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CONSTITUTIONAL LAW—EQUAL PROTECTION AND THE CLOSING OF PUBLIC FACILITIES

Pursuant to a judgment declaring that the operation of segregated public recreation facilities in Jackson, Mississippi, was a denial of equal protection of the laws,[1] the city council desegregated the city's parks, auditoriums, golf course and zoo, but closed the public swimming pools. Two of the pools were transferred to private organizations and apparently reopened on a segregated basis. Plaintiffs instituted an action to force the city to reopen the pools on a segregated basis. The federal district court held that the closing was not violative of the equal protection clause[2] and the court of appeal affirmed.[3] The United States Supreme Court *held*, that the closing of the pools was not a denial of equal protection of the laws and judicial inquiry into the motivation behind the closing was improper. *Palmer v. Thompson*, 91 S. Ct. 1940 (1971).

The genesis of "equal protection" was the adoption of the equal protection clause in the fourteenth amendment.[4] The Court, in *Strauder v. West Virginia*,[5] interpreted the amendment as primarily prohibiting discrimination against Negroes by state governments. This proscription was applied to public facilities in *Plessy v. Ferguson*,[6] which established the "separate but equal"

1. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir. 1963), *cert. denied*, 375 U.S. 951 (1963).

2. This opinion is not officially reported, but is referred to in the instant case. *See* Palmer v. Thompson, 91 S. Ct. 1940, 1942 n.1 (1971).

3. Palmer v. Thompson, 419 F.2d 1222 (5th Cir. 1969).

4. U.S. CONST. amend. XIV, § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

5. 100 U.S. 303, 307-08 (1880): "It [the equal protection clause] ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctly as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

6. 163 U.S. 537 (1896).

doctrine.[7] The doctrine was eventually rejected, however, when, in *Brown v. Board of Education*,[8] the Court held that separate facilities were inherently unequal and constituted a deprivation of equal protection of the laws. Thereafter, the doctrine of *Brown* was applied to other public facilities—public golf courses,[9] municipal theaters,[10] public beaches and bathhouses,[11] busses and common carriers,[12] public parks,[13] and swimming pools.[14]

Prior to the instant case, the Court had not decided the specific issue of whether or not the closing of public facilities was a denial of equal protection. However, several cases decided by the Court were peripheral to that issue. In *Bush v. Orleans Parish School Board*,[15] certain Louisiana statutes were attacked on the grounds that they perpetuated segregation in the state school system. Through the statutes, the Governor was given the power to close any school in the face of integration.[16] The statutes were

7. After citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the *Plessy* Court interpreted the fourteenth amendment as enforcing political, not social, equality. The Court held that a statute permitting separate accommodations on trains was not unconstitutional as long as the accommodations were equal. The Court concluded by stating that "[i]f the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896).

8. 347 U.S. 483, 495 (1954). The Court stated that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold, that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

9. Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir. 1955), *aff'd mem.*, 350 U.S. 879 (1955).

10. Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953), *aff'd mem.*, 347 U.S. 971 (1954).

11. Mayor & City Council of Baltimore v. Dawson, 220 F.2d 386 (4th Cir. 1955), *aff'd mem.*, 350 U.S. 877 (1955).

12. Gayle v. Browder, 142 F. Supp. 707 (N.D. Ala. 1956), *aff'd mem.*, 352 U.S. 903 (1956).

13. New Orleans City Park Improvement Ass'n v. Detiege, 252 F.2d 122 (5th Cir. 1958), *aff'd mem.*, 358 U.S. 54 (1958).

14. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir. 1963), *cert. denied*, 375 U.S. 951 (1963).

15. 187 F. Supp. 42 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961).

16. These Louisiana acts included the following: La. Acts 1958, No. 256 (giving Governor the right to close any school that was integrated); La. Acts 1960, No. 495 (giving Governor the right to close all schools if one were integrated); La. Acts 1960, No. 542 (giving Governor the right to close any school threatened with violence or disorder).

declared unconstitutional because they permitted the state to close integrated public schools while maintaining an otherwise segregated public school system.

Later in *Griffin v. County School Board of Prince Edward County*,[17] the State of Virginia closed the county schools but maintained private schools with public funds. The Court held that closing the public schools while, subsequently, supporting the private system was a scheme to perpetuate segregation and, hence, a denial of equal protection. In another equal protection case, land was conveyed to the City of Macon, Georgia, under a testamentary trust, to be used as a park for the enjoyment of white persons exclusively. In an attempt to preserve the segregated nature of the park, its managers sought to have the city removed as trustee because the city could not legally enforce racial segregation. However, the Court held in *Evans v. Newton*,[18] that the park was subject to the fourteenth amendment regardless of who held title, because the city still retained some control over the facility.[19]

Paralleling the development of equal protection has been the development of the Court's policy of refusing to inquire into the motives and purposes behind a legislative act. The Court in *Fletcher v. Peck*[20] voiced the earliest rejection of such an inquiry; most opinions rendered thereafter have been in accord with *Fletcher*.[21] Recently, in *United States v. O'Brien*, the Court stated that "[i]t is a familiar principle of constitutional law that this

17. 377 U.S. 218 (1964).

18. 382 U.S. 296 (1966).

19. In the subsequent companion case of Evans v. Abney, 396 U.S. 435 (1970), the Court ruled that the trust had become unenforceable and the property should revert to the testator's heirs. The park was thereafter closed to public use.

20. 10 U.S. (6 Cranch) 87, 131 (1810): "If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."

21. Cases supporting this policy include the following: Barenblatt v. United States, 360 U.S. 109 (1959); Tenney v. Bandhove, 341 U.S. 367 (1951); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949); United States v. Darby, 312 U.S. 100 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); Mulford v. Smith, 307 U.S. 38 (1939); Sozinsky v. United States, 300 U.S. 506 (1937); Fox v. Standard Oil of New Jersey, 294 U.S. 87 (1935); Arizona v. California, 283 U.S. 423 (1931); Smith v. Kansas Title & Trust Co., 255 U.S. 180 (1921); McCray v. United States, 195 U.S. 27 (1904); *Ex parte* McCardle, 4 U.S. (7 Wall.) 506 (1868).

Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[22]

However, several cases seem to suggest that motive is a legitimate consideration in determining the constitutionality of a statute. In *Gomillion v. Lightfoot*,[23] petitioners attacked the constitutionality of an act by which the Alabama legislature had redefined the boundaries of the City of Tuskegee. The redefined city formed a 28-sided figure which excluded most Negro voters while including most white voters. The Court declared the act to be unconstitutional, stating that "'[a]cts generally lawful may become unlawful when done to accomplish an unlawful end. . . .'"[24] Later, in *School District of Abington Township, Pennsylvania v. Schempp*,[25] a state statute required that schools begin the day with Bible readings. The Court tested the constitutionality of the act by inquiring into its purpose and effect.[26] Subsequently, the same test was applied in *Epperson v. Arkansas*,[27] wherein the Court invalidated a statute prohibiting the teaching of Darwinism in public schools after determining that the purpose of the statute was to promote fundamentalist Christianity.[28]

In the instant case, the majority first held that closing the public pools was not a denial of equal protection of the laws. In reaching this decision, the Court noted the lack of an affirmative duty on the municipality to maintain these public facilities.[29] The Court also found persuasive the fact that the Jackson city council,

22. O'Brien was convicted for burning his draft card. The majority held that such burning frustrated the substantial governmental interest in keeping adequate records. O'Brien argued that the legislation was unconstitutional because the purpose was to suppress freedom of speech. The Court rejected this proposition calling "inquiries into motives or purposes . . . a hazardous matter." 391 U.S. 367, 383 (1968).

23. 364 U.S. 339 (1960).

24. *Id.* at 347.

25. 374 U.S. 203 (1963).

26. "The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power circumscribed by the Constitution." *Id.* at 222.

27. 393 U.S. 97 (1968).

28. In declaring the act to be unlawful the Court stated that "[t]he State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit . . . the teaching of a scientific theory where that prohibition is based on *reasons* that violate the First Amendment." *Id.* at 107. (Emphasis added.)

29. "It should be noted first that neither the Fourteenth Amendment nor any act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools." Palmer v. Thompson, 91 S. Ct. 1940, 1942 (1971).

unlike the school board in *Griffin v. County School Board of Prince Edward County*,[30] exerted no control over the pools after their closing.[31] That the city council later transferred two of the pools to people who apparently did discriminate[32] did not amount to a denial of equal protection because the council had not authorized or encouraged the private owners to discriminate.[33] Hence, the closing did not appear to be a subterfuge by which the Jackson public pools could be maintained on a segregated basis.[34]

Secondly, the Court held that the closing did not violate the equal protection clause on the basis of "unconstitutional" motives. Relying on *United States v. O'Brien*,[35] the Court pointed to the difficulty of ascertaining the sole motivation of the city councilmen and to the general futility of determining motives and pur-

30. 377 U.S. 218 (1964). *See* text accompanying note 17 *supra*.

31. "This record supports no intimation that Jackson has not completely and finally ceased running swimming pools for all time. Unlike Prince Edward County, Jackson has not pretended to close public pools only to run them under a 'private' label. . . . [T]here is nothing here to show the city is directly or indirectly involved in the funding or operation of either pool. If the time ever comes when Jackson attempts to run segregated public pools either directly or indirectly, or participates in a subterfuge whereby pools are nominally run by 'private parties' but actually by the city, relief will be available in the federal courts." Palmer v. Thompson, 91 S. Ct. 1940, 1943-44 (1971).

32. Of the original five pools that were closed, one had been leased from the local YMCA. When the lease was surrendered, it appears that the YMCA allowed only white patrons to swim. A second pool was subsequently owned and operated by Jackson State College, and opened to the predominately black student body.

33. Petitioners had urged the type of encouragement found in Reitman v. Mulkey, 387 U.S. 369 (1967). In *Reitman*, California had adopted a constitutional amendment allowing private individuals to discriminate on racial grounds in real estate transactions. The Court concluded that the adoption of the amendment "was legislative action which authorized private discrimination and made the state at least a partner in the instant act of discrimination." *Id.* at 375. This state involvement was considered prohibitive even though it encouraged rather than commanded discrimination.

34. The *Palmer* Court found no encouragement of discrimination by the city and rejected any implication of a conspiracy to discriminate between the city council and the YMCA. The Court stated: "The implication of petitioner's argument appears to be that the fact that the city turned over to the YMCA a pool it had previously leased is sufficient to show automatically that the city had conspired with the YMCA to deprive Negroes of the opportunity to swim in integrated pools. Possibly in a case where the city and the YMCA were both parties, a court could find that the city engaged in a subterfuge, and that liability could be fastened on it as an active participant in a conspiracy with the YMCA. We need not speculate upon such a possibility, for there is no such finding here, and it does not appear from this record that there was evidence to support such a finding." Palmer v. Thompson, 91 S. Ct. 1940, 1944 (1971).

35. 391 U.S. 367 (1968). *See* note 22 *supra*.

poses.[36] Rather than attempt such an inquiry, the Court examined the effect of the closing upon all citizens of Jackson and found that the closing had an equal effect on both the blacks and the whites of the city.[37]

Justice White filed a lengthy dissent in which he rejected the city's justification for closing the pools, *viz.*, that the pools could not be operated safely and economically on an integrated basis, and further declared that the action was solely to avoid a lawful order to desegregate.[38] In condoning inquiry into legislative motivation, Justice White asserted that state action could not be sustained without a showing that the action was taken to accomplish a permissible state purpose.[39] Furthermore, Justice White felt that to uphold such closings would be to deter Negroes from future judicial actions because Negroes could reasonably

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36. "It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators. Furthermore, there 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." Palmer v. Thompson, 91 S. Ct. 1940, 1945 (1971).

37. *Id.* "Here the record indicates only that Jackson once ran segregated public swimming pools and that no public pools are now maintained by the city. Moreover, there is no evidence in this record to show that the city is not covertly aiding the maintenance and operation of pools which are private in name only. It shows no state action affecting blacks differently from whites."

38. Justice Black's opinion expressed the view of five members of the Court. In addition to Justice White's dissent, Chief Justice Burger concurred and added that it was impermissible to subject every decision of a local governing body closing public facilities to a motivational analysis. Justice Blackmun concurred, emphasizing the facts that other facilities had been desegregated; that a swimming pool was not an essential public facility; and that the pools were being operated at a deficit. Justice Douglas dissented, relying mainly on the ninth amendment as providing a right of access to public recreation facilities which could not be taken away by the local government. Justice Marshall, joined by Justices Brennan and White, dissented because he felt the opinion was in conflict with the policy of Brown v. Board of Education, 347 U.S. 483 (1954). The majority recognized the fact that there was "substantial evidence in the record" to support the conclusion that the pools could not be operated safely and economically on an integrated basis. The lower court had examined the operating costs, and it was shown there that the average annual loss to the city was $11,700.00 for the period 1960-1962. Palmer v. Thompson, 419 F.2d 1222, 1225 (5th Cir. 1969).

39. "I am quite unpersuaded by the majority's assertion that it is impermissible to impeach the otherwise valid act of closing municipal swimming pools by resort to evidence of invidious purpose or motive." Palmer v. Thompson, 91 S. Ct. 1940, 1953 (1971) (dissenting opinion). In citing Judge Wisdom's dissenting opinion in the lower court, 419 F.2d 1222, 1237 n.16 (5th Cir. 1969), Justice White states further that "'[i]f the facts state that city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation and would therefore not offend the Constitution.'" 91 S. Ct. 1940, 1962 (1971) (dissenting opinion).

fear that other public facilities would also be closed rather than integrated.[40]

In its application of the equal protection clause, the *Palmer* Court recognized an important distinction which seemed to be the crucial factor in its determination that the closing of Jackson's public swimming pools was not a denial of equal protection of the laws:[41] the lack of continued maintenance and control over the facilities by the state after the transfer into private hands rendered the closing constitutional. This factor appeared to be controlling in *Evans v. Newton*,[42] where the Court stated that "[i]f the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment. . . ."[43] and in *Griffin*,[44] where "closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws."[45]

It thus appears that the Supreme Court has developed a test to determine whether or not the closing of public facilities will constitute a denial of equal protection of the laws. Such a closing will be unconstitutional only when some type of control, maintenance, or continued action is exercised by the local government after closure.[46] It was the lack of such control that made the closing in *Palmer* constitutional. However, it seems that the Court's test will be limited to those facilities which do not serve essential public functions. The Court noted that the local govern-

40. "It is evident that closing a public facility after a court has ordered its desegregation has an unfortunate impact on the minority considering initiation of further suits or filing complaints with the Attorney General. As Judge Wisdom said, 'the price of protest is high. Negroes * * * now know that they risk losing even segregated public facilities if they dare to protest * * * segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether * * *' 419 F.2d at 1236 (dissenting opinion). It is difficult to measure the extent of this impact, but it is surely present and surely we should not ignore it. The action of the city in this case interposes a major deterrent to seeking judicial or executive help in eliminating racial restrictions on the use of public facilities. As such, it is illegal under the Fourteenth Amendment." Palmer v. Thompson, 91 S. Ct. 1940, 1967 (1971) (dissenting opinion).

41. *See* note 31 *supra* and accompanying text.

42. 382 U.S. 296 (1966). *See* text accompanying note 18 *supra*.

43. *Id.* at 301.

44. 377 U.S. 218 (1964). *See* text accompanying note 17 *supra*.

45. *Id.* at 232.

46. *See* text accompanying notes 30 and 31 *supra*.

ment has no obligation to maintain swimming pools.[47] However, the question of whether or not there is a duty to maintain certain public facilities which could be termed essential was not answered by the Court. There is no provision in the Constitution that establishes such a duty, but perhaps a duty has arisen out of tradition and custom. If so, then the closing of a vital public facility, such as a public school system, would itself be unconstitutional.[48] It is submitted that the Court has failed to correlate sufficiently the application of the test with the duty to maintain the facility. Hence, when applied to more vital public facilities, the adequacy of the test is questionable.

In its rejection of judicial inquiry into legislative motivation, the Court has reiterated a time-honored doctrine.[49] Although prior cases have used such phrases as "purpose and the primary effect,"[50] "reasons that violate,"[51] and "accomplish an unlawful end,"[52] all of which suggest that the Court has considered the motives and purposes behind an act in determining its constitutionality, the Court was actually focusing on the effect of the statute in question. Substantiation for this conclusion is found in *United States v. O'Brien*,[53] where it is stated that "[t]hese cases stand,[54] not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional."[55] Furthermore, "the purpose of the legislation was irrelevant, because the inevitable effect—the 'necessary scope and operation,' . . . abridged constitutional rights."[56]

47. The majority stated that "neither the Fourteenth Amendment nor any act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools." Palmer v. Thompson, 91 S. Ct. 1940, 1942 (1971).

48. If the lack of constitutional authority precludes the existence of such a duty, then presumably a state could close its school system and transfer it into private hands. As long as the state exerted no maintenance or control after transfer, then the act would be constitutional under the *Palmer* test. Thus the application of the test hinges on the existence of a duty to maintain the facility.

49. *See* text accompanying note 21 *supra*.

50. School Dist. of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 222 (1963). *See* text accompanying note 26 *supra*.

51. Epperson v. Arkansas, 393 U.S. 97, 107 (1968). *See* text accompanying note 28 *supra*.

52. Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960). *See* text accompanying note 24 *supra*.

53. 391 U.S. 367 (1968).

54. Chief Justice Warren was referring to Gomillion v. Lightfoot, 364 U.S. 339 (1960) *and* Grosjean v. American Press Co., 297 U.S. 233 (1936).

55. United States v. O'Brien, 391 U.S. 367, 384 (1968).

56. *Id.* at 385.

Historically, the Court has applied this "effect" test to determine the constitutionality of statutes.[57] Recently, some writers have suggested that motivation can be relevant[58] and that "purpose" may be used to more effectively determine the effects of an act.[59] It is submitted, however, that inquiry into anything beyond the inevitable effects of an act is a "hazardous matter" indeed.[60] Such inquiry would subject the doctrine of equal pro-

57. North Laramie Land Co. v. Hoffmann, 268 U.S. 76, 83 (1925): "In passing on the constitutionality of a state law, its effect must be judged in light of its practical application to the affairs of men as they are ordinarily conducted." Mountain Timber Co. v. Washington, 243 U.S. 219, 237 (1917): "The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its operation and effect." New York v. Roberts, 171 U.S. 658, 691 (1898): "In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted." Minnesota v. Barber, 136 U.S. 313, 320 (1890): "Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

58. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1281-82 (1970): "I have suggested that the motivation of legislators and other government officials is relevant in cases where (1) the governmental choice under attack is not subject from the outset—that is, simply because a choice has been made and someone has been injured by it—to the demand for a legitimate defense and (2) the group whose disadvantaging is raised by way of objection is one to which the government owes no affirmative duty of accommodation, but simply an obligation of 'neutrality.' I have further suggested (3) that proof of unconstitutional motivation properly functions only to trigger a theretofore inapplicable burden of legitimate defense. The suggestion of this section is that the three numbered limitations delineate the only situation in which motivation constitutes the appropriate constitutional reference and define the only way in which it can properly function."

59. Note, 83 HARV. L. REV. 1887, 1892-93 (1970): "A more manageable suggestion is to attempt to incorporate purpose into the present process of judicial review based upon the effects which flow from the terms of legislation. Purpose can be quite useful in helping courts to take account of the full range of effects which flow from a given piece of legislation. In whatever manner a court chooses to analyze those effects—whether it chooses to 'balance' the bad and the good, to make one effect absolute, or to decide that the good might have been achieved at less cost—judicial performance will be improved by more sensitive determination of the effects of an act. Consideration of purpose will not answer whether the effects of an act are constitutional. But purpose may help a court to determine what those effects will be."

60. United States v. O'Brien, 391 U.S. 367, 383 (1968). One commentator has aptly described it: "Legislative motive, moreover, is such an awesome conception that it may conceivably also comprise the *separate* motives of legislators. . . . It also embraces all the motives innate in the interests, both individual and collective, that eventuate in the very introduction of a bill in the legislature. Only thereafter does it directly enter on the motives of the legislators and on *their* interpretations (interpolations) of the motives of all who have influenced them during the actual passage of legislation. To assume that these two hundred or two hundred thousand or two million motives can be truly and accurately known and somehow then synthesized

tection to varying and inconsistent standards depending on the motives or purposes behind the particular statute. Not only is it difficult to determine the sole motivation behind a legislative enactment, but it is also futile to judicially attempt to invalidate the law because of improper legislative motives. Presumably, the law could be re-enacted for valid motives and, thus, become constitutional.[61] However, if the Court continues to rely upon the effects of the statute, the standard will remain constant and judicial inquiry will be limited to an area within its proper bounds.

W. Michael Adams

FEDERAL TAX LIABILITY OF THE WIFE FOR COMMUNITY INCOME EARNED BY THE HUSBAND

Mr. and Mrs. Mitchell lived under Louisiana's community of gains from 1946 until its termination by judicial separation from bed and board in August 1961. Later, Mrs. Mitchell renounced the community of gains leaving Mr. Mitchell responsible for all assets and liabilities contracted during the existence of the community. Although he earned taxable income from 1955 to 1959, Mr. Mitchell failed to file federal tax returns. In an attempt to collect one-half of the taxes and penalties owed on this income, the Commissioner assessed a deficiency[1] against Mrs. Mitchell. The Tax Court[2] determined that Mrs. Mitchell's tax liability was created when she became owner of the property, and that she has become the immediate owner of one-half of all community property upon its acquisition. The Fifth Circuit[3] reversed, holding that Mrs. Mitchell's renunciation avoided any tax liability on income falling into the community of gains. On

into one composite legislative motive is at once absurd, irresponsible, and scientifically indefensible. It amounts to scientism of the worst variety." Howell, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute*, 47 VA. L. REV. 439, 450-51 (1961).

61. *See* note 36 *supra*.

1. A deficiency is the excess of a given tax over the net amount previously reported and assessed or collected without assessment. INT. REV. CODE of 1954, § 6211. Deficiencies are formally asserted by the government through an assessment. An assessment occurs when the district director signs the assessment list, and this fixes the government's tax claim. Mim. 3229, III-2 CUM. BULL. 293, 294 (1924).

2. Mitchell v. Commissioner, 51 T.C. 641 (1969).

3. Mitchell v. Commissioner, 430 F.2d 1 (5th Cir. 1970).