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Legislative Purpose and Equal Protection's Rationality Review

Robert C. Farrell

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ROBERT C. FARRELL*

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* B.A., Trinity College; J.D., Harvard University; Professor, Bridgeport School of Law at Quinnipiac College.

I. INTRODUCTION

EQUAL protection's rationality review has two faces. In most cases, its presumption of constitutionality and deference to legislative judgment lead to a purely formalistic review. Occasionally, however, the United States Supreme Court has used rationality review to monitor closely the purposes a legislature sought to advance and has found those purposes impermissible. In both situations, the Court has overlooked difficulties with the idea of legislative purpose and treated the notion of impermissibility as self-evident. On the few occasions where the Court has squarely faced these issues, the Justices were in substantial disagreement. The result of this abbreviated analysis and judicial conflict is an inconsistent and unpredictable body of case law. This Article will examine the concept of permissible legislative purpose in the context of equal protection's rationality review.[1]

1. For earlier treatments of some of the areas covered in this Article, see generally Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049 (1979) (examining meaning behind rationality requirement and legislative purpose requirement and defending requirement in this context provided its use is consistent and sensible); Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1 (1980) (discuss-

II. WHAT IS LEGISLATIVE PURPOSE?

Do laws have purposes? Rationality review necessarily includes a presumption that they do. The requirement that a classification be rationally related to the purpose of the law lacks foundation unless there is some legislative purpose apart from the terms of the law itself.[2] This distinction must precede any required connection between classification and purpose. Why should we suppose, however, that laws are enacted for some reason? This section examines the notion of legislative purpose and some of the problems associated with that notion.

A. *The Nature of Legislative Purpose*

This Article uses the term "legislative purpose" to mean "the end at which a law is directed."[3] The purpose of a law is the "preferred future" sought by the legislature in enacting the law.[4]

ing whether an intelligible national basis standard can be constructed, and if so, what normative functions standard would serve); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 251 (1976) (addressing "what 'due process' can sensibly mean as a constitutional standard for lawmaking," and critiquing rationality requirement at earlier legislative stage rather than testing its feasibility as tool of judicial review); Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review*, 13 CREIGHTON L. REV. 487, 488, 506 (1979) (analyzing "the possibility of a normative economic theory of constitutional adjudication," author concludes that rationality review could be appropriate in society of political institutions focused on economic goals; noting, however, that "[o]ur troubles about rationality review are a clue that economics does not for us provide the whole truth about the value of politics"); Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 128 [hereinafter Sunstein, *Public Values*] (suggesting "that the law of equal protection is not self-contradictory, but a more or less principled response to a more or less unitary understanding of what the Equal Protection Clause is about"); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128 (1972) ("[T]he traditional equal protection rationality test applied in these cases is invariably an empty requirement and a misleading analytic device."); Melanie E. Meyers, Note, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184, 1209 (1986) ("By focusing on the treatment of groups through governmental classification rather than on group identity, impermissible purpose analysis suggests a unitary principle condemning governmental accommodation of societal prejudice."); Brenda Swierenga, Note, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454, 1455 (1986) (considering "the Court's new willingness to reject certain legislative purposes as impermissible under the equal protection clause").

2. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state's system be shown to bear some rational relationship to legitimate state purposes.").

3. *Cf.* Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[I]t is possible to discern the objective 'purpose' of a statute (*i.e.*, the public good at which its provisions appear to be directed) . . . .").

4. *See* Linde, *supra* note 1, at 223. Linde stated:

Thus, the legislative purpose may be "either the elimination of a public 'mischief' or the achievement of some positive public good."[5] Defined in this way, legislative purpose is not something that exists in the minds of the legislators, either individually or as a collective body. It exists, rather, as an objective concept, "evident in the character of the [law] itself," as an end to be achieved.[6] For example, the end, or purpose, of a razor is for shaving. We need not ask the maker of the razor what was in her mind when she made the razor in order to understand its purpose.[7]

This understanding of legislative purpose is not without its problems.[8] The attempt here, however, has been to define "purpose" without reference to the minds of individual legislators and without speaking of the legislature as if it had a collective mind. It is important to separate the motives of individual legislators from the legislative purpose.[9] It is also important to realize that while it is acceptable to approach legislative purpose from the perspective of the collective body rather than from the end to be achieved, we need not find the mind that is doing the seeking but merely the end that is to be accomplished.[10]

> A rational policy must be one that is designed to move events toward some goal. At a minimum, therefore, it requires three elements: some knowledge of present conditions; the identification of a preferred future, or a goal; and a belief that the proposed action will contribute to achieving the desired goal, a belief that is sometimes called the instrumental hypothesis.

Id.

5. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346 (1949); *see also* Heydon's Case, 76 Eng. Rep. 637, 638 (K.B. 1584) (when interpreting statute, court should ask: "What was the mischief and defect for which the common law did not provide[?]").

6. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). If "purpose" existed only in the legislators' minds, then "purpose would be indistinguishable from the intention, and we should have the same difficulty already noted, that this purpose is practically undiscoverable and would be irrelevant if discovered." *Id.* at 875.

7. *See id.* ("In the case of statutes also, it is rare indeed that we can not say positively what any particular statute is for, by reading it. . . . But as a matter of fact, can we be quite so sure about it? . . . [N]early every end is a means to another end."). For a further discussion of the incoherent nature of legislative purpose, see *infra* notes 36-41 and accompanying text.

8. For a discussion of the principal problems in the concept of legislative purpose, see *infra* notes 36-89 and accompanying text.

9. For a discussion of the need for separation between individual motives and legislative purpose, see *infra* notes 42-68 and accompanying text.

10. For a discussion of approaching legislative purpose from the collective legislative mind, see *infra* notes 36-49 and accompanying text.

B. *The Terminology of Legislative Purpose*

This section considers the terms that are used to refer to the subject at hand. Principally, those terms are: "legislative purpose," "legislative motive" and "legislative intent." Although attempts have been made to stake out different territories for these terms, these attempts have been generally unsuccessful and, in any case, have been ignored by the courts.

1. *Legislative Purpose and Legislative Motive*

Two different attempts have been made to distinguish legislative purpose from legislative motive. Under the first formulation, "purpose" is an objective, collective concept and is identified through "the terms of the statute, its operation, and [its] context."[11] The term "motive" is saved for the subjective motivations of individual legislators.[12] This distinction between objective, legislative purpose and subjective motives of individual legislators continues to be important and valid.[13] In practice, however, courts often use both terms interchangeably.[14] Consequently, despite the value of the distinction in theory, its meaning becomes lost in practice.

In part, the attempt at distinction was probably a response to the United States Supreme Court's assertions that legislative motivation was in and of itself irrelevant to constitutional adjudication.[15] A successful differentiation between purpose and motive, then, could save "purpose" while still giving effect to the Court's

11. Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1091 (1969) ("[T]he 'purpose' of a measure is generally only a legal abstraction attributed to the statute by the courts; it denotes the permissible objective which the legislature might have had in enacting the statute."); *see also* Iram Heyman, *The Chief Justice, Racial Segregation and the Friendly Critics*, 49 CAL. L. REV. 104, 115-16 (1961) (arguing that purpose of segregation statutes—to create and maintain inferior status for blacks—has nothing to do with legislative "motive" and is susceptible to judicial scrutiny).

12. Heyman, *supra* note 11, at 115-16; Note, *supra* note 11, at 1091-92.

13. For a discussion of the need for a distinction between individual motives and legislative purpose, see *infra* notes 42-68 and accompanying text.

14. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring) ("Actual *purpose* is sometimes unknown. Moreover, undue emphasis on actual *motivation* may result in identically worded statutes being held valid in one State and invalid in a neighboring State." (emphasis added)); United States v. O'Brien, 391 U.S. 367, 383 (1968) ("Inquiries into Congressional *motives* or *purposes* are a hazardous matter." (emphasis added)).

15. Palmer v. Thompson, 403 U.S. 217, 225 (1971) ("[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason . . . it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."); *O'Brien*, 391 U.S. at 384 ("What motivates one legislator to

rejection of motivation. Subsequent decisions of the Supreme Court, however, suggest that this distinction is no longer necessary. The Court has expressly retreated from its position that legislative motive is irrelevant.[16] This development casts enough doubt on the distinction between motive and purpose to make it unworkable as a tool to understand constitutional adjudication.

The second attempt to distinguish between purpose and motive considers the immediacy of legislative aims. It seems that "purposes" are immediate aims while "motives" are more distant but intended results.[17] This distinction simply does not work and "has properly been put to rest."[18] The difficulties inherent in the attempt to make this distinction are exemplified in a Note in the *Harvard Law Review*.[19] The Note discusses a case, *Deerfield Park District v. Progress Development Corp.*,[20] in which a municipal board condemned certain land for use as a public park as soon as the board discovered that a developer was about to construct an integrated housing development on the property. The Note explains:

> The conflict between motive and purpose was thus sharply drawn; the condemned land was to be used for a park (the purpose of the action), but the reason that the land was condemned was allegedly to prevent residential integration (the board's motive). The Supreme Court of Illinois declined to examine the board's motive and upheld the condemnation. . . . This conclusion would seem correct.[21]

It is doubtful that the "sharply drawn" distinction between

make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.").

16. Washington v. Davis, 426 U.S. 229, 244 (1976) (indicating that *Palmer* had not "worked a fundamental change in equal protection law" (footnote omitted)). For a further discussion of the relevance of legislative motive, see *infra* notes 90-102 and accompanying text.

17. Heyman, *supra* note 11, at 115-16, *cited critically in* John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1219 (1970) ("There is of course a rough difference between those things a person intends to result immediately from his act, and other more distant and less certain, but nonetheless intended, results. But aims are immediate or distant only in relation to other aims . . . ."); Note, *supra* note 11, at 1091-95, 1100-01 (discussing identification of discriminatory purpose legislatures might have in enacting statutes, noting that process of finding purpose and motive might overlap).

18. Ely, *supra* note 17, at 1217-21, *noted in* Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 104.

19. Note, *supra* note 11, at 1100-01.

20. 174 N.E.2d 850 (Ill. 1961), *cert. denied*, 372 U.S. 968 (1962).

21. Note, *supra* note 11, at 1100-01.

motive and purpose is as clear to most readers as it was to the writer of the Note. The discriminatory effect of the condemnation, in combination with the sequence of events leading up to it, provide strong evidence of racially discriminatory purpose forbidden by the Equal Protection Clause.[22] Legislative motive and purpose therefore fail to be adequately distinguished under this second formulation as well.

It seems clear, then, that there is no accepted and usable distinction between the terms "legislative purpose" and "legislative motive." The next section examines another attempt to craft a workable distinction in terminology—this time, between "legislative purpose" and "legislative intent."

2. *Legislative Purpose and Legislative Intent*

In the context of race and gender discrimination, the Supreme Court has made it clear that only intentionally discriminatory actions are forbidden, and not those acts that merely have a discriminatory effect.[23] "Proof of racially discriminatory *intent* or *purpose* is required to show a violation of the Equal Protection Clause."[24] As the cited passage illustrates, the Court uses the terms "purpose" and "intent" interchangeably.[25] The terms are interchangeable, however, only when "intent" is used in one of its two senses.[26]

The question of legislative intent is often controlling when issues of statutory construction arise. In this context, "intent" means "meaning"—that is, "what do the words of the statute mean?"[27] Does a statute that excludes "vehicles" from the park

22. For a discussion of the use of statements made by individual legislators, see *infra* notes 154-64, 165-73 and accompanying text.

23. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 244 (1976).

24. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (emphasis added). The Court continued: "Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well-established in a variety of contexts." *Id.* (footnote omitted).

25. *Id.*; *see also* Michael M. v. Superior Court, 450 U.S. 464, 469 (1981) ("[T]he fact that the California Legislature criminalized the act of illicit sexual intercourse with a minor female is a sure indication of its *intent* or *purpose* to discourage that conduct." (emphasis added)); Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) ("[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.").

26. *See* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979). The Court noted that "[d]iscriminatory *intent* is simply not amenable to calibration," while " '[d]iscriminatory *purpose*' . . . implies more than intention as volition or intent as awareness of consequences." *Id.* at 277, 279 (emphasis added).

27. *See* James M. Landis, *A Note On "Statutory Interpretation,"* 43 HARV. L.

mean to exclude bicycles, roller skates and toy automobiles?[28] In this context, statutory intent is quite a different thing from legislative purpose. In constitutional adjudication, however, the intent of the legislature is important not to determine what the legislature meant, but rather to determine what the legislature was trying to accomplish. Thus a facially neutral statute enacted with an intent to promote racial discrimination is unconstitutional.[29] In this second sense, then, legislative purpose and legislative intent are synonymous.

The argument could be made, however, that it is incorrect to equate the discriminatory intent or purpose discussed in *Washington v. Davis*[30] with the legislative purpose of rationality review. It must be conceded that the two purposes arise in different contexts. A court is far more likely to look closely at evidence of an alleged racially discriminatory purpose than to credit assertions of impermissible purpose in other contexts.[31] In both cases, nevertheless, a reviewing court is attempting to answer the same question—"At what end was the law directed?" The racially discriminatory purpose that is forbidden in *Washington v. Davis* is really only one type of impermissible purposes forbidden by rationality review.[32]

3. *Summary*

The nomenclature involved in the area of legislative purpose is misleading at best. To a significant degree, conceptual distinctions cannot be made between legislative purpose and the terms legislative motive and intent, respectively. In practice, any worth-

REV. 886, 888 (1930) ("Intent is unfortunately a confusing word, carrying within it both the teleological concept of purpose and the more immediate concept of meaning . . . .").

28. This example is taken from H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

29. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) ("[R]acial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified.").

30. 426 U.S. 229, 242 (1976) (reaffirming requirement of discriminatory purpose behind statute for it to be invalidated under Equal Protection Clause).

31. Under rationality review, the Court will frequently defer to hypothesized purposes, rather than look for evidence of actual purpose. For a discussion of hypothetical purpose, see *infra* notes 103-23 and accompanying text.

32. *See, e.g.*, Burstyn v. City of Miami Beach, 663 F. Supp. 528, 534 (S.D. Fla. 1987) (utilizing rational basis analysis; citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) to explain what evidence was relevant to identification of legislative purpose).

while distinctions are lost mainly due to the courts' use of the terms interchangeably. Accordingly, this Article will use only the term "legislative purpose." This term will be used to include the terms "motive" or "intent," discussed above, and also the less frequently used terms "goal,"[33] "objective"[34] and "interest."[35]

C. *The Coherence of the Idea of Legislative Purpose*

Sixty years ago, Max Radin argued that the very idea of legislative purpose was incoherent.[36] In recent years, public choice theorists have vigorously renewed that argument.[37] Legislative purpose is said to be incoherent on the following grounds:

1. A legislature does not have a mind that could form a purpose;[38]
2. A multi-member body cannot have a single intent;[39]
3. The purpose of a particular law can be identified, variously, at different levels of generality;[40] and
4. Laws frequently have more than one purpose.[41]

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33. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 224 (1982) ("[T]he discrimination . . . can hardly be considered rational unless it furthers some substantial goal of the State.").

34. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 63 (1982) ("The last of the State's objectives . . . is not a legitimate state purpose.").

35. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule is that Legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

36. Radin, *supra* note 6, at 870. Radin stated:

> The least reflection makes clear that the law maker . . . does not exist, and only worse confusion follows when in his place there are substituted the members of the legislature as a body. A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.

Id. (footnote omitted).

37. For a discussion of the public choice model of legislative behavior and its conclusions about legislative purpose, see *infra* notes 50-63, 264-73 and accompanying text.

38. For a discussion of the need for a "mind" to form a purpose, see *infra* notes 42-49 and accompanying text.

39. For a discussion of the lack of a single intent in legislatures, see *infra* notes 50-68 and accompanying text.

40. For a discussion of the varying levels of purpose, see *infra* notes 69-75 and accompanying text.

41. For a discussion of the multi-purpose nature of laws, see *infra* notes 76-89 and accompanying text.

1. *The Necessity of a Mind*

Consider first the claim that a legislature cannot have a purpose because it does not have a mind.[42] This argument includes a presumption that only a living, thinking actor is capable of forming a purpose. Its proponents assume that wherever there is a purpose, there must be an agent to whom purpose can be attributed.[43] Because a legislature does not have a mind, per se, it follows under this view that ascribing purpose to a law is a mistaken projection of mind into a mindless entity. There are two responses to this objection to the concept of legislative purpose.

First, the term "purpose" is not limited to the connotation suggested in the previous paragraph. Rather than necessarily implicating an underlying mind, "purpose" can mean "the end at which something is directed."[44] In this sense, "consciousness is not an essential feature of purposefulness itself."[45] Thus, "a razor is something to shave with, and we should know this without the least speculation as to the ideas which were in the manufacturer's mind when the razor was made."[46] Purpose *does* exist apart from a thinking mind.

Second, even if, contrary to the thrust of this Article, we were to concede the claim that purposes can be formed only by thinking entities, the idea of legislative purpose would still be useful as a metaphor. We speak of the legislature in human terms because doing so provides a helpful analogy between purposive human behavior and purposive legislative activity. It makes sense, and is often legally important, to ask *why* a person acted in a certain way.[47] Similarly, it makes sense to speak of the legislature in that same way, and ask why the legislature enacted a law. The same action, whether of a person or of a legislature, will receive different legal treatment depending on the intent with which it was

42. *See* Bennett, *supra* note 1, at 1071 ("The concept of 'purpose,' even more than that of rationality, presumes individual intelligence."); Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 764 (1966) ("Legislation is a group activity and it is impossible to conceive a group mind or cerebration." (quoting ALBERT KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW 201 (1930)).

43. *See, e.g.*, JONATHAN LEAR, ARISTOTLE: THE DESIRE TO UNDERSTAND 41 (1988).

44. For a discussion of the nature of legislative purpose, see *supra* notes 3-10 and accompanying text.

45. LEAR, *supra* note 43, at 41.

46. Radin, *supra* note 6, at 875-76.

47. *See, e.g.*, RESTATEMENT OF TORTS § 13 (1934) (actor liable to another for battery only if he acts *intending* to cause a harmful or offensive contact).

done.[48] This practice of ascribing purpose to a nonliving entity is not without precedent in our legal system. The law treats a corporation as a single entity, capable of forming a single intent. Yet the corporation is purely a legal entity that can only act through its agents—the board, officers and employees.[49] Similarly, a legislature's purpose in enacting a law can exist independently from an individual or collective legislative mind. Therefore, criticism of legislative purpose analysis due to the lack of a legislative mind is groundless.

2. *The Sum of the Parts as a Single Entity*

No one doubts that individual legislators have motives when they cast their vote. It follows, then, that there may be as many motives for a law as there are legislators who voted for it.[50] If legislative purpose is the mere aggregation of the motivations of individual legislators, then there seems no escaping the conclusion that the very idea of legislative purpose is incoherent. Is it

48. *See, e.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST 137 (1980) ("[T]he very same governmental action can be constitutional or unconstitutional depending on why it was undertaken.").

49. *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1341 (1990) ("As with a legislature, the hundreds of individuals that form a corporation cannot be said to have a single intent. Still, corporations are routinely convicted of crimes which include intent as an element of the offense." (footnote omitted)).

50. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting). Justice Scalia stated:

> The number of possible motivations, to begin with, is not binary, or indeed, even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly *un*motivated when the vote was called, or he may have accidentally voted "yes" instead of "no" or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.

Id. at 636-37 (Scalia, J., dissenting).

necessary to determine the motives only of those who voted in favor of a bill? Only of those necessary to constitute a majority?[51] Which ones of those necessary to constitute a majority? Is it sufficient to consider only the motives of the median legislator?[52] What if only one, or three, or exactly half of the votes necessary for a majority were cast by legislators with improper motives?[53] Although it is often assumed that legislative purpose is composed of the purposes of individual legislators, those holding that view have not provided satisfactory answers to the questions just posed. In fact, the assertion that individual motives are determinative as to legislative purpose is used as a premise to support the conclusion that a composite body cannot have a single intent and thus that the idea of legislative purpose is incoherent.[54]

This claim that legislative purpose consists of the motives of legislators is an old one,[55] but in recent years public choice theo-

51. *See, e.g.*, Note, *Legislative Purpose, Rationality, and Equal Protection*, *supra* note 1, at 142 ("How is a court to determine which consequences a majority of the legislators had in mind when each legislator might have had several motivations and no majority had the same set of motivations?" (footnote omitted)).

52. Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 436 (1988) ("Public choice theory suggests that the legislation represents the outcome most preferred by the median legislator." (footnote omitted)).

53. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting). In his dissent, Justice Scalia wondered:

> If a state senate approves a bill by a vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? What if 3 of the 26 had the impermissible intent, but 3 of the 25 voting against the bill were motivated by religious hostility or were simply attempting to "balance" the votes of the impermissibly motivated colleagues?

Id. at 638 (Scalia, J., dissenting); *see also* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("It is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.").

54. MacCallum, *supra* note 42, at 764 (quoting John Willis, *Statute Interpretation in a Nutshell*, 16 CAN. B. REV. 1, 3 (1938)). Professor MacCallum attacked this premise:

> Is it possible for two or more men to "have a single intention"? Anyone wishing to deny the possibility must tell us why we cannot truthfully say in the simple case of two men rolling a log toward the river bank with the purpose of floating it down the river that there is at least one intention that both these men have— *viz.*, to get the log to the river so that they can float it down the river.

Id.

55. *See, e.g.*, Radin, *supra* note 6, at 870 (commenting in 1930 that "[t]he chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small").

rists have renewed and expanded the critique.[56] According to the public choice model of legislative behavior, majority voting itself is incoherent, chaotic and unpredictable.[57] This conclusion follows from Arrow's Paradox, under which majority voting leads to cycling majorities "that cannot choose among three or more mutually exclusive alternatives."[58] Where such cycling is present, maneuvers such as strategic voting,[59] logrolling[60] and agenda manipulation[61] control the results of legislative deliberation. The will of the majority either does not exist or, at least, does not control legislative outcomes. If, as public choice theory suggests, we cannot even attribute the statute itself to a legislative majority, then the attempt to ascribe an underlying purpose to a collective legislative body is senseless.

The first response to the claim that legislative purpose is incoherent is based on both confession and avoidance. Admittedly, if legislative purpose is the aggregation of some undetermined number of individual legislator motivations, then the concept does not make sense. This Article began with quite a different definition of legislative purpose, however—the end at which a law

56. The public choice theory of legislative behavior applies the economic principles of the marketplace to the political process. It is particularly concerned with the domination of the legislative process by interest groups. *See generally* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 925 (1987) [hereinafter Farber & Frickey, *Jurisprudence*]; Farber & Frickey, *supra* note 52; Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 267 (1986). For a further discussion of public choice theory, see *infra* notes 266-87 and accompanying text.

57. Farber & Frickey, *supra* note 52, at 425-26.

58. *Id.* at 426. Farber and Frickey give this example of cycling majorities:

> Three children—Alice, Bobby, and Cindy—have been pestering their parents for a pet. The parents agree that the children may vote to have a dog, a parrot, or a cat. Suppose the children's orders of preferences are as follows: Alice—dog, parrot, cat; Bobby—parrot, cat, dog; Cindy—cat, dog, parrot. In this situation, majority voting cannot pick a pet. A majority (Alice and Cindy) will vote for a dog rather than a parrot; a majority (Alice and Bobby) will vote for a parrot rather than a cat; and a majority (Bobby and Cindy) will vote for a cat rather than a dog.

Id. n.9.

59. Strategic voting involves voting against one's sincere interests in order to promote a final outcome more consistent with one's own ultimate interests. Farber and Frickey suggest that in the "pet picking" example, Alice (who likes dogs better than parrots) will vote for a parrot over a dog in order to prevent the ultimate selection of a cat. *Id.* at 427 n.13.

60. "Logrolling is the trading of votes on one issue for desired votes on other issues." *Id.* n.12.

61. Agenda manipulation involves the order in which choices are presented to the decisionmaker. In the pet picking example, if a dog-parrot choice is first offered, the dog will win. If the dog-cat choice is first offered, the cat will win. If a cat-parrot choice is first offered, the parrot will win. *See id.* at 426-27.

is directed.[62] This definition of purpose does not presume an underlying individual intelligence, nor a collection of underlying individual intelligences. If purpose does not presuppose mind, then there is no further need to look to the minds of individual legislators to form motives. The appropriate question is, "At what end is the statute directed?" not, "Why did Senator Smith vote for the bill?" The reasons why an individual legislator voted for a bill are relevant, if at all, only as evidence to be weighed in determining legislative purpose. Judge Posner, generally a supporter of the public choice theorists, has said that "[i]nstitutions act purposively, therefore they have purposes. A document can manifest a single purpose even though those who drafted it and approved it had a variety of private motives and expectations."[63]

Of course, the claim that laws have an objective end to be achieved implicitly assumes the possibility of collective action by the legislature. Before leaving this subject, therefore, it is appropriate to turn to the problem of cycling and its purported demolition of the coherence of legislative purpose. There is a body of evidence that the theory of the incoherence of legislative behavior lacks empirical support. Professors Farber and Frickey have found that legislative outcomes are, in fact, somewhat predictable in a wide range of situations: where preferences are uni-peaked,[64] where agenda rules produce a structure-induced equilibrium[65] and where behavioral norms of fairness are at work.[66] Even without these features, results in some controlled voting experiments have been fairly predictable.[67] Farber and Frickey, after reviewing the theoretical and empirical work on the subject, have concluded that "actual legislatures do not suffer from the instability and incoherence some public choice theorists have pre-

62. For a discussion of the nature of legislative purpose, see *supra* notes 3-10 and accompanying text.

63. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 196 (1986).

64. Farber & Frickey, *supra* note 52, at 430. Preferences are uni-peaked where, for example, they fall largely on a one-dimensional liberal/conservative spectrum. There is evidence that members of the United States Congress have this kind of preference. *Id.* at 430 n.25.

65. While agenda manipulation can lead to unpredictable outcomes, clearly stated and widely used agenda rules tend to make outcomes more predictable. *Id.* at 431.

66. The perceived equitable solution to a problem that would otherwise result in endless cycling produces its own sort of equilibrium. *Id.* at 433-34.

67. *Id.* at 432. In controlled experimental voting, the outcomes "are fairly predictable and clustered even where the voters' preferences lead to massive cycles." *Id.* Balanced compromise outcomes are favored. *Id.*

dicted."[68] The search for legislative intent need not be abandoned as an incoherent attempt to make one out of many.

3. *From the Particular to the General*

Consider a law that requires all car owners to have the emissions system of their cars inspected annually. If we were to look for the purpose of such a law, the following might be suggested:

1. To have emissions systems inspected.
2. To reduce automotive pollutants.
3. To improve air quality.
4. To preserve the environment.
5. To protect the public health.
6. To promote the general welfare.

These suggested purposes are ordered from the most particular to the most general. At some level, each is a plausible candidate for selection as the legislative purpose. The concept of legislative purpose is not a useful tool, however, if it is that elastic. It must be narrowed if it is to be a realistic constraint on legislative action. As a starting point, then, we can immediately eliminate the first and the last of the suggested purposes.

Nonetheless, there is a certain superficial attractiveness in the first statement of purpose because emissions inspection is precisely what the statute requires. We cannot derive the *purpose* of a law, however, from its operative *effect*.[69] It is hard to imagine that the legislature in question placed any independent value on the inspection *in itself*. Rather, the legislature required inspections as a *means* to an *end*—the end being at least one of the higher numbered purposes listed above. If the purpose of every law is to accomplish exactly what it accomplishes, there will always be a perfect correlation between law and purpose. As Justice Brennan aptly noted, "presuming purpose from result . . . reduces analysis to tautology."[70]

There is no similar tautological problem with the last of the

68. *Id.* at 435. Posner, as well, criticizes the view of "meaninglessness" of legislative outcomes. *See* Posner, *supra* note 63, at 199.

69. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 186-87 (1980) (Brennan, J., dissenting). Justice Brennan opined: "[T]he 'plain language' of the statute can tell us only what the classification is; it can tell us nothing about the purpose of the classification, let alone the relationship between the classification and that purpose." *Id.* (Brennan, J., dissenting). He added: "It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose." *Id.* at 187 (Brennan, J., dissenting).

70. *Id.* (Brennan, J., dissenting).

suggested purposes—the promotion of the general welfare. There is obviously a substantial distance between the law and this purported purpose. Here, on the other hand, the distance between the law and purpose is *too* attenuated. One could, with equal plausibility, conclude that there is *no* connection between the law and this purpose or that there is *always* a connection between them. Professor Ely has argued that courts cannot label attempts to promote the general welfare as rational or irrational.[71] Such an attempt would inevitably necessitate a value preference, an area Ely believes the courts should avoid.[72] What is really at issue when the general welfare is cited is the means that have been chosen to promote that welfare. Why is one industry or one activity supported rather than others to promote the general welfare? These questions are better answered more directly, without regard to the umbrella goal of promoting the general welfare.

Having eliminated the most particular and most general of the suggested purposes, we now need to consider the remaining purposes, which are of intermediate generality. As we move from the general to the specific, it becomes clear that the fourth and fifth suggested purposes—protecting the public health and preserving the environment—are still too attenuated. If a law was designed to achieve either of these purposes, yet only required automobile emissions inspections, it would be grossly underinclusive. If the concern for the public health was genuine, why did the legislature fail to address other substantial public health problems, like smoking or AIDS? If the legislature's concern was for the environment, why did the statute not address issues of land and water pollution? It seems reasonable to conclude that the legislature's purpose was something less comprehensive.[73]

The two remaining purposes suggested—improving air quality and reducing automotive pollutants—are more specific. They are also closely related to each other, in that reducing automotive

71. Ely, *supra* note 17, at 1241 (opining that if Court identifies "promotion of the 'general welfare' " as legislative goal, "standard evaluative technique of the Fourteenth Amendment—the testing of choice/goal relations in 'rationality-irrationality' terms—is inapposite, and an alternative to the disadvantageous distinction model of review must be found if such choices are to be policed" (footnote omitted)).

72. *Id.* at 1241, 1248.

73. *Cf.* Note, *Legislative Purpose, Rationality, and Equal Protection*, *supra* note 1, at 143 ("Surely 'public safety' is too large a goal and competing public purposes are too many for any statute to have as its single purpose the promotion of safety.").

pollutants is a *means* toward the *end* of improving air quality. Is it possible to choose between the two and confidently conclude that we have identified the definitive statutory purpose? The legislative history and other evidence of legislative purpose may be helpful in this regard.[74] What was the problem that the legislature was seeking to remedy when it considered the law at issue? Is the requirement that cars be inspected part of a law regulating the manufacture and use of automobiles? Or is it part of a statute dealing generally with issues of air quality? The concerns that prompted the law's passage in the first instance comprise some evidence of the appropriate level of generality at which its purpose can be identified.[75]

In some cases, however, there will be no obvious legislative purpose that abounds from this analysis. Even in these cases, however, a court should be able to identify a small set of consistent purposes within a narrow range of generality. There is, of course, room for manipulation in this area. If a court chooses to define legislative purpose broadly, the statute will likely be underinclusive. If, for example, the purpose of the emissions law is to improve air quality, then why did the legislature not also regulate emissions from factory smokestacks? If the purpose is defined too narrowly, analysis is reduced to tautology in that the purpose of the law is to accomplish exactly what it accomplishes. But even if the concept of legislative purpose is sometimes manipulable in terms of the appropriate level of generality, there are ordinarily sufficient indicators and evidence that the concept itself is not incoherent.

4. *Multiple Different Purposes*

The legislature may seek to accomplish two or more ends in a single piece of legislation.[76] The Food Stamp Act provides a good example.[77] In that statute, Congress sought both to raise

74. For a discussion of identifying legislative purpose, see *infra* notes 103-84 and accompanying text.

75. *Cf.* Heydon's Case, 76 Eng. Rep. 637, 638 (K.B. 1584) ("[T]he office of all the Judges is always to make such [] construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the fine intent of the makers of the Act, *pro bono publico*.").

76. The concern in this section is with multiple legislative ends; it is not concerned with the earlier-discussed problem of multiple and conflicting motivations of individual legislators. For a discussion of the issue of individual legislators' motivations, see *supra* notes 50-68 and accompanying text.

77. The Food Stamp Act of 1964 is codified at 7 U.S.C. §§ 2011-2030 (1988). The Act was passed "in order to promote the general welfare, [and] to

levels of nutrition among low-income households and to strengthen the agricultural economy by distributing farm surplus.[78] These two purposes have a harmonious factual relation—the government's purchase of food for low-income households strengthens the agricultural economy. There is no necessary connection, however, between the two purposes. It is easy to conceive of ways to advance one of the purposes without advancing the other.[79] It is even possible that a law will have two purposes that pull in opposite directions. The classic example of this strain occurs in statutes enacting welfare programs. The principal purpose of such laws is to provide financial assistance to specific groups of individuals considered to be needy and deserving; the secondary purpose is to preserve the state's fiscal integrity.[80] Spending more advances the first purpose; spending less advances the second.

The courts recognize that statutes are often designed to achieve several purposes. "[L]egislators . . . are properly concerned with balancing numerous competing considerations."[81] Generally, a court need not determine which purpose is primary and which is secondary.[82] The court will ask only whether a challenged classification is "so unrelated to the achievement of *any combination* of legitimate purposes that we can only conclude that

safeguard the well-being of the Nation's population by raising levels of nutrition among low-income households." *Id.* § 2011 (congressional declaration of policy).

78. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533-34 (1973) (quoting 7 U.S.C. § 2011).

79. For example, Congress could advance the first purpose but not the second by purchasing surplus food products abroad. Congress could advance the second purpose but not the first by arranging for grain sales to the Soviet Union.

80. *Compare, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 633 (1969) ("We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures . . . . But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.") *with* Jefferson v. Hackney, 406 U.S. 535, 549 (1972) ("Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living.").

81. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature . . . made a decision motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one.").

82. McGinnis v. Royster, 410 U.S. 263, 276 (1973) ("[O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate. . . . So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying.").

the legislature's actions were irrational."[83]

The presence of more than one end at which a law is directed complicates analysis and renders it occasionally manipulable. Ironically, the existence of a second legislative purpose cuts both ways—it can be used to invalidate a law that is otherwise perfectly reasonable, and it can be used to save a law that might otherwise appear irrational. The different results depend on the court's focus. A classification may appear to be arbitrary as to one purpose, but be clearly related to another purpose. If the court focuses on the first purpose and ignores the second, the statute is more likely to be invalidated. For example, a statutory provision that excludes households of unrelated individuals from the Food Stamp program may appear to be arbitrary because the relationships of household members have nothing to do with the statute's stated purposes of stimulating the agricultural economy and improving personal nutrition.[84] If a court considers what was arguably the actual, unstated purpose of this particular amendment to the Food Stamp Act, however—the prevention of fraud—the exclusion appears far more relevant.[85] A court that chooses to focus only on the statute's stated purposes is likely to find the classification irrational.

The existence of a second purpose has been used, on the other hand, to explain and justify why a particular group was singled out in what seems to be an invidiously discriminatory manner. For example, when allocating a fixed pool of welfare money among numerous individuals with acknowledged need, why did the Texas legislature provide for 100% of need for the aged, 95% of need for the blind and disabled, but only 75% of need for Aid to Families with Dependent Children (AFDC) recipients?[86] Although it is appropriate to give effect to the state budgetary constraints, why were the AFDC recipients made to bear the brunt of the pain? The United States Supreme Court upheld the Texas welfare scheme on the grounds that "the State may have

83. Vance v. Bradley, 440 U.S. 93, 97 (1979) (emphasis added). For a discussion of the historical background of a legislative decision, see *infra* notes 185-90 and accompanying text.

84. United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

85. *Id.* at 546 (Rehnquist, J., dissenting) (stating that household of related persons "provides a guarantee which is not provided by households containing unrelated individuals that the household exists for some purpose other than to collect federal food stamps").

86. *See* Jefferson v. Hackney, 406 U.S. 535, 545 (1972) (state computed need of each group, aged, blind and disabled and AFDC, then paid out different levels of "recognized need" to each).

concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living."[87] The existence of this secondary concern helped the Court explain and justify what otherwise appeared to be a statutory discrimination.[88]

The multiplicity of legislative purposes and a court's ability to focus on one or another contribute to the unpredictability of court decisions. Ideally, courts should realize that "it is only in the context of the full statutory scheme that full meaning can be given to each legislative objective."[89]

D. *The Relevance of Legislative Purpose*

Even if legislative purpose is discoverable, there is a long-standing claim that such purpose is irrelevant.[90] The Supreme Court adopted this view in both *United States v. O'Brien*[91] and *Palmer v. Thompson*,[92] asserting respectively that "[i]nquiries into congressional motives or purposes are a hazardous matter"[93] and that a legislative act does not "violate equal protection solely because of the motivations of the men who voted for it."[94] These statements would be entitled to some weight if the Court itself paid any attention to them. The Court, however, has rejected the views expressed in *O'Brien* and *Palmer*, both expressly and in practice.

When the Court in *Washington v. Davis*[95] held that only purposeful racial discrimination violated the Equal Protection Clause, it expressly explained in a footnote that *Palmer* was inconsistent with both prior and subsequent cases.[96] In practice, the

87. *Id.* at 549.

88. *See also* Vance v. Bradley, 440 U.S. 93, 109 (1979) (accepting imperfection in achievement of government's primary objective—maintaining competence of Foreign Service—because imperfection was rationally related to secondary objective—legislative convenience).

89. Note, *Legislative Purpose, Rationality, and Equal Protection*, *supra* note 1, at 127.

90. *See, e.g.*, Radin, *supra* note 6, at 872 ("A legislative intent, undiscoverable in fact, irrelevant if it were discovered, is the last residuum of our 'golden rule.' It is a queerly amorphous piece of slag. Are we really reduced to such shifts that we must fashion masters and endow them with imaginations in order to understand statutes?").

91. 391 U.S. 367 (1968).

92. 403 U.S. 217 (1971).

93. *O'Brien*, 391 U.S. at 383.

94. *Palmer*, 403 U.S. at 224.

95. 426 U.S. 229 (1976).

96. *Id.* at 244 n.11. The footnote reads:

To the extent that *Palmer* suggests a generally applicable proposition

Court has rejected *O'Brien* and *Palmer* by insisting that purpose is precisely what matters under the Establishment Clause of the First Amendment,[97] the Commerce Clause[98] and Article IV's Privileges and Immunities Clause,[99] in addition to the Equal Protection Clause, as stated in *Davis*. Although the difficulties with the idea of legislative purpose are substantial, it is clear that it is relevant to constitutional adjudication.

We can try to explain away the reach of *O'Brien* and *Palmer*. The two cases can be seen as setting forth the noncontroversial claim that the motives of individual legislators are, in themselves, not relevant to equal protection analysis.[100] This limitation would not prevent a court from reviewing the purpose of the legislature—the end at which the law aims—and considering individual motives as some weak evidence of this purpose. One problem with this view of the cases is that, although it is consistent with the Court's subsequent holdings, it suggests that *O'Brien* and *Palmer* themselves reached the wrong result. In *O'Brien*, for example, the Court had evidence before it that the objective end at which the law aimed was the impermissible purpose of suppressing free speech.[101] Similarly, the historic background and sequence of

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> that legislative purpose is irrelevant in constitutional adjudication, our prior cases—as indicated in the text—are to the contrary; and very shortly after *Palmer*, all members of the Court majority in that case joined the Court's opinion in Lemon v. Kurtzman, which dealt with the issue of public financing for private schools and which announced, as the Court had several times before, that the validity of public aid to church-related schools includes close inquiry into the purpose of the challenged statute.

Id. (citation omitted).

97. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("[T]he statute must have a secular legislative purpose . . . .").

98. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669-71 (1981) (discussing whether purpose of state was promotion of safety (permissible) or discouragement of interstate truck traffic (impermissible)).

99. *See, e.g.*, Toomer v. Witsell, 334 U.S. 385, 396 (1948) (Privileges and Immunities Clause bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States").

100. For a discussion of the motives of individual legislators, see *supra* notes 50-68 and accompanying text.

101. *See* United States v. O'Brien, 391 U.S. 367, 387 (1968). The Court, per Chief Justice Warren, stated:

> The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies. . . . The House Committee . . . is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individu-

events leading to the pool closings in *Palmer* might readily have been viewed as clear evidence of an objectively impermissible end—purposeful discrimination against blacks.[102]

Notwithstanding the broad but overstated language of *O'Brien* and *Palmer*, the Supreme Court does not consider the concept of legislative purpose to be irrelevant. The Court continues to determine the constitutional validity of statutes by reference to their purpose.

E. *Summary*

The notion of legislative purpose—the end at which a law aims—is a coherent, relevant and significant component of constitutional analysis. Notwithstanding the criticisms of the notion, the concept of legislative purpose does a significant amount of constitutional work. Even if it is conceded, however, that legislative purpose is a significant idea in the abstract, courts need some practical guidance concerning the means by which to identify particular legislative purposes. The next part of this Article examines the difficulties in identifying legislative purpose.

III. IDENTIFYING LEGISLATIVE PURPOSE

A. *Actual Purpose or Hypothetical Purpose*

Rationality review requires that a classification be rationally related to a permissible legislative purpose. Whenever a court chooses to hypothesize what purposes the legislature might have considered, the statute will be upheld.[103] When a court chooses to determine the actual purpose of a law, on the other hand, the statute is frequently invalidated.[104] As a result, "actual purpose" review often turns out to be deferential in theory, but fatal in fact.[105]

Traditional, deferential rationality review provides for an extensive amount of hypothesizing. "The court may . . . hypothe-

als openly defy and encourage others to defy the authority of the Government by destroying or mutilating their draft cards.

Id. (quoting S. REP. No. 589, 89th Cong., 1st Sess. 1-2 (1965); H.R. REP. No. 747, 89th Cong., 1st Sess. 1-2 (1965)).

102. *See* Palmer v. Thompson, 403 U.S. 217, 218-19 (1971).

103. *Cf.* Gerald Gunther, *Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (referring to "deferential 'old' equal protection . . . with minimal scrutiny in theory and virtually none in fact" (footnote omitted)).

104. *Id.* (referring to "aggressive 'new' equal protection with scrutiny that was 'strict' in theory and fatal in fact").

105. *See id.*

size the motivations of the . . . legislature to find a legitimate objective promoted by the provision under attack."[106] Actual evidence of legislative purpose is irrelevant.[107] Rather, identification of purpose is a purely intellectual exercise, limited only by the imagination of the court and the imaginations of the government attorneys on whom the court sometimes relies to fashion a purpose.[108]

The traditional statement of this view is that a court will uphold a classification "if any state of facts reasonably may be conceived to justify it."[109] So long as plausible reasons for legislative action have been hypothesized, the court's "inquiry is at an end."[110] The court need not inquire into and the legislature "need not articulate its reasons for enacting a statute."[111]

To the extent the standard just articulated is the one actually applied, then rationality review does not really constitute any review at all.[112] If legislative purposes can be arbitrarily hypothesized, then no law can fail the test. For even the most egregiously discriminatory laws, a legislative purpose promoting the public good can be hypothesized and the review is at end.[113]

Not all the members of the United States Supreme Court agree, however, with the standard just articulated. In *Schweiker v.*

106. Malmed v. Thornburgh, 621 F.2d 565, 569 (3d Cir.) (citing Weinberger v. Salfi, 422 U.S. 603, 612 (1960) and Williamson v. Lee Optical Inc., 348 U.S. 483, 487-90 (1955)), *cert. denied*, 449 U.S. 955 (1980).

107. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 612 (1960) (stating that it is not constitutionally relevant whether purported legislative purpose was in fact "reasoning [which] underlay the legislative decision").

108. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting) ("The Court analyzes the rationality of § 231 b(h) in terms of a justification suggested by government attorneys, but never adopted by Congress."); *see also* Schweiker v. Wilson, 450 U.S. 221, 244 (1981) (Powell, J., dissenting) ("When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence.").

109. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 426 (1961) (state statute which allowed only certain merchants to be open on Sundays not violative of equal protection where "legislature could reasonably find that the Sunday sale of exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day").

110. *Fritz*, 449 U.S. at 179 (equal protection inquiry ends where "there are plausible reasons for Congress' action").

111. *Id.*

112. If a court is free to assume facts necessary to justify legislation, it has broad authority to conceive that the very same state of facts exists. *See, e.g.*, *McGowan*, 366 U.S. at 426 ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

113. *See Fritz*, 449 U.S. at 179.

Wilson,[114] for example, four dissenting Justices rejected the view that the actual purpose of a law is irrelevant. The dissenters conceded that a clear legislative statement of purpose in the statute or legislative history was entitled to substantial deference but that nonetheless, "[a]scertainment of actual purpose to the extent feasible remains an essential step in equal protection."[115]

Justice Stevens has attempted to stake out a middle ground between the extreme deference of hypothesizing purposes and the more assertive demand for actual purpose. In his view, there must be a correlation between the classification and "either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislature."[116] Justice Stevens would limit traditional deference by adopting what may be labeled a "reasonably presumable purpose" test.[117] He would not credit farfetched claims of what the legislature *might* have considered.[118]

On several occasions, the Supreme Court decided cases by looking to the actual purpose of a challenged statute and finding the ascertained purpose to be impermissible.[119] In *City of Cleburne v. Cleburne Living Center, Inc.*,[120] the Court rejected a number of asserted purposes, all of which were at least "conceivable," and refused to hypothesize on its own what *might have* influenced the government defendant. Instead, the Court found that the actual purpose of a zoning permit denial was to give effect to an irrational prejudice against the mentally retarded, an impermissible purpose.[121] Similarly, in *United States Department of Agriculture v.*

114. 450 U.S. 221 (1981).

115. *Id.* at 244 n.6 (Powell, J., dissenting).

116. *Fritz*, 449 U.S. at 181 (Stevens, J., concurring) (criticizing use of merely "plausible" purposes, but equally critical of undue emphasis on actual purposes).

117. *Id.* (Stevens, J., concurring).

118. *Id.* (Stevens, J., concurring).

119. *See* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (promoting domestic business by discriminating against nonresidents is not legitimate purpose); *see also* Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (finding statute that singled out previous residents for tax exemption did not further legitimate state purpose); Williams v. Vermont, 472 U.S. 14 (1985) (giving tax exemption to residents, but not to nonresidents, did not further legitimate purpose); Zobel v. Williams, 457 U.S. 55 (1982) (apportioning benefits on basis of length of residence did not further legitimate state purpose).

120. 473 U.S. 432 (1985).

121. *Id.* at 450 (state action in denying special use permit to home for mentally handicapped, while not imposing same restriction on similar uses such as apartment houses and hospitals, is evidence of impermissible legislative objective).

Moreno,[122] the Court refused to credit the asserted purpose of preventing fraud and made no attempt to hypothesize a legitimate purpose. It instead found that the actual purpose of the challenged amendment was the impermissible goal of preventing "hippie communes" from participating in the food stamp program.[123] The Court has, therefore, on occasion rejected the traditional, deferential version of rationality review and instead searched for the actual purpose of governmental action.

B. *Proving Actual Purpose*

If equal protection only demands a rational relationship between a classification and a hypothesized purpose, then specific evidence of actual legislative purpose is irrelevant.[124] When, however, a court interprets the rationality standard to require proof of actual purpose, then that court must determine what evidence is probative to its determination and how much weight should be given to any particular type of evidence. The Supreme Court has found several different kinds of evidence to be relevant to the proof of actual purpose.

1. *Statutory Statements of Purpose*

The legislature may announce the purpose of a law in the officially adopted statutory language.[125] For example, when the Minnesota legislature banned the retail sale of milk in plastic containers, the statute itself stated that its purposes included reducing solid waste, conserving energy and promoting resource conservation.[126] When the Alaska legislature adopted a plan to distribute a percentage of oil revenues to residents, the statute announced that its purposes were to provide an equitable distri-

122. 413 U.S. 528 (1973) (denying federal assistance to unrelated individuals living in single household while allowing assistance to related individuals in single household is violative of due process).

123. *Id.* at 534-35.

124. *See* Mahone v. Addicks Util. Dist., 836 F.2d 921, 936 (5th Cir. 1988) ("[T]he task of hypothesizing necessarily renders less important the actual reasons which the state may have had for making the challenged classification. . . . [T]ruth is not the issue.").

125. *See, e.g.*, Crawford v. Board of Educ., 458 U.S. 527, 545 (1982) ("The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory objectives."); *see also* Johnson v. Robison, 415 U.S. 361, 376 (1974) ("Unlike many state and federal statutes that come before us, Congress in this statute has responsibly revealed its express legislative objectives in § 1651 of the Act and no other objective is claimed.").

126. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 458-59 (1981) (quoting MINN. STAT. § 116F.21 (1978) (repealed 1981)).

bution of the state's energy wealth, to encourage persons to establish and maintain residence in Alaska and to encourage prudent management of the permanent fund.[127]

In rational basis cases, the Supreme Court is deferential to such explicit statutory statements of purpose. "[T]his Court will assume that the objectives articulated by the legislature are the actual purposes of the statute unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.' "[128]

Under rational basis review, this deference to the legislative articulation of purpose is sufficiently strong to withstand even factual evidence to the contrary.[129] In *Minnesota v. Clover Leaf Creamery Co.*,[130] for example, the Court relied on the purposes articulated in the statute, notwithstanding the fact that the trial court had found the actual purpose of the law to be quite different than the articulated purpose.[131]

Statutory statements of purpose are strong evidence of legislative purpose. They cannot, however, be given conclusive weight.[132] A judicial attitude of extreme deference to statutory statements of purpose would have the effect of encouraging legislatures to dissemble about the purpose of a law.[133] A legislature so inclined can clothe even the most pernicious statute in the garment of broad-minded public purpose. A statute designed to

127. *See* Zobel v. Williams, 457 U.S. 55, 61 n.7 (1982).

128. *Clover Leaf Creamery*, 449 U.S. at 463 n.7 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975)).

129. *See, e.g.*, Vance v. Bradley, 440 U.S. 93, 111 (1979) ("In an equal protection case . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.").

130. 449 U.S. 456 (1981).

131. *Id.* at 460. The statute identified environmental concerns as the purpose of the law; the trial court, however, found that the actual purpose was to promote the economic interests of certain segments of an industry at the expense of others. *Id.* at 460-61.

132. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) ("But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.").

133. *See* Linde, *supra* note 1, at 231. Linde stated:

> Pursued into the legislative process, the hope for candor is more likely to produce hypocrisy. Recitals of findings and purposes are the task of anonymous draftsmen, committee staffs, and counsel for interested parties, not legislators. Such recitals will be an attempt to provide whatever, under prevailing case law, is expected to satisfy a court.

Id.

promote racism can be camouflaged as enacted to protect the peace.[134] A statute adopted to advance the interests of optometrists over opticians can be portrayed as enacted to protect consumers.[135]

The Supreme Court has been less deferential towards the articulated purposes of legislation that potentially violates the First Amendment's Establishment Clause. In such cases, the Court has rejected statutory statements of purpose and invalidated statutes on the ground that they were not in fact adopted to promote their stated purposes. Specifically, the Court found in *Edwards v. Aguillard*[136] that a statute designed by its terms to promote academic freedom was in fact an unconstitutional attempt to promote religion.[137] Similarly, in *Stone v. Graham*[138] the Court found that the purpose of a law requiring the posting of the Ten Commandments was the promotion of religion.[139] It rejected the law's stated purpose, which was to provide for instruction in a fundamental legal code.[140]

Although statutory statements of purpose can be misleading, they remain the best evidence of legislative purpose. In rational basis cases, courts ordinarily accord such statements the greatest deference. Where statutory statements of purpose are lacking, courts look to alternative sources of evidence. The next section examines the value of legislative history as an alternative source of evidence.

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134. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917) (holding that city ordinance prohibiting blacks from purchasing homes in white neighborhoods violates equal protection in spite of stated purpose to diminish miscegenation and promote public peace).

135. *Compare* Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (finding legislature might have concluded that statute would protect health and welfare of general public by assuring proper examination for, and fitting of, eyeglasses) *with* Richard A. Posner, *The Defunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 29 (arguing that it was "almost certainly the case . . . [that] the true purpose of the statute in *Lee Optical* was to protect the optometrists from competition").

136. 482 U.S. 578 (1987).

137. *Id.* at 589.

138. 449 U.S. 39 (1980).

139. *Id.* at 42 ("If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments.").

140. *Id.* at 41 ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." (footnote omitted)).

2. *Legislative History*

The United States Supreme Court has considered three types of evidence, grouped together under the classification of legislative history, in an effort to ascertain legislature purpose: (1) the official committee reports; (2) the debate on the legislative floor; and (3) subsequent statements of individual legislators.

a. Committee Reports

After the statute itself, the committee report is the next best source of information on statutory purpose. The reports are considered "authoritative."[141] Additionally, courts frequently rely on such reports.[142] Because legislators do not vote on committee reports, it seems that the reports should be accorded less weight than statutory statements of purpose. On the other hand, as "the considered and collective understanding of those [legislators] involved in drafting and studying proposed legislation,"[143] they cannot reasonably be ignored.

Currently, Justice Scalia is the leading proponent of a contrary view. He believes that committee reports are entitled to little weight.[144] Justice Scalia bases his claim on the grounds that the reports are written by committee staff, not by legislators, and that legislators rarely are familiar with the contents of such reports.[145] Furthermore, Justice Scalia states that committee re-

141. *See* United States v. O'Brien, 391 U.S. 367, 385 (1968) (terming reports of Senate and House Armed Services Committees more "authoritative" than statements made by three Congressmen during limited floor debate on bill).

142. *See, e.g.*, Lyng v. International Union, UAW, 485 U.S. 360, 371 (1988) (citing Senate Committee Report as evidence that purpose of statute was avoiding undue favoritism to one side or other in private labor disputes); *see also* Schweiker v. Wilson, 450 U.S. 221, 235 (1981) (citing committee reports as "clear expression of Congress' understanding"); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 185 n.3 (1980) (Brennan, J., dissenting) (citing Senate and House Reports to demonstrate that purpose of law was to preserve vested rights).

143. Garcia v. United States, 469 U.S. 70, 76 (1984) (quoting Zuber v. Allen, 369 U.S. 168, 186 (1969)). "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' " *Id.*

144. *See* Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring) (criticizing Court's reference to document issued by "single committee of a single house as the action *of Congress* [because it] displays the level of unreality that our unrestrained use of legislative history has attained" (emphasis added)).

145. *Id.* (Scalia, J., concurring) ("I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question . . . .").

ports are written to influence the courts rather than to inform the legislators.[146] Others claim that the reports are sometimes the result of capture by special interests, used to accomplish covertly what the proponents of a point of view could not accomplish on the legislative floor.[147]

Two recent law review articles have questioned Justice Scalia's arguments and found his textualist, "four corners" rule of statutory interpretation wanting.[148] As stated in one article, "Justice Scalia and his followers indulge in some doubtful factual assumptions."[149] The second article opined that Justice Scalia's implicit vision of legislators drafting and poring over the text of a bill, while ignoring the committee reports, "may accord little with the reality of the legislative process."[150] Typically, legislators draft the text of legislation no more than they draft the committee report. Furthermore, as most law students will attest, frequently the quickest way to grasp what a proposed law will accomplish is to read the committee report, not to crawl through the thicket of technical statutory language.[151] It would thus be surprising if legislators did not read the committee reports at least as often as they read the text of the statute.

Justice Scalia is correct in asserting that the use of legislative history has been abused on occasion.[152] If his other assertions were modified, they would be more meritorious. The courts, however, continue to rely extensively on committee reports as substantial evidence of legislative purpose.[153]

b. Debate on the Legislative Floor

A second form of legislative history is the record of floor debate. This is composed of the statements of individual legislators, often including their vocalized understanding of the purpose of a

146. *Id.* at 98-99 (Scalia, J., concurring).

147. *See* Farber & Frickey, *supra* note 52, at 444.

148. Farber & Frickey, *supra* note 52; *see also* Zeppos, *supra* note 49.

149. Farber & Frickey, *supra* note 52, at 445.

150. Zeppos, *supra* note 49, at 1311.

151. *Cf.* Farber & Frickey, *supra* note 52, at 445 ("[A]ccording to a principal study of congressional policymaking procedures, legislators outside the committee and their staffs focus primarily on the report, not the bill itself.").

152. *See, e.g.*, Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring). In *Wallace*, the majority cited legislative history at length. *See id.* at 1543-52. Judge Kozinski objected: "The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is." *Id.* at 1559 (Kozinski, J., concurring).

153. *See, e.g., id.* at 1545-46.

bill under consideration.[154]

In comparison to the two types of evidence of legislative purpose already considered—statutory statements of purpose and committee reports—statements by individual legislators are the least reliable. Statements from the floor represent the motivations of individual legislators.[155] As a result, the statements vary greatly and are often contradictory.[156] Additionally, only a small percentage of legislators casting votes typically explain for the record the reasons for their vote.[157] It is thus arbitrary to give weight only to those views that were saved in the legislative record.[158] For these reasons, the Court often "eschew[s] reliance on the passing comments of one Member . . . and casual statements from floor debates."[159]

As a general matter, however, the Court has occasionally considered the contemporary statements of individual legislators as relevant to the issue of legislative purpose.[160] This is most

154. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 (1977) ("The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body . . . .").

155. *See* South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1262 (4th Cir. 1989) ("It is axiomatic that if motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of valuable members, that is relevant." (citing Aldridge v. Williams, 44 U.S. 9, 24 (1845)).

156. For a discussion of the diversity in motivations of individual legislators, see *supra* note 50 and accompanying text.

157. *See, e.g.*, *South Carolina Educ. Ass'n*, 883 F.2d at 1262 (noting that legislative record is often silent as to whether views of legislators actually reflect sentiments of legislature as whole; stating that "legislative history is manifestly sparse and contradictory").

158. *Id.* at 1261 ("It is manifestly impossible to determine with certainty the motivation of a legislative body by resorting to the utterances of individual members thereof . . . since there is no way of knowing why those, who did not speak, may have supported or opposed the legislation." (footnote omitted)). *But see* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 527 (1982) (absent committee reports, statements by Senator made on day amendment was passed are "only authoritative indications of congressional intent").

159. Garcia v. United States, 469 U.S. 70, 76 (1984) (citing Weinberger v. Rossi, 456 U.S. 25, 35 (1982), Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) and United States v. O'Brien, 391 U.S. 367, 385 (1968)); *see also* Aldrige v. Williams, 44 U.S. 9, 23 (1845) ("[T]he judgment of the court cannot . . . be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered.").

160. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 (1977) (contemporary statements make legislative history "highly relevant"); *see also North Haven Bd. of Educ.*, 456 U.S. at 526-27 ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction."). *But see In re* Carlson, 292 F. Supp. 778, 783 (C.D. Cal. 1968) ("In the course of oral argument on the

likely to be the case when an amendment is first considered on the legislative floor, without committee reports.[161] For example, when reviewing an amendment to the Food Stamp Act that denied food stamps to households of unrelated individuals, the Court determined that its purpose was to harm hippie communes.[162] The evidence adduced to support this claim was a statement by Senator Holland recorded in the Congressional Record.[163] In a similar vein, when reviewing an Alabama state constitutional provision that disenfranchised persons convicted of crimes involving moral turpitude, the Court cited the opening address by the president of the constitutional convention as evidence that the purpose of the provision was to establish white supremacy.[164]

The statements of individual legislators, made in the course of legislative debate, are thus occasionally relevant to the issue of legislative purpose. Because these statements are selective and sometimes contradictory, however, their relevance is quite limited. The next section of this Article examines the even more limited relevance of statements made by individual legislators *after* the enactment of a law.

c. Subsequent Statements of Individual Legislators

Although it may sometimes be appropriate to consider statements made during the legislative debate, subsequent statements of individual legislators are far less relevant. "Inquiry into the

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Senate Floor, the choice of words by a Senator is not always accurate or exact. For this reason, courts have held that statements in debate are not a proper measure of the contents of a statute."), *aff'd*, 423 F.2d 714 (9th Cir.), *cert. denied*, 400 U.S. 819 (1970); *see also In re* Kelly, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely.").

161. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (after finding, "regrettably," little legislative history to illuminate the purpose of statutory amendment, Court considered statement of Senator Holland); *see also* Murphy v. Empire of Am., FSA, 746 F.2d 931, 935 (2d Cir. 1984) (labeling isolated remarks of representatives as entitled to "little or no weight" except when there is no legislative history or enactment).

162. *Moreno*, 413 U.S. at 534 ("The legislative history . . . indicates that that amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program.").

163. *Id.*

164. Hunter v. Underwood, 471 U.S. 222, 229 (1985) (evidence that constitutional provision was designed to disenfranchise blacks came from testimony and opinion of historians and record of statements made at convention).

mental process of decisionmakers usually is to be avoided."[165] Only "[i]n some extraordinary circumstances the members might be called to the stand at trial to testify concerning the purpose of the official action."[166] Such testimony will frequently be barred by the doctrine of privilege.[167] It may also represent an unwarranted invasion by the courts into the separate powers of the legislative branch of government.[168] It will thus be exceedingly rare that a legislator will ever be called on to testify in court to explain why she voted one way or another.

As with the consideration of statements in floor debates, there are exceptions to the general prohibition. For example, in *Wallace v. Jaffree*[169] the Court considered the constitutionality of three Alabama statutory provisions that provided for a period of silence for meditation or voluntary prayer in public schools. At issue was whether or not the statute had a secular purpose.[170] The Court found that the statute's purpose was to return voluntary prayer to the public schools.[171] As evidence of this purpose, the Court cited two statements by the bill's sponsor, one in the

165. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (citing United States v. Morgan, 313 U.S. 409, 422 (1941)).

166. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268 (1977) (remarking that legislative or administrative history "may be highly relevant . . . where there are contemporary statements by members of the decisionmaking body").

167. *Id.*; *see also* Tenney v. Brandhove, 341 U.S. 367 (1951). "The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has tap roots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Id.* at 372. The *Tenney* Court continued: "The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* at 377.

168. *See, e.g.*, South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251 (4th Cir. 1989). The *Campbell* court stated:

> Such an inquiry is inimical to the independence of the legislative branch and inconsistent with the constitutional separation of powers. Moreover, probing inquiries by federal courts into the motivations of legislators by calling representatives to testify concerning their motivations and those of their colleagues will doubtlessly have a chilling effect on the legislative process.

Id. at 1262.

169. 472 U.S. 38 (1985) (states have no greater power to interfere with freedom of religion than federal government).

170. *Id.* at 40. One statute authorized a one-minute period of silence in all public schools "for meditation." *Id.* (citing ALA. CODE § 16-1-20 (Supp. 1984)). A second statute authorized a period of silence "for meditation," and the third statute allowed teachers to lead "willing students" in a pre-written prayer to "Almighty God . . . the Creator and Supreme Judge of the world." *Id.* (citing ALA. CODE § 16-1-20.1 to -20.2).

171. *Id.* at 57-58 (referring to "wholly religious" character of statutes).

legislative record *and* one in the trial court at an evidentiary hearing on a motion for a preliminary injunction.[172] Justice O'Connor, in concurrence, was troubled by the denigration of "an express secular purpose due to postenactment testimony by particular legislators."[173]

Courts should be wary of post-enactment statements of legislators about legislative purpose, both because they are not particularly good evidence and because the use of such statements may infringe on the required separation of judicial and legislative functions. The next section examines an alternative, less direct kind of evidence—the effects of a law.

3. *Effects*

Sometimes, the best evidence of legislative purpose comes not from the statements of the legislature, individually or collectively, about what they were trying to do, but rather from the actual impact of the law itself. Although it is improper to collapse purpose into effect, the effects of a law are an important starting point in identifying its purpose.[174] Effects can be identified objectively, without necessitating the psychoanalysis of the legislature collectively or legislators individually.[175] Consequently, the Supreme Court has approved the use of a statute's effect as evidence of its purpose.[176]

Consider the Alabama statute that changed the city boundaries of Tuskegee from a square to a "strangely irregular twenty-eight sided figure."[177] There was no direct evidence of legislative purpose.[178] The alleged effect of the unusually-shaped diagram, however, was to remove from the voting district virtually all of the

172. *Id.* at 43, 56-57.

173. *Id.* at 75 (O'Connor, J., concurring).

174. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (in determining if legislation had discriminatory purpose, evidence of discriminatory impact provides "[a]n important starting point").

175. For example, in a discrimination case the result—reduced benefits to the burdened party—may be evidence of an intent to discriminate against the burdened party.

176. *See Arlington Heights*, 429 U.S. at 266; *see also* Washington v. Davis, 426 U.S. 229, 242 (1976) ("[D]iscriminatory purpose may often be inferred from the totality of relevant facts, including . . . that the law bears more heavily on one race.").

177. Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (district court erred in dismissing complaint since allegations, if proven, would establish that inevitable effect of act was to deprive blacks of right to vote).

178. *See id.* at 342.

city's black voters but not a single white voter.[179] The Supreme Court had no trouble in determining that if the facts alleged were proven, then the purpose of the law was to deprive black voters of their municipal vote.[180]

The effects of a law, while evidence of purpose and an important starting point, are not conclusive.[181] The Court has made it clear that the foreseeability of certain consequences does not in itself make the achievement of those consequences the purpose of the law.[182] To demonstrate purpose, it must be shown that a legislature acted at least in part "because of" and not merely "in spite of" the specific effects of a law.[183] Thus, even though the Massachusetts legislature must have been aware that an absolute hiring preference for veterans would have an adverse impact on women, that evidence did not demonstrate that the purpose of the law was to discriminate against women.[184]

Therefore, the effects of a statute are relevant to the issue of legislative purpose, and, in extreme cases, can be sufficient evidence of that purpose. More commonly, however, the effects of a law are only a statutory point of analysis, and are insufficient without supporting evidence to prove legislative purpose. The next section examines one of those other kinds of evidence—the historical background that underlies a legislative enactment.

4. *Historical Background*

The historical background of a legislative decision is another source of evidence of legislative purpose, "particularly if it reveals

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179. *Id.* at 341.

180. *Id.* Specifically, the Court stated:

> If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

Id.

181. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination.").

182. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 277-78 (1979) (holding that state did not discriminate against women even though statute's effects generally favored men).

183. *Id.* at 279.

184. *Id.* ("[N]othing in the record demonstrates that [a] preference for veterans [operating against women] would accomplish the collateral goal of keeping women in a stereotyped and predefined place in the Massachusetts Civil Service.").

a series of official actions taken for invidious purposes."[185] In *Hunter v. Underwood*,[186] the United States Supreme Court looked at the historical background of a statute that disenfranchised persons convicted of any crime involving moral turpitude. Although the statute was racially neutral on its face, the Court was able to filter out its true purpose—the disenfranchisement of blacks—by reviewing the history of the convention at which it was adopted.[187] That convention, the Court explained, was "part of a movement that swept the post-Reconstruction South to disenfranchise blacks."[188] In an analogous setting, the Court found that the historical background of school board decisions is to be considered as evidence of the school board's purpose.[189]

The evidence of historical background puts legislative actions in context and thus can help to explain why a law was adopted. Courts do not seem to use this evidence frequently, however, as an aid in identifying legislative purpose. "Historical background" may be too open-ended and vague a concept for lawyers and judges, who will not ordinarily be professional historians as well.[190] The next section examines evidence of events occurring much closer in time and more obviously related to the enactment of a law.

5. *Specific Sequence of Events*

The specific sequence of events leading up to a legislative enactment may also be relevant as proof of legislative purpose.[191] For example, where an area has for years been zoned to allow for multiple-unit housing, a sudden change to single-family zoning would be suspicious if the zoning board acts as soon as it learns of plans to build integrated housing.[192]

185. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (citing Lane v. Wilson, 307 U.S. 268 (1939)).

186. 471 U.S. 222 (1985).

187. *Id.* at 229 ("The evidence of legislative intent available to the courts below consisted of the proceedings of the convention, several historical studies, and the testimony of two expert historians.").

188. *Id.*

189. Keyes v. School Dist. No. 1, 413 U.S. 189, 207 (1973) ("Evidence that similar and related offenses were committed . . . tend[s] to show a consistent pattern of conduct highly relevant to the issue of intent." (alteration in original) (quoting Nye & Nissen v. United States, 336 U.S. 613, 618 (1949))).

190. *But see Hunter*, 471 U.S. at 228-29 (considering testimony and opinions of historians on issue of purpose of Alabama statute).

191. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977).

192. *Id.*

In another case, a plurality of the Court used the sequence of events surrounding passage of the legislation in question to determine legislative purpose.[193] The Iowa legislation barred the use of trucks longer than sixty feet on Iowa's interstate highways, but provided an exemption for border cities.[194] When the law was challenged, the state argued that its purpose was public safety.[195] The Court, however, looked at the events leading to enactment of the law.[196] The legislature had originally passed a law that would have permitted sixty-five foot double trucks.[197] The governor vetoed the bill on the ground that it "would benefit only a few Iowa-based companies while providing a great advantage for out-of-state trucking firms."[198] The legislature then enacted the sixty foot limitation with the exemption for border cities.[199] The Court used this sequence of events to determine that the purpose of the law was to discourage interstate truck traffic from Iowa's highways.[200]

The events that caused a legislature to turn its attention to a particular problem will thus sometimes frame the law in its appropriate context. This immediate context is relevant to the issue of legislative purpose. The next section examines a more difficult kind of evidence—the "reject all plausible alternatives" form of proving legislative purpose.

6. *Demanding a Justification: Why Was This Particular Group Singled Out?*

Even when legislation fails to address all the potential roots of a problem, the Court generally acts with deference and does not find discriminatory classification. Ordinarily, a legislature, when addressing itself to a problem, may deal with it "one step at a time."[201] "The legislature may select one phase of one field and

193. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 676-78 (1981) (plurality opinion).

194. *Id.* at 666-67.

195. *Id.* at 667 (law defended as "reasonable safety measure enacted pursuant to [state's] police power").

196. *Id.*

197. *Id.* at 677.

198. *Id.*

199. *Id.* The Court then adopted the court of appeals' conclusion "that a State cannot constitutionally promote its own parochial interests by requiring safe vehicles to detour around it." *Id.* at 678 (citing Kassel v. Consolidated Freightways Corp., 612 F.2d 1064, 1070 (8th Cir. 1979), *aff'd*, 450 U.S. 662 (1981)).

200. *Id.* at 677-78.

201. Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955).

apply a remedy there, neglecting the others."[202] Thus, the Minnesota legislature, concerned about environmental and energy problems, can prohibit plastic milk containers but not paper containers, even if both containers are substantially similar in relation to the legislature's environmental and energy goals.[203] The legislature need not decide between banning *all* environmentally harmful containers and not banning any at all.[204] Presumably, the Minnesota legislature will take the "second step" at a later time, but equal protection does not require it to do so.[205]

Occasionally, however, the Court will inquire further and ask whether selective impact is in fact evidence of another, less defensible, purpose.[206] Where, for example, the government defends a law on the basis of several somewhat vague and innocuous purposes, but is unable to explain why a particular group has been singled out to bear the entire burden of a law, a suspicion arises that the purpose of the law may bear some relation to the group singled out.[207]

The Court examined a series of such purported justifications in *City of Cleburne v. Cleburne Living Center, Inc.*[208] In *Cleburne*, a zoning ordinance required that the city issue a special use permit before anyone could operate a group home for the mentally retarded.[209] The city explained that the purposes of the ordinance included, *inter alia*, avoiding concentration of population, lessening congestion in the streets, limiting the number of people who would occupy a home and protecting against the dangers of building on a flood plain.[210]

The Court rejected each of the purported justifications. If those considerations did in fact underlie the ordinance, then why

202. *Id.* (citing AFL v. American Sash & Door Co., 335 U.S. 538 (1949)).

203. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463-66 (1981) (no requirement that legislation "strike at all evils at the same time or in the same way" (quoting Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610 (1935))).

204. *Id.* at 466.

205. *Id.*

206. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305 (1966) (statute, which applied only to incarcerated appellants, requiring appellant to pay cost of transcript necessary for appeal, constituted invidious discrimination).

207. *See* Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1114 (1978). Professor Simon calls this use of rationality review the "flushing out" of real motivation. *Id.*

208. 473 U.S. 432 (1985).

209. *Id.* at 436 (issue arose when group home operator applied for and was denied special permit).

210. *Id.* at 449-50.

did the city not require special use permits for nursing homes, sanitariums, hospitals, boarding homes or fraternity houses?[211] The Court found that all of these facilities were just as likely to cause congestion and overcrowding, and to create flood hazards as would a home for the mentally retarded.[212] The mentally retarded were no different in any relevant way from those whose uses of property were unregulated.[213] The fact that the mentally retarded had been singled out to bear the entire burden of the law led the Court to conclude that the underlying purpose of the statute had nothing to do with the asserted concerns.[214] Rather, the Court found that the ordinance rested "on an irrational prejudice against the mentally retarded."[215] This prejudice reflected "a bare desire to treat the mentally retarded as outsiders, pariahs who do not belong in the community."[216]

The Court's evidentiary approach to legislative purpose in *Cleburne* might be called the "reject all plausible alternatives" approach. The Court had no direct evidence before it that the purpose of the zoning ordinance was discrimination against the mentally retarded (other than the requirement of the ordinance itself that a special permit be issued). The absence of any plausible, legitimate purpose, however, combined with the singling out of the retarded, was sufficient evidence of impermissible purpose.

7. *Summary*

Once the courts have decided that the actual, rather than the hypothetical, purpose of a law is significant, then they must consider actual evidence of that purpose. This subpart of the Article has examined the different types of, and the different weight accorded to, evidence of actual legislative purpose.

C. *Burdens of Proof*

1. *Proving a Case Under the Deferential Version of Rationality Review*

The deferential version of rationality review begins with a

211. *Id.* at 447 (zoning restrictions were only applicable to homes "for the insane or feebleminded or alcoholics or drug addicts").

212. *Id.* at 449-50.

213. *Id.* at 448 (finding that home for mentally retarded would not "threaten legitimate interests of the city in a way that other permitted uses . . . would not").

214. *Id.*

215. *Id.* at 450.

216. *Id.* at 473 (Marshall, J., concurring in part and dissenting in part).

presumption that statutes are constitutional.[217] A plaintiff "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[218] The government defendant, however, need not offer any empirical proof in defense of the legislative judgment.[219]

Although the challenging plaintiff may offer evidence, a plaintiff will not prevail simply by proving that the legislature was wrong.[220] In *Vance v. Bradley*,[221] for example, the plaintiffs challenged a law that required foreign service officers to retire at age sixty.[222] The Court explained that the government did not have to offer empirical proof that health and energy tend to decline by age sixty.[223] Furthermore, the plaintiffs could not prevail simply by showing that health and energy did *not* decline at age sixty. Their burden was to prove that no legislature could reasonably have believed this to be true.[224]

When courts apply the rationality standard in this extremely deferential way, a complaint cannot be drafted that will survive a motion to dismiss. A plaintiff would have to "hypothesize all conceivable justifications for a statutory classification and then prove that no legislative body could 'rationally have believed' that the classification served [any of] the hypothesized purpose[s]."[225] This burden is insurmountable.

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217. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (statute requiring uniformed state police officer to retire at age 50 did not deny equal protection of law; "[s]uch action by a legislature is presumed to be valid").

218. Vance v. Bradley, 440 U.S. 93, 111 (1979) (citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911)).

219. *Id.* at 110 n.28 ("The State is not compelled to verify logical assumptions with statistical evidence." (quoting Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 812 (1976))).

220. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463-64 (1981) (plaintiffs must convince courts that facts assumed by legislature could not conceivably be true).

221. 440 U.S. 93 (1979).

222. *Id.* at 94-95 (no mandatory retirement age existed for civil service employees, including those serving abroad).

223. *Id.* at 110-11 & n.28.

224. *Id.* at 111.

225. Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 420 (N.D.N.Y. 1987) (citing Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 672 (1981)), *vacated in part*, 888 F.2d 230 (2d Cir. 1989). *Long Island Lighting* provides a lengthy discussion of the evolution of the rational basis test, establishing a polar approach by comparing the results under Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) and City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

The judicial practice of hypothesizing conceivable purposes conflicts with the ordinary practice under Rule 12(b)(6) of the Federal Rules of Civil Procedure under which "[a] motion to dismiss for failure to state a claim . . . is to be evaluated only on the pleadings."[226] Therefore, for example, a well-pleaded complaint that alleges that the purpose of a taxing scheme is to promote domestic business by discriminating against non-resident competitors should be sufficient to state a claim.[227] Surely the *complaint* will not include any hypothetical, legitimate purposes served by the statute. If a court limits its review to the facts alleged in the complaint, a motion to dismiss will fail.

The courts, however, have frequently dismissed complaints for failure to state a claim even though the complaint alleged facts that, if proven, would show an impermissible purpose at work.[228] The argument outlined above does not take into account the generous amount of hypothesizing that is permitted under deferential rational basis review. As one court explained, because "truth is not the issue,"[229] the use of discovery procedures to develop facts showing the state's true reasons for its actions would be "both inefficient and unnecessary."[230] The "argument that an evidentiary hearing is required on the rational-basis issue is without merit."[231] For these reasons, "[g]oing outside the complaint to hypothesize a purpose will not conflict with the requirement that, when reviewing a complaint dismissed under Rule 12(b)(6), we

226. Mahone v. Addicks Util. Dist., 836 F.2d 921, 935 (5th Cir. 1988) (quoting, with minor alteration, O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985)).

227. *Cf.* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882 (1985). At issue was the Alabama gross premiums tax which imposed a substantially lower tax on domestic insurance companies. The tax was held to violate equal protection as applied to appellants. *Id.* at 871-72, 882.

228. *See, e.g.*, Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990) (affirming trial court's dismissal of complaint alleging that mandatory retirement of state judges at age 70 discriminates on basis of age; looking to other court opinions to identify what rational bases would be served by mandatory retirement age), *aff'd*, 111 S. Ct. 2395 (1991); *see also* Brown v. City of Lake Geneva, 919 F.2d 1299, 1302 (7th Cir. 1990) (affirming trial court's dismissal of complaint alleging that liquor license denied because of bias, on basis of several purposes offered by defendant); *Mahone*, 836 F.2d at 936 (courts may hypothesize purposes on motions to dismiss).

229. *Mahone*, 836 F.2d at 936 ("task of hypothesizing necessarily renders less important the actual reasons which the state may have had for making the challenged classification").

230. *Id.*

231. *Gregory*, 898 F.2d at 605 (following highly deferential approach set forth in Vance v. Bradley, 440 U.S. 93, 99 (1978)).

accept as true all well-pleaded facts."[232]

Rational basis cases are also frequently dismissed at the summary judgment stage.[233] A motion for summary judgment is not to be granted unless "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[234] What should a court do when the parties disagree on the purpose of the law—for example, was a zoning ordinance adopted to prevent overcrowding or to give effect to the prejudice against the mentally retarded? This disagreement about purpose seems to be an issue of material fact and therefore the case would not be an appropriate candidate for summary judgment.

Once again, however, deferential review trumps the procedural rules. As one court explained, even if there is a genuine issue of fact concerning the *actual* purpose of legislation, that issue of fact is not *material*.[235] Evidence of actual purpose is only minimally relevant to what was material—whether there exists a conceivable legitimate purpose for the legislation.[236]

It has long been clear that an extremely deferential version of rationality review makes it virtually impossible for a plaintiff to

232. *Mahone*, 836 F.2d at 936.

233. *See* New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 17 (1988) ("In a case such as this, the plaintiff can carry this burden by submitting evidence to show that the asserted grounds for the legislative classification lack any reasonable support in fact, but this burden is nonetheless a considerable one." (citing United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938))); Vance v. Bradley, 440 U.S. 93, 111 (1979) ("[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." (citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911))); Mountain Water Co. v. Montana Dep't of Pub. Serv. Regulation, 919 F.2d 593, 596-97 (9th Cir. 1990) (holding distinction between public and private owned utilities rationally related to hypothesized purposes of enhancing maintenance and allowing local regulation of water); Howard v. City of Garland, 917 F.2d 898, 901 (5th Cir. 1990) (affirming summary judgment for defendants where plaintiffs failed to show "the specific requirements of the [challenged] zoning ordinance for the special use permit are irrational, arbitrary, or driven by invidious discrimination"); Oriental Health Spa v. City of Fort Wayne, 864 F.2d 486 (7th Cir. 1988) (affirming summary judgment where plaintiff failed to offer evidence rebutting constitutionality of ordinance regulating massage parlors).

234. FED. R. CIV. P. 56(c).

235. *See* DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F. Supp. 1479, 1502 (M.D. Fla.), *aff'd sub nom.* DeSisto College, Inc. v. Line, 888 F.2d 766 (11th Cir. 1989). It makes no difference whether the plaintiff could show that members of the governing body enacted the statute out of an irrational fear of learning disabled students so long as the governing body had evidence before it that could reasonably be conceived to be true and from which they arrived at their purported legislative purpose. *Id.*

236. *Id.*

win on the substantive merits of his challenge to government action. The same extreme deference corrupts the language of the Federal Rules of Civil Procedure. The next section examines the same two procedural motions—the motion to dismiss and the motion for summary judgment—under a more demanding rationality review.

2. *Proving a Case Under the More Demanding Rationality Review*

When the courts consider *actual* legislative purpose to be the relevant standard, a plaintiff who alleges that a law was designed to advance an impermissible purpose will survive a motion to dismiss.[237] Further along in the case, a plaintiff who presents evidence of impermissible purpose should survive a defendant's motion for summary judgment.[238]

D. *Summary*

Rationality review purports always to be concerned with the relation between classification and purpose. Where rationality review takes its most deferential form, however, the purpose with which it purports to be concerned becomes an entirely hypothesized, and ultimately fictional, concept. In such a scheme, evidence of facts becomes entirely irrelevant and the procedural rules must be interpreted away. On the other hand, when courts have determined that the actual legislative purpose is relevant, then a wide range of evidence must be considered to determine what that purpose was. In such a scheme, it becomes possible for a claimant to state a case upon which relief can be granted and to raise genuine issues of material fact.

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237. *See, e.g.*, Phan v. Virginia, 806 F.2d 516 (4th Cir. 1986). The district court had dismissed the complaint of a handicapped student alleging, *inter alia*, that the state's refusal to subsidize his tuition at an out-of-state sectarian school violated the Equal Protection Clause. *Id.* at 517. The court of appeals reversed. "[W]e proceed from the modest proposition that the simple articulation of a justification for a challenged classification does not conclude the judicial inquiry." *Id.* at 521 n.6 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)). "We can hypothesize, however, a rational justification for differential treatment of church-affiliated schools based on their location. . . . But this case comes to us not hypothetically but with a record of some proof . . . . The record, however is not complete and we conclude that we must remand the case to the district court [for further fact finding]." *Id.* at 522-23.

238. *See, e.g.*, Lockary v. Kayfetz, 917 F.2d 1150, 1155-56 (9th Cir. 1990). Where the plaintiffs alleged that the district's stated reason for denying water hookups, a water shortage, was pretextual, they raised triable issues of fact surrounding the very existence of a water shortage. *Id.* The appeals court, therefore, reversed the trial court's grant of summary judgment to the defendant. *Id.*

IV. WHAT PURPOSES ARE IMPERMISSIBLE?

A. *The Supreme Court Precedents*

Although the Supreme Court speaks frequently of permissible or impermissible purposes (i.e., every time it states the doctrine of rationality review), it has not systematically articulated the criteria that distinguish permissible from impermissible legislative purposes. On several occasions, however, the Court has suggested a framework for analysis.

As long ago as 1944, in *Korematsu v. United States*,[239] the Court explained that the internment of Japanese-Americans might be justified in order to prevent espionage and sabotage during a time of war, but never as an expression of racial antagonism.[240] Years later in *Regents of the University of California v. Bakke*,[241] Justice Powell insisted that admissions preferences for students of a particular race could be justified in order to promote diversity within the student body, but never as an expression of racial preference for its own sake.[242] The theme underlying both cases is that preferences for one group over another, for their own sake, are not permissible, but preferential or burdensome effects on one group rather than another are permissible, so long as the

239. 323 U.S. 214 (1944). In *Korematsu*, the Supreme Court upheld a military order forbidding all persons of Japanese ancestry from entering a "military area." *Id.* at 219. The Court affirmed the conviction of the petitioner, an American citizen of Japanese descent, for violating the military order, despite the fact that the petitioner's home was in the military area and his loyalty to the United States was not questioned. *Id.* at 216-18.

240. *Id.* at 216-17. The Court later explained:

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures . . . .

Id. at 223.

241. 438 U.S. 265 (1978) (judgment of Court announced in opinion by Justice Powell). Bakke, a white student, filed suit under the Equal Protection Clause after he was rejected for admission to the University of California Medical School twice, just missing the cutoff both times. *Id.* at 276-78. The school had two separate admissions programs: general and special. *Id.* at 273. The special admissions program chose 16 out of the 100 students per class from a pool of "economically and/or educationally disadvantaged" and minority applicants. *Id.* at 274-75. No disadvantaged white applicant was ever admitted under the special program, however, despite the large numbers who applied to it. *Id.* at 276. The Court found that the special program created a racial quota which had unfairly kept Bakke out of the school by holding 16 places for minority students, some of whom scored significantly lower than Bakke. *Id.* at 276-81.

242. *Id.* at 307, 311-15 (diversity of student body "clearly is a constitutionally permissible goal for an institution of higher education").

purpose of the law is not discriminatory, but rather to achieve some broader goal.

Perhaps the Court came closest to articulating a standard of impermissibility in *United States Department of Agriculture v. Moreno*,[243] when it overturned a Food Stamp rule intended to keep "hippie communes" from participating in the program. The Court held that the rule was not rationally related to a legitimate state interest because "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[244] In order for the government interest to be legitimate, the harmful effects on hippies must be justified by "reference to [some independent] considerations in the public interest."[245]

Even though virtually every piece of legislation results in a gain for some persons and a loss for others, "the state must provide a principled justification to explain why some win and some lose, to explain why Group A may tap the state's limited coffers and Group B may not."[246] Justice Stevens explained the impermissibility standard by reference to the idea of an "impartial lawmaker," which he thinks is implicit in the concept of rationality.[247] Justice Stevens's "impartial lawmaker" recognizes that a law may have an adverse impact on the class disfavored by the statute, but is willing to support the law because "the adverse impact may reasonably be viewed as an acceptable cost of achieving

243. 413 U.S. 528 (1973). The Food Stamp rule, § 3(e) of the Food Stamp Act of 1964, prevented households from being eligible to receive food stamps if the household contained a member who was not related to any other member of the household. *Id.* at 529.

244. *Id.* at 534 (small amounts of existing legislative history indicated that purpose of § 3(e) was to prevent "hippie communes" from participating in Food Stamp Program).

245. *Id.* at 534-35 (quoting Moreno v. United States Dep't of Agric., 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)). The government claimed that reducing fraud in the Food Stamp Program was a legitimate public interest furthered by § 3(e). *Id.* at 535. The Court disagreed, however, because even if an increase in food stamp fraud existed in households containing unrelated persons, denying aid to *all* such households was not a rational way to handle the problem. *Id.* at 535-36. Further, the Court noted that another section of the Food Stamp Act was drafted specifically to prevent fraud, making it doubtful that § 3(e) was drafted with that purpose in mind. *Id.* at 536-37.

246. Bishop v. Moran, 676 F. Supp. 416, 423 (D.R.I. 1987) (under the Equal Protection Clause, prisoners involuntarily imprisoned out-of-state are entitled to be brought back into state at state's expense to attend parole hearings because prisoners incarcerated in state were allowed to appear at parole hearings).

247. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

a larger goal."[248] That larger goal, however, must be a "public purpose that transcends the harm to the members of the disadvantaged class."[249]

On other occasions, the Court has explained the impermissibility standard by reference to the term "invidious discrimination."[250] A classification is invidious if drawn "with an evil eye and an unequal hand,"[251] or motivated by a "feeling of antipathy"[252] against a specific group. These invidious discriminations are distinguished from laws that impose special burdens, which are often necessary for general benefits.[253] Thus, the Equal Protection Clause prohibits invidious discrimination, but does not invalidate the rule that burdens some in order to provide general benefits, even if the legislature has miscalculated the costs and benefits.[254] From this perspective, rationality review cannot be said to prohibit unwise or foolish laws, but rather only biased laws.

It follows, therefore, that it is appropriate to adopt a zoning plan in order to promote an appropriate use of land, even though the plan adversely affects certain persons; but it is not appropriate

248. *Id.* at 452 n.4 (Stevens, J., concurring) (quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)).

249. *Id.* at 452 (Stevens, J., concurring). Justice Stevens opined that no applicable public purpose existed for forbidding the group home in this particular case, even though other restrictions on the mentally retarded, such as the right to drive cars, may be legitimate. *Id.* at 452-55 (Stevens, J., concurring).

250. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) ("The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.").

251. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). The Court held that the application of an ordinance requiring a permit to operate a laundry in a building not made of stone or brick was discriminatory and violative of the Equal Protection Clause. *Id.* at 374. Even though the ordinance appeared valid on its face as a means of preventing fires, the ordinance was used to discriminate against persons of Chinese decent by denying permits to hundreds of Chinese persons for no reason. *Id.*

252. Soon Hing v. Crowley, 113 U.S. 703, 710-11 (1885) (upholding ordinance that forbid operation of a laundry between 10 p.m. and 6 a.m. because language and legislative history of ordinance did not indicate intent to discriminate against class of persons, and ordinance in practice did not operate only against that certain class).

253. Barbier v. Connolly, 113 U.S. 27, 31 (1885) (finding ordinance controlling laundry business to be valid because it promoted public goals of health and fire prevention, even though it subjected class of laundry owners to special burdens).

254. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 468-69 (1981). The Court showed that it would uphold a statute that prohibited the use of plastic milk containers in order to save energy, even if the legislature was factually wrong—that is, even though the production of plastic milk containers required more energy than the production of paper containers. *Id.* at 469.

to adopt a zoning plan in order to exclude the mentally retarded.[255] Similarly, it is appropriate to preserve the fiscal integrity of state welfare programs, even though some people are adversely affected; but it is not appropriate to limit benefits in order to keep out indigents and out-of-staters.[256] Likewise, it is appropriate to provide veterans' educational benefits only to those who serve in the armed forces for the purpose of "mak[ing] military service more attractive;" but it is not appropriate to limit those benefits in order to punish conscientious objectors for their beliefs.[257]

The Court's cases are consistent, with one exception. They consistently hold that a state may not purposely prefer A over B for A's own sake, but it may enact laws to serve public purposes, even if the effect of those laws is to benefit A more than B. The single exception to this understanding comes from *Zobel v. Williams*.[258] In *Zobel*, the Court invalidated an Alaska statute that distributed a portion of Alaska's oil revenues on the basis of years of residency, starting from the first year of statehood.[259] The Court held that the legislative purpose of rewarding citizens for past contributions was not legitimate.[260] This view is plainly inconsistent, however, with the Court's previous approval of veterans' benefits programs, established for the purpose of rewarding veterans for past contributions.[261] *Zobel* also suggested that the state

255. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. at 432, 448 (1985).

256. Shapiro v. Thompson, 394 U.S. 618 (1969) (holding statutory provisions denying welfare benefits to residents of less than one year, in order to prevent the influx of indigents seeking higher welfare payments, violative of Equal Protection Clause), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

257. Johnson v. Ribison, 415 U.S. 361, 383 (1974) (purpose of veterans' educational benefits is to help veterans "readjust to civilian life" and make service in military more attractive; any burden to persons unable to serve in military due to religious beliefs is merely incidental).

258. 457 U.S. 55 (1982).

259. *Id.* at 65. Each adult citizen received one dividend per year of residency after 1959. *Id.* at 57.

260. *Id.* at 63. The Court disagreed with the past contribution rationale because it feared this analysis could be expanded to the point that citizens would be divided into "expanding numbers of permanent classes," so that all benefits and burdens would be apportioned in a similar manner. *Id.* at 64.

261. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 265, 280-81 (1979).

> The veterans' hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service . . . .
>
> . . . .
>
> Absolute and permanent preferences, as the troubled history of this law demonstrates, have always been subject to the objection that they give

may not set state insurance or pension benefits at levels designed to recognize past contributions to the state.[262] This, of course, is not the law.[263]

There *is* an impermissible purpose at work in the Alaska statute, but it is *not* rewarding citizens for past contributions. Rather, the problem is that the purpose of the law is to prefer more established residents over newcomers, for their own sake, without reference to any larger public purpose.[264] In defense of the statute, one might argue that the years of residency measurement was designed as a shorthand for identifying past contributions. If so, the distinctions drawn by the statute were an extremely crude approximation. In order for the past contributions analysis to be true, we must assume that persons who had been children or unemployed for the previous twenty-one years had made substantial contributions to the state and that those who arrived more recently to build the Alaska pipeline had made insignificant contributions.[265] The more obvious explanation of the statute and the Court's invalidation of it was that the statute was based on the impermissible premise that some persons are worthier than others. Thus, a legislative purpose is impermissible if it prefers one group over another without trying to benefit the general welfare.

> the veteran more than a square deal. But the Fourteenth Amendment "cannot be made a refuge from ill-advised . . . laws."

Id. (quoting District of Columbia v. Brooke, 214 U.S. 138, 150 (1909)).

262. *Zobel*, 457 U.S. at 64 ("Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency.").

263. *See* Shapiro v. Thompson, 394 U.S. 618, 633 n.10 (1969) ("We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions."), *overruled on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

264. *Zobel*, 457 U.S. at 71 (Brennan, J., concurring). Justice Brennan stated:

> [R]esort[ing] to duration of residence as the basis for a distribution of state largesse does closely track the constitutionally untenable position that the longer one's residence, the worthier one is of the State's favor. In my view, it is difficult to escape from the recognition that underlying any scheme of classification on the basis of duration of residence, we shall almost invariably find the unstated premise that "some citizens are more equal than others." We rejected that premise . . . when we adopted the Equal Protection Clause.

Id. (Brennan, J., concurring).

265. *See id.* at 77-78 (O'Connor, J., concurring). Justice O'Connor noted that new residents may have contributed more to Alaska than some of the natives. Thus, length of residency is not an accurate method to gauge past contributions to the state. *Id.* at 78 (O'Connor, J., concurring).

B. *The Scholarly Debate: Promoting the Public Good or Advancing Private Interests?*

The Supreme Court's view of impermissible purpose can be pieced together from the cases discussed in the previous section. What is perhaps not evident from the Court's discussion is the significance of the issue. The question of impermissible legislative purposes implicates more than rationality review. In fact, it raises questions about the nature of the legislative process and the nature of representative government in a democracy. These broader questions have provoked a scholarly debate between followers of two conflicting theories—the public value model and the interest group model.

1. *The Public Value Model*

More than forty years ago, Tussman and tenBroek considered the judicial tolerance of departures from the strict requirements of the principle of equality.[266] They asked, "[W]hat is a 'fair reason' for over-riding the demand for equal treatment?"[267] Were political considerations, including winning re-election and appeasing interest groups, appropriate factors?[268] They answered:

> [T]he requirement that laws be equal rests upon a theory of legislation quite distinct from that of pressure groups—a theory which puts forward some conception of a "general good" as the "legitimate public purpose" at which legislation must aim, and according to which the triumph of private or group pressure marks the cor-

266. Tussman & tenBroek, *supra* note 5. The doctrine of reasonable classification permits the legislature to classify people so long as persons similarly situated are treated similarly. *Id.* at 344. A problem arises, however, when only part of the group targeted by the legislation is affected. *Id.* at 348. Tussman and tenBroek are concerned with the judicial tolerance of legislation that does not affect all persons similarly situated, in the targeted group, in the same way. *Id.* at 348-49.

267. *Id.* at 349. In other words, when is it acceptable to allow part of a group to be affected by legislation, while others similarly situated are not affected?

268. *Id.* at 349-50. Tussman and tenBroek understand the need for judicial deference to less than perfect legislative classifications when administrative difficulties prevent treating everyone similarly situated in the same manner. *Id.* They question, however, judicial deference to the legislature's classification decisions made with political considerations in mind. Tussman and tenBroek recognize that a legislature may feel limited in what "it can do—and still be re-elected," if retribution at the polls is probable unless a specific group is "given special classificatory treatment in a law." *Id.* at 350.

ruption of the legislative process.[269]

Obvious to Tussman and tenBroek then, and still clear today, rationality review only makes sense if one adopts the public value model. Under the public value model, a broader public purpose exists at which laws must aim and against which laws are measured.

Professor Cass Sunstein, perhaps today's leading proponent of the public value model, has published a series of articles in which he develops the public value model and finds support for it in the historical background and structure of the Constitution.[270] Professor Sunstein distinguishes "naked preferences"— unprincipled distributions of resources and opportunities that reflect the view that it is intrinsically desirable to treat one person better than another[271]—from "public values," defined negatively as "any justification for government action that goes beyond the exercise of raw political power."[272] Professor Sunstein's argument is that a number of clauses in the Constitution, including the Equal Protection Clause, can best be explained as prohibiting naked preferences, thereby insisting that laws must promote public purposes.[273]

Sunstein finds support for the public value model of government in the Constitution itself. He first finds that "[t]he prohibition of naked preferences captures a significant theme in the original intent" of the framers—related to the "concern of ensur-

269. *Id.* Otherwise, the law will reflect the will of the strongest interest groups and will inherently not provide equal protection of the laws. *Id.*

270. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Republican Revival*] (examining republican principles in founding period and effect of republicanism on modern public law); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (discussing problem of powerful private interest groups influencing American public law); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984) [hereinafter Sunstein, *Naked Preferences*] (examining constitutional prohibition of "naked preferences," i.e., "the distribution of resources . . . to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want"); Sunstein, *Public Values*, *supra* note 1 (examining Equal Protection Clause, its focus and recent effect).

271. *See* Sunstein, *Naked Preferences*, *supra* note 270, at 1689, 1693-94 (defining "naked preferences"); Sunstein, *Public Values*, *supra* note 1, at 131, 137.

272. Sunstein, *Naked Preferences*, *supra* note 270, at 1694. Thus, the least that the prohibition of naked preferences requires is that "government action be justified by reference to some public value." *Id.* at 1694 n.29.

273. *Id.* at 1689. Sunstein includes within his theory "many of the most important clauses of the Constitution: the dormant, commerce, privileges and immunities, equal protection, due process, contract, and eminent domain clauses." *Id.* (footnotes omitted).

ing against capture of government power by faction."[274] Further, Sunstein argues that the prohibition of naked preferences "reflects the Constitution's roots in civil republicanism and accompanying conceptions of civic virtue," the common good and the value of deliberation and debate.[275] Finally, he argues that the structural provisions of the Constitution reflect the prohibition of naked preferences, specifically noting the separation of powers provisions designed to limit the powers of self-interested factions.[276] In this way, Sunstein makes a reasonably strong case for his public value theory based on the Constitution.

Sunstein's constitutionally-based public value theory is not without its problems or detractors, however. One problem, which Sunstein himself recognizes, is that "the line between public value and naked preference is quite thin."[277] For example, how is one to know whether a wealth transfer to a particular group is a classic case of capture by faction, or a legitimate attempt at promoting a public purpose? Additionally, as times change, so do our perceptions of public good.[278] For example, at the end of the nineteenth century, minimum wage and maximum hour laws were considered impermissible class legislation; today, however, they are viewed as promoting public purposes.[279] Similarly, today we argue about a cut in the capital gains tax—is it a payoff to the wealthy or a careful plan to stimulate the economy and thus provide broad public benefits? To the extent that no

274. *Id.* at 1690 ("The framers' hostility toward naked preferences was rooted in the fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another.").

275. *Id.* at 1690-91. Under the view of civil republicanism, legislators must not bow to private pressure, but rather strive for the common good. *Id.*; *see also* Sunstein, *Republican Revival*, *supra* note 270.

276. Sunstein, *Naked Preferences*, *supra* note 270, at 1691. The power of self-interested factions is limited by the predetermined constraints placed upon government power by the separation of powers. *Id.*

277. *Id.* at 1728. Unfortunately, it is usually possible to find *some* public value that justifies treating one group differently than another. *Id.*

278. *See id.* at 1702 ("[T]he use of such theories [of impermissible government ends] may allow constitutional prohibitions to change dramatically over time as the category of public value expands and contracts.").

279. *Id.* at 1701.

> During the *Lochner* era, for example, the redistribution of resources from employer to employee was not thought to respond to a public value and was therefore placed in the category of naked preferences. Numerous goals now considered to fall within the realm of public values were not recognized as such, largely because common law conceptions of rights and obligations dominated early public law. . . .
>
> Under current law, by contrast, all sorts of redistributive measures are permissible.

Id. (footnotes omitted).

clear answers to questions like these exist, Sunstein's theory will not provide concrete results in particular cases.[280]

Another criticism of Sunstein's theory is that he is swimming against a process-oriented current. Sunstein, by stating "[i]t is frankly substantive,"[281] declared outright that his theory is not process-based. Substantive theories are criticized because they allow non-elected judges to substitute their values for the values adopted by the democratically-elected legislature. For example, Gerald Gunther's influential 1971 article argued that courts should closely scrutinize the *means* chosen by legislatures, but should leave the choice of *ends* to the democratic process.[282] Likewise, in *Democracy and Distrust*, Professor Ely argued for a "participation-oriented, representation-reinforcing approach to judicial review" wherein "the selection and accommodation of substantive values is left almost entirely to the political process."[283] Hence, Sunstein's public value model clearly conflicts with the process theories. By grounding his model in the Constitution, however, Sunstein suggests that the Constitution itself places limits on the ends that a majority of the legislature may pursue. Thus, judicial review limited solely to issues of process would be inadequate to perform the job assigned to the courts by the Constitution.

One can find further support for the public value model of government in the works of several modern liberal political theorists. John Rawls' *A Theory of Justice* requires that "[a]ll social values . . . are to be distributed equally unless an unequal distri-

280. *See* Stephen M. Feldman, *Exposing Sunstein's Naked Preferences*, 1989 DUKE L.J. 1335, 1343 ("Consequently, in constitutional adjudication, the question whether a legislative action is based on either a naked preference or a public value does not have a neutral, objective, and preexisting answer. . . . Sunstein's theory of judicial review, lacking the support of its foundation, shudders, groans, and ultimately collapses.").

281. Sunstein, *Public Values*, *supra* note 1, at 138 (Sunstein's theory is substantive because "it grows out of a particular perception of the substantive evil forbidden by the [Equal Protection] Clause.").

282. *See generally* Gunther, *supra* note 103. The article discusses Supreme Court decisions for the 1971 term that pertain to the Court's treatment and development of rationality review. *See id.* at 42 ("In reality, the primary evil of the discredited [*Lochner*] doctrine was the dogmatic judicial intervention regarding ends, not means."); *id.* at 43 ("The old equal protection was always means-oriented; unlike due process, it had not added a substantive dimension focusing on the legitimacy of ends." (footnote omitted)); *id.* at 44 ("It does indeed follow from the political process theme that legislative value choices warrant judicial deference so long as the people can have their say in the public forum and at the ballot box.").

283. ELY, *supra* note 48, at 87. Thus, Ely's approach to judicial review completely supports the "American system of representative democracy." *Id.* at 88.

bution . . . is to everyone's advantage."[284] That would mean that a legislature might confer special benefits on a particular group, but only if that preference benefits all—that is, promotes a public value. Similarly, Ronald Dworkin insists that the government treat people with "equal concern and respect."[285] "It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern."[286] Under Sunstein's theory, such an unequal distribution would be called a naked preference. Likewise, in Bruce Ackerman's *Social Justice in the Liberal State*, the principle of "Neutrality" prohibits an exercise of power either on the ground that the power holder is intrinsically superior to his fellow citizens or on the ground that his conception of the good is better than that of his fellow citizens.[287] Clearly this is a prohibition of naked preferences. Thus, despite criticism, Sunstein's public value model finds support in the Constitution, as well as in the works of several renowned modern political theorists.

2. *The Interest Group Model*

The principal competitor of the public value model of government is a theory variously called the interest group model,[288] pressure group theory,[289] pluralism[290] and, recently, public choice theory.[291] This model purports to describe the legislative process as it is, not as it ought to be, and leaves no room for altruism in the legislative process it describes.

Tussman and tenBroek identified the "pressure group" the-

284. JOHN RAWLS, A THEORY OF JUSTICE 62 (1971) ("Injustice, then, is simply inequalities that are not to the benefit of all.").

285. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-73 (1977). This is one of the fundamental postulates comprising Dworkin's definition of equality.

286. *Id.* at 273. Clearly, Dworkin supports the public value theory and its prohibition of naked preferences. For Sunstein's definition of naked preferences, see *supra* notes 270-71 and accompanying text.

287. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980) (thrust of neutrality "is that nobody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied the rest of us").

288. Farber & Frickey, *Jurisprudence*, *supra* note 56, at 873 (theorizing that interest groups control legislative process).

289. Tussman & tenBroek, *supra* note 5, at 350 (when group pressure prevails, legislative process is corrupted).

290. Farber & Frickey, *Jurisprudence*, *supra* note 56, at 875 (under pluralism theory, balance of private political power is reflected in legislative outcomes).

291. *Id.* at 878 (public choice theory applies economic principles to legislative process). For a discussion of the public choice theory, see *infra* notes 297-304 and accompanying text.

ory of government, which holds that "a law is properly the resultant of pressures exerted by competing interests."[292] Politics is considered to be a struggle between interest groups.[293] Each group pursues its own advantage and hopes to gain benefits at the expense of less powerful, or less well-organized, interest groups. In such a model, success is defined as getting your way at the expense of others. Of course, it is to be expected that interest groups will sometimes have to compromise[294] or form coalitions with other groups, but these tactics are solely a means for advancing the ultimate group interest. In such a system, the concept of the public interest is under attack and acts merely to cover the actual workings of the legislative process.[295] Thus, the purpose of government, from the perspective of the interest group theory, is the aggregation of individual preferences and not the identification of public values. This means that the successful passage of a law by the majority of the legislature is itself a sufficient justification for the law, requiring no independent public welfare basis.[296]

The contemporary version of the interest group model is economic: it applies economic principles of the market to the legislative process.[297] This model is called the public choice theory. Under the public choice theory, legislators and interest groups are presumed to act in their own self-interest.[298] Legislators want to get re-elected; interest groups want to advance their interests.[299] Therefore, legislators and interest groups make deals

292. Tussman & tenBroek, *supra* note 5, at 350. Thus, the stronger the group, the more likely its members are to obtain favorable, and therefore unequal, legislation. *Id.*

293. *Id.* at 349-50; Farber & Frickey, *Jurisprudence*, *supra* note 56, at 883-84. Some of the literature on interest group politics is summarized in Farber & Frickey, *Jurisprudence*, *supra* note 56, at 883-90.

294. Farber & Frickey, *Jurisprudence*, *supra* note 56, at 884 (citing EARL LATHAM, THE GROUP BASIS OF POLITICS 35 (1952)).

295. Posner, *supra* note 135, at 27 ("The ability of such [interest] groups to obtain legislation derives from their money, votes, cohesiveness, ability to make credible threats of violence or other disorder if their demands are not met, and other factors *all totally unrelated to the abstract merit of the policy at issue*." (emphasis added)).

296. *Id.* at 29. Posner draws the line, however, at legislation that clearly "infringes upon a clear and definite constitutional goal," for example, forbidding discrimination by the government on the basis of race. *Id.* at 29-30. Thus, even if the majority could pass such a discriminating law, the courts would invalidate it, so that a blatantly unconstitutional law does not justify itself. *Id.* at 30.

297. DENNIS C. MUELLER, PUBLIC CHOICE 1 (1979) (describing public choice theory of government, based upon economic analysis).

298. Farber & Frickey, *Jurisprudence*, *supra* note 56, at 891.

299. *Id.* at 891-92. Presumably, the self-interest of the legislators is to win re-election. *Id.* at 891. Thus, legislators must "maximize their appeal to their constituents" by acting in the best economic interests of their constituents. *Id.*

which allow both to achieve their goals, even though this results in "rent-seeking" at the expense of the general public.[300]

It is not at all certain that the description of the legislative process in the public choice literature is accurate. Mark Kelman has argued that the public choice view of human character is shallow and incomplete,[301] that some of its basic propositions are assumed rather than proven[302] and that its most basic claim about the motivation of public officials is groundless.[303] While the public choice assumption (that self-interest is the only thing that matters) may be accurate in many instances, it is both cynical and "profoundly false" to conclude that considerations of the public interest are not important to many legislators.[304] Even if one were to concede the factual accuracy of the public choice claim, there is a more basic concern with the model. The public choice theory jumps from a purported description of how the legislature acts to an implicit judgment that this is the way the legislature ought to act. Just because something *is* a certain way does not mean that it *ought* to be that way. This assumption is profoundly unsound.

With regard to the permissibility of legislative purposes, it should be obvious that the interest group theory of government turns the public value model on its head. The unprincipled distribution of resources to A instead of B, for A's own sake, rather than being a prohibited naked preference, turns out to be the

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at 891-92. In this way, the individual legislator's votes can be easily predicted by examining the economic interests of her constituents. *Id.* at 892.

300. Macey, *supra* note 56, at 224 n.6. Rent-seeking is defined as "the attempt to obtain economic rents . . . through government intervention in the market. A classic example of rent-seeking is a corporation's attempt to obtain monopolies granted by the government. Such monopolies allow firms to raise prices above competitive levels. The increased income is economic rent from government regulation." *Id.*

301. Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 206 (1988). Kelman criticizes the public choice view that people, even in their nonpolitical conduct such as love, marriage and divorce, are merely wealth-maximizers. *Id.* at 206-07 (citing GARY BECKER, A TREATISE ON THE FAMILY 67-82 (1981) and Becker, *A Theory of Marriage* (pt. 1), 81 J. POL. ECON. 813 (1973)).

302. *See, e.g., id.* at 214. For example, Kelman states that the public choice proposition that voters vote to maximize their economic position is "highly debatable." *Id.*

303. *Id.* at 223. Public choice theorists state that the only motivation of public officials is "financial selfishness." Kelman disagrees by strongly asserting that motives other than personal finances exist. *Id.*

304. *Id.* at 213-14 ("It is not surprising, though, that people in the public sphere are not invariably simple selfish wealth-seekers, . . . [but rather] demonstrate more complex motivation.").

very essence of the democratic process.[305] This emphasis on allowing the democratic process to work without interference would be more appropriate in a pure democracy, where all of the choices were left to the majority. The American system, however, is a constitutional democracy, in which a number of choices have been taken away from the majority. The Constitution expresses the concern that, in certain areas, the majority is likely to trample on the rights and interests of the minority—exactly what would happen under the interest group model. But Sunstein's public value model, and the permissible purpose requirement of rationality review, limit such an exercise of the will of the majority, thus protecting the rights of minorities and upholding the Constitution.

Thus, it is quite clear that if we take rationality review as our starting point, the Constitution favors the public value model of government and is inconsistent with interest group theory. This is because rationality review insists that legislative judgments be directed towards a public good, while, under the interest group model, the passage of a law by a majority is itself sufficient justification for that law. Judge Posner, however, suggests a different starting point. Admitting that rationality review and the interest group theory are incompatible, Posner concludes that the problem is with rationality review rather than with the interest group theory.[306] The language of the Constitution, after all, requires only equal protection of the laws, not a rational relationship between classification and public purpose.

The Supreme Court, however, has not followed Judge Posner's lead, as it continues to proclaim the doctrine of rationality review. Implicitly, at least, the Court seems to have accepted Sunstein's view that the public value model, embodied in the ra-

305. Posner, *supra* note 135, at 27-28. For a further discussion of Posner's theories, see *supra* notes 295-96 and accompanying text.

306. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 586-87 (3d ed. 1986).

> There is a long-standing debate over whether the Supreme Court should use the due process and equal protection clauses of the Fourteenth Amendment to strike down state legislation that, even though it does not infringe a specific constitutional right such as freedom of speech, is unreasonable as judged by some general criterion of social welfare or public interest. Economic analysis suggests that the assertion of such a power by the Supreme Court would change fundamentally the nature of the democratic political process—an objective that cannot reasonably be attributed to the framers of the Constitution or consistently attained by the Court.

Id. at 586.

tionality requirement, is in fact derived from the Constitution. In practice, however, the Court falls far short of a generalized endorsement of the public value model. To the extent that the Court deferentially hypothesizes public values as legislative purposes, it allows private interests to pursue private advantage through the legislative process. When this happens, the public value model is nothing more than an academic theory, imposing no real limitations on the work of actual legislatures. The next part of this Article examines the Court at work, inconsistently applying the doctrine of rationality review.

V. RECONSIDERING THE PRECEDENTS

This Article began with the assertion that rationality review is unpredictable. As Justice Marshall has argued, there seems to be two rationality reviews: an extremely deferential one, and a "second order" rationality review that closely examines actual legislative purpose and is willing to proscribe certain legislative ends as impermissible.[307] The deferential review never results in the invalidation of a statute. The more demanding review, on the other hand, when applied, usually results in the invalidation of the challenged statute. Thus, the choice of the method of review preordains the results.

Unfortunately, the Supreme Court has never explained how to decide which form of review is appropriate in a particular case.[308] It has been suggested that the Court uses the more demanding form of rationality review when a semi-suspect class or a semi-fundamental right is involved.[309] However, the Court itself

307. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 458 (1985) (Marshall, J., concurring in part and dissenting in part). Justice Marshall criticized the opinion of the Court because it stated that mental retardation is not a quasi-suspect class requiring a heightened standard of judicial review, but then proceeded to apply such heightened scrutiny analysis under the name of the rational-basis test. *Id.* at 457-58 (Marshall, J., concurring in part and dissenting in part). Thus, the *Cleburne* Court created a "second order" rational-basis test that is distinct from the previously deferential rational-basis test. *Id.* at 458 (Marshall, J., concurring in part and dissenting in part).

308. *Id.* at 460 (Marshall, J., concurring in part and dissenting in part) ("Moreover, by failing to articulate the factors that justify today's 'second order' rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked.").

309. *See, e.g.*, Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 414, 417 (N.D.N.Y. 1987) ("The Supreme Court's occasional departures from the extreme deference . . . rational basis analysis . . . have been limited to cases involving classifications that infringed on rights that are 'almost' fundamental or singled out classes that are 'almost' suspect.").

has rejected this reasoning.[310] What is left is a rationality review that is deferential and undemanding in most cases, but occasionally, though unpredictably, becomes a tight noose around the neck of the legislature.

This section is a case study of this unpredictability. Eight cases will be examined—four in which the Court used a demanding standard of review to invalidate a challenged statute and four in which the Court used an extremely deferential standard to uphold a statute. The facts of each case will be examined under the opposite form of review from that applied by the Court, showing that the form of review determines the outcome of the case.

A. *Finding Permissible Purposes Where the Court Found None*

Consider first, four cases in which the Court invalidated legislation on rationality grounds. In each case, the Court found that the legislative purpose was impermissible. These cases will be reconsidered under the Court's extremely deferential review, where the only requirement is that a rational legislature could have rationally believed that a law furthered a legitimate government interest.[311]

In *United States Department of Agriculture v. Moreno*,[312] the Court invalidated an amendment to the Food Stamp Act that denied benefits to households made up of unrelated individuals.[313] The Court found that the actual purpose of the law was to keep "hippie communes" out of the Food Stamp Program.[314] The Court held that purpose to be impermissible. Had the Court chosen to

310. *See, e.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 459 (1988) (refusing to apply heightened scrutiny to an equal protection claim to education services and limiting *Plyler v. Doe* to its "unique circumstances"); Lyng v. International Union, UAW, 485 U.S. 360, 370-73 (1988) (refusing to apply heightened scrutiny of *Moreno* rational basis test to case involving denial of food stamps to households of striking workers); *Cleburne*, 473 U.S. at 446 ("Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination.").

311. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463-64 (1981). The legislature is not required to be correct in deciding that a law advances a legitimate government interest, so long as its decision is rationally debatable. *Id.* at 464. For a discussion of the burden of proof under the deferential version of rationality review, see *supra* notes 217-36 and accompanying text.

312. 413 U.S. 528 (1973). For a further discussion of *Moreno*, see *supra* notes 243-45 and accompanying text.

313. *Moreno*, 413 U.S. at 529.

314. *Id.* at 534 ("The legislative history . . . indicates that the amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program." (quoting in part statement of Sen. Holland) (citing H.R. CONF. REP. No. 1793, 91st Cong., 2d Sess. 8 (1970)).

be deferential, the result would have been different. It is quite clear that Congress *could have* adopted this amendment in order to minimize fraud in the administration of the Food Stamp Program.[315] Congress *could have* thought that the requirement that individuals be related guarantees that the household did not come into existence solely for the purpose of collecting food stamps.[316] Thus, the classification—unrelated individuals—would have a sufficient relation to a permissible government purpose—preventing fraud. Under the deferential standard, the adverse effect on hippies would be considered incidental.

In *City of Cleburne v. Cleburne Living Center, Inc.*,[317] the Court invalidated, as applied, a city zoning ordinance that required a special use permit for a group home for the mentally retarded.[318] The Court found that the purpose of the law was simply to give effect to prejudice against the mentally retarded, which was an impermissible purpose.[319] Had the Court chosen to be deferential, the result would have been different. The city *could have* adopted the zoning ordinance in order to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[320] The Court had already found these to be permissible objectives of the zoning function.[321] Conceivably, the thrust of the ordinance in *Cleburne* is no more aimed at the mentally retarded than the ordinance in *Village of Belle Terre v. Boraas*[322] was aimed at college stu-

315. *Id.* at 546 (Rehnquist, J., dissenting) ("I do not believe that the asserted congressional concern with the fraudulent use of food stamps is . . . quite as irrational as the Court seems to believe.").

316. *Id.* (Rehnquist, J., dissenting). The Court noted, however, that two otherwise qualified unrelated persons living together may create "two separate 'households,' both of which are eligible for assistance." *Id.* at 537. Therefore, Justice Rehnquist concluded, the motive for § 3(e) of the Food Stamp Act was not likely to be the prevention of fraud. *Id.* at 546 (Rehnquist, J., dissenting).

317. 473 U.S. 432 (1985). For a further discussion of *Cleburne*, see *supra* notes 208-16 and accompanying text.

318. *Cleburne*, 473 U.S. at 450.

319. *Id.* ("[R]equiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . .").

320. Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). For a further discussion of *Village of Belle Terre*, see *infra* note 322 and accompanying text.

321. *Id.* at 5-6, 9 (citing Berman v. Parker, 348 U.S. 26, 32-33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean . . . .")).

322. *Village of Belle Terre* involved a zoning ordinance that restricted all land use to single family dwellings. *Id.* at 2. The ordinance defined "family" as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants," although up to two unrelated persons living as a housekeeping unit would also constitute a family. *Id.* The ordinance was challenged by landlords

dents wanting to live together. In both cases, under the deferential standard, the city should be able to proceed one step at a time toward the accomplishment of its zoning goals.[323]

In *Plyler v. Doe*,[324] the Court invalidated a Texas statute that denied free public education to undocumented alien school age children.[325] The Court explained the result, in part, by insisting that the state had not chosen particularly effective means to accomplish its goals.[326] Clearly, this close scrutiny of means is not at all deferential. In addition, the Court insisted that the state explain "its selection of *this* group as the appropriate target for exclusion."[327] The implication of this comment is that, as in *Cleburne*, exclusion of this group was itself the purpose of the law—an impermissible purpose. Had the Court chosen to be deferential, it could have accepted any one of the purposes suggested by the state, such as mitigating the harsh economic effects of sudden shifts in population. The state should not be required to prove that such harsh economic effects would necessarily result from the influx of illegal immigrants, rather only that the legislature *could have* believed that, and also *could have* believed that excluding undocumented children from schools bore some relation

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who had been found in violation after leasing a house in the village to six college students. The Court held that the statute did not violate equal protection because it was rationally related to the permissible government interest in "quiet place[s] where yards are wide, people few, and motor vehicles restricted." *Id.* at 9.

323. For a discussion of the permissibility of the legislature proceeding towards its goals one step at a time, see *supra* notes 201-05 and accompanying text.

324. 457 U.S. 202 (1982).

325. *Id.* at 230. The Texas statute at issue in *Plyler* withheld state funds from local school districts for undocumented alien school children and "authorized local school districts to deny enrollment in their public schools to children not 'legally admitted' to the country." *Id.* at 250 (citing TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp. 1981)). The statute was challenged, as violative of equal protection, *inter alia*, by a class of children of Mexican origin unable to establish legal admission to the United States. *Id.* at 206. The state advanced the governmental interests of preserving their limited resources for the education of lawful residents, and discouraging aliens from illegally immigrating. *Id.* at 227-28. The Court declined to treat illegal aliens as a suspect class, but nevertheless invalidated the statute because the state failed to show that the exclusion "further[ed] some substantial state interest." *Id.* at 223, 230.

326. *Id.* at 228-30 (citing Doe v. Plyler, 458 F. Supp. 569, 585 (E.D. Tex. 1978) (charging undocumented children tuition is ineffective way of preventing illegal aliens from entering the country "at least when compared with the alternative of prohibiting the employment of illegal aliens").

327. *Id.* at 229. The state claimed that undocumented children were singled out because they burden "the State's ability to provide high-quality public education," and because they are less likely to use their education for productive use within the state. *Id.* at 229-30. The Court disagreed, and found no relationship between the denial and furthering a legitimate state interest. *Id.* at 230.

to this concern. Surely the challenged statute could had survived this test.

In *Zobel v. Williams*,[328] the Court invalidated an Alaska statute that distributed a portion of oil revenues to its citizens on the basis of years of residency in Alaska counting from the first year of statehood.[329] The Court found that the statute was designed to reward citizens for past contributions, which was an impermissible purpose.[330] Had the Court been deferential, however, it would not have rejected the other purposes submitted by the state. For example, the legislature *could have* believed that this distribution would create a financial incentive for individuals to establish and maintain residence in Alaska.[331] Although there was no need to give older residents a greater financial incentive than more recent residents, clearly the legislature *could have* believed that this distribution would advance the goal to some extent. That is all that the deferential rationality review is said to require.

The point of this discussion is not that these four cases were wrongly decided. Rather, the point is that they were not decided under the traditional deferential rationality standard, and that the standard applied by the Court determines the outcome of the case.

B. *Finding Impermissible Purposes Where the Court Found None*

In the next set of four rationality cases, the Court was extremely deferential to the legislative judgment. However, had the Court applied the stricter standard of *Moreno*, *Cleburne*, *Plyler* and *Zobel*, these next four cases would have been resolved differently.

In *Lyng v. International Union, UAW*,[332] the Court considered a challenge to an amendment that excluded striking workers from the Food Stamp Program. On its facts, this case is extremely similar to *Moreno*.[333] Had the Court chosen to look for it, there was

328. 457 U.S. 55 (1982).

329. *Id.* at 65.

330. *Id.* at 63. For the Court's analysis of the purpose of this law, see *supra* notes 258-65 and accompanying text.

331. *Zobel*, 457 U.S. at 61. The state advanced three purposes for the statute: (1) to financially encourage people to move to Alaska and establish residency there; (2) to promote careful investment decisions about the Permanent Fund; and (3) to reward the past contributions of citizens. *Id.* Nevertheless, the Court summarily dismissed the first two purposes as unsupportive of the state's goals. *Id.* at 62.

332. 485 U.S. 360 (1988).

333. For a discussion of *Moreno*, see *supra* notes 243-45, 312-16 and accom-

some evidence that the amendment had been adopted as a strike-breaking tool, "an effort to increase the power of management over workers, using food as a weapon."[334] Clearly, such a purpose would be a classic naked preference, and thus impermissible. The Court instead found that the purpose of the amendment was "the legitimate governmental objective of avoiding undue favoritism to one side or the other in private labor disputes."[335] The Court refused to review the assertion that withdrawing government benefits from only the labor side of a labor dispute is far from neutral, especially considering the numerous benefits that management received from the government regardless of the occurrence of a labor dispute.[336] Under the *Moreno* standard of review, the Court would have looked closely at this claim and might have reached the opposite result, thus invalidating the statute.

Minnesota v. Clover Leaf Creamery Co.[337] was a classic example of judicial deference to legislative judgment in economic matters. The Court upheld a statute that prohibited the sale of milk in plastic cartons.[338] The Minnesota trial court, however, had previously concluded that the actual purpose of the law was to promote some segments of the dairy and pulpwood industries at the expense of other segments of the dairy and plastics industries.[339] Again, this would appear to be a classic naked preference—an attempt to advance the interests of A over B for A's own sake—which is clearly an impermissible purpose requiring invalidation of the statute. The Supreme Court arrived at the opposite conclusion, finding that the legislative purposes were the environ-

panying text. Both cases deal with the intent of the legislature to prevent a specific group from participating in the federal Food Stamp Program. *Lyng*, 485 U.S. at 384 (Marshall, J., dissenting).

334. *Lyng*, 485 U.S. at 384 (Marshall, J., dissenting) (quoting H.R. REP. No. 464, 95th Cong., 1st Sess. 129 (1977)).

335. *Id.* at 371. The Court felt that allowing strikers to benefit from the Food Stamp Program turned food stamps into a "weapon" against the management in labor disputes. *Id.*

336. *Id.* at 381-83 (Marshall, J., dissenting). Justice Marshall noted that government loans, government contracts, the protection of the Bankruptcy Act and tax subsidies do not depend upon the management of a business refraining from labor disputes. *Id.* at 382 (Marshall, J., dissenting). Thus, withdrawing food stamp benefits from strikers "amounts to a penalty on strikers, not neutrality." *Id.* at 382-83 (Marshall, J., dissenting).

337. 449 U.S. 456 (1981).

338. *Id.* at 470.

339. *Id.* at 460. The Minnesota Supreme Court upheld the district court's invalidation of the law, stating that "the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives." Clover Leaf Creamery Co. v. State, 289 N.W.2d 79, 82 (Minn. 1979).

mental goals set forth in the statute itself.[340] Notwithstanding the contrary evidence that the legislative *ban* on plastic milk containers was environmentally harmful,[341] the Court said that the test was whether or not the legislature "*could rationally have decided*" that the ban on plastic containers would promote environmental well-being.[342] The statute easily passed this deferential standard, even though the Minnesota legislature had its environmental facts backwards.

In *United States Railroad Retirement Board v. Fritz*,[343] the Court upheld an amendment to the Railroad Retirement Act that eliminated a windfall retirement benefit for some persons who had qualified for both railroad retirement benefits and social security benefits.[344] The Act preserved windfall benefits, however, for others who qualified for both social security and railroad retirement benefits.[345] The Court held that the purpose of the amendment was to "provide benefits to career railroad employees."[346] This justification did not appear anywhere in the statutory language or legislative history, and seems to have been a post hoc rationalization suggested by the government attorneys defending

340. *Clover Leaf Creamery*, 449 U.S. at 465-70. The state advanced four reasons why the ban on plastic nonreturnable milk cartons was rationally related to the state's legitimate environmental goals: (1) the removal of popular plastic nonreturnables would promote the use of environmentally superior containers; (2) the quick ban would prevent economic loss to dairies before they switch to the plastic containers; (3) the removal of plastic containers would save energy and (4) the ban would reduce Minnesota's solid waste disposal problem. *Id.* at 465-69.

341. *Id.* at 463-64, 469-70. *Clover Leaf Creamery* presented "impressive" evidence that banning plastic containers would "deplete natural resources, exacerbate solid waste disposal problems, and waste energy." *Id.* at 463. Additionally, the Minnesota Supreme Court found that plastic containers consume less energy than paper containers, and would occupy less space in landfills and cause less solid waste disposal problems than paper. *Id.* at 469-70 (citing Clover Leaf Creamery Co. v. State, 289 N.W.2d 79, 82-85 (Minn. 1979)).

342. *Id.* at 466. "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the [legislature]." *Id.* at 464 (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).

343. 449 U.S. 166 (1980).

344. *Id.* at 169-72.

345. *Id.*

346. *Id.* at 177. The Court also noted, however, that it is not necessary for the legislature to "articulate its reasons for enacting a statute." *Id.* at 179 (citing Flemming v. Nestor, 363 U.S. 603, 612 (1960)). Justice Brennan, in a dissenting opinion, criticized this reasoning because after *Flemming* was decided, the "Court has frequently recognized that the *actual* purposes of Congress . . . must be the primary basis for analysis under the rational-basis test." *Id.* at 187 (Brennan, J., dissenting) (citations omitted) (emphasis added).

the case.[347] Furthermore, the Court held that Congress could assume that the protected group, those with a current connection to the railroad industry, were more likely to be career railroaders than the unprotected group.[348] Since the purpose of the Act was to protect career railroad workers, the classification was rationally related to the legislative purpose.[349]

Justice Brennan, who dissented, would have scrutinized the law much more closely. The drafters of the bill were not members of Congress, but rather members of a Joint Labor-Management Negotiating Committee.[350] Additionally, the district court had found that the labor members of this committee had traded off the interests of those who were no longer active railroaders or union members (the plaintiff class) to achieve increased benefits for their current members.[351] Obviously, this situation looks like a naked preference. Justice Brennan suggested that Congress did not realize that the language of the statutory amendment would have this effect.[352] Moreover, Congress could have been misled by the Committee Report, which explained that one of the purposes of the amendment was to protect *all* vested benefits.[353] Thus, if the Court had closely scrutinized the amendment, it would have invalidated the law, either as a naked preference or

347. *Id.* at 187 (Brennan, J., dissenting). Recent Court decisions have required a statute to rationally support the actual legislative purpose, thus preventing courts from substituting what they feel is an appropriate purpose. *Id.* at 188 (Brennan, J., dissenting) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (law must "rationally further[] some legitimate, *articulated* state purpose" (emphasis added)) and Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam) (law must rationally further "the purposes *identified by the State*" (emphasis added))).

348. *Id.* at 178 & n.11 (Congress has used "current connection" test in past to determine eligibility for retirement benefits, occupational disability, survivor annuities and supplemental annuities).

349. *Id.* at 177-78.

350. *Id.* at 190 (Brennan, J., dissenting). Thus, the drafters were clearly not in a position to articulate the congressional purpose behind the Act. Additionally, the members of the committee did not represent the interests of the plaintiff class, who were no longer active railroad workers or union members. *Id.* (Brennan, J., dissenting).

351. *Id.* at 191 (Brennan, J., dissenting) (citing unreported opinion of district court).

352. *Id.* at 193 (Brennan, J., dissenting). In this case, the Act was very complex, had been drafted by outside parties (who while explaining the Act to Congress made frequent and uncorrected misstatements) and no Congressman had correctly stated the effect of the law. *Id.* (Brennan, J., dissenting).

353. *Id.* at 185 (Brennan, J., dissenting) ("Persons who already have vested rights under both . . . systems will in the future be permitted to receive benefits computed under both systems . . . ." (quoting H.R. REP. No. 1345, 93d Cong., 2d Sess. 1-2 (1974); S. REP. No. 1163, 93d Cong., 2d Sess. 1-2 (1974))).

because the means did not advance the purpose of the law to protect all persons with vested benefits.

In *New York City Transit Authority v. Beazer*,[354] the Court upheld a New York City Transit Authority regulation that excluded all persons receiving methadone maintenance treatment from employment.[355] The Court found that the purpose of the rule was to promote safety and efficiency.[356] Even assuming that the exclusion was broader then necessary to promote that purpose, and possibly even unwise, the Court concluded that the Equal Protection Clause did not authorize it to interfere in such a policy decision.[357] Under the *Cleburne* methodology, however, the result would have been different. Why was this particular group—methadone users—singled out? Justice White's dissenting opinion pointed out that both the district court and the court of appeals found that the group consisting of persons who had completed one year in the methadone maintenance program were just as employable as members of the general population.[358] Thus, excluding them was no more rational than excluding a percentage of applicants by lottery. Contrary to the majority's conclusion, there was strong reason to believe that the motivation for the methadone exclusion was a "special animus" against heroin addicts, a group composed largely of the poor and racial minorities.[359] It is important to note that the Transit Authority had no similar exclusionary rule for persons suffering from alcoholism and mental ill-

354. 440 U.S. 568 (1979). Methadone, a narcotic, is used to break the addiction of heroin addicts by preventing a user from obtaining a "high" when shooting heroin and also reducing the painful withdrawal symptoms. *Id.* at 573-74.

355. *Id.* at 594.

356. *Id.* at 592. The New York City Transit Authority runs a system of public transportation including subways and buses. *Id.* at 571. Thus, certain jobs involve the possibility of grave danger to either the worker or the public. *Id.* Naturally, the exclusion of persons using narcotics and other illicit drugs from these safety sensitive positions will promote the safety and efficiency of the public transportation system.

357. *Id.* at 592-94. The Court noted that the Transit Authority's policy may be broader than necessary because some methadone users are qualified to work at the Transit Authority in non-safety related positions, and individualized consideration of each applicant would be a wiser policy than a general rule. *Id.* The Court stated that since the exclusion "does not create or reflect any special likelihood of bias" toward methadone users, however, the Constitution does not authorize the Court to intervene. *Id.* at 593.

358. *Id.* at 603-04 (White, J., dissenting) (citing Beazer v. New York City Transit Auth., 399 F. Supp. 1032, 1037, 1058 (S.D.N.Y. 1975) and Beazer v. New York City Transit Auth., 558 F.2d 97, 99 (2d Cir. 1977)).

359. *Id.* at 609 n.15 (White, J., dissenting) (quoting majority op., 440 U.S. at 593 n.40).

ness, which are "afflictions . . . shared by both white and black, rich and poor."[360] These facts tend to show that the Transit Authority's exclusion of methadone users was economically and racially motivated, which would have been held to be an obviously impermissible purpose if the Court had applied the stricter form of rationality review.

Again, the point is not necessarily that these four cases were decided incorrectly. Rather, the point is that they were not decided under the same standard as *Moreno*, *Cleburne*, *Plyler* and *Zobel*. Therefore, two distinctly different standards are at work in the Court's rational basis analysis, causing unpredictable results depending upon which standard the Court chooses to apply in a particular case.

VI. CONCLUSION

Does equal protection's rationality review still have a justifiable role to play in American constitutional law? Obviously, the doctrine has both theoretical and practical problems. Consider rationality's balance sheet. On one side, its alleged liabilities:

1. Rationality review is not derived from the Constitution.
2. Rationality review is an undemocratic assertion of judicial control over legislatures.
3. Rationality review allows the personal values of judges to trump proper legislative outcomes.
4. Rationality review is inconsistent and unpredictable.

On the other side, its alleged assets:

1. The requirement that laws serve a public purpose flows directly from the structures of the Constitution.
2. The Constitution itself has taken some decisions away from the people. The requirement that laws serve a public purpose is one such limitation on popular sovereignty.
3. Although the line between public values and private preferences is sometimes quite thin, should we not attribute to judges the same capacity Justice Oliver Wendell Holmes attributed to every dog—the ability to distin-

360. *Id.* at 609 n.15 (White, J., dissenting). Further, the district court found that approximately 2300 to 2400 of the Transit Authority's 47,000 employees were attending a counselling service designed to help problem drinkers. Beazer v. New York City Transit Auth., 399 F. Supp. 1032, 1056-57 (S.D.N.Y. 1975). Thus, it was possible, and even likely, that problem drinkers constituted a larger employment risk than methadone users. New York City Transit Auth. v. Beazer, 440 U.S. at 611 n.17 (White, J., dissenting).

guish between being stumbled over and being kicked?[361]

4. The inconsistency of rationality review is not due to intellectual confusion, but rather to very different theories of government held by individual Justices on a changing Supreme Court.

For every charge, a countercharge exists. One cannot *prove* the legitimacy of rationality review, nor its illegitimacy. Nor, under current Supreme Court precedents, can the doctrine be closely and consistently cabined. It continues, however, to be a doctrine with which prospective litigants and trial judges must reckon.[362]

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361. O.W. HOLMES, THE COMMON LAW 3 (1881).

362. With only one exception the Supreme Court has not decided a rational basis case in a plaintiff's favor since 1985. *See* Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989) (county tax assessment scheme that allowed county to overvalue plaintiff's property for more than 10 years not rationally related to goal of assessing property at true current value). There continue to be, however, pro-plaintiff decisions in the lower federal courts. *See, e.g.*, Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990) (summary judgment reversed to allow plaintiffs to show no rational basis for moratorium on new water hookups); Sullivan v. City of Pittsburgh, 811 F.2d 171 (3d Cir.) (requirement of conditional use permits for alcoholic treatment centers bore no rational relationship to legitimate government purpose and was thus invalid), *cert. denied*, 484 U.S. 249 (1987); Deibler v. City of Rehoboth Beach, 790 F.2d 328 (3d Cir. 1986) (requirement that candidate for position of commissioner be nondelinquent taxpayer is not rationally related to legitimate governmental interest); Perez v. Cucci, 725 F. Supp. 209 (D.N.J. 1989) (invalidating policy of promoting and demoting police officers because defendants failed to demonstrate rational relationship to legitimate government purpose), *aff'd*, 898 F.2d 139 (3d Cir. 1990); Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370, 422 (N.D.N.Y. 1987) (holding Used and Useful Act invalid because it bore no rational relationship to legitimate government purpose); Burstyn v. City of Miami Beach, 663 F. Supp. 528 (S.D. Fla. 1987) (invalidating zoning ordinance requiring special permits for adult congregate homes for elderly and mentally disabled, because ordinance bore no rational relationship to legitimate government purpose).