

Talk to the AALS Section on Jurisprudence

Saturday, January 8, 2005

1. My topic today is how the intentions of governmental decision-makers bear on the constitutionality of their actions.
2. Intentions bear on constitutional analysis in various ways. For example, I believe that the *intended meaning* of the ratifiers of the Constitution -- which will probably closely track the intended meaning of the Framers -- *is what the Constitution of 1789 and its formal amendments mean*. Likewise, when we are called upon to interpret a statute in order to assess its constitutionality, what the statute means is what those who voted for it intended it to mean. In other words, I am an intentionalist about meaning in the contexts of both constitutional and statutory interpretation.
3. But intentionalism in legal interpretation is not my topic today, interesting and important though it is. My topic today is not what governmental actors intended their promulgated rules to mean. Rather, my topic is the constitutional significance of what governmental actors intended to accomplish through their rules as correctly interpreted and applied. My topic is sometimes called the problem of *legislative motivation*, or more precisely, how governmental motivation -- what the government wishes to accomplish through its rules, or, put differently, government's *reasons* for its rules -- affects the constitutionality of those rules.

Let me be precise here. The governmental intentions that I am interested in are the

subjective reasons for which the government decision-makers promulgated the statute, rule, or decision at issue. Even more precisely, they are those subjective reasons that are relevant to political theory, reasons that have to do with how the government decision-maker foresees the law, rule, or decision furthering people's welfare or recognizing and implementing their rights. Irrelevant for my purposes are such subjective reasons as "this law will make me popular and get me re-elected," or "this law will make me feel better about myself," or "this law will please a certain interest group," and so on; though I confess that drawing the line between those subjective reasons that are relevant to political theory and those that are not is quite a difficult theoretical matter. I just beg your indulgence on this point and urge you to accept such a distinction.

My concern is government's subjective reasons for its laws, etc. But, as I shall argue momentarily, concern for government's subjective reasons is ultimately parasitic on a concern with *objective reasons*, that is, the actual effects -- of the political-theory-relevant-type -- that the government's actions will produce. (I will hereinafter refer to objective reasons as effects.)

4. The Supreme Court has sometimes said that the legislature's subjective reasons are immaterial to constitutionality. It said this in *United States v. O'Brien*, the draft card burning case, and in *Palmer v. Thompson*, the segregated swimming pools case. At other times, however, the Court has taken the position that subjective governmental reasons *are* material to constitutionality. Think of *Wayte v. United States*, *Mt. Healthy Board of Education v. Doyle*, and *Cornelius v. NAACP*, in the First Amendment area, or *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development* in the Equal Protection area, or *Yick*

Wo v. Hopkins.

I shall argue that the Court in these latter cases is correct. Government's reasons should matter. In what follows, I shall attempt to show why.

5. First, grant me some assumptions, assumptions that I don't believe should be controversial. Given these noncontroversial assumptions, however, it will follow that government's reasons for enacting its rules and making its rulings bear on constitutionality. The argument for this will at the same time, however, reveal some deeply puzzling features of constitutional law. Those puzzling features will be my final topic.

6. I should point out that the argument that follows from the assumptions that I shall get to momentarily does not distinguish among types of government actors. That is, it applies to legislatures, administrators, and courts, and it applies to both single governmental decision-makers and to multi-member ones. Moreover, it applies both to government actors' reasons for promulgating general rules and to governmental actors' reasons for particular one-off decisions.

7. The following example will be a stand-in for all types of governmental decisions by all types of governmental actors:

To operate a laundry, one must get a permit from the Board of Supervisors.

Assumption One: It would be constitutionally unproblematic for the Board to deny such a permit for any of a great number of reasons -- for example, lack of experience, lack of solvency, past conviction of a serious crime, and so forth. On the other hand, the Constitution does not

require the Board to deny a permit for any of those reasons.

Thus, a rule requiring five years of laundry experience in order to get a permit would be constitutionally permissible, though not constitutionally required. And the same for a rule requiring a certain level of financial solvency. These rules are what I call *constitutionally optional rules*.

So to rephrase this first, I hope uncontroversial, assumption: There are many rules regarding licensing laundries that are constitutionally optional -- neither forbidden nor required by the Constitution.

This first assumption has a corollary: Government is constitutionally permitted, not only to choose among these constitutionally optional rules, but to shift from one such rule to another at any time. Leaving aside shifts that would amount to a taking of property or otherwise constitutionally forbidden upset of legitimate expectations, no constitutionally optional rule is entrenched against repeal and adoption of a different constitutionally optional rule. In the absence of this corollary, optionality would exist only at the time of government's first choice among optional rules. Once it chose, its choice would be entrenched, which would mean the alternative rules were no longer constitutionally optional. That is why the corollary, that no optional rule is entrenched against repeal and replacement by another optional rule, is a corollary of the assumption that more than one rule is constitutionally optional.

Assumption Two: A rule that denies Asians permission to operate laundries is *constitutionally forbidden, not constitutionally optional*.

Let's just stipulate that this assumption is correct -- for all I require for my second assumption is that some rule or rules regarding who can operate a laundry are constitutionally

forbidden and not constitutionally optional. (The example could be a rule against Democrats' operating laundries -- but I'll stick with my rule against Asians here.)

Now why would such a rule be constitutionally forbidden? The answer presumably is "because of the rule's pernicious effects." (It's irrelevant for my purposes just what those invalidating effects are.)

8. At this point someone might raise an objection, not to my two assumptions, but to my explanation of why the second assumption is correct. Their objection would go like this: The reason why the rule forbidding Asians to operate laundries is constitutionally forbidden is not the effects of such a rule but rather is the governmental *attitude* toward Asians -- one of lack of equal regard and respect -- that is *expressed* by that rule.

I reject that "expressivist" explanation for several reasons:

(1) Even if the rule is invalidated by a court, the attitude the rule supposedly expressed is likely to remain. At least, striking down the rule does not itself extinguish the attitude. (Indeed, in some cases, it may strengthen the attitude.)

(2) Constitutional law and holding laws to be unconstitutional are not about punishing legislatures and other governmental officials for their bad attitudes but are about securing citizens the liberties, immunities, and rights to which they are constitutionally entitled.

(3) Where some legal state of affairs is not constitutionally optional but is constitutionally required, we don't care about the legislative attitude that lies behind that state of affairs. We care only that the state of affairs exists. For example, the Constitution, as rendered in *Lawrence v. Texas*, requires that there be no law criminalizing homosexual sodomy. That is,

laws against homosexual sodomy are not constitutionally optional but are constitutionally forbidden. Or put still differently, the legal liberty to engage in homosexual sodomy is not constitutionally optional but is constitutionally required. Now suppose a legislature repeals its criminal law forbidding homosexual sodomy, not out of respect for homosexuals, but instead out of contempt for them. The legislature might believe that legalization will lead to a major increase in the spread of AIDs among homosexuals and their eventual mass demise. Notwithstanding that attitude, however, we are not going to invalidate the repeal. As a constitutional matter, we care only that there *be* a repeal, not the why of it or the attitude that why expresses. And if we don't care about the governmental attitudes where nonoptional rules are concerned, why should we care about them where optional rules are concerned?

(4) Finally, and related to the preceding point, if government officials were inept in having their attitudes reflected in their laws -- if, for example, government officials who held attitudes of contempt for Asians would invariably enact precisely those laws that an attitude of equal regard and respect for Asians would dictate be enacted because of their effects -- then it would be perverse to invalidate those laws because of the attitudes that motivated their enactment. That suggests that what we ultimately care about is the effects of government's rules, not the attitudes of government officials that those laws reflect.

9. So now back to our two assumptions and the corollary of the first: The Board of Supervisors can require of applicants to operate laundries that they have a certain level of experience but not that they have financial wherewithal. Or it can require that they have financial wherewithal but not that they have experience. Or it can require both experience and

financial wherewithal, or neither. Moreover -- the corollary -- the Board may switch from one such constitutionally optional requirement or set of requirements to another to another and back again. But what the Board may not require is that the applicant be non-Asian. And the reason it may not require that is because of the untoward effects that requirement would produce and not the attitude of the government officials the requirement would express.

10. With these assumptions in hand, imagine the following scenario:

The first applicant for a laundry permit is an Asian who has experience with laundries but lacks financial wherewithal. The Board announces a rule requiring financial wherewithal and denies the permit.

The second applicant is an Asian with financial wherewithal but no experience. The Board announces that it has changed its rule and now requires experience. It again denies the permit.

And so on, and so on. Each time an Asian applicant appears, the Board announces that it has chosen from the multitude of constitutionally optional rules a rule under which the applicant is disqualified. The result is that no Asian applicant ever gets a permit.

11. Here is the crucial point: Unless we examine the actual intentions of the members of the Board of Supervisors -- their subjective reasons -- we cannot distinguish between the Board's permissibly switching back and forth among constitutionally optional rules and the Board's consistently applying a single impermissible rule -- no Asians need apply -- which might lie behind the various facially permissible rules that it has adopted. This possible rule behind the

rules, or “meta-rule,” can only be ascertained if we can pierce the stated rules and inquire into the psychology of the Board members -- their actual reasons for doing what they did. We might establish the Board’s reasons or meta-rule circumstantially. The more often the Board switches among constitutionally optional rules with the result that Asians are denied permits, the more likely it is that its real rule is the unconstitutional “no Asians need apply” rather than the various constitutionally permissible rules that are that rule’s momentary instantiations. If 300 such cases finally establish for Yick Wo, the 300th applicant, the existence of the unconstitutional “no Asian” meta-rule, Yick Wo will get relief. The first Asian applicant who was denied would likely have lost a circumstantial case, even though if the same meta-rule was applied to him that was applied to Yick Wo, he too was the victim of unconstitutional action. On the other hand, Yick Wo’s circumstantial case would be weakened if the composition of the Board of Supervisors changed between the 299th denial of a permit to an Asian and Yick Wo’s denial. Perhaps the new Board was predominantly Asian, or ran on a “get the racists out” platform. Whether the evidence is circumstantial or direct, however, what is material is the actual meta-rule that was being applied in the complainant’s case. For what reason did the Board that denied *his* permit adopt the rule that dictated the denial? The actual state of mind of the governmental actor or actors involved is the material fact for which the switching between constitutionally optional rules is circumstantial evidence, along with evidence of changes of personnel, ideology, and so forth. And to repeat the principal point: Unless we can look at governmental states of mind, we cannot distinguish permissible switching among permissible rules from consistent implementation of an impermissible rule.

12. That's the case for the constitutional materiality of governmental intent. Subjective reasons define the real rules that we must measure against constitutional standards. And that is because if there are rules that are constitutionally optional, we cannot distinguish between permissibly switching among them and consistently following an unconstitutional rule.

That's my case for why government's subjective reasons matter. But that case gives rise to problems and puzzles of its own.

13. Let's start with the problem that the Court itself identified in *O'Brien* and that has worried many constitutional scholars. When I refer here to government's reasons for enacting and repealing rules, I am referring to actual psychological states. Did the Board really believe at the time in question that no one who failed to meet the conditions of its *stated* rule -- either its experience rule or solvency rule, depending on the time -- should be permitted to operate a laundry, or did it believe that anyone but Asians should be so permitted? That is a question about the Board's actual psychology.

Now this inquiry into government's psychology is not an insuperable problem if the government actor in question is a single individual. But what if it is a multi-member body such as a legislature, an agency, or an appellate court. Do multi-member bodies have the relevant states of mind?

A lot of ink has been spilled on this question, so I plan to pass over it, except to acknowledge that it *is* a problem. I suspect that the solution lies in identifying overlaps in the states of mind of a sufficient number of government actors to produce the legal act in question, but I won't elaborate on that here. Suffice it to say, a solution must be found. For if our

hypothetical Board of Supervisors is multi-membered, then in order to distinguish constitutionally permissible switching among constitutional optional rules from consistently following a constitutionally forbidden rule, we must peer into the “mind” of the multi-membered Board. And remember, the Court’s own decisions require this. Think of *Village of Arlington Heights*.

14. Now for what I find deeply puzzling about the analysis I have offered for why reasons are material to constitutionality. To begin, note that the effects of the unconstitutional meta-rule -- no Asians need apply -- are *at any given point in time* identical to the effects of a constitutionally optional rule. Each Asian who is denied a permit under the unconstitutional meta-rule is also being denied a permit under the stated rule -- the experience rule or the solvency rule. Therefore, the effects of his or her denial are not by themselves the reason why the denial is unconstitutional. No given application of the infirm meta-rule -- no token of the disadvantaged type (Asian applicants) -- produces unconstitutional effects because that same token is a token of another type (e.g., inexperienced applicants) that is permissibly disadvantaged.

In most cases, constitutional protection does not extend to particular act tokens. Burning an American flag on the street is not a constitutionally protected act token. There are many rules describing act types under which that token may permissibly be punished. For example, it may be punished under a statute proscribing “burning objects on public streets.” It merely may not be punished under message-related statutes such as one proscribing “offensive treatment of the American flag.” As Matt Adler puts it, most constitutional rights are “rights against rules,” not

rights to engage in particular act tokens.

But if that is so -- and I think it must be -- then it must be because *the effects of rules over time* are what are constitutionally significant, not the effects of any given application of a rule. For any given application of an unconstitutional rule will be identical to the effects of an application of other constitutionally permissible rules. That is true with respect to any given instance of burning of an American flag. And it is true in our hypothetical of any given instance of denying an Asian applicant a permit.

15. So if the effects of rules are what matter constitutionally -- not the attitudes of government officials -- and it's not their effects at any given moment in time that matter, then it must be their effects over time that are constitutionally significant. And that suggests that in deeming our permit denials to Asians unconstitutional, despite the fact that each one occurs under a stated rule that is constitutionally permissible, we believe that not only is the reason behind the rule -- the meta-rule or real rule -- constitutionally significant, but also that it is significant and unconstitutional *because of its effects over time. And that further suggests that we assume that it will persist over time.* (We believe, for example, that when the next Asian applies for a permit, and she would be eligible under the current stated rule, the Board will still apply the unconstitutional meta-rule and switch the stated rule to one that would disqualify her.)

16. One thing to note about this analysis is that it reveals why not only conscious but also unconscious governmental reasons should be material. For what we want to know is whether the Board will switch from its current stated rule to another stated rule in order to keep on

disqualifying Asian applicants. Therefore, the inquiry is a counterfactual one: Would the Board have enacted the rule that disqualifies Yick Wo were Yick Wo not Asian? And unconscious reasons may bear on that.

17. But to return to the issue of temporal persistence, why should we assume that the meta-rule -- “no Asians need apply” -- will persist over time and produce effects that differ from the effects of constitutionally optional rules? After all, boards of supervisors change membership over time. And members change the reasons for which they act over time. And if that’s the case, can’t we expect a governmental body’s reasons -- it’s meta-rules for enacting and repealing its stated rules -- to change over time? And if the meta-rules will change, the effects they produce will be more circumscribed and thus more difficult to distinguish from the effects of permissible rules. And if the effects of rules are what matter constitutionally, then does this not suggest the pointlessness of the otherwise difficult conceptual and evidentiary task of inquiring into governmental motives to discern its meta-rules? Yet, haven’t I shown that we must so inquire in order to determine whether government is denying Yick Wo a permit because he is inexperienced or because he is Asian. That is the puzzle.

18. Let me illustrate this puzzle by changing my example from laundry permits to flag burning. Assume it is constitutionally permissible to have a rule proscribing burning objects in public and also not to have any such rule. Both the rule and its absence are constitutionally optional. On the other hand, a rule proscribing only the public burning of American flags is constitutionally forbidden, and forbidden because of its effects over time.

Now consider the following hypothetical cases:

City A has had a rule banning the public burning of American flags on the books for one year. It has now been repealed. Johnson burned an American flag while the law was in effect and is currently being prosecuted.

City B has had a rule banning all public burning for one year, and the rule remains on the books. It just so happens that the only people who have wanted to burn objects in public during the past year have been those who wanted to burn American flags. Jackson did burn an American flag and is now being prosecuted.

City C has alternated between a “no public burning” rule and having no rule regulating public burning. It has done so because it has changed its mind for constitutionally legitimate reasons. It just so happens, however, that all those prosecuted during the times the “no public burning” rule was in effect were those burning American flags in political protests. Jensen was such a person and is now being prosecuted.

City D has, like City C, switched back and forth between the same alternatives. Unlike City C, however, City D has been consistently motivated by its desire to punish those, and only those, who burn American flags. Jencks₁, a flag burner, is being prosecuted under the “no public burning” rule in effect when he acted. A new city council, composed of radicals sympathetic to flag burning, has taken office after Jencks₁'s arrest.

City E is like City D, except that the new city council took office *before* Jencks₂'s flag burning and left the “no public burning” rule on the books for legitimate reasons.

City F has just repealed a “no public burning” law and enacted a “no burning an American flag” rule that will sunset in one month, when a new city council, composed of radicals sympathetic to flag burning, will take office. Jinks burned an American flag after the “no burning an American flag” rule was enacted and is being prosecuted.

Now according to the arguments I have given, Johnson (City A), Jencks₁ (City D), and Jinks (City F) are being prosecuted unconstitutionally. On the other hand, Jackson (City B), Jensen (City C), and Jencks₂ (City E) are being permissibly prosecuted. Yet all burned American flags in protest. The past effects of the rules in each city were the same. Moreover, the future effects of some of the unconstitutional rules—for example, City D's and City F's—appear to be more benign than the past effects of the constitutionally permissible rules in effect in B, C, and E. Indeed, the past *and* future effects in D and E appear indistinguishable; yet

Jencks₁ is prosecuted unconstitutionally in D, but Jencks₂ is not prosecuted unconstitutionally in E.

I regard this pattern of results and the asymmetry between future effects and past effects as sorely in need of justification. Unfortunately, I have no good justification to offer.

19. Perhaps, contrary to what I have argued, constitutional law *is* an expressivist battleground, concerned with evaluating rulemakers' attitudes -- their subjective reasons -- rather than with evaluating their rules based on the rules' more straightforward effects, the objective reasons for and against such rules. Perhaps, but I seriously doubt it. It is true that we, like dogs, can tell the difference between being tripped over and being kicked, but it matters to us only when we care about the attitude of our injurer. Constitutional law seems, to me at least, to be properly concerned with rules and their tangible—and remediable—effects, not with legislative attitudes.

20. Here is a response to my argument that I owe both to my wife and to Mitch Berman: Laws resulting from certain legislative reasons are invalidated, not because we know their effects will be bad, but because courts cannot predict and assess their effects with any reliability. Instead, courts use certain legislative reasons as proxies for defective legislative deliberations, deliberations that were responsive to only the bad effects of the rule in question, not to its possible good effects. Defective deliberations are in turn conclusively presumed to issue in rules that have bad effects and fail to have the good effects that might justify them. In other words, constitutionally desired effects are to be achieved, not by direct judicial implementation through

invalidation of legislation that fails to produce those effects, but through a judicially-enforced *rule* invalidating all legislation that is enacted for specific illegitimate reasons, regardless whether the legislation ultimately differs in its effects from legislation enacted for proper reasons. (This judicially-enforced rule might either be, in Berman's terms, the *meaning* of the constitutional provision in question, or a judicial *doctrine* about how to *apply* that meaning.)

The principal problem with the Elaine-Mitch argument is that it results in identical laws in separate but otherwise similar jurisdictions having different constitutional statuses. For example, if jurisdictions A and B are otherwise similar, and even have the same number of prospective flag-burners and prospective burners of other objects, but A enacts its no burning law in order to get flag burners, while B enacts an identical law in order to protect the public, the "skewed deliberations" theory would deem A's law, but not B's, to be unconstitutional. Yet however reliable or unreliable are judicial predictions of effects, the effects of these two laws are identical (that is, except for the effects we might predict when either the circumstances or the legislature change—the effects that I regard as important). Conclusively presuming them to be different might seem nonsensical. If A but not B committed constitutional error in its deliberations, then it would appear to be harmless error.

Indeed, the argument could lead to different outcomes where two prosecutors in the same office have adopted the exact same prosecution policy, but for different reasons. Suppose prosecutors A and B have the same policy P for enforcing law L. A has adopted that policy for constitutionally permissible reasons. B adopted it because he believed it would lead to more prosecutions of blacks. Each has prosecuted one person under the policy, and in each case the person was black. B has now retired. The argument in question would mandate relief for his

defendant but not for A's despite the identical effects of their identical policies.

Of course, one could still argue that, although different results in cases of identical laws enacted for different purposes look nonsensical, over the long run the purpose-focused constitutional rule will perform better than an effects-focused constitutional rule. In other words, if the constitutional concern is, say, a skewing of public debate, then a constitutional rule invalidating all legislation enacted to favor or disfavor certain viewpoints might, in the long run, produce less skewing than an effects-focused rule, even if in specific cases the former rule produced as much or more skewing than the latter. Like all rules, this constitutional rule is over and under-inclusive relative to its justifying effects-related goal. But so what? This is Berman's point, and he may be correct. If so, then my puzzles about time evaporate.

21. Unless, however, I am wrong about either of these two points, then, I believe, we end up with the odd pattern of constitutional judgments I just presented. That pattern surely needs to be justified or denied, neither of which I can do. As the King of Siam was wont to say, "It's a puzzlement."

I do have an intuition, however, that the source of this problem—and the remedial and standing problems that go with it—is constitutional optionality. If the Constitution, contrary to Holmes, does enact a single, coherent political philosophy, then rules will be either mandated or forbidden but will not be optional. Legislative reasons will not matter. A mandated rule will be constitutional regardless of why the legislature enacted it, and a forbidden rule will not be redeemed by good intentions. Switching between permissible rules will be impossible because only one set of rules will be permissible. And the remedy for unconstitutional enactments will

be to reestablish the constitutionally mandated corpus juris.

Optionality may carry with it the virus of incoherence. Optionality is the source of such constitutional doctrinal morasses as “unconstitutional conditions,” “the greater power includes the lesser,” and “governmental discrimination among speakers and ideas,” which sometimes is and sometimes isn’t allowed, with no underlying rationale that I can discern. And the optionality of rules suggests a picture of constitutional law in which we care only *why* people are treated by government as they are and not about *how* they are treated. Such a picture ultimately seems a radical distortion of why we care about constitutional rights.