The Purpose of Purpose Analysis

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To get right to the point: 1

(1) Professor Alexander first wonders how I can urge a smoking-out conception of strict scrutiny while still supporting affirmative action programs that would fail strict scrutiny. “If [such programs] failed strict scrutiny, . . . does that not demonstrate that they were unconstitutionally motivated?”2 The answer is no—no more than a speed limit’s inability to survive strict scrutiny proves that it was unconstitutionally motivated. Nearly all laws would fail strict scrutiny. That is why strict scrutiny must be an exceptional test, triggered only when there are powerful grounds for suspecting an impermissible purpose.3

(2) Professor Alexander’s second question is, “What legislative purposes are unconstitutional?”4 He seems to want a complete list; if so, I cannot satisfy his request. My aim was to show that equal protection jurisprudence must confront this difficult question. I do say, on the basis of the Fourteenth Amendment’s paradigm cases, that state action is unconstitutional if it purposefully imposes an inferior caste status on any group. Professor Alexander suggests that this principle would be confounded by a statute banning blacks from “high social positions” if the lawmakers had been sincere utilitarians, motivated solely by concern over white pain at black success.5 This objection mistakenly supposes that an illegitimate purpose is somehow

1. As the Journal has limited this reply to two pages, I will not be able to give Professor Alexander’s characteristically incisive remarks the full consideration they merit.


3. This triggering function was supposed to be the point of suspect class doctrine, according to which a law singling out (say) blacks for adverse treatment raised so powerful a suspicion of improper purpose that only the most exacting showing of necessity could dispel that suspicion. Today, the Court has in effect made whites a suspect class, without ever acknowledging that this result contradicts everything the Court used to say about the criteria for suspect class status. But Professor Alexander asks why, if a suspicion of improper purpose can arise from “circumstantial evidence,” we should ever “resort to artificial evidentiary tests” like strict scrutiny. Id. at 2680. The answer is that the “artificial” test is a sensible judicial means of resolving the suspicion. If a prosecutor has used peremptories to eliminate all black veniremen, a court might demand a special demonstration of necessity as to each strike, setting a standard of review so high that most peremptories could not meet it. The point of this strict scrutiny would not be to permit the state to justify purposeful race-based exclusion. It would be to give the judiciary a practical means to smoke out purposeful race-based exclusion, precisely where the “circumstantial evidence” had raised a sufficiently high degree of suspicion that such purposeful exclusion had taken place.

4. Id. at 2680.

5. Id. at 2681.
erased or washed clean by the presence of a putatively legitimate further motive (or "ultimate" purpose). A law deliberately barring blacks from "high positions" is quintessentially a law purposefully inflicting an inferior caste status on blacks. It is hence unconstitutional—period. The lawmakers' motives are irrelevant.6

(3) Professor Alexander “save[s]” his “most important” question for last: “Why should the constitutionality of a law . . . ever turn on the purposes for which it is enacted?”7 This is indeed an interesting question, but happily not of an intricacy proportioned to its interest. The answer is: because the Fourteenth Amendment at its core concerns invidious discrimination, and such discrimination at its core involves purpose. Would we find invidious discrimination if a particular ethnic group had not a single member on any professional basketball team? I think not—unless this group were shown to have been purposefully excluded.8

Finally, Professor Alexander hypothesizes a situation in which “both sides in a legislature—those for law A and those against it—are acting for improper purposes.”9 Might not this lead, he asks, to the absurd conclusion “that both the existence of law A and its absence would be unconstitutional”?10 As Professor Alexander well knows, this conundrum raises difficult problems in figuring out how to understand a law’s purpose. He may think these problems are insuperable; I do not. One solution might be for courts to ask what purpose or purposes a reasonable citizen would impute to the law. Another might be for courts to presume a constitutional purpose in almost all cases, except when certain potent criteria of suspect purpose are present, in which case heightened means-ends scrutiny would apply. Sound familiar? Having begun by dismissing strict scrutiny as “artificial,” Professor Alexander concludes by despairing at precisely the kind of problem to which strict scrutiny is an answer.

6. According to Professor Alexander, my basic position on purpose in equal protection law (i.e., that the unconstitutionality of a law charged with discrimination must turn on the existence of an invidious purpose) does “not square with lots of—I dare say most of—Supreme Court jurisprudence.” Id. at 2683. This conclusion would be very surprising if true, given that my position is virtually a quotation from that jurisprudence. Professor Alexander neglects to mention what the Court has repeatedly affirmed: the “basic equal protection principle,” Washington v. Davis, 426 U.S. 229, 240 (1976), that “an invidious purpose must be adduced to support a claim of unconstitutionality,” City of Mobile v. Bolden, 446 U.S. 55, 63 n.10 (1980) (plurality opinion). The Court cannot abandon this principle without jeopardizing the entire line of disparate impact cases. Yet, as Alexander agrees, the Court has dishonored this principle in its affirmative action opinions.

7. Alexander, supra note 2, at 2683.

8. To be sure, if all “we care about” is the effectuation of free-market-social-welfare liberalism, see Alexander, supra note 2, at 2684 & n.20, then we will not “care about” invidious racial purposes as such. The Fourteenth Amendment, however, did not enact Dworkin’s Empire or Rawls’s Theory. See RONALD DWORKIN, LAW’S EMPIRE (1986); JOHN RAWLS, A THEORY OF JUSTICE (1971). It laid down a commitment whose central meaning is that the nation never again will tolerate any state action deliberately imposing on one race a degraded status or second-class citizenship. Such racial discrimination requires at a minimum a distinction made on account of race, and this on account of is a matter of purpose.

9. Alexander, supra note 2, at 2684 n.21.

10. Id.