The Yale Law Journal

Volume 79, Number 7, June 1970

Legislative And Administrative Motivation In Constitutional Law

John Hart Ely*

I. Introduction	1207
II. The Case Against Considering Motivation	1212
A. <i>The Concerns of O'Brien: Ascertainability, Futility and Disutility</i>	1212
B. <i>The Motive-Purpose Distinction: A Non-Answer</i> ...	1217
C. <i>The Limited Perspective of the Anti-Motivation Ar- guments</i>	1222
III. Describing the Government's Burden of Justification: The Demand for a Legitimately Defensible Difference ..	1223
IV. Triggering the Government's Burden of Justification: The Disadvantageous Distinction Model	1228
V. The Limitations of the Disadvantageous Distinction Model: Random and Discretionary Choice	1230
A. <i>Distinguishing the Indistinguishable: The Sometime Inevitability of Random or Partly Random Choice</i> ..	1230
B. <i>"Discretionary" Choice: The Sometime Inapposite- ness of a Demand for Rationality</i>	1235
VI. The Possible Alternative Models of Review	1249
VII. When the Disadvantageous Distinction Model is Inap- plicable, What Should Trigger Judicial Review—Impact or Motivation?	1254
A. <i>Affirmative Duties of Accommodation</i>	1255
B. <i>The Duty to be Neutral with Respect to Race: An Affirmative Duty to Seek a "Balanced" Impact, or a Duty Not to Use Race as a Criterion of Selection?</i> ..	1255
C. <i>Reference to Motivation and the Considerations Com- pelling the Suspension of the Disadvantageous Dis-</i>	

* Associate Professor of Law, Yale University. A.B. 1960, Princeton University; LL.B. 1963, Yale University.

<i>inction Model</i>	1261
D. <i>What Proof of Motivation Should Trigger Review?</i> ..	1263
E. <i>General Hershey's Error</i>	1268
VIII. What Sort of Review Should Proof of Unconstitutional Motivation Trigger—Automatic Invalidation, An Extra Burden of Justification, or “Simply” the Ordinary De- mand for a Legitimately Defensible Difference?	1269
A. <i>The Implication of the Considerations Compelling the Suspension of the Disadvantageous Distinction Model</i>	1269
B. <i>The Dispelling of O'Brien's Concerns</i>	1275
IX. Statement and Application of a General Theory	1281
A. <i>Administrative Choice</i>	1284
B. <i>Pupil Assignment and Some Other Problems of Racial Discrimination</i>	1289
C. <i>Governmental Encouragement of Private Discrimina- tion</i>	1299
D. <i>The Limits of Federal Power</i>	1302
E. <i>Congressional Control of the Jurisdiction of Federal Courts</i>	1306
F. <i>Congressional Investigations</i>	1308
X. The Religious Clauses	1313
A. <i>The Court Should Not Intervene on the Basis of Im- pact Per se</i>	1315
B. <i>The Court Should Intervene Only on the Basis of Proof of an Intention to Favor or Disfavor Religion Relative to Nonreligion, or One Religion Relative to Others</i>	1322
C. <i>A Choice Legitimately Justifiable in Terms of a Non- religious and Otherwise Permissible Goal Should be Upheld, Without Inquiry into Motivation</i>	1324
XI. Freedom of Political Belief and Expression	1327
A. <i>The Disfavoring of a Particular View: The Require- ment of Neutrality</i>	1327
B. <i>The Disfavoring of a Particular View: The Toleran- tion of Non-Neutrality</i>	1334
C. <i>The Favoring or Disfavoring of Expressive Activities Generally</i>	1334
D. <i>The Tinker and O'Brien Cases</i>	1336

I. Introduction

The Supreme Court's traditional confusion about the relevance of legislative and administrative motivation¹ in determining the constitutionality of governmental actions has, over the past few terms, achieved disaster proportions. The Court's difficulties stem from an apparent tension. Arguments that in the abstract seem compelling can be mounted against judicial consideration of motivation. Yet laws are passed and administrative acts undertaken that fairly cry out for invalidation but cannot be declared unconstitutional without referring to motivation.

The tension is illusory, however, for the arguments against considering motivation have force only in a limited context. They proceed from—and make sense only in terms of—an assumption that if motivation is to be cognizable at all, it must function to invalidate laws which by their language and their effects fully satisfy the Constitution's various tests of legitimacy. That the arguments should proceed on this assumption is only natural, in light of another commonly made assumption, that any governmental choice that disadvantages some persons relative to others must—unless it is to be declared invalid on its face—be shown to have a rational (at least) connection with some permissible governmental goal. Judges and academics have recently spent much time trying to define the government's burden of justification with respect to different sorts of distinction. But little attention has been paid to the assumption that this burden—however it is defined—attaches as soon as the complainant can demonstrate that the state has drawn a distinction that comparatively disadvantages him.

This model of review—which I shall call the disadvantageous distinction model—is, indeed, appropriate in the majority of cases which come before the Court. And in cases controlled by this model, consideration of motivation is properly excluded. But the model described is not universally applicable. There are distinctions for which we do not, because we cannot, demand even a “rational-connection” defense on the basis of a simple showing that an official choice has been made and someone has been comparatively disadvantaged. In such situations, an alternative model of review is needed: something other than simple disadvantageous distinction must function to trigger judicial review.

1. “Purpose” and “motive” are terms more commonly used. I have opted for a third term, “motivation,” not because it is any more descriptive, but in order to avoid the baggage the others may have acquired because of the commonly drawn, though not very helpful, “motive-purpose distinction.” See pp. 1217-21.

Sometimes proof that the law or action under attack is having, or is likely to have, a certain pattern of impact will constitute the appropriate trigger. On other occasions, however, an impact model is unacceptable; it is then that proof of unconstitutional motivation properly constitutes the factor which brings the challenged action into the court's view. There are, in other words, choices whose reviewability cannot intelligibly be made a function of the characteristics of the persons, items or courses of action distinguished and must turn instead on the nature of the process which produced the choice.

The function of proof of motivation in cases where it is relevant will be to create a burden of legitimate defense which otherwise would not be owing. As in the ordinary case, where the trigger is simple disadvantageous distinction, the government's burden will be to justify the choice under attack by relating it to a permissible governmental goal—a demonstration to which motivation is irrelevant. Absent such a showing, however, the proof of motivation which triggered the burden of justification will perforce invalidate the governmental action.

Its relevance thus restricted, both by the type of case in which it is cognizable and by its function in such cases, proof of unconstitutional motivation—while it will take on great, often dispositive, significance in broad areas of constitutional law—will be vulnerable to none of the arguments which have been directed against referring to it.

The Court's Recent Performance: The Traditional Confusion Intensified

Opening skirmishes over the relevance of motivation occurred during the 1920's and early 1930's in cases involving the reach of federal power. Several laws purportedly based on the federal powers to tax, spend and regulate commerce were held unconstitutional partially on the basis of the Court's judgment that they had been enacted with the intention of affecting matters the Constitution had left exclusively to the states.² Beginning in the mid-1930's, this mode of analysis gradually went the way of others that restricted congressional power. From time to time the Court explicitly stated that motivation was irrelevant to such questions.³ The force of these rejections was, however, diluted

2. See, e.g., *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hill v. Wallace*, 259 U.S. 44 (1922); *United States v. Constantine*, 296 U.S. 287 (1935); *United States v. Butler*, 297 U.S. 1 (1936). Cf. *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Linder v. United States*, 268 U.S. 5, 17-18 (1925).

3. See, e.g., *Sozinsky v. United States*, 300 U.S. 506, 513-14 (1937); *United States v. Darby*, 312 U.S. 100, 113-16 (1941). Cf. *United States v. Kahriger*, 345 U.S. 22, 30-31 (1953).

somewhat by the realization that they were unnecessary, in the light of the Court's increasingly broad construction of the commerce clause and its consequent narrowing of the domain of "exclusive state power."⁴

It was therefore no great surprise when the Court again turned to analysis of motivation in the wake of *Brown v. Board of Education*.⁵ Laws like that involved in *Brown*, which on their face distinguished on the basis of race, were readily taken care of, or so at least the Court felt, in traditional equal protection terms without examining motivation.⁶ But it was not long before recalcitrant officials began to seek the same results by measures not explicitly racial—as by drawing district lines to coincide with racial residential patterns or closing schools which had been ordered integrated. Unless the promise of *Brown* was to go unfulfilled, it seemed inevitable that the doctrine of unconstitutional motivation would be wheeled back into the judicial arsenal when a flagrant enough fact situation arose. The Alabama Legislature obliged, by redrawing the boundary lines of the City of Tuskegee so as to change its shape from a square to an "uncouth twenty-eight-sided figure" and, in the process, to exclude all but a handful of the city's 400 previously resident Negro voters. In 1960, in *Gomillion v. Lightfoot*,⁷ the Court unanimously invalidated Alabama's action, stating that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end."⁸

A weapon this powerful is not easily left alone. A year later in four decisions involving the constitutionality of Sunday closing laws⁹ the Court introduced the idea—which it reiterated the following term in *Abington School District v. Schempp*¹⁰—that whether a law constitutes an establishment of religion or a denial of religious freedom is largely a function of whether the legislature intended to aid or hinder religion. After an exhaustive search, the Court found no illicit motivation to have underlain any of the Sunday laws before it, but warned that if it ever did, its vengeance would be swift:

Finally, we should make clear that this case deals only with the constitutionality of § 521 of the Maryland statute before us. We

4. Cf. pp. 1304-06.

5. 347 U.S. 483 (1954).

6. But cf. note 265 *infra*.

7. 364 U.S. 339 (1960).

8. *Id.* at 347, quoting *United States v. Reading Co.*, 226 U.S. 324, 357 (1912). See also *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

9. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961); *Gallagher v. Crown Kasher Market*, 366 U.S. 617 (1961).

10. 374 U.S. 203, 222 (1963). See also, e.g., *Walz v. Tax Comm'n of the City of New York*, 90 S. Ct. 1409, 1412 (1970).

do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.¹¹

All this was forgotten, however, in May, 1968, when David O'Brien brought to the Court his conviction for burning his draft card. Obviously, the Court observed, Congress can protect government records from willful destruction. O'Brien tried to argue that Congress had passed the statute in order to discourage anti-war expression, but the Court would hear of no such thing:

The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.¹²

Gomillion v. Lightfoot, the Court explained, is a much misunderstood case, actually standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional."¹³ The Court's explanation of *Schempp* and the Sunday closing cases would have been interesting, but unfortunately they were not mentioned. It was, however, reassuring to be told in no uncertain terms that a law's constitutionality has nothing to do with what the legislators were trying to accomplish.

The matter stayed settled for exactly two weeks.¹⁴ In *Board of Education v. Allen*,¹⁵ decided June 10, 1968, the Court, upholding a New York textbook grant provision against a charge of establishment of religion, quoted and applied *Schempp*'s "purpose or effect" test without referring to *O'Brien*:

The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.¹⁶

11. *McGowan v. Maryland*, 366 U.S. 420, 453 (1961).

12. *United States v. O'Brien*, 391 U.S. 367, 383 (1968), quoting *McCray v. United States*, 195 U.S. 27, 56 (1904).

13. 391 U.S. at 384-85.

14. Arguably, it stayed settled for one sentence. Having concluded that motivation was irrelevant, the Court in *O'Brien* went on to state that it was "not amiss, in passing" to look at the legislative history of the draft card burning statute. It did so, rejecting O'Brien's assertion that the law had been passed in order to still antiwar expression. 391 U.S. at 385-88.

15. 392 U.S. 236 (1968).

16. *Id.* at 243, quoting 374 U.S. at 222.

Nor was this loose and idle talk. Five months later, in *Epperson v. Arkansas*,¹⁷ the Court invalidated a statute prohibiting the teaching of Darwin's theory of evolution in the state's public schools, on the sole ground that the law had been enacted with the intention of promoting fundamentalist Christianity.

Perhaps the sensational publicity attendant upon the *Scopes* trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine Creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.¹⁸

The fact that *O'Brien* was again not cited might have suggested that the Court was privy to some principle, apparently too obvious to warrant mention, which distinguishes—in terms of the relevance of motivation—cases involving freedom of expression from those which raise religious issues. But that it had no such distinction in mind was indicated a month later in *Oestereich v. Selective Service Board*.¹⁹ In *Oestereich* the Court clearly implied, albeit in dictum, that a draft board would violate the Constitution were it to select a man for reclassification or induction because it disapproved of views he had expressed.²⁰ Still later in the same term, Mr. Justice Harlan, dissenting in *Tinker v. Des Moines School District*,²¹ indicated that while he thought that under the circumstances the school board's ban on the wearing of black armbands to protest the war was constitutional, his opinion would have been different had the record "impugned the good faith" of the board.

I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.²²

If only logical tidiness hung in the balance, bemusement might be a satisfactory response to all this. But the rights of individuals are at stake. The Court should stop pretending it does not remember opinions on which the ink is barely dry and try to formulate principles

17. 393 U.S. 97 (1968).

18. *Id.* at 109.

19. 393 U.S. 233 (1968).

20. *Id.* at 237.

21. 393 U.S. 503 (1969).

22. *Id.* at 526.

for deciding on what occasions and in what ways the motivation of legislators or other government officials is relevant to constitutional issues.

II. The Case Against Considering Motivation

A. *The Concerns of O'Brien: Ascertainability, Futility and Disutility*

Chief Justice Warren, writing for the Court in *United States v. O'Brien*, well summarizes the case against invalidating laws because of the motivation with which they were passed.

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.²³

Ascertainability. The Chief Justice's first point is that motivation, particularly the motivation of an entire legislative assembly, is difficult to ascertain. But, as he notes, judges construing statutes frequently make just such determinations. He attempts to distinguish the two situations by suggesting that the risk of error is worth taking in statutory construction but not in constitutional adjudication. The stakes, he asserts, are higher when a constitutional judgment is involved. But the height of the stakes argues both ways: the fact that a man's constitutional rights are in the balance may be the very reason a difficult inquiry must be undertaken. Of course, courts should "eschew guesswork" in constitutional adjudication, as elsewhere. That resolution argues, however, for non-intervention when the proof of motivation is less than clear and not necessarily for a total rejection of its relevance.

23. 391 U.S. at 383-84.

The Chief Justice goes on to suggest, however, that in statutory construction the question of intention is mandatory; there simply is no escape from seeking the legislature's will if the Court is to face up to its responsibility of interpreting the law.²⁴ But in connection with a constitutional attack, he seems to be suggesting, there is a possible escape: the Court can determine (by applying "well-settled criteria") whether the act on its face violates the Constitution and, if it does not, simply uphold it.²⁵ The difficulty with this is that if the constitutional values at stake require the asking of a certain question, the Court's job simply is not done until that question has been asked. Whether an inquiry into motivation is constitutionally obligatory is what this article is about. But if it is, it should not be omitted because a different set of questions has produced something resembling an answer.

Despite the Chief Justice's failure to articulate it, however, there is a distinction between statutory construction and constitutional adjudication in terms of ascertainability. For the inquiry into motivation as it typically is framed by those who urge its propriety in a constitutional context is of a sort which is different from the questions of motivation involved in statutory construction. If, for example, one asks whether Congress in enacting the statute challenged in *O'Brien* intended to outlaw the private destruction of draft cards or only their destruction in public, the question may, it is true, not be easy. It may be extremely difficult to discern on the basis of the inevitably limited data what most of those voting for the measure felt about its applicability to cases of private destruction—or more realistically, what they would have felt had they considered it.²⁶ If, however, the question posed is whether, by passing the statute, Congress intended to protect government records or to discourage antiwar expression, there is not

24. Even this is not universally accepted. See Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 540-44 (1947).

25. The Court's suggestion that the question of motivation is not mandatory in most constitutional contexts appears most clearly in its attempt to distinguish away the "limited and well-defined class of cases" which refer to a punitive intent on the part of the legislature, on the ground that in those cases "the very nature of the constitutional question requires an inquiry into legislative purpose." 391 U.S. at 383 n.30. But see note 324 *infra*.

26. See *Swift & Co. v. Wickham*, 382 U.S. 111, 127 (1965); MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 771-72 (1966). Compare G. GRASS, *THE TIN DRUM* 15 (Fawcett 1967), "They must be from the brickworks, she thought if she thought anything . . .," with G. GRASS, *CAT AND MOUSE* 119 (Signet), "If I asked before leaving whether anyone had been around asking for Joachim, the answer was no. But I didn't ask . . ." Obviously I do not mean to suggest that factors other than intent are not properly considered in construing statutes. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958).

only this sort of difficulty, but another more fundamental one.²⁷ For while a single sane legislator cannot at the same time intend that private destructions be outlawed and that they not be outlawed, he can quite consistently intend to discourage expression and to protect government records. Since the desire to protect records is entirely proper and as consistent with the terms and impact of the statute as the alleged illicit intention to still expression,²⁸ only a hopelessly result-oriented judge would be able to assert that he knew which was "the" motivation or the "dominant" motivation underlying the statute. The two expectations probably were intertwined in the minds of most legislators, and evidence of a sort available only to the Almighty would be needed to sort them out or to assign them relative weights. So long as the unconstitutional motivation question is thus posed—as it was in *O'Brien* and is almost invariably by courts and commentators—as a determination about which of two compatible goals, one legitimate and one illegitimate, was "really" or, perhaps, "dominantly" intended, the Chief Justice's characterization of the possible judicial answers as "guesswork" seems apt.

Futility. The Chief Justice's second concern relates closely to the first. What point, he asks, can there be in invalidating a law on a ground which will permit the legislature—by stressing the "right" factors the second time—to reenact the law in a way that will withstand constitutional attack? Surely the Constitution mandates no such charade. His concern is justified. There are situations, and Chief Justice Warren has shown as great a sensitivity to them as anyone,²⁹ in which the Court by one device or another quite sensibly asks Congress or a state legislature to reconsider what it appears to have done. But this is not one. Professor Bickel, in many contexts an ardent advocate of this "remand to the legislature" technique,³⁰ agrees that in the face of an unconstitutional motivation, it would be a useless

27. The distinction is not entirely clean. The question whether private destruction was within the intendment of the act might well resolve itself into whether the act as a whole was aimed at stilling expression or preserving records, and those two goals are completely compatible. The distinction suggested by the Chief Justice's discussion has validity, however, in that there will be many problems of statutory interpretation with respect to which such dilemmas will not arise; in the constitutional context, however—as the inquiry typically is framed—dilemma is inevitable.

28. Indeed, in the example given, the legitimate motivation is *more* consistent with the law's terms, since the law plainly covers clandestine as well as public destructions. See 391 U.S. at 375.

29. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Watkins v. United States*, 354 U.S. 178 (1957).

30. See Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). See generally A. BICKEL, *THE LAST DANGEROUS BRANCH* (1962).

step—indeed, a step with high ultimate cost in terms of public respect for the judicial and legislative processes alike.

If a statute is denied application for being impermissibly motivated, how is a legislature to respond? . . . Presumably only by imposing upon some of its members a requirement of less candor in debate. This is scarcely a desirable consummation.³¹

Disutility. The third factor at work in the Chief Justice's discussion is the disutility of invalidating activities and regulations which are laudable in operational terms simply because the process which produced them was disreputable. The Lord's work should not be thwarted simply because Satan helped it along. In this suggestion the Chief Justice echoed the landmark article of Professors Tussman and tenBroek:

[T]he consideration of motive is complicated by the fact that it is altogether possible for a law which is the expression of a bad motive to be a good law. What is to be done with a law which, passed with the most questionable of motives, still makes a positive contribution to the public good?³²

But how is a court to decide what constitutes "a good law"? The Chief Justice, expressing the Court's disinclination to "void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact," suggests what is in our system the only responsible answer. Judges are not to act on the basis of their own political preferences, but must instead for purposes of constitutional adjudication presume to be "good laws" those which were enacted

31. *Id.* at 216. The dismissal in the text is admittedly somewhat hasty. There may be some motivations which ultimately must be judicially declared unconstitutional which might not have seemed so to the legislature the first time it passed the law. And even where the motivation can hardly have been thought legitimate, as in cases of racial discrimination, there may be some legislators who are racists but not liars, who would be unwilling to reenact the law with a statement of the "right" reasons. Nonetheless, the "remand" technique has no place here. In addition to the great risk in terms of respect for our institutions taken by any such remand, we must also consider the reliance interest of those who have been told that they have "won" by the Court's declaration of unconstitutionality (a declaration which necessarily would accompany the "remand," at least with respect to state statutes). It should also be noted—although I do not suggest the dynamics of the two processes are identical—that in the rare situation where the Court upholds a law on a basis other than the one the legislature had in mind, and the legislature decides in light of the opinion that it no longer wants the law on the books, it can repeal it. But the ultimate reason the remand technique could not work here is one which will become clear later in the article, that the ability to articulate a rational and otherwise legitimate defense of a law will in practically all cases render impossible a responsible inference that it was unconstitutionally motivated, and thereby render untenable the declaration of unconstitutionality needed to support the remand. See pp. 1275-80.

32. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 311, 360 (1949).

by the politically responsible departments and meet the Constitution's various tests of legitimacy.

Moreover, standard formulations of constitutional doctrine—the “well-settled criteria” which apparently informed the *O'Brien* discussion—advise that when a governmental act does not by either its terms or its impact violate the Constitution one must conclude:

First, that it can be related rationally to a power entrusted to the person or department which performed it;³³

Second, that to the extent it inhibits anyone's liberties, the inhibition is justified by its other effects and has been effected in accord with whatever procedural safeguards the Constitution requires;³⁴ and

Third, that any distinctions or choices which have the effect of treating some persons better than others are legitimately defensible in terms of some permissible governmental goal.³⁵

Invalidating an act which meets all these demands solely because of the motivation with which it was undertaken would convert the Constitution from a document concerned with limiting power, protecting liberty and ensuring equality to an instrument for punishing the evil thoughts of members of the political branches by knocking down handiwork of theirs which under other circumstances would count as legitimate. Bad faith, the Court therefore suggests, should no more invalidate an act which by its terms and its effects measures up to

33. See, e.g., A. BICKEL, *supra* note 30, at 38. In order for a law or administrative act to clear this hurdle it is not necessary, the Court has made clear, that the legislature or official have had the relevant, or indeed any, source of power in mind when it acted. See Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191, 1199 n.27 (1962), and cases cited. But it has also made clear that if an act is to stand, it must in fact be relatable to such a source; the fact that the actor *thought* he was acting within his authority is beside the point. See, e.g., *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).

34. “The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction”. *Zemel v. Rusk*, 381 U.S. 1, 14 (1965). Once again the controlling tests seem fully applicable without recourse to motivation. The deprivation has or has not been imposed; the necessary justification (assuming justification is possible) does or does not exist; the procedural requirements have or have not been observed. *But cf.* note 324 *infra*. When the government fails to meet its burden of proof on any of these issues, the deprivation must be invalidated; no amount of governmental good faith will save it.

In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). See also *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938). *But cf.* pp. 1327-40.

35. What counts as a legitimate defense will vary according to the terms in which the distinction is drawn and the comparative disadvantage whose distribution has been limited. But the customary assumption of the rhetoric is that the demand for such a defense—however defined—attaches simply because a distinction has been drawn and the complainant has been comparatively disadvantaged. See p. 1228.

the demands of the Constitution than good faith can save one which does not.

B. *The Motive-Purpose Distinction: A Non-Answer*

Sometimes the Court's reference to motivation in *Gomillion* is explained by asserting that it constituted a reference not to legislative "motive," which is forbidden, but to legislative "purpose," which is proper. Although the Supreme Court has never adopted this distinction,³⁶ it has been a favorite of commentators and lower courts. But while its meaning is surely not self-evident,³⁷ courts invoking the distinction have seldom attempted to define it. By and large the term "purpose" has served as nothing more useful than a signal that the court is willing to look at motivation, "motive" as a signal that it is not.³⁸

The judicial failure of definition does not, however, necessarily mean there is nothing to the motive-purpose distinction. The most detailed attempt to give it content appears in Professor Heyman's article supporting *Brown v. Board of Education* in terms of the motivation of the legislature.³⁹

It is common to state that a court is foreclosed from inquiring into the motives of a legislature. Here, however, we are not concerned with motivations, but with a purpose or aim of segregation legislation which is not patently disclosed by the statutes themselves.

"Motive" is defined in dictionary terms as "that within the individual, rather than without, which incites him to action; any idea, need, emotion, or organic state that prompts an action." The actions with which we deal here are the passage of statutes by white legislatures requiring separation of whites and Negroes in different public schools. One "effect" of these actions is that Negro children are made to feel inferior, made to feel like second-class

36. In *O'Brien*, for example, it used the terms interchangeably. 391 U.S. at 333.

37. In the criminal law, "intent" is used to designate the state of mind the statute requires for conviction. "Motive" refers to a state of mind which is not required for conviction but is proven in order to buttress an argument that the defendant in fact performed the act with which he is charged or at the time of the act entertained the statutorily requisite intent. This distinction is of little analogical assistance in the constitutional context. To the extent it is suggestive, it involves the same difficulties as Professor Heyman's attempted distinction. See text at notes 39-49.

38. See, e.g., *NAACP v. Patty*, 159 F. Supp. 503, 515 n.6 (E.D. Va. 1958), *vacated and remanded sub nom. Harrison v. NAACP*, 360 U.S. 167 (1959); *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, 837-38 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968). The general confusion is described in Howell, *Legislative Motive and Legislative Purpose in the Invalidity of a Civil Rights Statute*, 47 VA. L. REV. 439, 440-44 (1961).

39. But cf. note 265 *infra*. Nothing of immediate relevance hangs on the disagreement, however.

citizens. On the most elementary level, the "purpose" of the actions is to assure racial separation. On a somewhat more sophisticated level, the "purpose" . . . is to isolate Negroes in order to preserve for whites superior status while simultaneously maintaining for Negroes a position of inferior status—"to keep the Negro in his place." The "motives" inducing individual legislators to take such actions for such purposes are no doubt varied and impossible to discover—in some cases by the legislators themselves; such motives could range from political expediency to irrational sexual fears. One legislator might vote for segregation because he fears that his daughter might otherwise be a partner to a miscegenetic marriage. Another's vote might be stimulated by a desire to keep jobs for white men. A third might honestly believe that Negroes are inferior. But such motivations are irrelevant. We are concerned, rather, with a purpose or aim which does not appear on the face of the statute.⁴⁰

The reference to political expediency taken in isolation would suggest a distinction between those things a legislator hopes to accomplish *by the operation of the statute* for which he is voting, and those things he hopes personally to achieve *by the act of his vote*—salve his conscience; collect a bribe; please his constituents, the majority leader, or his wife.⁴¹ But the Court long ago held this latter sort of motivation not subject to examination,⁴² and no one to my knowledge has urged it to change its mind.⁴³ If, therefore, there is to be a motive-purpose line which will assist the Court with the cases which give it trouble, it must be one which distinguishes among those things the various legislators intend to bring about by the passage and consequent implementation of the statute.⁴⁴

It would be consistent with Professor Heyman's examples to conclude that he has in mind a distinction in terms of the immediacy of various legislative aims. Thus, one legislator votes to segregate the schools because he wishes to keep the races apart (his purpose) and *thereby* to discourage miscegenetic marriages (his motive). Another so votes in order to make Negroes feel inferior (also a purpose,

40. Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104, 115-16 (1961).

41. Professor Heyman's other examples make clear that this is not the distinction he has in mind. *But cf.* Marx, *Congressional Investigations: Significance for the Administrative Process*, 18 U. CHI. L. REV. 503, 513 (1951); Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865, 876 (1963).

42. *See, e.g.,* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130-31 (1810); United States v. Des Moines Navigation & Rwy Co., 142 U.S. 510, 544-45 (1892).

43. *Cf.* MacCallum, *supra* note 26, at 757.

44. That is, some subdivision of MacCallum's sixth category is needed. *Id.* at 756.

according to Heyman) and *thereby* to keep them from competing for white men's jobs (a motive).⁴⁵ There is of course a rough difference between those things a person intends to result immediately from his act, and other more distant and less certain, but nonetheless intended, results. But aims are immediate or distant only in relation to other aims: one may segregate the schools in order to separate the races, or separate the races in order to discourage miscegenation. And we all know how to play House That Jack Built: he voted for the bill authorizing the redrawing of school district lines in order to bring about its passage, and thereby to permit the school boards to redraw the lines so as to separate white and black neighborhoods in order to segregate the schools so as to keep the races apart, thus avoiding miscegenetic marriages, thereby diminishing the possibility of his daughter's marrying a Negro The crucial question is how one decides at which point on the continuum purposes fade into motives.

Professor Heyman does not suggest, nor could he intelligibly, that only the "most immediate" aim counts as a purpose.⁴⁶ He includes among the "purposes" of the law under attack in *Brown*—indeed, he deems it essential to his analysis that he do so—not simply the segregation of the schools and the general separation of the races, but also, "on a more sophisticated level," the disadvantaging of Negroes. The distinction he probably has in mind, therefore, is one geared solely to ascertainability: between motivations which a court can confidently conclude were shared by a majority of those who voted for the legislation (these would be purposes) and those concerning which no such conclusion can responsibly be drawn (motives).⁴⁷ But if this is the distinction, it too will be of negligible assistance to the Court. For the only motivations on the basis of which the Court would even consider acting—or, indeed, a litigant would have the temerity to suggest

45. Both personal goals and goals sought via the operation of the statute, *see* p. 1218, could on this analysis count as motives. The same distinction is sometimes described by stating that the motive gives rise to, or causes, the purpose; thus a legislator favors segregation *because* he fears miscegenation. *See* Howell, *supra* note 38, at 440; Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 S. Cr. Rev. 1, 35; *Gomillion v. Lightfoot*, 270 F.2d 594, 610 (5th Cir. 1959) (Brown, J., dissenting), *rev'd*, 364 U.S. 339 (1960). FREEDOM AND RESPONSIBILITY 173, 205 (Morris ed. 1961) (passages from Bentham and Anscombe asserting that a motive is the cause of an "intention").

46. What, for example, was the most immediate aim in *Gomillion*—reducing the size of the city; running the city line up Fifth rather than Fourteenth Street?

47. Clarity could be achieved if . . . "motive" and "purpose" were explicitly recognized as conclusory terms; that is, where state motivation is insufficiently clear from the facts alleged to warrant judicial intervention it is deemed "motive"; where it is sufficiently clear it is deemed "purpose" and hence reviewable under the equal protection clause.

Note, 81 HARV. L. REV. 1568, 1571 (1968).

that it do so—are those which can confidently be said to have been shared by a majority of the decision-makers.⁴⁸

Professor Heyman appreciates this conclusion, for once he has drawn the motive-purpose distinction, in order to remove an apparent obstacle to his defense of *Brown*, he never mentions it again. Instead, he goes on to attempt a distinction between those constitutional questions to which “purpose” is relevant and those to which it is not. He makes no effort to disguise this discussion in motive-purpose wrapping, but frankly asserts that the Court should sometimes look at “purpose” and should at other times refrain from doing so.

But is not the Court here [in racial discrimination cases] doing just what it refuses to do in the economic regulation cases? Is it not determining what was the “real,” as distinguished from the “stated,” basis of classification? And must it not do this?⁴⁹

Anyone who concludes that legislative or administrative motivation is sometimes relevant to constitutional questions will inevitably become concerned with the methodology by which such motivation is to be determined. Although I would think the effort ill-advised, one might attempt to work out a detailed calculus for determining when to refer to, and how much weight to attach to, the various evidentiary sources: the terms of the law in issue, those effects which must have been foreseen by the decision makers, the historical context in which the law was passed, and the legislative history and other recorded statements of intention. There is of course no law which would prevent a commentator from labeling those motivations which can be inferred in accordance with his calculus “purposes” and calling all others “motives.”⁵⁰ There would, however, be at least a practical dan-

48. Cf. MacCallum, *supra* note 26, at 768-69.

49. Heyman, *supra* note 40, at 119. Unfortunately we do not have the benefit of a considered analysis by Professor Heyman of the differences underlying the various constitutional questions he distinguishes; his reliance here is almost exclusively on judicial precedent, which, even at the time he wrote his article, was a guide hardly deserving of trust. But for this we can forgive him, since the primary task he set for himself was a defense of the result in *Brown*—albeit in terms of motivation—and not a general analysis of the roles to be played by impact and motivation.

It is difficult to state in general terms when a court should rely on the non-explicated purposes of a statute to determine its constitutionality. Clearly, reliance is unjustified when purpose is irrelevant. . . . Clarity, however is important. The court must be strongly convinced that a chief purpose of the statute is improper before it strikes the statute down, lest the court interfere unduly with legislative distinctions. One can find border-line cases where the decision is difficult. State enforced racial segregation, however, is not on the border line

Id. at 121.

50. In motive-purpose discussions, it is often stressed that the ascertainment of purpose must be “objective.”

ger in using these two particular nouns to signal compliance or non-compliance with a particular set of recommendations concerning the process of inferring motivation: the danger that courts by scanning, without unpacking, the analysis would be buoyed in their misguided belief that "motive" and "purpose" refer to distinct species of legislative goals, that only the latter is relevant to the constitutionality of government action, and that therefore the paradox presented by the Supreme Court's pronouncements is easily solvable if one can just get the hang of telling a purpose from a motive.

But practical dangers aside, it probably is, as a recent commentary has suggested, "fruitless to attempt a principled articulation of the distinction between motive and purpose."⁵¹ And more to the present point, even if one *could* come up with a clear distinction, that would not explain why motivation, of any stripe and however ascertained, should be relevant. Nor does labeling a motivation a "purpose" diminish in any way the force of the *O'Brien* opinion's objections to declaring a law unconstitutional simply because it is found to have proceeded from an impermissible motivation. To assert, or even to explain, that a given reference to motivation is a reference to purpose rather than motive is to make no move in the direction of legitimating it.⁵²

The ascertainment of purpose is objective; it focuses on the terms of the statute, its operation, and the context, both legal and practical, in which it was passed. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1091 (1969) [hereinafter cited as *Harvard Developments*]. See also A. BICKEL, *supra* note 30, at 209; Cushman, *Social and Economic Control Through Federal Taxation*, 18 MINN. L. REV. 759, 777 (1934); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). Such caveats appear to be designed to tell us, however, either not to consider those things various legislators hope personally to accomplish by the act of their vote, p. 1218, or to be careful about the sorts of evidence on which we rely in determining motivation. In any event, it is not their apparent objective to distinguish motive and purpose in terms of the evidence on which one may appropriately rely.

To this end [of determining purpose] the court may properly consider not only the language of the statute but also general public knowledge about the evil sought to be remedied, prior law, accompanying legislation, enacted statements of purpose, and internal legislative history.

Harvard Developments, *supra*, at 1077.

51. Note, *Legislative Purpose and Constitutional Adjudication*, 83 HARV. L. REV. 1887, 1887-88 n.1 (1970). Though it too suggests that reference to legislative and administrative motivation has a place in constitutional adjudication, the thesis of this Note could scarcely be more at odds with that of the instant article. Starting from the undefended assumption that a law is unconstitutional if it in fact significantly disadvantages Negroes more than white persons or results in the separation of the races, *see, e.g., id.* at 1893-96, it proceeds to argue that motivation can on occasion be probative of such a "clearly prohibited effect." *Id.* at 1893. In starting from that assumption, however, it has begged the central question on which the cognizability of motivation must turn, and in my opinion (and, so far as it can be discerned, the Court's) has begged it the wrong way. *See pp.* 1256-61. Thus what is properly the constitutional point-in-chief in certain contexts, racial motivation, is made to do service as evidence of disproportionate racial impact, when it should be quite the other way around.

52. One could attempt to legitimate the reference to motivation in *Gomillion* by

C. *The Limited Perspective of the Anti-Motivation Arguments*

The Court was right to be seriously concerned in *O'Brien* with considerations of ascertainability, futility and disutility. Although the decision is subject to criticism on other grounds, the refusal to hear the proffered motivation argument was correct.⁵³ There are, nonetheless, substantial areas of constitutional adjudication where recourse to the motivation of legislators and other government officials is entirely proper, indeed the only way to avoid placing in jeopardy the constitutional values implicated by the law in issue. The error of the Court in *O'Brien* was one of overextrapolation: considering motivation in the case before it would indeed have led the Court into the three traps to which it alluded, but that does not mean such consideration will always do so.

Each of the Court's arguments against considering motivation has substance only in situations where the law under attack can be defended in constitutionally legitimate terms. However, to say that a law will not fall on the strength of its language or its impact is *not* always to say that it can be legitimately defended. Specifically, the assertion that a governmental choice which disadvantages some persons relative to others will fall unless it is susceptible to reasoned connec-

noting that it was in terms decided under the *Fifteenth* Amendment ("The right of citizens . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude") and arguing that the "on account of" language justifies, if indeed it does not demand, a reference to the motivation of the legislature or person doing the abridging. Cf. *Guinn v. United States*, 238 U.S. 347 (1915); *Schnell v. Davis*, 336 U.S. 933 (1949); *Louisiana v. United States*, 380 U.S. 145, 156 (1965) (Harlan, J., concurring); *Wells v. Rockefeller*, No. 66-Civ.-1970 (S.D.N.Y., March 25, 1970) (Cannella, J., concurring and dissenting), *aff'd*, 38 U.S.L.W. 3450 (U.S. May 18, 1970); *but see* *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959). However, shifting the focus from the Fourteenth to the Fifteenth Amendment would not avoid the traps of unascertainability, futility and disutility to which the Court referred in *O'Brien*. Additionally, tying *Gomillion* to the Fifteenth Amendment would render its logic inapplicable to situations widely regarded as similar. It could not, for example, be extended to racially gerrymandered *school* districts, since no right to vote is therein abridged. Nor could it cover voting district gerrymanders (1) where the intent is to exclude religious or political minorities, since the Amendment is limited to "race, color, or previous condition of servitude," cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966), or (2) where the populations of the resulting districts are equal, since it would then be difficult to argue that the right to vote has been "denied or abridged". (If *Gomillion* is only a Fifteenth Amendment case, the Court in *Wright v. Rockefeller*, 376 U.S. 52 (1964), wrongly regarded it as relevant precedent.) More fundamentally, *Gomillion* itself cannot comfortably be rationalized, though the point is arguable, in terms of the Fifteenth Amendment. For those excluded from Tuskegee could, under Alabama law, have formed their own city and voted there. See Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 S. Cr. Rev. 194, 210. That the persons excluded from Tuskegee were deprived of something of value is clear, but that they were denied "the right to vote" is at best a tenuous claim. If, therefore, *Gomillion* itself is to be confidently explained, and seemingly similar cases are to be explained at all, it must be in terms of a theory applying to the Fourteenth as well as the Fifteenth Amendment.

53. Pp. 1339-40.

tion with some permissible governmental goal⁵⁴ is not universally valid, although it does accurately reflect the Court's approach to most distinctions which are likely to be challenged under the equal protection clause. Yet it is only on the assumption that this "disadvantageous distinction model" of review properly controls the review of all governmental choices that concerns about ascertainability, futility and disutility deserve the weight the *O'Brien* Court attached to them. An understanding of the limitations of the disadvantageous distinction model will yield the principles that properly control the uses of motivation in constitutional adjudication.

III. Describing the Government's Burden of Justification: The Demand for a Legitimately Defensible Difference

Recent judicial and academic discussions of the equal protection clause have paid much attention to defining the burden the government owes with respect to various sorts of choices and distinctions whose effect is to treat some persons better than others.⁵⁵ Initially, the government must point to some difference which distinguishes the persons or items on one side of the line its action has drawn and those on the other. It must then defend the decision to focus upon that difference by relating it to some goal it may permissibly pursue in the context in question. The traditional test was that the difference had to be rationally relatable to such a goal. But the assumption that a single burden of justification could suffice in all contexts has long since passed into history. Some classifications—notably but not exclusively racial classifications—have been designated "suspect," and a defense which is not simply rational, but in some sense compelling, has been required.⁵⁶ And courts no longer blind themselves, if they ever did,⁵⁷ to the substantiality of the benefit or deprivation whose distribution has been limited. Thus some interests—the franchise is probably

54. P. 1216.

55. There is no difference, so far as the equal protection clause is concerned, between a distinction explicitly made between persons or classes of persons, and a choice of one course of action rather than another which has the effect of unusually disadvantaging one class of persons. Requiring only spaniels to be vaccinated unusually disadvantages spaniel owners; placing a park in Hartford but not New Haven comparatively disadvantages New Haveners. See also Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 327 (1969). We shall see with respect to both sorts of distinction—explicitly between persons, or indirectly so by virtue of a choice of one course of action rather than another—some are reviewable *ab initio* while others are not.

56. See *Harvard Developments*, *supra* note 50, at 1087-1120, 1124-27.

57. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

the most conspicuous example—have been designated “fundamental,” and distinctions in their distribution must likewise be defended in “compelling” terms.⁵⁸ In describing the government’s burden of justification, I shall therefore use the phrase “legitimately defensible difference,” in order to take account of the varying character of the defense required and to encompass not only the traditional demand for rationality but also the developing demand for something stronger in certain cases.⁵⁹

Defining the Class of Acceptable Goals

The concept of legitimate defense—in either the traditional sense of rational connection or the developing sense of compelling connection—describes a relation between choice and goal, and therefore is meaningless without a definition of what goals may acceptably be pursued in the context in question.⁶⁰ Some goals can never count as acceptable. Imprisoning all Negroes is rationally—indeed, quite compellingly—related to the goal of disfavoring Negroes, but that is in no context an acceptable goal.⁶¹ One possible view is that this should constitute the only limitation on the class of acceptable goals, that—in other words—government officials should be privileged to pursue in any context any goal they may acceptably pursue in any other context.⁶² This view would imply, for example, that because farming can constitutionally be encouraged by subsidies, it can also be encouraged by limiting driver’s licenses to farmers or free public education to their children. Not surprisingly, numerous decisions of the Court make

58. See *Harvard Developments*, *supra* note 50, at 1120-23, 1127-31.

59. “Rational basis” is the term perhaps most often employed to describe the government’s burden of justification. For the reasons noted in the text, “rational” is too limited a reference. But “basis” too can be a misleading term. For it is sufficiently vague to encompass not only a defense of some difference between the classes distinguished (“Dogs differ from cats in the following way”) but also the *process* by which the choice in fact was made (“We chose every other animal.”). We shall see that a confusion of these two quite distinct sorts of justification, each of which is appropriate on some but only some occasions, has hampered the development of a coherent theory of when motivation is relevant.

60. Such goals are frequently labelled “purposes.” I shall use the term “goals,” however, since it seems slightly less likely to convey the impression that the reference is necessarily to motivation. See p. 1225.

61. See also *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969):

We do not doubt that the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance But the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.

62. At times the Court uses language suggesting that any valid goal will serve in any context. See, e.g., *Turner v. Fouché*, 90 S. Ct. 532, 541 (1970): “the traditional test for a denial of equal protection [is] whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective.” However, the Court’s actions in many cases—and indeed in *Turner* itself, see note 63 *infra*—indicate that by “a valid state objective” it means “an objective valid in the context of *this* sort of statute.”

clear that it is not prepared to recognize as acceptable in all contexts all goals it is prepared to recognize as acceptable in some.⁶³

It has been suggested that the question of goal definition is one of motivation, that is, that the rationality of a distinction is to be measured against what the legislature or other decision maker was trying to accomplish.⁶⁴ But were this in fact the Court's approach, the equal protection clause—save in cases of out and out lunacy—would, again, outlaw only legislation enacted in pursuit of some universally unacceptable goal: legislatures generally have sufficient wit to bring the statutory language within rational range of what they are trying to accomplish.⁶⁵ And, indeed, it has not been the Court's approach. Classifications have been upheld by virtue of their relation to goals it is clear the legislature had not thought of.⁶⁶ And on other occasions the Court has refused to credit as acceptable in the context presented a goal the legislature plainly *did* have in mind. For example, in *Smith v. Cahoon*,⁶⁷ decided in 1931, the Court voided as a denial of equal protection the exemption of carriers of farm products and certain seafoods from a Florida law requiring commercial carriers to post security against liability for injuries caused by their negligence. Obviously the exemption did not stem from a legislative belief that the exempted drivers were any more careful than the drivers covered by the statute; it was obviously motivated by a desire to foster the production of farm and seafood products. Although this is a goal which can properly be served by classifications made in other statutory settings, and it plainly was the goal the legislators had in mind, the Court refused to refer to it in order to uphold the classification.

In cases like *Cahoon*—which subsequent developments make clear

63. Ownership of land can be encouraged in some ways, as by tax breaks or loan programs, but not by limiting school board membership to freeholders. *Turner v. Fouche*, 90 S. Ct. 532 (1970). The state can ensure the collection of taxes by many devices, including criminal penalties, but not by withholding the franchise. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The collection of fines can be ensured in many ways, but not by forcing a man to "work off" his fine by confining him beyond the maximum term for the offense of which he has been convicted. *Williams v. Illinois*, 38 U.S.L.W. 4607 (U.S. June 29, 1970). The discouragement of illegitimacy surely is not a goal the state is totally barred from pursuing, but it cannot do so by denying the mothers of illegitimate children wrongful death benefits. *Glonn v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968). Farming can be made more attractive by subsidies and tax breaks, but not by weighing farmers' votes more heavily. *Reynolds v. Sims*, 377 U.S. 533 (1964).

64. See, e.g., *Coons, Clune & Sugarman*, *supra* note 55, at 332.

65. *Coons, Clune and Sugarman* appear to recognize this, but regard the realization as a shortcoming of the Court's approach rather than an indication that they may have misdescribed it. *Id.* at 333.

66. See, e.g., *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947); *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949).

67. 283 U.S. 553 (1931).

is not simply a derelict surviving from the "overactive" early 1930's⁶⁸—the Court apparently is applying a sort of "consensus" theory, asking not what motivation underlay the specific distinction in question, but rather what such laws are generally concerned with, what most legislators intend to accomplish by most such laws considered in their entirety.⁶⁹ Where a law has generally to do with traffic safety, the Court is saying, classifications must—regardless of the motivation underlying the specific classification in issue—be justifiable in terms of traffic safety. (Economy to the owner surely would count as an acceptable goal as well. If the installation of a safety device on one sort of vehicle is significantly more costly than its installation on another sort of vehicle, its installation could be required on the one but not the other.⁷⁰) A subsidy program or a tax code may constitute an appropriate vehicle for legislative promotion of whatever activity is deemed to advance the general welfare, but a motor vehicle code does not.

Limitation of the acceptable goals of a certain type of law to something less than a roving commission to promote the general welfare does not always proceed on a consensus theory, however. Prior to

68. In *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), which upheld a New York City ordinance banning advertisements on the side of trucks but exempting those truckers who were advertising their own products, the Court declined to rest its decision on the theory that since owner operation can obviously be encouraged in other ways, it can be encouraged this way. See A. BICKEL, *supra* note 30, at 225-27. Instead, it chose the vastly more tortured route of attempting, not altogether successfully, to postulate a rational relation between the challenged distinction and something it was willing to credit as an acceptable goal, increased traffic safety.

The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case.

336 U.S. at 110. See *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949) and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), for other examples of the Court's having to strain to find a distinction rationally defensible because of its unwillingness to credit as acceptable the goal the legislature plainly had intended to serve in making the challenged distinction, even though that goal could properly have been served by distinctions in other statutory settings. See also *Glonn v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968).

69. One might justify a "remand to the legislature" on such a theory: "Legislatures seldom use their traffic codes as vehicles for encouraging certain sorts of production, and we therefore are skeptical that you would want the distinction involved here upheld on such a basis. If upon reconsideration, however, you decide that you do indeed wish to use your motor vehicle code in this manner, let us know by reinstituting the distinction, and we shall uphold it." This, however, is plainly not what the Court was doing in either the traffic regulation cases or the recent wrongful death cases. See *Glonn v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968). Those decisions were intended to bind finally; the Court clearly was not interested in what the legislature meant to be doing.

70. If, moreover, carriers of farm and seafood products could have been shown to be financially more secure, and therefore better able to pay in case of an accident, the *Cahoon* distinction presumably would have been upheld. Cf. *Morey v. Doud*, 354 U.S. 457 (1957).

Reynolds v. Sims,⁷¹ it simply was not the case that most legislators drafting apportionment plans saw as anything like their exclusive goal the equal representation of equal population groups. Many other interests were quite intentionally being served—for example, the favoring of farmers and the consequent fostering of a strong agricultural economy, or perhaps the protection of ethnic minorities by granting them greater political power than numbers alone would warrant.⁷² Yet the Court refused to look to such goals in evaluating the rationality of the distinctions under attack. By that refusal it obviously did not mean to suggest that the promotion of such goals is in all contexts impermissible. It meant, instead, that everyone should have an equal voice in choosing the men who will decide whether and when such “special interests” should be served. The franchise being—at least in theory—the ultimate determinant of who is to be legislatively accorded benefits and deprivations in various contexts, the Court felt the imposition of its own definition of the acceptable goals of apportionment legislation to be justifiable, regardless of a consensus or the lack of one.⁷³ Thus those goals were limited to one—the equal representation of equal population groups. The rest was comparatively easy: no standard other than “one man, one vote” is even rationally relatable to this, the only acceptable goal of apportionment legislation.⁷⁴

I obviously have not described very fully, nor do I mean to evaluate,⁷⁵ the ways in which the Court—by reference to what it takes to be a consensus or an overriding value judgment compelled by the Constitution—limits a law’s class of acceptable goals to something nar-

71. 377 U.S. 533 (1964).

72. The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellants’ words “the basic principle of representative government”—is, to put it bluntly, not true.

Baker v. Carr, 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting).

73. Cf. *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

74. [T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a state, stand in the same relation regardless of where they live.

Reynolds v. Sims, 377 U.S. 533, 565 (1964).

75. As shall become clear from the ensuing discussion, a judicial movement toward treating as acceptable in all contexts all goals which can properly be served in some context would not undercut this article’s theory of when motivation is relevant. On the contrary, it would render it vastly more widely applicable. (If the fact that groups may be favored without rational defense in taxing and spending legislation, see pp. 1246-48, means they may be favored without national defense in any sort of legislation, then the disadvantageous distinction model is nowhere applicable and motivation is everywhere relevant.)

rower than the promotion of the general welfare. But this brief elucidation of what is involved in the demand for a legitimately defensible difference—that is, a difference relatable rationally (at least) to some goal which counts as acceptable in the context in question—should set in context the crucial question of what sort of showing by the complainant should be required to trigger that demand.

IV. Triggering the Government's Burden of Justification: The Disadvantageous Distinction Model

Despite the recent preoccupation with the equal protection clause, little if any attention has been devoted to what sort of showing should be required to *trigger* the demand for a legitimately defensible difference. This lack of attention undoubtedly stems from an acceptance of the customary assumption that the demand is triggered by the fact of distinction alone.⁷⁶ Under this traditional model, the complainant must, of course, allege—and prove, if pressed—that he falls on the disadvantaged side of the line the governmental choice under attack has produced; as a law teacher, I would lack standing to challenge a choice which favors optometrists over ophthalmologists. But, standing having thus been established by the complainant, the simple fact that a distinction has been made is sufficient, under this “disadvantageous distinction model,” to compel the government to justify it with a legitimately defensible difference. In order to place the burden of justification on the state, the complainant need prove nothing about

76. See, e.g., Note, 83 HARV. L. REV. 1911, 1912 n.7 (1970):

Normally a law violates the equal protection clause if it treats one individual or class differently from others and if the differential treatment bears no rational relation to a permissible state purpose.

(The ensuing discussion makes clear that the word “normally” was included to signal the realization that some distinctions must be defended in terms which are more compelling than simple rationality, and not to indicate the possibility that the burden of justification might not attach simply because a disadvantageous classification has been made.) See also, e.g., *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 155 (1897):

[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

Cf. Coons, Clune & Sugarman, *supra* note 55, at 327 (emphasis supplied):

A legislative (or administrative) “means” is a . . . use of selected facts as a way of distinguishing one group of humans from another for an end the legislature has in mind. The chosen fact may be the ownership of something such as cows, pistols, or houses; it may be a personal quality such as race, age, or acuity of vision; it may be an act such as the possession of burglar tools; it may be location, profession, wealth, sex, size, intelligence or police record. Each of these chosen factual attributes separates its human referents as a group from everyone else, an effect which serves some legislative purpose—or must if it is to survive scrutiny.

See also Note, *Constitutional Limitations on the Conditions of Pretrial Detention*, 79 YALE L. J. 941, 947 (1970).

the likely statistical *impact* of the distinction; that is, he need make no showing concerning the racial, religious, political or any other traits possessed by those it is likely to affect. The only impact he must show is that *he* will be disadvantaged relative to one or more other persons; who they are, neither he nor the court cares. Nor, of course, is he obligated to prove anything concerning the *motivation* of those who made the choice.

Thus, should the complainant attack a law which requires hounds, but not spaniels, to be vaccinated for rabies, on the ground that it unconstitutionally discriminates between hound owners and spaniel owners, he would (in order to establish standing) have to allege and if necessary prove that he owns a hound. But in order to force the government to justify the distinction, he would not be obliged to prove or even speculate on how many hounds as opposed to spaniels there are, or what sort of persons own which sort of dog; nor would he have to make any showing concerning the legislature's motivation in making the choice. Simply because the state has drawn a distinction which disadvantages some persons relative to others, the court would require the state to come up with a legitimately defensible difference between hounds and spaniels—for example, "Hounds are more susceptible to rabies than spaniels," or "Hounds are more likely to run about biting people." At this stage in the process of review—the *justification*, as opposed to the *triggering*, stage—the likely impact of the law (specifically, the way in which it will function to reduce the incidence of rabies) can be said to be relevant, though courts typically stand ready to presume the existence of facts necessary to sustain the distinction.⁷⁷ The factor which defines what I have designated the disadvantageous distinction model is that no demonstration of likely effect is needed to move the case to the justification stage, to force the government to defend the choice under attack. The simple existence of the distinction is sufficient to do that.

Nor does this disadvantageous distinction model require even an explicit statutory classification, or other proof of what criterion of choice has been employed, to trigger review. Were the dog warden simply to appear at the door and announce, "Your dog is one of the group we have selected for vaccination," the dog's owner would be entitled to the production of a legitimately defensible difference. Should I receive in the mail a statement from the State of Connecticut informing me that

77. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1960).

I am one of the 500 whose driver's licenses have been selected for revocation, I am entitled to be told wherein I differ from those who are permitted to keep their licenses, and how that difference relates to the promotion of safety—without the necessity of any showing on my part concerning the criterion of choice which was employed or the characteristics of the other 499.

Although we shall consider a number of problems of racial discrimination which are not amenable to treatment under the disadvantageous distinction model, there are some such problems to which the model is properly applicable. In *Loving v. Virginia*,⁷⁸ for example, the Court invalidated a law denying racially mixed couples the opportunity to get married. In order to place on the state the burden of producing a legitimately defensible difference between racially mixed couples and others, which burden it manifestly could not carry, the complainants were obliged to show neither that the law injured the members of one race more than the other, nor that it had been intended to do so. The simple fact that the distinction had been drawn was sufficient to place the burden of justification on the state, just as the burden would attach immediately were the state statutorily to deny redheads and blondes, or plumbers and chambermaids—or, by simple administrative fiat, me and my girlfriend—the right to marry one another.⁷⁹

V. The Limitations of the Disadvantageous Distinction Model: Random and Discretionary Choice

A. *Distinguishing the Indistinguishable: The Sometime Inevitability of Random or Partly Random Choice*

The constitutional contours of *Gomillion v. Lightfoot* are very different from those of *Loving v. Virginia*. *Gomillion* was decided before the Court had developed the doctrine that the franchise constitutes a "fundamental interest" and therefore distinctions which affect its distribution require an unusually compelling defense.⁸⁰ But the distinctions produced by the Alabama legislature's redrawn boundary line did not satisfy even the traditional demand for a rational connection with some permissible governmental goal. The only difference between

78. 388 U.S. 1 (1967).

79. The content of the burden presumably would be less demanding where a non-racial classification is involved, but the burden would attach simply because the distinction had been drawn and a couple had been disadvantaged thereby.

80. But cf. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Arguably, *Gomillion* should not be treated as a case involving the distribution of the franchise. Note 52 *supra*.

the houses on either side of the line was the race of their occupants. On any definition of legitimately defensible difference, Alabama was unable to produce one.

That observation is not, however, sufficient to explain *Gomillion*. The distinctions drawn by city or voting district boundaries seldom can be justified in terms of some difference between the persons or properties on one side of the line and those on the other. Yet such boundaries stand, because they seldom *must* be justified. A number of precedents, overruled neither explicitly nor by implication in *Gomillion*, make clear that a city is not ordinarily obligated to come up with a legitimately defensible difference between the persons or properties distinguished by its boundary line.⁸¹ Should I march into court and point out that my house is only a block beyond the East Haven town line, demonstrate that I am injured by being denied the status of an East Havener, and demand that East Haven point to a legitimately defensible difference between me and the man down the block—or between my house and his—the officials are still entitled to respond with nothing more than laughter. Distinctions drawn by the placement of voting district lines are—the momentous changes wrought by *Baker v. Carr*⁸² and *Reynolds v. Sims*⁸³ notwithstanding—similarly immune to the automatic demand for a legitimately defensible difference.⁸⁴ Nor should this be dismissed as some sort of aberration. Imposing the disadvantageous distinction model on boundary and districting choices could obviously result only in the cynical recognition of illusory differences.

Why the disadvantageous distinction model is inapplicable to districting choices can be clarified by considering the analogous process of selecting a jury panel. Although they invariably speak in terms of motivation, jury discrimination cases typically are not mentioned in discussions of legislative motivation generally or of *Gomillion* in particular, probably because of the widespread assumption that the principles governing reference to motivation are different when administrative action is involved.⁸⁵ But such cases are similar to *Gomillion* in

81. See, e.g., *Missouri v. Lewis*, 101 U.S. 22, 30-31 (1879); *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

82. 369 U.S. 186 (1962).

83. 377 U.S. 533 (1964).

84. A requirement that representation be apportioned to population is not a requirement that a decision to go up Third and across Forty-fifth, rather than up Fourth and across Fiftieth, must be supported in terms of a legitimately defensible difference. The point is perhaps best made by noting that *Wright v. Rockefeller*, 376 U.S. 52 (1964), was decided the same day as *Wesberry v. Sanders*, 376 U.S. 1 (1964).

85. But see pp. 1284-89 *infra*.

one significant respect: in jury selection, as in districting, the state is not obligated *ab initio* to point to a legitimately defensible difference, or indeed to any difference at all, between those who were selected and those who were not.⁸⁶

Some personal characteristics which rationally bear upon one's ability to serve on a jury—to observe the proceedings and draw inferences therefrom—are widely employed as criteria of exclusion; children and deaf persons, for example, are systematically and properly excluded. It is conceivable that a county would want to select its jury panel by the application of *nothing but* criteria it regards as rationally related to an ability to arrive at an informed decision: exclusion of those whose IQs are less than 150, for example, might produce about the required number of persons. But such a method of selection would be of dubious constitutionality,⁸⁷ and in any event no state would use it.

[T]he very idea of a jury [is] "a body truly representative of the community," composed of "the peers or equals of the person whose rights it is selected or summoned to determine"⁸⁸

Thus somewhere during the process of selection persons will have to be excluded who are in no sense "unqualified" for inclusion.⁸⁹ A number of persons left off the panel will be distinguishable from those selected in terms of one or more characteristics related to fitness to serve,

86. The state's burden, at most, is to prove that it did not take race or another impermissible factor into account. (And even that burden does not attach until the complainant has made out a *prima facie* case. *But see* p. 1265.) But to prove that is to prove something about motivation—about what criteria of selection were employed—not to point to some difference in characteristics between those who were chosen and those who were not. *Compare* note 59 *supra*. The burden is one of demonstrating that the distinctions in fact were generated by random choice, not that they might have been. (It is, after all, possible to flip ninety-two heads in a row. *See* T. STOPPARD, ROSENCRANTZ AND GUILDENSTERN ARE DEAD, Act I, Scene I.)

87. *But cf.* *Fay v. New York*, 332 U.S. 261 (1947).

88. *Carter v. Jury Comm'n of Greene County*, 90 S. Ct. 518, 524 (1970).

89. Random selection in practice probably often occurs at an in-between stage. Cuts on the basis of age may be made—by virtue of the choice of the list from which names are selected for a random drawing—prior to the random choice process; cuts on the basis of deafness probably occur after the random process, either on the basis of an interview or questionnaire or by the judge in the courtroom itself. Where choices are made not from a list but from among the commissioner's acquaintances, *but cf.* p. 1265, the random and non-random processes are even more intertwined. Thus it is not possible temporally, though perhaps it is theoretically, to separate out "the selection of the pool" and "selection from the pool." In any event, review is triggered by a showing that an exclusion resulted, at any stage, from non-random selection. P. 1263. Since such proof is more likely to be forthcoming—from a showing of what list was used or perhaps a statutory classification—at what we might be tempted theoretically to classify as the "pool-defining" stage, "pool-defining" characteristics are more likely to be reviewed. Thus should a statute exclude law teachers, I, as a criminal defendant or perhaps in a class action, would have standing to challenge it. The point of the text is that one or more law teachers (or any other group) would not, *simply because they are not on the panel*, be entitled to the production of a legitimately defensible difference.

but most will not. That being so, a simple showing that some person or group of persons has been left off cannot trigger a demand for the production of some relevant difference between them and those who were selected.

In bounding a city or voting district, as in choosing a jury panel, the state must select a subclass from the whole of society and in the process exclude a number of persons who cannot be said on any rational ground to be unqualified for inclusion. Certain factors obviously cannot be used as criteria for locating the boundaries of political units—race,⁹⁰ religion, ancestry; the Court seems to have added likely political behavior and may even mean it.⁹¹ The more difficult question, strangely enough, is whether any criteria of selection exist which *are* legitimately defensible.

Geographical factors occasionally can be so regarded, but only occasionally. There is, for example, nothing about the fact that two sections of a city are divided by a river that makes a decision to divide the voting districts along the river rationally defensible⁹²—unless, for example, there is such a scarcity of bridges that any other decision would make it hard for voters to get to the polls.⁹³ To say this is not to say that a district line cannot permissibly be drawn along a river, but only that a decision to do so will not necessarily satisfy the demand for a legitimately defensible difference.

There seems to be something of a consensus that it is rational and otherwise inoffensive to form districts along “community” lines. One might object that “community” is a nebulous concept and may on oc-

90. *Wright v. Rockefeller*, 376 U.S. 52 (1964), quite plainly rejects the view that the intentional concentration of the members of one racial group in one district, even if it is effected with the motivation of increasing the political power of that group, is constitutional. *But cf.* *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969). However, should such “benevolent” construction of racial districts ever be legitimated—*cf.* A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 160 (1970)—that development would not alter the general framework I am suggesting. Proof of the employment of race as a criterion of exclusion would still trigger the demand for a legitimate defense. The shift in attitude would mean, however, that such a defense might be forthcoming.

91. “Fencing out” from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.” *Carrington v. Rash*, 380 U.S. 89 (1965). *Carrington* involved not the drawing of district lines but rather a complete denial of the franchise. The statement therefore seems to cover cases like *Gomillion*, where the bounding of a city is in issue, *but cf.* note 52 *supra*, but may not extend to the drawing of legislative districts. *Sims v. Baggett*, 247 F. Supp. 96, 104 (M.D. Ala. 1965), suggests that political gerrymanders, unlike racial gerrymanders, present political questions. Though the consistency of such a position is questionable, the prediction may be accurate. *See, e.g.,* *Jones v. Falcy*, 48 N.J. 25, 222 A.2d 101 (1966). *Cf.* *Wells v. Rockefeller*, No. 66-Civ-1970 (S.D.N.Y., Mar. 25, 1970), *aff’d*, 38 U.S.L.W. 3450 (U.S. May 18, 1970).

92. *Cf.* *Reynolds v. Sims*, 377 U.S. 533, 580 (1964).

93. Or where four cities of equal population are arranged thus, , it would for similar reasons be rational to choose a vertical over a horizontal district line.

casion serve as little more than a euphemism for race, nationality or wealth. Moreover, *Reynolds v. Sims*, carried to one of its logical extremes, can be said to cut against the use of community lines: to employ them is to move toward representing area interests rather than sheer numbers.⁹⁴ *Reynolds* did, however, stop short of ordering that all of a state's legislators be elected on a statewide at-large basis⁹⁵—perhaps leaving the implication that although community interests cannot be served by granting equal representation to districts which are unequal in population, they can be served by the placement of the lines.

But even though community lines will count as permissible, they will inevitably constitute less than sufficient guidelines for districters. The equal population command of *Reynolds* will frequently require that what appears to be a community be subdivided, or that part of it be placed in a district with some or all of another community.⁹⁶ Or clear community lines just may not exist.⁹⁷ Moreover, it surely is not mandatory that community lines be followed: a state could, if it wished, resolve to be neutral with regard to all personal characteristics, including those which define a "community."

Thus the state often will not be able—and certainly is not required—to draw the boundary lines of its voting districts and other political units so as to divide people up on the basis of characteristics which bear on likely political behavior. With respect to such characteristics the selection may, and often must, be random. Thus the disadvanta-

94. But "[l]egislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). The argument is that the vote of one resident in, but not "of," a neighborhood (a white man in Harlem) is not as likely to make a difference as it would be if the districts were not drawn along "community" lines, and is therefore impermissibly "diluted." But this sort of analysis can also be invoked to support "community" districts. For the more nearly all the districts in a state reflect the ethnic balance of the state as a whole, the more powerless minorities are rendered: are *their* votes not thereby "diluted"? See *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969). *Reynolds* is a case rich in possible implications.

95. 377 U.S. at 579. See also *Fortson v. Dorsey*, 379 U.S. 433 (1965).

96. See *Kirkpatrick v. Preisler*, 394 U.S. 526, 533 (1969).

97. In such cases the state will find itself in the situation of the protagonist in John Barth's *The End of the Road*, with enough money to get to Cincinnati, Crestline, Dayton or Lima, and no rational basis for choosing among them. Flipping coins may seem an unlikely way out. But for a legislature which is serious about neutrality it might serve to decide whether to go up Sixth and across Forty-third, or up Fifth and across Forty-fifth, cf. Weaver & Hess, *A Procedure for Nonpartisan Districting: Development of Computer Techniques*, 73 YALE L.J. 288 (1963), as, indeed, might the principles of choice suggested to Barth's immobile protagonist:

If the alternatives are side by side, choose the one on the left; if they're consecutive in time, choose the earlier. If neither of these applies, choose the alternative whose name begins with the earlier letter of the alphabet. These are the principles of Sinistrality, Antecedence, and Alphabetical Priority—there are others, and they're arbitrary, but useful.

J. BARTH, *THE END OF THE ROAD* 85 (Bantam 1969).

geous distinction model is necessarily inapplicable: if differences need not be considered, their production can hardly be required.

B. "Discretionary" Choice: *The Sometime Inappositeness of a Demand for Rationality*

Situations in which the state must select a group of persons who are no more "qualified" for selection than much of the rest of the population are not the only ones in which a legitimately defensible difference is not required simply because the government has made a choice which comparatively disadvantages some persons. It is settled that law enforcement officials are under no general obligation to justify a decision to arrest or prosecute one person rather than another, even though both appear equally guilty.⁹⁸ School officials are not required by the Federal Constitution rationally to defend distinctions drawn by their student dress codes—for example, the outlawing of mustaches but not sideburns, or the allowance of skirts which end three but not four inches above the knee.⁹⁹ A litigant who asserted a constitutional right to a rational defense of a school's decision to teach Russian rather than Greek would likewise be thrown out of court on the papers, even though such choices—like dress code choices—will favor some persons relative to others.¹⁰⁰ A legislature can punish burglary more harshly than battery (or vice versa) without a rational explanation for the disparity.¹⁰¹ And by means of taxing and spending distinctions, it can treat oilmen better than artists, or artists better than oilmen, again without a rational defense.¹⁰²

98. *Oyler v. Boles*, 368 U.S. 448, 456 (1962); cf. *Edelman v. California*, 344 U.S. 357, 359 (1953). But see *Universal-Rundle Corp. v. F.T.C.*, 352 F.2d 831 (7th Cir. 1965), *rev'd*, 387 U.S. 244 (1967). The cases indicate, however, that judicial intervention is justified when there is proof of the employment of an unconstitutional criterion of selection. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). That, I shall suggest, is the correct approach.

99. See pp. 1242-43, *Tinker v. Des Moines School District*, 393 U.S. 503, 507-08 (1969).

100. *Meyer v. Nebraska*, 262 U.S. 390 (1923), (assuming it still controls, but cf. *Epperson v. Arkansas*, 393 U.S. 97, 105-06 (1968)), is not authority to the contrary:

[C]hallenge [has not] been made of the state's power to prescribe a curriculum for institutions which it supports. [That question is] not within the present controversy. 262 U.S. at 402.

101. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), is not to the contrary. Faced with the possibility of a finding of cruel and unusual punishment and the virtual certainty of invalidation under the clause proscribing *ex post facto* laws, the state declined to argue the case on the theory that the Habitual Criminal Sterilization Act was a penal statute, and therefore tried to justify the distinction in "regulatory" terms.

102. See, e.g., *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930); 51 Am. Jur. *Taxation* § 168 (1944). My reference here is only to taxing and spending disparities which make sense in terms of the encouragement or discouragement of some behavior. A tax break for Caucasians could be voided without reference to motivation, since one cannot be encouraged to be a Caucasian. Cf. *Dandridge v. Williams*, 90 S. Ct. 1153 (1970). A tax break for Republicans or Presbyterians—or, for that matter, the children only of Caucasians—presents a different problem, however, for one can be encouraged to be a

The situations mentioned obviously do not entail the distinguishing of the indistinguishable; clear differences exist, and conscious, non-random criteria of selection are employed.¹⁰³ The courts' failure to require production of the usual legitimate defense of such choices is customarily phrased in terms of an assertion that the legislature or administrator has "discretion" in making the selection. But that shorthand, without more, obviously constitutes no explanation of why the choices should be sheltered from the disadvantageous distinction model. Although the concept of discretion has seldom been defended or even very clearly defined, more lies behind it than simple judicial unwillingness to review (and thereby run the risk of having to invalidate) certain legislative and administrative choices. The courts' use of the concept cannot be clarified entirely, in large part because it is bound up with the process of defining a regulatory area's class of acceptable goals—which process, we noted above, has not even been fully appreciated as a separate and crucial step, let alone carefully analyzed. Nonetheless, an attempt to understand the considerations thought here to require the attaching of the label "discretionary" (and the consequent suspension of the ordinary demand that disadvantageous distinctions be rationally related to the advancement of some acceptable goal) is essential if we are to be in a position to evaluate whether those same considerations argue against other models of review which might be constructed to handle situations the disadvantageous distinction model cannot.

The requirement of a legitimate defense is meaningless unless it includes, at a minimum, the rational connection of the choice in issue with the effectuation of some acceptable goal. To call somehow for a defense which "need bear no rational relation to an acceptable goal but must in all other ways be constitutionally inoffensive" is to make

Republican or a Presbyterian, and a non-Caucasian can be encouraged not to have children. It is provisions like this to which the disadvantageous distinction model is inapplicable, and for which an alternative model of review is needed. See p. 1249.

103. An assertion that no legitimately defensible difference is demanded *ab initio* in the situations cited because they all involve "privileges" would not only stretch the term beyond any meaning it was given even in its heyday, but also constitute no more than an exercise in question begging. Happily, the right-privilege distinction has been formally interred. *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963); *Shapiro v. Thompson*, 394 U.S. 618, 627 n.6 (1969); cf. *United States v. Brown*, 381 U.S. 437 (1965).

Some of the decisions mentioned, for example curriculum choices, constitute "expert" decisions. But others—what penalty to attach to what crime, and whom to arrest or prosecute—while they are also made by "experts," involve factors with which courts are unusually competent to deal. Moreover, courts frequently evaluate (admittedly within limits, but the demand for rationality is a distinctly limited one) choices they would not themselves be equipped to make in the first instance; one of the functions of the expert witness is to assist in such evaluation.

no demand at all: "One might just feel like drawing the line there" is such a defense. Thus without requirement of a *rational choice/goal relationship*, the demand for a legitimately defensible difference is meaningless, and the disadvantageous distinction model cannot function.

There are, however, two sorts of situation where courts might sensibly conclude that this crucial component, the rational relation of the choice in issue with the effectuation of an acceptable goal, cannot intelligibly be demanded. The first is the situation where the Court is prepared to credit as acceptable, *along with other relatively precise goals*, one goal—such as the promotion of "good taste"—whose relation to various choices cannot be evaluated by a calculus of "rationality" and "irrationality." The second is the situation where the Court is unprepared to restrict an area's class of acceptable goals to anything more precise than the promotion of the general welfare.

Before proceeding to a discussion of the situations in which the Court stands ready to credit such goals as acceptable, some attention must be paid to why the crediting of such a goal renders the disadvantageous distinction model's universal demand for a legitimate defense inapposite, why choices made to implement such goals cannot be evaluated by the usual calculus of rationality and irrationality.

1. *Three Types of Choice/Goal Relations: Rational, Irrational and Nonrational*

Where an area of choice is limited by a finite set of relatively precise goals, the political branches will, to be sure, be granted discretion by courts to honor their own value preferences in deciding which goal to promote at the expense of which other goal. If, for example, a new and unusually effective truck brake, the deadstop brake, were developed, courts would not interfere with a legislative judgment concerning the extent to which one of the acceptable goals of traffic regulation, safety and owner economy,¹⁰⁴ should be promoted at the expense of the other. The legislature could permissibly opt for maximum safety by requiring all trucks to install the brake, or for minimum owner cost by not requiring its installation at all. Courts *would* require, however, that any

104. See p. 1226. Of course the Court might well recognize other acceptable goals; the example is deliberately oversimplified for illustrative purposes. The point, as will appear, is that the disadvantageous distinction model is apposite so long as, but only so long as, the class of acceptable goals is finite, and the goals are relatively precise.

legislative choice be rationally relatable to the effectuation of *one* of the acceptable goals.

Assume the legislature passes the following law:

All trucks whose weight exceeds five tons must install the deadstop brake.

If the state can make out a plausible case—and it need be no more than plausible¹⁰⁵—that the heavier a truck is, the harder it is to stop with an ordinary brake (or the more damage it will cause if it is not stopped), the distinction drawn by this law, between heavier and lighter trucks, would be upheld as rationally relatable to the goal of promoting traffic safety. Of course safety would be maximally promoted by requiring all trucks to install the brake, but the distinction here drawn is sustainable because, in light of the proof, “Requiring deadstop brakes on heavy trucks promotes safety *to a greater extent* than requiring them on light trucks” can be labeled rational. Or assume that the legislature decrees:

All trucks manufactured henceforth must install the deadstop brake.

If the state can make out a plausible case that installation costs are higher for an already existing truck than they are for one not yet produced, the distinction drawn by this law, between existing and future trucks, would be upheld as rationally relatable to the goal of reducing owner cost. That goal would be maximally promoted by not requiring the brake at all, but the choice made is sustainable because “Excusing an existing truck from the requirement reduces the cost to the owner *to a greater extent* than excusing a future truck” can also be labeled rational.

Assume, however, that the legislature enacts a law which provides

Blue trucks must install the deadstop brake.

or, more likely politically

All trucks save those carrying seafood must install the deadstop brake.

Both of these laws would fall,¹⁰⁶ because neither of the distinctions

105. Note 77 *supra*.

106. The question remains, of course, *why* states cannot favor various industries by their motor vehicle codes as they do by their tax codes. The Court, however, has indicated that they cannot. See pp. 1225-26.

drawn is rationally relatable to the promotion either of safety or of owner economy. Specifically, the following claims (barring proof which would surprise me greatly) must be labeled irrational.

Requiring deadstop brakes on blue trucks (or trucks not carrying seafood) promotes safety to a greater extent than requiring them on others.

Excusing non-blue trucks (or trucks carrying seafood) reduces the cost to the owner to a greater extent than excusing others.

By way of contrast, assume a context in which there is, once again, a finite set of acceptable goals, but those goals are the promotion of physical health and the promotion of "good taste." As in the traffic example, the legislature must be granted discretion to decide which of these goals to pursue at the expense of the other, should they on occasion conflict. But the discretion here must be even greater. For so long as the promotion of "good taste" is credited as an acceptable goal, courts cannot intelligibly demand the rational relation of every choice to an acceptable goal.

Courts *can* evaluate the "rationality" of the relation between various choices and the goal of promoting physical health in much the way they review traffic regulation choices: a distinction between rubbers and sneakers as acceptable rainy day footwear is rationally related to that goal, a distinction between black and blue rubbers is irrational with respect to it. However, the relation between various choices and the other goal, the promotion of good taste, cannot be thus labeled rational or irrational. The statements

Outlawing sneakers promotes good taste to a greater extent than outlawing loafers.

and, for that matter

Outlawing loafers promotes good taste to a greater extent than outlawing sneakers.

can be labeled neither rational nor irrational by courts. They are judgments of taste—like saying that spinach is tastier than broccoli; or that Raphael's Madonnas are more beautiful than Leonardo's. Unlike claims of increased safety or economy, their "validity" depends on no reasoned elaboration of the choice's actual or projected results. Of course people can argue about loafers and sneakers, or Raphael and Leonardo. But courts sensibly appreciate that they could "review" judgments like the two hypothesized only by substituting their own aesthetic judgment for that of the political branches—a kind of revisory authority which

would negate the assumed grant of authority to the political branches to promote good taste. Aesthetic judgments so far from community standards that courts would be moved to find some way to invalidate them can of course be articulated, but they are virtually impossible politically.¹⁰⁷ The standard equipment of judicial review thus being sensibly regarded as inapposite to all judgments of "good taste" which have a remote chance of coming to court, judges in fact do not employ that equipment to review such judgments, but instead label them "discretionary"—which in a constitutional context means they need not be rationally defended.¹⁰⁸ So long as even one acceptable goal in a given context is thus "discretionary," even if others are not, an across-the-board demand that all choices be "rationally" related to the effectuation of some acceptable goal is impossible, and the disadvantageous distinction model of review cannot be imposed.¹⁰⁹

The usual demand that choices be rationally related to the effectuation of some acceptable goal would be similarly inapposite were the Court to define the acceptable goals of the area of choice in question not as some set of goals of varying precision but rather as one goal, the promotion of the "general welfare."

Encouraging industrial growth promotes the general welfare to a greater extent than encouraging the arts.

and

Protecting private property promotes the general welfare to a greater extent than protecting physical security.

are claims which courts can label neither rational nor irrational. Of course we can disagree and argue about them, but after the smoke clears, the choice still reduces to a value preference.¹¹⁰ Courts could

107. See p. 1243; note 130 *infra*.

108. By suggesting that "discretionary" carries this meaning in a constitutional context, I do not mean to suggest that there is any necessary equation between "discretion" and "lawlessness." Cf. K. DAVIS, *DISCRETIONARY JUSTICE* (1969); Dworkin, *The Model of Rules*, 35 U. CHI. L.R. 14 (1967). Indeed, as we shall see, a grant of "discretion" is not a grant of unbridled authority even so far as the Fourteenth Amendment is concerned.

109. "Discretionary goal" is a misnomer, used nonetheless in the hope of clarity. Choices, not goals, are discretionary: a discretionary choice is one not subject to a demand for rational connection with some acceptable goal. "Discretionary goal" is used to designate a goal so amorphous that its very definition depends on the decision maker's value preferences; the relation between such a goal and various choices cannot be evaluated as rational or irrational.

110. Deciding which goal to promote at the expense of which other goal always involves a value preference. What is special about these "discretionary goal" situations is that the relation between the choice under attack and such a goal can be evaluated only in terms of a value judgment. Of course there will come a point, given a sufficiently large number of goals to choose among, where the first process will become virtually

"review" them only by superimposing their own value preferences by announcing that the political branches' values are skewed—that the arts are more important to the general welfare than industrial growth, or that physical security is a more important component of the good life than the security of property. A demand for a rational relation between choice and goal, the courts sense, is as inapt where the goal is the Good as it is where the goal is the Beautiful.

Of course courts *could* develop some utilitarian calculus for defining the Good—as indeed they could develop an aesthetic calculus for defining the Beautiful—and impose it upon the decisions of the political branches. I do not mean to suggest that such philosophical attempts to rationalize the apparently nonrational are necessarily fruitless, or even that legislatures should spurn them. But courts in our system have rightly refused thus to seize total control of the decision processes of government.¹¹¹ They will intervene when the factual claim on which the relation between choice and goal necessarily depends is outside the realm of empirical plausibility. But where the goal is such that the choice/goal relation depends ultimately not upon an empirical claim but upon a value preference, legislative satisfaction with the relation will ordinarily be deferred to, by calling the judgment discretionary.

I obviously have yet to make the case that the Court ever does, or ever sensibly does, baldly credit the promotion of the "general welfare" as the acceptable goal of an area of choice. But if it does, the standard evaluative technique of the Fourteenth Amendment—the testing of choice/goal relations in "rationality-irrationality" terms—is inapposite, and an alternative to the disadvantageous distinction model of review must be found if such choices are to be policed.¹¹²

indistinguishable from the second—where discretion to select among goals will be the equivalent, as far as a reviewing court is concerned, of discretion to make a choice without connecting it rationally to the promotion of any goal. That, however, is precisely the point of the ensuing discussion.

111. Of course the Court often imposes "ought" judgments upon the political branches—judgments it feels have been made by various constitutional provisions: "One religion should not be favored over another;" "White persons should not be favored over Negroes." A test for "rationality," however, is one geared to judging "is's" rather than "oughts." Of course the situation is complicated by the fact that the Court not only tests the choice/goal relation for rationality, but also decides what goals count as acceptable in various contexts. It does so, however—or at least it should—either in terms of "is's" (the "consensus" approach) or in terms of "oughts" inferable from explicit constitutional commands or the governmental structure set up by the Constitution. (This is *Reynolds*, by the Court's lights.) See generally pp. 1224-27. Authority to test relations for rationality, in other words, does not by itself empower the Court to superimpose its value judgments on those of the political branches.

112. There is an obvious kinship here with that aspect of the so-called political question doctrine which withholds review where there is "a lack of judicially discoverable and manageable standards." *Baker v. Carr*, 369 U.S. 186, 217 (1962). See also A. BICKEL, *supra* note 30, at 184; but cf. Scharpf, *Judicial Review and Political Question: A Func-*

2. One "Discretionary" Goal Among Other Relatively Precise Goals

There has recently been a good deal of litigation concerning school dress codes, mainly involving challenges—some of which have been successful, others not—to regulations of the length of boys' hair. Significantly, though, most of the challenges have been based not on an allegation that every distinction drawn by an apparel code must be supported with a legitimate defense,¹¹³ but rather on an assertion that the regulation in question infringes a First Amendment right to self-expression¹¹⁴ or some other vaguely defined personal right.¹¹⁵ In pitching their arguments thus, litigants and judges have rightly sensed that there is something about dress codes that renders the disadvantageous distinction model of review inapposite. For it is obviously impossible to justify rationally such representative distinctions as those between khakis and bluejeans, sneakers and loafers, culottes and bermuda shorts; yet such distinctions stand, generally without challenge.

The reason courts have refrained from requiring a rational defense of such distinctions is that they have recognized as acceptable goals of school apparel regulation not only the preservation of physical health and the avoidance of educationally intolerable disruption, but also the inculcation of good taste. A powerful argument can be mounted that the cultivation of taste should be disallowed as an acceptable goal;¹¹⁶ such an approach would be more candidly addressed to what is really at stake here—the right of government to impose its aesthetic judgments on the young—than is the strained, though voguish, attempt to fit these cases into a First Amendment framework. But we are not there yet; for the present—though the point is often shrouded in an overly expansive definition of disruption or circular doubletalk about respect

tional Analysis, 75 YALE L.J. 517, 555-58 (1966). My suggestion, however, is not that review be withheld, but that—the usual model of review being incapable of intelligible application—an alternative model be found.

113. *But cf.* Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967); Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969).

114. *See, e.g.*, Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968); Davis v. Firmont, 269 F.Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969).

115. *See, e.g.*, Breen v. Kahl, 296 F. Supp. 702 (W.D. Wisc. 1969).

116. The inevitable hampering of the development of self-expression, and the *de facto* (and perhaps unreviewable *de jure*) discrimination against students of certain backgrounds and attitudes, quite plainly outweigh whatever interest the state can claim in inculcating tasteful dressing and grooming habits. Were the cultivation of taste eliminated as an acceptable goal, the disadvantageous distinction model would become applicable, for the state would have to justify each apparel rule in terms of either the preservation of health or the avoidance of educationally intolerable disruption. (Explicitly disallowing good taste as an acceptable goal should have the effect—and it would be a meaningless step if it did not—of making courts police strictly the notion of disruption, *cf.* Tinker v. Des Moines School District, 393 U.S. 503, 508-09 (1969), permitting the proscription only of aberrations on the order of nudity and the wearing of masks.)

for authority¹¹⁷—the inculcation of good taste is widely recognized as one of the acceptable goals of school apparel regulation.

It is conceivable that a crazed school official would be moved to promulgate an apparel regulation at such distance from standards accepted in any community—a requirement that all students wear bathrobes to school—that a court would regard it as relatable to no sane definition of good taste and void it, somewhat inexactly, as “irrational,” or perhaps as an “abuse of discretion.”¹¹⁸ But regulations of this sort are politically unimaginable and certainly would not survive long enough to get to court.¹¹⁹ Those which will—decisions to ban mustaches but not sideburns, or to permit skirts to end three but not four inches above the knee—do not lend themselves to rational evaluation in terms of their relation to the goal of promoting good taste. So long as that is credited as an acceptable goal, dress code choices must be treated as discretionary: an across-the-board demand for a rational choice/goal relationship would be inapposite.

The discretion granted police and prosecutors with respect to law enforcement choices customarily is justified by noting that law enforcement resources are limited.¹²⁰ This is undoubtedly true, but irrelevant; the fact that a choice must be made does not mean it need not be defended.¹²¹ Were the sole acceptable goal of law enforcement the overall reduction of activity which the legislature has defined as criminal, we might sensibly be able to impose the demand for a rational defense of

117. See generally Note, *A Re-evaluation of School Appearance Regulations: Is Free Choice in Grooming Accorded Constitutional Protection?*, 15 S. DAK. L. REV. 94 (1970), and cases cited.

118. Professor Bickel has called judgments on this order “counter-rational, the product of sheer unreasoned will and emotion.” A. BICKEL, *supra* note 30, at 226. The test applied in such a situation, were one ever to get to court, would be akin to the “totally without redeeming social importance” standard applied in obscenity cases, which means, I gather, that First Amendment protection will be accorded if anyone in possession of his faculties sees social importance in the work in issue. (By drawing the analogy, I do not mean to suggest that such a test is appropriate in First Amendment areas: having the Court decide what possesses social importance discomforts me even more than having them decide what is erotic. Whether one should be discomforted by a similar “off the screen” test in non-First Amendment contexts is a question of, at most, theoretical interest—since bathrobe requirements will not survive long enough to get to court. Compare note 130 *infra*.)

119. Where the class of acceptable goals contains no “discretionary” goal, however, choices relatable to no acceptable goal, while rare, are certainly politically imaginable. See pp. 1225-27. The disadvantageous distinction model is a meaningful safeguard in such situations; where one goal is “discretionary,” however, an alternative model of review must be found.

120. See, e.g., *Harvard Developments*, *supra* note 50, at 1128.

121. I am here discussing differential enforcement of a single statute. If different statutes are involved, and the charge is that police and prosecutors are enforcing one but not the other, the situation—so far as the Federal Constitution is concerned, *cf.* p. 1286—is equivalent to a legislative decision to make the one act but not the other a crime, and the disadvantageous distinction model would be inapplicable for similar reasons. See pp. 1246-48.

every decision to proceed against one individual rather than another.¹²² To be sure, many factors bear on the extent to which the prosecution of a man will reduce crime—centrally, the chances of convicting him, but beyond that the likely deterrent impact of his conviction, the probability of his being rehabilitated by the correctional process, and the likelihood of his committing further crimes if he is not incarcerated. But these factors—like those which bear on the likelihood of increasing traffic safety by a given regulation—involve factual predictions, not value judgments. Perhaps, therefore, a defense—rationally geared to the overall reduction of criminal activity—should be required whenever one man is prosecuted while others are not.¹²³

One objection to such an imposition of the disadvantageous distinction model is that given our limited understanding of dangerousness, deterrence and rehabilitation, courts would probably accept any explanation, no matter how speculative, of how the defendant's prosecution will reduce the incidence of criminal activity more than the prosecution of another would.¹²⁴ A universal call for justification, it might plausibly be asserted, would lead only to universal validation. A more fundamental answer to the suggested imposition of the disadvantageous distinction model, however, is that the overall reduction of criminal activity is not the only acceptable goal of law enforcement. Retribution has not been eliminated as a permissible end of the criminal law. And while we might prefer "retributive" distinctions to be made at the legislative level, in fact they often are not,¹²⁵ and it is seldom the busi-

122. Selective enforcement obviously may be just or unjust, depending on how the selections are made. Theoretically possible is a system of enforcement in only a fraction of the cases in which enforcement would be [statutorily] appropriate, with discretionary selections made in such a way that all the cases prosecuted are more deserving of prosecution than any of the cases not prosecuted.

K. DAVIS, *supra* note 107, at 167. I do not understand Professor Davis to be making a constitutional argument, however.

123. The application of the disadvantageous distinction model here would carry consequences the Court might hesitate to accept; if decisions to arrest and prosecute were reviewable *ab initio* under the Fourteenth Amendment, it would be difficult logically to insulate police deployment decisions, plea bargains and sentences. This is not, however, a compelling parade of horrors. Indeed, sentencing would be a good place to start. See *United States v. Wiley*, 267 F.2d 453 (7th Cir. 1959), 278 F.2d 500 (1960). Another argument which should be given little heed is that the imposition of the disadvantageous distinction model would compel the identification of, and thereby endanger, government informants. Here, as elsewhere, the government could be put to the choice of revealing its informant or dropping the case. See *Roviaro v. United States*, 353 U.S. 53 (1957); *cf. United States v. Reynolds*, 345 U.S. 1 (1953).

124. This probability is compounded by the fact that law enforcement officials, who obviously will not want their judgment overturned, will be in practically exclusive control of the data bearing on the various relevant factors. One small fact omitted or overstressed, and the government's burden, which would be negligible to begin with, will have been carried. (Every time I argued a bail reduction motion, I was surprised to learn what a big operator my client was. For a public defender I had quite an impressive practice.)

125. Whether to seek the death penalty is a decision frequently made by local prose-

ness of the federal judiciary to tell states how to organize their separation of powers.¹²⁶ That one individual is more "deserving of punishment" than another, however, is a judgment which is manifestly not susceptible to evaluation as "rational" or "irrational." So long as retribution remains an acceptable goal of law enforcement, an across-the-board demand that every choice be rationally related to an acceptable goal cannot sensibly be imposed.

The curriculum planning situation is similar. Surely one acceptable goal of such planning is the omission of subjects schools lack the facilities to present. Thus a school might decide not to offer a laboratory science on the ground that it simply lacks the money to supply the needed laboratory, or Greek might be omitted because no qualified teacher can be found. But most curriculum choices are made on no such basis. A school day's time is limited, and subjects which could quite feasibly be taught must be omitted; not all languages or sciences—or even poets, battles or scientific theories—can be included. Such choices take their shape from, and can be evaluated only in light of, one's definition of another—and obviously the central—acceptable goal of curriculum planning, the development of the well-educated child, the fulfilled citizen. "The problem for which education is the corrective is the very humanity of the beneficiaries of the legislation."¹²⁷ The relation between a goal thus defined and various curriculum choices is not amenable to judicial evaluation as rational or irrational,¹²⁸ however, and here too choices must be treated as discretionary. If such choices are to be checked, an alternative to the disadvantageous distinction model's universal demand for rational relation to the effectuation of an acceptable goal must be found.

cutors; and police will often release a culprit on the basis of a judgment that he is a "good kid" who simply made a mistake.

126. *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902). Specific safeguards with separation of powers overtones may on occasion justify federal judicial attention to who in the state government is doing what job. See, e.g., Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 320 (1962); Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 308 (1965); cf. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (identity of actor as it affects First Amendment balance). But as a generalization the *Dreyer* principle still stands.

127. Coons, Clune & Sugarman, *supra* note 55, at 336. "The evil is unfulfilled potential; in a sense the evil is evil." *Id.*

128. On one level, what appear to be rational defenses are available here. A choice of Greek over Russian can be defended in terms of the goal of developing an appreciation for the classics, and so forth. That courts correctly call for no "rational" defense on this level, but rather view the goal as the development of the fulfilled citizen, and therefore treat choices as nonrational or "discretionary," should be demonstrated by the ensuing subsection, where the equivalence between an infinitely expandable set of subgoals—one to defend every conceivable choice—and one umbrella "discretionary" goal is suggested.

3. *One Umbrella "Discretionary" Goal: The Roving Commission to Promote the General Welfare*

Less obvious are the reasons which render the disadvantageous distinction model inapplicable to legislative decisions to encourage a particular occupation or activity by the creation of taxing or spending discrepancies¹²⁹ and decisions to punish one crime more severely than another (or to make one act rather than another a crime in the first place). Of course such choices will ultimately take their direction from the decision maker's definition of the general welfare. But what appear, on one level at any rate, to be "rational" defenses can be mounted in support of such choices. Thus giving a tax break to oilmen but not to artists can be justified in terms of the promotion of industry. "Encouraging oil production promotes industry to a greater extent than encouraging artists" appears to be rational in the same sense as "Requiring brakes on heavy trucks promotes safety to a greater extent than requiring them on light trucks." Of course the choice of oilmen over artists involves a choice of the goal of promoting industry over the goal of promoting the arts, but there is nothing in the ordinary demand for a rational choice/goal relation which limits the discretion of the political branches to choose one goal over another when they conflict. The requirement is simply that the choice be rationally relatable to *some* acceptable goal. And is it not clear that this choice is thus relatable—the goal being the promotion of industry? By a similar process, a decision to punish burglary more harshly than battery could be defended in terms of its promotion of the goal of protecting property.

But of course *any* politically imaginable¹³⁰ decision to encourage one

129. If the government bore an obligation to justify all taxation distinctions in terms of ability to pay, the disadvantageous distinction model would obviously be applicable. But the Court has indicated many times that this is not its position, that discrepancies in tax treatment can properly be employed to encourage or discourage certain occupations or activities. Its refusal to require that all tax distinctions be defended in terms of taxing those best able to pay seems virtually unavoidable. First, especially high taxes must surely sometimes be sustainable in terms of the receipt of atypical benefits. Second, in some circumstances it can plausibly be asserted that the economy as a whole, and therefore each member of it, will benefit from easing the tax load of those *best* able to pay. Finally, it is impossible to argue that spending programs must be geared to financial need only, that government monies cannot be expended to encourage or discourage certain behavior. But taxing and spending are sides of the same coin: what could be the point in denying the government power to give farmers a tax break worth \$1000 if they can be given a \$1000 subsidy? Of course "We want to help our good friends, the oilmen" is always translatable into "We want to foster oil production." But to this, the Court seems to have realized, there is really no answer; to permit taxation provisions to be manipulated to control behavior is inevitably to set aside the tax code as an enclave where political payoffs are possible.

130. Once again value choices so far out that the Court would invalidate them as abuses of discretion can be imagined: a desire to promote the bubonic plague, or to protect small sums of money more strenuously than large sums (by punishing petty lar-

occupation or activity more than another, or to punish one act more harshly than another, is defensible in just such terms—a realization that should raise questions about the aptness of our model of review. A decision to aid artists rather than oilmen is defensible in terms of promoting the arts; punishing battery more harshly than burglary is defensible in terms of the safeguarding of physical security. And so is any such choice thus defensible, because courts are prepared to credit as acceptable any goal the political branches view as contributing to the general welfare. Thus each choice will import its own goal, each goal will count as acceptable, and the requirement of a “rational” choice-goal relation will be satisfied by the very making of the choice.

There are two ways courts could react to this realization. They could proceed as if the disadvantageous distinction model is applicable here as elsewhere, and purport to require of all choices a rational relation to the effectuation of some acceptable goal. Whenever a litigant chose to squander his funds by challenging a tax break for an occupation other than his own, the government would be required to come in and recite, for example, that encouraging oil production more strenuously than the arts is defensible in terms of the promotion of industry, and the legislature is surely entitled to regard as in the national interest. The choice would duly be upheld on the ground that the government had carried its burden of rationally relating the choice to an acceptable goal. A tax break for artists rather than oilmen would be upheld by a similar process. Doubtless some courts in some cases have required just this sort of charade; in light of the overbreadth with which it frequently is asserted that all governmental distinctions must be rationally defended, it would be surprising if they had not.

The more common judicial reaction, however, is to refuse even to go through the motions of requiring this kind of “rational” defense, by labeling the choice discretionary. This approach signals a recognition that a purported application of the disadvantageous distinction model here involves no evaluation—no judicial review—since each choice will import its own acceptable goal. As the class of acceptable goals limiting an area of choice expands from a comparative few to a substantial number, the requirement that every choice be rationally connected to the effectuation of an acceptable goal obviously becomes less of a restriction. But the demand remains intelligible—evaluation

cerny more severely than grand larceny) is relatable to no sane view of the general welfare, and courts would deal with it accordingly. *See* p. 1243. But such choices would not last long enough to get to court. With respect to those which would, the disadvantageous distinction model is useless; it is not an instrument of judicial review.

can take place—so long as the class of acceptable goals remains finite (and the goals remain relatively precise). *When, however—because the courts stand ready to credit as acceptable any goal the political branches regard as conducive to the general welfare—the class of acceptable (sub)goals is infinitely expandable at the discretion of the political branches, a requirement of a rational choice/goal relation for every choice is no demand at all.* An infinitely expandable “set” of acceptable subgoals, one to fit every choice the political branches will make, is more realistically and economically viewed as one umbrella goal, the promotion of the general welfare. And when the goal is thus defined—as courts do in effect define it, by labeling the choices discretionary—the inappositeness of a “rationality-irrationality” brand of review becomes clear. The general welfare is the goal courts are ultimately prepared to credit as acceptable in these contexts. In labeling the choices discretionary, they signal their appreciation that the relation between such a goal and various choices is not amenable to evaluation in terms of rationality.¹³¹

As I indicated above, the principles by which the Court decides whether or not to limit the acceptable goals of an area of choice to something more limited and precise than the promotion of the good society are less than clear.¹³² Hopefully in time the step of goal definition will come to be recognized as a crucial step in the review of any choice, and a process of reasoning will be undertaken and exposed to view. But whatever the reasons, unless a regulatory context is limited to

131. The quicksand one is bound to get into by purporting to demand a rational relation between various choices and the promotion of the general welfare is exemplified by the following passage:

Certain choices as to the functioning of the economy must be made. When one industry is favored over another, there seems to be a presumption that promoting the favored industry works in some fashion to advance the general welfare. Since designating one industry as more worthy than another does no great violence to egalitarian ideals, this reasoning is easy to accept.

Harvard Developments, supra note 50, at 1081.

A better track is momentarily suggested by Professor Bickel:

Of course, to want to foster farming, or Times Square displays, or small business, or the oil industry—always at some social cost, at the expense of some other desirable end—is not a rational choice in the sense that reason compels it. It is a choice, and perhaps it would be as well to call it arational.

A. BICKEL, *supra* note 30, at 226. Unfortunately Professor Bickel does not distinguish for purposes of equal protection analysis the rational and the arational.

See also Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 308 (1965):

The only criteria for choice [in designating penalties] are public needs and moral sensibility, which are normally evaluated by the legislature. The judiciary is expected to veto punishments which offend its sense of civilization [footnote referring to cruel and unusual punishment clause.] but has no mandate to make routine political compromises.

Cf. *Powell v. Texas*, 392 U.S. 514, 531 (1968) (plurality opinion of Marshall, J.).

132. Pp. 1224-1228.

something less than a roving commission to promote the general welfare, the disadvantageous distinction model of review is necessarily inapposite. The demand for a legitimate defense cannot be triggered simply because a choice has been made and someone has been unusually disadvantaged thereby. Judicial review, if there is to be judicial review, must find some other basis.

VI. The Possible Alternative Models of Review

That a choice can be made without automatically incurring an obligation rationally to relate it to an acceptable goal cannot, and does not, mean that there are no constitutional restraints upon the choice. The Court would obviously invalidate a law limiting income tax exemptions for children to the children of Caucasians (or Republicans or Protestants). The question, and it is not as simple as it seems, is why such an exemption would be unconstitutional. If such provisions were subject to the disadvantageous distinction model of review, the answer would be easy. A distinction which disadvantages some persons relative to others has obviously been drawn, and no legitimate defense of the distinction can be postulated, for the only goals to which it can be rationally related are constitutionally impermissible. But courts have recognized that it is senseless to hold decisions to encourage or discourage various sorts of activity by taxing or spending distinctions up to a requirement of rational connection with an acceptable goal and that, therefore, the disadvantageous distinction model as a whole is useless in such contexts.¹³³ The offensiveness of the classification must therefore be taken account of by some mode of review other than an *ab initio* demand for a legitimate defense.

By hypothesis the law on its face distinguishes in terms of race, and that undoubtedly would be all the Court would point to. But explicit racial terminology cannot be the *sine qua non* of unconstitutionality;¹³⁴

133. Pp. 1236-37.

134. I do not mean to suggest that the statutory language can never be determinative. If, for example, a legislature wanted to keep illiterates from voting, and—out of genuine though monumentally stupid considerations of administrative convenience—decided that “Negroes” constituted an appropriate shorthand for the class of persons it wanted to exclude, the Court would swiftly and properly void the law because its *terms* were woefully overinclusive and underinclusive with respect to the acceptable goal of disenfranchising illiterates. Indeed, this approach, which has obvious connections with the Court’s theories of attainder and overbreadth, seems to me to begin to suggest the most sensible meaning which can be attached to the Court’s evolving notion of “suspect classification.”

Thus even where there is no suspicion of illicit motivation, the terms in which a law is drafted can serve to invalidate it because they do not fit any acceptable goal with sufficient precision. The suggestion of the text is that where the objection is one which

a law granting the exemption to "the children of Asger H. Aaboe, Jer-rit Aardewerk, . . . [listing the names of all Caucasians and no one else]" would be just as obviously unconstitutional. Nor would the infirmity be cured by sprinkling into such a list the names of a few non-Caucasians. The law's susceptibility to judicial review must therefore rest on either the fact that its *impact* is to treat white persons better than others, or the fact that it was enacted with the *motivation* of distinguishing on the basis of race.

Similarly, the realization that in bounding a city the state must of necessity distinguish between persons who differ in no relevant way—and the consequent suspension of the disadvantageous distinction model—cannot mean that a state may constitutionally redraw the boundaries of a city so as to exclude all but a handful of the 400 Negro voters previously resident therein but not a single white voter. Patently, the state by such an act has violated its constitutional obligation to be neutral as among the races. Neutrality is an elusive command, however, and there are two ways the Court might go about policing it. It might intervene whenever a districting statute or other law *in fact* operates substantially to treat persons of one race differently from others. The *O'Brien* Court, struggling to establish the irrelevance of motivation to constitutional questions, sought to explain *Gomillion* on such a theory.

O'Brien's position, and to some extent that of the court below, rests upon a misunderstanding of . . . *Gomillion v. Lightfoot* [*Gomillion* stands] not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. . . . [T]he Court sustained a complaint which, if true, established that the "inevitable effect" . . . of the redrawing of municipal boundaries was to deprive petitioners of their right to vote for no reason other than that they were Negro. . . . [T]he purpose of the legislation was irrelevant, because the inevitable effect—the "necessary scope and operation" . . . abridged constitutional rights.¹³⁵

Or the Court might enforce the command of neutrality by intervening only when it is clear, as it was in *Gomillion*, that the legislators in-

asserts—in a situation where the disadvantageous distinction model is inapplicable—not that the legislature has misfired at a proper target, but rather that it has fired at an improper target, only motivation (and not the law's terms or its impact, though each can constitute strong evidence of motivation) must trigger review.

135. *United States v. O'Brien*, 391 U.S. 367, 384-85 (1968). Cf. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

tended to distinguish on the basis of race. This is the approach suggested, albeit opaquely, by the *Gomillion* opinion itself,¹³⁶ and unmistakably embraced in a case not cited in *O'Brien—Wright v. Rockefeller*,¹³⁷ a 1964 decision rejecting a charge of racial gerrymander made in connection with certain New York City congressional districts.

To ask whether unconstitutional motivation or disproportionate impact should trigger judicial review in situations where the disadvantageous distinction model is inapplicable is, however, to request a description of only half the process of review. The requisite unconstitutional motivation or disproportionate impact might function (as the simple fact of disadvantageous distinction functions where the ordinary model is applicable) simply to trigger a demand for the production of a legitimately defensible difference—that is, a difference which is rationally relatable to some goal which in context counts as acceptable, or if the comparative benefit whose distribution has been limited is “fundamental,” a difference relatable to such a goal in “compelling”

136. Prior to *O'Brien*, the *Gomillion* opinion had, so far as I am aware, universally been read to depend upon the conclusion that the Alabama legislature had been motivated by racial considerations. But when it is reread in light of *O'Brien*, the focus blurs, and one gets the feeling that Justice Frankfurter, who wrote the *Gomillion* opinion, must have shared some of *O'Brien's* unease about the relevance of motivation. (*But see United States v. Kahriger*, 345 U.S. 22, 37 (1953) (Frankfurter, J., dissenting).) “Acts generally lawful may become unlawful when done to accomplish an unlawful end,” is not an unambiguous reference to motivation. Nor is the following:

These allegations, if proven [the District Court had dismissed the complaint] would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is *solely concerned with* segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

364 U.S. at 341 (emphasis added). Traces of this ambivalence are found in Professor Bickel's discussion as well. Compare A. BICKEL, *supra* note 30, at 209, defining “purpose” as “the name given to the Court's objective assessment of the effect of a statute,” *with id.* at 211, discussing *Gomillion*:

Fanciful suggestions might have been possible, and they might have included whim; but they would all have been disingenuous on their face given the meticulous care with which, running the line house-by-house, the legislature succeeded in not eliminating a single previous white resident of Tuskegee from the new city limits. Had the job been less meticulously done, or had the object of the legislature's discrimination been less readily observable than is the distinction of color, the case might have been different . . .

The ambivalence is understandable, for *Gomillion* is a case about which it is practically impossible not to be of two minds. On the one hand stand *O'Brien's* arguments against reference to motivation; but on the other there remains the inevitable conviction that the *Gomillion* statute just has to be unconstitutional, and the impossibility of coming up with anything other than a motivation analysis which can satisfactorily explain it.

Equally ambiguous, of course, is Chief Justice Marshall's famous “pretext” passage: Should Congress . . . under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

137. 376 U.S. 52 (1964).

terms. Or it might trigger some extraordinary burden of justification, some defense stronger than that which would be required were the disadvantageous distinction model applicable and the demand for a legitimate defense therefore operative *ab initio*. (This possibility, in other words, would treat the triggering demonstration—be it racial motivation or disproportionate racial impact—as the equivalent of an explicitly racial classification: “suspect” and therefore requiring a defense more compelling than would otherwise be required.) The third possibility is that the triggering demonstration—be it impact or motivation—should simply invalidate the challenged distinction.

Gomillion can be used to demonstrate the range of possible theories. The impact of the statute there invalidated was grossly disproportionate racially.¹³⁸ Moreover, the disproportionate impact, coupled with the strange shape of the new city, established beyond doubt that the Alabama legislature had employed race as a criterion of selection. The matter is further complicated by the realization that there existed no legitimately defensible difference which could justify the distinctions drawn by the statute, and *a fortiori* the distinctions could not be justified in terms of any more stringent demand for a “compelling” defense. There are, therefore, six possible theories on which *Gomillion* might be explained.

1. A racially disproportionate impact (of some as yet undefined intensity), intended or not, invalidates a districting statute.
2. A racially disproportionate impact, intended or not, triggers a judicial demand for an unusually compelling defense of the distinctions drawn.
3. A racially disproportionate impact, intended or not, triggers the ordinary demand for a legitimately defensible difference to support the distinctions.
4. Proof of the intentional employment of race as a criterion of selection invalidates a districting statute.¹³⁹

138. It did not, it is true, fence all Negroes out and all white persons in. Four or five Negro voters, and perhaps some Negro non-voters, were left inside. 364 U.S. at 341. And we are not told how many white persons previously living near but not in Tuskegee were left outside. But the law, to put it mildly, excluded many more Negroes than white persons.

139. If an illegitimate motivation has gone completely unfulfilled—if, in the districting situation, an inept legislature, try as it may to discriminate against Negroes, somehow ends up with racially proportional districts—no one would have standing to complain. The practical ramifications of this realization are minimal. It is unlikely that anyone *would* complain in such a situation. Deterrent impact will not be diminished by a realization on the part of other potential districters that totally bungled attempts at racial discrimination will go uncorrected. And most importantly, unless there is a substantially disproportionate impact, the motivation will likely not be demonstrable.

5. Proof of the intentional employment of race as a criterion of selection triggers a demand for an unusually compelling defense of the distinctions drawn.
6. Proof of the intentional employment of race as a criterion of selection triggers the ordinary demand for a legitimately defensible difference to support the distinctions.

Section VII of this article will consider whether—when the disadvantageous distinction model is inapplicable—a disproportionate impact should (as theories 1 through 3 suggest) trigger judicial review, or whether such review should (as theories 4 through 6 suggest) await a showing of the intentional use of a forbidden criterion of selection. Where the class of persons allegedly disadvantaged by the distinction in issue is one whose intentional favoring or other accommodation the Court is willing to compel, reference to motivation is out of order. Where, however, the claim is that the distinction in issue has disadvantaged the members of one *racial* group, the controlling considerations are quite different. For the Court, for reasons we shall explore, has demonstrated a resolution not to compel government officials making various decisions to take into account the races of those likely to be affected. So long as it remains convinced of the wisdom of withholding such an order, judicial intervention must await proof of racial motivation.

Section VIII will take up the second half of the process of review and discuss whether a demonstration of racial or other unconstitutional motivation should automatically invalidate the distinction in issue, trigger some extraordinary demand, or “simply” instate the ordinary demand for a legitimately defensible difference. The third alternative (and therefore theory 6 for racial discrimination cases) is implied by the considerations which compel us to substitute motivation for simple disadvantageous distinction as the demonstration which triggers judicial review. By reconsidering the three concerns of *O’Brien* in light of the conclusion that proof of motivation should function only to instate the ordinary demands of the Constitution in contexts where they otherwise would be inapplicable, we shall see that limiting motivation to the burden-triggering role implied by the factors which sup-

The question whether an illicit motivation unaccompanied by any disproportionate impact ought to trigger judicial intervention is therefore of theoretical interest only. But the theoretical answer is that intervention is justified on the basis of proof of illicit motivation accompanied by only that quantum of impact it takes to vest standing. *Cf.* Pollak, *Forward: Public Prayers in Public Schools*, 77 HARV. L. REV. 62, 67 (1963).

port its cognizability drains the anti-motivation case of essentially all its force.

The remainder of the article will demonstrate that so to limit the relevance of unconstitutional motivation is by no means to render it insignificant; there are broad areas of constitutional adjudication in which motivation can importantly function without implicating the concerns which troubled the *O'Brien* Court.

VII. When the Disadvantageous Distinction Model is Inapplicable, What Should Trigger Judicial Review—Impact or Motivation?

Disproportionate racial impact is usually the best evidence that race has been employed as the criterion of selection. This frequent conjunction between impact and motivation is doubtless one reason courts generally, like the Court in *Gomillion*, have failed to indicate clearly which factor triggers the judicial response. The choice between the two is of more than theoretical interest, however. There are laws which fall most heavily on one racial group from which it would be difficult to infer racial motivation;¹⁴⁰ in such situations the question whether impact or motivation triggers judicial review is obviously crucial. Moreover, the decision makers' statements of intention, the law's terms, and the historical context in which it was passed—while they can on occasion constitute persuasive evidence of motivation—would constitute irrelevant referents were an impact model to control. Finally, there is on a motivation theory the possibility that the inference of motivation which arises from the statistical impact can be rebutted. It is difficult of course to imagine that anything could have served as a rebuttal in *Gomillion*. Given the delicacy with which the new line wove its way through the old city, it would have taken authenticated motion pictures of the coins being flipped or the computer running amok; surely no amount of legislative history, no matter how carefully doctored, could have served.¹⁴¹ But the statistics are not always so overwhelming,¹⁴² and convincing proof that the selection was in fact made at random would, on a motivation but not an impact theory, serve as a rebuttal.

140. See Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 Nw. U.L. Rev. 157, 177 (1963). Consider also tax breaks for farmers and oilmen, sales taxes, graduated income taxes, literacy tests, and perhaps certain criminal statutes in certain communities.

141. Cf. *Poindexter v. Louisiana Financial Assistance Comm'n*, 296 F. Supp. 686 (E.D. La. 1968).

142. See pp. 1264-65,

A. *Affirmative Duties of Accommodation*

Where a regulation is challenged on the ground that it impermissibly disadvantages a group whose interests the Court is willing to compel government officials to go out of their way to protect, there can be no occasion to refer to the officials' motivation. In such situations the Court need only ask whether the group's interests have been disadvantaged to an intolerable extent and, if they have, order the state to eliminate the disadvantage it should have taken pains to avoid in the first place.

Such an affirmative duty of accommodation has been developed in the recent spate of "equal protection-poverty" cases.¹⁴³ The Court has determined that there are some disadvantages which the state simply cannot visit upon poor people, even if it takes a deviation from some broader policy in no sense designed to injure the poor to avoid doing so. The state is expected to consider the likelihood of its laws' unusually disadvantaging the poor in certain ways and, if necessary, to take intentional steps to avoid their doing so. Thus, when a law is challenged on the ground that it impermissibly disadvantages the poor, the Court has no occasion to refer to the motivation which produced it. It need only inquire whether the law has in fact unusually disadvantaged the poor to an extent under the circumstances impermissible and, if it has, order the state to take the steps necessary to eliminate the disadvantage.

B. *The Duty to be Neutral with Respect to Race: An Affirmative Duty to Seek a "Balanced" Impact, or a Duty Not to Use Race as a Criterion of Selection?*

A number of commentators have asserted that government officials may, if they wish, go out of their way to favor the members of minority races without violating the Constitution.¹⁴⁴ But none of whom I am aware, and certainly not the Court, has argued that such favoritism is constitutionally required: the Fourteenth Amendment is read only to require "neutrality" toward such groups. The difficult question is what neutrality ought to mean in this context. The guarantee of "the equal protection of the laws" might be construed to require that laws

143. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956). See generally Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

144. See, e.g., Freund, *Constitutional Dilemmas*, 45 B.U.L. REV. 13, 20 (1965); Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 675 (1970). But cf. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 367-88 (1966).

shall not in fact disproportionately disadvantage racial minorities; or it might mean simply that race shall not be employed as a criterion of selection for benefit or deprivation. On the choice between these propositions turns the relevance of governmental motivation to problems of racial discrimination. If the achievement of a racially "balanced" impact is affirmatively required, the Court need not inquire into the motivation with which a given selection was made or a given law passed; a simple look at the statistics will determine whether invalidation, or a demand for justification, is in order.

Of course, the suggestion that a showing of disproportionate racial impact, whether intended or not, should trigger judicial review has extremely far-reaching implications. There are many towns and voting districts throughout the United States whose residents are predominantly or exclusively white (not to mention those whose residents are largely Protestant, Catholic, conservative, Republican or Democratic¹⁴⁵), and a number of them are abutted by largely Negro (or whatever) communities. The implications for laws which concern subjects other than districting are probably even more far-reaching.¹⁴⁶

One who favors an impact approach might, by way of partial though far from total avoidance of such implications, assert that invalidation or review should not be triggered by just any disproportionate impact, but only a substantial one. In response to this, one is surely entitled to ask "disproportionate as compared to what"—the racial distribution in the nation, the state, or the surrounding area, however that might be defined? And assuming that question can be answered, how disproportionate is disproportionate enough?¹⁴⁷

However, the observation that a constitutional doctrine will have far-reaching implications cannot count as a refutation; whatever else we may or may not know about the adoption of the Fourteenth Amendment, it plainly was intended to make a difference. The fact that no standards push themselves forward for determining the degree of disproportion which should be required to trigger intervention cannot be a determinative answer either. Were the Court to conclude that an affirmative requirement of "balanced" impact would best serve the values underlying the guarantee of equal protection, the chain of reasoning by which that conclusion was established presumably would suggest guidelines which could be given specific content on a case by case basis.

145. See p. 1233.

146. See note 140 *supra*.

147. Cf. Kaplan, *supra* note 140, at 180-82.

Courts have proceeded thus in other legal contexts; there is no reason to think they could not do so here. There are, however, more fundamental reasons why the Court has been unwilling to find in the Fourteenth Amendment an affirmative command of racial balance. Since the case for imposing such an affirmative duty can be made most strongly with respect to jury selection, it is in that context that I shall explore the reasons underlying the Court's hesitation to do so.

The disadvantageous distinction model is inapplicable to choices made in jury selection because we realize that the state inevitably will have to distinguish among persons who are indistinguishable in terms of the characteristics relevant to an ability to hear and decide cases. That realization does not, however, answer one way or another the question whether states should be affirmatively obligated to include on each panel a percentage of minority group members equivalent to the percentage of the entire population they constitute.¹⁴⁸ And if the imposition of such an affirmative obligation is ever appropriate, it surely is appropriate in the jury selection context. The harm which accrues to a litigant from the underrepresentation of his race on the jury which sits in judgment on him is exactly the same whether the underrepresentation was achieved intentionally or unintentionally.¹⁴⁹ No argument can be made, as it can in the districting situation, that a degree of racial imbalance serves a desirable political function. And a standard for policing the obligation to seek a balance readily suggests itself: the state could be obligated to make the racial composition of the panel conform as closely as possible to the most recent census figures for the area from which the jury is drawn.

Yet no member of the Court has ever suggested imposing such an obligation in the jury context. As Mr. Justice Douglas observed last term:

We have often said that no jury need represent proportionally a cross-section of the community. . . . Jury selection is largely by chance; and no matter the race of the defendant, he bears the risk

148. The disadvantageous distinction model will be inapplicable even if a quota system is substituted for random selection. Even if each panel is made, say, 12% Negro, there still will be no difference which distinguishes those Negroes who are on the panel from those who are not, those white persons on the panel from those who are not, or the total class of persons on the panel from the class excluded.

149. There has been dispute in the literature over whether Negro children suffer harm of the sort described in *Brown* (but cf. note 265 *infra*) when racial separation results from factors other than the obvious design of the white majority. But the harm accruing to a Negro defendant surely is the same regardless of whether the underrepresentation of Negroes on the jury which tries him was achieved intentionally or unintentionally. See Note, *The Case for Black Juries*, 79 YALE L.J. 531, 538 (1970).

that no racial component, presumably favorable to him, will appear on the jury that tries him. The law only requires that the panel not be purposefully unrepresentative.¹⁵⁰

Indeed, the Court has gone further, and has indicated that it would be constitutionally *impermissible* for a state intentionally to achieve a racial cross-section.¹⁵¹

The reasons thought to support this prohibition were stated in 1950 in *Cassell v. Texas*:

Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no discrimination because of color, proportional limitation is not permissible.¹⁵²

The Court's first point is that perfect proportionality would be impossible to achieve. And indeed it would. The state's duty of neutrality in the jury selection context must, as the Court indicates by mentioning nationality, extend beyond race—certainly to religion and politics, indeed, to any factor which is irrelevant to one's ability to observe the proceedings and draw inferences therefrom but nonetheless likely to affect his sympathy with one side or the other.¹⁵³ Such factors are too numerous, and they overlap in too many combinations, to permit perfectly proportional representation. But this is not a sufficient objection. Although a purposefully proportional method of jury selection would not work perfectly, there is every reason to think that in the long run it could do at least as good a job as random selection in achieving a cross-section.¹⁵⁴ And on a day-to-day basis, which is what matters to individual defendants, it would certainly do a better job.

The Court's second objection to a purposefully proportional system of selection—although simplistically stated—is more telling. It is that race is simply not something jury commissioners should be allowed to take into account in making their selections, even for the purpose of achieving racial balance. This objection rests in the main on two con-

150. *Carter v. Jury Comm'n of Greene County*, 90 S. Ct. 518, 530-31 (1970) (Douglas, J., dissenting in part).

151. *See Swain v. Alabama*, 380 U.S. 202, 208 (1965).

152. 339 U.S. 282, 286-87 (plurality opinion of Reed, J.).

153. Sex and educational background should be included. *But cf. Hoyt v. Florida*, 368 U.S. 57 (1961), and *Fay v. New York*, 332 U.S. 261 (1947).

154. In a districting situation, selection without regard to personal characteristics is even *less* likely to produce a cross-section, since persons of similar races, etc., often live in the same areas.

siderations.¹⁵⁵ The first is the difficulty of constructing a system of review capable of ensuring that the consideration of race and other personal characteristics is not turned to improper ends. If, for example, the jury commissioner can take into account the fact that a prospective juror is a Negro, it might be hard to prevent him from taking into account the fact that he is a militant Negro. Moreover, if consideration of race (or religion or politics) is permitted in the jury context, it would be difficult logically to bar its consideration in numerous other contexts where the problems of control might be even more aggravated.¹⁵⁶ Perhaps the safest long-run course is to demand that officials be entirely "colorblind," no matter how neutral or benevolent they claim they wish to be.¹⁵⁷ The second consideration is that the government's intentional and explicit use of race as a criterion of choice is bound—no matter how careful the explanation that this is a "good" use of race—to weaken the educative force of its concurrent instruction that a man is to be judged as a man, that his race has nothing to do with his merit. Citizens, thus besieged by what will understandably be taken to represent two conflicting government-endorsed principles, are likely to listen to the voice they wish to hear.¹⁵⁸

Although the Court has quoted the passage from *Cassell*¹⁵⁹ with approval as recently as 1965,¹⁶⁰ it is difficult to believe—in light of the widespread undertaking and judicial legitimation of affirmative attempts to achieve racial balance in public schools¹⁶¹—that it represents its last word, or necessarily even its present thinking,¹⁶² on the *permissibility* of such attempts in the jury context. But one thing does seem quite clear: the Court is a long way from *requiring* states to seek a racial balance by taking race into account. And this, indeed, would be a significantly different matter. The difficulty of designing a selection system capable of ensuring proportional representation is properly taken into account at this level. If a state wishes to take on the task and does it tolerably well, that is one thing. It would be quite another

155. Requiring proportional representation might also involve courts in the difficult and unpleasant business of litigating a person's race. See Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387, 1420-22 (1962); Kaplan, *supra* note 140, at 180-81 (the problem "has caused a great deal of litigation in the South").

156. Bittker, *supra* note 155, at 1410-15; Kaplan, *supra* note 140, at 186-87.

157. See Kaplan, *supra* note 144, at 382-83; Kaplan, *supra* note 140, at 188, 207; Bittker, *supra* note 155.

158. Kaplan, *supra* note 144, at 379-80.

159. P. 1258.

160. Note 151 *supra*.

161. Note 255 *infra*.

162. See *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1966).

for the Court to *order* the performance of a difficult task where an apparently acceptable alternative (random selection) exists. The difficulty of ensuring effective judicial surveillance of governmental consideration of race would, moreover, obviously be compounded were the Court to insist upon such consideration. And since the Supreme Court is preeminently entrusted with the care of the nation's principles, it most of all should hesitate to issue a pronouncement which can be read to mean that Negroes are different from white persons. The success of the Court's work always depends in large part on the moral clarity and force of its pronouncements: the success of its greatest work to date may depend in particular upon acceptance of the proposition that a man's race is an irrelevance. Colorblindness may in time turn out, here as elsewhere, to be a less than absolute constitutional command. But for the foreseeable future it is constitutionally satisfactory.

So long as the Court remains unwilling to order states to take race into account in selecting their jury panels, judicial review must await proof of racial motivation and cannot be triggered by disproportion *per se*. To undertake automatically to invalidate panels because of racial disproportion would obviously be to order that balance be intentionally achieved. And so would holding that disproportion *per se* triggers a duty of either rational or compelling justification. For as we have seen in discussing the inapplicability of the disadvantageous distinction model to jury panel selection, there will almost certainly be no difference between those who are on the panel and those who are not which is rationally—let alone “compellingly”—relatable to their ability to hear and decide cases. To call for a legitimately defensible difference on the basis of an unintended racial disproportion would therefore be tantamount to invalidating all panels exhibiting such a disproportion—which would, in turn, amount to ordering the intentional achievement of racial balance.¹⁶³

In discussing *Gomillion*, the *O'Brien* Court would have been well advised to refer to the jury discrimination cases, for the considerations which there imply that judicial review must await proof of the intentional use of race as a criterion of selection counsel the employment

163. Of course, statistical disparity is often suggestive of illicit motivation. The “danger” that this realization will coerce a commissioner to consider race and attempt to achieve a respectable balance should be mitigated, however, by the realization that under a motivation test the suggestion of the statistics can be rebutted by convincing proof that he in fact chose at random. And even if the mitigation is less than total, the Court's judgment that states should not be forced to take race into account is obviously served better by a motivation than an impact test. Indeed, a motivation test is the best we can do in this regard.

of a motivation model with respect to the bounding of political units as well. In 1964, in *Wright v. Rockefeller*,¹⁶⁴ the Court hinted that there might be constitutional problems with the intentional achievement of racially balanced voting districts. I doubt, again because of the analogy to what is happening with respect to pupil assignment, that the Court would be moved to invalidate a districting plan on such a ground. However, the reasons which counsel against *forcing* states to consider race in selecting jury panels apply—indeed, with even greater force¹⁶⁵—to the drawing of district lines. And a judicial declaration that racially lopsided cities or districts are *per se* unconstitutional (or what, again, would be functionally equivalent,¹⁶⁶ that racial disproportionality triggers a demand for a rational or compelling defense) would amount to a command that state legislatures consider race in drawing district lines.¹⁶⁷

C. *Reference to Motivation and the Considerations Compelling the Suspension of the Disadvantageous Distinction Model*

In jury selection and districting situations, the conclusion that proof of motivation should trigger review is supported not only by the realization that an impact test would amount to an order of a sort the Court is unwilling to make, but also by the considerations which render inapplicable the ordinary model of review. The disadvantageous distinction model is not applied in such situations because courts recognize that although some exclusions can properly be made on the basis of characteristics which bear upon the way one will function in a jury or political context, a number of selections inevitably will have to be made in a way which is random with respect to such characteristics. Thus the usual automatic demand for a legitimately defensible difference is suspended to accommodate random selection. Whenever, therefore, the complainant can prove that an exclusion or choice did *not* result from random selection, the reason review was suspended *ab initio* does not obtain, and review is indicated.¹⁶⁸

In “discretionary choice” situations, the line of argument support-

164. 376 U.S. 52, 57-58 (1964).

165. P. 1237.

166. See pp. 1271-72.

167. The courts' unwillingness generally to require states to take race into account in an attempt to achieve a balance does not necessarily mean that there will not be occasions on which a history of racially motivated selections will necessitate the use of such an order as a remedial measure. Compare pp. 1289-91. I am not aware, however, that this has ever been done with respect to juries or voting districts.

168. To say that review is indicated is not, of course, necessarily to say that the panel must be invalidated. See pp. 1269-74.

ing the choice of motivation as the factor which triggers review in racial discrimination cases is not so direct. The argument is, in brief, that measures like a tax exemption for only Caucasian children must be unconstitutional; disadvantageous distinction cannot sensibly trigger review in such situations; and a test conditioning judicial review upon impact *per se* would be inconsistent with the Court's resolution not to compel those designing tax codes, or drawing up dress codes or deciding whom to prosecute, to take into account and attempt to "balance" the races of the likely gainers and losers.

I make no apology for the form of this argument. Starting from a clearly unconstitutional course of action—and I have trouble seeing the unconstitutionality of a tax exemption for only Caucasian children as a controversial assumption—and attempting to explain why it is unconstitutional in terms of a theory capable of acceptable and consistent application to other areas, is a perfectly sensible way of developing constitutional doctrine. But the victory of the motivation model in areas of discretionary choice, it must be said, is by default, in the sense that nothing said so far supports it except the unacceptability of the alternatives.¹⁶⁹ The remainder of the article should demonstrate that a motivation model is capable of "principled" application. And although the choice of motivation as the trigger in discretionary choice situations is not—as it is in random choice situations—directly implied by the considerations which render the disadvantageous distinction model inapplicable, it is in no sense incompatible with them. The disadvantageous distinction model is inapplicable in these contexts because the decision maker is entrusted with a goal—such as the inculcation of good taste or the advancement of the general welfare—whose relation to various choices can be labeled neither rational nor irrational by courts. But an inability to evaluate the rationality of a criterion of choice imports no paralysis with regard to the Constitution's other limitations. If, therefore, the principle of selection employed by the decision makers can be identified, there is no reason why judges should refrain from measuring that principle, not in terms of rationality, but rather against the other commands of the Constitution. Political judgments concerning the

169. Precedent could also be mentioned. That motivation must control is unmistakably the conclusion the Court has reached with regard to decisions to arrest and prosecute. Note 98 *supra*. There are, moreover, indications, albeit spotty, that it has reached the same conclusion with regard to taxation distinctions, *Bell's Gap Railroad Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and curriculum choices, *Epperson v. Arkansas*, 393 U.S. 97 (1968).

promotion of the general welfare may not be amenable to rational evaluation by courts, but some such judgments—that the general welfare would be served by the separation of the races or by the conversion of everyone to Christianity—constitute constitutionally impermissible criteria of choice.¹⁷⁰

D. *What Proof of Motivation Should Trigger Review?*

1. *Random Choice Situations*

In jury and districting situations, review is triggered by a showing that selection was not random.¹⁷¹ Specifically—given the interests at stake in jury selection and districting¹⁷²—review should be triggered as to any exclusion from a jury panel which can be shown to have resulted from the employment of a criterion of selection not random with respect to those characteristics which are likely to influence the way one will hear evidence and decide cases; review of a districting-selection should be triggered by proof that it was not random with respect to characteristics likely to influence voting or other political behavior.

To agree with the Court that review should, in racial contexts as in others, await proof of motivation is by no means necessarily to approve its view of what constitutes proof that race was taken into account during the selection process. A resolution not to force states

170. The old saw that the government need deal with only one part of a problem at a time, e.g., *Mutual Loan Co. v. Martell*, 222 U.S. 225, 235-36 (1911); *Buck v. Bell*, 274 U.S. 200, 203 (1927); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488-89 (1955), just will not cut when the "part of the problem" dealt with was selected for a constitutionally illegitimate reason. (Mr. Justice White's use of the doctrine in his dissent in *United States v. Brown*, 381 U.S. 437, 474 (1965) is equally invalid; that part of a problem may be attacked does not mean the legislature may specify the individuals on whom a start is to be made.)

171. P. 1261.

172. One is affected by a districting choice only by virtue of the probable political behavior of those in his and other districts. The composition of juries has traditionally been thought relevant only because of its likely influence on verdicts and consequent impact on litigants. Despite the Court's recent declaration that "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion," and its consequent recognition of the class action as a vehicle for challenging racial discrimination in jury selection, *Carter v. Jury Comm'n of Greene County*, 90 S.Ct. 518, 523 (1970), I doubt that it would recognize a class action brought by a group excluded on the basis of a characteristic which is not likely to influence verdicts, such as shoe size—which suggests, perhaps, that the *Carter* class action might better have been regarded as brought on behalf of potential litigants. Where the harm to one selected is a function simply of the fact of selection, and does not depend on the likely behavior of those in one or the other class—and this is jury selection, if the Court plans seriously to pursue the notion that a citizen has a cognizable interest in serving on a jury—review should be triggered by a showing that selection was made by a method which rendered the selection of some persons more likely than the selection of others, that is, a method under which all do not start out with an even chance. Of course, to say that review is triggered is not necessarily to say that the selection must fall. See pp. 1269-74.

to consider race in making their selections, and a consequent toleration of colorblind choice, is plainly indefensible absent an equally strong resolution to prevent the intentional underrepresentation of minority groups. Yet the Court's definition of what counts as *prima facie* proof of such intentional underrepresentation has at times been insupportably demanding. Doubly dangerous are statements like the following, from the insufficiently notorious *Swain v. Alabama*:¹⁷³ "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%."¹⁷⁴ Of course a ten per cent underrepresentation might on occasion be rebuttable by convincing proof that the selection was in fact made at random or on the basis of criteria legitimately related to fitness to serve. But to announce that a ten per cent disparity is not sufficient to call for such a rebuttal is

173. 380 U.S. 202 (1965). The Court held that no *prima facie* case was made out by a showing that although 26% of the residents of the county eligible for jury service were Negro, jury panels since 1953 had averaged only 10% to 15% Negroes. "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%." *Id.* at 208-09. The issue, however, was not whether purposeful exclusion had been "satisfactorily proved," but rather whether it had been sufficiently indicated to call for some convincing explanation on the part of the state.

Petitioner also argued that he had been denied equal protection by the systematic use of peremptory challenges to exclude Negroes, noting that *no* Negro had sat on a petit jury in the county since 1950. After an extended paean to peremptory challenges, *id.* at 212-21, the Court recognized that they could be misused, and suggested that their systematic employment over a period of years to exclude Negroes might constitute a denial of equal protection. *Id.* at 223-24. It denied petitioner's claim, however, on the ground that it could not tell the extent to which the historic absence of Negroes was attributable to the employment of peremptories by the prosecution as opposed to the defense. *Id.* at 224; *but see id.* at 228-47 (Goldberg, J. dissenting).

Petitioner also noted that in *his* case all six of the Negroes called had been peremptorily struck by the prosecution. The Court's response to this was perhaps the most amazing part of an already amazing opinion. It did not, we have seen, take the position that peremptory challenges are immune from the equal protection clause. Nor did it say that evidence concerning what happened in a single case cannot constitute *prima facie* proof that racial motivations were at work. (Such a blanket statement, of course, would be indefensible; consider the case where all twenty Negroes but none of the twelve white persons on the panel are struck, and the prosecutor announces that his goal is to keep the county's juries lily-white.) Nor did the Court even say that the proof in *this* case was insufficient to make out a *prima facie* case. Instead, it asserted that the use of peremptory challenges in a single case, no matter what the motivation, simply cannot amount to a constitutional violation: "we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." *Id.* at 221.

This does not make sense. Unless peremptory challenges are uniquely sheltered from the demands of the Constitution, their racially motivated employment in even one case denies equal protection—presumably to Negroes as a class, *see* note 172 *supra*—and surely to the defendant. One man can be denied equal protection.

[I]n forbidding a state to "deny to any person within its jurisdiction the equal protection of the laws," the Fourteenth Amendment does not permit a state to deny the equal protection of its laws because such denial is not wholesale. *Snowden v. Hughes*, 321 U.S. 1, 15 (1944) (Frankfurter, J., concurring). *See also* *McFarland v. American Sugar Co.*, 241 U.S. 79, 86, 87 (1916).

174. 380 U.S. at 208-09.

practically to guarantee all the evils of a disproportionate impact model of review without its accompanying benefits: race very likely will be considered, but minorities very likely will be underrepresented—by about ten per cent.

At the least, any non-negligible variation over a period of time from what we would expect totally random selection to produce should shift to the state the burden of proving that the selection was in fact generated by a combination of exclusion on the basis of legitimately defensible characteristics and random selection. The facts, after all, are far more accessible to the state than the defendant. It does not seem too demanding to ask that a credible witness be present when the names are drawn from the hat.¹⁷⁵ Indeed, the approach best designed to avoid the consideration of impermissible factors would be to place that burden on the state the moment the defendant puts the matter in issue.

Nor is there anything in the reasoning which counsels the choice of motivation over disproportionate impact *per se* as the factor triggering judicial review which should prevent the Court from invalidating, as a prophylactic measure, methods of jury selection which invite intentional racial discrimination.¹⁷⁶ Systems whereby the jury commissioner selects from among his acquaintances, without obligation to refer to a city directory or some other broad and racially neutral list, should be disapproved.¹⁷⁷ So should statutory standards of the sort approved last term in *Carter v. Jury Commission of Greene County*¹⁷⁸ ("generally reputed to be honest and intelligent . . . and . . . esteemed in the community for . . . integrity, good character and sound judgment,") and *Turner v. Fouché*¹⁷⁹ ("discreet," "upright," and "intelligent"). The Court has, correctly in my view, opted for a motivation model. It should seriously employ it.

An understanding of what is at stake¹⁸⁰ should also make the Court more willing to infer motivation from disproportion in districting situations than it has been in the past;¹⁸¹ it is not just criminals who presumably intend the natural consequences of their acts. But even given a shift of attitude, convincing proof of non-random selection will be

175. Cf. *United States v. Wade*, 388 U.S. 218 (1967).

176. Cf. *Davis v. Schnell*, 81 F. Supp. 872, 877-78 (S.D. Ala. 1949), *aff'd sub nom Schnell v. Davis*, 336 U.S. 933 (1949); *Yick Wo v. Hopkins*, 118 U.S. 356, 366-68 (1886).

177. But cf., e.g., *Smith v. Texas*, 311 U.S. 128, 130-31 (1940).

178. 90 S. Ct. 518 (1970).

179. 90 S. Ct. 532 (1970).

180. See note 260 *infra*.

181. See, e.g., *Wright v. Rockefeller*, 376 U.S. 52 (1964).

much harder to produce in the districting situation than it is with regard to jury selection. Persons of the same race, religion or nationality often live in the same sections of the city or state. Thus, unless the line's zigs and zags are inexplicably frantic, nothing short of a startling statistical disproportion is likely to support an inference that the line was drawn along the river, or Forty-second Street, because a majority of the decision makers wished to fence out the Italians, as opposed to the conclusion that the river or street was selected simply because it seemed a handy place to draw the line.¹⁸²

2. *Discretionary Choice Situations*

In areas of discretionary choice, a showing of non-random selection can hardly be sufficient to trigger judicial review. A decision to tax farmers less heavily than others stems from the employment of a criterion of choice which is anything but random; the disadvantageous distinction model is inapplicable because the relation between such criteria and the promotion of the general welfare cannot be evaluated by a calculus of rationality and irrationality. That realization does not, however, bar the evaluation of identifiable criteria of choice in terms of constitutional commands other than rationality. Thus, in discretionary choice situations the triggering demonstration must be not simply that some non-random criterion of selection was employed, but rather that an *unconstitutional* criterion of selection was employed.

What criteria of selection will count as unconstitutional will obviously be a function of the particular judge's reading of various provisions of the Constitution. But in any context, the question whether the criterion of selection whose employment has been proven is unconstitutional can be rephrased as whether the government could permissibly word its statute or rule explicitly in terms of that criterion. A showing that a particular tax provision was motivated by a desire to disadvantage Marxists, for example, should trigger judicial review if and only if the government would violate the Constitution by explicitly limiting the comparative disadvantage to Marxists.

3. *The Senseless Search for "Dominant Purpose"*

Upon occasion, the Supreme Court has phrased its inquiry into motivation as an attempt to determine, as between an illicit motivation

182. *But see* *Sims v. Baggett*, 247 F.Supp. 96, 108-10 (M.D. Ala. 1965). Moreover, so long as "community" is credited as a legitimate districting criterion, proof that race or another personal characteristic was employed as a criterion of exclusion may come to naught, since the lines drawn may be justifiable in terms of a "community" explanation. *See* pp. 1271-72.

and a permissible one, which was "dominant." As one might anticipate from the face of the question, the resulting analysis has been less than satisfactory.¹⁸³ Once the considerations properly supporting recourse to motivation are understood, however, it becomes clear that the question of "dominance" is one there can be no reason to ask. In jury and districting situations it obviously has no place. The exclusion under attack either is or is not the product of random selection, and if it is not, review is indicated. In discretionary choice situations, the question upon which the triggering of review must turn is whether the decision maker—or a majority of the decision makers—employed an unconstitutional criterion of selection in making the choice in issue. The fact that he or they *also* may have been influenced by a simple judgment of taste, or a desire to promote the general welfare, should be deemed irrelevant to whether the choice should be reviewed.

Unless this conclusion is accepted, no choice made in a "discretionary" area will be reviewable, no matter how clearly the product of an unconstitutional motivation. For it is always possible to assert, and there will be no way to disprove it, that the demonstrated illicit motivation was accompanied by a judgment of taste or a feeling the nation would simply be better off. And precisely because the validity of the alleged accompanying licit judgment rests ultimately on a value choice,¹⁸⁴ it will be impossible to determine the extent to which it is *itself* the product of the impermissible motivation. A high school principal who admits that he outlawed dashikis in order to dampen Negro pride should not be able to avoid judicial review by adding that he also, in fact "dominantly," was influenced by a judgment that dashikis simply do not constitute proper school attire.

The disadvantageous distinction model is inapplicable in "discretionary" areas because choices will generally not be susceptible to judicial evaluation as rational or irrational. When, however, it can be demonstrated that a constitutionally illegitimate criterion of selection was employed, the reasons for staying judicial review no longer obtain. For the criterion, assuming it is identifiable, can be evaluated with the standard equipment of judicial review. And that conclusion obtains—the choice is susceptible to judicial evaluation, and review therefore need no longer be withheld—whether or not it appears, as it almost always will, that some other consideration may also have played a role.

183. See, e.g., pp. 1324-25.

184. Where a rational (or compelling, depending on the context) defense of the choice can be articulated, motivation should not be inquired into. Pp. 1269-81.

It is easy to be misunderstood at this point. Of course an inference of illegitimate motivation will often be rendered impossible by the likelihood that the choice in issue was in fact the product only of a simple judgment of what promotes the general welfare. I suspect, for example, that the vast majority of farmers are white. But the likelihood that in granting farmers subsidies most congressmen were genuinely moved by a feeling that a secure agricultural economy contributes to a healthy America would, barring evidence of which I am not aware, compel the rejection of an inference that such provisions were racially motivated. To say this, though, is only to say something that can come as no surprise: alternative explanations will often render impossible a responsible inference of illicit motivation. If, however, it *could* be convincingly demonstrated that a majority of the legislators granted farmers subsidies for racial reasons, the fact that they may also have believed that a strong farming economy promotes the general welfare should not preclude judicial review of the choice. The question a court must ask in determining whether review is indicated is whether it has been demonstrated that a majority of the decision makers were moved by an unconstitutional criterion of selection in making the choice in issue. I do not suggest that discarding the concept of "dominant purpose"—the process of "weighing" two known motivations against each other—is going to make analysis of motivation easy. It will often be difficult to determine whether the decision maker, or a majority of the decision makers, were influenced by an unconstitutional principle of selection. But at least the inquiry is intelligible.

E. *General Hershey's Error*

Gomillion v. Lightfoot makes sense only as what it had prior to *O'Brien* been taken to be, a case turning on the motivation of the Alabama legislature. It is true that the conclusion that race had been employed as the criterion of selection was inferred in large part from the fact that the line excluded many more Negroes than white persons. But without the inference the result would have been indefensible. Ordinarily, when challenged to say why it drew a district or city line here rather than there, the state can get away with saying "for no special reason at all, we just had to draw it somewhere," so long as that is an accurate reflection of what happened. But where it can be shown, as it was so overwhelmingly in *Gomillion*, that race was taken into account in drawing the line, the state can no longer hide behind the ordinary unreviewability of such distinctions. The Alabama legislature's misconception was the same as that more recently entertained by Gen-

eral Hershey in ordering the induction of anti-war demonstrators:¹⁸⁵ the assumption that if something can be done at random or without rational defense, it can be done on any basis the government chooses.¹⁸⁶

VIII. What Sort of Review Should Proof of Unconstitutional Motivation Trigger—Automatic Invalidation, An Extra Burden of Justification, or “Simply” the Ordinary Demand for a Legitimately Defensible Difference?

A. *The Implication of the Considerations Compelling the Suspension of the Disadvantageous Distinction Model*

The reasons which lead us to suspend the disadvantageous distinction model in certain situations and substitute proof of motivation as the factor which triggers judicial review suggest that such proof should function—as the simple fact of distinction does in the ordinary case—to place on the government the burden of producing a legitimately defensible difference which supports the choice in issue. Of course, the content of this burden is not constant; it varies according to the importance of the comparative benefit whose distribution is in issue.¹⁸⁷ But proof of unconstitutional motivation should not augment the burden beyond what the Court would otherwise require in light of the seriousness of the deprivation or benefit whose distribution has been limited. Such proof should serve only—though this is a highly significant function—to trigger the demand for a legitimate defense in situations where it would not otherwise attach (and perforce to invalidate the choice if such a defense is not forthcoming).

1. *Random Choice Situations*

In jury selection and districting situations, the disadvantageous distinction model is suspended not because we object to the state's selecting on the basis of characteristics which rationally relate to fitness to

185. See, e.g., *Who Gets Drafted*, The New Republic, August 2, 1969, at 9. Compare TAN 382-89.

186. One cause of the confusion may be that “arbitrary,” a word which figures prominently in constitutional discussion, has two quite distinct meanings. It can mean “capricious” or “whimsical”—that is, without reason. But it is sometimes used to conjure up prejudice, vindictiveness or other illegitimate motivation—that is, with bad reason. It should by now be evident, however, that despite numerous indiscriminate judicial condemnations of “arbitrariness,” there are situations where the government *can* act arbitrarily in the first sense. The point of the foregoing discussion, however, is that Arbitrary-I does not entail Arbitrary-II; license to choose without reason is not license to choose on any basis whatsoever.

187. See pp. 1223-24.

serve—children and deaf persons are quite properly excluded from juries—but rather because we recognize that reference to such factors cannot complete the job of selection. Some persons who were not selected will be legitimately distinguishable from those who were, but a probably even greater number will not be; thus we cannot demand the production of some relevant difference between those on the panel and those left off simply because the distinction has been made.

Unless proof of motivation is held only to trigger a demand for a legitimately defensible difference, however, proof of the employment of a non-random criterion of selection—even one legitimately relatable to fitness to serve—would invalidate the panel. For review of an exclusion is indicated whenever it can be shown to be the product of a criterion of choice not random with respect to those characteristics which are likely to influence verdicts.¹⁸⁸ Thus proof that A through F were intentionally excluded because they are under eighteen years of age or have a hearing loss would trigger review of the exclusion of A through F. Unless that review is prepared to recognize a legitimately defensible difference, the panel would have to be invalidated.

If, however, proof that an exclusion resulted from non-random selection serves only to trigger the demand for a legitimately defensible difference, the systematic exclusion of persons possessing a characteristic likely to bear on their performance will not necessarily be unlawful; it will simply have to be legitimately defended. Exclusions from the panel will stand if they resulted either from random selection (because review will not be triggered) or from the application of some criterion defensible in terms of fitness to serve (because, although review will be triggered, the distinction will be sustainable in terms of a legitimately defensible difference between the classes distinguished).¹⁸⁹ However, the odds are overwhelmingly against the upholding of an exclusion in fact produced by the employment of a non-random criterion of selection, such as race, which is *not* legitimately defensible in terms of fitness to serve. Jury discrimination challenges are brought either as class actions or by a litigant who, although he seeks ultimately to protect his own right to a fair trial, also challenges the intentional

188. See p. 1261.

189. Concurring in *Cassell v. Texas*, 339 U.S. 282, 291 (1950), Justice Frankfurter perceived that jury selection is properly an amalgam of the legitimately relevant and the totally irrelevant:

[W]as there a purposeful non-inclusion of Negroes because of race or merely symbolic representation, not the operation of an honest exercise of relevant judgment or the uncontrolled caprices of chance?

exclusion of a class of persons.¹⁹⁰ The realization that proof of non-random selection serves only to trigger a demand for the production of some legitimately defensible difference between the members of the two classes thus distinguished will therefore avail a racist jury commissioner only in that rare county where all the Negroes happen to be deaf or under eighteen.

If, therefore, proof of non-random selection is held—as, of course, it tacitly has been held—only to trigger a demand for a legitimately defensible difference, the only motivations in practice worth alleging will be illegitimate ones. Litigants will offer proof of the employment only of criteria of selection they believe not to be legitimately relatable to fitness to serve, and judges will hear the proffered proof only if they agree with the litigant's claim that the alleged criterion is not so relatable. But the considerations which compel the suspension of the disadvantageous distinction model, and the consequent substitution of motivation as the factor which triggers review, imply that review must be triggered by proof of the employment of any criterion of selection not random with respect to verdict-influencing characteristics. Unless motivation is held only to trigger the ordinary demand for a legitimately defensible difference, the only panels which would survive would be those selected entirely at random.

In the districting situation too, the disadvantageous distinction model is inapplicable not because we necessarily wish totally to outlaw selection on the basis of characteristics which bear on likely political behavior—though skepticism with regard to “community” selection brings one close to that position—but rather because we recognize that such non-random criteria will usually be inadequate to complete the job of selection, and in any event do not wish to *compel* their employment.¹⁹¹ Thus proof of selection on some basis not random with respect to likely political behavior should not automatically invalidate the selection, but simply trigger a demand for legitimate defense.

Courts would therefore *review* choices shown to have been motivated

190. If a jury challenge were brought by an individual claiming he has been wrongfully excluded from the panel, it is possible that the exclusion could be alternatively justified despite proof of racial motivation. If, for example, the state could prove that he is deaf and those who were selected are not, he would not be entitled to be placed on the panel—though he might retain standing to secure a declaratory judgment that race had improperly been considered, and an order enjoining its future consideration. (Alternative justification obviously becomes more likely the fewer members the wrongfully distinguished classes contain. Cf. *McGowan v. Maryland*, 336 U.S. 420 (1961).) It is, however, unlikely—despite *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 329-30 (1970); see note 172 *supra*—that jury challenges can be brought by individuals claiming wrongful exclusion.

191. See pp. 1233-34.

by a desire to district along "community" lines, but presumably would *uphold* them if they found them to be genuinely sustainable on a community basis and not—and I wish I fully understood the principles by which the difference can be told—on simply racial, national, religious or economic criteria. As noted above, geographic features can seldom count as legitimately defensible differences. Thus a line which was selected for racial reasons should not be upheld because it happens to follow a river. For following a river, unlike excluding deaf persons from a jury, is not a rationally defensible principle of selection: it does not—unless there are no bridges—sort people out according to any qualifications which bear upon the district in which they should vote. Distinctions created by following a river should be treated as the constitutional equivalent of differences produced by the flip of a coin—incapable of rational relation to an acceptable goal, but not necessarily unconstitutional either. That a line in fact was drawn, without racial motivation, by following a river, or for that matter the flight pattern of the barnacle goose, should shield it from review. That a racially motivated line *might* have been thus innocently generated cannot legitimate it.

2. *Discretionary Choice Situations*

a. *The Roving Commission to Promote the General Welfare*

With respect to taxing, spending and criminal penalty decisions, the question whether an unconstitutionally motivated choice should be upheld nonetheless if it is susceptible to rational connection with the promotion of an acceptable goal is one there can be no occasion to face. In the first place, the only explanations we might even be tempted to credit as "rational" are "subgoal rationalizations" on the order of the promotion of industry or the protection of property;¹⁹² and as we have seen, the ability to articulate a defense in terms of some such subgoal will frequently render impossible a responsible inference of unconstitutional motivation.¹⁹³ And even on the rare occasion when an inference of unconstitutional motivation can responsibly be drawn in the face of such a "subgoal rationalization," the possibility of alternative

192. Sometimes an unconstitutionally motivated taxing, spending or criminal penalty choice will not even be susceptible to plausible rationalization on the subgoal level. On such occasions, the choice obviously must fall as soon as the inference of unconstitutional motivation is drawn. *See, e.g., Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Cf. Ep- person v. Arkansas*, 393 U.S. 97 (1968).

193. *See* p. 1268.

rational justification still need not be considered; on such an occasion, the choice simply must fall. For the very reason the disadvantageous distinction model is suspended in these "roving commission" situations—the fact that explanations on the subgoal level can be judicially labeled neither rational nor irrational, but must be treated as non-rational in light of the amorphous nature of the ultimate acceptable goal—suggests with identical force that such explanations cannot be regarded as "rational" for purposes of alternative justification either. If the demand for a rational choice/goal relation is never apposite, it can never be satisfied. If, therefore, a taxing, spending or criminal penalty choice can be shown to have been unconstitutionally motivated, it must be invalidated. Alternative legitimate justification is—for precisely the reason the usual model of review is suspended—impossible.¹⁹⁴

b. *One "Discretionary" Goal Among Other Relatively Precise Goals*

Where, however, the "discretionary" goal entrusted to the decision maker is but one among several, the possibility of legitimate defense must be recognized. In drafting apparel regulations, school officials may pursue not only the goal of cultivating good taste, but also the preservation of health and the avoidance of educationally intolerable disruption. There is, therefore, the theoretical possibility that an unconstitutionally motivated dress code choice could be rationally justified in terms of promoting health or preventing disruption.¹⁹⁵ Similarly, a decision to exclude a certain subject from the curriculum¹⁹⁶ (though obviously not a decision to include one¹⁹⁷) could rationally be justified on the ground that no teacher qualified to present it could be found. The crediting of "the cultivation of taste" and "the development of the well-educated citizen" as acceptable goals in these contexts makes

194. If the disadvantageous distinction model were inapplicable to police and prosecutorial law enforcement decisions solely because retribution counts as an acceptable goal, the possibility of alternative justification of an unconstitutionally motivated selection—perhaps by a showing that the choice of the defendant would have an unusually great deterrent impact—would have to be acknowledged. There is, however, another reason the disadvantageous distinction model is inapplicable here: the realization that given our present understanding of human behavior and the prosecution's virtually exclusive control of the relevant data, *any* choice would in practice be defensible in terms of deterrence, rehabilitation or the strength of the case, and therefore a demand for rational defense would be empty. P. 1244. That being so, the possibility of a rational alternative defense of a racially or otherwise unconstitutionally motivated enforcement decision should not be recognized. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). (The multitude of criteria of choice does suggest, however, that an unconstitutional motivation will be difficult to prove.)

195. In this context, as in others, claims of "disruption" should be strictly reviewed. Note 116 *supra*.

196. Cf. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

197. See *Abington School District v. Schempp*, 374 U.S. 203 (1963).

impossible a judicial demand that *every* choice be rationally related to an acceptable goal. But the crediting of some other goals which are not "discretionary" in this sense ensures that *some* choices will be rationally defensible. An apparel regulation which promotes physical health is defensible without reference to, and regardless of how one defines, good taste. A decision not to offer a subject for which there is no teacher is defensible on any definition of the well-educated citizen. Such choices relate rationally to a goal which counts as acceptable irrespective of the value choices which inform one's definition of the "discretionary" goal with whose promotion the decision maker has been entrusted. They are, therefore, fully susceptible to evaluation by the calculus of rationality and irrationality, and they must be counted rational.

The considerations which support a reference to unconstitutional motivation in discretionary choice situations suggest that when an unconstitutionally motivated choice can be thus defended in terms of a legitimately defensible difference, motivation should not be considered. The cognizability of motivation in such situations derives from the obvious need for some sort of review and the unacceptability of the alternatives—a disproportionate impact model and the ordinary disadvantageous distinction model.¹⁹⁸ The disadvantageous distinction model is inapplicable, however, because a number of choices can be judicially labeled neither rational nor irrational, and the Court consequently cannot impose an automatic demand for a legitimate defense. But the rare choice made in such an area which can be related to some non-"discretionary" goal—the apparel regulation which can be justified in terms of health—is amenable to rational evaluation and defense in the usual sense. With respect to such a choice, therefore, the condition which supports the suspension of the disadvantageous distinction model and the consequent substitution of a motivation model does not obtain—which suggests that motivation should be regarded as irrelevant. To say, however, that motivation is irrelevant when a legitimately defensible difference exists is necessarily to say that an unconstitutional motivation should neither automatically invalidate a choice nor trigger a demand more stringent than the ordinary demand for a legitimately defensible difference.

The chances of a court's upholding a choice proven to be unconstitutionally motivated—obviously limited, in light of the examples to

198. See pp. 1261-62.

which I have been forced to resort—are reduced still further by the realization that an ability to postulate a rational and otherwise inoffensive explanation for a choice will in practically all cases render impossible a judicial finding of unconstitutional motivation. Thus the question whether a choice which the court can conclude was unconstitutionally motivated should be saved by the production of a legitimately defensible difference is one which in practice will seldom be reached. The conclusion that motivation properly serves only to trigger the ordinary demand is, however, of crucial theoretical importance to the overriding question whether motivation should be judicially cognizable—specifically, to the arguments which have been leveled against referring to motivation—as a reconsideration of *O'Brien's* three concerns will demonstrate.

B. *The Dispelling of O'Brien's Concerns*

Ascertainability. Whenever the Court—misguidedly, in light of the logic which renders motivation relevant—has set for itself the question whether a choice was generated by a rational and otherwise inoffensive criterion on the one hand or an unconstitutional one on the other, it has concluded that the illegitimate motivation has not been convincingly shown, sometimes in the face of substantial evidence to the contrary.¹⁹⁹ In *Lassiter v. Northampton County Board of Elections*,²⁰⁰ decided in 1959, the Court upheld North Carolina's imposition of a literacy test for voting,²⁰¹ finding it to be legitimately related to an ability intelligently to exercise the franchise:

The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . Literacy and intelligence are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society . . . a State might conclude that only those who are literate should exercise the franchise.²⁰²

The old cases invalidating grandfather clauses provided ample precedent for considering the motivation underlying voter qualification

199. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); *United States v. O'Brien*, 391 U.S. 367 (1968).

200. 360 U.S. 45 (1959).

201. The plaintiff made no allegation that the test was administered discriminatorily. *Id.* at 50. Nor, of course, did the case present the issue whether Congress possesses power, under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment, to outlaw such tests. Cf. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

202. 360 U.S. at 51-52.

laws:²⁰³ those decisions rested explicitly on the conclusion that the clauses had been enacted with the intention of disenfranchising Negroes.²⁰⁴ Nor was the law upheld in *Lassiter* by any means without suggestions of racial motivation, suggestions over and above the general suspicion of literacy tests in Southern states which has produced, *inter alia*,²⁰⁵ the Voting Rights Act of 1965.²⁰⁶ For the North Carolina provision enacting the literacy test also contained—in the very next sentence—just such an admittedly unconstitutional grandfather clause, and a statement that the entire provision constituted “one indivisible plan for the regulation of the suffrage.”²⁰⁷ The Court might have been

203. It is difficult in 1970 to imagine that voter qualification laws could not be subject to the disadvantageous distinction model—that a distinction between those who can vote and those who cannot need not, simply because a line has been drawn, be defended by the state in terms which are rationally (indeed, “compellingly,” see note 212 *infra*) related to a likelihood of responsible exercise of the franchise and otherwise inoffensive. But that, prior to the decision of *Carrington v. Rash*, 380 U.S. 89 (1965), was precisely the assumption on which the Court operated. Thus in the grandfather clause cases the Court did not proceed, as it would today, simply by noting that the distinction drawn, between those whose ancestors had voted and others, was incapable of legitimate relation to a likelihood of responsible use of the ballot. The opinions in those cases rested instead on the conclusion that the grandfather clauses had been enacted with the motivation of disenfranchising Negroes.

204. *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939).

205. See also *United States v. Mississippi*, 380 U.S. 128 (1965); *Louisiana v. United States*, 380 U.S. 145 (1965).

Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), invalidated Alabama’s “Boswell Amendment,” which limited the franchise to those who could “understand and explain” various articles of the Federal Constitution. The opinion is something of a potpourri, asserting (1) that the vagueness of the test left the registrars undue discretion; (2) that the test had in fact been applied by the registrars only to Negroes; and (3) that the passage of the statute had been motivated by a desire to disadvantage Negroes. The Supreme Court affirmed *per curiam*, 336 U.S. 933 (1949), inscrutably citing *Lane v. Wilson*, 307 U.S. 268 (1939), which suggests the third theory; *Williams v. Mississippi*, 170 U.S. 213 (1898), which suggests the first; and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), which suggests both. It is therefore significant that the *Lassiter* opinion, in discussing *Schnell*, adopted the first theory, thereby substantially erasing whatever implication there may have been in the Court’s affirmance in *Schnell* that a distinction which was in fact legitimately defensible could fall because of an unconstitutional motivation. 360 U.S. at 53. See also *Louisiana v. United States*, *supra*, at 153; *Harvard Developments*, *supra* note 50, at 1096. Given this gloss, *Schnell* (like *Louisiana v. United States*) should be read as holding not that a law valid on its face was void for unconstitutional motivation, but rather that the law in issue was invalid on its face.

206. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966).

207. The Attorney General of North Carolina conceded that the grandfather clause was unconstitutional. And in the lower court decision, *Lassiter v. Northampton Board of Elections*, 248 N.C. 102, 102 S.E.2d 853 (1958), the North Carolina Supreme Court held that the indivisibility clause (appearing in § 5) had been implicitly repealed by a 1945 amendment of § 1 to read:

Every person born in the United States, and every person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote

Since the grandfather clause as well as the literacy test remained in “this article,” specifically § 4 thereof, after 1945, it is a bit difficult to see how this section meant to sever the two. But this is a question of state law, and the United States Supreme Court was of course correct in accepting the state court’s conclusion. However, the conclusion that the two tests are severable for purposes of deciding whether one can stand while the other falls does not settle the issue of legislative motivation.

tempted to use this evidence of racial motivation in either of two ways: to automatically invalidate the challenged provision, or at least—as an extension of its already developed doctrine that explicitly racial classifications are suspect²⁰⁸—to place on the state a burden of unusually compelling defense (which burden, the language quoted above strongly suggests,²⁰⁹ would not have been carried).

Yet the Court, speaking unanimously through Mr. Justice Douglas, gave the suggestion of racial motivation breathtakingly short shrift: “Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show.”²¹⁰ The reason it did has been well stated by Professor Heyman:

[I]t is undoubtedly demonstrable that many more Negroes are excluded [by literacy tests] than whites. But can it be said that classifications of literate and illiterate . . . are substitutes for racial classifications? One suspects that in some cases they are. But it is generally accepted that literacy is a permissible criterion for voting. . . . Because [it] is reasonably related to the advantage provided, it is virtually impossible to determine whether [it is] being used for ulterior purposes banned by the equal protection clause and the fifteenth amendment. . . . In such situations, the Court has refused to invalidate the law. These refusals seem proper, for the Court can by no means be sure that the legislature has acted wrongly.²¹¹

Because literacy tests were²¹² supportable in terms of the ordinary demand for a legitimately defensible difference—as, of course, grandfather clauses are not—the Court was unwilling to pursue the suggestion of racial motivation.

208. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Brown v. Board of Education*, 347 U.S. 483 (1954). The suggestion of *Lassiter*, therefore—and also the suggestion of this article—is that the concept of suspect classification should be reserved, as by and large it has been, for laws which on their face distinguish in terms of the “suspect” characteristic. See note 134 *supra*. (This is an obvious concomitant of holding that proof of racial motivation should trigger no more than the ordinary demand for a legitimately defensible difference.) But see *Hunter v. Erickson*, 393 U.S. 385, 390-92 (1968). But cf. pp. 1299-1302.

209. P. 1275. See also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), upholding, under § 2 of the Fifteenth Amendment, Congress’ suspension in certain states of literacy tests; admittedly this result does not prove that literacy tests would not meet a demand for “more than rationality,” but it is a relevant precedent.

210. 360 U.S. at 51.

211. Heyman, *supra* note 40, at 119-20.

212. *Carrington v. Rash*, 380 U.S. 89 (1965) took two giant steps. It not only held voter qualifications subject to the disadvantageous distinction model, see note 203 *supra*, but also indicated that they demand (*ab initio*) a “more than rational” or compelling defense. See also, e.g., *Kramer v. Union Free School District*, 89 S. Ct. 1886, 1890 (1969). Thus, had literacy tests again been challenged, the Court might—though I am skeptical—have gone the other way. See note 209 *supra*. The recent amendment to the Voting Rights Act which outlaws literacy tests nationwide, compare note 201 *supra*, has mooted the issue, however.

And this, indeed, was the only responsible judicial reaction, for it would take either a record of a sort which will never exist or a judge hell-bent on invalidation to conclude in the face of a rational and otherwise permissible explanation for a choice that he knew it was unconstitutional motivated. The *O'Brien* discussion picks up the *Lasater* realization and runs with it—much too far. Starting from an appreciation that courts will be unable to determine—as between a rational and otherwise legitimate explanation for a choice and an unconstitutional explanation—which one in fact motivated the choice, it concludes that unconstitutional motivation can never be ascertainable.

But proof of unconstitutional motivation, on those occasions when it is relevant at all, properly functions simply to trigger the ordinary demand for a legitimate defense. Thus courts should on no occasion be called upon to decide whether a choice proceeded from an unconstitutional motivation as opposed to a rational and otherwise legitimate motivation. They will, instead, be asked to determine in deciding whether review has been triggered: either (in random choice situations) whether the choice was made for an unconstitutional reason²¹³ or essentially for no reason at all, or (in discretionary choice situations) whether the choice is the product of an unconstitutional criterion of selection on the one hand or what is essentially a judgment of taste on the other.²¹⁴

Even so, of course, the decision will often be difficult. In jury selection and districting situations, it will sometimes be impossible to tell from the statistics and other available evidence whether a personal characteristic such as race was employed as a criterion of selection, or whether the selection was made without reference to the characteristic. But at least the inquiry is intelligible—the characteristic either was or was not considered—and there will be occasions on which the conclusion that it was will be entirely supportable. Similarly, the possibility that a selection was entirely the product of a nonrational judgment of what promotes good taste, the general welfare, or whatever, may render insupportable the conclusion that it was racially or otherwise unconstitutionally motivated.²¹⁵ But here too, the conclusion that

213. See p. 1271.

214. Where a choice can be "rationalized" in terms of a "subgoal" on the level of "the promotion of industry," the characterization "judgment of taste" may seem inapposite, even though such choices are ultimately defensible only in terms of a non-rational relation to the goal of promoting the general welfare. And, indeed, in precisely those situations courts will have difficulty accepting suggestions of unconstitutional motivation. See p. 1268. The point of the text is that such "subgoal rationalization" will on a number of occasions not be possible, which in turn suggests that the *O'Brien* Court overstated the unascertainability of motivation.

215. See note 214 *supra*.

the decision maker, or a majority of the decision makers, employed an unconstitutional criterion of selection can sometimes be quite responsibly drawn.²¹⁶

The difficulty of determining motivation must never be entirely discounted. Courts should on all occasions bear it in mind, and intervene on the basis of nothing less than convincing proof. But the difficulty would merit the dispositive weight the *O'Brien* Court gave it only under a system of review in which courts were called upon to decide whether choices resulted from a rational and otherwise inoffensive motivation on the one hand, or an unconstitutional one on the other. If, however, motivation is confined to its proper role of triggering demands for legitimate defense which would not otherwise attach, such quandaries will be avoided, for the existence of a legitimate defense will render motivation irrelevant.

It would in all likelihood be impossible responsibly to conclude that a school principal's requirement of coats in winter was racially motivated—even assuming a school district in which, for economic reasons perhaps, failure to wear coats in the winter is a phenomenon largely restricted to the Negro community. For no matter what vision of the tastefully dressed child is entertained, a requirement of coats in the winter is legitimately defensible in terms of physical health. It is quite another matter to conclude in the face of the possibility that the principal just does not think dashikis are in "good taste" that his decision to outlaw them was racially motivated. The ability to articulate a rational and otherwise inoffensive defense of North Carolina's literacy test makes it virtually impossible responsibly to conclude that it was racially motivated. But one knows—yes, knows—that the selection in *Gomillion* was racial rather than random.

Futility. The Court's concern about the possibility of futile orders is inextricably bound up with its worries about ascertainability, and will be similarly ameliorated by limiting motivation to its proper burden-triggering role. Had the Court invalidated North Carolina's literacy test on the ground that it had been passed in order to disenfranchise Negroes, its action could very well have proved futile. For the legislature at one of its next sessions could have removed the concededly unconstitutional grandfather clause from the provision, put together a legislative history discoursing on nothing but the dangers of granting the franchise to those who can read neither newspapers nor the ballot, and passed the very same law. One might be more than a

216. See note 193 *supra*.

little suspicious of all this, but it is unlikely that the Court would on such a record be able to void the law on motivation grounds, and still retain the option of sustaining a similar law in a case coming from Vermont. For a wholly legitimate defense of the law can be articulated, and nothing else will appear in the record.

When, however, the only articulable alternative explanation for an unconstitutionally motivated choice is either random selection or a judgment of taste, the likelihood of a futile judicial order, though it cannot be entirely discounted,²¹⁷ is substantially lessened. Had the Alabama legislature, after the *Gomillion* decision, reenacted the same or an equally lopsided law and come back into court averring, "We did what you ordered. We drew the lines essentially at random, without reference to race, but damned if the figure we came up with didn't exclude most of the Negroes again," the Court could only have rejected the defense. The same result would be in order were the principal whose dashiki ban had been voided for racial motivation to repromulgate it, averring that *this* time it was solely the product of his notion of what constitutes good taste.

If motivation is limited to its proper role of triggering burdens of legitimate justification which would not otherwise attach, laws whose reenactment could be justified on rational and otherwise inoffensive grounds will not be invalidated. The possibility of futile orders will not vanish entirely, but it will cease to deserve the weight *O'Brien* gave it.

Disutility. Should proof of unconstitutional motivation be held either automatically to invalidate the choices it has produced, or to place on the state some burden of justification over and above the ordinary demand for a legitimately defensible difference, *O'Brien's* fear of the invalidation of laws which measure up to the Constitution's usual tests of legitimacy would be fulfilled. If, however, motivation is limited to the burden-triggering role implied by the considerations which support its cognizability, only those choices which are not supportable in terms of a legitimately defensible difference will fall. Proof of illegitimate motivation will function only to deny the government a privilege of non-justification which, owing to the peculiar nature of the area of choice involved, it would otherwise be able to invoke. If the choice in issue is justifiable in terms of the usual constitutional demands, it will not be invalidated.

217. Cf. note 214 *supra*.

Thus the Court in *O'Brien*, unable to see any theoretical justification for the examination of motivation it was asked to make, and bothered by considerations of ascertainability, futility and disutility, rightly concluded that motivation was irrelevant to the problem before it;²¹⁸ but erroneously jumped to the conclusion that it can never be relevant—not even in respondent O'Brien's most troublesome precedent, *Gomillion v. Lightfoot*. The Court's attempt to torture a non-motivation explanation out of *Gomillion* was bound to fail, however, and it would have been well advised to ask whether *Gomillion* was not significantly different from the case before it.

The demonstration that the underlying considerations demand—in districting cases where the charge is one of racial discrimination—that racial motivation must function to trigger judicial review is, perhaps, of a complexity beyond what we are reasonably entitled to expect of a Court opinion. But the concerns which most explicitly troubled the *O'Brien* Court, ascertainability and futility, are manifestly without relevance to *Gomillion*. Determining the motivation of the Alabama legislature was hardly a difficult assignment. And the Court's order could obviously not have been evaded by the legislature's turning around and reenacting the same statute “for the right reasons”—not even Daniel Webster could write the “wiser speech”²¹⁹ that would do that job. Finally, the proof of illicit motivation in *Gomillion* did not operate to invalidate an act which by its terms and impact satisfied the Constitution's tests of legitimacy. It functioned rather to subject to the ordinary demands of the Fourteenth Amendment—to which they did not even arguably measure up—a series of legislative distinctions which, owing to the peculiar nature of the decision involved, would otherwise have escaped their scrutiny.

IX. Statement and Application of a General Theory

I have suggested that the motivation of legislators and other government officials is relevant in cases where (1) the governmental choice under attack is not subject from the outset—that is, simply because a choice has been made and someone has been injured by it—to the demand for a legitimate defense and (2) the group whose disadvantaging is raised by way of objection is one to which the government owes no affirmative duty of accommodation, but simply an obligation

218. P. 1339.

219. P. 1212.

of "neutrality". I have further suggested (3) that proof of unconstitutional motivation properly functions only to trigger a theretofore inapplicable burden of legitimate defense. The suggestion of this section is that the three numbered limitations delineate the only situation in which motivation constitutes the appropriate constitutional reference²²⁰ and define the only way in which it can properly function.

The third limitation has been defended in the preceding section, and the first limitation follows from the third. If proof of unconstitutional motivation can serve only to trigger a demand for a legitimate defense, it plainly lacks relevance where that demand already obtains.²²¹

The second limitation has also been defended above. Were the government affirmatively obligated—as the Court has held it is with respect to the poor—to take intentional steps to ensure that its laws will not unusually disadvantage certain racial groups, reference to motivation would be out of place in cases involving alleged racial injustice: a simple look at the statistics, the actual comparative deprivation, would suffice. It is because the Court, for obvious reasons, has refused to require the favoring of one race over another—and has further felt it unwise, ultimately dangerous to the interests of racial minorities, to force legislators and administrators to take into account and "balance" the races of those likely to be affected by their various choices—that racial motivation, and not disproportionate impact *per se*, must constitute the factor which triggers review.

Since, in a given context, governmental neutrality—in the sense of a lack of intentional disfavoring of the group or interest the complainant claims has been impermissibly disadvantaged by the action at issue—either is or is not constitutionally sufficient, there should be no occasion on which a choice should be tested in terms of *both* its impact and its motivation.²²²

So far the discussion has concerned itself solely with constitutional

220. There will in addition be rare occasions on which motivation ought to be consulted because it is probative of the impact on which the case ultimately must turn. Pp. 1310-11.

221. Aside from whatever psychological impact, which a litigator might take into account, it may have—though in theory it should not—upon the stringency of the court's demand for a legitimate defense. See, e.g., *Bates v. Little Rock*, 361 U.S. 516 (1960); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 469-70 n.27 (1969).

222. The same constitutional provision may tolerate neutrality on some occasions but not on others, and different judges may differently define the occasions on which neutrality is sufficient. See pp. 1327-40. It is, however, impossible for one judge to feel with respect to one situation that governmental neutrality both is and is not sufficient; there should, therefore, be no occasion on which he feels that both motivation and impact are relevant. But see p. 1315; *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

attacks directed at governmental choices—of one group of persons rather than another, or one course of action rather than another—and has suggested that on some occasions proof of the motivation which produced the choice should trigger an otherwise inapplicable burden of justifying it in rational and otherwise inoffensive terms. But of course some constitutional arguments are not directed at choices at all:²²³ some attacks are launched quite without regard to the way persons other than the complainant have been treated or alternative courses of action the government might have followed. A litigant might assert that a governmental body or official has taken an action it simply lacks power under the Constitution to take. Or he might argue that the government has done something to him which the Constitution says it simply may not do—or may do only pursuant to a justification which does not exist, or a procedure which has not been observed.

Motivation should be deemed irrelevant to arguments thus framed. It is not needed to trigger the ordinary constitutional tests of legitimacy, for the ordinary tests controlling such questions—of the power of government in general or the acting branch or department in particular, or the government's authority to interfere with protected rights—are fully applicable from the outset.²²⁴ And to permit motivation to serve any function beyond this—to invalidate some action which meets the ordinary tests, or to trigger some extraordinary duty of justification—would be to fall prey to *O'Brien's* three concerns. If a fully legitimate defense of the challenged action is available, it will be virtually impossible responsibly to find illicit motivation; the ability to reenact the law (or take the same action again) pursuant to a "wiser" legislative history (or statement of intention) incorporating only the legitimate defense will necessarily subject the Court's order to the risk of futility; and such an order would invalidate an action

223. See p. 1216.

224. See notes 33 and 34 *supra*. Should this assertion on close examination turn out to be inaccurate—should it transpire that there are occasions on which the tests ordinarily controlling these questions are not fully applicable—the possibility that proof of an unconstitutional motivation should function so as to instate the ordinary tests would have to be considered. That possibility cannot be considered, however, without an understanding of why the ordinary tests are inapplicable. Compare pp. 1261-63. It may be, for example, that certain questions of presidential power are immune to the usual constitutional tests due to that aspect of the "political question doctrine", compare note 112 *supra*, which counsels the Court not to involve itself in unseemly interdepartmental squabbles. Unlike the limitations I have canvassed in this article, that limitation—assuming it to be defensible at all—would seem to counsel as strongly against judicial intervention where an unconstitutional motivation has been proven as it does against intervention in the absence of such proof.

which fully satisfies the Constitution's demands solely because of the reasons for which it was undertaken.

To say that motivation is irrelevant to issues of whether the acting body has exceeded the scope of its authority, or whether it has denied the complainant a right to which the Constitution entitles him, is by no means to say that it is irrelevant to all issues which customarily are *approached* in those terms. One of the conclusions which will appear from the remainder of this article is that some constitutional objections typically treated under the rubrics of scope of authority and invasion of protected rights will on analysis prove capable of more sensible expression in terms of the theory advanced by this article. Governmental choices not immediately subject to the demand for a legitimate defense pervade all of constitutional law.

A. *Administrative Choice*

Before I proceed to illustrate the application of the theory, one possible source of confusion should be analyzed. The assertion is frequently made in the literature that the relevance of motivation should turn on whether the governmental action involved is "legislative" or "administrative." According to some commentators, a person disadvantaged by an administrative choice must prove that the discrimination was intentional if he is to gain relief under the equal protection clause. Thus, they maintain, the mere existence of an apparently indefensible inequality in an administrative context does not, as it ordinarily does with respect to legislative action, give rise to a governmental duty of justification; where the actions of administrators are at issue, that duty attaches only upon proof of improper motivation.²²⁵ The Court has never expressly embraced the legislative-administrative distinction in general terms, but the commentators are justified in asserting that a number of its decisions support it.

The distinction, however, does not make sense. Even if there were a clear line dividing legislative and administrative action,²²⁶ there is no reason why we should be willing or obligated to tolerate the negligent infliction of unjustifiable inequalities simply because an "admin-

225. A showing of discriminatory intent or motivation would, therefore, seem not only a permissible, but a necessary basis for challenging an administrative action on equal protection grounds.

Harvard Developments, *supra* note 50, at 1098. See also Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1115 (1961).

226. The commentators admit that "questions may arise" in this regard. *Harvard Developments*, *supra* note 50, at 1100. For a graphic demonstration of the difficulty, see p. 1298.

istrator" is doling them out. The motivation of an administrator probably is more often ascertainable than that of a legislative body,²²⁷ although administrative motivation can be very difficult to prove. However, the fact that something is relatively easy to prove is not sufficient reason for making its proof mandatory.²²⁸ The background command of the Fourteenth Amendment is that inequalities cannot be inflicted unless they are defensible in terms of a rational and otherwise in-offensive argument. There is nothing special about "administrative action" which should exempt it.

The jury discrimination cases are in large part responsible for the confusion, for they involve administrative selection and properly require proof of intentional discrimination. In seizing upon them as precedent, the Court and the commentators have failed to note that the reason intentional discrimination must be proven in jury cases is unrelated to the fact that an administrator is doing the choosing. It results instead from the fact that jury selection is an area where random selection is a tolerable, arguably mandatory, method of choice—just as it is in the districting situation, which explains why proof of intentional discrimination was required in *Gomillion*, which involved the action of a *legislative* body. Also fueling the administrative-legislative misconception has been the line of cases which establishes that law enforcement selections need not be defended in the absence of proof of unconstitutional motivation. But there too motivation is required not because a non-legislature is doing the selecting, but rather because imposition of a demand for rationality would be illusory, given the Court's acceptance of retribution as an acceptable goal of law enforcement.²²⁹

The Court got off the track around the turn of the century, when it announced that in order to demand a governmental explanation the victim of a tax assessment higher than that given the owners of other property must demonstrate that the unusually high assessment was the product of an intent to discriminate against him. "Inequality . . . is nothing, unless it was in pursuance of a scheme."²³⁰ Though the Court has reiterated this position many times,²³¹ it is indefensible as

227. See A. BICKEL, *supra* note 30, at 214.

228. That the victim's age is usually capable of proof does not compel us to make it an element of the crime of murder.

229. See also note 194 *supra*.

230. *Coulter v. Louisville & Nashville R.R. Co.*, 196 U.S. 599, 610 (1905).

231. See, e.g., *Maish v. Arizona*, 164 U.S. 599, 611 (1896); *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352-53 (1918); *MacKay Telegraph & Cable Co. v. Little Rock*, 250 U.S. 94, 100 (1919); *Southern Ry. Co. v. Watts*, 260 U.S. 519, 526 (1923); *Sioux City*

a generalization. There is no reason why a tax assessor, when asked why he assessed one house higher than all the rest on the block, should be able to get away with explaining that the dice happened to roll that way, or that he simply felt that assessing the one house higher would promote the general welfare. There is, in other words, no excuse here for suspending the disadvantageous distinction model; a difference in valuation should call for proof of a difference in value regardless of what can be proved about the assessor's state of mind.

In the landmark tax assessment cases establishing the motivation requirement, what was under attack was not a difference in assessment between two comparable pieces of property but rather a practice of assessing different classes of property at different rates—for example, land at fifty per cent of its market value and railroads at eighty per cent.²³² But for the purpose of judging its federal constitutionality, this sort of discrepancy should be deemed equivalent to the legislature's setting a higher tax *rate* on railroads than on land.²³³ This latter process, for reasons explored above, is "discretionary": it cannot intelligibly be subjected to a demand for rationality. The Court brushed this rationale once or twice,²³⁴ but was apparently unwilling or unable to question the pervasive though misleading rhetoric that all legislative classifications demand a rational explanation, and therefore chose ultimately to rest its conclusion on the broad pronouncement that intentional discrimination must be proven in assessment cases.

This would have been harmless enough had the pronouncement been limited to the fact situation of the landmark cases, the differential valuation of two distinct classes of property.²³⁵ But of course it

Bridge Co. v. Dakota County, 260 U.S. 441, 447 (1923). But see Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U.S. 421, 435-36 (1894); Raymond v. Chicago Union Traction Co., 207 U.S. 20, 36-38 (1907).

232. Maish v. Arizona, 164 U.S. 599 (1896); Coulter v. Louisville & Nashville R.R. Co., 196 U.S. 599 (1905); Southern Ry. Co. v. Watts, 260 U.S. 519 (1923).

233. Whether a state official has violated his state's law does not ordinarily constitute a federal question. Cf. note 126 *supra*. The "no evidence" doctrine of *Thompson v. Louisville*, 362 U.S. 199 (1960), though it relies on a finding that state officials—specifically courts—have disregarded state law, is a special case. The due process clause's command of fair warning is violated by conviction under a statute whose elements have not been proved. See *Drews v. Maryland*, 381 U.S. 421, 427 (1965) (Warren, C.J., dissenting).

234. It was mentioned as an alternative ground in *Coulter v. Louisville & Nashville R.R. Co.*, 196 U.S. 599, 608-09 (1905). In his perceptive opinion for the Court in *Raymond v. Chicago Traction Co.*, 207 U.S. 20 (1907), Justice Peckham recognized that it constituted the only sensible basis of decision in *Coulter*, and accordingly by implication limited *Coulter's* motivation requirement to cases involving separate species of property. Justice Holmes, who had written the *Coulter* opinion, dissented in *Raymond*. Unfortunately, Justice Holmes ultimately prevailed. Note 231 *supra*.

235. It should be noted, however, that the requirement should be one of unconstitutional motivation and not simply intentional discrimination. See pp. 1266-67. Since the discrimination was clearly intentional in cases like *Coulter* and *Watts*, this presumably is what the Court meant, though it did not put it that way.

was not so limited, with the predictable consequence that it has from time to time been employed to defeat equal protection claims directed at differing assessments of two comparable pieces of property.²³⁶ The Court has become somewhat uncomfortable with this development, and has stated that the gross excessiveness of a valuation can constitute "the equivalent in law of intention."²³⁷ But it would do well to clean up the area altogether by explicitly recognizing that the disadvantageous distinction model is applicable where similar pieces of property (two lots or two railroads) are involved, and inapplicable where different classes of property (railroads and land) are involved.²³⁸

Snowden v. Hughes,²³⁹ decided in 1944, is frequently cited for the proposition that proof of motivation is required in administrative contexts. Snowden, along with several others, ran in the Republican primary for nomination for a seat in the Illinois General Assembly. (Because there were three available seats in his district, and the Democrats were to list one candidate and the Republicans two, placement on the ballot would have been tantamount to election.) Snowden ran second in the primary and was duly certified as one of the Republican candidates by the Cook County Canvassing Board. The State Primary Canvassing Board, however, failed to put him on the ballot. Snowden sued the members of the State Board for damages under the 1871 Civil Rights Act, alleging a denial of equal protection. The Supreme Court held there was no cause of action, on the theory that where state officials are charged with disregarding state law, equal protection is not denied absent "intentional or purposeful discrimination between persons or classes."²⁴⁰

236. See, e.g., *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350 (1918).

237. *Great Northern Ry. Co. v. Weeks*, 297 U.S. 135, 152, (1936). Ironically, *Weeks* is a case in which it is hard to see a federal claim at all, since the allegation was not that petitioner's property was assessed higher than other properties of similar value, but simply that it was assessed for more than it was worth. As Justice Stone pointed out in dissent, *id.* at 155-56, such an allegation—in the absence of a claim that others were treated differently—raises no more of a federal question than would a legislative imposition of a higher tax rate.

238. If the reluctance to hold disparities in the assessment of comparable pieces of property subject to the disadvantageous distinction model stems from a fear of flooding the Court with trivial matters, it should be noted that certiorari can be reserved for the most egregious cases, as it is with regard to the diversity jurisdiction. See, e.g., *Blaauw v. Grand Trunk Western R.R. Co.*, 380 U.S. 127 (1965).

239. 321 U.S. 1 (1944).

240. *Id.* at 7. See also *id.* at 8:

The unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. Later in the opinion it appeared that even proof of "intentional or purposeful discrimination" would not suffice.

On the facts of *Snowden*, a requirement of intentional discrimination was justified.²⁴¹ Of course the state officials would not have been constitutionally justified in flipping coins to determine which of the candidates would be listed; they would not, for example, be justified in randomly selecting the men who finished first and third. However, Snowden finished second and only the man who beat him was listed. Surely it would not have been unconstitutional for the state legislature to have provided that only the candidate receiving the most votes in the primary should be listed on the ballot, even given that two offices were to be filled. As far as the Constitution is concerned, the state legislature could have chosen the number to be listed at random: there would be no federal bar to its listing the top twenty votegetters, only the top man, or any number in between. The Illinois legislature had, it is true, opted for two names, but the fact that the listing of one resulted from administrative rather than legislative action makes no difference in a federal court. Once again, however, the fact that a choice can, as far as the Constitution is concerned, be made at random does not mean that it can be made on any basis whatsoever. If, therefore, Snowden had been able to prove that the number one rather than two was selected because the state officials—either the administrators involved or the legislature—wished to disadvantage him personally, he would have been entitled to federal relief.²⁴²

At one point in its opinion the Court suggested this theory.²⁴³ But

The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets "willful" and "malicious" applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing the failure as an unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the failure to certify, other than that petitioner has been deprived of the nomination and election, and therefore add nothing to the bare fact of an intentional deprivation of petitioner's right to be certified to a nomination to which no other had been certified.

Id. at 10. Since the Court never said why motivation had to be demonstrated, it is not surprising that it was unable to clarify just what sort of motivation was relevant.

241. Justice Douglas's argument, *id.* at 17-19, that the Court was unduly restrictive in its construction of the complaint seems irrefutable, however. See note 240 *supra*.

Justice Frankfurter concurred on the theory that administrative action taken in violation of state law does not constitute state action and therefore is not subject to the Fourteenth Amendment at all. *Id.* at 13-17. ("Otherwise," he observes, "every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court." *Id.* at 16. For a more satisfactory answer to this "horrible," see pp. 1243-45.) Happily, the "illegal action is not state action" theory has since been laid to rest. *United States v. Raines*, 362 U.S. 17, 25-26 (1960).

242. Cf. *Mann v. Powell*, No. 69-C-2235 (N.D. Ill., Dec. 30, 1969), *aff'd*, 38 U.S.L.W. 3493 (U.S. June 15, 1970), reacting to finding of favoritism of personal acquaintances, party regulars and incumbents in selecting order in which names are to appear on ballot by ordering random selection.

243. While the Court indicated—if only for the moment, see note 240 *supra*—that motivation should be required to attack such a choice whether it was administrative or

obviously misled by a failure to appreciate why motivation is properly required in jury selection and some assessment cases,²⁴⁴ it returned to the idea that the relevance of motivation somehow depended upon the fact that administrative selection was involved. The proposition for which *Snowden* unfortunately is remembered and cited is that an administrative violation of state law constitutes a denial of equal protection only if it results from a purposeful discrimination. Closer attention to the underlying considerations in both *Snowden* and the assessment cases would have yielded the conclusions that violation of state law is irrelevant to the federal claim, and that proof of unconstitutional discrimination—by an administrator or a legislature—should be required only with respect to choices not subject to the disadvantageous distinction model of review.²⁴⁵

B. *Pupil Assignment and Some Other Problems of Racial Discrimination*

In *United States v. Montgomery County Board of Education*,²⁴⁶ decided in 1969, the Supreme Court reinstated District Judge Johnson's timetable for gradually making the ratio of white to Negro teachers in each of Montgomery's schools substantially the same as it was throughout the school system. The Court stressed that the Court of Appeals, in modifying Johnson's order, had erred in reading it as

legislative, 321 U.S. at 11, it did not explain why motivation was required in such contexts, thereby leaving its opinion open to the broad and hair-raising construction apparently put on it by Justice Douglas in dissent:

I believe, as the opinion of the Court indicates, that a denial of equal protection of the laws requires an invidious, purposeful discrimination.
Id. at 18.

244. *Id.* at 8-9.

245. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), is seldom cited in this connection but raises similar issues. When he was led to the electric chair and—unintentionally, the Court assumed—administered a nonfatal but nonetheless very painful shock, Francis was denied equal protection, with a vengeance. For there existed no rational argument by reference to which the distinction thus drawn between him and others sentenced to die could be justified, or at least the state did not point to one. ("Carelessness," while it may explain why a distinction was drawn, is not a rational defense of one—else all distinctions would be constitutional, since all *could* have been produced by carelessness. Compare note 86 *supra*. This is not necessarily to say that lack of willfulness should not serve as a defense to a civil suit.) The Court's assertion that Francis had to prove willfulness to establish a constitutional violation will not bear analysis: electric shocks may not be distributed without reason to some but not others of those who have been convicted of a given crime. What was wrong with his claim, and it is somewhat surprising that this appeared nowhere in the panoply of opinions, is that the relief he requested, cancellation of his execution, bore no relation to the wrong he had suffered. If I am sentenced to thirty years imprisonment, and on my first day in prison mistaken for another prisoner and placed in solitary confinement for three weeks, I surely have been denied equal protection. But I would not be entitled to release from prison as a result.

246. 395 U.S. 225 (1969).

"rigid and inflexible." But its opinion must nonetheless be read as approving in some circumstances court orders of a sort we have not seen with regard to jury selection or voting districts:²⁴⁷ those requiring local authorities intentionally to achieve racial balance. It is important, however, to read *Montgomery County* and lower federal court decisions issuing similar orders in context.²⁴⁸ Judge Johnson's order was made in response to a long history of racially motivated teacher assignment, and the United States argued for its reinstatement on that basis alone. Its brief, in a passage significantly quoted by the Court, asserted:

[The order] is designed as a remedy for past racial assignment We do not, in other words, argue here that racially balanced faculties are constitutionally or legally required.²⁴⁹

In the circumstances which confronted Judge Johnson an order setting forth statistical requirements is understandable, and entirely proper. A series of dodges designed to avoid desegregation orders must at some point move even the most patient judge to respond in effect, "So long as I know there is no chance of your choosing without taking race into account, the best I can do—even granting the general undesirability of such orders—is to order you to take it into account in a way that will produce roughly the same results that not taking it into account would produce." Moreover, the objections which apply generally to orders requiring racial balance are somewhat diluted in situations like this. The difficult question of how disproportionate the impact must be to call for such an order need not be asked here, since the order is rendered in response not to disproportion *per se* but rather to a history of racially motivated choices. The dangers of unreviewable misuse of the criterion of race are mitigated by the court's setting of the figures and its already inevitably close surveillance of the situation. And experience shows that orders issued in contexts like this are not taken by legal scholars,²⁵⁰ government offi-

247. There is, however, no reason why—under circumstances similarly involving a history of racially motivated choices—a similar order would not be equally justified in a districting or jury selection situation.

248. See, e.g., *United States v. Jefferson County Board of Education*, 372 F.2d 840 (5th Cir. 1966), 380 F.2d 385 (5th Cir. 1967), cert. denied sub nom *Caddo Parish School Board v. United States*, 389 U.S. 840 (1967).

249. 395 U.S. at 236 (emphasis omitted). "[T]he Constitution is color conscious to prevent discrimination and to undo the effects of past discrimination." *United States v. Jefferson County Board of Education*, 372 F.2d 840, 876 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967). Cf. *Green v. County School Board*, 391 U.S. 430 (1968); *Smuck v. Hobson*, 408 F.2d 175, 184 (D.C. Cir. 1969).

250. See, e.g., A. BICKEL, *supra* note 90, at 130, 131-32; Freund, *supra* note 144, at 20;

cialists²⁵¹ or the popular press²⁵² as expressions of a principle, which would run counter to so much of the Court's work, that race constitutes an acceptable, indeed mandatory, criterion for sorting people out. They are understood for what they are, virtually unavoidable responses to officials who have shown themselves unable to *avoid* using race as such a criterion.²⁵³

Of course the situation is in flux, and these limited remedial orders may in time turn out to have been the first steps in the development of a general judicial command of racially balanced schools. Should this transpire—and it might be noted that if such treatment is justified here, it is justified as well with regard to juries and perhaps voting districts²⁵⁴—there will be no place for reference to motivation: a look at the statistics will suffice. But we are not there, and for the moment such a development seems improbable. It is quite clearly established that states can if they wish affirmatively seek racial balance in their schools,²⁵⁵ but the Court has scrupulously refrained from saying that they must.²⁵⁶ Thus the theoretical framework controlling review of voting district decisions should obtain with regard to school attendance zones as well: courts should not intervene by automatic invalidation or imposition of an extraordinary burden of justification on the basis of imbalance *per se*, but should await proof of an intentional racial gerrymander.²⁵⁷

Comment, *The Affirmative Duty to Integrate in Higher Education*, 79 YALE L.J. 666, 669, 682 (1970).

Judge Smith's opinion in *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1968), does, however, read *Jefferson County* out of context, and ends up with some broad dicta not supported by prior cases. The reversal in *Norwalk CORE* was clearly correct, however; for the plaintiffs, whose complaint had been dismissed by the trial judge, had alleged racial motivation in a situation in which, under the theory developed in this article, it clearly is relevant. *Id.* at 926, 931.

251. See, e.g., *Civil Rights: Desegregation Yes, Integration No*, Time, April 6, 1970, at 11, relating and commenting on President Nixon's statement on school desegregation.

252. *Id.*

253. Cf. *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan & Stewart, JJ., concurring).

254. See note 149 *supra*.

255. See, e.g., *Offermann v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967); *Tomeiz v. Board of Education*, 39 Ill. 2d 593, 237 N.E.2d 498 (1968); *School Comm'n of Boston v. Board of Education*, 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968); *Booker v. Board of Education*, 45 N.J. 161, 212 A.2d 1 (1965); *Vetere v. Allen*, 15 N.Y.2d 259, 206 N.E.2d 174, *cert. denied*, 382 U.S. 825 (1965); *Pennsylvania Human Rights Comm'n v. Chester School District*, 427 Pa. 157, 233 A.2d 290 (1967). This line of cases should cast doubt on the Court's suggestions that the intentional achievement of racial balance may be unconstitutional in jury selection and districting situations. See notes 151 & 164 *supra*.

256. See, e.g., *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Downs v. Board of Education*, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Bell v. School City of Gary*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

257. See, e.g., *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Taylor v. Board of*

In seeking to identify unconstitutional motivation in this context or others, courts should not consider themselves bound by any rigid action-inaction distinction. A racially motivated decision not to alter attendance zone lines should trigger a judicial demand for an explanation as readily as a racially motivated decision to redraw them, though the proof problems are likely to be more substantial.²⁵⁸ Moreover, where a pattern of segregated housing can confidently be attributed to racially motivated government action and the racial imbalance in the schools is attributable to that residential segregation, a court should not hesitate to find the segregation of the schools the product of racially motivated government action.²⁵⁹ The realization that these two conclusions follow from the considerations properly controlling review in this area should make the courts more willing to infer unconstitutional motivation than they have been in the past.²⁶⁰

But neither a motivation approach to review nor any other is likely to produce anything resembling total integration, except in the rural South,²⁶¹ if "community", in the sense of an area whose residents are united by ethnic and economic ties, is credited as a legitimate criterion of choice. The confusion of several questions and definitions makes it difficult to determine the extent to which such choice is condoned.

Education, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961); *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962).

258. But when the decision not to make a change can be located temporally, inferring motivation from the existing factual situation may be entirely legitimate—surely no less legitimate than inferring it, with regard to a decision to make a change, from the effects which must have been foreseeable.

When it determined to maintain the status quo, the Board could hardly have been unaware that this would necessarily perpetuate Lincoln as a predominantly Negro school.

Taylor v. Board of Education, 191 F. Supp. 181, 186 (S.D.N.Y. 1961), *aff'd*, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961).

259. See Kaplan, *supra* note 140, at 212; Fiss, *Racial Imbalance in the Public Schools*, 78 HARV. L. REV. 564, 584-86 (1965).

260. Professor Bickel has recently observed, A. BICKEL, *supra* note 90, at 134:

All too many federal judges have been induced to view themselves as holding roving commissions as problem solvers, and as charged with a duty to act when majoritarian institutions do not. Not all of them have so far resisted, and not all will resist, invitations to take charge, whether by being more skeptical of the *bona fides* of local school administrators, or by directly confronting the *de facto* problem.

The suggestion of this article is that there is, despite the similarity of the results which specific cases may generate, a substantial difference between assuming an attitude of skepticism with regard to the *bona fides* of government officials and affirmatively commanding racial balance.

While I do not mean to suggest that the Court be cavalier in its inferences—which course of action would soon be recognized for what it is and thus involve the same costs as an impact test—there need be no terribly strong resolution to err on the side of refusing to find the alleged motivation. For so long as it can convincingly phrase its opinion in terms of a finding of motivation, the court will be able at the same time to require the reformulation of a districting plan which has produced substantial racial imbalance, and to avoid instructing other districters that they must take race into account.

261. See *id.* at 133.

It is widely accepted that school districts—a district being an area whose schools are controlled by a common governing authority—can legitimately be constructed along such “community” lines.²⁶² I am not aware, however, of widespread acceptance of the view that within such districts the various attendance zones can properly be drawn along community lines of an ethnic or economic nature.²⁶³ The obvious problem with this combination of positions is that if effective racial segregation can be justified under the guise of “community” distinction at the level of constructing school districts, a hesitancy to permit the use of such criteria of choice in subdividing the districts into attendance zones may be largely meaningless. This realization might suggest that the acceptance of “community” as a legitimate criterion of choice even at the district level ought to be reexamined.²⁶⁴ Certainly those who charge the courts with thwarting integration by their refusal to embrace a pure impact test by declaring “*de facto* segregation” of attendance zones unconstitutional would do well to consider not only the costs of instructing local officials to take into account the races of the persons they are sorting out, but also whether such a broad pronouncement would actually achieve integration in view of the recognition of “community” as a legitimate criterion of choice at the district level.²⁶⁵

262. This position is a logical extension of the view that voting districts and other political units may be thus constructed, and is thus subject to the reservations expressed above, p. 1234, in addition to the one now mentioned in the text.

263. In the context of pupil assignment as opposed to governance, condonation of the “neighborhood school concept” apparently amounts to nothing more controversial than acceptance of the propriety of assigning pupils along geographical lines; it says that students should generally go to school near their homes without taking a position on how the geographical discriminations should be made. See, e.g., *Brown v. Board of Education*, 349 U.S. 294, 300 (1955); Kaplan, *supra* note 140, at 178-80.

264. I hope it is unnecessary to note that to say this is to take no position on how control should be divided as among the school, district, city, county and state levels.

265. Professor Black's defense of *Brown v. Board of Education* relies in part on the observation that segregation was and is intended to disadvantage Negroes. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). It is relatively clear, however, that he means this observation not to serve as the constitutional point-in-chief, but rather to provide a buttress—alternative to the sociological and psychological studies on which the Court relied—for what, he feels, is to the constitutional point, that segregation “significantly disadvantages” Negroes. *Id.* at 421. See *id.* at 425:

Segregation in the South grew up and is kept going because and only because the white race has wanted it that way—an incontrovertible fact which in itself hardly consorts with equality. This fact perhaps more than any other confirms the picture which a casual or deep observer is likely to form of the life of a southern community—a picture not of mutual separation of whites and Negroes, but of one in-group enjoying full normal communal life and one out-group that is barred from this life and forced into an inferior life of its own

Professor Heyman, however, taking off from the undeniable proposition that the equal protection clause was designed in large part to guarantee that Negroes would be treated equally with white persons, concludes that even if comparative disadvantage does not in fact result from a law, the law must fall nonetheless if it was designed to hurt Negroes. Heyman, *supra* note 40, at 112-15.

The review of official decisions regarding teacher placement²⁶⁶ and the location of new schools²⁶⁷ has been approached by the courts in terms of motivation, and properly so. Each could constitutionally be done at random; but once such a decision is shown to be the product of a desire to promote the separation of the races, a (rarely satisfiable) judicial demand for a legitimate defense is appropriate.²⁶⁸

It was established above that the fourteenth amendment prohibits a state from disadvantaging Negroes on the basis of race. Normally, when faced with a statute which classifies on the basis of race, as do segregation statutes, a court only inquires whether the parties are disadvantaged in order to determine the statute's validity. There is no inquiry into the aim or purpose of the statute. (For instance, a state law prohibiting Negroes from voting in an election is invalid whether or not the state aimed to harm Negroes by the statute.) *For purposes of Professor Wechsler's argument, it must be presumed that the state is providing "equal" facilities.* The argument following this presumption is that the "harm" which results to Negroes, the generation of feelings of inferiority, is the product solely of the interpretation which Negroes give segregation statutes. Presumably such "harm" flowing solely from a subjective interpretation of this nature is insufficient to render segregation statutes unconstitutional. *But if the state passes segregation statutes for the very purpose of causing such "harm" to occur, then there would seem to be no question but that the statutes are invalid.*

Id. at 115 (emphasis added and footnotes omitted). Since segregation obviously was designed to hurt Negroes, Heyman continues, it is unconstitutional. There are two problems with this. The first is that not all would agree that the conclusion that Southern legislatures meant to harm Negroes by segregating them is sufficiently solid to support a constitutional judgment.

Who is to say that the majority of a legislature which enacts a statute segregating the schools is actuated by a conscious desire to suppress and humiliate the Negro? Who is to say that for many members more decent feelings are not decisive—the feeling, for example, that under existing circumstances Negro children are better off and can be more effectively educated in schools reserved for them exclusively, and that this is the most hopeful road to the goal of equality of the races under law? A. BICKEL, *supra* note 30, at 61-62 (not approving, but simply citing as a tenable inference, the "more decent" motivation. *See also id.* at 57.) A more basic objection to Heyman's position is that the bridge from the proposition that Negroes cannot be comparatively disadvantaged, to the proposition that an intent to disadvantage them constitutes the equivalent in law of actually doing so, simply is not built. *See Heyman, supra*, at 112-15.

The thesis developed by this article yields the conclusions that proof of motivation is indeed a prerequisite of judicial intervention in cases like *Brown*, but that Professor Heyman errs in asserting that the relevant motivation is a desire to disadvantage Negroes. Instead, the requisite motivation was so patently present that the Court was entirely justified in not addressing the issue. Nothing in the Constitution would prevent Topeka or any other city from having only one attendance zone but two (or more) schools of the same level, and deciding which students were to go to which school by random selection. That being permissible, the disadvantageous distinction model is inapposite. Thus proof that the selection was not random is necessary to trigger judicial review. But that sort of motivation was conceded, for the law in terms drew a racial distinction.

I therefore tender yet another explanation of *Brown v. Board of Education*. Miss Brown was surely harmed sufficiently to give her standing to bring the suit, *see* note 139 *supra*, for she was excluded from a school she wished to attend. Moreover, it was clear beyond dispute that she was not excluded at random. Thus, the burden of constitutionally legitimate justification of the exclusion was shifted to the state, which obviously could not meet it.

266. *See, e.g.,* *Bradley v. School Board of City of Richmond*, 382 U.S. 103 (1965); *Rogers v. Paul*, 382 U.S. 198 (1965); *Hobson v. Hansen*, 269 F. Supp. 401, 501-03 (D.D.C. 1967), *remanded*, *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

267. *See, e.g.,* *Henry v. Godsell*, 165 F. Supp. 87, 90 (E.D. Mich. 1958) (*dictum*); *Sealy v. Department of Public Instruction of Pennsylvania*, 159 F. Supp. 561, 565 (E.D. Pa. 1957) (*dictum*), *aff'd*, 252 F.2d 898 (3d Cir. 1958), *cert. denied*, 356 U.S. 975 (1958).

268. Such a defense would rarely be forthcoming. *Compare* note 273 *infra*. Decisions

In *Griffin v. County School Board of Prince Edward County*,²⁶⁹ decided in 1964, the Supreme Court, speaking the language of motivation, invalidated Virginia's closing of Prince Edward County's public schools, which had been ordered integrated. One way of dealing with such a case, which was employed as an alternative ground by a three judge district court in the earlier and similar case of *Hall v. St. Helena Parish School Board*,²⁷⁰ would have been to hold such geographical discriminations subject to the disadvantageous distinction model and thus demand *ab initio* a legitimate defense of a decision to provide a public service in one county but not another. The Supreme Court has declined to do so, however, holding that geographical discriminations need not generally be defended.²⁷¹ Against that somewhat questionable background, the reference to motivation was quite in order. A decision to close the schools in only that county where integration has been ordered can fairly be taken, in the absence of rebuttal evidence, to have been motivated by a desire to continue segregation. And that motivation should, in turn, trigger a demand for a rational and nonracial defense of the choice of that county—a defense which almost certainly would not be, and in the event was not, forthcoming. Indeed, should a state close *all* its schools under circumstances clearly revealing that it has done so in order to preserve segregation, the same theory would apply.²⁷² Ordinarily a state need provide no legitimate defense of a decision to terminate one public service rather than another, but when the choice has been made for an unconstitutional reason, such a defense should be required. (It would almost certainly not be available. Of course closing all schools—or, indeed, closing one school—saves the state money, but what requires a legitimate defense

to fire teachers, on the other hand, should be treated under the disadvantageous distinction model; a legitimate defense should be demanded simply because a choice has been made, and without requirement of illicit motivation. *But cf.* *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); *Chambers v. Hendersonville Board of Education*, 364 F.2d 189 (4th Cir. 1966).

269. 377 U.S. 218 (1964). *See also* *Bush v. Orleans Parish School Board*, 187 F. Supp. 42, 45 (E.D. La. 1960).

270. 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515 (1962). *See also* *Lee v. Macon County Board of Education*, 231 F. Supp. 743, 754 (M.D. Ala. 1964); *Harvard Developments*, *supra* note 50, at 1096.

271. *See* *McGowan v. Maryland*, 366 U.S. 420, 427 (1961); *Salzburg v. Maryland*, 346 U.S. 545, 551 (1954). *But cf.* *Reynolds v. Sims*, 377 U.S. 533 (1964). (Such cases say the equal protection clause does not apply to geographical distinctions, but that they mean only that the disadvantageous distinction model is inapplicable is demonstrated by *Prince Edward County*.) The hesitancy to apply the disadvantageous distinction model may stem from the fact that decisions regarding the provision of public services may be made at the local, rather than the statewide, level.

272. This probably is closer to *Prince Edward County*, since the decision to close the schools was made at the county level.

is the choice, the decision to save money this way rather than some other.²⁷³)

273. It is undoubtedly true as well that the integration of Prince Edward County's schools increased the possibility of racial strife and consequently raised the costs of maintaining the school system. But under cases like *Cooper v. Aaron*, 358 U.S. 1 (1958) and *Buchanan v. Warley*, 245 U.S. 60 (1917), such considerations cannot count as constitutionally legitimate justifications. Nor can they rebut the inference of unconstitutional motivation; under *Cooper* and *Buchanan*, an intention to resist integration in order to save the money it will cost to deal with the resultant strife is an unconstitutional motivation. See *Poindexter v. Louisiana Financial Assistance Comm'n*, 296 F. Supp. 686 (E.D. La. 1968); *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967). But see *Palmer v. Thompson*, 419 F.2d 1222 (5th Cir. 1970), *prob. juris. noted*, 38 U.S.L.W. 3401 (1970).

"Increasing private discretion" should not be credited generally as a legitimate justification of an unconstitutionally motivated decision to terminate a particular governmental function—or, what is equivalent, to turn it over to private management—else all decisions to do so in order to evade constitutional restrictions on state action would be lawful. The point, once again, is that the proffered defense must be such that it rationally distinguishes *this* public function from all others. Perhaps, however, educational functions should be regarded as unique in this respect, given the holding of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), that a parent's prerogative to determine how his child shall be educated amounts to a constitutional right. There might be situations in which a closing of the public schools, coupled with a general tuition grant program, would increase the range of parental choice. But maximization of choice clearly should not be credited as a legitimate justification where there is no real choice for the group against whom the entire project is directed. (In *Prince Edward County*, Negroes apparently would have been able to attend all-Negro private schools, but not integrated schools. 377 U.S. at 223. The state's plan hardly increased the range of their choice.) Thus the question of whether "maximization of choice" can justify a racially motivated decision to turn a governmental function over to private management is something of a tempest in a teapot, since such motivation and the availability of truly free choice for Negroes will rarely coexist in the same community. Cf. *Green v. County School Board*, 391 U.S. 430 (1968).

The lower court decisions invalidating tuition grant programs—see, e.g., *Griffin v. Board of Supervisors of Prince Edward County*, 339 F.2d 486 (4th Cir. 1964); *Griffin v. State Board of Education*, 296 F. Supp. 1178 (E.D. Va. 1969); *Poindexter v. Louisiana Financial Assistance Comm'n*, 296 F. Supp. 686 (E.D. La. 1968); *Brown v. South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C. 1968), *aff'd*, 393 U.S. 222 (1968); *Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd*, 389 U.S. 215 (1967)—set forth three alternative rationales: that such a system will in fact lead to racial imbalance; that the motivation underlying the enactment was the separation of the races; and that the school to which the student hands over the grant becomes perforce a government agency, and consequently cannot discriminate racially. I shall not repeat the objections to the first ground. The third ground hardly seems sufficient to support invalidation of the grants; on a "state action" theory, courts should await and rectify unconstitutional action by the schools involved. But even thus refined, the third ground carries consequences with which I expect the courts would be unhappy: prayer or religious studies in a parochial school thus funded would seem on such a view to be—though I have no doubt the Court would valiantly seek a way out, cf. *Evans v. Newton*, 382 U.S. 296, 300 (1966)—in serious constitutional difficulty. The motivation approach, however, is soundly grounded; in the cases cited, a racial motivation was clear, and—for the reasons discussed in the last paragraph—"maximization of choice" should not be credited as a legitimate defense.

Motivation is irrelevant to whether the acts of an arguably private body or individual should be treated for constitutional purposes as governmental acts; my desire to be, or belief that I am, a policeman does not make me one. It is, however, customary also to treat under the rubric "state action" the question whether an undeniably governmental act impermissibly encourages private acts of discrimination. This assimilation of two distinct issues has had unfortunate consequences. Cases raising the second issue have been treated as if they raised only the first. The Court (obviously misled by the label "state action" and the well-founded feeling that motivation cannot convert a private act into a governmental act) has on occasion failed to appreciate that—given its apparent

Motivation in Constitutional Law

The theory proposed herein also applies to problems of racial discrimination raised by residential zoning and by the choice of sites for

reading of the Fourteenth Amendment as requiring no more than governmental neutrality with respect to private discrimination—motivation can be relevant to the second issue. Opinions which cry out for a reference to motivation have therefore had to struggle along without it.

The white primary decisions—see *Smith v. Allwright*, 321 U.S. 649 (1944), and the history it recites—exemplify this confusion of issues. What, for example—as Professor Wechsler has asked, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959)—becomes of religiously sponsored political parties if we take seriously the Court's "state action" theory that primary elections constitute governmental action? The cases would better have been decided by focusing on the undeniably racial motivation underlying the plainly governmental decision to turn the nomination process over to private hands, rather than the post-transfer character of that process. Compare the latest "Girard College case," *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir. 1968), cert. denied, 391 U.S. 921 (1968).

Evans v. Newton, 382 U.S. 296 (1966), involved a tract of land which in 1911 had been willed in trust to the city of Macon, to be used as a park for white people. After the park had been desegregated in response to *Brown* and its progeny, the city resigned as trustee, and the state courts approved the city's resignation and appointed private trustees to replace it. On certiorari the Supreme Court, speaking through Mr. Justice Douglas, held that the park remained public for constitutional purposes, and reversed the order of the state court approving the resignation and appointing the new trustees. In finding state action, the Court focused on the facts that parks usually are governmentally owned and operated, and that this park had in the past undeniably been government property. Apparently concerned, however, by the realization that exclusive reliance on these two factors would mean that a parochial school located in a formerly public building would be constitutionally barred from selecting students on religious grounds or giving religious instruction, the Court relied further on the record's absence of evidence that the park was no longer being maintained by city employees. *Id.* at 300-01. But this is patent nonsense. There was nothing in the record to indicate that the park was still being publicly maintained, and it surely is not judicially noticeable that a city striving to establish the "private" character of a facility would continue to maintain it. But if the Court's rationale was senseless, its order was equally so. The conclusion that the park remained public despite the change of trustees hardly supports a reversal of the order of the Georgia court accepting the resignation and appointing new trustees. An order desegregating the park would be proper were a suit requesting that relief brought. But the appropriate remedy in the case before the Court would have been, if not an affirmance, *id.* at 312-15 (Black, J., dissenting), a remand for reconsideration of the order in light of the Court's conclusion that a shift of trustees would not alter the park's public character, and therefore would not legitimate its resegregation. *Id.* at 302-05 (White, J.).

If, however, the case could have been decided in terms not of the park's present character—which was bound to be somewhat uncertain, given the procedural posture—but rather in terms of the city's decision to turn it over to private trustees, the Court's remedy would have been appropriate. The disadvantageous distinction model is not applicable in such a situation: ordinarily a city is under no obligation rationally to justify a decision to turn a particular facility over to private management. However, it was clear beyond dispute in *Evans* that the change of trustees had been effected with the motivation of permitting the segregation of the park. Record, at 8, 60-61, 65, 82; Petition for Certiorari, at 12a, *Evans v. Newton*, 382 U.S. 296 (1966). The neatness of this rationale is spoiled by the realization that the decision to turn the park over to private management is arguably justifiable on the ground that a failure to keep the park segregated would cause the trust to fail under Georgia law. *Evans v. Abney*, 90 S. Ct. 628 (1970). I would argue that a belief that "a segregated park is better than no park at all" should not count as a legitimate defense of a racially motivated choice. But the question is not free from difficulty; arguably, the state was pursuing a "neutral" policy of keeping trusts from failing. Mr. Justice White's argument that the Georgia law of trusts had not been neutral with respect to race, 382 U.S. at 302-12, may therefore present a more satisfactory rationale. The matter could, of course, be entirely cleared up by holding that state neutrality with respect to private discrimination is not constitutionally sufficient. See pp. 1301-02.

public housing projects.²⁷⁴ Similar problems are raised by *Deerfield Park District v. Progress Development Corporation*,²⁷⁵ which one commentary described and analyzed as follows:

Upon learning that a private developer was about to construct an integrated housing development, the Deerfield Park District, a municipal corporation governed by a board of five elected members, immediately condemned the developer's land for use as a public park. The conflict between motive and purpose was thus sharply drawn; the condemned land was to be used for a park (the purpose of the action), but the reason that the land was condemned was allegedly to prevent residential integration (the board's motive). The Supreme Court of Illinois declined to examine the board's motives and upheld the condemnation. The court treated the board's members as "legislators" and therefore found inquiry into their motives improper. This conclusion would seem correct. Although the board of five members was not as numerous as a state legislature, it was a popularly elected and politically responsive body performing a legislative function—determining what land was to be condemned—within its area of power. It would, therefore, seem sufficiently legislative to bar examination of its members' motives.²⁷⁶

This passage graphically illustrates the difficulties which flow from (a) the assumption that the controlling principles differ as between "legislative" and "administrative" action, and that a sensible line between the two can be drawn for purposes of determining the relevance of motivation; (b) the assumption that "motive" and "purpose" refer to separate species of legislative aims; and (c) the failure to distinguish two separate questions—whether to have a park, and where to put it. Of course the City Fathers can have a park, and ordinarily they would not be obligated to provide a rational defense of their decision to place it at point X rather than somewhere else. But it follows from neither the realization that a park may be created, nor the realization that random selection of the location would be constitutionally tolerable, that the selection of point X may be made on any basis whatsoever.

274. See *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969). To agree that motivation is relevant in such situations is not necessarily to approve the court's view of the proper remedy. See Note, *Public Housing and Urban Policy: Gautreaux v. Chicago Housing Authority*, 79 YALE L.J. 712 (1970).

275. 22 Ill.2d 132, 174 N.E.2d 850 (1961), cert. denied, 372 U.S. 968 (1962). See also *Green Street Ass'n v. Daley*, 373 F.2d 1 (7th Cir. 1967), cert. denied, 387 U.S. 932 (1967).

276. *Harvard Developments*, supra note 50, at 1100-01 (footnotes omitted).

C. *Governmental Encouragement of Private Discrimination*

In *Reitman v. Mulkey*,²⁷⁷ decided in 1967, the Court invalidated an amendment to the California constitution which repealed existing fair housing legislation by recognizing an absolute right to sell or rent to whomever one pleases. In *Hunter v. Erickson*,²⁷⁸ a 1969 decision, it struck down an amendment to the Akron city charter which provided:

Any ordinance enacted by the Council of the City of Akron which regulates the use, sale, advertisement, lease, sub-lease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before such ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

The Court's rationale in *Reitman* is less than coherent, but the opinions in *Hunter* begin to delineate the possible grounds of decision. Writing for the Court, Mr. Justice White at one point suggests that the invalidity of such amendments stems from the realization that they will in fact unusually disadvantage racial minorities.²⁷⁹ The difficulties with this impact approach have been canvassed at length above. At another point he suggests that the amendments are invalid because they cannot legitimately be distinguished from various other amendments which might have been, but were not, passed.²⁸⁰ This line of argument assumes that a decision constitutionally to enshrine one right rather than another—or otherwise to render it relatively immune to the democratic process—is subject from the outset to a demand for (at least) a rational defense. This position cannot be maintained, however, for such choices cannot be held up to a standard of rationality. If asked to justify their decision to protect a right of privacy but not a right to indictment by a grand jury, or vice versa, the drafters and enactors of a state constitution can really say no more than that they thought it more important or more fundamental; courts can apply a “rationality-irrationality” calculus here no more than they can with respect to a criminal code.

277. 387 U.S. 369 (1967).

278. 393 U.S. 385 (1969).

279. *Id.* at 391.

280. *Id.* at 390. Cf. Black, *Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 74-83 (1967); A. COX, *THE WARREN COURT* 47 (1969).

The fact that the disadvantageous distinction model cannot intelligibly be imposed on such choices suggests the applicability of the analysis proposed by this article. A decision to render a particular right relatively immune to the democratic process is not subject *ab initio* to the demand for a legitimate defense, but proof of a motivation which violates the Federal Constitution should trigger such a demand. Since it is ultimately impossible to analyze or support a decision thus to enshrine a particular right in terms of anything *but* a value judgment, proof of an unconstitutional motivation would inevitably ensure the invalidation of such a choice.²⁸¹ Though he gets there by a different route,²⁸² this is essentially the position Mr. Justice Harlan takes in his concurrence in *Hunter*,²⁸³ which suggests that *Reitman* was wrongly decided and attempts to distinguish the two cases.

If states are not affirmatively obligated to combat private acts of racial discrimination,²⁸⁴ Mr. Justice Harlan's conclusion that no unconstitutional motivation was proven in *Reitman* seems well founded. It is difficult to infer that a majority of those voting for the California amendment were moved by a desire to impose a special disadvantage upon racial minorities attempting to gain passage of fair housing legislation, rather than by the broader and nonracial motivation reflected on the face of the provision on which they were asked to pass judgment—a desire to place *all* restrictions on vendors' and renters' freedom of choice beyond the reach of the ordinary political processes.

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

Although one must suspect that a number of voters had racial or religious discrimination in mind when they voted for this provision, its language is more consistent with a desire to safeguard the seller's or landlord's right to refuse to deal with anyone who for any reason

281. See pp. 1272-73.

282. Mr. Justice Harlan's suggestion seems to be that racially motivated laws, like those which classify in terms of race, engage in "suspect classification" and therefore demand an unusually compelling defense. 393 U.S. at 393-96 (Harlan, J., concurring). The thesis advanced by this article suggests that choices of the sort involved in *Reitman* and *Hunter* ordinarily bear no burden of even rational defense, but that proof of a desire unusually to burden the political efforts of one racial group should instate such a burden. No demand for "more than rationality" would be appropriate on the basis of such proof, pp. 1269-81, but none is needed here; such choices are never "rationally" defensible.

283. But see *Reitman v. Mulkey*, 387 U.S. 369, 390-91 (1967) (Harlan, J., dissenting).

284. But see pp. 1301-02.

Motivation in Constitutional Law

displeases him—be it because of his race, his age, the length of his hair or the cut of his jib—than it is with a desire to place unusual obstacles in the path of racial or religious groups seeking legislative protection from discrimination.²⁸⁵ And if we are to take seriously the Court's assertions that states are under no affirmative obligation to discourage racial and religious discrimination—that in taking or refraining from various actions,²⁸⁶ they need simply maintain a position of neutrality with respect to the likely or actual practice of such discrimination²⁸⁷—the former motivation cannot be counted unconstitutional.

The *Hunter* amendment, Mr. Justice Harlan correctly asserts, cannot be regarded as neutral in this sense: because it is directed in terms at legislation respecting racial and religious groups, it plainly was enacted with the motivation of rendering unusually difficult the efforts of such groups to secure protection via the political process.

Mr. Justice Harlan's employment of a motivation approach in this context is sound only if neutrality is sufficient in the sense that states are not affirmatively obligated to combat racial discrimination in the sale and rental of housing and other transactions which the law historically has regulated. If, however, as Professor Black has forcefully argued,²⁸⁸ the state's duty to ensure "the equal protection of the laws" incorporates such an obligation, reference to motivation is out of place; the Court need only survey the steps the state has taken and determine whether they constitute adequate fulfillment of the constitutional obligation. Doubtless some, perhaps for historical reasons, will not agree that the Fourteenth Amendment can responsibly be given this expansive a reading. But one objection which clearly should not be heeded is that this position shares the dangers which inhere in requiring states affirmatively to seek racial balance in various areas by quota systems or other methods which take race into account. A resolution

285. Cf. p. 1324.

286. In *Reitman* the Court characterized the amendment there invalidated as different in constitutional significance from either a state's decision to repeal a fair housing law or a decision not to enact such a law. But surely either of the latter two courses of action can "encourage" private discrimination—as, indeed, can essentially any governmental act (the provision of a postal system; charitable contribution deductions; the enforcement of bequests by name.) See also Note, *supra* note 51, at 1900 n.38. Sooner or later the Court must follow logic one way or the other. Either the state can act without regard to how its actions or inactions are going to affect the likelihood of private discrimination, in which case judicial intervention should await proof of an intention to foster such discrimination; or the state is obligated to combat such discrimination by taking some actions and refraining from others.

287. But cf., e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Peterson v. South Carolina*, 373 U.S. 244 (1963).

288. Black, *supra* note 280.

not to force states to take race into account in making choices, and a consequent requirement only that they not take race into account, coexists quite comfortably with a resolution to require states to require their citizens, similarly, *not* to take race into account. Since *Reitman* is defensible on no other basis,²⁸⁹ it should be taken to have established this affirmative obligation.²⁹⁰

D. *The Limits of Federal Power*

An attack upon a given Act of Congress on the ground that power to enact it is not granted in Article I, § 8 or elsewhere in the Constitution is one to which the motivation of Congress is irrelevant. The controlling constitutional test—a rational relation to a head of power entrusted to Congress—is fully applicable from the outset.²⁹¹ Any system of review which permitted motivation to impose an additional burden of justification would inevitably create problems of ascertainability, futility and disutility.²⁹² This is not to say that there will not be occasions, in the context of what are typically but myopically approached as scope of authority cases, when motivation is relevant. If, for example, Congress were to create a tax rate discrepancy in order to disadvantage Negroes or liberals, its motivation would indeed be relevant—not because the illicit motivation proved that the taxes in question were “beyond the taxing power,” but rather because, in an area where distinctions need not ordinarily be defended, Congress had decided whom comparatively to advantage and disadvantage on an unconstitutional basis. The taxes are no less “real” because of that,²⁹³

289. See note 286 *supra*.

290. But see *Evans v. Abney*, 90 S.Ct. 628 (1970).

291. See note 33 *supra*.

292. See also p. 1283.

293. During the era when it invalidated taxes because they were passed with the motivation of influencing affairs not otherwise subject to federal control, see note 298 *infra*, the Court generally concluded with a statement that the challenged measure was “not really a tax.” This has misled a surprising number of commentators. See, e.g., Kent, *Compulsory Disclosure and the First Amendment—The Scope of Judicial Review*, 41 BOSTR. U. L. REV. 443, 462 (1961) (footnote omitted):

It is sometimes asserted that in the area of federal taxation motive, or ulterior purpose, has a unique role in judicial review. In the main, the cases do not bear this out. While the Court has had occasion to conclude that a measure labeled “tax” was in reality something else, that which it has determined to be a tax it has not invalidated because of the ulterior purposes of the legislature in enacting it.

Numerous factors have been said to indicate that what purports to be a revenue measure is really intended as regulation, and therefore is not really a tax. I would suggest, however, that none of the factors thus mentioned is properly taken to establish or even to suggest that a given revenue measure is not within the taxing power; and that while some among them properly give rise to constitutional concern, the concern will upon reflection be seen to be rooted in a provision other than the taxing clause.

One feature of the Child Labor Tax mentioned by the Court which invalidated it in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36 (1922), was that it was not geared to the

Motivation in Constitutional Law

number of infractions committed by the employer:

[The prescribed] course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years; and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the government one tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day.

This factor hardly suggests that the motivation underlying the law was the discouragement of child labor rather than the raising of revenue; fines frequently vary with the number of infractions. It is doubtful that the opinion of the Court or anybody else would have varied an iota if the Act had taxed according to the number of pieces produced, or the days worked, by children.

Moreover, if [the employer] does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scierter is associated with penalties not with taxes.

Id. at 36-37. Again, it is difficult to believe that the absence of a scierter requirement would have made any difference. Nor should it; a state legislature, in directly prohibiting child labor, might reasonably place—and many have—on employers the burden of making sure they are not employing underage labor, and thus deny them the defense of ignorance.

It has also been suggested that a high rate constitutes evidence that what purports to be a tax was not really so intended, since it indicates that the legislative aim was not to gather revenue but to discourage the taxed activity. But not so long ago personal income taxes went as high as 91%; it is doubtful that Congress was thereby trying to eliminate earning. Cf. Note, *Hot Cargo Clauses: The Scope of Section 8(c)*, 71 *YALE L.J.* 158, 166 n.42 (1961). On other occasions purported revenue measures have been branded “not real taxes” on the ground that their rates are too low to produce substantial revenue, presumably on the theory that the legislature must have been more interested in the regulations which accompany the measure, or the disclosure of the taxpayer’s activities which the obligation to pay would compel, than it was in the money. But the proposition that a low tax rate is inconsistent with a revenue purpose is as dubious as its converse: taxes can be low, as they can be high, because of the amount of money the government needs. (The whipsaw effect of a combination of high and low rates is considered at pp. 1304-06, also suggesting that the constitutional concern is rooted elsewhere than the taxing clause.) And if there is something offensive about the accompanying regulations or disclosure, it is they which ought to be attacked.

And so they have, but all too often not at their roots, but instead once again by the “not a tax” inference. Thus the fact that what purports to be a tax measure is buttressed by a detailed network of regulations has sometimes been taken to imply that revenue was not the dominant aim. As Justice Frankfurter put it in his dissent in *United States v. Kahriger*, 345 U.S. 22, 39 (1953).

A nominal taxing measure must be found an inadmissible intrusion into the domain of legislation reserved for the States . . . when Congress requires that such a measure is to be enforced through a detailed scheme of administration beyond the obvious fiscal needs

There certainly may be constitutional problems lurking in unusually detailed sets of regulations, but the inference from that realization to the conclusion that the underlying measure is not really a tax seems questionable. It surely is not inconceivable that a legislator might sincerely regret that a detailed regulatory network is necessary to ensure collection of a tax, but take the bitter with the sweet because he feels the government needs the money and this is a sensible place to get it. A court which sets for itself the task of determining from inspection of a legislative package which includes a tax and accompanying regulations, whether revenue or regulation was the “dominant purpose” will be able to come to no satisfactory conclusion; for both were plainly intended, and once again the concept of “dominant purpose” is being used to paper over a failure to distinguish two separate choices. Compare p. 1308. The constitutional approach better tailored to the evil here apprehended would be to invalidate as beyond the necessary and proper clause those regulations which are not reasonably related to revenue collection—“beyond the obvious fiscal needs.” Those which are reasonably related to the collection of the tax ought to be upheld, even if they take up, as they frequently will, more space in the United States Code than the underlying revenue provision.

Of course some regulations are objectionable on other than “necessary and proper”

but the distinction must nonetheless fall under the logic of *Gomillion*.²⁹⁴

Of similar contour are cases like *McCray v. United States*,²⁹⁵ which involved the taxation of white oleomargarine at one quarter cent a pound and colored oleomargarine at ten cents a pound. While both taxes are "real," no examination of legislative history is needed to tell us that the discrepancy between them was designed to discourage the coloring of oleomargarine. And that is a goal difficult to justify in terms of any independent constitutional grant of congressional power. The theory this article proposes would therefore seem applicable, in that the challenged distinction was created in order (1) to control behavior whose control is left exclusively to the states, or in the alternative (2) to achieve a goal encompassed by no other constitutional grant of power. The Court in fact upheld the taxes, asserting that motivation simply is not relevant to questions of congressional power.²⁹⁶ But that answer will not bear analysis, for properly conceived Mc-

grounds. A requirement that a taxpayer throw wide the doors of his home whenever a Revenue Agent approaches would offend the Fourth Amendment. So it was with Justice Frankfurter's objection in *Kahriger*:

[T]he enforcing provision of this enactment is designed for the systematic confession of crimes with a view to prosecution for such crimes under State law.

It is one thing to hold that the exception which the Fifth Amendment makes to the duty of a witness to give his testimony when relevant to a proceeding in a federal court, does not include the potential danger to that witness of possible prosecution in a State Court It is a wholly different thing to hold that Congress, which cannot constitutionally grapple directly with gambling in the States, may compel self-incriminating disclosures for the enforcement of State gambling laws, merely because it does so under the guise of a revenue measure obviously passed not for revenue purposes. The motive of congressional legislation is not for our scrutiny, provided only that the ulterior purpose is not expressed in ways which negative what the revenue words on their face express and which do not seek enforcement of the formal revenue purpose through means that offend those standards of decency in our civilization against which due process is a barrier.

Id. at 39-40. But when the taxed activity is illegal, the compulsion of self-incrimination is a tactic *well* designed to enhance the probability of collecting the tax, just as the issuance of a general search warrant to the Internal Revenue Service would be. As Justice Frankfurter seems ultimately to have realized, "due process"—not the taxing clause—was what the statute offended. Mr. Justice Harlan for the Court in *Marchetti v. United States*, 390 U.S. 39 (1968), overruling *Kahriger* on the self-incrimination point, felt no obligation to suggest that the gambling tax was not really revenue-oriented. Indeed, he inexplicably drew the other conclusion—"The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers . . .," *id.* at 57—which is no more capable of demonstration than its converse, and no more relevant.

294. Pp. 1272-73.

295. 195 U.S. 27 (1904). *See also* *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hill v. Wallace*, 259 U.S. 44 (1922); *Sozinsky v. United States*, 300 U.S. 506 (1937); *United States v. Sanchez*, 340 U.S. 42 (1950); *United States v. Kahriger*, 345 U.S. 22 (1953). Similar problems can, of course, be raised by cases involving purported exercises of the spending power, *United States v. Butler*, 297 U.S. 1 (1936), and the commerce power. *See, e.g.*, *United States v. Darby*, 312 U.S. 100 (1941); *Kentucky Whip & Collar Co. v. Illinois Central R.R. Co.*, 299 U.S. 334 (1937); *United States v. Hill*, 248 U.S. 420 (1919); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917).

296. P. 1210.

Cray's objection was not that Congress had exceeded its power by taxing oleomargarine, but rather that the discrepancy in rates had been unconstitutionally motivated. The attack was one sounding not in scope of authority, but in the "equal protection" of *Gomillion*.²⁹⁷

There is, nonetheless, a serious problem with the argument: it is difficult to maintain—today, at any rate—that either of the asserted motivations is unconstitutional. The notion that the Constitution fences off some enclave of "local affairs" and entrusts them exclusively to the states²⁹⁸ was long ago resoundingly²⁹⁹ (and rightly³⁰⁰) laid to rest; what is left exclusively to the states is now seen as a function of what has not been granted to the central government.³⁰¹ There is,

297. I am throughout assuming that the federal government, like the states, is bound by the constitutional prohibition of indefensible inequality. *See, e.g.,* *Bolling v. Sharpe*, 347 U.S. 497 (1954).

298. *See, e.g.,* *United States v. Butler*, 297 U.S. 1, 68 (1936); *United States v. Constantine*, 296 U.S. 287, 295-96 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

299. *United States v. Darby*, 312 U.S. 100 (1941).

300. "The term 'police power' is a vague one which embraces an almost infinite variety of subjects." *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 192 n.5 (1968), quoting *Munn v. Illinois*, 94 U.S. 113, 145 (1877). Thus the federal government would be practically powerless if it were precluded from affecting by legislation any subject the states can regulate; and I know of no other way—save by reference to the negative implications of Article I, § 8, which is precisely my point—to give content to the notion of state concern. Of course states cannot regulate in areas which have been preempted by federal statutes, or interfere with matters of peculiarly federal concern; but to note that is only to underline the conclusion that the notion of some bundle of state powers and concerns furnishes no guide for determining what the federal government may or may not do. Moreover, the Tenth Amendment, so often felt—apparently without a reading—to lend support to the state enclave theory, not only fails to support it, but explicitly rejects it. It certainly proves that the framers felt there were some powers the central government was to be denied, but it could hardly be clearer that the question of what regulations may be enacted by only the states is to be determined by examining the constitutional grants of power to the federal government, not by reference to some notion of state concern:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
U.S. CONST. amend. X.

301. The state enclave theory does hang on, however, in one respectably credentialed approach to the command of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court held applicable, statutorily authorized, and constitutional Federal Rule of Civil Procedure 4(d)(1), regulating service of process. Mr. Justice Harlan, concurring, took the Court to task for "misconceiv[ing] the constitutional premises of *Erie*." *Id.* at 474.

To my mind the proper line of approach in determining whether to apply a state or a federal rule . . . is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. If so, *Erie* and the Constitution require that the state rule prevail, even in the face of a conflicting federal rule.

Id. at 475. The "basic principles" adverted to are of course those of Professors Hart and Wechsler. H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 616-17, 678 (1953). They are also, however, those of *United States v. Butler*.

The notion that states typically retain power to regulate "primary" activity might be of assistance in trying to figure out what was meant by the enactors of a statute or rule. It might, indeed, provide a sensible basis for construing the Rules Enabling Act's command that the Federal Rules are not to "modify any substantive right." 28 U.S.C. § 2072

however, also James Madison's view that taxing and spending provisions can constitutionally be manipulated in order to promote only those goals which are entrusted to Congress by some grant of power independent of the taxing and spending clause.³⁰² This position is by no means without appeal, primarily because without some such limitation federal power is virtually limitless. But in view of the mass of federal legislation built upon the contrary assumption, it is probably too late in the day to consider exhuming it.

E. *Congressional Control of the Jurisdiction of Federal Courts*

Seventeen years ago Professor Hart effectively laid to rest the assumption that the provisions of Articles I and III granting Congress authority to define the jurisdiction of lower federal courts and the Supreme Court are uniquely immune to the Constitution's various prohibitory provisions.³⁰³ It is unclear, however, because the cases are rare and the opinions are muddled, just what sort of review the Court would be willing to exercise in an egregious case. It surely is not prepared to apply the disadvantageous distinction model and demand that every decision to withdraw one sort of jurisdiction rather than another be rationally related to an acceptable goal. And although the Court has demonstrated a willingness to make state governments create effective procedures for protecting federal constitutional rights,³⁰⁴ it does not

(1958). However, Mr. Justice Harlan—like Hart and Wechsler before him—set forth the theory as a doctrine of constitutional law. The more defensible *constitutional* approach is to focus, as the majority did, on the scope of granted federal power:

We are reminded by the Erie opinion that neither Congress nor the federal courts can . . . fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; *in such areas state law must govern because there can be no other law*. But . . . the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either. Cf. *M'Culloch v. Maryland*, 4 Wheat. 316, 421.

380 U.S. at 471-72 (emphasis added).

302. THE FEDERALIST NO. 41, at 300-02 (B. Wright ed. 1961) (Madison). Madison's approach was rejected in *United States v. Butler*, 297 U.S. 1, 66 (1936):

Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction . . . We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one.

This "trust me" approach would seem pretty thin in any event, but coming from the *Butler* majority it is uniquely unconvincing. One must suspect that if the state enclave theory had not been waiting in the wings the Court might have felt differently about Madison's view.

303. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

304. See, e.g., *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923); *Ward v. Board of County Comm'rs*, 253 U.S. 17, 24 (1920); *Carter v. Texas*, 177 U.S. 442 (1900). Consider also the

seem ready to make a similar demand of Congress, at least insofar as that demand would have implications for the jurisdiction of federal courts. One might, and I would, quarrel with the appropriateness of these two conclusions, but as predictions they seem reasonably safe.

However, an unwillingness to impose the disadvantageous distinction model, and a refusal to require an affirmative accommodation of the interest at stake, are the two factors which should lead a reviewing court to examine the motivation underlying the challenged enactment. If a statute denying jurisdiction in a certain class of cases can be shown to be the product of a desire by a majority of those voting for it to deny citizens the protection of a certain constitutional right, the court should insist upon a defense of the choice in terms which rationally relate the choice to an acceptable goal and are unrelated to the inhibition of the right in issue. It would be impossible to infer such a forbidden motivation from the setting of a jurisdictional amount applicable to all sorts of cases. An inference of unconstitutional motivation might, moreover, on rare occasion be rebutted by a showing that some adequate alternative means of ensuring protection of the right exists, and Congress knew of it.³⁰⁵ But where the inference of intent to curtail the enforcement of a constitutionally guaranteed right is solid, and no

Court's suggestions that states are affirmatively obligated to create a system of post-conviction review adequate to ensure the vindication of federal rights. *Young v. Ragen*, 337 U.S. 235 (1949); *cf. Case v. Nebraska*, 381 U.S. 336 (1965). *See also, e.g., Jackson v. Denno*, 378 U.S. 368 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gilbert v. California*, 388 U.S. 263 (1967); *Schmerber v. California*, 384 U.S. 757 (1966).

305. The existence of an administrative remedy equal to the task of vindicating the federal right might serve to rebut the charge of unconstitutional motivation. (I put to one side the question whether Article III may not demand that such questions be decided by judges with fixed salaries and lifetime tenure.) So on some occasions might a history of effective state court protection of the right in issue. But this should not be overdone: the existence of the state courts obviously cannot rebut the inference which must be drawn concerning the motivation underlying the Tuck Amendment, H.R. 11926, 88th Cong., 2d Sess. (1964):

§ 1259. The Supreme Court shall not have the right to review the action of a Federal court or a State court of last resort concerning any action taken upon a petition or complaint seeking to apportion any legislature of any State of the Union or any branch thereof.

§ 1331(c). The district courts shall not have jurisdiction to entertain any petition or complaint seeking to apportion or reapportion the legislature of any State of the Union or any branch thereof, nor shall any order of decree of any district or circuit court now pending and not finally disposed of by actual reapportionment be hereafter enforced.

See also, e.g., S. 2646, 85th Cong., 2d Sess. (1958).

The coin has another side, which is that that portion of the Norris-LaGuardia Act which rendered yellow dog contracts unenforceable in federal courts was just as clearly motivated by a desire to deny employers constitutional rights which had been recognized in *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915). Lest the Court be so swept away by my argument as to begin looking for a case in which to invalidate the provision, I should note that time, and the passing of *Adair* and *Coppage*, have rendered the motivation no longer unconstitutional.

alternative legitimate justification suggests itself—and one seldom would³⁰⁶—the Court should invalidate the statute, “jurisdictional” though it may be.

F. *Congressional Investigations*

Reference to motivation is commonly suggested with respect to the review of legislative investigations.

The Court . . . might judge of the “chief aim” of an investigating committee and hold invalid an investigation the “dominant purpose” of which is not “to gather information in aid of law-making or law-evaluation but rather to harass . . . [the witness] and expose him for the sake of exposure.”³⁰⁷

The difficulty with this kind of analysis is that the members of a legislative committee can intend, and probably often do, both to gather information for legislation and to make life miserable for some of the witnesses they call—in much the same way that legislatures or administrators can intend by a statute or course of conduct both the wholly licit end of creating voting districts or picking a jury and the illegitimate one of disadvantaging Negroes. To ask which aim is “dominant” is to pose a question for which we can construct no sensible standards for evaluating answers; it is as meaningless as asking whether, when I drove to work this morning, my dominant motivation was to get to work or to choose automotive transportation over walking. If sense is to be made of the question whether motivation is relevant to the constitutionality of the actions of legislative committees, several distinct issues must be sorted out.

1. *The Bounds of the Committee's Authority*

This issue is akin to questions of the reach of federal power. As to each, the controlling constitutional test—rational relation to a head of power entrusted to the acting body—is fully applicable from the outset, and consequently motivation is irrelevant. The Court does not examine motivation in deciding whether the President, in taking a certain action, was acting within the power delegated him by the Constitution and the Congress.³⁰⁸ It should not examine the motivation

306. Of course any diminution of jurisdiction will save money, but what needs justification here—and I say it often because the distinction is often neglected—is the decision to save money this way.

307. A. BICKEL, *supra* note 30, at 208 (describing rather than endorsing an approach).

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

of a committee in deciding whether *it* was acting within the power it has been delegated by the Constitution and the Congress.

Of course the Court may limit the scope of a committee's investigatory authority to something narrower than a commission to explore all questions with which Congress is competent to deal³⁰⁹—as by holding it bound by the parent body's authorizing resolution³¹⁰ or the chairman's statement of the scope of inquiry.³¹¹ But the addition of such restrictions does not make motivation relevant: the question is still whether the committee has or has not acted within the bounds of its authority.

The inquiry of Wilkinson as to membership in the Communist Party either does or does not relate to the legislative purpose which the Court has found contained in the House Resolution establishing the Committee on UnAmerican Activities. That relationship is neither added to nor substracted from by the motives which may have spurred the interrogation.³¹²

2. *Selection of Witnesses*

Here, motivation is relevant but seldom demonstrable. A committee's decision to call a certain witness is not likely to be held subject from the outset to a demand for the production of a legitimately defensible difference between him and the rest of the population. If, however, it can be proved that he was selected in order to harass him, or to deter acceptance or expression by others of views similar to his, the committee should then be obligated to produce such a difference;

309. How else can we avoid, to take the most hair-raising example, the implications of Congress's authority to propose constitutional amendments? Questions usually arise in the context of a prosecution under 2 U.S.C. § 192, into which the Court has quite properly read numerous requirements. But various constitutional theories are available as well: (1) fair warning; (2) refusal to reach a difficult constitutional question in the absence of a clear indication that the legislature wants it reached, *see* *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *United States v. Rumely*, 345 U.S. 41 (1953); (3) maximization of the likelihood of equal treatment by keeping the committee to its rules, *cf.* *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943); (4) reduced "deference" and consequent unwillingness, *compare* note 33 *supra*, to search for an unstated acceptable goal to which to relate the challenged action. *See* C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 82-85 (1969); Shapiro, *Judicial Review: Political Reality and Legislative Purpose: The Supreme Court's Supervision of Congressional Investigations*, 15 VAND. L. REV. 535, 554-55 (1962); *cf.* Calabresi, *supra* note 33, at 1199; *but see* *In Re Chapman*, 166 U.S. 661 (1897).

310. *See, e.g.,* *Sacher v. United States*, 356 U.S. 576 (1958); *United States v. Rumely*, 345 U.S. 41 (1953). *Cf.* *Watkins v. United States*, 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Scull v. Virginia*, 359 U.S. 344, 349 (1959).

311. *See, e.g.,* *Gojack v. United States*, 384 U.S. 702 (1966); *Deutch v. United States*, 367 U.S. 456 (1961); *Scull v. Virginia*, 359 U.S. 344 (1959). *Cf.* *Watkins v. United States*, 354 U.S. 178, 214-15 (1957).

312. *Kent, supra* note 293, at 465. *See also* *Watkins v. United States*, 354 U.S. 178, 200 (1957). *Cf.* *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

specifically, proof should be required that of all the possible witnesses, he was *uniquely*³¹³ qualified and likely³¹⁴ to shed light on the subject under investigation. Proving the motivation needed to trigger this burden will not be easy, however; Communists *are* more likely than others to know about the operations of the Communist Party.³¹⁵ But there are cases—such as *Wilkinson v. United States*³¹⁶ and *Bruden v. United States*,³¹⁷ both (wrongly) decided in 1961—where the showing can be made.

3. *Legislative Investigations and the First Amendment*

The motivation of the committee members should also be examined by the Court in deciding whether the questions asked by the committee have unconstitutionally infringed the witness's freedoms of belief and association. Motivation is relevant here, however, not because it is the referent on whose presence or absence the question of constitutionality—or even the question whether an otherwise non-existent burden of justification should attach—must ultimately turn. It is, instead, relevant because it can shed light on what is ultimately to the constitutional point, the likely use of the information elicited. Congressional investigations, in other words, present one of the few contexts³¹⁸ where motivation constitutes evidence which bears significantly on the existence or nonexistence of the impact which is ultimately crucial to the decision.

In the case of a statute inhibiting expression, the existence and magnitude of the beneficial effects alleged to justify the inhibition—assuming such effects are to be considered at all³¹⁹—will inevitably be

313. That he knew something about the subject under investigation may be enough to rebut the inference of illicit motivation. But if an illicit motivation is clear, the choice is not alternatively justifiable unless his qualifications were unique.

314. See *Wilkinson v. United States*, 365 U.S. 399, 429-30 (1961) (Brennan, J., dissenting).

315. I put to one side the question whether the subject is one into which Congress constitutionally can inquire.

316. 365 U.S. 399 (1961).

317. 365 U.S. 431 (1961).

318. A similar analysis would be applicable whenever the state interest alleged to justify the inhibition of protected rights is an interest in gathering information for some future use. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 464 (1958). Compare note 320 *infra*.

319. Mr. Justice Black, who would say such effects are irrelevant, sometimes discusses motivation in congressional investigation cases. He does so, however, not in connection with First Amendment issues (if "no law" means "no law," the reasons why a law was passed presumably are irrelevant), but rather in connection with whether the committee has exceeded its authority, see, e.g., *Barenblatt v. United States*, 360 U.S. 109, 153-66 (1959) (dissenting opinion), or whether it has violated the prohibition of bills of attainder, *id.* at 160; cf. *United States v. Lovett*, 328 U.S. 303 (1946). But see pp. 1308-09 and note 324 *infra*. See Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 736-44 (1963).

difficult to measure, but they are not a function of the motivations of those who passed the law.³²⁰ If, however, it is clear that the members of a legislative committee, in questioning a witness about his political connections or beliefs, have no intention of employing their findings in connection with a decision to recommend or not to recommend legislation, or with some other legitimate committee function, that fact undeniably bears on the likelihood that the information ever will be put to any such use.³²¹ If, therefore, a committee is engaging in exposure "for the sake of exposure"³²² (and for little or no other sake) it should be clear, even to the most dedicated "balancer,"³²³ that there is nothing on the "benefit to society" side which can conceivably outweigh the interest in protecting the witness's freedom of belief.³²⁴

320. Professor Alfange suggests a contrary view:

The basic problem that must be answered . . . by courts deciding the constitutionality of an enactment . . . which on its face is explainable in terms of a proper governmental interest but which may have the incidental effect of burdening expression, is whether the asserted interest is sufficiently great or sufficiently endangered to warrant the accompanying limitation on freedom of speech. Thus, the factor of crucial importance when legislative purpose is examined for constitutional reasons is the quantity of evidence available to the legislature that the governmental interest to be served by the statute was actually in jeopardy and in need of legislative protection. Legislative history can serve this function admirably.

Alfange, *supra* note 45, at 36-37. Cf. Kent, *supra* note 293, at 477-78. This might be convincing under a system of review wherein the courts defer totally to the legislative assessment of the gains and losses an act will entail. But this is not the way the Court approaches such questions—if indeed it ever has been. Cf. *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring). Thus Alfange's suggestion has the force of a debater's point—"This interest cannot be very important; even Congress gave it little heed"—but little more. See also Note, *supra* note 51, at 1892 n.11, and—for that matter—Alfange, *supra*, at 38:

Constitutionality must depend upon an assessment of the actual governmental interest protected by the law, not merely the interest seen by the legislators who enacted it.

321. See O.W. HOLMES, *THE COMMON LAW* 67-68 (1881).

322. *Watkins v. United States*, 354 U.S. 178, 200 (1957).

323. Compare note 319 *supra*. What appears generally to have happened is that the Court, correctly discerning that motivation is irrelevant to issues concerning the reach of the committee's authority, has slid without further thought into the conclusion that it must therefore be irrelevant to all issues arising in a legislative investigation case. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 132-33 (1959); *Wilkinson v. United States*, 365 U.S. 399, 412 (1961).

324. See *Uphaus v. Wyman*, 360 U.S. 72, 100-01, 105 (1959) (Brennan, J., dissenting); *Barenblatt v. United States*, 360 U.S. 109, 166 (1959) (Brennan, J., dissenting); *The Supreme Court*, 1958 Term, 73 HARV. L. REV. 126, 161 (1959).

Punitive Intent and Procedural Protection. The existence of "punitive intent" has on occasion been said by the Court and commentators to be prerequisite to the operation of the bill of attainder, *ex post facto*, and cruel and unusual punishment clauses, and relevant as well to determining the requirements of procedural due process. The *O'Brien* Court, having rejected generally the relevance of motivation to constitutional questions, swept this cluster of problems aside in a footnote indicating that in this "very limited and well-defined class of cases" motivation "may" be cognizable because "the very nature of the constitutional question requires an inquiry into legislative purpose." 391 U.S. at 383-84 n.30. The issue here does seem severable, and though my conclusions are different from the Court's, I am going to follow its lead by giving the matter short shrift. A satisfactory treatment would require another article.

I have argued elsewhere that "punitive intent" is irrelevant to the application of the

bill of attainder clause. Read in light of the evils to which the framers were addressing themselves by its inclusion, the clause is properly construed not as a ban on legislative "punishment" but rather as an aspect of the separation of powers, setting limits upon the extent to which legislative bodies can specify who is to be subject to the general rules they promulgate. Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962). In *United States v. Brown*, 381 U.S. 437 (1965)—invalidating as a bill of attainder § 504 of the Labor-Management Reporting and Disclosure Act, which made it a crime for members of the Communist Party to serve as labor union officials—the Court accepted a somewhat similar analysis, but apparently stopped short of discarding the requirement of punishment. However, it found that § 504 met the requirement, because

It would be archaic to limit the definition of "punishment" to "retribution". Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive.

One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment. *Id.* at 458. To add prevention to the list, compare *American Communications Ass'n v. Douds*, 339 U.S. 382, 413 (1950), is obviously to say that any law imposing a deprivation counts for constitutional purposes as punitive. The Court in *Brown* thus refrained from combing the legislative record in search of a punitive intent. But cf. *United States v. Lovett*, 328 U.S. 303 (1946).

Justices Black and Douglas have for years been campaigning for an analogous approach to the provision outlawing *ex post facto* laws, arguing, essentially, that it should be read to outlaw the conditioning by the government of any serious deprivation upon activity completed prior to the announcement of the condition. *Marcello v. Bonds*, 349 U.S. 302, 319 (1955) (Douglas, J., dissenting); *Lehmann v. Carlson*, 353 U.S. 685, 690 (opinion of Black, J.); cf. *Flemming v. Nestor*, 363 U.S. 603, 621, 626 (1960) (Black, J., dissenting). (The *Marcello* opinion makes clear that what they have in mind is, to borrow Professor Slawson's terminology, "method retroactivity," the attaching of detrimental consequences to activities terminated prior to the passage of the law, as opposed to "vested rights retroactivity," the disturbing of existing patterns of conduct which involve some investment. As Professor Slawson notes, the latter concept is illimitable. Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 217-18 (1960). The *Marcello* opinion further recognizes that past acts can on occasion legitimately be taken into account as bearing on a relevant present characteristic. Cf. *id.* at 234-35.) History appears to support the Black-Douglas position. See *Saterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 414 (1829) (Johnson, J., concurring); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212, 271 (Johnson, J.). Cf. Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947). The justices who originally read the requirement of punishment into the *ex post facto* clause quite plainly were proceeding on the assumption that other provisions would play a stronger role than they have in limiting retroactive civil legislation, and were moved by fears that the *ex post facto* clause would be read to outlaw "vested rights retroactivity" (Justice Iredale) or to outlaw legislation retroactively affecting rights as between private citizens (Justice Chase). See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). The Black-Douglas view would entail neither of these consequences. It would therefore seem a natural development, justified functionally in terms of the clause's obvious purpose, cf. Reich, *supra* note 319, at 703-04, for the Court to accept, with respect to the *ex post facto* clause, the broad definition of punishment set forth in connection with the companion bill of attainder clause in *United States v. Brown*.

Thus the bill of attainder clause (coupled with the prohibition of *ex post facto* laws) can be viewed as serving a function analogous to article III's restriction on judicial action. Roughly, article III, by limiting federal courts to cases and controversies, tells them, at least in theory, two things. First, they—unlike the legislature—may not create broad rules; they must content themselves with applying the law, either statutory or constitutional, to the particular disputes before them. And second, because they are restricted to adjudicating the rights of the litigants before them, they can act only retrospectively. On the other hand, the prohibition of *ex post facto* laws (and notions rooted in due process and the obligation of contracts clause) tell the legislature that in general it can act only prospectively. The bill of attainder clause, it is submitted, is a broad prohibition completing the legislative analogue of article III. For it tells legislatures that they may not apply their mandates to specific parties; they instead must leave the job of application to other tribunals.

Comment, *supra*, at 347 (footnotes omitted).

With respect to procedural due process, the development is proceeding apace. On no recent occasion of which I am aware has the Court asked, in deciding what constitutes due process, whether the law in question was enacted with a punitive intent. Kennedy

X. The Religious Clauses

The Court has often indicated that the religious clauses, read together, counsel governmental neutrality with respect to religion.³²⁵ Stated in these broad terms, the conclusion is virtually unavoidable. To read the establishment clause as anything stronger than a command that the government refrain from favoring one religion over others, or religion generally over nonreligion, would be inevitably to invite collision with the free exercise clause.³²⁶ And establishment problems would be created by reading the free exercise clause to require more by way of accommodation of religion than that religion not be disfavored relative to nonreligion, and that no specific religion be disfavored relative to others. Within this broad frame, however, there is room

v. *Mendoza-Martinez*, 372 U.S. 144 (1963), which did proceed in such terms, no longer represents the Court's thinking with respect to the sort of problem there involved. *Afroyim v. Rusk*, 387 U.S. 253 (1967). The Court now proceeds by asking how serious a deprivation has been imposed, under what circumstances, and with what postulated justification. See, e.g., *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 138-39 (Burton, J.), 161 (Frankfurter, J.), 175-76 (Douglas, J.), 183-86 (Jackson, J.) (1951). But see *id.* at 203, 205 (Reed, J., dissenting). See also *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958); *Greene v. McElroy*, 360 U.S. 474 (1959); *United States v. Barnett*, 376 U.S. 681 (1964). But see *id.* at 755-56 (Goldberg, J., dissenting, relying on his opinion for the Court in *Mendoza-Martinez*). See also *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Spevack v. Klein*, 385 U.S. 511, 514-15 (1967); *Keyishian v. Board of Regents*, 383 U.S. 589, 606-07 (1967); *In re Gault*, 387 U.S. 1, 30, 49-50 (1967); *Goldberg v. Kelly*, 40 S. Ct. 1011 (1970); *In re Winship*, 90 S. Ct. 1068 (1970); *Reich*, *supra*, at 703-04. Cf. Note, *Civil Disabilities and the First Amendment*, 78 YALE L.J. 842, 854-56 (1969).

Despite the unavoidable presence of the word "punishment," this sort of approach to the cruel and unusual punishment clause should not be difficult to accept. Its syntactic coupling with the prohibition of excessive bail might suggest that it should be read to outlaw any deprivation unreasonably (or "unusually") out of proportion to the conduct which triggered it. *Trop v. Dulles*, 356 U.S. 86 (1958), whose plurality opinion discussed punitive intent, is probably capable of rationalization in these terms. See *id.* at 97. In any event, it was written by a justice who wanted to decide it on another theory, *id.* at 92, and that other theory has since prevailed. *Afroyim v. Rusk*, *supra*. It is hard to discern precisely the principle which supports the holding of *Robinson v. California*, 370 U.S. 660 (1962), that the cruel and unusual punishment clause precludes entirely the treatment of narcotics addiction as a criminal offense. But it is reasonably clear that *Robinson* is not a case turning on the presence of a punitive intent, since the Court made no inquiry into whether the statute invalidated was passed with a motivation different from that which produces similar civil commitment statutes, considered constitutional by the Court. *Id.* at 665. Since the Court did not inquire into whether persons convicted under the law in issue were treated differently from those committed under civil statutes either, the fatal flaw must have been the placement of the law in the criminal rather than the civil code, and the consequent attachment of the opprobrious label "criminal." Concerning *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 86 (1947), see note 245 *supra*.

325. Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). See also, e.g., *Abington School District v. Schempp*, 374 U.S. 203, 226 (1963); *Walz v. Tax Commission of the City of New York*, 390 S. Ct. 1409, 1412 (1970).

326. See *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

for two distinct approaches. I am persuaded by the view that the whip-saw effect of the two clauses can successfully be avoided only by forbidding governmental bodies or officials to go out of their way in any context to favor or disfavor a religion or religion generally.³²⁷ Others, however, while they agree that courts must never compel the special accommodation or limitation of religion, take the position that there must be "some play in the joints," that some special accommodation or limitation should be constitutionally tolerated.³²⁸

Thus while the positions differ over the extent to which neutrality should be compelled, there is agreement that neutrality is *tolerable*, that the special accommodation or limitation of religion is not to be judicially required. Neither position, however, has generated a satisfactory or even coherent statement of the relative roles to be played by impact and motivation in judicial review.³²⁹ When the governmental choice in issue is from the outset subject to the disadvantageous distinction model, no showing of either disproportionate impact or religious motivation is needed to trigger review: a legitimate defense is owing from the outset.³³⁰ The difficult cases, once again, arise where the choice in issue is not subject *ab initio* to the demand for a legitimate defense. My suggestion here, predictable in view of what has gone before, is that judicial intervention is indicated only³³¹ when there is proof that the choice resulted from a desire comparatively to favor or disfavor a religion or religion generally. Such proof, however, serves "only" to activate the ordinary constitutional demand; choices defensible in terms which relate rationally to an acceptable goal must stand

327. See *Welsh v. United States*, 90 S. Ct. 1792, 1805-07 (1970) (Harlan, J., concurring); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Weiss, *Privilege, Posture and Protection: "Religion" in the Law*, 73 YALE L.J. 593 (1964).

328. See *Walz v. Tax Commission of the City of New York*, 90 S. Ct. 1409, 1411-12 (1970); cf. A. BICKEL, *supra* note 90, at 67-68. This was Mr. Justice Harlan's view. *Sherbert v. Verner*, 374 U.S. 398, 422-23 (1963) (Harlan, J., dissenting). It is no longer. *Welsh v. United States*, 90 S. Ct. 1792, 1806 n.9 (1970) (Harlan, J., concurring).

Conceivable, of course, is a third view, albeit one difficult to reconcile with the notion of neutrality: that the Court should *force* government officials sometimes to make special accommodations for, and sometimes to impose special limitations upon, religions. Though I have not surveyed all the literature, I have not seen this advocated as a general approach, though—as we shall see—the *Sherbert* case can be defended in no other terms.

329. Both Professor Kurland and Mr. Weiss allude to "purpose" as it is relevant, Kurland, *supra* note 327, at 88-89; Weiss, *supra* note 327, at 619, but talk mainly in terms of classification and impact, without an attempt to relate these three potential triggers. See also Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 277-78 (1968).

330. On the Harlan-Kurland-Weiss view, note 327 *supra*, a defense pitched to the advancement or inhibition of religion would not count as legitimate. Those willing to tolerate some special accommodation or limitation of religion, note 328 *supra*, presumably would gear their definition of legitimate defense accordingly.

331. See pp. 1282, 1315.

regardless of why they were made. (I would define "acceptable goal" to exclude the advancement or inhibition of religion; those who feel that some kinds of intentional favoring or disfavoring of religion are permissible presumably would define it differently.)

The ruling rhetoric dates from the school Bible-reading case, *Abington School District v. Schempp*.

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.³³²

This statement falls short in three respects. First, it errs in suggesting that impact *per se* should on some occasions serve to invalidate a governmental choice. Second, it fails to define with sufficient precision the motivation necessary to justify a judicial demand for legitimate justification; what should be required is not simply proof of a desire to help or hinder religion, but proof of a desire *comparatively* to favor or disfavor religion with respect to nonreligion or one religion with respect to others. Third, it fails to restrict motivation to its proper burden-triggering role, by suggesting that religious motivation may operate to invalidate a choice which is legitimately defensible in terms of a nonreligious and otherwise permissible goal.

Despite these substantial rhetorical shortcomings, the Court's performance in cases raising religious issues indicates that it appreciates the second and third reservations, and with one glaring exception,³³³ the first as well.

A. *The Court Should Not Intervene on the Basis of Impact Per Se*

Were the Court right in asserting that impact alone should trigger judicial intervention under one of the religious clauses, it would be wrong in asserting that motivation is also relevant. For if courts could properly force legislators and administrators affirmatively to accommodate or restrict religious groups, an assumption necessarily underlying an impact approach, then the case for the cognizability of motivation could not be made out. A court would have simply to see whether the law's effects passed muster, and if they did not, order the state to alter the law accordingly.

332. 374 U.S. 203, 222 (1963).

333. *Sherbert v. Verner*, 374 U.S. 398 (1963). In my opinion *Zorach v. Clausen*, 343 U.S. 306 (1955), was also wrongly decided. See p. 1314. However, it violates none of the three reservations expressed in the text, which are valid regardless of whether one accepts the view expressed note 327 *supra* or that expressed note 328 *supra*.

But for reasons akin to those adduced above in connection with problems of racial discrimination, impact—though it can often support an inference of motivation—should not trigger intervention in the absence of such an inference. Essentially all government spending programs and probably most regulations aid religion to some extent, and many favor some religions relative to others. They cannot all be unconstitutional, and an attempt to “equalize” the help or hindrance (or proportion it to membership?) among all religions, including nonreligion, would obviously be nonsense. Thus the question of what sort and amount of disproportionate impact should justify intervention will necessarily arise under an impact theory. The Court’s attempts at quantification have been notably unenlightening.³³⁴ And even if the necessary quantum of help or hindrance could be defined, perhaps by some sort of balancing test,³³⁵ an impact test of any variety would force legislators and administrators to make judgments of just the sort the framers of the First Amendment sought to discourage by the inclusion of the religious provisions.

A legislative or administrative practice of pausing to inquire whether a contemplated action will adversely affect various religious groups—and if it is determined that it will, making the necessary adjustment—is at least suspect under the establishment clause, and surely should not be required by a court. Yet that is precisely the kind of behavior an impact approach to the free exercise clause would necessitate. Likewise, an impact approach to the establishment clause would force decision makers to ask whether a contemplated action is likely to assist one or more religious groups and, if it is, to carve out an exception. But that sort of calculation seems exactly what the free exercise clause was included to prevent; certainly it should not be compelled either. A motivation approach to the two clauses will carry neither of these consequences, but instead will withhold judicial intervention pending proof that religious considerations *have* been taken into account one way or the other.

A religious motivation will usually³³⁶ be readily inferable where the

334. *Schempp*, for example, indicates that if “the primary effect” is religious, a law must fall; but that if “a primary effect” is secular, it must stand. 374 U.S. at 222.

335. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring).

336. The exceptional case is exemplified by *Everson v. Board of Education*, 330 U.S. 1 (1947). The regulation under attack did, it is true, specify that bus transportation would be furnished to students at public and Roman Catholic schools. *Id.* at 4 n.2. It is therefore understandable that Justice Jackson, dissenting, framed the question for decision thus: “Is it constitutional to tax this complainant to pay the costs of carrying pupils to Church schools of one specified denomination?” *Id.* at 21 (emphasis supplied).

challenged classification is explicitly religious. The inference would also be clear were the government to build a church,³³⁷ or outlaw (or, more likely, require) prayer.³³⁸ *Schempp* is only a short step beyond this. The Court was right in thinking a search for motivation appropriate, for curriculum decisions are not subject to the disadvantageous distinction model. And, as it concluded, the motivation was clear: readings from the Bible without prefatory statements were plainly included in the opening exercises for purposes of religious indoctrination.

The Court made no inquiry into whether “the primary effect” of the readings was religious, which given its disjunctive rhetoric of “purpose or effect” is understandable enough, since it had found a religious motivation. But it should not have suggested even in *dictum* that a religious effect, unaccompanied by a religious motivation, could invalidate a practice. This should have been clear from an observation made later in the opinion:

It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.³³⁹

The distinction is a sensible one. But can the Court seriously be suggesting—as its “purpose or effect” rhetoric would indicate it must—that under these circumstances it would be clear that the “advancement of religion” was not a “primary effect” of the reading? Hopefully students are influenced by the content of what they study “for its literary and historical qualities,” and the scriptures can be potent stuff. The more sensible distinguishing factor is the impossibility of inferring a desire to favor a religious viewpoint over others in the context of a general study of literary or historical works. The “primary effect” half

However, when it is taken into account that all the children in the township attended either a public or Roman Catholic school, *id.* at 4 n.2, the Court’s formulation seems more apt: “Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.” *Id.* at 18. The terms in which a law classifies are indeed important, since they are immensely probative of a desire specially to advance or limit religion, and 99 times out of 100 a religious classification will prove a religious motivation. But analyses geared solely to “classification” inevitably will boggle over *Everson*. See Kurland, *supra* note 327, at 67-72. For *Everson* is the hundredth case.

337. Restoring a Roman Catholic mission as part of a general program of preserving historic monuments would probably present a different case. *But cf.* *Frohlinger v. Richardson*, 63 Cal. App. 209, 218 P. 497 (1923).

338. See *Engel v. Vitale*, 370 U.S. 421 (1962); *Braunfield v. Brown*, 366 U.S. 549, 603 (1961); *cf.* *Torcaso v. Watkins*, 367 U.S. 488 (1961).

339. 374 U.S. at 225.

of the *Schempp* test is therefore most charitably read as an evidentiary reference, to denote the sort of impact which will support an inference of pro- or anti-religious motivation. And if that perchance is not what the Court meant, the reference should be so limited.

Epperson v. Arkansas,³⁴⁰ decided in 1968, is similar. The Court, invalidating as an establishment of religion a statute prohibiting the teaching in Arkansas's public schools and universities of the theory that man evolved from other species of life, explicitly rested its holding upon the conclusion that the law had been passed with the motivation of promoting fundamentalist Christianity.³⁴¹ Nor was the reliance upon motivation unnecessary, for the Court's conclusion cannot be justified in terms of the law's impact alone. Surely biology generally, or the study of all theories of man's origins, could under some circumstances be eliminated entirely, even though it would mean that the students would never be exposed to Darwin's theory.³⁴² There are, moreover, numerous philosophical and scientific theories which would undoubtedly tend to undercut a fundamentalist's faith as much as or even more than evolution. *Epperson* cannot mean that since their omission aids religion, a school is obligated to teach them all.

The way the Court went about demonstrating that the exclusion of evolution from the curriculum was religiously motivated—by quoting newspaper advertisements and letters to the editor from God-fearing citizens, and drawing precious parallels to the Scopes trial³⁴³—is bound to leave a reader of the opinion feeling somewhat uneasy about the declaration of unconstitutionality. However, a moment's reflection on the significance of evolution to Twentieth Century assumptions about the origins of man is enough to establish the soundness of the Court's conclusion. The exclusion of evolution and only evolution plainly resulted from more than an arbitrary reaction to the realization that the curriculum had to be closed somewhere.³⁴⁴ And no other explanation or alternative justification was suggested.³⁴⁵

Judicial intervention in "free exercise" cases should also turn on

340. 393 U.S. 97 (1968).

341. P. 1211.

342. There might be circumstances under which an illegitimate motivation could be found to underlie the elimination of all study of man's origins and perhaps even the elimination of biology altogether. The most obvious example would be an action taken by Arkansas in response to the *Epperson* decision.

343. 393 U.S. at 107-09.

344. The motivation is equally illegitimate whether the law is construed to outlaw all mention of evolution or only its endorsement. See *id.* at 102-03.

345. The state did urge that Darwin's theory is unusually controversial. This is a defense the Court is unwilling to credit as legitimate, however. Cf. p. 1337.

proof of motivation. Laws against polygamy, for example, unquestionably disfavor Mormons relative to others. Yet the Court has upheld them,³⁴⁶ and properly so. The decision to outlaw multiple marriages is no more susceptible to a "rational" defense than any other decision to make something a crime. But the fact that polygamy was broadly proscribed long before Utah was even a glint in its founders' eyes makes it impossible responsibly to infer an anti-Mormon motivation.

Sherbert v. Verner,³⁴⁷ decided in 1963, plainly stands for the contrary view, that a regulation's unintended adverse impact upon persons of a particular faith can invalidate it, at least insofar as it is applied to persons of that faith.³⁴⁸ South Carolina had provided that unemployment benefits would be paid only to persons who made themselves available for employment Monday through Saturday. Mrs. Sherbert, a Seventh Day Adventist, refused to work Saturdays and consequently was unable to find work in any of the local mills. The Court sustained her challenge to the state's refusal to pay her benefits, indicating that under the circumstances³⁴⁹ the state was obligated to excuse religious objectors from its requirement of availability Monday through Saturday.³⁵⁰

The course of action thus suggested by the Court—granting exemptions only to religious persons—is supremely suspect under the establishment clause: "neither a State nor the Federal Government . . . can constitutionally pass laws or impose requirements which aid all religions as against non-believers"³⁵¹ That the Court has since *Sherbert* come to the opinion that an exemption solely for religious

346. *Reynolds v. United States*, 98 U.S. 145 (1878). See also *Cleveland v. United States*, 329 U.S. 14 (1946); cf. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

347. 374 U.S. 398 (1963). See also *In re Jenison*, 375 U.S. 14 (1963).

348. Section 64-4 of the South Carolina Code, cited 374 U.S. at 406—were it ever enforced, compare *id.* at 421-22 n.3 (Harlan, J., dissenting)—would present a serious constitutional problem, for it quite plainly was enacted with a pro-Christian motivation. However, the Court places no real reliance on it—as under the circumstances it could not, *id.*—and proceeds as if § 64-4 did not exist; it is on that basis that I discuss the case.

I do not suggest that even if an anti-Seventh Day Adventist motivation had suggested itself in *Sherbert*—and it did not—the Court should have intervened. For there existed a rational and nonreligious explanation for the decision to choose Monday through Saturday as the days on which millworkers should make themselves available: the mills all operated those six days. The case is used to illustrate only that an unintended disadvantageous impact on persons of one religion should not render that law unconstitutional, even as applied to such persons.

349. See note 359 *infra*.

350. 374 U.S. at 407-08 n.7. See also *Welsh v. United States*, 90 S. Ct. 1792, 1812 (1970) (White, J., dissenting).

351. *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). See also *Everson v. Board of Education*, 330 U.S. 1, 15 (1947); *Shreveport v. Levy*, 26 La. Ann. 671, 672 (1874); *Welsh v. United States*, 90 S. Ct. 1792, 1805-07 (1970) (Harlan, J., concurring). Cf. *McGowan v. Maryland*, 366 U.S. 420, 516 (1961) (Frankfurter, J., concurring); *United States v. Seeger*, 380 U.S. 163, 193 n.2 (1965) (Douglas, J., concurring).

persons is unconstitutional is strongly indicated by its strained construction of the draft law's conscientious objector provision in *United States v. Seeger*,³⁵² decided in 1965, and *Welsh v. United States*,³⁵³ decided late last term. The statutory exemption is limited to claims arising from "religious training and belief," which in turn is statutorily defined in terms of the claimant's relation to "a Supreme Being." The Court, nonetheless, has held the statute's exemption to extend to any individual whose refusal to serve is based on a sincerely held moral objection. A construction this strained is defensible only as a response to, and obviously was the product of, a desire to preserve the statute's constitutionality; in *Seeger*, and even more obviously in *Welsh*, the Court plainly (and rightly)³⁵⁴ was telling Congress that an exemption limited to religious objectors would probably violate the establishment clause.³⁵⁵ *A fortiori*, such an exemption should not be judicially compelled.³⁵⁶

There is, of course, a possible response to *Sherbert* other than the (now rather plainly unconstitutional) one suggested by the Court: allowing an exemption for anyone who has a good faith moral objection to working on one of the designated days.³⁵⁷ Surely a state could, if it wished, voluntarily institute such a system. But a constitutional *requirement* that such objections be recognized—which requirement *Sherbert* must carry, unless it is directly to conflict with the implication of *Seeger* and *Welsh*—would obviously result in substantial disruption of state and federal regulatory programs. (If such exemptions are mandatory in the *Sherbert* context, it is difficult to see why they would not be universally mandatory; at the least, they would be mandatory in a broad range of contexts.) More importantly,

352. 380 U.S. 163, 166, 173 (1965).

353. 90 S. Ct. 1792 (1970).

354. See p. 1314, note 351 *supra*.

355. The *Seeger* construction is widely assumed to have resulted from constitutional pressure—a conclusion with which it is impossible to quarrel, since it is so plainly indefensible on any other basis. See Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 341 (1969); *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 115 (1965). The latter source suggests that the pressure to which the Court was reacting was one limited to ensuring that the provision encompassed all religions. That the pressure was, properly, perceived as broader than this is suggested not only by the sources cited note 351 *supra*, but also by the fact that the construction upon which the Court settled was one obviously tailored to the broader goal of avoiding a distinction between religion and nonreligion. The *Welsh* decision renders this conclusion unanswerable.

356. See p. 1314; *Sherbert v. Verner*, 347 U.S. 398, 423 (1963) (Harlan, J., dissenting).

357. The limitation to one day, however, might well be unconstitutional. What business is it of the state to tell religions—or nonreligious objectors—they may have only one day of rest and worship a week? What of the Buddhist, or humanist, who takes it to be his duty to meditate seven days a week?

despite the surface neutrality of such a requirement, it would in several ways endanger the very values the establishment clause exists to protect.

In the first place, since religious training and activity constitute unusually convincing evidence of a good faith moral objection,³⁵⁸ such a system would in practice inevitably favor religious objectors. (I do not mean to suggest that states for that reason should be barred from instituting such a system, but only that courts should hesitate constitutionally to compel it.) Second, in view of the inevitable disruption such a good faith moral objection system would engender, states would institute it only where it appears that someone might raise a religious objection. (The Court obviously would not interfere in the absence of such an objection.) Thus legislatures and administrators would soon fall into a pattern of pausing, after tentative selection of a regulatory course, to inquire whether any religious groups will be offended—and if they would, either creating a “good faith moral objection” exemption or, necessarily in many instances, forgetting the regulation altogether. Such a course of action is obviously at odds with what the establishment clause is all about. Third, given the inevitable (indeed, constitutionally mandatory) recognition of religious training and belief as evidence of a good faith moral objection, the state’s interest in having as many persons as possible working rather than drawing compensation will inevitably incline state officials toward minimizing exemptions by making sure they select as the day when availability is not required that day—probably but not inevitably Sunday—which is the Sabbath of most of the workers in the industry in question.³⁵⁹ But to choose a day as the

358. It would, indeed, be unconstitutional specifically to exclude proof of religious training and belief.

359. On the other hand, the Court suggested that one of the reasons it was prepared to honor Mrs. Sherbert’s claim was that there were few Seventh Day Adventists in the county involved, and that most of them had been able to find suitable employment. 374 U.S. at 399 n.2, 409-10. This suggestion could incline officials toward requiring work on a day which constitutes the Sabbath of a sizeable minority; for if we are to take the Court seriously, the existence of a large number of religious objectors might serve to defeat all their claims. I am with Justice Harlan in hoping the Court did not mean what it said.

The Court does suggest, in a rather startling disclaimer . . . that its holding is limited in applicability to those whose religious convictions do not make them “non-productive” members of society, noting that most of the Seventh-day Adventists in the Spartanburg area are employed. But surely this disclaimer cannot be taken seriously, for the Court cannot mean that the case would have come out differently if none of the Seventh-day Adventists in Spartanburg had been gainfully employed, or if the appellant’s religion had prevented her from working on Tuesdays instead of Saturdays. Nor can the Court be suggesting that it will make a value judgment in each case as to whether a particular individual’s religious convictions prevent him from being “productive.” I can think of no more inappropriate function for this Court to perform. 374 U.S. at 420-21 n.2. (Harlan, J., dissenting).

day of rest because it coincides with the Sabbath of the majority is manifestly to violate the spirit of the establishment clause.³⁶⁰ Yet any other response to *Sherbert* (under either a good faith moral objection test or the explicitly religious test the Court suggested) would likely destroy a state's unemployment compensation scheme.

Sherbert was an aberration when it was decided; it and *Braunfield v. Brown*,³⁶¹ decided two years earlier, are as irreconcilable as two cases not involving the same parties can be.³⁶² Whatever authority *Sherbert* ever possessed has been drained by last term's *Welsh* decision. It should not be followed.³⁶³

B. *The Court Should Intervene Only on the Basis of Proof of an Intention to Favor or Disfavor Religion Relative to Nonreligion, or One Religion Relative to Others*

There is no constitutional bar to helping or hindering religious persons or groups along with otherwise similarly situated persons or groups. Deviation from neutrality occurs only when religion or a religion is singled out for advancement or inhibition. The Court's performance indicates that it understands this perfectly well; my suggestion is only that the language of decision be tailored to this understanding.

In *Board of Education v. Allen*,³⁶⁴ decided in 1968, the Court upheld a New York law requiring the public school authorities to lend textbooks free of charge to all students in grades seven to twelve, including students attending parochial schools. Speaking through Mr. Justice White, the Court quoted as controlling the "purpose and primary effect" test of *Schempp*, but gave the "purpose" question short shrift indeed:

The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the the necessary effects of the statute that is contrary to its stated purpose.³⁶⁵

360. *McGowan v. Maryland*, 366 U.S. 420 (1961).

361. 366 U.S. 599 (1961).

362. See *Sherbert v. Verner*, 374 U.S. 398, 417-18 (1963) (Stewart, J., concurring).

363. The second flag salute decision, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), is occasionally said to stand for the proposition that the state is sometimes obligated to carve religious exemptions out of valid across-the-board requirements. See, e.g., *Braunfield v. Brown*, 366 U.S. 599, 603 (1961). The Court in *Barnette*, however, stated that the presence or absence of religious objections on the part of the complainants was entirely beside the point, 319 U.S. at 634-35. What *Barnette* holds is that the state simply cannot compel an affirmation of patriotic loyalty.

364. 392 U.S. 236 (1968).

365. *Id.* at 243.

If, however, *Schempp's* undiscriminating reference to "the advancement or inhibition of religion" were to be taken seriously, this dismissal would be cavalier. For the provision obviously aids parochial schools and thereby the Roman Catholic Church among others, and the legislators could hardly have been unaware of this. The point, of course, is that since textbooks were provided to all children, it was impossible to infer a motivation to single out religion or a religion for advancement.³⁶⁶

The issues raised by the grant of tax exemptions to religious organizations are similar. Were the government to exempt the property of religious organizations and only religious organizations from real property taxes, there would be an understandable temptation to deal with the case simply by asserting that there has been drawn a distinction for which no legitimate defense can be articulated. This would be an oversimplification, however. For decisions as to what groups or activities to favor and disfavor by the network of distinctions which form a tax code cannot be held up to a test of rationality, and therefore any claim that each distinction of this sort must be backed by a rationally defensible difference is a delusion. When, however, the motivation which generated a taxation distinction is constitutionally impermissible, that distinction must fall, since alternative rational defense of a taxation distinction is impossible.³⁶⁷ And when the exemption is of only religious organizations, the motivation can have been nothing other than the promotion of religion relative to nonreligion, which the establishment clause renders illegitimate.³⁶⁸

The recently decided *Walz v. Tax Commission of the City of New York*³⁶⁹ is not this case, however. In *Walz* the Court upheld the constitutionality of a law providing:

Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scien-

366. Should the authorities charged with providing the textbooks commence lending sectarian books, see Note, *Sectarian Books, the Supreme Court and the Establishment Clause*, 79 YALE L.J. 111 (1969), it is that practice which ought to be constitutionally attacked, precisely in terms of the theory advanced by this article.

367. Pp. 1272-73.

368. The Court should not become embroiled in the impossible task of combing the tax code to try to figure out whether religion is paying its "fair share." Cf. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969). The point, instead, is that this distinction was drawn for an impermissible reason and is not legitimately justifiable.

369. 90. S. Ct. 1409 (1970).

tific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section.

It is impossible to find a rationale in Chief Justice Burger's opinion for the Court; its sole uniting theme is that searching for principles is folly. Mr. Justice Harlan's concurring opinion, however, is impressive. Though he does not speak explicitly in terms of motivation, the framework he suggests can be fleshed out in no other terms:

Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the radius of legislation encircles a class so broad that it can fairly be concluded that religious institutions could be thought to fall within the natural perimeter.³⁷⁰

The salvation of the *Walz* statute inheres not in some supposed difference of constitutional magnitude between subsidies and tax exemptions. It survives because its terms are considerably more consistent with a desire to exclude from the tax base property generally used for "good works" instead of the economic benefit of its owner, than with a desire to promote religion relative to non-religion.³⁷¹

C. *A Choice Legitimately Justifiable in Terms of a Nonreligious and Otherwise Permissible Goal Should be Upheld, Without Inquiry into Motivation*

In *McGowan v. Maryland*,³⁷² decided in 1961, the Court upheld the state's Sunday closing law against a charge that it constituted an estab-

370. *Id.* at 1425. The reference to gerrymanders is particularly suggestive, since whether something is a "gerrymander" is a question of motivation. *See* p. 1261.

371. The statute's list of organizations might well turn out to be underinclusive with respect to any general goal one could formulate. But that is beside the point, which is that the list fits some broader aim with precision sufficient to negate the suggestion of a desire to single out religion for advancement. *See* 90 S. Ct. at 1425-26 (Harlan, J., concurring).

Mr. Justice Douglas, dissenting, argues that the record does not negate the possibility that exemption would be denied to groups whose tenets were atheistic or agnostic. *Id.* at 1428. In view of the lack of any statutory indication that it would, this observation is reminiscent of his reliance for the Court in *Evans v. Newton* on the lack of proof in the record that public employees were not still tending the park. *See* note 273 *supra*. When Mr. Justice Harlan observes that he "would suppose" that agnostic or atheistic groups would not be denied exemption, *id.* at 1426, one of the things he obviously is saying is that they had better not be. For this among many reasons his opinion should have been the opinion of the Court.

372. 366 U.S. 420 (1961). *See also* *Two Guys v. McGinley*, 366 U.S. 582 (1961); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961).

lishment of religion. Both Chief Justice Warren for the Court and Justice Frankfurter, concurring, defended at length the conclusion that the "dominant purpose" of the law was other than to promote Christianity. An inquiry into motivation would seem to be supported by the theory this article proposes. A state legislature, in the exercise of its broad police power to safeguard public health and tranquillity surely has authority to require that all stores close one day a week—indeed, that they shall close on the same day. Moreover, as a general matter it would be quite acceptable for that day to be picked at random. No rational defense would have to be provided for the selection of Monday rather than Tuesday, for they are indistinguishable in terms of the goal of providing a day of rest.³⁷³ The charge made by the complainant, however, was that the selection had not been random, but that Sunday had been picked in order to promote church attendance and thereby to aid the Christian religion.

The Court granted that the original motivation of the law had been to promote Christianity. But as time went on, the Court continued, a "secondary civil purpose"—ensuring working men a day of rest—began to emerge; over time that secondary purpose became "dominant"; thus today the law is constitutional. The Court should have specified the legislative choice whose motivation it was seeking, for essentially all of its historical analysis is directed to the wrong questions. The permissible "civil purpose" whose gradual rise to "dominance" the opinions charted in detail—the desire to set aside a day of leisure—obviously has everything to do with why the legislature required (or continued to require) that all stores should close one day a week and undoubtedly also bore on the decision to make them all close on the same day. But it has nothing to do with the crucial question of why Sunday was selected as that day.

With regard to this question, which received comparatively little attention in the opinions, the evidence was anything but unequivocally on the Court's side. The challenged statute appeared in a section of the Maryland Code entitled "Sabbath Breaking" and referred to Sunday as "the Lord's Day." In attempting to rebut the inference thus suggested, the Court noted several provisions of the law which were hard to reconcile with a religious motivation.³⁷⁴ But the ultimate rea-

373. If any day possesses characteristics rendering it preferable in terms of the goal of providing a day of rest, it is Sunday. Cf. p. 1326.

374. The Court noted that the provisions of the state law permitting recreation, sports and entertainment, and allowing the sale of tobacco and liquor, bespoke an air more of relaxation than of religious piety. 366 U.S. at 448. It further relied on the fact that gam-

son such motivation could not confidently be inferred is the reason the motivation question should not have been asked in the first place. For both the Court and Justice Frankfurter felt that the choice of Sunday could be justified on a nonreligious basis:

[I]t is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. . . . The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a state to choose a common day of rest other than that which most persons would select of their own accord.³⁷⁵

It is difficult to deny that if the legislature were now to designate Wednesday as the day of rest, substantial social and economic havoc would result. A legislature composed entirely of Jews or atheists, sitting tomorrow to decide which day shall be designated as the day when stores must close, might well pick Sunday for reasons completely unconnected with a desire to promote Christianity.³⁷⁶ A failure to credit this alternative basis for the choice of Sunday would therefore be to give rise to the concerns of *O'Brien*: the difficulty of ascertaining motivation, the possibility of a futile order, and the invalidation of a choice which otherwise would count as laudatory solely because of the law makers' intentions.

Very different are certain local regulations mentioned in *McGowan*.

bling was allowed on Sunday in Anne Arundel County, *id.*; reliance on the local regulations to prove the motivation underlying the state law was, however, a treacherous course. See p. 1327.

375. 366 U.S. at 451-52. See also *id.* at 483, 503-04 (Frankfurter, J., concurring). The point was made in the context of rebutting the suggestion of religious motivation, and not by way of indicating that the question should not have been asked. Of course, the points are related. One of the reasons I argue that the existence of a legitimate defense should render motivation irrelevant is that the availability of such a defense will make virtually impossible a responsible conclusion of illicit motivation. The Court's performance in *McGowan* supports this argument.

376. It might be argued that while this alternative justification for the choice of Sunday is rational, it is nonetheless constitutionally impermissible. For it has unquestionable historical roots in the fact that Sunday is the Christian Sabbath. Any such justification, it might be asserted, is therefore the fruit of the poisonous tree, and cannot be credited. See *id.* at 573 n.6 (Douglas, J., dissenting). This argument is certainly not frivolous, but it cannot carry the day. To taint as illegitimate bases of governmental choice all customs and commands which have roots in our nation's religious heritage would be to place in constitutional doubt large segments of our criminal and other law. "Cultural history establishes not a few practices and prohibitions religious in origin which are retained as secular institutions and ways long after their religious sanctions and justifications are gone." *Id.* at 503-04. (Frankfurter, J., concurring).

One, for example, prohibited certain activities within 100 yards of a church where services were being held.³⁷⁷ The unconstitutional motivation here is clear, and a nonreligious defense of the distinction thus drawn between religious services and other events is impossible to imagine. In a properly framed case, such regulations should be invalidated. They were not under attack in *McGowan*, however, but were adduced as bearing on the motivation underlying the state's closing law. How probative they are in that regard need not detain us, for—a legitimate defense of the choice of Sunday being available—the motivation underlying it is irrelevant. This, however, the Court's rhetoric denied:

Finally, we should make clear that this case deals only with the constitutionality of § 521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.³⁷⁸

In view of the pains taken by the Court to avoid finding religious motivation, there was probably little danger that this statement would lead anyone seriously to entertain the possibility that another state's Sunday closing law could successfully be challenged. The remark, however, is one which should not have been made.

XI. Freedom of Political Belief and Expression

A. *The Disfavoring of a Particular View: The Requirement of Neutrality*

The First Amendment's guarantee of freedom of belief and expression³⁷⁹ is sometimes a command of neutrality. In dispensing parade permits or permission to use the municipal stadium for rallies, for example, the government cannot favor the D.A.R. over S.N.C.C., or vice versa.³⁸⁰ Where the distinction in issue is from the outset subject to the demand for a legitimately defensible difference—as the two mentioned almost certainly would be³⁸¹—motivation is irrelevant; the state

377. *Id.* at 424.

378. *Id.* at 453.

379. Coupled, if you will, with the requirement of equal protection.

380. *Cf. Schacht v. United States*, 90 S. Ct. 1555 (1970).

381. Random selection would be tolerable were there more applications for the stadium than could be accommodated.

is obligated *ab initio* to come up with a difference defensible in terms unrelated to what the organizations stand for. But where the disadvantageous distinction model is not applicable—as in a taxation situation—motivation again must constitute the trigger. Any other methodology would force legislators drafting tax codes to determine and characterize the political views of the potential gainers and losers, and attempt somehow to ensure that the “left” and the “right” (or whatever) will come out “about even.” This is hardly the sort of calculation the First Amendment exists to encourage. Once again, proof of the employment of an unconstitutional criterion of selection should serve only to activate the demand for a legitimate defense.

Oestereich v. Selective Service Board,³⁸² the first “delinquency reclassification case,” involved a young man who returned his draft registration certificate to the government as an expression of his opposition to the war in Vietnam, whereupon the Board declared him a delinquent and changed his classification from IV-D to I-A. The ground on which the case was decided involved no consideration of the motivation of the Draft Board; there simply was no statutory authority, the Court held, for declaring Oestereich a delinquent and reclassifying him.³⁸³ The more interesting question suggested by the case, however, is whether it would be constitutional to select for reclassification or induction one who does come within the statutorily eligible class, because he has engaged in antiwar expression.³⁸⁴ At one point Mr. Justice Douglas, writing for the Court, comes close to suggesting that this would be constitutionally impermissible:

We deal with conduct of a local Board that is basically lawless. It is no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered (a) to retaliate against the person because of his political views or (b) to bear down on him for his religious views or his racial attitudes or (c) to get him out of town so that amorous interests of a Board member might be better served.³⁸⁵

The limitation to persons “clearly exempt” makes this technically a

382. 393 U.S. 233 (1968).

383. See also *Gutknecht v. United States*, 90 S. Ct. 506 (1970).

384. I am assuming that the expression involved is constitutionally protected in the sense that Congress could not overtly provide for induction as a response to it. For a judge who does not believe the expression to be protected in this sense, the reasons why the man was selected must be deemed irrelevant to the constitutional question. P. 1334. Of course, it may be *statutorily* impermissible for a draft board to take action even on the basis of expression which is not constitutionally protected, but that is a question with which I do not deal.

385. 393 U.S. at 237.

trivial statement; if one is statutorily exempt he cannot be inducted regardless of motivation. But Mr. Justice Douglas obviously means more than this. The reference to "constitutional implications" suggests that a draft board is constitutionally precluded from selecting from among the pool of those statutorily eligible on the basis of political belief or expression.

This conclusion, though intuitively correct, cannot be sustained on any non-motivation ground. Even if it could be demonstrated that those inducted were largely or even exclusively—as becomes less unlikely as the war drags on—persons who had expressed opposition to the war, the selection would not offend the Constitution³⁸⁶ if the Board could prove that it had in fact been random, or made in accord with some legitimate criterion of selection such as health or age. Nor could the conclusion that such selection is impermissible be sustained in terms of its impact on free expression; the effect of induction on the expression of one who opposes the war would be the same whether he was selected at random or on the basis of some legitimate criterion on the one hand, or because of his views on the other. Of course, announcing that draft selections are being made on the basis of political expression would have a substantial deterrent effect on expression; such a threat (whether or not it was carried out) would violate the First Amendment by its impact alone.³⁸⁷ But we are obviously concerned with more than this; even if the criterion is not announced, selection on the basis of political expression must be unconstitutional. This conclusion is supported by the theory proposed in this article. There is no constitutional requirement that a difference between two individuals be produced merely because one is drafted and the other is not.³⁸⁸ When, however, an inductee can prove that he was selected on the basis of a constitutionally impermissible criterion, he is entitled to relief.³⁸⁹

386. My remarks should for the present be limited to those whose opposition to the war is on other than "moral" grounds, in light of the Court's apparent resolution to decide whether such objection to a specific war entitles one to conscientious objector status. See *Gillette v. United States*, cert. granted, 38 U.S.L.W. 3517 (U.S. June 29, 1970).

387. Cf. Note, *supra* note 51, at 1901-02. What remedy would be appropriate is unclear.

388. There are reasons—for example, the safeguard provided by a cross-section "citizen army"—supporting the choice of a military force whose members meet certain minimum standards but are in many ways no more "qualified" than the rest of the population. Thus random selection is tolerable here. Compare p. 1232. Additionally, it would be difficult to hold various notions of what makes a good soldier (brains, brawn, imagination, subservience) up to a standard of "rationality." This latter observation suggests that the complainant's burden must be to prove not simply that *some* criterion of selection was employed; he must demonstrate the employment of a *constitutionally impermissible* criterion. See pp. 1266-67.

389. The possibility of alternative justification need not detain us. In the first place, it would be necessary for the government to prove that the inductee possesses some charac-

Counsel for O'Brien relied heavily not only upon *Gomillion* but also upon *Grosjean v. American Press Co.*,³⁹⁰ decided in 1936. In *Grosjean* the Court, speaking through Justice Sutherland, invalidated a Louisiana license tax of two per cent on the advance receipts of all periodicals whose circulation exceeded 20,000 per week, of which there were thirteen (out of 163) in the state. The *O'Brien* Court, struggling to establish the irrelevance of motivation, characterized *Grosjean* thus:

[T]he Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on its face did nothing other than impose just such a tax.³⁹¹

The *Grosjean* opinion is a masterpiece of ambiguity, and it does contain language arguing that historically taxes on newspapers had been viewed as suspect forms of prior restraint. It is clear, however, that the Court did not intend to void all taxes on the gross income of periodicals.³⁹² As we shall see, the tax in fact bore most heavily on papers which had taken an anti-administration line. But for reasons we have canvassed, this effect cannot be sufficient *per se* to invalidate it, any more than the graduated income tax should be declared unconstitutional because its impact apparently is to tax Republicans more heavily.

The case might be rationalized in terms of a command that if some periodicals are taxed, all must be, presumably at a uniform rate geared to ability to pay. Such a broad prophylactic rule might be defended on the theory that whereas discretion to tax only those businesses whose volume exceeds a certain level is ordinarily tolerable, First Amendment freedoms are so peculiarly delicate, and the possibility of discrimination against certain ideas without effective judicial review is so evident, that taxes imposed in a First Amendment area must be universal and uniform.³⁹³ But to impose such a rationale upon an opinion written

teristic absent in all those who were not inducted. Second, the characteristic would have to be one, and I cannot imagine what would qualify, which is rationally defensible no matter what vision of the good soldier is entertained. See note 388 *supra*; pp. 1273-74.

390. 297 U.S. 233 (1936).

391. 391 U.S. at 384-85.

392. *Giragi v. Moore*, 301 U.S. 670 (1937). Cf. *Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937).

393. This *per se* approach seems especially appropriate where, as in *Grosjean*, those periodicals whose circulation exceeded 20,000 were taxed on all their receipts and not simply on the receipts attributable to that percentage of their circulation which exceeded 20,000. True, such an "all or nothing" approach has its analogues in various taxing and spending provisions—sales taxes, the definition of capital gain, welfare grants, F.H.A. loans, etc.—and is probably ordinarily defensible in terms of the combination of the state's need for a certain amount of money and the administrative inconvenience which would ensue from collecting the tax from those with comparatively low incomes. Moreover, even if the big

in 1936 by Justice Sutherland is plainly anachronistic. Moreover, the language of the opinion makes clear that the Court felt it was invalidating a specific tax, the Louisiana tax, and that it was doing so because of the motivation with which that tax had been enacted.³⁹⁴ In fairness to Chief Justice Warren and the Court for which he wrote in *O'Brien*, he may have been doing a bit of constructive construction, telling us that what the *Grosjean* Court *should* have meant is that the tax in question was voidable on the basis of its impact alone. That much may be fair enough.³⁹⁵ But in going on to suggest that the *Grosjean* Court erred in basing its decision on a finding of illegitimate legislative motivation, he went a step too far.

The lower court in *Grosjean* threw out the tax on the ground that a distinction had been drawn, between those periodicals whose circulation exceeded 20,000 and all others, for which distinction no rational defense could be postulated.³⁹⁶ The Supreme Court declined to adopt this theory, and wisely so.³⁹⁷ For the choice of a cutoff is part of the bundle of discretionary, "what makes for a good society," judgments (whom to favor, by how much, and at whose expense) which make up a tax code.³⁹⁸ The point of the Supreme Court's opinion in *Grosjean* is,

newspapers *were* allowed to exclude from their tax bases the income attributable to the first 20,000 copies, the *Grosjean* tax could be functionally duplicated by raising the rate from two per cent to about forty per cent or fifty per cent. But perhaps such analogies should not be credited, and such gross disparities not allowed, when the First Amendment hangs in the balance. The possibility of unreviewable discrimination against certain ideas might lead us to disallow state taxation of some periodicals but not others, at least not on the whole of their income—or perhaps to hold that periodical taxes may not be geared to circulation. *But see* note 395 *infra*.

394. P. 1332.

395. *Quaere*, however, whether a judicial insistence that limited circulation periodicals be taxed at the same rate as large ones might not tend to entrench "established" ideas and viewpoints? The Court should think carefully before taking the step the Chief Justice's language suggests.

396. *American Press Co. v. Grosjean*, 10 F. Supp. 161 (E.D. La. 1935).

397. *Cf. Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 566 (1935) (Cardozo, J., dissenting).

398. Of course any cutoff will be "arbitrary" in the limited sense that it will distinguish persons between whom there is only a trivial difference, for example, those who earn \$599 and those who earn \$600. But that realization does not tell us why we do not demand a "rational" defense of the distinction. For even a fine grained distinction can be rationally related to the promotion of an acceptable goal. *Cf.* pp. 1237-38; *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 564 (1935). And it would not seem too difficult to hypothesize a quite "rational" process of choosing a cutoff point: the government could determine from its budget how much money it needs, and choose the cutoff so as to produce just that amount of money. Why should we not (obviously allowing some margin for difficulties of prediction) demand this sort of defense? The reason, of course, is that the matter is not that simple. How much revenue is needed is but one of the many ingredients of a choice of a cutoff, for that choice is but one of many ingredients of an income tax structure. The need for more revenue could be met just as readily by raising the rates of those above the cutoff (or by any of a thousand other possible alterations) as by lowering the cutoff. *Cf. Bitker, supra* note 368, at 1287 n.11. Thus the selection of the cutoff is one of the bundle of non-rational judgments which make up a tax code. *See* pp. 1246-48.

however, the point of this article: if it can be demonstrated that the class of those to be taxed was closed where it was in order to discourage certain ideas or injure those who have expressed them, the distinction cannot stand.

The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled by virtue of the constitutional guaranties.³⁹⁹

The Court supported this charge of illicit motivation with only the following:

The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.⁴⁰⁰

The fact that the cutoff was geared to circulation rather than advertising volume does not, however, demonstrate an intent to disfavor those espousing certain ideas;⁴⁰¹ it might in some contexts cut quite the other way. The crucial issue is why, of the infinite number of possible cutoff points along the circulation continuum, 20,000 was selected. That only thirteen of 163 periodicals were affected is suspicious. Moreover, the record (though not the opinion) reveals that twelve of the thirteen periodicals whose circulation exceeded that figure had been taking a position antagonistic to Senator Long's proposal—and this should confound the viscera—to abolish the poll tax. However, 20,000 circulation (unlike twenty-eight sides to a voting district) is not an inherently suspicious figure, and absent some further evidence, coincidence would have been an arguable explanation.

To understand fully the confidence with which the Court arrived at its conclusion of illicit motivation, it is necessary to delve still further into the record. A circular signed by Senator Long and Governor Allen, and distributed to the legislature at the time the bill was under consideration, explained the bill's aim:

399. 297 U.S. at 250.

400. *Id.* at 251.

401. *Cf. Metropolis Theatre Co. v. Chicago*, 228 U.S. 61 (1913); *State Board of Tax Comm'rs v. Jackson*, 283 U.S. 527 (1931).

Motivation in Constitutional Law

It is a system that these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, two cents per lie.⁴⁰²

Of the one cooperative newspaper whose circulation exceeded 20,000 Long had this to say:

Well, we tried to find a way to exempt the "Lake Charles American Press" from the advertising tax, but did not think we could do it, but we would have done it if we could.⁴⁰³

As *O'Brien* noted, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it"⁴⁰⁴ Not necessarily, to be sure, but *Grosjean* is the rare case where reference to the remarks of two men is entirely appropriate,⁴⁰⁵ and sufficient to seal an already attractive inference of unconstitutional legislative motivation. The issue facing the Court was not—as it never will be, if motivation is limited to its proper burden-triggering role—which of two criteria of selection, one legitimate and one impermissible, was employed, but rather whether the choice of 20,000 resulted from an impermissible criterion of selection on the one hand or essentially random choice on the other. This realization should cause us to temper somewhat the canon—which is not and should not be an absolute in any context⁴⁰⁶—that silence in the face of

402. Record, at 43, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

403. *Id.*

404. *United States v. O'Brien*, 391 U.S. 367, 384 (1968). Cf. A. BICKLE, *supra* note 30, at 214; *Harvard Developments*, *supra* note 50, at 1094.

405. Another argument which might be marshaled against judicial reference to legislative history in connection with constitutional attacks is that it will lead state legislatures either to refrain from recording such history (at least with regard to controversial statutes) or, perhaps more realistically, to distort it so as to hide the suspect motivation. Cf. A. BICKLE, *supra* note 30, at 216. The potential loss in terms of statutory construction, it might be argued, is too great to justify this risk. *But cf.* note 24 *supra*. In response it might first be noted that references to legislative history in constitutional contexts have been and will be rare indeed; in most cases it either is not needed or would not be persuasive. But perhaps this answer will not suffice, for even one reference by the Court to legislative history might have the feared effect. And *Grosjean* demonstrates that there will be occasions, albeit rare, where a reference to legislative history is a necessary and (as a final touch) convincing element of a finding of illicit motivation.

One might be tempted to conclude, therefore, that the confusion of the *Grosjean* opinion was its genius. The Court obviously looked at the legislative history to seal its inference of unconstitutional motivation, but did not mention it, thereby minimizing the likelihood of discouraging candid debates. It is not necessary to resort to such cynicism to justify the Court's apparent reliance on the legislative history, however, for the "candid debate" point does not make sense. The possibility that legislatures will hide their constitutionally suspect aims and thereby deprive courts of the opportunity of construing statutes in the light thereof is not something which should trouble us; it surely is in the interest of the federal system to encourage state courts to construe state statutes in a constitutional manner. *See, e.g., Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). Thus if statements of unconstitutional aim are not cognizable in connection with constitutional attacks, there is no reason we should want them recorded.

406. *See Note*, *supra* note 293, at 170.

another's remarks should not be taken as concurrence. Long's publicized statements, coupled with the crucial fact that the statute's effects were consistent with the aim he stated,⁴⁰⁷ constitute compelling evidence that 20,000 was not chosen without reference to the ideas espoused by the papers in question. More underlay the choice than a feeling that a line had to be drawn somewhere.

B. *The Disfavoring of a Particular View: The Toleration of Non-Neutrality*

The Court has not read the First Amendment to require complete neutrality among various views and sentiments. In choosing guards for the Pentagon, the United States can discriminate against persons who favor the overthrow of the government by stealth and sabotage; and a distinction can be drawn between urging a child to eat spinach and urging him to eat poison. Thus whether motivation is relevant to the review of a decision which in fact disfavors a person or persons of a particular persuasion must ultimately turn on one's view of the scope of the First Amendment and his consequent designation of those situations in which a departure from neutrality is or is not tolerable. Take, for example, the case of a Marxist who claims he was excluded from the jury because of his political beliefs.⁴⁰⁸ A judge who believes that being a Marxist does not constitute a proper ground of jury disqualification is in the position of the Court in *Grosjean*. Because he feels that insofar as jury selection is concerned the state must be neutral as between Marxists and others, his decision to intervene must turn on whether the exclusion was politically motivated or resulted instead from random or legitimate choice. To a judge who feels that Marxists *are* properly excludable from juries, however, motivation is beside the point.⁴⁰⁹ For in his opinion there exists a legitimately defensible basis of exclusion, and therefore motivation is irrelevant.

C. *The Favoring or Disfavoring of Expressive Activities Generally*

Here too the First Amendment combines elements of neutrality and non-neutrality, but the situation is different. We have seen that when discrimination among various views is involved, the Constitution on some occasions commands neutrality, and on others tolerates non-

407. Cf. *Draper v. United States*, 358 U.S. 307 (1959).

408. This is probably procedurally impossible, note 190 *supra*, but makes a good example.

409. Such a position would obviously be untenable. The example is used for illustrative purposes only.

neutrality in the form of an intentional disfavoring of a view which in context is intolerably dangerous. However, when the question is whether a governmental regulation has impermissibly clogged the channels of expression generally, the Constitution on some occasions tolerates neutrality as between otherwise similar expressive and non-expressive conduct and on others commands non-neutrality in the form of an intentional favoring or accommodation of expressive activity.

Under some circumstances the government can remain neutral as between expressive and nonexpressive conduct. It can, for example, tax the income or real property of periodicals at the same rate at which it taxes other businesses.⁴¹⁰ This does not mean it cannot treat expressive activity better, for example, by taxing periodicals at a lower rate; there is no constitutional prohibition of "establishment of expression." It does mean, however, that the government cannot go out of its way to disfavor expressive activities relative to otherwise similar nonexpressive activities. Had the license tax discrepancy in *Grosjean* been designed to silence all periodicals rather than simply some, the same decision would have been appropriate, and doubtless forthcoming.⁴¹¹

On other occasions neutrality with regard to expressive conduct is not good enough. Sometimes the government is affirmatively obligated to deviate from its policy respecting similar nonexpressive conduct in order to accommodate expression. For example, the state's interest in keeping the streets and sidewalks clean cannot constitutionally be served by outlawing the distribution of handbills.⁴¹² Here neutrality—an absence of any special restrictions on expression—is not good enough. The state is obligated to protect the channels of communication, even if it takes a special exception and some sacrifice of the state's expression-unconnected interest in clean cities to do it. That there must be some such affirmative obligations is clear. Were the constitutional requirement simply one of neutrality toward expressive

410. *But cf.* *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

411. Indeed, *Grosjean* is sometimes taken to be this case.

The tax . . . in *Grosjean* . . . had the unmistakable purpose of hitting at one out of many occupations and hitting so hard as to discourage or suppress the pursuit of that calling.

Follett v. McCormick, 321 U.S. 573, 580 (1944) (separate opinion of Roberts, Frankfurter and Jackson, JJ.).

412. *Schneider v. State*, 308 U.S. 147 (1939); *Marsh v. Alabama*, 326 U.S. 501, 504 (1946); *Niemotko v. Maryland*, 340 U.S. 268, 276-77 (1951) (Frankfurter, J., concurring), and cases cited. *See also* *Martin v. Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944); *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939) (opinion of Roberts, J.); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Teamsters Union v. Vogt, Inc.*, 354 U.S. 284, 295 (1957); *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968).

conduct, channels of communication such as pamphleteering, picketing and public speaking could effectively be closed altogether, given the state's undeniable interests in keeping thoroughfares clear, and controlling crowds, noise and litter. It is difficult to determine what factors lead the Court to say in a given context that neutrality will not suffice, that the means of expression in issue simply must be respected. A review of the results reached in the relevant cases⁴¹³ suggests, however, that the controlling inquiries are the importance of the interest the state is pursuing, the extent to which that interest could be served by less inhibiting regulations, and the existence of alternative means of communicating with the same audience with approximately equal effectiveness.⁴¹⁴

Once again the relevance of motivation must be a function of the judge's view of the scope of the First Amendment. That is, he first must decide whether in the context presented the state need only refrain from comparatively disfavoring expressive conduct, or whether it simply must keep the channel of communication open—even if it takes a special deviation from some broader policy to do it. If in his opinion neutrality is enough, anti-expression motivation is relevant. But if neutrality is not enough, motivation is beside the point; he need only ask whether the medium involved has in fact been given the accommodation he feels is requisite.

D. *The Tinker and O'Brien Cases*

In *Tinker v. Des Moines School District*,⁴¹⁵ the Court invalidated as an impermissible restriction on free expression a public school's prohibition against the wearing of black armbands by students. Mr. Justice Harlan's dissent, in its entirety, reads as follows:

I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school

413. Note 412 *supra*.

414. Cf. *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (Frankfurter, J., concurring).

415. 393 U.S. 503 (1969).

measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the arm band regulation, I would affirm the judgment below.⁴¹⁶

Since distinctions drawn by school apparel regulations are not subject to the disadvantageous distinction model, Mr. Justice Harlan's suggestion that the motivation underlying them can be constitutionally relevant accords with the thesis of this article. However, what appears to be Mr. Justice Harlan's further suggestion—that the difference of view in *Tinker* is ultimately traceable to a disagreement concerning the role of motivation in constitutional adjudication—is misguided. There is a disagreement in *Tinker*, but it has to do with the scope of the First Amendment, not with the relevance of motivation.

The Court did not have to face the broad question whether the wearing of political insignia constitutes, like the distribution of pamphlets, an activity the state simply cannot bar, even as part of a neutral and across-the-board effort to serve some interest unrelated to expression. For a narrower ground was available; the record was clear that the armband ban had been promulgated not out of some consideration of good taste or uniformity of dress but rather in a quite intentional attempt to still anti-Vietnam expression. The state had not been neutral as between expressive and nonexpressive apparel nor, indeed, as among various sorts of expressive apparel,⁴¹⁷ and it made no claim that it had. Instead, it argued that the departure from neutrality had been justified by the threat of disorder. It was this claim with which the Court disagreed:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength . . .⁴¹⁸

416. *Id.* at 526.

417. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these.
Id. at 510.

418. *Id.* at 508-09.

Thus the Court was of the opinion that under the circumstances a departure from neutrality by either disfavoring expressive apparel relative to nonexpressive apparel, or disfavoring the expression of one view relative to others, was not justifiable. Since an intentional departure from neutrality was admitted, the regulation had to fall.

The difficulty with Mr. Justice Harlan's opinion lies, therefore, not in his suggestion that motivation is relevant, but rather in the fact that the only motivation of constitutional relevance—a desire to still anti-Vietnam expression—was undeniably present. The school board, unlike the state in *Grosjean*, made no attempt to hide its departure from neutrality, but on the contrary tried to justify it. And unlike the Court, Mr. Justice Harlan accepts the justification. He suggests, however, that he might feel differently about the case had it been proven that anti-Vietnam expression had been singled out not because it was felt to be unusually disruptive but rather because it represented an unpopular point of view. But this, given the proper burden-triggering role of motivation, is an inadmissible suggestion. For if, as Mr. Justice Harlan believes, the threat of disorder provided a legitimate basis for singling out anti-Vietnam expression, a search for the motivation underlying the choice not only is theoretically insupportable, but also exposes the Court to difficulties of ascertainability and possible futility, and may eventuate in its invalidating what is in his opinion an entirely justifiable choice simply because the wrong reasons motivated it.

The real disagreement in *Tinker*, therefore, was not over the relevance of motivation, nor was it over what motivation had been proven; it was instead a disagreement over the sort of risks the First Amendment obligates us to take. That the state had departed from a position of neutrality was incontrovertible; the question separating Mr. Justice Harlan from the Court was whether neutrality was required. And that is a question to which motivation is irrelevant.

O'Brien is unlike *Tinker* in that the government denied the complainant's charge that the activity in issue, the destruction of draft cards, had been singled out for prohibition in an effort to still anti-Vietnam sentiment. Instead the government attempted to frame the case as one involving a decision to extend, for various reasons unconnected with expression, special protection to a particular class of government records. The Court, apparently a trifle uneasy about its conclusion that motivation is irrelevant, deemed it, in the very next paragraph, "not amiss, in passing" to inquire into Congress's motiva-

tion. It did so, concluding that the impermissible motivation had not been proven.⁴¹⁹

This, it must be granted, was the only defensible conclusion, no matter how strongly one's suspicions may pull in the other direction. O'Brien made much of the timing factor; the law had been passed promptly after the first publicized draft card burnings. But while this tells us that Congress wanted to halt draft card burnings, it does not reveal whether that desire sprang from the expressive impact of such burnings or the increased threat specifically to selective service records. As between these two possible motivations, the legislative history, as the Court points out, is in equipoise. And more importantly, the impact of the statute is equally consistent with both motivations, if indeed it is not more consistent with the legitimate one.⁴²⁰ The final reason it is impossible to infer the illegitimate motivation is the reason the motivation question should not have been asked at all—that there are a number of rational explanations for the decision to protect draft cards more strenuously than other sorts of records. A draft card provides a record of a young man's military or draft status; its on-the-spot availability may be essential in the event of an administrative mix-up or a national emergency. It serves to remind him of his obligation to communicate with his draft board, and to facilitate that communication. Moreover, because of their frequent use as proof of age, draft cards present unusual temptations to forgery or alteration; the ban on mutilation and destruction renders the prohibitions of forgery and alteration easier to enforce.⁴²¹ It would be difficult to label any of these defenses compelling, but each rationally relates the singling out of draft cards to an acceptable goal and is unconnected with the inhibition of expression; under such circumstances, motivation is irrelevant.⁴²²

419. 391 U.S. at 385-88.

420. Note 28 *supra*.

421. See 391 U.S. at 378-80.

422. The opinion of the Court of Appeals, *O'Brien v. United States*, 376 F. 2d 538 (1st Cir. 1967), in pursuing a different line of analysis, pointed to what it considered a legislative distinction: between knowing destruction or mutilation, which was outlawed by subsection (3) of the statute in question, 50 U.S.C. App. § 462(b) (1964 ed.), and failure to possess, which was (by reference to a selective service regulation) outlawed by subsection (6). Were the former punishable by ten years and the latter by five, we would then be able to point to a legislative distinction which does on the surface seem to have been motivated by a desire to still antiwar expression. And functionally the same result would follow if consecutive sentences for violations of the two subsections were permissible—that is, if one who simply failed to possess could get only five years, but one whose failure to possess resulted from destroying his card could get ten. The Supreme Court, by citing the "rule of lenity" cases, 391 U.S. at 380 n.28, may have meant to suggest that consecutive sentences would not, as a matter of statutory construction, have been available under such

A motivation approach is indicated, however, only if governmental neutrality with respect to the interest asserted by the complainant is constitutionally sufficient. The Court grants that the government cannot go out of its way to burden expressive activity.⁴²³ However, in treating as dispositive the fact that the entirety of the draft card destruction statute serves the expression-unconnected interests enumerated⁴²⁴—that is, that the law contains no prohibition that does not further those interests⁴²⁵—the Court suggests that neutrality is constitutionally sufficient, that the government has fulfilled its obligation by refraining from placing gratuitous burdens on expressive activity. This is not the teaching of the prior cases,⁴²⁶ and as a generalization it is indefensible.⁴²⁷

The entirety of an anti-handbill ordinance is quite rationally directed to the prevention of littering; no part of such an ordinance fails to promote that perfectly legitimate goal. Nor is an increase in trash cans or a law against littering going to keep the streets as clean as would such measures coupled with a ban on handbills; the point of the handbill cases is that the interest in effective expression is so important that government must on occasion accept less than entirely effective vindication of its expression-unconnected interests. The interests served by the draft card destruction law, like the interest in clean streets, can obvi-

circumstances. Even if that was not its suggestion, and it is by no means an inevitable reading, the cited cases do suggest that § 462(b) would likely be read not to permit consecutive sentences. That being so, it is difficult to find a legislative distinction between nonpossession and destruction. In any event, the Court made clear that it would find such a distinction to be legitimately supportable. Destruction permanently puts out of reach a draft card, while nonpossession need only mean that the card is not immediately available; and the destruction subsection, unlike that proscribing non-possession, relates to any draft card and not just the defendant's. 391 U.S. at 380-81.

423. [A] governmental 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.
Id. at 377 (emphasis supplied). The italicized clause, particularly the word "essential," is ambiguous. It could mean that the interest in keeping open effective channels of communication is so important that sometimes the government will have to settle for less than completely effective vindication of the expression-unconnected interest it seeks to serve. Or it could mean simply that the prohibition can contain no inhibition which is superfluous in the sense that it does not serve the expression-unconnected interest. The Court's *performance* indicates that it means the latter. See note 425 *infra*.

424. P. 1339.

425. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. . . . *The 1965 Amendment prohibits such conduct and does nothing more.*

391 U.S. at 381 (emphasis supplied).

426. Note 412 *supra*.

427. Pp. 1335-36.

ously be served by alternative means of regulation. To note that they cannot be served *as well* by alternative means is not—as the Court seems to feel it is—the end of analysis, but only the beginning.

I am not suggesting it is an easy question whether the draft card destruction law's inhibition of broad and effective communication is sufficient to compel the reduced efficiency of the selective service system in which the law's invalidation would result. But that is the question *O'Brien* poses. It should have been faced.

The Yale Law Journal

Volume 79, Number 7, June 1970

BENJAMIN W. HEINEMAN, JR.
Editor-in-Chief

PETER B. HAMILTON
JOHN P. RUPP
Article Editors

ROBERT F. CARTER
DAVID B. COOK
RONALD J. GILSON
JAMES R. HUNTWORK
WILLIAM C. KELLY, JR.
DAVID E. KENDALL
*Note & Comment
Editors*

RAND E. ROSENBLATT
*Article & Book Review
Editor*
STANLEY S. JASPAN
Managing Editor

GEORGE A. BERMAN
JAMES F. BLUMSTEIN
RAYMOND P. BOULANGER
BARBARA A. BROWN
JEFFREY A. BURT
GREGORY L. COLVIN
RICHARD J. DANZIG
LANNY J. DAVIS
WILLIAM DRAYTON, JR.
JOHN J. DYSTEL
S. ALLEN EARLY III
J. MICHAEL EISNER
REID L. FELDMAN
NANCY GERTNER
ELEANOR S. GLASS

SUSAN A. GOLDBERG
PETER J. GREGORA
OLOF K. HELLÉN
STEPHEN HOCHBERG
ANDREW D. HURWITZ
BALLARD JAMIESON, JR.
WILLIAM E. KANE
ALAN D. KEISER
JOHN W. KEKER
MARC S. KOPLIK
JONATHAN L. KROWN
HAROLD J. KWALWASSER
JOHN C. LADD
JOHN R. LUCAS, JR.
HAROLD A. MCDUGALL III
ELLIOT MEISEL

RONALD W. MEISTER
MARSHALL L. MILLER
STEPHEN R. MUNZER
BARRY A. SANDERS
DAVID W. SCHNEIDER
THOMAS J. SEGAL
STEPHEN M. SHAPIRO
KENNETH I. SIDLE
LINDA L. TEDESCHI
MARK V. TUSHNET
ROBERT S. VENNING
MELVIN L. WATT
PETER H. WEINER
RICHARD P. WILD
PETER E. YAEGER

Business Secretaries M. OLIVE BUTTERFIELD, PAMELA WILLMOTT

Student Contributors to This Issue

John W. Keker and William L. Want, *Offensive Speech and the FCC*
Stanley S. Jaspán, *Picket Line Observance: The Board and the Balance of
Interests*