence has failed to meet her burden of going forward and establishing that it is implausible to believe that enforcement of the legislation will further these two goals.

If, however, the court recognizes only the able-bodied faculty goal, Ms. Brown has a chance to prevail. Enforcement should be ruled irrational if she can show, as she alleges, that it is implausible to believe that pregnant teachers are, as a class, any more likely to be weak or absent during their first seven months of pregnancy. Of course, Ms. Brown may have a very difficult time meeting her burden of proof. She must prove, in effect, that no reasonable person could conclude that the link exists.

Aware of the difficulty of establishing this broad proposition about pregnant teachers as a class, Ms. Brown has asserted a narrower claim, namely that the able-bodied teacher goal of the legislation will not be served by suspending her because her physical stamina and past history of pregnancy establish, beyond a reasonable doubt, that *she* is *less* likely than other nonpregnant teachers to be weak or absent. Whether this showing is sufficient to preclude her suspension depends on the court's treatment of the administrative convenience interest advanced by the attorney general. The consensus theory would surely recognize administrative convenience as an important objective of most legislation. Indeed, the trade-off between precision and convenience is endemic to legislation. Thus, the attorney general's assertion that administrative convenience was a secondary objective of the legislative scheme should be accepted, subject of course to Ms. Brown's attempt to present a rebuttal.

It may be useful, however, to identify two types of "administrative" costs that a legislature might seek to avoid in passing legislation that suspends pregnant teachers at the end of the first trimester. First, the legislature might be interested in avoiding the costs of having the *bureaucracy*—in this case the school board—determine an appropriate leave of absence date in each case. In other words, the legislature could be interpreted as saying to local school boards and other school administrators, "Do not determine on a case-by-case basis which pregnant teachers are likely to be unfit, and do not entertain claims by teachers who assert that they have special characteristics that will make them fit far beyond the usual cutoff date. Spend your time on other activities." Second, the legislature could also be interested in avoiding the costs of a *judicial* exceptions procedure. Thus, its interest in a "bright line" standard could be aimed at saving the attorney general's and judiciary's time as well as that of school administrators.

A legislature need not elect to serve both of these administrative interests. It may, for example, decide to provide for administrative case-by-case review and exclude judicial review.[172] Alternatively, it may opt against administrative case-by-case review but still allow individuals the opportunity to prove to a court that the substantive policies of the legislation will not be served in their particular case. This second approach adopts a distinction similar to that between mandating a hearing in every case before government action is taken and providing for a hearing at the request of an aggrieved party after the action has been taken, a familiar procedural due process distinction.[173]

In the context of contemporary American lawmaking, the legislature's failure to provide a case-by-case approach at the administrative level should probably be viewed, at least in most contexts, as a decision to save the costs that such a procedure imposes. Thus, if there is no indication of an administrative exceptions procedure in the statute's terms or legislative history, a presumption that the legislature wished to save these bureaucratic costs comports better with the common understanding of the legislative process than does the alternative presumption. Of course, the requirements of procedural due process may limit the legislature's ability to avoid the costs of bureaucratic procedure.[174]

Deciding on the appropriate presumption in the case of legislative silence about a judicial exceptions procedure is more difficult. Legislatures know that the judiciary will use purposive analysis to interpret statutes and that statutes may thus not be enforced in instances in which their application would not achieve the legislature's goals. Whether legislatures should commonly be understood as wishing to avoid the costs of defending the rationality of laws in particular cases is a close question. There is probably no general answer, since the legislature's dedication to rule utilitarianism may vary depending on the subject matter of the legislation. Statutes regulating traffic speed may be highly rule utilitarian while those precluding employment may not. As with many issues in the applica-

172. *See, e.g.*, Selective Service Extension Act of 1950, § 10(b)(3), 50 U.S.C. App. § 460(b)(3) (1976).

173. *Compare* Goldberg v. Kelly, 397 U.S. 254 (1970) *with* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

174. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80-84 (1972) (procedural due process requires hearing before goods can be seized under prejudgment writ of replevin).

tion of the consensus theory, a sensitive judicial judgment will often be difficult, yet necessary.

Although the issue is far from clear, a plausible argument can be made that the interest in avoiding the cost of judicial challenge should not be presumed in legislation, such as the pregnant teacher statute, that suspends or terminates employment. Thus, the consensus theory would not credit the administrative convenience interest of avoiding lawsuits like Ms. Brown's as a goal of the legislation. Should Ms. Brown prove that she in fact will not be more prone to weakness or absence, the court should find her suspension irrational. On the other hand, if a stronger rule utilitarian position more accurately characterized the legislative action and the legislature sought to avoid the costs of judicial review, her suspension should be found rational.