1983

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UNCONSTITUTIONAL MOTIVATION ANALYSIS 
AND THE FIRST AMENDMENT: THE 
FURTHER DEMISE OF A "WISE AND 
ANCIENT DOCTRINE"

The degree to which courts will scrutinize the decisionmaker's motive when passing on the constitutionality of legislation has been a constantly changing standard. Courts originally conducted the search for unconstitutional motive only with great hesitation. Gradually, however, they came to view legislative motivation as a more critical factor in determining constitutional questions. "Unconstitutional motivation analysis," as the inquiry came to be known, has become particularly relevant to first amendment adjudication. This Note analyzes the efficacy of unconstitutional motivation analysis, emphasizing its first amendment application. Following a description of the history and nature of unconstitutional motivation analysis, the Note examines its use in first amendment cases, focusing on its most recent application by the Supreme Court in Board of Education, Island Trees Union Free School District No. 26 v. Pico. The Note concludes by proposing an alternative model for unconstitutional motivation analysis.

INTRODUCTION

WHEN RULING on the constitutionality of an act, the Supreme Court generally utilizes three distinct theoretical approaches in deciding whether to inquire into the legislative body's motives or the effects of its enactment.\(^1\) Under the first rubric, courts look solely at the decisionmaker's motive.\(^2\) A second approach focuses only on the effects of the action taken.\(^3\) Finally, either motive or effects are examined first and, depending upon what is discovered, the other factor may also be explored.\(^4\) The Court has failed, however, to provide guidance as to the areas of constitutional adjudication to which each of these modes of analysis applies.

The most controversial of these approaches is the inquiry into the decisionmaker's motive. Justices Stevens,\(^5\) Rehnquist,\(^6\) Mar-

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shall, and Black have argued against examining motive. Commentators, however, have generally viewed unconstitutional motivation analysis more favorably.

This Note examines the efficacy of first amendment unconstitutional motivation analysis. After tracing the history and general nature of the analysis, several scholars' theories on the subject are explored. The Note then describes the relationship of unconstitutional motivation analysis to the first amendment by analyzing a series of cases from the secondary school setting. The Note concludes with a presentation of a comprehensive unconstitutional motivation analysis model for first amendment adjudication.

I. THE HISTORY OF UNCONSTITUTIONAL MOTIVATION ANALYSIS

The Supreme Court has vacillated on whether courts should scrutinize an official decisionmaker's action because it was motivated by an unconstitutional purpose. The Court initially refused to consider motivation as a possible ground for overruling legislative action; in Fletcher v. Peck, Chief Justice Marshall declared that scrutinizing legislative motive should only be attempted "with much circumspection." This judicial aversion to analyzing legislative motive eventually developed into what Jus-
tice Cardozo termed the "wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful."18

The modern seeds of destruction of this "wise and ancient doctrine" were planted in *Brown v. Board of Education*,19 where a statute was held to violate the equal protection clause on its face. The Court's failure to consider legislative motive in *Brown* led to legislative schemes which would appear constitutional facially but which, if scrutinized by courts, might be found to have an unconstitutional effect or to have been motivated by an unconstitutional animus. Litigation arising over acts motivated by an unconstitutional animus ushered in an age of unconstitutional motivation analysis, characterized by the Supreme Court's statement in *Gomillion v. Lightfoot*20 that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end."21

Motivation analysis has not, however, been evenly applied. In *Abington School District v. Schempp*,22 for example, the Court remarked favorably on its earlier test from *McGowan v. Maryland*:23 "[I]f it can be demonstrated that [the legislation's] 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"24 then the legislation is unconstitutional. The Court's enthusiasm for analyzing legislative motive, however, was short-lived. In *United States v. O'Brien*,25 the Court confronted a claim that the penalties imposed upon the respondent for burning his draft card were designed to quell his freedom of expression. In considering the first amendment issue, the Court explicitly refused to review legislative motivation, stating that "under settled principles the purpose of Congress . . . is

21. *Id.* at 347 (quoting United States v. Reading Co., 226 U.S. 324, 357 (1912)). Justice Whittaker stated "that accomplishment of a State's purpose—to use the Court's phrase—of 'fencing Negro citizens out of' Division A into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment." 364 U.S. at 349 (Whittaker, J., concurring) (quoting *Gomillion*, 364 U.S. at 341).
24. *Id.* at 453.
not a basis for declaring this legislation unconstitutional." The Court distinguished *Gomillion*, which it characterized as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional." The Court made no attempt to explain *Schenck v. O'Brien*, at least under a literal interpretation, appeared to signal the end of judicial inquiry into legislative motive. However, it really marked the beginning of a controversy that rages to this day—whether legislative motive should properly be examined when determining an act's constitutionality under the equal protection clause or the first amendment.

The effect of *O'Brien* was short-lived. In *Board of Education v. Allen* and *Epperson v. Arkansas*, decided the same term as *O'Brien*, the Court invalidated legislation because it was enacted for illicit purposes—purposes which violated the Establishment Clause. The following year, Justice Harlan, dissenting in *Tinker v. Des Moines Independent Community School District*, found inquiry into motive completely proper. He confronted the first amendment symbolic expression issue in the secondary school setting by indicating that he "would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view." Justice Harlan's approach attained fruition in 1982. In *Board of Education, Island Trees Union Free School District No. 26 v.

26. *Id.* at 383.

27. *Id.* at 384; see also *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) (also foreshadowing the death of motivation analysis).

28. 392 U.S. 236 (1968). In *Allen*, the Court had this to say about illicit motive: "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution." *Id.* at 243 (quoting *Schenck*, 374 U.S. 222).

29. 393 U.S. 97 (1968). The Court found that there was "no doubt that the motivation for the law was . . . to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man." *Id.* at 109. In effect, the Court determined that the purpose of the legislation "was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read." *Id.* Another notable case from this period concerning motivation analysis is *Oestereich v. Selective Serv. Bd.*, 393 U.S. 233 (1968) (draft board could violate the Constitution when it selects people because it disapproves of their views on war).


31. *Id.* at 526 (Harlan, J., dissenting).
Pico, a group of students attacked their school board's decision to remove certain books from the library shelves of schools within the board's jurisdiction. The Court held that the decisive factor in determining the constitutionality of the board's action was the board's motive:

[Whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exceeded their discretion in violation of the Constitution.]

Thus, Pico represents the complete resurrection of unconstitutional motivation analysis in first amendment cases, notwithstanding O'Brien. To fully appreciate the impact of this resurgence, the mechanics of unconstitutional motivation analysis must first be explored.

II. JUDICIAL INQUIRY INTO UNCONSTITUTIONAL MOTIVE

Motive is defined as "something within a person . . . that incites him to action" or a "consideration or object influencing a choice or promoting an action." A motive analysis, in its sim-
plest terms, inquires into the "whys" of a decision. Unconstitutional motivation analysis usually begins with an inquiry into why the decisionmaker made a particular decision, focusing on both the objective and subjective processes by which the decision was made. The objective process includes any procedure which the particular decisionmaking body usually follows when arriving at a decision, while the subjective process involves the decisionmaker's state of mind. Although the content of the decision may have a bearing on the decisionmaker's motive, it is seldom the focus of a motivational analysis. It is assumed that the decisions speak only

examine the decisionmaker's motive, because the evidence before the court appears insufficient to support a finding of unconstitutionality. See Clark, supra note 9, at 961-62.

38. Alexander, supra note 9, at 927. Motivational analysis must be contrasted with an effects theory of constitutional adjudication. Effects theorists concentrate on the "what was done" of the rule enacted; motive is irrelevant to the pure effects theorist. The most vocal proponent of the effects theory is Justice Stevens. See Rogers v. Lodge, 438 U.S. 613, 631-53 (1982) (Stevens, J., dissenting).

Effects are the state of affairs produced by an enactment. In most situations an effects theorist uses the motive of the decisionmaker merely as evidence of the unconstitutional effects. Concentrating solely on motives creates complex difficulties for effects theorists. First, it is difficult, if not impossible, to tell which effects are relevant and the reasons for their relevancy. Suppose no effects are empirically visible but there are clearly improper reasons for enacting the statute? Only a motivation theory would protect the constitutional rights of the complaining party. Second, viewing only effects creates difficulties when the judiciary, for institutional reasons, permits two or more inconsistent effects. Such situations arise when more than one rule or decision, each constitutional by itself, operate together to produce prohibited effects. See Alexander, supra note 9, at 927-29.

39. Clark, supra note 9, at 963-78.

40. See Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341 (1949). In their seminal article, Tussman and tenBroek argue that an inquiry into the motivation behind a legislature's actions might be the only proper method of adjudicating constitutional questions in the majority of cases.

It is indeed difficult to see that anything else is involved in these discriminatory legislative cases than questions of motivation. Hostility, antagonism, prejudice—these surely can be predicated not of laws but of men; they are attitudes, states of mind, feelings, and they are qualities of law-makers, not of laws.

Viewed in this light the prohibition against discriminatory legislation is a demand for purity of motive. It erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility, or, alternatively, of favoritism, and partiality. The imposition of special burdens, the granting of special benefits, must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good. When and if the proscribed motives replace a concern for the public good as the "purpose" of the law, there is a violation of the . . . prohibition against discriminatory legislation. Id. at 358-59. Although the authors wrote about violations of the equal protection clause, modern constitutional adjudication applies many of the same tests and theories to cases arising under the first amendment. This area of constitutional adjudication is referred to as "first amendment equal protection analysis." For further discussion of the overlap of first amendment and equal protection analysis in the public forum and censorship contexts, see T. Emerson, The System of Freedom of Expression 303-307 (1970); Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 SUP. CT. REV. 1, 29-30.
for those creating them.\textsuperscript{41}

A pure unconstitutional motive theorist approaches a decision armed with a set of either proscribed or mandated motives.\textsuperscript{42} The motive theorist does not care whether the decision will result in beneficial effects; the inquiry is restricted to determining what in the mind of the particular decisionmaker prompted the decision. The final determination of constitutionality or unconstitutionality depends upon whether illicit objects or criteria—proscribed or mandated motives—were substantial factors in the decisionmaking process and whether the same result might be reached if the legislation were justified by legitimate objectives or criteria.\textsuperscript{43}

A. The Relevance of Motive

Several reasons have been advanced for the judicial inquiry into a decisionmaker's motive. First, the Constitution is viewed as a grant of enumerated powers defining the limits of the decisionmaker's authority;\textsuperscript{44} the argument is that illicit motives exceed the constitutionally imposed limits on the authority vested in a decisionmaking body.\textsuperscript{45} Similarly, the Bill of Rights explicitly denies a decisionmaker the authority to act in certain proscribed areas.\textsuperscript{46}

\begin{itemize}
  \item \textsuperscript{41} See Tussman & tenBroek, supra note 40, at 358-59.
  \item \textsuperscript{42} Mandated motives are those which require specific acts. For example, a law mandating that all other laws facilitate freedom of speech would require that every law have as its purpose the facilitation of that freedom. Proscribed motives are those which are impermissible. For example, the Bill of Rights guarantees that no law shall abridge freedom of speech. See Alexander, supra note 9, at 931.
  \item \textsuperscript{43} See, e.g., Simon, supra note 9, at 1097-1127.
  \item \textsuperscript{44} Alexander, supra note 9, at 935. Congress is prohibited from acting without authority specifically defined in the Constitution. See U.S. CONST. art. I, § 8; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("[t]his government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted").
  \item \textsuperscript{45} See infra text accompanying note 82.
  \item \textsuperscript{46} The Bill of Rights specifically denies Congress the power to make laws "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I. In the case of free speech, motivation may be the only relevant factor to consider in adjudicating claims of alleged infringement. For instance, Professor Tribe sees two categories of legislation abridging freedom of speech where motivation is relevant:

  \textit{First}, government can aim at ideas or information, in the sense of singling out actions for government control or penalty either (a) because of the specific viewpoint such actions express, or (b) because of the effects produced by awareness of the information such actions impart. . . .

  \textit{Second}, without aiming at ideas or information in either of the above senses, government can constrict the flow of information and ideas while pursuing other goals, either (a) by limiting an activity through which information and ideas
Second, an illicit motive may determine the outcome of a decision, which may, in turn, produce illicit effects. This illustrates the interdependence of effects and motive. For example, suppose a decisionmaker decides to enact legislation prohibiting black people from wearing green eyeshadow to protest a series of murders; the illicit effect is to inhibit freedom of expression and the illicit motive is to stigmatize black people.

Third, only the political decisionmaker has the authority to weigh the fairness and utility of a decision. When an illicit motive exists, fairness and constitutional neutrality are automatically jeopardized because the opportunity for a full and proper assessment of the decision is destroyed.

Fourth, the presence of an illicit motive creates a "breach of faith between the governor and the governed." These reasons for inquiring into motive do not exist in a vacuum. Any consideration of the relevance of unconstitutional motivation must also take into account the inherent difficulty in pursuing an inquiry into motive.

B. The Problems of Motivation Analysis

Critics of motivation analysis deem it improper for courts to review a decisionmaker’s motive. The motive of a collective body is said to be difficult, if not impossible, to ascertain, precluding the motivation from being determinable with constitutional sufficiency. Moreover, even after being found unconstitutional, a
decision or law may be reenacted with a constitutional motive. A valid and otherwise useful decision also may be declared unconstitutional because it was enacted with an illicit motive. Finally, motivational analysis is faulted for improperly validating inquiry by one branch of government into the good faith decisions of another. These arguments against inquiring into the motives of decisionmaking bodies are generally viewed by commentators as illusory, and each is now considered frivolous.

C. Dissipating the Problems of Motivation Analysis

Justice Black's opinion in Palmer v. Thompson argued that determining the "sole" or "dominant" motivation of a legislature is difficult, if not impossible. However, simply because an analysis is difficult does not render it any less necessary; when constitutional principles are at issue, an inquiry into the motives of the decisionmaking body may be required. Although a legitimate explanation for a decision may exist, a hidden unconstitutional purpose may also exist given all the relevant circumstances. The judiciary should not refuse to inquire into motive since the constitutional consequences may be great. A fortiori, if an illegitimate purpose is the exclusive explanation for making a decision, the judiciary should closely scrutinize motive. In that case, the motive would be conclusive evidence of unconstitutionality.

The second objection to an inquiry into a decisionmaker's motive is that such inquiry may be futile because the law may be reenacted. But, as Professor Ely explains, after determining that an enactment or decision was made with an illicit purpose, courts will be skeptical of any revision with an allegedly "constitutional" motive. Furthermore, the unconstitutional motive must be the overriding factor influencing the decision.

52. Id.
53. See Eisenberg, supra note 9, at 117.
54. See infra notes 55-74 and accompanying text.
56. Id. at 224-25; see supra note 50.
58. See supra note 51 and accompanying text.
59. Ely, supra note 19, at 1275-79.
60. See supra note 34 and accompanying text.
mate explanations for the decision, courts will not fully scrutinize the motive factor.\textsuperscript{61} Therefore, since there may be several plausible justifications for the decision, motivation will not be the determinative inquiry; rather, it will "trigger the ordinary demand for a legitimate defense."\textsuperscript{62} Finally, sending the law back after striking it down because it was unconstitutionally motivated tends to legitimize the so-called "due process of legislation," allowing the decisionmaker to rethink the law in constitutional terms.\textsuperscript{63}

The third criticism of motivation analysis is its disutility.\textsuperscript{64} Illicit motive, however, will invalidate only those decisions which cannot be supported by legitimate concerns.\textsuperscript{65} All an enactment or decision would need to withstand a motivation analysis is some legitimately defensible purpose. Moreover, inquiry into motive will come into play only if the illegitimate motivations are a substantial factor in the decisionmaking process.

The final criticism of motivation analysis, that it is improper for one branch of government to delve into the affairs of another branch,\textsuperscript{66} is easily dispelled. Judicial review of the executive and legislative branches is a long accepted practice\textsuperscript{67} which has been extended to the areas of presidential behavior\textsuperscript{68} and legislative apportionment.\textsuperscript{69}

After the commentators had diluted the criticisms of motive inquiry, they recognized that the judiciary could properly conduct a motivation analysis in considering the constitutionality of some legislative or executive actions. From this conclusion, as Professor Ely has pointed out, two further conclusions follow. First, in a practical sense, there are concrete instances where unconstitutional motivation can be inferred.\textsuperscript{70} Second, intuitively, there are cases that can be explained only by a motivation theory.\textsuperscript{71} The various unconstitutional motivation theories of Professors Ely,\textsuperscript{72} Brest,\textsuperscript{73} and Clark\textsuperscript{74} are premised upon these conclusions.

\begin{itemize}
  \item \textsuperscript{61} Ely, supra note 19, at 1275–79.
  \item \textsuperscript{62} Id. at 1278.
  \item \textsuperscript{63} Id. at 1279–80.
  \item \textsuperscript{64} See supra note 52 and accompanying text.
  \item \textsuperscript{65} Id. at 1280–81.
  \item \textsuperscript{66} See supra note 53 and accompanying text.
  \item \textsuperscript{67} Eisenberg, supra note 9, at 117.
  \item \textsuperscript{69} See Baker v. Carr, 369 U.S. 186 (1962).
  \item \textsuperscript{70} J. Ely, supra note 15, at 139.
  \item \textsuperscript{71} Id.
  \item \textsuperscript{72} Ely, supra note 19.
  \item \textsuperscript{73} Brest, supra note 9.
\end{itemize}
D. Theories of Unconstitutional Motivation

Professor Ely bases his theory of motivation analysis upon what he calls the "disadvantageous distinction model." He distinguishes statutes or decisions by who must sustain the required burden of justification. When a statute or decision draws distinctions among persons and disadvantages a select group of those persons, the government has the burden of justifying those distinctions. Consequently, in this situation motive and motivation analysis are irrelevant. However, Ely discusses two situations where his "disadvantageous distinction" model does not apply and motive is therefore a proper inquiry. First, the model does not apply when the government cannot offer any legitimate reason for the distinctions it draws. Second, Ely's model does not apply to "discretionary choices"—choices made when the particular decision is not rationally related to "the effectuation of some acceptable goal." Ely would thus subject enactments in these two categories to review for whether the decisions were unconstitutionally motivated.

Professor Brest's theory of motivation analysis rests on the premise that proscribed objectives are beyond the authority of official decisionmakers—if an illicit objective is proved by clear and convincing evidence, a court should invalidate the decision. In its simplest terms, Brest's theory is a "but for" test of constitutional motivation: "[A]ssuming that a person has no legitimate complaint against a particular decision merely because it affects him adversely, he does have a legitimate complaint if it would not have been adopted but for the decisionmaker's consideration of illicit objectives." The court should review a decision if "it was designed in part to serve an illicit or suspect objective."

Professor Clark borrows the Supreme Court's term "invidious
motivation, defining it as "devaluing the needs, wants, capabilities, or dignity of members of a group, whether for reasons of hostility or other prejudice, on the unwarranted assumption that such group members are less capable than other members of society." Clark uses this concept of "invidious motivation," along with the usual constitutional evidentiary determinations such as suspect classes, fundamental rights, and compelling governmental interests, as tools to search for mistaken assumptions of lesser moral worth. Clark presumes a bad purpose or motive when there is no proper governmental interest to rebut a suspicion of unconstitutional motivation.

A common thread running through each of these theories is the basic assumption that unconstitutional motivation analysis should be employed in first amendment adjudication. This assumption deserves further discussion.

III. THE SPECIAL PLACE OF UNCONSTITUTIONAL MOTIVATION ANALYSIS IN FIRST AMENDMENT ADJUDICATION

Unconstitutional motivation analysis is especially relevant to cases arising under the first amendment, which explicitly procribes certain legislative goals: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press." While the decisionmaker has no choice as to which government objectives are forbidden, the scope of the first amendment remains ambiguous.

The first amendment denies government the "power to restrict expression because of its message, its ideas, its subject matter, or

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85. Clark, supra note 9, at 966–67; see, e.g., Washington v. Davis, 426 U.S. 229 (1976). As the Court observed in Washington,

[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups.

426 U.S. at 239 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).

86. Clark, supra note 9, at 966–67.

87. Id. at 954, 964, 967.

88. Id. at 983.

89. Although motivation analysis is, and has been, much debated in the equal protection area, most commentators agree that it has special significance in the first amendment sphere. L. Tribe, supra note 46, at 567–608; Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 MINN. L. REV. 379, 447–49 (1976).

90. U.S. CONST. amend. I.
its content.\textsuperscript{91} The Framers imposed this restriction with a strong consideration for history, remembering that dissatisfaction with government was traditionally silenced by regulation of speech and religion. Laws regulating the content of speech and the practice of religion contain the evils which accompany an invidious stigma upon a class of people, and interfere with society’s ability to determine its own view of politics, religion, morality, and lifestyle.\textsuperscript{92} This is especially true when a government’s motive is to single out particular ideas for exclusion. The Supreme Court has consistently held such action unconstitutional.\textsuperscript{93}

A. The Prohibition Against Imposed Homogeneity of Ideas

Regulations that isolate and exclude particular ideas or viewpoints from the public sphere are generally considered repugnant to the first amendment. Milton,\textsuperscript{94} Holmes’ marketplace of ideas theory,\textsuperscript{95} Meiklejohn’s civic importance theory\textsuperscript{96} and its expanded


\textsuperscript{92} This is the “purposive” view of the first amendment, which recognizes four functions served by freedom of expression in a modern democratic society: assuring individual fulfillment, attaining the truth, securing societal participation in the decisionmaking process, and balancing stability and change. See Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 878-79 (1963). But see L. Tribe, supra note 46, at 576 (first amendment cannot be adequately conceived of in “purposive” terms).

\textsuperscript{93} See infra notes 104-27 and accompanying text; see also L. Tribe, supra note 46, at 899-905.


\textsuperscript{95} Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting). The following statement is generally recognized to be Holmes’ position on first amendment jurisprudence:

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

\textit{Id}. at 630.

\textsuperscript{96} A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). See generally L. Tribe, supra note 46, at 577 (stating that Meiklejohn’s theory is “that free speech is protected by the first amendment as essential to intelligent self-government in a
versions, Harlan, and Brandeis all evidence a particular distaste for such regulations. One type of regulation which provokes the first amendment controversy is action by school boards to limit or exclude ideas from the classroom.

A school board's attempts to control students' ideas creates a constitutional conflict of complex proportions. On the one hand, the school board has a duty to prepare the individual for citizenship and economic independence, inculcate values of the community, and preserve the security of the state. Statutes or state constitutions therefore give the school board plenary power to prescribe the curriculum and purchase needed materials for the school system's operation. As the Supreme Court has consistently recognized, content based judgment, and hence regulation, are unavoidable in this context. Conversely, a basic democratic system and that based on this theory "the special guarantees of the first amendment [should be limited] to public discussion of issues of civic importance").

97. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231, reh'g denied, 433 U.S. 915 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary or ethical matters . . . is not entitled to full First Amendment protection"); see also, L. Tribe, supra note 46, at 577 (observing that Meiklejohn's theory can legitimately be expanded to protect these areas since they may "indirectly contribute to the sophistication and wisdom of the electorate").

98. In Cohen v. California, 403 U.S. 15 (1971), the Court observed that the constitutional right of free expression puts the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. Id. at 24 (Harlan, J.).


Those who won our independence believed that the final end of the State was to make men free to develop their faculties. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. Id. at 375 (Brandeis, J., joined by Holmes, J., concurring).

100. See generally Hare, Decisions of Principle, in Readings in the Philosophy of Education 171 (1958) (all teaching is the teaching of principles, forcing the learner to make his own decisions); Belok, Schoolbooks, Pedagogy Books, and the Political Socialization of Young Americans, 12 Educ. Stud. 35 (1981) (governments inculcate societal norms into the attitudes of their school students); Reynolds, Textbooks: Guardians of Nationalism, 102 Educ. 37 (1981) (governments impose upon their young a reflection of the values, goals, and essential priorities of their particular societies).

101. See infra notes 104-20 and accompanying text.
constitutional doctrine holds that a governing institution cannot exercise power designed to dominate the mental processes of those governed. The clash of these two diametrically opposed constitutional principles creates problems with which the Supreme Court has struggled over the past sixty years, and to which motivation analysis is the only viable solution.

B. The Cases From Meyer to Tinker

In loosening the tension between the first amendment’s commitment to heterogeneity of ideas, and the acknowledged duties and powers of local boards, the Court has insisted that whatever may be the inculcative mandate of local authorities, “the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom.” Furthermore, no speech or content-based classification, whether a march, rally, film, or book, may be prohibited merely because some arm of the state government disapproves of the ideas it expresses.

In Meyer v. Nebraska, the Court struck down a statute that prohibited the teaching of foreign languages below the ninth grade in any public or private school. The Court recognized the legislature’s interest in regulating school curricula, noting that “[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate.” Nonetheless, after acknowledging this function of the state educational machinery the Court restricted it, warning that “individual . . . fundamental rights . . . must be respected.” While the Court conceded that the state could prescribe a curriculum, it found no emergency situation that could justify the first amendment in-

103. See L. Tribe, supra note 46, at 899–903. Tribe observes that [t]he invasion of this protected sphere of “intellect and spirit” produced by compelling an individual to express beliefs and convictions, whether actually held or only vacantly mouthed, represents a particularly insidious regulation, in order to shape the mind itself, of the expressive end of that spectrum which runs from private perception to public participation.

106. 262 U.S. 390 (1923).
107. Id. at 397, 402–03.
108. Id. at 402. Indeed, the Court felt that “the State may do much, go very far indeed, in order to promote the quality of its citizens, physically, mentally and morally.” Id. at 401.
109. Id. at 401.
fringement. The Court therefore held that the statute bore no rational relation to any legitimate state interest.110

Meyer was only the beginning of the Court’s delineation of the power a transient political majority could use to impose “homogeneous” values. In *West Virginia State Board of Education v. Barnette*,111 the Court considered the state’s power to encourage allegiance to the flag’s values and precepts. While noting that “[n]ational unity as an end which officials may foster by persuasion and example is not in question,”112 the Court viewed the deeper issue in *Barnette* as whether that end could be pursued by eliminating dissenting values. In holding that the state possessed no such power, the Court had “no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization.”113

In *Keyishian v. Board of Regents*,114 the Court invalidated a statute aimed at preventing “subversives” from teaching in public schools. While acknowledging the classroom as a proper place for inculcating values, the Court found that the first amendment imposed upon the judiciary an obligation to preserve heterogeneity in the schools. The Court stated that American schools are “peculiarly the ‘marketplace of ideas’”115 and that “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”116

These same themes emerge in *Epperson v. Arkansas*117 and *Tinker v. Des Moines Independent School District*.118 In *Epperson*, the Court exhibited a hostility to the imposition of orthodoxy in the school setting, stating that the Arkansas legislature “sought to prevent its teachers from discussing the theory of evolution.”119

110. *Id.* at 403.
111. 319 U.S. 624 (1943).
112. *Id.* at 640.
113. *Id.* at 641.
115. See supra note 95.
117. 393 U.S. 97 (1968).
119. *Id.* at 107. “The State’s undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit . . . the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.” *Id.*
In *Tinker*, the Court quoted *Meyer* in rejecting "the principle that a State might so conduct its schools as to 'foster a homogeneous people.'"\(^{120}\)

\section*{C. The Secondary School Book Removal Cases}

The major use of unconstitutional motivation analysis in first amendment adjudication has occurred in the school book cases, where the issue is whether a student's first amendment freedoms are infringed when a local school board removes books from the library shelves of a public school.\(^{121}\) A government's use of text-

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\item Id. at 511 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1922)).
\item The list of curriculum and library disputes heard in the federal courts since *Tinker* is long. *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir.), cert. denied, 409 U.S. 998 (1972), is the first case. In *Presidents Council*, the issue was whether the removal of a book from a public school's library infringed a student's first amendment rights. The court deferred to the judgment of the school board, refusing to delve into "either the wisdom or the efficacy of the determinations of the Board," 457 F.2d at 291, and holding that, since the book could be purchased outside the school library and class discussion of the book was not prohibited, no first amendment violation had occurred. *Id.* at 291–92.

In *Presidents Council*, *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976), the Sixth Circuit held that the school board's removal of a book from a school library solely because the book's contents were distasteful to the board's social or political views violated the students' first amendment rights. *Id.* at 582. The court criticized the board's reliance on personal standards instead of objective educational criteria in its book evaluations. *Id.* Calling the school library a "forum for silent speech," *id.* at 583, the court held that book removal is justified only under circumstances which are "neutral in First Amendment terms," *id.* at 582, \(e.g.,\) where the book is obsolete, worn out, or occupying shelf space that could be better utilized. *Id.* at 581. The Sixth Circuit found a first amendment violation in the denial to students of the "right . . . to receive information which they and their teachers desire them to have." *Id.* at 583.

The Seventh Circuit sharply disagreed with *Minarcini* in *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980). There, as in *Minarcini*, plaintiffs argued that book removal interfered with the students' right to know and their right to academic freedom, and that defendants had acted according to their own social, political, and moral tastes. *Id.* at 1302. Narrowing its discussion to the academic freedom issue, the *Zykan* court held that secondary school students have, at the very least, an interest in academic freedom through the "qualified freedom to hear." *Id.* at 1304. However, the court used a *parents patriae* rationale to curtail academic freedom for secondary school students, whose underdeveloped academic abilities created a compelling state interest in determining which books should fill the school library's shelves. To prevail, the students were required to demonstrate that the school board was imposing an exclusive ideological orthodoxy upon them. *Id.* at 1305–06.

In *Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981), plaintiffs alleged a first amendment violation when a school superintendent determined that the play "Pippin" was inappropriate for a public high school drama production because of its sexual content. The Third Circuit found that the school's spring musical program did not differ in principle from the selection of curricula or library books, *id.* at 216, and confirmed the district court's findings that "no student was prohibited from expressing his views on any subject; no student was prohibited from reading the script, an unedited version of which remains in the school
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book and library book selection to influence the morals and politics of its young has roots in antiquity, and early American educators considered fundamental the use of textbooks to socialize the young. Unity of thought and language—homogeneity—was understood to be desirable, if not necessary, for the survival of the young nation.

The court also found that time and resource limitations required that certain curriculum decisions be made, and that "since the objective of the educational process is the 'inculcation of both knowledge and social values' in young people, these decisions as to what will be taught will necessarily involve an acceptance or preference of some values over others." Thus, the court affirmed the ruling below that cancellation of the "Pippin" production did not infringe the students' first amendment rights.

In Pratt v. Independent School Dist. No. 831, 670 F.2d 771 (8th Cir. 1982), the court held that removal of the film "The Lottery" unconstitutionally infringed students' first amendment rights. The district court found, and the Eighth Circuit affirmed, that the school board could not constitutionally ban a film merely because the majority of the board members objected to its religious and ideological content and wanted to prevent ideas contained in the material from being expressed in the school. The Board argued that the film was too violent, but failed to show a substantial and reasonable state interest which justified interfering with the students' right to receive the information contained in the film. Teachers testified that "The Lottery" was faithfully adapted from the short story and was an effective teaching tool which would involve students who might not otherwise read the story. The board's failure to specify why the films were too violent or how they distorted the short story led the court to infer that concern over violence was mere pretext for the board's desire to express an "official policy with respect to God and country of uncertain and indefinite content which is to be ignored by pupils, librarians, and teachers at their peril." The court concluded that the board had used its official power to "perform an act clearly indicating that the ideas contained in the [film] are unacceptable and should not be discussed or considered." In Sheck v. Baileyville School Comm., 530 F. Supp. 679 (D. Me. 1982), the court granted an injunction to reinstate Glasser's 365 DAYS to the library shelves, reasoning that the school board's ban of the book was overbroad, and that the board may not exclude information from students.

In order to indoctrinate its young with the societal values and develop what it considered ideal citizens, Sparta assembled all seven-year-old males into barracks and entrusted their education to official guardians of the state. W. Durant, The Life of Greece 82 (1939). Probably the most celebrated example of government intervention in the socialization of its young was Socrates' trial for indoctrinating the nation's youth with "wrong" ideas. The government served him a cup of hemlock as punishment. Id. at 452-53; see The Apology, Phaedo, and Crito of Plato (B. Jowett trans. Anchor 1973) (in the Apology, Socrates defends himself against accusations that he is a corrupter of youth; in Phaedo, a pupil recounts Socrates' last hours in prison). See generally R. Allen, Socrates and Legal Obligation 18 (1980) (stating that the charge of atheism was merely a procedural device to bring Socrates to trial, and that the real reason for his execution was that he corrupted the youth). Meanwhile, the Chinese emperor Ch'in Shih Huang-ti, who ordered the erection of the Great Wall, also had all the books burned to prevent the nation's youth from remembering the values of past dynasties. W. Durant, Our Oriental Heritage 694-98 (1935); see also J. Hay, Ancient China 83-84 (1973); Y. Yap & A. Cottrell, The Early Civilization of China 58, 77 (1975).

See supra note 100.

See Belok, supra note 100, at 35, 36, 38-39, 45-46.
The federal courts, therefore, rarely interfered with book removal or selection in the nation's school systems. In the 1970's and early 1980's, however, the courts became much less hesitant to do so.125 Issues raised in a series of decisions now known as the "book removal cases"126 reached the Supreme Court in the celebrated case of Board of Education, Island Trees Union Free School District No. 26 v. Pico.127

D. Board of Education, Island Trees Union Free School District No. 26 v. Pico

In September 1975, the school board of the Island Trees Union Free School District No. 26 on Long Island, New York attended a conference sponsored by a politically conservative parents group concerned with the values taught in the New York public school systems.128 At this conference, the board members obtained a list of books which the group had determined were objectionable and unsuitable for students.129 The board subsequently ordered that books appearing on the list be removed from the shelves of the libraries in the school district.130 When publicity concerning the board's actions prompted public inquiry, the board, in an effort to justify its order, issued a press release describing the books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."131 A book review committee was formed which recommended that some of the books be retained and that two of the books be removed.132 The board rejected the committee's findings and ordered the books "removed from elementary and secondary libraries and [from] use in the curriculum."133

A student group brought suit, and the district court granted the school board's motion for summary judgment.134 The Second Circuit reversed, holding that the record was insufficient to sup-

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126. See supra note 121.
128. Id. at 856.
129. Id.
130. Id. at 857.
131. Id.
132. Id. at 857-58.
133. Id. at 858.
134. Id. at 858-59.
port summary judgment. Judge Sifton concluded that the students should have had the opportunity to show that the board's actions "were simply pretexths for the suppression of free speech." The Supreme Court affirmed the Second Circuit's opinion.

1. Justice Brennan's Plurality Opinion

The Supreme Court struggled in *Pico* to determine which first amendment right the school board had infringed. Justice Brennan proceeded cautiously, limiting the scope of his opinion to the removal of "library books, books that by their nature are optional rather than required reading." This voluntary/compulsory distinction was significant for the plurality. While a school board's duty to inculcate values may endow it with farreaching discretion in matters of curriculum planning, the same cannot be said for its decisions regarding the content of the school library. The inculcative function is properly confined to "the compulsory environment of the classroom," having no place in the school library where "the regime of voluntary inquiry . . . holds sway."

Thus, while the discretion of local school boards to manage school affairs is undeniably broad, the Court felt it should not go totally unfettered. Such discretion "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment"—the right to receive information and ideas.

To guide the lower courts in determining whether a local school board has abused its discretion in restricting student access to alternative views, Justice Brennan announced a motivation analysis test:

Our Constitution does not permit the official suppression of ideas. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and

135. *Id.* at 860.
136. *Id.*
137. *Id.* at 862 (emphasis in original).
138. *Id.* at 869.
139. *Id.*
140. *Id.*
141. *Id.* at 864-65.
142. *Id.* at 864.
if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*.

Justice Brennan remanded the case to the district court to apply this motivation test in determining whether the school board's decision was made with the proscribed intent.

2. **Justice Blackmun's Concurrence.**

Justice Blackmun disagreed with the plurality on the nature of the first amendment right involved in the school book removal cases. Rather than focusing on the students' right to receive ideas, he viewed the issue as whether the board's action amounted to involving improper "state discrimination between ideas." Justice Blackmun advocated a balancing approach, weighing the inculcative function of the local school system against the first amendment's "bar on 'prescriptions of orthodoxy.'" For him, the proper balance would be achieved "by holding that school officials may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved."

III. **IN SEARCH OF AN ANALYSIS: A POSSIBLE ALTERNATIVE MOTIVATION ANALYSIS MODEL**

This Note enunciates a general motivation analysis to accommodate the conflicting constitutional principles affecting the first amendment's guarantee of free access to ideas. The proposed standard is that for free speech problems regarding the exchange of ideas, the challenging party establishes a first amendment violation by showing that the decisionmaker's action was motivated solely by ideological considerations likely to compromise the right to acquire information or ideas, or subtly to influence the party's

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143. *Id.* at 871 (emphasis in original).
144. *Id.* at 875.
145. *Id.* (Blackmun, J., concurring).
146. *Id.* at 878-79 (Blackmun, J., concurring) (emphasis omitted). Justice Blackmun elaborated in a footnote: "In effect, my view presents the obverse of the plurality's analysis: while the plurality focuses on the failure to provide information, I find crucial the State's decision to single out an idea for disapproval and then deny access to it." *Id.* at 879 n.2.
147. *Id.* at 879 (Blackmun, J., concurring).
148. *Id.* at 879-80 (Blackmun, J., concurring)(emphasis in original).
beliefs by imposing a majoritarian ideology. Under this standard, the court would examine the decisionmaker's motive: if that motive is to advance or inhibit a particular point of view, then the action exceeds the scope of the decisionmaker's administrative power and violates the first amendment. Therefore, actions which would be deemed first amendment violations are those which: (1) serve the ideological interests of a vocal minority, (2) employ the organs of government for essentially doctrinal purposes, or (3) use governmental means to serve ideological ends where secular means would suffice.

A burden of proof model would ensure that this standard is met. Initially, the burden would be on the challenging party to show that the decisionmaker acted with an unconstitutional motive or a deliberate policy to deny or impose a particular ideological viewpoint. Several factors might justify the inference of unconstitutional motive: (1) there is no evidence that the decision furthered a legitimate government interest;\(^\text{149}\) (2) narrow interest groups were decisively influential in the decisionmaking process; (3) the decision's effects were not considered; (4) the decisionmaker failed to consult experts or those knowledgeable in the field;\(^\text{150}\) (5) the decisionmaker did not follow the regular procedures of the decisionmaking process;\(^\text{151}\) (6) the act did not affect all people uniformly; (7) the decision suffered from vaguely articulated purposes;\(^\text{152}\) or (8) others in a position comparable to that of the challenging party were also affected. If the burdened party proves by clear and convincing evidence that the decisionmaker acted with a deliberate motive to impose or deny access to a particular ideological viewpoint, a presumption of unconstitutional motive would arise,\(^\text{153}\) which the decisionmaker could rebut by demonstrating a legitimate government purpose for the action.

Acknowledging the duty of the school board to prepare and educate the young,\(^\text{154}\) the burden of proof model would leave considerable discretion with the decisionmaker. School systems could still teach the values of their respective communities. What they

\(^{149}\) See, e.g., Pratt v. Independent School Dist. No. 831, 670 F.2d 771, 777-78 (8th Cir. 1982).


\(^{151}\) Id.

\(^{152}\) See, e.g., id. at 872-73.

\(^{153}\) If the plaintiff fails to meet this burden, a directed verdict for the defendant would be appropriate.

\(^{154}\) See supra notes 100-02 and accompanying text.
could not do is regiment community values by excluding alternative viewpoints.

CONCLUSION

Despite the reluctance of Chief Justices Marshall and Warren and Justice Cardozo to examine a decisionmaker's motive, that "wise and ancient doctrine" no longer fully applies to first amendment cases after *Pico*. Courts should not hesitate to inquire into the motives of a decisionmaking body when faced with a first amendment challenge. The goals of the first amendment in a modern democratic society are too fundamental to be thwarted by blatant or subtle attacks on freedom of speech.

Courts should also recognize the various methods by which decisionmakers may chill first amendment freedoms. To further the aims of the first amendment, courts should adopt a simple burden of proof model. The application of such an analysis will free society from laws restricting citizens' rights to free speech.

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155. See *supra* notes 89–148 and accompanying text.
156. See *supra* note 20 and accompanying text.
157. See *supra* notes 94–127 and accompanying text.
158. See *supra* notes 149–53 and accompanying text.