Forbidden Purposes: A New Path for Limiting Criminalization

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FORBIDDEN PURPOSES: A NEW PATH FOR LIMITING CRIMINALIZATION

RAFF DONELSON*

Activists and scholars have often complained that the American criminal justice system makes choices about criminalization and sentences based on nefarious reasons. For instance, critics have claimed that criminalization and sentencing decisions are made to provide cheap prison labor to the government or private industry, to boost the private prison industry, to offer employment in rural communities in the form of jobs managing correctional facilities, or to empower police to harass undesirables and remove them from public spaces. These accusations are very alarming, and the evidence may not confirm activists’ worst suspicions. But, supposing the extraordinary evidence could be adduced, what difference would it make in a court of law?

While most can agree that officials act wrongly if motivated by these concerns, it is less clear whether such officials act illegally. Does constitutional law disclose any legal ground for opposing action taken for these nefarious purposes? This Article outlines a strategy that courts might adopt for finding that some governmental purposes are, constitutionally speaking, forbidden purposes. Purpose-based arguments for invalidating government action are not entirely new. Rational basis review, familiar from the Equal Protection and Substantive Due Process contexts, sometimes requires courts to determine whether governmental action advances legitimate purposes. However, such scrutiny lacks general elucidation, and

* Associate Professor of Law, Chicago-Kent College of Law. I thank the editors of the Journal of Criminal Law and Criminology for inviting me to take part in the 2023 symposium, for many helpful comments and suggestions, and for saint-like patience with me as I developed the first written iteration of an idea that I have nursed for a few years. Thanks are owed to Isabelle Abbott, David Judd, Jordyn Metrick, Erin Wright, and Dulcie Xue for excellent research assistance. An earlier version of this paper was presented at the Katz Workshop at Penn State Dickinson Law. Finally, for specific feedback, I thank Mark Rosen, Laurel Terry, and my wonderful commentators at the JCLC Symposium, Alexa van Brunt, Quinn K. Rallins, and Michael Serota.
few have endeavored to elaborate how this would work specifically in the
criminal sphere. This Article is a first attempt to develop a method for
distinguishing the legitimate from the forbidden purposes in criminal law and
beyond.

On the proposed framework, courts would consider the constitutive
rules of liberal legal systems, that is, those rules that both define and govern
liberal legal systems. The set of constitutive rules will limit the state’s pursuit
of certain aims, and those foreclosed options are, on the proposed
framework, forbidden purposes under rationality review.

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INTRODUCTION

Imagine that some state, say, Indiana, criminalizes marijuana use and
sale, not under the belief that marijuana is dangerous, but rather as part of a
complicated scheme to generate revenue and jobs. The scheme would work
in the following way. Officials believe that marijuana use is ubiquitous and that its use will continue despite criminalization, just as alcohol consumption continued despite Prohibition. Officials plan to fine many people for their marijuana use and to imprison certain others for marijuana sale. This ingenious plan will generate revenue for the state of Indiana as a whole without the need for increased taxes, and the plan will also provide jobs to underserved rural communities in the form of new positions in correctional facilities and in industries supporting corrections.

If this were implemented in the real world, one could bet that it would be enforced in an impermissibly discriminatory fashion. Even putting aside worries about discrimination, something seems off about our hypothetical law. As a first pass, narcotics laws are supposed to protect society from dangerous substances, or at least from substances that lawmakers take to be dangerous. Narcotics prohibitions—and criminal laws more generally—are commonly thought to be tools for protecting society from wrongs, not mere money-making schemes. Using the criminal law for these means seems illegitimate, and governments should not pervert the criminal law to serve illegitimate purposes.

No doubt, some activists allege that Government does sometimes act for illegitimate purposes. There are allegations that the American Drug War is

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3 See Jeffrey A. Miron & Jeffrey Zwiebel, Alcohol Consumption During Prohibition, 81 Am. Econ. Rev. 242, 246 (1991) (concluding that the onset of Prohibition contributed to an initial decrease in alcohol consumption that rebounded sharply in the next several years); see also Jesse D.H. Snyder, Watering Down the Exceptionalism of the Twenty-First Amendment, 36 J.L. & Pol. 31, 51 (2021) (noting that the Prohibition reduced consumption “most effectively among the nation’s working class and poor, as the high price of bootleg liquor margined out all but middle- and upper-class consumers;” that the cost of enforcement “spiraled upward” (quoting Prohibition, HISTORY, https://www.history.com/topics/roaring-twenties/prohibition [https://perma.cc/NR3K-DMSV] (last updated Apr. 24, 2023)); and “that more than ten thousand people died of tainted booze during Prohibition”).
no effort to stem addiction but a plot to line certain parties’ pockets,\(^4\) that local traffic laws are not meant to protect us but meant to extort us\(^5\) and that various professional licensing rules were


\(^5\) See Mike McIntire & Michael H. Keller, THE DEMAND FOR MONEY BEHIND MANY POLICE TRAFFIC STOPS, N.Y. TIMES, (Nov. 2, 2021), https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html [https://perma.cc/8HRW-BVF] (detailing that Valley Brook, Oklahoma, a town of 70 people, collects approximately $1 million in traffic fines each year and that in 2019, Henderson, Louisiana, a town of about 2,000 people, collected $1.7 million in fines, or about 89% of its general revenues). In a larger city, Chicago, traffic tickets generated about $264 million, or 7%, of the city’s $3.6 billion operating budget in 2016. Melissa Sanchez & Sandhya Kamboj, Driven into Debt: How Chicago Ticket Debt Sends Black Motorists into Bankruptcy, PROPUBLICA ILL. (Feb. 27, 2018), https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy/ [https://perma.cc/SP62-MW4K]. Due to the lack of a statute of limitations for unpaid tickets in Illinois, as of 2018, “Chicago motorists owe $1.45 billion in ticket debt dating to September 1990.” Id. This debt disproportionately affects Chicago’s low-income, mostly Black neighborhoods. Id.; see also Edward R. Morrison & Antoine Uettwiller, Consumer Bankruptcy Pathologies, 173 J. INST. & THEORETICAL ECON. 174, 186–87 (2017) (analyzing Chapter 13 bankruptcies filed in the Northern District of Illinois and determining that a subset of consumers with government fines of over $500—typically parking and traffic-related tickets—has over $4,000 in such debt and may be more likely in Black Americans).

\(^6\) As the inimitable Tupac Shakur once said, “Instead of war on poverty, they got a war on drugs so the police can bother me.” 2PAC, CHANGES (Interscope Records 1998); see also, e.g., Nicol Turner Lee & Caitlin Chin-Rothmann, POLICE SURVEILLANCE AND FACIAL RECOGNITION: WHY DATA PRIVACY IS IMPERATIVE FOR COMMUNITIES OF COLOR, BROOKINGS INST. (Apr. 12, 2022), https://www.brookings.edu/articles/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/ [https://perma.cc/4WFL-6N2A] (reporting that technical inaccuracies in facial recognition systems used by law enforcement in the United States reflect a systemic bias that is “significantly more likely to return false positives or negatives for Black, Asian, and Native American individuals compared to white individuals.”). One scholar argues that inconsistent marijuana regulations lead to the “routine and unnecessary removal of children . . . compound[ing] existing racial disparities in state
not installed to ensure the quality of professional services but rather to eliminate competition and afford the professional class economic rents.\footnote{The law at issue in \textit{Williamson v. Lee Optical of Oklahoma, Inc.}, 348 U.S. 483 (1955), provides an example. There, an Oklahoma law made it unlawful for a person without an optometry or ophthalmology licensure to fit, duplicate, or repair glasses or other devices. \textit{Id.} at 485. This meant that a person who simply needed their glasses fitted or repaired needed to obtain a new prescription. The district court declared that the Oklahoma law failed the rational basis test because a prescription was unnecessary if a person simply needed their glasses repaired. \textit{Id.} at 486. The Supreme Court reversed, deciding that despite the law’s “needless, wasteful requirement . . . it is for the legislature, not the courts, to balance the advantages and disadvantages of the [law].” \textit{Id.} at 487. “[T]he law need not be in every respect logically consistent with its aims to be constitutional. 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.” \textit{Id.} at 487–88; see also Erwin Chemerinsky, \textit{Constitutional Law: Principles and Policies} 654 (5th ed. 2016).}

Supposing that such extraordinary claims about government officials could be borne out, what difference would it make in an American court of law? Under American law, what cause of action could one bring and what kind of relief would be available? To any practicing lawyer, the idea that one might sue over such matters can seem far-fetched and a waste of time and other resources. It may well be a waste to try to prove these conspiratorial claims; as Carl Sagan told us, “Extraordinary claims require extraordinary evidence.”\footnote{\textit{Carl Sagan, Broca’s Brain: Reflections on the Romance of Science} 62 (1979).} Sagan’s adage, however, concerns the factual showing, but what about the legal showing? Is there a viable legal theory that can clearly show why Government is forbidden to act for the kind of reasons mentioned above? American law does offer a solution, but its details have yet to be explored. It is the project of this Article to develop that legal theory and to explain why this is important, even if our government is not (yet) engaged in such schemes.

The solution to the opening hypothetical lies in an unlikely place: the rationality test. Over the course of the twentieth century, the Supreme Court developed its “tiers of scrutiny” approach to Substantive Due Process\footnote{U.S. \textit{Const.} amend. XIV, § 1. Substantive due process considers the adequacy of the government’s reason for taking away a person’s life, liberty, or property. See, e.g., Mugler v. Kansas, 123 U.S. 623, 665 (1887) (“The principal that no person shall be deprived of life, liberty, or property without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment.”). Despite its controversy, the Supreme Court has recognized significant liberty interests—fundamental rights—concerning, among other things, aspects of life, privacy,} and
Equal Protection jurisprudence. According to this framework, every government action must at least pass the lowest level of judicial scrutiny, which is the rational basis test. At a minimum, the rational basis test—also known as rationality review—requires that a challenged government action be rationally related to furthering a legitimate government purpose. The flipside of a legitimate government purpose is a forbidden purpose. Thus, in order to apply rationality review, courts must have a working theory of forbidden purposes, that is, a theory that allows a court to separate constitutionally permissible purposes from other purposes in a fairly definite, non-ad hoc way. As it happens, neither courts nor commentators have clearly defined what constitutes a forbidden purpose. The ambition of this Article is to develop a serviceable theory of forbidden purposes. Armed with such a theory, we can fully appreciate what goes awry in the hypothetical sketched above. As an added bonus, this Article will fruitfully and reliably apply one of the most ubiquitous doctrinal tests: rationality review.

Part I explores rationality review in a little more detail. Due to the brevity of this piece, the goal is not to give an exhaustive overview of the doctrine. Instead, the purpose is to further substantiate the need to develop a theory of forbidden purposes. Part II surveys a few theoretical dead ends for developing a serviceable theory of forbidden purposes. These dead ends will suggest criteria by which to judge a successful theory. Part III articulates my constitutivist theory of forbidden purposes and applies it in a few cases. Part

bodily autonomy, and family decisions. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (privacy); Roe v. Wade, 410 U.S. 113, 153–54 (1973), overruled by Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022) (bodily autonomy); Washington v. Harper, 494 U.S. 210, 221–22 (1990) (bodily autonomy as against state-administered involuntary psychiatric medications). But see Lawrence v. Texas, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting) (“[J]ust like Justice Stewart [dissenting in Griswold], I ‘can find neither in the Bill of Rights nor any other part of the Constitution a general right of privacy.’ or as the Court terms it today, the ‘liberty of the person both in its spatial and more transcendent dimensions.’”) (cleaned up) (quoting Griswold, 381 U.S at 527 (Stewart, J.) and Lawrence, 539 U.S. at 562 (Kennedy, J.)).

10 U.S. CONST. amend. XIV, § 1. The Equal Protection Clause provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” Id. It requires a state to govern impartially and not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. Lehr v. Robertson, 463 U.S. 248, 265 (1983).

11 See Erwin Chemerinsky, The Rational Basis Test Is Constitutional (and Desirable), 14 GEO. J.L. PUB. POL’Y 401, 401–02, 402 n.6 (2016) [hereinafter Chemerinsky, The Rational Basis Test] (describing that, under the framework set forth in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), Equal Protection claims must meet the rational basis standard of review at minimum, but, depending on the classification at issue, a higher standard of review may be required).
IV considers several potential objections to the arguments advanced. By way of conclusion, I consider future applications of the work done here.

I. WHAT A THEORY OF FORBIDDEN PURPOSES CAN DO FOR YOU

Rationality review, I contend, offers an important doctrinal tool to prevent the government from openly acting on nefarious purposes like those sketched above. This might surprise seasoned constitutional scholars and lawyers, for it is well known that the rationality test is extremely deferential. While some scholars emphasize its liberatory potential,12 most commentators say that rationality review is toothless.13 This skeptical perspective stems from a deep misunderstanding of the test and a severe underappreciation of one of the test’s key components. Below, I try to rectify this. With a correct version of the rationality test in hand, it becomes clear that the notion of legitimate purposes—or its inverse, forbidden purposes—plays a very important role in determining the constitutionality of government action. This notion has been underexplored by both courts and commentators, but developing the idea can enable blocking actions like those contemplated in the Introduction.

This Part proceeds by first clarifying how rationality review has been employed by the Supreme Court. In the course of doing so, I explain why scholars should stop talking about “rational basis with a bite.” This clarification by itself demonstrates a doctrinal need to understand what counts as a forbidden purpose. Next, I list a few general benefits of developing a robust theory of forbidden purposes. Finally, I survey some of the forbidden purposes already recognized by courts. This survey demonstrates that pondering the question, “What is a legitimate goal for government to pursue?” is not an idle academic exercise. Rather, it is an activity currently undertaken by courts. The problem, I suggest, is that this judicial inquiry is not guided by an articulable theory, so we get unpredictability and other problems.

Taken together, the proceeding discussion should make it clear that the best time for developing a theory of forbidden purposes was in 1938 when

12 See, e.g., Katie R. Eyer, The Canon of Rational Basis Review, 93 Notre Dame L. Rev. 1317, 1321, 1330 (2018) (arguing that rational basis review can “be understood as offering an array of possibilities to social movements (and judges) in conceptualizing why . . . certain forms of group-categorizing or group-burdening government action must fail.”).

modern rationality review first emerged. But the second-best time to do it is today.

A. THE DOCTRINAL NEED

If one were to open up almost any constitutional law casebook or hornbook, one would likely read that the rational basis test provides as follows: A challenged government action survives this level of scrutiny if the action is rationally related to furthering any legitimate government purpose. One must use this deferential test when the government action does not involve (a) classification on the basis of a suspect characteristic or (b) the infringement of a fundamental right. When there is a suspect classification or a fundamental right infringement, a court must employ heightened scrutiny—either intermediate scrutiny or strict scrutiny. Of course, most cases do not involve suspect classifications or fundamental rights, so the default level of scrutiny for government action is rationality basis.

This (incorrect) version of the test is thought to be particularly deferential due to two features that might escape one’s attention on a quick glance. First, an action can be “rationally related to furthering” a purpose while (a) not in fact furthering that purpose at all or (b) furthering the purpose in the most inefficient way imaginable. Second, the action will be upheld so long as there is the aforementioned weak connection between the action and any legitimate purpose, not necessarily between the action and the actual purpose envisioned by government officials or even the action and the post hoc purposes offered in court by the government’s lawyers when the action has been challenged. Indeed, a court is free to invent purposes that could be served by the action.

While courts do sometimes characterize rationality review in this exceedingly deferential way, scholars and others have long recognized that this picture fails to accurately track what the Supreme Court has actually done in a number of cases. In Romer v. Evans, the landmark Equal Protection case from 1996, the Court considered the constitutionality of an

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16 In the Substantive Due Process arena, we talk generally about a government action; whereas, in the Equal Protection context, we speak more narrowly about a government classification. However, the more general nomenclature suffices for present purposes since nothing turns on the distinction.

17 See McGoldrick supra note 14, at 771 n.74.
amendment to the Colorado state constitution that had been adopted by a state-wide referendum.\textsuperscript{18} The relevant provision prohibited any state body from barring discrimination on the basis of lesbian, gay, or bisexual identity or conduct.\textsuperscript{19} Without deciding that heightened scrutiny was inapt, the Court explicitly tested the Colorado law using rationality review. In its analysis, the Court held that the Colorado amendment “seem[ed] inexplicable by anything but animus toward the class it affects.”\textsuperscript{20} Now, if the rationality test merely asks after conceivable legitimate government purposes, this declaration about the actual purposes behind the law should have been irrelevant. However, the actual purpose was critical for the Court; on the basis of the animating animus, the Court found that the law failed rationality review and thus violated the Equal Protection Clause.\textsuperscript{21}

\textit{Romer} is not the only instance where the Court has employed rationality review but looked to actual purposes. \textit{Department of Agriculture v. Moreno},\textsuperscript{22} \textit{City of Cleburne v. Cleburne Living Center, Inc.},\textsuperscript{23} \textit{Lawrence v. Texas},\textsuperscript{24} and others comprise a little canon of cases in which rationality review operates differently from how the textbooks would have it. Scholars have given a name for this: “rational basis with a bite.”\textsuperscript{25} But this is deeply confused.

Scholars who talk about rational basis with a bite contend that there are two versions of rationality review. There is the \textit{real} version that is extremely deferential, and then there is a different version, to be called “rational basis with a bite,” which is more akin to heightened scrutiny.\textsuperscript{26} In heightened scrutiny, courts are not to invent conceivable legitimate purposes that government action could serve; instead, in that context, courts must look to the actual purposes behind the action. The problem with this line of commentary is that it stubbornly refuses to take seriously what the Supreme Court actually says. In fact, over the course of fifty years, nowhere has the Supreme Court ever said that there are two rationality tests. Ever since \textit{Moreno}, one of the earliest cases in the rational-basis-with-a-bite canon, the Court has had plenty of time to admit that there are two tests, if there really

\begin{itemize}
\item \textsuperscript{18} 517 U.S. 620 (1996).
\item \textsuperscript{19} \textit{Id.} at 623–24. Amendment 2 declared that sexual orientation could not “be the basis of or entitle any person or class of persons to have...protected status of claim of discrimination.” \textit{Id.} (quoting \textit{COLO. CONST.}, art. II, § 30b (1992)).
\item \textsuperscript{20} \textit{Id.} at 632.
\item \textsuperscript{21} \textit{Id.} at 626–636.
\item \textsuperscript{22} 413 U.S. 528 (1973).
\item \textsuperscript{23} 473 U.S. 432 (1985).
\item \textsuperscript{24} 539 U.S. 558 (2003).
\item \textsuperscript{25} See Gayle Lynn Pettinga, Note, \textit{Rational Basis with Bite: Intermediate Scrutiny by Any Other Name}, 62 Ind. L.J. 779, 779 n.9, 780 n.11 (1987).
\item \textsuperscript{26} Eyer, \textit{supra} note 12, at 1356–57.
\end{itemize}
are two tests. There have even been instances where the Court has corrected itself about its use of the rationality test. Reed v. Reed, a 1971 gender discrimination case, provides a paradigmatic example. There, the Court said it was using rationality review, but it seemed to employ a much more searching form of scrutiny. Within a mere five years of Reed, the Court admitted that it uses a kind of heightened scrutiny for gender discrimination cases, intermediate scrutiny, which is different from rationality review. No such correction has happened with the rational-basis-with-a-bite cases.

The words from Romer itself reveal how rationality review really works. According to the Court, rationality review is supposed to be highly deferential: when considering some challenged action, courts are supposed to appraise its constitutionality by determining whether the action could hypothetically serve a legitimate purpose, and courts are supposed to strike down the action if that review leads to the “inevitable inference” that it was done for an illegitimate purpose. As I think of what would justify this rule, I think the Court is saying that it will not be played for a fool. While it is

28 Id. at 76 (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”) (quoting F.S. Royster Guano v. Virginia, 253 U.S. 412, 415 (1920)). The Court did not indicate that gender was a suspect classification, and instead held that to “give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.” Id. Contra Frontiero v. Richardson, 411 U.S. 677, 688–89 (1973) (plurality opinion) (invalidating, under strict scrutiny, a statute that distinguished military benefits for similarly situated men and women exclusively on the basis of sex for the purpose of administrative convenience). Three Justices cited Reed as support for their position that strict scrutiny did not apply to sex-based classifications. Id. at 692 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, J.).
29 See Craig v. Boren, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”); see also id. at 218 (Rehnquist, J., dissenting) (identifying this as “intermediate” level scrutiny).
30 Romer v. Evans, 517 U.S. 620, 634 (1996). Earlier in the opinion, Justice Kennedy explained:

We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

id. at 631–62 (internal citations omitted).
perhaps improper for courts to deeply investigate every government action, trying to suss out what drove executive and legislative officials’ conduct, courts will not shield their eyes and be complicit in openly and notoriously nefarious schemes. Thus, as I understand the Court’s full version of the test, a government action facing an Equal Protection or Substantive Due Process challenge survives rationality review if the action is rationally related to furthering any legitimate government purpose unless review of the action leads to the inevitable inference that it was made for an illegitimate purpose. Naturally, presenting this unfamiliar version of rationality review as the real test raises an obvious question: Why do courts often leave out the “unless . . .” part? If pressed to speculate, I would guess that the full version is only mentioned when it is relevant. Where there is no inevitable inference, the Court omits discussion of this element. Where there is the inevitable inference, it takes center stage.

If I am right about the real version of the rationality test, it should be obvious that figuring out what counts as a forbidden purpose is crucial. If there are forbidden purposes, an action should be struck down in whole or at least as applied to the complaining parties. Also, knowing what forbidden purposes are will help court-watchers know when courts are likely to reject post hoc reasons offered by government lawyers and to decline to offer their own rationales for the action. Doctrinally, then, a theory of forbidden purposes is of great importance.

B. OTHER BENEFITS OF BUILDING A THEORY OF FORBIDDEN PURPOSES

Above I argue that, in light of the full and correct version of the rationality test, knowing what counts as a forbidden purpose is crucial for employing the test. When Government pursues forbidden purposes, these are always unconstitutional. Also, when it is unmistakably clear that Government pursues forbidden purposes, the method of scrutinizing its conduct changes under rationality review. Beyond these important doctrinal points, there are several practical reasons to articulate a theory of forbidden purposes.

Because the notion of forbidden purposes plays a decisive role in rationality review, courts must necessarily have an implicit, partial story about which purposes are forbidden. Fully articulating that story and making it into a workable theory would help numerous parties. First, a theory may help the political branches better comply with the Constitution. As of now, the political branches are told to avoid forbidden purposes, but they have little guidance about what those are. Second, a theory can help aggrieved parties know when it might make sense to sue the government. As of now,
with no general theory about forbidden purposes, aggrieved parties and their lawyers do not know what is likely to be meritorious. This uncertainty, combined with the realities of how civil rights litigation gets financed, means that potentially winning cases will not be brought and that people of lesser means will bear the brunt.

C. CURRENT FORBIDDEN PURPOSES

Concern with forbidden purposes is not a merely academic exercise because courts currently grapple with the question. Courts and commentators have already recognized many purposes to be forbidden and judge the constitutionality of government action accordingly. Some of these recognized forbidden purposes spring from the Constitution’s text or a plausible reading of it, and some of them require more theoretical work.

I first turn to a few of the more obvious forbidden purposes. To begin, the Establishment Clause of the First Amendment rather clearly suggests that the federal government cannot have as its aim to develop a state church.\textsuperscript{32}

\textsuperscript{31} In civil rights cases, as in many areas of civil litigation, attorneys frequently operate on a contingency fee basis. See Adam Shajnfeld, \textit{A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements}, 54 N.Y.L. SCH. L. REV. 773, 774 (2010) ("Contingent compensation arrangements for legal representation are . . . ubiquitous"). As a result, most firms will not, on the whole, take on many risky cases because they need to meet their expenses and generate profit. See Joanna Schwartz, \textit{"Well, Is There Blood on the Street?"}, ATLANTIC (Apr. 2, 2023), https://www.theatlantic.com/ideas/archive/2023/04/civil-rights-lawyers-cases-supreme-court/673587/ [https://perma.cc/M8SD-QP6S] (reporting that after interviewing "dozens of civil-rights lawyers across the country, most said they were disinclined to take a case on behalf of a person whose rights had clearly been violated unless the potential damages were significant enough that one-third of the plaintiff’s award would adequately compensate them for their time. For many lawyers, if a case did not involve death or a serious physical injury, it wasn’t worth the risk."); see also Joanna C. Schwartz, \textit{Qualified Immunity’s Selection Effects}, 114 NW. U. L. REV. 1101, 1105 (2020) (finding that “qualified immunity almost certainly increases the costs and risks of Section 1983 litigation”). Occasionally, firms will take on some “longshot” cases, but economically speaking, this cannot be the usual practice if done on a contingency fee basis. Of course, clients could opt for a flat or hourly fee arrangement for legal services, though that payment option obviously favors clients with greater financial resources. Certain nonprofit and public interest-oriented agencies often take on civil rights matters and will partner with law firms as litigation advances and becomes more expensive. See \textit{Pro Bono, LAWS.’ COMM. FOR C.R. UNDER L.}, https://www.lawyerscommittee.org/project/pro-bono/ [https://perma.cc/M3QA-ZFBW] ("The Lawyers’ Committee and the law firm co-counsel do not charge their clients fees or require that they advance expenses. There are often significant expenses associated with . . . lawsuits, including substantial discovery, expert witness(es), and other costs . . . . Every effort is made, however, to recover litigation costs and expenses, together with [a]ttorneys fees, at the conclusion of a case through statutory fee-shifting provisions."). Additionally, many law schools operate legal clinics that provide services to clients free of charge, and in partnership with law firms.

\textsuperscript{32} U.S. CONST. amend. I.
Building a state church is literally to establish religion, and the Clause, if it forbids anything, forbids all government action taken for this pursuit. Presumably also, though, the Clause forbids the government from trying to convince anyone of the rightness of any particular religious tradition. Article I of the Constitution also bars the government from establishing a monarchy in the United States; that simply cannot be the goal of any American law. The Corruption of Blood Clause provides that the government cannot seek to punish family members of treasonous parties.

These more obvious forbidden purposes do not exhaust what courts and commentators find suspect. In the First Amendment Free Speech context, the Court has sometimes said that a commitment to free speech means a commitment to content neutrality; if that ideal forbids anything, it says that “The State may not suppress exposure to ideas—for the sole purpose of suppressing exposure to ideas.” This is not obvious from the text of the First Amendment. With a little work, however, it is easy enough to understand why we might interpret the Amendment that way. A more challenging task is the animus line of cases, stretching from Moreno through Romer to Lawrence. These cases all stand for the principle that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” This conclusion seems right, but there is not much argument for it. It reads as rather conclusory. This is just where one might want a richer, fleshed-out theory of forbidden purposes.

II. FALSE STARTS FOR FASHIONING A THEORY OF FORBIDDEN PURPOSES

Before offering my own theory of forbidden purposes, I look to two other ways one might begin to build a theory. Both constitutional text and sectarian political values seem like they might offer the resources to distinguish legitimate purposes from forbidden purposes. These alternatives, while initially plausible, present some problems that I highlight below.

33 U.S. CONST. art. I, § 9, cl. 8.
34 U.S. CONST. art. III, § 3, cl. 2.
35 A law is content-neutral if is not content-based, and “a law is content based if its application depends on either the subject matter or the viewpoint expressed.” Erwin Chemerinsky, Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application, 74 S. Calif. L. Rev. 49, 51 (2000).
37 U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).
Pointing out the problems with these alternative approaches is not an end in itself. Some problems are also lessons. These particular problems lead us to a set of desiderata that any plausible theory of forbidden purposes should satisfy. I outline the desiderata here, and in the following Part, I offer my constitutivist theory that meets them.

A. CONSTITUTIONAL TEXT

The first and most obvious source for a theory of forbidden purposes is constitutional text. Dean Erwin Chemerinsky seems to endorse such a theory when he writes that a legitimate purpose is “[v]irtually any goal that is not forbidden by the Constitution.”\(^{38}\) I take it that Dean Chemerinsky means “virtually any goal that is not explicitly forbidden by the Constitution;” otherwise, this theory is circular.\(^{39}\) Another point in favor of reading the Chemerinsky passage this way is that he counts animus against an unpopular group as another forbidden purpose, not encompassed by the phrase “any goal that is not forbidden by the Constitution.” That is why he says “[v]irtually any goal”—by including the word “virtually,” he makes room for animus as kind of add-on to the theory. Clearly, Dean Chemerinsky finds it unconstitutional for Government to act based on animus, but this is not explicitly forbidden by any constitutional text. Chemerinsky, then, is best read as offering a two-part theory of forbidden purposes; part one focuses on what is explicitly forbidden by constitutional text, while part two focuses on animus. For now, let us focus on that first part.

As noted above, there are some goals that the Constitution, by its explicit language, bars Government from pursuing. The establishment of a national church is one such forbidden purpose. Any good theory of forbidden purposes must capture the items explicitly ruled out by the Constitution’s text.\(^{40}\) Problems arise however, in thinking that the Constitution’s explicit text sets the only limit on government purposes.

The first problem is that the main text of the Constitution—the seven articles and twenty-seven amendments—largely speaks of the government’s

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\(^{38}\) Chemerinsky, The Rational Basis Test, supra note 11, at 410.

\(^{39}\) Why would it be circular? Remember our question. The question is, “How does one know if the purpose behind a government action is forbidden?” If one says in reply, “The purpose is forbidden if the Constitution says so,” that is no help because the terms of the rationality test require us to say that any forbidden purpose was an unconstitutional purpose. In other words, because the rationality test says that every forbidden purpose is unconstitutional, it tautological to offer a “theory” of forbidden purposes that says forbidden purposes are unconstitutional purposes. Now, if Chemerinsky claims that a purpose is forbidden if it runs afoul of explicit constitutional text, that would add something extra.

powers, not the purposes to which these may be put.\textsuperscript{41} This is a problem because if one suspects that there are numerous forbidden purposes, such purposes cannot be found in the Constitution’s text. The touchstone for this Article is the intuition that the state cannot legitimately criminalize conduct merely to collect fines; that is a forbidden purpose, at least with respect to that kind of government action. But that is not mentioned anywhere in the explicit text of the Constitution. Even animus, which the Supreme Court has long recognized as a forbidden purpose, is nowhere to be explicitly found in constitutional text. To put a name to this problem, a theory of forbidden purposes that only looks to explicit prohibitions from the Constitution’s main text will be \textit{too permissive}. A theory of forbidden purposes is too permissive if it would allow Government to pursue goals that we already know to be illegitimate.

Of course, there is a section of the Constitution that talks all about purposes. The Preamble to the Constitution lists a set of purposes that the government is to achieve. To develop the Preamble into a theory of forbidden purposes, one might rely on the \textit{expressio unius est exclusio alterius} canon of construction, what some call the “negative-implication” canon.\textsuperscript{42} The idea, familiar to many lawyers, is that if a text only mentions one set of things, it thereby excludes another set of things.\textsuperscript{43} Applying this canon to the Preamble, the Preamble lists one set of legitimate purposes, so all other purposes are forbidden. While initially plausible, this is a defective theory of forbidden purposes. A careful look at the text of the Preamble reveals why.

For those who did not memorize it in sixth grade, here is the full text of the Preamble:

\begin{quote}
We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.\textsuperscript{44}
\end{quote}

It is a beautiful and inspiring provision, but it cannot bear the weight needed to craft a theory of forbidden purposes. The primary problem here is

\textsuperscript{41} See \textsc{John Hart Ely}, \textsc{Democracy and Distrust: A Theory of Judicial Review} 98–101 (1980); see also id. at 92 (“[M]y claim is only that the original Constitution was principally . . . dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values.”).

\textsuperscript{42} \textsc{Antonin Scalia} \& \textsc{Bryan A. Garner}, \textsc{Reading Law: The Interpretation of Legal Texts} 107 (2012).

\textsuperscript{43} \textit{Id.} (specifying the cannon “applies only when the \textit{unius} (or technically, \textit{unum}, the thing specified) can reasonably be thought to be an expression of \textit{all} that shares in the grant or prohibition involved”).

\textsuperscript{44} U.S. \textsc{Const. pmbl.}
that the Preamble is *too flexible*. A theory of forbidden purposes is too flexible if it would allow Government to pursue any goal. Any pursuit of Government could be construed as trying to “form a more perfect Union” or promoting “the general Welfare.” Contending that a purpose is forbidden if not encompassed by the Preamble is to just say that no purpose is forbidden at all.

B. SECTARIAN POLITICAL VALUES

Because explicit constitutional text provides too little material for building a workable theory of forbidden purposes, one might consider turning to full-fledged political theories like libertarianism. Libertarianism offers a theory on the legitimate use of governmental power; within this framework, Government should act only to protect our physical safety and property interests against trespass, to safeguard us from fraud and other ways that wrongdoers might subvert one’s will, and to provide a forum in which to authoritatively settle disputes.\(^\text{45}\) According to libertarians, other sorts of goals—goals like providing affordable housing for the poor and free schools for the youth—are off the table; a libertarian government cannot advance those purposes, and, arguably, it cannot deliver mail, maintain low inflation, or provide unemployment, health, flood, or disability insurance.\(^\text{46}\) According to the libertarian, these goals, if pursued at all, should be pursued by private parties instead of the state.\(^\text{47}\) As such, libertarianism is not flexible, in the sense articulated above. It will clearly screen out certain pursuits as forbidden. Depending on one’s politics, one might claim that libertarianism succeeds on the permissiveness score too, for a committed libertarian will think that this view permits all and only the legitimate purposes.

The problem with libertarianism, as a theory of forbidden purposes for our constitutional order, is that it is *too sectarian*. As the great Justice Holmes wrote in his *Lochner* dissent, our republic “is made for people of fundamentally differing views.”\(^\text{48}\) A theory of forbidden purposes is too sectarian if it would set the boundaries of Government’s proper goals on a basis that a large swath of the populace rejects and that our constitutional

\(^{45}\) There are many statements of libertarian political thought. For a classic work exemplifying both philosophical rigor and creativity, see generally ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

\(^{46}\) *See id.* at ix (“Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons’ rights not to be force to do certain things, and is unjustified.”).

\(^{47}\) *See id.*

tradition seems to disfavor. That does not mean that the theory cannot say surprising things about which purposes are forbidden. Rather, the theory cannot say surprising or highly contestable things about why a purpose is forbidden. This is a difference worth marking. That a theory implies “purpose X is forbidden” while many members of society embrace X as a laudable purpose is not enough to determine whether this is a sectarian theory of forbidden purposes. Instead, that the theory justifies its conclusion by maintaining, say, “Libertarianism is the uniquely correct theory of justice” makes it too sectarian.

I distinguish between these two things—the verdict on a purpose and the rationale for the verdict—because a decision like *Loving v. Virginia* was not wrongly decided. In the famed anti-miscegenation case, the Court held that the actual purposes Virginia had for banning interracial marriage were not just uncompelling; the Court said that these purposes were illegitimate. The purposes were illegitimate, or forbidden, even though plenty of Virginians (and others too) thought it was perfectly fine to try to preserve White racial purity. The *Loving* Court, as I read it, implicitly held a partial theory of forbidden purposes, according to which a purpose is forbidden if it conflicts with political equality. That is not something many people would reject, even in 1967. Arguments were made at bar that preserving White racial purity did respect political equality because the law also sought to prevent Whites from disturbing Black racial purity. The Court unanimously rejected that argument, which may have surprised some people, but the basis for rejecting it was put in terms that were not too sectarian. It would have been too sectarian if the Court had declared that races do not exist and used this as a basis for rejecting the White racial purity purpose. That view, which might be the correct view of the world, is too sectarian.

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49 388 U.S. 1 (1967).
50 *Id.* at 11 (“There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”).
51 See Oral Argument at 01:00:44, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), https://www.oyez.org/cases/1966/395 [https://perma.cc/SP54-YEQ4] (R.D. McIlwaine III, attorney for the state of Virginia, argued, “[I]f the Fourteenth Amendment be deemed to apply to State antimiscegenation statutes, then these statutes serve a legitimate, legislative objective of preventing a sociological, psychological evils which attend interracial marriages, and is a— an expression, a rational expression of a policy which Virginia has a right to adopt.”). McIlwaine also invoked scientific authority supporting white supremacy. See *id.* at 01:23:17 (“I do not say that the author of this book [DR. ALBERT I. GORDON, *INTERMARRIAGE: INTERFAITH, INTRARACIAL, INTERETHNIC* (Beacon Press 1964)] would advocate the prohibition of such marriages by law but we do say that he personally and clearly expresses his view as a social scientist that interracial marriages are definitely undesirable that they hold no promise for a bright and happy future for mankind.”).
The foregoing discussion highlights how difficult it might be to see what being sectarian means in theory; determining what theories count as too sectarian will also be hard in practice. Libertarianism is a good example of a theory that clearly flouts this consideration, for it is so obvious that the populace does not accept this as the uniquely correct theory of justice. Our constitutional tradition, our everyday political life, and even passages from the Constitution all stand as evidence of that. For other theories of forbidden purposes, it will be harder to judge whether they are too sectarian. Nonetheless, this consideration should be borne in mind while appraising theories.

C. SUMMARIZING THE LESSON

At this point, we can reflect on these false starts and distill the lessons that these disclose. There are four key desiderata that a theory of forbidden purposes must meet. The right theory must rule out the few purposes explicitly noted in the Constitution. It also cannot be too flexible, too permissive, or too sectarian.

These desiderata are hard to jointly meet. Theories that confine the set of forbidden purposes to anything not mentioned by the platitudinous Preamble will not be sectarian, but they will be too flexible. Some theories will rule out with precision exactly those items mentioned in the main text of the Constitution, so they will meet that desideratum along with the flexibility desideratum; yet they might be sectarian or fail to rule out purposes that seem clearly illegitimate. In the next Part of the Article, I attempt to thread the needle, crafting a theory which learns from the false starts and satisfies all four desiderata.

III. A CONSTITUTIVIST FRAMEWORK FOR FINDING FORBIDDEN PURPOSES

Here begins the attempt to work out a theory of forbidden purposes. In the approach advanced below, a purpose is forbidden if the government’s pursuit of that purpose would violate a constitutive norm of legal systems generally or liberal-democratic legal systems in particular. As I will explain, a purpose can be across-the-board forbidden or just forbidden for a particular area of law. To appreciate the force of this suggestion, I begin with an overview of constitutivism, what is distinctive about my use of the approach, and what recommends this over alternatives. Next, I apply the framework to think about what is constitutive of legal systems generally, and I correlative

52 See U.S. Const. art. I, § 8, cl. 7 (explicitly providing that Congress will set up a mail service, stating “The Congress shall have Power . . . To establish Post Offices and post Roads.”). That does not sound very libertarian. See supra notes 45–46 and surrounding text.
derive a few forbidden purposes, both generally and for particular areas of law. Then, I apply this same framework to liberal-democratic legal systems. As I demonstrate below, a great virtue of this account is that it answers many questions while leaving some room for further development: It will vindicate various judgments courts have already made and other judgments many of us intuitively think would be correct, but it will leave other issues up for debate.

A. CONSTITUTIVE RULES AND LAW

Constitutivism is a relatively new strategy in moral and political thought. The idea behind it is simple. For all practices, including the law, there are ground rules that both govern the practice and make something an instance of the practice. For example, if I am employed as an election volunteer, there are several rules that govern this activity. Rule 1: Count all legally cast ballots. Rule 2: Count each ballot only once. Rule 3: Use the natural numbers, beginning with one, for the first ballot cast for each option. These are but a few of the rules. Notice, about these rules, that these govern the practice in the sense that when an election volunteer fails to follow a rule, the volunteer is rightly criticized. What is distinctive about constitutive rules is the explanation of their normativity, or their right to govern the practice. A constitutive rule governs a particular practice because it helps to define an instance of the practice. In our election example, someone who declines to count all legally cast ballots or who counts the same ballot twelve times just does not seem to be in the business of counting the ballots at all. In this sense, constitutive rules differ from other sorts of rules. Suppose some precinct has a policy that election volunteers must mark all ballots with a red X after they have been counted, to ensure that these are not errantly recounted. This rule, though eminently reasonable, is not a constitutive rule of vote-counting. Something can qualify as vote-counting even when the “red X” rule is flouted.

My proposal, which I develop more below, is that there are constitutive rules for legal systems and for liberal-democratic legal systems, and these can help courts derive the systems’ forbidden purposes. Before explaining this, it may prove useful to say more about what is distinctive and desirable about my use of constitutivism.

When pondering normativity of any kind, it makes some sense to ask where the rules come from, and it makes a lot of sense to ask why we should

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53 One representative work is CHRISTINE KORSGAARD, SOURCES OF NORMATIVITY (1996).
follow the dictates of that kind of normativity. Constitutive rules fare better than certain other types of rules because there are easy answers to these questions. Constitutive rules come from the practices they govern. Why do we have to count all the ballots exactly once when engaged in vote-counting? Just reflect on the practice of vote-counting, and it should be obvious. Our practice, as practiced, just requires following these rules. If you decide you want to flout those rules, you would have to admit that you have begun a different sort of activity. Thus, the reason why one should follow the rules is one’s commitment to the practice as it exists.

In talking about a practice as it exists, this leads me to another point very important for our purposes. To get there, however, I must embark on a path that may appear to be a digression.

Some thinkers take a constitutivist approach to morality; that is, they argue that common rules of morality are simply derivable from, or identical to, constitutive rules of some practice or set of practices to which we all are already committed. If we are already committed to those practices, then that commitment supplies a reason why we ought to follow the moral rules, developed by the moral theorist in question, which are supposedly constitutive. Now, there are plenty of reasons to doubt such approaches to morality. Let us explore one of those reasons: One might wonder whether everyone really does have a prior commitment to the relevant practices which give birth to the constitutive rules—rules that supposedly bind us. What if one were not committed to the precise practice articulated by some theorist? What if, instead, they were committed to something nearby that looks almost the same, except that it is not governed by the constitutive rule in question?

Returning to the example of vote-counting should make this clear. Above, I claim that one is not engaged in the practice of vote-counting if one decides to count some ballots multiple times. That seems right about our practice, but what if one were a rogue election volunteer, one who intentionally flouts the constitutive rule? Whatever else one may be doing, one is no longer engaged in our current practice as practiced. One may wish to appear to be engaged in our practice, hoping to deceive others, or one may not be surreptitious at all, for one might openly try to convince others that there are compelling reasons to double-count certain ballots. Again, either way, this is a different practice. Therefore, there is a real sense in which the rules of regular vote-counting fail to apply to the rogue volunteer. Nevertheless, if one were the

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55 Arguably, this is the best reading of Korsgaard’s work. See id.
56 For a frontal attack on this approach, see, for example, David Enoch, Agency, Shmagency: Why Normativity Won’t Come from What Is Constitutive of Action, 115 PHIL. REV. 169 (2006).
57 This is Enoch’s “shmagent” point. See id. at 179.
boss of the election volunteers, it seems completely reasonable to say, “We don’t do that here” and expel the rogue.

What is the lesson here? There are several. First, whatever a person thinks they are doing, holding some practice $P$ fixed, we can say rightly that they are (or are not) following the rules of $P$ and thus are not really doing $P$. This is important for our discussion, for it may well be that a legislature is of many different minds about whether its activity really counts as making laws, making criminal laws, or making laws for a liberal-democratic polity; despite this, a court can still say that the legislature flouts a rule constitutive of a practice to which we are committed. Second lesson: Practices can change. If the rogue convinces everyone, then we really are no longer committed to vote-counting as it existed. This is also important for our purposes because my approach calls on courts to investigate whether some purpose is inconsistent with legal systems generally or with liberal-democratic legal systems. However, these systems are not Platonic forms, known by pure reason alone. Legal systems and liberal-democratic legal systems are practices with a life and a history. The claim that “legal systems do not allow government officials to criminalize conduct that is neither wrongful or risky by officials’ own determinations”—a claim I defend below—is an empirical claim about what we do. Currently, we do not allow that here. Of course, if it happens enough, openly and without shame, it will turn out that we do allow that here. In a phrase, I take seriously the idea that the constitutive rules come from our practices. The practice of living under law is shared, so one person’s thought of what she is doing is not dispositive, and practices are malleable.

These general remarks about my constitutivist approach have, so far, aimed to clarify. At this point, I shift to talking about why such an approach is desirable. I happen to think an empirical approach to understanding our practices is preferable to a metaphysical one. Putting this preference aside however, we developed some criteria by which to judge approaches to the question of forbidden purposes. The right theory, recall, must rule out the few purposes explicitly noted in the Constitution; it also cannot be too flexible, too permissive, or too sectarian. The constitutivist approach, arguably, can do all of this.

By focusing on our practice of liberal-democratic law and how it works, the constitutivist approach will, of course, mark as forbidden those purposes expressly forbidden by the Constitution. The rules of our Constitution, as the name suggests, constitute the kind of liberal-democratic polity that we have. Anything that runs afoul of its express terms literally violates a constitutive rule of our liberal-democratic order.
That desideratum was easy to fulfill. Now, let us look at the other three. The right theory of forbidden purposes cannot be too flexible. The constitutivist approach is not particularly flexible because it requires courts to think about whether Government’s pursuit of an end is out of step with how legal systems or liberal-democratic legal systems work. This demand to cohere with existing practice about how such legal systems work is not toothless. As I argue below, it generates some very specific limits on the goals that governments may pursue.

The right theory of forbidden purposes cannot be too sectarian. By asking after what is constitutive of legal systems and liberal-democratic legal systems, the approach should not be particularly controversial or sectarian. To be clear, liberal-democratic legal systems are not ubiquitous. Plenty of polities historically and currently work otherwise, and there are advocates in our nation today for a different social arrangement. Nonetheless, it is uncontroversial that the United States aspires to be, and imperfectly approximates, a liberal-democratic legal system. That is our practice. For that reason, it is not too sectarian to say—as I urge courts to say of some purposes—“that purpose is forbidden because its pursuit is inconsistent with liberal democracy.”

Finally, the right theory of forbidden purposes cannot be too permissive. To show that the constitutivist approach returns the correct verdicts on particular controversies is a task to be discharged in the next Sections. Suffice it to say, for now, that there is some reason to be hopeful about the constitutivist approach: It can actually validate rationality review in the first place.

Rationality review requires the political branches to undertake only those actions that are, or can be seen as, rationally related to furthering a legitimate government purpose. One might ask the grounds on which courts can demand that all government action meet this standard. Certainly, no constitutional text suggests as much. Here is where the constitutivist approach can come to the rescue. Liberal-democratic polities are not just democratic in the sense that there is voting for leaders or policies. They are liberal and democratic. This means that the state should approximate treating each full adult citizen as both partial author of the collective rules that govern as well as self-governing (to the extent compatible with external law), with ends and projects and reason of her own. As such, liberal-democratic polities ought not to make irrational laws—i.e., laws that bear no rational relation to legitimate purposes—because these cannot be something each citizen can jointly author. Irrational laws of this sort can only be foisted upon a populace. The only author of irrational laws is (a) a monarch who behaves haphazardly without concern for the people, (b) a monarch who is adept but covertly
pursues illegitimate ends, or (c) the functional equivalent of either. Liberal democracy stands opposed to irrational law. At least, that is part of what our Declaration of Independence indicates. The Founders complained of the British monarch that “He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.”\(^58\) As the Founders saw it, a tyrant took action that looked haphazard and foolish; either it was just haphazard and foolish or it was something more sinister, like a deft way of pursuing an illegitimate aim.

Because it validates rationality review, the constitutivist approach enjoys a kind of reflexive justification. To be clear, such justification is not necessary. As argued above, a theory of forbidden purposes is good so long as it meets the four desiderata from Part II. Still, the theoretical economy enjoyed by a theory with reflexive justification is some reason to be hopeful about it and to suspect that it can ultimately redeem other important commitments.

To close this discussion, I outline what lies ahead. To talk about the constitutive rules for liberal-democratic legal systems, I divide the task in two. First, I derive a few constitutive rules for all legal systems. Second, we can move to finding a way to derive constitutive rules specific to liberal-democratic legal systems. With these rules, one can derive several forbidden purposes, both generally and for certain areas of law. These derivations will, in turn, show that the constitutivist approach is not too permissive because it rules out a number of purposes we pre-theoretically find appalling.

B. CONSTITUTIVE OF A LEGAL SYSTEM

A legal system, as discussed here, is a social practice. As such, certain rules constitute it; these rules must be followed to have a legal system that functions in practice. Specific domains of law, such as criminal law and tort law, also have constitutive rules. Some of these constitutive rules concern or entail limits on the purposes a state can pursue. Below are a few examples.

In general, a legal system is supposed to safeguard important interests of the citizenry, including their lives and their interest in avoiding great physical pain. I say in general because this is one charge among many, and any legal order must balance between competing goals. Still, a purported legal system that took no interest in these concerns would seem off—not just in liberal-democratic polities like the United States, but also in illiberal polities like Iran. In the same vein, a purported legal system that aimed to massacre all of its citizens would seem utterly baffling. Sure, a legal system

\(^{58}\) The Declaration of Independence para. 6 (U.S. 1776).
can kill some of its citizens to avenge or save the lives of others, and it can declare some citizens enemy combatants and liable to killing. Nonetheless, a legal system cannot have as its end to kill all the citizens. Mass murder certainly cannot be a final end, that is, a purpose pursued for its own sake. Arguably, killing the entire citizenry cannot even be an intermediary end, a purpose pursued for the sake of some further goal. We would not recognize such an undertaking as a legal system. We would call it a death cult.

This example is extreme for a reason: Things that we recognize as legal systems can pursue a very wide set of goals. There is not much, qua legal system in general, that seems to be out of bounds. Particular areas of law and particular sorts of legal systems, however, have more strictures.

Within the criminal law, there are more constitutive rules. Here is one: Punish only those who bear some responsibility for the crime. Everywhere in the world, things that we call legal systems observe this rule. There are, no doubt, different ideas about responsibility. Legal systems differ widely about the kind of responsibility necessary for the aptness of punishment. Some hold that small children can bear criminal responsibility; others do not; historically, some have held that nonhuman animals can be criminally responsible; nowadays, we do not; some allow broad sorts of vicarious criminal liability, while others do not. Still all of them find scapegoating—herein understood as punishing some random person for another’s misdeeds—deeply wrongful. Because of this constitutive rule, finding a convenient scapegoat for some heinous crime to calm disquieted masses is a forbidden purpose for all legal systems. That is not how criminal law works.

Here is another constitutive rule for the criminal law for all legal systems: Criminal laws can declare something legally impermissible only because it is malum in se or the act itself risks harm. Again, legal systems differ widely in what they consider malum in se and harmful. One might be tempted to say that this wide diversity in thought about which situations are bad in themselves or risky means that this constitutive rule rules out nothing after all. But not so fast. As a result of this constitutive rule, something cannot be a criminal law if its sole purpose is to raise money or create jobs. There must also be the thought that the conduct criminalized was either bad in itself or risked harming some important interest. Using the criminal law merely for pecuniary ends violates this and thus is forbidden. At long last, we have arrived at an answer about our opening hypothetical. The hypothetical polity criminalized marijuana use not under the belief that its use is inherently evil or causes harm like lung cancer or foul odors but rather under the belief that its use would continue and consequently create opportunities for collecting fines. Thus, the criminalization of marijuana only used the law for pecuniary ends, making it a misuse of criminal law.
Two observations are appropriate at this juncture. First, one might wonder where these constitutive rules come from. It can seem like they were cherry picked to solve the problem raised at the outset, or they might seem like mysterious products from the ether. Neither suspicion is true, and we only have to consult the methodology mentioned above. Rules that constitute a practice come from the practice. When we debate whether a rule is really constitutive of some practice, like legal systems or the criminal law, we have to consult the practice. We have to look at what we do. For instance, say a party in litigation claims that the purpose pursued by the state is forbidden, and the state’s claim is based on the idea that legal systems generally or this area of law generally forbids. That party, then, has to look broadly at our practices and argue that we do not, aside from the complained-of action, do things like this. Second, even though looking at what is constitutive of legal systems and bodies of law can offer real constraints of government conduct, they still allow a state to pursue inegalitarian aims—for instance, the subjugation of unpopular groups. Therefore, to know which are the forbidden purposes in America, we must not only ask if the state action violates constitutive rules for legal systems in general, but whether the action violates constitutive rules for a liberal-democratic legal system like ours aims to be. This next Section explores these constitutive rules.

C. CONSTITUTIVE OF A LIBERAL LEGAL ORDER

The key constitutive rule for laws of a liberal-democratic legal order is the following: Laws must be made in such a way as to recognize all citizens as free and equal. There are, to be sure, many ways to understand this demand to recognize all as free and equal. The political philosopher John Rawls offers one familiar way to operationalize the ideal of treating people as free and equal: the veil of ignorance.\(^\text{59}\) Rawls’s veil of ignorance can be fruitfully used to determine whether the government’s pursuit of certain aims would violate the key constitutive rule of liberal democracies. In what follows, I explain the veil of ignorance as a device of modeling liberal democracy, and then I show how this tool (and my approach more broadly) vindicates the animus line of cases.

For Rawls, a liberal democracy treats all citizens as free and equal. Among other things, that means that the state does not subject citizens to treatment that each of them would not have chosen from behind a veil of ignorance. Before even saying what the veil of ignorance entails, it is important to note that this theoretical move, that of making political justice depend on the unforced choice of each citizen, is already one way to model

freedom and equality. The veil of ignorance, however, deepens our understanding of freedom and equality. The veil hides important information that people ordinarily know about themselves. We ordinarily know our age and sex, talents and defects, religious opinions and the era into which we are born. We ordinarily know all of this and much else besides. Because we have this self-knowledge, we can make political choices to benefit ourselves and others with those same attributes. For instance, if I know that I am a young man, I might prefer legal rules that benefit young men, such as provocation doctrines that partially excuse homicides committed in fits of rage or jealousy. Without that knowledge, I might be a little more ambivalent about such rules. If I know that I believe a certain faith, I may be less inclined to worry about religious persecution of other religions. Rawls’s veil of ignorance is designed to eradicate these forms of self-preference. If no one knows these things about themselves or even the probabilities, they cannot rationally engage in self-dealing. They have to develop legal rules that treat everyone equally and extend to each citizen the maximum freedom compatible with the equal freedom of all.

Of course, that does not mean that everyone is treated exactly the same in every respect. Rawls holds instead that we would accept some differences in material circumstances from behind the veil of ignorance. We would, from behind the veil, not accept a system without broad and equal political and civil liberties, but differences in income, wealth, and prestige would be acceptable, so long as these differences would make the least well-off among us better off than they would be under conditions of strict equality. For instance, the least well-off among us may enjoy better lives if we allowed doctors to be paid more than waiters. In a world where doctors earn more than waiters, we would incentivize smarter, more industrious people to become doctors, and having better doctors makes everyone’s life better. This idea about distributive justice is what Rawls called the “Difference Principle.”

The Difference Principle is quite controversial as a claim about what liberal democracy demands. Many theorists doubt that the veil of ignorance device leads to the Difference Principle. On the other hand, the guarantee of broad and equal political and civil liberties—what Rawls calls his first principle of justice—this does more plausibly look like a requirement of liberal democracy. This first principle of justice should be guiding as one considers whether the state’s pursuit of certain goals conflicts with the constitutive rules of liberal-democratic legal orders. Looking at the animus line of cases demonstrates how this might work.

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60 Id. at 65–69.
As noted above, the Supreme Court has said repeatedly, but often without much explanation, that the state cannot act merely to disadvantage a politically unpopular group. Why is this a forbidden purpose? Well, it is not something liberal democracies can do. From behind the veil of ignorance, no one would accept allowing the government to act on such motives because each of us realizes, from behind the veil, that we could be a member of that unpopular group.

IV. CONSIDERING OBJECTIONS AND OFFERING REPLIES

The constitutivist theory advanced here has been offered in brief. There are, no doubt, many questions and worries that it raises. Considerations of space and the limits of my imagination mean that I cannot address all of them in a single article. Nonetheless, below I consider and respond to three important concerns about my theory of forbidden purposes.

A. TOO COMPLICATED FOR JUDGES TO IMPLEMENT?

A first worry that one might have is that this is far too complicated for judges to implement. Recall that the theory requires judges to make complicated empirical judgments about what we think is necessary for a legal system to be what it is, empirical judgments about what is necessary for certain areas of law to function as we think they should, and normative judgments about Rawls’s veil of ignorance and what a rational person would choose. I concede that such inquiry demands that judges wade deep into the waters of non-legal questions, pushing judges to the limits of their institutional competence. But this is inevitable.

Currently, in both Equal Protection and Substantive Due Process jurisprudence, judges have to make very tough decisions that require thinking about hard non-legal questions. For heightened scrutiny, judges are asked whether the government’s purpose is sufficiently important or compelling to justify the curtailment of rights or to justify unequal treatment. To provide answers, judges have to think hard about vexing questions of fact and value. If that is not too complicated, neither is the task I ask judges to undertake.

A possible retort is that heightened scrutiny is employed in but a handful of cases, whereas every government action is potentially subject to rationality review. Another way to put the worry: It is one thing to ask judges to do something complicated on occasion, but it is another thing to ask this all the time.

This retort has teeth. One way to respond is to recall that ours is a system that features stare decisis, so judges will not have to start from scratch, trying to answer hard questions alone without a template each time. Also, even if I concede that implementing my proposal is more mentally taxing than using
heightened scrutiny, there is no plausible alternative to hard thinking sometimes. Whether it is my proposal or something else, rationality review requires great mental exertion on occasion. Rationality review already requires courts to think about something very heady and arguably more akin to political philosophy than run-of-the-mill doctrinal analysis. Judges are asked to determine whether some purpose is truly a legitimate goal for an American jurisdiction to pursue. Often, the answer is obvious, and courts answer quickly in the affirmative because the government, subject to democratic pressures, often acts for legitimate purposes. However, there are a handful of cases when answering the question of legitimacy becomes more vexing. In those cases, judges (and commentators too) shoot from the hip because there is no working theory of forbidden purposes. A complicated procedure for deciding whether a purpose is forbidden is probably better than none at all.

B. IS A FOCUS ON PURPOSE TOO WEAK TO DEFEND OUR RIGHTS?

Supposing that my theory gains support in the courts, one might worry now that it will be too weak to protect anyone’s rights. To sharpen the point, one might note that legal arguments which require showing that Government has acted from bad purposes are awfully hard to win.61 This is why scholars and activists have urged courts to adopt disparate impact—rather than intentional discrimination—theories in Equal Protection jurisprudence.62

This is an important concern. To respond carefully, we must think broadly about what my intervention seeks to accomplish. I have two goals here, one about doctrine and the other about limiting criminalization. This piece hopes to offer a more thorough and theoretically sound understanding of rationality review. Rationality review is one of the most important doctrines in constitutional law, but one of its major parts is completely underexplored in the courts and by commentators. This must change if the test is to function well. The other goal is less about specific doctrines and more about outcomes. Many commentators, academic and nonacademic, believe that the United States engages in overcriminalization. I am quite sympathetic to this concern about the justice system,63 so this Article attempts

61 I thank Alexa van Brunt for pressing me on this point.
63 I gather that some scholars and activists prefer “criminal legal system” to phrases like “criminal justice system” and its derivatives. That preference likely stems from the observation that existing systems of criminal justice are far from just. Nonetheless, I prefer the more familiar phrasing because it reminds us of the constitutive aim of such systems.
to see how the doctrines that we already have can be usefully applied to a recognized problem.

With this framing of the Article in mind, I can now return to the point about the effectiveness of my purpose-centered argument. The point about effectiveness is a concern that the adoption of my theory would fail to limit criminalization. So far as this concern goes, my theory might be wonderful as a matter of crafting good constitutional argument, but the practical upshot is likely to be underwhelming. Why think that? “Well,” a critic might say, “courts will simply do everything in their power to find or invent legitimate purposes where it is unmistakable that forbidden purposes moved Government to act as it did.” This cynical take may not be far from the truth. But what does one do with that cynicism? Hoping that courts turn to using disparate impact instead of purpose-based inquiries has two problems. First, it is incomplete, for it only deals with Equal Protection and tells us nothing about how to consider Substantive Due Process cases. Second, and more gravely, hoping that courts turn to using disparate impact is assuming an answer to the deep problem. The deep problem, as envisioned by the cynic, is that courts are outcome-oriented and wish to maintain the status quo, even where the facts and law point in another direction. If that is our situation, courts will never adopt a disparate impact theory of the Equal Protection Clause.

If the cynic’s view is our reality, I concede that a new theory to limit criminalization will be ineffective. If, however, the jury is out about that question, as I suspect, it will certainly do no harm—and it may do some good—to develop the tests that courts have already adopted and show how they can be used effectively for more liberatory ends.

C. CAN WE EVER SHOW THAT THERE WERE FORBIDDEN PURPOSES?

There is a related practical concern about my proposal insofar as it aims to limit criminalization. One might worry that, even if courts were inclined to act in good faith, virtually no one would benefit from my theory of forbidden purposes because virtually no one will be able to show that the government acted from forbidden purposes. Under the current rationality test, as used by the Supreme Court, courts are free to invent hypothetical

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64 It reminds me of the old joke where an engineer, physicist, and economist are stranded on a desert island. They are terribly hungry when a can of soup washes up onto the shore. The engineer starts trying to make a tool to open the can. The physicist starts calculating angles at which the can could be dropped such that the lid comes off. The economist, however, says, “Assume there is a can opener.”

65 I thank Michael Serota and Quinn Rallins for separately presenting versions of this concern.
purposes which are legitimate, so long as the government action and its surrounding circumstances do not give rise to the inevitable inference that it was, in fact, motivated by forbidden purposes. Often, legal officials will disguise improper motives such that there is no inevitable inference.

At this juncture, there are two paths for a reply: one that concedes that this worry is damning and one that does not. Were I to take the first path, I might argue, as others have, that the rationality test is flawed insofar as courts are allowed to invent hypothetical purposes instead of divining the actual purposes when conducting rationality review. While I am sympathetic to this perspective, that is not the path I trot here. This Article is an apologia for the rational basis test, albeit one that seeks to draw out the full liberatory potential of that test. While I admit that the test is a fairly deferential sort of scrutiny that, by design, will not lead to lots of government action getting overturned by courts, it still offers important limits on government conduct. Moreover, the importance of those limits is not to be measured by how many actions get overturned.

The motivating hypothetical at the outset of this Article sketched out something outlandish. It is hard to imagine lawmakers openly saying that they are going to criminalize certain innocuous conduct merely because they want to raise revenue. American lawmakers today do not say things like that, at least not in the open, mainly because there would be swift and strong political backlash. Of course, what incites political backlash is subject to change. The United States is currently at an inflection point because a former President has vehemently flouted liberal-democratic norms while enjoying unequaled support in one of the major national political parties. In offering

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66 See, e.g., Chemerinsky, The Rational Basis Test, supra note 11, at 411.

67 Evan Osnos, Long Shots, NEW YORKER (June 19, 2023) (“Asked at a CNN event the night before Trump’s indictment about the ongoing investigations, [former Vice President Mike Pence] declared that ‘no one’s above the law,’ but also, wincing, urged the Justice Department not to indict his former boss, on the ground that it would be ‘divisive’ and ‘send a terrible message to the wider world.’ After the news broke, Pence said that he was ‘deeply troubled to see this indictment move forward.’”); Amanda Marcotte, It’s Not Just Trump: A Sobering New Report Chronicles the Extensive G.O.P. War on Democracy, SALON (Jan. 12, 2023), https://www.salon.com/2023/01/12/its-not-just-trump-a-sobering-new-report-chronicles-the-extensive-on-democracy/ [https://perma.cc/GZP8-CJKT] (describing the right’s embrace of the former president despite characterizing a “strong majority of Americans” as “repulsed” by Trump’s lawsuits attempting to vacate the results of the 2020 presidential election); Matthew C. MacWilliams, Trump Is an Authoritarian. So Are Millions of Americans, POLITICO (Sept. 22, 2020, 5:45 PM), https://www.politico.com/news/magazine/2020/09/23/trump-america-authoritarianism-420681 [https://perma.cc/2NA5-KXJC]; Jonathan Chait, The GOP’s Authoritarian Acceleration, N.Y. MAG. (June 5, 2023), https://nymag.com/intelligencer/2023/06/gop-republican-party-fbi-authoritarian-
a workable theory of forbidden purposes, the aim is not mainly to curb existing problems that a deferential test is ill-equipped to handle. Instead, a theory of forbidden purposes, if skillfully implemented in good faith by the judiciary, can serve as a backstop against the worst abuses.

To answer this Section’s question: “Can we ever show that there were forbidden purposes?” I say, “I hope not!” I hope there is limited occasion for courts to examine what lies behind run-of-the-mill government action, for it will mean that officials are not openly and unashamedly contravening the constitutive norms of liberal democracy. Even if the officials are contravening the norms behind closed doors, that does not negate the great value of appearing to respect these norms. Paying lip service to important ideals is fundamental because failure even to pay lip service can quickly lead to an erosion in those liberal democratic norms. Furthermore, when we pay lip service to high ideals, we write a check—a check that later generations may come to cash in.

CONCLUSION

This Article essentially began with a question: Why is it illegal for the government to pass criminal laws just to raise revenue, when there is no belief by lawmakers that the laws would stamp out conduct deemed risky or inherently bad? The answer to that apparently simple question is a little more complicated and requires several steps. First, one must see that such criminal laws, like all government actions, are subject to rationality review. Second, rationality review, rightly understood, requires the government to have (or plausibly appear to have) a legitimate government purpose. Third, armed with a suitable theory of which purposes are legitimate and which are forbidden, an individual challenging a government action can safely conclude whether the challenged action has a legitimate purpose. Each of these steps, no doubt, needs greater elucidation than this initial treatment could offer, but together they set up a strategy.

acceleration.html [https://perma.cc/84RB-U4EG] ("During Trump’s first term, violations of democratic norms came in sudden dramatic bursts attracting wide news coverage, and these efforts were often undone by a lack of planning and haphazard execution. January 6 is the most vivid example . . . Since Trump left office, the Republican Party’s anti-democratic turn has accelerated, but it has taken place quietly and deliberately with little drama or media attention.")