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Reflections on a Unified Theory of Motive

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Motive has come a long way since *Palmer v. Thompson*[1] and *United States v. O'Brien*[2] revived the notion that legislative motive is not a basis for invalidating official enactments. Recently, writers seem to agree that motive should play some role in constitutional adjudication.[3] Reason exists to believe that the Court itself concurs.[4] Professors Clark[5] and Simon[6] now ably join this consensus.

Even though motive may be relevant in assessing some constitutional claims, the question remains whether there are cases in which motive should not be relevant. Professor Ely has suggested that motive need not and should not be relevant in all cases merely because it is relevant in some cases.[7] I have already ex-

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1. 403 U.S. 217 (1971).

2. 391 U.S. 367 (1968).

3. Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

4. Despite the Court's expressed willingness to resort to motive, *e.g.*, Washington v. Davis, 426 U.S. 229 (1976), one should be only cautiously optimistic about motive's future until the Court actually utilizes motive to invalidate official acts. Eisenberg, *supra* note 3, at 47 n.63.

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

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

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

pressed some of my views on this matter.[8] Professor Clark's article again raises the question whether a line should be drawn, and if so, where.[9]

Initially, one might ask why we should try to draw a line between cases in which motive should matter and cases in which it should not. Neither constitutional text nor formal logic mandates such a line. One could hold that all unconstitutional motives are judicially cognizable. The Court then would be left with the task of deciding which motives are unconstitutional. There may well be a case, however, for trying to draw a line. If in any particular case resort to motive entails highly desirable consequences and relatively minor undesirable consequences, a prima facie case for using motive exists. At the other extreme, to the extent there are undesirable consequences and relatively minor gains, a prima facie case exists for ignoring motive. If the ends of the spectrum are sufficiently distant from one another, the case for a line begins to emerge.

Some potential adverse consequences of motive analysis are apparent. As Professor Karst notes elsewhere in this Colloquium, no decisionmaking body wishes to be told that its motives are sufficiently impure to require invalidation of its acts.[10] Interbranch tensions increase when judges examine official decisionmakers' motives. Also, there is always the risk that a judge mistakenly will attribute an illicit motive to the official decisionmaker. In such a case, society may be deprived of an otherwise beneficial law because of judicial error. These two costs seem inherent in any system allowing review of official motives.

If given enough weight, these and other costs[11] may be sufficient to require important and otherwise unattainable benefits to result from examination of motive. One unique benefit to be attained from scrutiny of all sufficiently "bad" motives exists. One may not want a society in which there are statutes that would not have been enacted but for bad reasons, and therefore one may desire a rule proscribing such statutes regardless of their effects. Although complete purity of process might be a goal worth pursuing, it does suggest rather unrealistic standards. If one discards this general due process benefit,[12] however, many situa-

8. Eisenberg, note 3 *supra.*

9. Clark, *Legislative Motivation and Fundamantal Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 1038-39 (1978).

10. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978).

11. For other objections to resorting to motive, *see, e.g.*, Eisenberg, *supra* note 3, at 114-17.

12. For discussions of other ways in which the concept of due process may ad-

tions arise in which one is hard-pressed to point to any other substantial benefit attending resort to motive. Nevertheless, some important classes of cases in which analysis of motive yields important dividends remain. Space limitations permit outlining only one example of a possible mode of analysis for isolating the cases in which courts should examine motive.

Consider a state law that is within whatever substantive limits the sixth amendment imposes on jury trials. If the statute is going to fall, it must be because of motive. An enactment that exceeds sixth amendment limits—a law abolishing trial by jury—would fall regardless of the legislators' motives. An example I have worked with before is a state law that allows six-person juries in criminal cases.[13] The Court upheld such a law in *Williams v. Florida.*[14]

Let us make the unrealistic assumptions that one motive underlies the enactment and that it can be determined with whatever certainty is deemed necessary. Assume also that one of the following can be deemed *the* motive of the legislature: (1) to make the state's criminal justice system more efficient (this might be a response to delay or to difficulty in finding twelve qualified jurors), (2) to increase the percentage of criminal trials resulting in convictions, (3) to subvert the protection the sixth amendment provides defendants (this hostility might accompany a feeling that the Bill of Rights is too favorable to defendants), (4) to fulfill an agreement with state prosecutors by which the legislators agreed to vote for the law in exchange for payment by the prosecutors of $1,000 to the legislators, (5) to increase the likelihood of convicting the notorious criminal, John Smith, or (6) to increase the number of blacks or Quakers who are convicted.

One can deal with the first motive, facilitating the administration of justice, rather easily. Under no reasonable view of any constitutional provision is this motive tainted. A court will not entertain the argument, by one who is tried by a six-person jury (assuming a six-person jury is otherwise constitutional), that the

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dress the process by which laws are enacted, as opposed to the fairness of procedures mandated by laws or to the substantive effects of laws, see Hazard, *Representation in Rule-making*, in LAW AND THE AMERICAN FUTURE 85 (M. Schwartz ed. 1976); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222-24, 238-44 (1976).

13. Eisenberg, *supra* note 3, at 141-42 & n.497.

14. 399 U.S. 78 (1970).

six-person requirement would not have been enacted but for the legislature's desire to improve the administration of justice.

The second posited motive, achieving conviction of suspects in a greater percentage of criminal cases, may be slightly more difficult to deal with. Some might assert it as permissible for a legislature to seek the conviction of more suspects as to seek the improvement of criminal justice administration. If one follows this view, no difficulty exists in refusing to use the second posited motive to invalidate legislation. One might argue, however, that the sixth amendment and other constitutional limitations on criminal procedure were designed to prevent legislatures from playing fast and loose with procedure merely to achieve more convictions. Under this view, consideration of the second motive would result in greater fidelity to the Constitution. Should the Court allow use of this motive? In approaching the problem, the Court might ask: Given that resort to motive entails some costs, does the protection afforded by using this motive sufficiently outweigh these costs? For the present, I am content to advocate the asking of the question without attempting to answer it.

Even if one takes a generous view of the first two motives, a court could not dismiss a claim alleging the third motive merely on the ground that the third motive is permissible. A desire to subvert the sixth amendment directly conflicts with constitutional dictates. Admittedly, it is unlikely that many legislators will be thinking in terms of exceeding a particular constitutional provision, but the horror stories one hears about how the Bill of Rights might fare if put to public vote suggest the example is not so unrealistic. In addition, it is possible that the Court will view other actual motives as the functional equivalents of a desire to exceed sixth amendment limitations.[15] In characterizing some federal social legislation as motivated by a desire to invade areas left by the Constitution to the states, and in relying in part on this motive to strike down such legislation, the Court has treated some motives not necessarily cast in constitutional terms as the functional equivalents of motives so framed.[16] Under the proposed form of analysis, the motive's impropriety requires that one examine relative costs and benefits of resort to motive. Would the greater fidelity to sixth amendment values be worth the costs? How much, if any, of this increase would be unattainable by fine-tuning an effects test?

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15. *Cf.* Screws v. United States, 325 U.S. 91 (1945) (intent to deprive person of constitutional rights inferred from acts even though it was unlikely that the defendant was thinking in constitutional terms).

16. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1208 n.2 (1970).

The fourth posited motive, that the six-person jury rule represents a response to bribes, raises the question whether a patently reprehensible motive not in direct conflict with the Constitution should provide a basis for invalidating legislation. Potential difficulties that might accompany an affirmative response readily come to mind. May legislators realistically be expected not to pursue self-interest? Do citizens really want them not to do so? One might distinguish among forms of self-interest on the ground that some pursuits of self-interest are criminal (receiving bribes) but others often are not (for example, voting for legislation favorable to a business in which legislators have an interest). Alternatively, motives relating to criminal pursuit of self-interest might lose their favored candidacy because criminal laws could be said to represent society's judgment concerning both which motives should be banned and how to effectuate the ban. But criminal penalties do nothing to vindicate the interests of those claiming a right to live in a society free of laws enacted for "bad" or for illegal reasons. The criminal legislators may be in jail, but the laws are on the books. Is it frivolous to assert a due process claim in such cases? These cases are, after all, defects in process.[17] Loosely read, *Fletcher v. Peck*[18] may settle this issue, but rethinking the matter may be in order.

The fifth posited motive, a desire to "get" John Smith, raises questions under the ex post facto and bill of attainder clause.[19] If the legislature wishes to penalize Smith because of acts he previously has committed, and the new jury rule affects the trial for the crimes these acts allegedly constitute, the law may be attacked under the ex post facto clause regardless of motive. The attack would probably fail.[20] Should the additional factor of the anti-Smith motivation change the analysis? Respectable opinion suggests that it might.[21] This situation raises difficult questions about the origins and the contemporary function of the ex post facto and bill of attainder clause. It suffices for now to note that *if*, for example, the ex post facto provision limits governmental actions aimed at specific constituents, a strong and perhaps over-

17. *See also* note 12 *supra*.
18. 10 U.S. (6 Cranch) 87 (1810).
19. U.S. CONST. art. I, § 9, cl. 3.
20. *See* Dobbert v. Florida, 432 U.S. 282 (1977).
21. *E.g., id.* at 307 (Stevens, J., dissenting); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 484 & n.10 (1978).

whelming factor exists in favor of examining the anti-Smith motive. Unless the Court is willing to do so, it is impossible to vindicate an important aspect of the ex post facto clause. No reasonable effects test can protect this interest.

The inability of effects tests to protect important equal protection and free exercise clause interests renders analysis of the sixth posited motive relatively easy. Whatever detriments attend resort to motive, given our history, they seem outweighed by the need to protect individuals from racial and religious discrimination. Testing effects can only partly serve the need. A racial challenge to the firing of one teacher and perhaps the facts of *Palmer v. Thompson* illustrate this principle. Increasing scrutiny of effects can never fully vindicate racial equal protection interests.

Could a similar shortfall exist between effects tests and the thrust of the sixth amendment, causing the third motive also to be relevant? The difference between the two motives may be one of degree, but even this is doubtful. Except for the general due process interest in examining any motive conflicting with the Constitution, jury trial interests can be protected fully by heightening or by altering effects tests. The racial and the religious interests protected by the first and the fourteenth amendments are different in kind from the general interest in a process of pure motives. The discrete and insular minority cliché is one obvious way of separating racial and religious interests from more general interests in process. In a prescient early analysis of the equal protection clause, Professors Tussman and tenBroek observed that there is little to discriminatory legislation cases other than questions of motive.[22] It is doubtful that the same can be said for the right to trial by jury.[23]

If any conclusion emerges from this brief discussion, it is that one should not attempt too quick or too facile an answer to the question whether motive should be considered in constitutional adjudication. In particular, one should not extrapolate from an answer to the question whether one motive should or should not be constitutionally relevant an answer to the question whether any other motives should be. Unpraiseworthy motives may conflict with many different constitutional limitations. These limitations

22. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 358 (1949).

23. *See* Eisenberg, *supra* note 3, at 141-42 & n.497. The line between cases in which motive should matter and cases in which it should not may turn on whether the constitutional provision at issue limits the scope of governmental power or whether it limits the way in which this power is exercised. *See id.*, at 139-46. Professor Tribe seems to have proposed a similar dividing line. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 229 (1978).

protect such a variety of interests that one should not expect a single answer to the motive question.