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THE ROLE OF GOVERNMENTAL PURPOSE IN CONSTITUTIONAL JUDICIAL REVIEW

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I. INTRODUCTION

Why is the purpose of governmental action sometimes highly relevant to judicial determination of its constitutional validity and other times completely irrelevant to that question? Even when purpose is relevant, why is the method of determining purpose so variable? When *should* governmental purpose be relevant to assessment of the constitutional validity of government action? What method should courts use to determine purpose? This Article seeks to answer these questions.

Before doing so, it is important to be clear about the meaning of governmental purpose. A statutory purpose—or objective—might be different than the motives of the legislators who enact the statute.[1] The purpose of executive action might differ from the motives of the executive official for taking the action.[2] This suggests that purpose might be determined objectively by reasoning from the terms of the statute, declarations of purpose, or the likely public benefit the statute aims to establish. By contrast, motives might be thought to be a matter of subjective intent. Because subjective intent is markedly more difficult to determine than objective intent, perhaps the search for governmental purpose is a search for objective indicators of governmental intent. Unfortunately, this handy distinction breaks down in practice. It turns out that purpose is sometimes reckoned by objective markers such as the terms of the statute[3] or the government's stated purposes,[4] and at other times purpose is determined by supposition[5] or inquiry into actual

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1. Justice Scalia, for example, has noted that "while it is possible to discern the objective 'purpose' of a statute ([i.e.], the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth . . . , discerning the subjective motivation of those enacting the statute is . . . almost always an impossible task." Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

2. For example, the President might negotiate a treaty that commits the nation to reduce its carbon emissions. The President declares that the purpose of the treaty is to combat global warming and that purpose would be a fair inference from the face of the treaty. But the President's motive might be to curry favor with voters to win reelection; to punish oil companies who have contributed to his opponent; to spur technological innovation that will reduce the nation's dependence on foreign oil in order to free the nation from foreign policy entanglements in the Middle East; or any number of other possibilities.

3. Perhaps the most famous statement of this approach is that of then-Justice Rehnquist, with respect to the application of minimal (or "rational basis") scrutiny: "[T]he plain language of [the statute] marks the beginning and end of our inquiry [into congressional purpose]." U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176 (1980). In an earlier case, Justice Rehnquist declared that the "purpose [of legislation is] to make the language [of the statute] a part of the . . . law." Trimble v. Gordon, 430 U.S. 762, 782 (1977) (Rehnquist, J., dissenting). A broader search for purpose "expands the normal meaning of the word into something more like motive." *Id.*

4. When applying minimal scrutiny in equal protection cases, Justice Brennan declared that if "Congress has articulated a legitimate governmental objective, and the challenged classification rationally furthers that objective, we must sustain the provision." *Fritz*, 449 U.S. at 188 (Brennan, J., dissenting).

5. In *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), the Court stated, "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." *Id.* at 78. More recently, the Court has declared that, under minimal scrutiny, "[w]here . . . there are plausible reasons for Congress'[s] action, our inquiry is at an end. It is, of course, 'constitutionally

purpose.[6] Because the determinants of actual purpose are not tethered to any objective criteria, the search for actual purpose becomes a probe into the subjective intentions of government actors—a task greatly compounded by the difficulty of aggregating disparate subjective intentions into a single actual purpose.

A satisfactory answer to the first two questions is more difficult to produce than a satisfactory answer to the second pair of questions. The Court's focus upon governmental purpose as a factor to be examined in assessing the constitutional validity of government action is uncertain and wavering. At the same time, when the Court deems purpose to be relevant, it employs sharply divergent methods of locating purpose. Part II canvasses some possible explanations for these phenomena. The Court might be treating governmental purpose as relevant in rough proportion to the stringency of the level of review it applies. The Court could be finding purpose to be relevant in cases of individual rights but not with respect to structural issues, such as federalism and separation of powers. Perhaps the Court uses governmental purpose as a criterion for decision when examination of the effects of governmental action is inadequate to decide its constitutional validity. Or, the Court might simply be relying upon governmental purpose in an ad hoc fashion, with no concern for identification of a general rationale—a process that inevitably risks incoherence. Given tiered scrutiny, one might suppose that the Court's method of divining purpose varies with the applicable level of judicial review. Part II suggests that none of these answers are satisfactory.

Fortunately, it is easier to answer the normative questions. Because it is the real world effects of government action that harm or help people, the default criterion for assessing constitutional validity should be the effects of the challenged government action. However, consideration of governmental purpose is inevitable so long as courts continue to use tiered scrutiny as the principal method of constitutional adjudication. Yet, because it is so extremely difficult, if not impossible, for a court to infer actual legislative purposes from evidence of the motives of individual actors, courts should strive to confine purpose inquiry to objective indicators of governmental purpose. Moreover, reliance upon motive to infer actual purpose and, thus, to invalidate governmental actions can lead to anomalous results, such as when the chosen means are ineffective to achieve an illegitimate actual purpose.[7] However, the principle that purpose should be

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irrelevant whether this reasoning in fact underlay the legislative decision . . . .'" *Fritz*, 449 U.S. at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).

6. Usually, this is phrased as determining the government's actual purpose. See, for example, Justice Brennan's argument that when applying minimal scrutiny in equal protection cases, if a "challenged classification is either irrelevant to or counter to [the legislatively stated] purpose, we must view any *post hoc* [hypothetical purposes] proffered by Government attorneys with skepticism. A challenged classification may be sustained only if it is rationally related to achievement of an *actual* legitimate governmental purpose." *Fritz*, 449 U.S. at 188 (Brennan, J., dissenting). The actual purpose of legislation, then, must be determined by ignoring its stated purpose and possible purposes, and by attributing a unitary "actual" purpose to a deliberative body—an activity that tends to blur any distinction between purpose and motive because the quest for actual purpose is a search for the subjective intentions of the legislature or executive official.

7. *See* discussion *infra* Part IV.B.

determined from objective intent is not universal. Most importantly, when constitutionally suspicious effects are produced by a facially valid means that stem from hidden forbidden motives, a failure to recognize and account for such bad motives leads to inappropriate outcomes.

There are also a number of exceptions to the general rule that effects should matter most. When Congress acts to regulate the states in their sovereign capacities, a clear expression of its purpose to do so ensures the integrity of the political process upon which federalism limits are heavily dependent and dampens judicial intervention to preserve federalism boundaries. When illegitimate purpose, by itself, causes stigmatic or other inherent injury sufficient to constitute a constitutional violation, purpose and effects are united in an invidious fashion that requires courts to strike down such measures. When courts are not capable of assessing whether the means chosen to accomplish an illegitimate purpose are effective, voiding a measure because it has a clearly identifiable illegitimate purpose is a prophylactic means to prevent possible constitutional harm. Finally, purpose is relevant to resolution of the so-called disparate impact cases: When an apparently legitimate purpose causes suspicious effects, evidence of an illegitimate actual purpose, even if inferred from motive, separates intended suspicious effects from the truly unintended, and wholly inadvertent, ones.

These exceptions, however, do not account for all the instances in which the Court finds purpose to be relevant to a constitutional decision. As a result, there are several doctrines that are questionable because they use purpose unnecessarily or, even worse, perversely. In free speech, for example, the Court's use of purpose to separate content-based and content-neutral speech restrictions generally, and with respect to the secondary effects doctrine in particular, is ill-conceived and ought to be scrapped. Judicial focus on purpose to decide whether the government has created a limited public forum is equally dubious. With respect to the religion clauses, the Court's insistence on proof of a secular purpose under the *Lemon* test,[8] no matter how diluted that inquiry has become, is unnecessary and obfuscatory. To the extent that the government's clearly identified purpose is either overtly religious or hostile to religion, such a purpose might fall into the category of inherent or stigmatic injury and thus be void on that ground alone.[9] Absent such a purpose, the criterion of constitutional invalidity should be the effects of the measure. Similarly, judicial focus on government hostility to religion in Free Exercise cases is wholly unnecessary; it is the effect of the government action that bites the religious observant. Finally, the sui generis undue burden test, applicable to previability abortion regulations, ought to focus exclusively on whether such abortion regulations actually erect a substantial obstacle to such an abortion. An *ineffective* government purpose to do so poses, by definition, an insubstantial obstacle to

8. Chief Justice Burger first articulated the three pronged test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion," Lemon v. Kurtzman, 403 U.S. 602, 612 (1970) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)); "finally, the statute must not foster 'an excessive government entanglement with religion,'" *id.* at 613 (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674 (1970)).

9. *See* discussion *infra* Part IV.B.1.

vindication of the constitutional autonomy right in question.

Even when purpose is deemed relevant, the inconsistent judicial method of ascertaining purpose deserves criticism and reevaluation. The judicial propensity to sometimes infer an illegitimate purpose from motives when applying minimal scrutiny is neither necessary nor within the ken of judicial cognition. The results of such cases as *U.S. Department of Agriculture v. Moreno*,[10] *City of Cleburne v. Cleburne Living Center, Inc.*,[11] *Romer v. Evans*,[12] and *Plyler v. Doe*[13] can be grounded in the irrational effects of the measures at issue and need not rely on inferred intent. While the use of actual purpose may be more theoretically justifiable under any level of heightened scrutiny, reliance upon motive evidence to prove actual purpose enhances the danger that courts will engage in the pseudo-psychic art of inventing governmental purpose from a skimpy jumble of motive evidence. Nevertheless, because of the skepticism that should attend to examination of governmental purpose under heightened scrutiny, actual purpose should remain the focus of judicial scrutiny in that context, but clear expression of the method of determining actual purpose would be helpful to both analysis of constitutional controversies and prediction of their judicial resolution.

Some of these conclusions may be controversial and, as is always the case in constitutional law, will provoke disagreement. Of course, that is the academic function. I hope to spark debate in this undertheorized area,[14] not to offer the final word.

Part II seeks to briefly describe the inconsistent present use of governmental purpose, however determined, as an aid to constitutional adjudication, to illustrate the inconsistent use of motive evidence to reveal governmental purpose, and to demonstrate the kaleidoscopic methods of locating purpose. Part III consists of an attempt to derive some overarching principles from what the Court does with respect to its use of governmental purpose and its method of identifying purpose.

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10. 413 U.S. 528 (1973).
11. 473 U.S. 432 (1985).
12. 517 U.S. 620 (1996).
13. 457 U.S. 202 (1982).
14. There is a dearth of comprehensive examination of this issue. Perhaps the best treatment is John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). A more recent examination is Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997). A fair amount of attention has been paid to the related, but distinctly different, problem of developing a principled method of assessing the relative importance of governmental purposes. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–83 (1987) (noting the many critiques of commentators regarding the Court's adherence to a constitutional jurisprudence of balancing); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 348–50 (1993) (arguing that judicial decisions rendered during the New Deal era greatly expanded the Court's view of constitutionally valid governmental purposes); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932–37 (1988) (arguing that the Court has failed to articulate a constitutional basis for its governmental purpose inquiry); Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 983–85 (1994) (noting that the Court begins its analysis by presuming a legitimate governmental purpose, leaving the adverse party to rebut that presumption).

That effort is ultimately unsatisfactory. I leave it to the reader to decide whether the fault is mine or the Court's. Part IV turns to two normative questions: First, when should governmental purpose be relevant to determination of the constitutional validity of government actions? Second, when purpose is relevant, what should be the proper method of ascertaining purpose? In doing so, I hope to reveal why a number of constitutional doctrines appear to be in error and ought to be reconsidered or abandoned.

II. THE SUPREME COURT'S USE OF GOVERNMENTAL PURPOSE IN CONSTITUTIONAL ADJUDICATION

Every constitutional lawyer knows that constitutional doctrine focuses on the ends and means of executive and legislative action. While those factors are framed differently at each level of judicial scrutiny, that framing depends on the relationship between governmental purposes and the means chosen to accomplish those ends. Strict scrutiny, of course, requires the government to justify its purpose as compelling[15] and to prove that the means chosen are necessary to realize the compelling purpose. Minimal scrutiny, on the other hand, obliges the challenger to prove that the government has either no legitimate purpose for its action or that the action is not rationally related to any conceivable legitimate purpose.[16]

A. The Relevance of Purpose

The triggers for strict scrutiny are familiar. In equal protection cases, such scrutiny is triggered either by the employment of a means that is a presumptive indicator of a forbidden purpose (e.g., a racial classification) or by a means that has the effect of infringing a constitutionally fundamental right (e.g., a denial or dilution of the vote). Governmental purpose is critical in the first instance, but in the second it is the effects of governmental action that matter. Yet, when the means employed lack any indication of forbidden purpose (e.g., a racially neutral classification), even though the effects produced by the chosen means are racially disparate, courts apply minimal scrutiny absent proof by the challenger that a government motive for the action was to produce the disparate racial effects.[17] When minimal scrutiny is the level of review, courts find legitimate purpose

15. There is no articulated calculus for determining when a governmental objective, however determined, is "compelling," much less when a governmental objective is "important." *See generally* discussion *infra* Part III.A.

16. There are, of course, a variety of additional tests, ranging from intermediate scrutiny in equal protection cases to a host of specially crafted tests for specific areas of constitutional law. Because my objective here is to draw attention to the role of governmental purpose in constitutional adjudication, I discuss the permutations of judicial review as they become relevant to my goal.

17. *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977) (holding that the plaintiffs had failed to sustain their burden of showing that a rezoning classification was racially motivated); Washington v. Davis, 426 U.S. 229, 245–46 (1976) (holding that a neutral law that resulted in a disparate impact upon African Americans did not require invalidation of the law upon Equal Protection grounds).

lacking when the effects of the action appear to be explicable only due to an illegitimate purpose, or when the effects are so wildly underinclusive or otherwise unrelated to its ostensible purpose that either the rationality of the means or the legitimacy of the purpose or both are implausible.[18]

In substantive due process cases, strict scrutiny results from government actions that have the effect of infringing a constitutionally fundamental right, regardless of the government's purpose. With respect to abortion regulations prior to fetal viability, however, where the unique undue burden standard applies, an abortion regulation is void if *either* its purpose or effect is to create a substantial obstacle to a woman's choice of terminating her pregnancy.[19]

This phenomenon, however, is not confined to judicial review under the Equal Protection and Due Process Clauses. Legislative purpose is central to the increasing development of clear statement rules in areas in which state autonomy is at issue. Some such areas include Eleventh Amendment immunity,[20] the scope of the commerce power,[21] and the conditional spending power.[22] Though these clear

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18. *See* Lawrence v. Texas, 539 U.S. 558, 575–78 (2003) (holding that a Texas statute prohibiting sodomy violated the Due Process Clause because it demeaned and stigmatized private adult conduct); Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that an amendment of the Colorado constitution violated the Equal Protection Clause because, notwithstanding the stated purpose of protecting homosexuals, the amendment operated to prevent local governments from providing homosexuals with more protection from discrimination); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448–50 (1985) (refusing to uphold an ordinance that required a special permit for a home for the mentally retarded when the home did not threaten the city's legitimate interests any more than other multiperson homes); *Plyler*, 457 U.S. at 220 ("[L]egislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 537–38 (1973) (invalidating a provision of the Food Stamp Act, which included legislative history suggesting that Congress was targeting "hippies," and in operation tended to exclude from participation "those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility").

19. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion). The undue burden standard was adopted by a majority of the Court in *Stenberg v. Carhart*, 530 U.S. 914, 920–52 (2000) (adopting the undue burden standard in four separate opinions comprising a majority).

20. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985) (noting that a state does not waive its immunity in federal court absent a specific, unequivocal indication to do so).

21. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corp of Eng'rs, 531 U.S. 159, 172–73 (2001) (recognizing that when an administrative interpretation of a statute approaches the limits of Congressional power vis-á-vis the states, the Court expects an express statement that Congress intended that result); United States v. Bass, 404 U.S. 336, 349 (1971) (noting that in areas of legislation affecting the "federal balance," the clear statement requirement assures that the legislature has intended the consequence of its actions).

22. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly . . . . '") (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). This could be read as a purpose-driven inquiry, to ensure that Congress does not inadvertently exact regulatory compliance from the states; but it could also be read as an effects-based inquiry, to ensure that Congress is sufficiently clear to eliminate the effect of an inadvertent or unknowing acquiescence by the states. This latter reading is supported by *Arlington Central School District Board of Education v. Murphy*, 126 S. Ct. 2455 (2006), in which the Court stated that it must view conditional spending measures "from the perspective of a state official who is engaged in the process of deciding whether the State should accept [federal] funds and the obligations that go with those funds." *Id.* at

statement rules are principles of statutory construction, they have been adopted to avoid constitutional adjudication, and thus have a quasi-constitutional character. Even after *Kelo v. City of New London*,[23] a taking is for a public use if it "is rationally related to a conceivable public purpose."[24] The Court could have divined public use by reference to the effects of the taking, but it instead chose to rely upon evidence of governmental purpose as the determining factor.

Free speech doctrine depends on a broad divide between content-based speech regulations, which are generally subject to strict scrutiny,[25] and content-neutral speech regulations, which are generally subject to an intermediate level of scrutiny.[26] However, when governments regulate sexually explicit speech, they are treated to the intermediate level of scrutiny applicable to content-neutral regulations if their purpose is simply to address the secondary effects of the regulated speech.[27] In other cases not involving the secondary effects doctrine, the divide between content-based and content-neutral regulations is discerned by reference to governmental purpose. As the Court noted in *Ward v. Rock Against Racism*,[28] "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration."[29]

The government's purpose is also critical to determination of whether or not it has created a public forum. If the government does not intend to create a public forum by opening its property to solicitation by charities other than those formed for legal or political advocacy, it has not created a public forum.[30] If the government intends to provide a passage, but not a public forum, by building a walkway between a post office and its adjacent parking lot, no public forum is created.[31] Partly because airports have not been intentionally opened to unbridled speech, they are not public fora.[32]

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23. 545 U.S. 469 (2005).

24. *Id.* at 490 (Kennedy, J., concurring) (quoting Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984)) (internal quotation marks omitted).

25. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 196–98 (1992) (applying strict scrutiny to a content-based speech restriction).

26. *See, e.g.*, Turner Broad. Sys., Inc., v. FCC, 512 U.S. 622, 642 (1994) (noting that regulations that are "unrelated to the content of speech are subject to an intermediate level of scrutiny").

27. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–49 (1986) (applying intermediate scrutiny to an adult theater restriction); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71–72 (1976) (applying intermediate scrutiny to an ordinance dispersing adult film theaters).

28. 491 U.S. 781 (1989).

29. *Id.* at 791 (citation omitted).

30. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (citing Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45–46 (1982)).

31. United States v. Kokinda, 497 U.S. 720, 730 (1990).

32. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680–81 (1992). Although a minority of the Court would have reasoned from effects rather than purpose to determine the existence of a public forum in airport terminals, such an approach was rejected. *See id.* at 693–703 (Kennedy, J., concurring). Justice Kennedy outlined the approach in his concurrence:

> The Court's error lies in its conclusion that the public forum status of public property depends on the government's defined purpose for the property, or on an

Nor is the focus upon purpose limited to the free expression component of the First Amendment. Evidence of a secular purpose is necessary to a successful defense of an Establishment Clause challenge under the *Lemon* test, although proof of a secular purpose is insufficient to the defense unless the effects of the government action are religiously neutral. Although strict scrutiny of free exercise claims is triggered by, among other things, proof that the government regulation is "specifically directed at . . . religious practice,"[33] the Court is divided over how that phenomenon may be shown. In *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*,[34] a four-Justice plurality thought that Hialeah's purpose for banning only a tiny class of ritual killings of animals was highly relevant to resolution of the question of whether the ban was neutral with respect to Santeria religious practices.[35] Concurring in the judgment, Justice Scalia noted that

> the First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted. . . . Had . . . Hialeah . . . set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to 'prohibi[t] the free exercise' of religion. . . . Had the ordinances . . . been passed with no motive . . . except the ardent desire to prevent cruelty to animals . . . , they would nonetheless be invalid.[36]

Yet, in *Locke v. Davey*,[37] the Court upheld the State of Washington's denial of scholarship assistance otherwise available to students majoring in theology, reasoning that Washington "has merely chosen not to fund a distinct category of instruction"[38] and that this refusal was "not evidence of hostility toward religion."[39] In dissent, Justice Scalia charged that the "reason the Court thinks this particular facial discrimination [against religion] less offensive is that [it] was not motivated by animus toward religion. The Court does not explain why the legislature's motive matters, and I fail to see why it should."[40]

> explicit decision by the government to dedicate the property to expressive activity. In my view, the inquiry must be an objective one, based on the actual, physical characteristics and uses of the property.

Id. at 695 (Kennedy, J., concurring). "If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum." *Id.* at 698 (Kennedy, J., concurring).

33. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).
34. 508 U.S. 520 (1993).
35. *Id.* at 540–42.
36. *Id.* at 558–59 (Scalia, J., concurring) (quoting U.S. CONST. amend. I).
37. 540 U.S. 712 (2004).
38. *Id.* at 721.
39. *Id.*
40. *Id.* at 732 (Scalia, J., dissenting).

B. Finding Purpose: All Roads Lead to Rome

Locke and *Lukumi* also reveal the Court's failure to agree on the method of locating purpose, even when agreement is reached that purpose is relevant. In *Lukumi*, the Kennedy plurality found a governmental purpose of hostility to Santeria in the "minutes and taped excerpts" of a city council session, which were replete with condemnations of Santeria.[41] This motive evidence was fairly clear and, to the Kennedy plurality, established Hialeah's purpose in enacting the ordinances in question.[42] In *Locke*, by contrast, the majority located Washington's purpose—avoidance of using public funds to educate religious ministers—in the history, text, and operation of the Washington constitutional provision that banned the use of state funds for theological instruction.[43] Despite Justice Scalia's contrary claim, it was mostly the effects produced by the Washington provision that supplied the evidence of Washington's purpose.[44] None of those effects established a governmental "animus toward religion,"[45] the purpose that must be present to trigger strict scrutiny under the Free Exercise Clause.

Locke and *Lukumi* are not isolated exemplars of the Court's division with respect to the manner in which purpose should be located. When minimal scrutiny is at issue, the Court varies all over the lot. In *United States Railroad Retirement Board v. Fritz*,[46] for example, the Court fractured over this question. The majority concluded that purpose was to be reckoned from either the effects produced by the "plain language" of the statute at issue[47] or by any conceivable, albeit conjectural, purpose.[48] The dissenters argued that judges should rely on the stated purpose of the action unless the effects are irrelevant or contrary to that purpose, in which case the government's actual purpose should be divined from any source available to a judge, including judicial imputation of motive.[49] Justice Stevens's variant approach was to probe for either actual purpose or a "legitimate purpose that we may reasonably presume . . . motivated an impartial legislature."[50] To similar effect are

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41. *Lukumi*, 508 U.S. at 541.

42. *Id.* at 540–42.

43. *See Locke*, 540 U.S. at 725.

44. Among the effects that the Court found significant in its quest for Washington's purpose were the following effects: Washington "imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community." *Locke*, 540 U.S. at 720. "[I]t does not require students to choose between their religious beliefs and receiving a government benefit[,]" *id.* at 720–21, because certain students "may still use their scholarship to pursue a secular degree[,]" *id.* at 721 n.4, "attend [accredited,] pervasively religious schools . . . , [and] take devotional theology courses[, provided they do not major in theology]," *id.* at 724–25.

45. *Id.* at 725.

46. 449 U.S. 166 (1980).

47. *Id.* at 176.

48. *See id.* at 179.

49. *See id.* at 188 (Brennan, J., dissenting).

50. *Id.* at 181 (Stevens, J., concurring). For further discussion of this panoply of choices regarding ascertainment of governmental purpose, see *infra* text accompanying notes 271–73.

United States Department of Agriculture v. Moreno[51] and *Romer v. Evans*.[52] As an alternative rationale for voiding a federal law, the Court in *Moreno* extracted from legislative history an illegitimate motive "to harm a politically unpopular group."[53] The Court in *Romer*, however, reasoned from the effects of the Colorado measure to conclude that "the amendment seems inexplicable by anything but animus toward the class it affects."[54]

When heightened scrutiny—whether intermediate or strict—is applicable, the Court searches for actual purpose, but its method of locating that purpose is almost as variable as that displayed under minimal scrutiny. In *United States v. Virginia*,[55] the Court relied on present effects and over a century of history to reject Virginia's claim that its actual purpose in maintaining the all-male character of the Virginia Military Institute (VMI) was to foster diversity in educational choices.[56] The Court was unpersuaded by VMI's study of the merits of single-sex military education—which VMI conducted after sex discrimination became presumptively unlawful—preferring to infer purpose from the effects of continued single-sex military education.[57] In *Wallace v. Jaffree*,[58] the Court relied on a combination of legislative motive (divined from the sponsor's floor comments) and effects to conclude that Alabama's actual purpose in authorizing a minute's worth of silence to begin the school day was to return voluntary prayer to the schools.[59] In *Edwards v. Aguillard*,[60] the Court reasoned from statutory text and "historic and contemporaneous antagonisms between . . . certain religious denominations and the teaching of evolution" to attribute a "preeminent [religious] purpose" to Louisiana's act requiring public schools to teach neither or both of the theories of evolution and creation science.[61] Yet, in *Grutter v. Bollinger*,[62] the Court uncritically accepted student body diversity as the actual purpose of the University of Michigan Law School's admissions policy, despite considerable statistical[63] and motive[64] evidence

51. 413 U.S. 528 (1973).
52. 517 U.S. 620 (1996).
53. 413 U.S. at 534.
54. 517 U.S. at 632.
55. 518 U.S. 515 (1996).
56. *Id.* at 535–40.
57. *Id.* at 539–40.
58. 472 U.S. 38 (1985).
59. *Id.* at 56–61.
60. 482 U.S. 578 (1987).
61. *Id.* at 591.
62. 539 U.S. 306 (2003).
63. *Id.* at 383–86 (Rehnquist, C.J., dissenting); *id.* at 389–92 (Kennedy, J., dissenting).
64. Summarizing the testimony of Michigan's former Dean of Admissions (1979–1990), Justice Kennedy wrote that "faculty members were 'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans." *Id.* at 393 (Kennedy, J., dissenting). "Many academics at other law schools who are 'affirmative action's more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.'" *Id.* at 393 (Kennedy, J., dissenting) (quoting Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 34 (2002)).

in the record that suggested the school's actual purpose was either to produce offers of admission that mimicked the racial composition of its pool of applicants or to deliver a subjective notion of redistributive justice.

The Court employs a scattershot approach to determining governmental purpose; the question is whether there is any unifying principle. Perhaps the Court is pragmatically eclectic, but this explanation requires definition of the factors that trigger each mode of purpose determination. A less flattering possibility is that the judicial determination of purpose, under any level of scrutiny, is entirely an exercise in expediency. This explanation suffers from its implicit claim that the Justices are merely politicians in robes committed to a relentless quest for politically congenial results. These possibilities will be considered at greater length in Part III.

C. The Irrelevance of Purpose

Lest one fall into the error of thinking purpose nearly always matters, consider the areas where purpose never matters. Although John Marshall, in *M'Culloch v. Maryland*,[65] famously opined that the Court would void laws passed by "Congress, under the pretext of executing its powers . . . for the accomplishment of objects not entrusted to the [federal] government,"[66] the Court has never examined congressional purpose to locate pretextual uses of its means-enabling power under the Necessary and Proper Clause.[67] Perhaps that inquiry is more properly made when courts assess the scope of the substantive powers given to Congress; however, since *United States v. Darby*,[68] the Court has eschewed any such scrutiny with respect to the Commerce Clause power—the "motive and purpose of [commerce regulations] are matters for the legislative judgment . . . and over which the courts are given no control."[69] So long as a law is structured as a regulation of interstate commerce, it matters not what the underlying purpose of the law may be.[70] Similarly, congressional purpose is irrelevant should Congress either commandeer

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65. 17 U.S. (4 Wheat.) 316 (1819).

66. *Id.* at 423.

67. Justice Thomas is the only Justice who seems willing to take Marshall's *M'Culloch* prextext qualifier seriously. Dissenting in the medical marijuana case, he declared that "the Government's rationale—that it may regulate the production or possession of any commodity for which there is an interstate market . . . —would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a 'pretext . . . for the accomplishment of objects not entrusted to the government.'" Gonzales v. Raich, 545 U.S. 1, 66 (2005) (Thomas, J., dissenting) (quoting *M'Culloch*, 17 U.S. (4 Wheat.) at 423).

68. 312 U.S. 100 (1941).

69. *Raich*, 545 U.S. at 15 (citing McCray v. United States, 195 U.S. 27, 53–59 (1904); Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937)).

70. Of course, one could say that so long as Congress regulates interstate commerce itself, or the channels or instrumentalities of interstate commerce, its purpose to do so is fully and conclusively revealed from the face of the statute. On this view, purpose matters, but the method of locating purpose is identical to that stated by then-Justice Rehnquist in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980), in which he noted, "[T]he plain language of [the law] marks the beginning and end of our inquiry [into congressional purpose]." *Id.* at 176.

a state's legislative process by compelling it to enact and enforce a federal command[71] or conscript state executive officers "to enact or administer a federal regulatory program."[72]

In *Bailey v. Drexel Furniture Co.*,[73] the Court concluded from its scrutiny of the effects of the Child Labor Tax Law that Congress's purpose was to impose ultra vires regulations rather than to tax;[74] however, the Court has since abandoned that effort, perhaps because there can be so many possible purposes for any given taxation measure. If a tax produces some revenue, courts "are not free to speculate as to the motives which moved Congress to impose it."[75] If a measure is called a tax and produces some revenue, it is a valid tax, regardless of Congress's underlying purpose to use its taxing power to regulate in some fashion that might not otherwise be open to it.

In taxation, as with commerce, the Court states that purpose is irrelevant and merges purpose and motive. What the Court has actually done, however, is to conclusively infer purpose from the face of the statute while barring judicial examination of either legislative motive or the effects of the law.[76] Congress's purpose in these areas, as revealed by the face of its legislation, is clear: Congress intends to regulate interstate commerce or impose a tax. Its motive for doing so, however, may be far afield from the subjects of interstate commerce or taxation. By declaring motive inquiry off-limits, the Court has also implicitly stated that the judiciary should ignore the effects of the measure. The most likely motive for enacting an excise tax on marijuana sales, for example, is to add another layer of criminality to such trafficking; the principal effect of the measure is not to collect revenue but to add a possible count to the indictment of apprehended marijuana dealers. If one were to infer purpose from effects, however, the inferred purpose of such a measure would be to punish marijuana traffickers.

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71. *See* New York v. United States, 505 U.S. 144, 161–63 (1992). In enacting the statute at issue in *New York v. United States*, Congress's most likely purpose was to give effect to a deal reached by the states to ensure that every state had created a safe and reliable means for disposing of low-level radioactive waste. This legitimate purpose did not save the law, however, because it employed an impermissible means or, put another way, delivered constitutionally impermissible effects.

72. Printz v. United States, 521 U.S. 898, 933 (1997) (quoting New York v. United States, 505 U.S. at 188) (internal quotation marks omitted). In enacting the measure at issue in *Printz*, Congress's most likely purpose was to create a mechanism that would prevent handguns from being purchased by known criminals, lunatics, or others who ought not be trusted with firearms. While legitimate, this purpose employed an illegitimate means or, phrased differently, produced impermissible effects. (I assume, of course, the legitimacy of the congressional purpose, even if the personal rights theorists of the Second Amendment are correct. *See* Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1125 (2000)).

73. 259 U.S. 20 (1922).

74. *Id.* at 37.

75. Sonzinsky v. United States, 300 U.S. 506, 514 (1937); *see also* United States v. Kahriger, 345 U.S. 22, 28–32 (1953) (upholding occupational tax on gamblers), *overruled on other grounds by* Marchetti v. United States, 390 U.S. 39, 54 (1968); United States v. Sanchez, 340 U.S. 42, 44–45 (1950) (upholding marijuana tax despite its regulatory and penalizing effects).

76. *See supra* note 70 and accompanying text.

The law of regulatory takings, by contrast, is almost entirely effects oriented. Purpose is irrelevant if a regulation effects a permanent dispossession[77] or if it results in the complete loss of all economically viable uses[78] (unless the regulation merely abates what would be a nuisance under the preexisting law of the jurisdiction).[79] If the *Penn Central Transportation Co. v. New York City*[80] balancing test applies, the validity of the regulation turns on assessment of a variety of effects produced, principally the impact of the regulation on "investment-backed expectations" and the character of the regulation.[81] Neither purpose nor motive are given any role in the judicial calculus of sifting regulations (which do not require compensation) from takings (which do require just compensation), but the rejection of motive inquiry here does not have the by-product of implicit rejection of inquiry into the effects of the measure. The difference may be attributable to the fact that taxation and commerce involve federalism limits on federal power, while the law of regulatory takings is an attempt to preserve the individual liberty of freedom from compelled transfers of property except where public necessity intervenes. Ever since the mid-twentieth century the judiciary has been reluctant to police the federalism frontier,[82] while it has assumed ever-increasing responsibility for protecting individual liberties.[83] Yet, over much of the same period, judicial solicitude for economic rights has withered.[84] Thus, it is not entirely clear that the Court's disparate approach to the role of purpose, motive, and effects in taxation, commerce, and regulatory takings can be easily squared.

Perhaps the classic example of a case where purpose, motive, and effects were each treated differently, and in which motive was regarded as utterly irrelevant, is

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77. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

78. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

79. *Id.* at 1029. Purpose is relevant to the question of whether the regulation is a nuisance abatement measure, but the Court in *Lucas* made it clear that the test of whether that purpose has been validly realized is congruity of the alleged nuisance abatement regulation with the jurisdiction's preexisting common law of nuisance. *Id.* Thus, only if the effect of a regulation that strips property of all economically viable uses is within the boundaries of the prior law of nuisance, will the regulation be valid and not a taking.

80. 438 U.S. 104 (1978).

81. *Id.* at 124.

82. *See, e.g.*, Perez v. United States, 402 U.S. 146, 154–57 (1971) (upholding federal law criminalizing local loansharking); Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 261 (1964) (upholding federal law requiring local hotels and motels to provide accommodations for black guests).

83. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–14 (1969) (invalidating the high school's rule precluding students from wearing black arm bands in protest of the Vietnam War); Sherbert v. Verner, 374 U.S. 398, 399–402 (1963) (holding that the state could not deny unemployment benefits to claimant who, because of her religious beliefs, refused employment requiring her to work on Saturdays).

84. *See, e.g.*, Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 536 (1949) ("[S]tates have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."); Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236, 249–51 (1941) (reversing the Nebraska Supreme Court by validating a statutory provision capping the compensation a private employment agency could collect for services).

United States v. O'Brien.[85] Congress amended the Selective Service law to criminalize the knowing destruction or mutilation of a draft card.[86] In upholding the validity of the amendment, the Court dismissed fairly persuasive evidence in the legislative record that Congress had enacted the measure to criminalize a potent symbolic form of protest against the Vietnam War—draft card burning.[87] The Court stated, in essence, that so long as a law is otherwise valid, it would not strike that law down simply because of the presence "of an alleged illicit legislative motive."[88] In so doing, the Court conflated purpose and motive, at least when such inquiry is undertaken to impeach the validity of "a statute that is . . . constitutional on its face."[89] Yet, in the balance of the opinion, the Court treated purpose quite differently. The second and third *O'Brien* factors—an "important or substantial governmental interest"[90] that is "unrelated to the suppression of free expression"[91]—require some process by which a court identifies governmental purpose. The process employed in *O'Brien* was to identify purpose by reference to the statute itself.[92] Thus, the Court could plausibly state that the purposes served by the amendment were to preserve a ready means of proving one's draft status, to facilitate communication between registrant and draft board, and to remind the registrant of the need to tell his draft board of any change in his status.[93] These purposes were not stated in the statute but were inferred by the Court from the context of the entire law. Purpose was not quite derived from the "plain language" of the statute but was certainly drawn from the superficial context of the statute. The Universal Military Training and Service Act[94] was, as its title suggested, all about establishing a mechanism for conscripting Americans into a brief period of military service, so the presumed purpose of the amendment was to further that broader purpose. In effect, the Court employed a metapurpose to find purpose: The purpose of inquiry into the purpose of specific statutory provisions is to determine whether there exists a plausible purpose for the specific provision that is consistent with the larger purpose of the entire statute. Thus, so long as the government could articulate plausible purposes for the amendment that were consistent with the larger and more general purposes of the statute, the search for purpose was over. This method is, of course, a very short step from the reliance on any conceivable legitimate purpose that is generally, but not universally, applied under minimal scrutiny.

The final *O'Brien* factor—the requirement that the "incidental restriction" on free expression be "no greater than is essential" to further the government's

85. 391 U.S. 367 (1968).
86. *Id.* at 370.
87. *See id.* app. at 386–88.
88. *Id.* at 383.
89. *Id.* at 384.
90. *Id.* at 377.
91. *Id.*
92. *See id.* at 383–86.
93. *See id.*
94. 50 U.S.C. app. §§ 451–473 (2000).

purpose[95]—requires an assessment of the effects of the measure. The Court's view of effects was somewhat myopic, for it regarded as relevant only those effects produced by conduct alone—the "wilful mutilation or destruction" of draft cards.[96] Alternatively, it focused on the lack of any other means to accomplish the benign purpose it had identified,[97] an approach that emphasized the incidental nature of any effect upon free expression. Under either approach, the Court's notion of effects was selective. The first approach—the amendment's effect is only on conduct—wholly ignored the context of the conduct. O'Brien's burning of his draft card in a public antiwar protest was vastly different from his imaginary burning of his draft card to kindle a fire to brighten and warm his living room.[98] The second approach—reliance on the unavoidable, hence incidental, impact on free expression—enabled the Court to avoid serious inquiry into the actual impact of the measure. Though I have no data by which to prove the assertion, I strongly suspect that the only people ever prosecuted (or even likely to be prosecuted) for "wilful mutilation or destruction" of draft cards were those who employed that conduct as a device to demonstrate their distaste for the Vietnam War.

Because the issue in *O'Brien* arose in the context of a statute that regulated behavior that could be symbolic expression or utterly lacking in expression, the problem presented is conceptually analogous to the disparate impact cases, in which a government uses some constitutionally unsuspicious tool to further a legitimate purpose and in the end produces effects that are suspicious. The leading case is *Washington v. Davis*,[99] in which a police department employed a test of verbal and written proficiency as an employment criterion, which had the effect of disqualifying four times as many African American applicants as white applicants.[100] Absent proof that race was a motivating factor for adoption of the test, the program was entitled to the presumption of validity that applies under minimal scrutiny.[101] Unlike *O'Brien*, which declared that motive was irrelevant, *Washington* recognized that motive ought to be relevant to impeach the validity of apparently valid governmental action. Rather than being ignored altogether, *Washington* treated motive as a useful second-order inquiry, when the effects produced by a presumptively valid regulation raise at least a constitutional eyebrow.

While this description of purpose, motive, and effect is surely incomplete, it suffices to convey the kaleidoscopic nature of governmental purpose in the project of constitutional judicial review. The question presented is whether there is some order in this chaos. Is there a general principle, or a set of principles, that explains this apparently random pattern?

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95. *O'Brien*, 391 U.S. at 383–86.
96. *Id.* at 381.
97. *Id.*
98. *See id.* at 378.
99. 426 U.S. 229 (1976).
100. *Id.* at 237.
101. *Id.* at 247–48.

III. BY DESIGN OR BY AD HOC JUDICIAL EVOLUTION?

Any attempt to tease some general principles out of the Court's use of governmental purpose is problematic because inductive reasoning is necessary to that process, and induction is an imperfect art. Unlike deduction—where the premises compel the conclusion, and the validity of the conclusion depends on the validity of the premises—inductive reasoning relies on the premises to provide some, but not conclusive, support for the conclusion. Applied to the Court's use of governmental purpose, one can at best infer some principles that may be at work but may not be an explanation of the Court's actions. That is the ambition of this Part III.

A. Governmental Purpose as a Function of Tiered Scrutiny

A hallmark of constitutional judicial review in the twentieth century was the development of tiered scrutiny. The creation and refinement of various levels of review, with their attendant shifts in the presumption of validity of governmental action and corollary reversals of the burden of proof, was a great judicial invention. The nature of tiered scrutiny, whether strict or lax, is assessment of the government's objective and the relationship of its chosen means to accomplish that objective. Thus, consideration of governmental purpose is a necessary element of tiered review. Because any legitimate objective suffices under minimal scrutiny, but under strict scrutiny the government must prove that its objective is compelling, one might surmise that the relevance of governmental purpose increases in rough proportion to the stringency of the level of review.

Unfortunately, this conjecture is only partially true. While governmental purpose is critical to heightened scrutiny, the methods used to determine purpose are, at times, no more searching than those employed under minimal scrutiny. Consider a few examples.

Strict scrutiny applies only when governments intend to classify by race. While that element is often established by the face of the classification, it is sometimes established by proof of discriminatory application of a racially neutral criterion[102] or by the effects of a racially neutral practice that are so precisely and strongly racial that the only plausible inference is that the government's purpose was to deliver those racially discriminatory effects.[103] Purpose—invidious intent—is essential to trigger strict scrutiny, but contemporary doctrine treats all intentional uses of race alike; it does not matter whether the government's purpose is broadly remedial of the lingering social and economic effects produced by centuries of race-based oppression or designed to perpetuate subordination of historically

102. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (striking down an ordinance regulating laundry facilities that, though "fair on its face and impartial in appearance," was applied "to make unjust and illegal discriminations between persons in similar circumstances").

103. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 347–48 (1960) (invalidating a state legislative act that redefined a city's boundaries and effectively disenfranchised a majority of black voters in a municipal district).

disadvantaged racial minorities. The nuance of governmental purpose matters more when courts turn to examination of the government's objective. A governmental purpose to subordinate a racial minority can never be legitimate, much less compelling, but a governmental purpose to use race as one factor among many to enhance diversity in public universities is compelling,[104] and courts will defer to the good faith judgment of university administrators in the application of this objective.[105] In *Johnson v. California*,[106] the Court held that strict scrutiny was the applicable standard to apply to California's policy of segregating prisoners by race in initial cell assignments.[107] In doing so, the Court rejected the deferential *Turner v. Safley*[108] test, which permits prison administrators to abridge the constitutional rights of inmates when the burdens imposed are "reasonably related to legitimate penological interests."[109] Although the Court did not address the application of strict scrutiny to California's practice, it opined that the "ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system."[110] The Court conceded that the "special circumstances" of prisons "may justify racial classifications in some contexts,"[111] but remanded the case for consideration of that issue. We do not yet know whether California's asserted objective—to prevent the fatal violence resulting from racist prison gangs[112]—is compelling or, if so, whether the Court will defer to the good faith judgment of prison administrators in the application of this objective. Such deference to governmental judgment is, of course, what one used to associate with minimal scrutiny.

Assessments of governmental objective—whether legitimate, important, or compelling—are hardly precise, and the Court has been lax in its articulation of the criteria it employs to reach these characterizations;[113] but it is at least clear that under heightened scrutiny, this process requires the Court to identify the

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104. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

105. *See id.* at 329 ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'") (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978)).

106. 543 U.S. 499 (2005).

107. *Id.* at 515.

108. 482 U.S. 78 (1987).

109. *Id.* at 89.

110. *Johnson*, 543 U.S. at 510–11.

111. *Id.* at 515.

112. *Id.* at 502.

113. *See, e.g.*, Gottlieb, *supra* note 14 (analyzing the source and role of compelling governmental interests in Supreme Court jurisprudence). Justice Scalia, in his inimitable style, has derided the entire process of tiered scrutiny: Minimal, intermediate, and strict scrutiny "are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case. . . . [S]trict scrutiny will be applied to the deprivation of whatever sort of right we consider 'fundamental.' We have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice." Unites States v. Virginia, 518 U.S. 515, 567–68 (1996) (Scalia, J., dissenting).

government's actual purpose before it proceeds to characterize that purpose. However, the quest for actual purpose is not stable. In *United States v. Virginia*,[114] the Court relied on Virginia's historical sex-segregation practices in higher education to reject its claimed actual purpose of fostering diverse educational choices,[115] but in *Michael M. v. Superior Court of Sonoma County*,[116] the Court ignored California's historical practice of treating only male participation in sexual intercourse involving a female minor as criminal.[117] This asymmetrical law "was initially enacted on the premise that young women, . . . [b]ecause their chastity was considered particularly precious, . . . were felt to be uniquely in need of the State's protection."[118] The Court, however, brushed that purpose aside to accept California's present claim that the law's purpose was to inhibit teenage pregnancies.[119] The "risk of pregnancy itself" was enough to deter women from sexual intercourse, reasoned the Court, but a "criminal sanction imposed solely on males . . . serves to roughly 'equalize' the deterrents on the sexes."[120]

In *Stone v. Graham*,[121] the Court inferred a solely religious actual purpose for displaying the Ten Commandments in public schoolrooms,[122] but in its more recent Ten Commandments cases historical context was critical. Three attempts to display the Ten Commandments in a McCreary County, Kentucky courthouse, where each successive attempt employed more secular elements than the last, was enough to convince the Court that the actual purpose was to endorse religion;[123] but in the companion case of *Van Orden v. Perry*,[124] the Court relied on "the rich American tradition of religious acknowledgments"[125] to conclude that Texas's display of the Ten Commandments on its capitol grounds did not violate the Establishment Clause, because the display had "a dual significance, partaking of both religion and government."[126] In *Epperson v. Arkansas*,[127] the Court used the history of an

114. 518 U.S. 515 (1996).
115. *Id.* at 536–40.
116. 450 U.S. 464 (1981).
117. *See id.* at 470–74.
118. *Id.* at 494–95 (Brennan, J., dissenting).
119. *Id.* at 470.
120. *Id.* at 473.
121. 449 U.S. 39 (1980) (per curiam).
122. *Id.* at 41.
123. McCreary County v. ACLU of Ky., 545 U.S. 844, 869–73 (2005).
124. 545 U.S. 677 (2005).
125. *Id.* at 690.
126. *Id.* at 692. Because the Court found the *Lemon* test "not useful in dealing with the sort of passive monument" at issue in *Van Orden*, it is rash to assume that the Court concluded that Texas's actual purpose was not exclusively religious. *Id.* at 686. Nevertheless, the Court's reliance on a long history of governmental acknowledgment of religion and characterization of that history as of "dual significance" suggests that the rationale for the Court's decision was the conclusion that Texas's actual purpose was secular—acknowledgment, but not endorsement, of religion. Justice Breyer, who supplied the crucial fifth vote, concurred in the judgment, reasoning that history and context were essential to the determination of whether Texas's display conveyed a solely religious message or one that combined the secular and the religious in a constitutionally inoffensive manner. *Id.* at 701 (Breyer, J., concurring). Justice Breyer found the latter to be the case, relying on the history of the display as communicating moral rather than religious principles, its physical setting, and the lack of objection for forty years. *Id.*

Arkansas law that forbade public school teachers from teaching "the theory or doctrine that mankind ascended or descended from a lower order of animals,"[128] to conclude that the state's purpose was to promote "a particular religious doctrine."[129] In *Edwards v. Aguillard*,[130] the Court employed cultural inferences to conclude that a religious purpose (or motive, or both) prompted the enactment of a facially evenhanded law requiring the teaching in public schools of both evolution and creation science or neither.[131] If *Edwards* involved an amalgam of purpose and motive inquiry, motive was almost entirely what the Court relied on in *Larson v. Valente*,[132] in which it voided a facially neutral exemption of some religious organizations from a general regulation of charitable solicitations.[133]

A similar process arises in the application of strict scrutiny to content-based restrictions of speech. The government's purpose matters mostly to decide whether the restriction at issue is content-based or content-neutral. Of course, once it is concluded that the government has regulated speech by its content, the government's purpose is relevant to the question of whether it is sufficiently compelling to warrant such regulation. Some categories of speech, defined by content, are exiled from free speech protection, and the mechanism for doing so is sometimes, but not always, an assessment of the government's purpose for regulating such speech. Punishing speech that is intended to incite immediate crime, under circumstances where it is likely to do so, is permissible[134] because the social disutility of such speech is strong. This may be a more direct way of saying that the government's purpose in preventing the immediate commission of a crime is relevant to the question of whether the entire category of speech should receive

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127. 393 U.S. 97 (1968).

128. *Id.* at 98–99 (citing ARK. CODE ANN. § 80-1627 (1960)) (internal quotation marks omitted).

129. *Id.* at 103. The Arkansas statute was enacted in the era which gave rise to the notorious *Scopes* trial in Tennessee in 1925, *see id.* at 109 n.17, in which John Scopes was convicted of teaching evolution, *see* Scopes v. State, 289 S.W. 363, 363 (Tenn. 1927). A useful summary of the trial is maintained by Professor Douglas Linder, of the UMKC School of Law. *See* Douglas O. Linder, State v. John Scopes *("The Monkey Trial")* (2002), http://www.law.umkc.edu/faculty/projects/ftrials/scopes/evolut.htm. Scopes's conviction was reversed on nonconstitutional grounds two years later. *See Scopes*, 289 S.W. at 367. The Arkansas statute was modeled after the Tennessee law at issue in *Scopes* but was not as facially rooted in a religious purpose. *Epperson*, 393 U.S. at 107–09. The Tennessee law made it unlawful for public school teachers "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Act of Mar. 13, 1925, ch. 27, 1925 Tenn. Pub. Acts 50, 50–51.

130. 482 U.S. 578 (1987).

131. *Id.* at 586–94.

132. 456 U.S. 228 (1982).

133. *Id.* at 253–55. The legislative history revealed a change in the bill that extended the exemption to the Roman Catholic Church but not to other, less popular religious organizations. *Id.* at 254. From that the Court could, and did, infer a purpose of religious discrimination. *Id.* at 255. The legislative history also revealed the underlying motive in the form of a legislator's statement to his colleagues: "I'm not so sure why we're so hot to regulate the Moonies anyway." *Id.* at 255 (quoting a senator whose words were memorialized in the transcript of the legislative discussions) (internal quotation marks omitted).

134. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

constitutional protection. The level of scrutiny attached to commercial speech restrictions depends upon whether the government's purpose is "to protect consumers from misleading, deceptive, or aggressive sales practices, . . . [or to provide consumers with] beneficial consumer information"[135] on the one hand, or to deny consumers access to "truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process" on the other.[136] However, once the government regulates speech by content within a protected category, the government's purpose for doing so is no longer of much practical relevance.[137] To be sure, the government can theoretically justify content-based regulations by proving that they are necessary to accomplish some compelling objective, but the United States Reports reflect a paucity of successful efforts to do so. In this area, Gerald Gunther's famous declaration that strict scrutiny is "'strict' in theory and fatal in fact"[138] may well continue to apply.

When minimal scrutiny applies, courts usually accept any hypothetical legitimate objective as sufficient to establish the legitimacy of the government's purpose. This deferential approach reduces consideration of governmental purpose to an absolute minimum. So far, that would appear to corroborate the hypothesis that governmental purpose is more relevant as the level of scrutiny increases. But, the exceptions to the general application of minimal scrutiny are of more importance than the general rule. In a small, but steady, stream of important cases, the Supreme Court has struck down laws or regulations on the basis of an inferred illegitimate governmental purpose.[139] Unlike the use of purpose in strict scrutiny, where, with few exceptions,[140] the governmental purpose that is relevant is either acknowledged or obvious, the government's purpose under minimal scrutiny analysis is inferred from a variety of evidence, including the effects of the measure, legislative history, and a certain judicial *gestalt* that is utterly inconsistent with the doctrinal postulates of minimal scrutiny.

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135. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (Stevens, J., plurality opinion).

136. *Id.*

137. The secondary effects doctrine is a possible exception to this claim. The doctrine is founded on the fiction that because the government's purpose for regulating nonobscene, sexually explicit speech is to address the noncommunicative effects of such speech, its nominally content-based regulation of speech is deemed to be content-neutral. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 311 n.1 (2000) (Souter, J., concurring). The secondary effects doctrine would surely constitute an exception to the claim made in the above text were it not for the judicial declaration that governmental purpose transmutes a particular form of content-based regulation into content-neutral regulation. This exercise in judicial alchemy is designed to preserve separate levels of review for content-based and content-neutral regulations without injecting consideration of governmental purpose into the strict scrutiny analysis applicable to content-based regulations.

138. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

139. *See* cases cited *supra* note 18.

140. *See* Edwards v. Aguillard, 482 U.S. 578, 585–86 (1987) (noting that the Louisiana legislature stated no clear purpose for the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in the Public School Instruction Act, which required creation science to be taught if evolution was also taught or required the exclusion of both theories if one of the theories was not taught).

Moreover, judicial reliance upon governmental purpose seems even more chaotic under intermediate scrutiny. In sex discrimination cases, the Court seeks to use intermediate scrutiny to void those measures that are rooted in archaic sex role stereotypes, and uphold those that either compensate women for the effects of historic disadvantage or are intended to recognize real, rather than stereotypical, differences between the sexes. Consideration of governmental purpose is critical to this effort.[141] Yet when a somewhat different brand of intermediate scrutiny is at work with respect to free expression, governmental purpose is of little relevance. A content-neutral time, place, and manner regulation is valid if it does not "burden substantially more speech than is necessary"[142] to serve a legitimate interest and "leave[s] open ample alternative channels for communication."[143] So long as the government can articulate some purpose for its time, place, and manner regulation of speech that is unrelated to its content, purpose inquiry is at an end. Much the same condition attaches to the four-part *O'Brien* test that arose in the context of regulations that pinch symbolic expression.[144] As discussed earlier, in *O'Brien*, the Court dismissed fairly persuasive evidence that Congress had acted to punish draft card burning to suppress a potent form of Vietnam War protest[145] and declared that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[146] Because the law was facially valid if one accepted the government's hypothesized purpose for the amendment, the Court was unwilling to take its purpose inquiry any further.[147]

The emerging pattern is that, while consideration of governmental purpose is required by the framework of tiered scrutiny, the Court's use of governmental purpose is spread unevenly across all levels of tiered scrutiny. Although actual purpose must be determined when heightened scrutiny is employed, the methods of locating that purpose vary widely. Even when actual purpose is determined, and that purpose is subjected to a uniform standard of justification, the Court's practical scrutiny of purpose varies considerably. Nowhere is this pattern more chaotic than at the level of minimal scrutiny, where the Court cannot even agree on how purpose is ascertained. One might expect that as the level of scrutiny increases courts would

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141. *Compare* United States v. Virginia, 518 U.S. 515, 536–40 (1996) (rejecting Virginia's stated purpose of providing diversity in its public higher education system through reliance on history and effects to conclude that Virginia's policy was rooted in outdated generalizations about the capacity and skills of women), *with* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 470–74 (1981) (accepting California's deterrence purpose for punishing men, but not women, for sexual intercourse with a female minor, regardless of evidence of a contrary history and disputed present effects).

142. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

143. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

144. United States v. O'Brien, 391 U.S. 367, 377 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

145. *Supra* note 87 and accompanying text.

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

147. *Id.* at 384.

be more likely to draw inferences to detect purposes, yet judicial willingness to draw inferences in order to consider governmental purpose seems at least as likely when intermediate or minimal scrutiny applies.

B. Governmental Purpose as a Function of Individual Rights but Not Constitutional Structure

One theme of constitutional adjudication over the course of the twentieth century is the increasing vigor of judicial review to enforce individual liberties[148] and the concomitant decline in the use of judicial review to enforce constitutional limits on the scope of congressional powers.[149] While it is true that the so-called "new federalism"[150] that began in the 1990s appeared to indicate revived judicial scrutiny of federalism limits, that movement has sputtered like a badly tuned engine.[151] Although the Court has evinced a continued willingness to enforce implicit, federalism-based limits on state power—primarily through the Dormant Commerce Clause—and to adjudicate issues of allocation of power between the three branches of the federal government, an undeniable aspect of the last century is the vast explosion of judicial enforcement of the Constitution's guarantees of individual rights and liberties. One might suppose that, whether it be cause or effect, courts would think governmental purpose less relevant to the judiciary's role in policing federalism limits on federal power and more relevant to questions of the scope of constitutional individual liberties.

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148. *See* cases cited *supra* note 83.

149. *See* cases cited *supra* note 82.

150. Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 681–82 (2006) (describing the term "New Federalism" as the Rehnquist Court's attempt to rein in "congressional power vis-à-vis the states").

151. The Court's reaffirmation of *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942) (holding that Congress had the power under the Commerce Clause to regulate individual home consumption of homegrown wheat because of its effects on the national supply and demand of wheat) in *Gonzales v. Raich*, 545 U.S. 1, 17–20 (2005) (upholding Congress's regulation of intrastate growth and use of marijuana as a proper exercise of the Commerce Clause power because Congress had a rational basis for believing the intrastate activity would undercut the interstate regulation of marijuana by leaking into illicit channels) is perhaps the most vivid reminder that the revival of judicially enforceable federalism has distinct limits. Other recent indications of that phenomenon are *Tennessee v. Lane*, 541 U.S. 509, 530–34 (2004) (upholding congressional power under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity by enacting the provisions of title II of the Americans with Disabilities Act of 1990, which require states to provide disabled people with access to courthouses and other similar public facilities), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 735–37 (2003) (upholding congressional power under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity by enacting the Family and Medical Leave Act of 1993), as well as the absence of any indication that the Court is inclined to develop a state autonomy limit on the spending power that would mimic the commerce limits imposed by *Printz v. United States*, 521 U.S. 898, 933–35 (1997) (holding that the Brady Handgun Violence Prevention Act violated the Tenth Amendment by commanding state chief law enforcement officers to perform background checks on gun purchasers) and *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the Low-Level Radioactive Waste Policy Amendments Act of 1985 violated the Tenth Amendment because it directed states to dispose of radioactive waste).

This hypothesis is partly, but not universally, true. An important aspect of the New Deal revolution in constitutional adjudication was the Court's rejection of consideration of governmental purpose as a criterion for ascertaining whether a given federal law was within the scope of one of Congress's enumerated powers. *United States v. Darby*[152] is the clearest articulation of this view. *Darby* disavowed *Hammer v. Dagenhart*[153] and its use of inferred purpose as a means of deciding whether Congress had properly invoked its interstate commerce power.[154] A similar unwillingness to consider purpose can be observed with respect to other federal powers, particularly Congress's power to tax and regulate conditions ancillary to warfare.[155] Even the Court's contemporary limits on Congress's power to enforce Section Five of the Fourteenth Amendment, a staple of the "new federalism," are largely bereft of consideration of governmental purpose. Instead, the focus is upon what Congress has done and whether Congress has acted in a congruent and proportional fashion to address identified state behavior that offends the constitutional guarantees of the Fourteenth Amendment.[156] Congressional purpose for so acting is of little relevance to this calculus.[157]

Nor is governmental purpose of much significance in assessing the propriety of various executive or legislative initiatives that are alleged to offend the Constitution's structural principles of separated power; rather, what Congress or the President has done is important for resolution of these conflicts. The purpose behind these actions is relevant only insofar as it serves to flesh out the context in which the action takes place but is not an actual criterion of decision. Thus, in *Dames & Moore v. Regan*,[158] the Court considered the context of the President's suspension of pending suits against Iran rather than directly considering the President's purpose, which, of course, was to resolve the Iranian hostage crisis.[159] Similarly, in the *Steel Seizure Case*,[160] the Court considered the President's seizure of the steel mills in the context of the Korean War and to that extent recognized his purpose was ostensibly to avoid interruption of the production of needed war materials.[161] In neither case did the Court probe deeply into purpose, whether

152. 312 U.S. 100 (1941).

153. 247 U.S. 251 (1918).

154. *Darby*, 312 U.S. at 115–17.

155. *See* discussion *supra* Part II.C.

156. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (noting that the proper analysis—when determining the validity of remedial measures enacted by Congress pursuant to Section 5 of the Fourteenth Amendment—is whether the law reflects a proportionality or congruence between the means adopted and the ends to be achieved).

157. The exception is *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), in which the Court relied on the stated purpose of the Family and Medical Leave Act—"to protect the right to be free from gender-based discrimination in the workplace"—*id.* at 728, as a basis for characterizing the statutory provision at issue—a requirement that employers grant up to twelve weeks of unpaid leave to care for ill family members—*id.* at 724, as a response to presumptively invalid sex discrimination in granting such leaves, *id.* at 728–35.

158. 453 U.S. 654 (1981).

159. *Id.* at 664–67.

160. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

161. *Id.* at 582–84.

derived from the action itself or by reliance upon inferred motive. President Carter's motive may have been to prevent incoming President Reagan from receiving all of the credit for the resolution of the crisis; President Reagan's motive may have been to remove a thorny issue immediately upon entering office; and President Truman's motive may have been to accede to the wage demands of the steelworker's union in an election year. One will never know for sure, and the Court did not think such inquiry was relevant. Even as far back as *The Prize Cases*[162] the Court focused on the effect of President Lincoln's action of imposing a blockade on Confederate ports and not on his purpose or motive for taking such action.[163]

However, purpose remains far more relevant in other areas that are rooted in constitutional structure. Foremost among these is the Dormant Commerce Clause. Regulations that are openly intended to protect local commerce from interstate competition are void per se.[164] State regulations that may lack that intention, but which facially discriminate against interstate commerce, are subject to strict scrutiny.[165] State regulations that are facially neutral with respect to interstate commerce are nominally subject to the *Pike v. Bruce Church, Inc.* balancing test.[166] Despite this taxonomy, the actual pattern that emerges from the Dormant Commerce Clause cases is that the Court scrutinizes both the effects of and the governmental purpose for such regulations in order to decide whether such regulations are valid. A modern example is *West Lynn Creamery, Inc. v. Healy*,[167] in which the Court voided a facially neutral tax and subsidy scheme because its purpose and effect was to benefit Massachusetts dairy farmers at the expense of out-of-state milk producers and Massachusetts consumers.[168] Classic examples of this mode of reasoning include *Baldwin v. G.A.F. Seelig, Inc.*[169] and *H.P. Hood & Sons, Inc. v. Du Mond*.[170] In *Baldwin* the Court ascribed a protectionist purpose to New York's facially neutral regulations concerning the sale of milk, given its effect on Vermont milk producers.[171] In *Hood*, the Court voided New York's refusal to

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162. 67 U.S. (2 Black) 635 (1863).

163. *See id.* (analyzing the effects of President Lincoln's decision to impose a blockade on southern ports in the context of the presidential authority to do so during an insurrection between the states, as opposed to Congressionally declared war).

164. *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268–73 (1984) (holding that a Hawaiian liquor tax that excluded indigenous liquor violated the Dormant Commerce Clause because it had the purpose and effect of discriminating against out-of-state liquor).

165. *See, e.g.*, City of Phila. v. New Jersey, 437 U.S. 617, 623–24 (1978) (declaring that state laws that discriminate against interstate commerce or are protectionist in nature are "virtually *per se*" invalid).

166. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.") (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

167. 512 U.S. 186 (1994).

168. *Id.* at 194–96.

169. 294 U.S. 511 (1935).

170. 336 U.S. 525 (1949).

171. *Baldwin*, 294 U.S. at 522–26.

license a processing plant owned by a Massachusetts entity.[172] Although New York maintained that its action was for the purpose of preventing "destructive competition"[173] in the local milk market, the Court perceived this purpose to be naked protectionism.[174] To be sure, not all Dormant Commerce Clause cases involve assessment of governmental purpose, and sometimes the Court disavows any attempt to do so,[175] but just as frequently the Court considers evidence of discriminatory purpose as but one factor in its *Pike* balancing calculus.[176]

When Presidents claim executive privilege, their purpose for doing so becomes an issue. *United States v. Nixon*,[177] the leading case on the subject, makes plain that while the President's claim of executive privilege is entitled to a presumption of validity, a court must weigh the purposes for which the President asserts the privilege against the reasons for compelled disclosure of the material the President seeks to keep confidential.[178] In *Nixon*, the President's purpose was kindly characterized as "general in nature" while disclosure was essential to secure due process and a fair trial for accused criminal defendants.[179] Undergirding the euphemism was what many then suspected and now know to be the case: The President's motive for asserting executive privilege was to avoid the heavy weight of personal responsibility for his misconduct in office, even if his purpose was to protect executive confidentiality. The Court was no less naive than the rest of the nation; only a bit more polite.

If judicial consideration of purpose with respect to federalism and separation of powers presents a mixed bag, so too does judicial consideration of purpose with respect to individual liberties. Purpose is irrelevant when the problem is deciding which unwritten rights are sufficiently rooted in our history and tradition to be characterized as constitutionally fundamental. While justification of infringement of fundamental rights requires proof of a compelling interest, the Court has not questioned whether the government's asserted purpose is its actual purpose. Instead, it has confined its attention to evaluation of the interest.[180]

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172. *Hood*, 336 U.S. at 545.

173. *Id.* at 529 (quoting the Commissioner's report which denied Hood's application for expanded facilities).

174. *See id.* at 539–40.

175. *See* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 352–54 (1977) (pointing out that the stated purpose of the law at issue was so completely undermined by its operation that the Court was not compelled to seriously incorporate it into the calculus of its decision).

176. *See* Kassel v. Consol. Freightways Corp., 450 U.S. 662, 677–79 (1981) (noting the Iowa statute that restricted the length of vehicles using its highways was actually an attempt to deflect through traffic and limit the use of its highways).

177. 418 U.S. 683 (1974).

178. *Id.* at 708–13.

179. *Id.* at 713.

180. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990)) (noting the Court's standing assumption of a fundamental right to be free from unwanted medical treatment); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 63–84 (1976) (discussing various provisions of Missouri law regulating abortions, with a focus on the constitutional underpinnings that warranted the recognition of abortion as a fundamental right); Roe v. Wade, 410 U.S. 113, 147–52 (1973) (discussing the state's interests in

As discussed earlier, governmental purpose is mostly irrelevant to the determination of many issues of free expression, but not all.[181] Purpose is of little consequence to such procedural doctrines as overbreadth or vagueness, and plays only the most attenuated role in deciding questions regarding the extent of governmental control over the speech of its employees, public school students, prisoners, or military members. Those issues are decided in large part by balancing the ability of the government to discharge its function against the public's right to learn of matters of public interest. Government function is not the same as government purpose. Yet, government purpose is critical to the resolution of limited public forum cases and plays some role in deciding the extent of government control of speech that it sponsors. In *Rust v. Sullivan*,[182] for example, the government's purpose—encouraging childbirth rather than abortion—was deemed to be relevant to the question of whether the government could selectively fund a program to advance its purpose.[183] In *Legal Services Corp. v. Velazquez*,[184] the government's purpose was also relevant, but this time the purpose—providing financial support for legal services for people too poor to afford a lawyer—was thought to prevent the government from muzzling the lawyers for the poor.[185] Similarly, *Rosenberger v. Rector & Visitors of the University of Virginia*[186] struck down a ban on the introduction of religion in university-funded student publications because the university's purpose in providing the funds was not to convey a university message, but "to encourage a diversity of views from private speakers,"[187] and that purpose was inconsistent with its denial of funding for religious speech.

Examination of governmental purposes can produce knotty conflicts in this area. An example is the controversy over the application of public university policies forbidding discrimination on the basis of sexual orientation to university-funded student groups.[188] A typical such policy would deny official recognition, funding, and use of university facilities to a student religious group that sincerely believes that homosexual conduct is sinful and thus bars openly gay and lesbian students from voting membership in the group. The university's, and therefore the government's, purpose in enacting the policy is to prohibit what it regards as invidious discrimination against its students. The government's purpose in recognizing and funding student groups, as well as providing access to university facilities, is to create a limited public forum—one limited to student groups that do not practice invidious discrimination. The government is free to use viewpoint-

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outlawing abortion and eventually concluding that abortion is a fundamental right which outweighed the state's interest in preventing the procedure).

181. *See supra* text accompanying notes 134–38.

182. 500 U.S. 173 (1991).

183. *Id.* at 192–93.

184. 531 U.S. 533 (2001).

185. *Id.* at 548–49.

186. 515 U.S. 819 (1995).

187. *Id.* at 834.

188. *See, e.g.*, Christian Legal Soc'y v. Kane, No. C 04-4484 JSW, 2006 U.S. Dist. LEXIS 27347, at *4–14, (N.D. Cal. April 17, 2006) (detailing the facts of one such case).

neutral, reasonable distinctions to limit access to its nontraditional fora, and a nondiscrimination policy is viewpoint neutral.[189] Nor does the policy require that the hypothetical religious student group accept gays and lesbians as members, but it does require that the group do so as a condition of access to the limited public forum.[190] Similarly, the policy in *Rosenberger* did not preclude publication of the student religious magazine but did require that it abandon its religious message as the price of access to the limited public forum created by the University of Virginia.[191] Thus, it may be that a governmental purpose to compel unwanted association, as the price of admission to the forum, produces the same outcome as *Rosenberger*. The outcome is different, however, if the government's purpose is characterized as a mere refusal to subsidize conduct that the university regards as offensive and harmful. From that perspective, the issue resembles *Regan v. Taxation with Representation of Washington*,[192] in which the Court upheld federal laws that permit tax deductibility of contributions to charitable organizations that do not engage in political lobbying.[193] Much depends on identification of governmental purpose—a fact that highlights the importance of principled inquiry into purposes.

Equal protection cases, as previously discussed, manifest curious uses of purpose—as a rigid device to trigger strict scrutiny and as a flexible tool to resolve its application.[194] Moreover, there is no clear linkage between the importance of purpose and the level of scrutiny employed. Sometimes purpose matters more in intermediate scrutiny than in strict scrutiny, and sometimes matters a great deal under minimal scrutiny. Finally, there is no common method of ascertaining purpose; indeed, courts appear to be more willing to infer a purpose when applying minimal scrutiny than when considering whether strict scrutiny should apply.

Purpose does matter in the Court's Establishment Clause jurisprudence—at least when the *Lemon* test is applied—but not as much when the endorsement or coercion tests are at issue. The endorsement test focuses on what message, if any, a reasonable and informed observer would receive from governmental exhibitions of religious symbols, texts, or rituals.[195] If purpose is relevant to that inquiry, it is only the purpose divined by the reasonable observer. To that extent, the method of finding purpose under the endorsement test is to assess the effects of the government's action. The coercion test focuses almost exclusively on the effects of

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189. *See, e.g., id.* at *41 ("[T]he fact that the neutral policy [of the public university] may affect a group with a certain perspective or belief system does not render the policy viewpoint based.").

190. *See id.* at *51 ("[The public university] is not directly ordering CLS to admit certain students. Rather, [the university] has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations.").

191. *Rosenberger*, 515 U.S. at 827.

192. 461 U.S. 540 (1983).

193. *See generally id.* (holding that a statutory scheme that grants tax exempt status to certain organizations that do not engage in substantial lobbying activities does not violate the First Amendment).

194. *See supra* notes 15–18 and accompanying text.

195. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37–38 (2004) (O'Connor, J., concurring in judgment).

the government's action.[196] No matter how benign the government's purpose may be, if the effect of its action is to force unbelievers to profess belief by word or deed, or to force believers to deny their beliefs, the government's action is invalid. Finally, as revealed by *Lukumi* and *Locke*,[197] the Court is divided as to the relevance of purpose in assessing claimed violations of the free exercise guarantee.

This sampler of individual rights jurisprudence suggests that, while purpose may matter a bit more in the area of individual rights than with respect to issues of allocation of government power, purpose is not universally or consistently employed in resolving claims of infringement of individual rights. Purpose pops up here and there, and while it may show up more often in individual rights cases, it is not there with enough reliability to conclude that courts consistently use purpose to decide individual rights cases, much less that purpose lies exclusively in the domain of individual rights.

C. Governmental Purpose as a Decisional Criterion when Effects Cannot Be Accurately Determined

Another possible explanation for the Supreme Court's actual practice is that it considers governmental purpose as a criterion for decision when examination of the effects of governmental action is inadequate to decide the law's constitutional validity. Unfortunately, this explains only a portion of the Court's practice, and thus cannot be a general guide to the Court's consideration of governmental purpose.

Dormant Commerce Clause cases are a prime example of diffuse and difficult-to-assess effects. Yet even in these cases, the Court does not consistently consider purpose only when the effects of the state regulation are inadequate grounds for decision. *City of Philadelphia v. New Jersey*[198] is a helpful example. New Jersey barred out-of-state solid waste from its landfills and defended the action as a legitimate measure that would preserve New Jersey's scarce and diminishing landfill capacity.[199] The Court accepted that objective as legitimate but ruled that because the barrier was discriminatory on its face, it could only be justified by proof that the discrimination was necessary to achieve New Jersey's objective.[200] Because there were other, less discriminatory means of preserving New Jersey's landfill space, the regulation was voided.[201] The Court did not discuss the effects of the ban, evidently thinking it was sufficient to note its overtly discriminatory nature. Perhaps the Court's reliance on facial discrimination as the trigger to strict scrutiny rested on an unarticulated judgment that effects would prove too difficult to measure. Those harmed by the New Jersey ban were out-of-state waste producers—who presumably would be forced to use higher cost landfills—and New Jersey landfill operators—who would experience lower demand and, possibly,

196. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992).
197. *See supra* text accompanying notes 33–40.
198. 437 U.S. 617 (1978).
199. *Id.* at 618–19, 625.
200. *Id.* at 626–29.
201. *Id.* at 629.

diminished revenue. Conversely, beneficiaries of the ban were New Jersey waste producers and out-of-state landfill operators. Moreover, this taxonomy completely fails to assess the relative magnitude of these gains and losses. Without more detailed data, it was impossible to determine whether the net effects of the New Jersey measure actually harmed interstate commerce. Thus, because the effects were so difficult to measure with any tolerable degree of accuracy, this would appear to be a prime candidate for close scrutiny of governmental purpose. The Court avoided doing so by relying on the facial discrimination of the New Jersey law, even as it accepted the legitimacy of New Jersey's claimed purpose. Of course, the face of the regulation revealed a purpose—discrimination against out-of-state waste producers—and so it could be argued that the Court did rely upon purpose. If it did, its mode of determining purpose was quite Rehnquistian: the plain words of the statute were the alpha and omega of purpose.

Another example is *West Lynn Creamery, Inc. v. Healy*,[202] in which the Court voided a Massachusetts regulation that imposed a tax on milk sold by dealers to Massachusetts retailers, the proceeds of which were used to subsidize Massachusetts dairy farmers.[203] Approximately two-thirds of the milk subject to the tax came from out-of-state.[204] The Court stated that the regulation's "avowed purpose and its undisputed effect are to enable higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States."[205] Despite this identified protectionist purpose, the Court proceeded to examine and rely on the effects of the measure, including analysis of interest group politics within Massachusetts.[206] On that latter score, the Court was influenced by the fact that the subsidy defused in-state dairy farmers as an important opponent of the tax, leaving only unorganized consumers and milk dealers as likely opponents.[207] Though the Court did not say so, milk dealers were probably indifferent because they could pass on the incidence of the tax to consumers. If purpose were relevant only when effects are difficult to assess, there should have been no occasion to consider purpose in *West Lynn Creamery* because the effects of the scheme were so clearly protectionist and the interest group proxy for out-of-state interests was eliminated. However, purpose was expressly considered and, when combined with effects, doomed the measure.

Yet another illustration is *Dean Milk Co. v. City of Madison*,[208] in which the Court struck down Madison, Wisconsin's prohibition of the sale of all milk not pasteurized within five miles of Madison's central square.[209] The Court accepted as legitimate Madison's claimed purpose of ensuring sanitary milk and spent the remainder of its opinion assessing the prohibition's effects on interstate

202. 512 U.S. 186 (1994).
203. *Id.* at 188.
204. *Id.*
205. *Id.* at 194.
206. *Id.* at 200–01.
207. *Id.*
208. 340 U.S. 349 (1951).
209. *Id.* at 356.

commerce.[210] Though the rule was facially neutral, the Court saw its effect as a complete exclusion of out-of-state milk.[211] Not so, charged the dissent, for out-of-state bottlers could locate a plant within five miles of Madison if they chose to do so.[212] A sharper assessment of the effects of the Madison ordinance would require some analysis of the economic feasibility of compliance with the ordinance by out-of-state bottlers. This is beyond the ken of the judiciary, and so one might expect a more jaundiced examination of Madison's purpose if the Court turns to purpose when effects are inadequate. This did not happen in *Dean Milk*, perhaps because the Court was convinced its analysis of effects was adequate.

Two other Dormant Commerce Clause cases provide final illustrations of the improbability of this theory of the Court's consideration of governmental purpose. Ostensibly as a consumer protection measure, North Carolina barred apple shipping containers from bearing any grade other than the U.S. Department of Agriculture's grade.[213] Though this regulation was facially neutral concerning interstate commerce, the Court struck it down in *Hunt*.[214] Almost all of the Court's analysis was devoted to the effects of the rule.[215] Because Washington State had developed its own grading system, apparently superior to the USDA's system, the North Carolina regulation stripped Washington apple growers of a competitive advantage.[216] The Court intimated that the North Carolina law might have been intended to discriminate against interstate commerce but stated that consideration of purpose was unnecessary to resolution of the case.[217] Yet, a year later, in *Exxon Corp. v. Governor of Maryland*,[218] the Court upheld a Maryland statute that prohibited gasoline refiners from owning retail gasoline stations in Maryland.[219] The effect of the ban, reasoned the Court, did not discriminate against interstate commerce.[220] Maryland had not inhibited the interstate flow of gasoline, nor had it barred out-of-state, independent retailers from doing business in Maryland.[221] The Commerce Clause "protects the interstate market, not particular interstate firms."[222] Again, a full appreciation of the effects of the ban would require assessment of the economic strength of independent, interstate retailers, as well as the impact of the ban on the amount of gasoline moving through interstate commerce into Maryland. These factors are not easily determined by judges, suggesting that the Court should have looked at Maryland's purpose if the Court was dedicated to the principle that it consider purpose when effects are insufficiently clear. The only reason the *Exxon*

210. *Id.* at 353–57.
211. *Id.* at 354.
212. *Id.* at 357 (Black, J., dissenting).
213. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 335 (1977).
214. *Id.* at 352–53.
215. *See id.* at 350–52.
216. *Id.* at 351.
217. *Id.* at 352–53.
218. 437 U.S. 117 (1978).
219. *Id.* at 119–21.
220. *Id.* at 125.
221. *Id.* at 126.
222. *Id.* at 127.

Court thought the effects of Maryland's ban were clear and constitutionally insignificant was because the ban distinguished between interstate markets and interstate competitors.[223] But *Hunt* did not make that distinction; nor did the Court in *Pharmaceutical Research & Manufacturers of America v. Walsh*,[224] in which the Court upheld Maine's "Maine Rx" program.[225] Maine offered prescription drug manufacturers a choice of reducing prices by granting rebates to pharmacists, which were required to be passed on to consumers, or subjecting their Medicaid drug sales to an undesirable "prior authorization" program.[226] The Court relied heavily on the fact that Maine's program, unlike the scheme at issue in *West Lynn Creamery*, did not impose "a disparate burden on any competitors."[227] Here, the effects may have been benign with respect to interstate competitors, but there was little discussion of the impact on interstate market, and none with respect to Maine's purpose.

The Dormant Commerce Clause cases, which one would expect to be the most fertile ground for evidence of the Court's consideration of purpose as a fallback device when assessment of effects is inadequate for decision, thus fails to bear out this hypothesis. Perhaps this judgment is too harsh, for the Court may simply be too quick to think that its assessment of effects is adequate. However, further evidence that this theory is not borne out by the Court's practice may be seen by a brief examination of other areas of constitutional adjudication.

For brevity's sake, consider only the Court's use of purpose and effects in connection with the religion clauses. When government action is challenged as a forbidden establishment of religion, and the Court applies the *Lemon* test, the government is required to articulate a secular purpose for its action. This is not very difficult, as almost any plausible secular purpose will suffice, and then judicial attention is focused on whether the effects of the action primarily benefit or harm religion, or, if not neutral towards religion, at least deliver only incidental benefits or harms to religion. Given that most of the action under the *Lemon* test occurs when the Court is assessing effects, one is tempted to say that the test tends to confirm the hypothesis that the Court considers purpose as a second order inquiry. This hypothesis, however, is belied not only by the fact that proof of secular purpose is a nominal predicate to consideration of effects but also by the Court's occasional severe scrutiny of purpose.

In *Edwards v. Aguillard*,[228] the Court voided Louisiana's law requiring public schools to choose between teaching no origin theory at all or teaching both the theory of evolution and creation science.[229] Louisiana asserted a secular purpose for the law—academic impartiality with respect to the origin of life—but the Court treated this purpose as insincere and a sham.[230] It reasoned to that end by examining

223. *Id.* at 127–28.
224. 538 U.S. 644 (2003).
225. *Id.* at 670.
226. *Id.* at 649–50.
227. *Id.* at 670.
228. 482 U.S. 578 (1987).
229. *Id.* at 581–82.
230. *Id.* at 586–87.

provisions of the law that required schools to develop curriculum guides for creation science but not for evolution, and provisions that protected creation scientists and teachers of creation science from retribution.[231] From this the Court concluded that Louisiana had a "preeminent religious purpose"[232] and voided the law on its face, without waiting to see what the actual effects of the law might be in practice.[233] Perhaps, as Justice Scalia observed in dissent, creation science in practice would amount to "no more than a presentation of the Book of Genesis,"[234] but it would be these actual, real world effects that would doom the law, not the dismissal of Louisiana's stated secular purpose as a sham in favor of a suppositional purpose.[235]

Edwards is not alone. Voluntary readings from the Bible were disallowed in *School District of Abington v. Schempp*[236] on the ground that the only purpose of the readings was to further religion, despite the government's contention that the readings were intended to promote moral values, contradict materialism, perpetuate cultural institutions, and teach literature.[237] Was the Court unable to assess the effect of Bible readings? In *Epperson v. Arkansas*,[238] the Court voided Arkansas's law prohibiting the teaching of the theory of evolution.[239] After examining the history of the law's adoption and the lack of any asserted secular purpose for the law, the Court reasoned that

> there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas'[s] law may be justified by considerations of state policy other than the religious views of some of its citizens.[240]

Would not the effect of the law have been to privilege one religious view of the origins of life? *Wallace v. Jaffree*[241] voided an Alabama law that authorized public schools to set aside one minute for "meditation or voluntary prayer"[242] on the ground that Alabama's religious purpose to inject voluntary prayer into the schools

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231. *Id.* at 588.
232. *Id.* at 590.
233. *Id.* at 594–97.
234. *Id.* at 634 (Scalia, J., dissenting).
235. But see discussion *infra* Part IV.D for a discussion of why purpose inquiry should be relevant with respect to facial challenges.
236. 374 U.S. 203 (1963).
237. *Id.* at 223.
238. 393 U.S. 97 (1968).
239. *Id.*
240. *Id.* at 107.
241. 472 U.S. 38 (1985).
242. *Id.* at 40 (quoting ALA. CODE § 16-1-20.1 (Supp. 1984), *repealed by* Act of Apr. 27, 1998, Act No. 98-381, § 2, 1998 Ala. Laws 715, 716) (internal quotation marks omitted).

could be inferred from the fact that the law was a "sequel" to a prior law that authorized a one minute period of silence for "meditation."[243] Here, by contrast, the effect of the law was indeterminate.

Stone v. Graham[244] found that Kentucky's requirement of posting a copy of the Ten Commandments in every public school classroom lacked any secular purpose, despite the state's claim that the Ten Commandments form the basis for many secular laws.[245] Because the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths,"[246] the Court reasoned that the actual purpose of the Kentucky statute was entirely religious-based on the Court's perception of the statute's effects.[247] In *McCreary County v. ACLU of Kentucky*,[248] the Court inferred from government actions a wholly religious purpose for the posting of the Ten Commandments in a Kentucky courthouse.[249] The Court did not consider effects; rather, purpose must "be taken seriously . . . and needs to be understood in light of context."[250] Context mattered, but the *Lemon* test did not, in *Van Orden v. Perry*,[251] in which the Court upheld Texas's display of a granite monument inscribed with the Ten Commandments.[252] Neither Texas's purpose for the display nor its effects were given much consideration because the Court opined that the *Lemon* test was "not useful" for resolution of the case.[253] Rather, the Court relied on a long historical tradition of public recognition of the Ten Commandments and other manifestations of religious belief to conclude that "the rich American tradition of religious acknowledgments,"[254] embodied by Texas's passive display, did not constitute a forbidden establishment of religion.[255] This tale of the Court's consideration of governmental purpose in dealing with alleged religious establishments fails to support the notion that the Court turns to purpose only when its consideration of effects is inadequate for decision.

The Court's modern application of the Free Exercise Clause produces a more mixed picture. *Employment Division, Department of Human Resources of Oregon v. Smith*[256] confined the strict scrutiny test of *Sherbert v. Verner*[257] into a very small

243. *Id.* at 58–60 (quoting ALA. CODE § 16-1-20 (Supp. 1984)) (internal quotation marks omitted).
244. 449 U.S. 39 (1980) (per curiam).
245. *Id.* at 41.
246. *Id.*
247. *Id.* at 42 ("Posting of [the Ten Commandments] serves no [secular] educational function. 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.").
248. 545 U.S. 844 (2005).
249. *Id.* at 869–73.
250. *Id.* at 874.
251. 545 U.S. 677 (2005).
252. *Id.* at 690–92.
253. *Id.* at 686.
254. *Id.* at 690.
255. *Id.* at 692.
256. 494 U.S. 872 (1990).
257. 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." (quoting Thomas

corner.[258] In so doing, the focus of judicial review shifted to the generality of the law that pinches religious conduct. Apart from exceptions carved out to preserve nuggets of existing case law,[259] minimal scrutiny applies to religiously neutral laws of general applicability no matter how grave the resulting restriction upon religious conduct. The leading applications of that principle have revealed a Court divided on the question of whether governmental purpose is relevant to whether a challenged law is a neutral law of general applicability. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[260] Justice Kennedy could marshal only four votes for an examination of governmental purpose, but a majority determined neutrality and generality by reference to the effects of the statute.[261] In *Locke v. Davey*,[262] while the Court paid attention to the effects of Washington's denial of scholarship aid for theological instruction, the Court upheld the denial as much on the basis of governmental purpose as effects.[263] Although the exclusion singled out religious conduct, the Court determined that Washington did not intend hostility toward religion.[264]

There does not appear to be a general principle that guides the Court in its consideration of governmental purpose. The best that can be said is that the Court is required to take purpose into account as an inevitable result of its embrace of tiered scrutiny but uses purpose in distinctly different ways within each level of scrutiny, as well as across the tiers of scrutiny. In many different substantive areas, whether the issue is individual rights or structural allocation of powers, the Court sometimes relies on effects, sometimes on purpose, and sometimes on a combination of the two. The Court's fractured pattern of consideration of purpose appears to be the result of an ad hoc method unguided by any theory of the matter. To be sure, the Court states that it will not strike down otherwise legitimate actions simply because an illicit motive is present,[265] yet its disparate impact doctrine is an

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v. Collins, 323 U.S. 516, 530 (1945)) (internal quotation marks) (alterations omitted)).

258. *Smith*, 494 U.S. at 884–85.

259. For example, *Sherbert* remains valid in the "context . . . [of] individualized governmental assessment of . . . conduct," *Smith*, 494 U.S. at 884, and when so-called hybrid claims—the marriage of a plausible free exercise claim with a plausible claim under some other constitutional guarantee—are united, *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (upholding an Amish family's decision to end their children's state-sponsored education after the eighth grade for religious reasons, notwithstanding the state's substantive interest in providing a formal education to its children).

260. 508 U.S. 520 (1993).

261. *Id.* at 542. Part II-A-3 of the Court's opinion addressed the effects of the statute sub judice, and Justice Kennedy was joined in that Part of the case by Chief Justice Rehnquist and Justices Stevens, Scalia, and Thomas. *Id.* at 522. In Part II-A-2 of the Court's opinion, Justice Kennedy examined the governmental purpose of the same statute, with only Justice Stevens joining. *Id.*

262. 540 U.S. 712 (2004).

263. *Id.* at 720–21.

264. *Id.*

265. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (finding a city ordinance banning public nudity was constitutional because the ordinance served a legitimate city interest despite the allegation that the ordinance was enacted with the illicit motive of targeting a specific establishment); Palmer v. Thompson, 403 U.S. 217, 224–25 (1971) (upholding a city ordinance to close all city-leased pools in order to prevent the desegregation of those pools); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130–31 (1810) (upholding a law that effected the transfer of land in which the adversely

attempt to do just that.[266] Moreover, the Court keeps its disparate impact doctrine confined to racial and sexual classifications in equal protection, rather than broadening its applicability to analogous settings, such as that at issue in *United States v. O'Brien*.[267] Surely, the Court could do better.

IV. THE PROPER ROLE OF GOVERNMENTAL PURPOSE IN CONSTITUTIONAL ADJUDICATION

When should governmental purpose be relevant to constitutional adjudication? When purpose is relevant, how should purpose be detected? The ubiquity of tiered scrutiny necessarily implies that judicial consideration of governmental purpose cannot be abandoned. The practical problem is to confine judicial consideration of governmental purpose to methods that are reliable and which emphasize the real world impact of governmental action. If constitutional law is to be manufactured by reliance on governmental purpose, such purposes must be accurately identified, because once constitutional law is made, it tends to remain fixed in place. In general, while effect should matter more than purpose, it is essential to identify purpose in a principled manner.

Reliability is an issue when courts attempt to infer governmental purpose from slivers of data. If induction is always an uncertain form of reasoning,[268] the possibility of error becomes greatly magnified when a judge, removed in time and space from the legislature or executive, attempts to ascribe a purpose to the action taken by a complex body. As the late Chief Justice Warren noted, "Inquiries into congressional motives or purposes are a hazardous matter."[269] The Chief Justice continued, "What motivates one legislator . . . is not necessarily what motivates scores of others . . . and the stakes are sufficiently high for us to eschew guesswork."[270] Nor was Earl Warren the first Chief Justice to voice these misgivings. The iconic John Marshall stated much the same concerns in *Fletcher*

affected party challenged the law on the grounds that some of the legislators voting for the law did so because they were promised an interest in the land).

266. *See supra* notes 99–101 and accompanying text.

267. 391 U.S. 367, 382–86 (1968).

268. *See supra* pp. 16–17.

269. *O'brien*, 391 U.S. at 383.

270. *Id.* at 384.

v. Peck,[271] and they have been repeated in more recent years,[272] but no Justice has provided a more thorough catalogue of the obstacles to ascertaining the inferential purposes or motives of a legislature than Justice Antonin Scalia.[273]

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271. Chief Justice Marshall noted,

> It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements [to governmental action] are examinable in a court of justice. If the principle be conceded, that [governmental action] might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. . . . Must the vitiating cause operate on a majority, or on what number of the members?

10 U.S. (6 Cranch) 87, 130 (1810).

272. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217, 225 (1971) ("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, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."); *see also* Epperson v. Arkansas, 393 U.S. 97, 113 (1968) (Black, J., concurring) ("[T]his Court has consistently held that it is not for us to invalidate a statute because of our views that the 'motives' behind its passage were improper; it is simply too difficult to determine what those motives were.").

273. Justice Scalia outlined the difficulties of discerning governmental purpose in his dissent:

> [W]hile it is possible to discern the objective "purpose" of a statute ([i.e.], the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth . . . , discerning the subjective motivation of those enacting the statute is . . . almost always an impossible task. The number of possible motivations, to begin with, is not . . . finite. . . . [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.
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> . . . [Nor can we] assume that every member present (if, as is unlikely, we know who or even how many they were) agreed with the motivation expressed in a particular legislator's preenactment floor or committee statement. . . . Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read . . . ? Should we consider postenactment floor statements? Or postenactment testimony from legislators, obtained expressly for the lawsuit? Should we consider media reports on the realities of the legislative bargaining? All of these sources, of course, are eminently manipulable. Legislative histories can be contrived and sanitized,

The task is impossible, even for the Olympians of the Supreme Court. What is not impossible, however, is to ascertain purpose from the face of the governmental action involved or even from a comparison of the government's stated purpose with the means chosen to achieve that purpose. A radical disconnection between stated purposes and chosen means might be sufficient to cause judges to doubt that the stated purposes are the actual purposes, but that should cause them to first focus on the effects of the action. An example is *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*.[274] Hialeah's stated purpose for its narrow ban on ritual slaughter of animals was to preserve public morals, peace, and safety.[275] The chosen means, however, permitted almost all ritual slaughter except that practiced by the Santeria sect.[276] This sharp disconnection between stated ends and chosen means caused the Court to focus on the effect of the measure, which was to outlaw the sacramental rite of the Santerians.[277] This effect should have been sufficient to invalidate the measure. Even if further inquiry into purpose might be made, the purpose of the measure could be inferred from its effect. There was no need to inquire into motive evidence, as did five Justices,[278] even though the motive evidence was strikingly clear.

The consequences of mistaken judicial readings of purpose in cases of statutory construction or executive action are much less significant than in constitutional adjudication. Legislatures and executives can correct these mistaken impressions.

> favorable media coverage orchestrated, and postenactment recollections conveniently distorted. Perhaps most valuable of all would be more objective indications—for example, evidence regarding the individual legislators' religious affiliations. And if that, why not evidence regarding the fervor or tepidity of their beliefs?
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> Having achieved, through these simple means, an assessment of what individual legislators intended, we must still confront the question (yet to be addressed in any of our cases) how *many* of them must have the invalidating intent. If a state senate approves a bill by 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 their impermissibly motivated colleagues? Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it—on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?
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> . . . [T]here are no good answers to these questions . . . . [D]etermining the subjective intent of legislators is a perilous enterprise. It is perilous, I might note, not just for the judges who will very likely reach the wrong result, but also for the legislators who find that they must assess the validity of proposed legislation—and risk the condemnation of having voted for an unconstitutional measure—not on the basis of what the legislation contains, nor even on the basis of what they themselves intend, but on the basis of what *others* have in mind.

Edwards v. Aquillard, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting) (citations omitted).

274. 508 U.S. 520 (1993).

275. *Id.* at 528.

276. *See id.* at 542–45.

277. *Id.* at 542.

278. *See id.* at 543–46.

But when constitutional law is crafted on the basis of a mistaken view of purpose, the mistake endures. Such mistakes affect not only the specific case but others that look like the adjudicated case. Mistakes even affect cases that bear no resemblance to the original one because the fortune-telling methodology that spawned the original mistake has been legitimized. An example is *United States Department of Agriculture v. Moreno*.[279] When Congress enacted the Food Stamp Act, its stated purpose was to alleviate hunger and malnutrition among the poor.[280] When Congress amended the law to deny food stamps to households composed of unrelated persons, it failed to state a purpose but later argued that the purpose was to prevent fraud.[281] The Court first concluded that the amendment was "clearly irrelevant to the stated purposes of the Act."[282] The Court then vaulted from that to a conclusion that the actual purpose of Congress—as revealed by pinpricks of motive evidence—was "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."[283] That motive, however accurate, was declared to be an illegitimate, "bare congressional desire to harm a politically unpopular group,"[284] despite the government's assertion that its actual purpose was to minimize fraud and abuse of the program. If that mode of purpose detection is appropriate, why should it not also apply to instances of economic discrimination against politically unpopular groups, such as vendors of fast food or tobacco? It is not enough to say that those entities inflict external costs by their activities, for so does abuse of the food stamp program. Nor is it enough to say that the actual purpose of legislation detrimental to fast food vendors is far more likely to be in pursuit of a public good than denying food stamps to households of unrelated persons. Rationing public funds to help only financially hard-pressed kinship families avoid hunger is as legitimate a public good as deterring the availability of unhealthy food or addictive, death-dealing tobacco products. The fact that the *Moreno* method has not triggered a flood of imitation is small cause to celebrate. Justice Jackson's loaded weapon metaphor is as apt here as it was in *Korematsu v. United States*.[285]

The general problem of reliability is compounded in cases of ineffective purpose or unintended consequences. To use Justice Scalia's example, "if bizarre new historical evidence revealed that [the Clayton Act] lacked a secular purpose, even though it has no discernible nonsecular effect,"[286] it would make no sense to

279. 413 U.S. 528 (1973).
280. *Id.* at 529.
281. *Id.* at 535–36.
282. *Id.* at 534.
283. *Id.*
284. *Id.*
285. 323 U.S. 214 (1944) (upholding the dislocation and internment of Japanese residents on the reasoning that it was necessary for national security during World War II). In dissent, Justice Jackson characterized the reasoning of the Court as creating a "loaded weapon" ready for future use. *Id.* at 246 (Jackson, J., dissenting).
286. Edwards v. Aguillard, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting).

strike it down because of its ineffective purpose.[287] A somewhat different problem is presented in cases of unintended consequences. When the District of Columbia police force began to use a test of verbal and written ability to screen applicants,[288] it is fair to presume it did not do so to inflict racial disadvantage. Yet, that was the effect of the test. Given that effect, it is fair to go back and question the initial presumption that the test was not intended to produce this effect. That is what the disparate impact doctrine seeks to do. The puzzle is why the Court has not extended this mode of reasoning to other doctrinal areas where observable effects produce constitutional disadvantage. Unintended effects are not confined to cases of racial or sexual disparate impact.

While ineffective purpose and unintended effects provide a starting point for determining when courts should consider governmental purpose, they do not end the inquiry. Of equal importance is the manner in which courts should determine purpose in those circumstances in which they must assess the government's purpose. Consideration of the manner in which purpose ought to be divined, and application of that inquiry to cases of ineffective purpose and unintended consequences, goes a long way toward construction of some general principles to guide judicial examination of governmental purpose.

A. Determining Governmental Purpose

Given that tiered scrutiny requires assessment of governmental purpose, one may profitably "round up the usual suspects," in the immortal words of Captain Louis Renault,[289] and subject them to academic grilling. Minimal scrutiny purports to rely upon any conceivable, hypothetical purpose to establish the requisite legitimate governmental objective. This may be supplied after the fact, but it can also be divined by reference to the action itself. Then-Justice William Rehnquist's argument that the "plain language of [the statute] marks the beginning and end of our inquiry"[290] was criticized as a supposed tautology[291]—Congress intends to do what it does—but the criticism is not as apt as the critics suppose. Justice Rehnquist may have meant that courts should determine purpose by reference to the effects of the action; if those effects are not constitutionally suspect, there is no reason to

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287. I do not contend that cases of ineffective purpose should always result in upholding the government's action. Some ineffective purposes inflict stigmatic injury and thus ought to be voided because the hortatory purpose actually has stigmatic effects. An example would be a government proclamation that "the United States is a Christian nation." Assuming no tangible effects attached to the proclamation, the governmental purpose of establishing a cultural and religious hegemony is ineffective, but the very announcement inflicts stigmatic injury on non-Christian Americans. Whether this is really a case of ineffective purpose is open to debate; perhaps the government's purpose would be to inflict such symbolic injury. Such a debate is a fool's paradise, though, for the reasons Justice Scalia developed at length in his *Edwards* dissent. *See supra* note 273.

288. *See supra* notes 99–101 and accompanying text.

289. CASABLANCA (Metro-Goldwyn-Mayer 1942). Claude Rains, of course, performed as the inimitable Captain Renault.

290. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176 (1980).

291. *Id.* at 186–87 (Brennan, J., dissenting).

search for an alternative purpose. In short, he may have meant his comment as a shorthand expression of the futility of invalidating otherwise valid statutes because they are ineffective to achieve an occult, illicit purpose. Justice Rehnquist may have also meant that if the statutory provision does not expose itself as illegitimate, any plausible—albeit hypothetical—legitimate purpose for it will suffice. The former possibility divines purpose from effects; the latter possibility locates purpose in a universe of plausible supposition, which is tantamount to a rejection of any search for purpose.

In *United States Railroad Retirement Board v. Fritz*, Justice Brennan argued that courts should start with the legislatively stated purpose and uphold classifications that rationally further such purpose, except when the means are "either irrelevant to or counter to that purpose."[292] In such a case, the measure is valid only if the means are "rationally related to achievement of an *actual* legitimate governmental purpose."[293] Mischief can begin here. Stated purposes are useful and made more so by doctrine announcing that the Court will consider stated purposes. The trouble begins when the chosen means are disconnected from the stated purposes. Although a sharp dissociation of stated purposes and effects cannot be ignored, if the effects are not constitutionally suspicious, one is entitled to wonder why it matters that the legislature has badly—or even falsely—stated its purposes. If legitimate purposes exist, even if the legislature failed to articulate or deliberately concealed them, what constitutional harm has occurred?[294] While a search for actual purpose may sometimes reveal an illegitimate purpose that is effectively accomplished, if purpose is inferred from motive evidence, Justice Brennan's approach would plunge the courts into the endless difficulties of inferring actual purpose from motive.[295]

Justice Stevens, in *Fritz*, argued for a judicial quest for the discovery of "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."[296] This middle-of-the-road position is hardly less objectionable. Here, actual purpose serves only to invalidate statutes—or at least subject them to heightened scrutiny—and it is only if the Court fails to produce a damning, imagined actual purpose that the presumption of an impartial purpose

292. *Id.* at 188 (Brennan, J., dissenting).

293. *Id.*

294. The sports-minded of a certain age will be reminded of the phrase coined by the immortal Chick Hearn, long-time radio play-by-play announcer for the Los Angeles Lakers: "No harm, no foul." For a discussion of the origins of the phrase "no harm, no foul," see Linda E. Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in* Neder v. United States, 28 AM. J. CRIM. L. 229, 230 n.3 (2001).

295. In both *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), and *Fritz*, 449 U.S. at 189 (Brennan, J., dissenting), Justice Brennan leaped immediately to motive evidence as the touchstone for actual purpose.

296. 449 U.S. at 181 (Stevens, J., concurring).

would be relevant.[297] This is an invitation to expediency, for one could always proffer motive evidence sufficient to strike down distasteful government actions. Of course, these inferred actual purposes must be plausible, so there is an outer limit to such chicanery; but within a broad spectrum of contested cases, the opportunity for judicial abuse is present.

Once the level of scrutiny is heightened, the tables of proof are turned, and it is the government that must justify the legitimacy of its actions by establishing the requisite connection between its means and an important or compelling objective. Identification of actual purpose is essential to decision under heightened scrutiny, at least in equal protection cases.[298] Yet, for the most part, the divination of actual purpose in such cases is by reference to the classification itself,[299] the application of the classification,[300] or the effects produced by the classification.[301] Although the doctrine of heightened scrutiny in equal protection erects no barriers to judicial rummaging for inferred actual purpose, there are surprisingly few instances of the Court doing so, even under circumstances where it might be appropriate.[302] The curious result is that the Court appears to be at least as likely to rely upon its own ideas of governmental purpose under minimal scrutiny as under heightened scrutiny.

Reliance on stated purposes also serves a useful quasi-constitutional function. The Court has imposed a series of clear statement requirements on Congress, which are designed both to give fair notice to the states of congressional action that invades traditional understandings of state sovereignty and to ensure that Congress does not inadvertently displace state autonomy. Congress must be clear and unambiguous when it intends to abrogate the states' Eleventh Amendment immunity;[303] when it uses its commerce power to regulate states with respect to matters that are "fundamental . . . for a sovereign";[304] when it acts to preempt areas

297. *Id.* ("If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect. If, however, the adverse impact may reasonably be viewed as an acceptable cost of achieving a larger goal, an impartial lawmaker could rationally decide that that cost should be incurred.").

298. As discussed previously, when courts apply intermediate and strict scrutiny to free speech issues, they lose much of their focus on actual purpose and concentrate far more on the effects of the regulation at issue. *See supra* text accompanying notes 137–38.

299. *See* Tuan Anh Nguyen v. INS, 533 U.S. 53, 67–68 (2001).

300. *See* Reed v. Reed, 404 U.S. 71, 76–77 (1971).

301. *See* Califano v. Webster, 430 U.S. 313, 317–18 (1977) (per curiam).

302. *See* Palmore v. Sidoti, 466 U.S. 429 (1984) (reversing a custody assignment where there existed an inference that the lower court exclusively used an interracial relationship between the child's mother and stepfather as its reason for awarding custody to the natural father); *see also infra* text accompanying notes 332–41 (discussing Palmer v. Thompson, 403 U.S. 217 (1971)).

303. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (affirming the well-established requirement that Congress use clear and unmistakable language in any statute abrogating a state's immunity from being sued in federal court).

304. Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991).

historically reserved for state regulation;[305] when it attaches conditions to federal grants to the states;[306] and, in general, whenever it "intends to alter the usual constitutional balance between the States and the Federal Government."[307] The clear statement principle is a rule of statutory construction, but its function is both to ensure that Congress does not inadvertently invade state autonomy and to avoid the necessity of deciding delicate issues of the outer bounds of congressional authority to displace state authority.[308]

The clear statement principle is not confined to federalism concerns. Professor Cass Sunstein argues that when issues of individual rights are pitted against executive authority, the Court insists upon a clear and unambiguous congressional grant to the President of such authority.[309] In so doing, the Court has eschewed the argument that when it comes to national security, foreign affairs, and prosecution of authorized armed force, the President has broad discretion to interpret ambiguous grants of authority.[310] Professor Sunstein refers to this as "liberty-promoting minimalism," a device to give the benefit of doubt to individual liberty while avoiding decision upon the outer limits of the President's exclusive or unilateral authority in these areas.[311] The clear statement principle operates here in a fashion analogous to the federalism cases but also serves another quasi-constitutional function—preserving liberty without judicial exercise of the constitutional trump cards of the liberty-protecting provisions of the Constitution.

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305. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (asserting that the police powers of the states could not be superseded by congressional action unless that was Congress's clear purpose).

306. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006) (stating that although Congress may attach conditions to states' acceptance of federal money, the presence of the conditions must be unambiguous); South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)) (explaining that Congress must unambiguously set out conditions attached to a state's acceptance of federal funding to allow the state to make a fully informed decision about acceptance).

307. Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting *Atascadero*, 473 U.S. at 242) (internal quotation marks omitted) (construing 42 U.S.C. § 1983 to exclude states from within the statutory definition of "person").

308. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001) (acknowledging that the clear statement requirement for congressional actions that push the outer limits of federal authority is in part motivated by the Court's desire to avoid delicate constitutional issues); Jones v. United States, 529 U.S. 848, 857–58 (2000) (recognizing that it is the duty of the Court to reject an interpretation of a statute that creates serious constitutional issues when another construction is available that avoids the issues); United States v. Bass, 404 U.S. 336, 349–50 (1971) (refusing to interpret a federal statute to allow the exertion of federal control over local criminal conduct in the absence of express congressional intent to alter the normal federal–state balance of power); Rewis v. United States, 401 U.S. 808, 812 (1971) (holding that a broad interpretation of a federal statute, which would disturb the traditional federal–state relationship, would not be adopted where there was neither legislative history nor statutory language supporting a broad construction of the statute).

309. Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. 1, 1 (2006).

310. *Id.* at 5.

311. *Id.* at 1.

Clear statement requirements are only quasi-constitutional; it is thus ironic that the Court will use unreliable motive evidence to infer actual purpose when making constitutional decisions but will reject that approach when seeking to avoid difficult constitutional decisions. If inferences of actual purpose are reliable when the stakes are high—constitutional interpretation that is difficult to alter—why is it treated as unreliable when the stakes are lower—statutory construction or tentative conclusions about executive authority that Congress could alter at its pleasure, with enough votes to override a veto? While the Court offers no answer, there is a theoretical answer of sorts. Unfortunately, that answer, which can be seen by considering *Hamdan v. Rumsfeld*,[312] suggests that the Court has its purpose inquiry backwards.

The central question in *Hamdan* can be presented in different ways or on different levels. If the question is couched as whether Congress intended by its September 2001 Authorization for Use of Military Force[313] to authorize the President to subject detainees to military tribunals that do not conform to the Uniform Code of Military Justice, there can be only one of two answers: yes or no. While considerably difficult to discern the answer, in theory an answer could be discerned. The possibilities are binary—the one excludes the other. If that question is answered in the affirmative, however, the *Hamdan* question necessarily becomes a constitutional one. And if purpose is relevant to answer the constitutional question, one might ask whether Congress intended to enable the President to keep the nation secure from jihad or whether Congress intended to enable the President to incarcerate indefinitely and subject to military tribunals anybody he might remotely suspect of aiding jihadist terrorists? The answer to that question is not binary; Congress might have had both intentions. While the former is surely a legitimate purpose, the latter is not. Thus, examination of purpose in the constitutional context is a considerably more vexed inquiry, a fact that partially explains the nature of the Court's disparate impact doctrine in equal protection cases. Adding to the epistemological discomfort is the fact that there can be any number of overlapping motivations that occur in constitutional cases, but for every issue of statutory construction, there can be only two, mutually exclusive possibilities. The import of this is that the problem of reliable ascertainment of purpose is greatly increased when constitutional decisions hang on determination of purpose. Because of the decreased reliability of any form of purpose ascertainment in constitutional adjudication, in such cases the Court should be particularly unwilling to resort to its least reliable method of determining purpose—inference of actual intent from motive evidence. By contrast, in cases of statutory construction, there is more room for error—because of the relative ease of correcting judicial error—and the Court should be more willing to experiment with less reliable techniques of ascertaining intent. Alas, the Court's process is the opposite.

312. 126 S. Ct. 2749 (2006).
313. Pub. L. No. 107-40, 115 Stat. 224 (2001).

This incoherent pattern would be ameliorated if the Court extracted governmental purpose, whether hypothetical or actual, primarily from the face of the action and its effects, and secondarily from the government's stated purpose. Attempts to infer actual purpose should be restricted to a few exceptional categories, designed mostly to deal with the problem of concealing forbidden purposes behind the cloak of unintended consequences.[314]

B. Ineffective Purpose

When government action is not effective to accomplish its purpose, should it matter that the purpose is illegitimate? Should the answer depend on the manner in which purpose is determined?

In *United States v. O'Brien*, Chief Justice Warren opined that it would be futile to invalidate otherwise valid laws due to an illegitimate purpose, because the legislature could simply reenact the law without any evidence of impure purpose.[315] Invalidation on such grounds would amount to a remand to the legislature with a not-so-subtle invitation to be less candid the second time around. Creating incentives for legislatures to act on carefully concealed purposes hardly seems a good idea.

Moreover, the presence of an illicit purpose does not automatically mean that what the legislature did is condemnable. It would be foolish to invalidate a law punishing copyright infringement because Congress declared that its purpose was to suppress free speech. Years ago, Professors Tussman and tenBroek confronted this issue and concluded that "it is altogether possible for a law which is the expression of a forbidden motive to be a good law."[316] Considered in this section is the problem of *ineffective* purposes; if the effect of a law that is infected with a bad purpose is benign, there is generally no good reason to condemn it.

There are, however, at least two exceptions to this principle. Some expressions of purpose may be inherently injurious; thus, it cannot be said that there are absolutely no evil effects, and the problem is no longer one of ineffective purpose. Or, to parse the point a bit more finely, while the law inflicts no tangible injury—and thus produces no wrongful effects—its purpose sends a message that is so counter to constitutional values and so likely to wreak psychic offense that its poison must be expunged. A joint resolution of Congress declaring "White Supremacy Day," while of no tangible effect, would be a venting of such poison. The other exception is rooted in the limitations of courts. When courts are not

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314. *See infra* text accompanying notes 332–41.

315. 391 U.S. 367, 384 (1968). The evidence of impermissible purpose in *O'Brien* consisted of statements by members of Congress that the proposed amendment to the Selective Service law would suppress draft card burning as a form of protesting the Vietnam War. *Id.* app. at 386–88. Chief Justice Warren noted that if the Court were to strike down the amendment on the ground of such illicit purpose, it "could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *Id.* at 384.

316. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 360 (1949).

capable of assessing whether the means chosen to accomplish an illegitimate purpose are effective, it is appropriate to invalidate the law because of its bad purpose, or at least subject it to heightened scrutiny. This is a prophylactic approach to evil effects. Of course, before courts leap to invoke this exception, they should be certain of the illegitimate purpose. To the extent illegitimate purpose is divined by unreliably inferring actual intent from shards of motive evidence, a court should be extremely reluctant to strike it down.

1. Stigmatic Injury

When an illegitimate purpose, by itself, causes stigmatic injury, the resulting injury warrants invalidation of the government action. The endorsement test for violations of the Establishment Clause, for example, is entirely rooted in this notion. Justice O'Connor, who originated the theory, asserted,

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition . . . . [by] endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[317]

Of course, not everyone agrees the endorsement test is an adequate way to deal with such stigmatic injury. Justice Thomas rejects the endorsement test in favor of a hard-shell brand of "actual legal coercion"[318] as the "touchstone for . . . Establishment Clause inquiry."[319] To be sure, Justice Thomas objects to the endorsement test, not so much because it renders a false positive for stigmatic injury, but because its application, no matter the outcome, may produce such injury.[320] To avoid this Hobson's choice, Justice Thomas proffers an analysis based

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317. Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring).

318. Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment)) (internal quotation marks omitted).

319. *Id.* at 697 (Thomas, J., concurring).

320. Justice Thomas contended that

> [endorsement] analysis is not fully satisfying to either nonadherents or adherents. For the nonadherent, who may well be more sensitive than the hypothetical "reasonable observer," . . . this test fails to capture completely the honest and deeply felt offense he takes from the government conduct. For the adherent, this analysis takes no account of the message sent by removal of the sign or display, which may well appear to him to be an act hostile to his religious faith. The Court's foray into religious meaning either gives insufficient weight to the views of nonadherents and adherents alike, or it provides no principled way to choose

entirely upon the effects of governmental action.

In the end, the problem with the endorsement test may be that it relies too much on subjective indicators of purpose, for a great deal turns on what purpose the mythical reasonable observer would attribute to government action. Yet, whatever problems may bedevil the endorsement test, the problem of stigmatic purpose remains. This problem is most readily exemplified when a government actually declares its illegitimate purpose, although this is unlikely to occur. Far more likely is a form of government action that combines a forbidden purpose as one motivating factor with a legitimate purpose as another, or one that is ineffective to achieve the purpose all together. Consider two cases in this regard.

In *American Family Ass'n v. City & County of San Francisco*,[321] the Ninth Circuit concluded that the San Francisco Board of Supervisors did not violate the Establishment Clause by passing resolutions that officially condemned the views of "religious organizations"[322] such as "the Religious Right"[323] or by characterizing the group's views as "erroneous and full of lies."[324] The Board's resolutions were a response to an advertisement that the plaintiffs placed in the *San Francisco Chronicle* as part of their "Truth in Love" campaign, which stated,

> Christians love homosexuals[;] [although] "God abhors any form of sexual sin . . . [, we offer] an open hand [of] healing for homosexuals, not harassment. We want reason in this debate, not rhetoric. And we want to share the hope we have in Christ, for those who feel acceptance of homosexuality is their only hope."[325]

The Board's resolution asserted that advertising of the sort used by the plaintiffs helped to "'create an atmosphere which validates oppression of gays and lesbians' and encourages maltreatment of them. The Resolution claimed a 'marked increase in anti-gay violence' that coincided with 'defamatory and erroneous campaigns' against gays and lesbians."[326] The Ninth Circuit ostensibly used the *Lemon* test to conclude that the plaintiffs did not present a claim because "there [was] no actual or threatened imposition of government power or sanction."[327] The court reached its conclusion by injecting the endorsement test into its assessment of the *Lemon* test's primary effects prong: "We believe a reasonable, objective observer would view the primary effect of [the Board's resolutions] as encouraging equal rights for gays and discouraging hate crimes, and any statements from which

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> between those views. In sum, this Court's effort to assess religious meaning is fraught with futility.

Id. at 696–97 (Thomas, J., concurring).

321. 277 F.3d 1114 (9th Cir. 2002).

322. *Id.* at 1119 (quoting a letter sent by the Board to the plaintiffs and others regarding the Board's disapproval of the plaintiffs' "Truth in Love" ad campaign) (internal quotation marks omitted).

323. *Id.* (quoting S.F. Board Res. No. 234-99 (1999)) (internal quotation marks omitted).

324. *Id.* at 1120 (quoting S.F. Board Res. No. 873-98 (1998)) (internal quotation marks omitted).

325. *Id.* at 1119 (quoting the plaintiffs' advertisement in the *San Francisco Chronicle*).

326. *Id.* at 1120 (quoting S.F. Board Res. No. 873-98 (1998)).

327. *Id.* at 1125.

disapproval [of religion] can be inferred [are] only incidental and ancillary."[328] In his dissent, Judge Noonan argued that the resolution constituted a forbidden endorsement and offered the following analogy:

> Suppose a city council today, in the year 2002, adopted a resolution condemning Islam because its teachings embraced the concept of a holy war and so, the resolution said, were "directly correlated" with the bombing of the World Trade Center. Plausibly the purpose might be to discourage terror bombings. Would any reasonable, informed observer doubt that the primary effect of such an action by a city could be the expression of official hostility to the religion practiced by a billion people?[329]

As a long-time resident of San Francisco, I nominate myself as a reasonable, informed observer. I think it quite likely that the Board of Supervisors was motivated in roughly equal parts by a desire to endorse equal rights for homosexuals and by a desire to condemn Christian fundamentalists for what the Board believed to be ignorant bigotry. The former purpose is legitimate; the latter is not. The illegitimate purpose does not produce any tangible injury but may inflict stigmatic injury. The Court of Appeals, of course, did not see it this way. The majority of the circuit panel perceived no illegitimate purpose and thought that the plaintiffs suffered no injury.[330] Judge Noonan, however, perceived injury by relying on the endorsement test's focus on the effects of government action upon a reasonable, informed observer.[331] Existing doctrine forced the judges of the circuit panel to speak in the vernacular of the *Lemon* and endorsement tests, but one presents a clearer picture by confining the issue to the effects of the action, without reference to its suppositional effect upon mythical observers. The plaintiffs did not incur any coercive harm; at most they suffered the sting of being treated as "outsiders, not full members of the political community."[332] Though this conclusion would be enough to constitute forbidden endorsement, that test relies on the premise that courts can detect forbidden purpose through hypothesized effects upon hypothesized observers. This detection method is highly subjective and little more than a proxy for inferential purpose inquiry.

A court would do better to focus upon real effects. Absent real coercion, the effects are slight. Moreover, the purposes are mixed. If a court voided the San Francisco resolutions, what would prevent San Francisco from reenacting differently worded versions, ones that make plain that San Francisco respects Christian fundamentalist beliefs, but point out that the effect of those beliefs is to deny equal rights for homosexuals and to inadvertently encourage hate crimes? The

328. *Id.* at 1122–23.
329. *Id.* at 1127 (Noonan, J., dissenting).
330. *Id.* at 1125–26.
331. *Id.* at 1126–27 (Noonan, J., dissenting).
332. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

net result of this remand for forbidden purpose would require San Francisco to rephrase its resolutions in a more polite and inclusive fashion. While this might mitigate the stigmatic injury the endorsement test seeks to identify and punish, perhaps it is too much effort for too little reward.

Palmer v. Thompson[333] may be a rare case of ineffectual purpose to deliver racially discriminatory results, but which, nevertheless, produced stigmatic injury that should have been addressed. The Supreme Court, however, did not analyze the problem in this fashion. In the wake of a judicial decree that Jackson, Mississippi's racial segregation of its public recreational facilities violated equal protection, Jackson integrated all of those facilities except its five swimming pools, four of which had been reserved for whites and one for blacks.[334] Jackson closed all five swimming pools because the city council thought that the pools "could not be operated safely and economically on an integrated basis."[335] Although the Court admitted that there was evidence to support the contention that "the Jackson pools were closed because of ideological opposition to racial integration in swimming pools,"[336] it deferred to the lower courts' determination that the real purpose of the closure was to preserve public safety and fiscal responsibility.[337] One need not be a cynic to think that in 1963, the same year that federal troops suppressed a riot over the enrollment of James Meredith as the sole black student at the University of Mississippi, racial animus towards African Americans motivated Jackson's closure of its municipal swimming pools. Although the action taken affected whites and blacks equally, this was the same bogus equality that the Court struck down in *Loving v. Virginia*.[338] The Court might have reasoned that the effect of the closure was to inflict stigmatic injury on African Americans by declaring them unfit to swim with whites. In *Loving*, the Court thought that because Virginia's ban on racially mixed marriages only applied to marriages with a white participant, the face of the statute revealed a purpose "to maintain White Supremacy."[339] While no such facial asymmetry existed in Jackson's closure,[340] its evident effect, at the height of southern white resistance to the recognition of the social and political equality of blacks and whites, was to inflict serious stigmatic harm upon black citizens. The resulting stigmatic harm should have been enough to cause the Court to carefully parse the record for evidence of a forbidden purpose, evidence that the Court admitted existed.[341]

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333. 403 U.S. 217 (1971).

334. *Id.* at 218–19.

335. *Id.* at 225.

336. *Id.* at 224–25.

337. *Id.* at 225.

338. 388 U.S. 1, 8 (1967) ("[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations . . . .").

339. *Id.* at 11.

340. *See Palmer*, 403 U.S. at 220.

341. *Id.* at 224–25.

At the very least, such evidence should have triggered the sort of scrutiny prescribed in *Washington v. Davis*.[342] Whether it would have been sufficient to void the closure outright, or merely reverse the presumption of validity, is debatable. What is far less debatable is that the Court should not have ignored the admitted evidence of racial animus as a purpose for Jackson's action.

2. *Inability to Assess Effectiveness of Means to Achieve a Forbidden Purpose*

When courts are not capable of assessing whether the means chosen to accomplish an illegitimate purpose are effective, they should strike down the government's action on the basis of the illegitimate purpose. Of course, the wisdom of this prescription depends in part on the method by which courts determine the presence of an illegitimate purpose. To test the application of this principle, consider a sampling of Dormant Commerce Clause cases.

City of Philadelphia v. New Jersey,[343] which established the modern parameters for application of strict scrutiny to state regulations of interstate commerce,[344] is thought to be a paradigmatic example of the Court's reliance upon effects rather than purpose, but the Court did not actually examine the effects of the New Jersey law at issue.[345] True, the law discriminated facially against interstate commerce, but there was no proof that it delivered effects that discriminated against interstate commerce.[346] An assessment of effects, however, was beyond judicial competence, for it would have required a complex empirical calculation that would challenge even the most skilled economist. In circumstances where measurement of the actual effects of a measure are beyond judicial competence, it is appropriate for the Court to rely on facial indications of a suspicious means as reason enough to trigger strict scrutiny.

Not every Dormant Commerce Clause case can be resolved so neatly. When state regulations are facially neutral concerning interstate commerce, the Court faces a difficult analytical dilemma. Should strict scrutiny apply if the Court detects illegitimate protectionist purposes, discriminatory effects, or both; or should the regulations be presumed to be valid and issues of purpose and effects simply be factors taken into account in conducting *Pike* balancing?[347] The Court has no consistent answer to this problem. In *Dean Milk Co. v. City of Madison*,[348] the Court accepted Madison's purpose as legitimate but reasoned, from the effects of the

342. 426 U.S. 229, 242 (1976) (citing McLaughlin v. Florida, 379 U.S. 184, 196 (1964)) ("[R]acial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.").

343. 437 U.S. 617 (1978).

344. *Id.* at 624 .

345. *See id.* at 625–29.

346. *See supra* text accompanying notes 198–201.

347. *See supra* note 166 and accompanying text.

348. 340 U.S. 349 (1951).

ordinance, that an early form of strict scrutiny should apply.[349] In *Hunt v. Washington State Apple Advertising Commission*,[350] the Court examined the effects of a North Carolina law—the Court recognized indications that the law was motivated by a discriminatory purpose—to strike down the law under a murky amalgam of *Pike* balancing and strict scrutiny.[351] In such classic cases as *Southern Pacific Co. v. Arizona ex rel. Sullivan*[352] and *Kassel v. Consolidated Freightways Corp. of Delaware*,[353] the Court examined effects in order to apply *Pike* balancing, but the Court sometimes ascribes a protectionist purpose to state laws that, though facially evenhanded, have the effect of discriminating against interstate commerce.[354]

If a court can detect discrimination against interstate commerce by examining the effects of the regulation, as seems to be the case in *Dean Milk*, there is no good reason to inquire into purpose. However, if the effects of the challenged action do not readily reveal such discrimination, there may be more reason to probe the government's purposes. *H.P. Hood & Sons, Inc. v. Du Mond*[355] appears to be such a case. New York officials denied Hood a license to open a new milk receiving plant in New York because they thought Hood would increase the amount of milk it exported to Massachusetts, even though Hood remained free to receive unlimited quantities of New York milk at its existing New York plants.[356] In essence, the Court applied a prophylactic rule: If the Court is not certain whether a law effectively discriminates against interstate commerce, but there is evidence in the record that strongly suggests a protectionist purpose, it will strike the law down to avoid possible resulting harm.[357] The Court's rationale in *Hood* makes sense. A protectionist purpose, if ineffective, causes no harm; but if courts cannot adequately assess the effects that facially neutral laws may have on interstate commerce, they should scour the record for evidence of a forbidden purpose. There is more warrant for doing so in the unique area of the Dormant Commerce Clause than other areas of constitutional law because the Court's rulings in these cases are only provisional. Dormant Commerce Clause cases always arise when Congress has not spoken to the issue. Congress can always use its affirmative power under the Commerce Clause to authorize states to do what the Court has said they cannot do in the absence of congressional action or to preempt state regulatory authority over matters the Court has said the states may regulate in the absence of any

349. *Id.* at 354.

350. 432 U.S. 333 (1977).

351. *Id.* at 350–54.

352. 325 U.S. 761, 771–84 (1945).

353. 450 U.S. 662, 669–75 (1981).

354. *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194–96 (1994) (invalidating a Massachusetts law requiring out-of-state dairy farmers to make "premium payments" that would effectively negate any competitive advantage over in-state farmers); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 542–45 (1949) (striking down as unconstitutional a New York statute that operated to lower the volume of milk traveling into New York through interstate commerce).

355. 336 U.S. 525 (1949).

356. *Id.* at 526–29.

357. *See id.* at 542–44.

congressional action. Because Dormant Commerce Clause decisions merely apportion the burden of persuading Congress to act, there is much less reason to worry that the Court will misread governmental purpose.

C. Unintended Consequences

Governmental purpose is relevant to cases where the effects of government action appear to produce unconstitutional harm. Sometimes those effects are merely adventitious by-products of entirely legitimate governmental action,[358] but sometimes they result from an illegitimate purpose.[359] The equal protection doctrine identifies illegitimate purposes primarily from the face of the action[360] or the discriminatory application of a facially legitimate law.[361] Only the disparate impact cases rely on circumstantial evidence of governmental purpose. Surely the Court should probe the government's purpose for actions that produce effects that appear to be constitutionally harmful. Were the Court to simply shrug off such effects by reference to some claimed legitimate purpose for the action, the government could easily mask its true, and illegitimate, reasons for acting. The puzzle is why the Court has not extended its disparate impact doctrine beyond the equal protection arena.

United States v. O'Brien[362] is the perfect example of a case where the sort of purpose inquiry contemplated by the disparate impact cases should apply. One effect of the ban on destruction of a draft card was to make criminal a form of political protest.[363] Of course, this effect might have been the unavoidable by-product of a purely legitimate purpose: protecting government records and ensuring that draft eligible men could readily produce evidence of their draft status.[364] The Court held that the law effectively carried out the latter of these two purposes and denied O'Brien any opportunity to invoke strict scrutiny of the law by proving that

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358. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (holding that a Wisconsin statute mandating school attendance was unconstitutional as applied to Amish parents who refused to send their children to school on religious grounds).

359. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 541 (1993) (finding a governmental purpose of hostility towards Santeria in the city's ordinance banning certain killings of animals).

360. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 534 (1996) (observing that Virginia's express attempt was "to afford VMI's unique type of program to men and not women" (quoting United States v. Virginia, 976 F.2d 890, 892 (4th Cir. 1992)) (internal quotation marks omitted)); Smith v. Allwright, 321 U.S. 649, 664 (1944) (holding that the Democratic Party's resolution excluding blacks from voting was state action within the meaning of the Fifteenth Amendment).

361. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447 (1985) (observing that Cleburne required a special multifamily housing permit for Cleburne Living Center, a group home for the mentally retarded, but not for "apartment houses, multiple dwellings, boarding and lodging houses[, or] fraternity or sorority houses"); South Carolina v. Katzenbach, 383 U.S. 301, 310–11 (1966) (noting that the reading and writing requirements for voting registration were only applied to blacks).

362. 391 U.S. 367 (1968).

363. *See* Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 80–81 (1988).

364. *See O'Brien*, 391 U.S. at 378–82.

a motivating factor was the desire to punish antiwar protestors.[365] The Court must think that its intermediate form of scrutiny is adequate to deal with instances of forbidden purpose; after all, one of the elements of the *O'Brien* test requires a determination of whether the government's action is unrelated to the suppression of speech.[366] Yet, when the Court applies this prong of the test, it does not probe governmental purpose. Rather, it reasons from the face of the regulation to divine plausible purposes that are unrelated to speech.

An example is *City of Erie v. Pap's A.M.*[367] Erie forbade public nudity and applied its ban to sleazy nude dancing establishments such as "Kandyland."[368] The Court agreed that nude dancing was symbolic expression and applied *O'Brien*.[369] The law was content-neutral and ostensibly had as its purpose "combating crime and other negative secondary effects caused by the presence of adult entertainment establishments [rather than] suppressing the erotic message . . . of nude dancing."[370] Despite evidence that the city council's real aim was to suppress precisely this message,[371] the Court brushed this aside with the observation, derived from *O'Brien*, that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive."[372] Nor will the Court give a litigant the opportunity to prove the presence of an illicit motive in order to invoke strict scrutiny.[373] While it is too cynical to equate the Court's refusal with W.C. Fields's immortal quip,[374] it is astonishing that the Court remains blind to the application of its disparate impact doctrine to content-neutral regulations of symbolic speech.

The Court cannot seriously contend that permitting litigants to introduce evidence of the government's purpose to suppress speech will lead to invalidation of laws that only incidentally and accidentally impinge upon expression. Just as not every instance of disparate racial or sexual impact is the product of a forbidden purpose,[375] not every content-neutral regulation of symbolic speech is the product of a purpose to suppress expression.[376] Disparate impact doctrine in equal protection

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365. *Id.* at 382–86.

366. *Id.* at 376–77.

367. 529 U.S. 277 (2000).

368. *Id.* at 282–83.

369. *Id.* at 289–302.

370. *Id.* at 291.

371. *See id.* at 292.

372. *Id.* at 292 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986); United States v. O'Brien, 391 U.S. 367, 382–83 (1968)).

373. *See O'Brien*, 391 U.S. at 382–86.

374. NEVER GIVE A SUCKER AN EVEN BREAK (Universal Pictures 1941).

375. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 270–76 (2003) (noting that educational institutions are not barred from considering race in the admissions process); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978) (plurality opinion) (lauding Harvard College's admission process which uses race as a one plus factor in establishing a diverse student population).

376. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) ("This and other public indecency statutes were designed to protect morals and public order."), *overruled on other grounds by* White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, 171 (2007) (rejecting the evidentiary standard for establishing a legitimate governmental purpose established in *Barnes* and adopting the evidentiary standard established in *Renton*); Frisby v. Schultz, 487 U.S. 474, 483–84

cases permits the government to escape strict scrutiny, even if a forbidden purpose has been established as a motivating factor for government action, if the government can prove that it nonetheless could have taken the action to accomplish a legitimate objective.[377] This is hardly the same as striking down "otherwise constitutional" laws because of an illicit purpose.

D. Facial Challenges

Reliance on effects may frustrate challenges of the facial validity of unconstitutional statutes and hinder prevention of the enforcement of these statutes before they inflict constitutional injury. Because the general rule is that a facial challenger "must establish that no set of circumstances exists under which the Act would be valid,"[378] a requirement that purpose inquiry be limited to the face of the statute, the stated purposes, or inferred only from the effects, would sharply circumscribe facial challenges. Only the most ineptly drafted measures would be likely to succumb to facial challenges. The practical problem with facial challenges is to identify and invalidate those laws that are nearly certain to deliver unconstitutional effects without waiting to observe those effects and the concomitant injuries. Thus, facial challenges implicate several of the exceptions discussed previously.

First, courts are incapable of assessing effects in facial challenges cases because there are no effects to be observed. Further, predictions of effects, however accurate, are not the same as real events, as any stock market investor will vouch. As such, there is room for courts to treat facial challenges as a form of constitutional prophylaxis.[379] Professor David Gans has argued that this preventive function is desirable in three broad areas: (1) when a chilling effect on constitutional rights would exist without entertaining a facial challenge;[380] (2) when statutes confer excessive discretion on officials—with the attendant risk of invalid exercises of discretion escaping as-applied detection;[381] and (3) when statutes inflict stigmatic injury.[382] The absence of effects necessarily triggers a search for purpose that goes beyond inferences from effects.

(1988) (finding that the purpose of an antipicketing ordinance was to protect residential privacy).

377. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) ("Although such biases may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make."); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973) (noting that "a bare . . . desire to harm . . . cannot constitute a legitimate government interest," but that the inquiry does not end there; the Court will look to other proffered purposes to determine if a legitimate government interest exists).

378. United States v. Salerno, 481 U.S. 739, 745 (1987), *overruled on other grounds by* United States v. Salerno, 505 U.S. 317, 324–25 (1992) (excluding the testimony of a grand jury witness as hearsay and remanding).

379. *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1337 (2005).

380. *Id.* at 1352–53.

381. *Id.* at 1364.

382. *Id.* at 1379.

Second, statutes that on their face inflict stigmatic injury produce effects by virtue of the stigma announced.[383] The courts need not wait for more effects to be produced. But because stigmatic injury can also be inflicted by effects,[384] facial challenges that claim stigmatic injury will result from future effects are also cases where purpose must be considered because consideration of future effects is inadequate for decision.

In general, facial challenges should represent another exception to the principle that purpose is to be inferred from text, effects, or stated purposes. It is unrealistic to rely on conjectural effects as the basis for inferred purpose. Moreover, such a method piles surmise upon surmise and thus risks the same problem of inaccuracy that plagues the use of motive evidence to identify actual purpose. Therefore, facial challenges necessarily require detection of governmental purpose by reference to the statute, the stated purposes, the connection—or lack thereof—between means and purpose so detected, and—only as a last resort—careful consideration of motive evidence in conjunction with other probative circumstantial evidence.

E. Some Implications for Constitutional Doctrine

The conclusion that effects should primarily drive constitutional adjudication implies that a number of constitutional doctrines ought to be reexamined. Bear in mind that purpose cannot, and should not, be exiled entirely from constitutional adjudication. For the reasons advanced earlier, the most objectionable form of purpose inquiry is judicial inference of actual legislative purpose from motive evidence.[385] In questioning the doctrines that follow, the objective is not so much to drive out purpose inquiry altogether as it is to cabin such inquiry into a more reliable form.

The Court's focus on purpose to separate content-based and content-neutral speech restrictions is misguided. This has led to such anomalous results as the secondary effects doctrine, in which the attribution to the government of a purpose unrelated to speech suppression is sufficient to transmute facially content-based speech regulations into content-neutral ones.[386] If such regulations, which typically pertain to land use in order to address the sordid side effects of the commercial trade in sexually explicit expression, are truly aimed at the secondary effects of

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383. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (observing that the statutory ban on African Americans serving as jurors was "practically a brand upon them, affixed by law, an assertion of their inferiority"), *abrogated on other grounds by* Taylor v. Louisiana, 419 U.S. 522, 536–37 (1975) (rejecting the dictum in *Strauder* that a state may constitutionally confine jury service to men).

384. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 755 (1984) ("There can be no doubt that [a stigmatizing injury caused by racial discrimination] is one of the most serious consequences of discriminatory government action."); Brown v. Bd. of Ed., 347 U.S. 483, 494 (1954) (noting the significant psychological impact on black children that resulted from school segregation).

385. *See supra* notes 268–73 and accompanying text.

386. *See supra* notes 366–71 and accompanying text.

such speech, they should easily be able to survive strict scrutiny. Crime control and prevention are surely compelling interests. If content-based regulations of the location of such speakers are necessary to combat the crime associated with, but not produced by, such speech, strict scrutiny is satisfied. As an alternative method, the Court could avoid purpose inquiry by treating the entire category of sexually explicit, but nonobscene speech, as a "low value" category that is entitled to reduced protection under an intermediate level of scrutiny. There are considerable objections to this latter approach, which are beyond the scope of this Article. The benefit, which might not be enough to overcome the objections, is that it would take the Court out of the business of divining the government's purpose for regulating sexually explicit speech.

The Court should reexamine its focus on purpose to decide whether the government has created a limited public forum. A functional test, which would be largely effects-based, should control determination of this question. At one time, it appeared that the Court had taken this step when it declared that the "crucial question" in assessing restrictions on speech in alleged public fora was "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[387] Were the Court to return to this test, it would be required to assess the effects of speech on government property, rather than the sometimes murky intentions of the government, to determine the limits of the speaker's right to speak in such publicly owned locales. Although the test from *Grayned v. City of Rockford* is subjective—it eschews bright lines, pigeon holes, and tiered scrutiny dependent on the pigeon hole in which the public property is placed[388]—it does obviate the need for the equally uncertain inquiry into governmental purpose. As with other areas, if consideration of effects is insufficient to deliver an answer, further inquiry into purpose would be in order.

More broadly, the Court should reconsider its reliance on purpose as the method to sift content-based from content-neutral speech regulations. An example is *Turner Broadcasting System, Inc. v. FCC*,[389] which considered a federal law requiring cable operators to carry local broadcasts free of charge.[390] Congress's stated purpose was to promote a diversity of viewpoints in the media,[391] and the Court splintered over whether purpose operated to make the law content-based—and thus trigger strict scrutiny.[392] The Court treated the law as content-neutral despite Congress's declaration of a content-based purpose, because the effect of the law was to require cable operators to carry additional programming

387. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). This comment led Geoffrey Stone to enthusiastically declare that, with it, "the right to a public forum came of age." Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 251 (1975).

388. *See Grayned*, 408 U.S. at 116–21.

389. 512 U.S. 622 (1994).

390. *Id.* at 626.

391. *See id.* at 662.

392. *Compare id.* at 661–62 (agreeing with the district court that the law was content-neutral and should be evaluated under the intermediate level of scrutiny), *with id.* at 678–82 (O'Connor, J., concurring in part and dissenting in part) (concluding that the law was content-based and should face strict scrutiny).

without regard to its content.[393] This approach makes sense; if the law did not deliver content-based effects, why treat it as content-based simply because Congress has confessed to that objective? The secondary effects doctrine is the mirror image of *Turner Broadcasting*, but the Court has it wrong there. If content-based land use regulations deliver content-based effects, the Court should subject the regulations to strict scrutiny despite the government's purpose to address social ills that are not the immediate product of expression.

The Court should question its focus on secular purpose under the *Lemon* test. As discussed earlier, when a government openly avows a purpose that is either religious or hostile to religion, it inflicts inherent or stigmatic injury, and its action is void on that ground alone.[394] However, there is no reason to place the legislature on the judicial psychiatrist's couch to imagine legislative purpose. The *Lemon* test is creaky enough without adding to its burden the ineffable task of inferring actual governmental purpose from the flimsy raw materials of motive. The Louisiana legislature may have had a religious purpose in enacting the law at issue in *Edwards v. Aguillard*,[395] and because the challenge to it was facial, purpose inquiry was appropriate. Yet, if neither the face of the law, its stated purpose, nor its inferred future effects revealed such a purpose, perhaps the law should have been allowed to take effect. If the law had taken effect, we would have soon seen whether creation science was Genesis in a lab coat as Justice Scalia discussed.[396] That revelation would not only have killed the law, but it might also have killed creation science as a topic for public education.

Similarly, the Court should reexamine its nascent focus on government hostility to religion in Free Exercise cases. The Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* did not need to rely on evidence of Hialeah's purpose in exempting from its ban on ritual animal slaughter virtually every form of such killings except those practiced by Santerians.[397] The impermissibly pointed effect of the statute was sufficient for the result. Likewise, the Court in *Locke v. Davey* was wrong to rely on the absence of a governmental purpose of hostility to religion as the rationale for its decision upholding Washington's ban.[398] Perhaps Washington's stringent ban on state aid for theological instruction could have survived strict scrutiny, but the Court should have subjected the ban to that searching level of review.[399] The ban was as pointed as that at issue in *Lukumi*. The pernicious effect of *Locke* is that it invites use of a judicial divining rod to determine the presence or absence of a governmental purpose that is hostile to religion.

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393. *See id.* at 653–62 (majority opinion).

394. *See supra* note 287.

395. *See supra* text accompanying notes 228–33.

396. *See supra* text accompanying note 234.

397. *See supra* text accompanying notes 274–78.

398. *See supra* text accompanying notes 37–39.

399. *See id.* Washington might have successfully argued that it had a compelling interest in enforcing, via its state constitution, a more stringent ban on religious establishments than would be possible under the analogous federal provision.

The Court should also reconsider its propensity to infer illegitimate governmental purpose when it employs minimal scrutiny. Rather than infer illicit purposes in such cases as *City of Cleburne v. Cleburne Living Center*[400] and *Romer v. Evans*,[401] the Court should confine its inquiry to the rationality of the chosen means to accomplish the stated or hypothesized end. Given the ludicrous underinclusion in *Cleburne*, and the simultaneous overinclusion and underinclusion combined with the pariah effects produced by Colorado's Second Amendment in *Romer*, these cases would have reached the same result without second guessing the government's purpose. That may not be true of *United States Department of Agriculture v. Moreno*, but as pointed out by Justice Brennan in his opinion for the majority, the food stamp exclusion at issue served the stated purposes remarkably badly.[402] So badly, in fact, that it would not be much of a stretch to conclude that these means were not a rational way of achieving the stated end. In any case, it might be useful to ponder whether a case like *Moreno* or, better yet, *Romer*, might fall into the category of a disparate impact case. If the effects produced are sufficiently suspicious, the challenger ought to be permitted an opportunity to invoke a higher level of scrutiny upon proof of a forbidden purpose as a motivating factor for the government's action.

Finally, the Court should question its current formulation of the undue burden test for previability abortion regulations. This is not the place to debate the propriety or coherence of the undue burden test, or to debate the modern project of substantive due process. Rather, whatever the merits of undue burden as a constitutional test, it is questionable whether a governmental purpose to erect a substantial obstacle to a previability abortion is of any consequence if the chosen means fail to create a substantial obstacle. Perhaps the question of whether any given abortion regulation has the effect of erecting a substantial obstacle to an abortion is too amorphous for judicial resolution, but if that is so, the entire undue burden test ought to be scrapped. However measurable, it is the effect of governmental action that matters here.

There may be other doctrinal areas that are deserving of reconsideration. This brief summary identifies some of the prominent candidates. In doing so, I hope to spark discussion of the merits of my proposal, not to write the last word on the subject.

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400. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448–50 (1985) (refusing to uphold an ordinance that required a special permit for a home for the mentally retarded when the home did not threaten the city's legitimate interests in any way different than other multiperson homes).

401. Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that an amendment of the Colorado constitution violated the Equal Protection Clause because, notwithstanding the stated purpose of protecting homosexuals, the amendment operated to prevent local governments from providing homosexuals with more protection from discrimination).

402. 413 U.S. 528, 534 (1973).

V. CONCLUSION

Judicial consideration of governmental purposes is a necessary part of constitutional adjudication, but courts have not formulated any guiding principles for the exercise of that task. There is neither agreement on the method by which governmental purpose is to be determined nor is there any agreement on when purpose is relevant to constitutional decisionmaking. This fractured and ill-considered situation is not necessary.

In general, courts should first rely upon the effects of government action to decide constitutional issues, for that is what harms or helps those subject to governmental actions. Because tiered scrutiny requires consideration of governmental purpose, courts should develop consistent standards to ascertain governmental purpose within each tier of scrutiny. When employing minimal scrutiny, courts should accept plausible hypothesized purposes or the government's stated purposes. However, when the chosen means are wildly divorced from those purposes or serve them so poorly that the purposes become implausible, courts should not hesitate to declare the hypothesized or stated purposes to be irrational, rather than forage among mere snippets of motive evidence to surmise an inferred actual purpose. Within any form of heightened scrutiny, courts ought to examine the face of the statute or its application in practice for circumstantial evidence of a forbidden purpose. In the absence of such indicators, and when the effects of the action are constitutionally suspicious, courts should liberally permit challengers of the action to offer proof of an illegitimate purpose. This is, of course, what disparate impact strives to do, but that doctrine has been confined to equal protection cases and has not been applied to the analogous circumstances of governmental regulation of conduct that restrict symbolic speech. The *O'Brien* test, which governs such cases, is inadequate to the task it is called to perform.

While this prescription may sound like a description of current doctrine, it is not. Courts deviate significantly from the nominal doctrine, with little indication of the triggers for such deviation. The most lamentable deviation is the propensity of courts, frequently when applying minimal scrutiny, to infer an actual illegitimate purpose from skimpy and inadequate evidence of legislative motive. Such inferential judgments of governmental purpose cause little harm in cases of statutory construction because inaccurate determinations of governmental purpose can be legislatively repaired. On the other hand, mistaken inferential judgments of governmental purpose in constitutional adjudication cements the error—not only is the particular case affected, but future cases are affected by legitimizing this dubious method of ascertaining governmental purpose.

There are four broad categories of exceptions to the aforementioned principle that effects of governmental action should matter more than governmental purposes. The first exception involves intangible stigmatic injuries. When the government's chosen means are not effective to accomplish a forbidden purpose, courts should generally ignore that purpose. However, when a forbidden purpose, by itself, inflicts inherent or stigmatic injury, courts should void the action even in the absence of more tangible injurious effects. The second exception occurs when

courts are not capable of assessing whether the means chosen to accomplish an illegitimate purpose are effective. In such cases, there are two reasonable prophylactic approaches for a court faced with an identified bad purpose: the court can either strike the action or subject it to heightened scrutiny. The third exception is an application of disparate impact doctrine to other areas of possible unintended consequences. The government may act legitimately to address harm, but in doing so may unintentionally infringe upon constitutional liberties. This can occur in many more areas than racial or sexual disparate impact. The prime example is apparently legitimate regulations of conduct that have the effect of restricting symbolic expression. The final exception is for facial challenges. Because there are no actual effects that courts can measure, facial challenges necessarily require identification of purpose from the face of the statute, from the legislature's stated purpose, or from the strength or weakness of the connection between the means and the facial or stated purposes. In cases of facial challenges alleging stigmatic injury from the probable effects of the law, further inquiry into purpose may be necessary to prevent the infliction of such injuries.

The implication of this view of the relevance of governmental purpose to constitutional adjudication is that a number of constitutional doctrines ought to be reconsidered. In the area of free speech, these include the reliance on purpose to distinguish content-based from content-neutral speech regulation, the secondary effects doctrine, and the use of purpose to decide whether the government has created a public forum for speech. With respect to the religion clauses, courts should consider whether the withered *Lemon* test should shrink a bit more, by elimination of the purpose inquiry, and whether courts should abandon purpose inquiry when applying the *Employment Division v. Smith*[403] criteria for resolving free exercise cases. Finally, the disjunctive purpose prong of the undue burden test for abortion regulations appears to be of little utility and should probably be abandoned. So long as tiered scrutiny remains the operative principle of contemporary judicial review, judicial scrutiny of governmental purpose must remain. That inquiry need not be amorphous, free-floating, and unguided. The effects of governmental action are the pincers of the governmental pliers. That is what courts should examine first.

403. *See supra* text accompanying notes 256–64.