VOLUME 130 DECEMBER 2016 NUMBER 2

HARVARD LAW REVIEW

ARTICLES

CONSTITUTIONALLY FORBIDDEN LEGISLATIVE INTENT

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CONSTITUTIONALLY FORBIDDEN LEGISLATIVE INTENT

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In litigation under the Equal Protection, Free Exercise, Establishment, Free Speech, and dormant commerce clauses, among others, the Supreme Court sometimes inquires whether the legislature that enacted a challenged statute did so with a discriminatory or otherwise constitutionally forbidden intent. In a comprehensive reexamination of the nature and significance of forbidden legislative intentions, purposes, and motivations, this Article shows that the Court's references invoke varied senses of legislative intent, some of which are subjective and others objective, some of which are coherent and others of which are incoherent. The Article also demonstrates that the Court has provided disparate indications of the significance that should attach to a finding of forbidden intent. These include automatic statutory invalidation, the application of strict judicial scrutiny, and further inquiry into whether the legislature, absent a forbidden motivation, would have enacted the same statute anyway.

After mapping confusions in current law, this Article argues that courts should never invalidate legislation solely because the legislature acted with forbidden intentions. Substantive tests of validity should ultimately determine constitutionality. Nevertheless, the Article defends a role for intent-based inquiries — pursuant to intelligibly specified rules for ascribing intentions to multimember bodies — in triggering elevated judicial scrutiny under some constitutional provisions.

Inquiries into legislative intentions, purposes, and motivations feature prominently in American constitutional law.[1] In order to identify constitutional violations under the Equal Protection Clause, courts sometimes ask whether the legislature acted with a racially discriminatory intent,[2] whether it manifested animus toward an identifiable group,[3] or whether the legislature had the predominant purpose of creating a voting district in which members of a racial minority group constitute a majority.[4] Under the dormant commerce clause, tax or

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[1] *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 89–95 (2001); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297 (1997).

[2] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240 (1976).

[3] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *see also* United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (invalidating a federal statute "[t]he principal purpose" of which was "to impose inequality").

[4] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 959 (1996) (plurality opinion); Miller v. Johnson, 515 U.S. 900, 916 (1995); *cf.* Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1309 (2016) (finding that population deviations among state legislative districts of less than ten percent do not violate the Equal Protection Clause absent a showing "that it is more probable than not that illegitimate considerations were the predominant motivation behind the plan's deviations from mathematically equal district populations").

regulatory statutes that reflect a discriminatory or protectionist legislative purpose incur strict judicial scrutiny.[5] The Supreme Court has long held that statutes violate the Establishment Clause if they are motivated entirely by the forbidden purpose of promoting religion.[6] The Free Exercise Clause mandates strict scrutiny of laws "the object" of which "is to infringe upon or restrict practices because of their religious motivation."[7] Under the "undue burden" test of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[8] regulations of abortion violate the Due Process Clause if their "purpose . . . is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[9] The Court has pointed to forbidden purposes as a ground for invalidating interferences with the right to travel.[10] Under constitutional provisions that restrict permissible state punishments — including the prohibitions against ex post facto laws,[11] bills of attainder,[12] and double jeopardy[13] — judicial inquiries frequently begin with the question whether the legislature enacted a challenged provision with a punitive intent.[14] In a famous article written while she was a law professor, Justice Kagan once argued that modern Free Speech Clause doctrine systematically seeks to ferret out and invalidate legislation that was enacted with the intent to suppress messages that the government disapproves.[15]

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[5] *See, e.g.*, Wyoming v. Oklahoma, 502 U.S. 437, 454–55 (1992) ("This 'negative' aspect of the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 454 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988)).); City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (condemning measures enacted "to slow or freeze the flow of commerce for protectionist reasons").

[6] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 43, 56 (1985); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[7] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[8] 505 U.S. 833, 877 (1992) (plurality opinion).

[9] *Id.* at 878, *quoted in* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

[10] *See* Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 263–64 (1974); Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

[11] U.S. CONST. art. I, § 10, cl. 1.

[12] *Id.*

[13] *Id.* amend. V.

[14] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 368–69 (1997); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1370 (2008).

[15] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996). Although the Supreme Court said in *United States v. O'Brien*, 391 U.S. 367 (1968), that "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," *id.* at 383, subsequent First Amendment cases arguably look in different directions, *see* Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016) ("When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment . . . ."); Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2663 (2011) (asserting that "a statute's stated purposes may also be considered" in appraising its constitutional validity); *see also* Texas v. Johnson, 491 U.S. 397, 407,

Despite their entrenched status, intent-, purpose-, and motivation-based doctrines cry out for reexamination and reform. A major prod to rethinking comes from developments in the theory and practice of statutory interpretation. In statutory interpretation cases, a growing panoply of commentators — with apparently increasing influence on the Justices — has disparaged and indeed ridiculed inquiries into subjective legislative intent as a gauge of statutory meaning.[16] When matters of statutory interpretation occupy center stage, the lesson has taken hold that the legislature is "a 'they,' not an 'it.'"[17] Individual legislators may have intentions and purposes, but the legislature as a whole has no collective intent or purpose, the emerging wisdom maintains, and it is impossible to derive a collective psychological intent from the disparate mental states of individual legislators.[18]

As soon as reexamination commences, moreover, a number of deeper difficulties with current doctrine emerge. Some are doctrinal. Some are conceptual. And some, inevitably, are normative.

Among the doctrinal and conceptual questions, the most pressing involves what the Supreme Court means when it speaks of discriminatory or otherwise forbidden legislative intentions, purposes, or motivations. When the Supreme Court invokes the concepts of legislative intent or purpose, and occasionally of legislative motivation, does it refer — possibly confusedly or even incoherently — to an imagined collective mental state, to some aggregation of the mental states of individual legislators, or to something else? As I shall show, this question has no clear answer, even though important analytical conclusions emerge from pursuing it.[19]

Because multimember legislatures typically have no unitary, collective intentions in the psychological sense, many references to "the intent of the legislature" or the legislature's collective purposes may indeed reflect intellectual confusion. As I shall argue, however, it would

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410 (1989) (invalidating a state statute where the state did not properly assert any justificatory interests unrelated to the suppression of ideas). In addition, Justice Kagan argued that many objective-looking inquiries — such as the examination of whether restrictions on speech are content-based — function as "proxies" for direct examination of legislative intent. Kagan, *supra*, at 414, 441.

16 The skeptics range from the conservative Justice Scalia, *see, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 16–23 (Amy Gutmann ed., 1997), to the politically liberal jurisprudential writer and moral philosopher Ronald Dworkin, *see, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 321–33 (1986).

17 Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992).

18 *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 428–32 (2005).

19 An additional issue involves the relationship among the concepts of intention, purpose, and motivation. For discussion, see *infra* notes 43–50 and accompanying text.

be a mistake to conclude that all references to legislative intentions are either confused or meaningless. First, because individual legislators have subjective intentions, it is possible to develop legal rules for ascribing the intentions of individual legislators to the legislature as a whole — for example, in cases in which an absolute majority of the legislature acts with forbidden intent. Second, although most references to forbidden legislative purposes concern psychological phenomena — somehow involving the attitudes of actual legislators — some usages invoke conceptions of legislative intent that plausibly claim to be objective, not subjective. Distinguishing subjective from objective intentions is a tricky exercise that I shall discuss at length. For now, suffice it to say that even the most vehement critics of judicial inquiries into subjective legislative intent acknowledge a need to identify "objective" intentions or purposes.[20]

Overall, I argue, leading cases display varied approaches to the identification of legislative intent, but without clear awareness of the diversity. Some of the Supreme Court's analyses are wholly coherent. Others manifest ambiguity or confusion. But modern constitutional law has failed to settle on a single, intelligible conception of legislative intent.

After a court has determined that the legislature acted with forbidden intentions, a second question about current constitutional doctrine involves the consequences that ensue. Once again, the Supreme Court's cases exhibit a disparity of approaches. In some instances, the Court suggests that an impermissible purpose conclusively invalidates legislation, at least in the absence of an additional, legitimate purpose.[21] In others, it states that a finding of invalid purpose shifts the burden to the state to establish that it would have enacted the same legislation for other reasons.[22] In yet other cases, the Court says that a statute enacted for a forbidden purpose is invalid unless "justified by a compelling interest" and "narrowly tailored to advance that interest."[23]

After completing an effort to discover patterns in the current scheme, but achieving only limited success, this Article takes a sharply

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[20] *See, e.g.*, Manning, *supra* note 18, at 423 ("[T]extualists have sought to devise a constructive intent that satisfies the minimum conditions for meaningfully tracing statutory meaning to the legislative process."); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 353–57 (2005) (discussing textualists' search for statutes' "'objectified' intent," *id.* at 354 (quoting Scalia, *supra* note 16, at 17)); Scalia, *supra* note 16, at 17 ("We look for a sort of 'objectified' intent — the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.").

[21] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[22] *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

[23] *E.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

normative turn. My analysis and prescriptions unfold in several stages. First, I argue that courts should never invalidate legislation *solely* because of the subjective intentions of those who enacted it. Instead, in all cases, final determinations of statutes' validity should depend on their language and effects. In ways that I explain, Equal Protection and Establishment Clause doctrine should be reformulated to reflect this conclusion. So should relevant aspects of current doctrine involving the dormant commerce clause, the Free Exercise Clause, and — though in a more minor way — the Free Speech Clause.

Accepting that courts should never invalidate statutes solely based on subjective legislative intentions would require the rejection of fewer iconic holdings than one might expect. Nevertheless, my proposed approach would avoid the confusions that mark existing doctrine and, equally important, would permit the resolution of a number of hypothetical testing cases in ways that accord with legal and moral intuitions that I expect are widely shared. In an example to which I shall refer repeatedly, courts should not invalidate a statute prohibiting murder even if it could be demonstrated that a majority of the legislators who voted for it did so for the sole psychological purpose of enforcing the Sixth Commandment.[24]

Second, I argue that the Supreme Court should replace a number of intent-based measures of constitutional invalidity with content- or effects-based measures. As I demonstrate, the constitutional provisions that the Court currently enforces with intent-based tests also generate substantive norms. In addition, as I have noted, some conceptions of forbidden legislative intent purport to be objective, not subjective, due to their exclusive focus on publicly observable conditions — such as statutes' facial discrimination against racial or religious minorities — and their refusal to take account of other, possibly competing, evidence of legislative intentions in the psychological sense. Insofar as objective conceptions train their attention solely on statutes' facial content or publicly measurable effects, and especially insofar as they rule out otherwise probative evidence of enacting legislators' actual, psychological intentions, the reference to legislative intentions does no real analytical work. Omitting such references, we should reconceptualize doctrines that ascribe forbidden intentions exclusively on the basis of specified statutory content or effects as substantive doctrines that prescribe results directly on the basis of that content or those effects. Partly as a result of this reconceptualization, reliance on substantive tests should result in no overall diminution of constitutional protections.

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[24] *See Exodus* 20:13.

Third, after having argued that courts should never invalidate legislation based solely on forbidden subjective legislative intentions, I take up the question whether forbidden psychological intentions should, nevertheless, have a less conclusive role in judicial inquiries into the validity of statutes. To that question I answer yes. Although the "collective legislature"[25] will seldom have a shared intent, individual legislators of course have intentions and motivations. They also have obligations — which I call "deliberative obligations" — not to pursue constitutionally forbidden aims or to take official actions based on constitutionally forbidden motives. In addition, many constitutional doctrines employ levels of judicial scrutiny that frequently prescribe judicial deference to legislative judgments. These norms of deference presuppose that the members of an enacting legislature will have considered the constitutionality of any statute that it enacts. In my view, courts should normally subject a challenged statute to elevated judicial scrutiny whenever a challenger can demonstrate that an actual majority of the enacting legislature probably voted for it with constitutionally forbidden intentions.

Fourth, although legislative intent–based and substantive tests should ordinarily perform distinct functions in assessments of the validity of statutes, the two should come together, I argue, as potential triggers of strict judicial scrutiny in one important class of cases. In some instances, the publicly identified, forbidden subjective intentions of less than a majority of the legislature may help to give a challenged statute an objective "expressive" effect that stigmatizes a racial or religious minority or promotes religion to a greater than de minimis extent. For example, if it is well known that some members of the legislature (but less than a majority) voted for a statute with the aim of harming a racial or religious minority, their intentions might contribute to the statute's overall expressive impact in marginalizing or stigmatizing that minority. If so, that consequence, as established in part by the identified forbidden intentions of a subset of the legislature, should help to activate elevated judicial scrutiny under an effects-based (rather than a purely intent-based) test.

I should say a final preliminary word about the scope of my analysis. This Article focuses on the sometimes peculiar problems posed by judicial inquiries into the intentions of multimember legislative bodies for the purpose of determining the validity of statutes or other policies with future applications, typically affecting a number of cases. I do not analyze the partly parallel problems that arise when single officials — such as prosecutors, other executive officials, or judges — act

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[25] I derive the term "collective legislature" from Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015).

for constitutionally forbidden purposes. Actions by such officials do not present the main conceptual problem with which I am concerned, involving the aggregation of the mental states of multiple officials into a collective intent of a decisionmaking body. Much of my analysis of how the Supreme Court gauges the intentions of individual legislators might carry over to cases involving executive officials and judges, but I shall not examine how far.

Cases involving forbidden motivations by individual officials might also call for a different, and more diverse, pattern of doctrinal responses than cases of forbidden legislative intent. The reasons are largely consequentialist.[26] In the context of judicial review of legislation, the practical question typically concerns whether courts should hold a statute invalid and thus unenforceable in all cases. As I have noted, few would judge it tolerable for courts to strike down a law prohibiting murder if historical examination revealed that most members of the legislature voted for it solely for the constitutionally forbidden purpose of enforcing one of God's commandments. The consequences would be too draconian. By contrast, more of us might think it tolerable, and even desirable, for a criminal conviction to be vacated and the case retried upon proof that a prosecutor used her peremptory challenges to exclude potential jurors on racially discriminatory grounds.[27] Both fairness- and deterrent-based considerations would support this conclusion. It is also plausible that courts should inquire into executive officials' motives in some contexts or for some purposes but not others. Whatever conclusion one reaches, whether officials' subjective motivations should determine the reasonableness and thus the validity of searches under the Fourth Amendment[28] is a different question from whether forbidden intent should matter in a case alleging that a statute violates the Equal Protection Clause.[29] The two provisions

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[26] *See, e.g.*, Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1, 24–26 (noting that cases involving unconstitutional motivations by judges and executive officials frequently present different kinds of remedial issues — involving, for example, whether individual judicial judgments should be vacated or particular actions nullified — than do challenges to the constitutionality of legislation).

[27] *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that the Equal Protection Clause forbids prosecutors' use of peremptory challenges to exclude potential jurors based on their race).

[28] *See, e.g.*, Whren v. United States, 517 U.S. 806, 819 (1996) (holding that the temporary detention of a motorist who the police have probable cause to believe has violated the traffic laws does not violate the Fourth Amendment regardless of the officer's actual motivation for making the stop or effecting the detention).

[29] *See id.* at 813 (observing that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment," which relies on "probable-cause . . . analysis").

have different language and purposes. The costs and benefits of motive-based inquiries may vary from one case to the other.[30]

Nor shall I seek to identify which specific intentions and motivations various constitutional provisions — including the Equal Protection and Due Process Clauses, the Establishment and Free Exercise Clauses, and the dormant commerce clause — should be interpreted to prohibit. To do so would expand the scope of this Article beyond reasonable limits. Because the motivations that are prohibited would depend on the substantive content of the constitutional provision in question,[31] the requisite analysis would be not only multifaceted, but also inescapably controversial in some cases. To keep my inquiry within manageable bounds, I shall assume, unless I indicate otherwise, that the intentions and motivations that the Supreme Court has classed as impermissible deserve that designation. Correspondingly, I shall leave questions concerning possible additional forbidden intentions and motivations — including the possibility that the category of discriminatory intent should subsume subconscious mental states — for another day.[32]

Despite these limitations, my overall analysis and set of proposals not only chart a path to doctrinal reform, but also mark a significant innovation in the modern literature. Since the 1970s and 1980s, when the Supreme Court abandoned its traditional reluctance to inquire into legislative intent as a gauge of statutes' constitutionality, no major article of which I am aware has mounted a general argument that the Supreme Court should never invalidate statutes under any rights-conferring provision of the Constitution based solely on a finding that the legislature enacted it with forbidden subjective intentions.[33] In a

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[30] *See generally* FALLON, *supra* note 1, at 28–44 (discussing the importance of pragmatic considerations in the design of and selection among tests of constitutional validity).

[31] *See* Bhagwat, *supra* note 1, at 331–38.

[32] *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323, 331–44 (1987) (maintaining that the Supreme Court has "ignore[d] much of what we understand about how the human mind works" by turning a blind eye to unconscious racism, *id.* at 323); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1138 (1997) (asserting that the Supreme Court's conception of discriminatory purpose "does not reflect prevailing understandings of the ways in which racial or gender bias operates"); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 956–62 (1989).

[33] Writing in 1993, Professor Laurence Tribe argued that illicit legislative motive is never a sufficient justification for the invalidation of laws regulating conduct, but he maintained that "laws or regulations setting criteria for the distribution of opportunities or benefits" should remain subject to purpose-based scrutiny and invalidation. Tribe, *supra* note 26, at 23 (emphasis omitted). Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, mainly deals with forbidden legislative intent in the domain of election law. With regard to that context, Professor Hasen argues that "proof of . . . bad intent" — which he equates with a purpose of protecting incumbents or a political party from competition — "should be neither necessary nor sufficient for an election law challenge to succeed, though it should be relevant in getting courts to take a hard look at elec-

dissenting opinion in *Edwards v. Aguillard*,[34] Justice Scalia argued that courts should wholly eschew inquiries into subjective legislative intentions,[35] but he subsequently joined opinions applying purpose-based tests.[36] My analysis rationalizes Justice Scalia's apparent approach by distinguishing between subjective and objective gauges of legislative intent and by explaining the appropriateness of constitutional reliance on the latter, regardless of one's judgment about the former. My arguments similarly build on the work of others concerning the significance that constitutional law should accord to expressive effects,[37] but I relate expressive effects to the analysis of legislative intentions in novel ways.

The Article has five parts. Part I explores the variety of conceptions of legislative intent that operate, or at least may play a role, in current constitutional doctrine. Part I emphasizes that although some conceptions are rooted in the mental states of individual legislators and pose problems in combining those individual attitudes into a collective intent of the legislature, such problems need not prove insuperable. In addition, other, purportedly objective, conceptions do not depend on inquiries into particular lawmakers' psychological motivations. Overall, however, Part I argues that it is often unclear to what the Supreme Court refers when it assigns legal relevance to the intent or purposes of the legislature.

Part II turns to questions involving the consequences that follow from a finding that the legislature acted with forbidden purposes. It identifies rampant inconsistencies in the Court's prescriptions.

Part III briefly summarizes the lacunae and confusions in existing doctrine and commences the project of clarification and reform. More specifically, Part III examines the proper role of subjective conceptions of forbidden legislative intent in constitutional analysis. It advocates a consistent, coherent approach that (a) emphasizes the significance of substantive norms and tests, as distinguished from inquiries into legis-

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tion laws." *Id.* at 846. Although Hasen's proposed framework for dealing with forbidden subjective intentions bears important similarities to mine, he offers only a brief discussion of how it might apply to Equal Protection and Establishment Clause cases. *See id.* at 890–94. He does not apply it at all to intent-based claims under other constitutional provisions, nor does he probe the various conceptions of legislative intent that the Supreme Court sometimes employs.

[34] 482 U.S. 578 (1987).

[35] *Id.* at 636–39 (Scalia, J., dissenting).

[36] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 917 (1995) (accepting the district court's invalidation of an electoral districting plan because "race was the predominant factor motivating the drawing of the [electoral district]").

[37] *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993).

lative intent, in constitutional law; (b) insists that ultimate determinations of constitutional validity should always depend on the content and effects of challenged legislation, not the subjective intentions of the enacting legislature; and (c) recasts doctrines that currently purport to rely on measures of objective intent as embodying substantive, not intent-based, constitutional norms.

Part IV further advances the agenda of doctrinal clarification and reform by proposing a residual but limited role for subjective conceptions of legislative intent in instigating strict judicial scrutiny of legislation (the final validity of which will then depend on substantive considerations). More specifically, Part IV argues that courts should apply elevated scrutiny when it can be shown that a majority of the legislators who supported an enactment did so based on forbidden motivations. This test is appropriately difficult, but not in all cases impossible, to satisfy. Part IV also defends heightened judicial review in cases in which the discriminatory intentions of less than a majority of the legislature significantly contribute to a statute's expressive effect in substantially burdening either a minority group or vulnerable constitutional rights. Part V supplies a brief conclusion.

I. CONCEPTIONS OF FORBIDDEN OR DISCRIMINATORY INTENT IN CURRENT CONSTITUTIONAL DOCTRINE

Inquiries into the intent of the legislature for purposes of determining the constitutional validity of legislation have a disputed history. Nineteenth-century cases frequently rebuffed calls for judicial scrutiny of legislative motivation.[38] According to a study by Professor Caleb Nelson, however, the Supreme Court, from the nineteenth century onward, has regularly invalidated statutes when a discriminatory or other constitutionally forbidden purpose manifests itself on a statute's face.[39]

Whatever the Supreme Court's early practices, at least since the 1970s it has recurrently deployed tests that focus on forbidden legislative intentions.[40] In applying those tests, the Court almost invariably

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[38] *See* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790–91 (2008).

[39] *See id.* at 1790–91 & nn.17–22. When a forbidden purpose was not evident on the face of a statute, Nelson acknowledges that the early Court generally rejected inquiring into legislative history. *See id.* at 1820 (asserting that in the late nineteenth century, courts "still generally refused to use internal legislative history to impugn the legislature's good faith").

[40] *See* FALLON, *supra* note 1, at 90; *supra* notes 1–14 and accompanying text; *see also* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 284–85 (1991) (noting that the Supreme Court's equal protection jurisprudence manifested a significant shift from a predominant focus on legislative outcomes, as measured by substantive norms, to a heightened focus on legislative "inputs," as judged by deliberative norms, during the 1970s).

treats the terms "intentions" and "purposes" as synonymous.[41] In addition, it most frequently includes "motivations" in the same conceptual hopper.[42] In this Article, I shall be slightly more conceptually fastidious. An important philosophical literature and some related legal discussions distinguish among intentions, purposes, and motivations.[43] In pursuit of analytical clarity, some writers define a person's intentions in terms of the proximate aims that she seeks to achieve in taking an action.[44] For example, if a legislator votes to authorize a Ten Commandments display in the state capitol, we might say that she acts with the intention (or aim) of promoting religion. So speaking, we might distinguish her "motivations" for doing so as involving the values, beliefs, or dispositions that made the aim of promoting religion attractive to her.[45] For example, we might say that her motivation was to please God — or, alternatively, that it was to win the support of religiously devout voters. If we distinguish between "intention" and "motivation" in this way, with each denominating a distinct mental state, then the term "purpose" is ambiguous: it can refer either to what a person proximately aims at[46] or to the deeper grounds that would explain why someone adopted the aim that she did.[47]

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41 *See* Strauss, *supra* note 32, at 951; Julia Kobick, Note, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 521 n.22 (2010) ("As used in [*Washington v. Davis*, 426 U.S. 229 (1976)], a government's 'discriminatory purpose' is a synonym for a government's 'intentionally discriminatory action.' Throughout the majority opinion, the Court uses 'purpose' and 'intent' to denote the same idea."); *see also* Edwards v. Aguillard, 482 U.S. 578, 613 (1987) (Scalia, J., dissenting) ("[R]egardless of what 'legislative purpose' may mean in other contexts, for the purpose of the *Lemon* test it means the 'actual' motives of those responsible for the challenged action.").

42 *Cf.* Kagan, *supra* note 15, at 426 n.40 (rejecting distinctions among these and similar terms as unhelpful for purposes of constitutional analysis); Ristroph, *supra* note 14, at 1354 & n.2 (noting that "[i]nquiries into purpose, intention, and motivation are . . . prevalent in constitutional doctrine," *id.* at 1354, and using the terms "interchangeably," *id.* at 1354 n.2).

43 *See, e.g.*, DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 140 (2008); Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 207–08 (2008). In the philosophical literature, the foundational text for many modern discussions of intention and related concepts is G.E.M. ANSCOMBE, INTENTION (2d ed. 1963). For a survey, see Kieran Setiya, *Intention*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), http://plato.stanford.edu/archives/sum2015/entries/intention [https://perma.cc/DUU4-ZC9V].

44 *See, e.g.*, HELLMAN, *supra* note 43, at 140; T.M. Scanlon & Jonathan Dancy, *Intention and Permissibility*, 74 ARISTOTELIAN SOC'Y SUPPLEMENTARY VOLUME 301, 306 (2000).

45 *See, e.g.*, HELLMAN, *supra* note 43, at 140; Young, *supra* note 43, at 207.

46 *See, e.g.*, *Edwards*, 482 U.S. at 636–37 (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute (*i.e.*, the public good at which its provisions appear to be directed), . . . discerning the subjective motivation of those enacting the statute is . . . almost always an impossible task." *Id.* at 636.); *see also* Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 249 (1990) (plurality opinion) ("[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.").

47 *See, e.g.*, HELLMAN, *supra* note 43, at 140.

In this Article, I shall use the terms "intent" and "intentions" to denominate legislative aims and the terms "motive" and "motivations" to refer to the values or dispositions that lead people to adopt particular aims. But I shall not seek to purge "purpose" — a term that the Supreme Court most characteristically treats as synonymous with intention[48] — of its ambiguity. Nor will my analysis focus exclusively on the relevance to constitutional law of legislative intent as distinguished from legislative motivations. By all accounts, legislators' motivations — in the sense of values or dispositions — are constitutionally irrelevant unless officials act on them.[49] Accordingly, forbidden motivations matter to constitutional law almost exclusively as evidence of or due to their connection with forbidden intentions.[50] My analysis will take account of legislative motivations, as distinguished from intentions or purposes, only insofar as they serve that function.

Beyond these conceptual equations and connections, the reference point for the Supreme Court's inquiries into forbidden legislative intentions has often remained obscure in a way that requires deeper probing. As noted above, one question involves whether intent-, purpose-, or motive-based tests require determinations of individual legislators' mental states and, if so, whether and how they contemplate the aggregation of a diversity of individual attitudes into a unitary intent of the legislature. A related question is how Justices who scorn inquiries into, and attempts to aggregate, legislators' intentions in other contexts could plausibly adhere to doctrines that require similar inquiries in appraising statutes' constitutional validity.

As I shall establish, the doctrine is unclear and inconsistent in its answer to these two questions. Amid the uncertainty and confusion, however, the cases exhibit a central division between "subjective" and "objective" conceptions of legislative intent. In rough terms, subjective conceptions — of which there are several subvarieties — first seek to identify the actual thought processes or psychological attitudes of the legislators who proposed or enacted a statute. Then, having done so, some such conceptions must separately endeavor to aggregate individual legislators' intentions into a collective intent of the legislature. Critics have questioned the workability and even the intelligibility of

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[48] *See* Strauss, *supra* note 32, at 951; Kobick, *supra* note 41, at 521 n.22.

[49] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558–59 (1993) (Scalia, J., concurring in part and concurring in the judgment) ("Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to 'prohibi[t] the free exercise' of religion." (alteration in original)); Tribe, *supra* note 26, at 29–30.

[50] This connection may explain why a number of sophisticated studies of the role of legislative intentions, purposes, and motivations in constitutional analysis have eschewed efforts to maintain distinctions among these and related concepts. *See, e.g.*, Kagan, *supra* note 15, at 426 n.40; Ristroph, *supra* note 14, at 1354 n.2.

both steps of this approach. By contrast, objective conceptions of legislative intent aspire to identify a form of legislative intention that exists independently of the thought processes of individual legislators and that is ascertainable through inquiries that do not focus on individual psychology.

A. Subjective Conceptions of Legislative Intent

The Supreme Court has most self-consciously addressed questions about the nature of discriminatory intentions in its equal protection doctrine. In the leading case of *Personnel Administrator v. Feeney*,[51] the Court equated discriminatory intent with an aim to achieve results defined by a forbidden criterion. According to *Feeney*, the conclusion that the legislature acted with a "'[d]iscriminatory purpose' . . . implies that [it] . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[52] In other cases, the Court has identified malice and animus as attitudes that either exemplify or give rise to and explain discriminatory intent.[53] A number of Establishment Clause cases have also equated legislative intentions with the psychologically grounded aims of the legislators who proposed or supported a challenged law.[54] The Court took a similar approach in the Free Exercise Clause case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[55]

Despite well-known questions about whether Congress as a collective body can possess intentions or purposes,[56] there are circumstances under which courts might coherently ascribe a collective intent to the legislature based on the intentions or motivations of individual legislators. But it is far from clear that the Supreme Court employs a consistent formula.

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[51] 442 U.S. 256 (1979).

[52] *Id.* at 279. *But cf.* McCreary County v. ACLU of Ky., 545 U.S. 844, 862 (2005) (maintaining that "an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts," based on the inquiries of "an 'objective observer' . . . who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute'" (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000))).

[53] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2693 (2013); Romer v. Evans, 517 U.S. 620, 632 (1996).

[54] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 613 (1987) (Scalia, J., dissenting) ("[R]egardless of what 'legislative purpose' may mean in other contexts, for the purpose of the *Lemon* test it means the 'actual' motives of those responsible for the challenged action.").

[55] 508 U.S. 520, 540–41 (1993) (plurality opinion).

[56] *See, e.g.*, Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 11 (1992) ("If legislative purpose is the mere aggregation of the motivations of individual legislators, then there seems no escaping the conclusion that the very idea of legislative purpose is incoherent.").

1. *Collective Intentions*. — It is a theoretical possibility for a legislative body to have genuinely collective, shared, psychological intentions in some senses of that term. A number of philosophers have worked out theories of group intentions.[57] In one conceptualization, group intentions exist when every member intends what he or she does to be an aspect of a coordinated activity that makes sense only as a group activity.[58] In such circumstances, every member, thinking of or speaking for himself or herself as "I," also has a "we-intention" such that it is true for each that "I intend that we" do something collectively or jointly.[59]

To cash out this thought with respect to legislation, we might say that each member of the legislature who votes for a bill (a) intends that the legislature should enact the bill as law and (b) further intends to communicate whatever a reasonable member of the target audience would understand the law as communicating — for example, that the sales tax on gasoline has been increased, or that it is a crime to sell or possess a particular drug. It seems typically to be less plausible, however, to think that all or even most of the members of a collective legislature would individually intend to join with other members of the legislature in collaboratively performing an activity defined by its forbidden purpose. Each legislator could of course individually have a forbidden purpose in voting to enact a law — for example, to suppress racial minorities or promote Christianity. But the only necessary or even psychologically likely we-intention would appear to be to enact a law with particular substantive content — and not to do so in order to join with others in pursuing an unconstitutional goal. As a result, insofar as constitutional doctrine is concerned with forbidden legislative intentions, it will seldom aim to uncover we-intentions.

2. *Counting-Based Ascription Rules*. — Another approach would ascribe intentions to the collective legislature based on an identification and counting of individual legislators' conceptually unrelated mental states. Such an approach would begin with inquiries into the intentions of individual legislators and then rely on legal rules to prescribe when the intentions of some should be ascribed to the legislature as a whole.

This is another coherent approach. Moreover, it is consistent with the Supreme Court's actual inquiries in a number of leading cases.[60] As I have emphasized, individual legislators have intentions, purposes,

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[57] *See, e.g.*, MICHAEL E. BRATMAN, FACES OF INTENTION (1999); CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY (2011).

[58] *See, e.g.*, RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 54–57 (2012).

[59] *Id.* at 56.

[60] *See, e.g.*, *infra* notes 64–67 and accompanying text (discussing Gomillion v. Lightfoot, 364 U.S. 339 (1960)).

or motivations. At least sometimes, available evidence permits courts to ascertain individual intentions.[61] It also bears emphasis that the challenge in identifying whether legislators voted for a statute with a specific, forbidden aim differs from the more open-ended challenge in statutory interpretation cases in which we might want to know legislative intentions for purposes of determining what a statute means or whether it applies to a particular case. In that context, different legislators may have acted with radically diverse beliefs, assumptions, expectations, and so forth, any or all of which may, on some accounts, bear on a statute's meaning. By contrast, if we want to know whether individual legislators acted with forbidden purposes — such as that of disadvantaging a racial or religious minority — the question solicits a yes or no answer. Answering it may prove difficult for either evidentiary or conceptual reasons.[62] But the questions whether one or more individual legislators acted for impermissible reasons — and, if so, how many of them did so — are by no means inherently unanswerable.

The most stringent version of this methodologically individualist approach to the definition and ascription of a collective legislative intent would require unanimity. As an alternative, the Supreme Court could plausibly stipulate, as a matter of law, that the legislature acts with a discriminatory or otherwise forbidden intent whenever a majority votes with such an intent. This test would be difficult but not impossible to satisfy. Sometimes the legislative history may suggest that a majority of legislators voted as they did for constitutionally forbidden purposes.[63] Sometimes, moreover, there may be no psychologically plausible explanation for individual legislators' decisions to vote for a particular law that does not involve forbidden purposes. A classic example comes from *Gomillion v. Lightfoot*,[64] in which the Alabama legislature changed Tuskegee's city boundaries from a square to a twenty-eight-sided figure.[65] In doing so, it removed all but "four or five of its 400 Negro voters while not removing a single white voter."[66] On the pleaded facts, the Court sensibly reasoned, "the conclusion would be irresistible, tantamount for all practical purposes to a mathematical

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[61] *See, e.g.*, Ristroph, *supra* note 14, at 1365 (noting that "courts and juries regularly make determinations of individuals' intentions" in criminal cases).

[62] *See generally* Tribe, *supra* note 26 (discussing the kinds of intentions in which constitutional law takes an interest and those in which it does not and distinguishing between "motive in the fairly innocuous *mens rea* sense" and "the murkier sense" that "entails more probing into . . . inner beliefs," *id.* at 15).

[63] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56–57 (1985) (relying on legislative history to support a finding that the legislature acted with a constitutionally forbidden purpose of promoting prayer in public schools).

[64] 364 U.S. 339 (1960).

[65] *Id.* at 340.

[66] *Id.* at 341.

demonstration, that the legislation [was] solely concerned with . . . fencing Negro citizens out of town so as to deprive them of their preexisting municipal vote."[67]

As a third possibility, the Supreme Court might adopt a rule deeming that the legislature acted with forbidden intentions whenever the votes of legislators with prohibited purposes were necessary to enact — and thus were the but-for cause of the passage of — a challenged piece of legislation.[68] Under this approach, the attitudes of even a single legislator could lead to an ascription of forbidden legislative intent if that single legislator cast the determining vote in an otherwise evenly divided legislature.

3. Aggregation of Individual Intentions in the Absence of Counting Rules. — Although any of the possibilities that I have canvased thus far would permit coherent ascriptions of forbidden motivations to the legislature as a whole, the Supreme Court has rarely sought to describe the conceptual underpinnings of its intent-based inquiries in informative detail. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[69] the Court described the relevant question as whether "a discriminatory purpose has been *a* motivating factor in the decision."[70] Commentators have called for inquiries into whether a forbidden purpose "contributed substantially to the adoption of the law"[71] or "may have affected the outcome" of legislative deliberations.[72]

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[67] *Id.* As I shall explain below, cases in which courts base findings of forbidden purpose nearly entirely on a statute's language and effects, without in-depth analysis of context or legislative history, could also be conceptualized as involving reliance on an "objective" conception of legislative intent. *See infra* notes 73–143 and accompanying text. Without denying that possibility, I mean to emphasize here that the "objective" evidence can be seen as proof of the existence of psychological intentions that, because they are subjective and not publicly visible, can only be identified based on objective indicators.

[68] *See, e.g.*, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1148–49 (1986) (discussing but rejecting this possible approach to ascribing forbidden legislative intent).

[69] 429 U.S. 252 (1977).

[70] *Id.* at 265–66 (emphasis added). Notable, too, is the formula that the Supreme Court uses in assessing the permissibility of race-based considerations in the drawing of voting districts. In that context, the Court frames the question as whether race was the "predominant" factor in the legislature's decision to draw district lines as it did. *E.g.*, Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1262 (2015); Shaw v. Hunt, 517 U.S. 899, 906–07 (1996). Professor John Hart Ely mocked the "predominant purpose" standard as incoherent. *See* John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 611–12 (1998). Among the reasons to think that the "predominant purpose" test depends on legislators' actual psychological motivations is that the Court has held that there is no constitutional impropriety in legislatures drawing irregular or otherwise seemingly suspicious district lines for the purpose of protecting incumbent legislators. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 239, 257–58 (2001). Determining whether incumbent protection was the legislature's actual predominant purpose seems to require psychological inquiries.

[71] Regan, *supra* note 68, at 1148.

[72] Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 131.

With formulae such as these, we return to the question whether there is any intelligible sense in which the intentions of individual legislators, understood as psychological attitudes, could be aggregated into a collective "intent of the legislature" other than (1) by identifying the forbidden intentions of individual legislators and then determining how many other legislators likely had similar motivations or (2) by concluding that there is no psychologically plausible account of why legislators might have voted for a statute that does not involve a constitutionally forbidden motivation. To that question, the answer, as I have acknowledged from the beginning, is no. Nevertheless, we should not let sloppy talk or loose thinking impede recognition that we can coherently ask whether individual legislators have forbidden intentions or that we could, in principle, develop rules specifying the conditions under which the forbidden intentions of individual legislators should be ascribed to the collective legislature.

B. Objective Conceptions of Legislative Intent

In contrast with subjective conceptions of legislative intent that require a combination or counting of individual legislators' mental states, several purportedly "objective" conceptions have emerged in the case law and literature. One of these exhibits close similarities to, and overlaps substantially in practice with, an avowedly subjective approach. The others are more sharply distinctive.

The three conceptions of objective legislative intent that I discuss in this section are diverse. But it is important to focus from the outset on the sense in which they purport to be objective, not subjective. If that distinction is to be meaningful, it cannot reside — as might superficially seem to be the case — wholly in the nature of the evidence on which subjective and purportedly objective conceptions respectively rely. Efforts to prove subjective intentions necessarily depend on objective, publicly available evidence.[73] There is no other way to prove what people think, value, or aim to accomplish. Rather, objective conceptions must attach legal significance to something that is conceptually distinct from the actual psychological intentions or motivations of the legislators who voted to enact a statute.

1. Imputed Collective Intent to Make Sense of Specific Statutory Language. — In one usage, the notion that the legislature could have an "objective" intent draws its currency from debates involving the intent of the legislature as a possible source of statutory meaning. In those debates, textualists maintain that a multimember legislature

[73] *See* Young, *supra* note 43, at 248.

could have no unitary, collective, psychological intent of the relevant kind; the relevant intentions will, they argue, be too diverse.[74] According to them, a statute's meaning is the meaning that an informed observer would understand it as having in its semantic context.[75] Interestingly, however, textualists acknowledge the need for courts to develdevelop and rely on an ostensibly "objective" conception of legislative intent.[76]

They do so in response to two uncontroversial insights. First, our interest in interpreting statutory language presupposes that it reflects the communicative intentions of legislators who enacted it with the aim of prescribing the consequences of future conduct.[77] Second, it is frequently impossible to understand statutory language in its communicative context without imputing aims or purposes to the legislature.[78] As the avowedly textualist Justice Scalia once wrote, the word "nails" means one thing when it appears in a building code, but something different in a statute regulating beauty salons.[79] To know what the word means in context, we need to reach judgments concerning the goals that the legislature sought to achieve.

In defending their version of a methodology that ascribes "objective" intentions to the collective legislature, textualists often say that courts should not rely on a statute's ascribed purpose to contradict the clear meaning of its language.[80] In some instances, this asserted stric-

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[74] *See, e.g.*, Manning, *supra* note 18, at 428–31.

[75] *See* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 66 (2011) ("*Interpretation* is the activity of identifying the semantic meaning of a particular use of language in context."); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73, 79–80, 91 (2006) (maintaining that textualists "give primacy to" a statute's "*semantic* context," *id.* at 91).

[76] *See, e.g.*, Manning, *supra* note 75, at 79 (discussing textualists' need for a conception of objective intent); Nelson, *supra* note 20, at 353–57 (discussing textualists' search for statutes' "'objectified' intent," *id.* at 354 (quoting Scalia, *supra* note 16, at 17)); Scalia, *supra* note 16, at 17 (explicating the need for inquiries into "'objectified' intent").

[77] *See* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 990 (2004).

[78] As the philosopher of language Professor Scott Soames has insisted:

> [W]hat a speaker uses a sentence *S* to assert or stipulate in a given context is, to a fair approximation, what a reasonable hearer or reader who knows the linguistic meaning of *S*, and is aware of all relevant intersubjectively available features of the context of the utterance, would rationally take the speaker's use of *S* to be intended to convey and commit the speaker to.

Scott Soames, *Deferentialism: A Post-originalist Theory of Legal Interpretation*, 82 FORDHAM L. REV. 597, 598 (2013).

[79] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 20 (2012).

[80] *See id.* at 57 (discussing the "Supremacy-of-Text Principle," which provides that "except in the rare case of an obvious scrivener's error, purpose — even purpose as most narrowly defined — cannot be used to contradict text or to supplement it"); *id.* at 343 (discussing "[t]he false notion that the spirit of a statute should prevail over its letter"); *id.* at 375 (rejecting "the use of legislative history" as "assum[ing] that what we are looking for is the intent of the legislature

ture poses puzzles. With all agreeing that meaning depends on context[81] and must be determined in light of the purposes that legislation seeks to promote, it is not obvious how statutory language could have a clear meaning apart from a determination of its purposes, in context. If that puzzle can be untangled, one possibility would be this: textualists might believe that interpreters should ordinarily impute to the legislature the sparest set of assumptions or purposes that are necessary to make it plausible that rational legislators would have adopted the statutory language in their historical and cultural context.[82]

With that conception in mind, we might say, as the Supreme Court sometimes does, that a statute exhibits an unconstitutional intent or purpose on its face. In light of a statute's language, there may be no psychologically plausible explanation of why a legislature might have enacted it that does not involve a forbidden purpose. If more distance from the psychological intentions of the actual legislature were wanted, we might even postulate a conception of legislative intent predicated on what an imagined typical legislature, enacting particular statutory language in a specified historical context, would most reasonably be understood as having aimed at or having been motivated by.[83] The modern Supreme Court (with the assent of the textualist Justices Scalia and Thomas) may have adopted this approach in *Shaw v. Reno*,[84] which invalidated a peculiarly shaped legislative district that was, in the Court's view, "so extremely irregular on its face that it rationally [could] be viewed only as an effort to segregate the races for purposes of voting."[85]

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rather than the meaning of the statutory text"); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2434 n.179 (2003) ("[T]he modern textualists' concerns come into play only when courts use background statutory purpose to contradict or vary the clear meaning of a specific statutory provision." (emphasis omitted)).

[81] *See* Manning, *supra* note 75, at 73, 79–80 (discussing the importance of context for textualism and purposivism); *see also* SCALIA & GARNER, *supra* note 79, at 16, 32–33.

[82] *See* Manning, *supra* note 18, at 423. In my view, many textualists fail to adhere consistently to the policy of imputing the sparest possible set of background assumptions necessary to render statutory language intelligible. *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation — and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 707–19 (2014).

[83] *See* Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1155 (2003) (employing an "objective notion of intention as it is made manifest through the performance of actions of a certain type, actions that, because of what they involve, are typically motivated by a certain rationale and are reasonably interpreted as being so motivated").

[84] 509 U.S. 630 (1993).

[85] *Id.* at 642; *see also* McCreary County v. ACLU of Ky., 545 U.S. 844, 861–62 (2005) ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *Id.* at 862 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)).).

As this example suggests, an approach that imputes an objective legislative intent or purpose in order to make the legislature's adoption of statutory language psychologically or sociologically intelligible — even one that looks to a hypothetical legislature — will often overlap in practical effect with a conception of legislative intent based on the imagined subjective intentions of a majority of the actual legislature. For instance, *Gomillion v. Lightfoot*, which I discussed earlier, could be conceptualized as involving a finding of either "subjective" or "objective" legislative intent.[86] As in *Shaw v. Reno*, an objective observer could "only" view the challenged statute as "an effort to segregate the races,"[87] regardless of whether she viewed herself as seeking to discover the psychological intentions of a majority of the actual legislature or the imagined objective intent of a hypothetical legislature. With the exception of legislative history, which textualists characteristically eschew,[88] those seeking subjective legislative intent and those seeking this kind of objective intent will typically look at the same evidence in this kind of case and — as in *Gomillion* — will typically come to the same conclusions.[89]

Nevertheless, a conceptual distinction exists, as the Supreme Court occasionally highlights. In *Board of Education v. Mergens ex rel. Mergens*,[90] for example, a plurality of the Court insisted that "what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."[91] In this formulation, "motives" are actual psychological phenomena, but the legislative purpose is not a psychological attitude.

2. Categorically Ascribed Objective Intent. — Another genuinely objective conception of legislative intent ascribes forbidden purposes to the legislature in categorical, rule-like terms, based on objective

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[86] *See supra* notes 64–67 and accompanying text.

[87] *Shaw*, 509 U.S. at 642.

[88] *See* SCALIA & GARNER, *supra* note 79, at 76; *see also id.* at 369 (listing, as one of thirteen "falsities," "[t]he false notion that committee reports and floor speeches are worthwhile aids in statutory construction"); Manning, *supra* note 75, at 73 ("[T]extualists emphasize[] that the statutory text alone has survived the constitutionally prescribed process of bicameralism and presentment.").

[89] A similar conclusion has often emerged concerning efforts to distinguish objective and subjective conceptions of intent in private law. *See, e.g.*, Lawrence Ponoroff, *The Limits of Good Faith Analyses: Unraveling and Redefining Bad Faith in Involuntary Bankruptcy Proceedings*, 71 NEB. L. REV. 209, 222 n.44 (1992) (observing that "the dichotomy" is less pronounced in practice than in theory since "ordinarily the only way to prove bad motive is by inferences drawn from objective conduct"); Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1247 (1999) (characterizing the debate about objective and subjective conceptions of intent in contract law as exhibiting "more theoretical smoke than practical fire").

[90] 496 U.S. 226 (1990).

[91] *Id.* at 249 (plurality opinion).

characteristics of statutes' language or structure, without any effort to reconstruct the thinking of a specific legislature or its members — and, what is more, dismisses evidence that the actual legislature did not have forbidden intentions in the psychological sense as legally irrelevant. Justice Kagan's article, which argues that large elements of free speech jurisprudence deploy "proxies" for inquiries into subjective legislative intent,[92] exemplifies this possibility. It surveys the landscape of First Amendment doctrine, most of which makes no reference to legislative intent, but argues that the rules are best understood as mechanisms to identify instances in which a legislature likely had forbidden motivations. For example, reigning case law marks statutes as suspect under the First Amendment if they regulate speech on the basis of content (rather than imposing content-neutral time, place, and manner regulations).[93] According to Justice Kagan, when the legislature enacts content-based regulations, the Justices suspect that it acted with the forbidden purpose of stifling speech with which it disagreed.[94] Crucially, however, the rule structure precludes case-by-case inquiries concerning the legislature's actual, subjective intentions.[95] Rather, in Justice Kagan's account, the Court takes objective measures as irrebuttable indicators of legislative intent.

In explaining how rule-like proxies can create and support an objective conception of legislative intent, an analogy to the objective theory of contracts may prove helpful. Under the objective theory of contracts, courts apply objective legal tests that purport to gauge the intent of the parties.[96] In fact, however, intent in the subjective, psychological sense becomes a legal irrelevancy. In the words of a leading treatise, "in interpreting or construing a contract, the courts are seeking to discern the intent that is expressed or apparent in the writing, and not the real intent of the parties; that is, it is the objective, not the subjective, intent that controls."[97] As it is with irrebuttable presumptions of the parties' intent in contract law, so it can be with legislative intent in constitutional analysis.[98] When all is said and done, "state of

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[92] Kagan, *supra* note 15, at 414, 441.

[93] *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

[94] *See* Kagan, *supra* note 15, at 443.

[95] *See, e.g.*, *Reed*, 135 S. Ct. at 2228 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[96] *See* 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 31:4 (4th ed. 1990 & Supp. 2016); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427 (2000) ("[T]he objective theory of contract formation and interpretation holds that the intentions of the parties to a contract or alleged contract are to be ascertained from their words and conduct rather than their unexpressed intentions.").

[97] 11 LORD, *supra* note 96, § 31:4 (footnote omitted).

[98] A number of Supreme Court decisions from the 1960s and 1970s selectively condemned certain legislative classifications on the ground that they embodied "irrebuttable presumptions" forbidden by the Due Process and Equal Protection Clauses. *See, e.g.*, Vlandis v. Kline, 412 U.S.

mind is no longer the ultimate issue to which proof is to be addressed."[99] Under the First Amendment, for example, evidence of good legislative intentions or purposes in the psychological sense becomes irrelevant. As the Supreme Court said in *Reed v. Town of Gilbert*,[100] "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive . . . or lack of 'animus toward the ideas contained' in the regulated speech."[101] The text of the statute is all that matters.

Because the free speech doctrine that Justice Kagan describes as intent based does not, with a few exceptions, purport on its face to consider legislative intentions or purposes,[102] the First Amendment is, admittedly, a controversial example to use in illustrating an objective conception of constitutionally forbidden intent. But several other doctrines that refer specifically to legislative intentions demonstrate the possibility of an objective conception that relies entirely on nonpsychological indicia.

One example comes from equal protection doctrine and, in particular, from the rational basis test.[103] Although rational basis review is normally highly deferential, the Supreme Court occasionally invalidates statutes on the ground that the legislature enacted them with discriminatory or otherwise forbidden purposes.[104] The decisions in which it does so plainly involve a reliance on legislators' actual mental states in one way or another. More typically, however, the Court insists that the rational basis test eschews inquiry into the legislature's

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441, 453 (1973) (invalidating an irrebuttable presumption that students who applied to a state university while residing in another state remained residents of that other state, and thus were ineligible for in-state tuition, for so long as they remained students). As commentators persuasively argued, however, the Court's prohibitions of reliance on particular irrebuttable presumptions functioned, for all practical purposes, as substantive rules of constitutional law that forbade legislative classification on those bases. *See, e.g.*, John M. Phillips, Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974). Presumably as a result of the cogency of that criticism, irrebuttable presumption analysis has largely vanished from constitutional law.

99 Todd Rakoff, Washington v. Davis *and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 79 (1994).

100 135 S. Ct. 2218.

101 *Id.* at 2228 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

102 Indeed, in *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court famously held that "the purpose of Congress . . . is not a basis for declaring . . . legislation unconstitutional." *Id.* at 383; *see also* Kagan, *supra* note 15, at 413 ("[M]ost descriptive analyses of First Amendment law, as well as most normative discussions of the doctrine, have considered the permissibility of governmental regulation of speech by focusing on the effects of a given regulation.").

103 *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

104 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985).

psychological motivations.[105] Refusing to look at actual intentions, it asks whether, as an objective matter, there is any rational basis on which the legislature's action could be sustained.[106] In so doing, the Court could be interpreted as employing an objective conception of legislative intent, defined by any objectively valid interest that the state advances.

It would also be possible to conceptualize the rule that race-based classifications trigger strict judicial scrutiny[107] as a proxy for inquiries into the subjective intent of the legislature[108] that, analogously to the objective theory of contracts, ultimately relies on an objective conception of legislative intent. On this interpretation, race-based classifications would irrefutably establish the existence of a forbidden discriminatory intent, which could plausibly be described as objective, regard-regardless of what individual legislators' subjective mental attitudes might have been. Strict scrutiny would then apply to determine whether such classifications might be justified nevertheless.[109]

It is equally plausible to conceptualize other doctrines as employing a rule-like, conclusive measure of objective legislative intent. A further example comes from the dormant commerce clause. Dormant commerce clause issues characteristically arise when states enact legislation that impedes the free movement or exchange of goods across state lines. In appraising the constitutional validity of such legislation, the Supreme Court has said repeatedly that "protectionist" intentions or purposes are constitutionally forbidden.[110] But the precise content of forbidden protectionist motivation — even in the otherwise conceptually unproblematic case of a single legislator — proves hard to define. Although the Court regularly invalidates taxes and regulatory

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[105] *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 315; U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980).

[106] *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 315; *Fritz*, 449 U.S. at 179.

[107] *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005).

[108] *See* DWORKIN, *supra* note 16, at 394–96.

[109] On a similar but distinct interpretation, race-based classifications would be rebuttably (rather than irrebuttably) assumed to flow from forbidden motivations, and the strict scrutiny formula would test the bona fides of the government's claim to have a legitimate, and indeed compelling, justification for its employment of racial criteria in a particular context. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)); *see also Johnson*, 543 U.S. at 505 ("The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose."). *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1309–10 (2007) (discussing one possible conception of strict scrutiny as an illicit motive test); Charles Fried, *Types*, 14 CONST. COMMENT. 55, 62–63 (1997); Jed Rubenfeld, Essay, *Affirmative Action*, 107 YALE L.J. 427, 428–29 (1997).

[110] *E.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("The crucial inquiry, therefore, must be directed to determining whether [a challenged law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.").

statutes that discriminatorily target out-of-state sellers and producers,[111] it upholds legislation that accords preferential treatment to citizens over noncitizens in a variety of other contexts. In the most striking example, states can provide cash subsidies to in-state businesses that they withhold from those businesses' out-of-state competitors.[112] In a leading study of dormant commerce clause doctrine, Professor Donald Regan therefore defines forbidden protectionism as requiring an intention to advantage in-staters in economic competition with out-of-staters through mechanisms such as tariffs and regulations that have historically aroused interstate resentment and provoked trade wars.[113]

Assuming Regan's analysis to be correct, one could easily recharacterize the doctrinal structure as aiming to discover an objective legislative intent, as deduced directly from statutory structure and effects, rather than legislators' subjective purposes. What matters is not whether members of a state legislature vote for legislation with the subjective aim of advantaging in-staters in economic competition with out-of-staters, but whether the legislature enacts particular kinds of discriminatory tax or regulatory statutes, such as tariffs or trade barriers.[114] It is true, of course, that when the legislature enacts discriminatory legislation of the historically objectionable kind, its action may furnish powerful evidence of individual legislators' subjective intentions. Nevertheless, subjective intentions have no irreducibly necessary role in the judicial analysis. For all practical purposes, one might say that certain kinds of tax and regulatory statutes' disparate, disadvantaging effects on out-of-staters conclusively determine the objectively "protectionist" intent of the legislature and therefore elicit elevated judicial scrutiny, regardless of the legislators' actual, psychological intentions.[115]

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111 *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994); Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951).

112 *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988) ("The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce*."); *see also Healy*, 512 U.S. at 199 ("A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business.").

113 *See* Regan, *supra* note 68, at 1094–95.

114 *See, e.g.*, *City of Philadelphia*, 437 U.S. at 626–27 ("This dispute about ultimate legislative purpose need not be resolved, because . . . whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."). When state legislatures enact such statutes, the courts will invalidate them unless the states can show that they constitute the least restrictive means of promoting a legitimate state goal. *See Limbach*, 486 U.S. at 278.

115 *See* Regan, *supra* note 68, at 1098 (emphasizing that adoption of such a "purpose-based anti-protectionism principle" would not entail "that courts should sift the evidence looking for purpose case by case"; that "the Court both should use and does use some *per se* rules or presumptions in its search for protectionist purpose"; and that "the *per se* rules or presumptions the Court uses can

3. An Expressive Conception of Legislative Intent Derived from the Social Meaning of Legislation. — A further set of judicial references to the intent of the legislature in leading constitutional cases is not captured by the analyses that I have offered so far. In these cases, courts invoke a conception of legislative intent derived from statutes' expressive meanings. That conception involves, as a first approximation, the communicative significance that a competent, informed participant in a society would attach to a statute as an indicator of prevailing societal values.[116] The derivation unfolds in two steps: first, an ascription to a statute of an expressive meaning and, second, an imputation of an "objective" legislative intent to communicate that meaning.[117] A leading proponent of this approach likens it — as I have analogized other objective conceptions of legislative intent — to the objective theory of contracts.[118] However close or imperfect that analogy may be, the Supreme Court has sometimes sought to derive legislative intent from a statute's expressive meaning without further regard to, and occasionally in defiance of, the apparent subjective intentions of the legislators who voted for a statute.

Establishment Clause doctrine provides perhaps the clearest examples of cases in which the Supreme Court has manifested its concern with expressive meaning,[119] as identified from the perspective of a reasonable observer, and has treated expressive effects as a sufficient basis

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be justified by a purpose-based theory, and are in fact better justified by a purpose-based theory than by any other").

116 On expressive theories of law and harm, see, for example, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 124–28 (2007) ("The social meaning of an event or a public expression is the meaning that a competent participant in the society . . . would see in that event or expression." *Id.* at 127.); Anderson & Pildes, *supra* note 37, at 1525 ("Expressive meanings are socially constructed . . . [and] are a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community."); Pildes & Niemi, *supra* note 37, at 513 ("Expressive harms focus on social perceptions, public understandings, and messages; they involve the government's symbolic endorsement of certain values in ways not obviously tied to any discrete, individualized harm." (emphases omitted)). According to Professors Elizabeth Anderson and Richard Pildes:

> [E]xpressive theories of law, morality, and practical reason [are] concerned with the attitudes and ideas that individuals and institutions express, not just with the attitudes and ideas that they communicate. To express a state of mind is, among other things, to manifest it in action. To communicate a state of mind is to act with the intention of inducing others to recognize that state of mind by recognizing that very communicative intention. Communicative acts are only a small subset of all expressive acts.

Anderson & Pildes, *supra* note 37, at 1565 (emphases omitted) (footnote omitted).

117 *See, e.g.*, C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 976 (1983); Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997); Rakoff, *supra* note 99, at 79, 81–88, 91–92.

118 *See* Rakoff, *supra* note 99, at 76–98.

119 *See* Anderson & Pildes, *supra* note 37, at 1545.

for the ascription of a forbidden legislative intent. In *Santa Fe Independent School District v. Doe*,[120] for example, the Court, in an approach initially formulated by Justice O'Connor, inquired whether a reasonable person would view challenged legislation as sending a message to nonadherents of a favored religion "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[121] One could view this inquiry as turning on the effects of legislation: Would it cause nonadherents of a majority faith to feel excluded?

Alternatively, one could imagine an inquiry into whether, as a psychological matter, individual members of the legislature had a motivating purpose of sending a message of exclusion. Sometimes, however, the Court appears to ask a different question, involving the expressive meanings that a reasonable observer would perceive a statute as conveying, and to treat the answer to that question as reflecting a different conception of legislative intent. Under this conception, legislative intent is defined by reference to the message that a statute conveys, regardless of whether it was the psychological intention of the legislators who enacted the statute to convey that message.[122]

An especially striking example comes from *McGowan v. Maryland*,[123] which upheld the constitutionality of a set of Maryland statutes that barred many retail establishments from opening on Sundays.[124] The Supreme Court appeared to acknowledge that the statutes would be invalid if they had the purpose of promoting religion in general or Christianity in particular.[125] The Court further acknowledged that the legislature that originally enacted at least one of the challenged laws had possessed such a purpose, as was likely true with regard to many Sunday-closing laws throughout the United States.[126] But the Court concluded that the provisions had a "present purpose and effect" that stood "wholly apart from their original purposes or connotations" — one of "provid[ing] a uniform day of rest for all citi-

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120 530 U.S. 290 (2000).

121 *Id.* at 309–10 (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

122 Professor C. Edwin Baker not only endorsed this approach, but also argued that it has broad power to explain the outcomes of Supreme Court cases. *See* Baker, *supra* note 117, at 972–84.

123 366 U.S. 420, 445 (1961).

124 *Id.* at 452.

125 *See id.* at 453.

126 *See id.* at 431 ("There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character.").

zens."[127] On the basis of that present-day purpose and effect, the Court upheld the statute.[128] The best way to make sense of this holding begins with what the Court took to be the statute's expressive meaning or lack thereof: the statute had ceased to communicate the message that the government applauded Christian worship on Sunday mornings. In the absence of that expressive meaning, the Supreme Court found no purpose of conveying a forbidden message of endorsement, and thus no purpose that the Establishment Clause condemned. In other words, the statute's purpose, in the relevant sense, became a function of the statute's expressive meaning, capable of evolving as the statute's expressive meaning evolved.

Outside the Establishment Clause, an example of the ascription of a forbidden intent based on a statute's expressive meaning may come from *Rogers v. Lodge*.[129] The case involved the constitutionality of an at-large voting scheme that, as a practical matter, prevented African Americans from ever electing any representatives to a Georgia county board of commissioners, even though African Americans constituted thirty-eight percent of the county's voters.[130] Because the challenged districting statute did not facially discriminate based on race, all agreed that, under *Washington v. Davis*,[131] rational basis review applied in the absence of a racially discriminatory legislative intent.[132] All of the Justices further agreed that the legislature that enacted the challenged statute had not put it in place for discriminatory purposes.[133] Nevertheless, the Court found that the plaintiffs had established a discriminatory intent by showing that the county had "maintained" its at-large voting scheme for discriminatory purposes.[134]

As in *McGowan v. Maryland*, the *Rogers* Court's ascription of intentions either involved public officials who held office subsequently to those who had actually enacted the challenged statute or, at least as plausibly, a hypothetical legislature, imagined as having acted nearly contemporaneously with the challenge. In either scenario, the Court's conclusion that the County acted with forbidden intentions had to reflect a conception of legislative intent that can evolve with social

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[127] *Id.* at 445.
[128] *Id.* at 452.
[129] 458 U.S. 613 (1982).
[130] *Id.* at 615.
[131] 426 U.S. 229 (1976).
[132] *See Rogers*, 458 U.S. at 617 & n.5.
[133] *See id.* at 616 (reporting the uncontested finding of the district court that the challenged method of selecting county commissioners was "racially neutral when adopted" (quoting Lodge v. Buxton, No. 176-55, slip op. at 7 (S.D. Ga. Oct. 26, 1978))); *id.* at 631 (Powell, J., dissenting); *id.* at 646 & n.29 (Stevens, J., dissenting).
[134] *Id.* at 622 (majority opinion).

meanings.[135] If *Rogers v. Lodge* can be rationalized in a way that renders it consistent with *Washington v. Davis*'s holding that discriminatory effects do not violate the Equal Protection Clause in the absence of a discriminatory intent, it may be on the ground that the statute in *Rogers* had a social or expressive meaning — partly independent of its propositional content — that the statute in *Washington* did not: a reasonable observer would have regarded the statute as conveying a present-day message of contempt or unconcern for African Americans.[136] And that social meaning provided the foundation for an ascription of forbidden objective legislative intent without regard to the specific intentions of the legislators who enacted the challenged statute.[137]

In a recent article, Professor Richard Ekins sharply criticizes reliance on social or expressive meanings as a basis for the constitutional analysis of legislation.[138] In his view, the idea of statutes having social meanings is confused unless focused on the "reasoning of the agent" that enacted them.[139] A reasonable observer, he claims, would base her appraisal of a statute's meaning on the intent of the enacting legislature.[140] But Ekins's arguments leave me unpersuaded. We are familiar with conceptions of meaning that are relatively independent of authorial intentions — especially with regard to literature and the arts.[141] And laws, as much as artworks, can serve as publicly conspicuous reminders of reigning values and attitudes, even in cases in which lawmakers had no conscious purpose of promoting those values or expressing those attitudes. Given this possible conception of meaning, I believe that laws can have social meanings, including ones of endorsement and disparagement, that do not depend on the legislature's conscious aims.

For the moment, however, my primary goal is more sociologically descriptive than critically analytical or normative. My claim, moreover, is relatively modest: a number of the Supreme Court's references to legislative intent presuppose that statutes have social meanings from

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135 *See* Baker, *supra* note 117, at 983–84.

136 *See Rogers*, 458 U.S. at 625 ("Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.").

137 *See* Baker, *supra* note 117, at 984 ("[A]ll the contextual evidence cited by the Court would be relevant in establishing the present meaning or in understanding the present objective purpose of the at-large voting system.").

138 *See* Richard Ekins, *Equal Protection and Social Meaning*, 57 AM. J. JURIS. 21 (2012).

139 *Id.* at 43.

140 *Id.* at 46.

141 *See, e.g.*, DWORKIN, *supra* note 16, at 55–62.

which the intent of the legislature can be inferred, largely without reference to the actual motivations of those who enacted the statutes in the first instance.

If so, a number of cases that I discussed above as involving the case-specific imputation of an "objective" legislative intent to make a statute's language rationally intelligible — including *Gomillion v. Lightfoot* and *Shaw v. Reno* — could also be interpreted as involving the imputation of an objective legislative intent based on a statute's expressive meaning.[142] But there is a potentially important difference between these two approaches. As section I.B.1 explained, the Court predicated its imputation of a forbidden intent in *Gomillion* and *Shaw* on assumptions that seemed necessary to explain how a rational legislature could have enacted the challenged statutes. By contrast, ascriptions of intent based on expressive meanings go far beyond what is minimally necessary to explain how a rational legislature might have adopted particular statutory language in the historical and cultural context of its adoption. I need to be careful not to overstate this point. As debates in the cases and in the literature reveal, there is a great deal of vagueness or even variability in both the conception of legislative intent that ascribes purposes in order to make legislation sociologically or psychologically intelligible and the "objective observer" formula for the ascertainment of statutes' social meanings that I have considered in this section.[143] Suffice it to say that the uncertainty on both scores highlights my point that what the Supreme Court means by legislative intent — including "objective" legislative intent — and its methods for gauging intent are both variables, not constants, in constitutional analysis.

C. Forbidden Legislative Intent as a Protean Concept

Although I have suggested that a variety of subjective and objective conceptions of forbidden legislative intent make appearances in constitutional doctrine, I have not attempted to chart the frequency with which the Supreme Court respectively invokes them. Nor shall I do so now. My most important point is that discriminatory or forbidden legislative intent is a protean concept capable of assuming different forms in different constitutional cases. Some conceptions of constitutionally prohibited intentions by the collective legislature are coherent, but other references to forbidden legislative intent may reflect confusion. It is frequently unclear, moreover, which conception of

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[142] *See generally* Anderson & Pildes, *supra* note 37 (exploring a variety of decisions and doctrines that take account of expressive effects).

[143] *See generally, e.g.*, William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); *Developments in the Law — Religion and the State*, 100 HARV. L. REV. 1606 (1987).

forbidden legislative intent is at work in particular judicial invocations of that concept. Ambiguity prevails. Confusion may lurk just beneath the surface.

II. THE SIGNIFICANCE OF FORBIDDEN LEGISLATIVE INTENT UNDER CURRENT DOCTRINE

Beyond questions concerning the Supreme Court's aims when it asks whether a legislature had constitutionally forbidden intentions looms a further doctrinal issue: Do such intentions necessarily invalidate a statute, or do they play some less than conclusive role in judicial analysis? Well-known cases convey conflicting signals. To some extent, the consequences of forbidden purposes may vary from doctrine to doctrine. Ultimately, however, the puzzle runs deeper and reflects judicial inconsistency if not confusion.

A. Necessary and Automatic Invalidation

In Establishment Clause cases, and especially under the test articulated in *Lemon v. Kurtzman*,[144] the Supreme Court has sometimes held statutes invalid — ostensibly without more — if they have the primary, forbidden purpose of promoting or inhibiting religion and no other valid purpose that is not a sham.[145] *McCreary County v. ACLU of Kentucky*,[146] in which the Court invalidated a Ten Commandments display, furnishes a relatively recent example.

In *Casey*, the Court said that abortion regulations violate the Due Process Clause, apparently without more, if their "purpose . . . is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[147] In *United States v. Windsor*,[148] the Court similarly ruled that a statute barring federal recognition of state-authorized same-sex marriages "violate[d] basic due process and equal protection principles applicable to the Federal Government" because Congress, in enacting it, impermissibly sought "to injure the very class" that state law endeavored to protect.[149] Although the Court subsequently noted that the statute also had a demeaning effect,[150] it did not suggest that it might have upheld the chal-

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144 403 U.S. 602, 612–13 (1971).

145 *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005); Edwards v. Aguillard, 482 U.S. 578, 585 (1987); Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

146 545 U.S. 844.

147 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion). The Court repeated this formulation of the applicable test in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

148 133 S. Ct. 2675 (2013).

149 *Id.* at 2693.

150 *See id.* at 2693–96.

lenged provision, despite its forbidden purpose, if the government could have made some further showing in its defense. Indeed, the Court did not even respond to the protest of a dissenting opinion that the challenged provision, at the very least, served the legitimate governmental goal of "avoid[ing] difficult choice-of-law issues" that could arise for federal officials when one state with which a same-sex couple had substantial contacts recognized their marriage but another state did not.[151] Accordingly, one might infer that the majority regarded the challenged statute's forbidden purpose as decisive.

Even in Establishment Clause cases, however, the Supreme Court has not consistently enforced the rule that a forbidden legislative purpose necessarily invalidates a statute. In *McCreary County*, despite insisting in text that an "ostensible and predominant" governmental purpose to promote religion violates the Establishment Clause,[152] the Court acknowledged in a footnote that "[i]n special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious."[153] In support of that qualification, the *McCreary County* majority cited *Marsh v. Chambers*,[154] which had relied heavily on historical practice in upholding a state legislature's retention and payment of a chaplain.[155] Equally strikingly, *McGowan v. Maryland* brushed aside the actual historical purposes of Sunday-closing laws and instead imputed a modern, secular purpose in order to uphold the challenged statutes against constitutional attack.[156]

B. Invalidation Whenever Forbidden Intent Is the But-for Cause of a Statute's Enactment

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, after prescribing an elaborate process for identifying discriminatory intentions, the Supreme Court asserted in an important footnote that a finding of discriminatory intent would not conclusively resolve an equal protection challenge.[157] Upon a determination that the legislature had forbidden purposes, the Court ruled, a lower court should ascertain whether the legislature would have reached the same

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151 *Id.* at 2708 (Scalia, J., dissenting). Justice Kennedy's majority may have had this interest in mind when it said, cryptically and without other explanation, that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696 (majority opinion).

152 McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005).

153 *Id.* at 859 n.10.

154 463 U.S. 783 (1983).

155 *See id.* at 786–92.

156 *See* 366 U.S. 420, 445 (1961).

157 *See* 429 U.S. 252, 270 n.21 (1977).

decision even in the absence of a discriminatory intent.[158] If so, "the complaining party . . . no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose," the Court reasoned.[159] The Court reiterated that approach — and applied it to a challenge to the validity of a provision of a state constitution that disenfranchised felons convicted of crimes of moral turpitude — in *Hunter v. Underwood*.[160]

On one possible interpretation, *Arlington Heights* and *Hunter* contemplate that a discriminatory intent invalidates a statute if, but only if, it is a but-for cause of the statute's enactment.[161] Other cases send other signals, as we shall see presently. In any event, *Arlington Heights* deviates from the approach of cases such as *McCreary County* that prescribe automatic invalidation as the consequence of a finding of a predominant forbidden legislative intent.

C. Forbidden Intent as a Trigger for Elevated Judicial Scrutiny

In a number of cases the Supreme Court has held that a finding of discriminatory or otherwise forbidden legislative intent will provoke strict judicial scrutiny but not necessarily require a statute's invalidation, regardless of issues of but-for causation. A leading example comes from *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[162] Confronting a statute adopted out of hostile intentions toward an unpopular religious sect, the Court said that "if the object of a law is to infringe upon . . . practices because of their religious motivation, the law . . . is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest."[163]

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158 *See id.* at 271 n.21.

159 *Id.*

160 471 U.S. 222, 225–28 (1985).

161 There is language in other Supreme Court decisions that could be cited in support of the same conclusion. *See, e.g.*, Texas v. Lesage, 528 U.S. 18, 20–21 (1999) (per curiam) ("Under *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977), even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration."). But these cases are better understood as imposing limits on the cause of action for damages under 42 U.S.C. § 1983 than as prescribing a test for statutes' validity and invalidity. *See* Sheldon Nahmod, Mt. Healthy *and Causation-in-Fact: The Court Still Doesn't Get It!*, 51 MERCER L. REV. 603, 605 (2000) (arguing that there is a constitutional violation in such cases). As the Supreme Court thus recognized in *Texas v. Lesage*, 528 U.S. 18, "a plaintiff who . . . seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question" in order to be able to challenge a statute that deprives him of "the []ability to compete on an equal footing," *id.* at 21 (quoting Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993)). *Hunter*'s analysis is arguably more on point: "[W]here both impermissible racial motivation and racially discriminatory impact are demonstrated, *Arlington Heights* and *Mt. Healthy* supply the proper analysis." *Hunter*, 471 U.S. at 232.

162 508 U.S. 520 (1993).

163 *Id.* at 533.

As a practical matter, this formulation — at least on one interpretation — treats discriminatory legislative intentions largely as a trigger mechanism or heuristic, signaling the propriety of a more searching inquiry into the ultimate determinants of constitutional validity than would occur otherwise. The attractiveness of this approach may depend partly on the cases in which one imagines its application. For at least some cases, however, it seems intuitively correct. As noted above, no one thinks that a statute forbidding murder should be held unconstitutional even if a majority of members of the enacting legislature voted for it with the exclusive subjective motivation of enforcing one of God's Commandments.

D. Variety or Inconsistency

As the foregoing brief survey demonstrates, when one asks what doctrinal consequences follow from a judicial finding that the legislature acted with a forbidden intent, one finds inconsistency. One could imagine that the Supreme Court's approach might vary with the constitutional provision at issue. For example, noting that the Court ruled in the equal protection case of *Village of Arlington Heights v. Metropolitan Housing Development Corp.* that the consequence of a finding of discriminatory legislative intent would be a further inquiry into but-for causation,[164] one might hypothesize that the Court prescribes the same protocol in all equal protection cases, even if the results differ under other constitutional provisions. But that hypothesis would fail. To take just one example, the Court has held in equal protection cases challenging the constitutionality of deliberately drawn majority-minority voting districts that a finding of forbidden legislative intentions requires the immediate application of strict judicial scrutiny.[165] Under the Establishment Clause, the Court has often said that a finding that the legislature that enacted a statute did so for predominantly forbidden reasons will yield automatic invalidation.[166] As I noted above, however, the Court has sometimes given contradictory indications and at least arguably has flatly deviated from this approach.[167] And no one, to repeat a now-tired example, should imagine that the Court would invalidate an antimurder statute upon proof that the leg-

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[164] *See* 429 U.S. 252, 265–68 (1977).

[165] *See* Miller v. Johnson, 515 U.S. 900, 920 (1995) (finding that because "[r]ace was . . . the predominant, overriding factor explaining the General Assembly's decision to attach to the Eleventh District various appendages containing dense majority-black populations[,] . . . Georgia's congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny").

[166] *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 860 (2005); Edwards v. Aguillard, 482 U.S. 578, 585 (1987); Wallace v. Jaffree, 472 U.S. 38, 56 (1985).

[167] *See supra* notes 154–56 and accompanying text (discussing *Marsh* and *McGowan*).

islature enacted it with the exclusive psychological intention of enforcing God's law.

Although one could press the inquiry into the relative frequency with which the Supreme Court prescribes one or another set of consequences for impermissible legislative intent, either generally or under specific constitutional clauses, the more interesting and important questions are normative, not descriptive. The next two Parts will take up some of the normative questions that a doctrinal review has framed.

III. REORIENTING CONSTITUTIONAL DOCTRINE TOWARD THE ENFORCEMENT OF SUBSTANTIVE CONSTITUTIONAL NORMS

The diversity of the Supreme Court's approaches to defining or conceptualizing forbidden legislative intentions and to prescribing their consequences provokes a fundamental question: Why does the Court, the Constitution, or the constitutional community care about legislative intentions in the first place? If we could answer that question satisfactorily, good responses to other, subsidiary questions might follow.

Unfortunately, however, the fundamental question of why legislative intentions or purposes matter to constitutional analysis permits no simple, straightforward answer. The reason inheres in the analysis that I have offered already: forbidden legislative intent is a protean concept, which refers to different phenomena in different contexts. In turn, different senses or conceptions of forbidden intent may call for different analyses. Given this state of affairs, we can best make progress by beginning with the division that Part I identified between subjective conceptions of legislative intent, on the one hand, and objective conceptions, on the other. We may have different reasons for caring about objective legislative intent than we do for caring about subjective intentions.

This Part's analysis begins with two points of framing. First, the constitutional provisions that generate norms marking certain legislative purposes as forbidden invariably support substantive tests of constitutional validity as well. Second, courts can employ both substantive and intent-based tests in either of two ways — as conclusive determinants of constitutional validity or as triggers for elevated judicial scrutiny of challenged legislation.

Against this background, I argue that courts should never invalidate legislation solely because of the subjective intentions of the legislators who voted for it. Legislative intentions should matter far less to constitutional analysis than the language and effects of challenged legislation. A more substantively based approach need not, I demonstrate, result in a diminution of constitutional protections. It would, however, redirect attention to the substantive protections that our Constitution affords, including those against legislation that selectively

disadvantages minority groups and burdens the exercise of protected rights. With the role of substantive constitutional norms having been highlighted, the final section of this Part proposes reformulating two of the three conceptions of "objective" legislative intent that section I.B identified as substantively based triggers for elevated judicial scrutiny or substantive tests of ultimate constitutional validity.

Before proceeding, I should offer a last preliminary comment in order to forestall misunderstanding. Although this Part insists that courts should never invalidate legislation except on substantive grounds, Part IV will propose a different, less decisive role for judicial inquiries into subjective legislative motivations: in some cases, forbidden intentions in the subjective sense should prompt elevated judicial scrutiny. Defense of that residual function will come best after this Part's arguments for courts to place increased primary reliance on substantive, rather than deliberative, constitutional norms.

A. Substantive and Deliberative Norms and Their Possible Roles in Judicial Inquiries into Constitutional Validity

In rethinking the appropriate role of subjective conceptions of forbidden legislative intent in constitutional analysis, we should reconsider the relationship between deliberative norms, including those that mark some legislative purposes as forbidden, and substantive norms, which establish content- and effects-based measures of statutes' validity. It will also prove helpful to recognize that constitutional norms and associated judicial tests can serve either as conclusive measures of constitutional validity or as activating mechanisms for elevated scrutiny.

1. The Importance of Substantive Norms. — Today, almost no one questions that our Constitution includes deliberative norms that require legislators to eschew reliance on forbidden considerations when acting in their official capacities.[168] In considering the role of deliberative norms, however, we should not forget that all of the provisions under which the Supreme Court currently applies intent-based tests also generate substantive norms and tests. Substantive tests appraise

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[168] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977), articulates a robust version of this intuition by insisting that the government and its officials must treat everyone with "equal concern and respect." *Id.* at 273. A more minimal version might hold that the legislators should not act on the basis of "naked preferences" unsupported by publicly spirited reasons. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984). For a classic argument that the courts should interpret the Constitution's relatively open-ended, rights-conferring provisions — including the Due Process, Privileges and Immunities, and Equal Protection Clauses — as embodying exclusively deliberative or process-based, democracy-reinforcing norms, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), which I discuss *infra* in notes 177–89 and accompanying text.

statutes based on their content and effects, not freestanding legislative intentions, purposes, or motivations.

For obvious reasons, different constitutional provisions give rise to different substantive norms.[169] The Equal Protection Clause establishes one set of standards, the dormant commerce clause another, and the religion clauses yet a further set. Under all of these provisions, however, the paradigmatic basis for determinations of statutory invalidity begins with the identification of a statute's facial discrimination against a protected group or its regulation of a protected activity. To offer concrete examples, statutes that facially discriminate against a racial minority,[170] women,[171] or a religious minority[172] are presumptively invalid. Courts will uphold such statutes only if they survive strict[173] or, in the case of gender-based discrimination, intermediate judicial scrutiny.[174] A statute that prohibits speech or religious practice offends substantive constitutional norms (if it ultimately does so) because of its effects in precluding speech or action that the Constitution marks as deserving of protection.[175] The dormant commerce clause has facially discriminatory tariffs and trade barriers as a primary target.[176]

It would be a tedious and pointless exercise to attempt to catalogue all of the substantive norms generated by constitutional provisions that the Supreme Court has also developed intent-based tests to enforce. But it would be radically implausible to maintain that any of those provisions generates only deliberative norms or that the courts should rely exclusively on intent-based tests to enforce them.

In so asserting, I recognize that Professor John Hart Ely, in one of the greatest books written about constitutional law in the last fifty years, argued for a position similar to the one that I have just dismissed.[177] According to Ely, the Constitution's relatively open-ended provisions all call upon the courts to guarantee both that the political process operates fairly and that prejudice against minority groups does not corrupt legislative deliberations, but he maintained that the Con-

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169 *See* Bhagwat, *supra* note 1, at 330–37.

170 *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005).

171 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996).

172 *See, e.g.*, Larson v. Valente, 456 U.S. 228, 246–47 (1982).

173 *See, e.g.*, *Johnson*, 543 U.S. at 505–06.

174 *See, e.g.*, *Virginia*, 518 U.S. at 533 ("The State must show 'at least that the [challenged] classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."'" (alteration in original) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))).

175 *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

176 *See, e.g.*, Wyoming v. Oklahoma, 502 U.S. 437, 454–55 (1992); City of Philadelphia v. New Jersey, 437 U.S. 617, 623–24 (1978).

177 *See* ELY, *supra* note 168.

stitution mostly excludes the courts from assessing the substantive fairness of legislation.[178] In his view, if judicially enforceable equal protection norms bar discrimination against African Americans, women, or religious minorities, for example, it is only because legislation disadvantaging such groups likely reflects forbidden prejudice on the part of the legislature.[179]

As numerous critics have persuasively argued, however, it is frequently impossible to assess the fairness of legislative deliberations without also making judgments concerning the fairness of substantive outcomes.[180] One person's prejudice is another's moral judgment.[181] Accordingly, courts cannot determine which attitudes count as prejudice, or animus, without determining whether particular practices fairly elicit moral disapproval.

Moreover, as Ely himself acknowledged, modern doctrine reflects substantive judgments about which groups and activities deserve protection under a diverse list of constitutional provisions.[182] To cite one plain example, modern doctrine treats all legislation that discriminates on the basis of gender as quasi-suspect,[183] even though neither men nor women are plausibly categorized as a "discrete and insular" minority — and thus presumptively incapable of protecting their interests in the political process — within the framework of the *Carolene Products* footnote[184] that Ely basically sought to defend. Although counseling judicial deference to legislative judgment in most cases, that famous footnote recognized that a different approach might be appropriate with regard to "statutes directed at particular religious, or national, or racial minorities."[185] Women constitute an actual majority of the population, and men have traditionally dominated the political process.[186] Accordingly, it is most improbable that statutes disadvantaging men result from violations of deliberative norms that forbid legislators to act with hostile intentions toward men as a group. To take an even clearer case, if affirmative action appropriately attracts strict judicial scrutiny, it is surely because substantive constitutional norms so dic-

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178 *See id.* at 75–77, 102–03.

179 *See id.* at 146, 152–59.

180 *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 737–38 (1985); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064–65, 1071 (1980). For a powerful, closely reasoned argument that discriminatory legislative intentions should be neither necessary nor sufficient to establish that statutes violate equal protection norms, see HELLMAN, *supra* note 43, at 138–68.

181 *See* Ackerman, *supra* note 180, at 737.

182 *See* John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833 (1991).

183 *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982).

184 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

185 *Id.* at 153 n.4 (citations omitted).

186 *See* ELY, *supra* note 168, at 164.

tate, not because politically accountable bodies that adopt affirmative action policies likely do so based on prejudice against whites.[187] Similarly, the Establishment Clause forbids more than improper purposes: a tax levied to support a national church would be invalid even if all members of the enacting Congress voted for the tax with the subjective purpose, not of promoting religion, but of fostering a political sense of national community. Although some have sought to characterize dormant commerce clause doctrine as designed to compensate for the nonrepresentation of out-of-staters in state legislatures' deliberative processes,[188] no violation of deliberative norms that forbid reliance on hostile wishes to harm outsiders necessarily occurs when states choose to prefer their own citizens to residents of other states. They can permissibly do so in the case of subsidies, welfare benefits, or free public schooling, for example. The paradigmatic instances of illegality come when states cross substantive lines, such as the one forbidding tariffs on out-of-state goods.[189]

In insisting somewhat dogmatically that the Constitution establishes and that the courts regularly enforce substantive as well as deliberative norms, I do not mean to defend any particular substantive norm or test that the Supreme Court currently employs. I mean only to maintain that substantive norms and tests feature prominently in constitutional law, including under all of the constitutional provisions that the Court sometimes uses deliberative norms to help enforce.

2. The Possible Roles of Substantive and Deliberative Norms and Tests. — The norms or tests through which the Supreme Court enforces the Constitution can play either of two roles. Some tests determine whether legislation is ultimately valid. Others instigate the application of elevated judicial scrutiny. Norms forbidding legislators from acting with impermissible intentions can perform either function, as can substantive norms.

As Part II showed, in some contexts the Supreme Court has indicated that a forbidden legislative intention renders a statute per se invalid.[190] In other contexts, however, it has said that statutes that fail

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[187] *See id.* at 170–72.

[188] *See, e.g.*, LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 6-5, at 1052 (3d ed. 2000); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 125 ("[J]udicial displacement of legislative judgment is appropriate when it seems that the legislative process has operated in a distorted way — for example, by excluding some affected interest from influence on the legislative process.").

[189] *See, e.g.*, Comptroller of the Treasury of Md. v. Wynne, 135 S. Ct. 1787, 1804 (2015) ("[T]ariffs are '[t]he paradigmatic example of a law discriminating against interstate commerce.'" (second alteration in original) (quoting W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994))).

[190] *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 862–63 (2005); Edwards v. Aguillard, 482 U.S. 578, 585 (1987).

intent-based tests incur heightened judicial scrutiny, which they may ultimately satisfy.[191]

Tests that focus on legislation's substantive content or effects can also serve either of the same two purposes. To offer just a few examples of substantive tests that activate searching review, the Supreme Court has recurrently asserted that statutes that facially restrict the exercise of speech or fundamental rights incur strict judicial scrutiny, regardless of underlying legislative motivations.[192] Statutes that discriminate on their faces against vulnerable groups, notably including racial minorities, similarly provoke elevated scrutiny under a number of constitutional doctrines.[193] With regard to substantive tests of ultimate statutory validity, the Constitution's plain text provides myriad examples, including the prohibition against religious tests for public office.[194] The strict scrutiny formula also furnishes a paradigmatic example of a substantive (rather than an intent-based) test, at least in some applications.[195] It asks not whether the legislature acted with good motives, but whether a statute is narrowly tailored to objectively compelling interests.

B. Subjective Intent and Substantive Constitutional Invalidity

Mindful of the distinction between tests that mandate elevated scrutiny and conclusive tests of constitutional validity, courts should never strike down a statute that is otherwise substantively justified merely because the legislature enacted it for forbidden purposes in the subjective, psychological sense. The determinative test should always involve objective justifiability pursuant to substantive constitutional norms.

1. Distinguishing the Permissibility of Actions from the Permissibility of Motivations. — My argument for this conclusion begins with two analogies, both illustrating a conceptual gap between the permissibility of an action and the permissibility of the intentions with which the action was performed. The first involves the pertinence — or, perhaps more appropriately, the lack of pertinence — of subjective motivations to the permissibility or wrongfulness of actions in the domain of morality. Recent work in moral philosophy debunks the rele-

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191 *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

192 *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015) (speech); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969) (voting).

193 *See, e.g.*, Johnson v. California, 543 U.S. 499, 505–06 (2005).

194 *See* U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

195 *See generally* Fallon, *supra* note 109, at 1302–15 (discussing substantive as well as intent-based versions of the strict scrutiny test).

vance of subjective motivations to determinations of whether actions are morally permissible or impermissible.[196] For reasons that have also appealed to lawyers and judges,[197] many philosophers have long believed that intent or purpose can crucially affect the moral permissibility of actions.[198]

The doctrine of "double effect"[199] has served as an anchor for this belief. That doctrine holds, roughly, that it is always morally impermissible to act with an evil purpose, but that it is sometimes permissible to take actions that aim at achieving good ends but will foreseeably have bad, unintended, and unwanted side effects. Consider a doctor who must decide whether to give a patient a dose of pain medication that the doctor anticipates would bring about the patient's death. If the doctor administered that dosage for no other reason than to kill the patient, adherents of the doctrine of double effect maintain that she would commit a clear moral wrong. But if the patient has a terminal illness, and no lesser dosage will relieve her excruciating pain, then — it is often said — the doctor acts permissibly if she administers that dosage with the intent of alleviating pain, even if she knows that the patient's death is nearly certain to result as an undesired consequence.[200] In this case, intentions — either to alleviate pain, on the one hand, or to hasten death, on the other — may appear to hold the key to moral permissibility or impermissibility.

In newer scholarship, however, the traditional view — or family of traditional views — has come under cogent attack, notably from Professor T.M. Scanlon.[201] Even in a case such as that of a doctor who must decide whether to administer pain medication that would likely

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196 *See generally* T.M. SCANLON, MORAL DIMENSIONS (2008).

197 *See, e.g.*, Vacco v. Quill, 521 U.S. 793, 808 n.11 (1997) ("Just as a State may prohibit assisting suicide while permitting patients to refuse unwanted lifesaving treatment, it may permit palliative care related to that refusal, which may have the foreseen but unintended 'double effect' of hastening the patient's death.").

198 *See, e.g.*, G.E.M. Anscombe, *Medalist's Address: Action, Intention, and 'Double Effect*,*' in* THE DOCTRINE OF DOUBLE EFFECT 50 (P.A. Woodward ed., 2001); Philippa Foot, *Morality, Action, and Outcome*, *in* THE DOCTRINE OF DOUBLE EFFECT, *supra*, at 67.

199 According to one formulation of the doctrine of "double effect":

> The foreseen evil effect of a man's action is not morally imputable to him, provided that (1) the action in itself is directed immediately to some other result, (2) the evil effect is not willed either in itself or as a means to the other result, [and] (3) the permitting of the evil effect is justified by reasons of proportionate weight.

John C. Ford, *The Morality of Obliteration Bombing*, *in* WAR AND MORALITY 15, 26 (Richard A. Wasserstrom ed., 1970). For debate about the proper formulation of the doctrine and its substantive defensibility, see generally THE DOCTRINE OF DOUBLE EFFECT, *supra* note 198.

200 *See* Alison McIntyre, *Doctrine of Double Effect*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), http://plato.stanford.edu/archives/win2014/entries/double-effect [https://perma.cc/8VF4-F6AS] (discussing the application of the doctrine of double effect to this example).

201 *See* SCANLON, *supra* note 196, at 8–36.

cause a patient's death, Scanlon maintains that moral permissibility and impermissibility depend on the availability of objective reasons or justifications for a particular action — by which he means, in essence, reasons or justifications that a fair-minded observer would credit as valid — and not on the psychological intentions or motivations of a particular agent.[202] The distinction can prove highly consequential. Imagine a doctor who dislikes her terminally ill patient and must decide whether to give her medication adequate to alleviate her pain, in circumstances in which any dosage with that effect would also cause the patient's death. In considering what she ought to do, the doctor will turn up a blind alley if she inquires into her own psychological attitudes.[203] Even if she thinks or worries that her intention in prescribing the medication (if she should decide to prescribe it) might be to cause the death of a person whom she dislikes, the right question for that doctor — as for any other doctor — is whether the balance of objective reasons makes it permissible, impermissible, or possibly even mandatory for her to alleviate the patient's pain, even when doing so would likely bring about the patient's death.

If Scanlon is correct, his analysis should extend to issues concerning the legal justifiability of statutes. Suppose that a bare majority of the legislature voted for a statute requiring the vaccination of children based on a dislike of Christian Scientists, who believe that vaccination contravenes God's mandates. But further suppose that, in light of an infectious disease epidemic, the statute is necessary to promote a compelling governmental interest. If nonpsychological facts adequately justify the statute, a court should uphold it even in this special case.[204] A legislator who acts for forbidden purposes both breaches her deliberative obligations under the Constitution and nearly invariably exhibits a bad character as well. Voters should take both of these considerations into account in determining whether to return such a legislator to office.[205] But the question for voters differs from the question of constitutional validity that courts must decide. The latter resembles — though it is of course not the same as — the issue of the moral permis-

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[202] *See id.* at 37.

[203] *See id.* at 19–20, 30–31 (making a similar point through use of the example of a general and a prime minister considering whether a military bombing that would cause civilian casualties is morally permissible).

[204] *But cf.* Brest, *supra* note 72, at 127–28 (maintaining that the argument for judicial review of legislative intentions is to ensure that the legislature did not act for impermissible purposes, not to determine independently whether the legislature reached a good ultimate decision); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 699 (1991) ("When the court finds that the purpose of a regulation is an illegitimate one, the remedy is plain: hold the regulation invalid on its face . . . .").

[205] *Cf.* Nelson, *supra* note 38, at 1812 ("[A]ntebellum courts emphasized that the people themselves could police the legislature's good faith by voting faithless legislators out of office.").

sibility of an action, as distinguished from one involving the character of the person who performed the action.

In a further parallel between the legal and moral cases, a legislator deciding whether to vote for a law that would require parents to have their children vaccinated should make her decision based on substantive considerations, not an examination of her subjective attitudes toward Christian Scientists or anyone else. If befuddled about her own conscious and subconscious motives, she should ask, and be guided by her conclusion concerning, whether the bill is well supported by the balance of objectively pertinent reasons for voting for or against it, centrally including whether it is needed to avert acute threats to public health and whether it satisfies substantive constitutional norms. In other words, the way for her best to satisfy even her deliberative obligations is to base her decision on objectively relevant considerations, not matters of personal psychology.

A second analogy, this one drawn expressly from law, shows the possibility of adjudging the action of a public official to be constitutionally permissible even if the motivations that produced it were not. In *Whren v. United States*,[206] the Supreme Court held that a search or seizure may be objectively reasonable and thus permissible under the Fourth Amendment regardless of the possibly invidious motivations that led an official to perform it.[207] As I shall shortly discuss, one might think *Whren* either rightly or wrongly decided. At the very least, however, it illustrates the conceptual distinction between judging an action or a statute and judging the motivations that led to an action or the enactment of a statute. *Whren* further shows the possibility of deploying that distinction within the law, for the achievement of legal purposes.

In sum, these two analogies should help us see that we can appraise statutes, both morally and constitutionally, separately from the motivations that led to their enactment. Indeed, once we recognize that the collective legislature typically has no unitary psychological state, it may be even easier to distinguish between the constitutional validity of statutes and the legislative motivations that produced them than between the moral permissibility of actions and the psychological motivations that led to their performance.

2. Appraising the Costs and Benefits of Invalidating Statutes Based on Legislators' Forbidden Subjective Motivations. — Despite the distinction that I have just highlighted, some critics have objected to the Supreme Court's ruling in *Whren* on substantially deterrence-

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[206] 517 U.S. 806 (1996).
[207] *Id.* at 813, 819.

based grounds.[208] Their argument is a fair one. The distinction between the appropriate appraisal of people's motivations, on the one hand, and the actions or legislative votes that they motivate, on the other, is a conceptual one. No doctrinal consequences follow directly from it. Just as some believe that *Whren* removed an important deterrent to police misconduct, we should take seriously the possible desirability of automatic judicial invalidation of any statute that results from legislators' breaches of deliberative norms as a judicially crafted, partly deterrent remedy for legislative misconduct.[209]

Once a distinction is drawn between the permissibility of actions and the permissibility of motivations, however, the question of how constitutional law should respond to constitutionally forbidden legislative intentions should depend largely on calculations of likely costs and benefits. Neither logic nor historical understandings of the Constitution dictate that all violations of deliberative norms by individual legislators, or even by a majority of individual legislators, always require courts to invalidate statutes for which the legislators voted. If anything, constitutional history points in the opposite direction.[210]

For reasons to be developed in Part IV, I believe that courts should normally apply strict judicial scrutiny to any statute that a majority of the enacting legislature supported for constitutionally impermissible reasons and that harms constitutionally protected interests. Here, our concern involves the more basic question of whether constitutional doctrine should ever deem statutes invalid solely because the legislature enacted them with constitutionally forbidden intentions in the subjective sense.

Based on a substantially instrumental calculation, I would conclude that courts should never invalidate a statute based on forbidden legis-

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[208] *See, e.g.*, Kevin R. Johnson, Essay, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1074 (2010).

[209] *See generally* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988) (discussing the judicial role in crafting remedies for constitutional violations).

[210] *See* Nelson, *supra* note 38, at 1790. Another, related objection would follow from the view of John Hart Ely, which I discussed above. *See supra* notes 177–89 and accompanying text. Under that reasoning, enforcing deliberative norms bearing on the enactment of legislation is a necessary judicial function under the constitutional separation of powers. On this view, our Constitution appropriately reserves the function of authoritatively appraising statutes' normative desirability exclusively to the legislature, but assigns to courts the irreducibly necessary functions of identifying breaches of deliberative, procedural, or otherwise process-based norms and of invalidating legislation that results from such breaches. As I argued above, however, our practice of judicial review widely rejects the premise that courts should not enforce substantive constitutional norms, *see supra* notes 168–89 and accompanying text, and, as I have argued elsewhere, is amply justified in doing so, *see* Richard H. Fallon, Jr., *The Core of an Uneasy Case* for *Judicial Review*, 121 HARV. L. REV. 1693 (2008).

lative motivations unless two further conditions apply. First, the challenged statute should need to inflict some objectively palpable harm. If, to take a perhaps far-fetched example, a legislature required the posting of the Declaration of Independence with the purpose of promoting religious belief — based on a hope and expectation that the Declaration's reference to "all men" being "endowed by their Creator with certain unalienable Rights"[211] would have this effect — but its effort to communicate a religious message almost wholly failed, I do not believe that the statute should be invalidated.[212]

This proposal might appear to require a radical revision of Establishment Clause doctrine, under which courts have sometimes identified forbidden legislative intent as a sufficient basis for invalidating legislation. For instance, in *McCreary County v. ACLU of Kentucky*, the Court held that a lower court properly enjoined a county's Ten Commandments display solely because relevant officials acted with predominantly if not exclusively constitutionally impermissible intentions in installing it.[213] In fact, accepting that forbidden legislative intentions do not require statutes' invalidation in the absence of significant harmful effects would necessitate only a modest doctrinal reconfiguration.

Although the Supreme Court would need to disavow some of the language in a few Establishment Clause cases[214] in order to embrace my suggestion that courts should never ultimately invalidate statutes except pursuant to a substantive standard of constitutional validity, it would not need to renounce any holdings. As I shall explain, in each of the Establishment Clause cases in which the Court purported to hold statutes invalid based solely on the legislature's forbidden intentions, the Court reasonably could have concluded that the challenged

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[211] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[212] *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 558–59 (1993) (Scalia, J., concurring in part and concurring in the judgment) ("Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to 'prohibi[t] the free exercise' of religion." (alteration in original)).

[213] 545 U.S. 844, 881 (2005). The *McCreary County* Court qualified its holding in two ways. First, it described the kind of legislative intent that will invalidate a statute as an "ostensible and predominant" constitutionally forbidden purpose. *Id.* at 860. Second, it recognized that "Establishment Clause doctrine lacks the comfort of categorical absolutes" and that "[i]n special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious." *Id.* at 859 n.10.

[214] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 56 (1985) ("[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."); Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam) (holding that because "[t]he pre-eminent purpose [of a law requiring] posting the Ten Commandments on schoolroom walls [was] plainly religious in nature," the law violated the First Amendment).

laws had a more than de minimis expressive effect in promoting religion or marginalizing or stigmatizing religious minorities.

Second, even unconstitutionally motivated statutes that cause some palpable harm should not be deemed invalid if they nevertheless can pass muster under an appropriately stringent substantive test, such as strict judicial scrutiny. Despite assertions in some cases that statutes with constitutionally forbidden predominant motivations are categorically invalid, I know of no case in which the Supreme Court has ever struck down a law that it plausibly could have adjudged necessary to promote a compelling governmental interest. Although we should not adhere blindly to currently dominant legal approaches, such approaches deserve consideration as possible sources of accreted wisdom when they draw support from independent arguments.[215] Consider once again a hypothetical case in which a state legislature, in the past, had overwhelmingly voted for that state's statutory prohibition against murder for the sole, forbidden purpose of pleasing God by enforcing the Sixth Commandment. As this hypothetical case demonstrates, the proposition that a statute could be necessarily unconstitutional under the Establishment Clause solely because of the legislature's forbidden motivation is flatly untenable. In order to demonstrate an Establishment Clause violation, a complainant should need to show a more than de minimis harm, and, even in cases of harm, a statute should be upheld if it is necessary to promote a compelling governmental interest.

C. Refashioning Objective Tests of Forbidden Legislative Intent into Substantive Constitutional Norms

Of the three categories of objective legislative intent that section I.B identified, two — involving categorically ascribed objective intent and objective intent inferred from expressive content — easily could be, and should be, refashioned into substantive constitutional norms.[216] Questions about their appropriate invocation most often devolve directly into questions about the substantive protections that particular constitutional provisions provide. It would both clarify and

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[215] *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 40–46 (2010) (developing Burkean arguments for a common law–like approach to constitutional adjudication).

[216] By contrast, the third category, which applies when courts impute legislative intent on a case-by-case basis to make it intelligible why the legislature might have enacted the language that it did, typically requires inquiries that overlap substantially in practice with inquiries into legislators' actual psychological intentions. *See supra* notes 86–91 and accompanying text. Accordingly, this third category of objective intent should be treated the same as forbidden legislative intent in the psychological sense: it should not provide sufficient basis for invalidating legislation, but its presence should trigger strict judicial scrutiny, for reasons to be discussed in Part IV.

improve constitutional analysis to reformulate doctrines that rely on these conceptions as enforcing substantive constitutional demands.

1. Categorically Ascribed Objective Intent. — The conception of objective legislative intent that relies on categorical rules to mark statutes as suspect based on their content or effects — for example, in regulating speech on the basis of content — functions less as an intent-based than as a substantive test of constitutional validity. Although Justice Kagan has described objective conceptions of this kind as "proxies" for inquiries into forbidden intentions,[217] Part I emphasized that we could simply say, with no practical redirection of legal analysis, that laws exhibiting designated characteristics are either per se invalid or, more typically, trigger heightened judicial review. Accordingly, the Supreme Court should take the clarity-enhancing step of marking them as the substantive, content- or effects-based tests that — for all practical purposes — they already are. As a perceptive commentator observed in critiquing the Court's now-abandoned jurisprudence forbidding some but not all "irrebuttable presumptions,"[218] "[a]ny rule that expressly and conclusively presumes one fact from another may be recast as a direct rule of substantive law."[219] With regard to examples discussed previously, we should conceptualize statutes that classify on the basis of race to the disadvantage of racial minorities, that impose discriminatory taxes on goods from out of state, or that regulate speech on the basis of content as presumptively unconstitutional because of their substantively burdensome effects on constitutionally protected groups or activities.[220]

Some may resist this suggestion by protesting that tests embodying "objective" conceptions of legislative intent typically apply to, and are designed to identify, situations in which a majority of the legislature likely had forbidden psychological motivations.[221] Nevertheless, deliberative norms — as I argued above — are almost always the correlates of substantive norms that protect vulnerable groups and presumptively valuable activities from substantive burdens. Characterizing inquiries into "objective" intent as efforts to implement deliberative norms is, accordingly, unnecessary in all cases, and it can frequently prove misleading, as well.

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[217] Kagan, *supra* note 15, at 414, 441.

[218] *See supra* note 98.

[219] Phillips, *supra* note 98, at 462.

[220] *See, e.g.*, HELLMAN, *supra* note 43, at 21–33 (explaining why statutes discriminating against historically disadvantaged minorities should be deemed morally impermissible due to their material and expressive effects).

[221] *Cf.* Johnson v. California, 543 U.S. 499, 505 (2005) (explaining that race-based classifications are subject to strict judicial scrutiny because "[r]acial classifications raise special fears that they are motivated by an invidious purpose").

To take just one example that I have discussed previously, only confusion flows from characterizing rules that require heightened scrutiny of all statutes that classify on the basis of race or gender as proxies for inquiries into forbidden legislative intentions. And when considering whether to classify on the basis of race or gender, legislators should ask themselves not whether they have good intentions, but whether they have adequately compelling reasons for doing so. Especially when reviewing statutes that expand opportunities for members of historically disadvantaged groups, courts should inquire whether a violation of substantive norms of fairness has occurred, not whether the legislature exhibited bias or animus — implausibly, even if not impossibly — against whites.

This proposed mode of analysis would require a revision of existing doctrine in one significant respect. In gender-discrimination cases, including *United States v. Virginia*,[222] the Supreme Court has sometimes said that when a statute classifies on the basis of gender, the applicable intermediate scrutiny standard — under which a statute is invalid unless substantially related to an important governmental purpose[223] — requires inquiry into the enacting legislature's actual purpose.[224] Under the analysis advanced in this Article, the Court should focus on the possible existence of objective justifications for gender-based classifications, not on the legislature's subjective motivation for adopting them. In *United States v. Virginia*, the principal question under this standard would have been whether the state's maintenance of an all-male Virginia Military Institute that practiced an "adversative" method of single-sex education was substantially related to an important state interest in providing diverse educational opportunities.[225] A plausible though perhaps not necessary answer to this question would be that the state had no important interest in promoting a kind of diversity that facially and systematically advantaged males in comparison with females.

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[222] 518 U.S. 515 (1996); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982) (concluding that "although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification" (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975))).

[223] *Virginia*, 518 U.S. at 533.

[224] *See id.* at 535–36 ("In cases of this genre, our precedent instructs that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." (citing *Wiesenfeld*, 420 U.S. at 648 & n.16 (stating that "mere recitation of a benign [or] compensatory purpose" does not block "inquiry into the actual purposes" of government-maintained gender-based classifications, *id.* at 648); Califano v. Goldfarb, 430 U.S. 199, 212–13 (1977) (plurality opinion) (rejecting government-proffered purposes after "inquiry into the actual purposes," *id.* at 212))).

[225] *Id.* at 535.

2. Intent Inferred from Expressive Content. — When courts infer legislative intentions exclusively from a statute's expressive meaning, especially in cases in which expressive meaning changes over time, expressive effects, rather than subjective legislative motivations, provide the true ground for constitutional concern (or, in cases such as *McGowan v. Maryland*, for the amelioration of constitutional concern). Even if we impute an objective intent in order to explain how a statute can have an expressive meaning independent of the psychological intentions of those who voted for it,[226] the intent has no further work to do after its imputation. For all practical purposes, the expressive meaning is all that remains.[227] Given that current expressive meaning alone has operative significance, we should once again abandon the vocabulary of subjective intentions — subject to one significant qualification to be discussed shortly. The remaining normative question would then be a substantive one, asking which expressive effects should either render statutes directly invalid or, much more frequently, furnish a ground for elevated judicial scrutiny.

Rogers v. Lodge provides a useful example of how judicial analysis could proceed in these terms, typically without altering the outcomes of iconic cases. Once the confusions introduced by intent-based analysis are stripped away, *Rogers* stands for the proposition that a statute that prevents a racial minority from electing any representatives to a governing body, in a context in which readily available alternative districting schemes would permit the minority group to do so, will attract elevated judicial scrutiny if the statute, in context, also expressively communicates a message of racial stigmatization, hostility, marginalization, or hierarchy.[228] So read, *Rogers* reflects the substantive reach of the Equal Protection Clause in mandating strict judicial scrutiny of statutes that significantly burden racial minorities through a mixture of directly substantive and expressively marginalizing effects. Understood in these terms, *Rogers* would of course remain controversial; some would undoubtedly reject the proposition for which I said the case stands as legally untenable. But *Rogers* is controversial anyway. Analysis in substantive rather than intent-based terms would provide a clearer picture of the nature of the controversy.

If we understand *Rogers* in this way, the juxtaposition of *Rogers* with Establishment Clause cases in which the Supreme Court has inferred a forbidden legislative purpose from a statute's expressive ef-

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[226] *See supra* notes 138–41 and accompanying text (rejecting the suggestion that statutes cannot have expressive meanings independent of the intentions of the enacting legislature).

[227] Professors C. Edwin Baker and Todd Rakoff thus use the terms "objective intent" and "expressive meaning" nearly interchangeably. *See* Baker, *supra* note 117, at 976; Rakoff, *supra* note 99, at 63, 71, 79, 81–88, 91–92, 95.

[228] *See* Rogers v. Lodge, 458 U.S. 613, 626–27 (1982).

fects[229] should provoke a rethinking of the roles of expressive meanings and effects, and their relation to forbidden purposes, under the Establishment Clause. Against the background of historical practice and the familiar intertwining of religious and nonreligious motivations in legislative judgments, I said above that I thought it untenable to hold that forbidden religious purposes, without more, should lead to automatic constitutional invalidation even when those religious purposes are predominant or even exclusive. Neither do I believe that such purposes, without more, should trigger strict judicial scrutiny of such practices as inscribing "In God We Trust" on the currency or maintaining Christmas Day as a national holiday. *McGowan v. Maryland*, in which the Court relied on expressive effects to deny that Sunday-closing laws had a religious purpose,[230] helps to illuminate some of the grounds for my position. In *McGowan*, a majority of the Justices — correctly, in my view — thought it unnecessary and possibly unreasonable to invalidate the statute before them.[231] Whether or not one agrees with the holding, the case turned on the Court's assessment that the challenged statute had few if any remaining stigmatizing, marginalizing, or religion-promoting effects at the time the litigation occurred.[232] Absent any significant showing of harm, I share the Court's appraisal that it lacked an adequate justification to invalidate Sunday-closing laws.

Apart from *McGowan*, redirection of analytical attention from imputed forbidden purposes to religion-promoting, marginalizing, and stigmatizing effects would help to rationalize the small set of cases in which the Supreme Court has invalidated statutes under the Establishment Clause on ostensible grounds of forbidden legislative purpose alone.[233] As I noted above, a number of longstanding practices that the Supreme Court has shrunk from invalidating — including the inscription of "In God We Trust" on the currency — cannot plausibly be defended without acknowledging that a predominant or even exclusive legislative purpose of promoting religion does not lead to a statute's automatic invalidation, nor even call for strict judicial scrutiny, in the absence of more than de minimis effects in promoting religion or stigmatizing religious minorities. Correlatively, legislation with significant present effects in promoting religion or marginalizing religious minorities should normally be held to violate the Establishment Clause unless

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[229] *See supra* pp. 549–51.

[230] *See* 366 U.S. 420, 445 (1961).

[231] *See id.*

[232] *See id.* at 444–45.

[233] *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 859 (2005) (noting that the Court had invalidated legislation under the "purpose" prong of the *Lemon* test on only four prior occasions).

an exception specific to the Establishment Clause — such as one, possibly, for some practices with deep historical foundations[234] — applies.

Admittedly, determining when legislation has significant, rather than de minimis, effects of this forbidden kind would pose delicate problems.[235] But such problems appear unavoidable unless the Supreme Court is prepared either to invalidate all legislation that has some purpose and effect of promoting religion or to approve all religion-promoting legislation that is not overtly coercive.[236] As an alternative, holding that the Establishment Clause ordinarily requires the invalidation of legislation only upon a showing that it has significant expressive effects in promoting religion or marginalizing religious minorities would bring a measure of coherence (and I claim no more) to the currently confusing case law. Overall, the Supreme Court has exhibited a greater tolerance for long-ensconced practices that symbolically support religion — such as inscribing "In God We Trust" on the currency — than for newly initiated practices, such as the introduction of displays of the Ten Commandments in public buildings.[237] In my view, the expressive effects of legislation in supporting religion or marginalizing religious minorities are frequently greater at the time of the legislature's initial action than when original purposes are widely forgotten. If so, this disparity makes sense of the Supreme Court's failure to require the chiseling out of religious symbols and exercises (such as "In God We Trust" on the currency and possibly legislative prayer) that it should not allow to be initiated today.[238] I do not, however,

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[234] One possible example of a historically grounded exception on which all of the current Justices seem to agree is that early congressional practice in hiring a chaplain establishes that prayers at the beginning of congressional sessions do not violate the Establishment Clause. *See* Town of Greece v. Galloway, 134 S. Ct. 1811, 1845 (2014) (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting) (agreeing with "the Town and Court" that "a long history, stretching back to the first session of Congress (when chaplains began to give prayers in both Chambers), 'ha[s] shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom"'" (alterations in original) (quoting *id.* at 1820 (majority opinion))).

[235] For an illuminating discussion of comparable challenges under the Equal Protection Clause, which emphasizes the need for interpretation under circumstances of disagreement, see HELLMAN, *supra* note 43, at 59–85.

[236] *Cf.* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" (alteration in original) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984))), *abrogated by Town of Greece*, 134 S. Ct. 1811.

[237] *See, e.g.*, *McCreary*, 545 U.S. at 881; Stone v. Graham, 449 U.S. 39, 41 (1980) (per curiam).

[238] *See* Richard H. Fallon, Jr., Tribute, *A Salute to Justice Breyer's Concurring Opinion in* Van Orden v. Perry, 128 HARV. L. REV. 429, 431–33 (2014). This, roughly, is what I take to be the approach of Justice Breyer's controlling concurring opinion in *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment).

categorically rule out the possibility that the expressively stigmatizing effects of a statute might grow, rather than recede, over time.

IV. A CONTINUED ROLE FOR SUBJECTIVE LEGISLATIVE INTENT AS A TRIGGER FOR ELEVATED JUDICIAL SCRUTINY

Although all dispositive tests of constitutional validity are appropriately substantive, forbidden legislative intentions in the subjective sense — as appropriately conceptualized and identified — should normally trigger heightened judicial scrutiny outside the context of the Establishment Clause. In the main body of this Part, I lay out the grounds for this conclusion and then discuss the circumstances under which courts should ascribe forbidden intentions to the legislature as a whole based on the subjective mental attitudes of individual legislators. Courts should do so, I argue, only when the evidence establishes that an actual majority of the legislature voted for a statute for constitutionally forbidden reasons. In a final acknowledgment of the proper role of forbidden legislative intent in constitutional analysis, this Part further argues that forbidden intentions by less than a majority of the legislature could sometimes contribute to a statute's expressive effect in substantially burdening or stigmatizing a minority group. In such cases, I argue, elevated judicial scrutiny should apply on partly intent-based grounds.

Before commencing substantive analysis, however, I should address possible suspicions that if forbidden intent in the subjective sense can trigger strict scrutiny, its role in constitutional analysis will remain substantially undiminished under my proposed doctrinal reconfiguration, despite the enhanced emphasis on substantive norms that Part III advocated. "[O]ne of the most quoted lines in legal literature"[239] asserts that strict scrutiny is "'strict' in theory and fatal in fact."[240] If forbidden subjective intent triggers strict scrutiny, and if strict scrutiny is fatal in fact, it might appear that my proposed revision of existing doctrine would reintroduce through the back door what it purports to banish through the front door. But any suggestion to this effect is doubly misplaced.

First, as will shortly become clear, my proposed standards for concluding that the legislature acted with a forbidden subjective intent are very stringent, even though not impossible to satisfy. Second, the

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[239] Kathleen M. Sullivan, Tribute, *Gerald Gunther: The Man and the Scholar*, 55 STAN. L. REV. 643, 645 (2002).

[240] Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 79 (1997) (""[S]trict" in theory' will routinely prove 'fatal in fact.'" (quoting Gunther, *supra*, at 8)).

characterization of strict scrutiny as "strict in theory and fatal in fact" appears overstated in its application to some cases. In an important empirical study, Professor Adam Winkler found that "30 percent of all applications of strict scrutiny [in the lower federal courts] — nearly one in three — result in the challenged law being upheld."[241] In the Supreme Court, too, strict scrutiny appears to have variable severity.[242] In *Employment Division v. Smith*,[243] which rejected a claim that all facially neutral statutes that substantially burden religious liberty therefore require strict scrutiny, Justice Scalia characterized that formula as a kind of "balancing test."[244] In light of prior cases that had upheld statutes against free exercise objections, purportedly pursuant to strict scrutiny, that characterization possessed a ring of verisimilitude in the free exercise context.[245] Many believe that the Court's rulings that some affirmative action programs pass muster under strict scrutiny reflect a similar play in that formula's joints as applied to equal protection cases involving minority preferences.[246] For present purposes, however, I do not wish to make any large claims about the nature of strict judicial scrutiny in cases in which it applies. I mean only to insist that my proposed approach would make a significant difference to the clarity, structure, and application of constitutional doctrine.

A. Subjective Intent as a Basis for Enhanced Scrutiny of Legislation

1. The Grounds for Elevated Scrutiny. — Against the background of my conclusion that final determinations of constitutional validity should turn entirely on substantive constitutional norms, the argument that courts should apply elevated judicial scrutiny to challenged statutes when the legislature acted with forbidden intentions (provided that the statutes also have more than de minimis effects of a relevant kind) unfolds in three steps. First, as I have recognized repeatedly, legislators have genuine deliberative obligations. Although difficult questions can arise concerning which intentions are forbidden under which constitutional provisions,[247] and although attempting to resolve the

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[241] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006).

[242] *See* Fallon, *supra* note 109, at 1306–08. The Supreme Court's most recent case involving affirmative action in education, *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016), upheld a challenged program despite applying the strict scrutiny test, *id.* at 2208, 2214–15.

[243] 494 U.S. 872 (1990).

[244] *Id.* at 883.

[245] *See, e.g.*, United States v. Lee, 455 U.S. 252, 257–60 (1982) (holding that members of the Old Order Amish could not refuse to pay Social Security taxes "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order," *id.* at 260).

[246] *See, e.g.*, Fallon, *supra* note 109, at 1307.

[247] *See supra* notes 31–32 and accompanying text.

gamut of such questions lies outside the ambitions of this Article, current doctrine marks a number of plain examples. To take perhaps the least controversial, a legislator would breach a deliberative obligation if she voted to enact a statute for the purpose of harming a racial or religious minority.[248]

Second, "ordinary," nonelevated judicial review presupposes that legislators will satisfy their deliberative obligations. It does so perhaps most strikingly through doctrines that call for substantial judicial deference to legislative judgments of constitutional permissibility.[249] When the legislature defaults on its obligation not to act for forbidden purposes, any confidence that it fairly considered whether the resulting statute nevertheless satisfies substantive norms of constitutional validity would be wholly misplaced.[250]

Third, when the legislature demonstrably breaches its deliberative responsibilities by acting for forbidden purposes, courts should respond by applying elevated scrutiny as a compensatory hedge against the risk that a challenged statute violates constitutional rights. As I have argued elsewhere, the best justification for judicial review does not presuppose that courts will perform better than legislatures in determining what rights people have in circumstances of reasonable disagreement — as exists, for example, with respect to abortion, affirmative action, and many First Amendment issues, to name just a few.[251] Given reasonable disagreement, critics of judicial review plausibly argue that a thoughtful, carefully deliberative legislature might do as well as the judiciary in determining whether a controversial statute actually trenches on a moral or constitutional right.[252] But that argument overlooks the benefits of enlisting both the legislature and the courts as guarantors of rights, with each charged to determine independently whether a statute comports with constitutional norms.[253] Although a system in which the legislature and the courts both have

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[248] *See, e.g.*, Johnson v. California, 543 U.S. 499, 505 (2005). Going further, the Supreme Court has held repeatedly that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). Apart from bare desires to inflict harm, the range of permissible purposes under the Due Process and Equal Protection Clauses needs to be very broad under the modern relaxed standard of rational basis review. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315–16 (1993).

[249] *See* FALLON, *supra* note 1, at 95–97.

[250] *See* Young, *supra* note 43, at 244–45; *see also* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.").

[251] *See* Fallon, *supra* note 210, at 1695.

[252] *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

[253] *See* Fallon, *supra* note 210, at 1695, 1704–09.

responsibilities to ensure that individual rights are respected may sometimes result in the overenforcement of constitutional guarantees — for example, if the Supreme Court erroneously concludes that a statute violates constitutional rights when the legislature has adjudged that it does not — our system rests on the premise that it is better for fundamental constitutional rights to be overenforced than underenforced.[254]

Stated abstractly, this argument for judicial review as part of a two-track system for protecting individual rights leaves open the level of scrutiny that reviewing courts ought to apply when ruling on constitutional challenges to legislation. As I have just noted, constitutional doctrines often assume that relatively deferential review suffices. But when the legislature defaults on its deliberative obligations, and the first part of our system's double safeguard of constitutional rights demonstrably fails to operate properly, judicial review appropriately becomes more stringent. Within a doctrinal structure that otherwise defers to legislative judgments, the hypothesis that errors of overprotection of rights are normally less morally and constitutionally regrettable than errors of underprotection supports heightened judicial scrutiny to compensate for the failure of the legislature to satisfy its deliberative obligations.

In principle, elevated judicial review could take myriad forms. None follows incontrovertibly from the premise that courts should apply a test designed to err on the side of over- rather than underenforcement of fundamental rights.[255] That said, our constitutional practice's sensible default formula for according stringent protection to fundamental rights and vulnerable minorities — which I would almost invariably extend to cases in which the legislature acted for forbidden purposes — is the strict judicial scrutiny formula,[256] which asks whether a challenged statute is narrowly tailored to a compelling governmental interest.

Although sound arguments establish that elevated scrutiny should normally follow immediately from a finding that the legislature acted with a constitutionally forbidden intent, the Supreme Court sent a contrary signal in *Arlington Heights* and *Hunter*. In those cases, the Court indicated that upon a showing that the legislature had a discriminatory purpose, the burden would shift to the government to show "that the law would have been enacted without this factor."[257] If

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[254] *See id.* at 1706–09.

[255] *See id.* at 1733–34.

[256] *See* Fallon, *supra* note 109, at 1268–69 (surveying the range of legal issues to which strict scrutiny applies).

[257] Hunter v. Underwood, 471 U.S. 222, 228 (1985); *see* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

the government could carry that burden, *Arlington Heights* reasoned, the challenger "no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose," and "there would be no justification for judicial interference with the challenged decision."[258]

This reasoning misunderstands the relevant constitutional question. It is not whether the legislature would have reached the same result absent an affirmatively forbidden purpose, but whether a court should defer to the legislature's judgment that a challenged statute comports with constitutional norms. With regard to that question, the legislature's breach of its deliberative obligations should bring deference to an end and, for reasons stated above, should provoke elevated judicial scrutiny.

2. Identifying Forbidden Subjective Legislative Intent. — At this point I have gotten ahead of myself. I have argued that forbidden, subjective legislative intentions should normally trigger elevated judicial scrutiny, but I have not yet specified when or how courts should ascribe forbidden intentions to the collective legislature. In my view, there are two independently plausible and substantially overlapping approaches. Courts should apply elevated judicial scrutiny when either yields the conclusion that the legislature had a forbidden subjective intent.

The first of these approaches, as laid out in section I.A, involves the identification of individual legislators' subjective intentions and the ascription of forbidden intent to the legislature as a whole when the evidence establishes that a majority probably breached their deliberative obligations. Although this approach presents contestable issues in application, none should prove insuperable. Conceptually and sometimes practically, those issues unfold in two steps. The first involves the ascription of motivations to individual legislators, the second the ascription of a forbidden intent to the legislature as a whole.

With regard to the first of these challenges, I have repeatedly made the obvious point that individual legislators have intentions or motivations. I have further noted that the intentions that current doctrine makes relevant — for example, intentions to harm a minority group, or to thwart the practice of an unpopular religion — are typically easier to define and identify than the kinds of intentions sometimes thought to bear on the proper interpretation of statutes' meanings. Critics of inquiries into subjective legislative intent often point out that legislators can have multiple and conflicting intentions or motivations.[259] Insofar as constitutionally forbidden intentions are concerned, the law

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[258] *Arlington Heights*, 429 U.S. at 271 n.21.

[259] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 637–38 (1987) (Scalia, J., dissenting).

should stipulate that if an intention or motivation likely played some role in a legislator's decision, it counts as decisive for purposes of constitutional analysis,[260] without further inquiry into which motives were dominant. A legislator breaches her deliberative obligations if she allows forbidden reasons to play any role in her analysis.

A question then can arise about how we know individual legislators' private intentions or motivations.[261] This is a genuine problem, but often nowhere nearly so severe as some suggest. As noted above, the criminal law recurrently requires courts to determine defendants' intentions.[262] In imputing intentions to people whom we know, we often rely on a mix of contextual factors, biographical information, and explicit statements. We can do the same with legislators. The remarks of a single legislator in legislative debate may provide only weak evidence of the intentions or purposes of other members, but very strong evidence regarding the speaker's intent. And sometimes — as I shall shortly emphasize — the language of a statute itself will provide powerful evidence of the relevant intentions of all who voted for it.

Assuming that the forbidden intentions of individual legislators can sometimes be identified (pursuant to a preponderance of the evidence standard), I would address the second challenge with a rule that ascribes forbidden motivations to the legislature as a whole whenever an actual majority of the legislators who voted for a law did so with improper individual intentions. No inexorable logic dictates assigning this significance to the intentions of a majority of supporting legislators, rather than a greater or a smaller number, but drawing the line at this point reasonably accommodates several pertinent considerations.

If a majority of the legislators who vote for a bill take their deliberative obligations seriously, then a substantial legislative check against constitutional rights violations will have operated, even if a minority of the supporters breach their obligation. The check will have functioned — even if the breaching minority cast votes needed for a statute's enactment — because there normally will be no reason to suspect that those who opposed a challenged measure defaulted on their deliberative obligations in any relevant way. Setting a high bar also gives political democracy reasonable latitude to operate by precluding claims that courts should apply the stringent (even if not necessarily fatal) strict scrutiny formula whenever the legislature divides narrowly and there is plausible evidence that a few members may have voted as they did for corrupt, self-serving, or invidious reasons. A point comes, however, at which too many legislators' defaults on their

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[260] *Cf. Arlington Heights*, 429 U.S. at 265–66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.").

[261] *See, e.g.*, *Edwards*, 482 U.S. at 637–38 (Scalia, J., dissenting).

[262] *See* Ristroph, *supra* note 14, at 1365.

deliberative obligations demand an increment in judicial solicitude to safeguard against the underprotection of constitutional rights. Although one could cavil about exactly where along a spectrum that point lies, setting it at malfeasance by a majority of the enacting majority aligns with the intuition, which prevails in many settings, that majority will and preferences fairly determine the collective stance of those who share responsibility for a decision.

Although establishing that an actual majority of supporting legislators acted for forbidden reasons is admittedly a heavy burden, it should not always prove impossible to meet, as I emphasized above. Among other things, an approach that in principle requires the counting or estimation of how many legislators had individually forbidden intentions will frequently overlap in practice with one that ascribes a purportedly "objective" forbidden intent to the legislature, or constructs the intent of an imagined hypothetical legislature, as the only psychologically plausible explanation for a statute's enactment.[263] This is the second basis on which courts could appropriately ascribe forbidden legislative intent. Even though it is possible to define an "objective" legislative intent by focusing on the likely aims of a typical or hypothetical legislature, the same process of inference from statutory language to the intentions that make the choice of language intelligible can often be used to identify the intentions of the actual legislators who voted for a statute. Indeed, in many of the most paradigmatic cases of forbidden legislative intent in the *United States Reports*, evidence that includes the language of challenged statutes leaves little doubt that a majority of the legislature must have had impermissible motivations.

To cite an example used earlier, *Gomillion* relied exclusively on a statute's language and effects to conclude that "the legislation [was] solely concerned with . . . fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[264] *Lukumi Babalu*, which involved a prohibition against the "ritual" killing of small animals,[265] invites a similar analysis: the language of the challenged statute again made it overwhelmingly probable that most, if not all, of those who enacted it had impermissibly sought to restrict religiously motivated killings but not others.[266] I would think that the language

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[263] *See supra* notes 60–68 and accompanying text (describing this approach).

[264] Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960).

[265] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527 (1993).

[266] *See id.* at 527–28.

and effects of statutes, without more, would support similar conclusions in a number of other cases.[267]

Although the best evidence that a majority of the legislature acted with subjectively impermissible motives may sometimes lie in the absence of any psychologically plausible, nonforbidden purposes that might have led to the enactment of a challenged statute, I believe that constitutional doctrine should also allow reliance on legislative history as evidence of forbidden intentions.[268] Admittedly, such evidence can be manufactured or planted. It therefore requires cautious treatment. But if one wants to know whether a majority of the legislature had forbidden intentions, one ought not exclude probative evidence of what particular legislators thought.

B. A Proposed Hybrid Trigger for Elevated Scrutiny: Forbidden Motivation as a Factor that Increases Legislation's Harmful Effects

With Part III having argued that courts should sometimes apply elevated scrutiny based on a statute's effects, including its expressive effects, the question arises whether forbidden subjective intentions by less than a majority of the legislature — although not sufficient by themselves to provoke elevated scrutiny — could ever contribute to a statute's expressive effects in burdening minorities and thereby help to make heightened scrutiny appropriate. To that question, my answer is yes.[269]

Within current doctrine, the expressive effects of legislation — and possibly the contribution of some legislators' intentions in creating or enhancing those effects — have their largest acknowledged role within Establishment Clause doctrine. In that context, the Supreme Court has frequently, even if not invariantly, queried whether a reasonable observer would construe challenged legislation as conveying a forbidden message that tacitly favors adherents of some creeds and disfavors nonbelievers or adherents of others.[270] Although the Court's Establishment Clause jurisprudence is chronically controversial, the idea that the expressive effects of legislation should matter to constitutional

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[267] *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.").

[268] *See, e.g.*, Brest, *supra* note 72, at 124 (explaining the utility of legislative history and pitfalls to be avoided).

[269] *Cf.* Young, *supra* note 43, at 255 ("[I]t is the harmful consequences of some governmental expression that plausibly partially underwrites the concern with laws easily perceived as motivated by a desire to . . . harm minorities.").

[270] *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 862 (2005) ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute' . . . ." (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000))).

adjudication helps to explain judicial decisions in a number of domains. Among the vices of the prohibition against interracial marriage at issue in *Loving v. Virginia*[271] was its effect in symbolically supporting the noxious ideology of white supremacy.[272] A number of cases have emphasized the role of gender-based classifications — which Equal Protection Clause doctrine strongly disfavors — in expressively reinforcing stereotypes that often disadvantage women.[273] To offer just one further example, in determining when discriminations against same-sex couples violated the Due Process and Equal Protection Clauses, the Supreme Court, in opinions by Justice Kennedy, has relied on the challenged statutes' stigmatizing or marginalizing messages.[274]

Although the due process and equal protection cases that I have discussed so far have all involved statutes that facially discriminate, laws' marginalizing or stigmatizing effects need not depend on express classifications. The Supreme Court has so recognized not only in Establishment Clause cases, but also in disputes involving legislative districting, including *Shaw v. Reno*.[275] "[R]eapportionment," the Court said, "is one area in which appearances do matter,"[276] because conspicuously race-based districting "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[277] Since *Shaw*, the Court has emphasized that the ultimate touchstone for determining when strict scrutiny applies to legislative districting decisions is whether the legislature acted with the predominant intent of achieving

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[271] 388 U.S. 1 (1967).

[272] *See id.* at 11 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

[273] *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (1982) (noting that a state's exclusion of males from its school for nursing "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job," *id.* at 729, and "lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy," *id.* at 730); Orr v. Orr, 440 U.S. 268, 283 (1979) ("Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection.").

[274] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) ("Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser."); United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) ("The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."); Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("The stigma this criminal statute imposes, moreover, is not trivial.").

[275] 509 U.S. 630 (1993).

[276] *Id.* at 647.

[277] *Id.* at 650.

a racially defined outcome.[278] Nevertheless, I think it fair to say that the Court, under current doctrine, will presume — even though the presumption is rebuttable — that a very oddly shaped majority-minority district has a forbidden purpose, and thus is constitutionally suspect, partly based on a concern about expressive effects.[279]

Against the background of the Supreme Court's selective sensitivity to statutes' marginalizing or stigmatizing expressive effects, imagine that a school board adopted a regulation forbidding children to cover their heads or faces while attending public school. All members, I assume, knew that the rule would have a disproportionately burdensome effect on the religious practices of identifiable minority groups. But let us further assume that while most members of the school board acted for unbiased reasons, it is well known that some, though less than a majority, supported the regulation for the forbidden purpose (under the Free Exercise Clause[280]) of interfering with religiously motivated practices by adherents to a religion that those members disdain.

In such a case, I believe that the regulation would have an expressive effect of stigmatizing or marginalizing the religious minority — as registered from the perspective of a reasonable member of that group[281] — and that that expressive effect would be exacerbated by the widely shared knowledge that some members of the school board had constitutionally forbidden motivations. Under these circumstances, members of the disadvantaged group could reasonably view the prohibition against the covering of heads or faces in school as emblematizing their marginalized and sometimes disfavored status, especially in light of the unwillingness of other representatives of the community's religious majority to accommodate their religiously motivated practices. With a case such as this in mind, we should reconsider the

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[278] *See, e.g.*, Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1264–65 (2015); Shaw v. Hunt, 517 U.S. 899, 907–08 (1996).

[279] In a partly parallel context, a number of Justices have decried the expressive effects of race-based schemes of student selection and assignment in state-run schools. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007) (plurality opinion) ("As the Court explained in *Rice v. Cayetano*, 528 U.S. 495, 517 (2000), '[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.'" (alteration in original)).

[280] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–41 (1993) (opinion of Kennedy, J.) (plurality opinion).

[281] *Cf. Developments in the Law — Religion and the State*, *supra* note 143, at 1648 ("If the establishment clause is to prohibit government from sending the message to religious minorities or nonadherents that the state favors certain beliefs and that as nonadherents they are not fully members of the political community, its application must turn on the message received *by the minority or nonadherent*."). My formula includes a demand that the interpretive perception be a reasonable one — a demand well explicated by Professor Deborah Hellman. *See* HELLMAN, *supra* note 43, at 60–85.

possibility that the Free Exercise, Equal Protection, and Due Process Clauses — viewed now as sources primarily of substantive and not merely deliberative norms — might call for strict judicial scrutiny of statutes with stigmatizing effects that are exacerbated by the known, unconstitutional motivations of some legislators.

The argument for according significance to legislation's expressive effects under the Free Exercise, Equal Protection, and Due Process Clauses, and for linking those expressive effects to the publicly known subjective motivations of individual legislators, once again draws strength from an analogy in moral philosophy. Above I discussed Scanlon's view that an actor's subjective intent generally has no bearing on the moral permissibility of her acts.[282] But Scanlon does not believe that intentions never have moral significance. In some instances, we have interests in the "meanings" of actions as expressions of a person's values or attitudes.[283] For example, the meaning of a gift will depend on whether the giver sought to express affection or to curry favor. Just as we have reason to care about the meanings of actions independently of whether they are morally permissible, we may have reasons — including reasons of constitutional stature — to care about the meanings of statutes as expressions of the values of some, even if not all, members of the legislature, who are, of course, elected representatives of the political community that they serve.[284]

In arguing that the intentions of individual legislators sometimes contribute to statutes' expressive effects, and in proposing elevated judicial scrutiny when statutes' burdensome effects on protected groups grow sufficiently severe, I confess to having no crisp answer to two important questions. First, when do burdensome effects, including marginalization and stigmatization, become large enough to justify enhanced judicial scrutiny of legislation? Second, how much can the known motivations of less than a majority of legislators contribute to a statute's expressive, minority-burdening impact?

I would not know how to respond to these questions except on a case-by-case basis. Those who claim that facially neutral statutes convey significant, demeaning messages should need to surmount a weighty presumption to the contrary.[285] To offer one concrete example, *Washington v. Davis*, which refused to apply heightened scrutiny to a hiring test for Washington, D.C., police officers that dispropor-

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[282] *See supra* pp. 564–65.

[283] *See* SCANLON, *supra* note 196, at 52–56.

[284] *Cf.* Rakoff, *supra* note 99, at 88 (proposing "[t]he rule: 'official action which has a differentially negative impact on a minority group and which bears a discriminatory social meaning violates the constitutional guarantee of equal protection'").

[285] *See id.* at 91 ("[I]t would make sense to require that there be clear evidence that the official action bears a substantial discriminatory meaning before finding a violation of equal protection.").

tionately excluded African American candidates,[286] does not seem to me to have been wrongly decided on its facts. Perhaps most important, the case included no hint of discriminatory intentions by D.C. officials.[287] To the contrary, as a result of their aggressive minority-recruitment efforts, forty-four percent of new police recruits in the year immediately preceding the lawsuit had been black.[288] No strong, psychologically based correlation existed between race and performance on an examination "designed to test verbal ability, vocabulary, reading and comprehension,"[289] and the district court had specifically "rejected the assertion that [the test] was culturally slanted to favor whites."[290] The situation would have been different if, for example, official policy gave a hiring preference to those with relatives on the existing police force in a city in which the existing force was well known to be disproportionately white.

An example of a case that belongs in a different category from *Washington v. Davis* may come from *City of Memphis v. Greene*.[291] The case arose when the city closed to through traffic a street that ran through a predominantly white residential area, but that was used disproportionately by residents of a heavily minority neighborhood.[292] In my view, the combined effect of the street closure in disproportionately accommodating whites (who understandably disliked having heavy traffic in their neighborhood) and disadvantaging blacks (who had to traverse greater distances on their way to and from their homes) could reasonably have been understood as conveying an implicit message concerning favored and disfavored racial groups. More to the present point, evidence of specifically discriminatory subjective intentions on the part of some members of the decisionmaking body would have enhanced that message.[293]

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[286] 426 U.S. 229, 242, 245–46 (1976).

[287] *See id.* at 235.

[288] *Id.* at 232, 235.

[289] *Id.* at 235 (quoting Davis v. Washington, 348 F. Supp. 15, 16 (D.D.C. 1972), *rev'd*, 512 F.2d 956 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229).

[290] *Id.*

[291] 451 U.S. 100 (1981).

[292] *See id.* at 102–03.

[293] *See id.* at 141–44, 144 n.11 (Marshall, J., dissenting); *cf.* Rakoff, *supra* note 99, at 86–87 ("I suspect that it would matter to almost everyone, if they were asked to think about the social meaning of what the city had done, to know whether this was the first time the city had closed off a street — or the tenth time, and all ten had been at racial boundaries — or the tenth time, and this was the first time at a racial boundary. It would matter if there were many more accidents on this street than on others, and it would matter if that were a notorious fact. . . . It would matter what meanings were invoked in the course of the public discussions on the issue; whether permanently closing off a street carries a common connotation, and if so, whether that connotation is of traffic control or of boundary setting; whether the barriers used recalled the barriers that some years before had enforced the boundaries of de jure segregation; and so on.").

Despite the acknowledged vagueness of my proposal, it would respect the Equal Protection Clause, in particular, as a source of substantive as well as deliberative norms by providing greater protection than current doctrine affords against statutes with marginalizing and stigmatizing effects. If the final test of constitutional validity is substantive, turning on whether a statute is objectively justified, it makes sense for objective considerations, including the nature and weight of the burden that the challenged legislation disproportionately imposes on minority communities, to play a role in activating elevated scrutiny even when a statute does not formally employ suspect classifications. My proposed approach would also put equal protection doctrine on a coherent (even if vague) footing by cashing out the concept of legislative intent — to the extent that intent matters — in terms of the one-by-one motivations of individual legislators.

Another possible objection to my proposal also deserves a response. Although I have mostly tried to avoid head-on rejection of iconic judicial precedents, my proposed approach would require a partial rejection of the analytical framework that the Supreme Court established in *Washington v. Davis* — though not, as I have said, of the Court's ruling for the defendants on the particular facts of that case. With respect to the largest issue before the Court, *Washington v. Davis* held that if a statute does not discriminate facially on the basis of race, a court should not apply strict scrutiny under the Equal Protection Clause unless the plaintiff can demonstrate that the enacting legislature — and not, I take it, a mere minority thereof — had a racially discriminatory intent.[294]

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[294] *See Washington*, 426 U.S. at 239–41. Before the Court's decision in 1976, several prior cases had appeared to assume that racially disparate effects — to which I would add the category of expressive effects — could sometimes trigger strict scrutiny under the Equal Protection Clause. *See* White v. Regester, 412 U.S. 755, 766–70 (1973) (sustaining a challenge to a districting scheme that diluted minority voting strength without inquiring into legislative motive); Dandridge v. Williams, 397 U.S. 471, 485 n.17 (1970) (noting the absence of any allegation that a challenged regulation was "infected with a racially discriminatory purpose or effect such as to make it inherently suspect"); *cf.* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 43–44 (1977) (noting that the Court's prior signals were mixed). In addition, some did not see *Washington v. Davis* as marking a sharp break from prior law at the time of its decision. *See, e.g.*, Kobick, *supra* note 41, at 523. Among other things, both the Court's majority and Justice Stevens's concurring opinion acknowledged that legislation's effects would sometimes provide compelling evidence of legislative intent and that intent and effects were therefore interconnected in determining whether heightened scrutiny should apply. *See Washington*, 426 U.S. at 242 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."); *id.* at 254 (Stevens, J., concurring) ("[T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume . . . [because] when the disproportion is as dramatic as in *Gomillion v. Lightfoot*, 364 U.S. 339 [(1960)], or *Yick Wo v. Hopkins*, 118 U.S. 356 [(1886)], it really does not matter whether the standard is phrased in terms

As all should now recognize, however, the approach of *Washington v. Davis* is incoherent if it requires the combination of individual legislators' private motivations into an imagined, unitary, psychological intent of the collective legislature.[295] The Supreme Court could, of course, respond to that problem by holding that plaintiffs can establish a forbidden legislative intent only by showing that an actual majority of the legislature (or more) acted with forbidden intentions in voting for challenged legislation or that a legislature's adoption of particular language defies any other objectively plausible explanation. If put forward as the exclusive trigger for elevated scrutiny under the Equal Protection Clause (in cases not involving facial discriminations against protected minorities), however, such stringent standards would come indefensibly close to stripping the Fourteenth Amendment of its minority-protecting effect. The same analysis should apply to cases under the Free Exercise Clause, even though its application would require a comparable adjustment in current doctrine.[296]

V. CONCLUSION

Doctrines that inquire into the intent of the legislature to gauge the constitutional validity of legislation deserve a comprehensive reexamination. First, we need to clarify what courts mean to refer to when they ascribe, or consider ascribing, a unitary intent to a multimember body. Pressing this question makes evident that courts use the terminology of forbidden legislative intentions to refer to different phenomena in different cases.

Second, in debates about the relevance of forbidden legislative motivations to constitutional adjudication, a fundamental division exists between subjective approaches that seek to identify legislators' actual mental attitudes on a case-by-case basis and approaches that ascribe "objective" intentions, often to a hypothetical legislature, sometimes on

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of purpose or effect."). Nevertheless, subsequent decisions have interpreted *Washington v. Davis* as having decisively rejected reliance on the effects of facially neutral legislation as a factor helping to trigger elevated judicial scrutiny except insofar as those effects furnish proof of a forbidden legislative intent. *See* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1807–08, 1812–15 (2012).

[295] Because the holding of *Washington v. Davis* on this point is thus "unworkable," it merits overruling under well-accepted criteria. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) (noting the relevance in decisions about whether to overrule precedent of "whether the rule has proven to be intolerable simply in defying practical workability").

[296] As currently interpreted, the Free Exercise Clause calls for elevated scrutiny of legislation motivated by a desire to burden religious practices, *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540–41 (1993) (plurality opinion), but it does not require government actors to make exceptions to facially neutral and permissibly motivated statutes for those who wish to engage in religiously motivated conduct, *see* Emp't Div. v. Smith, 494 U.S. 872, 881–85 (1990).

a rule-like basis or in exclusive reliance on legislation's expressive effects. For all practical purposes, doctrinal rules that categorically ascribe forbidden legislative intentions based on statutes' content and effects, like approaches that impute "objective" intentions to the legislature based on the shifting messages that they convey, are best viewed as substantive rules of constitutional law. "Intent" in the psychological sense of that term either falls out of the picture or does no practical work.

Third, insofar as the doctrine treats the legislature's psychological intent as significant to determinations of constitutional validity, courts need to establish clear criteria for determining when the forbidden psychological intentions or motivations of some members should be ascribed to the legislature as a whole. The best way to do so, I have argued, is by ascribing a forbidden subjective intent to the collective legislature only when the evidence suggests that an actual majority of legislators voted as they did for forbidden purposes.

Fourth, in appraising the significance of legislative intentions in constitutional law, we should rethink the relationship between intent-based norms and tests, on the one hand, and substantive norms and rules, which focus on legislation's content and effects, on the other hand. All of the constitutional provisions under which the Supreme Court has developed intent-based tests also generate substantive norms.

Fifth, in light of the distinction between intent-based and content- or effects-based judicial inquiries, courts should never invalidate a statute that passes muster under applicable substantive tests, even if every member of the legislature voted for it for forbidden reasons. The Supreme Court should restrict tests that aim to identify legislators' mental states to the subsidiary but nevertheless important function of triggering elevated substantive scrutiny.

Finally, the conclusion that constitutional outcomes should ultimately turn on substantive considerations, not the subjective intent of the legislature, should not lead to a diminution of constitutional rights. Instead, it should produce more reliance on substantive tests to protect constitutional rights. We have every reason to embrace, not to shy away from, an understanding of the Constitution as a source most fundamentally of substantive guarantees, not of prohibitions against subjective legislative intentions.