

JUDICIAL REVIEW OF LEGISLATIVE PURPOSE

CALEB NELSON*

Modern constitutional doctrine is full of restrictions on the reasons for which legislatures can enact certain kinds of statutes. Modern American courts, moreover, stand ready to enforce those restrictions by considering a broad array of sources about the hidden purposes behind challenged statutes. Yet for most of our history, courts shied away from those inquiries—not because state and federal constitutions were thought to impose no purpose-based restrictions on legislative power, but because such restrictions were not thought to lend themselves to much judicial enforcement. This Article calls attention to bygone norms of judicial review, which often prevented courts from investigating the motivations behind statutes even when the statutes' constitutionality depended upon those motivations. The Article proceeds to describe changes over time in the practice of judicial review. The history that emerges sheds light on myriad subjects, including the proper interpretation of various seminal precedents, the source of some of the apparent inconsistency in doctrines that implicate purpose-based restrictions on legislative power, and the ways in which uncodified aspects of judicial practice can affect the glosses that courts put on the Constitution's text.

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INTRODUCTION

When present-day courts review the constitutionality of statutes, they often inquire into the possibility that the enacting legislature had hidden purposes. Statutes that seem innocuous on their face will nonetheless be held unconstitutional if the court concludes that the legislature enacted them in order to disadvantage African-Americans,¹ or to restrict an unpopular religion,² or to punish a disfa-

¹ See, e.g., *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1044–45 (11th Cir. 2008) (noting that under established doctrine, courts should hold facially neutral statute unconstitutional “if (1) [racial] discrimination was a substantial or motivating factor” in the government’s enactment of the law, and (2) the [party defending the statute] cannot . . . show[] “that the provision would have been enacted in the absence of any racially discriminatory motive” (quoting *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1223 (11th Cir. 2005))); see also *Hunter v. Underwood*, 471 U.S. 222, 227–33 (1985) (applying same analysis to provision of state constitution that disenfranchised people convicted of “crimes involving moral turpitude,” and finding provision unconstitutional because expert testimony and records of constitutional convention showed that it had been “enacted with the intent of disenfranchising blacks”).

² See, e.g., *Larson v. Valente*, 456 U.S. 228, 254–55 (1982) (holding that provision of state’s “charitable solicitations Act” violated Establishment Clause, in part because legislative history disclosed that “the provision was drafted with the explicit intention of including particular religious denominations and excluding others”); see also *Church of the*

vored individual.³ Indeed, scholars persuasively argue that a host of constitutional doctrines, as currently applied by the courts, are best understood as being *primarily* concerned with the detection of illicit purpose.⁴

Of course, purpose tests are more prominent in some areas of constitutional law than others. The propriety of such tests depends in part on the substance of the constitutional provision that the courts are implementing, and some provisions are not understood to impose any purpose-based restrictions on legislative power. But many provisions of the Federal Constitution and its state counterparts *are* understood to restrict the reasons for which legislatures can take certain actions. For the most part, moreover, those restrictions are not considered any less susceptible to judicial enforcement than other restrictions on legislative power. Under the orthodox modern view, attempts to unearth the actual purposes behind legislation are a widely accepted part of the practice of judicial review.

A generation ago, the opposite orthodoxy prevailed. “It is a familiar principle of constitutional law,” the Supreme Court intoned

Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993) (holding that even if local ordinances forbidding animal sacrifice and regulating animal slaughter were facially neutral, they violated Free Exercise Clause because “[t]he record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances”); *id.* at 540 (opinion of Kennedy, J.) (examining legislative history and concluding that “the ordinances were enacted ‘because of, not merely in spite of,’ their suppression of Santeria religious practice” (quoting Personnel Adm’r v. Feeney, 442 U.S. 256, 279 (1979)) (some internal quotation marks omitted)). *But cf. id.* at 558–59 (Scalia, J., concurring in part and concurring in the judgment) (distinguishing “the object of the laws” from “the subjective motivation of the lawmakers,” and suggesting that First Amendment makes only former sort of purpose relevant).

³ See, e.g., Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 475–80 (1977) (noting that even if statute does not sentence named individuals to death, imprisonment, or other traditional forms of punishment, statute still triggers Bill of Attainder Clause if “punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers,” and that courts can detect this purpose by “inquiring whether the legislative record evinces a congressional intent to punish”).

⁴ See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414–15 (1996) (advocating this understanding of current free-speech doctrine); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) (arguing that “the central area” of modern dormant Commerce Clause doctrine is “exclusively” concerned with illicit protectionist purpose); see also RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 81 (2001) (noting prominence of purpose-based inquiries in constitutional doctrine); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 (1994) [hereinafter Pildes, *Avoiding Balancing*] (“[C]onstitutional adjudication is often . . . about defining the kinds of reasons that are impermissible justifications for state action in different spheres.”); cf. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727–33 (1998) (discussing implications of this fact for proper understanding of constitutional rights).

in 1968, “that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”⁵ Indeed, a few years later the Court suggested that even in the context of the Equal Protection Clause, “the motive or purpose behind a law” simply is not “relevant to [the law’s] constitutionality”—and that “no case in this Court” had ever held that it was.⁶

Admittedly, these statements were too crude to be entirely accurate. Traditional doctrine sharply limited judicial inquiries into a legislature’s hidden motivations, but not because such motivations were always irrelevant. Rather than holding that the Constitution itself paid no attention to legislative purpose, the traditional doctrine reflected restrictions on the practice of judicial review (akin to those associated with one branch of the political-question doctrine⁷). Those restrictions, moreover, were not quite as absolute as the Court made

⁵ *United States v. O’Brien*, 391 U.S. 367, 383 (1968). The fact that the Court cast this statement in terms of “motive” rather than “purpose” does not seem to have been significant. To be sure, some legal writing of the day used these terms in technical ways that drew distinctions between them. For instance, to highlight the aggregation issues that questions of collective intention raise, some commentators contrasted the “motives” of individual legislators with the “purposes” that can properly be attributed to the entire legislature. *E.g.*, Ira Michael Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CAL. L. REV. 104, 116 (1961). Other commentators used the same vocabulary to note that the various factors prompting legislators to favor a bill (“motives”) might go beyond the results that the bill was intended to produce in the real world (“purposes”). *E.g.*, Ronald F. Howell, *Legislative Motive and Legislative Purpose in the Invalidity of a Civil Rights Statute*, 47 VA. L. REV. 439, 440–41 (1961). More famously, Alexander Bickel associated the term “motives” with the actual intentions behind a statute, as opposed to the “purposes” that an objective outside observer would impute to the statute on the basis of the evidence that the observer is allowed to consider and the legal presumptions that the observer is required to apply. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 61–63 (1962). But rather than embracing any of these specialized usages, the Court’s opinion in *O’Brien* used the two words as synonyms. *O’Brien*, 391 U.S. at 383–85, 383 n.30; *see also* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217 n.36 (1970) (agreeing that Court “used the terms interchangeably” in *O’Brien*).

⁶ *Palmer v. Thompson*, 403 U.S. 217, 224–25 (1971); *see also id.* at 226 (suggesting that municipal legislature’s decision to close city’s public pools so that they were unavailable “to black and white [patrons] alike” did not “constitute[] a denial of ‘the equal protection of the laws’” even if it stemmed from racist motives).

⁷ Professor Harrison has usefully divided political-question cases into two categories. John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CAL. L. REV. 1367, 1372–75 (2007). Cases in the first category say that courts cannot second-guess the political branches’ determinations of certain kinds of questions; to the extent that those questions come up in litigation, courts must simply accept the answers that the political branches have given. *Id.* at 1373–74; *see also* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 592–93 (2007) (providing further examples). Cases in the second category say that some remedies lie beyond the courts’ authority. *See* Harrison, *supra*, at 1375 (noting courts’ hesitancy to “direct the performance of a politically sensitive function of the government”). Both categories reflect “the familiar principle that some kinds of decisions are not to be made by courts,” *id.* at 1372,

them sound in 1968. While courts traditionally refused to examine the legislature's inner workings to determine whether a superficially valid statute was tainted by an unconstitutional motivation, they had long been willing to consider some objective indicia of legislative purpose in deciding whether a statute was even superficially valid. Thus, it was not quite true that the Supreme Court never considered the legislature's apparent purposes when assessing the constitutionality of a statute.⁸

The Court's rhetorical excess left an opening for scholars who wanted the Court to engage in more robust review of the process that produced legislation (as opposed to the substantive outcomes that the legislature reached). In a famous article published in 1970, John Hart Ely highlighted some recent Supreme Court opinions that had taken account of legislative motivation, and he proposed an expanded understanding of the circumstances in which such inquiries were appropriate in constitutional adjudication.⁹ But while Ely himself later called this proposal "radical" for its time,¹⁰ modern readers will be struck by its narrowness: Under Ely's proposal, courts would not have inquired into actual legislative purposes in nearly as many situations as courts now do.¹¹ Ely therefore was soon leapfrogged—first by commentators¹² and then by the Court itself.¹³

but the traditional limitations on judicial review of legislative purpose are more closely related to the first category than to the second.

⁸ Cf. BICKEL, *supra* note 5, at 208–11 (referring to "[t]he established view . . . that inquiries into motive are not open in the Supreme Court," but observing that this view "is too simple to suffice" and that existing doctrine did occasionally permit Court to impute impermissible purposes to statutes "on the basis of an objective inquiry").

⁹ Ely, *supra* note 5.

¹⁰ John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1155 (1978) (observing that in 1970, when Ely's article appeared, "the standard line of Court and commentator alike was that legislative motivation simply was not cognizable").

¹¹ See Ely, *supra* note 5, at 1281–82 (spelling out three conditions that, in Ely's view, "delineate the only situation in which motivation constitutes the appropriate constitutional reference"); *id.* at 1207 (indicating that "the majority of cases which come before the Court" will not satisfy these conditions).

¹² See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 130 (arguing that "the courts should not refuse to inquire into the motivation of any governmental body," whether legislative or administrative, though they should demand "clear and convincing evidence" before they "invalidate a decision on the ground that it was designed to serve illicit objectives"); Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 132–33 (1977) (arguing that although some constitutional rights "can be completely protected without an examination of motive," courts should be open to investigating true reasons for legislative action whenever those reasons relate to "rights of equality"); cf. Ely, *supra* note 10, at 1155 (acknowledging having been "outflanked" by Professors Brest and Eisenberg, among others). Ely's later work came much closer to Brest's position. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A*

The Court's shift on this issue in the 1970s is one of the most significant recent developments in American constitutional doctrine. But the shift has been so complete, and judicial inquiries into legislators' true goals are now so widely accepted, that we no longer ask many questions about what came before. Perhaps as a result, accounts of the history vary.¹⁴

The modern Supreme Court, for its part, sometimes seems entirely unaware of the limitations that it once recognized on its own ability to investigate the hidden purposes behind challenged statutes. The Court therefore tends to overread precedents decided under the old regime: To the extent that those precedents declined to investigate the legislature's true motivation, the Court sometimes takes them to have held that the constitutional provisions at issue simply do not impose any purpose-based restrictions.¹⁵ This misunderstanding may have contributed to the incoherence of modern doctrine as to which

THEORY OF JUDICIAL REVIEW 136–48 (1980) (appearing to support judicial inquiry into legislative motivation wherever particular constitutional provisions make it relevant); *see also id.* at 243 n.16 (noting that Brest's paper "in various ways has helped me correct and refine positions taken in my original article").

¹³ *See, e.g.,* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68, 266 n.12 (1977) (invoking Brest); *see also* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1109 (1989) ("It was Brest's purer application of process theory that the Court later cited with approval and followed.").

¹⁴ Compare MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 35 (2004) (noting that by end of nineteenth century, "some precedent existed on both sides of the question of whether legislative motive was relevant to constitutionality," but "the tradition of rejecting motive inquiries was preponderant"), with Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 309–10 (1997) (asserting that "from the time of the Framers at least until the modern period," courts tested constitutionality of federal statutes by seeking to "identif[y] the actual purposes of a given regulation" rather than simply deferring to "facial purpose" stated by Congress itself).

¹⁵ *See, e.g.,* FCC v. Beach Commc'ns, Inc. 508 U.S. 307, 315 (1993) (taking precedents to establish that when coherent reason can be hypothesized for legislative classification that does not trigger heightened scrutiny, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"); Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) (arguing that Free Exercise Clause does not make legislators' subjective motivations relevant, and supporting this claim by citing old cases in which courts declined to investigate such motivations); *see also* Bogan v. Scott-Harris, 523 U.S. 44, 54–55 (1998) (holding unanimously that legislators enjoy absolute immunity from liability in damages for their legislative acts regardless of motivations for those acts, and invoking Court's refusal to inquire into legislative motive in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)); DiMa Corp. v. Town of Hallie, 185 F.3d 823, 828–29 (7th Cir. 1999) (taking Supreme Court precedent to mean that motives behind ordinance are not "relevant" to whether ordinance conflicts with Free Speech Clause).

provisions are concerned with legislative motivations and which are not.¹⁶

To forestall future misunderstandings and to tell a story that is important in its own right, Part I of this Article explores changes over time in American courts' willingness to hold statutes unconstitutional because of the enacting legislature's purposes. Although this story requires some attention to the substance of constitutional interpretation, my primary focus is on the practice of judicial review. That is an important distinction. Figuring out whether particular provisions of the Federal Constitution and its state counterparts impose any purpose-based restrictions on legislative power, and exactly what the restrictions are, requires fine-grained judgments about the meaning of each provision. Those interpretive questions cry out for further study, but they will not receive it here. This Article focuses instead on questions of judicial practice that cut across different provisions. Once particular provisions have been understood to restrict the reasons for which legislatures can validly take certain actions, how should courts determine whether a statute violates those restrictions? What role are courts supposed to play in enforcing purpose-based restrictions on legislative power?

Part I.A describes early practice on these questions. As a matter of constitutional interpretation, early courts and commentators recognized various purpose-based restrictions on legislative power. For much of the nineteenth century, though, those restrictions were not thought to lend themselves to judicial enforcement. Because of the respect that courts owed to legitimate legislative bodies, judges did not believe that they could impute a forbidden purpose to a duly enacted statute unless the face of the statute itself acknowledged that purpose (either explicitly or, perhaps, by leaving no room for any legitimate explanation).

The famous contrast between *Ex parte McCordle*¹⁷ and *United States v. Klein*¹⁸ encapsulates this limitation on judicial review. If the Supreme Court had been willing to look beyond the face of the jurisdiction-stripping statute that it enforced in *McCordle*, it might well have held the statute unconstitutional; although the Constitution empowers Congress to make exceptions to the Supreme Court's appellate jurisdiction, the Constitution does not necessarily authorize Congress to use this power for the sole purpose of insulating a ques-

¹⁶ Cf. Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 35 (2007) (criticizing Supreme Court's "fractured pattern of consideration of purpose").

¹⁷ 74 U.S. (7 Wall.) 506 (1869).

¹⁸ 80 U.S. (13 Wall.) 128 (1872).

tionable federal law from judicial review, and there are strong reasons to believe that Congress enacted the jurisdiction-stripping statute in *McCardle* for precisely that purpose.¹⁹ But as Chief Justice Chase explained without recorded dissent, “[w]e are not at liberty to inquire into the motives of the legislature.”²⁰ By contrast, Chief Justice Chase’s majority opinion in *Klein* held unconstitutional a different statutory proviso that again purported to eliminate some of the Supreme Court’s appellate jurisdiction. While acknowledging that the Court would have had to give effect to the proviso if Congress had “simply denied the right of appeal in a particular class of cases” without saying anything else, Chase maintained that the situation in *Klein* was different: “[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end,” and the Constitution did not authorize Congress to pursue that end.²¹ Modern scholars have puzzled over the alleged tension between these two opinions, written by the same judge less than three years apart. But the tension dissolves once we appreciate the then-prevailing norms of judicial review. Under the doctrine of the day, courts could impute impermissible purposes to a statute when “the language of the proviso” made them clear (as in *Klein*), but not when the imputation required reference to things beyond the face of the statute (as in *McCardle*).²²

Starting around the 1870s, courts broadened their field of vision slightly. Instead of limiting themselves entirely to the face of a statute, judges indicated that they could sometimes infer an impermissible purpose from the statute’s “natural and reasonable effect” as revealed by facts of the sort eligible for judicial notice.²³ As Part I.B notes, though, most courts still refused to impute impermissible pur-

¹⁹ See William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 239–41 (1973) (reciting evidence that Congress was trying to deprive Supreme Court of vehicle for declaring Reconstruction Act of 1867 unconstitutional).

²⁰ *McCardle*, 74 U.S. (7 Wall.) at 514.

²¹ *Klein*, 80 U.S. (13 Wall.) at 145 (concluding that “[the proviso’s] great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have,” and indicating that this purpose was impermissible).

²² See *infra* text accompanying notes 49–50, 64, 75, 84–87. Thus, Professor Clinton is correct to note that “the condemnatory motive was evident on the face of the statute in *Klein* and . . . needed to be derived from obvious contemporary events in *McCardle*,” but he and other modern scholars are wrong to discount the significance of this distinction. See Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1610–11 (1986) (flagging this distinction but not pursuing it, and describing *Klein* as “retrench[ing] somewhat from [*McCardle*]”); see also Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 GEO. L.J. 1, 35 (2002) (suggesting doubt that distinction noted by Professor Clinton could possibly have mattered).

²³ *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 268 (1876).

poses to statutes on the basis of extrinsic evidence introduced by the parties. What is more, courts continued to give the enacting legislature the benefit of every conceivable doubt; if the (limited) information that they were willing to consider left room for any legitimate explanation of a statute, courts typically refused to impute an unconstitutional purpose to the statute. On one contemporary account, indeed, cases like *Plessy v. Ferguson*²⁴ reflected this restriction on judicial review rather than an endorsement, on the merits, of the constitutionality of segregationist legislation enacted for the purpose of racial subordination.²⁵

In the 1920s and early 1930s, the judiciary seemed poised to ratchet up its scrutiny of the animating purposes behind statutes. The Federal Supreme Court firmly embraced the practice of basing inferences about legislative purpose on extrinsic evidence about the real world, and a few Justices seemed open to consulting internal legislative history too. Some of the Justices also applied a somewhat lower standard of proof than their predecessors. When they were sufficiently confident that a statute sprang from an impermissible purpose, they were willing to say so even if some other explanation was theoretically possible.

After the mid-1930s, however, the Court retreated from this facet of the *Lochner* era just as it retreated from others. Part of the retreat stemmed from reinterpretation of the Constitution itself. For instance, the Commerce Clause—which the Court had previously read as empowering Congress to act only for commerce-related ends—was now read as giving Congress “plenary” power to act upon things in interstate commerce: Except to the extent that other constitutional provisions restricted this power, Congress could regulate the passage of goods in interstate commerce for any reason at all (including reasons that had nothing to do with promoting commerce).²⁶ But even where constitutional provisions were still understood to impose purpose-based restrictions on legislative power, judges of the 1940s and 1950s recognized serious limitations on their ability to enforce those restrictions. Part I.C observes that, notwithstanding the increasing importance of legislative history in statutory interpretation, judges of this era shied away from using information about the internal legislative process to condemn the enacting legislature’s moti-

²⁴ 163 U.S. 537 (1896).

²⁵ See *infra* text accompanying notes 136–40.

²⁶ *United States v. Darby*, 312 U.S. 100, 114–16 (1941). *But cf.* Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1298–1300 (2003) (noting that *Darby* leaves room for purpose analysis when congressional action rests on Necessary and Proper Clause rather than on Commerce Clause alone).

vations. When assessing other information about a statute's purposes, moreover, judges restored the standard of proof that had prevailed before the 1920s.

In the 1960s, a smattering of opinions contained hints that courts conducting judicial review might be able to go further in investigating the actual motivations behind a statute than previous cases had allowed.²⁷ At first, such suggestions were sporadic, and the Warren Court disavowed them in other cases.²⁸ But in the 1970s and early 1980s, the Burger Court decisively associated judicial review under various constitutional provisions with the search for impermissible legislative purposes, and it saw nothing wrong with having the judiciary identify those purposes by investigating the internal legislative process. As Part I.D describes, modern courts stand ready to enforce a broad variety of purpose-based restrictions on legislative power by examining the available legislative history and even by taking testimony about the legislature's deliberations.

This Article's main goals are simply to identify the relevant periods and to trace changes over time in judicial review of legislative purpose. Part I is therefore the heart of the project. In Part II, though, I speculate briefly about connections between the history and other doctrines of interest to modern lawyers.

The most important application of the history is obvious: Courts cannot properly decide modern cases without adequately understanding their precedents, and courts cannot adequately understand their precedents without appreciating the shifts over time in judicial review of legislative purpose. To take a simple example, when Chief Justice Chase refused to investigate the motives behind the jurisdiction-stripping statute in *McCardle*, he was not necessarily holding that the Constitution authorizes Congress to enact such statutes for any and all purposes. Whatever might be said on both sides of that question of constitutional interpretation, Chase did not reach it; rather than affirmatively concluding that Congress had behaved

²⁷ See *infra* note 227 (discussing *Griffin v. County School Board*, 377 U.S. 218 (1964)); see also *McGowan v. Maryland*, 366 U.S. 420, 453 (1961) (rebuffing Establishment Clause challenge to Sunday-closing law, but suggesting that such legislation might be held unconstitutional "if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion"); cf. *Epperson v. Arkansas*, 393 U.S. 97, 107, 108 & n.16 (1968) (holding that statute adopted by popular initiative to forbid state's public schools from teaching theory of evolution amounted to impermissible establishment of religion, and quoting newspaper advertisements used in public campaign to show that "fundamentalist sectarian conviction was and is the law's reason for existence").

²⁸ See *supra* notes 5–6 and accompanying text (discussing Court's refusal in *O'Brien* and *Palmer* to investigate motive or purpose behind law).

constitutionally, he was following then-prevailing norms about the practice of judicial review. If modern courts accept the changes that have occurred since 1869 in those norms, *McCardle* is not a powerful precedent about the substantive meaning of the Constitution.²⁹

But rather than dwelling on the proper interpretation of particular precedents, Part II looks for less obvious applications of the history described in Part I. Without pretending to be comprehensive, it highlights three different categories of applications.

First, the history helps explain apparent inconsistencies over time in doctrines that implicate purpose-based restrictions on legislative power. To illustrate this potential use of the history, Part II.A shows how the development of the doctrine of “unconstitutional conditions” tracks the rise of judicial review of legislative purpose. In addition to confirming that the unconstitutional-conditions doctrine is partly about the purposes behind statutes, this linkage suggests that at least some of the doctrine’s famed murkiness stems from changes over time in the courts’ willingness to scrutinize those purposes.

Second, the history shows how norms about the practice of judicial review can affect the substantive glosses that courts put on the Constitution. As an example, Part II.B links the developments described in Part I with changes in the nature of the restrictions that courts understood the Constitution to impose on state power. Early on, when courts were not supposed to investigate the hidden purposes behind legislative acts, they sometimes sought to minimize the risk of legislative duplicity by reading the Constitution to establish categorical rules that they could enforce without regard to legislative purpose. As judicial review of legislative purpose expanded, those categorical rules lost some of their appeal, and courts modified them accordingly. Thus, the history described in Part I helps us understand both the bright-line rules of early constitutional jurisprudence and the erosion of those rules in the twentieth century.

Third, the history may also help explain some otherwise puzzling aspects of modern judicial rhetoric. In particular, the recent upsurge in judicial review of legislative purpose provides a partial answer to a

²⁹ Similarly, modern courts should not cite precedents from the early 1900s as holding that the Constitution allows Congress to design taxes for the purpose of affecting conduct in areas that Congress cannot regulate more directly. *See, e.g.,* *United States v. Rogers*, 270 F.3d 1076, 1080 (7th Cir. 2001) (“Long ago the Supreme Court held that the taxing power may be employed to achieve a regulatory end.” (citing *McCray v. United States*, 195 U.S. 27 (1904), and *United States v. Doremus*, 249 U.S. 86 (1919))). Whatever the Constitution should now be understood to say about the interplay between Congress’s powers of taxation and Congress’s other enumerated powers, the old precedents were driven by limitations on judicial review. *See infra* text accompanying notes 151–62 (discussing *McCray*); *infra* note 186 (discussing *Doremus*).

question posed by Gillian Metzger: Why does the Supreme Court persist in suggesting that “facial” challenges to statutes hardly ever succeed, when the results of actual cases tell a different story?³⁰ In modern practice, one of the main reasons to hold a statute invalid “on its face” is that the statute was enacted for an unconstitutional purpose, which taints all of its possible applications. Part II.C suggests that the Court’s rhetoric about the rarity of successful facial challenges is a relic of past restrictions on such purpose-based inquiries.

No one should be surprised that the history described in Part I sheds light on such a diverse array of subjects. After all, there is growing agreement that purpose-based restrictions on legislative power play a central role in modern constitutional jurisprudence. A comprehensive study of the history of judicial review of legislative purpose is therefore overdue.

I

THE HISTORY OF JUDICIAL REVIEW OF LEGISLATIVE PURPOSE

A. *From the Early Republic to the 1870s*

If one’s sense of the general jurisprudence of judicial review in antebellum America comes entirely from the canonical cases that are excerpted in modern Constitutional Law casebooks, one might not detect much difference between judicial review of legislative purpose in the early nineteenth century and judicial review of legislative purpose today. In *M’Culloch v. Maryland*,³¹ for instance, Chief Justice Marshall stressed that the Necessary and Proper Clause did not authorize Congress to charter a corporation “in any case whatever,” but “only for the purpose of carrying into execution the given powers.”³² Having identified this purpose-based restriction on legislative power, moreover, Marshall strongly suggested that it was subject to some form of judicial enforcement:

[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government[,] it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.³³

³⁰ Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 878–79 (2005).

³¹ 17 U.S. (4 Wheat.) 316 (1819).

³² *Id.* at 421–22.

³³ *Id.* at 423.

In modern times, this sentence has come to be known as the “pre-text passage,” and it has become one of the most famous lines in *M’Culloch*. But it was not similarly prominent in antebellum jurisprudence. Indeed, electronic databases suggest that neither Chief Justice Marshall nor any other American jurist ever quoted the pretext passage in a single reported opinion issued before 1870. The passage’s practical insignificance to antebellum courts can be attributed to two facts. First, even when particular provisions of the Federal Constitution or one of its state counterparts made the purpose behind a statute relevant to the statute’s constitutionality, antebellum judges did not think that courts could properly peer into the black box of the legislative process; as far as the courts were concerned, any conclusions about the true purposes behind a statute had to be based on a limited amount of information, consisting chiefly of the statute itself. Second, antebellum courts insisted upon a high degree of certainty before they would impute impermissible purposes to a duly enacted statute. If any other explanation for the statute was consistent with the limited amount of information that the courts were willing to consider, judges were supposed to give the enacting legislature the benefit of the doubt.

1. *Fletcher v. Peck and Its Progeny*

Both these features of antebellum jurisprudence are apparent in *Fletcher v. Peck*,³⁴ another canonical opinion by Chief Justice Marshall. In 1795, the Georgia legislature had directed state officials to sell four enormous tracts of public land to four private companies at specified prices.³⁵ Members of the interested companies may well have won passage of this statute by giving individual legislators either cash or shares in the companies, and the sale quickly became a scandal.³⁶ In 1796, a new crop of legislators purported to declare that the 1795 statute was “null and void” because it had been “fraudulently obtained” and because the state constitution authorized the legislature to enact statutes only “for the good of the State.”³⁷ Meanwhile, though, the private companies had been selling the land off to other speculators,³⁸ and these third-party purchasers maintained that the

³⁴ 10 U.S. (6 Cranch) 87 (1810).

³⁵ Act of Jan. 7, 1795, 1795 Ga. Acts 3, 4–5, reprinted in 2 THE FIRST LAWS OF THE STATE OF GEORGIA 557–66 (John D. Cushing ed., 1981).

³⁶ C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC—THE CASE OF *FLETCHER v. PECK* 6–8 (1966).

³⁷ Act of Feb. 13, 1796, 1796 Ga. Acts 1, 1–2, 5, reprinted in MAGRATH, *supra* note 36, app. B, at 127, 129, 136.

³⁸ MAGRATH, *supra* note 36, at 15–19.

1795 statute was a solid foundation for their chains of title.³⁹ To secure a judicial declaration in support of this position, the buyer of one parcel (Fletcher) ultimately sued his predecessor in title (Peck).⁴⁰ At least in the context of such a suit, Chief Justice Marshall agreed that the judiciary could not “enter into an inquiry” about whether bribery lay behind the 1795 statute. In Marshall’s words, a court of law “cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.”⁴¹ Consistent with this idea, nineteenth-century courts recognized a broad rule against entertaining challenges to statutes on the theory that the enacting legislators had been bribed.⁴²

³⁹ See ROBERT GOODLOE HARPER, *THE CASE OF THE GEORGIA SALES ON THE MISSISSIPPI CONSIDERED* 53 (Philadelphia, Benjamin Davies 1797) (“[I]t is believed that a legislative act can never be invalidated on account of the motives from which it may have been agreed to by individual members: that those motives can never be brought into question.”); MEMORIAL OF THE AGENTS OF THE NEW ENGLAND MISSISSIPPI LAND COMPANY TO CONGRESS, WITH A VINDICATION OF THEIR TITLE AT LAW ANNEXED 55–58 (Washington, A. & G. Way 1804) (asking whether “the *motives* which induced a legislature to pass an act [can] be questioned or traversed before any tribunal,” and advocating negative answer).

⁴⁰ See MAGRATH, *supra* note 36, at 54–55 (noting that “the case of Fletcher against Peck was . . . an arranged case between friendly ‘adversaries’ acting on behalf of the New England Mississippi Land Company,” a third-party purchaser of 11 million acres).

⁴¹ Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 131 (1810).

⁴² See, e.g., McCulloch v. State, 11 Ind. 424, 431 (1859) (“We know of no principle or authority upon which an issue of that character can, in any case, be tried before a judicial tribunal.”); State *ex rel.* Belden v. Fagan, 22 La. Ann. 545, 548 (1870) (“[C]ourts are without warrant in law to go behind an enrolled and duly authenticated and promulgated public statute to inquire into the motives which may have influenced or actuated the members of the General Assembly in enacting laws.”), *aff’d on other grounds sub nom.* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); State v. Cardozo, 5 S.C. 297, 312 (1874) (“[A]ny wrong or improper motive on the part of the Legislature in the particular enactment . . . is beyond the control of the judicial department. . . . Public and proper motives are alone to be attributed to the Legislature.”); Slack v. Jacob, 8 W. Va. 612, 634–40 (1875) (citing many authorities against judicial investigation of legislative motive, and concluding that “we have no authority to inquire into or set aside an act of the Legislature for alleged fraud on the part of the Legislature”). Judge Cooley’s treatise reports that practice was uniform on this point:

[A]lthough it has sometimes been urged at the bar, that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon.

THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 187 (Boston, Little, Brown & Co. 1868).

Admittedly, Chief Justice Marshall did not state the rule quite so broadly in *Fletcher v. Peck* itself. For instance, he did not address whether the judiciary could have taken evi-

One possible explanation for this rule is that allegations of fraud or bribery were simply irrelevant: Even if all the legislators who supported a statute did so entirely because they had been bribed, perhaps their corrupt motives had no bearing on the validity of the resulting law. But Chief Justice Marshall did not take that position. To the contrary, he specifically reserved judgment about “how far the validity of a law depends upon the motives of its framers.”⁴³ His point was not that the 1795 statute was necessarily valid in some theoretical sense, but simply that it would be “indecent” for the courts to investigate whether the legislature had acted upon impermissible motives.⁴⁴

Antebellum courts expressed similar views about the scope of judicial review more generally.⁴⁵ Consider the classic case of *Hoke v. Henderson*,⁴⁶ decided by the Supreme Court of North Carolina in 1833. *Hoke* held that the state’s clerks of court enjoyed a limited property right in their offices; while the legislature could abolish those offices entirely, it could not eject the existing clerks and call for the election of new ones.⁴⁷ As the court understood the state constitution, moreover, the legislature could not validly use its admitted power over other aspects of the clerks’ offices for the purpose of circumventing this restriction. For instance, although the legislature controlled the fees that the clerks could charge for their services, the state constitution forbade the legislature to use this power “for the indirect

dence about the motivations behind the 1795 statute if an appropriate suit had been brought in equity (rather than at law) or if the plaintiff had been the state government itself (rather than a private individual). These potential qualifications, however, may well have reflected the peculiarities of land-grant cases. If a land speculator bribed the agent for a private landowner to sell him the principal’s land at a bargain price, the landowner could presumably sue the purchaser for rescission of the transaction (if the purchaser still held the land) or damages (if the purchaser had transferred the land to an innocent third party). When the landowner who has been defrauded is the government rather than a private individual, perhaps the government has the same rights of action. If Chief Justice Marshall simply meant to leave open this possibility, so that the rule against judicial inquiries into legislative motive did not put the government in a worse position than ordinary landowners when the government itself wanted courts to investigate fraud in a proprietary transaction, then the potential qualifications in his opinion did not extend very far.

⁴³ *Fletcher*, 10 U.S. (6 Cranch) at 130.

⁴⁴ *Id.* at 131.

⁴⁵ See, e.g., *Whittington v. Polk*, 1 H. & J. 236, 246 (Md. Gen. Ct. 1802) (“The motives which may induce the legislature to pass a law cannot be inquired into by the court in a question as to its constitutionality”); see also *Ellis v. Marshall*, 2 Mass. (1 Tyng) 269, 273–74 (1807) (argument of counsel) (“[N]o court has a right to enquire into the . . . motive of passing an act or law, which, under any conceivable circumstances, [the legislature] might be authorized to pass.”).

⁴⁶ 15 N.C. (4 Dev.) 1 (1833), *overruled in part by* *Mial v. Ellington*, 46 S.E. 961 (N.C. 1903).

⁴⁷ *Id.* at 17–26.

purpose of expelling [the existing clerks] by starvation.”⁴⁸ Still, the court acknowledged strict limitations on the judiciary’s ability to enforce this purpose-based restriction on the legislature’s power. If a statute did not itself declare its purpose,⁴⁹ and if the legislature could validly enact the statute for one reason but not another, the judiciary had to assume that the legislature had acted properly. Even if the legislature had in fact enacted the statute for a forbidden reason, a court would not be able to reach that conclusion, for “the court . . . cannot enquire into motives not avowed.”⁵⁰ Thus, the court would have to give effect to the statute—“not because it was constitutional[,] but because the court could not see its real character, and therefore could not see that it was unconstitutional.”⁵¹

2. *The Controversy over Protective Tariffs*

For evidence that this position enjoyed widespread acceptance in antebellum America, one need look no further than the great debate over protective tariffs. As early as the Washington Administration, Congress had taxed some foreign imports at least partly for the purpose of promoting domestic industry.⁵² In the 1820s, however, protective tariffs became a source of enormous sectional strife. As Joseph Story wrote in 1833, the controversy over protective tariffs “agitates all America, and marks the divisions of party by the strongest lines, both geographical and political, which have ever been seen since the establishment of the national government.”⁵³ Much of the debate was driven by practical economic concerns: Because manufacturers were concentrated in the North, while the South’s economy relied on agricultural exports to foreign countries, protective tariffs were seen as burdening Southern interests to prop up Northern industries.⁵⁴ But the debate also involved constitutional claims about the purposes for which Congress could validly impose taxes and regulate foreign commerce.

⁴⁸ *Id.* at 26.

⁴⁹ *Cf. id.* (noting that court could hold statute unconstitutional on grounds of impermissible purpose “[i]f the purpose were declared in the law in such terms, that the Court could say, that the act was passed upon no other”).

⁵⁰ *Id.*

⁵¹ *Id.* at 27.

⁵² DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829*, at 283–84 (2001).

⁵³ 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 520 (Boston, Hilliard, Gray & Co. 1833).

⁵⁴ *See* EXPOSITION REPORTED BY THE SPECIAL COMMITTEE (1828), *reprinted in* 10 *THE PAPERS OF JOHN C. CALHOUN* 445, 449 (Clyde N. Wilson & W. Edwin Hemphill eds., 1977) [hereinafter *CALHOUN PAPERS*] (“So partial are the effects of the system, that its burdens are exclusively on one side and its benefits on the other.”).

Defenders of the constitutionality of protective tariffs argued that there were relatively few purpose-based restrictions on these powers. With respect to taxation, the Constitution explicitly authorizes Congress “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁵⁵ Defenders understood these words to mean that Congress could impose taxes for any purpose that it saw as promoting the general welfare,⁵⁶ and they did not limit their definition of “taxes” to measures that were primarily intended to raise revenue.⁵⁷ As for the power to regulate foreign commerce, defenders argued that nations had traditionally used this power to protect domestic manufacturers and that Congress could do likewise.⁵⁸

More generally, defenders of protective tariffs denied that either members of Congress or subsequent decisionmakers should base their assessment of a statute’s constitutionality on the subjective reasons that led legislators to support the statute. As Justice Story put it, a statute’s provisions either were within Congress’s power to enact or they were not, but any determination on that score had to rest entirely on objective factors; it would be “novel and absurd” to suggest that “the same act passed by one legislature will be constitutional, and by another unconstitutional,” depending upon the mindset with which the legislature had acted. “The motive to the exercise of a power,” Story concluded, “can never form a constitutional objection to the exercise of the power.”⁵⁹

Opponents of protective tariffs understood the Constitution both to impose more restrictions on permissible legislative purposes and to make subjective motivation more relevant to the constitutional responsibilities of individual legislators. In their view, the Commerce Clause did not authorize Congress to enact laws either for the purpose of constricting commerce or for the purpose of promoting interests other than commerce.⁶⁰ As they read the Tax Clause, moreover, it empowered Congress to impose tariffs only for the purpose of col-

⁵⁵ U.S. CONST. art. I, § 8, cl. 1.

⁵⁶ WILLIAM ALEXANDER DUER, *A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES, DELIVERED ANNUALLY IN COLUMBIA COLLEGE, NEW-YORK 173–78* (New York, Harper & Bros. 1843).

⁵⁷ See 2 STORY, *supra* note 53, at 433–35 (indicating that measures designed for other purposes can also qualify as “Taxes, Duties, Imposts and Excises”).

⁵⁸ *Id.* at 523–26.

⁵⁹ *Id.* at 533.

⁶⁰ See, e.g., PROCEEDINGS OF THE CONVENTION OF SOUTH CAROLINA UPON THE SUBJECT OF NULLIFICATION 15 (Boston, Beals, Homer & Co. 1832) (“[A]s the power to regulate commerce, conferred expressly for its security, cannot be fairly exerted for its destruction, so neither can it be perverted to the purpose of building up manufacturing establishments—an object entirely beyond the jurisdiction of the Federal Government.”).

lecting revenue.⁶¹ To be sure, when evaluating different proposed tariffs, Congress could take domestic economic effects into account; as long as it was genuinely seeking to raise revenue, Congress could structure tariffs to have the incidental effect of protecting American manufacturers.⁶² But opponents of protective tariffs argued that the Constitution did not authorize members of Congress to flip these priorities. In their view, a tariff that was designed primarily to protect domestic industry from foreign competition, and that treated the reduction of foreign imports (and therefore the tax base) as an affirmative goal rather than an unfortunate side effect, amounted to an unconstitutional perversion of the powers that Congress had been granted.⁶³

Strikingly, though, *even the Southern lawyers and politicians who took this position conceded that the judiciary could not refuse to enforce a tariff statute on this basis*. As John Calhoun put it in the manifesto that he drafted against the protective tariff of 1828, “[t]he Courts can not look in the motives of legislators,” but instead “are obliged to take acts by their titles and professed objects[;] and if these be Constitutional, [courts] cannot interpose their power, however grossly the acts may, in reality, violate the Constitution.”⁶⁴ Indeed, precisely because of this acknowledged limitation on the practice of judicial review, Calhoun and his allies saw statutes enacted for unconstitutional purposes as the “most dangerous” type of unconstitutional behavior: While other violations of the Constitution “cannot be perpetrated without the aid of the judiciary,” the perversion of granted powers to unconstitutional purposes could be accomplished “by the

⁶¹ *Id.* at 14.

⁶² See ADDRESS OF THE FREE TRADE CONVENTION TO THE PEOPLE OF THE UNITED STATES 2 (Washington, J. Heart 1831) (noting that people who opposed federal tariff of 1828 “admit the power of Congress to lay and collect such duties as [Congress] may deem necessary for the purposes of revenue, and within these limits so to arrange those duties as incidentally, and to that extent, to give protection to the manufacturer”); Letter from John C. Calhoun to Samuel Smith (July 28, 1828) (agreeing that “Congress may undoubtedly take into consideration the effect of any particular measure proposed on the industry of the country,” but insisting that “all such regulations must be the incident of acts really intended to raise revenue, or regulate commerce,” and adding that Congress cannot constitutionally “convert[] the incident into the principal”), *quoted in* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861, at 90 (2005).

⁶³ EXPOSITION REPORTED BY THE SPECIAL COMMITTEE, *supra* note 54, *reprinted in* 10 CALHOUN PAPERS, *supra* note 54, at 445, 447.

⁶⁴ Rough Draft of What is Called the South Carolina Exposition (1828) [hereinafter Rough Draft], *in* 10 CALHOUN PAPERS, *supra* note 54, at 444, 446; *accord* ADDRESS OF THE FREE TRADE CONVENTION TO THE PEOPLE OF THE UNITED STATES, *supra* note 62, at 2 (agreeing that courts had to judge each statute “by its terms, and by what is apparent on its face,” but arguing that members of Congress were honor-bound not to take advantage of this limitation on judicial review).

executive and Legislative Departments alone.”⁶⁵ In the debate over protective tariffs, then, *both sides* agreed that courts could not inquire into the true goals that a statute was designed to achieve (except to the extent that the statute revealed those goals on its face).⁶⁶

3. *The Dormant Commerce Clause and Similar Restrictions on State Legislatures*

Just as opponents of protective tariffs understood the Constitution to restrict the purposes for which the Federal Congress could legitimately impose tariffs, so too some antebellum judges understood the Constitution to limit the purposes for which state legislatures could enact statutes with certain kinds of effects on interstate or foreign commerce. Again, though, even judges who took this view of the Constitution recognized important limitations on the judiciary’s ability to enforce it.

Chief Justice Marshall’s seminal opinion in *Gibbons v. Ogden*⁶⁷ provides the essential background for this issue. In elaborate dicta, Marshall expressed sympathy for the idea that either the Commerce Clause itself or the statutory scheme that Congress had enacted under its authority might implicitly strip states of the power to regulate interstate and foreign commerce.⁶⁸ Marshall conceded, however, that the states unquestionably retained authority to enact “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c.”⁶⁹ Although such laws might have “considerable influence on [interstate and foreign] commerce,” Marshall indicated that they were not themselves regulations of such com-

⁶⁵ Rough Draft, *supra* note 64, in 10 CALHOUN PAPERS, *supra* note 54, at 446; *see also*, e.g., *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 27 (1833) (observing that use of legislative power for forbidden purpose “is a gross and wicked infraction of the Constitution; and the more so, because the means resorted to, deprive the injured person, and are designed to deprive him of all redress, by preventing the question becoming the subject of judicial cognizance”).

⁶⁶ This acknowledged limitation on judicial review may have been one of the catalysts for Calhoun to develop his theory of extrajudicial “nullification”—the idea that the people of each state, exercising the same sovereignty that they had exercised when they adopted the Federal Constitution, could “pronounce, in the last resort, authoritative judgment” on the unconstitutionality of federal measures like the tariff act. PROCEEDINGS OF THE CONVENTION OF SOUTH CAROLINA UPON THE SUBJECT OF NULLIFICATION, *supra* note 60, at 29.

⁶⁷ 22 U.S. (9 Wheat.) 1 (1824).

⁶⁸ *Id.* at 200–09.

⁶⁹ *Id.* at 203.

merce; they had a different “object,” and their effect on interstate or foreign commerce was “remote” (in the sense of being indirect).⁷⁰

Subsequent jurists struggled to describe exactly what differentiated state quarantine and inspection laws (which were permissible) from state regulations of interstate commerce (which might not be). Judge William Harper of South Carolina, who was a leading figure in the then-raging debate about protective tariffs,⁷¹ gravitated toward a purpose-based account. In his view, the only way to reconcile measures such as quarantine laws with the dormant Commerce Clause was to notice “that they were *in good faith intended*, not to regulate commerce, but for the internal security of the State, or other municipal purpose, and that their interference with commerce is only *incidental*.”⁷² By the same token, Judge Harper argued that courts reviewing the constitutionality of a state statute imposing a one-percent tax on dividends paid on stock in the Bank of the United States should ask “whether the imposition . . . is, *in good faith, a tax*, or whether, under the guise of a tax, a *penalty* was intended to be inflicted, with a view to the suppression of the Bank.”⁷³ While Harper knew that his proposed approach would be criticized as “giv[ing] to Courts a dangerous latitude of construction, in determining on the *intention* of the legislature,” and while he conceded that it was often desirable for the rules administered by courts to be more “precise, technical, [and] artificial,” he insisted that precise rules were “not always practicable” and that courts could not categorically rule out inquiries of the sort he proposed.⁷⁴

But even Judge Harper acknowledged substantial limitations on the judiciary’s ability to impute impermissible purposes to statutes. He considered it obvious that courts “cannot go into evidence to determine . . . by what motives members of the legislature were actuated in passing the law,” but instead “must determine the intention from the terms of the law itself.”⁷⁵ What is more, he assumed that courts had to indulge a presumption in favor of the legislature’s good faith. “If the unconstitutional intention cannot be detected,” he

⁷⁰ *Id.*; see also *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 251–52 (1829) (Marshall, C.J.) (upholding state law that authorized company to construct dam across previously navigable creek, and noting that law was calculated to increase value of neighboring land and to promote inhabitants’ health).

⁷¹ See 8 *DICTIONARY OF AMERICAN BIOGRAPHY* 287 (Dumas Malone ed., 1932) (noting that Judge Harper wrote South Carolina’s nullification ordinance, adopted by convention in 1832).

⁷² *State ex rel. Berney v. Tax Collector*, 18 S.C.L. (2 Bail.) 654, 674 (Ct. App. 1831).

⁷³ *Id.*

⁷⁴ *Id.* at 674–75.

⁷⁵ *Id.* at 676.

wrote, “the law must have effect. [Judges] cannot declare a law void, on a doubtful question of constitutionality; and it is only where the intention is apparent, that this interference can take place.”⁷⁶

Some other antebellum jurists also spoke of the dormant Commerce Clause as restricting the purposes for which states could enact statutes.⁷⁷ But they were no more aggressive than Judge Harper about enforcing such restrictions. Antebellum judges who understood the dormant Commerce Clause as a restriction on legislative purpose almost invariably *upheld* the state laws that they were reviewing.⁷⁸

Tellingly, the antebellum jurists who envisioned robust judicial enforcement of the dormant Commerce Clause were those who understood the Clause to impose some restrictions that were *not* purpose-based. In keeping with his position in the debate over protective tariffs, Joseph Story was a leading member of this camp. In his view, certain measures amounted to “regulation[s] of commerce” no matter why the state had enacted them, and the Constitution stripped

⁷⁶ *Id.* (acknowledging that “many laws may be passed, in which it will be impossible to detect the true intention,” and indicating that courts would have to enforce such laws).

⁷⁷ See, e.g., *Pierce v. State*, 13 N.H. 536, 580 (1843) (opinion of Parker, C.J.) (emphasizing “the end designed and to be accomplished”), *aff’d on other grounds sub nom.* *The License Cases*, 46 U.S. (5 How.) 504 (1847); cf. *Crow v. Missouri*, 14 Mo. 237, 246 (1851) (argument of counsel) (noting that “[t]he motive” of state laws “has been sometimes considered the test of constitutionality” under the dormant Commerce Clause). By contrast, Chief Justice Taney (who denied that the Commerce Clause restricts state power at all) specifically observed that any purpose-based restrictions would not be enforceable in court:

[W]hen the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

The License Cases, 46 U.S. (5 How.) at 583 (opinion of Taney, C.J.).

⁷⁸ See, e.g., *Commonwealth v. Kimball*, 41 Mass. (24 Pick.) 359, 359, 363 (1837) (upholding statutory ban on unlicensed retailers of “spirituous liquors” as means “to prevent the evils of vice, riot, pauperism, and the temptation to crime”); *City of St. Louis v. Boffinger*, 19 Mo. 13, 15–17 (1853) (upholding period of waiting and cleaning for northbound steamboats as means “to guard against the introduction of disease into the city,” and refusing to “undertake to determine whether some other measure, interfering less with commerce, could not as well have accomplished the object”); cf. *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 312 (1852) (“[W]e cannot pronounce [the challenged law] to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one.”). *But cf.* *Chapman v. Miller*, 29 S.C.L. (2 Speers) 769, 777 (1844) (observing that while “[i]t is not the province of this court to enquire into the designs of legislative enactments, or the motives of those who make them,” the “very language” of challenged statute reflected impermissible attempt “to give a preference, in the harbor of Charleston, to coasting vessels of one State over those of the other States”).

the states of power to enact such measures to the extent that the commerce being regulated was interstate or foreign.⁷⁹

The famous case of *Norris v. City of Boston*, which reached the Supreme Court as one of the *Passenger Cases*, illustrates the dynamics of this debate.⁸⁰ In 1837, a Massachusetts statute required the masters or owners of vessels that arrived at any port or harbor in Massachusetts from outside the state to pay two dollars for every “alien passenger[]” who proposed to disembark, with the proceeds going into the port city’s treasury “for the support of foreign paupers.”⁸¹ When a shipmaster brought a challenge based on the dormant Commerce Clause, Chief Justice Lemuel Shaw of the state’s highest court understood the necessary analysis to focus on “the object and purpose” of the challenged statute, and he duly upheld the statute; while expressing his willingness to set aside any state law whose “real object . . . , as manifested by its provisions,” was to regulate interstate or foreign commerce, Shaw saw no reason to doubt that “the real and sole object of this law, on the part of the legislature, was in good faith to carry into effect that part of the poor laws of the State, which provides relief for every suffering member of the human family . . . , including the foreigner.”⁸² By contrast, the Federal Supreme Court understood the dormant Commerce Clause to impose some restrictions that were not purpose-based, and it reversed Shaw’s judgment because the statute ran afoul of those restrictions: According to a majority of the Justices, a state could not impose a blanket tax on all passengers in foreign commerce, regardless of its motivation for doing so.⁸³

⁷⁹ *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 156 (1837) (Story, J., dissenting) (“A state cannot make a regulation of [interstate or foreign] commerce, to enforce its health laws”); see also 2 STORY, *supra* note 53, at 514–15 (discussing distinction between impermissible “regulations of commerce” and permissible “regulations of . . . police”).

⁸⁰ 45 Mass. (4 Met.) 282 (1842), *rev’d sub nom.* *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

⁸¹ Act of Apr. 20, 1837, ch. 238, § 3, 1837 Ma. Laws 270, 270–71.

⁸² *Norris*, 45 Mass. (4 Met.) at 291–93 (indicating that in evaluating state laws under dormant Commerce Clause, “we look . . . to the ends to be attained, [rather] than to the particular enactments by which they are to be reached”).

⁸³ *The Passenger Cases*, 48 U.S. (7 How.) at 404, 410 (opinion of McLean, J.) (indicating that tax charged for each passenger transported in interstate or foreign commerce, and collected before passengers could land, amounted to “a regulation of [interstate or foreign] commerce”); *id.* at 414–15 (opinion of Wayne, J.) (asserting that “any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the [Commerce Clause],” though distinguishing cost-based charges for detaining and purifying quarantined ship); *id.* at 447 (opinion of Catron, J.) (agreeing that “the ‘object’ for which [the challenged tax] was imposed” did not save it). *But cf. id.* at 571–72 (Woodbury, J., dissenting) (endorsing Chief Justice Shaw’s focus on “the object and motive of the State” and voting to uphold statute).

Just as statutes easily survived purpose-based inquiries under the dormant Commerce Clause, so too they survived such inquiries in other areas of constitutional law. Across the entire domain of constitutional law, I am aware of no antebellum cases in which a court refused to credit a legislature's declared purposes and imputed impermissible objectives to a statute that the court would have upheld if it had genuinely been enacted for the reasons recited on its face. To the contrary, the conventional wisdom in antebellum America was that "[i]f a given act of legislation is not forbidden by express words, or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it are not the real ones."⁸⁴ And while jurists were willing to set aside statutes that either candidly acknowledged their unconstitutional purposes⁸⁵ or (perhaps) otherwise foreclosed any innocent explanation by their very language,⁸⁶ most statutes that said nothing about their goals were effectively insulated from purpose-based judicial review. In the words of the Supreme Judicial Court of Massachusetts, if a statute seemed likely to produce any legitimate public benefit, "then we are bound to suppose that the act was passed in order to effect it."⁸⁷

In the influential treatise that he published shortly after the Civil War, the distinguished judge Thomas Cooley summarized the prevailing jurisprudence on this point. At least from the perspective of

⁸⁴ *People ex rel. Wood v. Draper*, 15 N.Y. 532, 545 (1857).

⁸⁵ See *supra* note 49 and text accompanying note 64.

⁸⁶ The separate opinions in *People ex rel. Vermule v. Bigler*, 5 Cal. 23 (1855), reflect disagreement about whether courts could impute impermissible purposes to a statute that did not acknowledge them, but whose text nonetheless made them apparent. Chief Justice Murray took the narrow view:

I know of no authority this Court possesses to inquire into the motives of the Legislature in the passage of any law; on the contrary, it has been uniformly held, that they could not be inquired into. What difference is there in this Court attempting to investigate the conduct of individual members of the Legislature, for the purpose of declaring a law void, and in assuming, from the letter of the statute itself, that the Legislature was actuated by other than correct motives[?]

Id. at 26–27 (opinion of Murray, C.J.). Justice Heydenfeldt's dissent understood the courts to have slightly more power: "It has been said that we cannot inquire into the motives of the Legislature in making a law, but this is not correctly stated for a legal proposition. The true rule is, that we cannot go behind the Act to do so." *Id.* at 34 (Heydenfeldt, J., dissenting).

⁸⁷ *Talbot v. Hudson*, 82 Mass. (16 Gray) 417, 424 (1860) (noting that this presumption applied "in the absence of any declared purpose"); see also *Draper*, 15 N.Y. at 545 ("If the act can be upheld upon any views of necessity or public expediency, which the legislature may have entertained, the law cannot be challenged in the courts."); *State ex rel. Haswell v. Cram*, 16 Wis. 343, 347 (1863) (rejecting idea that statute's validity in court could "depend on the motives of the framers" or on whether "the voting majority had [a] sinister purpose," and calling this idea "a principle of adjudication which has been often repudiated and never once sustained").

the courts, he observed, “it appears that whether a statute is constitutional or not is always a question of power,” and that “the courts are not at liberty to inquire into the proper exercise of the power.”⁸⁸ If the legislature was authorized to enact a particular statute under certain conditions, courts were required to “assume that legislative discretion has been properly exercised”⁸⁹ and could not “form an issue to try by what motives the legislature were governed in the enactment of a law.”⁹⁰

⁸⁸ COOLEY, *supra* note 42, at 186.

⁸⁹ *Id.* at 186–87.

⁹⁰ *Id.* at 187 n.4 (quoting *Wright v. Defrees*, 8 Ind. 298, 302–03 (1856)). Contemporaneous decisions of the Federal Supreme Court reflect the same understanding. In addition to *Ex parte McCordle*, discussed *supra* text accompanying notes 17–20, consider *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869). In conjunction with federal statutes authorizing a national currency, Congress had required banks to pay a stiff tax on any state bank notes that they used for circulation. The Veazie Bank of Maine urged the Court to hold that the statute was not genuinely designed to raise revenue and therefore exceeded Congress’s constitutional authority to lay and collect taxes; according to the bank, the imposition was “so excessive as to indicate a purpose on the part of Congress” simply to stamp out state bank notes. *Id.* at 548. Given the circumstances, this understanding of Congress’s true purposes was almost certainly correct. Even so, the Supreme Court held that it simply could not entertain the bank’s argument that Congress had imposed the challenged “tax” for some reason other than raising revenue. On questions of this sort, the Court indicated, “the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.” *Id.* Although the majority went on to hold that Congress had not needed to rely upon the taxing power and that other constitutional provisions gave Congress direct authority to discourage or prohibit state bank notes, *id.* at 548–49, the Court apparently would have refused to investigate the bona fides of Congress’s purported tax even if the majority had understood Congress’s other powers more narrowly.

The Court’s opinion is sometimes said to be internally inconsistent on this point, because an earlier passage observed that use of the tax power “for ends inconsistent with the limited grants of power in the Constitution” would “undoubtedly be an abuse of the power.” *Id.* at 541. But the Court nowhere said that this sort of abuse was one that lent itself to judicial review. *Cf. Ex parte Newman*, 9 Cal. 502, 515 (1858) (Burnett, J., concurring) (“Where the power exists to do a particular thing, and the thing is done, the reason which induced the act is not to be inquired into by the Courts. The power may be abused; but the abuse of the power can not be avoided by the judiciary.”). Contemporaneous commentators understood *Veazie Bank* as excluding the possibility of such review:

[I]t is only when a burden is imposed which it is impossible to bear; one which is laid not for the purpose of producing revenue, but in order to accomplish some ulterior object which the general government lacks the power otherwise to accomplish, that a case is presented which really can be said to be fairly debatable on the score of power. . . . But even in such cases, it is held that the presumption that correct motives have controlled the legislative action must preclude the judiciary from inquiring into the purpose of the legislation.

THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS 75–76 (Chicago, Callaghan & Co. 1876).

4. *Rationales for Restricting Judicial Review of Legislative Purpose*

Throughout this period, courts and commentators articulated various reasons for this restriction on judicial review. Like modern-day supporters of textualism in statutory interpretation, many people noted the practical difficulties that would confound judicial efforts to unearth a legislature's unacknowledged purposes. For one thing, courts could not possibly acquire complete information: "The motives of many of the members may, nay must be utterly unknown, and incapable of ascertainment by any judicial or other inquiry"⁹¹ Even if courts could overcome this problem, the mindsets of individual legislators might be "opposite to, or wholly independent of each other."⁹² As a result, courts might find it hard to aggregate them into a collective purpose that could sensibly be imputed to the legislature as a whole.⁹³

These practical concerns, though, do not fully account for the courts' practices. If the difficulty of aggregating mental states within multimember bodies was the sole reason for the judiciary's reluctance to investigate the hidden motives behind a legislature's decision to pass a bill, then one might have expected courts to be willing at least to investigate the motives behind the chief executive's decision to sign the bill. Courts, however, uniformly held that such inquiries also fell beyond their purview.⁹⁴ More generally, while courts were willing to undertake some inquiries into the motivations behind mere "administrative" actions (such as a federal land office's decision to issue a patent conveying public land to a private person),⁹⁵ courts refused to

⁹¹ 2 STORY, *supra* note 53, at 533.

⁹² *Id.*

⁹³ See, e.g., *Sunbury & Erie R.R. v. Cooper*, 33 Pa. 278, 286 (1859) ("We cannot thus try legislative acts. To judge of their validity by motives would be impossible, for the prevailing motive in the mind of every member might be different.").

⁹⁴ See, e.g., *State v. Gleason*, 12 Fla. 190, 215–16 (1868) (treating it as obvious that courts cannot "question [the governor's] motives in . . . signing or refusing to sign the enactments of the legislature" (emphasis omitted)); *Wright v. Defrees*, 8 Ind. 298, 303 (1856) (disclaiming any authority to "inquire by what motives the executive is induced to approve a bill or withhold his approval").

⁹⁵ See, e.g., *Whitney v. Morrow*, 112 U.S. 693, 696 (1885) ("No impeachment can be had of the motives of the legislature, whereas the motives of officers employed to supervise the alienation of public lands may sometimes be questioned, as in proceedings to set aside their action."); *Patterson v. Tatum*, 18 F. Cas. 1331, 1334 (C.C.D. Cal. 1874) (No. 10,830) (indicating that courts of equity can inquire into whether "improper motives" lay behind administrative decision to issue land patent); cf. *Greaton v. Griffin*, 4 Abb. Pr. (n.s.) 310, 312, 314 (N.Y. Sup. Ct. 1868) (addressing statute that appointed commissioners to perform some "administrative functions" in connection with street-paving project, and observing that while "[t]he court could, undoubtedly, afford a remedy for any abuse of the trust thus reposed in the commissioners," it could not investigate "the motives or inducements which actuated the legislature in enacting the law").

investigate the motivations of the chief executive himself in the exercise of his constitutional prerogatives.⁹⁶

The practical difficulty of aggregating mental states in a multi-member body also fails to account for some of the distinctions that courts drew when reviewing the actions of municipal corporations. Judicial doctrine came to treat the legislative acts of municipal bodies like the acts of state legislatures; in Judge Cooley's words, "the same presumption that they have proceeded upon sufficient information and with correct motives shall support their legislative action which supports the statutes of the State, and precludes judicial inquiry on these points."⁹⁷ But when a city council was not wearing its "legislative" hat—for instance, when it was exercising administrative powers instead—courts were more willing to investigate the true reasons for its actions.⁹⁸ If judicial doctrine on these issues had derived entirely

⁹⁶ See, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *187 (Boston, Little, Brown & Co., 3d ed. 1874) (noting that courts refused to undertake "an inquiry into the motives of the governor in the exercise of a discretion vested in him exclusively"); cf. *State ex rel. Worrell v. Peelle*, 24 N.E. 440, 443–45 (Ind. 1890) (Elliott, J., dissenting) (observing that if governor had "exercised the constitutional prerogative of the chief executive" when appointing appellee to office, "then what moved [him] to do it, or what reason, belief, motive, or opinion influenced [him], is not a question for judicial cognizance," and suggesting that this principle barred judicial inquiry even into claim that governor had simply been bowing to *ultra vires* action of state legislature).

⁹⁷ COOLEY, *supra* note 96, at *208; see also *Borough of Freeport v. Marks*, 59 Pa. 253, 257 (1868) (applying this principle). In later years, some commentators urged courts not "to apply the analogy [between city councils and state legislatures] to its full extent," and to permit municipal ordinances to be impeached at least for fraud or corruption. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 311 (Boston, Little, Brown & Co., 4th ed. 1890) (accepting "well settled" rule "that the judicial branch of the government cannot institute an inquiry into the motives of the legislative department in the enactment of laws," but arguing that courts should allow acts of municipal bodies to "*be impeached for fraud* at the instance of persons injured thereby"); see also CHARLES B. ELLIOTT, THE PRINCIPLES OF THE LAW OF PUBLIC CORPORATIONS 193 (Chicago, Callaghan & Co. 1898) (asserting on Judge Dillon's authority that "the courts will not sustain an ordinance the enactment of which was procured by fraud and bribery"). But see *Kittinger v. Buffalo Traction Co.*, 160 N.Y. 377, 387–88 (1899) (refusing to recognize this exception and asserting blanket rule that "the courts have not the power to inquire into the motives inducing legislative action, whether such action be taken by the legislature of the state or the common council of a city"); see also *Moore v. Village of Ashton*, 211 P. 1082, 1083 (Idaho 1922) (indicating that "the great weight of authority" rejected Judge Dillon's distinction); *People v. Gardner*, 106 N.W. 541, 543 (Mich. 1906) ("The suggestion of Dillon has not received the approval of the courts or jurists of the country.").

⁹⁸ See COOLEY, *supra* note 96, at *208–09 (observing that "[municipal] corporations are . . . entitled to the same protection which surrounds the exercise of State legislative power," but adding that this principle covers only "those cases where the corporation is exercising a discretionary power, and where the reasons which are to determine whether it shall act or not, and if it does, what the action shall be, are addressed to the municipal body exclusively"); see also *State ex rel. Att'y Gen. v. Cincinnati Gas Light & Coke Co.*, 18 Ohio

from the practical difficulty of aggregating mental states in a multi-member body, courts would not have drawn this distinction.

The same is true of distinctions that the federal judiciary used immediately after the Civil War to determine the legal effect of measures adopted by the purported legislatures of the rebel states. Although the Supreme Court denied that these bodies had been “the legitimate legislature[s] of the[ir] State[s],” it treated them as “legislature[s] *de facto*,” and it held that many of their acts should be given legal effect.⁹⁹ According to the Court, however, statutes that these bodies had enacted “in furtherance or support of rebellion against the United States,” or that had been “intended to defeat the just rights of citizens,” should be “regarded as invalid and void.”¹⁰⁰ As applied by the Court, this test necessitated judicial inquiry into the actual purposes behind various measures adopted by multimember groups that looked and acted exactly like legislatures. But the Court did not consider the test impracticable for this reason.¹⁰¹ Given the Court’s purpose-oriented approach to the acts of *illegitimate* legislatures, it seems highly unlikely that the Court’s refusal to investigate the motivations behind the acts of *legitimate* legislatures rested entirely on the practical difficulty of identifying and aggregating the views of individual legislators.

Not surprisingly, then, contemporaneous courts and commentators did not account for that refusal simply on the basis of the aggrega-

St. 262, 301–02 (1868) (acknowledging that courts might not be allowed to impugn motives behind “an ordinance passed by a city council in the exercise of the legislative powers conferred upon it for the purposes of . . . municipal government,” but distinguishing ordinance that set rates for single company and that city council had issued pursuant to administrative authority conferred by state legislature). Later authorities fleshed out this distinction. *See, e.g.*, *Weston v. City of Syracuse*, 158 N.Y. 274, 286–89 (1899) (concluding that city council’s action on particular contract was “not legislative in character, but . . . administrative,” and hence did not benefit from principle that “the motives that induce [legislative] action cannot be the subject of judicial investigation”); JOHN C. THOMSON, *TAXPAYERS’ ACTIONS TO REDRESS MUNICIPAL WRONGS UNDER THE STATUTES OF THE STATE OF NEW YORK* 58–59 (1900) (“[N]ot all the action taken by a city council or board of supervisors is legislative. There are many duties devolving upon each of these bodies which are administrative in their character and not impressed with the character of sovereignty . . .”).

⁹⁹ *United States v. Ins. Cos.*, 89 U.S. (22 Wall.) 99, 101, 103–04 (1875).

¹⁰⁰ *Texas v. White*, 74 U.S. (7 Wall.) 700, 733 (1869), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476 (1885).

¹⁰¹ *See id.* at 734 (“[W]e cannot shut our eyes to the evidence which proves that the act of repeal [eliminating a prior statutory requirement about the endorsement of certain bonds] was intended to aid rebellion by facilitating the transfer of these bonds. . . . We can give no effect, therefore, to this repealing act.”); *cf. Daniels v. Tearny*, 102 U.S. 415, 418–19 (1880) (applying same test to statute enacted by Virginia’s insurrectionary convention, and determining that “the statute was invalid by reason of the treasonable motive and purpose by which its authors were animated in passing it”).

tion problem. They also advanced various arguments based on the separation of powers and the proper division between “judicial” and “legislative” authority. According to widespread understandings of that division, if a challenged statute would be a valid means of achieving some constitutional purpose, and if the legislature had not disclaimed that purpose, the respect that courts owed to legitimate legislative bodies required judges to assume that the legislature’s motivations had been pure.¹⁰² Prevailing ideas about the lines of accountability in our political system dovetailed with this view. In the words of the Supreme Court of Pennsylvania, “the judicial authority of the state is instituted to judge of the fulfilment of the duties of private relations, and not to decide whether legislators have faithfully fulfilled theirs.”¹⁰³

In addition to these abstract considerations, some people may have believed that it would be too intrusive as a practical matter for courts to try to identify the hidden motives for legislative action.¹⁰⁴ (Insofar as the Federal Congress was concerned, indeed, such inquiries could conceivably have been thought to impinge upon the same interests that the Constitution’s Speech or Debate Clause was designed to protect.¹⁰⁵) Other people seemed concerned that courts looking for unacknowledged legislative motivations would “falsely impute[]” unconstitutional purposes to the legislature and would refuse to enforce statutes that the people’s legitimate representatives had adopted for perfectly valid reasons.¹⁰⁶ Admittedly, the only way to eliminate this risk of false positives was to run the risk of false negatives; if courts conducting judicial review could not inquire into the legislature’s unacknowledged purposes, they sometimes would

¹⁰² See *People ex rel. Wood v. Draper*, 15 N.Y. 532, 545 (1857) (“The courts cannot impute to the legislature any other than public motives for their acts.”); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 38 (Boston, Little, Brown & Co. 1873) (“The court should never impute evil motives to the legislative body.”).

¹⁰³ *Sunbury & Erie R.R. v. Cooper*, 33 Pa. 278, 286 (1859); see also *supra* note 90 (quoting similar observation in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 548 (1869)).

¹⁰⁴ Cf. *Wright v. Defrees*, 8 Ind. 298, 303 (1856) (“To institute the proposed inquiry would be a direct attack upon the independence of the legislature . . .”).

¹⁰⁵ See U.S. CONST. art. I, § 6 (“[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”). For a modern discussion of the relevance of this Clause to judicial inquiries into legislative motivation, see generally Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?*, 63 N.C. L. REV. 879 (1985).

¹⁰⁶ See ANDREW JACKSON, PROCLAMATION (1832), reprinted in 2 THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, INAUGURAL, ANNUAL, AND SPECIAL, FROM 1789 TO 1846, at 794, 797–98 (New York, Edward Walker 1846) (responding to South Carolina’s nullification ordinance, but making general argument about “danger[]” of “the position that an unconstitutional purpose, entertained by the members who assent to a law enacted under a constitutional power, shall make that law void”).

enforce statutes that had in fact been enacted for unconstitutional reasons. But antebellum courts emphasized that the people themselves could police the legislature's good faith by voting faithless legislators out of office.¹⁰⁷ At least before judicial elections became widespread, false positives (whereby courts refused to enforce perfectly valid laws) might therefore have seemed more dangerous than false negatives (whereby courts enforced laws that had been enacted for unconstitutional reasons).

Whatever the rationale, the bottom line was clear. Under the doctrine that was dominant until the 1870s, if a statute did not itself acknowledge its purposes, and if some hypothetical set of facts would justify its enactment, courts were supposed to assume that the legislature had been pursuing permissible purposes and had found the necessary facts to exist.

B. From the 1870s to the 1930s

1. The Possibility of Imputing Impermissible Purposes to a Statute on the Basis of Facts Eligible for Judicial Notice

Starting around the 1870s, occasional judicial opinions began imputing unconstitutional purposes to certain statutes that did not explicitly acknowledge those purposes and whose language, considered on its own, did not otherwise make them apparent. This development did not necessarily reflect shifting understandings of the substantive content of American constitutional law: Although some judges were more willing than others to read particular constitutional provisions as restricting the purposes for which legislatures could act, the idea of such purpose-based restrictions on legislative power was nothing new.¹⁰⁸ Nor did the increasing willingness of some courts to find violations of those restrictions reflect a substantial decrease in the level of certainty that judges required in this context: In general, courts still refused to impute an unconstitutional purpose to a legitimate legislative body unless the objective indicia that judges were willing to consider left no room for any other coherent account of the

¹⁰⁷ See *Sunbury & Erie R.R.*, 33 Pa. at 283 (“The remedy for such an evil is in the hands of the people alone, to be worked out by an increased care to elect representatives that are honest and capable.”). This electoral check, in turn, gave legislators some reason to police their own conduct. So too did the oaths of office administered under Article VI of the Federal Constitution and its state counterparts: If legislators deliberately sought to evade the constitutions that they had sworn to protect, they might be risking their status in the afterlife. Cf. *Ableman v. Booth*, 62 U.S. (21 How.) 506, 524 (1859) (describing oath requirement as means of “guard[ing] against resistance to or evasion of [the Constitution’s] authority”).

¹⁰⁸ See *supra* text accompanying notes 32, 43, 48, 60–63, 72–73, 77, 82.

legislature's actions.¹⁰⁹ The change, instead, involved a slight expansion in the kinds of objective indicia that judges felt authorized to consider when conducting this sort of judicial review. Rather than limiting themselves entirely to the face of the challenged statute, judges became willing to impute unconstitutional purposes to a statute when certain kinds of external facts ruled out any other explanation of the statute's provisions.

The Federal Supreme Court's decision in *Henderson v. Mayor of New York*¹¹⁰ illustrates this sort of judicial review. In 1823, the New York legislature had purported to require the master of every vessel that arrived in the port of New York from a foreign port to pay "hospital money" to the city's health commissioner in the amount of \$1.50 per cabin passenger and \$1.00 per steerage passenger.¹¹¹ Although this statute did not trigger immediate challenge, the Supreme Court eventually concluded that states cannot tax the transportation of passengers in interstate or foreign commerce, and in 1849 it held the New York statute unconstitutional.¹¹² In response, the New York legislature substituted a different scheme. For each disembarking passenger who was not a citizen of the United States, the owner or consignee of every vessel that arrived in the port of New York from a foreign port was now required to post a \$300 bond upon which state or local authorities could draw if the passenger became a public charge in the

¹⁰⁹ See, e.g., *Swift & Co. v. City of Newport*, 70 Ky. (7 Bush) 37, 41 (1869) (emphasizing that judiciary should not impute "unconstitutional end or aim" to legislature "without indisputable proof from the nature of the case, and the total destitution of any presumption of a constitutional object"); *Mason v. Trs. of Lancaster*, 67 Ky. (4 Bush) 406, 408–09 (1868) (acknowledging possibility "that a statute [might be] so flagrantly beyond revenue purposes as to indicate other objects under its guise," but adding that "before this court would determine such, it would have to appear palpable and unmistakable; for without such, this court would not presume such unworthy motives in a co-ordinate branch of the government"); *Perry v. Keene*, 56 N.H. 514, 534 (1876) (opinion of Ladd, J.) (observing that "nothing short of a moral certainty" would warrant court in concluding that purpose of tax was private rather than public). This level of deference was not necessarily specific to the attribution of unconstitutional purposes; for at least some judges, it was part of a broader commitment to Thayerian principles of judicial review. See, e.g., *State ex rel. Scanlan v. Archibold*, 131 N.W. 895, 898 (Wis. 1911) (referring to "well settled" rule that judiciary can declare statute invalid "only when the unconstitutional purpose is clear beyond reasonable doubt," but supporting this rule by citing *State ex rel. Grundt v. Abert*, 32 Wis. 403 (1873), which stands for more general proposition that courts should not declare statutes unconstitutional "unless they are clearly so").

¹¹⁰ 92 U.S. 259 (1876).

¹¹¹ Act of Mar. 21, 1823, ch. 71, §§ 34–35, 1823 N.Y. Laws 64, 77–78; see also 1 N.Y. REV. STAT. tit. 4, §§ 7–8 (Packard & Van Benthuyzen 1829) (setting out revised version of this requirement).

¹¹² The Passenger Cases, 48 U.S. (7 How.) 283 (1849). The New York case, *Smith v. Turner*, was a companion to *Norris v. City of Boston*, discussed *supra* text accompanying notes 80–83.

next four years, *except* that the owner or consignee of the vessel could avoid this requirement by paying \$1.50 up front.¹¹³ When shipowners John and Thomas Henderson attacked the constitutionality of this revised statute, lawyers for New York City asserted that the State could lawfully require a bond to protect itself in the event that immigrants became public charges, and the alternative of paying \$1.50 per passenger was simply “a favor” that the State offered owners or consignees who might prefer it.¹¹⁴ The Hendersons, however, insisted that the bond requirement was a ruse. At oral argument before the Supreme Court, their lawyer argued that the “well-understood purpose” behind the statute was “not . . . to obtain [any] bonds,” but instead to collect \$1.50 per passenger; the State had not expected anyone to post bonds, and the legislature apparently had introduced this possibility simply “to make the payment of a specific sum the election of the passenger or his carrier.”¹¹⁵ According to the Hendersons, the statute was “manifestly intended to evade the decision” that had barred direct imposition of the \$1.50 fee.¹¹⁶

The Court agreed. Although the face of the statute did not itself confess the statute’s purpose, the Court took judicial notice of the fact that preparing bonds and obtaining sureties would cost more than \$1.50 per passenger and that vessel owners would therefore “inevitabl[y]” choose to pay the \$1.50 fee instead. What is more, the Court thought it fair to impute this goal to the New York legislature. “In whatever language a statute may be framed,” the Court asserted, “its purpose must be determined by its natural and reasonable effect”¹¹⁷ Given the known cost of preparing bonds, the Court thought it “apparent” that “the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York”¹¹⁸ In both “purpose and effect,” the law amounted to the same sort of tax that the Court had already held invalid, and it was unconstitutional for that reason.¹¹⁹

¹¹³ Act of Apr. 11, 1849, ch. 350, § 2, 1849 N.Y. Laws 504, 505–06.

¹¹⁴ *Henderson*, 92 U.S. at 264–65 (argument of counsel).

¹¹⁵ *Id.* at 262–63 (argument of counsel).

¹¹⁶ *Id.* at 263 (argument of counsel); *see also* Brief of Appellants at 8, *Henderson*, 92 U.S. 259 (No. 880) (“It is impossible not to see that the Act of 1849 is an attempt to evade the decision of this court . . . and to accomplish indirectly what had been condemned when attempted directly.”).

¹¹⁷ *Henderson*, 92 U.S. at 268.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 268–69. The Court held, in particular, that New York could not validly tax all immigrants in order to build a fund to protect the State’s coffers against the subset of immigrants who were likely to become public charges. *Id.* at 269. The Court specifically reserved judgment about what states could do to secure indemnity for public outlays on

Admittedly, the Court's opinion in *Henderson* did not specify exactly what it meant by the challenged statute's "purpose": Was the Court talking about the results that members of the enacting legislature had actually intended the statute to achieve, or was the Court referring to some other concept of "purpose" that could be imputed to the statute regardless of anyone's true mindset? In later years, different members of the Court glossed the case in different ways. Justice Miller, who had written the Court's opinion, used the rhetoric of legislative intent; in his view, New York's statute had been unconstitutional because it was "intended by roundabout means to invade the domain of Federal authority," and the judiciary could properly detect this unconstitutional purpose because "the operation and effect of the statute" had made it apparent.¹²⁰ But Justice Harlan, who joined the Court a year after *Henderson*, preferred to write as if the case had articulated a pure effects test. In his view, when litigants argued that a state law violated the dormant Commerce Clause, courts should examine the statute's "necessary or natural operation"—not as a basis for inferring anything about the legislature's goals, but simply because states should not be permitted to enforce laws that would produce the same effects as protective tariffs.¹²¹

behalf of the latter class of immigrants. *Id.* at 275. In a companion case, however, the Court held unconstitutional a California statute that seemed, on its face, to be somewhat more narrowly tailored. The statute required the masters or owners of vessels arriving from foreign ports to post a \$500 bond for each alien passenger whom the State's Commissioner of Immigration identified as a convicted criminal, a "lewd or debauched woman," a person with physical or mental disabilities who was "not accompanied by relatives who are able and willing to support him," or someone who was "likely to become a public charge" for any other reason. *Chy Lung v. Freeman*, 92 U.S. 275, 277–78 (1876). Under the statute, however, masters or owners of vessels could escape this requirement by making whatever up-front payment the Commissioner of Immigration thought proper to demand (eighty percent of which would go to the state treasury and twenty percent to the Commissioner himself). *Id.* at 278. After protesting against the "extortion" that this system made possible, the Court concluded that the statute's "manifest purpose" was "not to obtain indemnity, but money." *Id.* at 278–80.

¹²⁰ *Morgan v. Louisiana*, 118 U.S. 455, 462 (1886).

¹²¹ *Minnesota v. Barber*, 136 U.S. 313, 319–21 (1890); *see also* *New York v. Roberts*, 171 U.S. 658, 681 (1898) (Harlan, J., dissenting) (citing *Henderson* as holding that "[i]n a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted"). Similarly, when litigants challenged Congress's powers under the affirmative Commerce Clause, Justice Harlan seemed less willing than some of his colleagues to test statutes by their underlying motivations. *Compare* *The Lottery Cases*, 188 U.S. 321, 353, 363–64 (1903) (Harlan, J.) (holding that Commerce Clause gives Congress "plenary authority" to forbid commercial transportation companies to carry lottery tickets from one state to another), *with id.* at 364–65 (Fuller, C.J., dissenting, joined by Brewer, Shiras, and Peckham, JJ.) (concluding from statute's title and its "natural and reasonable effect" that "the purpose of Congress in this enactment was the suppression of lotteries," and arguing that Commerce Clause did not give Congress this authority).

It is hard to say exactly how many members of the Court sided with each of these two Justices over the course of the late nineteenth and early twentieth centuries. But the position articulated by Justice Miller certainly had its adherents. Over Justice Harlan's dissent, the Court repeatedly upheld certain kinds of state laws that had the practical effects of burdening interstate commerce and giving some advantage to local businesses *if* those effects could plausibly be seen as incidental consequences of a measure that the state legislature had enacted for a permissible reason.¹²² The majority cast its analysis of these cases in terms of purpose rather than effect, and it portrayed *Henderson* as instructing courts to see through "pretense or masquerade" and to ascertain "the true purposes of a statute."¹²³ Many judges on state courts used similar rhetoric in a variety of different contexts.¹²⁴ Although courts of the day did not approach these issues with a single mind,¹²⁵ there was substantial support for the idea that Justice Miller took *Henderson* to reflect: To the extent that a constitutional provision restricted the reasons for which the legislature could

¹²² See, e.g., *Roberts*, 171 U.S. at 662–66 (upholding New York tax on business corporations despite exemption for manufacturing companies that had all their plants in New York); *Patapsco Guano Co. v. N.C. Bd. of Agric.*, 171 U.S. 345, 346–47, 354–61 (1898) (upholding statute establishing labeling and other requirements for all fertilizers sold in North Carolina); see also *Smith v. St. Louis & Sw. Ry.*, 181 U.S. 248, 250, 257–59 (1901) (upholding Texas commission's quarantine regulations that temporarily forbade shipment of cattle from Louisiana to Texas, again over Justice Harlan's dissent).

¹²³ *Smith*, 181 U.S. at 257.

¹²⁴ Consider, for example, Chief Justice Morse's concurring opinion in *Giddings v. Blacker*, 52 N.W. 944 (Mich. 1892):

I believe that the time for plain speaking has arrived in relation to the outrageous practice of gerrymandering There is not an intelligent school boy but knows what is the motive of these legislative apportionments, and it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason, which is nothing more nor less than partisan advantage taken in defiance of the constitution

Id. at 948. See also, e.g., *Graves v. Janes*, 2 Ohio App. 383, 391–92 (Ct. App. 1914) (holding that statute imposing license fees "clearly discloses an intention upon the part of the general assembly to raise the larger portion of this fund for general revenue purposes," and concluding that statute "to that extent is unconstitutional and void"); *State ex rel. Burke v. Hinkel*, 129 N.W. 393, 394–95 (Wis. 1911) (holding that statute purporting to continue powers of justices of the peace in large cities, but eliminating their power to collect fees and giving them annual salary of only twenty-five dollars, "evinces a purpose to make the performance of the functions of the office so burdensome as to deter persons from assuming its duties," contrary to state constitution); cf. *Iowa City v. Glassman*, 136 N.W. 899, 902 (Iowa 1912) (taking judicial notice of facts about peddling, and concluding that "the purpose of the [city] council" in enacting purported tax on peddlers was really to prohibit peddling within city limits, which lay beyond powers that state legislature had delegated to municipalities).

¹²⁵ See, e.g., *Todd v. Bd. of Election Comm'rs*, 64 N.W. 496, 496 (Mich. 1895) ("Courts have nothing to do with the motives of legislators, nor the reasons they may have for passing the law.").

take certain actions, the judiciary could conclude that a statute violated those restrictions when the objective indicia of legislative purpose—including not just the statute’s terms but also extrinsic facts of which the courts could take judicial notice—foreclosed any other explanation.

2. *Continuing Limitations on Judicial Review of Legislative Purpose*

Still, even the most purpose-oriented judges recognized substantial limitations on their ability to impute impermissible goals to duly enacted statutes. As Justice Field noted in 1885:

[T]he rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation.¹²⁶

¹²⁶ *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885). This statement might seem inconsistent with Justice Field’s opinion on circuit in *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6546), which held that a local sheriff had not been justified in cutting off a Chinese prisoner’s “queue” (a distinctive hair braid worn as a matter of “the custom [and religious faith] of Chinamen”) pursuant to a San Francisco ordinance requiring the hair of each male inmate imprisoned in the county jail to be “cut or clipped to an uniform length of one inch from the scalp.” *Id.* at 253, 257. Despite this ordinance’s facial neutrality, Justice Field denounced it as “hostile and discriminating legislation” that “was intended only for the Chinese in San Francisco” and whose enforcement violated their rights under the Federal Constitution’s Equal Protection Clause. *Id.* at 255–56. As support for this conclusion, Justice Field noted that members of the enacting body had specifically acknowledged that the ordinance was aimed at Chinese immigrants, and he argued that courts could properly consult such statements to determine “the general object of the legislation proposed.” Justice Field also observed that “[t]he ordinance is known in the community as the ‘Queue Ordinance,’ being so designated from its purpose to reach the queues of the Chinese.” *Id.* at 255.

Some commentators have seen these statements as proof that modern judicial inquiries into legislative purpose are “nothing new.” Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 795 (2001); see also *id.* at 775 & n.17 (using *Ho Ah Kow* to condemn historical claims in *United States v. O’Brien*, 391 U.S. 367, 383 (1968)). In *Ho Ah Kow*, though, Justice Field’s judgment did not rest simply on his conclusion that the municipal board of supervisors had enacted the Queue Ordinance because of animus against the Chinese. An additional fact was crucial: “[The ordinance] is not enforced against any other persons.” *Ho Ah Kow*, 12 F. Cas. at 255. As Justice Field emphasized,

When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation

Id. at 255. When this sort of selective enforcement was not present, Justice Field took a very different view of the courts’ role. See, e.g., *Soon Hing*, 113 U.S. at 710–11 (refusing to entertain *Soon Hing*’s argument that San Francisco’s board of supervisors had enacted local laundry ordinance because of antipathy toward Chinese immigrants, and asserting that “even if the motives of the supervisors were as alleged, the ordinance would not be

The second of these two exceptions can be traced to *Henderson*, for the Court had never previously used external facts about real-world conditions (such as the cost of obtaining a \$300 bond with good sureties) as the basis for imputing impermissible purposes to a legitimate legislative body. Even after *Henderson*, though, courts typically restricted themselves to external facts of the sort eligible for “judicial notice”—facts that they could take as given without hearing evidence.

This limitation was part of a broader set of ideas about the relationship between courts and legislatures. Although those ideas will strike modern lawyers as outlandish, before the 1920s many courts believed that most constitutional challenges to statutes had to rely entirely upon “argument deduced from the language of the law itself, or from matters of which a court can take judicial notice,” and could not entail the introduction of extrinsic evidence.¹²⁷ Whatever this principle’s rationale¹²⁸ and precise scope,¹²⁹ there was fairly wide-

thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned”). Thus, while Justice Field’s opinion in *Ho Ah Kow* did speak in terms of legislative purpose, discriminatory patterns of administrative enforcement seem to have been crucial to his conclusion. For that reason, *Ho Ah Kow* is best understood as a precursor of *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (concluding from enforcement pattern that “whatever may have been the intent of the [licensing] ordinances as adopted, they are applied by the public authorities charged with their administration . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of . . . equal protection of the laws”).

¹²⁷ *People ex rel. Kemmler v. Durston*, 24 N.E. 6, 8 (N.Y. 1890) (holding that trial court had been wrong to accept evidence about whether electric chair imposed so much pain as to be cruel and unusual form of punishment), *aff’d on other grounds*, 136 U.S. 436 (1890); *accord, e.g., Stevenson v. Colgan*, 27 P. 1089, 1090 (Cal. 1891) (“[I]n passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice.”); *Pittsburgh, Cincinnati, Chi. & St. Louis Ry. v. State*, 102 N.E. 25, 28 (Ind. 1913) (“[A statute’s] validity cannot be contested or brought into review by inquiries of fact into matters extraneous of the act itself, of which courts may not take judicial notice.”); *In re N.Y. Elevated R.R.*, 70 N.Y. 327, 351–52 (1877) (“Can a court take proof for the purpose of showing a statute valid and regular upon its face to be unconstitutional? . . . These questions must be answered in the negative.”); *State v. Nelson*, 39 N.E. 22, 24 (Ohio 1894) (“[I]n passing upon the constitutionality of a statute a court can judge of its operations only through facts of which it can take judicial notice. A court cannot take testimony to determine the operation of a statute, and thereby declare it unconstitutional.”); *Mfrs. Mut. Fire Ins. Co. v. Clarke*, 103 A. 931, 933 (R.I. 1918) (“It has generally been held by the federal and state courts that extrinsic evidence will not be received for the purpose of impeaching the constitutional validity of a legislative act.”); *Barker v. State Fish Comm’n*, 152 P. 537, 539 (Wash. 1915) (noting that “numerous decisions” had made clear “the rule that the constitutionality of a statute must be determined from those matters which appear upon its face and from those matters of which the court may take judicial notice,” and calling counsel’s contrary suggestion “somewhat startling”); *see also* 6 RULING CASE LAW § 112, at 112 (William M. McKinney & Burdett A. Rich eds., 1915) (“The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court.”).

¹²⁸ One common rationale was that if determinations of a statute’s constitutionality depended upon the evidence of record in a particular case, there would be “as many

spread agreement that courts could not properly use any sort of extrinsic evidence to impute an impermissible purpose to a duly enacted statute.¹³⁰ It followed, among other things, that courts could not properly impute an unconstitutional purpose to the legislature on the basis of evidence about the legislature's deliberations or the mind-sets of individual legislators.¹³¹

varying conclusions as there might be bodies or triers [of fact]." *Pittsburgh, Cincinnati, Chi. & St. Louis Ry.*, 102 N.E. at 28; *see also* *State v. Somerville*, 122 P. 324, 325–26 (Wash. 1912) (noting that evidence of record would vary in different cases, "[y]et it is manifest that a court could not in one [case] declare the act unconstitutional, while sustaining it in the other"); *State ex rel. Att'y Gen. v. Cunningham*, 51 N.W. 724, 738 (Wis. 1892) (Pinney, J., concurring) (arguing that if practice of judicial review were made to hinge upon extrinsic evidence, evidentiary disputes would often need to be submitted to juries, which "would beget a distressing condition of uncertainty" because "a jury might find on the issue one way to-day, and another way to-morrow"); *cf.* *People v. Smith*, 66 N.W. 382, 384 (Mich. 1896) (concluding on this basis that "there is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law").

¹²⁹ Despite the broad formulations that I have just quoted, courts did not apply the principle across the board. For instance, "without any discussion of the principle whatever," courts routinely permitted regulated entities to introduce evidence that maximum rates established by statute would be confiscatory as applied to their business. James D. Barnett, *External Evidence of the Constitutionality of Statutes*, 58 AM. L. REV. 88, 91–93 (1924). Extrinsic evidence cropped up in other constitutional challenges too. *See, e.g.,* *Smith v. Texas*, 233 U.S. 630, 639–41 (1914) (using information about job of railroad engineer to evaluate constitutionality of state law prescribing qualifications for conductors, and noting that "[i]f we cannot take judicial knowledge of these facts the record contains affirmative proof on the subject"); *cf.* *Binns v. United States*, 194 U.S. 486, 494 (1904) ("The presumptions are that the act imposing those taxes is constitutional, and anything essential to establish its invalidity which does not appear of record or from matters of which we can take judicial notice must be shown by the party asserting the unconstitutionality."). Still, without identifying coherent patterns in these uses of evidence, courts and commentators alike tended to treat them as limited exceptions to the general rule. 6 RULING CASE LAW, *supra* note 127, § 112, at 113; *see also* *Tenement House Dep't v. Moesch*, 85 N.Y.S. 704, 707 (App. Div. 1904) ("Cases no doubt can be found where testimony has been taken, but that has been very seldom permitted, and only under extraordinary circumstances."), *aff'd on other grounds*, 72 N.E. 231 (N.Y. 1904), *aff'd*, 203 U.S. 583 (1906); *cf.* Barnett, *supra*, at 89, 98 (describing "orthodox view" that courts assessing statute's constitutionality "will . . . consider only such facts of which they may take judicial notice," though identifying "mass of contradictions" in case law).

¹³⁰ *See, e.g.,* *Waterloo Woolen Mfg. Co. v. Shanahan*, 28 N.E. 358, 361–62 (N.Y. 1891) (observing that when statute's constitutionality hinged on "the purpose of the legislature," that purpose had to "be determined from the [statute] itself, and from such considerations as the court can judicially notice"); *State ex rel. Govan v. Clausen*, 183 P. 115, 116–19 (Wash. 1919) (deeming both cases and commentary clear on this point).

¹³¹ *See, e.g.,* *City of Amboy v. Ill. Cent. R.R.*, 86 N.E. 238, 240 (Ill. 1908) (refusing to consider parol evidence about city council's consideration of ordinance, and stating generally that "in no [cases] to which our attention has been called, was the validity of [an] ordinance made to depend upon . . . parol testimony"); *Murray v. Nelson*, 185 N.W. 319, 320 (Neb. 1921) (similarly refusing to consider "the evidence of members of the Legislature who supported the act upon its passage").

Even within the category of information that might be subject to judicial notice, at least some judges drew further distinctions. In the late nineteenth century, courts started tentatively using internal legislative history as a guide to the intended meaning of statutory language.¹³² But they still generally refused to use internal legislative history to impugn the legislature's good faith; while judges might be able to use legislative history in a cooperative spirit to help interpret a statute in line with the legislature's intentions, judges were not supposed to use legislative history to frustrate those intentions by invalidating a statute that they would otherwise have upheld.¹³³ In the words of Henry Campbell Black, "any inquiry as to the motives operating on the minds of the legislators, in voting for the measure, is entirely incompetent" in constitutional adjudication.¹³⁴

Because courts were supposed to presume the validity of statutes that had not been shown to be unconstitutional,¹³⁵ the limitations on the information that courts could consider meant that the judiciary sometimes had to apply statutes that had in fact been enacted for

¹³² See Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 944–45 (2000) (citing conflicting authorities from this period).

¹³³ See, e.g., *Shenandoah Lime Co. v. Mann*, 80 S.E. 753, 754 (Va. 1913) (holding emphatically that although internal legislative history is useful in construing ambiguous language, it cannot be used to second guess statute's declared purposes and to establish that legislature was really acting for unconstitutional reason); LEROY PARKER & ROBERT H. WORTHINGTON, *THE LAW OF PUBLIC HEALTH AND SAFETY, AND THE POWERS AND DUTIES OF BOARDS OF HEALTH* 63 n.3 (Albany, Bender 1892) ("[T]he motives of legislators cannot be inquired into judicially unless to aid in the interpretation of the law."); cf. *Williams v. Mississippi*, 170 U.S. 213, 223 (1898) (refusing to investigate allegation that facially neutral provisions of Mississippi Constitution of 1890 had been designed for purpose of disfranchising African-Americans, notwithstanding damning evidence to that effect in records of constitutional convention's proceedings and notwithstanding state supreme court's prior use of those records to help interpret constitution). Justice Brown's dissent in *Pabst Brewing Co. v. Crenshaw*, 198 U.S. 17 (1905), is a rare counterexample. There, Justice Brown would have used internal drafting history to establish that a statutory provision requiring all beer sold in Missouri to be inspected by a state official, and establishing an "inspection fee" for this service, was not "a *bona fide* exercise of the police power of the State," because "the inspection was really an incident to or an excuse for the revenue to be derived from the act." *Id.* at 36, 38 (Brown, J., dissenting).

¹³⁴ HENRY CAMPBELL BLACK, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* 60–61 (St. Paul, West Publ'g Co. 1895); see also NORTON T. HERR & ALTON A. BEMIS, *A TREATISE ON THE POWER TO ENACT, PASSAGE, VALIDITY AND ENFORCEMENT OF MUNICIPAL POLICE ORDINANCES* 167 (Cincinnati, Robert Clarke & Co. 1887) ("The reasonableness of an ordinance must . . . be judged solely from the wording of its provisions and from its results. The *motives* of the legislative body can under no circumstances be inquired into.").

¹³⁵ See, e.g., *Antoni v. Greenhow*, 107 U.S. 769, 775 (1883) ("We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account.").

unconstitutional reasons. Indeed, one Alabama judge offered such an explanation for no less a case than *Plessy v. Ferguson*.¹³⁶ According to Judge E. Perry Thomas of the Alabama Court of Appeals, if the statute at issue in *Plessy* had declared that “the leading purpose of this statute was to protect the white race from the presence of negroes while traveling on trains,” then the courts would have been obliged to conclude that it violated the Fourteenth Amendment.¹³⁷ But the statute had not declared this forbidden purpose, and it was within a state’s power to require racial segregation on trains for the purpose of “promot[ing] the public peace by preventing clashes and conflicts between the two races.”¹³⁸ Under these circumstances, when courts confronted a statute that was “consistent in its terms with constitutional purposes,” courts had to “presume that these and these only led to its passage” and could not investigate “[w]hatever private or secret reasons may [really] have actuated the Legislature.”¹³⁹ This presumption, Thomas suggested, was “[t]he only basis upon which statutes like the one here have been sustained by the United States Supreme Court.”¹⁴⁰

Members of Congress were well aware of the limitations on judicial review of legislative purpose. Consider, for instance, the comments of Senator and future Chief Justice Edward Douglass White¹⁴¹ in legislative debate about the Hatch Anti-option Bill of 1892, which would have imposed stiff federal taxes on options contracts involving certain agricultural commodities.¹⁴² Senator White believed that this measure was not genuinely intended to raise revenue, but rather aimed at eradicating the contracts that it purported to tax. In keeping with then-common views, he further believed that Congress could not validly impose domestic taxes for the purpose of achieving regulatory objectives that the Constitution did not empower Congress to pursue more directly. He therefore condemned the bill as “subjectively unconstitutional”; its true purposes—which were known to members of Congress—violated the Constitution. But White conceded that if

¹³⁶ 163 U.S. 537 (1896).

¹³⁷ *Mobile & Ohio R.R. v. Spenny*, 67 So. 740, 743 (Ala. Ct. App. 1914) (Thomas, J., dissenting in part) (quoting *Gulf, Colo. & Santa Fe Ry. v. Sharman*, 158 S.W. 1045, 1047 (Tex. Civ. App. 1913)).

¹³⁸ *Id.* at 744.

¹³⁹ *Id.* at 743–44.

¹⁴⁰ *Id.* at 743.

¹⁴¹ White served in the Senate from 1891 to 1894, when President Cleveland appointed him to the Supreme Court. He served as an Associate Justice from 1894 to 1910 and as Chief Justice from 1910 to 1921. 20 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra* note 71, at 96.

¹⁴² H.R. 7845, 52d Cong. §§ 3–4 (1892).

the bill were enacted and its constitutionality challenged in court, “the court can only look at it objectively.” As White noted, “[t]he court must look at its provisions, and . . . if on its face it be for the purpose of raising revenue, the court will say that it can not consider the motive, but must decree its enforcement.”¹⁴³

In the particular context that he was addressing, White thought that the anti-option bill’s unconstitutionality would be apparent “even objectively to a court,” because the bill “can not under its terms raise a dollar of revenue.”¹⁴⁴ Other opponents of the bill agreed that “this is a disingenuous and dishonest bill, which, under mere false color of doing one thing, designs and intends to do another,”¹⁴⁵ but they were not so sure that the judiciary could see through its pretenses. In the words of Senator (and lawyer) John W. Daniel:

A court in determining whether or not an act of this nature is constitutional, can only do one thing; it can only look at the abstract, naked power with which the Constitution has invested the legislator and then look at the act of the legislator, and if the abstract, naked power, which the people have reposed in the Congress to be exercised by it with certain motives, with certain purposes, with certain designs be there, and the act does not transcend that abstract power, the court say we can not asperse the integrity of a coördinate branch of the Government because, if that were permissible, the executive, the judicial, and the legislative powers would be no longer independent of each other.¹⁴⁶

According to Daniel, courts would be able to hold the law unconstitutional only if its preamble candidly declared Congress’s true goal of suppressing the disfavored contracts.¹⁴⁷ But the fact that the bill contained no such preamble, and that courts would therefore have to enforce the statute, did not establish that the statute was valid or that legislators could vote for it in good conscience. As Daniel put it:

¹⁴³ 23 CONG. REC. 6518 (1892). Although I came across it independently, Senator White’s speech is also featured in Barry Cushman, *The Structure of Classical Public Law*, 75 U. CHI. L. REV. (forthcoming Fall 2008) (book review).

¹⁴⁴ 23 CONG. REC. 6518 (1892).

¹⁴⁵ *Id.* at 6448 (statement of Sen. Daniel).

¹⁴⁶ *Id.* at 6449.

¹⁴⁷ Upon being asked by a fellow Senator whether the bill “as it stands” would be struck down by the Supreme Court as unconstitutional, *id.* (statement of Sen. Mitchell), Daniel responded:

I believe . . . if you would put in a whereas to this bill the truth as to the motive inspiring it, the court would say the truth of the whereas destroys the integrity of what follows. Therefore this is one of the bills which has come into this body without a whereas.

Id. (statement of Sen. Daniel). Absent such a declaration, Senator Daniel concluded that the Court “would say that it had to regard this as a bill to raise revenue, because Congress said so.” *Id.*

There are a great many unconstitutional things which can happen in this country which no United States court and no State court has any jurisdiction to take cognizance of. . . . All political questions, . . . questions which depend upon motive, upon design, upon conscience, the Supreme Court has decided over and over again that in that class of cases the question of constitutionality rests with the legislative body, and that it has no jurisdiction to hear and to determine them.¹⁴⁸

If anything, Daniel argued, this limitation on judicial review gave legislators an even more pressing obligation to behave constitutionally.¹⁴⁹

Contemporaneous commentators agreed that because of the restrictions on judicial review of a legislature's motivations, conscientious legislators needed to analyze the constitutionality of proposed bills for themselves rather than simply considering how similar statutes had fared in court. As James Bryce noted in *The American Commonwealth*, the two inquiries were not the same: "[A] man might with perfect consistency argue as a member of a legislature against a bill on the ground that it is unconstitutional, and after having been appointed a judge, might in his judicial capacity sustain its constitutionality."¹⁵⁰

Indeed, that is precisely what Edward Douglass White did with respect to the federal tax on oleomargarine. When White was in the Senate, he denounced the original version of this tax as "subjectively unconstitutional"; although it purported to be a revenue measure, its true purpose was to suppress oleomargarine, and that goal lay beyond Congress's constitutional authority.¹⁵¹ Senator White conceded, however, that the courts would have to enforce the tax statute because it had "a revenue-producing capacity" and did not acknowledge the regulatory purposes that really lay behind it.¹⁵² In 1897, after Senator White had become Justice White, the Court bore out this predic-

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; see also *id.* at 6705 (statement of Sen. George) ("[Y]ou can not do anything meaner with the Constitution of the United States than to pass a law for an avowed purpose, which everybody who votes for it knows is not its true purpose, but the court does not know this, because the court has not the power to discover a purpose outside of the professions of the act.").

¹⁵⁰ 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 431 (London, Macmillan 1888); see also Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585, 586 (1975) (noting this point's distinguished historical pedigree).

¹⁵¹ 23 *CONG. REC.* 6518 (1892) (discussing Act of Aug. 2, 1886, ch. 840, 24 Stat. 209).

¹⁵² *Id.*; see also EBEN F. STONE, *AN ADDRESS DELIVERED BEFORE THE ESSEX BAR, ON THE OPENING OF THE NEW COURT HOUSE, AT SALEM, FEBRUARY 2, 1889*, at 7 (Salem, Salem Press 1889) (describing statute as deliberate attempt "to suppress the sale of oleomargarine," but noting that it was "ostensibly for revenue" and observing that "[i]f a party aggrieved should . . . alleg[e] the unconstitutionality of the law, it is certain that the court would accept the declaration of Congress as decisive").

tion.¹⁵³ Congress then enacted an even more aggressive statute, quintupling the tax on yellow oleomargarine while sharply reducing the tax on oleomargarine that was not colored to resemble butter.¹⁵⁴ In *McCray v. United States*,¹⁵⁵ an oleomargarine dealer argued that even the judiciary should be able to detect the regulatory purposes behind the revised statute: In his view, the tax on yellow oleomargarine was “of such an onerous character as to make it manifest that the purpose of Congress in levying it was not to raise revenue but to suppress the manufacture of the taxed article,” and the distinction between yellow oleomargarine and other oleomargarine made sense only as a means of achieving purposes that lay beyond Congress’s powers.¹⁵⁶ Writing for the Court, however, Justice White rebuffed these arguments. According to his majority opinion, the statutory provisions did not themselves establish that Congress had harbored an unconstitutional purpose,¹⁵⁷ and the “confidence and respect” that courts owed to Congress precluded any further judicial inquiry along these lines.¹⁵⁸ As Justice White put it, “[t]he decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.”¹⁵⁹

This latter passage should not be understood as rejecting any role at all for judicial review of legislative purpose. To be sure, Justice White was not in the vanguard of such inquiries: He shared Justice Harlan’s emphasis on effects rather than purposes in dormant Commerce Clause cases,¹⁶⁰ and he did not rush to read other constitutional

¹⁵³ See *In re Kollock*, 165 U.S. 526, 536 (1897) (“The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.”).

¹⁵⁴ Act of May 9, 1902, ch. 784, 32 Stat. 193.

¹⁵⁵ 195 U.S. 27 (1904).

¹⁵⁶ *Id.* at 51–52 (summarizing counsel’s arguments).

¹⁵⁷ See *id.* at 53 (indicating that “inferences drawn from the face of the acts” were not alone sufficient to establish McCray’s claims). In taking this position, some members of the Court may have been influenced by the government’s argument that there was a legitimate possible justification for Congress’s harsh treatment of yellow oleomargarine. According to the government, this aspect of the statute could be seen as a device to aid enforcement of the more modest tax on other oleomargarine, which people might otherwise try to evade by coloring their oleomargarine yellow and passing it off as “butter, an untaxed article.” *Id.* at 41 (argument of counsel).

¹⁵⁸ *Id.* at 55; see also *id.* (acknowledging that this limitation on judicial review made it possible for Congress to abuse its powers, but contending that remedy for such abuses “lies . . . in the people” rather than in courts).

¹⁵⁹ *Id.* at 56.

¹⁶⁰ See *Smith v. St. Louis & Sw. Ry.*, 181 U.S. 248, 259–60 (1901) (Harlan, J., dissenting) (“Mr. Justice White authorizes me to say that he concurs in these views.”); *supra* notes 121–22 and accompanying text (describing Harlan’s position); see also *McCray*, 195 U.S. at

provisions as restricting the reasons for which legislatures could act.¹⁶¹ But when Justice White did understand the Constitution to impose such a restriction, and when the objective indicia established that the legislature had violated it, he was willing to rule accordingly.¹⁶² His point in *McCray* was that courts could not *assume* that a legitimate legislative body had acted for an impermissible reason when the objective indicia left room for some other possibility.

3. *Modulations in the Strength of the Presumption of Proper Purposes*

While agreeing with Justice White that courts were restricted to considering “objective” rather than “subjective” constitutionality, some members of the Court were somewhat quicker to infer from a statute’s text and other objective indicia that it had been enacted for an impermissible purpose. There is more than a hint of this idea in *Lochner v. New York*.¹⁶³ Justice Peckham’s majority opinion

60 (White, J.) (describing cases like *Henderson* as adopting “the test of necessary operation and effect” to assess constitutionality of state laws that allegedly trespassed upon federal preserves).

¹⁶¹ See, e.g., *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 343 (1909) (White, J.) (permitting State to exclude foreign corporation from doing business within its borders even for reasons having to do with corporation’s acts elsewhere, and asserting that “the power, and not the motive, is the test to be resorted to” in this context).

¹⁶² Consider, for instance, his opinions for the Court in *Guinn v. United States*, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915). The Fifteenth Amendment forbids states to deny or abridge the right to vote “on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1. Around the turn of the century, several states hit upon the plan of linking voting rights to something that correlated (almost) perfectly with race—whether the prospective voter or one of his lineal ancestors had been eligible to vote in his state of residence some forty years earlier, before the Reconstruction Act of 1867. See, e.g., OKLA. CONST. of 1907, art. III, § 4a (1910) (requiring prospective voters to pass literacy test *unless* they or one of their lineal ancestors had been “entitled to vote under any form of government” on or before January 1, 1866); see also KLARMAN, *supra* note 14, at 70 (discussing such “grandfather clauses” and noting that “[o]f the more than 55,000 blacks who resided in Oklahoma in 1900, only fifty-seven came from states that had permitted blacks to vote in 1866”). In companion cases from Oklahoma and Maryland, Chief Justice White saw through this scheme without recorded dissent: Even the judiciary could conclude that the states were restricting voting rights “on account of” race, because “it is [not] possible to discover any basis of reason for the standard thus fixed [in the grandfather clause] other than the purpose above stated.” *Guinn*, 238 U.S. at 364–65; see also *Myers*, 238 U.S. at 379 (upholding different aspect of Maryland’s franchise requirements that could be explained by “a reason other than discrimination on account of race or color” and that therefore could not “be assumed, because of the impossibility of finding any other reason for its enactment, to rest alone upon a purpose to violate the Fifteenth Amendment”); cf. *supra* text accompanying note 144 (noting Senator White’s expectation that even judiciary would be able to impute impermissible purpose to Hatch Anti-option Bill); *infra* note 186 (describing Chief Justice White’s dissent in *United States v. Doremus*, 249 U.S. 86 (1919)).

¹⁶³ 198 U.S. 45 (1905).

acknowledged that even though the Due Process Clause of the Fourteenth Amendment forbids states to “deprive any person of life, liberty or property without due process of law,” and even though “[t]he right to purchase or to sell labor is part of the liberty protected by this [clause],” the Fourteenth Amendment does not strip the states of their legitimate police powers. To the contrary, “[b]oth property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers”¹⁶⁴ But the mere claim that a particular state law “was enacted to conserve the morals, the health or the safety of the people” did not automatically make it so, for such a claim might be “a mere pretext.”¹⁶⁵ Justice Peckham indicated that where interests protected by the Due Process Clause were at stake, the Court was obliged to try to sniff out such pretexts by asking whether there was some foundation for the idea that the State was making a legitimate use of its police powers. In particular, the Court needed to ask whether the statute could plausibly be viewed as a means to achieve one of the purposes (relating to the public’s health, safety, morals, or general welfare) for which the State could permissibly use its police powers. A “remote” relationship between the statute and one of those purposes, moreover, would not be enough; to persuade the Court, the fit between means and ends had to be “more direct.”¹⁶⁶

Applying this approach in light of public information about bakery work, Justice Peckham found “no reasonable foundation” for viewing the State’s limitation on bakers’ hours as a permissible “health law”—a measure that was “necessary or appropriate . . . to safeguard the public health or the health of the individuals who are following the trade of a baker.”¹⁶⁷ Notwithstanding the “proclaimed purpose” of the statute, then, the Court concluded that “the real object and purpose were simply to regulate the hours of labor” for reasons unconnected with the State’s legitimate police powers (that is, the powers that would let the State restrict interests protected by the Fourteenth Amendment). Justice Peckham summed up this conclusion as follows:

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon

¹⁶⁴ *Id.* at 53.

¹⁶⁵ *Id.* at 56.

¹⁶⁶ *Id.* at 57.

¹⁶⁷ *Id.* at 58.

which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law.¹⁶⁸

To be sure, Peckham's approach did not persuade all of the Justices,¹⁶⁹ and even some of the Justices who voted with him may not have based their votes on suspicion of the legislature's motivations.¹⁷⁰ While the Constitution was widely understood to limit the purposes for which state legislatures could impinge upon private property or liberty interests,¹⁷¹ courts did not have to accuse legislators of bad faith in order to rebuff a purported use of the police power; a statute that impinged upon protected interests could be held unconstitutional if it bore no reasonable relation to any legitimate purpose, even if members of the enacting legislature had honestly been trying to serve such a purpose.¹⁷² Because a regulatory statute's failure to serve a legitimate purpose could be treated either as evidence of an ulterior

¹⁶⁸ *Id.* at 64. Thus, Justice Peckham accepted *Lochner's* bottom-line conclusion that the statute "was never intended as a health provision but was purely a labor law." Brief of Plaintiff in Error at 40, *Lochner*, 198 U.S. 45 (No. 292). In keeping with the idea that judicial review was restricted to objective indicia of legislative purpose, though, Justice Peckham resisted the invitation to base this conclusion in part on "the facts leading up to the adoption of this statute by the New York legislature" (such as the fact that a trade union of journeyman bakers had agitated for the statute). *Id.* at 40–42.

¹⁶⁹ See *Lochner*, 198 U.S. at 68–73 (Harlan, J., joined by White and Day, JJ., dissenting) (arguing that State's health rationale was strong enough to credit, especially in light of court's obligation to resolve all doubts in favor of statute's constitutionality); *id.* at 73 ("We cannot say that the State has acted without reason nor ought we to proceed upon the theory that its action is a mere sham.").

¹⁷⁰ Cf. Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 936–41 (2005) (advancing evidence that Justice McKenna, who voted with majority in *Lochner*, did not share Justice Peckham's analysis and would have voted to uphold more general regulation of workers' hours).

¹⁷¹ See, e.g., *Lawton v. Steele*, 23 N.E. 878, 879 (N.Y. 1890) (indicating that legislatures could not validly enact such statutes "for the purpose of individual oppression," or indeed for other purposes that were not connected with "[a] public right or interest"), *aff'd*, 152 U.S. 133 (1894); see also *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 319 (1872) ("The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen."); *Eccles v. Ditto*, 167 P. 726, 729 (N.M. 1917) (echoing *Lawton's* observation that "if the court could judicially see that a statute was a mere evasion, or was framed for the purpose of individual oppression, it would be set aside as unconstitutional"); ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 133 (1904) (cataloguing "[t]he questions which present themselves in the examination of a safety or health measure," including "[whether] the choice of a particular measure show[s] that some other interest than safety or health was the actual motive of legislation"); PARKER & WORTHINGTON, *supra* note 133, at 6 ("[T]he rights of citizens may not be invaded under the guise of a police regulation, for the protection of health or the promotion of the general security, where it is manifest, upon the face of the law, that such is not the true object of the legislation.").

¹⁷² See *In re White*, 134 A. 409, 413 (Pa. 1926) ("Where a statute or ordinance interferes with the use and control of property without rational relation to public safety, health,

motivation or as a constitutional defect in its own right, courts of the day did not always tease out the differences between these prongs of their doctrine.¹⁷³

Over time, though, concerns about the true objects behind legislation became more salient in certain quarters. In 1917, Judge Charles Merrill Hough published an article in the *Harvard Law Review* calling attention to what he saw as a growing trend: Congress was increasingly trying to use taxes, postal regulations, or restrictions on interstate commerce to accomplish regulatory goals that the Constitution was not thought to let it achieve directly.¹⁷⁴ The next year, in *Hammer v. Dagenhart*,¹⁷⁵ a closely divided Supreme Court held unconstitutional one of these statutes—the Federal Child Labor Law, which had purported to forbid manufacturers to “ship or deliver for shipment in interstate or foreign commerce” any goods that had been produced in an American mill or factory where, within the thirty-day period before the goods left the premises, children under age fourteen had been permitted to do any work or children between the ages of fourteen and sixteen had been permitted to work “more than eight hours in any day, or more than six days in any week, or after [7:00 p.m.], or before [6:00 a.m.]”¹⁷⁶ In *Hammer* itself, both the lawyers challenging the statute and Justice Day’s majority opinion tried to craft an argument that did not depend upon “the motives of Congress in enacting this legislation.”¹⁷⁷ But Congress’s subsequent attempt to evade the Court’s ruling brought that issue into the open.

morals, or general welfare, . . . the enactment cannot be sustained as a legitimate exercise of police power.”).

¹⁷³ See, e.g., *In re Jacobs*, 98 N.Y. 98, 115 (1885) (stating as conjunctive test that “[w]hen a health law is challenged in the courts . . . , the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end”).

¹⁷⁴ See Charles Merrill Hough, *Covert Legislation and the Constitution*, 30 HARV. L. REV. 801, 801 (1917) (predicting that “[l]awyers will increasingly deal with statutes whose constitutional support bears no sincere relation to the legislative and popular purposes sought to be attained”).

¹⁷⁵ 247 U.S. 251 (1918).

¹⁷⁶ Act of Sept. 1, 1916, ch. 432, § 1, 39 Stat. 675, 675.

¹⁷⁷ *Hammer*, 247 U.S. at 275–76 (suggesting that whatever Congress’s actual motivations, “[a] statute must be judged by its natural and reasonable effect,” and “the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States”—which Congress could not constitutionally do); Brief of Appellees at 37, *Hammer*, 247 U.S. 251 (No. 704) (“There is not involved in this argument an attack on the good faith of Congress, nor an invitation to the Court to seek for the motives of Congress in passing the statute.”). The appellees’ lawyers apparently were less circumspect at oral argument. See *Hammer*, 247 U.S. at 265 (argument of counsel) (invoking Judge Hough’s article, *supra* note 174, and suggesting that Court could detect that Congress had acted “for a covert purpose”).

Within nine months after the Court's decision in *Hammer*, Congress tried to use its tax power to accomplish what the Court had just prevented it from accomplishing under the commerce power. The so-called Child Labor Tax Law provided that if, at any point during the taxable year, any mill or factory in the United States knowingly permitted children to work in violation of the same restrictions listed in the previous statute, the facility's operator would have to pay an "excise tax" amounting to ten percent of the entire net profits generated by sales of the facility's products during the year.¹⁷⁸ When a challenge to this new statute reached the Supreme Court, the Solicitor General argued that "[t]his Court is powerless to say judicially that the motive of Congress in levying the tax under consideration was not to impose a tax, but to regulate child labor"; even if the statute was in fact "politically anti-constitutional," the Court could not declare it "juridically unconstitutional," because "the motives and objectives of the tax are within the broad field of political discretion into which the judiciary is powerless to enter."¹⁷⁹ With only one recorded dissent, however, Chief Justice Taft rebuffed this argument and distinguished precedents like *McCray*. "Out of a proper respect for the acts of a coordinate branch of the Government," he acknowledged, "this Court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject."¹⁸⁰ Thus, if Congress had simply imposed an excise tax on a particular article, "we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax."¹⁸¹ Here, however, this inference was reinforced by the facts that the act "provide[d] a heavy exaction for a departure from a detailed and specified course of conduct in business," this exaction was not "proportioned in any degree to the extent or frequency of the departures," the employer's liability hinged upon scienter, and the statute gave the Labor Depart-

¹⁷⁸ Act of Feb. 24, 1919, ch. 18, §§ 1200–1207, 40 Stat. 1057, 1138–40.

¹⁷⁹ *Child Labor Tax Case*, 259 U.S. 20, 25 (1922) (argument of counsel). The Solicitor General maintained that judges could "invalidat[e] the exercise of a delegated power by reason of its assumed motives or objectives" only when "this court can indubitably deduce from the language of the act that the exercise of the power was not to accomplish any purpose intrusted to the Federal Government, but rather some purpose beyond the scope of federal power." According to the Solicitor General, moreover, taxing statutes always passed this test; the Court could never positively determine, simply from the face of the statute, "that Congress did not intend to impose a tax, when it expressly says that it does." *Id.* at 26–28 (argument of counsel).

¹⁸⁰ *Id.* at 37.

¹⁸¹ *Id.* at 36.

ment a role in enforcement.¹⁸² “In the light of these features of the act,” Taft asserted,

a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?¹⁸³

While the Court acknowledged that “[t]axes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them,” the Court concluded that the regulatory intentions manifested by the Child Labor Tax Law could not be characterized as “incidental”: Instead of coming within Congress’s powers of taxation, the statute had to be seen as imposing “a mere penalty with the characteristics of regulation and punishment” on a subject that Congress lacked the constitutional authority to regulate.¹⁸⁴

On the same day, the Court reached a similar conclusion about the Federal Future Trading Act of 1921.¹⁸⁵ That statute imposed a substantial purported tax on contracts for the sale of grain on future delivery, but exempted contracts made through boards of trade that the Secretary of Agriculture had certified as satisfying detailed conditions spelled out in the statute. Those conditions dealt with the boards’ operating methods and could not possibly be seen as devices to help enforce the tax.¹⁸⁶ The very title of the statute, moreover,

¹⁸² *Id.* at 36–37.

¹⁸³ *Id.* at 37.

¹⁸⁴ *Id.* at 38; *see also id.* at 39–40 (invoking *M’Culloch*’s “pretext” passage).

¹⁸⁵ *Hill v. Wallace*, 259 U.S. 44 (1922).

¹⁸⁶ *Id.* at 66 (“[M]any of [the specified conditions] can have no relevancy to the collection of the tax at all.”). This fact helped to distinguish the Future Trading Act from the provisions of the Harrison Narcotic Drug Act that a closely divided Court had upheld in *United States v. Doremus*, 249 U.S. 86 (1919). Section 1 of that statute had required manufacturers, importers, and distributors of opium, coca leaves, and their derivatives to register with the tax collector and to pay a special tax of one dollar per year. *Id.* at 90. Section 2 then sharply restricted transactions in the covered drugs. *Id.* at 91–92. Although even Chief Justice White was willing to condemn Section 2 as “a mere attempt by Congress to exert . . . the reserved police power of the States,” *id.* at 95 (White, C.J., dissenting), the government insisted that Section 2 could instead be seen as a legitimate means of preventing evasions of the tax, *id.* at 87–88 (argument of counsel). Speaking for a bare majority, Justice Day agreed with the government: The requirements of Section 2 “tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law.” *Id.* at 94. Because the statute’s requirements could be understood in terms of this legitimate purpose, the majority thought it improper for the judiciary to assume that Congress had really acted for some other reason that lay beyond its powers. *See id.* at 93 (“If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.”); *cf.*

described the act not only as “[t]axing contracts for the sale of grain for future delivery” but also as “providing for the regulation of boards of trade.”¹⁸⁷ Under these circumstances, the Court found it “impossible to escape the conviction” that the statute had been “enacted for the purpose of regulating the conduct of business of boards of trade” and that the purported tax had been imposed “to compel boards of trade to comply with regulations” rather than to raise revenue.¹⁸⁸ As Chief Justice Taft explained without recorded dissent, “[w]hen this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power”; the Constitution did not authorize Congress to impose so-called taxes for the sake of accomplishing regulatory objectives that lay beyond Congress’s other enumerated powers, and even the judiciary could see that this was the “manifest purpose” of the tax on grain futures.¹⁸⁹

In the ensuing decade, the Court’s willingness to identify unconstitutional legislative purposes reached a temporary high-water mark. Although Justice Brandeis still shied away from such inquiries, several of the Justices who had been most reluctant to impute impermissible purposes to legitimate legislative bodies had been replaced by Justices who were somewhat less deferential.¹⁹⁰ Around the same time, more-

United States v. Parsons, 261 F. 223, 223–24 (D. Mont. 1919) (asserting that “any one with sense enough to be at large without a keeper knows the revenue feature [of the statute] . . . is but a fiction and device to enable Congress . . . to hinder and obstruct [opium] traffic and use,” but acknowledging that courts were not permitted to see through this fiction insofar as the restrictions adopted by Congress were “calculated to promote the revenue features”).

In a later case, the Taft Court suggested that the majority opinion in *Doremus* might have been wrong; given that the amount of the purported tax had been only one dollar per year, even the judiciary could perhaps have concluded that the revenue features of the statute were “a mere pretext.” *Nigro v. United States*, 276 U.S. 332, 353 (1928). But “[i]f there was doubt as to the character of this Act” as “a subterfuge,” Congress had eliminated that potential stumbling block by sharply increasing the amount of the tax. *Id.* (noting that this amendment, which took effect in 1919, transformed what had previously been “a nominal tax” into “a substantial one”).

¹⁸⁷ Future Trading Act, ch. 86, 42 Stat. 187 (1921).

¹⁸⁸ *Hill*, 259 U.S. at 66.

¹⁸⁹ *Id.* at 66–68.

¹⁹⁰ Not only had Chief Justice Taft replaced Chief Justice White, but Justice Sutherland had replaced Justice Clarke (who had provided the lone dissenting vote in the *Child Labor Tax Case*) and Justice Butler had replaced Justice Day (who had disclaimed authority to impugn Congress’s motives in *Hammer v. Dagenhart* and had also written the majority opinion in *Doremus*). Justice Holmes, for his part, had become less consistent in his opposition to purpose inquiries. See Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 338 (1935) (“After his defeat in [two cases from 1910], Justice Holmes yielded to authority, and recognized that the purpose for which a state exerts a power may determine the constitutionality of its exertion.”); see also, e.g.,

over, the Court decisively rejected the idea that litigants could not use extrinsic evidence to impeach the constitutionality of a statute.¹⁹¹ Instead of restricting themselves to the text of the challenged statute and facts eligible for judicial notice, Justices were now willing to consider at least certain kinds of extrinsic evidence when deciding whether a statute had an impermissible purpose.

*Foster-Fountain Packing Co. v. Haydel*¹⁹² is a case in point. In 1926, the Louisiana legislature enacted a statute forbidding anyone to export saltwater shrimp caught in the waters of the state without first removing the shrimp's heads and shells. The statute purported to justify this restriction by declaring that these parts of the shrimp were "a natural resource of the State" and were "valuable for use . . . as a fertilizer in the State."¹⁹³ The plaintiffs, however, introduced evi-

Maxwell v. Bugbee, 250 U.S. 525, 543–44 (1919) (Holmes, J., dissenting) ("Many things that a legislature may do if it does them with no ulterior purpose, it cannot do as a means to reach what is beyond its constitutional power. . . . [I]t seems to me that that is what [New Jersey] is trying to do . . ."); *Quong Wing v. Kirkendall*, 223 U.S. 59, 63 (1912) (Holmes, J.) (noting that although plaintiff was making other arguments against statute that taxed operation of hand laundries, "it is impossible not to ask whether [the statute] is . . . aimed at the Chinese[,] which would be a discrimination that the Constitution does not allow"); David E. Bernstein, *Two Asian Laundry Cases*, 23 J. SUP. CT. HIST. 95, 95–101 (1999) (calling attention to *Quong Wing*).

¹⁹¹ For discussion of the old idea, see *supra* notes 127–30 and accompanying text. For opinions rejecting it, see *Weaver v. Palmer Bros.*, 270 U.S. 402, 410 (1926) ("Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the Legislature has transgressed the limits of its power. Invalidity may be shown by things which will be judicially noticed, or by facts established by evidence." (citations omitted)), and *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548 (1924) ("In our opinion it is open to inquire whether the exigency still existed upon which the continued operation of the law depended. . . . [I]t is not impossible that a full development of the facts will show [the plaintiffs' contrary allegations] to be true."). See also Henry Wolk Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 14–18 (1924) (advocating use of extrinsic evidence in judicial review, and noting that "the later decisions of the Supreme Court" support this position). By the 1930s, the new view had become fairly well established. As the Court explained in 1934:

With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence

Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 210 (1934); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." (citation omitted)).

¹⁹² 278 U.S. 1 (1928).

¹⁹³ Act of July 8, 1926, § 13, 1926 La. Acts 150, 156.

dence that people in the shrimp business actually considered them to be a “nuisance,” that most of the shrimp processors in Louisiana simply threw them away, and that shrimp heads and shells had relatively little chemical or commercial value as fertilizer.¹⁹⁴ Invoking the dormant Commerce Clause, Justice Butler’s majority opinion held that these affidavits warranted a preliminary injunction against enforcement of the statute; in the absence of any effective rebuttal, they supported the inference that the legislature’s stated rationale was “feigned” and that the “real purpose” of the statute was to force companies trying to serve the interstate market for processed shrimp to conduct their processing operations in Louisiana rather than Mississippi (where the bulk of the shrimp-packing industry was then located).¹⁹⁵ This purpose, moreover, served to distinguish the Louisiana law from other statutes that genuinely sought to conserve a state’s natural resources for the use of the state’s people.¹⁹⁶

The Court was just as blunt in *Macallen Co. v. Massachusetts*,¹⁹⁷ which held that “under the guise of” imposing an ordinary excise tax on the income that corporations derived from business within the state, Massachusetts had impermissibly sought to tax the interest on federal bonds.¹⁹⁸ Justice Sutherland’s majority opinion asserted that “the legislature may not, by an artful use of words, deprive this Court of its authority to look beyond the words to the real legislative purpose.”¹⁹⁹ In conducting that inquiry, moreover, the Court would not necessarily resolve every last doubt in favor of the legislature; if “the history, the surrounding circumstances, or the statute itself considered in all its parts” supplied “persuasive grounds” for inferring “a scheme to lay a tax upon a non-taxable subject by a deceptive use of words,” then the Court could hold the statute unconstitutional on that basis.²⁰⁰ Indeed, for the first time ever, a majority of the Court explicitly used

¹⁹⁴ *E.g.*, Affidavit of Louis Braun, Transcript of Record at 58, *Foster-Fountain*, 278 U.S. 1 (No. 68); Affidavits of Tony Guerra et al., Transcript of Record at 64, *Foster-Fountain*, 278 U.S. 1 (No. 68); Affidavit of L.O. Johnson, Transcript of Record at 76–77, *Foster-Fountain*, 278 U.S. 1 (No. 68); Affidavit of C.B. Foster, Transcript of Record at 86, *Foster-Fountain*, 278 U.S. 1 (No. 68); Affidavit of E.C. Tonsmeire, Transcript of Record at 99, *Foster-Fountain*, 278 U.S. 1 (No. 68); *see also* Affidavit of Donald W. Howe, Transcript of Record at 106, *Foster-Fountain*, 278 U.S. 1 (No. 68) (reporting results of chemical analysis).

¹⁹⁵ *Foster-Fountain*, 278 U.S. at 10, 13–14.

¹⁹⁶ *See id.* at 12–13 (explaining that Louisiana was wrong to invoke *Geer v. Connecticut*, 161 U.S. 519 (1896), because “[t]he purpose of the Louisiana enactment differs radically from the Connecticut law there upheld”).

¹⁹⁷ 279 U.S. 620 (1929).

¹⁹⁸ *Id.* at 626, 634.

¹⁹⁹ *Id.* at 630.

²⁰⁰ *Id.* at 629.

documents generated during the legislative process to buttress its decision to impute an impermissible purpose to a statute.²⁰¹

To be sure, the tenor of the Court's opinions on these questions depended on which Justice was writing. When the Court was speaking through Justice Brandeis, it seemed less inclined to second guess the legislature's declared purposes than when it was speaking through Justices Butler or Sutherland.²⁰² At least when the more purpose-oriented judges were writing, though, there were two important ways in which judicial review of legislative purpose was different by the 1920s than it had been before the 1870s. First, judges had broadened the information base that they could use when deciding whether a statute manifested an impermissible purpose; it was well accepted that courts could consider not only the face of the statute but also public facts of the sort that were eligible for judicial notice, and courts were beginning to take account of evidence introduced by the parties as well. Second, some judges seemed to be flirting with an adjustment to the applicable standard of proof; instead of giving the legislature the benefit of every conceivable doubt, they suggested that they could impute impermissible purposes to the legislature when the information that they were willing to consider supplied "persuasive grounds" for doing so.²⁰³

By the mid-1930s, both this second development and the Court's internal divisions about it were on full display. In *United States v. Constantine*,²⁰⁴ the Court considered a federal statute that purported to impose a "special excise tax" of \$1000 on anyone who carried on the business of a brewer, distiller, or liquor dealer contrary to the laws

²⁰¹ As the majority explained, the conclusion that the Court had drawn from objective indicia "is confirmed, if that be necessary, by the report of the special commission appointed by the legislature to investigate the subject of taxation of banking institutions" (which had encouraged the legislature to broaden the state's excise tax on corporate income precisely because corporations should not be able to escape state taxes on interest from federal bonds). *Id.* at 632. The majority quoted at length from this report, which "received the consideration of the legislature and, it is fair to suppose, constituted the basis for adopting the [statute] here assailed." *Id.* at 633.

²⁰² Compare *Arizona v. California*, 283 U.S. 423, 455 (1931) (Brandeis, J.) ("Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this Court may not enquire."), *id.* at 455 n.7 ("Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers."), and *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919) (Brandeis, J.) ("No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress."), with *supra* notes 195–96 and accompanying text (discussing Justice Butler's opinion in *Foster-Fountain*) and *supra* notes 197–201 and accompanying text (discussing Justice Sutherland's opinion in *Macallen*).

²⁰³ See *supra* text accompanying note 200.

²⁰⁴ 296 U.S. 287 (1935).

of the state in which he was operating.²⁰⁵ Under the doctrine of the day, while Congress could lay taxes for the purpose of raising revenue, it had no authority “to ordain a penalty for violation of state liquor laws.”²⁰⁶ The statute was therefore unconstitutional “if, in fact, its purpose is to punish rather than to tax.” Various features of the law supported that suspicion: The new federal imposition applied in addition to the normal excise taxes that federal law already imposed on liquor traffic, it was “grossly disproportionate to the amount of the normal tax,” and it was triggered by unlawful conduct.²⁰⁷ A majority of the Court found these “indicia . . . of . . . intent” strong enough to let the judiciary conclude that Congress had merely adopted “the guise of a taxing act” and that “the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct.”²⁰⁸ But Justices Cardozo, Brandeis, and Stone would have required a higher standard of proof. The indicia on which the majority was focusing, they argued, did not rule out the possibility that Congress had enacted the statute as a legitimate means of raising revenue: “Congress may reasonably have believed that . . . a business carried on illegally . . . is likely to yield larger profits,” or “that the furtive character of the business would increase the difficulty and expense of the process of tax collection,” or simply that the people engaged in such activities should “be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful.”²⁰⁹ Because legitimate explanations for the statute were conceivable, the dissenters thought it improper for judges to assume that Congress had in fact been motivated by some other purpose. In Justice Cardozo’s words, “the process of psychoanalysis has spread to unaccustomed fields.”²¹⁰

C. From the 1930s to the 1970s

At least in the short run, time was on the dissenters’ side. In the years after *Constantine*, judges limited their “psychoanalysis” of legislatures in several distinct ways. To begin with, a new majority on the Supreme Court overruled *Hammer v. Dagenhart* and reinterpreted the Commerce Clause in a way that de-emphasized Congress’s objec-

²⁰⁵ *Id.* at 289 n.1 (quoting Revenue Act of 1926, ch. 27, § 701, 44 Stat. 9, 95).

²⁰⁶ *Id.* at 293–94.

²⁰⁷ *Id.* at 294–95 (noting that these features were “significant of penal and prohibitory intent”).

²⁰⁸ *Id.* at 295–96.

²⁰⁹ *Id.* at 297 (Cardozo, J., dissenting).

²¹⁰ *Id.* at 299.

tives.²¹¹ But even when dealing with provisions of the Constitution that were still understood to make legislative purpose relevant, the Court shied away from robust review of the legislature's true motivations. The two most important limitations both had roots in earlier practice. First, although extrinsic evidence generally remained welcome in constitutional adjudication, many of the Justices seemed reluctant to investigate the internal dynamics of the legislative process. As a result, litigants who alleged that a statute sprang from impermissible purposes could not count on the judiciary either to examine internal legislative history or to hear testimony about the mindsets of individual legislators. Second, the Court gravitated toward the *Constantine* dissenters' view of the applicable standard of proof. By the end of the 1940s, and continuing until at least the 1960s, the Court typically refused to impute impermissible purposes to a statute unless the available indicia effectively ruled out any other conceivable explanation. The next two subsections discuss these twin limitations in turn.

1. *The Court's Reluctance To Impute Impermissible Purposes to Statutes on the Basis of Judicial Investigations of the Internal Legislative Process*

Although antebellum courts had generally refused to impute impermissible purposes to a statute on the basis of anything other than the face of the statute, the period after the Civil War had seen an erosion of that principle. In *Henderson*, for instance, the Supreme Court had taken judicial notice of certain facts about the real world, and by the 1920s the Court had become willing to consider evidence introduced by the parties too. But what *sort* of evidence?

The Court had a natural opportunity to address this question in *Grosjean v. American Press Co.*²¹² The Louisiana Legislature had just imposed a substantial tax on "every person, firm, association, or corporation . . . engaged in the business of selling, or making any charge for, . . . advertisements . . . in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week . . . in the State of Louisiana,"²¹³ and publishers of the affected newspapers were challenging the statute's validity. As John

²¹¹ See *United States v. Darby*, 312 U.S. 100, 115–16 (1941) (Stone, J.) (holding that federal statutes forbidding shipment of items in interstate or foreign commerce qualify as "regulations of commerce" even if they are not designed to achieve commerce-related ends, and that Commerce Clause gives Congress "plenary power" to enact such statutes "[w]hatever their motive and purpose").

²¹² 297 U.S. 233 (1936).

²¹³ Act of July 12, 1934, § 1, 1934 La. Acts 176, 177.

Hart Ely has described in detail, an affidavit submitted to the district court established that of the 163 periodicals then being published in Louisiana, only thirteen had weekly circulations above 20,000, and twelve of the thirteen “had been actively opposing, in their editorial policies, the dominant political faction in the State.”²¹⁴ The affidavit further attested that the faction’s leader—United States Senator Huey P. Long—had given a public speech shortly after the statute’s enactment in which he said that “only one newspaper in the State . . . had not joined up with the gang opposing me” and “we tried to find a way to exempt [that newspaper] from the advertising tax.”²¹⁵ The affidavit added that while the tax bill had been under consideration, a similarly damning circular signed by Senator Long had been “laid on the desk of each member of the Legislature.”²¹⁶ On the basis of this evidence, the plaintiffs ultimately asked the Supreme Court to conclude that although the statute’s “declared purpose” was simply to raise revenue, its “real and underlying purpose” was “to punish those newspapers opposed to the dominant political faction in the State,” in violation of the freedom of the press protected by the First and Fourteenth Amendments.²¹⁷

The plaintiffs’ affidavit bundled together three different kinds of facts—the statute’s targeted impact on newspapers hostile to the Long faction, Long’s own public statements about the statute, and evidence about what individual legislators had seen during the internal legislative process. Justice Sutherland, who had already invoked legislative history in *Macallen*, seems to have been perfectly happy to consider all this evidence. But in response to the draft opinion that Justice Sutherland circulated, Justice Stone suggested deleting references to “the circular which was laid on the desks of members of the legislature,”²¹⁸ and Justice Sutherland acquiesced. In fact, the final version

²¹⁴ Affidavit of Marshall Ballard & J. Walker Ross, Transcript of Record at 42, *Grosjean*, 297 U.S. 233 (No. 303), cited in Ely, *supra* note 5, at 1332.

²¹⁵ *Id.* at 43, cited in Ely, *supra* note 5, at 1333.

²¹⁶ *Id.*, cited in Ely, *supra* note 5, at 1332–33.

²¹⁷ Brief of Appellees at 36–38, *Grosjean*, 297 U.S. 233 (No. 303) (invoking *Child Labor Tax Case* for proposition that “[c]ourts . . . determine the validity of legislation according to its real rather than according to its declared purpose”). Although the plaintiffs made other arguments too, they returned to the affidavit again and again. *Id.* at 8–9, 26–27, 36–37.

²¹⁸ Letter from Harlan Fiske Stone, Associate Justice, United States Supreme Court, to George Sutherland, Associate Justice, United States Supreme Court (Feb. 5, 1936) (Container 76, Harlan Fiske Stone Papers, Library of Congress) (on file with the *New York University Law Review*); cf. *Sonzinsky v. United States*, 300 U.S. 506, 513–14 (1937) (Stone, J.) (“Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts.”). I am indebted to ANDREW L. KAUFMAN, *CARDOZO* 697 n.18 (1998), for calling my attention to Justice Stone’s letter about the draft opinion in *Grosjean*, and to Patrick Kerwin of the Library of Congress for tracking the letter down.

of Justice Sutherland's opinion, published on behalf of a unanimous Court, did not invoke the plaintiffs' affidavit at all. After emphasizing that advertisement taxes had "a long history of hostile misuse against the freedom of the press" and that the framers of the First Amendment had been familiar with that history,²¹⁹ the opinion made only one Delphic reference to the "present setting" of this particular tax:

The tax here . . . is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.²²⁰

This formulation papered over the apparent disagreement within the Court about sources like the circular.

As the studied ambiguity of *Grosjean* might lead one to expect, later opinions charted an uncertain course about the circumstances in which courts could impute impermissible purposes to a statute on the basis of either the legislature's own records or other information about the internal legislative process. In general, though, the Court did not seem eager to embrace this practice. In *Daniel v. Family Security Life Insurance Co.*,²²¹ for instance, a lower court had held a regulatory statute unconstitutional because it did not serve a legitimate public purpose but instead had been enacted at the behest of a group of insurance companies "to eliminate the plaintiff company as a competitor."²²² Without recorded dissent, the Supreme Court thought it inappropriate for the judiciary to investigate the statute's genesis. In response to the contention that the statute had been enacted as a favor for the insurance lobby, the Court said only: "We cannot undertake a search for motive in testing constitutionality."²²³

²¹⁹ *Grosjean*, 297 U.S. at 248, 250; see also *id.* at 246 (chronicling Parliament's imposition of such taxes in eighteenth century, and emphasizing that "the main purpose of these taxes was to suppress the publication of comments and criticisms objectionable to the Crown"); *id.* at 247 ("[I]n the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern; . . . the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs.").

²²⁰ *Id.* at 250; see also *id.* at 251 (adding that "[t]he form in which the tax is imposed is in itself suspicious" and reflected "the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers"); cf. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 579-80 (1983) (discussing later debates about *Grosjean's* rationale).

²²¹ 336 U.S. 220 (1949).

²²² *Family Sec. Life Ins. Co. v. Daniel*, 79 F. Supp. 62, 68, 70 (E.D.S.C. 1948).

²²³ *Daniel*, 336 U.S. at 224; accord, e.g., *Stahm v. Klein*, 179 Cal. App. 2d 512, 518 (Dist. Ct. App. 1960) ("Any attempt . . . by the judiciary to define the personal thoughts of the legislator in voting for the passage of a law involves such delicate and frustrating problems that it has always been frowned upon. It is only when the law on its face or in its results shows an improper purpose, motive or intent, and thereby unfairly and improperly dam-

Admittedly, Justice Murphy—the author of *Daniel*—was willing to go at least part of the way down that road to detect racial discrimination. In several racially charged cases in the 1940s, he urged his colleagues to use legislative history as a basis for imputing discriminatory purposes to state statutes.²²⁴ But as Professors Tussman and tenBroek noted at the time, “the majority of the Court has been less willing than Mr. Justice Murphy to follow this line.”²²⁵ In the 1960s, Justice Black’s majority opinion in *Griffin v. County School Board*²²⁶ arguably opened the door to the sort of investigation that Justice Murphy had contemplated.²²⁷ But Justice Black himself rebuffed that

ages a person, that the courts may interfere.”); *Adams v. City of Richmond*, 340 S.W.2d 204, 206 (Ky. 1960) (“It is well settled that the courts will not inquire into the motives that impel legislative action.”). *But cf.* *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 595, 598 (1961) (emphasizing that Sunday-closing law had been “promoted principally by the representatives of labor and business interests” and that “[the] legislators who favored the bill specifically disavowed any religious purpose,” and calling this legislative history “particularly” relevant to Court’s decision to uphold statute’s constitutionality).

²²⁴ See *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 425–26 (1948) (Murphy, J., concurring) (using legislative history to expose anti-Japanese animus behind statute restricting eligibility for commercial fishing licenses, which majority held unconstitutional on other grounds); *Oyama v. California*, 332 U.S. 633, 651–61 (1948) (Murphy, J., concurring) (similar analysis for statute restricting ownership of farmland). Later, this mantle passed to Justice Douglas. See *NAACP v. Button*, 371 U.S. 415, 445–46 (1963) (Douglas, J., concurring) (referring approvingly to district court’s examination of legislative history in *NAACP v. Pate*, 159 F. Supp. 503, 511–15 (E.D. Va. 1958), *vacated sub nom.* *Harrison v. NAACP*, 360 U.S. 167 (1959)); *Harrison*, 360 U.S. at 181–82 (Douglas, J., dissenting) (same).

²²⁵ Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 359 (1949); see also *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1097 (1969) (“Generally, the Court has avoided the question of [legislative] motive even in racial cases.”). For a striking illustration of this issue at the state level, see *Missouri ex rel. City of Creve Coeur v. Weinstein*, 329 S.W.2d 399 (Mo. Ct. App. 1959). There, an African-American couple had begun to build a house in Creve Coeur, Missouri. Before the couple could move in, the city’s Board of Aldermen enacted an ordinance authorizing the city to acquire the property by eminent domain and to turn it into a public park. When city officials initiated condemnation proceedings to carry out this ordinance, the couple argued that the ordinance sprang from racial prejudice and was an attempt to maintain residential segregation. *Id.* at 401. The state trial judge announced his intention to take evidence on this subject, but an appellate panel forbade him to do so. Although the appellate court acknowledged “the gravity of the allegations,” it understood established doctrine to preclude judicial inquiry into them; even in cases of alleged racial discrimination, “[t]he motive which actuates and induces the legislative body to enact legislation is wholly the responsibility of that body and courts have no jurisdiction to intervene in that area.” *Id.* at 410.

²²⁶ 377 U.S. 218 (1964).

²²⁷ In the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), Virginia had openly pursued a policy of “massive resistance” to school desegregation. A statute enacted in 1956, for instance, required any public elementary or secondary school with both “white and colored children” to be “closed and . . . removed from the public school system.” Act of Sept. 29, 1956, ch. 68, §§ 1–3, 1956 Va. Acts 69. When Virginia’s highest court held that

idea in the subsequent case of *Palmer v. Thompson*,²²⁸ refusing to probe the motives that had led a municipal legislature in Mississippi to close the city's swimming pools after a federal judge had declared that the city could not segregate their patrons on the basis of race.²²⁹ As late as 1971, then, the Court's official doctrine still opposed judicial inquiries into the internal thought processes of legislative bodies, even when there were strong grounds to suspect that a facially permissible statute had in fact sprung from racial animus.

Outside of the race context, Justice Black's majority opinion in the 1946 case of *United States v. Lovett*²³⁰ did use internal legislative history to impute an unconstitutional purpose to a federal statute that cut off the salaries of three named men then working for federal agencies. Although the statute did not explain Congress's motivations, the Court concluded that it was designed to punish the men for their affiliations with Communist-front organizations and that it therefore amounted to an impermissible bill of attainder.²³¹ *Lovett*, however, involved an unusual sort of legislative action—one addressing personnel matters of the sort customarily handled by administrative offi-

this statute and related laws violated state constitutional provisions giving local school boards the power to supervise local schools, *Harrison v. Day*, 106 S.E.2d 636, 646–47 (Va. 1959), the legislature authorized a more local approach. Prince Edward County's Board of Supervisors used this authority to close the county's public schools after federal courts ordered their desegregation. A private foundation built a new school for white children in the county, and children attended this school with tuition grants that came to be supported mostly by state and local funds (supplemented by private contributions that the county encouraged through tax credits). Tuition grants were also available to support the education of black children, but segregated private education in underfunded facilities was not a good substitute for desegregated public education, and most of the black children in Prince Edward County got "practically no formal . . . education" during the period that the public schools were closed. BOB SMITH, *THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951–1964*, at 254–55 (1965).

In *Griffin*, the Supreme Court saw through the public authorities' efforts to circumvent *Brown*. Without specifying exactly which sources the judiciary could and could not consult, Justice Black observed that

the record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school.

Griffin, 377 U.S. at 231. Some lower courts took this statement to invite judicial scrutiny of the internal legislative process in race cases. *See, e.g.*, *Mann v. Powell*, 333 F. Supp. 1261, 1266 (N.D. Ill. 1969) (taking some recent cases, including *Griffin*, to reflect race-discrimination exception to ordinary principle of "judicial deference in the ascertainment of legislative purpose").

²²⁸ 403 U.S. 217 (1971).

²²⁹ *Id.* at 224–26.

²³⁰ 328 U.S. 303 (1946).

²³¹ *Id.* at 308–17.

cials rather than Congress. That context may have made judicial examination of the decisionmaking process seem more appropriate, for courts were used to reviewing the motivations behind certain administrative decisions.²³² In any event, later cases sharply limited *Lovett's* implications. As the Court put it in 1960, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground. Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."²³³

Chief Justice Warren's 1968 opinion in *United States v. O'Brien*²³⁴ is to the same effect. After publicly burning his draft card to protest the Vietnam War, David O'Brien had been prosecuted and convicted under a federal statute that forbade the knowing destruction of such cards. On appeal, he argued that although the statute did not single out protesters on its face, Congress had enacted it for the purpose of suppressing symbolic speech, and the statute therefore violated the First Amendment.²³⁵ O'Brien cited statements in the legislative history to support his account. But the Court refused to impute an impermissible purpose to the statute on this basis. While acknowledging that "the Court will look to statements by legislators for guidance as to the purpose of the legislature" when the Court was simply trying to understand and carry out the legislature's commands, Chief Justice Warren's majority opinion insisted that matters were "entirely . . . different" when the Court was being asked to hold those commands unconstitutional. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."²³⁶

2. Ratcheting Up the Standard of Proof

In addition to expressing caution about basing inferences of impermissible purpose on internal legislative history, Chief Justice Warren's comments in *O'Brien* reflect an important shift in the standard of proof. From the late 1930s on, the Court restored the standard that had prevailed before the 1920s: The Court refused to accuse legislatures of unconstitutional motivations unless the information that the Court was willing to consider left no room for any other conceivable explanation.

²³² See *supra* notes 95, 98 and accompanying text.

²³³ *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

²³⁴ 391 U.S. 367 (1968).

²³⁵ *Id.* at 369–71, 382–83.

²³⁶ *Id.* at 383–84.

This development is clearest in cases involving economic regulations. Although *Lochnerism* was in decline, the Court still understood the Fifth and Fourteenth Amendments to restrict the reasons for which legislatures could validly adopt regulations that impinged upon private property or freedom of contract. For instance, the Constitution was thought to prohibit both Congress and the state legislatures from adopting such regulations for purely private purposes—that is, simply to benefit a favored individual or group at the expense of a disfavored one without thereby trying to advance any permissible vision of the public interest.²³⁷ Because of the Court's reluctance to impugn legislative motivations, however, the judiciary played little role in enforcing this principle; if any conceivable public purpose could be hypothesized that would supply a rational basis for the legislature's actions, judges were supposed to give the legislature the benefit of the doubt. As Justice Stone announced in *United States v. Carolene Products Co.*,²³⁸ “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”²³⁹ By the end of the 1940s, the Court was openly treating *Constantine* as a relic and was strongly implying that the judiciary had become less willing to impute improper motivations to legislatures.²⁴⁰

To be sure, *Carolene Products* indicated that the Court might not extend its powerful presumption of constitutionality to all areas of

²³⁷ See, e.g., George D. Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 580 n.28 (1948) (thinking it clear that “a state statute which purported to take property from A and give it to B simply because the legislators disliked A” would be unconstitutional); cf. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1732 (1984) (canvassing modern doctrine about power of eminent domain, dormant Commerce Clause, Privileges and Immunities Clause, Contracts Clause, Due Process Clauses, and Equal Protection Clause, and concluding that “the prohibition of naked preferences serves as the most promising candidate for a unitary theory of the Constitution”).

²³⁸ 304 U.S. 144 (1938).

²³⁹ *Id.* at 152; see also *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); *Ry. Express Agency v. New York*, 336 U.S. 106, 109–10 (1949) (taking similar approach under Equal Protection Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1, 5–8 (1947) (observing that when taxpayers argue that they are being taxed for other people's private benefit rather than for any public purpose, courts should defer to legislature and proceed “with the most extreme caution”).

²⁴⁰ See *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) (contrasting *Constantine* with more recent cases); see also *United States v. Kahriger*, 345 U.S. 22, 25 (1953) (reversing lower court that had relied on *Constantine* to impute impermissible purpose to purported federal tax).

constitutional law, or even all areas of the Fourteenth Amendment. In the seminal footnote four, Justice Stone suggested that judges would not bend over backward to uphold a statute that “appears on its face to be within a specific prohibition of the Constitution,” and he made clear that he considered the Fourteenth Amendment “specific” insofar as it incorporated specific provisions of the Bill of Rights. Even aside from those provisions, statutes limiting eligibility to vote, interfering with political organizations, or otherwise “restrict[ing] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” might trigger “more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than . . . most other types of legislation.” Most famously, Justice Stone suggested that “similar considerations [might] enter into the review of statutes directed at particular religious, or national, or racial minorities.” Without saying exactly what he meant by statutes “directed at” minority groups, he explained that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”²⁴¹

Decades later, John Hart Ely and others would explain this idea, and the concept of “strict scrutiny” that it eventually generated, as a means of “flushing out” impermissible purposes.²⁴² If the Court itself was thinking in these terms, then heightened scrutiny would mark an exception to the general trend that I have been discussing: While the Court was ratcheting up the standard of proof for imputing impermissible purposes to statutes in other areas, it was simultaneously becoming more willing to impute impermissible purposes to statutes that triggered footnote four. In fact, however, neither Justice Stone nor the rest of the Court seems to have understood heightened scrutiny as a way of detecting unconstitutional motivations. As originally applied, the *Carolene Products* idea was more about effects than about purposes.

Stephen Siegel has already made this point about First and Fourteenth Amendment cases involving the freedoms of speech, press, and religion, where the idea of heightened scrutiny gained its first foothold.²⁴³ As early as 1939, the Court explicitly held that state

²⁴¹ *Carolene Prods.*, 304 U.S. at 152 n.4 (citations omitted).

²⁴² E.g., ELY, *supra* note 12, at 146; Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1043, 1113–14 (1978).

²⁴³ Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 394–97 (2006) (concluding that until at least early 1960s,

laws required stronger justifications when they operated to restrict these freedoms than when they impinged upon other private interests, including other interests protected by the Due Process Clause.²⁴⁴ But the Court did not portray this form of heightened scrutiny as a way to root out statutes with invidious purposes. Rather, the Court repeatedly described its approach as an effects-oriented balancing test: The Constitution treated impingements upon speech, press, and religion as a substantial harm, and the judiciary should invalidate statutes with those effects unless they served a sufficiently powerful countervailing interest.²⁴⁵ In keeping with this view, even when a statute's apparent goals were perfectly legitimate and the statute burdened protected activities only as an incident to the pursuit of those goals, particular applications of the statute sometimes failed the Court's test—not because the statute's effects raised doubts about the legislature's true goals, but simply because those goals were not weighty enough.²⁴⁶

As heightened scrutiny developed, the Court eventually held that even when a statute's purported goals were important enough to warrant restrictions on protected activities, judges should uphold the statute only if the same goals could not be achieved through less restrictive means.²⁴⁷ The idea that a tighter fit between means and

heightened scrutiny in these cases was “a jurisprudence of cost-benefit analysis, not motive discovery”); *see also* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 301–02, 310–52 (1996) (providing detailed intellectual history of Court's “bifurcated review project”).

²⁴⁴ *See, e.g.*, *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (referring to “the preferred place given in our scheme to . . . the indispensable democratic freedoms secured by the First Amendment,” and noting that “[t]he rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice” to sustain legislation when those freedoms are at stake); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (observing that while courts often require only some “rational basis” for economic regulations challenged under Due Process Clause, “freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds”); *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (“Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.”).

²⁴⁵ *See* Siegel, *supra* note 243, at 394–97 (arguing that “‘cost-justification’ was [the] original point” of strict scrutiny and suggesting that this focus persisted until 1960s).

²⁴⁶ *See, e.g.*, *Schneider*, 308 U.S. at 162–65 (not questioning sincerity of anti-litter motivations behind local ordinances barring public distribution of handbills, but nonetheless holding that ordinances could not constitutionally be applied to political or religious handbills); *see also* *Dennis v. United States*, 341 U.S. 494, 508 (1951) (plurality opinion) (“[M]any of the cases in which this Court has reversed convictions by use of [the ‘clear and present danger’ test] have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech.”).

²⁴⁷ *See* *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (“In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that

ends is required when free speech, free press, or the free exercise of religion are at stake than “[i]n other areas, involving different constitutional issues,”²⁴⁸ might be seen as a safeguard against statutes with impermissible purposes; in Professor Ely’s words, only “the goal the legislators actually had in mind” is likely to fit the legislature’s chosen means as tightly as strict scrutiny requires, and this form of judicial review will therefore be fatal to statutes whose true goals cannot be acknowledged openly.²⁴⁹ But the Court itself did not necessarily see the narrow-tailoring requirement in these terms. To the contrary, the Court often seemed to think of the requirement in terms of effects rather than purposes—as a way of minimizing the collateral damage caused by statutes that served legitimate goals, rather than as a way of making sure that the enacting legislature had really been motivated by those goals.²⁵⁰

One should not misunderstand this point. As a matter of substantive constitutional law, the Court plainly interpreted the First and Fourteenth Amendments to impose some purpose-based restrictions on legislative power: Neither the state nor the federal government was supposed to wield its authority for the purpose of suppressing disfavored ideas or religions.²⁵¹ But the Court of this period was not

purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”); *Butler v. Michigan*, 352 U.S. 380, 382–83 (1957) (complaining that statute barring distribution of lewd books in order to keep such books away from children was “not reasonably restricted to the evil with which it is said to deal”). Although *Shelton* invoked earlier cases, I am skeptical that a special requirement of “narrow tailoring” crystallized in First Amendment jurisprudence until *Shelton* itself. Before then, heightened scrutiny in First Amendment cases simply required especially important ends, not especially well-fitting means. In this respect, First Amendment doctrine resembled equal-protection doctrine. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding military orders excluding all people of Japanese ancestry from West Coast because of importance of preventing espionage and sabotage, without requiring tight fit between this important end and the means chosen).

²⁴⁸ *Shelton*, 364 U.S. at 488 n.8.

²⁴⁹ ELY, *supra* note 12, at 146.

²⁵⁰ Siegel, *supra* note 243, at 395–96; see also *United States v. Robel*, 389 U.S. 258, 268 & n.20 (1967) (holding that federal statute failed narrow-tailoring analysis despite “its concededly legitimate legislative goal,” and insisting that “Congress must achieve its goal by means which have a ‘less drastic’ impact”). Admittedly, some narrow-tailoring opinions from the 1960s seem more suspicious of the legislature’s true goals. See *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) (“[R]egulatory measures . . . cannot be employed *in purpose or in effect* to stifle, penalize, or curb the exercise of First Amendment rights.” (emphasis added)); cf. *Talley v. California*, 362 U.S. 60, 64 (1960) (noting that while counsel had attempted to defend city’s ban on all anonymous handbills as “a way to identify those responsible for fraud, false advertising and libel,” challenged ordinance “is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose”).

²⁵¹ See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 147 (1943) (referring to “the naked restriction of the dissemination of ideas” as “[a] purpose . . . forbidden by the Con-

eager to circumvent the traditional limitations on judicial enforcement of such restrictions, and it probably did not develop heightened scrutiny for that reason. Thus, even after heightened scrutiny was firmly established in free-speech doctrine, Chief Justice Warren's opinion in *O'Brien* specifically indicated that the Court was no more willing to impute impermissible purposes to statutes in free-speech cases than in other cases.²⁵²

Cases from the 1960s involving alleged establishments of religion, though singled out by Professor Ely as illustrating the judiciary's occasional willingness to investigate legislative motivation,²⁵³ do not reflect a different approach. As with other aspects of the First Amendment that the Due Process Clause was said to incorporate, the Establishment Clause was understood to pay attention to legislative purpose.²⁵⁴ In general, however, the Supreme Court seemed unwilling to find a prohibited purpose unless the objective indicia permitted no other conclusion. As a result, the Court imputed an imper-

stitution"). Cases involving administrative actions make this point clear: Administrative officials could not take full advantage of the strictures on judicial inquiries into the motivations of the legislature, and the Court assessed certain kinds of constitutional challenges to administrative decisions by investigating the true reasons for those decisions. *See, e.g.,* *Niemotko v. Maryland*, 340 U.S. 268, 272–73 (1951) (concluding that city council, while sitting in administrative capacity, had violated Equal Protection Clause by denying Jehovah's Witness permit to use public park for Bible talks, and basing this conclusion on testimony indicating that "the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views"). Along the same lines, the Court also held that statutes could not give administrative officials "uncontrolled discretion" about whether to allow speech activities, precisely because there was too great a danger that they would use their power to permit speech that they liked and to forbid speech with which they disagreed. *Saia v. New York*, 334 U.S. 558, 562 (1948); *cf. Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (making clear that statute delegating excessive discretion to administrators was invalid "[w]hatever the motive which induced its adoption," and hence that Court was not questioning *legislature's* good faith).

²⁵² *See* *United States v. O'Brien*, 391 U.S. 367, 382–83 (1968) (responding to defendant's First Amendment argument by invoking "[the] familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"); *cf. Barenblatt v. United States*, 360 U.S. 109, 132, 134 (1959) (affirming witness's conviction for refusing to answer questions posed by House Committee on Un-American Activities, observing that witness's efforts to impugn "true objective" behind Committee's investigation were misplaced, and stating that "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power").

²⁵³ Ely, *supra* note 5, at 1209–11.

²⁵⁴ *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (indicating that Establishment Clause bars statutes that have either "purpose" or "primary effect" of advancing or inhibiting religion); *see also Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (distilling from Court's precedents three-pronged test that "the statute must have a secular legislative purpose . . . , its principal or primary effect must be one that neither advances nor inhibits religion, . . . [and] the statute must not foster 'an excessive government entanglement with religion'").

missible religious purpose to precisely one statute during this period—an Arkansas law that prohibited public schools and universities from teaching evolution and that the state’s lawyers had not even tried to justify “by considerations of state policy other than the religious views of some of its citizens.”²⁵⁵ Indeed, lower courts of the day went so far as to question whether the Court’s “secular legislative purpose” requirement “truly exist[s] as a distinct, dispositive requirement.”²⁵⁶ At any rate, they treated Establishment Clause jurisprudence as entirely consistent with the principle that “[c]ourts are . . . highly reluctant to scrutinize a legislature’s motivation or predominant purpose for enacting a given law.”²⁵⁷

Even in race cases, the Supreme Court of this period did not use heightened scrutiny to relax the ordinary standards for accusing legislatures of impermissible purposes. To be sure, in the mid-1960s, when the Court began applying something like modern strict scrutiny to statutes that explicitly classified people on the basis of race,²⁵⁸ the Court was perfectly willing to impugn the purposes behind those statutes.²⁵⁹ In these cases, however, the traditional standard of proof was satisfied: The impermissible purposes behind the challenged statutes could be gleaned with near-total certainty from the face of the statutes themselves, considered in light of extrinsic facts about the real world. This sort of judicial review of legislative purpose was not an innovation.²⁶⁰

²⁵⁵ *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968). The Court may also have imputed an impermissible purpose to the legislature in *Schempp*, 374 U.S. at 223, but this imputation was not central to its analysis.

²⁵⁶ *Wolman v. Essex*, 342 F. Supp. 399, 411 n.13 (S.D. Ohio), *aff’d mem.*, 409 U.S. 808 (1972); *see also* *Thomas v. Schmidt*, 397 F. Supp. 203, 208 (D.R.I. 1975) (“It is noteworthy that in only one of all the major cases decided under the Establishment Clause did the Court find a secular purpose lacking.”), *aff’d mem.*, 539 F.2d 701 (1st Cir. 1976).

²⁵⁷ *Kosydar v. Wolman*, 353 F. Supp. 744, 752 n.4 (S.D. Ohio 1972), *aff’d mem. sub nom. Grit v. Wolman*, 413 U.S. 901 (1973).

²⁵⁸ *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991) (discussing rise of “a presumptive rule against racial classifications”).

²⁵⁹ *See* *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. 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.”); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (explaining that racial classifications are usually irrelevant to “any constitutionally acceptable legislative purpose”).

²⁶⁰ Ironically, the cases that may really have augured a shift in the Court’s approach to legislative motivation were those in which the Court did *not* speak of the legislature’s purposes. In *Brown v. Board of Education*, for instance, the Court studiously avoided that topic, emphasizing instead “[t]he effect of [state-enforced racial segregation in public schools] on [children’s] educational opportunities.” 347 U.S. 483, 494 (1954). Contempo-

For the most part, moreover, the Court limited strict scrutiny in racial equal-protection cases to statutes that explicitly classified people on the basis of race. This limitation makes it hard to see the rise of strict scrutiny in race cases as a means of flushing out the legislature's hidden motivations. After all, if the Court imported strict scrutiny into equal-protection doctrine to root out statutes that ostensibly served legitimate goals but that the legislature had in fact adopted out of racial animus, one might have expected the Court to apply strict scrutiny to all statutes with disproportionate impacts on disfavored minority groups, or perhaps to all statutes enacted in racially charged contexts. The Court did not follow that path.²⁶¹

In fact, in the three decades after Justice Stone's famous footnote in *Carolene Products*, there is really only one prominent area of constitutional doctrine—the dormant Commerce Clause—in which the courts' application of heightened scrutiny can persuasively be explained as a means of smoking out unconstitutional purposes. Courts had long been willing to hold unconstitutional state statutes whose "avowed purpose" was "to suppress or mitigate the consequences of competition between the states."²⁶² In an earlier period,

aneous commentators, however, plausibly suggested that the Court's true logic must have been different and that the real rationale for *Brown* may have "involve[d] an inquiry into the motive of the legislature, which is generally foreclosed to the courts." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

²⁶¹ Without discussing levels of scrutiny, the Court of the 1960s occasionally expressed willingness to impute discriminatory purposes to statutes that did not explicitly classify people on the basis of race. In *Gomillion v. Lightfoot*, for instance, the Alabama legislature had changed the boundaries of the city of Tuskegee from a square to "a strangely irregular twenty-eight-sided figure." 364 U.S. 339, 340–41 (1960). The Court held that plaintiffs should be permitted to show that the new boundaries left all of the city's white population intact but removed ninety-nine percent of the African-Americans who had previously been eligible to vote in municipal elections. *Id.* at 342. The Court further held that if the plaintiffs established these objective facts, "the conclusion would be irresistible . . . that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote," in violation of the Fifteenth Amendment. *Id.* at 341. But this logic was nothing new: Courts had long been able to impute impermissible purposes to statutes where the objective indicia left no room for any other explanation, and the Court had applied this principle in the racial context as early as 1915. *See supra* note 162 (discussing *Guinn v. United States*); *see also Gomillion*, 364 U.S. at 342 (invoking *Guinn*'s progeny as precedent).

The Court reached a similar conclusion in *Griffin v. County School Board*, 377 U.S. 218 (1964). As in *Gomillion*, though, the Court could do so without relaxing the standard of proof; again, the indicia of invidious motivation were absolutely overwhelming. *See supra* note 227 (discussing *Griffin*).

²⁶² *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935); *see also, e.g., Kan. Natural Gas Co. v. Haskell*, 172 F. 545, 555–57, 572 (C.C.E.D. Okla. 1909) (concluding "from an examination of the provisions of the act itself" that its "dominant object and purpose . . . was to place within the grasp of the state the absolute dominion and control of the business of transportation of natural gas through pipe lines" so as to "cut off and destroy any inter-

courts had also forbidden state legislatures to impose “direct” burdens on interstate or foreign commerce, regardless of the goals that the state legislatures were trying to achieve.²⁶³ Beginning in the 1930s and 1940s, though, the direct/indirect distinction gave way to a different test—one that applied particularly rigorously when a statute operated to protect in-state economic interests against out-of-state competition and that held such statutes unconstitutional “if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.”²⁶⁴ While the Court occasionally held even nondiscriminatory statutes unconstitutional because of their effects on interstate commerce,²⁶⁵ most laws that the Court struck down under this prong of its test favored in-state interests at the expense of out-of-state interests and probably were designed to do so. Thus, Donald Regan has persuasively described the Court’s test as a means of rooting out state laws that were enacted for protectionist reasons.²⁶⁶ But the Court did not justify its approach in these terms, and even Professor Regan does not assert that the Court was *consciously* engaged in a search for impermissible purposes.²⁶⁷ At least on its

state transportation of such product,” and holding that act therefore violated dormant Commerce Clause), *aff’d*, 221 U.S. 229 (1911).

²⁶³ See, e.g., *Di Santo v. Pennsylvania*, 273 U.S. 34, 37 (1927) (“A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed.”), *overruled by California v. Thompson*, 313 U.S. 109 (1941); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925) (same for interstate commerce); see also *supra* text accompanying notes 79, 83 (discussing early manifestations of this idea).

²⁶⁴ *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353–54 (1951) (using this test to invalidate state statute despite legitimacy of its “avowed purpose”); see also *Parker v. Brown*, 317 U.S. 341, 362–63 (1943) (deemphasizing direct/indirect distinction); *Thompson*, 313 U.S. at 116 (overruling *Di Santo*); *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 185 (1938) (treating dormant Commerce Clause as nondiscrimination provision).

²⁶⁵ *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 528–29 (1959) (invalidating state statute requiring trucks to have contoured mudflaps, and observing that “[t]his is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce”); *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 781–82 (1945) (similarly invalidating state law restricting length of trains); see also *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444 (1960) (explaining *Bibb* and *Southern Pacific Co.* on theory that “a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary”).

²⁶⁶ See Regan, *supra* note 4, at 1206 (arguing that since 1935, Court has been “doing nothing [in what Regan calls ‘movement-of-goods cases’] but preventing state protectionism, where protectionism is defined in terms of *purposeful* favoring of locals over their foreign competitors”); *id.* at 1098 (adding that “the *per se* rules or presumptions the Court uses [in some of these cases] can be justified by a purpose-based theory, and are in fact better justified by a purpose-based theory than by any other”).

²⁶⁷ See *id.* at 1284–87 (speculating that “the Justices . . . are imperfectly aware of what they are doing” and suggesting that concerns about legislative motivation “can operate unconsciously on the judicial mind”).

face, then, doctrine under the dormant Commerce Clause was consistent with the judiciary's approach to questions of legislative motivation throughout the rest of constitutional law.

D. *From the 1970s to the Present*

Things changed in the 1970s and 1980s. When asked to impute impermissible purposes to a statute, modern courts routinely consult internal legislative history and other sources of information that their predecessors considered off-limits. In at least some areas of constitutional adjudication, moreover, the standard of proof—though rarely discussed with much clarity—seems to be less demanding than it once was. Again, I will survey these developments in turn.

1. *The Expansion in the Sources of Information that Courts Will Consider*

The Burger Court's willingness to investigate the internal legislative process in connection with judicial review of legislative purpose first became clear in equal-protection cases. In 1976, Justice Byron White's majority opinion in *Washington v. Davis*²⁶⁸ set the stage by interpreting the equal-protection component of the Fifth Amendment (and, by extension, the Equal Protection Clause of the Fourteenth Amendment) to make the constitutionality of various statutes depend on the legislature's reasons for enacting them.²⁶⁹ In *Davis* itself, the Court did not have to address the extent of the judiciary's role in investigating those reasons. Indeed, although Justice White had

²⁶⁸ 426 U.S. 229 (1976).

²⁶⁹ *Davis* held that if a statute was "neutral on its face" and "serv[ed] ends otherwise within the power of government to pursue," the mere fact that it had a disproportionate impact on members of a traditionally disfavored racial group did not automatically make it unconstitutional, or even trigger strict scrutiny. *Id.* at 242. According to the Court, the Constitution forbids legislators to enact a statute for the purpose of having adverse effects on people of a particular race, but it permits a statute to have such effects as an incidental consequence of the legislature's pursuit of a legitimate goal. *See id.* at 240 (articulating "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

Although the modern Court continues to follow *Davis*, affirmative-action cases have exposed disagreements about whether the Equal Protection Clause imposes additional restrictions on legislative power that are not keyed to legislative purpose. Some Justices read the Clause as flatly forbidding legislatures to classify people on the basis of race (regardless of the legislature's motivations) unless the interests served by the classification are extraordinarily important. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2765 (2007) (plurality opinion) (characterizing precedents as "rejecting a motives test for racial classifications"); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("When racial classifications are explicit, no inquiry into legislative purpose is necessary."). But the Justices in this camp agree that the constitutionality of statutes that do not classify people on the basis of race depends on the purposes behind those statutes. *Id.*

written the principal dissent in *Palmer v. Thompson*, his opinion in *Davis* left room for the Court to continue following *Palmer*'s holding that facially neutral statutes serving legitimate purposes "[a]re not open to impeachment by evidence that the [legislators] were actually motivated by racial considerations."²⁷⁰ The very next year, though, the Court announced a new approach.

Hardly pausing over the contrary tradition, Justice Powell's majority opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²⁷¹ indicated that judges could legitimately seek to unearth the hidden motivations behind legislative acts, just as they had long been willing to investigate the possibility of illicit motivations within administrative agencies. In both contexts, the Court suggested, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."²⁷² The Court went on to list various sources of information that judges could consider. Both the "sequence of events leading up to the challenged decision" and the internal "legislative or administrative history" were "subjects of proper inquiry in determining whether racially discriminatory intent existed."²⁷³ In extraordinary cases, indeed, courts could even summon individual legislators "to testify concerning the purpose of the official action" (subject to the limitations imposed by the Speech or Debate Clause and other evidentiary privileges).²⁷⁴ As this recitation of acceptable evidence suggests, modern-day judges are perfectly willing to go beyond the objective indicia of legislative purpose when investigating whether facially neutral laws were actually motivated by illicit racial considerations.²⁷⁵

²⁷⁰ *Davis*, 426 U.S. at 243. To the extent that *Palmer* suggested that legislative purpose was simply "irrelevant" to the constitutionality of statutes, Justice White disavowed it. *Id.* at 244 n.11; see also *supra* notes 6–8 and accompanying text (noting *Palmer*'s imprecision on this point).

²⁷¹ 429 U.S. 252 (1977).

²⁷² *Id.* at 266.

²⁷³ *Id.* at 267–68.

²⁷⁴ *Id.* at 268; cf. *id.* at 268 n.18 (acknowledging that because "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," courts should usually avoid "[p]lacing a decisionmaker on the stand").

²⁷⁵ See, e.g., *Hunt v. Cromartie*, 526 U.S. 541, 546 & n.2, 547 (1999) (noting judiciary's willingness to consider what *Arlington Heights* called "'direct evidence'" that state legislature drew electoral districts "with an impermissible racial motive" (quoting *Arlington Heights*, 429 U.S. at 266)); *Miller v. Johnson*, 515 U.S. 900, 917–18 (1995) (referring in this context to testimony by operator of computer that Georgia legislature used to draw district lines); *Hunter v. Underwood*, 471 U.S. 222, 228–33 (1985) (using evidence about proceedings in Alabama's constitutional convention of 1901 to conclude that facially neutral provi-

The same is true when judges consider whether statutes reflect invidious sex discrimination. Even before *Arlington Heights*, the Court had indicated that it would test statutory sex classifications according to their “actual purposes,” as revealed by internal legislative history.²⁷⁶ After *Arlington Heights*, the Court not only confirmed this point²⁷⁷ but also indicated the judiciary’s willingness to consult the sources catalogued in *Arlington Heights* to detect whether laws that were neutral on their face had nonetheless been enacted for the purpose of “keeping women in a stereotypic and predefined place.”²⁷⁸

Just as the judiciary will examine the internal legislative process when litigants accuse legislatures of racist or sexist motivations that implicate the Equal Protection Clause, modern judges use a similar approach when litigants accuse legislatures of religious motivations that implicate the Establishment Clause. To decide whether a challenged statute was enacted for the prohibited purpose of advancing a particular religious doctrine, the Supreme Court has freely considered internal legislative history and the testimony of the statute’s spon-

sion of state constitution “was motivated by a desire to discriminate against blacks on account of race”).

²⁷⁶ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648–51 (1975).

²⁷⁷ See *Califano v. Webster*, 430 U.S. 313, 318–20 (1977) (per curiam) (using legislative history to help establish that challenged sex classification had been enacted for valid purpose); *Califano v. Goldfarb*, 430 U.S. 199, 214–17 (1977) (plurality opinion) (Brennan, J.) (rejecting hypothesized rationale for another challenged sex classification, in part because legislative history indicated that this rationale was not Congress’s actual purpose). Notwithstanding these cases, Justice Rehnquist later suggested that *Palmer* had survived *Arlington Heights* and required judges to accept an asserted justification for a sex classification without investigating whether the enacting legislature had genuinely acted for that reason. *Michael M. v. Superior Court*, 450 U.S. 464, 472 n.7 (1981) (plurality opinion) (Rehnquist, J.). This suggestion, though, did not take root. Cf. *United States v. Virginia*, 518 U.S. 515, 535–36 (1996) (noting that under current doctrine, proffered justification for sex classification is tenable only insofar as it “describe[s] actual state purposes, not rationalizations for actions in fact differently grounded”).

Justice Rehnquist had more success in blocking judicial inquiries into the actual purposes behind statutory classifications that are not alleged to spring from race- or sex-based calculations, but that are nonetheless challenged as arbitrary. In *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980), he secured a majority for the proposition that courts conducting rational-basis review under the Equal Protection Clause should simply ask whether a legitimate justification for the challenged classification can be hypothesized and should not seek proof that the enacting legislature really acted for that reason. *Id.* at 179 (Rehnquist, J.); cf. *id.* at 187–93 (Brennan, J., dissenting) (arguing that courts should test rationality of legislative action according to enacting legislature’s actual purposes, as revealed by internal legislative history). Even that proposition, however, is now subject to an exception of uncertain scope. See *Nordlinger v. Hahn*, 505 U.S. 1, 15–16 (1992) (indicating that Court will not use hypothesized rationale to uphold statutory classification in “the rare case where the facts preclude[] any plausible inference” that this rationale actually motivated enacting legislature, but failing to specify evidentiary sources that can inform Court’s view of “the facts”).

²⁷⁸ *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 & n.24 (1979).

sors.²⁷⁹ In *Edwards v. Aguillard*,²⁸⁰ for instance, the Court used this information to conclude that the secular purpose articulated by the government's lawyers was "a sham" and that the challenged statute was really enacted "for the purpose of endorsing religion."²⁸¹ And while the Court recently said that the relevant analysis of legislative purpose should proceed from the perspective of an "objective observer," that observer is supposed to be familiar with the internal legislative history as well as other publicly available materials about the statute's genesis.²⁸² If those materials reveal that the statute was enacted "to promote a particular faith" and that any secular considerations were "secondary" in the legislature's actual decisionmaking process, the Court will hold the statute unconstitutional—even if secular reasons could support the very same provisions.²⁸³

Even the rhetoric that is used *against* this approach has changed over time. On the current Supreme Court, Justice Scalia is the person who most consistently opposes judicial investigation of the legislature's "subjective" purposes.²⁸⁴ In *Aguillard*, he urged his colleagues to abandon modern Establishment Clause doctrine insofar as it asks courts to "discern[] the subjective motivation of those enacting the statute."²⁸⁵ In *Church of the Lukumi Babalu Aye v. City of*

²⁷⁹ *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 56–60 (1985).

²⁸⁰ 482 U.S. 578 (1987).

²⁸¹ *Id.* at 585–87, 592–93.

²⁸² *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005) (internal quotation marks omitted).

²⁸³ *Id.* at 864–65, 866 n.14.

²⁸⁴ Justice Stevens has also criticized such inquiries, but his record on this point is mixed. *Compare* *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 287 n.15 (1984) (Stevens, J., dissenting) ("Because [the majority's approach] makes the constitutionality of state legislation depend on a judicial evaluation of the motivation of the legislators, I regard it as an unsound approach to the adjudication of federal constitutional issues."), *Marsh v. Chambers*, 463 U.S. 783, 823 n.1 (1983) (Stevens, J., dissenting) ("[O]nce again, the Court makes the subjective motivation of legislators the decisive criterion for judging the constitutionality of a state legislative practice. . . . [T]hat sort of standard . . . is not conducive to the evenhanded administration of the law."), *and* *Rogers v. Lodge*, 458 U.S. 613, 642 (1982) (Stevens, J., dissenting) ("Ever since I joined the Court, I have been concerned about the Court's emphasis on subjective intent as a criterion for constitutional adjudication."), *with* *Mazurek v. Armstrong*, 520 U.S. 968, 978–80 (1997) (Stevens, J., dissenting) (invoking "the legislative hearings preceding the enactment of the statute" and other evidence to argue that a reasonable fact finder "could conclude that the legislature's predominant motive [in requiring abortions to be performed by licensed physicians] was to make abortions more difficult"), *Wallace*, 472 U.S. at 56–60 (Stevens, J.) (relying upon internal legislative history and key legislator's testimony to conclude that challenged statute had impermissible religious purpose), *and* *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 153 n.2 (1981) (Stevens, J., dissenting) (asserting that First Amendment analysis should pay less attention to after-the-fact rationalizations than to "the purposes that actually motivated Congress," as identified from internal legislative history).

²⁸⁵ 482 U.S. at 636–40 (Scalia, J., dissenting).

Hialeah,²⁸⁶ he took the same position about the Free Exercise Clause: While agreeing with his colleagues that a Florida city's ordinances against animal sacrifice were unconstitutional, he criticized Justice Kennedy's lead opinion for basing this conclusion partly on internal legislative history indicating that the city council had been "target[ing] animal sacrifice by Santeria worshipers because of its religious motivation."²⁸⁷ In neither case, though, did Justice Scalia purport to be identifying restrictions on the practice of judicial review. Instead, he simply disagreed with his colleagues about the substantive meaning of the Constitution; in his view, "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted"²⁸⁸ Justice Scalia himself seemed to assume that if the Religion Clauses *did* impose purpose-based restraints on legislative power, judicial enforcement would follow as a matter of course, and courts would have to conduct inquiries of the sort embraced by his colleagues.²⁸⁹

As this assumption suggests, the traditional idea that the legislature's hidden purposes are nonjusticiable, and that courts should not

²⁸⁶ 508 U.S. 520 (1993).

²⁸⁷ *Id.* at 542 (opinion of Kennedy, J., joined by Stevens, J.); *see id.* at 558 (Scalia, J., concurring in part and concurring in the judgment) ("I do not join that section because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*").

²⁸⁸ *See id.* at 558. Notwithstanding the passage that I have just quoted, Justice Scalia does not understand the Free Exercise Clause to establish a straightforward effects test. In *Employment Division v. Smith*, 494 U.S. 872 (1990), he famously held that legislatures can prohibit an activity across the board without trying to accommodate people who engage in the activity for religious reasons; a generally applicable statute can validly have the "incidental effect" of prohibiting the exercise of a particular religion, as long as this prohibition is not the "object" of the statute. *Id.* at 878. For Justice Scalia, then, the Free Exercise Clause does make a species of legislative purpose relevant. To judge from his opinion in *Lukumi Babalu Aye*, though, the purpose that matters is objective rather than subjective. As interpreted by Justice Scalia, the Free Exercise Clause does not forbid legislators to design and enact statutes for the specific purpose of prohibiting particular religious practices, but only to design and enact statutes that would make this purpose apparent to an outside observer unfamiliar with the legislature's internal deliberations.

This position arguably conflates the meaning of the Constitution itself with the doctrinal tests that courts might develop to implement that meaning. (For discussions of this distinction, see generally FALLON, *supra* note 4, and Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); for Justice Scalia's tendency to overlook it, see Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1669–70 (2005).) After all, while it is easy to argue that courts should focus on objective purpose (because of practical limitations on the judiciary's ability to review the legislature's actual purposes), it is harder to understand why *the Constitution* should be understood to focus on objective purpose. Especially in light of the fact that the Free Exercise Clause was written before judicial review was as prominent as it is now, one should not expect the Clause's substantive restrictions on legislative power to coincide in every respect with the restrictions that courts are best suited to enforce.

²⁸⁹ *Aguillard*, 482 U.S. at 639 (Scalia, J., dissenting).

open the black box of the legislative process to investigate them *even when they are relevant to the constitutionality of legislative action*, is now largely defunct. Across a wide range of doctrinal areas, when modern courts identify purpose-based restrictions on legislative power, they rarely hesitate to enforce those restrictions by considering legislative history and other information about the legislature's inner workings.²⁹⁰ To take just a few examples, sources of this sort have played prominent roles in cases about the dormant Commerce Clause (where courts ask whether challenged state laws were enacted for purposes of economic protectionism),²⁹¹ the Ex Post Facto and Bill of Attainder Clauses (where courts ask whether statutes that lack the traditional indicia of punishment were nonetheless enacted for punitive purposes),²⁹² and the constitutional right to travel (where courts

²⁹⁰ The recent case of *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008), provides a rare counterexample. In *Kelo v. City of New London*, 545 U.S. 469 (2005), the Supreme Court held that governments can exercise the power of eminent domain for the purpose of promoting economic development, but the Court added that a "pretext[ual]" use of this power would be unconstitutional: A city council cannot validly "take property under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit." *Id.* at 478. In *Goldstein*, the Second Circuit nonetheless held that "a full judicial inquiry into the subjective motivation" behind each exercise of the power of eminent domain would be too "intrus[ive]" and that courts should usually stop at asking whether a challenged taking has some "objective" basis. *Goldstein*, 516 F.3d at 60–64. *But see Kelo*, 545 U.S. at 491–92 (Kennedy, J., concurring) (discussing pretext analysis and referring approvingly to district court's examination of evidence that bore on actual motivations for taking).

²⁹¹ See, e.g., *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 156, 160 (5th Cir. 2007) (assuming that courts hearing dormant Commerce Clause cases can investigate legislative purpose by consulting same sources of information listed in *Arlington Heights*); *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 & n.4, 1066 (8th Cir. 2004) (noting potential for "statements by legislators and the governor about the challenged statute" to impugn statute's stated purpose); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 336–41 (4th Cir. 2001) (using lawmakers' press releases, public statements, and internal memoranda to identify "protectionist motivation"); see also *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270–71 (1984) (accepting state supreme court's conclusion, based partly on committee reports, that state legislature had impermissible motivation for enacting challenged statute); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981) (reviewing legislative history but finding no reason to impugn state legislature's motivations). Among lower courts, the trend toward use of legislative history in this context actually started in the 1960s. *Armour & Co. v. Nebraska*, 270 F. Supp. 941, 945 (D. Neb. 1967); *Ness Produce Co. v. Short*, 263 F. Supp. 586, 588–89 (D. Or. 1966), *aff'd*, 385 U.S. 537 (1967) (per curiam). *But see Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 753 F. Supp. 739, 769 (S.D. Ind. 1990) ("[A]nalysis of the actual motives of Indiana's lawmakers and executives is irrelevant to the outcome of the commerce clause inquiry.").

²⁹² See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 478–80 (1977) (noting that some statutes can be classified as bills of attainder because "the legislative record evinces a congressional intent to punish," and examining legislative history to determine whether challenged statute failed this "motivational" test); *United States v. Reynard*, 473 F.3d 1008, 1019–20 (9th Cir. 2007) (using similar approach under Ex Post Facto Clause); *Foretich v. United States*, 351 F.3d 1198, 1225–26 (D.C. Cir. 2003) (using legislative history in conjunction with other considerations to conclude that "the legislative process in this case

ask whether statutes were enacted for the purpose of discouraging interstate migration).²⁹³ Even in the realm of the Free Speech Clause, where the precedential force of *O'Brien* delayed judicial inquiries into the internal legislative process,²⁹⁴ at least some modern judges now say that when courts are trying to determine whether a challenged statute was enacted for the impermissible purpose of suppressing protected speech, they “may examine a wide variety of materials, including . . . legislative history”²⁹⁵

Of course, courts rarely have to decide whether a statute can be held unconstitutional *solely* because of its purpose if the statute does not actually have the effects that the legislature intended.²⁹⁶ Statutes that raise this question are presumably rare, and litigants with standing to challenge them might be even rarer. Even under modern doctrine, then, it is possible that most of the Constitution’s purpose-based restrictions on legislative power come into play only when a statute produces certain kinds of real-world effects. But when a statute does produce those effects, the outcome of judicial review can hinge on the courts’ assessment of the legislature’s actual purposes:

amounted to precisely that which the Bill of Attainder Clause was designed to prevent: a congressional determination of blameworthiness and infliction of punishment”); *see also* *Artway v. Att’y Gen. of N.J.*, 81 F.3d 1235, 1263 (3d Cir. 1996) (surveying case law under Ex Post Facto, Double Jeopardy, and Bill of Attainder Clauses, and noting relevance of both objective and subjective indicia of purpose).

²⁹³ *See* *Warrick v. Snider*, 2 F. Supp. 2d 720, 724 (W.D. Pa. 1997) (examining legislative history to determine whether this impermissible goal was “primary objective” behind challenged statute), *aff’d mem.*, 191 F.3d 446 (3d Cir. 1999).

²⁹⁴ *See supra* text accompanying notes 234–36 (describing *O'Brien*); *see also* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 652 (1994) (invoking *O'Brien*, though adding that appellants had little evidence of improper purpose); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582, 583 & n.1 (1991) (Souter, J., concurring in the judgment) (suggesting, based on precedent, that legislature’s actual purposes may be relevant to judicial review under Establishment Clause but not Free Speech Clause); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 828–29 (7th Cir. 1999) (citing *O'Brien* for proposition that “[t]he actual motives of those who enacted the ordinance are irrelevant to our First Amendment analysis”); *Cleveland Area Bd. of Realtors v. City of Euclid*, 88 F.3d 382, 387–88 (6th Cir. 1996) (referring to “the limited inquiry that case law permits when reviewing legislative motive”). *But see* *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1529 (11th Cir. 1993) (observing that *O'Brien*’s statements about legislative motive “may . . . effectively have been overruled”).

²⁹⁵ *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1280 (11th Cir. 2001). *But see* *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 34 (1st Cir. 2008) (“[I]t was an empty exercise for plaintiff to have conducted examinations of Concord’s mayor or code enforcement officer in an effort to show the stated reasons for the ordinance were not the real reasons. Legislative history is permissible for other purposes, but not this.”); *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (“In assessing whether a restraint on speech is content neutral, we do not make a searching inquiry of hidden motive”).

²⁹⁶ *See* *Lynce v. Mathis*, 519 U.S. 433, 444 (1997) (noting that this question remains open in context of Ex Post Facto Clause); *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 36 n.3 (1st Cir. 2005) (suggesting that same is true in context of dormant Commerce Clause).

Was the legislature *trying* to produce the adverse effects in question, or were those effects simply incidental to the legislature's pursuit of some legitimate objective? In a broad variety of areas, moreover, modern courts stand ready to impute impermissible purposes to statutes on the basis of legislative history and similar evidence about the legislature's internal decisionmaking process.

2. *Changes in the Standard of Proof*

This shift in the courts' practices has forced judges to wrestle with some practical questions that the prior regime avoided. As antebellum courts and commentators warned,²⁹⁷ inquiries into the internal legislative process inevitably raise difficult questions of aggregation: When should the motivations of one or more individual legislators be imputed to the legislature as a whole? Although similar questions can arise in other contexts,²⁹⁸ courts have not yet come to a consensus about how to approach them.²⁹⁹ But even if one brackets questions of aggregation, one must also determine the applicable standard of proof. In at least some areas of constitutional law, the case law on that issue too may be in flux.

To be sure, when litigants argue that statutory impositions denominated by the enacting legislature as civil remedies were nonetheless adopted for punitive purposes (of the sort that trigger the Ex Post Facto and Bill of Attainder Clauses), majority opinions continue to quote the standard articulated by the Supreme Court in 1960: "[O]nly the clearest proof" will warrant that conclusion about the legislature's hidden purposes.³⁰⁰ At least until recently, the Supreme

²⁹⁷ See *supra* notes 92–93 and accompanying text.

²⁹⁸ See, e.g., Peter T. DePasquale, Note, *Municipal Liability Under § 1983: The Difficulty in Determining Improper Motives of a Multi-member Municipal Board*, 42 NEW ENG. L. REV. 865, 874–82 (2008) (discussing circuit splits about aggregation of motivations when municipal boards act in administrative capacity).

²⁹⁹ For discussion of some rival approaches, compare *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (“[A]n isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body . . .”), with *Raveson*, *supra* note 105, at 954–61 (canvassing competing views and suggesting that single legislator's improper motivations can taint statute that would not have been enacted without his support).

³⁰⁰ *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). For modern opinions quoting this standard of proof, see *Smith v. Doe*, 538 U.S. 84, 92 (2003), *Hudson v. United States*, 522 U.S. 93, 100 (1997), and *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). For a case in which this standard of proof concededly affected the court's outcome, see *Wiley v. Bowen*, 824 F.2d 1120 (D.C. Cir. 1987). “Despite appellant's strong showing,” the court explained in *Wiley*, “enough doubt remains about the purpose of the statute that we cannot declare it unconstitutional under the standard established in *Flemming*.” *Id.* at 1122.

Court arguably retained a similarly demanding standard for imputing religious purposes to statutes in Establishment Clause cases.³⁰¹

In cases about racial gerrymandering, though, modern courts have treated questions about whether statutes were enacted for impermissible reasons like ordinary questions of fact, which the relevant trier of fact apparently can answer in the affirmative even if the record would also have supported the opposite conclusion. In *Hunt v. Cromartie*,³⁰² for instance, the Supreme Court held that whether the North Carolina legislature was acting from “an impermissible racial motive” when it drew particular electoral districts is “a factual question” on which trial courts should not grant summary judgment “when the evidence is susceptible of different interpretations or inferences by the trier of fact.”³⁰³ Although this idea can coexist with elevated standards of proof, the majority did not seem to think that the evidence must be conclusive in order to support a finding of impermissible motivation.³⁰⁴ Indeed, some lower courts have indicated that a simple preponderance of the evidence can suffice.³⁰⁵

Drawing appropriate generalizations from the case law in other realms of constitutional adjudication is difficult. Trial courts rarely

³⁰¹ See *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (“The Court has invalidated legislation . . . on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute . . . was motivated wholly by religious considerations.”); *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 431 (2d Cir. 2002) (quoting this standard to explain why “the secular purpose prong of the *Lemon* test . . . rarely presents the greatest obstacle for laws attacked on Establishment Clause grounds”). But see *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 863–65 (2005) (appearing to reject this understanding of *Lynch* and insisting that “we have not made the purpose test a pushover”); *Jewish War Veterans of the U.S., Inc. v. Gates*, 506 F. Supp. 2d 30, 44 (D.D.C. 2007) (reading *McCreary County* to “put more bite into the purpose inquiry”); cf. *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (summarily rejecting purported secular rationale behind Kentucky statute requiring public schools to post Ten Commandments, and observing that “[t]he pre-eminent purpose for posting the Ten Commandments on school-room walls is plainly religious in nature”).

³⁰² 526 U.S. 541 (1999).

³⁰³ *Id.* at 548–53.

³⁰⁴ See *id.* at 552 (“While appellees’ evidence might allow the District Court to find that the State acted with an impermissible racial motivation, despite the State’s explanation as supported by the Peterson affidavit, it does not require that the court do so.”). After the Supreme Court reversed the district court’s entry of summary judgment in *Hunt*, the district court held a full trial and again concluded that the challenged statute sprang from impermissible motivations. On appeal, a bare majority of the Supreme Court held that this finding was clearly erroneous in light of the trial record. Again, though, the Court indicated that it will sometimes be permissible for triers of fact to decide that a statute was enacted for unconstitutional reasons, even when other judges examining the same evidence would reach a different conclusion. See *Easley v. Cromartie*, 532 U.S. 234, 242–43 (2001) (discussing “clear error” standard).

³⁰⁵ *Hunt v. Cromartie*, 133 F. Supp. 2d 407, 417 (E.D.N.C. 2000), *vacated on other grounds sub nom. Easley*, 532 U.S. 234; *Hays v. Louisiana*, 839 F. Supp. 1188, 1198 (W.D. La. 1993), *vacated on other grounds*, 512 U.S. 1230 (1994).

specify the level of confidence necessary for imputing impermissible purposes to a statute, and the standards of appellate review are equally unsettled.³⁰⁶ It is safe to say that courts remain cautious about imputing impermissible purposes to duly enacted statutes; even when judges acknowledge both the relevance of legislative motivation to a statute's constitutionality and the judiciary's ability to investigate that motivation, they tend to resolve doubts in favor of presuming that the legislature behaved properly.³⁰⁷ For many courts, though, that presumption does not seem to be as strong as it once was: Near-certainty is no longer required before courts can conclude that a statute was enacted for forbidden reasons. If the applicable standard of proof is something more than a simple preponderance of the evidence, it is something less than overwhelming.³⁰⁸

II APPLICATIONS

Once we appreciate the changes over time in judicial review of legislative purpose, we are obviously in a better position to under-

³⁰⁶ Among other things, federal circuit courts may disagree about whether to review conclusions about legislative motivation as questions of law or as questions of fact. *Compare* *Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1260 (4th Cir. 1995) (remanding for district court to make findings about whether state statute was enacted for discriminatory purpose in violation of dormant Commerce Clause, and noting that “[w]e are ill-suited to resolve this question in the first instance due to the inherently factual nature of the inquiry”), *with* *S.D. Farm Bureau v. Hazeltine*, 340 F.3d 583, 592–98 (8th Cir. 2003) (affirming district court’s holding that state constitutional amendment violated dormant Commerce Clause, but appearing to conduct *de novo* review of drafting history and other “evidence of discriminatory purpose”).

³⁰⁷ *See, e.g.,* *Karlin v. Foust*, 188 F.3d 446, 493–94 (7th Cir. 1999) (inferring from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Mazurek v. Armstrong*, 520 U.S. 968 (1997), that “plaintiffs challenging abortion statutes will face significant difficulty in showing that an otherwise constitutional abortion regulation was enacted with an impermissible purpose”); *Lenscrafters, Inc. v. Wadley*, 248 F. Supp. 2d 705, 729 (M.D. Tenn. 2003) (investigating legislative history in dormant Commerce Clause case, but characterizing plaintiffs’ evidence as “equivocal at best” and declaring that “no factfinder could reasonably conclude that [the challenged state law] was adopted for discriminatory purposes”), *aff’d*, 403 F.3d 798 (6th Cir. 2005); *cf. Stenberg v. Carhart*, 530 U.S. 914, 1008 n.19 (2000) (Thomas, J., dissenting) (referring to “the kind of persuasive proof we . . . require before concluding that a legislature acted with an unconstitutional intent,” and criticizing Justice Ginsburg’s separate opinion for imputing impermissible purposes to statute without this sort of evidence).

³⁰⁸ *See, e.g.,* *Pete’s Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1015–16 (W.D. Mo. 1998) (acknowledging that “[i]n the absence of clear legislative history it is often difficult to determine a legislature’s purpose in passing a statute,” but using evidence that “raises doubts” about challenged statute’s bona fides to infer that statute “was passed to benefit in-state companies”).

stand what the judicial decisions of prior eras did and did not hold.³⁰⁹ But in addition to helping us read particular precedents, the history described in Part I sheds light on some broader doctrines. This Part explores three different kinds of examples.

One lesson of the history described in Part I is that apparent vacillations in judicial doctrines are not necessarily signs of incoherence in the doctrines themselves. To the extent that the doctrines grow out of purpose-based restrictions on legislative power, we should actually *expect* them to have ebbed and flowed in ways that track the developments described in Part I. By way of illustration, Part II.A shows how this linkage explains at least some of the inconstancy in the doctrine of “unconstitutional conditions,” the murkiness of which is legendary.³¹⁰

Just as the history described in Part I helps us understand the trajectory of doctrines that reflect purpose-based restrictions on legislative powers, so too it can help account for the rise and fall of certain other doctrines that did *not* entail inquiries into legislative purpose. Part II.B uses some basic questions about federalism to illustrate this idea. Nineteenth-century courts are famous for reading the Constitution to impose various bright-line restraints on state legislatures—restraints that seem artificial to modern readers, but that courts could enforce without reference to legislative purpose. As Part II.B explains, courts may well have gravitated toward these interpretations of the Constitution precisely because the then-prevailing norms of judicial review prevented courts from using purpose-based inquiries to rein in misbehaving legislatures.

Both Part II.A and Part II.B consider connections between the history described in Part I and the substance of judicial doctrine. Part II.C, by contrast, links the history to some of the modern Supreme Court’s rhetoric. In particular, Part II.C argues that past restrictions on judicial review of legislative purpose may help explain the Court’s otherwise puzzling statements about the rarity of holding a statute unconstitutional “on its face” (rather than simply “as applied”).

The illustrations offered in this Part are not meant to be exhaustive; one can surely identify many additional connections between changes in judicial review of legislative purpose and other changes in legal doctrine or judicial practice. But the examples highlighted here

³⁰⁹ Cf. *supra* notes 15, 29 (providing examples of modern cases that misread old precedents by confusing their statements about limitations on judicial review for holdings about Constitution’s substantive meaning).

³¹⁰ See, e.g., Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 913–14 (2006) (“intellectual and doctrinal swamp”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416 (1989) (“minefield”).

do show the diversity of the topics that the history described in Part I can inform.

A. *Resolving Apparent Inconsistencies in Purpose-Related Doctrines: The Case of “Unconstitutional Conditions”*

The doctrine of “unconstitutional conditions” addresses a deceptively simple question: Under what circumstances can the government insist, as a condition of providing some benefit that it is not obliged to give (such as a monetary grant, or a government job, or a license to conduct activities that the government could flatly prohibit), that the recipient act in a way that the government could not otherwise require? When courts allow legislatures to impose such conditions, they often invoke the hoary maxim *majus dignum trahit ad se minus dignum*—the greater power (to refrain from providing the benefit at all) includes the lesser power (to provide the benefit but only on certain conditions).³¹¹ On the other hand, when courts reach the opposite conclusion, they emphasize that this maxim does not always apply.³¹²

As many scholars have suggested, the concept of “greater powers” and “lesser powers” is too uncertain to be very helpful.³¹³ When people assert that the greater power includes the lesser, they are implicitly making an argument of the following sort: “If our system lets a particular institutional actor exercise Power #1, then there is no reason (of the sort that our system recognizes) for that actor not to be able to exercise Power #2, and we should therefore infer that our system also gives the actor that power.”³¹⁴ Sometimes

³¹¹ This idea has been a staple of legal argument for centuries. See EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND 355b (London, 1629) (“Et omne maius dignum trahit ad se minus dignum, quamuis minus dignum fit antiquius, & à digniori debet fieri denominatio.”); WILLIAM NOY, A TREATISE OF THE PRINCIPAL GROUNDS AND MAXIMES OF THE LAWEES OF THIS NATION 6 (London, 2d ed. 1651) (“Majus continet minus.”); *Jones v. Langhorn*, 2 Va. Colonial Dec. B52, B53 (Gen. Ct. 1736) (argument of counsel) (“[T]hat *Omne Majus continet in se minus*, is a Rule of Law as well as an Axiom of Philosophy.”); see also, e.g., *Commonwealth v. Myers*, 3 Va. (1 Va. Cas.) 188, 208 (Gen. Ct. 1811) (argument of counsel) (“The greater power includes the lesser: the power to acquit altogether, includes the power to acquit in part.”); *In re Henry Street*, 7 Cow. 400, 401 (N.Y. Sup. Ct. 1827) (“The greater power, to retain all the old commissioners, or to appoint an entire new board, includes the lesser power to retain part, and reject part.”); *State v. Crowell*, 9 N.J.L. 390, 421 (1828) (opinion of Ford, J.) (“[T]he greater always comprehends the less, according to the maxim *omne majus continet minus*.”).

³¹² E.g., *Doyle v. Cont’l Ins. Co.*, 94 U.S. 535, 543–44 (1877) (Bradley, J., dissenting).

³¹³ E.g., Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1310 & n.54, 1311 (1984).

³¹⁴ As this formulation suggests, we cannot safely infer one power from another simply on the basis of the powers themselves, without considering the particular institutional actor who proposes to exercise them and the types of restraints that our legal system commonly

this argument will be valid. But sometimes there *will* be reasons (of the sort that our system might take into account) for distinguishing between the actor's ability to exercise the two powers.

Scholars who have written about the doctrine of unconstitutional conditions have identified a variety of different reasons why the legislature's ability to withhold a benefit entirely (Power #1) will not always imply that the legislature can grant the benefit subject to specified conditions (Power #2).³¹⁵ But an important class of such reasons stems from purpose-based restrictions on legislative power. Even when the Constitution gives Congress considerable power over a benefit, the Constitution will not necessarily let Congress use that power to suppress speech critical of the government, or to harm members of a disfavored race, or to circumvent restrictions on Congress's regulatory authority. In other words, one reason why a system of conditioned benefits might be labeled "unconstitutional" is that the legislature designed the conditions for a forbidden purpose.³¹⁶ As we shall see, this fact sheds considerable light on the historical development of the doctrine of unconstitutional conditions.

From an early date, some judges have worried that if the legislature could freely condition its grants of desirable things upon "the relinquishment of a right secured by the Constitution," there would be no practical limit to its powers: "By such inventions every constitu-

imposes upon that actor. In our system, for instance, it seems clear that if Congress has the power to provide that anyone convicted of stealing federal property should be sentenced to prison for ten years, then Congress must have the power to establish a mandatory sentence of only seven years instead. Even if the Eighth Amendment forbids "disproportionate" punishment, the private rights of potential criminal defendants will not be violated by a statute *decreasing* the term of the mandatory sentence, and the Constitution has long been understood to give Congress control over the public rights that are at stake on the other side. But it is not at all clear that if *judges* have the power to impose a ten-year sentence for theft, then they must also have the power to impose a seven-year sentence instead. The length of the sentence that judges can impose is limited not just by the Constitution but also by the existing statutory scheme, and there are plenty of reasons why that scheme might withhold sentencing discretion from the judiciary.

³¹⁵ See, e.g., Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) (identifying collective-action problems, externalities, and problems caused by monopolistic nature of government as reasons to restrict what government can demand in exchange for benefits that it is not obliged to provide); Sullivan, *supra* note 310, at 1490 (expressing concern about conditions that would "alter the balance of power between government and rightholders," or "skew the distribution of constitutional rights among rightholders," or "create an undesirable caste hierarchy in the enjoyment of constitutional rights").

³¹⁶ See Farber, *supra* note 310, at 917 (noting that one rationale for unconstitutional-conditions doctrine is "to screen transactions for improper government motivations"); Kreimer, *supra* note 313, at 1327 (calling this idea "[t]he easiest solution to the dilemma of distinguishing a legitimate absolute denial from an unconstitutional condition," though ultimately advocating different solution); Pildes, *Avoiding Balancing*, *supra* note 4, at 736-41 (noting "central role" of "excluded reasons" in unconstitutional-conditions cases).

tional right may in succession be bartered away.”³¹⁷ Before the 1870s or so, however, any purpose-based limitations on this aspect of the legislature’s authority were not thought to lend themselves to judicial enforcement; under the prevailing doctrine canvassed in Part I.A, courts could not impute an impermissible purpose to a legitimate legislative body unless the very face of a statute effectively acknowledged that purpose. With this line of inquiry blocked, some judges spoke as if they had to respect just about any condition that the legislature chose to establish on benefits that the legislature was not obliged to grant.³¹⁸ A few judges flirted with the opposite sort of all-or-nothing approach.³¹⁹ But prevailing doctrines of judicial review did not give courts much authority to distinguish permissible conditions from impermissible conditions on the basis of the purposes that the legislature was apparently trying to serve.

Those restrictions on judicial review played a central role in *Doyle v. Continental Insurance Co.*,³²⁰ the 1877 case that is now famous because Justice Bradley’s dissent introduced the phrase “unconstitutional conditions” to the United States Reports.³²¹ At the time of *Doyle*, the ability to do business in the corporate form was regarded as a privilege rather than a right, and state legislatures had considerable power to withhold this privilege from entities that had been incorporated only by other states.³²² The Wisconsin legislature

³¹⁷ *Townsend v. Townsend*, 7 Tenn. (Peck) 1, 12 (1821); see also Kreimer, *supra* note 313, at 1302 (highlighting *Townsend*).

³¹⁸ See, e.g., *Mager v. Grima*, 49 U.S. (8 How.) 490, 494 (1850) (“[I]f a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.”); *State v. Lathrop*, 10 La. Ann. 398, 402 (1855) (“[T]he Legislature had an undoubted right to attach what conditions it thought fit to the privilege.”); *Pa. R.R. v. Commonwealth*, 3 Grant 128, 131 (Pa. 1860) (“[T]he defendants cannot complain of [a condition in their statutory charter], for they freely subjected themselves to it for the sake of the benefits offered with it.”); *Burrows v. Bashford*, 22 Wis. 103, 108 (1867) (“It would only have been unconstitutional for the legislature to impose [these statutory provisions] on the plaintiff without his consent. It was not unconstitutional for them to say that he might voluntarily subject himself to them, as conditions to the enjoyment of a new advantage given by the act.”).

³¹⁹ In *Townsend*, for instance, Tennessee’s highest court advanced the remarkably broad proposition that “[c]onstitutional rights are . . . unexchangeable, and unalienable,” and that any condition entailing their surrender “is utterly void.” *Townsend*, 7 Tenn. (Peck) at 12 (explaining that “[c]onstitutional rights . . . belong to posterity as well as to the present generation” and that “[w]e may use . . . but not transfer them”).

³²⁰ 94 U.S. 535 (1877).

³²¹ *Id.* at 543 (Bradley, J., dissenting); see also Peter Westen, *The Rueful Rhetoric of “Rights,”* 33 UCLA L. REV. 977, 979 n.1 (1986) (describing Justice Bradley’s dissent as first appearance of doctrine of unconstitutional conditions in United States Supreme Court).

³²² See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181–82 (1869) (indicating that states could flatly prohibit out-of-state corporation from conducting local business within their borders or could “exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest”).

duly specified that out-of-state insurance companies could do business in Wisconsin only if they promised not to remove suits from the Wisconsin state courts to federal court. A separate statute directed the secretary of state to revoke the operating permits of companies that violated this promise. In *Doyle*, an out-of-state insurance company that had removed a suit in violation of its promise, and that was therefore at risk of losing its license, argued that the revocation statute had been enacted for an impermissible purpose; according to the company, the Wisconsin legislature had been trying to prevent the exercise of rights secured by federal law, and the State could not validly pursue this policy.³²³ But a majority of the Supreme Court refused even to entertain the argument that the Wisconsin legislature had acted for an “unconstitutional reason.” According to the majority, the consequence decreed by the revocation statute was not itself unconstitutional (since Wisconsin did not have to let out-of-state insurance companies continue to do business within the state), and “it is quite out of the power of any court to inquire what was the intention of those who enacted the law.” In the majority’s words, “an emotion or a mental proceeding . . . is not the subject of inquiry in determining the validity of a statute.”³²⁴

Even as the majority was making these statements, however, courts were beginning to relax the traditional limitations on judicial review of legislative purpose. The Supreme Court itself had moved in that direction in *Henderson v. Mayor of New York* a year earlier,³²⁵ and other courts of the day were beginning to apply *Henderson*’s style of analysis to the problem of unconstitutional conditions. In an 1875 case, for instance, New Hampshire’s highest court observed that even though the state legislature had considerable power to require litigants to pay court costs, the legislature could not validly rig differential charges “for the purpose of deterring parties from claiming their constitutional right to [trial by jury],” and a statute that candidly

³²³ See Brief of Appellee at 5, *Doyle*, 94 U.S. 535 (No. 910) (reading precedent to condemn “all statutes of the state having for their object a prohibition of the removal of suits from the state to the federal courts”); *id.* (“They are simply *black-mailing* statutes, passed for the purpose of compelling insurance companies to submit their cases to prejudiced courts and juries . . .”).

³²⁴ *Doyle*, 94 U.S. at 541. One might think that the recognized limits on judicial review of legislative purpose should not actually have defeated the insurance company’s argument, because the very face of the statute revealed the legislature’s impermissible purposes. But only the revocation statute was directly at issue in *Doyle*, and a legitimate justification for that statute could conceivably have been hypothesized: Companies that broke their solemn promises might not be sufficiently trustworthy to do business in Wisconsin (even if the promises were not otherwise enforceable and had themselves been extracted for a forbidden reason).

³²⁵ See *supra* text accompanying notes 110–19.

acknowledged this purpose would not survive judicial review.³²⁶ According to the New Hampshire court, moreover, judges could sometimes detect the legislature's impermissible intentions even "if the statute, instead of expressly declaring its unconstitutional purpose, were silent on that subject, or . . . expressly declared that its purpose was to secure and facilitate the constitutional right." In language that resonates with *Henderson*, the court expressed its willingness to impute an unconstitutional purpose to the legislature "[i]f the burden or disadvantage imposed [by the statute] could have no operation or effect except to prevent, hinder, obstruct, or discourage the exercise of the constitutional right."³²⁷

Lower federal courts too were beginning to link their analysis of conditioned benefits to the objective indicia of legislative purpose. In the 1870s, for instance, California tried to use its power over the privilege of incorporation as leverage to get businesses not to "employ . . . any Chinese or Mongolian."³²⁸ The Federal Circuit Court for the District of California held this scheme unconstitutional. Although the two judges who wrote opinions advanced a variety of arguments, they both relied in part upon a purpose-based doctrine of unconstitutional conditions. Invoking *Henderson*, Judge Hoffman thought it clear that the object of California's laws was "[t]o drive the Chinese from the state, by preventing them from laboring for their livelihood," and he understood both the Federal Constitution and federal treaties as forbidding California to use its power over corporations for that purpose.³²⁹ Judge Sawyer was even more emphatic: "It cannot be otherwise than unlawful to use any means whatever to accomplish an unlawful purpose. . . . And whatever form the law may take on, . . . the court will strip off its disguise, and judge of the purpose from the manifest intent as indicated by the effect."³³⁰

In keeping with the relaxation of the traditional limitations on this sort of inquiry, the Supreme Court soon cut back on what the majority had said in *Doyle*. In *Barron v. Burnside*,³³¹ the Court con-

³²⁶ *Copp v. Henniker*, 55 N.H. 179, 194 (1875).

³²⁷ *Id.*

³²⁸ CAL. CONST. of 1879, art. XIX, § 2 ("No corporation now existing or hereafter formed under the laws of this State, shall . . . employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The Legislature shall pass such laws as may be necessary to enforce this provision."); Act of Feb. 13, 1880, ch. 3, § 2, 1880 Cal. Acts Amendatory of the Penal Code 1, 2 ("Any corporation now existing, or hereafter formed under the laws of this State, that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, shall be guilty of a misdemeanor, . . . and upon the second conviction shall . . . forfeit its charter and franchise, and all its corporate rights and privileges . . .").

³²⁹ *In re Tiburcio Parrott*, 1 F. 481, 492–99 (C.C.D. Cal. 1880) (opinion of Hoffman, J.).

³³⁰ *Id.* at 514–15 (opinion of Sawyer, J.).

³³¹ 121 U.S. 186 (1887).

sidered an Iowa statute that purported to make out-of-state corporations' ability to do business in Iowa contingent upon their not removing cases from state to federal court. Distinguishing *Doyle*, the Court thought it "apparent" that "the entire purpose of this statute is to deprive the foreign corporation . . . of the right conferred upon it by the Constitution and laws of the United States, to remove a suit from the state court into the Federal court," and it declared this purpose impermissible.³³² Some contemporaneous commentators took *Barron* to overrule *Doyle* in its entirety.³³³ This view suffered a temporary setback in 1906, when the Court reaffirmed *Doyle*, limited *Barron*, and held that states could validly "place foreign insurance companies upon a par with the domestic ones" by revoking their operating privileges if they fled the state courts.³³⁴ But the Court quickly seemed to have second thoughts about that idea,³³⁵ and in 1922—the same year as the *Child Labor Tax Case*—it formally repudiated *Doyle*.³³⁶ By the 1920s, the Court not only recognized a doctrine of unconstitutional conditions but also associated this doctrine in large part with restrictions on the purposes that legislatures could validly pursue.³³⁷

³³² *Id.* at 197, 200; *cf. id.* at 199–200 (noting factual distinctions between *Doyle*, where federal courts were being asked to enjoin state officials from revoking operating permit of company that had made and then violated promise, and *Barron*, where "no such agreement has been made").

³³³ *E.g.*, B.C. MOON, THE REMOVAL OF CAUSES FROM THE COURTS OF THE SEVERAL STATES TO THE CIRCUIT COURTS OF THE UNITED STATES §§ 30 & n.3, 31 & nn.6–7 (1901).

³³⁴ *Sec. Mut. Life Ins. Co. v. Prewitt*, 202 U.S. 246, 256–58 (1906).

³³⁵ *See Donald v. Phila. & Reading Coal & Iron Co.*, 241 U.S. 329, 332 (1916) ("Consideration of the Wisconsin statutes convinces us that they seek to prevent . . . foreign commercial corporations doing local business from exercising their constitutional right to remove suits into Federal courts. To accomplish this is beyond the State's power."); *Harrison v. St. Louis & S.F. R.R.*, 232 U.S. 318, 330–31 (1914) (attributing impermissible purpose to Oklahoma statute that sought to achieve similar result through other means); *see also N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 164 (1914) (suggesting that *Doyle* had effectively been overruled).

³³⁶ *Terral v. Burke Constr. Co.*, 257 U.S. 529, 533 (1922).

³³⁷ *See Fid. & Deposit Co. of Md. v. Taffoy*, 270 U.S. 426, 434 (1926) ("[I]t has been held a great many times that the most absolute seeming [powers] are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called [power] is used as part of a scheme to accomplish a forbidden result."); *see also Hale*, *supra* note 190, at 322 (associating doctrine of unconstitutional conditions with idea "that a power which is valid when exerted for most purposes may be invalid when exerted for others").

To apply this sort of doctrine, of course, the Court had to identify the purposes that particular provisions of the Constitution prevented legislatures from pursuing in particular contexts. As Cass Sunstein has suggested, that inquiry raises fine-grained interpretive questions whose answers can vary from provision to provision. *See* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 608 (1990) (noting that different provisions may leave legislatures with varying degrees of freedom to try to encourage conduct that they cannot require or to discourage conduct that they cannot forbid); *see also*

During the period that this doctrine was developing, though, courts could enforce such restrictions only when objective indicia made the legislature's impermissible purposes apparent. When a condition on a particular benefit or burden could plausibly be understood to serve a legitimate purpose, courts did not investigate the enacting legislature's internal deliberations to make sure that the legislature had really been acting for that reason. But when the condition could be understood *only* as an attempt to serve an impermissible purpose, the objective indicia were strong enough to let courts impute that purpose to the legislature and hold the condition unconstitutional. Writing in 1935, Robert Hale summed up this idea under the rubric of whether the conditions that a legislature had engrafted upon a burden were "germane" to a purpose that the legislature could validly seek to advance by imposing the burden without conditions.³³⁸

Kreimer, *supra* note 313, at 1334 (discussing difficulty of determining which purposes are prohibited by which provisions). Conditions on doing business in the corporate form nicely illustrate the necessary line-drawing. Under the regime of *Pennoy v. Neff*, 95 U.S. 714 (1878), there was widespread agreement that although a state could not validly extend the process of its courts beyond its borders, it could refuse to let out-of-state entities transact local business unless they appointed an in-state agent for the service of process in suits arising out of those transactions. This condition protected the state's residents against the potential burden of having to pursue claims in a distant state, and federal law was not thought to prevent states from using their leverage over operating licenses for that purpose. *Id.* at 735; *see also* *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1856) ("It cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State, and fully subject to its laws . . ."). As interpreted in *Barron* and its progeny, however, federal law *did* prevent states from using the same leverage to keep suits against out-of-state entities in state rather than federal court.

³³⁸ *See* Hale, *supra* note 190, at 352. In her illuminating modern article about unconstitutional conditions, Kathleen Sullivan suggests that Hale saw "germaneness" as a requirement that went beyond "the legitimacy of the governmental motive." She indicates that if a state could validly impose some burden on everyone in a particular group, but offered to exempt individual members of the group from the burden if they behaved in some way that the state could not directly compel, Hale would have considered the state's action unconstitutional even if the condition specified by the state served a perfectly legitimate purpose, unless that purpose was germane to the reasons for which the state could have imposed the burden unconditionally. *See* Sullivan, *supra* note 310, at 1461 n.196 (discussing how Hale would have analyzed what Sullivan calls "a legitimate but nongermane condition"). As I understand Hale's analysis, though, he would have resisted this formulation, because he would not have thought it possible for a nongermane condition to serve a legitimate purpose. In the situations that he was addressing, the government's power to establish the condition derived entirely from its power to impose the burden more generally; the government did not have any direct authority to mandate the behavior that the condition encouraged. If the purposes served by the condition were not purposes for which the government could validly use its power to impose the burden—that is, if the condition failed the "germaneness" test—then Hale presumably would have concluded that the condition manifested an impermissible purpose. *Cf.* Hale, *supra* note 190, at 357 (indicating that case law permitted government to devise conditions on benefits or burdens "for the purpose of bringing pressure to induce surrender of a constitutional right, provided such sur-

For a very early illustration of this sort of analysis, consider the companion cases of *Cummings v. Missouri*³³⁹ and *Ex parte Garland*,³⁴⁰ decided by the Supreme Court in 1867. In the immediate aftermath of the Civil War, Missouri's new constitution purported to exclude from both public office and certain private professions

[any] person . . . who has ever been in armed hostility to the United States, or to the lawful authorities thereof, or to the government of this State; or has ever given aid, comfort, countenance, or support to persons engaged in any such hostility; . . . or has ever, by act or word, manifested his adherence to the cause of such enemies, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in exciting or carrying on rebellion against the United States³⁴¹

No one could practice as an attorney or preach as a clergyman in Missouri unless he took an oath swearing that he had never done any of the specified things, and people who took the oath falsely were subject to imprisonment.³⁴² At around the same time, Congress imposed a similar requirement on attorneys wishing to appear in federal court.³⁴³ In *Cummings* and *Garland*, the Supreme Court held that these provisions amounted to retroactive "punishment" and therefore violated the Federal Constitution's Bill of Attainder and Ex Post Facto Clauses. The precise basis for the Court's conclusion is not entirely clear. Some language in the majority's opinions suggests that the Court acted without regard to the purposes behind the provisions and deemed the provisions punitive simply because they deprived people of the right to practice a calling on the basis of conduct that had already occurred.³⁴⁴ As later cases would recognize, though, a law that treats someone's past conduct as evidence of what he might do in the future, and that deems him unqualified for particular positions because of that concern, should not necessarily be classified as

render serves a purpose germane to that for which the power [over the benefits or burdens] can normally be exerted without conditions").

³³⁹ 71 U.S. (4 Wall.) 277 (1867).

³⁴⁰ 71 U.S. (4 Wall.) 333 (1867).

³⁴¹ MO. CONST. of 1865, art. II, § 3 (depriving all such people of voting rights); *id.* §§ 5–6 (prescribing oath about past behavior as condition of voting); *id.* §§ 7–9 (requiring public officers, attorneys, and clergymen to take same oath).

³⁴² *Id.* §§ 9, 14.

³⁴³ Act of Jan. 24, 1865, ch. 20, 13 Stat. 424.

³⁴⁴ See *Garland*, 71 U.S. (4 Wall.) at 377 ("[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."); *Cummings*, 71 U.S. (4 Wall.) at 322 ("Any deprivation or suspension of [political or civil] rights for past conduct is punishment, and can be in no otherwise defined.").

“punishment.”³⁴⁵ Perhaps in anticipation of that objection, the majority in *Cummings* suggested that Missouri’s requirements were not germane to any legitimate, forward-looking purpose: Notwithstanding the State’s attempt to describe its requirements as qualifications for particular pursuits or professions, “many of the acts [covered by the State’s requirements] . . . have no possible relation to [the parties’] fitness for those pursuits and professions.”³⁴⁶ Given this disconnect between Missouri’s provision and the legitimate purposes that a qualification requirement might serve, the majority concluded that the Missouri provision must have been adopted “in order to reach the person, not the calling.”³⁴⁷

Although this sort of analysis had become commonplace by 1935 (when Robert Hale emphasized the “germaneness” theme in the previous half-century of court decisions³⁴⁸), the judiciary’s willingness to impute impermissible purposes to legislatures waned somewhat thereafter. To be sure, the Supreme Court still stood ready to rebuff obvious attempts by a state to use its power over privileges either to suppress protected speech or to evade the procedural requirements that the punishment of unprotected speech would ordinarily trigger.³⁴⁹ But the doctrine of unconstitutional conditions (at least as applied to statutes) does seem to have shrunk in the 1940s and 1950s.³⁵⁰ When the Supreme Court reinvigorated the doctrine in the

³⁴⁵ Cf. *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 408–09 (1950) (arguing that “a federal statute provid[ing] that no person may become a member of the Secret Service force assigned to protect the President unless he swears that he does not believe in assassination of the President” should not be seen “as ‘punishing’ . . . the holding of beliefs”).

³⁴⁶ *Cummings*, 71 U.S. (4 Wall.) at 319.

³⁴⁷ *Id.* at 320; cf. *Garland*, 71 U.S. (4 Wall.) at 395 (Miller, J., dissenting) (“I maintain that the purpose of the act of Congress was to require loyalty as a qualification of all who practise law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty.”).

³⁴⁸ See *supra* note 338 and accompanying text.

³⁴⁹ See *Speiser v. Randall*, 357 U.S. 513, 520–29 (1958) (denying constitutionality of California law that (1) conditioned tax exemption on oath that recipient did not advocate overthrow of government by unlawful means and (2) purported to let government deny exemption unless recipient carried burdens of proof and persuasion as to oath’s truthfulness); see also *id.* at 527 (invoking “[t]he purpose of the legislation” to distinguish statute upheld in *Douds*); cf. *United Pub. Workers v. Mitchell*, 330 U.S. 75, 100–01 (1947) (invoking apparent purposes behind Hatch Act to explain why Congress can constitutionally forbid various executive officials to participate actively in political campaigns but cannot constitutionally forbid them to “attend Mass”).

³⁵⁰ See Comment, *Consent and the Constitution*, 5 STAN. L. REV. 514, 519 (1953) (arguing that use of unconstitutional-conditions doctrine to curtail state power over out-of-state corporations “reached a summit” in 1920s and that “[t]his trend . . . has been reversed in recent years”).

1960s,³⁵¹ moreover, it initially sought to do so without reference to legislative purpose.³⁵² As the Court has become increasingly willing to impute impermissible purposes to statutes, however, those attempts have faded.³⁵³ Much of the modern doctrine of unconstitutional conditions is best understood in terms of restrictions on the reasons for which government can act.³⁵⁴ The continuing importance of “germaneness,”³⁵⁵ for instance, puzzles the many distinguished scholars whose understanding of unconstitutional conditions does not empha-

³⁵¹ See Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 144 (1968) (“The doctrine of unconstitutional conditions is undergoing a revival and metamorphosis . . .”).

³⁵² See *Sherbert v. Verner*, 374 U.S. 398, 405 (1963) (holding that statute denying unemployment compensation to people who refused available work could not validly apply to Seventh-Day Adventist who lost job for refusing to work on Saturdays, and citing *Speiser* for proposition that “conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms”).

³⁵³ See *Employment Div. v. Smith*, 494 U.S. 872, 878–79, 883–85 (1990) (observing that *Sherbert* has been dramatically limited, and using purpose-based inquiry to uphold denial of unemployment compensation to members of Native American Church who lost their jobs because of drug use that was illegal but religiously inspired).

³⁵⁴ See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (casting doctrine of unconstitutional conditions in these terms, albeit in administrative rather than statutory context); see also *supra* note 316 (citing more recent commentary).

³⁵⁵ See, e.g., *Nat’l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 747 (1st Cir. 1995) (“[I]f a condition is germane—that is, if the condition is sufficiently related to the benefit—then it may validly be imposed.”).

The precise content of the “germaneness” inquiry may seem to have changed over time. In his 1935 article, Professor Hale cast the “germaneness” idea in terms of conditional burdens; as he formulated the inquiry, courts asked whether the conditions under which the government imposed the burden were germane to the purposes for which the government could impose the burden unconditionally. One can readily reformulate this inquiry in terms of conditional benefits simply by treating the government’s decision to withhold a “benefit” as itself amounting to a “burden.” When evaluating the constitutionality of conditions on government benefits, followers of Hale would therefore ask whether the conditions under which the government denies the benefit are germane to the purposes that might legitimately lead the government to eliminate the benefit program altogether. Many modern courts, however, cast the inquiry in somewhat different terms: When considering government grants that come with strings attached, they ask whether the strings are germane to the purposes behind the benefit program. *E.g.*, *Rust v. Sullivan*, 500 U.S. 173, 196–98 (1991). Still, this inquiry is not as different from Professor Hale’s approach as it might seem. The underlying logic of the inquiry is that the government could eliminate the benefit program entirely if the government did not think that the program was going to achieve its intended purposes. Assuming that those purposes are legitimate, conditions that help achieve them are germane to reasons for which the government could withhold the benefit altogether.

size governmental purposes,³⁵⁶ but makes much more sense to scholars who focus on that facet of the doctrine.³⁵⁷

This thumbnail sketch of developments in the doctrine of unconstitutional conditions closely tracks the history chronicled in Part I. That fact should come as no surprise: To the extent that restrictions on the purposes for which governments can take certain actions play a prominent role in the doctrine of unconstitutional conditions,³⁵⁸ changes in perceived limitations on the judiciary's ability to impute impermissible purposes to the legislature will naturally produce changes in the judiciary's application of the doctrine of unconstitutional conditions. It follows that at least some of the apparent inconsistency over time in that doctrine is not really the doctrine's own fault. Instead of suggesting that the concept of unconstitutional conditions is completely malleable, some of the ebbs and flows in the doctrine simply reflect changing views on broader questions about the courts' proper role in reviewing legislative purposes.

B. Recognizing the Link Between Norms of Judicial Review and the Content of Judicial Doctrine: The Case of Restrictions on State Power

In a quite different way, the history described in Part I also illuminates the rise and fall of certain formal rules about federalism. As antebellum courts tried to understand the structural features of the Constitution, they had to draw many inferences and resolve many ambiguities. In choosing among possible interpretations of constitutional provisions, they kept an eye on the consequences of the various

³⁵⁶ See, e.g., Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1345–50 (2002) (observing that “[t]he persistent puzzle in [unconstitutional-conditions] cases is when and why individuals who choose to surrender constitutional entitlements are not implicitly compensated by the government benefits that they accept in exchange,” and seeing no obvious reason “why nearby government benefits should count but not benefits that happen to be just slightly further away”); cf. Sullivan, *supra* note 310, at 1457 (“The cases and commentary . . . say remarkably little about why germaneness should matter.”).

³⁵⁷ See, e.g., Renée Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 NW. U. L. REV. 775, 777–78 (2007) (advocating purpose-based inquiry and endorsing relevance of germaneness); cf. Farber, *supra* note 310, at 941 (“The best that can be said for nexus requirements is that the complete absence of germaneness may be an indicator of improper government motivation.”).

³⁵⁸ Of course, no one thinks that the doctrine of unconstitutional conditions is *entirely* about the purposes for which governments can act. While restrictions on permissible purposes account for many of the relevant cases, conditions can be challenged on other grounds too. See Farber, *supra* note 310, at 951 (“The problem of unconstitutional conditions is probably too difficult to yield to any one analytic technique.”); see also Sunstein, *supra* note 337, at 621 (noting that different constitutional provisions may well impose different kinds of limitations on conditions that can be attached to particular programs).

possibilities, and the limitations on their own ability to impute impermissible purposes to legislatures colored their assessment of the consequences. In particular, courts that did not fully trust state legislatures had incentives to read the Constitution to restrict those legislatures in ways that courts could enforce. Thus, even though the prevailing norms of judicial review were not necessarily hard-wired into the Constitution, they may well have affected how courts resolved substantive ambiguities in the document itself.

Some of the classic cases in the constitutional canon illustrate this point. Consider, for instance, the restrictions on state power that Chief Justice Marshall read into the Federal Constitution in *M'Culloch v. Maryland*.³⁵⁹ Marshall's famous observation that "the power to tax involves the power to destroy"³⁶⁰ rests on his assumption that courts would be unable to police either the motives behind state statutes taxing the Bank of the United States or the extent of the taxes that such statutes imposed. On this view, if the Constitution and the applicable federal statutes were not construed as flatly forbidding states to tax the Bank's operations, the judiciary could not prevent state legislatures from making their taxes ruinous. Because courts should resist interpretations that were not compelled by the Constitution's text and that "would defeat the legitimate operations of a supreme government,"³⁶¹ Marshall held that states could not tax the Bank's operations at all. As lawyers of the day recognized, though, this categorical position was driven at least in part by Marshall's understanding of the restrictions on judicial review—and, in particular, by the fact that courts "cannot look into the motives of the lawgiver."³⁶²

Similar concerns may have influenced doctrine under the dormant Commerce Clause. In *Gibbons v. Ogden*,³⁶³ for instance, Daniel Webster urged the Supreme Court to hold that when Article I empowered Congress to regulate interstate and foreign commerce, it implic-

³⁵⁹ 17 U.S. (4 Wheat.) 316 (1819).

³⁶⁰ *Id.* at 431.

³⁶¹ *Id.* at 427.

³⁶² *State ex rel. Berney v. Tax Collector*, 18 S.C.L. (2 Bail.) 654, 657 (Ct. App. 1831) (argument of counsel). In Marshall's day, prevailing understandings of the restrictions on judicial review included not only restrictions on judicial review of the motivations behind statutes but also restrictions on judicial review of questions of degree. See *M'Culloch*, 17 U.S. (4 Wheat.) at 430 (referring to "the perplexing inquiry, so unfit for the judicial department, what degree of taxation . . . may amount to the abuse of the power"). Stephen Siegel has already linked the bright-line rules articulated in cases like *M'Culloch* to the latter sort of restrictions. Stephen A. Siegel, *Let Us Now Praise Infamous Men*, 73 TEX. L. REV. 661, 698 & n.272 (1995) (book review). But restrictions on the judiciary's ability to police the legislature's motivations pushed in the same direction.

³⁶³ 22 U.S. (9 Wheat.) 1 (1824).

itly deprived the states of various categories of regulatory authority, including “the power of granting monopolies . . . of trade or of navigation.”³⁶⁴ Webster warned that state legislatures would use this power to advance parochial interests rather than the best interests of the nation as a whole. Given the prevailing limitations on judicial review, moreover, Webster took it for granted that the courts would be unable to step in: “Of course, there is no limit to the power, to be derived from the *purpose* for which it is exercised. . . . No one can inquire into the *motives* which influence sovereign authority.”³⁶⁵ Although Chief Justice Marshall’s opinion for the Court did not specifically embrace this argument, Marshall went out of his way to say that he saw “great force” in Webster’s ultimate conclusion.³⁶⁶

The same pattern is apparent in *Brown v. Maryland*,³⁶⁷ the 1827 decision that introduced the “original-package doctrine” to constitutional law. At the time, state law forbade importers of foreign goods to sell those goods in Maryland unless they had a license from the State, and the State charged \$50 for such licenses. When Brown was prosecuted for selling imported goods without a license, he urged the Supreme Court to hold that the statute violated the Import/Export Clause of Article I, which sharply restricts the states’ power to “lay . . . Imposts or Duties on Imports or Exports” without Congress’s consent.³⁶⁸ Brown’s lawyer warned that if the phrase “Duties on Imports” were not read to encompass license taxes of the sort at issue, then each state could effectively “evade . . . the constitutional prohibition” and regulate foreign commerce “under the disguise of license laws.”³⁶⁹ To be sure, the lawyer acknowledged, “[i]t may be said, that [Maryland’s] law looks to no such object; that it is simply a tax for revenue” But the lawyer had a ready response: “[T]he motives for legislative acts are not fit subjects of judicial inquiry. If the power can be exercised for one purpose, it may be for another; the intention may always be effectually concealed.”³⁷⁰ In other words, because of the restrictions on judicial review of legislative motive, the Court could effectively prohibit *some* state laws of the sort at issue in *Brown* only if it read the Constitution as prohibiting *all* state laws of the sort at issue in *Brown*.

³⁶⁴ *Id.* at 10 (argument of counsel).

³⁶⁵ *Id.* at 23 (argument of counsel).

³⁶⁶ *Id.* at 209.

³⁶⁷ 25 U.S. (12 Wheat.) 419 (1827).

³⁶⁸ U.S. CONST. art. I, § 10, cl. 2.

³⁶⁹ *Brown*, 25 U.S. (12 Wheat.) at 424–25 (argument of counsel).

³⁷⁰ *Id.* at 425 (argument of counsel).

In keeping with this argument, Chief Justice Marshall's opinion for the Court understood the Constitution to establish a broad and categorical rule. According to Marshall, goods imported from foreign countries retained their character as "Imports" (which had not yet been "incorporated and mixed up with the mass of property in the country") so long as they "remain[ed] the property of the importer, in his warehouse, in the original form or package in which [they were] imported," and the Import/Export Clause barred states from charging importers for licenses to sell such goods.³⁷¹ Nineteenth-century jurists who believed in the dormant Commerce Clause came to apply a similar principle in that context too: Rather than blending into purely intrastate commerce as soon as they entered a state, goods that had been transported from another state for sale and that remained in their original packages were deemed to be in interstate commerce (and therefore beyond the reach of many state regulations) until they were sold.³⁷² Commentators have long heaped scorn on this idea,³⁷³ and the original-package doctrine seems comically artificial to modern scholars.³⁷⁴ But in a world where courts could not review the hidden motivations behind state taxes, one can readily understand why jurists like Chief Justice Marshall would gravitate toward categorical limitations on those taxes.³⁷⁵ Notwithstanding its artificiality, moreover, the

³⁷¹ See *id.* at 441–42. Marshall did not necessarily limit this idea to goods imported from foreign countries; a dictum in his opinion suggested that the Import/Export Clause also covers "importations from a sister State." *Id.* at 449. But in *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869), the Court repudiated this understanding of the word "Imports." *Id.* at 136. After *Woodruff*, the Court maintained that state taxes on goods in interstate commerce violated the dormant Commerce Clause but not the Import/Export Clause.

³⁷² The Supreme Court did not definitively apply the original-package doctrine to the dormant Commerce Clause until *Leisy v. Hardin*, 135 U.S. 100, 110–12 (1890). Early on, however, the Court spoke as if the original-package doctrine would apply to whatever version of the dormant Commerce Clause it ended up recognizing. See, e.g., *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 136–37 (1837). But cf. *Ex parte Brown*, 48 F. 435, 438–39 (E.D.N.C. 1891) (criticizing this assumption). At the time of *Leisy*, even lawyers who criticized other aspects of the Court's decision noted that the extension of the original-package doctrine to interstate commerce "has been expected, and needs no comment here." William R. Howland, *The Police Power and Inter-state Commerce*, 4 HARV. L. REV. 221, 221 (1890).

³⁷³ See, e.g., William Trickett, *The Original Package Ineptitude*, 6 COLUM. L. REV. 161, 168–74 (1906) (calling doctrine "arbitrary and absurd").

³⁷⁴ See, e.g., Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison*, 18 CONST. COMMENT. 563, 572 (2001) (referring in passing to "the Court's long discarded and overly formalistic 'original package' . . . doctrine[]"); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722–23 (2002) (including doctrine in list of "constitutional eccentricities that few now bother remembering").

³⁷⁵ Marshall himself linked the bright-line rule that he recognized in *Brown v. Maryland* more to the unreviewability of questions of degree than to the unreviewability of questions of motivation. See *Brown*, 25 U.S. (12 Wheat.) at 439 (suggesting that without a blanket

original-package doctrine did not wither away until after courts had become willing to engage in such review.³⁷⁶

Other antebellum restraints on state power followed a similar path. In *Dobbins v. Commissioners of Erie County*,³⁷⁷ for instance, the antebellum Supreme Court held that states could not constitutionally tax the income of officers of the federal government.³⁷⁸ Later, the Court added that the federal government could not tax the income of certain state officials either.³⁷⁹ Both conclusions rested on *M'Culloch's* idea that “the power to tax involves the power to destroy”³⁸⁰—that if courts did not read the Constitution as flatly prohibiting taxation of this sort, each rival government “might impose taxation to an extent that would impair . . . the operations of the [other government’s] authorities when acting in their appropriate sphere.”³⁸¹ But as courts became willing both to entertain questions of degree and to impute impermissible purposes to statutes that did not avow them, the Court’s hard-edged interpretation of the Constitution came to seem less justified. In light of the changes in the prevailing practice of judicial review, Justice Holmes eventually opined

rule, states would be able to impose license taxes so heavy as to “amount[] to a prohibition,” because “[q]uestions of power do not depend on the degree to which [the power] may be exercised”). As counsel’s emphasis on motivation suggests, though, these questions were linked; one reason for a state to impose unreasonably high license taxes on sellers of imported goods was that the state was trying to restrict commerce in those goods. It is telling, then, that the original-package doctrine did not appeal to the antebellum judges who saw the most room for judicial review of legislative purpose. See *Pierce v. State*, 13 N.H. 536, 580, 584–85 (1843) (opinion of Parker, C.J.) (indicating that courts could sometimes detect impermissible object notwithstanding statute’s contrary “title or professions,” and criticizing original-package doctrine as unduly broad restraint on state power), *aff’d on other grounds sub nom.* *The License Cases*, 46 U.S. (5 How.) 504 (1847).

³⁷⁶ The original-package doctrine remained central to the Import/Export Clause through the 1960s. See, e.g., *Dep’t of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 343 (1964). In 1976, however, the Supreme Court held that states could require importers to pay nondiscriminatory property taxes on imported articles in their warehouses even if those articles remained in their original packages. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 302 (1976); see also *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360 (1984) (confirming that *Michelin* effectively overruled precedents relying upon original-package doctrine). A similar process occurred earlier in the realm of the dormant Commerce Clause; although never formally overruled, the original-package doctrine was gradually superseded by the Court’s increasing emphasis on nondiscrimination. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 526–28 (1935) (downplaying original-package doctrine in favor of asking whether objective indicia suggested that state law had “the aim and effect of establishing an economic barrier against competition with the products of another state”).

³⁷⁷ 41 U.S. (16 Pet.) 435 (1842).

³⁷⁸ *Id.* at 447–49.

³⁷⁹ *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124–28 (1871).

³⁸⁰ *Id.* at 127 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)); see also *Dobbins*, 41 U.S. (16 Pet.) at 449 (invoking *M'Culloch*).

³⁸¹ *Day*, 78 U.S. (11 Wall.) at 124.

that “[t]he power to tax is not the power to destroy while this Court sits,” because the judiciary “can defeat an attempt to discriminate or otherwise go too far.”³⁸² Although Justice Holmes made this statement in dissent, a variant of his position soon became the majority view.³⁸³

C. *Making Sense of Otherwise Puzzling Rhetoric: The Case of “Facial” Challenges*

The traditional limitations on judicial review of legislative purpose may also help explain the modern Supreme Court’s rhetoric about the difficulty of mounting “facial” challenges to statutes. As Richard Fallon has explained, the difference between “as applied” and “facial” challenges is not as crisp as one might think.³⁸⁴ Still, some of the arguments that a litigant might advance against a statutory provision will focus on the facts of the litigant’s particular situation; while conceding that the provision may well supply a rule of decision for many other cases, the litigant will argue that his situation is special in a way that makes the provision unconstitutional as applied to him.³⁸⁵ By contrast, other arguments (if accepted and applied in later cases) would effectively make the provision a dead letter across the board. As a matter of terminology, we can refer to the latter sort of arguments as “facial” challenges to the provision.

³⁸² *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting); see also Siegel, *supra* note 362, at 698 (linking Justice Holmes’s comments to judiciary’s newfound willingness to review not simply *existence* of power but also *exercise* of that power).

³⁸³ See *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466 (1939) (effectively replacing flat prohibition announced in *Dobbins* with nondiscrimination principle allowing states to tax federal officials’ income on same terms that they taxed other people’s income); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) (moving in this direction); cf. *id.* at 180 (Roberts, J., dissenting) (agreeing that state laws targeting federal contractors’ income for higher taxes bespoke “hostile purpose” that nondiscriminatory state taxes did not, but nonetheless supporting adherence to *Dobbins* on dual-sovereignty grounds). Soon after *Graves*, Congress explicitly consented to nondiscriminatory state taxation of federal employees’ salaries. Public Salary Tax Act of 1939, ch. 59, § 4, 53 Stat. 574, 575 (codified as amended at 4 U.S.C. § 111 (2006)).

³⁸⁴ Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1335–41 (2000). Professor Fallon notes that even when a litigant challenges a statute “on its face,” the court’s immediate task is simply to decide whether the statute supplies a valid rule of decision for the case at hand. While the reasoning that the court adopts may indicate that the statute is invalid in other cases too, there is a sense in which this conclusion is simply an “incident[] or outgrowth[] of as-applied litigation.” *Id.* at 1324.

³⁸⁵ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 207–09, 234–36 (1972) (indicating that even though State’s compulsory-attendance laws are valid as applied against most parents of school-age children, constitutional protection for free exercise of religion requires exception for Old Order Amish).

In *United States v. Salerno*,³⁸⁶ the Supreme Court famously suggested that such challenges rarely succeed.³⁸⁷ Although other language in *Salerno* has prompted debate within the current Court, the Justices continue to indicate that successful facial challenges are “infrequent”³⁸⁸ and deviate from the “normal rule.”³⁸⁹ According to commentators, however, there is a mismatch between the Court’s rhetoric on this point and actual practice: Successful facial challenges are not quite as unusual as the Court suggests.³⁹⁰

To the extent that such a mismatch exists, the history surveyed in Part I may help account for it. To appreciate this point, though, one must consider the different sorts of reasons that might lead courts to declare a statutory provision facially invalid.³⁹¹

One prominent set of reasons is connected with severability doctrine. Even if a statutory provision would otherwise be valid as applied to a litigant’s case, the litigant might be able to attack the provision “on its face” by arguing that some aspects or applications of the provision are unconstitutional and that the other aspects or applications of the provision cannot be severed from them.³⁹² But this argument will often be unavailable. As a matter of statutory interpretation, modern courts typically apply a presumption in favor of severability.³⁹³ And while the Supreme Court has recognized some special constitutional limitations on severability (especially in the context of

³⁸⁶ 481 U.S. 739 (1987).

³⁸⁷ See *id.* at 745 (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully . . .”).

³⁸⁸ *Sabri v. United States*, 541 U.S. 600, 608 (2004).

³⁸⁹ *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (internal quotation marks omitted); see also *United States v. Shrake*, 515 F.3d 743, 745 (7th Cir. 2008) (“Justices of the Supreme Court . . . are united on the proposition that facial review is reserved for exceptional situations.”).

³⁹⁰ Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 236 (1994); accord Metzger, *supra* note 30, at 878 (“[I]n practice the Court accepts facial challenges far more frequently than its stated doctrine suggests.”).

³⁹¹ Cf. Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 363 (1998) (“Facial challenges can take at least two qualitatively distinct forms.”).

³⁹² See, e.g., Metzger, *supra* note 30, at 883–93 (discussing connection between facial challenges and inseverability).

³⁹³ Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1950 & n.28 (1997); cf. John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 218–21 (1993) (tracing fluctuating history of this presumption).

the First Amendment),³⁹⁴ the current Court does not seem inclined to extend those limitations very far.³⁹⁵

Assuming that the unconstitutional applications of a statutory provision can be severed from the constitutional applications, the provision will be ineffective across the board only if it does not have any constitutional applications—that is, only if the provision suffers from a constitutional defect that is “independent of [its] application to particular cases,”³⁹⁶ in the sense that the same reasons that would prevent courts from applying the provision in one case would also prevent courts from applying the provision in every other case. Many attacks on a provision’s constitutionality are not so far-reaching. But purpose-based arguments often are. As various commentators have observed, when a court concludes that a provision was enacted for an impermissible purpose, the court usually is saying that the provision is ineffective across the board: “The invalid legislative purpose pervades all of the provision’s applications.”³⁹⁷ Thus, the rise of purpose tests in a particular area of constitutional law will correlate with the rise of facial challenges in that area.³⁹⁸

This linkage may help account for some of the alleged mismatch between the Court’s rhetoric about the rarity of successful facial challenges and the Court’s actual practices. While the current Court may indeed be hostile to facial challenges that are based on versions of inseparability, it reviews the purposes behind both state and federal statutes to a far greater extent than it ever did before the 1970s. When making general statements against the routinization of facial challenges, however, the Court continues to invoke familiar prece-

³⁹⁴ See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1171 (2003) (referring to “the standard view of the First Amendment overbreadth doctrine,” which interprets Constitution as forbidding severability in certain circumstances); Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 14–23 (discussing this view of overbreadth doctrine).

³⁹⁵ See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1638–39 (2007) (discussing grounds for facial invalidation of statutes restricting abortion, and noting that “[t]he latitude given facial challenges in the First Amendment context is inapplicable here”).

³⁹⁶ Isserles, *supra* note 391, at 364.

³⁹⁷ Dorf, *supra* note 390, at 279; see also Fallon, *supra* note 384, at 1345 & n.124 (observing that while counterexamples do exist, “[i]f a statutory rule has an invalid purpose, so ordinarily will all of its subrules”); Isserles, *supra* note 391, at 440–41 (emphasizing that “with one curious exception, all of the Court’s notable decisions invalidating statutes on the grounds of illegitimate governmental purpose have been facial invalidations” (footnote omitted)).

³⁹⁸ See David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 90–91 (2006) (highlighting this connection in context of Congress’s commerce power, and arguing that “a judicial concern with permissible legislative purposes provides the most plausible explanation of the facial character of the Court’s recent Commerce Clause cases”).

dents; for instance, to support the proposition that “facial challenges are best when infrequent,” the Court recently cited cases from 1960 and 1912.³⁹⁹ To the extent that courts are now willing to conduct serious scrutiny of the legislature’s actual purposes, rhetoric based on these older cases will miss an important slice of modern judicial practice—and hence will overlook at least one set of cases in which facial challenges may not be so difficult to maintain successfully.

CONCLUSION

For much of American history, courts recognized strict limits on their ability to impute impermissible motivations to a legitimate legislative body. Even when they interpreted constitutional provisions to make the validity of a particular statute depend on the reasons for which the legislature had acted, judges presumed that the legislature had acted properly unless the information that they were willing to consider established the contrary with the requisite level of certainty. Until quite recently, the applicable standard of proof was extraordinarily demanding: With the exception of a brief period during the *Lochner* era, courts refused to accuse legislatures of impermissible purposes unless the information that they were willing to consider ruled out any other conceivable explanation. What is more, litigants could use only limited sources of information to satisfy this standard. Antebellum courts generally restricted themselves to the face of the challenged statute itself. By the 1870s, public facts of the sort eligible for judicial notice also became fair game, and by the 1920s, courts were basing inferences of impermissible purpose on extrinsic evidence introduced by the parties. But only in the last forty years has it become common for courts to examine internal legislative history or to take testimony about the internal legislative process in order to detect whether a statute was enacted for reasons that the Constitution forbids. Simply put, modern-day courts reviewing a statute’s constitutionality investigate the enacting legislature’s purposes in ways that were unheard of throughout most of the country’s past.

Both in tracing these changes and in linking them to the evolution of other aspects of constitutional doctrine, this Article has been entirely descriptive. But readers will naturally ask whether the fact that modern-day courts are doing something new means that they are doing something wrong. In the 1970s, when courts were launching what proved to be a dramatic change in the practice of judicial review,

³⁹⁹ *Sabri v. United States*, 541 U.S. 600, 608 (2004) (citing *United States v. Raines*, 362 U.S. 17 (1960), and *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217 (1912)).

should the history described in Part I have given them pause? If so, should courts now change course again and revive longstanding limitations on the judiciary's ability to impute impermissible purposes to legislatures? Indeed, to the extent that those limitations were grounded in the constitutional separation of powers, is it affirmatively unconstitutional for courts to continue their present practices?

The answer to the last question, at least, seems relatively clear. Even if one believes (as I do) that courts should care about the original understanding of the Constitution and that settled historical practices can help to "fix" the Constitution's meaning on ambiguous points,⁴⁰⁰ the Constitution does not reach or resolve many questions about the practice of judicial review. One should not conclude that *Marbury v. Madison* was therefore illegitimate; while the Constitution might not compel judicial review, the Constitution does not rule it out either, and many members of the founding generation anticipated in general terms that the judiciary would refuse to apply statutory provisions that judges determined to be unconstitutional.⁴⁰¹ According to the most sophisticated recent scholarship on the relevant history, however, judicial review did not grow out of the Constitution itself. Instead, it reflected the application to our constitutional system of preexisting principles—principles about the courts' role in enforcing limits on the authority that had been delegated to corporate entities,⁴⁰² or more general principles "about the hierarchy of law and the duty of judges to decide in accord with law."⁴⁰³ On this account, the practice of judicial review stems from a species of general jurisprudence rather than from the Constitution—making it quite unlikely that the Constitution regulates the details of that practice (such as the conditions under which courts reviewing a statute's constitutionality can look behind the statute's stated purposes and impute impermissible motivations to the enacting legislature).

Indeed, even if one believes that the courts' authority to conduct judicial review stems entirely from the Constitution rather than from

⁴⁰⁰ Cf. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–47 (2003) (discussing prominence of both these ideas in founders' own views about interpretation).

⁴⁰¹ See Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 1 (2003) ("The early evidence of judicial review is relatively plentiful."); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 927–81 (2003) (surveying relevant evidence); see also 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 51–52 (Windham, John Byrnes 1795) (acknowledging that idea of judicial review is "very popular and very prevalent," though arguing against it).

⁴⁰² Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 507–09 (2006).

⁴⁰³ Hamburger, *supra* note 401, at 9. Professor Hamburger's new book refines and meticulously defends this thesis. PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

the application to our constitutional system of uncodified principles, one still cannot plausibly read the Constitution to supply many details about the practice of judicial review.⁴⁰⁴ No one thinks, for instance, that the Constitution codifies the rules of evidence that courts must use in cases implicating a statute's constitutionality; instead of being restricted to the evidentiary sources of 1788, modern courts conducting judicial review can use modern rules of evidence. There is little more reason to think that the Constitution codifies the practices of 1788 about judicial inquiries into legislative purpose. In fact, one of the primary differences between those practices and their modern counterparts can be cast in terms of evidence: Modern courts are willing to impute impermissible motivations to the legislature on the basis of materials that founding-era courts would not have considered.

Admittedly, one reason rules of evidence can change over time is that the Constitution gives Congress considerable power to regulate what goes on in federal court,⁴⁰⁵ and Congress periodically supplies new rules of evidence for federal courts to use.⁴⁰⁶ The details of the practice of judicial review might be somewhat more insulated from congressional change than, say, the details of the rules about authenticating documents. If the present-day Congress were to enact a law purporting to require federal courts henceforth to accept all statutory statements of purpose at face value and to inquire no further into the enacting legislature's motivations, the courts might well balk; just as Congress cannot validly require courts to apply statutes without regard to their constitutionality, so too Congress may not be able to insist that courts defer completely to the legislature's assurances that its statutes spring from permissible motives. But the fact that the Constitution might prevent Congress from requiring the courts to return to their old practices on this point does not mean that the old practices themselves violated the Constitution, or that the Constitution otherwise specifies whether and when courts should be willing to impute impermissible purposes to a statute. More generally, the fact

⁴⁰⁴ For an illustration of this point, compare John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998) (arguing that judicial review flows from Constitution's text), with John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 525 (2000) (observing that norms of stare decisis followed by federal courts, even with respect to judicial interpretations of Constitution, "cannot plausibly be attributed to the Constitution itself").

⁴⁰⁵ See U.S. CONST. art. I, § 8, cl. 18 (empowering Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" judicial power of United States).

⁴⁰⁶ See, e.g., Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (promulgating Federal Rules of Evidence); see also 28 U.S.C. § 2072(a) (2006) (delegating power to Supreme Court "to prescribe general rules of practice and procedure and rules of evidence" for cases in lower federal courts).

that the Constitution does not give Congress plenary power to specify the details of judicial review does not mean that the Constitution codifies those details.

It does not follow that courts can adjust the details of judicial review however they please, or that radical breaks from past practice are perfectly legitimate. To the extent that the details of judicial review reflect a species of general jurisprudence or common law, one might think that they can change only in the ways that the common law can change. Traditionally, courts articulating common-law rules have not been supposed to act like legislatures; even when a court overturns an old decision or articulates a new common-law rule in a case of first impression, the past has been thought to constrain common-law development more than it constrains Congress.⁴⁰⁷ In keeping with this view, when the Burger Court was considering whether to begin scrutinizing the actual purposes behind statutes more vigorously, the weight of established doctrine should perhaps have had more force than it did.

Whatever one's verdict on the Burger Court, however, the current regime of purpose-based judicial review has been in place for the past generation. A return to the old regime would be no less radical a departure from established practice than the Burger Court itself accomplished in the 1970s. Even someone who was interested exclusively in continuity with the past would not necessarily advise the current Court to launch such an upheaval. At least on this point, then, history does not tell us how to behave in the future. What history can tell us is how to understand our past.

⁴⁰⁷ Cf. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (“I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.”); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 508 (2006) (noting that, even today, “the fact that the Supreme Court has authority to articulate [rules of ‘federal common law’ in certain areas] does not mean that it may legitimately make up any rules it likes”).